

The Pitfalls of Customary Copying

Customs Do Not Make Law

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Customs Do Not Make Law: The Pitfalls of Customary Copying

They say imitation is the sincerest form of flattery – but in the eyes of copyright law, it might look more like infringement than admiration. The speed and accessibility of digital platforms have normalised copying to the point where many businesses assume it can be done without legal repercussion, blurring the line between inspiration and infringement.

This practice is particularly prevalent among fast-fashion brands, which replicate high-fashion trends at lower prices. In 2023, Chinese fast-fashion retailer Shein found itself in hot water when Swedish fashion brand H&M filed a lawsuit against it in Hong Kong for copyright infringement, alleging that Shein had copied several designs of H&M's apparel. In 2024, Shein was caught up in litigation again when Uniqlo filed a lawsuit in Japan against it for copyright infringement of Uniqlo's viral cross-body bag. Though there has not been an outcome from these cases, they highlight the legal risks of design copying.

A sobering example is Forever 21, which recently in 2025 filed for bankruptcy (for the second time). The American retailer, once known as a key player in the fast-fashion industry, is no stranger to controversies.

In 2007 alone, Forever 21 faced four intellectual property infringement lawsuits, three involving copyright infringement for selling garments that resembled the designs belonging to other parties. Over the years, it continued to attract similar copyright-related lawsuits from the likes of H&M, Gucci, PUMA, Adidas and Ariana Grande. More recently, Forever 21 was faced with another lawsuit, which came after its bankruptcy filing, for another allegation of copyright infringement of Understated Leather Ltd.'s \$500 "Moon Glow Coat". Whilst no finger has been pointed at the continuous litigation as a root cause of Forever 21's downfall, one cannot help but note the correlation.

The practice of copying and recreating designs under the notion that it is acceptable is widespread across various industries, including furniture design, electronic gadgets, and home appliances. However, when you take someone else's design and recreate it, whether by yourself or through a third party, you risk exposing yourself to allegations of copyright infringement (amongst other types of intellectual property infringement), as seen in the cases above.

For copyright owners, customary practices which encourage the cross-copying of the designs of other industry players should certainly be a cause for concern, especially when you never consented to such copying in the first place.

1 "H&M sues fast fashion retailer Shein for copying its designs" (<https://www.independent.co.uk/life-style/fashion/hm-suing-shein-copyright-infringement-b2382001.html>)

2 "Uniqlo sues Shein over 'imitation' banana-shaped 'it' bag" (<https://www.theguardian.com/fashion/2024/jan/17/driven-bananas-uniqlo-sues-online-retailer-shein-it-bag-copy-claims>)

3 "Notice to our Valued Customers" (https://www.forever21.com/pages/notice-to-our-valued-customers?srsltid=AfmBOopUX7e5lqsNwgyS6_cwZSOBH7LfUGp4qM4AUeBiV_v3NNgznf7)

4 "With Bankruptcy Looming, Forever 21 Faces Copyright Lawsuit" (<https://www.law.com/texaslawyer/2025/02/28/with-bankruptcy-loomng-forever-21-faces-copyright-lawsuit/?slreturn=20250409-21035>)



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Copyright law in Malaysia is governed under the Copyright Act 1987, which grants the owner of a copyrighted work exclusive control over the said work. This exclusive control includes, amongst others, control over the reproduction of the copyrighted work in any material form and the distribution of such copies to the public by sale or other transfer of ownership. Committing any of these acts without consent or licence from the copyright owner may therefore amount to copyright infringement.

The works eligible for copyright protection under the Copyright Act 1987 consist of literary works, musical works, artistic works, films, sound recordings, and broadcasts. For the purposes of this article, when we mention design, we are referring to “artistic works” defined under the Copyright Act 1987, and not designs which are protected under the Industrial Designs Act 1996. “Artistic works” can include graphic works, photographs, and other works of artistic craftsmanship.

The Copyright Act 1987 broadly defines “graphic work” to include paintings, drawings, diagrams, maps, charts, or plans, and also includes engravings, etchings, lithographs, woodcuts and other similar works. Further, case law suggests that the scope of “graphic work” is far-reaching and can include patterns or motifs on numerous mediums such as carpets, wallpapers and fabrics, and even bed linen. These cases further illustrate the prevalence of cross-copying within industries, and the allegations of copyright infringement that could follow.

It is also important to note that a person may be exposed to an allegation of copyright infringement regardless of whether he is aware that the work he is copying belongs to someone else. This can implicate third-party manufacturers when they receive orders from customers. A common example is when someone takes “inspiration” from graphic works he sees online and, whether by himself or through third-party manufacturers, recreates and sells them under his own brand without consent or licence from the copyright owner. Unbeknownst to him (or the third-party manufacturers), he may have inadvertently infringed on someone else’s copyright by using the graphic works without the owner’s consent. Even if he does not manufacture the products containing these said graphic works, the act of distributing the products is sufficient to constitute copyright infringement.

Rule of thumb: If something exists on the Internet, someone probably owns the copyright to it.

⁵ *Stoddard International Plc v William Lomas Carpets Ltd* [2001] All ER (D) 113

⁶ *Nouveau Fabrics Ltd v Voyage Decoration Ltd and another* [2004] All ER (D) 288

⁷ *Dempsey Group Pty Ltd v Spotlight Pty Ltd* (2018) 138 IPR 190



Mitigating Risks of Copyright Infringement

Businesses can minimise their exposure to potential copyright infringement (from an artistic works / graphic works perspective) by following these non-exhaustive steps:

1. Make a List and Check it Twice

Business owners should create checklists of important questions to ask themselves and their employees throughout the creative process, from ideation to implementation. When in doubt, start with the “5Ws and 1H”: what, where, when, who, why, and how? – “What is it that you are designing?”, “Where and when did you find the inspiration for this design?”, “Who designed this?”, “Why is it the way it is?” and “How did you come up with this design?”. Each business is unique, and your checklist should be tailored to the specific purpose of your business.

If you are a third-party manufacturer taking orders from other businesses, it is equally important to verify your customer's sources and determine whether the designs resemble any pre-existing ones. If so, it is best to reject such orders for fear of potential legal action.

If you are a re-seller of products that incorporate a specific business's design(s), make sure that these products come directly from the business owners themselves or from authorised distributors. When sourcing these products from authorised distributors, take the extra step and reach out to the business owners themselves for their confirmation that your source is indeed licensed to distribute the products.

If as a business owner you become aware that your designs have been applied on products and sold in the market without your consent, you should immediately reach out to your legal team to ascertain how best to safeguard your rights and put a stop to these unpermitted activities.

2. Policies to Educate

Implement workplace policies addressing copyright compliance. This can educate your employees on the do's and don'ts when researching or creating content, and on how best to avoid infringing on someone else's copyright.

3. When in Doubt, Seek Permission!

If you plan to use someone else's design, make sure to obtain the necessary licence from the copyright owner. Identify and contact the copyright owner and request written consent.

4. © for Copyright

If your business has created its own designs and you are trying to prevent others from infringing on your copyright, it may be helpful to include visual reminders such as copyright notices on the works that you want to protect through the inclusion of the “©” symbol.

You may also post notices on your website or social media to remind the public and industry competitors that your copyrighted works should not be reproduced or manufactured without your express consent.



Mitigating Risks of Copyright Infringement

5. Evidence is Key

If your business has created its own designs, it is important to keep a trail of documentation to ensure you have evidence of the creation of each design – such as when it was created, who created it, and where it was created. This can be very useful in situations where you need to take action against infringers and are required to prove your ownership of the work.

6. Yours or Not? Make it Clear

When outsourcing design work, ensure that any service agreement includes an express clause stating that ownership rights in the work belong to you.

Conclusion

In recent times, businesses have become increasingly vigilant in safeguarding their intellectual property rights, including their copyright. Therefore, it is important to be well-educated on the ins and outs of copyright law (alongside other intellectual property rights) to ensure that you are not stepping on anyone's proverbial toes.

Remember – just because it is customary, does not mean it is legal!

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