**18**

**THE CHALLENGE OF INTELLECTUAL PROPERTY RIGHTS FOR CULTURALLY SIGNIFICANT PATTERNS, PRODUCTS AND PROCESSES**

Tom Cassidy, Tracy Diane Cassidy

**INTRODUCTION**

Intellectual Property Rights (IPR) in the UK has been a topic of controversy, frustration and complexity for design and designers for many years and this continues to be the case. The situation is further complicated by the different laws affecting IPR in different countries and, often, a lack of knowledge about IPR especially among young designers. Indeed, there are significant differences in knowledge and understanding of IPR among designers in both economically developed and developing countries. To understand IPR we must first alter or augment our perception of property.

We grow up to consider property as a material entity: a car, a house, a television etc., something tangible that an individual has paid to take possession of or has manufactured themselves and therefore has the right to charge another individual for or even to give away; the last three words are important and may become more important as we begin to discuss IPR in relation to culturally significant patterns, products and practices. For example, many of us will give away our personal property to charity shops or any other non-profit organisation we choose because we believe that, in doing so, we are contributing towards the good of our national and global society.

The concept of design knowledge as a property is covered in depth and breadth by Mwendapole (2005) in her PhD thesis. She explains that, although property is probably not semantically the right word to cover design knowledge it is used because, as MacPherson (1978 : 11) stated, ‘property must be grounded in a public belief that it is morally right; if it is not so justified it does not remain an enforceable claim. If it is not justified, it does not remain property’. Design knowledge can be placed into one of two groups (Rodgers and Clarkson 1998): tacit or explicit. To put this simply, tacit knowledge is what is in the designer’s brain; it has been put there by training, education, practice and experience. It is how the designer collects and interprets previous knowledge. The knowledge will remain tacit throughout most of the idea generation stage and even up to the stages of early sketches. Once the designer moves on to technical drawings, models, computer simulations and so on (i.e. they become explicit) the ideas can be tested, viewed, used and enjoyed in the public domain and therefore should be protected and a value placed on them. How this value is arrived at and whether it is purely temporal or spiritual or both is difficult enough in contemporary society; when the designer is an individual or corporate entity, when the designer is part of a cultural group or ecology that has existed for decades, centuries or even longer, the situation is highly complex.

**THE PROTECTION OF DESIGN**

Mwendapole’s research (2005) primarily considered the protection of modern individual designers or design agencies/groups. She proposed a model (Figure 18.1) and her evaluation tests of this model showed that designers appreciated it as a checklist and awareness tool to remind them when the explicit stage(s) of design had been reached.

**Insert Figure 18.1 Here**

Figure 18.1: Model illustrating the allocation of property rights to design knowledge. Adapted from Mwendapole (2005).

In 2012, a substantive report was produced by the UK Intellectual Property Office. It was reported that designs are protected in the UK by five legal rights:

* EU registered design rights
* EU unregistered design rights
* UK registered design rights
* UK unregistered design rights
* Artistic copyright

This report goes on to show that the protection of design rights presents a maze that designers and companies have to try to navigate and in which most feel unlikely to succeed and/or that even success would be more costly than it is worth. The cost of failure when attempting to protect design rights is more or less prohibitive to SMEs, which make up the majority of design agencies. Across Europe there has been an effort through the Community Design Regulation introduced in 2001 (Intellectual Property Office. 2012) to bring about a unitary system and approach but this has had limited success.

A section of the report that may be considered of significant interest to individuals, agencies, companies and cultures is the Effect of Design Rights on Motivation and Innovation. Many companies will quote their number of patents in promotional materials but very few quote their design rights/copyrights etc., in the same manner. Are they missing a trick or is it simply that product/design lifecycles are so short that it is not worthwhile? For many years, Taiwanese product/industrial design agencies have used the award of a patent to an individual designer’s work as a mark of esteem and as a motivational tool. Perhaps in the West we need to consider this more thoroughly. Might it also be that cultures would be inspired, motivated and feel important if their patterns, products and practices were considered valuable enough to be legally protected?

It was reported that most designers, agencies and companies were most comfortable with the concept and reality of copyright and would normally revert to that as a first choice.

**Recommendations from the development of design law report**

The recommendations of the report are briefly outlined as follows:

* The Intellectual Protection Office (IPO) could offer design rights as an insurance policy for which companies/individuals would have to pay a registration fee. The IPO should then make the information related to the protection of registered designs more accessible and clear.
* The IPO could give clear guidelines as to the likelihood of success in litigation cases brought about due to perceived design right infringement. Information regarding costs, time and benefits of such action should be made available.
* Among the main problems perceived in the current system are time and cost. In order to alleviate this, it is recommended that a superfast track be considered that would be available to small value design claims. The associated cost would then also be limited but no precise figure is suggested. Extra expense could be attributed to any party wishing to step outside the superfast process.
* Problems can arise due to the judiciary having a different value perception to design from that of the design community. In order to obviate or at least lessen the likelihood of this occurring, ‘lay assessors’ or ‘informed users’ could be appointed to be on the bench and advise the judge.
* The time taken for and cost of bringing about a judgement on IPR infringements may be reduced by introducing an IPO Tribunal system. This would hear cases only where registered design rights exist and last up to a maximum of three hours.One final recommendation is for the formation of a design list to help accommodate an expedited process. This list would comprise cases where it was considered by the judiciary that decisions could be reasonably achieved in three hours or less.

These recommendations are much more expansively described in the report. The above outline gives the reader some flavour of what could be done. At this time these recommendations remain just that, ‘recommendations’, and the law with regard to Design Intellectual Property Rights in the UK is still difficult to comprehend and/or to ensure firm expectations.

As stated before, the extant literature on Design IPR is mainly aimed at individuals, agencies (SMEs) or companies. In order to begin to consider culturally significant patterns, products and processes it is necessary to look at some case studies and, while trying to relate back to the current IPR situation, we can make some comments on the deeper complexities therein. Five case studies are considered: Harris Tweed; American Hopi Indian designs; the Paisley pattern; an Inuit Indian design and Fair Isle patterns. Let us begin with the recognized best protected process and product(s) of Harris Tweed.

**The Harris Tweed Act 1993**

The history of tweed fabric weaving in the Outer Hebrides in Scotland is chequered and clouded in mystery. At times, and up to the mid-1960s, spun yarn from the Scottish mainland was used in large quantities, but then the islanders on Harris, Lewis, Uist and Barra decided that they would only use yarn spun on the islands, albeit from wool that originated anywhere in Scotland. This in itself raises many interesting questions; anyone who has a knowledge of the wool industry knows that wool brokers have to source and use wools from every part of the world in order to produce economic blends of the right quality. No other fabric/garment styles produced around Scotland and Ireland (e.g. Fair Isle or Aran jumpers) enjoy the protection of an Act of Parliament in the way Harris Tweed does (Harris Tweed Act 1993). So the question could be asked ̶ was this an acquired privilege as was the case with all protection rights in the seventeenth and up to the mid-eighteenth century? It is also strange that no pattern types are protected by the Act and conversely this means that the designers can appropriate any other culturally significant patterns, or does it? The definition of Harris Tweed given in the Act is one any textile designer or technologist could easily challenge and navigate around. Perhaps this supports the recommendation of the UK IPO report, discussed earlier, that informed users be present on the bench to advise the judges. Let us have a close look at the first part of the definition as stated:

‘In this Act ‘Harris Tweed’ means a tweed which:

1. has been handwoven by the islanders at their homes in the Outer Hebrides, finished in the Outer Hebrides, and made from pure virgin wool dyed and spun in the Outer Hebrides;

The handwoven part has attracted sceptics down through many years but a more interesting question would be to wonder why, as often reported, they use large fibre preparation and spinning machinery, which, in order to run economically, would produce a volume of yarn far higher than could be coped with by the relatively small number of weavers available from the population of the islands. The pure virgin wool does not specify where that wool comes from and what quality (in terms of fineness, length, kemp content, etc.) it should be. ‘Spun in the Outer Hebrides’, but what kind of spinning, to what counts (thicknesses and plies) and what twist content and directions should be used? It would appear that, as long as the fabric is handwoven and finished in the Outer Hebrides it can be made from any fibre or yarn. This would surprise any customer of tweed fabrics as there is always a small amount of kemp (dead fibres) which gives these fabrics part of their character but must be carefully controlled as many people find it can irritate the skin.

Interestingly, no patterns are mentioned either as surface design or as weave structure. Most textile designers would expect tweed to be herringbone or houndstooth weave but this is not mentioned. According to newspaper reports (Moss 2015; Hollingworth 2012.) Japanese visitors will often buy the traditional weaves but sometimes ask for special designs, which the islanders are happy to accommodate. Thus it would appear that they require protection for their process and product but are able to use any patterns or weave structures asked for by the consumers. The Act also covers the right to use the Orb symbol as a logo by Harris Tweed producers.

A search for cases brought to the judiciary under the terms of the 1993 Act will show little activity. The most well-known one was that between Vivienne Westwood and the Harris Tweed Association. It was suggested that Westwood had used a version similar to the Harris Tweed Orb for garments not conforming to the specifications of the 1993 Act. However, Westwood, who has always been a great supporter and user of Harris Tweed and tartan in her designs, was able to show that her Orb included three variations of the original Orb design and won the case.

There is no doubt that the intent of the 1993 Act was, and is, laudable and that the protection of the livelihoods of islanders living in isolated regions is important. However, let us examine what has been protected from the perspective of IPR:

* There can be no protection of the processes as they exist in many parts of the world and there is little or no evidence of trade secrets;
* There is no protection of the wool type being used;
* There is no protection of patterns.

Therefore what we have is protection of the place where a part of the design and processing takes place and no requirement for the islanders to adhere to the protection or desired protection of other culturally significant patterns, places or processes. These are the views of the authors; others may disagree with this interpretation.

**Appropriation of Hopi Indian Design and Culture**

This particular case was reported in the interesting chapter by David Howes (1996) in the book he edited called *Cross-Cultural Consumption*. He explains how ‘Indianness’ had become, and remains, a particular target of exploiters in the American Southwest. He goes on to discuss how one of the most marketable cultures was that of the Hopi of Arizona. He describes the various ways that this tribe’s culture had been, what can only be described as, abused, such as: the use of Hopi words to describe commercial products; the production and sale of Hopi ‘fakelore’ products which had no foundation in Hopi culture; the copying of Hopi motifs on cheap tourist consumables; annual ceremonial events by people emulating Hopi culture but having no real connection to it; teaching of spiritually related Hopi crafts by people with no right to do so; the production of children’s comics with characters drawn from Hopi spiritual stories and portraying them as American anti-heroes.

Eventually, the Hopi people had taken enough of these abuses and wanted to call a halt to them and therefore a series of incidents and law cases arose. Howes goes on to explain how it was hoped that the concept of ‘a right to cultural integrity’ could be integrated into Anglo-American Law. He examines how various extant rights might be applied, namely:

* *The Right to Privacy*: This had been mainly used to protect the privacy of private life and, after much consideration, it was decided that this would not cover many of the transgressions of cultural integrity that were taking place.
* *Ordinary Sensibilities*: It was found that most cases considered under this concept, which lies within the right of privacy, had failed to reach a conclusion on the degree of offensiveness and tended to consider this from the point of view of the majority/dominant culture.
* *Copyright*: As stated earlier, this is the oft-used fall back of designers as it is the most widely understood outside the judicial community. Once again, though there have been many examples of successful litigation by designers using this right (e.g. Walt Disney v. Air Pirates (1978)), it was realized that the law of copyright pertained more to the commodification of knowledge rather than to its conservation and so would have limited use in the protection of culturally significant issues.
* *The Right of Publicity:* At its core, this right is aimed at enabling persons to control and profit from the use of their name and likeness. Howes decided that this right may have some use in the protection of Hopi culture but ends by being somewhat doubtful as to the real value the people would obtain while fully supporting the need for an end to exploitative abuse.

It seems that the primary component in any use of culturally significant patterns, products and processes is that of ensuring the participation of the culture in the design or exploitation process. Of course, there can be situations where the culture involved may be difficult to identify, as with the next case study.

**The Paisley Pattern**

The teardrop shape known by many in contemporary society as the Paisley pattern (Figure 18.2) is called many other names by a variety of nationalities. How has this come about? Let us look at the case of the town of Paisley in Scotland, which has been associated with this pattern by many people over the last one hundred and fifty years.

**Insert Figure 18.2 here**

Figure 18.2: Paisley Pattern provided by Professor Martyn Evans

At the middle of the nineteenth century the British Raj in India was still strong but beginning to feel pressure from Indian nationalists, and therefore the influx of British soldiers was at its highest. At the same time, many of these soldiers came from towns where the biggest sources of employment were involved in the weaving of fabric that had flourished since the Industrial Revolution. The soldiers, while mindful of their duties, were also mindful of the time when they would return to their hometowns and, hopefully, to jobs in the local industries. It was therefore natural that when they saw beautiful surface and structural decoration on sale in Indian markets they were quick to capture these patterns and take them back to their local weavers. The Paisley pattern was one such design and could just as easily have been called the Bolton pattern or the Norwich pattern; it would seem that the Paisley weavers were a larger and perhaps more organized or vociferous group and so the pattern became known as the Paisley pattern in much of the Western world. This is one version of the story; there may be others.

It is also generally accepted that the pattern may not have originated in India and there are suggestions that it is evidenced in archaeological findings from Babylon (Reilly 1987: 10). The question, therefore, is to which culture does this pattern exist and who would ask for protection? The pattern has gone through many metamorphoses and some of its reincarnations could hardly be called revitalizations; by revitalization we mean bringing again into use, prominence and sustainability. In the course of the Design Routes project, designers have been asked to carry out a revitalization exercise on the Paisley pattern with particular consumer markets in mind. If the output of one such exercise were to be successfully used in the fashion market, who would hold the IPR? Perhaps this is the answer to the future of design in the global market. We no longer exist as separate cultural entities and design ideas should be shared as long as we respect the culture(s) and do not cause spiritual or temporal offence to those cultures.

**Possible Appropriation of Inuit Design**

A case study of considerable interest and one that challenges various aspects of IPR was reported in the *Toronto Star* in 2015. A Nunavut woman, Salome Awa, accused a UK fashion label of using a design that had been on a parka (coat) worn by her great-grandfather, and which had been photographed by Knud Rasmussen, a Danish explorer, in 1922. She said that she was particularly upset because the design was of great spiritual meaning and importance. She explained that her great-grandfather had been a Shaman and that he had asked his wife to make the parka with a design that emphasized two large hands pushing out from the parka to protect him from anyone who might wish to do him harm. The fashion label stated that their clothes were known for ‘raw energy and contemporary urban edge, but also for embracing ethnographic references and multiculturalism.’ The Nunavut woman told the newspaper that she was consulting a lawyer about possible Intellectual Property infringement by the fashion label but would consult with her family before making any decision. This case raises a number of questions/issues that lawyers and the general public would have to consider:

* Is it possible that the great-grandfather would have been proud that his wife’s design had been introduced to and appreciated by the world?
* Did the company consider that any copyright ownership (even if it had been registered) would have now run out in the same way that music/song copyright does?
* How can one measure the level of spirituality assigned to the design?
* Who would the lawyer fight for: the great-granddaughter and her family, the great-grandfather and his wife, the Nunavut people?
* Consequently, to whom would any compensation be paid?
* Are the great-granddaughter and her family concerned with cultural outrage or the compensation that might be obtained?
* Could the company simply claim, as in other cases, that showing the design on the catwalk did not provide monetary gain and that they would produce no articles for sale?

We await the result, if the case is ever brought to trial.

**Fair Isle**

The Fair Isle patterns produced on Shetland and surrounding small islands (a subarctic archipelago of Scotland that lies off the northeast coast of Great Britain) have never enjoyed the level of protection of Harris Tweed, and many famous designers have used typical Fair Isle patterns (see Figure 18.3) in their collections. Perhaps one of the reasons why protection has been difficult to obtain is the generally accepted knowledge that the patterns are Moorish in style and were possibly transferred to the already well-skilled knitters of Shetland from one or more Spanish Armada shipwrecks.

Insert Fig 18.3 here

Fair Isle Pattern Scarves. Image provided by Dr. Elizabeth Gaston, University of Leeds.

In late 2015, it was reported that a knitwear designer from the Shetland Islands had accused Chanel of copying her Fair Isle jumper patterns for a fashion show (Bobila2015). This case is made all the more interesting in that the designer concerned is Venezuelan and has only lived on Shetland for a relatively short time. However, she felt that the incidence of two Chanel employees visiting in the summer of 2015, buying some of her stock garments and then the very close copies appearing on the catwalk, was not coincidental. The designer and Chanel have come to an out-of-court agreement by which the original designer was credited for the design patterns used.

Questions to consider include:

* Was this a culturally related issue or that of an individual and therefore covered by design rights as described at the beginning of the chapter?
* Could Chanel have used the defence that showing designs on the catwalk does not constitute making money from them as has been used by fashion houses in the past?
* Does the settlement out of court mean that Chanel accept they have done wrong and what will be the implications of this in the future?

Because of this case, there has been talk of the need for better protection of Fair Isle patterns. Does this mean that the designer living on Shetland, though not a native, should be compensated for the use of her own designs or should the Shetland Islands or some affiliation have a case of their own to prosecute?

**CONCLUSION**

The complex nature of Design Intellectual Property Rights has been outlined here but the reader will have to refer to the texts cited to go into greater detail on the plethora of issues involved. Examples have been given of possible misappropriations of culturally significant patterns, products and processes. Outcomes have been given, though there are few actual settlements, and, as the reader will have discovered, these can be cloaked in secrecy. The questions then remain; can the revitalization of culturally significant patterns, products and processes be protected? Should they be protected? And who should be protected?

Perhaps the answers lie in chapters where it is made clear that the people of the culture concerned must participate in the revitalization process at every stage and be allowed to collaborate with the designer(s) to avoid the temporal and spiritual pitfalls that surround the subject. The authors would like to suggest that protection should be available against exploitation, spiritual and/or temporal misuse, abuse or mockery of culturally significant manifestations, but that sharing and revitalization of such is an inevitable part of our global community and should be prudently encouraged. Since 2003, an EU community design rights regulation has been in force and it will be interesting to see what effect this will have; but it will not affect culturally significant patterns, products and processes as dealt with in this book. This is not an easy subject and never will be. The chapter does not claim to provide definitive solutions but rather to pose questions and to continue raising awareness among readers and the design community generally.

**REFERENCES**

Bobila, M. (2015), ‘Chanel accused of copying knitwear designer Mati Ventrillon’, *Fashionista,* 7 December. Available online: http://fashionista.com/2015/12/mati-ventrillon-chanel-metiers (accessed 1 November 2016).

Harris Tweed Act 1993 (c.xi) London: HMSO.

Hollingworth, W. (2012), ‘Traditional Tweed finds a new life in Japan’, *Japanese Times,* 30 March. Available online: http://www.japantimes.co.jp/news/2012/03/30/national/traditional-tweed-finds-a-new-life-in-japan/#.WBjDZYXXJMs (accessed November 1 2016).

Howes, D. (1996), *Cultural Appropriation and Resistance in the American Southwest in Cross Cultural Consumption*. Routledge: New York.

Intellectual Property Office. (2012), ‘The Development of Design Law – Past and Future’, 24 July. Available online:https://www.gov.uk/government/publications/the-development-of-design-law-past-and-future (accessed 1 August 2016).

# [Kestler-D’Amours](https://www.thestar.com/authors.kestler-damours-jillian.html), J. (2015), ‘Nunavut woman accuses U.K. fashion label of appropriating Inuit design’, *Toronto Star,* 26 November. Available online: https://www.thestar.com/news/canada/2015/11/26/nunavut-woman-accuses-uk-fashion-label-of-appropriating-inuit-design.html (accessed 1 August 2016).

# MacPherson, C. B. (1978), *Property, Mainstream and Critical Positions*. Oxford: Basil Blackwell.

Moss, V. (2015), ‘The wool to succeed’, *The Telegraph,* 25 April. Available at: <http://www.telegraph.co.uk/luxury/womens-style/69209/harris-tweed-the-wool-to-succeed.html> (accessed 1 November 2016).

Mwendapole, C. (2005), ‘Design Knowledge and Intellectual Property Rules’, PhD Thesis, De Montfort University, Leicester.

Reilly, V. (1987), *The Paisley Pattern*, Glasgow: Richard Drew Publishing.

Rodgers, P.A. and Clarkson, P.J. (1998), ‘An Investigation and Review of the Knowledge Needs of Designers in SMEs’, *The Design Journal*, 1 (3): 16-29.

Walt Disney Productions v. Air Pirates (1978), 581 F.2d 751.