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**WORLD
INTELLECTUAL
PROPERTY
ORGANIZATION**

Marketing Crafts and Visual Arts: The Role of Intellectual Property

A practical guide



ABSTRACT FOR TRADE INFORMATION SERVICES

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Guide dealing with the relationship between successful marketing of crafts and visual arts, and the appropriate use of intellectual property (IP) system instruments - points to situations where obtaining formal IP protection ought to be considered; explains how to implement marketing and IP strategies within a business framework and marketing management process; presents case studies and examples of managing IP assets in marketing from the craft and visual arts sectors in developing countries; includes bibliographical references (pages 134–135).

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Preface

With the continuing liberalization and deregulation of the world trading system freeing the flow of goods and services, the international business environment is becoming increasingly competitive for creators and providers of all kinds of craft and visual arts products. Consumers now have tremendous choice. Artisans, craft entrepreneurs, visual artists and all the intermediaries in the supply chain must constantly strive to improve the quality of their products and services, the production processes, their brand identity and the effectiveness of their marketing strategies, if they wish to improve their business performance, productivity and competitiveness and win the hearts and minds of customers. Understanding the market, particularly the behaviour of consumers and competitors, is the key to success for any business. Identifying a demand and then working backwards – before making a product – is a must. This is where marketing comes in.

Marketing implies a market-driven, customer-centred approach. This is the reality for most categories of goods and services. For the craft and visual arts sectors, the marketing challenges come from many directions. At first sight, it would seem that machine-made products could easily be substituted for these essentially hand-made ones, especially in our knowledge-driven high-tech times: modern industry is enabling an increasing degree of mass customization and personalization of product offerings. Another challenge may come from the fact that the products of craftspeople and visual artists are not generally basic needs for consumers. As a result, consumption of these products may decline if consumer spending is down, especially during economic downturns.

A key strength of artisans and visual artists lies in their creativity and craftsmanship in expressing it. This gives their output a distinct traditional, cultural or symbolic flavour, which arouses the interest and matches the emotional needs and aesthetic tastes of discerning customers in specialized niches of domestic and export markets. Even so, **attracting and retaining consumers is a daunting task** in an overcrowded marketplace, where consumers find ample choice and alternatives and where competitors are constantly searching for successful product trends.

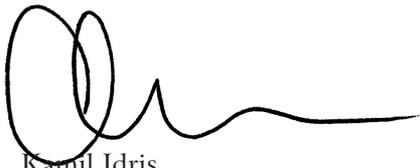
Given today's instant information and communication facilities, coupled with the ease and speed of copying and imitation, the market can simply get flooded with look-alike products or downright copies, which are also known as 'counterfeits' or 'forgeries'. The real challenge for artisans and visual artists is thus not just to produce and market winning new products that cater to changing consumer tastes, but also to prevent – or if unable to prevent then to effectively deal with – unfair competition or theft of their creative ideas. **The intellectual property (IP) system is the best available tool for creating and maintaining exclusivity over creative and innovative output in the marketplace**, albeit for a specified maximum period of time. The effective use of IP can also help artisans and visual artists to develop networks and relationships not only with end consumers, but also with all the links in the supply and demand networks.

If artisans and visual artists are to get a fair return from their creativity in the marketplace, it is important for them to follow a planned and systematic marketing strategy which integrates the use of the tools provided by the system of IP rights. This must begin with a basic understanding of the principles of marketing and of the IP system, along with a broad recognition of the value of IP assets in marketing and practical guidance in making proper use of them.

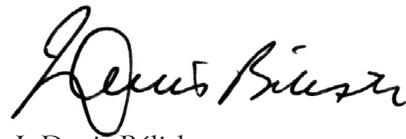
The highly competitive nature of the marketing process compels each country to protect culture-based goods as a substantial part of its national cultural heritage. This is especially relevant for many developing countries and countries in transition, in which the role of the craft and visual arts sectors can prove to be pivotal for sustainable development and poverty reduction. For policy-makers in government, business and civil society in these countries, defending the interests of artisans, craft entrepreneurs and visual

artists against unfair competition is becoming critical in order to underpin their commercial success and their contribution to individual and collective wealth creation, as well as to preserve cultural identity and diversity.

WIPO and ITC have joined hands to improve information dissemination, awareness creation and capacity building in their client countries, to explain the decisive links between successful marketing and the appropriate use of the tools of the IP system. In this spirit, this Guide attempts to demystify marketing and IP by underlining the practical relevance of both – and their interdependence – in responding to the economic or business needs of artisans, craft entrepreneurs and visual artists. This understanding should allow them to create and retain a competitive edge in the marketplace and to make meaningful profits based on their creativity, expertise, skills and enterprise – and by using fair means.



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Note

Unless otherwise specified, all references to dollars (\$) are to United States dollars.

The following abbreviations are used:

ACID	Anti-copying in Design (United Kingdom)
BSDA	Bureau sénégalais du droit d'auteur (Senegalese Copyright Office)
CD	Compact disc
CV	Curriculum vitae (résumé)
DVD	Digital video (or versatile) disc
EU	European Union
GDP	Gross domestic product
IP	Intellectual property
IPRs	Intellectual property rights
ITC	International Trade Centre
NGO	Non-governmental organization
OAPI	African Intellectual Property Organization
PCT	Patent Cooperation Treaty
SME	Small and medium-sized enterprise
TCEs	Traditional cultural expressions
TRIPS	(Agreement on) Trade-Related Aspects of Intellectual Property Rights
TSIs	Trade support institutions
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Chapter 1

Introduction

About this Guide

The purpose of this Guide is to provide a basic knowledge and understanding of marketing techniques and of intellectual property (IP) to artisans, craft entrepreneurs and visual artists, to enhance the chances of their business success. It seeks to indicate why, which, what, where, when, whether and how consideration ought to be given to the effective management of IP assets by using IP tools for successful marketing of craft and visual art products. In particular, it seeks to help artisans and visual artists to establish:

- Which IP issues are relevant to them;
- Why they should consider protecting their creative output with IP rights (IPRs);
- How to identify the creative output that may be protected with IPRs;
- What type of IPRs and protective measures are best suited to their particular needs and business;
- What the costs and practical business benefits are of such protection;
- How to access relevant information on IP and locate relevant intellectual property offices;
- Whether to join copyright collective management institutions or associations;
- Where to go for assistance on IP matters, and in particular whether to use the services of IP agents, IP attorneys and/or IP consultants; and
- Whether all necessary basic measures and procedures have been put in place to start implementing an IP policy and strategy as an integral part of their business and marketing strategy.

Where possible, the Guide points to situations in business where consideration ought to be given to obtaining formal IP protection and decisions should be made. To explain each IP issue and its link with business and marketing management processes, an outline has been provided of a basic business cycle and marketing plan that may be used by artisans, craft entrepreneurs and visual artists.

However, this remains general guidance only. In a particular business situation an artisan or visual artist would be well advised to take advice from a competent IP consultant about IP tools. There are significant variations in national IP laws and practice, and these may have huge practical business implications.

The basic purpose of this Guide will be fulfilled if it enables an artisan, craft entrepreneur or visual artist to develop a meaningful framework and business perspective on marketing and on the role of IP in marketing, and to pose the right questions. The Guide may be considered truly a success if it also helps to create a useful framework within which to carefully weigh the advice from an IP specialist, for the ultimate responsibility for any business decision cannot be shifted to the IP specialist.

The intended audience

This Guide assumes the reader has limited knowledge or expertise, if any, about principles of marketing or IP. An effort has been made to write in clear, and, to the extent possible, jargon-free language, and from a practical and common sense perspective. It is hoped that the Guide will be as relevant for a person belonging to an indigenous group or tribe as for a traditional artist or craftsman, or for a modern, city-based enterprise in a fast-paced business environment.

The Guide is essentially aimed at readers in developing countries and countries in transition, but will also be applicable for those in developed countries. The following individuals, groups, enterprises or institutions may find it useful:

- Individual or employed artisans and their associations;
- Self-employed craft entrepreneurs, producers and exporters;
- Associations of craft industries and trade;
- Visual artists (individually or collectively);
- Trade and other support institutions for the craft and visual arts sectors;
- Teachers, trainers and teaching and training institutions involved with business development and management, marketing, trade and export promotion for the craft and visual arts sectors;
- Governmental and non-governmental organizations (NGOs) working for development of the craft and visual arts sectors;
- Professionals or business consultants in the craft and visual arts sectors.

Using the Guide

The following information may be useful in navigating the Guide:

- Marketing issues are shown in black type in chapters 2 to 4;
- IP issues are shown in blue type in chapters 2 to 5;
- All headings and subheadings in the book are listed in the table of contents;
- The abbreviations and acronyms used are listed on page xiii;
- Throughout the Guide examples are given to clarify the text, and case studies of artisans and visual artists are given separately in chapter 6;
- Reference information – including a list of websites – and a bibliography form the two last chapters, 7 and 8.

It ought to be easy to grasp the basics of marketing and IP, since these are based on plain common sense, linked to practical business needs. But business situations vary considerably and also change with time and place, so the details of marketing and IP strategies may vary significantly, depending on the business environment of a country and the business needs of a particular person or enterprise. This makes everything very complex. The complexity is even greater in the case of the IP system, as there are a number of different types of IP laws in each country, and the details of a particular IP law and related practices vary considerably from one country to another.

A comprehensive account of IP issues is neither possible nor desirable in a Guide such as this one. Instead, this Guide seeks to paint a broad but systematic picture of the importance of marketing and IP, in the right amount of detail for a reader who has limited time to spare for these important but complex issues.

To drive a car or use a computer, you do not need to know the details of the technology behind them. All you need to know is *how* to drive the car or operate the computer, and when to go to a specialist for repairs or maintenance. The same applies to marketing and IP. So this Guide presents enough information about the fundamentals of marketing and IP to permit artisans, craft entrepreneurs and visual artists to make basic decisions about implementing a marketing and IP strategy within a business framework. The information sources listed in chapter 7 may provide useful additional inputs in the decision-making process.

However, the following reservations should be kept in mind while using the Guide:

DISCLAIMERS

- ❑ *This Guide is not a substitute for specialist marketing or legal advice. In particular, if individuals or enterprises believe that their IP rights are likely to be or are already being adversely affected, then they should take professional advice before rushing into action, in order to fully understand the costs and benefits of the available options.*
- ❑ *The pace of change in the international market environment and in IP legislation and practices is very rapid. Readers are strongly recommended to check with local, regional and international trade-supporting and IP institutions on the latest situation.*
- ❑ *Any artisan or visual artist who intends to use the tools of the IP system in business and export activities would be wise to prepare a list of possible issues and questions, and discuss all the IP-related aspects with a competent IP professional.*
- ❑ *Views expressed in the Guide are those of the contributors' and do not necessarily reflect those of ITC or WIPO.*

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Chapter 2

Definitions and outline

Crafts and visual arts

The distinction between crafts and visual arts has always been blurred. Some experts talk of ‘the useful arts’ (of the craftspeople) as objects produced for everyday use, and the ‘decorative arts’ (of the visual artists) as those created for their own sake. Some other experts refer to the ‘plastic arts’, in which they include painting, sculpture, photography, architecture, and sometimes even fine glassware, jewellery and furniture. The use of artistic works in artisanal products is common. The use of craft techniques and skills by visual artists is also easily seen. A photograph of a craft product is considered to be a manifestation of visual art. **There can be no sharp dividing line between crafts and visual arts.**

Some observers consider crafts to be a bridge between visual art and industrial design, and industrial design, in turn, to be a bridge between craft and industrial manufacturing. This may be called the traditional mass production perspective. However, modern manufacturing tools, techniques and methods, coupled with increasing reliance on computer-aided design and computer-aided manufacturing, have heralded a new era of personalization and mass customization. It is not possible to consider visual arts as merely contributing to crafts. Each sector has its own independent standing and market, but they also have a mutually supportive and interdependent relationship, including their linkages with the industrial design and formal factory-oriented mass production sectors.

From an IP perspective as well as from a marketing and consumer perspective, crafts and visual arts overlap in that they both produce essentially **hand-made** products, often culturally rooted, whose distinctive quality or inherent character has **primarily an aesthetic appeal** which is judged largely by the eye, although elements of touch and smell may also be important. Craft items may also have functional or useful features, whereas the products of visual arts do not.

Not only does the definition of artisan and visual artist differ from country to country, so does their status. Artisans in developed countries are often respected for pursuing a career involving high levels of creativity. Visual artists are highly regarded in many countries. In some other countries, however, artisans and visual artists are not necessarily considered worthy of any special status or respect. In fact, some craft producers do not wish their children to become artisans or visual artists. But in Japan, for example, both artisans and visual artists can be awarded the title ‘National Living Treasure’ as a mark of respect for their talent. Customers may also be confused about the professional identity of artisans. Some artisans in developing countries regard themselves as visual artists, while their customers in export markets regard them as artisans.

It is clear that identifying and defining crafts and visual arts and their makers has long been a matter of debate. For this reason, this Guide deals with both the craft and visual arts sectors together.

Definition of craft products

The following terms are used interchangeably throughout this Guide: artisanal products, craft products, craft items, crafts.

Craft products encompass a vast variety of goods made of diverse materials. This diversity makes it incredibly difficult to give a satisfactory definition of the material content, technique of production and/or functional use of craft products. Yet, for a variety of reasons, a working definition of such products is sought by importers, exporters, customs and excise departments, or trade development agencies. Although there is no universally agreed definition of artisanal products, the following characteristics broadly apply to a wide range of the world's crafts:¹

- They are produced by artisans, either completely by hand or with the help of hand-tools and even mechanical means, as long as the direct manual contribution of the artisan remains the most substantial component of the finished product;
- There is no particular restriction in terms of production quantity;
- Even when artisans make quantities of the same design, no two pieces are ever exactly alike;
- They are made from sustainably produced raw materials;
- Their special nature derives from their distinctive features, which can be utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, and religiously and socially symbolic and significant.

Crafts concerned with servicing, installation, maintenance and repair (of transport equipment, household goods or electric appliances, for instance), fall outside the above definition and, therefore, are beyond the scope of this Guide. Services provided by artisans, whether working on commissioned projects or as design consultants, are, however, very much within the scope of this Guide, even though its primary focus is on the business cycle of craft products.

Artisanal products can be classified under broad divisions. These divisions are primarily based on the materials used, or a combination of the materials and the technique. The six main categories² are:

- Basket/wicker/vegetable fibre-works;
- Leather;
- Metal;
- Pottery;
- Textiles;
- Wood.

Further categories could correspond to *various additional animal, mineral or vegetable materials* covering those other materials used in craft production that are specific to a given country or region, are rare, or are difficult to work, such as: *stone, glass, ivory, bone, horn, shell, sea shells, or mother-of-pearl*. Finally, extra categories could be considered when different materials and techniques are applied at the same time. This might be the case, for instance, for *arms for ceremonial or decorative purposes or as theatrical properties, decorative items and fashion accessories, jewellery, musical instruments, toys, or works of art*.

1 Based on the definition adopted by the 44 countries participating in the *UNESCO/ITC Symposium on Crafts and the International Market: Trade and Customs Codification* held in Manila, the Philippines, October 1997.

2 *Crafts: Methodological Guide to the Collection of Data, UNESCO.*

Characteristics of an artisan and a craft enterprise

Artisans may be defined as people who make products manually. They usually work individually, but can often be helped by family members, friends, apprentices or even a limited number of workers, with whom they are constantly in close personal contact. This contact generates a sense of community and attachment to the craft.

However, in order to include all business initiatives which contribute to the development of the sector, the use of the term ‘artisan’ will also cover those craft entrepreneurs who:

- ❑ Although not actively participating in production, specialize in research, market negotiations or product design and conception;
- ❑ Use machine tools or even machinery, without affecting the essentially hand-made nature of the work and the production process;
- ❑ Beyond the usual cottage or artisan unit, have associated in cooperatives or any other form of organization, formal or informal; and
- ❑ Manage or belong to micro-, small or medium-sized enterprises concerned with artisanal production.

Artisans and craft enterprises share many characteristics:

- ❑ Artisans generally perceive themselves as business people.
- ❑ Artisans are mainly successful in economic terms, although few achieve fame.
- ❑ They either learn their skills in the family or community in which they live, or receive skill training under government craft development initiatives. In developed communities, artisans make career choices, studying degree courses in the craft and visual arts areas in universities and colleges.
- ❑ Artisanal products are normally commercial, utilitarian objects used in many different ways.
- ❑ Artisans’ prices are usually based on material and labour costs, although a small number of artisans may command premium prices, linked to good reputation.
- ❑ Artisanal products sell in exhibitions, retail outlets, street markets, fairs, tourist venues and export markets. They are frequently sold through entrepreneurs and middlemen, NGOs, and producers’ and exporters’ associations. Internet facilities and websites are also being increasingly used for marketing artisanal products.
- ❑ Most artisanal production is market-led: that is, production is geared to observed market needs and niches.
- ❑ Local communities in developing countries and countries in transition often regard artisans as lower-status social groups.
- ❑ Export consumers may have little understanding of tradition, aesthetic and production skills and processes in artisan manufacture.
- ❑ Export market enterprises often see artisans as low-cost production sources.
- ❑ Promotion is done through advertising and catalogues. An artisan’s reputation for reliability and quality may travel by word of mouth.
- ❑ Relationships with middlemen and customers may range from nurturing to exploitative.

Definition of visual arts

In visual arts, the individual (the artist) uses various elements or material to express his or her feelings, emotions and differing perceptions of the world that surrounds him or her. The result of this work is judged mainly by the sense of sight.

Painting, drawing, sculpture in various materials, printmaking, photography, plans, maps, performance art, installation art, mail art, assemblage art, body art, textile arts, fashion design, multimedia, video art, web design, web art, digital art, graphic and product design are some expressions of visual arts.

Characteristics of visual artists and their work

The general characteristics of visual artists include the following:

- Visual artists generally perceive themselves as creative individuals, and not as business people. Their focus is much less on skill or craftsmanship, and more on artistic talent, creativity and aesthetic beauty.
- They may have a formal education in the arts, or may be completely self-taught.
- Artists can be successful in terms of both artwork and personality.
- Art works are non-functional, emotional, social, political, traditional and cultural statements. They are not greatly affected by commercial sector constraints.
- Art sells in galleries and exhibitions, art fairs, and through commissions.
- Art prices have their basis in aesthetic values and artistic success, not in material or labour costs.
- Local communities regard artists as special, and as having high social status.
- Export markets do not easily distinguish between artist and artisan.
- Export markets categorize much artwork from developing countries as décor.
- Visual artists promote their work by reputation, through media critics, press releases, websites, culture publications, film and television.
- Enterprise sponsorship of exhibitions is commonplace in developed countries.

Intellectual property

Definition of intellectual property

Intellectual property (IP) is the name given to **property arising out of human intellectual effort**. The output of human intellectual effort often manifests itself as new or original knowledge or creative expression which adds a desirable quality to a marketable product or service. Various elements provide intellectual output with attributes that, in one way or another, enhance the quality of life. These elements may be called human endeavour, ingenuity, creativity, inventiveness, flash of inspiration, sudden insight, or new insight into observed facts. They may or may not involve experimentation, trial and error, skill, team work, craftsmanship, aesthetic sensibility, and so on. They may involve solving a technical problem in making something with more desirable functional qualities, or result in creating something aesthetically

pleasing, to satisfy a human need or want, be it utilitarian, sensory, social, cultural, mental, spiritual or religious. These value-adding or ‘quality of life’ enhancing elements are the basis of IP.

Intellectual property refers to **creations of the mind**: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.

Intellectual property is divided into two categories: **industrial property**, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and **copyright**, which includes literary works such as novels, poems and plays, films, musical compositions; artistic works, such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programmes.³

Some key characteristics of intellectual property

A key characteristic of any property, as it is generally understood nowadays, is that the owner of property has the **exclusive authority to determine how that property is used**. However, IP has many characteristics that are different from those of physical or tangible property.⁴

Unlike physical property, which can be used or enjoyed by one or a limited number of people at any moment, **intellectual output can potentially be used or enjoyed by an unlimited number of people**, and without depriving its owner of its use or enjoyment. **One key way of using IP assets is to permit their simultaneous use by a number of users**, in exchange for payment. In IP jargon this is called **licensing** of IPRs. Such licensing can be done for different purposes, in different countries, for different lengths of time, by different users (called licensees) who may pay very different sums of money.

Physical property has value either as long as it is in demand or while it exists. **IP has value only for the duration for which laws allow** the intellectual output to be treated as property and provided it is still in demand in the marketplace. The owner of physical property has much greater control over it than the owner of intellectual output could ever have in the absence of the legal system of IP. Depending on the type of IP, different rules govern its creation, the nature and scope of rights over it, and the duration and circumstances in which those rights can be put into practical use.

There is a **greater possibility of theft and disputes concerning ownership and use** of IP than is the case with physical property. A physical object is stolen only if its possession changes hands, whereas IP is deemed by law to be ‘stolen’ if without permission of its creator or owner, it is copied, imitated, adapted, translated, displayed or used as an input or starting point for further inventive or creative endeavour. It is even possible for IP to be considered stolen when it is independently discovered or created! A forgery, counterfeit or pirated version, even if better than the original, is theft, as it is based on stolen ideas, expressions, concepts, or technologies. Understanding this is crucial to

³ A broad introduction to IP is available in the WIPO publication *WIPO Intellectual Property Handbook: Policy, Law and Use* (see www.wipo.int/about-ip/en/iprm/index.htm).

⁴ Tangible property refers to property that has physical substance and can be touched (e.g. furniture, buildings, cars, jewellery).

understanding the importance of the legal system of IP rights and their practical application in business strategy.

Just like physical property, **IP has commercial value**. Expenditure on or income from IP may be subject to taxation. Acquired IP assets may be shown on account books and balance sheets. IP assets may be insured. Income streams linked to IP assets may be securitized⁵ and used as collateral for borrowing money from banks and other financial institutions. More and more venture capitalists are interested in supporting only businesses that have taken adequate steps to protect their IP assets.

Property rights cannot be claimed until ownership has been established. Throughout most of the world, a set of laws provides exclusivity and ownership of IP. This allows people to own their creativity and innovation in the same way that they can own physical property. The owner of IP can control and be rewarded for its use. This encourages further innovation and creativity to the benefit of everyone.

The following table summarizes the main similarities and differences between physical property and IP.

<i>Physical Property (tangible or material)</i>	<i>Intellectual Property (intangible or immaterial)</i>
<i>Is property → the owner has exclusive right to determine how it is used.</i>	<i>Is property → the owner has exclusive right to determine how it is used.</i>
<i>Can only be used by one or a limited number of people at a given time.</i>	<i>Can be used by various people at the same time (including the owner or creator).</i>
<i>Has economic value as long as it exists or as long as there is demand for it.</i>	<i>Has economic value only for the duration specified in the laws and as long as there is demand for it.</i>
<i>Possibility of theft and disputes concerning ownership is rather limited.</i>	<i>Greater possibility of theft and disputes concerning ownership.</i>
<i>Theft occurs only if the possession of the property changes hands.</i>	<i>Theft occurs if the property is copied, imitated, adapted, translated, used, displayed, etc. without permission of the owner or creator.</i>
<i>Expenditure or income from the property may be subject to taxation.</i>	<i>Expenditure or income from the property may be subject to taxation.</i>
<i>May be valued and reflected on account books and balance sheets.</i>	<i>May be valued and reflected on account books and balance sheets.</i>
<i>May be insured.</i>	<i>May be insured.</i>
<i>May be securitized and used as collateral for borrowing money.</i>	<i>May be securitized and used as collateral for borrowing money.</i>

Overview of the types of intellectual property

The different types of IP are briefly introduced below, in alphabetical order. Chapter 5 will provide a detailed account of the different types of IP and their respective protection systems. At the outset, it must be noted that the definition of a particular type of IP varies from country to country, as does the scope of rights attached to it, and the conditions under which the rights can be enjoyed.

⁵ Securitization normally refers to the pooling of different financial assets and the issuance of new securities backed by those assets.

- ❑ **Brand or trademark.**⁶ A brand or trademark is a sign or any combination of signs, capable of distinguishing a product or service from other products or services on the market. The main task of a trademark is to individuate a product or a service – consumers are able to distinguish between different goods with different marks precisely on the basis of the marks. Unlike other types of IP, the term of protection for trademarks is not limited; they can be renewed indefinitely by the owner.

Example: LLADRÓ is a trademark used for hand-crafted porcelain sculptures. It derives from the surname of the original creators, together with a flower and an ancient chemical symbol.

- ❑ **Copyright.** Copyright describes a bundle of rights given to creators in relation to their literary and artistic works. Basically, copyright gives the owner the exclusive right to use the work. It protects items such as paintings, drawings, sculptures, photographs, architecture, instruction manuals, software, databases, technical documentation, advertisements, maps, literary works, music, films or songs. In most countries, a copyrighted work is protected for the length of the author's life plus a minimum of another 50 years.
- ❑ **Industrial design.** An industrial design (or simply a design) is the appearance of the whole or part of a product resulting from features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. Industrial designs, as objects of IP, can usually be protected for up to a maximum of 15 or 25 years.

Example: A new textile pattern or the unique shape of a piece of jewellery can be protected as designs.

- ❑ **Geographical indication.** A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or reputation that are due to their place of origin.
- ❑ **Appellation of origin.** An appellation of origin is the geographical name of a country, region or locality, used to designate a product that originates there, and that has quality and characteristics that are due exclusively or essentially to the geographical environment, including human factors.

Example: Bohemia crystal indicates that the product is manufactured in Bohemia, the Czech Republic, following the art traditions of the region.

- ❑ **Patent:** A patent is an exclusive right granted for an invention, which is a product or a process that provides a new and non-obvious way of doing something, or offers a new and non-obvious technical solution to a problem. A patent provides protection for the invention to the owner of the patent for a limited period, generally 20 years.

Example: A new method of tatting, using a shuttle, that enables the tatter to use more than two colours or textures of thread has been patented.⁷

⁶ A 'brand' is really a much larger concept than a mere 'trademark'. Strong brands and successful branding generally refer to successes in terms of contribution to market share, sales, profit margins, loyalty and market awareness. However, for the sake of convenience, the terms brand and trademark are used interchangeably throughout this Guide.

⁷ This invention is protected by a patent in the United States – see www.cs.arizona.edu/patterns/weaving/patents/05727439.pdf.

- ❑ **Petty patent or utility model.** A petty patent or utility model is similar to a patent, but the requirements for acquiring protection are less stringent and the protection is much cheaper to obtain and to maintain. On the other hand, the term of protection offered by a petty patent or utility model is shorter than a patent.
- ❑ **Trade secrets or confidential business information** are any information that can be used in the operation of a business and that is sufficiently valuable and secret to afford economic advantage over others. To be protected, the owner of a trade secret must have taken reasonable steps to keep the information secret.

Examples: Glass-blowing techniques, oven processing methods for baking pottery, clay mixture preparations for ceramics, consumer profiles, advertising strategies, lists of suppliers and clients, and manufacturing processes can all be trade secrets.

How to convert intellectual output into intellectual property

Before a person or enterprise can take advantage of its intellectual output it has to acquire IP rights (IPRs). Most IPRs in the fields of industrial property need to be registered in order to be protected. The procedures for acquiring and maintaining IPRs may differ from country to country, but the basic principles and features of these procedures are common to most countries. Where certain conditions are met, IPRs can also be acquired at a regional or international level. Detailed information on how to acquire IP protection is provided in chapter 5.

Chapter 3

Understanding the value of intellectual property

‘A little knowledge that acts is worth more than much knowledge that is idle’
– Khalil Gibran, *The Prophet*.

Artisans or visual artists have very many different motivations for producing creative products. These motivations could be cultural, religious, social, self-expression or earning-related, and so on. When issues of livelihood, recognition, reward and profitability are prominent motivators, the modern tools of marketing and IP come in very handy for reaping the fruits of handwork, and skilful expression of creativity.

Artisans and visual artists, whether operating individually, in family or micro-enterprises, should apply and enhance enterprise management skills. They need to understand the basics of business, marketing and IP in order to ask the right questions and evaluate the responses of the various intermediaries in the chain between them and their consumers.⁸

Challenging business and market environment

Business is done in the marketplace. A market may be ‘free’ or ‘regulated’. Free markets are the hallmark of economies in developed countries. To varying degrees, most developing countries and countries in transition have adopted the free market model of economic growth or are moving towards it.

In a free market economy, allocation of resources for production (of products and services) is essentially based on the interaction of market forces of supply and demand. If a product or service is in short supply, its price will rise, and producers and sellers will make higher profits as production rises to meet excess demand. If available supply exceeds demand, the price will tend to fall, thereby attracting more buyers and discouraging other producers and sellers from entering the market. In a free market, producers and buyers interact voluntarily and the price of a product is influenced by the relative balance between its supply and demand compared with that of competing products. In other words, **consumer behaviour influences the behaviour of producers, and the other way round.**

Nowadays, physical markets coexist with virtual markets based on online promotion and e-commerce. Producers and consumers generally interact through intermediaries in the supply and/or demand chain. In fact, the existence of intermediaries between producers and consumers is increasingly the rule, rather than an exception, even in e-commerce. The craft and visual arts

⁸ We define consumers as individuals who buy products or services for personal use and not for manufacture or resale.

sectors are equally affected by this trend, which is further accentuated by globalization. This increasing distance between producers and consumers poses real **challenges for businesses, especially in correctly matching the needs of consumers to products on offer.**

For producers there are numerous other challenges, such as too many products chasing too few and very discerning consumers. In today's business environment, the supply of products seems to far exceed demand. Globalization of markets means that consumers as well as competitors are no longer in geographical proximity. **Understanding the behaviour of markets and doing market research is not an easy task.**

Globalization of markets, coupled with the use of the Internet, has given consumers worldwide unlimited choice. The consumer is truly king! This has increased the challenges faced even by artisans and visual artists in successfully producing and marketing their products. The rapidly changing tastes of consumers add further constraints for artisans and visual artists and their marketing partners. In this rapidly evolving business environment, successful products have shorter and shorter life cycles. It is a growing challenge for most businesses to provide newer, better, or more attractive products that catch the eye and retain the interest of consumers. **The real challenge is to be more resourceful, creative and innovative than the competitors in all aspects of business** from conceiving new ideas and transforming them into products, to marketing them in an efficient and cost-effective manner and earning a reasonable profit on the investment made.

So, is there a formula or mantra for business success in these turbulent and unpredictable times? There is no magic wand, but understanding the basics of business is where every business must begin. Fundamentals first, and always.

Basic ingredients of business success

A successful business is one that makes a bigger profit after understanding and meeting the needs of consumers better than its competitors. This can be achieved only if there is:

- A quality product;
- A distinctive brand; and
- Effective marketing.

In other words, these are the essential elements that give a business competitive advantage over its rivals.⁹

What is a quality product?

Calling something a quality product usually implies that the consumer perceives it to be better than competing products because of its functional or technical attributes and/or because of its outward appearance and style. Such a perception could be reinforced by a lower price for the customer, or by greater success (and profit) for the producer or provider of the product.

What is a distinctive brand?

It is not always possible to ascertain the quality of a product by merely looking at it or even by examining it closely. Some of the qualities of the product may be

⁹ This Guide does not deal with other basic aspects of business management, such as maintaining accounts and smooth cash flows.

ascertained only by using or consuming it and still others only by experiencing it. A consumer may not be able to make a rational choice between competing craft products without using, consuming, or experiencing all of them. This is generally not a practical option. It is possible to overcome this problem if the consumer has reason to trust the claims of a particular producer or provider.

How then does a consumer identify the producer or provider of a particular product that he or she wants to buy? To compete effectively, an artisan, craft enterprise or visual artist must achieve market recognition and respect for itself and its products. This is done by creating and nurturing an enterprise image linked primarily to the name of the proprietor, of the business or of its products. The process of doing this is called **branding**. Branding in turn depends on creating and using a distinctive trademark. It may also rely secondarily on other types of IP such as industrial designs or patents.

Basically, trademarks have three functions:¹⁰

- ❑ An origin function – they indicate who is the producer of the product or service;
- ❑ A quality function – they are a guarantee of consistent quality; and
- ❑ An advertising function – they help in marketing products and bringing new products to the market.

In marketing jargon, trademarks become brands when they are able to convey something positive about the product to the consumer. **The essence of a great brand lies in its capacity to foster the sales of a product by creating an emotional link with its customers.**

What is effective marketing?

Marketing can be seen as a business philosophy that makes the customer the centre of the universe of the business or the pivot around which the business resolves. Effective marketing creates a demand for a product. **To be effective, the marketing plan and strategy of a business must be based on sound and continuous market research so that the needs of consumers are fully understood.** Only then should time, skill and other resources be invested in creating, testing, replicating and marketing new products, based on a coherent plan and strategy, for easy access at a price that is affordable to the consumers. This will ensure that while the consumers' needs and expectations are fully met (or even exceeded), at the same time the producer or provider of the product is able to reap a reasonable profit on the net investment made.

Access to knowledge as added value

The three essential business success ingredients were described earlier (quality product, distinctive brand, and efficient marketing). Even when coupled with other important factors such as access to raw materials, financial capital, good distribution networks, special skills, appropriate production processes and technology, they are no longer necessarily sufficient to enable businesses to sustain their competitive edge. **Knowledge is more and more becoming the key resource for building durable competitive advantage in the continuously evolving business environment. Knowledge is a critical input for creating value.**

¹⁰ W.R. Cornish *Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights*. London: Sweet & Maxwell, 4th edition, 1999, p. 612.

Knowledge and its relevance to business

Strictly speaking, knowledge resides only in our brains. The human brain creatively combines old ideas, frameworks, concepts, skills, memories, and so on, and develops new ideas, concepts, principles, models, frameworks, guiding principles and skills. Expression of these ideas, through verbal and non-verbal means, is a way of sharing with other human beings these new insights and the practical products based on them. Although such skills originate and reside in the human brain, they can be manifested by using the hands. Hand–eye–brain coordination is critical.

Most artisans and visual artists, including those who are running a business or an enterprise, consider themselves to be merely creative and skilled, and believe that they do not create any intellectual property. This is far from the truth. All of them create and therefore can – and should – own valuable IP. Understanding, identifying, managing and exploiting knowledge or IP assets has become a defining characteristic of business success in today’s marketplace. There are many elements that contribute to business success, but the importance of ‘intellectual property’ is becoming overwhelming as a determinant of good business models, business plans and marketing success.

From a business perspective, **knowledge adds value to a product**. Relevant knowledge can give its owner (whether an artisan or visual artist) an unbeatable advantage. It also potentially leads to a change in the perception of the artisan or visual artist – a transformation from a mere skilled craftsperson or creator into a ‘knowledge worker or professional’ (such as a designer), or a ‘creator of a knowledge-based enterprise’ (such as a design agency). This is a major change that the IP system seeks to promote, to enable artisans and visual artists to maximize their incomes while at the same time protecting their works. **IP creates a new kind of trust and stability in commercial relationships and is a risk-reduction and empowering tool for business success.**

What is the problem with knowledge?

Unlike the use of physical or tangible property, the use of knowledge by others cannot be excluded once it is revealed to them. **There is a real practical problem in controlling knowledge**, and therefore in using it to gain or maintain competitive advantage in the marketplace. This is especially so if the knowledge is presented in such a manner that it can be captured and used by competitors who get access to it.

But, sooner or later, knowledge needs to be shared, in order to use it to add value to various facets of a business. For example, a craftsperson who hires an employee will need to share the techniques and skills for manufacturing the craft products. In many situations, if there is a relationship of trust between the owner and user of the knowledge, then that may suffice. In other situations, a contractual relationship may be all that is needed to reasonably safeguard the loss or leakage of knowledge to competitors. But it is not easy to develop trust or enter into a contract. And there are still other situations in which parties who are unrelated to the owner of the valuable business information are to be prevented from using knowledge that they may have obtained accidentally, inadvertently or by foul means. In all these situations, a different solution is needed. This is where **the system of IP** comes in. It **provides the legal framework of ethical conduct to enable orderly using or sharing of knowledge.**

As has been outlined earlier, IP is the collective name given to a wide variety of knowledge created by human intellect. IP is generally protected by specific laws, for a specified maximum period of time, and under certain conditions.

So, **knowledge resulting from human ingenuity, creativity and inventiveness is protected by laws as ‘intellectual property’**. (See the section on ‘Intellectual property’ in chapter 2, and chapter 5, for more detailed information on the IP law issues related to craft and visual art marketing.) Through a variety of laws, different types of knowledge are given some of the basic attributes of physical property so as to enable them to be owned and controlled by their creators and/or owners. **This legal control over knowledge transforms it into ‘intellectual property’**.

Like any other businesspeople, artisans and visual artists cannot allow competitors to free-ride on their knowledge – their secrets of success. They **must make reasonable efforts to prevent their knowledge from being stolen by using the tools of the IP system**.

Since most artisans and visual artists also use IP created by others, they **must treat others’ knowledge with as much respect and care as they treat their own**. There can be no double standards.

Example: An artist makes a sculpture. He hires a professional photographer to take a photograph of the sculpture. The copyright over the photograph will generally belong to the photographer, unless the copyright law permits, and a written agreement between the artist and the photographer clearly provides, that the copyright belongs to the artist. Without transfer of the copyright over such photographs from the photographer to the artist, the artist cannot use the photograph for any commercial purpose.

Example: An artisan cannot use patterns, graphics, or pictures created by another person to adorn a new item (of pottery, for instance) without prior permission of the person who is the copyright owner of the pattern, graphics, or pictures in question.

What is special about IP?

The real power of the legal system of IP is that **it allows the knowledge that adds value to a product to be dissociated from (and therefore to be dealt with independently of) the product** to which it adds value. In fact, often the product is only the carrier or container of the IP.

Example: To illustrate this point, here is an example from another area. Consider the case of music. It is obvious that music in itself is IP when it is dissociated from audio tape, CD or DVD and is distributed online in digital or electronic form. This may not be as apparent in relation to an ornamental design or pattern when it is ‘lifted’ and applied to a completely different product, but the rule still applies.

Because IPRs can be dissociated from the products to which they apply, **they can be shared** for developing business relationships of diverse kinds with partners, suppliers, contractors, wholesalers, distributors, retailers, art galleries, museums, fairs, consultants, agents, and, above all, customers. This can be done, for instance, through licensing or franchising. (See ‘Protecting intellectual property abroad’, pages 95–99 in chapter 5 for details.)

It is vital for artisans and visual artists to learn to highlight their IP assets. By doing this they may shift the task of making copies of their creative works to others, and yet be protected while earning substantial additional income through royalty payments for permitting such copying.

Preventing others from free-riding on one's own knowledge

The old maxim 'a right without a remedy is no right at all' is equally applicable to the enforcement of IPRs.

Once the creativity and innovation of artisans and visual artists is translated into business transactions, it becomes even more important that unscrupulous competitors not be allowed to steal, imitate or copy their ideas, concepts, designs, know-how, etc. Worse still, an artisan or visual artist may himself or herself be accused of knowingly or unintentionally stealing a competitor's knowledge – for instance, when inadvertently using a design, a technique or copyrighted work from other creators.

In legal jargon, 'infringing' IPRs is the equivalent of 'stealing' material objects. Most artisans and visual artists understand what is meant by theft of physical property. Very few, on the other hand, understand what is meant by theft of IP. With IP protection in place, it is possible to act against, and even claim compensation for, infringements.

Why is intellectual property crucial in crafts and visual arts marketing?

All artisans and visual artists create IP assets. Their works may be protected by copyright. Many of them possess confidential information of commercial value, known as trade secrets. Some of them have a trademark. Most develop creative new or original designs. Some may even invent or improve a product or process used in their creative endeavour, which can be protected by a patent or a utility model. There are, therefore, many practical reasons for artisans and visual artists to understand and use various types of IP. Some of these reasons are described below.

❑ Earn more with greater security

It is true that not every artisan can – or wants to – become an entrepreneur or manage an enterprise. Yet many need to earn a living from their creative output. The IP system makes it possible for them to earn more money in a secure way, in a number of different ways and for a longer period of time. (See chapter 5 for details.)

❑ Exercise ownership of IP assets

Craftspeople and visual artists may work alone or in a group. They may be employed, or may employ others, and they may use or improve upon IP assets of others. Whether ownership of IP assets is individual or joint, it needs to be established unambiguously. This is a prerequisite before an artisan or visual artist, as the owner of IP assets, can exercise the rights that are associated with owning those assets (for example, to buy or sell assets, or to take action against theft or unauthorized copying or imitation of the business's image, trademarks, original designs, inventions, confidential business information or other IP assets). On the other hand, an artisan or artist who wants to use IP assets owned by someone else needs specific authorization to do so.

❑ Enjoy exclusivity in the marketplace

Artisans or visual artists who own trademarks, designs, patents, trade secrets, and so on have exclusivity over such IP assets. This means that they have the right to **exclude all others from using those IP assets**. Anyone else who wants to use the IP assets needs to have the permission of the owner. There are many types of rights associated with ownership of different types of IP assets. The owner has the option of permitting the use of IP assets, on payment, by allowing one or more types of rights to be used for different purposes by many people, or of limiting the number of users in a specified geographical area.

❑ Expand commercial activities and exports

The skilful use of IP assets may assist artisans and visual artists in almost every aspect of their business development and competitive strategy: from product design and development to marketing and product delivery, and from raising financial resources to expanding business and exporting.

❑ Encourage creativity and economic growth

The artisans' and visual artists' communities, as well as a country's economy, may benefit from the IP system. For example, in Australia the craft and visual arts sectors added approximately \$A 160 million to the national GDP in 1996–97. This was comparable to the value added by the record companies and distribution sector (\$A 162 million in 1995–96), but only 40% of the value added by the Australian performing arts industries (\$A 415.7 million in 1996–97).¹¹ Effective protection and use of IP assets owned by artisans and visual artists would not only enrich the cultural heritage of a country but also increase the contribution of the craft and visual arts sectors to their individual wealth as well as their country's GDP.

Basic requirements for enjoying the benefits of IP assets

The many potential advantages of IP assets can be reaped only if the country or countries in which the creative output of artisans and visual artists is to be protected and exploited has or have an effective IP infrastructure in place. This infrastructure includes internationally acceptable IP laws, an efficient office for registration and grant of certain types of IP rights, and trained police, customs and judiciary so that artisans and visual artists can use these services for timely and effective action to safeguard their IP rights.

- ❑ Some developing countries and economies in transition may not yet have a complete IP infrastructure. Even in some developed countries the craft and visual arts sectors are not necessarily supported as well as they should be. For example, in Australia's case, it is reported that 'The contemporary visual arts and craft sector is largely unregulated, and arts workers are generally unable to access the types of support other workers enjoy on a day-to-day basis.'¹²
- ❑ In other countries, the infrastructure is in place, but it is neither heavily promoted nor sufficiently used by the craft and visual arts sectors. Many artisans and visual artists, even when they have developed and protected a strong IP portfolio, do not know how to fully highlight their IP assets to reap commercial benefits.

In addition, for many self-employed artisans or visual artists, or those who work in or own micro-enterprises or SMEs, cost and time are crucial, and working capital may not be sufficient to meet additional expenses. Most artisans and visual artists believe that:

- ❑ They cannot afford the fees required to register and maintain IP protection.
- ❑ They have to spend too much of their valuable time on follow-up activities during various stages of the registration process.
- ❑ Even if they can afford to put IP protection in place, they cannot afford the legal fees required to bring a successful legal action against competitors who imitate or copy their IP assets.

This Guide seeks to illustrate in a practical manner the true potential of effective use of IP assets, and to clarify the many doubts in the minds of artisans and visual artists who have to make these decisions, according to their own situation and criteria.

¹¹ Executive summary, *Report of the Contemporary Visual Arts and Crafts Inquiry*, Commonwealth of Australia, 2002. ISBN 0 642 75095 5.
www.dcita.gov.au/Article/0%2C%2C0_1-2_15-4_111225%2C00.html

¹² *Ibid.* Chapter 2, 'The contemporary visual arts and craft sector – an overview', p. 6, para. 1.

Chapter 4

Linking intellectual property to business development and marketing throughout the business cycle

This chapter briefly describes the different stages of business development and marketing and the role that IP assets play at each stage in the cycle.

It is important to realize that, although the general outline of business development and marketing is quite similar for artisans and craft enterprises on the one hand, and for visual artists on the other hand, each of these sectors has some special features. Generally speaking, it is easier for most artisans and craft enterprises to use the same best practices that are used in mainstream manufacturing businesses. Visual artists can and do often use the same tools, but there are significant differences in their approaches to the marketplace.

Equally, all types of IP assets are owned or used both by artisans and by visual artists, but the relative role and importance of different types of IP assets in business development and marketing for artisans and craft enterprises on the one hand, and for visual artists on the other hand, often differ significantly. This is mainly because artisans and visual artists produce different kinds of works. Artisans are basically trying to make a living in the craft business. They seek to produce quality products, which can be reproduced in certain quantities. They aim at selling these products at a price that guarantees a quick turnover. Such products are more likely to be protected by industrial design rights (one type of IPR). Visual artists, conversely, are creators of original artistic works. Unlike artisans, they want first and foremost to create one-of-a-kind works that express their individuality and creative ideas. Such works are more likely to be protected by copyright (another type of IPR).

Marketing defined – an outline

Marketing is the sequence of activities undertaken by an individual or an enterprise to persuade customers to buy his, her or its products for satisfying their needs and wants. Before planning or commencing production, an individual artisan or an enterprise must ascertain and understand the market demand by taking note of consumers' needs and interests. This is usually done by surveying and identifying:

- ❑ **Market trends** – which affect the function, style and colour of a product;
- ❑ **Market channels** – the routes by which products go from producer to consumers;
- ❑ **Market outlets** – the places which sell products to consumers; and
- ❑ **Consumers** – their customs, habits, fundamental needs and desires.

Only on the basis of such systematic study should an individual or an enterprise decide which products to make in order to satisfy the needs of a maximum

number of consumers in the most economical manner according to the strategy of the enterprise. Marketing is a management tool which allows the enterprise to satisfy both individual customers and enterprise goals.

Because artisans are more involved in commercial markets than visual artists, they are more likely to take into account the influences that market conditions exert on their activities and livelihoods. The business process can assist them in making decisions that will improve their business performance.

Visual artists are frequently active in ways outside the trends in the market. They may be less involved in commercial business cycles, or even uninterested. But they still have to think how their artistic actions affect their livelihood earnings. This may lead them to take decisions that move them closer to formal commercial business or away from it. In many respects, visual artists also may do market research, and follow certain basic business practices to survive in their specialized markets. For example, a painter may change his or her technique or style to suit the evolution of a creative process. A key customer or gallery owner may have valid marketing reasons for asking an artist to continue producing in a style he or she has chosen to discard. If the artist cannot persuade the gallery owner to accept the new style, then the opportunity for sales may be lost.

Marketing fundamentals

A practical marketing operation is based on three main activities:

- ❑ **Analysis** – studying various components of the market environment before making any strategic decision. The qualitative and quantitative studies carried out usually relate to the market, its suppliers, competitors, customers, environment, products, distribution systems and modes of communication. The results of such studies provide valuable information, which assists an individual or enterprise to identify new markets, customers and products. These studies are known as **market research**.
- ❑ **Strategy and planning** – using the market research results, an individual or enterprise may adapt an existing strategy, or create a new strategy for targeting selected market segments and positioning the products in the market within the reach of targeted consumers. This is known as **marketing strategy**. The individual or enterprise responsible for marketing must, in accordance with the strategy adopted, develop a **business plan** for implementation of the strategy. This business plan will incorporate an **action plan** for each business activity or service: **product development, production, costing and pricing, promotion, distribution, customer relations**, and after-sales service.
- ❑ **Action** – implementing the decisions taken in order to develop, make, promote, supply and serve the products made for satisfying the needs and interests of the customers.

These three activities form the basis of all commercial business, and are collectively known as the **business cycle**. (See figure on following page.)

The business cycle for artisans and craft entrepreneurs

Market research

- ❑ Maintaining and improving enterprise image.
- ❑ Identifying new markets.
- ❑ Finding new customers.
- ❑ Seeking out new product niches.
- ❑ Analysing product sales from past year (identifying weak/strong products to discard/continue/modify).

Analysis



Marketing strategy (up to five years ahead)

- ❑ Product, position, price, promotion (based on market research).

Business planning

- ❑ Enterprise image updating and application.
- ❑ Product development and design plan.
- ❑ Production and pricing plan.
- ❑ Promotion plan, packaging, labelling and advertising.
- ❑ Distribution plan.
- ❑ After-sales service, including return policy plan.

Strategy and planning



Product development and adaptation

- ❑ Design based on market research findings.
- ❑ Prototype making.

Product costing and pricing

- ❑ Related to market research and production realities.

Market-testing products

- ❑ Limited production to check:
 - Customer reactions;
 - Production systems.

Product promotion

- ❑ Advertising, catalogue mailings, media, fairs and exhibitions.

Product launch

- ❑ Dispatch of samples to new and existing customers.
- ❑ Order processing and dispatch, customer relations.

Action



The business cycle is then repeated on a regular basis, usually annually

For artisans and craft entrepreneurs it is considered essential that they go through all the stages listed above, in order to maximise the potential benefits of thorough planning at every stage of their business operation.

Visual artists are unlikely to have had much experience in using many of the processes above, but it is still important to plan business activity and study all possibilities for ensuring cost-effective management and the best use of IP.

(More detailed information on each part of the business cycle appears in pages 22–55, together with the role of IP in each part.)

Marketing fundamentals for artisans and craft enterprises

It is important for artisans and craft enterprises to realize that the business cycle should be applied in their business. The business cycle provides a basic sequence of processes, which should become standard operating routines. These processes ensure that artisans and craft enterprises make the best use of information gained by market research. The cycle also ensures that no aspect is forgotten during planning, and that all aspects of enterprise management are updated regularly.

One or more types of IP assets may add value at any stage of the business cycle. Therefore, while going through the different stages of the business cycle, artisans and craft enterprises must carefully consider a number of IP-related issues. These include, in chronological order: identifying their IP; ensuring its secrecy to begin with; understanding the commercial relevance of IP; evaluating different options of protecting it; protecting it formally at the appropriate time; registering it in one or more countries; carrying out a cost-benefit analysis of continuing to invest in monitoring or managing the portfolio of IP assets; using IP assets in the production of goods and services or selling, licensing or disposing of the IP to non-competing buyers. How to outline IP strategies and how to integrate such IP strategies effectively into every stage of the business cycle, are explained under 'Relevance of intellectual property at the various stages of the business cycle' in this chapter.

Marketing fundamentals for visual artists

There are significant differences in business management for visual artists, and the basic marketing practices are often completely different. This requires approaches unlike those of a commercial enterprise. The main differences lie in the nature of the products, markets and prices of the visual artist, mentioned under 'Crafts and visual arts' in chapter 2, namely:

- ❑ Art works are non-functional, emotional, social, political, traditional and cultural statements, not greatly affected by commercial sector constraints.
- ❑ Art works are sold in galleries, exhibitions, art fairs, and through commission. Increasingly, art works are being marketed through websites. Digital art or web art is also being sold on the Internet.
- ❑ Prices of art works often have their basis in aesthetic values and artistic success, not in the material or labour costs of the commercial sector.

Marketing of visual arts is usually far more personal and individual, and the marketing channels differ from those used by artisans and craft enterprises. But the fundamentals of the business cycle are equally applicable to marketing original arts, even though the artist's reputation often has a greater impact on the demand for his or her works and, therefore, on the price of the artwork.

Using an artist's agent

Agents are business people, good at marketing, who represent the artist in dealings with buyers. They earn a percentage on every sale and must sell either in great quantity or at very high prices to make a living. Agents offer two key advantages: range of work, and contacts. Agents can be more successful in meeting buyers than an individual artist, since they can show a lot of work by different artists. Buyers are interested in choice and diversity. Good agents also

have more contacts than an individual maker or artist can usually manage. Selling is their business and they put substantial efforts into developing a relationship with potential buyers.¹³

Marketing alone

Many artists and makers act as their own agents and, through necessity, develop the selling skills and contacts required. As they gain experience, they find the appropriate shops, galleries and dealers to sell their work. These outlets become their agents, developing and sustaining a profitable relationship with buyers. Some artists dislike the business of selling so much that they develop an informal arrangement with a friend or fellow artist to act as their agent.¹⁴ Online promotion and even e-sales of artwork are becoming increasingly common for certain artists even in developing countries and countries in transition. Artists who do not have individual Internet access can use e-marketing technology through artists' associations.

Exhibitions

An exhibition can be organized by a visual artist alone, sharing a show space with other artists, or in collaboration with exhibition agencies or galleries. Preparing for an exhibition requires planning many differing activities, so much so that the preparation of the exhibits is sometimes buried in the administrative preparations. It is essential to prepare well in advance, with checklists of activities¹⁵ and strict deadlines for completing the various stages.

Applying for commissions or entering competitions

Any application for any project should be thoroughly researched. The more work done identifying and costing materials, checking technical information and working out detailed time-scales and budgets, the more confident the visual artist will be about his or her application. Practical considerations should not be underestimated. A proposal budget with very low costs is as unlikely to lead to a contract as a proposal that is too highly priced. For competition submissions, it is advisable to stick closely to the brief. Visiting the location and asking for more information may be very practical. When initiating a project, it may be useful to instigate early informal discussions with any potential funding partners by sending a brief letter and following up by a telephone call. Describing how the project will benefit all involved with it can be advantageous. Outlining how any project will be carried out and the estimated time-scale involved can make the aspects of the proposal clear to all involved. Providing a reasonably accurate breakdown of costs and possible sources of income will probably benefit the applicant by indicating that he or she is being cost-conscious.¹⁶

No matter what market approach they adopt, visual artists should think through the basic IP issues when creating their marketing strategy in order to capitalize effectively on their IP assets. Copyright, especially, will be a crucial tool for marketing visual arts. See 'Intellectual property in marketing strategies for artisans, craft enterprises and visual artists' on page 32.

13 Source: www.a-n.co.uk, website of [a-n] The Artists Information Company, 'Using an artist's agent'.

14 Source: *Ibid.*

15 For detailed information and checklists on preparation for an exhibition, see www.a-n.co.uk. See also *International Craft Trade Fairs – A practical guide*. Commonwealth Secretariat, London; ITC, Geneva; UNESCO, Paris; 2001; ISBN 92-3-103779-X.

16 Source: www.a-n.co.uk, the website of an artists information company: 'Making an application'. For full details see 'Reference and information websites' in chapter 7.

Relevance of intellectual property at the various stages of the business cycle

Each type of IPR confers on its creator or owner a different set of exclusive rights that can be used to gain a competitive edge through **exclusivity** of its use in the marketplace and/or a significant source of income through **licensing** to others. It is clear, however, that artisans, craft enterprises and visual artists can realize the value of their IP assets only if they use these assets effectively at every stage of the business cycle.

Effective use starts with understanding the basic characteristics of the various types of IP assets, and understanding how proper use of IPRs may assist in almost every aspect of business development and competitive strategy.

This chapter explores in detail the relevance of IP assets in the following stages of the business cycle:

- Market research;
- Marketing strategy;
- Business, marketing and product development planning;
- Product development and adaptation;
- Product costing and pricing;
- Test marketing;
- Product promotion and product launch; and
- Analysis of product sales and new market research.

Market research

Basic marketing fundamentals were outlined under ‘Marketing defined – an outline’ on page 19. At this stage it is necessary to examine the other parts of the business cycle in more detail, and show how IP assets can be integrated into these parts of the cycle.

Market research is the gathering and analysis of data relating to marketplaces or customers, leading to more market knowledge and better-informed decision-making. It can provide artisans and visual artists with information about both general and detailed aspects of any marketplace into which they wish to enter – customer types, products, prices, market channels and outlets, promotional methods, trade fairs and exhibitions. Market research is not a one-time task, but an ongoing activity or a continuing journey.

Most market research is done using a set of study tools (they are too detailed to cover in depth in this book), which help in search, definition and analysis, revealing the nature of the market relevant to the operation of the enterprise or individual undertaking the study. These essential tools also help to predict future trends and responses of the market segments and customer groups with whom the individual or enterprise wishes to do business. (Useful sources of information on marketing crafts and visual arts are given in chapter 7.)

Market research takes place in the **market environment**, which has several components:

- Market channels and product niches** – the various types of wholesale and retail selling agents or shops;
- Locations** – the places where the selling agents do business;
- Consumers** – the general public;

- ❑ **Products** that manufacturers wish to sell to consumers; and
- ❑ **Promotional potential** – the systems available for advertising products.

As market research may provide valuable insights for business development and growth, all smart individuals and enterprises make considerable efforts to keep their market research data, analysis and strategies out of reach of their competitors. In the IP jargon, commercially valuable marketing data, especially when woven into a marketing strategy and the marketing plan, are called '**trade secrets**'. (For more information, see 'Trade secrets' in chapter 5.) Artisans and visual artists should make sincere efforts to keep all commercially valuable information gathered during the stage of market research (such as customer mailing lists, lists of art galleries, agents or sponsors, financial information, or sales tactics and marketing strategies) strictly hidden from competitors. In fact, such valuable business information can be legally protected as trade secrets if, and only if, **reasonable steps have been taken to keep it secret or confidential**. Chapter 5 explains in more detail the conditions for trade secret protection, how trade secrets are protected, and what precautionary measures should be taken to protect trade secrets against inadvertent, accidental or fraudulent disclosure.

Market research for artisans and craft enterprises

In order to identify **customers, products, product niches, wholesalers, importers, exporters, new market channels, segments and trends in existing markets**, artisans and craft entrepreneurs in developing countries and countries in transition may have to analyse various statistics, visit locations and talk with many people before the patterns of a market become understandable. It is good to remember that:

- ❑ It is possible to identify new export markets by looking at **import figures for specific products in the target country**. This will assist in identifying whether there is a need or an existing niche to be exploited with new products. Study figures can be found in the embassy trade missions, ministries of trade, chambers of commerce, trade support institutions (TSIs), local craft NGOs, foreign cultural centre libraries in the capital cities of most home countries. Commercial market research agencies in most market countries can provide data for a fee.
- ❑ It might be possible to obtain market information about a target country by studying some of that country's **trade journals and trade association publications, periodicals and professional publications** in cultural centre libraries. These provide valuable insights into current trends in potential target markets.
- ❑ Contacts with **existing customers** may provide ideas for new products that will benefit producer and customer alike.
- ❑ Attendance at **international trade fairs** and exhibitions will provide valuable information on market trends and product ideas.
- ❑ Visiting **retailing centres** in major cities in any country reveals much potential for both products and new customers.
- ❑ **The Internet** may also prove a very useful tool for gathering information about potential markets. Concepts and ideas may be gleaned about the end users by searching the websites of enterprises involved in marketing in the target market.
- ❑ **Syndicated general market information** might be available, on payment, from professional agencies in almost every country of the world, which can undertake market research; many of them also carry out public relations,

and marketing and advertising functions. Alternatively, craft enterprises could enlist the support -often at little or no cost- of a national university to get commerce or business students to carry out the research required as part of their university work.

Identifying new markets

Enterprises must stimulate customers with new products in order to survive. In most markets there is a need to provide customers with a choice of products to purchase. In order to find new customers or markets, it is necessary to identify the categories of market outlets and customers available in the target location. The markets are the meeting point between the supply side (artisans and craft entrepreneurs who want to make and sell the products in local and/or export markets) and the demand side (the importers, wholesalers and retailers who want to buy products to sell on to consumers).

The links from the point of production to the consumer are called **market channels**. These include most or all of the following categories in the distribution chain: *exporters; importers; wholesalers; department, chain and discount stores; independent retailers; art gallery, gift, hotel, museum, specialist and tourist shops; mail-order businesses; alternative or fair trading organizations; franchises.*

As is often the case, particularly in local markets, artisans can also sell their products direct to consumers. These *direct selling* methods include: *own shops; tourist outlets; community, street or covered public markets; individual street and door-to-door vendors; special exhibitions or sale events.* These retailing systems are organized directly by the participating members. In countries with strong tourist industries, there may be special venues – *craft villages* – where artisans both demonstrate the making of the products and sell them direct to the tourists.

Internet marketing and e-commerce have become another widely used market channel in developing and developed countries alike. They enable producers and traders to present products direct to consumers using their own websites.

Artisanal products can be found in all market channels.¹⁷ Most craft enterprises involved in exporting use conventional marketing processes, either using an entrepreneur as a channel, or supplying direct to importers or importing retail enterprises.

Sourcing market information

Artisans and craft entrepreneurs wishing to enter any market need to gather as much target market information as possible through study in their home country or, better still, by visiting the market they propose to enter.

Home country research

Contacting or visiting local information sources in the craft enterprise's home country is a simple and effective way to begin. *Ministries of trade, export promotion offices or councils, chambers of commerce, TSIs, and local craft NGOs* can provide information. They may have brochures and publications on studies of the target country, local government trade incentives for export, and corporate assistance for trade fair participation. *Foreign embassy trade missions and cultural centres* may have libraries and information services, where *trade and association journals, popular fashion and household interest magazines* from the target market country can be consulted. There will also be books and other publications related to

¹⁷ For more detailed descriptions of market outlet categories, see pp. 23-28, *International Craft Trade Fairs – A Practical Guide*. Commonwealth Secretariat, London; ITC, Geneva; UNESCO, Paris; 2001; ISBN 92-3-103779-X.

enterprise management and trading laws in the country of interest. In many countries there are *publication importers and distributors* who can take subscriptions for, and deliver, relevant foreign magazines.

National, regional or international trade fairs should also be studied, either as an exhibitor or as a visitor, within the home country, and abroad if possible.

Websites provide a diverse range of information of great value to those who have access to the technology. In sites established by both home and target market countries, it is possible to find most of the following information:

- ❑ *Market data* – lists of trade fairs and exhibitions which it may be of interest to visit or to participate in, trade information, cultural activities, trade laws and regulations... all of them at national, regional or international levels;
- ❑ *Country data* – trade figures, population distribution, economic situation information, consumer classification, climate, transport, freight handling agencies, standards institutions;
- ❑ *Foreign trade reference material for specific market countries* – frequently prepared by producer nations as advice for national exporters;
- ❑ *Foreign trade and industry publications and journals* – sources of publications that can be subscribed to from overseas; market trend information; technology and creativity periodicals; packaging, legal, trade, public health and safety regulations; environmental legislation and issues;
- ❑ *Individual company websites* – can provide:
 - *Potential customers' contact information;*
 - *The number of competitors making or marketing particular product lines;*
 - *Website design and operation ideas.*

Research in target countries

Once essential information has been acquired in the home country, it would be best for a craft enterprise to undertake a study in the intended target country itself.

A *study tour* is an expensive undertaking, and not necessarily within the capabilities of all artisans or craft entrepreneurs. But *market information* can also be obtained during participation in *trade fairs in national, regional or international venues*, both within the fair venue and in the host country. An artisan or craft entrepreneur who is participating in an overseas trade fair might be able to remain in the target market for a while after the end of the event, and make visits to organizations found during home country research. A search through *city shopping centres* allows the visitor to study products, and compare qualities, prices, finishes and materials. *Retail outlets* show how products are presented to consumers. Conversations with retail staff can reveal information about display, consumer types and promotion. Visits to *public libraries* in market countries can also provide information about various aspects of the target market population distribution, retailing patterns, and directories of importing, marketing and other companies. *Book shops* may offer many practical publications on a wide range of enterprise development and management subjects. *Government offices* are useful for publications on trade conditions, regulations, customs and excise legislation, and material on enterprise development.

Locations

In order for artisans and visual artists to effectively reach the customers to whom they wish to sell their products, they must know in which *location* most of their target consumers are likely to shop. They may choose to have outlets in

different residential areas of cities and towns. Each branch may sell slightly different ranges of merchandise, catering to consumers of varying economic and social types within a particular district. They can offer varying quality and prices according to the needs of a particular consumer group in a specific location. This targeting of product to social group location is known as **market segmentation**. The layout of cities and communities follows certain clearly identified patterns, with consumers of certain categories tending to live in particular areas. Market researchers should attempt to link the geographical location of retail outlets with the consumer categories most likely to shop there.

Consumer types

Within each market segment, consumer types can be identified by common factors in any population. The market information sources mentioned earlier, in either the home or the target country, may have statistics showing *social and economic facts* about consumer society, including: gender, race, religion, income, profession, interests and hobbies, lifestyle, purchasing preferences, attitudes, politics, and geographical location by continent, region, country, city, town and village.

This information is usually graded to give a marketing picture of a community, known as *Socio-Economic Classification Grouping*, which is also part of the market segment definition. Consumer classifications range from Type A (upper middle class) through B (middle class), C1 (lower middle class), C2 (skilled working class), D (working class) to E (those at the lowest level of subsistence).

These classifications allow marketing personnel to work out which products will best suit a specific market segment, or whether a product should be offered throughout the whole market. Certain types of product and price range fit certain consumer categories. It might be possible to have identical designs of garden furniture, but with one range made in teak targeting consumer categories A and B, for example, and one made in rubberwood for B and C1 consumer categories.

Most artisans and craft entrepreneurs will find that their traditional export customers have the location and consumer information outlined above. This information will already be guiding their market decisions.

Seeking out market niches and product ideas

Finding a market niche is a good way to penetrate a new market. A *market niche* is a specialized limited market segment, usually small volume. Searches may also reveal opportunities to insert a new product into an existing market niche. This is why artisans and craft entrepreneurs should try to visit *national, regional and international trade fairs*¹⁸ related to their business, if only to see how they compare with competitors in the market. They should take every opportunity to do market research at the exhibitions. All fair participants, whether exhibitors, observers or sellers, will be exposed to:

- *New products* that are on display. Because many fairs categorize their exhibitors, artisans and craft entrepreneurs can easily locate the stands of producers displaying items made by similar processes to their own. Similar products tend to be grouped together in one part of the exhibition venue. If there are pavilions or stands from other countries, there will be potential to derive many ideas from the rich environment.

¹⁸ For general information and advice, methodology guidelines, checklists and directories, see *International Craft Trade Fairs – A practical guide*. Commonwealth Secretariat, London; ITC, Geneva; UNESCO, Paris; London; 2001. ISBN 92-3-103779-X.

- ❑ *New technologies and production processes* being used in product-making. This can give artisans and craft enterprises ideas and encouragement to experiment with their own production methods.
- ❑ *New promotional materials and methods.* All visiting artisans and craft enterprises should take the opportunity to study promotional literature, packaging, and presentation techniques.

Identifying promotional materials and methods

The need to maintain awareness of new techniques for attracting customer attention cannot be overemphasized. While investigating the market for customers, market channels and product ideas, artisans and craft entrepreneurs should take note of any promotional materials and methods that are particularly well designed, written or presented. Among these, the following examples are most common:

- ❑ *Catalogues and brochures* for distribution to customers and consumers permit the potential buyer to obtain product information easily and in an attractive way. The text and images used have to be of very high standard to give the impression that the enterprise produces quality products.
- ❑ *Promotional video CDs* showing craft products being made, with cultural background material, can be shown on laptop computers at exhibition stands. The CDs are easily produced and can be mailed to any customer. Interactive catalogues can also be produced.
- ❑ *Websites* require specialist design collaboration to obtain an attractive image on the screen, while allowing the viewer to easily access the information needed. The expansion of Internet marketing is beginning to allow craft enterprises in developing countries to trade direct with customers in foreign countries, using standard postal service package delivery systems by surface or air mail.
- ❑ *Media advertisements* are another useful tool in local marketing. Well-placed newspaper and magazine advertisements can expand the customer base for a producer. Local *television and radio* advertising can also bring in customers. Both require advertising design inputs. *Press releases* in *specialized trade press* or by *trade fair organizers* can likewise be a valuable communication means.
- ❑ *Posters and billboards* can be very effective in a local marketing environment. Posters can be prepared at a reasonable cost and put up in popular places.
- ❑ *Telephone, e-mail and fax contact* can assist artisans and craft entrepreneurs to ascertain interest and find potential customers.

Market research for visual artists

Visual artists sell their works in the export market through agents, specialist galleries and exhibitions, and in solo (i.e. one-person) or group shows. There are artists who sell through retail shops, their output being considered as décor, or home decorating products. A visual artist who wishes to enter a new market should learn as much as possible about that market and its particular requirements. The nature of the market is very different from that for craft enterprises, so a different type of research is required.

Desk research

Visual artists can prepare themselves for an overseas visit by logging on to the websites of *arts societies* and *cultural organizations* in the target market. These sites may have information about *galleries* specializing in works from the artist's own country or region. Visual artists should also *search the Internet, visit cultural*

institutions attached to foreign missions in their own country, read *art publications*, search for *scholarships and bursaries* available to artists from emerging economies, and find out about *invitations to exhibit* in special events. For example, an artist who is well known in his or her home country but unknown elsewhere may learn of an opportunity to exhibit work during an international cultural event (such as the Dakar Biennial of Arts in Senegal or the Havana Biennial in Cuba). This could prove very enriching for the artist, and could lead to the opportunity to return several times to repeat the experience.

Visual artists can *visit other artists' websites* and perhaps make direct contacts with a view to meeting during a visit abroad. In all cases, it is essential that the visual artist collect as many contact details as possible of places to go to and people to try and meet if visiting a country. In order to save time during the visit, it would be practical to have set up some appointments prior to leaving home. Also, as with any commercial undertaking, it is unlikely that any gallery owner will meet artists without an appointment. If a sales meeting is expected, then it is important to prepare a *folio of work and a CV*. Time and money should be invested to ensure good layout, excellent reproductions and good physical protection of images.

Research in target countries

It also increases efficiency if telephone calls are made to confirm appointments soon after arrival in the target country. Moreover, on arrival in a new city, it is possible to find additional names and addresses of art galleries from *trade telephone directories* (yellow pages). With a detailed street map, it should be possible to plan several days of visits to such *galleries and shops* of potential.

Although a visiting artist may not be able to sell at the first meeting, he or she can learn valuable information about the way that galleries operate, and the types of work preferred by a particular gallery, and its methods of display.

Meeting some local artists in the target country can lead to discussions about the routines and methods used for approaching galleries and agents. Through these contacts, it may be possible to *organize a joint exhibition* with other artists, by renting a space, and doing joint publicity. Sharing the costs with other artists is beneficial, and having a group show can be a better marketing tactic than a solo exhibition. Artists who wish to sell their art works will find that establishing a good relationship with galleries is very important, and takes considerable time.

Visual artists should also contact IP offices in both their home country and any target countries, to collect national and international information about IP protection of their works of art.¹⁹

Marketing strategy

Marketing strategies for artisans and craft enterprises

Market research gives an enterprise a set of relevant information that allows it to determine 'a strategy indicating the specific target markets and types of competitive advantages that are to be developed and exploited'.²⁰ For most artisans and craft enterprises in developing countries and countries in transition this means that they need to define their **marketing mix**:

19 A list of addresses of the national and regional IP offices is available at www.wipo.int/news/en/links/addresses/ip/index.htm.

20 Source: *Marketing, Concepts and Strategies*. Dibb, Simkin, Pride and Ferrell, 4th ed. Houghton Mifflin, 2001, p. 656.

- ❑ Identify a **product** for a **target market** (or a **segment** of a particular market). It may be that the enterprise can diversify into new product lines using existing technology and skills. It may have to invest in new technology and skills, to enable it to produce entirely new ranges of products. The ‘new range’ could include a new brand image, new packaging, new services and new way of maintaining or servicing customer relations. This may involve brand stretching, brand extension or the creation of new brands or trademarks for the new market or customer types.
- ❑ Calculate the **price** at which this product will sell. To penetrate certain markets profit margins may have to be kept low; for other markets the current trends may allow increased margins for certain periods. In yet other markets the rarity of a raw material or skill will permit pricing at the highest margins possible. See ‘Product costing and pricing’, pages 45–48 in this chapter.
- ❑ Work out where to **place or position** the products in the market(s) by: attempting contact with new types of customers; competing with another maker; introducing the products to a new type of retail outlet in a totally new locality (new market channel); or developing an export market about which little is known. *The enterprise should check whether it has the freedom to use an existing or proposed verbal trademark in an export market. It should also verify whether the trademark has any negative or undesirable connotations in the export market (if it does, then the enterprise will have to find a new trademark for use in that market). Creating or selecting a suitable trademark is just as important if the enterprise intends to position a product to target a new customer type, market segment or location. In addition to trademarks, new packaging and labelling may be required, and these too may have branding (trademark), industrial design or copyright implications. (See ‘Creating labelling, packaging and promotional materials’ on page 39.)*
- ❑ Establish the best way to **promote** the product to the consumer, depending upon the location in which the product is placed. See ‘Product promotion and product launch’, pages 49–51 in this chapter.

Varying combinations of these factors will provide artisans and craft enterprises with a choice of actions to take and directions in which they might move in order to continue in business effectively. This is **marketing strategy**.

Part of a marketing strategy might be to join or form a **collective marketing association**, or a **registered marketing company**, either of which would be able to:

- ❑ Undertake market research as a body;
- ❑ Offer and supply wider ranges of products to the market;
- ❑ Negotiate business terms and conditions with greater authority than a single artisan or craft enterprise; and
- ❑ *Operate an IP strategy at lower cost and higher effectiveness: for example, by using a collective trademark to market the products of association members. See also the case study ‘Mglass – A collective mark’, page 129 in chapter 6.*

Marketing strategies for visual artists

Usually the product development strategy of visual artists is driven by creative impulses of an aesthetic kind. Their research usually consists of experimenting with new colours, shapes, media, styles, and so on. However, the need to earn an income from their creative expression requires a proactive market strategy after the product has been created.

The marketing strategy for visual artists is greatly affected by their fame and the popularity of their art work. Visual artists may have a ready-made market based on their reputation and fame, or may seek to create one. In such a situation, the marketing strategy for a visual artist could include:

- ❑ Broadening the search for galleries in which to exhibit art work;
- ❑ Approaching festivals and arts events where it may be possible to show jointly with other artists;
- ❑ Establishing a website, new promotional presentations and distribution;
- ❑ Forming or joining collectives or associations of visual artists for licensing or marketing of artwork.

The artists' collective or association might also provide an exhibition space, undertake promotion, and facilitate access to IP protection services (see also 'What is collective management of copyright?', pages 64–65 in chapter 5).

Intellectual property in marketing strategies for artisans, craft enterprises and visual artists

During the process of preparing their marketing strategy, artisans, craft entrepreneurs and visual artists should also carefully plan how they will strategically use their IP assets for marketing purposes. In fact, even if artisans or artists have developed and protected an appropriate IP portfolio for their products, this portfolio will do them little good if they fail to cleverly highlight their IP assets while commercializing their products. Therefore, it is important to understand how different types of IP assets may contribute in different ways to the marketing strategy. The list that follows is a sample of possible ways in which artisans or artists may **use their IP assets to better market their products**.

Trademarks. Trademarks can be helpful marketing tools to assist artisans and artists to:

- ❑ Promote product sales;
- ❑ Cement customer loyalty;
- ❑ Facilitate customer decision-making;
- ❑ Increase revenues from product sales;
- ❑ Gain or maintain market share;
- ❑ Earn royalty income through licensing and franchising.

These benefits are illustrated in detail under 'Trademarks', pages 73–82 in chapter 5, and in the case study 'Maquí – A trademark story', pages 118–119 in chapter 6.

Collective marks. Artisans and visual artists may benefit from joining together with other producers to form a collective marketing group, perhaps a cooperative or an association. This group may be formed on the basis of the common origin or common quality characteristics of the products. The group can then use a collective mark, which may give them a stronger presence in the market, presenting a unified quality image and a better enterprise image. The creation of a collective mark may not only help to *promote* the products, but may also provide a framework for *cooperation* between local artisans or artists. As a group, they can also *economize* by undertaking joint market research, developing a common marketing strategy, sharing the cost of the trademark registration, monitoring possible trademark infringements, and so on. For more information, see 'Collective marks', pages 82–83 in chapter 5 and the case study 'Mglass – A collective mark', page 129 in chapter 6.

Geographical indications. A geographical indication, like a trademark, communicates a message. It tells potential buyers that a product is produced in

a particular place and has certain desirable characteristics that are found only in that place. Therefore, geographical indications may be useful to *highlight specific qualities* of craft or visual arts products – for example if they are due to specific manufacturing skills and traditions of a given region. More information is provided under ‘Geographical indications’, pages 85–87 in chapter 5 and in the case study ‘Modranská majolica – A geographical indication for ceramics’, pages 121–122 in chapter 6.

Copyright. Copyright protection encourages the creative efforts of artists and may generate various benefits related to the marketing of their works:

- *Securing the exclusive right to use the work.* Copyright encourages artists by giving them exclusivity over use of their works. The copyright owner has the exclusive right to reproduce the work, to sell it, to distribute copies of the work and to prepare new works based on the protected work. For more details of the rights of a copyright owner, see ‘Copyright’, pages 56–66 in chapter 5.
- *Exploiting this right for economic benefit.* Like other types of IP, copyright can be bought, sold or licensed (i.e. other people can be allowed to use the work in return for a fee). In many countries, institutional mechanisms have been created to help artists exercise their copyright. *Collective management* of copyright, which exists in a number of countries, is an effective example. See ‘What is collective management of copyright?’, pages 64–65 in chapter 5.
- *Resale rights.* In some countries, artisans and visual artists may benefit from subsequent sales of their original works of art. In practical terms, this means that artisans and visual artists may be entitled to receive a percentage, generally varying from 2% to 5%, of the sale price of their works whenever they are resold by commercial dealers or auctioneers. Such rights are called *resale rights* or *droit de suite*. For more information, see ‘What are resale rights?’, page 65 in chapter 5.

Trade secrets. All artisans and visual artists have knowledge that could be protected by trade secrets, if their secrecy is well maintained. Simple examples are the know-how related to making, glazing and firing ceramics in a kiln, or even more general aspects of business operations such as lists of clients. If trade secrets are properly protected, their owners may *prevent others from improperly acquiring, disclosing or using* them. For more information, see ‘Trade secrets’, pages 87–90 in chapter 5.

Patents. Patents provide *exclusivity for the commercialization of inventions*. A patent is often the best proof of an entrepreneur’s ability to exclude competitors from free-riding on the novel or original functional features of its products or services. Being a patent holder can also open other business avenues such as *licensing* or strategic *alliances*. In the craft sector, most patents would be on improvements in the quality of the materials used or in functional improvements to hand-tools or production techniques. In the visual arts sector, they may apply to improvements in the materials used for drawing, painting, or photography, or to software for computer-aided art, web art, digital art, and so on. For more information on patents, see ‘Patents and utility models’, pages 90–94 in chapter 5.

Utility models. A utility model is needed for basically the same reasons as a patent. Indeed, sometimes an invention may not qualify for patent protection but can be protected as a utility model instead. This is often the case with technical improvements of products. As the requirements for obtaining a utility model are lower than those for patents, and acquiring it is considerably faster and cheaper, it can be used as a tactical competition tool having *immediate effect*. Like patents, utility models can be used to secure *exclusive rights* to use the invention in one’s own production and issue *licences* in the countries where the utility model is valid. See also ‘Patents and utility models’, pages 90–94 in chapter 5.

Traditional cultural expressions. An important segment of artisanal products falls under the designation ‘traditional cultural expressions’ (or ‘expressions of folklore’). These are regarded as part of the broader notion of ‘traditional knowledge’, which also includes technical traditional know-how as another specific form. Traditional cultural expressions are not always adequately protected by current intellectual property systems, especially pre-existing cultural expressions which are old and collective. On the other hand, contemporary creativity, including contemporary artisanal products, which draws upon tradition can be protected. In chapter 6, the case study ‘Legal measures to protect the *mola* in Panama’, pages 114–118, summarizes a documented example. See also ‘Traditional knowledge and cultural expressions’, pages 94–95 in chapter 5.

Licensing. A good marketing strategy should envisage ways to exploit IP assets for commercial gain. In many circumstances, licensing may be an effective tool allowing artisans or visual artists to generate extra income from their creations and to expand into new markets. It is therefore important to be familiar with the basic issues involved in the licensing of IP. For more information, see the section on licensing under ‘Commercializing intellectual property’, pages 99–103 in chapter 5, and the case study ‘Mary Engelbreit: Artist and entrepreneur – A licensing story’, pages 122–124 in chapter 6.

Business, marketing and product development planning

After an artisan or craft enterprise has established a marketing strategy, specific actions can be planned.

Business plan

The business plan is the practical application of the marketing strategy. It incorporates all aspects of the operation of an enterprise. Each enterprise may choose the duration of its own business plan. In general practice, business plans can cover a period between one and five years long. In craft enterprises, they commonly cover a period of one or two financial years.

For artisans and craft entrepreneurs, writing a business plan is a crucial step in charting a business route to success. A good business plan provides an overview of where a business is, how it plans to position or reposition itself, and how it seeks to achieve its business objectives. A well-prepared and regularly updated business plan is a valuable management tool that serves a variety of purposes. These purposes are described below.

To attract business partners and possibly investors, a business plan should reveal a coherent business idea. It must provide credible evidence of current or potential demand for the products or services in the marketplace, the superiority of the new or improved products or services over those of the competitors, and the steps taken to protect them from dishonest competition. A business plan incorporates the following plans within it, as integrated components:

- ❑ A **marketing plan** is a schedule for implementing the marketing strategy. It includes market-based requirements for new or adapted products, and their subsequent design, production and promotion, including the anticipated life cycle of all products and ranges. Diversification of a product range, or the adaptation of existing products, can also feature in the marketing plan. The adoption of a trademark by an enterprise may also mean the application of that mark to products. It may mean the modification of an existing trademark to suit the changing market environment.
- ❑ A **product development plan** is a schedule for implementing the required production and design processes through all stages from creation to the

launch of the final products. Once there is agreement that the products conceived are viable to make, a plan is drawn up. This plan is based on the needs of the market, which have been ascertained by market research. It is usually updated annually. *New individual products* are chosen to replace old ones on the basis of sales from the previous year. New market information may indicate that *new ranges of products* are required. Other product ranges may need modification and upgrading. Invention and experiment add more ideas to the planning process. Product development plans may be significantly affected by many different factors in a craft enterprise's environment, as well as by the adoption of new techniques, equipment, processes and raw materials.

Marketing staff should prepare lists of all *new product ranges*, together with individual *product specifications* or *product briefs* for any new products and their variations. These product briefs will guide design and production staff in the successful implementation of the relevant stages. A typical product brief will contain:

- Product name, possibly a reference or code number;
- Target market;
- Description of the product function, or envisaged usage pattern;
- Possible size, and influence on packaging development;
- Potential colour, related to market forecasts;
- Special features and requirements – e.g. pack-flat, nesting sets (products that stack one inside the other to save shipping space);
- Target selling price;
- Estimated production quantities;
- Launch deadline, possibly coinciding with trade fair or seasonal demand.

Range (or collection) planning is an important part of marketing. Artisans and craft entrepreneurs should plan ranges and sets of their products because many customers may be more interested in some kind of collection than in single items. Ranges provide opportunities to market products at different price levels, using different materials, and targeting different consumer groups. A range can be created to suit any new market conditions.

Examples: In a traditional category of furniture, there might be a colonial-style range, based on furniture styles used during a target market country's history in foreign colonization – such as Spain and Portugal in Latin America; France, the Netherlands and the United Kingdom in South and South East Asia, Far East and Africa.

Oriental style may inspire another traditional range in which the common elements are based upon Chinese, Japanese, or Malay cultural motifs.

Consumers may wish to purchase products with a similar style or theme, to give a particular personality to their home. Some consumers may wish to furnish their homes throughout using a particular range. Others may wish to mix various ranges in different rooms to vary the personality of their home.

Product sets, which may be derived from a range, are part of product development and range planning.

Examples: A consumer might purchase a 'set of six dining chairs', or a 'sofa set' (a sofa with two armchairs), from a 'colonial' or 'oriental' range, but not necessarily purchase any of the other products in these ranges.

Many other products are developed as sets. They may be part of, or complement and harmonize with, the ‘colonial’ and ‘oriental’ ranges above. They could be groups of matching products, such as table crockery sets, cutlery sets, napkins, place mats, drinking glasses, bed linen, curtains and furnishing fabrics. Sets can also be groups of identical products in different sizes, such as bowls, trays, baskets and boxes.

- ❑ A **promotional plan** is necessary to ensure that the promotion of a product precedes its launch and continues until it is withdrawn from the market. Promotion is essential to ensure that the primary selling features of a product are brought to the close attention of target consumers. Detailed preparation of advertising and product launch campaigns makes the greatest impact on the market. Caution must be taken to ensure that any advertising does not infringe local advertising standards and law, and that promotion of any product’s capabilities or material content does not contain false information. Planning helps to ensure that investment funds involved in promotion are effectively spent. *Feedback* from previous advertising and promotional material dissemination can be used to evaluate existing promotion methods; weak promotions can then be improved or discarded entirely. As part of market research, it is also important to assess and review the current status in any intended target market of commonly used tools for reaching new customers. Many artisans and craft entrepreneurs are using one or more of these to expand their penetration in highly competitive markets.

All promotional material needs to be designed, either by the craft enterprise or subcontracted to an outside agency. *Using an external design consultancy might lead to leakage of ideas and designs; IP protection will need special consideration by the management.* The implementation of design and production of promotional material has to be in the promotional plan, which should be developed at the same time as the product development plan.

- ❑ A **distribution plan** must be prepared by any artisan or craft entrepreneur who delivers to customers. In export, this will include dealing with freight packers, shipping agents and customers. Every aspect of the distribution process has to be carefully integrated to avoid causing problems to anyone in the market channel to the consumer.

Why should intellectual property be integrated in the business plan?

Artisans and visual artists who plan to build a business will need resources, including a network of relationships and funds. The IP protection system provides a key tool for keeping at bay unscrupulous competitors, developing relationships with employees, consultants, suppliers, subcontractors, business partners and customers, and obtaining funds. In order to convince investors, artisans and artists need to show that:

- ❑ There is a demand for their product in the marketplace;
- ❑ Their product is superior to competing products, if any; and
- ❑ They have taken adequate steps to prevent free-riding on their success by dishonest competitors.

Therefore, their **business plan should clearly reflect how they plan to protect, manage and commercialize their IP assets for business success.**

What IP issues should be considered when developing a business plan?

Artisans, craft entrepreneurs and visual artists should ask themselves the following questions when developing their business plan:²¹

❑ *Which IP assets do I own?*

- All IP assets should be identified and classified. For artisans and visual artists, this invariably includes trade secrets, trade names and trademarks, often also domain names, industrial designs and copyright, and sometimes utility models and patents for inventions.

❑ *Which other intangible assets do I own?*

- In this context, franchise, license and distribution agreements, information databases, software, marketing profiles, management expertise, distribution networks, technical skills, and so on, should be taken into consideration.

❑ *What is the status of my IP assets?*

- It is important to verify: when the specific IP assets were created; who created them; which of the IP assets can be registered; and if they can be registered, whether they are or should be registered; whether they are registered in export markets; whether and when registrations have to be renewed, and so on.

❑ *How do I protect my IP assets?*

- If artisans or visual artists commercialize any of their IP assets, they should make sure that arrangements are in place to secure ownership (see also chapter 5).
- They should also consider how easy or difficult it might be for others to acquire or duplicate secret business information, and what measures are being taken to guard the secrecy of such information.
- Artisans and visual artists who market online should verify the measures they have taken to ensure that confidential business information and trade secrets are not available or lost by display or use on their website. They should also make sure that their web pages do not provide links to any other pages that contain confidential information.

❑ *How important are my IP assets to business success?*

- Artisans and visual artists should ask themselves to what extent their IP assets are currently being used, potentially useful, or no longer of use to their business.
- They should also decide whether their business depends for its commercial success on IP assets; and if so, on what type of IP assets it depends.
- Finally, they should check whether their trade secrets, trademarks, copyrighted works, industrial designs, utility models or patents go far enough to protect those aspects that determine their business's success.

❑ *Do I own the IP assets that I need to succeed, or do I rely on others' IP assets?*

- Once artisans and visual artists have ascertained which IP assets they depend on for their business success, they should also verify whether they own those assets themselves, or license them from others. It is crucial to be able to prove either ownership or the authorization or licence to use others' IP assets.

²¹ The list is not exhaustive. Many additional issues may have to be considered depending on the circumstances of each business. More details on IP and business planning are available at www.wipo.int/sme/en/ip_business/managing_ip/business_planning.htm.

- When artisans and visual artists are using external contractors, for example to design marketing and promotional material or a website, they should be sure that their contracts specify who owns the IP that is created.
- It is also essential for them to verify that they have proper permissions to use written material, graphics, photographs, music or anything else created by a third party on the website or in any other manner.
- Artisans and visual artists who have a website should be sure that it has no unauthorized metatags, hypertext links, frames or deep links to other websites.

□ *Which IP policy and IP strategy do I apply?*

- Artisans and visual artists should plan how they will identify, protect, highlight and manage their IP assets.
- They should integrate into their business planning how they will derive the maximum value from commercializing their IP assets. To this effect, they will need to assess the potential to commercialize IP assets through licensing, franchising and/or selling them.
- If they are planning to export, then they should consider using a regional or international filing or registration system.
- Finally, they should plan how they will value their IP assets; how they will reflect this value in the accounts and balance sheet of their business; and how they will take such value into account for product costing and pricing.

IP assets are important business assets and should form a key part of every aspect of a good business plan. In fact, any confirmation in the business plan that artisans and visual artists have duly protected their IP assets is likely to give them strategic guidance and, in addition, play an important role in convincing investors and lenders of the business's potential.

Planning a distinctive image or identity

Another part of business strategy concerns the identity of the enterprise – the **enterprise image**, or **brand image** – by which an enterprise presents itself in the marketplace. This enterprise image, typified in a **trademark**, can be applied to any or all aspects of the tangible property of an enterprise: **stationery, business cards, building, vehicles, products, product labels, packaging and uniforms**. Enterprises with a strong brand image usually have a clean and strong IP strategy in place. The development of an enterprise image requires considerable investment in planning and implementation.

Artisans may wish to have their own logo or symbol and use it on all their products, stationery and other property, basically establishing a simple enterprise image for their business. Alternatively, a number of artisans may decide to form a collective marketing group, and develop an enterprise image for the group.

Individual visual artists may not believe that they are using an enterprise image, but their name, associated with the very style and presentation of their work, is so distinctive that this can be their 'trademark' or identity.

IP and planning a distinctive image or identity

In order to create and establish a valuable enterprise image, artisans and visual artists will, of course, need a distinctive business name and/or one or more strong trademarks for their products or services. When working in groups or cooperating with other artists or artisans, they may also use a collective mark, which will add a distinctive image to their business.

But there is more. Other facets of a business, such as its décor, style, the distinctive form and style of its products, help a business to create a positive brand image in the minds of customers. In this context, trademarks and industrial designs often play a pivotal role in differentiating an enterprise's products from those of its competitors and in developing longer-term positive relationships with customers.

Like any business, artisans and visual artists and their enterprises should carefully create and nurture their image or reputation. To that extent, they will certainly have to deal with the following questions:

- ❑ How can a successful trademark be selected? Some useful guidelines are given under 'What makes a good trademark?', pages 76–77 in chapter 5.
- ❑ What can be an appropriate and successful industrial design for a product? See 'Industrial designs', pages 66–72 in chapter 5.
- ❑ How can a good enterprise image be maintained? As much as a trademark can help to create a distinctive and positive image for an enterprise, it can be extremely damaging to a business if consumers associate bad quality with it. A consumer generally buys a product because the trademark 'promises' a certain quality or certain features. But if the promise is broken and the product is disappointing, the consumer will be discouraged from buying that brand of product again. Therefore, it is vitally important for artisans and visual artists to invest in product quality so that they maintain the positive enterprise image signified by or associated with their trademarks. See also 'Why are trademarks relevant to crafts and visual arts', pages 73–74 in chapter 5.

Creating labelling, packaging and promotional materials

All products, whether produced by artisans, craft enterprises or visual artists, may need to be labelled and packaged at some point in the marketing process. Labels are materials attached to a product to identify it or to give details concerning its ownership, use, nature, destination, and so on. Packaging refers to the appearance of labels, wrappers, and containers used in packaging the product. Promotional material is advertising material which is generally distributed either independently of the product and its packaging or along with a free or discounted sample of the product.

Listed below are some of the most common requirements and functions of labelling, packaging and promotional material.

Labels

- ❑ **Product labelling** will usually describe the raw material content, the provider of the product and the country of origin (in some markets, such descriptions are legally required). There may also be a product name and code number. Visual art works may carry labels bearing the artist's name and a description of the work.
- ❑ **Care labels** are increasingly important in all craft sectors, and particularly in the textile sector. A brief description of how the consumer should care for and maintain the product is common. In the case of textile products, washing instructions are given. Care labels may be carefully studied by consumers during purchase and use of an item.
- ❑ **Shipping warning labels**, such as 'This way up', 'Fragile', or 'Heavy', are used on consignment packs, etc. These are set to international standards.

Packaging

- ❑ **Craft products** may require different kinds of **protective and descriptive packaging**. Any of the labelling described above may be printed on the

packaging during fabrication. There are two major types of packaging: display and shipping.

- ❑ **Display packs** are intended to be shown in retail outlets. Very small products may require packing in sets or in boxes; some products will need hanging packs for display. Customers may insist on their own package designs, which bear only their own trademarks.
- ❑ **Shipping packs** are usually very robust for protection in transit. They require specialist graphic labelling for transport requirements, but can still carry trademarks.

Promotional material

- ❑ **Catalogues, brochures, media advertisements, websites and other promotional materials** have also to be designed, either within the enterprise, or subcontracted to an outside agency. Using an external design agency could lead to leakage of ideas and designs. IP protection will need special consideration by the management.

IP and labelling, packaging and promotional materials

Many elements of labels, packaging and promotional material are protected by IPRs. When making decisions concerning these items, it is essential to understand the relevant IPRs, and also to plan whether, when and how such IPRs should be used for marketing reasons. The following is a summary of the main elements of labels, packaging and promotional material that can qualify for IP protection.

- ❑ **Promotional material** (such as catalogues, brochures, media advertisements, radio announcements, websites, audio-visual displays or pamphlets) will almost always contain **expressions of ideas and concepts** that constitute ‘original works of authorship’ and which fall under **copyright**. Even creative labels or packaging could qualify for copyright protection. If the promotional material is created by an employee, contractor, designer or consultant then issues of copyright ownership must be resolved at the time of hiring the employee, contractor, designer or consultant. This is done through specific written clauses in the contractual agreement.
- ❑ **Words, letters, names, slogans, drawings, designs, symbols, pictorial matters, or a combination** of these used in **labelling, packaging and promotional material** can be protected as **trademarks** if they are used to identify or distinguish the source of the products or services. Even audible signs such as music or vocal sounds, fragrances, or colours used as distinguishing features may constitute a trademark.²² Visual elements used in website design, such as logos, can be also registered as trademarks.
- ❑ Artisans or artists may also use a **collective mark** in labelling, packaging and promotional material in order to **jointly market the products** of a group of artisans or artists and enhance product recognition. They can also use a **certification mark** to certify that their products comply with a **pre-established set of standards**. Collective and certification marks may both be used together with the individual trademark of the artisan or artist.²³
- ❑ Crafts or visual arts products from a specific geographical origin may be **labelled, packaged and advertised** under **geographical indications**, if

²² As long as they may be visually perceptible or capable of graphical representation.

²³ See ‘Collective marks’, pages 82–83 and ‘Certification marks’, pages 84–85 in chapter 5, and the case studies in chapter 6: ‘Mglass – A collective mark’, page 129; ‘Harris Tweed – A certification mark for cloths’, pages 119–120 and ‘Toi Iho – A certification mark for Maori arts and crafts’, pages 120–121.

the products in question have a given quality, reputation or other characteristic which is attributable to their geographical origin.²⁴

- ❑ The **shape and design of the product packaging** (i.e. its ornamental or aesthetic aspects) may be protected as an **industrial design**. Artisans are advised to consider protecting packaging that is likely to win the consumer's preference because such protection will entitle them to prevent others from producing packaging with the same or a very similar appearance.²⁵
- ❑ In some countries, a product's distinctive packaging may be protected by **trade dress** in order to prevent competitors from using confusingly similar features. Trade dress generally protects the **total image of the product** and can include colour schemes, textures, sizes, designs, shapes, and placements of words, graphics, and decorations on a product or its **packaging**.
- ❑ Finally, the **shape and packaging of products** may also be *distinctive* (meaning that it distinguishes the product from those of competitors) and as such may therefore also operate and be registered as **(three-dimensional) trademarks**. The advantage of such protection is that trademarks, unlike industrial designs, can be renewed indefinitely.

Some general warnings

Packaging and promotional material give added value to the business of an artisan or visual artist, and should be protected accordingly. The following tips may help.

TIP 1 – Pay attention to trade secrets. Plans, sketches, drawings and outlines of labelling, packaging and promotional material that have not yet been put on the market are valuable business information. It is important to remember that such information is legally protected only if, and as long as, it is kept secret. Artisans, craft enterprises and visual artists therefore need to take basic measures to keep such information secret. See 'Trade secrets', pages 87–90 in chapter 5.

TIP 2 – Ascertain ownership of IPRs. This may sound simple, but artisans, craft enterprises and visual artists often rely on employees or independent contractors (e.g. marketing consultants) to develop a new label, logo or product design, product packaging, website, or any promotional material, and assume that they automatically own the rights in those assets because they paid for the work. In many cases, however, an independent contractor (and in some cases even an employee) will own the IPRs in the works that he or she has created, and may continue to exploit the works or even give them away to competitors. It is therefore important for artisans, craft enterprises and visual artists to ensure that they actually own all the IPRs.²⁶

TIP 3 – Be careful not to infringe others' IPRs. When planning labelling, packaging or promotional materials, artisans and visual artists should find out whether any envisaged trademark, design, trade dress, or other IP is owned by or already used by another enterprise in the target market(s). This type of information can be obtained by searching the relevant trademark or industrial design databases. See 'Industrial designs', pages 66–72 and 'How can I find out if a proposed trademark is likely to conflict with registered trademarks?', page 78 in chapter 5.

24 See 'Geographical indications', pages 85–87 in chapter 5, and case study 'Modranská majolica – A geographical indication for ceramics', pages 121–122 in chapter 6.

25 For more information on industrial design protection, see 'Industrial designs', pages 66–72 in chapter 5.

26 More can be read about this issue at www.wipo.int/sme/en/documents/wipo_magazine/11_2002.pdf

TIP 4 – Choose the best type of protection. Sometimes, a range of IPRs can overlap each other and be used cumulatively or alternatively to protect the same product packaging, labelling or promotional material. Given that different rights have their own purposes and time frames, it is important to identify which type of IP laws is most appropriate for a specific commercialization and marketing purposes. Finding out whether a packaging qualifies for protection by copyright, or as an industrial design, trade dress or three-dimensional trademark is not always an easy task. It is advisable to seek the help of an IP expert or advisor to work through the combinations and determine the best strategy for IP protection. See also ‘Are there alternative ways to protect an industrial design?’, page 68, ‘Can there be dual protection by industrial design rights and copyright?’, page 68 and ‘Can there be dual protection by industrial design rights and trademark rights?’, page 69 in chapter 5.

TIP 5 – Pay attention to possible national and international laws for labelling, packaging and advertising. In most countries, packaging, labelling and promotional materials have to meet a set of commercial and legal rules, which regulate in one way or another the creation of consumer expectations. The most relevant areas of law cover: IP; cultural heritage; packaging and labelling; product liability and advertising; restrictive trade practices; antitrust; competition; parallel importation; consumer protection; revenue; the environment; safety; and weights and measures. In addition, there may be specific regulations applicable to a particular sector, e.g. European Union (EU) requirements for the labelling of textile products. Artisans and visual artists must take into account such regulations. It is recommended to seek advice from legal counsel, experts or consultants in the relevant fields.

Product development and adaptation

As was shown in the section on preparing business plans, *product development* includes the creation of totally new products, the *adaptation* of existing ones, and the improvement of product quality. It embraces:

- ❑ *All elements of the marketing mix* – aspects related to production, pricing, promotion and distribution, based on market research;
- ❑ *Product design (including packaging design)* – the creation of the product from concept, using a drawing or a prototype, also based on market research;
- ❑ *Production processes and techniques* – ensuring that the product can be successfully made, using new and existing technology and available raw materials.

Product adaptation is a cost-effective method of upgrading product ranges and responding to market influences. The process is much the same as that for new products. Adaptation should be based on market research indicating that an existing product would be better received in the market if it was modified to suit other market demands than those originally planned. This may mean the development of new components, improved function, or the addition of other finishes and colours.

Product design process

Product design is an integral part of product development. It is an activity which can be done by either creative artisans or craft entrepreneurs, or qualified product designers contracted to develop ranges to the specifications of the client enterprise. Because craft enterprises must keep developing new products, either at the request of customers or to be competitive, the *regular design of new products* is of major importance. Effective use of design adds value to a product by:

- ❑ Creating higher perceived value through aesthetically pleasing industrial designs;
- ❑ Creating variety in the commercial world;
- ❑ Highlighting differences between competing products;
- ❑ Creating particular products and ranges for specific target market segments, ranging from basic household utilitarian products, such as pottery utensils and household textiles, through to expensive items, such as unique ceramic pieces and one-off batik paintings;
- ❑ Generating long-standing relationships with customers, which translate into greater market share, better prices and bigger profits.

Many businesses have successfully improved their sales through strong focus on product design. Most successful artisans and craft entrepreneurs recognize that design excellence brings stronger brand recognition and better profitability.

The product design process is the conversion of a product concept, described in the product brief, into a functioning prototype, which can be assessed and refined into a viable commercial product. The process is influenced to varying degrees by all the following factors:

- ❑ ***Function, use and maintenance*** of the product by the end user. All products must perform their function to suit the needs of the end user. If there is a mechanical function, such as a folding mechanism for a wooden chair, then the user must be able to learn the function easily and quickly, without undue need for lengthy written instructions. For example, the user of the chair should find it comfortable, durable, and should be provided with simple instructions for any product maintenance needed.
- ❑ ***Product dimensions*** in target markets, particularly export markets. Using footwear as example, it is important to use dimensions for a sandal which suit the target market customer. A sandal size made to be comfortable to a South-East Asian consumer would not necessarily fit or be comfortable to a North American. When fitting a product to human beings, the use of standardized human dimensions (ergonomic statistics) is important. These statistics are available for furniture and clothing markets, and differ from region to region of the world.
- ❑ ***International and national standards*** used in the target market are very important. As with the sandal dimensions, there are internationally agreed standards, regional standards such as those in the EU, and individual national standards. Products intended for export should conform to standards used in the target market. For example, in certain importing countries wooden toys can be confiscated and destroyed if they fail a toxicity or toy safety test, i.e. if they are painted with toxic paints or contain small and/or sharp components. It is the producer's and importer's responsibility to ensure their products conform to relevant standards.
- ❑ ***Production processes, technology and raw materials*** available to the maker have a great effect on the design of a product. Customers may expect to

receive a product made in material A as specified in the order and shown in the sample. If the producer or craft entrepreneur uses an inferior or different material B without prior consent of the customer, then the enterprise may lose both the order and a customer. So designers have to be alert to regular supply conditions for raw materials or components in their home country. Any designer who makes products without reference to existing or newly emerging production technology will have a product that either cannot be made, or can be made only with great difficulty.

- **Market trends in colour**, which change frequently, also cause many problems for artisan producers. When designing for any market, it is necessary to offer products in the market's current colour trend. For export markets, the production enterprise should attempt to keep up to date with the latest trends in colours. Export market customers may want certain specific colours. They will demand excellent colour matches. Craft enterprises should ask these customers to send them a good sample of the colour to match.
- **Product style and appearance trends** in the target market may provide crafts enterprises with opportunities to rapidly fill a niche that emerges suddenly in the market. For example, it is now common to see oil lamps on bamboo poles for use in gardens. But they became fashionable very rapidly one summer. By reacting quickly to demand, the bamboo workers of the Philippines became a major source, producing a reliable oil lamp and a well-finished bamboo pole to support it.
- **Price of competing products** in the market. If the person responsible for marketing has done correct research, the designer will have been provided early on with a maximum cost price for the manufacture of a given product. Going beyond the maximum is not good practice. Designers must discipline themselves to keep close to the price mark.
- **Packaging requirements** that affect product design or assembly. Packaging needs can radically alter the structural design of products. Furniture products provide a good example. Much furniture is shipped around the world fully constructed in crates and containers. Wardrobes can be filled with smaller products, but fully assembled chairs, tables, desks and sofas take up expensive cargo space. There have been huge efforts by retailers, designers and production people worldwide to develop inexpensive easy-to-use techniques and devices that allow furniture to 'fold', 'knock down' or 'pack flat'. This has been intensified by demand from large-scale furniture importers in the EU and North America, who purchase large quantities of low-cost, hand-made, flat-pack furniture in cardboard carton boxes from South and South-East Asia. These folding, knock-down and pack-flat furniture products require industrially manufactured precision metal fixtures and fittings for assembly by either consumers or retailers. These fixtures are not necessarily available in developing countries. Often the only solution for the craft enterprise is to import the components from the market country to ensure high quality parts. Many developing countries have import permits for such components that are to be used in export products. The designer must use them because of market pressure.

Each of the factors above has an influence on the cost of the product. Their relative importance is not fixed, being greatly affected by the priority demands of the product brief. It is the product designer's job to ensure that new products fulfil the requirements made in the product brief, while balancing these with technical production constraints, utility and aesthetic needs. The result will be a first prototype for assessment within the enterprise, which will be further refined until the product conforms to market requirements.

Sample making stage

When an artisan or craft enterprise makes prototypes and sends samples to customers, all parties involved can evaluate the function, appearance and production aspects of a given product. It can take more than one prototype to resolve the technological and design problems in a product. The basic appearance of the product will now be defined, and samples can be made in various colours and finishes for the marketing people to make a final choice. The design is agreed on, costs and selling prices accepted, the product specification sheet can be updated to its final version, photographs can be taken for promotional purposes, and the product is ready to launch.

Most innovations and other IP issues should have been resolved by this time. The various procedures for protection of IP should be used at the sample-making stage.

IP and product development and adaptation

By the sample-making stage, artisans, craft entrepreneurs and artists need to have identified precisely what elements of their product should be protected by IP and how, when and where they will apply for protection (mostly through registration). **Taking timely action** is often crucial – some IP rights depend upon registration and often registration is given to the one who is first to file for registration.

However, as long as the product is not launched on the market and IP protection is not in place, it is extremely important to **maintain secrecy** over all crucial product development details. If details of product development are not kept secret, this may pose challenges to successfully obtaining IP protection at later stages.

Product costing and pricing

Costing is the process of calculating all of the expenses involved in producing and marketing a product. **Pricing** is the process of determining the amount of money for which a product will sell, based on the costs of producing and marketing the product, balanced against what the market will bear.

The accurate costing and pricing of any product developed in an enterprise is very important, because it can affect the profitability of any sale, and the future of the enterprise itself.

Costing

The usual method of costing is to calculate the **direct production costs** of manufacturing a product, and the **overhead costs** of manufacture.

- ❑ **Direct production costs** are those costs directly related to the manufacture of a product. Examples are raw material costs, equipment costs, labour costs for each component, assembly, finishing and packing. Labour costs are calculated based on the production time taken to make a product, multiplied by the hourly wage of the maker, or the notional hourly wage of the self-employed artisan or artist.
- ❑ **Overhead costs** are those attributable to the product but for which there is no direct relationship. They have two components. **Fixed overheads** include: rents; depreciation of machines and tools; taxes; wages for full-time production staff; loan repayments; insurance premiums; and pension schemes. **Indirect overheads** include: wages for support staff; equipment and vehicle operating costs; gas, water and electricity utility charges; postage; office stationery; sample-making costs; telephone, fax, telex,

telegram and e-mail charges; business related travel; inflation; and contingency allowances. The calculation of overhead costs and their attribution to products on a percentage basis can be done in many ways. The following is the simplest method:²⁷

- To calculate the **percentage overhead cost per product**, the **monthly overhead costs** should be divided by the **total direct production costs for the month**.

The **direct costs of any product + percentage overhead cost per product = Total product cost** (incorporating a proportional allocation of overheads per product).²⁸

Pricing

If costing is determining the full cost of a particular activity, **pricing** is determining what to charge the customer for it. A price is typically determined by adding cost plus a profit margin and distribution costs. While doing so, it is assumed that the price is higher than the cost, and that the price so determined is what the customers would be willing to pay for the product in question.

Some of the cost of creating IP assets will get taken care of if the cost of failed attempts to develop a new product are included in the indirect overhead costs. The failed attempts result in learning, which in turn contributes to the success of future attempts at developing and launching a successful product. Even so, inclusion of such indirect overhead costs will still undervalue the costs and, therefore, result in a lower than fair cost of production. Beyond the contribution to costing in terms of costs associated with acquisition, maintenance and enforcement of IP rights, IP assets should contribute to:

- Safeguarding market share;
- Lower costs (through productivity of production, packaging, transport, etc.); or
- Higher income resulting from greater demand for the product (increased sales lower per unit overhead costs; and greater profit based on higher per unit price which the market/customer is willing to pay).

While visual artists may regard costing and pricing as not of primary importance in their work, they must make similar calculations to ensure that they are not losing money. They should go through the same costing process as any other enterprise.

IP and product costing and pricing

Many artisans and visual artists create products that could and should be protected under the IP system. Creation of new, innovative and original products usually involves a **very large up-front fixed cost**. Once created, however, the IPRs can be sold and resold for very little additional (i.e. incremental) cost. IP has a much **greater investment return potential** for these very reasons. While costs and benefits related to IP are difficult to value – and there will always be a little guesswork involved – they are important elements that should be integrated into the costing and pricing plan.

²⁷ Source: 'Product Costing and Pricing: Artisan as Entrepreneur – Training Module.' ITC, Geneva, 2000, Ref. 06.04.03 ART, p. 11.

²⁸ More information and concrete examples can be found in the training module referred to in footnote 27.

When calculating the costs of IP protection, the following main components should be taken into account:

- ❑ **Costs for the development of the IP**, including research and development.
- ❑ **Costs for the acquisition and maintenance of IPRs**. These may include fees for filing an application, and for obtaining and maintaining IPRs; other prosecution fees; costs relating to attorneys or agents who assist in drafting the registration application; translation costs (mainly for patent applications); and costs for protecting the secrecy of confidential business information. Such costs may vary widely for the different items of IP. See chapter 5 for more detailed information.

To some extent, the burdens associated with IP acquisition may be reduced:

- By considering the *best and most economic protection package* – a single product or service may embody various forms of IPRs covering different aspects of that product or service. Some types of IPRs may be cheaper to acquire and maintain than others;
 - By applying for IP protection through *regional or international arrangements* when seeking IP protection abroad (see ‘Protecting intellectual property abroad’, pages 95–99 in chapter 5); and
 - By making use of special *incentives* offered to SMEs or specific target groups in the craft and visual arts sectors, wherever available.
- ❑ **Costs for monitoring IP**. Consulting trademark, industrial design and patent databases regularly to monitor the market is important in order to find out about recent technical developments and new technologies, identify new licensing partners or suppliers, find new market opportunities, monitor activities of competitors, identify possible infringers, and to avoid infringing the IPRs of others, especially of competitors.²⁹
 - ❑ **Costs for enforcing IPRs**. If someone is imitating, copying or infringing IPRs without the owner’s authorization, the related cost could be calculated in terms of the fees that will have to be paid to the court(s) and to the attorney(s), and the costs of alternatives that should be explored and followed in the event of a negative decision. Many other issues have also to be assessed, for instance, the chances of winning the case, the amount of compensation and damages that can reasonably be expected from the infringing party, and the likelihood and extent of reimbursement if the final decision is favourable. See also ‘Enforcing intellectual property rights’, pages 105–109 in chapter 5.
 - ❑ **Costs for using another person’s IPRs**. Artisans and artists who wish to use IP assets that belong to others will have to buy such rights, or pay licence fees (royalties).

Once the IP requirements have been established, it is necessary to **apportion some IP costs to different overheads**. For example, if a trademark is being applied to a product then a proportion of IP overheads should be allocated to the indirect overheads for that product. The remaining IP costs should be allocated to overall trademark protection costs, because trademarks are used in many different parts of a business.

The costs that may be incurred in relation to IP assets could result in an overall lower or higher cost of production and marketing. In the latter case (overall costs higher), it makes business sense to incur the IP-related costs only if the

²⁹ Such searches may be conducted through online databases (free, or upon payment), specialized firms, or at the registries of the national IP Offices. Depending on the merits of the case, it may be advisable to use the services of a competent IP agent or attorney.

artisan, craft enterprise or visual artist is able to sell more items and/or sell at a higher unit price so that the additional cost per item due to the costs incurred for obtaining and maintaining IP assets is at least fully offset. This would happen if a higher price (a so-called premium price) could be charged for a better or more desirable product.

IPRs are necessary for seeking exclusivity or safeguarding the niche or market share of a product. They are, however, not sufficient, as competitors have their own IPRs. Ultimately consumers choose what they will like, and how much they will pay for it. To that extent, the contribution of IP assets to sale price is never easy to assess.

What must be appreciated is that, more than anything else, **IPRs provide the basis for exclusivity in the marketplace, which is a precondition for determining the highest price the market is likely to bear for a particular product.** If artisans or visual artists do not have valid and enforceable IPRs they may not be able to stop copiers, imitators and infringers from stealing their intellectual creations and innovations. On the other hand, when they are able to keep competitors out of their market by using their IPRs, then they may continue to earn profits, perhaps even at higher levels than before. If they have properly safeguarded their IPRs, then they can initiate legal action not only against forgers and counterfeiters, but also against other categories of copiers, imitators and infringers. As a result of such legal action, they may not only recover the direct costs of legal action but also be paid normal or punitive damages, as well as putting an end to the infringing activities of such free-riders.

Test marketing

Regardless of whether the enterprise is artisanal or artistic in nature, when samples are ready the product should be tested in the marketplace. This provides an ideal opportunity to:

- ❑ Make a short production run to ensure that all production procedures work easily;
- ❑ Allow a small number of end users to assess the product, its function and appearance; and
- ❑ Analyse any manufacturing faults, operating defects and image complaints that should call for changes before launching the product.

Visual artists do not usually conduct test marketing. Artists create without necessarily considering the commercial value of their works. This means that products are offered in the market as they are done. Any modification that might occur is a change in the next work, not the current one.

IP and test marketing

Before a product is launched on the market, artisans and visual artists must be sure that they own all relevant IPRs related to the product, or have duly acquired such rights from other people through assignment or licensing contracts, so that competitors cannot misappropriate their creations and they do not come in conflict with IPRs owned by others. In summary, artisans and visual artists should be sure that they own or have the authorization to use:

- ❑ Any IPRs that protect essential elements of the **product (or service) itself**, such as copyright, designs, trade secrets, patents or utility models;
- ❑ Any IPRs that constitute essential elements of the **enterprise image**, such as trademarks, trade names, designs or domain names;

- ❑ Any IPRs that protect essential elements of the product **packaging and labelling**, such as copyright, designs, trade dress, trademarks or geographical indications (see also ‘Creating labelling, packaging and promotional materials’ in this chapter).
- ❑ Any IPRs that protect essential elements of **advertising material**, such as copyright, designs or trademarks.
- ❑ Any IPRs that protect essential elements (both content and functioning) of a **website**, such as copyright, designs, trademarks, domain names, patents or utility models.
- ❑ Any IPRs that protect the **manufacturing process** and other relevant **business information**, such as trade secrets, patents, utility models or copyright.

Product promotion and product launch

When the test marketing phase is successfully completed, then the product may be promoted through whatever means the enterprise favours.

Artisans and craft entrepreneurs most commonly use:

- ❑ Mailing out **printed or CD catalogues**;
- ❑ **Exhibitions and trade fair showings** (at local, national, regional or international level);
- ❑ A **website**;
- ❑ **Advertising media** (such as specialized trade press or television).

Visual artists would be most likely to:

- ❑ Distribute **invitations** to a **private viewing of an exhibition**, or the **opening of a show**, sent with a **covering letter** and a **CV**;
- ❑ Issue a **brochure or CD** as the exhibition catalogue;
- ❑ Invite **arts reviewers** to the private viewing and hand out **press releases**;
- ❑ Try to obtain a **slot on a television arts show**;
- ❑ Use a **website**.

IP and product promotion

IP and promotion go hand in hand. A good set of logos, slogans, trade dress and trademarks is a basic requirement of successful advertising. **In many ways, IP can send ‘messages’ about the product, its key features and benefits, and how it is differentiated from other products.**

- ❑ Artisans and visual artists need **trademarks** to individualize their products in order to reach out to customers and communicate with them. Not only will trademarks identify the source of a particular product (i.e. tell consumers who has manufactured the product), they are also a guarantee for consistent quality.³⁰ It is therefore a good strategy to use them repeatedly and consistently throughout all product literature, presentations, advertisements, brochures, websites, etc. When artisans or visual artists hire advertising services or printers, or allow others to use their trademarks, then they should clearly specify how they want the trademarks to be used. It is their responsibility to make sure that the market knows their mark, and the qualities associated with it.

³⁰ See ‘Order processing, customer relations and quality’ on page 51.

- ❑ **Certification marks, collective marks and geographical indications** are helpful promotion tools, as they send messages about certain qualities or characteristics or the reputation of the products.
- ❑ **Patents and utility models** give the message that a particular innovation is involved and highlight the competitive strength of the products concerned.
- ❑ A product's appealing shape and look, attractive packaging, and creative product design will help to reach out to the targeted customer type(s). Having **design, trade dress and copyright** in such features will protect artisans and visual artists against unlawful copying or imitation.
- ❑ Artisans and visual artists who advertise their works on the **Internet** are advised to seek professional advice, as many IP and other legal issues will come up (a few are explained in this chapter), in the next section 'IP and product promotion on the Internet'.
- ❑ It is also important to **let others know that IPRs are protected**. IPRs should therefore be signalled in advertisements and other promotional communications.³¹
- ❑ However, artisans and visual artists should be careful about **advertising and unfair competition law**. Unauthorized, deceptive or misleading use of trademarks, for example, can open the door to lawsuits.
- ❑ Artisans or visual artists who are helped by an employee, independent consultant or advertising agency to create advertising material, a brochure, a trademark, a product design or a website, should make sure they **own all IPRs** in it, and not the employee, consultant or advertising agency.

IP and product promotion on the Internet

A very potent means to promote crafts and visual arts is by using the '**online world**', also known as cyberspace. (See chapter 7 for a few examples of online craft and art marketplaces.) However, the online world also entails many dangers. Artisans and visual artists who set up their own e-commerce business or start showcasing or selling their products through commercial online services run by other companies need to consider a few issues:³²

- ❑ To design a **website**, it is highly advisable to hire a professional. A good web designer will not only build an attractive, easy-to-navigate site, but will also pay attention to important details that will help a website to find higher ranking in search engines. However, in designing and building a website, the first thing to be aware of is **who owns the website presentation and content and every aspect of IP in it**. If artisans or visual artists hire a freelance designer to create their website, in many cases the designer will own copyright, patent, design or even trademark rights, unless it is otherwise agreed in a written contract. In some situations, the designer may have to formally transfer the IPRs to the artisan or artist in question after completion of the work done under contract on payment.

31 In certain countries, for example, the symbol ® can be used to indicate that the mark is registered with the national IP Office, or the symbol © to indicate that the work is copyrighted.

32 These, and other IP issues related to e-commerce can be read at the following WIPO web pages: www.wipo.int/sme/en/e_commerce/index.htm and <http://ecommerce.wipo.int/domains/index.html>.

- ❑ In order to do business via the Internet, artisans and visual artists will also need to have an Internet address, technically known as a **domain name**, through which a website can be identified. They should be careful to **pick a name that is not the trademark of another company**, particularly a well-known trademark. This is because most laws treat registration of another person's trademark as a domain name as trademark infringement, also known as 'cybersquatting'. The artisan or artist in question might have to transfer or cancel the domain name, and also pay damages.
- ❑ When **distributing content on the Internet**, written permission may be needed to use photos, videos, music, voices, art work, or software if the copyright in it belongs to someone else. Measures should be taken to protect content on the Internet against misuse and thus not to disclose content or inadvertently provide access to any trade secret to the visitors to the website.
- ❑ Simply placing a website online is not enough. Artisans and visual artists will need to continually **market** their online business, just as they would with a real-world business. Many website owners are excited when the website is launched: they are proactive at the beginning, then burn out after a while and the site productivity suffers. **Trademarks** are essential for marketing. Consumers rely heavily on trademarks, particularly when buying products online, as there is often no opportunity to inspect the products before purchasing them. In some respects, a trademark used on the Internet may have broader impact and possibly greater value than one in the physical world, as it is visible to a potentially global public. However, the use of trademarks online may raise numerous complex issues and it is strongly advised to seek legal counsel and assistance before using trademarks on the Internet. See also 'What should artisans and visual artists keep in mind while using their trademarks on the Internet?', pages 80–81 and 'What is a domain name and how does it relate to trademarks?', page 81 in chapter 5.

Order processing, customer relations and quality

Proper management of the business process demands that any interaction between an enterprise and its customers or competitors be handled efficiently, courteously and without delay. There are bound to be queries from customers on orders placed. Complaints about product quality will with any luck be few, but must be handled with great care.

It would be useful to have a product recall policy to build a reputation of integrity and concern for the needs of the customer. This will help in developing the long-term trust and credibility that underpin successful relationships, bringing the customer back for repeat purchases and/or encouraging the customer to undertake 'a word of mouth' marketing campaign on your behalf at no additional cost.

Also, customer complaints provide important feedback on problems that need to be solved in order to strengthen the existing product line or develop a new one. The innovative solutions to such problems may be protectable by patents or utility models, or as trade secrets.

Considerations about quality

As well as considering the major aspects of quality (such as ISO 9000), artisans, craft entrepreneurs and visual artists need to remember simpler rules of quality, by which many of their customers are more impressed.

Products should be manufactured:

- From finest raw materials;*
- To the highest quality of workmanship;*
- Using the design for the most functional and attractive product;*
- To be sold at the most advantageous price possible.*

Service. No matter how excellent the product may be, an enterprise is very likely to be remembered and judged by:

- Its professionalism;*
- Its courtesy;*
- The speed of its responses to enquiries; and*
- Generally efficient correspondence.*

IP and quality considerations

As has been outlined already above, different IPRs indicate compliance with certain qualities or standards in various ways:

- Trademarks** have a ‘guarantee of quality’ function, because consumers generally rely on the consistent quality of the products offered under the trademark. There are two aspects to the quality task of a trademark. On one hand, trademarks will influence consumer choice. Logically, a consumer who is disappointed in the quality of a product will not buy the same product again, and one who is satisfied with it will tend to rely on the trademark for a future purchase decision. On the other hand, trademarks will also influence the attitude of the mark owners (artisan or artist). To maintain consumer confidence they will do their best to keep the quality level of their products the same.

Case study: ‘Maquí – A trademark story’, pages 118–119 in chapter 6 nicely illustrates the quality functions of trademarks. It may also motivate artisans and visual artists to use their trademarks to communicate with the consumer, not only through the products bearing the mark, but also in advertising.

- Collective and certification marks** are other examples of quality indicators. Such marks may only be applied to products that meet special characteristics, which can relate to their mode of manufacture, the materials employed, or to any other quality aspect.

Case study: For a practical illustration of such use, see in chapter 6 the case studies on ‘Harris Tweed – A certification mark for cloths’, pages 119–120; ‘Toi Iho – A certification mark for Maori arts and crafts’, pages 120–121; ‘Mglass – A collective mark’, page 129.

- Geographical indications and appellations of origin**,³³ which designate the geographical origin of a product, may also indicate certain qualities that are derived from the specific area.

³³ **Appellations of origin** consist of the name of a geographical place used to designate a product originating therein, whose quality and special characteristics are due exclusively or essentially to the geographical environment, including natural and human factors.

Case study: For a practical illustration, see the case study ‘Modranská majolica – a geographical indication for ceramics’, pages 121–122 in chapter 6.

Analysis of product sales and new market research

At the end of every financial year, all enterprises, artisans, craft entrepreneurs and visual artists should review their performance during the past 12 months. Included in the review will be an **analysis of product sales and income**. ‘With the best of efforts, almost 50% of new product launches fail to meet the financial and other targets set initially.’³⁴ If done carefully, the figures will indicate:

- Which products have sold very well;
- Which have achieved target figures for sales; and
- Which have not reached the projected sales figures.

At this stage, a decision will have to be taken as to whether some products should be discarded from the range, and for what reasons. There should be clear indicators about products that are not reaching sales targets, and why they are failing. These should be replaced by new designs or adapted versions of other products for the coming year.

A list of new product concepts and target markets can be drawn up as a result of the analysis. This will then be kept for the next year’s market research activity.

After analysing sales, an enterprise must determine whether the market environment has changed in the last 12 months and, if so, how such changes affect the current marketing strategy and next year’s business plan. The most frequently asked questions while preparing to undertake new market research are:

- Are new products or ranges needed?**
 - (Add the list of new product ideas resulting from analysis.)
- If so, what new product categories should there be?**
 - (Perhaps diversification, adding a new sub-range made with existing technology. Or the addition of a new technology which will permit the manufacture of a new product type.)
- What are competitors doing? Are they imitating or copying my successful products? If so, are they infringing my IP rights?**
 - (Perhaps they have launched a new type of product, which has unusual technical aspects. Are they protected by IPR? Maybe they have expanded into a different market location.
- Are the market channels performing to target?**
 - (Perhaps the new business with distributor X is not working as well as expected.)
- If not, which channels or markets should be studied?**
 - (Who? Where – new location? New countries? Regional/ international?)
- Which channel locations and places are performing badly?**
 - (New location search?)

³⁴ Source: ‘Role of intellectual property system in development and marketing of new products’ by Guriqbal Singh Jaiya, SME Division, WIPO, Geneva.

- Which alternative channels can be tried?**
 - (New distributor in another city? New location, opening mall in another town or country?)
- Have any new product niches opened up in the last 12 months?**
 - (New products in a particular sector which might suit? Need new distributor?)
- How are the products within the niche being sold?**
 - (New distributor network in new locations?)
- What are the changes in the attitudes of consumers?**
 - (General downturn in consumer activity?)
- Are there any activities in the marketing environment which affect sales generally?**
 - (Economic downturn causing job losses? Variables in the global situation causing uncertainty in home markets?)

IP and analysis of product sales, and new market research

Proper product sales analysis and new market research should also deal with IP issues, by reviewing the impact of the IP strategy that was applied in the past year and trying to work out a more suitable and adequate IP strategy for the coming year. Some basic questions may be helpful for this task:

- Has the trademark or brand strategy been successful?
- Can the same trademark or brand strategy be applied across other product lines?
- Do I have any designs, patents or utility models that could be used for new products or product applications?
- Has IP been useful in advertising, and did it send the right message to the customers?
- Have the IP assets been fully and successfully commercialized? Are there any other licensing possibilities to explore? Should some IP assets be disposed of?
- Has there been any counterfeiting, copying or piracy of products? If so, what was the negative impact on sales? What actions have been taken?
- Did any competitors send warnings for infringement of their IP rights? If so, what remedies or future precautions have been taken?
- Have there been any significant changes in the national, regional or international IP system, including major decisions on IP matters by courts, that have any significant potential positive or negative consequences for my business or marketing strategy?
- Has the value of my IP assets changed significantly during the last 12 months?
- Have I conducted an IP audit to ascertain whether I am getting the best use out of our IP assets?
- Have I considered forming or joining an association which seeks to proactively fight counterfeiting and piracy of trademarks, designs and copyright? An example of such an association is ACID (Anti Copying In Design)³⁵ in the United Kingdom.

35 See www.acid.uk.com.

There is no simple or routine way for a business to undertake IP analysis. It is important for artisans, craft enterprises or visual artists to understand the basic principles and then look at their own business priorities to guide them in formulating an IP strategy that integrates into the overall business strategy. IP tools are a means to an end, namely, helping a business to achieve its profit-related objectives. There is no easy cut-and-paste method of creating a winning IP strategy. Asking the right IP-related questions, and having the correct reference framework in which to assess the advice provided by an IP expert, will enable artisans, craft entrepreneurs or visual artists to steer their marketing efforts and business results to a successful outcome in a competitive market environment.

Chapter 5

How to protect crafts and visual arts

Copyright

What is copyright?

Copyright is a legal term describing **exclusive rights** given to creators for their original literary and artistic creations, which are generally referred to as ‘artistic works’ or simply as ‘works’.³⁶

Artisans and visual artists are often creators of works which can be protected by copyright law. In fact, there are **two independent rights** in relation to an artwork. One relates to the artwork in its material form (as physical property) and the other to its copyright (as intangible or intellectual property). Each right may be sold or otherwise disposed of independently of the other. The two rights may be separate in ownership. The owner of the copyright in an artwork will normally be its creator, while the physical work may be owned by someone else.

What rights does copyright grant? Why is copyright relevant for artisans and visual artists?

Legal rights based on the copyright system empower copyright owners and their heirs in title to **benefit financially** for a long but fixed period of time. Most of these rights are referred to as **economic rights**. A creator has **exclusive property rights** in his or her works. In practice, the creator, as owner of copyright in a work, is the only person entitled to:³⁷

- ❑ *Reproduce or copy* the work in any way (e.g. by photographing, photocopying, copying by hand, filming, scanning into digital form or printing);³⁸
- ❑ Adapt, modify or prepare *derivative works* based on the work (e.g. by making a painting from a photograph, or a collage from several different works);³⁹

36 The kinds of works covered by copyright generally include: literary works such as novels, poems, plays, reference works, newspapers and computer programmes; databases; films, musical compositions, and choreography; plastic works such as paintings, drawings, photographs and sculpture; architecture; and advertisements, maps and technical drawings.

37 The list of rights given here, summarizes the rights related to crafts and visual arts works only. The entire bundle of rights that are protected under copyright law is larger.

38 **Reproduction right** means that no one other than the copyright owner may make any reproductions or copies of the work, even privately. For example, it is unauthorized to photocopy a photograph, copy a sculpture, use a cartoon character on a T-shirt, or incorporate a portion of another’s painting into a new painting.

39 **The right to make a derivative work** overlaps somewhat with the reproduction right. A **derivative work** is a transformation of an existing work protected by copyright – it builds on the pre-existing work by adding new creative elements – see ‘When is a work considered to be ‘derived from’ the work of someone else?’ on page 58.

- ❑ *Display and communicate the work to the public* (e.g. displaying a sculpture at an exhibition or communicating a painting in digital form via e-mail, television, or on the Internet);⁴⁰
- ❑ Distribute the work to the public (e.g. by initial publication, or through sale or rental); the distribution right also applies to any copies of the work made without the prior authorization of the copyright owner);⁴¹
- ❑ Authorize someone else to do any of the above.

Apart from the economic rights, copyright protection also includes **moral rights**. Moral rights include: (i) the right to claim authorship of the work (sometimes called the right of ‘**paternity**’); and (ii) the right to object to any distortion, mutilation or modification of, or other derogatory action in relation to, the work, which would be prejudicial to the author’s honour or reputation (sometimes called the right of ‘**integrity**’).

Example: The right to prevent colouration of black and white photographs, is an example of a moral right.

Example: In a famous Canadian case,⁴² an artist sold his sculpture of flying Canadian geese to a shopping centre. Just before Christmas, the shopping centre’s manager put Christmas wreaths and ribbons around the necks of the geese. When the artist complained, the manager claimed that he could do what he liked with it since he owned it. The artist sued for infringement of his moral rights. The court agreed that even if the shopping centre owned the sculpture, it did not have the right to place ribbons around the necks, as this was a modification which would prejudice the honour of the artist. The court ordered the shopping centre to take away the decorations.

Copyright is relevant for artisans and visual artists because the economic rights can be **exploited** for economic benefit, notably by sale or licence. They can also be gifted or left in a will. In addition, in some countries, artisans and visual artists may **benefit from subsequent sales** of their works through ‘resale rights’. See ‘What are resale rights’, page 65 in this chapter. The moral rights are generally of greater concern to visual artists than to artisans. Sometimes, moral rights have economic significance as well.

What are the requirements for obtaining copyright protection?

Artistic works are protected irrespective of their artistic quality. However, to qualify for copyright protection, a work must be **original**. This means that the work must have been developed **independently** by its creator. In many

40 To **display a work to the public** means to display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered. Public display of a work means, for example, showing a copy of the work, either directly or by means of a film, slide, television image, including the transmission of digitalized image online. To **communicate a work to the public** means transmission by wire or in such a way that the images or sounds can be perceived by persons outside the normal circle of a family and its closest social acquaintances at a place or places so distant from the place where the transmission originates that, without the transmission, the images or sounds would not be perceivable and, further, irrespective of whether the persons can receive the images or sounds at the same place and time, or at different places and/or times individually chosen by them.

41 The copyright owner’s exclusive right of public distribution would have no effect, however, upon anyone who owns a particular lawfully made copy of a work and who wishes to transfer it to someone else or to destroy it, except in countries where the copyright law provides for a resale right for certain types of works.

42 *Snow v. Eaton Centre Ltd* (1982 FCTD).

countries, there must be some **creativity** involved in the process of doing so. Originality can be difficult to determine, however, and court cases often revolve around the question of whether a work has been copied, even in part, from somebody else's work. In many countries, copyright protection is available only when the work is **fixed in a 'tangible form'**, which can also be difficult to determine.⁴³

Are crafts and visual arts works covered by copyright?

Most **visual arts** works are automatically protected by copyright as soon as they are created or fixed. **Craft products** may be also protected by copyright if they possess artistic qualities and if national copyright law allows it.

Examples: Artificial flowers and plants; artwork applied to clothing or to other useful articles; cartoons; comic strips; collages; dolls; toys; drawings; paintings; murals; enamel works; fabric, floor, and wall covering designs; games, puzzles; greeting cards, postcards, stationery; holograms, computer and laser artwork; jewellery designs; sculpture, such as carvings, ceramics, figurines, maquettes, and moulds; stained glass designs; weaving designs, lace designs, tapestries; patterns for sewing, knitting, crochet, needlework; needlework and craft kits, are examples of artwork that can be protected by copyright.

Besides, artisans or visual artists may create original advertisements, brochures, business directories, pamphlets, display ads, databases, packaging, websites, and so on, which are also protectable by copyright.

When is a work considered to be 'derived from' the work of someone else?

Many artists borrow parts of other works to create a **derivative work**. A derivative work is a separate work that adapts, recasts, or transforms an existing work.

Examples: Making a painting from a photograph; making a collage from several different photographs or images; or adding new artistic elements to a past work.

Many artists believe that they are free to take all or a part of other works to create a new work. They are free to do so only in some circumstances,⁴⁴ or if the borrowed works are not protected by copyright (i.e. if they are in the public domain).⁴⁵ In most cases the new work would be a violation of copyright, since only the copyright owner of a work is entitled to make derivative versions of it. **Artists who incorporate elements of other works must therefore obtain permission from the owner(s) of the borrowed work(s).**

Example: If an artist who uses without permission another artist's artwork and makes a sculpture, snow globe, puzzle, T-shirt, mouse pad, greeting card, CD-cover, figurine, etc., he or she is infringing by creating an unauthorized derivative work.

⁴³ Generally, the work must be expressed to some extent in some material form, having a more or less permanent endurance. For example, a landscape that an artist may create in his or her mind is not protected by copyright until it is reduced to painting. Fixation is required because copyright exists not in ideas themselves but in the form of expression of those ideas.

⁴⁴ For instance, if there is 'fair use' or 'fair dealing' – see 'What is 'fair use' or fair dealing?' on page 61.

⁴⁵ After the copyright term has expired, the work belongs to the public domain, see 'How can artisans and visual artists know if something is in the public domain?' on page 62.

Example: Martine wants to make a sculpture based on a photograph. She cannot do so without the photographer's permission. Martine's sculpture would be a derivative work and could damage the photographer's potential market for derivative works.

A derivative work **can still qualify for separate copyright protection**. However, to be protected by copyright, **it must be 'different enough' from the borrowed works** so that it can be considered a 'new work in its own right'. Someone who wants to copy a derivative work will need permission from the copyright owner of the derivative work, as well as the permission of all those copyright owners whose works, in full or important parts, are used in the derivative work.

Special attention should be paid to **collages**. A collage artist is always producing a derivative work, which may include copyrighted material. So making a collage that includes part of a photograph or several photographs from *National Geographic*, for instance, is illegal unless the collage artist has obtained permission from whoever owns the copyright in those works. Therefore, the safest approach for a collage artist is to use material which is not under copyright (in the public domain), or for which he or she owns the copyright. Rather than clipping photos out of magazines, the collage artists are better advised to take their own photos.

How is copyright protection acquired?

A created work is **automatically** protected by copyright as soon as it exists, without any special registration, deposit, payment of fees, or other bureaucratic requirements.⁴⁶

Do artisans and visual artists need to place a copyright notice on their works?

Although a copyright notice is not required in most countries, it is highly advisable to place one on the work, since it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year in which the work was published. **A proper notice may deter potential copiers** and, in case of an infringement, the copier will not be able to argue that he or she acted innocently.

Generally, a valid notice should contain: the copyright symbol '©' or the word 'copyright'; the year in which the work was reproduced or distributed; and the name of the copyright owner. It is also advisable to include the phrase 'All rights reserved'. The copyright notice may appear on the work itself. It can be painted, written, typed or stamped on the work.

How long does copyright last?

Copyright protection generally lasts for the **life** of the creator plus an additional period of at least **50 years** after the creator's death. The United States and most

⁴⁶ Some countries (such as the United States, Canada, India) nevertheless provide the possibility to **register** and **deposit**. Although such registration is not needed for the enjoyment of copyright, it may be helpful, for example, to prove that copyright subsists in the work and that the person, in whose name it is registered, is the owner of the copyright.

European countries have a copyright term of life plus 70 years. This means that not only the artisans and visual artists will benefit from their works, but also their heirs.⁴⁷

Who owns the copyright in a work?

Generally, the copyright in a work initially belongs to the artisan or visual artist who **created** the work. For example, in most countries, if someone hires a photographer to take a picture, the photographer owns the copyright. The person who hired the photographer will only get a copy of the print, which he or she will be entitled to use for the purpose for which it was taken. If a country has a ‘fixation’ requirement, the copyright will vest on **fixation**.⁴⁸

There are a few exceptions, however:

- ❑ If an artisan or visual artist works with other people on a **joint project**, then, in most countries, all creators are co-owners of the copyright in the resulting work, unless there is a contrary agreement. However, how much work is necessary before a person can qualify as a joint author and whether the product is of joint authorship, are often hotly debated questions, and it would be wise to resolve these issues clearly in a written agreement.
- ❑ If an artisan or visual artist creates a work on behalf of or for someone else, for example a **specially commissioned work**, then the person who commissioned the work may own the copyright in the work provided it has been expressly agreed so in a written agreement. Similarly, if an artisan or visual artist is an **employee** and creates a work as part of his or her job, then the employer will generally be the copyright owner. An **independent contractor**, such as a freelance photographer, generally is not considered to be an employee. A contractor will own the work unless agreed to differently in a written agreement. However, the issue of ownership of copyright in this kind of situation may be resolved differently in different countries.
- ❑ In some countries, if the artisan or visual artist agrees to produce an **engraving or a portrait** in return for money (or other valuable consideration), then copyright belongs to the client unless it was agreed differently in a written agreement.
- ❑ In some countries, **governments** own copyright in works made for them, or first published by them, unless the government agrees to a different arrangement in a written agreement.

***TIP** – Always verify who owns the copyright in a work! Artisans and artists should pay close attention to the terms of any employment, collaboration or commission agreements, particularly if they are creating a work that has income-generating potential.*

What is not protected by copyright?

Copyright protects only the expression of an idea, and **not the idea itself**. For example, it is the way an artisan has creatively executed the idea of creating a

⁴⁷ In some legislation, for works made by visual artists as **employees** whose copyright belongs to the employer, and for **commissioned works**, the duration of protection is 95 years from the date of publication or 120 years from the date of creation. Special rules may also apply to certain types of works, for example works created by the **government**, works **published after the creator has died**, works by an **unknown** creator, **photographic** works (they sometimes have a shorter term of protection), **typographical** arrangements, **joint** author works, etc.

⁴⁸ For instance, if there is ‘fair use’ or ‘fair dealing’ – see ‘What is ‘fair use’ or fair dealing?’ on page 61.

tea set, or the way a photographer has taken a picture of a specific subject that is copyrightable, not the idea itself. Ideas, processes, procedures and facts by themselves may be freely taken and applied or used.

Example: A photographer takes a picture of the famous bridge over the River Kwai in Thailand. This may inspire other artists to do a series of photographs or make a painting of the river scene. The photographer's original work, as well as the other artists', is copyrighted, but not the bridge and the river. However, while the photographer cannot prevent other people from making pictures or paintings of that same bridge, he or she can prevent others from duplicating his or her original picture.

Example: An employee of a textile company creates an original design for a dress fabric. The design consists of vertical stripes, with flowers and leaves scattered between the stripes, all painted in an impressionistic style. The textile company successfully markets the fabric. A competitor, having seen the dress fabric, produces a very similar design for its own fabric. This is copyright infringement, because it is not just the idea but the specific expression of it that has been copied and applied.

In some countries, such as the United States, **utilitarian, three-dimensional works** are excluded from copyright protection. For example, a toaster will be excluded from copyright protection in those countries (but could qualify for industrial design protection).⁴⁹

What is 'fair use' or fair dealing'?

'Fair use' and 'fair dealing'⁵⁰ are **exceptions to the exclusive rights** of copyright ownership, based on the belief that the public is entitled to freely use **portions** of copyrighted materials for purposes of **commentary and criticism**. In deciding whether a copier's actions were fair, judges will generally consider:⁵¹

- ❑ The purpose and character of the use. If the use is for informative or educational purposes (as opposed to entertainment or commercial purposes), it is more likely to be considered fair use.
- ❑ The nature of the copyrighted work. If the copyrighted work is primarily a factual or statistical work (as opposed to a creative or artistic work), it is more likely to be considered fair use.
- ❑ The amount and substantiality of the portion used in relation to the copyrighted work as a whole. If most of (or the substance of) the copyrighted work is taken, it is less likely to be considered fair use.

⁴⁹ However, to the extent that such utilitarian, three-dimensional works have components serving no end other than aesthetics, copyright protection is available for those components. See: www.fplc.edu/tfield/CopyVis.htm.

⁵⁰ In some countries [such as the United Kingdom, Australia, Canada, New Zealand and Hong Kong (China)], the rights granted to users by copyright laws to reproduce portions of a copyrighted work without infringing the legitimate interest of the authors or copyright owners is called 'fair dealing'. Whereas the 'fair dealing' is an exclusive system which spells out the scope for fair dealing to be applicable (e.g. private study, research, criticism), the 'fair use', on the other hand, is an open-ended system which does not impose a scope, and is more flexible. Instead, four factors are introduced to help users determine whether an act of reproduction (including copying) is fair.

⁵¹ See www.wipo.int/clea/docs/en/wo/wo001en.htm. Source: National Endowment for the Arts (NEA) Artforms: A Copyright Primer for Artists.

- ❑ The effect of the use upon the potential market for, or the value of, the copyrighted work. If the use will compete in the market against the copyrighted work, it is less likely to be considered fair use.

Examples of activities that may be excused as fair use or fair dealing include: distributing copies of a picture from a book, periodical, or newspaper in class for educational purposes; and imitating a work for the purpose of parody or social commentary.

What is meant by ‘in the public domain’?

Works are in the public domain once the copyright term has expired or if the work was never copyrightable. If a work is in the public domain, it **can be used for any purpose by anyone**.

Many people believe that any material on the **Internet** is in the public domain. This is a misunderstanding. Material posted on the Internet is often copyrighted, even if there is no copyright notice.

Under current IP systems, **traditional** crafts and visual arts are often regarded as being in the ‘public domain’. However, indigenous peoples, local communities and other custodians of traditional cultural expressions (or, ‘expressions of folklore’), strongly criticize this characterization, arguing that their cultural expressions are protected by indigenous and customary laws and are not therefore in the ‘public domain’. See also ‘Traditional knowledge and cultural expressions’ on pages 94–95.

How can artisans and visual artists know if something is in the public domain?

Finding out what is ‘free’ is not always easy. First, one has to study the country’s **law** in order to know when and for how long a work is protected under copyright. If something is over 100 years old, chances are big that it is in the public domain.

For more recent works, a good way to start may be to check if the work is listed in any industry **sourcebook**. Many licensing encyclopaedias for artists’ rights record works which are still under copyright, as well as other useful information, such as licensors, licensees, current properties and products, licensing agents, trade associations, etc. **Artists’ rights groups** may also offer assistance for verifying whether a specific work is in the public domain or not.

Can a visual artist make a painting or sculpture based on a photograph?

Making a painting or a sculpture based on a photograph may or may not infringe the photographer’s copyright, depending on:

- ❑ Whether there is copyright in the photograph (a photograph which is in the public domain can be freely used);
- ❑ Whether the actual photograph itself, and not the scene it depicts, has been copied in the painting or sculpture (only the expression of an idea, and not the idea itself, is protected by copyright);
- ❑ How much of the specific elements and unique style of the photograph are taken (there is only infringement if there is actual copying); and
- ❑ Whether there is fair use or fair dealing (for example, a painting that is meant as a satire of photograph and not intended to commercially profit from it, can be excused as fair use).

Example: Jeff Koons, an American artist, purchased a photograph of a couple holding eight puppies and created wooden sculptures, which were almost an exact copy of the photograph. Koons only added some flowers on the head of the man and the ears of the woman and put some character noses on the dogs. The photographer, who saw the sculptures at the art museum in San Francisco, sued Jeff Koons for infringement of his copyright in the original photograph. The courts held that Koons' sculptures infringed the photographer's copyright.

Case study: In chapter 6, the case study 'About making a painting from a picture', pages 124–125, describes in more detail how far an artist can go in borrowing ideas from other artists.

If artisans or visual artists sell their work, do they lose their copyright over it?

Merely selling a work protected by copyright does not automatically transfer copyright to the buyer. **Copyright in a work remains with the artisan or visual artist unless he or she expressly assigns it** by written agreement to the buyer of the work. In some countries, the copyright law prohibits the assignment of economic rights under copyright. In these countries, the only way to proceed is to license the entire bundle of economic rights on an exclusive basis. Normally, **moral rights cannot be assigned** or transferred, but the author may waive their exercise.

The artisan or visual artist will generally **retain** the following rights:

- Part or all of the moral rights;
- The right to make reproductions;
- The right to make derivative works;
- The right to make another identical or very similar work.

However, in some countries, the artisan or visual artist who sells a work may **lose** some of his or her exclusive rights. For example, the buyer of a protected work may have the right to destroy, sell, transfer or display the work. Which rights will be lost or kept varies significantly from country to country.

Is there such a thing as international copyright protection?

Not exactly. However there are various international treaties covering copyright. The most important of these is the Berne Convention for the Protection of Literary and Artistic Works.⁵² According to this Convention, artistic works are protected without any formalities in all the countries party to the Convention.⁵³ This means that if an artisan or visual artist is a national or resident of a country party to that Convention,⁵⁴ or has published the work initially in one of the member countries, his or her copyright will be **automatically protected in all other countries that are party to the Berne Convention.**

⁵² See www.wipo.int/clea/docs/en/wo/wo001en.htm.

⁵³ At the date of the preparation of this Guide, 151 countries belonged to the Berne Convention. See: www.wipo.int/treaties/documents/english/word/e-berne.doc.

⁵⁴ Or member of the World Trade Organization (WTO) bound by the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

How can artisans and visual artists use their copyright to earn income?

Artisans and visual artists who own copyright can choose to sell (‘assign’ or ‘transfer’) either all or part of their bundle of rights to different people, for different geographical areas and for different periods of time. In most countries, to be fully effective, an assignment of copyright must be in writing and must be signed by the artisan or visual artist transferring the copyright.

Artisans and visual artists can also ‘license’ either all or part of their copyright to others. It is advisable to have all license agreements in writing. A license can grant permission, against payment, for certain specified uses, markets, territories, periods of time – without selling or assigning the copyright. Examples of licenses granting specific permission are:

- ❑ Permission to use photographs in a particular magazine, book or other publication, or to display them in a particular venue;
- ❑ Permission to copy and distribute visual reproductions of a work such as posters, prints, or post cards.

In many cases, copyright may be collectively licensed on behalf of a large number of copyright owners through ‘collecting societies’ (see below). More information on licensing is given under ‘Commercializing intellectual property’ on pages 99–103.

TIP – As a rule of thumb, licensing should be the preferred option, and not sale or assignment of the copyright.

Case study: The case study on Mary Engelbreit illustrates the potential benefits that can be reaped from licensing copyrighted works. See chapter 6, pages 122–124.

What is collective management of copyright?

In practice, it is often difficult or simply impossible for a single artisan or visual artist to control all the many diverse uses that may be made of his or her works and to ensure efficient and cost-effective management of his or her rights. At the same time, it is also often quite difficult for someone who wishes to reproduce artistic works to trace the artists or their heirs in order to obtain the necessary authorizations for such reproduction or copying.

A number of countries have an infrastructure in place – called a ‘society for collective management of copyright’ – that makes the task easier by acting as an intermediary between users and the right owners. Such collective management organizations act in the interest, and on behalf of, the owners of copyright. They monitor the uses of works, negotiate all authorizations and remuneration with users, and distribute copyright royalties to their members, according to established rules.

In the field of visual arts, these organizations can handle all iconography works: plastic arts works (painting, drawing, sculpture), graphic creation (illustrations, caricatures, animated drawings, comics, graphic designs), photography, video creations and graphic info-creations.

Collective management societies for three-dimensional artworks still do not have the same economic power as their musical or audio-visual counterparts.

Yet, today, collective management of the rights of the creators of visual arts or crafts boasts around 80 societies around the world. They earn more than US\$ 100 million annually for artists and photographers.⁵⁵

More information on collective management of copyright is available at www.wipo.int/about-ip/en/collective_mngt.html.

What are resale rights?

In some countries, creators of certain types of works of art, such as photographs, paintings, drawings, prints, lithographs, collages, sculptures, engravings, tapestries, ceramics or glassware, have the right to **receive a percentage of the sale price if the work is resold**. Such right is referred to as ‘resale right’, or ‘droit de suite’. The share generally varies from 2% to 5% of the total sales price. The resale right exists for as long as the work being sold is subject to copyright protection and generally applies to all sales other than those between private individuals.

Example: François is a French painter. A collector has just sold one of his paintings for 100 times the original price in an auction in Paris. French copyright law entitles François to receive a royalty on the resale and thus to share in the enhanced value of his work.

The resale right is available in many countries around the world.⁵⁶ It is often administered by collective management organizations.

Are there any copyright issues to pay attention to before lending works for public display?

Artisans and visual artists who lend their works of art to museums, art galleries or art publishing houses, will have to deal with some practical copyright issues. For instance, an art gallery may borrow artworks and want to reproduce those artworks to promote the exhibition (e.g. in catalogues or pamphlets) or to produce merchandise related to the exhibition. Artisans and visual artists are strongly advised to seek practical and legal advice before granting permission for such acts; otherwise they may lose control over part of the bundle of rights available to them under copyright law.

When is copyright infringed?

Copyright in a work is infringed when someone, without permission of the owner of the copyright, exercises one or more of the exclusive rights of the copyright owner over that work. There is also copyright infringement where the moral rights of the creator are violated. See ‘What is infringement of intellectual property rights?’ on pages 106–107.

What to do in case of copyright infringement?

It can be difficult for artisans and visual artists to identify the infringer, and taking effective steps to stop infringement can be very expensive and complex. ‘Enforcing intellectual property rights’ on pages 105–109 explain the remedies

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- 55 The royalty collection of European societies represents more than 90% of the figure for the whole world. This is because of strong copyright legislation, especially in the area of rights in which collective management is compulsory (i.e. above all, private copying, reprography and resale rights).
- 56 The largest market of resale rights is the EU. Outside the EU, over 60 countries recognize the resale right, including the vast majority of the candidate countries for accession to the EU.

available to stop infringement. Remedies generally involve working closely with an IP expert skilled in copyright practice, who will help to devise and take the necessary steps. Collective management societies and other non-profit organizations⁵⁷ may in some cases be prepared to act on behalf of individual copyright owners whose copyright has been infringed.

Industrial designs

What is an industrial design?

An industrial design refers to the **aesthetic aspects** or **outward appearance** of a product. It may consist of three-dimensional features, such as the shape or configuration of a product; two-dimensional features, such as patterns, lines or colours; or a combination of such features.

Can design embodied in crafts and visual arts products be protected as an industrial design?

Only the **aesthetic aspects** or the **distinct outward appearance** of a product can be protected by an industrial design. Industrial designs may be embodied in a wide range of crafts and visual arts products such as watches, jewellery, housewares, architectural structures, textile, tapestries, shoes, leisure goods, toys, furniture, ceramics, pottery and packaging.

Examples: The shape of a lamp, the design of an earring or the ornamentation of a teapot may be protectable as industrial designs.

What rights does an industrial design grant?

An artisan or visual artist who owns the rights over an industrial design embodied in a product can **prevent** all others from producing, importing, selling, or distributing products that have an appearance which is identical to, or does not substantially differ from, that of the protected appearance.

Example: Maria has designed a teapot with an innovative design which she has registered at the IP office of her country. As a result, Maria has exclusive rights over teapots bearing that design. This means that if Maria discovers that a competitor is making, selling or importing teapots with the same or a very similar design in her country, she has the legal right to prevent the competitor from using her design and may also be able to obtain ‘damages’ which her business has suffered from the unauthorized use of that design.

Why are industrial designs relevant to crafts and visual arts?

Design protection is, generally speaking, relatively easily accessible to individual artisans and artists, in both industrialized and developing countries. There are good reasons for artisans and visual artists to protect the distinctive and original appearance of their products:

□ **Designs attract and win customers** – A well-designed chair is not just a pleasure to sit on, but a pleasure to look at as well. This can be said for

⁵⁷ Such as the National Indigenous Arts Advocacy Association in Australia, for instance.

almost every craft or visual arts product: its success in the marketplace will depend not only on its functionality, but also on its visual appeal. This is particularly true in areas where there is a wide range of products performing the same function, which is generally the case with craft products.

- ❑ **Designs are a competitive tool** – Because an industrial design gives exclusivity over the use of it, it gives advantages in competition.
- ❑ **Successful designs may provide additional income**, as they can be licensed for use by others (See ‘Commercializing intellectual property’ on pages 99–103).
- ❑ **Designs are business assets** – A certain style of designs may become synonymous with the brand image of a company, which can become an asset with a significant monetary value.

How can design protection be obtained?

In most countries, an industrial design must be **registered** in order to be protected under the industrial design law.⁵⁸ The design protection is valid only for the country or region in which registration has been duly obtained. (For protection abroad, see ‘Protecting intellectual property abroad’ on pages 95–99.)

In some countries, mostly in Europe, it has become possible to obtain limited industrial design protection for **unregistered designs**. Such an unregistered design provides artisans and visual artists an opportunity to test market their products before going through the effort and expense of registering them. Once a product is made public, designers have up to 12 months to register their design. The protection provided for unregistered designs is **limited**, however, and is **more difficult to enforce**.

Are there designs which cannot be registered?

In most countries, certain designs cannot be registered. These are:

- ❑ **Technical features or useful functions of a product** – An industrial design is primarily of an aesthetic nature and only protects features that provide visual appeal. It does not protect a design which is essentially or entirely due to the technical features of the product. Such technical features may be protected by other types of IPRs, such as patents, utility models or trade secrets.

Example: An artisan develops a new kind of folding chair. The way the chair folds, its lightweight construction, its strength and its durability are all functional aspects, which may qualify for patent protection. The industrial design features could include the shape or configuration of the chair, and any patterns or ornamentation on it.

- ❑ **Official symbols** or emblems (such as the national flag);
- ❑ Designs which are contrary to **public order** or **morality**;
- ❑ Some countries exclude **craft products** from design protection – these countries require that a product be made by industrial means;
- ❑ Designs which are **not applied to an article or product**: for example, the design of a house. But designs of doors and windows are generally registrable.

⁵⁸ In some countries, mostly in Europe, protection may also be available for **unregistered** industrial designs.

Depending on the national legislation, there may be further restrictions.

Are there any specific conditions or criteria for registration of an industrial design?

As a general rule, in most countries to be registrable, a design must be ‘**new or novel**’ and ‘**original**’. Generally, ‘**new or novel**’ means that no identical or very similar design is known to have existed before anywhere in the world. A design is considered to be ‘**original**’ if it has been created by the artist or designer independently and is not a copy or imitation of an existing design.

In most European countries mere novelty is not enough: the design must also have an ‘**individual character**’, which means that the design must produce an overall impression that is different from the overall impression produced by any prior design.

What is the registration process?

To register a design, a prescribed application form has to be completed, and a specified number of copies of the **representation** of the design included. The representations may be in the form of drawings, photographs and/or samples of the design. Once an application for registration of a design has been filed, it is not possible to modify the visual aspect of the relevant product. An **application fee** also has to be paid. Some countries do a **formalities check** only – namely, that the application has been duly filled in and prescribed fees have been paid. Other countries also do a **substantive examination**, covering the absolute conditions specified in the design law concerning exclusions from registration and the relative conditions concerning **novelty, originality and/or individual character**. When a design is accepted for registration, then it is **registered** in the official design register, and the design is **published** in an official publication of the design registry/office.

In many countries, any person may request that a registered design be invalidated or cancelled if it does not satisfy the legal criteria for registration.

TIP – Many IP offices scrutinize design applications for novelty and/or originality. Therefore, it is wise to conduct a **preliminary search** of existing industrial designs in the relevant part of the designs register, before preparing an application.

Are there alternative ways to protect an industrial design?

Depending on the relevant national laws and the kind of design, an industrial design may also be protected under **unfair competition** law, as an artistic work under **copyright** law, or in some very specific situations as a **trademark**.

Can there be dual protection by industrial design rights and copyright?

In some countries, industrial design and copyright protection can exist simultaneously, provided the conditions for each type of protection are satisfied. In other countries, the laws specify that once an owner chooses one kind of protection, he or she can no longer invoke the other. In still other countries, industrial design and copyright protection are mutually exclusive. It is advisable to consult an IP expert to be sure of the situation in a particular country.

The advantage of copyright protection is that it arises automatically with the creation of an original design: no formalities (such as registration) are

necessary to establish or secure copyright and there are no fees to pay. In practice, however, a creator may encounter serious problems while trying to prove that he or she is the owner and/or that the design is original.

The advantage of an industrial design registration is that it provides stronger protection. Normally, there is industrial design infringement if the infringing product is not substantially different from the registered design. This means that infringement of an industrial design registration can occur even when the designer of the infringing product has not copied, and has created his or her own design entirely independently. **Copyright protection, on the other hand, protects only against actual copying.** This can be difficult to prove, as the copyright owner must be able to show that the infringer had access to the copyright work and has reproduced a substantial part of it. See also ‘What is infringement of intellectual property rights?’ on pages 106–107.

TIP – As general rule, artisans and visual artists should:

- Register a design** at the industrial design office, even if they have copyright protection for the original work;
- Mark the article with the copyright symbol** and register and deposit the product at the copyright office (when such office exists), even if they have registered the design;
- Consult an IP expert** if there is any doubt about the way to proceed.

Can there be dual protection by industrial design rights and trademark rights?

Under many national laws, **three-dimensional objects, compositions, or shapes** (‘3D shapes’), can also be registered as trademarks, provided they perform the trademark function.

Three-dimensional designs that function as trademarks are often seen in relation to **packaging**, when a novel shape becomes synonymous with an enterprise’s products and may then be registered as a three-dimensional trademark. In some countries, however, once trademark protection has been given to an industrial design, then it can no longer be protected as a design in that country. At the same time, the three-dimensional trademark may have to continue to be protected as a design abroad, if trademark protection is not available in one or more countries of interest to the owner of the design or trademark.

How long does industrial design protection last?

The total duration of protection for an industrial design varies from country to country, but, to begin with, is usually one, five or 10 years, with the possibility of further periods of renewal of five years each time, usually adding up to **10, 15 or 25 years** in all.

How long and where should an industrial design registration be maintained?

Maintaining an industrial design registration is generally speaking relatively inexpensive. It is worth keeping it in force as long as the product is on the market and in all the countries where it is marketed.

An industrial design is generally in force only in the country(ies) where registration has been applied for and granted. Artisans or visual artists who intend to export products bearing an original design, or intend to license the manufacturing, sale or export of such products to other enterprises in foreign countries, should consider registering their designs in those countries.

When should artisans and visual artists apply for registration of an industrial design?

One should apply to register an industrial design when the design of a product is **final**, and **before the product is marketed or the design somehow becomes known to the public**.

Special attention should also be given to timing when filing an industrial design application abroad, since the **‘priority period’**⁵⁹ in most countries is only **six months from the date of filing** the first application (see also ‘When to apply for protection abroad?’ on page 96). In some countries it is even required that registration abroad be commenced **at the same time** as in the home country.

How important is it to keep the design confidential before registration?

Except in countries where the unregistered design right or grace period is available, **it is absolutely crucial to keep a design confidential prior to filing an application for registration**. Most countries require the design to be ‘new’ or ‘novel’ on a worldwide basis for it to be registrable. A design that has already been disclosed to the public (for example, by advertising it in a catalogue, by showing it in an international exhibition, or by selling products bearing the design) is no longer ‘new’ or ‘novel’ and is, therefore, barred from registration, unless the applicable law has the option of an unregistered design right or provides for a ‘grace period’ (see below). Artisans or visual artists who want to show their design to others before registration are advised to enter into **confidentiality or non-disclosure agreements**.

Only after an application for registration of a design has been filed can artisans and visual artists use the design in advertising the product, or display the product in trade fairs or exhibitions, or sell products bearing that design without loss of design rights.⁶⁰

What is a ‘grace period’?

In some countries, the design law allows for a ‘grace period’ for registration, generally of six months or a year from the moment a design was made public, disclosed or published. If such a grace period is available, then during such a period products bearing the design may be sold, displayed at a trade show, exhibition or fair, or published in a catalogue, brochure, advertisement, etc., prior to filing an application. However, it is generally advisable to keep the design secret or confidential until an application for design registration is filed

59 Someone who has already applied for design registration in another country in connection with the same design can quote **priority**. Thus, disclosure of a design that has taken place during the period of priority does not prevent from obtaining the design right abroad. The priority period is **normally six months** from the day the first application is filed.

60 An application is always in the public domain, but the applicant can request that the part of the application displaying the design itself, that is, an illustration or model, be kept **secret**, but for not longer than six months, from the application date, or priority date, if priority has been requested. This may be useful, for example in fashion, where articles may not be seen before they appear in the shops.

in all countries of potential interest. It must also be noted that artisans and visual artists will have no exclusive design rights in the design during the grace period.⁶¹

Can a design be displayed at an exhibition or fair prior to protecting it?

In countries where there is a **grace period**, public display will generally not prevent the design from being registered, provided it was not made public earlier than the maximum grace period available under the national design law. In most other countries there is likely to be a **special exception** in the case of exhibitions and fairs, allowing designers to display their design in an '**internationally certified exhibition**' up to six months prior to applying for design protection. However, not all exhibitions qualify as 'internationally certified exhibitions'. It is, therefore, advisable to file an application prior to exhibiting the designs in an exhibition or fair, whether national or international.

How much does it cost to protect and manage an industrial design?

Costs vary significantly from country to country. Several different types of costs may be involved.

- ❑ There will be **registration fees** to be paid to the IP office(s) concerned. These fees vary depending on the number of designs to be registered and the number of countries in which registration is sought. For example, an application for a single Community design in the EU countries costs 350 euros, rising to 1,950 euros if the application contains 10 designs. The costs of a 'typical' industrial design registration (protection for five designs in 11 countries) using the international registration system offered by the Hague Agreement is around 900 Swiss francs.
- ❑ There may also be costs associated with hiring the services of an **IP agent** to assist in the registration process.
- ❑ Most countries require the payment of **renewal fees** to maintain the exclusive rights in an industrial design.
- ❑ There may be costs associated with **monitoring** the use of the design in the market to check whether the design is being imitated or copied by others.
- ❑ If competitors infringe the industrial design, it may be necessary to take legal action, in which case there will be **enforcement costs**.

Who owns the rights over an industrial design?

The **creator** of a design is usually the first owner of the design, unless there are special circumstances.

In most countries, if an **employee** has developed a design under the terms of an employment contract, the design rights will belong to the employer.

In most countries, if a design is produced on **commission** for the use of a person or company, then the one who commissions the design is the owner of the rights in that design. If the national design law provides flexibility with regard to ownership of design rights in a commissioned design, it would be prudent for a designer to avoid misunderstandings at a later date by clarifying the issue of ownership of rights in a written contract with the person or company who commissioned the design.

⁶¹ The design may, however, be protected under copyright or unfair competition law, depending on the provisions of the relevant national legislation.

Is it useful to use a design notice?

While there is no legal obligation to do so, it is generally advisable to affix a notice to a design in order to indicate that it is registered as a design. In some countries a court could award a financial compensation if someone is found to be infringing a design which is marked with a design notice. In the absence of such a notice, the court may be able only to stop the infringer from continuing to use the design in the future, but not to compensate the owner of the design rights for losses suffered in the past.

The proper notice is generally a capital 'D' inside a circle, the name of the design's owner on the product, its label or packaging, and the year of registration.

How can infringement of design rights or copyright of others be avoided?

- ❑ **Putting oneself in the shoes of the other.** Artisans and visual artists should look at the designs of their competitors. If they would not feel comfortable taking their competitor's idea and the credit for that idea and its resulting product, this would be a good indication of likelihood of infringement.
- ❑ **Being creative.** The only way for artisans and visual artists to truly avoid design or copyright infringement is to create their own original designs, without drawing 'inspiration' from designs of competitors.
- ❑ **Searching the design and copyright register.** Well before bringing a new design to the market, artisans and visual artists should search the design register and, where available, the copyright register, to make sure that the design they intend to use, or a similar one, is not already registered by another person. A design register is a database containing details of all designs registered, published by the IP office. Most design registers are open and accessible for inspection, sometimes subject to a written request and the payment of fees. Some countries also have a copyright register which records copyright on an optional basis. Searching such registers is certainly useful, but artisans and visual artists should remember that a work is protected automatically by copyright, whether it is registered or not.
- ❑ **Getting permission.** In case of doubt, it is best to seek permission to use someone else's designs.

How can artisans and visual artists enforce their design rights?

Enforcing any IPR may be a complex issue, and it is usually advisable to seek professional assistance from an IP lawyer. See further 'Enforcing intellectual property rights' on pages 105–109.

The main responsibility for identifying copying, imitation or infringement of an industrial design lies with its owner. In other words, **artisans and visual artists are responsible for monitoring the use of their designs in the market, detecting any imitators or counterfeiters and deciding whether, how and when to take action against them.**

Trademarks

What is a trademark?

A trademark is any **distinctive sign** that identifies the products and services of a particular business and distinguishes them from those sold or provided by others. A trademark may be a word, letter, numeral, drawing, picture, shape, logotype, label or any combination thereof.⁶²

Why are trademarks relevant for crafts and visual arts?

Trademarks can be used by artisans and visual artists for several purposes, including the following:

- ❑ **Promote product sales.** By communicating a positive message to the consumers, a trademark will increase the sales of the product.
- ❑ **Cement customer loyalty.** Craft and visual arts products have to face competition from other products which are frequently identical or similar, or can be good substitutes for them. A trademark allows consumers to distinguish the products of an artisan or visual artist from those of the competition, and to make them readily recognizable. A trademark also serves to create lasting positive relations – and often emotional attachments – with clients, thanks to an image or reputation that is continuously promoted.
- ❑ **Facilitate customer decision-making.** In the case of crafts, consumers are often faced with the problem of choosing between products that are similar or almost identical. Trademarks help consumers to select the product with the qualities they desire. By using trademarks in advertising (product promotion, literature, packaging and point of sale displays), for example, it is possible to communicate information ‘in a nutshell’ about the product.
- ❑ **Increase revenues from product sales.** Customers are often willing to pay a higher price if they feel that the product and its quality and features – as communicated by an effective trademark – are worth the higher price.
- ❑ **Help in gaining or maintaining the market share.** Trademarks facilitate the introduction of new products, or the repositioning of an existing product. A good trademark and advertising campaign help artisans and visual artists to communicate with distant customers spread over a much larger territory than would be possible otherwise.
- ❑ **When successful, provide additional income.** A trademark can be synonymous with the branding and image of an artisan’s or visual artist’s business and can become an **asset** with a monetary value that could increase. Other companies or individuals may be interested in marketing products under a high-value trademark owned by an artisan or visual artist, especially if that trademark has become well-known.

⁶² In some countries, **advertising slogans** are also considered trademarks. An increasing number of countries also allow for the registration of non-traditional forms of trademarks such as single **colours**, **three-dimensional signs**, **sounds or smells**. But many countries have set limits to what can be registered as a trademark, generally only allowing for signs that can be represented graphically.

Case study: For a case study on the use of trademarks and a successful marketing strategy, see ‘Maquí – A trademark story’, pages 118–119 in chapter 6.

Why should artisans and visual artists protect their trademarks?

Proper protection gives the trademark owner the exclusive right **to prevent others from marketing the same or similar type of products under the same or a confusingly similar mark.**

In addition, a trademark may be licensed to others, or may be the basis for a franchising or merchandising agreement, **provided it is first duly protected.** See ‘Commercializing intellectual property’ on pages 99–105.

How is a trademark protected?

Trademark protection can be obtained through its **registration** at the trademark office(s) or, in some countries, through **use** of the trademark. If a trademark is registered, it is easier to oppose the deliberate, unauthorized use of a trademark (known as ‘infringement’), as well as to proceed against ‘grey market’ products (known as ‘parallel imports’).⁶³

To register a trademark, an application has to be filed in the prescribed form at the trademark office of the country.⁶⁴ The application generally includes the name and address of the applicant, the class(es) of goods and/or services for which registration is sought, a list of goods and/or services, and the trademark itself, including its representation in the prescribed form (such as a photocopy or sample). The services of a trademark agent are often very useful (and in some countries compulsory).

It is wise to register well before the market launch of a new product, because it may be that a desired trademark is in fact not registrable, in which case all expenditures incurred in advertising and other promotional activities would be completely wasted.

Is it compulsory to register a trademark?

While not compulsory, it is highly advisable to do so, as the benefits of trademark registration are substantial:

- Registration confirms the claim of ownership of the mark and also puts the competitors on notice. When trademark registration is applied for, the trademark will be recorded in the trademark register. Competitors will find it while clearing their own proposed mark – so registration helps to **avoid conflicts.**
- Registration grants the **exclusive right** to use the mark on, or in connection with, the products or services set forth in the registration.
- In case of a dispute, registration is helpful to **prove ownership** of the trademark.
- Filing an application for registration of a trademark in a country may be used as a basis for **seeking registration in other countries.** (See the Madrid System, page 97.)

⁶³ See ‘What is parallel importation? What is exhaustion of intellectual property rights?’ on pages 98–99.

⁶⁴ A list of national trademark offices is available online at www.wipo.int/news/en/links/ipo_web.htm.

Can artisans and visual artists register their name as a trademark?

Yes, they can register their name as a trademark, provided the trademark office considers it ‘distinctive’. As to whether a name is distinctive or not depends on a variety of factors. As a rule of thumb, the more common the name, the less likely it is to be considered distinctive, as there may be many others with the same name.

Example: Mikey Senkarik makes oil paintings. As an artist, she uses the name ‘Mikki Senkarik’, because Mikey sounded too much like a man or an entertainment park. Mikki has registered her name as a trademark in various countries and signs all her works under that name. ‘It is important to refine the signature’, says Mikki. ‘Make it something special, personal, and recognizable. Your signature is really important. It is part of your very image.’⁶⁵

Is the registration of the trade name of a business sufficient for getting trademark protection as well?

Many artisans and visual artists believe that by registering their business and its trade name at the business registry, their trade name will also be automatically protected as a trademark. This is a rather common misperception. It is important to understand the difference between trade names and trade marks.

A trade name is the full name of a business, such as ‘Blackmark International Ltd’, and it identifies the company. It often ends with Ltd, Inc. or another abbreviation denoting the legal character of the company.

A trademark is what identifies the product(s) of a business. An artisan, craft enterprise or visual artist may have various trademarks. For instance, Blackmark International Ltd. may sell one of its products as BLACKMARK but another as REDMARK.

A trade name, or part of it, can also become a trademark if it is used (and registered) as a trademark.

TIP – Register your trademark whether you have registered your business name or not! Registering a business and its name with the business registry does not protect the trade name as a trademark, even if the two are identical.

What are the main reasons for rejecting an application for trademark registration?

While choosing a trademark, it is helpful to know which categories of words or signs are usually not accepted for registration. Applications for trademark registration are usually rejected in the following cases:

- Generic terms.** For example, if an artisan intends to register the trademark HAMMOCK to sell hammocks, the mark would be rejected since ‘hammock’ is the generic term for the product and other people must be allowed to use that term to identify hammocks.

⁶⁵ The success story of Mikki Senkarik can be read at www.senkarik.com/index.html and www.artcalendar.com/Senkarikarticle.htm.

- ❑ **Descriptive terms.** These are words that are usually used in trade to describe some important feature of a product. For example, the mark CUTTING is likely to be rejected for marketing knives as being descriptive. In fact, it would be considered to be unfair to give any single knife manufacturer exclusivity over the word ‘cutting’ for marketing knives. Terms such as RAPID, BEST, CLASSIC or INNOVATIVE are likely to give rise to the same objection.
- ❑ **Deceptive trademarks.** These are trademarks that are likely to deceive or mislead consumers as to the nature, quality or geographical origin of the product. For example, marketing a non-gold item of jewellery under the trademark PURE GOLD would probably be rejected.
- ❑ **Marks considered to be contrary to public order or morality.** Words and illustrations that are considered to violate commonly accepted norms of morality and religion are generally not allowed.
- ❑ **Flags, armorial bearings, official hallmarks and emblems of states and international organizations** that have been communicated to the International Bureau of WIPO are usually excluded from registration.⁶⁶ For example, the Vietnamese flag may not be registered for marketing Vietnamese silk weave.
- ❑ **Common names and surnames.** Common names and surnames are normally not registrable, since they are usually not considered to be distinctive. As for less common names and surnames, registrability generally varies from country to country.
- ❑ **Trademarks that are identical or confusingly similar to an existing trademark.** Having two identical (or very similar) trademarks for the same type of products could cause confusion among consumers. Some trademark offices check for conflict with existing marks as a regular part of the registration process while many others only do so when the trademark is challenged by another person after publication. In either case, if the office considers a trademark to be identical or confusingly similar to an existing one for identical or similar products, it will be rejected or cancelled.

What makes a good trademark?

Finding or creating an appropriate trademark for a business is no easy task. There are specialized consultants whose main service is to develop an appropriate trademark for others.

First and foremost, a proposed mark should obviously **not be in conflict with other existing marks**, and must meet the **legal requirements** for protection. Above all, it is important to come up with a mark that is **sufficiently distinctive** to be worth protecting. The more distinctive the mark, the greater the level of trademark protection. Distinctiveness will also enhance recognition by consumers. The following commonly used criteria should be applied:

- ❑ The sign should be easy to read, spell, pronounce and remember in all relevant languages;
- ❑ It should have no adverse meaning in slang or undesirable connotations in the relevant languages in the target market;
- ❑ It should be suitable for use in export markets and also with no adverse meaning in relevant foreign languages;

⁶⁶ In accordance with Article 6ter of the Paris Convention for the Protection of Industrial Property.

- ❑ It should not create confusion as to the nature of the product; and
- ❑ It should be easy to use in all advertising media.

Studies have shown that most of the (word-based) excellent trademarks fall under one of the following categories:

- ❑ **Coined or fanciful words** – These are invented words without any real meaning in any language (e.g. *Kodak* or *Exxon*). Coined words have the advantage of being easy to protect, as they are more likely to be considered distinct. On the negative side, however, it may be more difficult to establish a link in the minds of the consumers between the product and the mark, thus requiring greater use of resources in advertising the product for developing such a link.
- ❑ **Arbitrary marks** consist of words that have a real meaning in a given language but that meaning has no relation to the product itself or to any of its qualities (e.g. *Apple* for computers, or *Camel* for cigarettes). As with coined words, the level and ease of protection of arbitrary word marks is generally high, as there is no direct association between the mark and the product. On the negative side, the very attribute which facilitates its registration as a trademark, requires much greater marketing effort to create an association between such a mark and the product concerned in the mind of the consumer.
- ❑ **Suggestive marks** are marks, which hint at one or some of the qualities or attributes of the product (e.g. *Bloomers* for a flower shop). The appeal of suggestive marks lies in the fact that they act as a form of advertising and may create a direct association in the mind of consumers between the trademarks, certain desired qualities and their products. A related risk, however, is that the trademark office may consider a suggestive mark to be too descriptive or not sufficiently distinctive to meet the criteria for trademark registration.

How long does it take to register a trademark?

The time required for the registration of a trademark will vary significantly from country to country, generally ranging from three months to two years, depending, among other things, on the type of examination conducted by each trademark office.

How long is a registered trademark protected?

The term of protection varies (it is usually 10 years), but a trademark registration may be **renewed indefinitely**, each time for similar periods, against payment of the renewal fees. Trademarks which have not been used for a certain period of time (usually three to five years) may be cancelled.

How much does it cost to protect and manage a trademark?

- ❑ There may be costs associated with the **creation of the sign** to be used as a trademark (specifically if artisans or visual artists subcontract its creation to consultants).

- ❑ There are costs associated with the **registration process**. These vary depending on the number of countries and the class(es) of products or services for which protection is sought. The national or regional trademark office will be able to provide details of applicable fees.⁶⁷
- ❑ Using a professional **trademark agent** to assist in the registration processing involves additional costs but generally saves significant time and energy.
- ❑ There will be costs associated with **using** a trademark: for example including it in labels, packaging, brochures, advertising, displays, etc.

The costs may appear high, but one should remember that:

- ❑ Artisans and visual artists generally have only one or a few trademarks to register (unlike industrial designs, where the registration may have to be done for each of the new designs). Once registration has been obtained, the trademark **can be used in connection with all the products and services for which it is registered**.
- ❑ It is possible to **share the costs**. Collective marks, for instance, are the property of an association. All members of the association use the same trademark in order to be identified with a standard of quality and other requirements laid down by the association. This is also true for certification marks.

How to find out if a proposed trademark is likely to conflict with registered trademarks? What is a trademark search?

Before registering a trademark, artisans and visual artists should carry out a proper **trademark search**, either directly or by hiring the services of a trademark agent. It is important to bear in mind that any such trademark search is only preliminary. It is difficult to make sure that a proposed trademark is not ‘confusingly similar’ to an existing trademark. This is why guidance from an experienced trademark agent may be very helpful.

Before going to an agent, artisans and visual artists may wish to check whether their national trademark office (or a commercial database company) has a free on-line trademark database that they may use to conduct a preliminary search on their own. A list of trademark databases is available on WIPO’s website at <http://commerce.wipo.int/databases/trademark/output.html>.

Is trademark registration valid internationally?

No. Like all IPRs, trademark protection is **territorial**, meaning that in general it is protected only in the country in which protection has been granted (unless the mark is considered to be a ‘well-known mark’).⁶⁸

Should artisans and visual artists register their trademarks abroad?

All the main reasons for registering a trademark in the home country also apply to the direct or indirect commercialization of craft and visual arts products in

⁶⁷ The Madrid System of international registration of trademarks charges a basic fee of 650/900 Swiss francs (US\$ 475/650) for three classes of products and services plus a complementary fee for each contracting party designated – ranging from 70 Swiss francs (US\$ 50) to 1,000 Swiss francs (US\$ 727). For more details, see www.wipo.int/madrid/en/index.html.

⁶⁸ There is no clear and uniform definition of a ‘well-known mark’, but the WIPO Joint Recommendation concerning Provisions on the Protection of Well-Known Marks establishes a non-exhaustive list of factors which may assist competent authorities to make such a determination. For more information, see www.wipo.int/about-ip/en/development_iplaw/index.htm.

foreign markets. If artisans or visual artists are currently engaged in **export** operations or intend to do so in the near future, it is highly advisable that they register their trademark abroad.

How can a trademark be registered abroad?

This can be done either through single applications in each country, or through regional or international applications. See ‘Protecting intellectual property abroad’ on pages 95–99.

If an artisan or visual artist asks or commissions another person or a company to create a trademark, who owns it?

In most countries, a creator automatically owns the copyright over creative or artistic works, such as the artwork of a trademark. Therefore, when the creation of a trademark is outsourced, it is best to clarify issues of copyright (and design rights) ownership in the original agreement and/or to make sure the rights over the proposed trademark are formally assigned to the artisan or visual artist who commissioned it.

Why is it important to use a trademark? What is meant by ‘using’ a trademark?

Trademarks, unlike other forms of IP such as copyright and patents, must be **actively used and defended**. A copyright or patent holder may simply ‘sit on’ his or her creation and prevent its use, but a trademark owner claiming or even registering a trademark who fails to make active use of it, or fails to defend it against infringement, may lose the exclusive right to use it. Artisans and visual artists should actually use their trademark, for the following reasons:

- ❑ In some countries, a trademark is **protected through mere use**, i.e. without any registration.
- ❑ In some countries (such as the United States, Canada, the United Kingdom and other ‘common law’ countries), a trademark **cannot be registered unless, and until**, it has been used by its owner.⁶⁹
- ❑ Other countries (‘civil law’ countries – roughly two-thirds of the world’s nations), usually do not require the use of marks prior to registration. Nevertheless, most countries require that marks be used within a short time after registration, usually three years: otherwise, the **rights may be considered abandoned**, and the registration cancelled.

What is considered as ‘use of a trademark’ varies significantly from country to country. It is generally required to use the mark **‘as a mark’** in respect of particular products or services in the ordinary course of business. Examples of such use are: placing the mark on the products, their containers, displays, tags, labels or associated documents; or displaying the mark in advertising. In some countries, mere use of the mark in advertising is considered ‘use’ of the mark for the purpose of trademark law, even if no products are offered for sale or actually sold in those countries.

⁶⁹ However, in these countries an application for registration of a trademark can be filed if the applicant ‘intends’ to use the trademark.

Certain uses can also cause the loss of trademark rights:

- ❑ If the owner allows the trademark to become generic;⁷⁰
- ❑ If the owner fails to prosecute infringers;
- ❑ If the owner improperly licenses or assigns trademark rights; and/or
- ❑ If the quality or character of the good or service changes too significantly.

How should artisans and visual artists use their trademark?

The use of marks is of no benefit if they are not used properly, in accordance with trademark laws. Artisans and visual artists should use them:

- ❑ **With a trademark notice.** The use of ®, TM, SM or equivalent symbols next to the trademark is not a requirement in every legislation and generally provides no further legal protection. Nevertheless, it will warn possible infringers.⁷¹
- ❑ **As much as possible.** This can be done by applying them directly to a product, to containers in which the product is packaged, or to tags or labels attached to the product, by using them in signs and other advertisements, on letterhead and invoices, correspondence, web pages, etc.
- ❑ **Distinctively.** If a mark is registered as a logo with a specific design or font (typeface), the original font and logo should be used, as far as possible.
- ❑ **Correctly, in advertising.** Each advertisement, press release, label or technical paper artisans and visual artists produce can strengthen the value of their trademarks or destroy them through improper use. Improper use, even if it is innocent or minor, can eventually erode the value of their trademarks.
- ❑ **Through licensing with care.** If artisans and visual artists allow others to use their trademark through licensing, they should monitor its use closely. The licence agreement must set standards concerning the licensee's use of the mark, and the quality of products or services with which the mark will be used (see also 'Why is it important to keep control?' on page 101.)

What should artisans and visual artists keep in mind while using their trademarks on the Internet?

The use of trademarks on the Internet has raised a number of controversial legal problems with no easy or uniform solution. One important problem stems from the fact that trademark rights are territorial (that is, they are only protected in the country or region where the mark has been registered or used), whereas the reach of the Internet is global. This creates problems when different people own identical or confusingly similar trademarks for the same type of products in different countries. Legislation in this area is still largely developing and different countries treat the issue differently.⁷² See also 'IP and product promotion on the Internet', pages 50–51 in chapter 4.

70 Generic terms designate a type of a product or service, without calling to mind any specific manufacturer or provider, and so the average consumer does not realize it is a trademark. Examples of generic words that were originally trademarks are: escalator, cellophane, nylon, cola, tarmac, zeppelin, etc.

71 The ® symbol is used once the trademark has been registered, whereas ™ denotes that a given sign is a trademark; SM is sometimes used for service marks.

72 For more information see the WIPO Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs on the Internet, at www.wipo.int/about-ip/en/development_iplaw/index.htm.

What is a domain name and how does it relate to trademarks?

Domain names are a simple form of Internet address, designed to enable users to find websites on the Internet easily. For example, the domain name ‘wipo.int’ is used to locate the WIPO website at *www.wipo.int*. Over time, domain names have become valuable in their own right as unique identifiers, akin to trademarks. Their value is heightened because there is only one spot for each word as a domain name in a particular Internet address.

The relationship between trademark and domain names raises numerous complex issues. Two things are certain:

- ❑ **Domain name registration does not automatically grant trademark rights.** The registration of a domain name, by itself, does not stop another business from using the name for its products or services.

Example: Tika makes pottery in Nigeria and wants to sell her products through the Internet. She registers the domain name ‘tika.com’. That does not allow Tika to stop others from using ‘TIKA’ for pottery products on-line or off-line. It only means that Tika has the right to use the specific Internet address ‘tika.com’ to locate her website.

- ❑ **A domain name owner can be sued by a trademark owner if the domain name is likely to infringe a trademark or confuse customers.** Disputes occasionally arise between domain name owners and trademark owners on the Internet. An artisan or visual artist who registers a domain name could run into a problem if that domain name legally conflicts with an existing trademark, especially if it is a famous one. Conversely, if a valuable trademark of an artisan or visual artist is being used or ‘cybersquatted’ by another person as a domain name then he or she may take action to stop such misuse of his or her trademark rights.⁷³

Can artisans and visual artists license their trademarks?

Any trademark owner may **allow** another person (called licensee) **to use** his or her trademark in exchange for an agreed payment (a fee or royalty), while **retaining ownership** of the trademark. This is usually done on the basis of a formal licensing agreement.

In practice, trademark licences are frequently granted within broader licensing agreements, e.g. **franchising** agreements, **merchandising** agreements, or agreements including the licensing of other IP rights such as patents, know-how, and some degree of technical assistance for the production of a given item. See ‘What is character merchandising, and why is it useful for artisans and visual artists?’ on pages 103–104 and ‘What is franchising?’ on pages 104–105.

Artisans and visual artists who license their trademarks should always exercise effective **control** over the licensee to ensure that products or services distributed under the mark are of a consistent quality.

Can artisans and visual artists sell or assign their trademark?

Yes, artisans and visual artists can also sell or assign a trademark, with or independently of their business. It may be necessary to deposit a copy of the agreement at the trademark office.

⁷³ In such a case, one option would be to use WIPO’s popular on-line administrative procedure for domain name dispute resolution at <http://arbitrator.wipo.int/domains>.

What should artisans and visual artists do if someone infringes their trademark rights?

An artisan or visual artist who finds another person or enterprise using a trademark that is identical or confusingly similar to his or her trademark, and who feels that he or she may be losing customers and profits as a result, should take legal action to stop such violation. The possible legal remedies are explained under “Enforcing intellectual property rights”, pages 105–109 in this chapter.

Compared with other instruments of protection, trademarks are the most accessible to individual artisans and visual artists. Trademark registration is, therefore, advisable for all those who wish to prevent others from free-riding on their products’ reputation in the market.

Collective marks

What is a collective mark?

Collective marks are marks used to distinguish products or services **provided by a group of enterprises**, generally members of an association. Collective marks are often used to show **membership** in such an association, union or organization.

Example: The Regional Commission of the Crystal Industry in Portugal is the owner of the collective mark ‘Mglass’. Member companies use the mark to promote and publicize their glass products.

What is the difference between collective marks and individual marks?

The main difference is that a collective mark is allowed to be used in relation to products of **different** enterprises which are members of an association, and all of which produce or provide the same or very similar products, whereas an individual trademark is used for product or service provided by just **one** enterprise.

Why are collective marks relevant for artisans and visual artists?

It is not always easy for artisans and visual artists to obtain consumer recognition and customer loyalty. Gaining access to retail stores, local markets and distribution networks and making their works known among consumers require a significant investment that may exceed their budget. Working together, artisans and visual artists can develop a **joint marketing campaign** for their products using collective marks.

- ❑ A collective mark denotes the **common origin** of the products and services from those individual producers or enterprises who use it.
- ❑ Collective marks are often used to **show membership** in a union, association or other organization – for example, ILGWU is a collective mark for the members of the International Ladies Garment Workers Union. Such membership may itself be an incentive to some consumers to buy a product bearing the collective mark.

- ❑ Because the owner of a collective mark is responsible for ensuring compliance with certain standards by its members, the function of the collective mark is also to inform the public about certain **features of the product** which the collective mark signifies.
- ❑ Collective marks are often used to promote products that are characteristic of a given region. In such cases, the creation of a collective mark not only helps to market such products domestically and occasionally internationally, but also provides **a framework for co-operation between local producers**. Craft products, in particular, may have certain characteristics which are specific to the producers in a given region, linked to the historical, cultural or social conditions of the area. A collective mark may be used to communicate such features and become the basis for marketing the products, thus benefiting all producers.

Case study: For a pragmatic illustration of how collective marks work in practice, see the ‘Mglass’ case study, page 129 in chapter 6.

Who can apply for a collective mark? How can it be protected?

In principle, any association of artisans or visual artists which will authorize its members to use the collective mark in relation to certain products or services can apply for a collective mark.

Collective marks are protected through **registration**. The national IP office will provide specific information about the applicable procedures for registration and use of a collective mark in a country.

Most countries require applicants to supply a copy of the **regulations** which govern the use of the collective mark. The regulations generally indicate who is authorized to use the mark, the conditions of membership of the association, the conditions for use of the mark, sanctions against misuse, etc.

The **costs, duration** and **scope** of protection are similar to those of an ordinary trademark (see ‘Trademarks’ on pages 73–82). Since the cost gets distributed over the entire membership of the association, it becomes much cheaper for an individual member.

Who can use a collective mark?

In most countries, use of a collective mark is limited to the **members** of the association that owns the mark. Other persons do not have any right to use the mark, regardless of the quality or characteristics of the products or services which they supply.

Can a collective mark be used together with an individual trademark?

Yes. This allows artisans and visual artists to differentiate their own products from those of competitors, while at the same time benefiting from the confidence of the consumers in products or services offered under the collective mark. Sometimes the regulations of a collective mark contain specific conditions on the use of the collective marks alongside the individual trademark(s).

Can a collective mark be licensed?

Most countries do **not** allow the licensing of collective marks. Only the members of the association which owns the collective mark are allowed to use it.

Certification marks

What is a certification mark?

A certification mark is a mark indicating that the products or services in relation to which it is used are **certified** by the owner of the mark in respect of one or more specific criteria, such as geographical origin, material, method of manufacture of products, standard of performance of services, quality, accuracy, or other characteristics.

Example: The Woolmark symbol is the registered trade (certification) mark of the Woolmark Company. The Woolmark is a quality assurance symbol denoting that the products on which it is applied, are made from 100% new wool and comply with strict performance specifications set down by The Woolmark Company. It is registered in over 140 countries and is licensed to manufacturers who are able to meet these quality standards in 67 countries.



What is the difference between certification marks and collective marks?

Both collective marks and certification marks inform the public about certain characteristics of the products or services marketed under the mark. The main difference between them is that the former may only be used by a specific group of individuals or enterprises, e.g. members of an association, while certification marks may be used by **anybody who complies** with the standards defined by the owner of the certification mark.

What is the difference between certification marks and individual marks?

The fundamental difference between these two marks is that an individual trademark serves to identify an individual trader, while a certification mark serves to guarantee some characteristics of the products or services.

Why are certification marks relevant for artisans and visual artists?

Artisans and visual artists may use certification marks to inform the consumers that their products meet **certain standards**. This may help them to **market** their products on the basis of an **improved image** among the consumers.

Certification marks can be used to certify, for example, that:

- Certain craft or visual arts products are hand-made;
- Certain ecological requirements have been respected in the production procedure;
- The products are made by women;
- No children were employed in the production process;

- ❑ The products are made 100% of recyclable materials;
- ❑ The products are made by an indigenous group and have certain characteristic features.

Case studies: The ‘Toi Iho’ certification mark is a promotional initiative for Maori artisans, visual artists and businesses, and ‘Harris Tweed’ is a certification mark used for cloths that are woven by the islanders of Lewis, Harris, Uist and Barra (Scotland). See chapter 6.

Who can apply for a certification mark?

In principle, any person or organization that authorizes traders to use a certification in relation to certain products or services (which that person or organization itself must *not* trade in) can apply for a certification mark. The person or entity which applies for registration must be considered **competent to certify** the products concerned.

The applicant must also supply a copy of the **regulations** governing the use of the certification mark, which generally must indicate who is authorized to use the mark, the characteristics to be certified by the mark, how the certifying body is to test those characteristics and supervise the use of the mark, the fees (if any) to be paid in connection with the administration of the certification mark system, and the procedures for resolving disputes.

A certification mark is granted and treated in substantially the same way as an individual trademark (see ‘Trademarks’ on page 73).

Who can use a certification mark?

Unlike collective marks, certification marks are not confined to any membership. Any artisan or visual artist who complies with the regulations and produces products, or supplies services, which **meet the prescribed standards**, may use the certification mark.

Can a certification mark be used together with an individual trademark?

Yes. The label used as a certification mark will be evidence that the artisan’s or visual artist’s products meet the prescribed standards for the use of the certification mark.

Geographical indications

What is a geographical indication?

A geographical indication is a sign that indicates that a product originates from a country, region or locality and the **desirable quality, reputation or other characteristics of the product essentially depend on its place of origin**. Most commonly, a geographical indication (i.e. an appellation of origin) consists of the name of the place of origin of the goods. Whether a sign functions as a geographical indication is a matter of national law and consumer perception. Geographical indications and appellations of origin are often used for agricultural products such as wine, cheese or olive oil. However, under the Lisbon Agreement for the Protection of Appellations of Origin,⁷⁴ member States have registered other types of products, including craft products.

⁷⁴ See www.wipo.org/treaties/registration/lisbon.

A geographical indication tells consumers that a product is **produced in a certain place** and has **certain characteristics that are due to that place** of production. It may be used by all producers who make their products in the place designated by the geographical indication and whose products share those particular qualities limited to the climate, soil, or skills nature of the place or geographical region represented by the geographical indication.

Can geographical indications be used for craft and visual arts products?

Many craft and visual arts products have qualities that derive from their place of production and are influenced by specific local factors. Geographical indications can be used for such products, in order to highlight specific qualities of the products that are due to distinctive human factors found in the place of origin of the products, such as specific manufacturing skills and traditions.

Examples: Examples of geographical indications (appellations of origin) applied to craft and visual arts products are ‘Talavera de Puebla’ (Talavera pottery, hand-made in the town of Puebla, Mexico);⁷⁵ ‘Jablonec crystal ware’, ‘Jablonec glass ware’ and ‘Jablonec jewellery’ (from the region of Jablonec and Nisou, Czech Republic).

Why are geographical indications relevant for artisans and visual artists?

A geographical indication indicates to a potential buyer that a given craft or visual arts product is produced in a particular place and has certain **desirable qualities** that are **only found in that place**. Like trademarks, geographical indications may add dynamic marketing power to craft and visual arts products.

Case study: ‘Modranská majolika’ is a geographical indication which is registered in Slovakia for hand-painted pottery made in the town of Modra. The Slovak Folk Majolic co-operative produces pottery from Modra, and promotes the products under the geographical indication ‘Modranská majolika’. See chapter 6, pages 121–122.

Why do geographical indications need protection?

False use of geographical indications by unauthorized parties is detrimental to the interests of consumers and legitimate producers. Consumers, believing that they are buying a genuine product with desirable specific qualities and characteristics, in fact get a worthless imitation. Legitimate producers also suffer damage because valuable business is taken away from them and the established reputation for their products is tarnished.

How is a geographical indication protected?

Geographical indications are protected in accordance with national laws and under a wide range of concepts, such as laws against unfair competition, consumer protection laws, laws for the protection of certification marks or special laws for the protection of geographical indications or appellations of origin. In essence, unauthorized parties may **not use geographical indications if such use is likely to mislead the public as to the true origin**

⁷⁵ Talavera is a type of majolica earthenware, a white and glazed type of ceramic. For illustrations and information, see worldexperience.com/ps_2000-03-31_talavera.html and www.inside-mexico.com/art1.htm.

of the product. Sanctions may range from court injunctions preventing the further unauthorized use of the geographical indication, to the payment of damages and fines or, in serious cases, even imprisonment.

How are geographical indications protected at the international level?

WIPO administers a number of treaties that provide for the protection of geographical indications, most notably the Paris Convention for the Protection of Industrial Property,⁷⁶ the Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods⁷⁷ and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.⁷⁸ In addition, Articles 22 to 24 of the TRIPS Agreement⁷⁹ deal with the international protection of geographical indications within the framework of the World Trade Organization (WTO).

Trade secrets

What are trade secrets?

Broadly speaking, any **confidential business information** which provides an artisan or visual artist with a **competitive edge** can qualify as a trade secret. A trade secret may relate to technical matters, such as the composition or design of a product, a method of manufacture or the know-how necessary to perform a particular operation.

Examples: Common items that are protected as trade secrets include manufacturing processes, market research results, consumer profiles, lists of suppliers and clients, price lists, financial information, business plans, business strategies, advertising strategies, marketing plans, sales plans and methods, distribution methods, designs, drawings, architectural plans, blueprints and maps, etc.

Why are trade secrets relevant for artisans and visual artists?

Artisans and visual artists may hold information that they want to keep hidden from their competitors because of its commercial value and the likelihood that competitors would use it. For example, a weaver may know a weaving technique that allows carpets to be made in a faster and more cost-effective manner, or a painter may have compiled a list of art galleries and art agents.

In fact, all types of IP begin as trade secrets: any new trademark, new design, creative work, invention, or other creative ideas of an artisan or visual artist who intends to use such sensitive business information of commercial value should be duly protected from being misappropriated or lost. The protection of such information as trade secrets should continue for as long as the information keeps providing a competitive edge to the business, or until it is protected by an alternative type of IPR.

76 See www.wipo.org/treaties/ip/paris.

77 See www.wipo.org/treaties/ip/index.html.

78 See www.wipo.org/treaties/registration/lisbon.

79 The full text of the TRIPS Agreement is available at <http://clea.wipo.int/clea/lpext.dll/Folder/Infobase/38c6ff/39053>.

What qualifies as a trade secret?

While conditions vary from country to country, some general standards exist:

- ❑ The information must be **confidential or secret**. Information which is generally known or readily ascertainable is not protectable as a trade secret. Even hard-to-learn information can lose its protected status if the owner does not take proper precautions to maintain its confidentiality or secrecy;
- ❑ The information must have commercial value because it is a secret;⁸⁰ and
- ❑ The holder of the information must have taken reasonable steps to keep it confidential or secret (e.g. through confidentiality or non-disclosure agreements with all those who have access to the secret information).

How can trade secrets be protected?

Unlike other forms of IP such as patents, trademarks, and designs, maintaining trade secrecy is basically a do-it-yourself form of protection. Trade secret protection lasts for **as long as the information is kept confidential**. Once the relevant information is made public, trade secret protection ends.

How can artisans and visual artists protect their trade secrets?

Simply calling information a trade secret will not make it so. Trade secret protection generally requires that ‘**reasonable efforts**’ have been taken to protect its secrecy. Basic steps include:

- ❑ Considering whether the secret is protectable through grant of a patent, or registration of a trademark or a design, and whether it would be better to do so;⁸¹
- ❑ Making sure that only a limited number of people who need to know the secret for the purpose of using it in business operations are made aware of it, and all those who are aware of it, clearly know that it is confidential or secret information;
- ❑ Signing confidentiality or non-disclosure agreements⁸² with everyone who may potentially see or receive the trade secret information, including employees, business partners, contractors, consultants and visitors;
- ❑ Marking documents containing trade secrets as ‘confidential’ and ‘do not copy’; and
- ❑ Limiting access to physical facilities which house the trade secrets (locking trade secret information after business hours; maintaining computer security; etc.).

80 Even ‘**negative**’ information, such as certain manufacturing processes which were tried out and gave poor results, or a list of art agents who are unreliable, may have commercial value and qualify for trade secret protection.

81 Patent or utility model protection, wherever possible, will in general provide much stronger protection.

82 A **confidentiality agreement** or **non-disclosure agreement** is a contract in which the parties promise to protect the confidentiality of secret information that is disclosed during employment or another type of business transaction. If an artisan or visual artist has entered into a non-disclosure agreement with someone, then if such a person uses his or her secrets without authorisation, he or she can request a court to stop the violator from making any further use or disclosures of his or her secrets and can sue that person for damages.

What rights does the owner of a trade secret have?

Artisans and visual artists who have properly protected their trade secrets can prevent others from improperly acquiring, disclosing or using them. Basically, this means that they can act against:

- ❑ People who are automatically bound by a duty of confidentiality not to disclose or use trade secret information, including any employee who routinely comes into contact with the employer's trade secrets as part of the employee's job;
- ❑ People who acquire a trade secret through improper means such as theft, industrial espionage or bribery;
- ❑ People who knowingly obtain trade secrets from people who have no right to disclose them;
- ❑ People who learn about a trade secret by accident or mistake, but had reason to know that the information was a protected trade secret; and
- ❑ People who have signed non-disclosure agreements (or 'confidentiality agreements'), promising not to disclose trade secrets without authorization from the owner. This may be the best way for an artisan or visual artist as a trade secret owner to establish a duty of confidentiality. In addition, lenders, investors and potential investors may require the artisan, visual artist and their employees to sign non-disclosure agreements.

However, trade secret law does **not** give the right to stop people who acquire or use information in a **legitimate way**, that is, without using illegal means or violating agreements or state laws. For example, it is generally not a violation to:

- ❑ Invent or discover the secret independently;
- ❑ Discover the secret by reverse engineering;⁸³
- ❑ Observe and study information available in the public domain; and
- ❑ Obtain information from published literature.

What can artisans and visual artists do if someone steals or improperly discloses their trade secrets?

The possibilities vary from country to country. In most countries, an artisan or visual artist who owns a trade secret (and has taken 'reasonable steps' to protect it) can enforce his or her rights against someone who steals confidential information by asking a court to issue an order (an injunction) preventing further disclosure.

Example: If a textile enterprise A proves that its employee has divulged trade secrets about weaving techniques to enterprise B, then enterprise A can obtain a court order preventing use of the secrets by enterprise B.

Sometimes, a trade secret owner can also collect **damages** for any economic injury suffered as a result of the trade secret's improper acquisition and use by a competitor.

83 Reverse engineering is the process of learning a secret by inspecting the product and figuring out how it works.

What are the disadvantages of trade secret protection?

The protection of sensitive business information as trade secrets may appear attractive for artisans, craft entrepreneurs and visual artists because trade secrets are not subject to any registration and are protectable for a potentially unlimited period of time. The main **disadvantages** of trade secret protection are, however:

- ❑ A single disclosure can cause the loss of trade secret status;
- ❑ Trade secrets do not protect against another person's independent discovery of the trade secret, only against the misappropriation (or stealing) of the information;
- ❑ Trade secret protection is generally weak in most countries; and
- ❑ The legislation or case law of some countries may require very significant efforts to preserve secrecy. Practical compliance with such conditions may be more difficult and costly than it might appear at first glance.

When should artisans and visual artists opt to protect information as a trade secret and not seek a patent?

This question arises only if the nature of the trade secret is such that it would meet the conditions for grant of a patent (many trade secrets do not meet the conditions required for grant of a patent, and hence can only be preserved as trade secrets). It is only advisable to keep such information as a trade secret if it is difficult to analyse the product and find out the trade secret, or if the probability of independent creation or discovery of the trade secret is very low. It is true that a patent, in general, will provide stronger protection than trade secret protection (see 'Patents and utility models', below). Some trade secrets, such as business plans and information, are simply not patentable. Others are better suited to trade secret protection, because a trade secret can be protected for ever or for as long as the owner is able to maintain the secrecy. A patent, on the other hand, expires 20 years after the patent application is filed.

Patents and utility models

What is a patent?

A patent is a **right** allowing an inventor to **exclude** others from commercially using his or her **invention** for a fixed period of time. An invention may be a product or a process which provides a way of doing something, or offers a new technical solution to a problem. It must be new, involve an inventive step and be industrially applicable or useful. Patents are concerned with how things work, what they do, how they do it, what they are made of or how they are made. The vast majority of patents are for additional improvements in known technology.

Patents provide protection for an invention to its inventor or owner for a **limited period**, generally 20 years from the date of filing the patent application, and only in the country (ies) in which protection has been obtained.

Example: Penreco is a company that owns patents related to transparent gel candles. Penreco produces and markets a series of patented gels for use in the manufacture of clear gel

candles under the versagelä brand name. The patents cover combinations of hydrocarbon oils and a variety of polymer thickening agents. The gels can be used, amongst other applications, in candles. There are two big advantages of transparent gel candles: (1) the gel burns much longer than paraffin wax, and (2) the transparent gel allows the artisan/crafter to add colour, fragrance or create designs that are very different from those of traditional wax candles. Anyone who wants to make transparent candles is likely to infringe Penreco's patent and should, therefore, first take a license from Penreco, provided Penreco has patented its invention in the relevant country.⁸⁴

What kind of protection does a patent offer?

The right conferred by the patent is a **negative right**: what is granted is the right to **exclude** others from making, using, offering for sale, selling or importing for those purposes the invention. Patent rights are usually enforced in a court. A court can also declare a patent invalid upon a successful challenge by someone else, if it is proved that one of the conditions for granting the patent was not fulfilled.

What rights does a patent owner have?

A patent owner has the right to decide who may – or may not – use the patented invention during the period in which the invention is protected.⁸⁵ The patent owner may give permission to, or license, others to use the invention on mutually agreed terms. He or she may also sell the right to the invention to someone else, who will then become the new owner of the patent.

Once a patent expires, however, the protection ends, and the invention becomes part of the **public domain**, that is, the owner no longer holds exclusive rights to the invention, and others can commercially exploit the invention freely.

What inventions can be protected?

To be patentable an invention must fulfil certain specific conditions. It must:

- ❑ **Be new.** In general, the invention must never have been made public in any way, anywhere in the world, before the date on which an application for a patent is filed. In some countries, the public disclosure of an invention in non-written form (oral presentation, public use of an invention, etc.) in a foreign country does not affect the novelty.
- ❑ **Be non-obvious or involve an inventive step.** This condition is met if the invention would not be obvious to someone with a general knowledge and experience of the subject (so-called 'person skilled in the art').

⁸⁴ See www.howtomakegelcandles.com/Penreco.htm.

⁸⁵ Where the subject matter of a patent is a **product**, the exclusive rights conferred will prevent others from the acts of: making, using, offering for sale, selling, or importing for those purposes that product. Where the subject matter of a patent is a **process** (which may be a process of making or a process of using something), the exclusive rights conferred will prevent others from the act of using the process, and from the acts of using, offering for sale, selling, or importing for those purposes at least the product obtained directly by that process.

- ❑ **Be capable of industrial application or have utility.** This means that the invention must take the practical form of an apparatus or device, a product such as some new material or substance or an industrial process or method of operation. In some countries, an invention must have utility.
- ❑ **Not be ‘excluded’ from patentable subject matter.** In many countries, scientific theories, mathematical methods, plant or animal varieties, discoveries of natural substances, commercial methods, methods for medical treatment (as opposed to medical products), and aesthetic creations (such as a literary, dramatic or artistic work) are generally not patentable.

How is a patent granted?

The first step in securing a patent is the filing of a **patent application**. The patent application generally contains the title of the invention, as well as an indication of its technical field. It must include the background and a description of the invention, in clear language and enough detail so that an individual with an average understanding of the field could use or reproduce the invention. Such descriptions are usually accompanied by visual materials such as drawings, plans, or diagrams. The application also contains one or more ‘claims’ that define the subject matter for which protection is sought by the applicant. The claim determines the extent of protection granted by the patent.

Who grants patents?

A patent is granted by a **national patent office** for a country or, in some regions, by a **regional patent office** for a number of countries, such as the European Patent Office and the African Regional Industrial Property Organization. The WIPO-administered **Patent Cooperation Treaty (PCT)** provides the mechanism for filing one patent application targeting a number of national and regional patent offices. This application is called an ‘**international**’ application (see ‘How to obtain protection abroad?’ on pages 96–98).

How long does it take to obtain a patent?

In countries where no examination as to the substance of the patent application is conducted, the procedure will generally be relatively fast (it will usually be registered within a few months). However, in countries where the patent office conducts a thorough substantive examination to check whether the invention meets the patentability criteria of novelty, inventive step and industrial applicability, the entire procedure from application to grant will generally take over 12 months, and in many cases well over 18 months, sometimes even a few years.

Are patent applications disclosed to the public?

Patents are granted by patent offices in exchange for a **full disclosure of the invention** in the application, which is published so as to make the information contained in it available to the general public. Publication may take place at different stages of the procedure. In some countries, the patent application is published only after the grant of the patent. In most other countries, patent applications are published **18 months** after the filing date or the priority date. Since substantive and procedural requirements are complex, and differ from one country to another, artisans and visual artists are advised to contact the IP office concerned or a professional IP expert.

How much do patents cost?

The costs related to patents may be divided into four types:

- ❑ Costs relating to patent **attorneys or agents who assist in drafting** the patent application. While the use of a patent attorney or agent is usually optional, it is generally advisable to seek legal advice for drafting a patent application. The fees for preparing patent drawings may be in addition to the fees payable to the patent agent, as the drawings are generally made by a different person.
- ❑ Costs relating to the **application fees** and other prosecution fees paid to the national or regional patent offices.
- ❑ Costs of **translation**. Such costs are only relevant when seeking IP protection in foreign countries whose official language is different from the language in which the application has been prepared. They may prove to be high, especially for highly technical and/or lengthy patent applications.
- ❑ The cost of **keeping the patent in force**. An inventor who wishes to maintain the exclusive right in his or her invention has to be prepared to pay maintenance fees. Such fees are usually paid at regular intervals (e.g. every year or once every five years) in order to keep the patent in force. Protecting patents for the entire term of protection may prove expensive.⁸⁶ These costs would have to be compared to the wide range of benefits that could derive from a patent.⁸⁷ For artisans and visual artists willing to apply for patent protection in various countries, the service offered by the PCT system may considerably reduce fees and simplify procedures.⁸⁸

What is a utility model?

In some countries,⁸⁹ inventions may also be protected by utility models, which are also known as ‘petty patents’ or ‘utility innovations’. The conditions for the registration of utility models are usually less stringent (since no inventive step or only a less significant inventive step is required), the procedure for registration is faster, and acquisition and maintenance fees are generally lower than those applicable to patents. Applications are usually filed with the national IP office.

Why are patents and utility models relevant for crafts and visual arts?

In the fields of crafts and visual arts, many inventions have been granted, and will continue to be granted, patent and utility model protection.

Example: A printmaker wants to print images on rice paper but encounters the problem that the ink does not maintain its colour on this medium. The solution to the problem – for example, a specific procedure and combination of inks and other materials – could very well qualify for patent or utility model protection, if it meets the legal requirements. With a patent or utility model in hand, the printmaker has the exclusivity over the use of his or her invention.

⁸⁶ Annual fees can range from thousands of US\$ in the beginning to tens of thousands of US\$ in about 10 years.

⁸⁷ See the WIPO article ‘How do you Turn Inventions into Profit-making Assets of Your SME’ at www.wipo.int/sme/en/ip_business/importance/inventions.htm.

⁸⁸ See www.wipo.int/pct/en/index.html.

⁸⁹ For a full list of countries that provide utility model protection, see: www.wipo.int/sme/en/ip_business/utility_models/where.htm.

Example: A number of novel functional features of woodworking tools as well as other hand-tools, brushes, paints, and stringed musical instruments are protected by patents and used by artisans and visual artists. Similarly functional improvements to kilns and furnaces used by potters and for ceramics glazing may be protected by patents. It does happen, although not very often, that the user of such tools, machines, kilns or furnaces suggests or actually makes significant functional improvements which can be protected by patents or utility models.

Traditional knowledge and cultural expressions

'Traditional' crafts, visual arts and other forms of traditional cultural expressions (expressions of folklore) are closely linked to the identity, heritage and socio-cultural well-being of indigenous and local communities. Traditional cultural expressions (TCEs) include, for example, paintings, carvings, sculptures, pottery, mosaic, jewellery, basket weaving, textiles, carpets, handicrafts, needlework, costumes, saddle decoration, etc. In this context, 'traditional' refers to cultural expressions which generally were first created a long time ago, have been transmitted from generation to generation, and are regarded as pertaining to a particular people or its territory.

Examples: A painting that depicts an old myth or legend which is part of the Maori culture of New Zealand; the knowledge and skill used to produce basket weaving, which has been transmitted in the community from one generation to the next; T-shirts depicting indigenous rock art from Eastern Arnhem Land (Australia); etc.

TCEs may not be fully protected under current IP laws. They may, for example, not meet the copyright requirement of originality. The limited term of protection and the need to identify the creator of a work can also pose problems.

Artisans and visual artists should, however, be aware that certain uses of TCEs can, aside from questions of legal infringement, cause cultural offence, particularly when sacred or secret expressions are used and indigenous and customary rights and responsibilities are not complied with.

Yet the limits of current IP should not be exaggerated. IP can protect contemporary, tradition-based arts and crafts made by current generations of society. A good example is provided by the so-called 'carpets case' in which an indigenous Australian painter successfully protected her traditional painting under copyright law, or a traditional Chinese designer who protects his silver-plated tea sets under industrial design law.⁹⁰

To complement the role of current IP systems in this area, some countries and regional organizations are also testing new *sui generis* mechanisms and systems. These may be based on model provisions for national laws developed by WIPO and UNESCO (United Nations Educational, Scientific and Cultural Organization) in 1982, or they may reflect entirely new approaches.⁹¹

⁹⁰ See the WIPO 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions' and 'Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions', written for WIPO by Ms. Terri Janke, Australia, at www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_3.pdf and <http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>, respectively.

⁹¹ WIPO has published information on these systems – see documents WIPO/GRTKF/IC/4/INF 2 to 5 Add at www.wipo.int/tk/en/laws/index.html.

These questions are the subject of discussion among WIPO Member States in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Further information on WIPO's ongoing programme on TCEs can be found at www.wipo.int/globalissues/cultural/index.html.

Protecting intellectual property abroad

Why should artisans and visual artists protect their intellectual property abroad?

- ❑ IPRs, as has been explained above, are usually **territorial**, which means that they are only protected in the country or region where protection has been applied for and obtained. Protecting IP in export markets is crucial if an artisan or visual artist is to enjoy the same benefits of protection abroad as are enjoyed in the domestic market.
- ❑ In most countries, the ownership of trademarks, industrial designs and patents is based on who registered or applied for one of these first, not on who used it first. This means that **someone else may get a registration of a trademark, design or patent in a country** if he or she filed the application first with the Office of that country. This presents a serious problem for trademarks that appear to be headed for international use after becoming well known in the home country. Some businesses have made money by spotting these types of marks, pre-emptively registering them in key countries and then demanding large fees to transfer the trademarks to those who need it, that is, their owners in the home country.
- ❑ In some countries products may not be imported without first registering the trademark used on such products.

In which countries should artisans and visual artists protect their IP?

This obviously depends on where a particular artisan or visual artist plans to market, but also on all the facts of his or her situation, such as financial means, geographical operation, growth possibilities, etc. The extent of the IP registration is a business decision in which the need for protection has to be **balanced with the reality of realizing a reasonable return on investment**. The following guidelines may help to pick the right countries:

- ❑ Candidate countries for protection will depend on the nature of the product and how it might **fit into the foreign market**.
- ❑ When deciding which countries may be of relevance, artisans and visual artists should also consider the issue of **parallel importation** – see ‘What is parallel importation? What is exhaustion of intellectual property rights?’ on pages 98–99.
- ❑ For most artisans or visual artists it remains difficult to decide which countries they should be expanding their business into. Depending on **financial means**, there are two choices: either cover as many countries as possible, or restrict protection abroad to the top one or two choices and hope the choice pays off.

- ❑ Many countries require that a trademark be used within a specified period of time after registration; otherwise, the protection will lapse. It makes sense to register trademarks only in those countries in which they are **likely to be used within the next few years**.
- ❑ In certain countries it may simply **not be possible to protect** a specific trademark, industrial design or patent, either because someone else has already registered it, or because the national laws of that country do not allow for registration or grant of the trademark, design, or patent concerned.

TIP – Check for conflicts with existing IPRs of others in the country(ies) of interest!

When to apply for protection abroad?

As a general rule, it is advisable to obtain adequate protection in all relevant export markets **as early as possible**.

- ❑ With regard to **patents**, most countries allow a 12-month priority period from the date of filing of the first application (normally in the home country) for applying for patents in other countries. Once this period has elapsed there is a higher risk of not being able to obtain patent protection in other countries.
- ❑ With regard to **trademarks** and **industrial designs**, most countries provide a six-month priority period for applying for trademark and industrial design in other countries, after filing an application for registration in the home country.
- ❑ With regard to **copyright**, the situation is different. If an artisan or visual artist is a national or resident of a country party to the Berne Convention or Member of the WTO bound by the provisions of the TRIPS Agreement, or if he or she has published his or her work for the first time or at least simultaneously in such a country, the copyright will be automatically protected in all other countries that are party to the Berne Convention or are Members of the WTO (see ‘Is there such a thing as international copyright protection?’ on page 63).

How to obtain protection abroad?

NOTE – This information applies to international protection of trademarks, industrial designs, geographical indications, utility models and patents. The situation for international protection of **copyright** is explained under ‘Is there such a thing as international copyright protection?’ on page 63.

There are essentially three ways of protecting IPRs abroad: the national, the regional and the international way.

National way. One option is to seek protection in individual countries separately by applying directly to national IP offices.⁹² Each application may have to be translated into a prescribed language, usually the national language. It will be necessary to pay national application fees and, particularly in the case of patents, it may be necessary to entrust an IP agent or attorney who will assist in making sure the application meets national requirements.

⁹² A list of website addresses of national IP Offices is available at www.wipo.int/news/en/links/ipo_web.htm.

Regional way. Some countries have established regional agreements for obtaining IP protection for an entire region with a single application. The regional IP offices include:

- ❑ European Patent Office (EPO, for European patents);⁹³
- ❑ Office for Harmonisation in the Internal Market (OHIM, for European Community trademarks and industrial designs);⁹⁴
- ❑ African Regional Industrial Property Office (ARIPO, the regional IP office for English-speaking Africa for patents, utility models, trademarks and industrial designs);⁹⁵
- ❑ African Intellectual Property Organization (OAPI, the regional IP office for French-speaking Africa for patents, utility models, trademarks, industrial designs, geographical indications and, in the future, layout-designs of integrated circuits);⁹⁶
- ❑ Eurasian Patent Organization (EAPO, for patent protection in the countries of the Community of Independent States);⁹⁷
- ❑ Benelux Trademarks Office & Benelux Designs Office (BTO and BDO, for trademark and industrial design protection in Belgium, the Netherlands and Luxembourg);⁹⁸
- ❑ Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office, for patents in the countries of the Gulf Cooperation Council).⁹⁹

International way. WIPO administers three international systems which significantly simplify the process for seeking IP protection simultaneously in a large number of countries. Rather than filing national applications in many languages, the systems of international filing or registration enable artisans and visual artists to file a single application, in one language, and to pay one application fee. These international filing or registration systems not only facilitate the process but also considerably reduce costs for obtaining international protection. Systems of international protection include:

- ❑ **Trademarks.** WIPO's system of international trademark registration is governed by two treaties, the Madrid Agreement Concerning the International Registration of Marks and the Madrid Protocol. Any artisan or visual artist who has a connection (through nationality, domicile or residence) with a State party to either treaty may obtain an international registration that is enforceable in some or all of the countries party to the Madrid System. At present 70 countries are party to one or both of these treaties. Full information about the Madrid System, including a list of Member States, is available at www.wipo.int/madrid/en/index.html.
- ❑ **Industrial designs.** International protection is provided by the Hague Agreement.¹⁰⁰ Artisans and visual artists from a country party to this system (currently 31 countries are parties) can file a single international deposit with WIPO. The design will then be protected in as many member countries

⁹³ oami.eu.int; aripo.wipo.net; oapi.wipo.net; www.european-patent-office.org.

⁹⁴ <http://oami.eu.int>

⁹⁵ <http://aripo.wipo.net>

⁹⁶ <http://oapi.wipo.net>.

⁹⁷ www.eapo.org.

⁹⁸ www.bmb-bbm.org and www.bbtm-bbdtm.org.

⁹⁹ www.gulf-patent-office.org.sa.

¹⁰⁰ The full name is the Hague Agreement Concerning the International Deposit of Industrial Designs.

of the treaty as are designated in the application. Full information about the Hague Agreement, including the application form and a list of Member States, can be found at: www.wipo.int/hague/en/index.html.

- **Patents.** The PCT makes it possible to seek patent protection for an invention simultaneously in a large number of countries by filing an ‘international’ patent application. Such an application may be filed by any person who is a national or resident of a Contracting State. The effect of the international application is the same as if a national patent application had been filed with the national patent office of each Contracting State. For more information and a list of Member States, see: www.wipo.int/pct/en/index.html.

TIP – To protect IPR in several countries, it will generally be much cheaper and more convenient to apply for regional or international protection rather than to seek protection through the national systems in each country.

What is parallel importation? What is exhaustion of intellectual property rights?

When developing their strategy for protecting IP abroad, artisans and visual artists should verify **whether a buyer could legally resell in another market IP-protected goods** bought from them or with their consent. This issue will arise only if artisans or visual artists have already protected their IPRs in the domestic as well as in export markets.

Once a product protected by an IPR has been put on the market by an artisan or visual artist or, with his or her consent, by others, he or she can no longer control its subsequent commercial movement – the IPRs are said to be ‘**exhausted**’. Sometimes this limitation is also called the ‘first sale doctrine’, as the rights of commercial exploitation for a given product end with the product’s first sale. Unless otherwise specified by law, **subsequent acts of resale, rental, lending or other forms of commercial use by others can no longer be controlled or opposed by the artisan or visual artist.**

There is no consensus as to whether the sale of an IP protected product abroad can exhaust the IPRs over this product in the context of domestic law. The issue becomes relevant in cases of so-called parallel importation. Parallel importation refers to the import of goods by someone who is outside the distribution channels contractually negotiated by the manufacturer. Based upon the right of importation that an IPR confers upon the IP owner, the latter may try to oppose such importation in order to separate markets. If marketing of the product abroad by the IP owner, or with his or her consent, leads to exhaustion of his or her domestic IPR, then his or her right of importation is also exhausted and hence can no longer be invoked against such parallel importation.

This has different implications depending on whether the country of importation applies the concept of national, regional or international exhaustion. The concept of **national exhaustion** does not allow the artisan or visual artist who owns IPRs in his or her products to control the commercial exploitation of products put on the domestic market by himself or herself or with his or her consent. However, he or she could still oppose the importation of original products marketed abroad based on the right of importation. In the case of **regional exhaustion**, the first sale of the IP protected product by the artisan or visual artist or with his or her consent exhausts any IPRs over these given products not only domestically, but within the whole region, and parallel imports within the region can no longer be opposed based on the IPR. But he or she can still oppose importation across the combined international border of

the region. However, if a country applies the concept of **international exhaustion**, the IPRs are exhausted once the product has been sold by the artisan or visual artist or with his or her consent in any part of the world, that is, whether sold in the domestic market or abroad.

National IP offices, or IP agents and attorneys, should be able to provide guidance as to which provisions or case law apply in the relevant country for each type of IPR.¹⁰¹

Commercializing intellectual property

IPRs represent **property rights**. They can be used by the IPR owner or they can be transferred to others. Artisans and visual artists who own any IPRs can sell their rights to another person. More importantly, IPRs have the particular advantage that they may be **exploited simultaneously by several people**. This can be done through licensing, character merchandising or franchising.

What is licensing and how does it work?

The word licence simply means **permission** – a person grants permission to another to do something. A licence agreement is a contractual agreement under which a licensor (the person who owns the IP) permits another (licensee) to use the right. It does not transfer the ownership of the IP.

For a license of IP to be effective, the following basic conditions must be met:

- The licensor must **own** the relevant IP or must have authorization from the owner to grant a licence.
- The IP must be **protected** by law or at least eligible for protection: this means also that licences can only be granted in foreign countries if the IP in question is legally protected in those countries.
- The licence agreement must specify what **rights** it grants to the licensee.
- The payment or other **compensation** must be clearly stated.
- Most countries require that a licence agreement be **written**, and many countries require that it be **recorded** with the local IP office, or other government agency. The agreement should be signed by both parties.

Why should artisans and visual artists consider licensing?

There are many reasons for artisans and visual artists to license out some or all of the IPRs they own.¹⁰²

- Artisans and visual artists who own rights in a design, patent, know-how, or other IP assets, but **cannot or do not want to be involved in the manufacturing of products**, could benefit by relying on the better manufacturing capacity, wider distribution outlets, greater local knowledge and management expertise of someone else (the licensee).
- Licensing out may be used to **gain access to new markets**. The licensee may agree to make all the adaptations required for entering a foreign market,

¹⁰¹ For further information, see document ATRIP/GVA/99/6 'Parallel Imports and International Trade' at www.wipo.int/sme/en/activities/meetings/pdf/atrip_gva_99_6.pdf.

¹⁰² WIPO's article on 'IP Licensing: Reaping the Benefits' analyses the main advantages and disadvantages of licensing – see: www.wipo.int/sme/en/documents/wipo_magazine/06_2003.pdf.

such as translation of labels and instructions; modification of goods so as to conform with local laws and regulations; and adjustments in marketing. Normally, the licensee will be fully responsible for local manufacture, localization, logistics and distribution.

- ❑ Licensing allows artisans and visual artists to expose their trademarks and products to more consumers, thereby **building brand awareness and brand loyalty**.
- ❑ A licence agreement may also be a means for **turning an infringer or competitor into an ally or partner** by avoiding or settling an IP litigation.
- ❑ Last but not least, licensing can be an excellent **source of additional revenue** for artisans and visual artists.

If artisans or visual artists grant a licence for their IP, then can they still use the IP themselves?

Yes, if agreed so in the licence agreement. A licence may be granted on either an exclusive or a non-exclusive basis. In a non-exclusive licence, the licensor reserves the right to grant additional licences to other persons and/or to use the IP in question himself or herself.

Can licences be limited or divided?

IPRs can be divided and subdivided and licensed to others in just about any way imaginable. Not only may a licence grant rights in relation to only part of the bundle of IPRs concerned, but the licence may be limited by reference, for example, to where, or for how long, or for what purposes the licensed IPRs may be used.

The most important single issue in negotiating a licence agreement is to determine the character and scope of the licence. Artisans and visual artists should ensure that the **broadest possible use is made of their IPRs in order to exploit their full economic potential** and to receive the best royalties. In most situations, the best thing to do will be to grant non-exclusive licences, limited in their scope to the specific needs and interests of the licensee. Further licences may then be granted to other interested users.

Example: Natsuko is a Japanese glass blower. She markets her products, mainly vases, sculptures, ornaments and houseware, successfully in Japan under the trademark JABLO. She licenses to a Chinese glass manufacturer the right to manufacture replications of her products, and the right to use the trademark JABLO in connection with its sale and distribution in China. For Natsuko, the trademark licence has become a way of extending her brand and co-marketing, so that the Chinese products help sell the Japanese products by reinforcing the popularity of the glasswork.

Example: Typically, museums try to enter into a licence agreement with an artist to ensure that the artist will not exhibit his or her works or license any rights in the works to another museum. Even in that case, the artist should only grant a licence to a particular museum for a limited period of time, and, while doing so, should keep all his or her rights for non-museum activities.

Why is it important to keep control?

Artisans and visual artists who license out their copyright trademark, design or other IP, are well advised to keep some control over their programme and products, and this should be outlined in the licence agreement. Control by the licensor is necessary to ensure that the licensee's products are of equal quality to the products previously associated with the licensor's trademark.

How to negotiate the terms of the licence agreement?

The terms and conditions of licence agreements are a matter of negotiation and the results largely depend on the commercial value of the IP that will be licensed and the relative strength of the partners in terms of financial and competitive positions.

Nevertheless, artisans and visual artists must well realize that when they grant someone a licence to use their IP (be it copyright, trademark, design or other), they are giving that person the ability to use that IP in a certain way, on a certain type of product, for a certain period of time, and with certain restrictions on usage.

A licence agreement should include:¹⁰³

- The names of the specific **works** being licensed;
- What specific types of **products** the works will be used on;
- The producer's or publisher's written agreement to put the artisan's or artist's **IP notice** on every product sold and on every advertisement or brochure for any such product which bears the work;
- The **countries** in which the products will be sold;
- A **period of time** (for example, six months or a year) during which the licensee has to produce and sell products using the IPRs, or else give up the right to use the IPRs;
- A requirement for the licensee to keep the artisan or visual artist informed of any third party **infringements** of the IPRs of which the licensee becomes aware;
- A **termination date** for the agreement, generally two or three years after signature – the contract can always be renewed if both parties are happy with the arrangement;
- An 'indemnification clause' which says that the licensee will protect the artisan or visual artist from any lawsuits that might arise from any of his or her business activities which in any way relate to products using the IPRs;
- A statement to the effect that the artisan or visual artist has the **right to cancel** the agreement if the licensee does not abide by its terms and conditions or if the licensee becomes bankrupt;
- A specific statement of any non-refundable **advance payment** to be made to the artisan or visual artist against future royalties, the specific **royalty** percentage to be paid to the artisan or visual artist on a timely basis, and the requirement that each royalty cheque be accompanied by a clear statement explaining the basis of calculation of the royalty amount by the licensee;

¹⁰³ Source: 'How to License Your Art and Protect Your Rights at the Same Time', by: Lance J. Klass, www.porterfieldsfineart.com/howtolicenseyourart.htm.

- ❑ A provision that the licensor will be entitled to reimbursement of legal fees and other costs incurred in enforcing the agreement.

The licensee should not be allowed to:¹⁰⁴

- ❑ Get the ownership of IPRs used in relation to any of the works. Retaining the rights in the licensed IPRs is important, as this opens doors to licensing the IPRs for other product categories and to other licensees;
- ❑ Gain full and complete reproduction rights to any of the works;
- ❑ Gain the right to sublicense the works to other companies without the artisan or visual artist having to approve and sign each specific sublicense agreement;
- ❑ Gain ownership of the original works as part of the licence agreement.

National laws sometimes limit the nature and the content of permissible contract clauses, and the grant of licences for foreign territories may render legal matters even more important and more complex. Artisans and visual artists are well advised to negotiate licence contracts with the assistance of an experienced expert or licence broker. At the very least, they should consult a licensing manual which lists the economic and legal issues to be dealt with in a licence contract and which proposes and explains possible solutions to these issues.¹⁰⁵

How does an artisan or visual artist begin licensing?

Artisans and visual artists who want to derive full benefits from the licensing of their IPRs will have to actively look for potential users. They should, therefore, first determine the basic principles of their **licensing policy**, such as:

- ❑ In which countries they need or have obtained IP protection, and in which countries they would like to grant licences;
- ❑ Whether exclusive licences may be granted or not; and
- ❑ What is a fair royalty rate.

Only then should the search for potential licensees start. The **Internet** provides quite a lot of information on art publishers, art galleries, artist agents, and other potential licensees. Information can also be obtained from **licensing associations**, such as the International Licensing Industry Merchandisers' Association (LIMA).

In looking for licensees, artisans and visual artists should provide easily understandable information on the terms and conditions on which they are offering licences. To this effect, they should prepare **information material** and supply it to licensing services (licensing databases), advertise in appropriate art periodicals or magazines, present themselves at exhibitions and fairs, and contact national or regional, public or private art or craft associations, agencies, etc. In addition, they should always directly address themselves to enterprises, agencies, or other persons that may be interested. Experience has shown that personal and professional contacts and 'word of mouth' give access to more licensing opportunities than formalized information systems.

¹⁰⁴ *Idem*.

¹⁰⁵ The **WIPO Licensing Guide for Developing Countries**, WIPO Publication No. 620, provides a detailed description of the negotiating process, explains the economic and legal implications of the specific contract clauses including the calculation of royalties, and contains a check-list to be followed in setting up a licence agreement.

Selecting the right licensee is important. Artisans and visual artists who grant a licence have to make certain they have partners they can trust and who can effectively promote their works. Therefore, they should diligently check the credentials of the prospective licensees.

What is character merchandising, and why is it useful for artisans and visual artists?

Character merchandising involves the use of real or fictional characters for marketing of goods or services. The characters used for this purpose may be protected by the law of trademarks, copyright, and/or unfair competition, and, in some countries, by the action of ‘passing off’. Such a real or fictional character, if it is legally protected as an IPR, then becomes a sort of ‘commodity’ which can be ‘merchandised’ through commercial exploitation by its owner, or more commonly, by a licensee who pays for the privilege of doing so. It may be noted that copyright law is relevant only to fictional characters, and not to real characters.

We all know about merchandising from the cinema and sports world. Comics, cartoons, and other fictional characters, leading artists, sport stars, and TV personalities are depicted on diverse products all over the world: from T-shirts, toys, games, clothing, bags, postcards, posters, wall paper, bedspreads, to even telephones, lamps, sporting goods and computer screensavers. There’s no doubt merchandising is big business.

But is it within the reach of artisans and visual artists? Why not? Visitors to exhibitions, art galleries, museums, or similar events, for example, often want to have a permanent reminder of their visit. This is especially important for children and tourists. Shops at art events have shown that people will buy not only souvenir catalogues or programmes, but also coffee mugs, jewellery, T-shirts, scarves, etc. as mementos. Artisans and visual artists should consider using their trademark, or a picture of their best or most famous artworks on such products. The advantage of such merchandising is that, apart from providing an **additional source of income**, it will **enhance the visibility and popularity** of the artisan or visual artist in question.

Example: The Walt Disney Company has been a pioneer in marketing to children. In 1929, the company sold the rights to use Mickey Mouse on school writing tablets and began extensive merchandising and licensing campaigns shortly thereafter. Kids could have Mickey wherever they wanted him – on underwear, jewellery, toothbrushes, silverware, toys, etc. As Roy Disney put it: ‘The sale of a doll to any member of a household is a daily advertisement in that household for our cartoons and keeps them all “Mickey Mouse minded.”’

Some of the common merchandise items for craft and visual arts products are:

- Bookmarks;
- Books;
- Calendars;
- Diaries;
- Clothing (such as T-shirts, socks, jumpers, scarves, hats, caps) and bags;
- Food, such as chocolates, lollies;
- Photo frames;
- Jewellery;

- ❑ Key rings;
- ❑ Mugs, bowls, plates, cups, glasses, pottery, crystal, ceramics;
- ❑ Paperweights;
- ❑ Pens, pencils, rubbers, rulers;
- ❑ Placemats;
- ❑ Prints, photographs, posters, postcards;
- ❑ Souvenir teaspoons;
- ❑ Stationery;
- ❑ Toys, puzzles, CD-ROM games;
- ❑ Tableware (mats, tea towels, paper plates, paper cups).

Case study: Mary Engelbreit is now known throughout the world for her colourful and intricate designs, which adorn 14 million greeting cards sold each year. Engelbreit holds licence agreements with dozens of manufacturers to reproduce her popular illustrations on nearly 6,500 gift and home decor products, including books, children's books, calendars, stationery, fabric, crafts, kitchen accessories, dinnerware and other home accents. But it all started with a single-minded young girl who decided that she was going to be an artist. Her story is described as a case study, pages 122–124 in chapter 6.

NOTE – Photographers should pay attention when merchandising their photos! Just because they took the picture does not mean that they can use it however they want.

Simply taking a snap of a person, product, event, or the like does not grant a photographer the right to sell products featuring that photograph. There are two different IPRs in a photograph: (1) the copyright in the photograph itself and (2) the rights in the subject of the picture, such as the person or product shown in it. For example, a photographer who takes a photo of a famous musician, owns the rights to the photo, but not the right to use the photo of the musician for merchandise sale. In order to sell T-shirts bearing the image, he or she will need to obtain explicit permission from the musician.

What is franchising?

Franchising is a way to exploit the format and characteristics of a business. It includes licensing of a trademark in addition to know-how and/or patent licences. Franchising can be considered as a variation on licensing in which owner of the rights (franchisor) generally has greater control than is the case of a standard licence agreement. In the case of franchising, the franchiser allows another (the franchisee) to **use his or her way of doing business** in accordance with a set of **prescriptions** which must be adhered to strictly.

A franchise usually works by combining two licences: a trademark licence and a know-how licence. At the core of a franchise is that the products or services which are delivered by the franchisee must be **uniform and consistent** in their quality and appearance. In this way, consumers know that regardless of the franchise premises they enter, they will get the same uniform and consistent product or service.

Example: McDonald's is one of the most famous franchising companies. Approximately 70% of McDonald's worldwide restaurant businesses are owned and operated by independent businessmen and women, the franchisees. They are all bound by strict guidelines on how to operate the outlet and, in exchange for the franchise system, pay a fee or royalty.

The franchisor has to exercise **quality control** over the franchisee's operations. If the franchisee is unable to maintain the contractually required standards, then the franchise agreement will be terminated.

Why is franchising relevant for artisans and visual artists?

An artisan or visual artist may find franchising beneficial either as a franchisor or as a franchisee.

As a franchisor. Artisans or visual artists who have a successful business, with one or more successful products, and a trademark which is well recognized in the market, could consider setting up a franchise business. This entails, however, a series of responsibilities and obligations, which must be carefully studied in advance under the guidance of a specialist or franchise organization. Specifically, the franchisor transfers all its operating systems, technical expertise, marketing systems, training systems, management methods and essentially all relevant information, to the franchisee. The franchisor also trains the franchisee extensively up-front and provides ongoing training and support throughout the life of the franchise agreement.

As a franchisee. Like nearly all businesses, a franchise business is hands-on, and franchisees generally work long hours, especially in the first year. But franchising has the advantage that the franchisee can buy an established business which is designed to **reduce commercial risk** because the business is run to a proven operational business plan. The greatest element of value in a franchise system is, however, the right to use the franchisor's **trademark**. Many franchise agencies, and also independent websites on the Internet, describe opportunities being offered by various franchisors, and provide assistance for evaluating a franchise opportunity, negotiating franchise agreements, or creating a new franchise system.

Enforcing intellectual property rights

Acquisition and maintenance of an IPR is meaningless if that right cannot be enforced in the marketplace.

Why should artisans and visual artists enforce intellectual property rights?

The main reason for acquiring IP protection is to be able to reap the benefits of the creations. IP assets can only lead to benefits when the acquired IPRs can be enforced; otherwise, infringers and counterfeiters will always take advantage of the absence of effective enforcement mechanisms to benefit from the artisan's or visual artist's hard work. It is often the threat of enforcement or the actual enforcement action which allows an IPR to be effectively exploited as a commercial asset.

What is infringement of intellectual property rights?

An IPR is infringed if someone uses the IPR without the permission of the owner. Most such actions or uses are for business or commercial purposes. This is generally referred to as ‘imitation’, ‘unauthorized copying’, ‘piracy’ or ‘counterfeiting’.¹⁰⁶ Depending on the nature of the IPR in question, different acts will amount to infringement.

- **Infringement of a trademark.** Trademarks protect the **distinctiveness** of the sign compared with other existing signs used for the same products or services. Infringement occurs generally if someone other than the owner of the trademark uses the same or a similar mark on a similar product, its package, advertisement or in some other way in his or her business in the country where the trademark is protected. When courts sort out trademark disputes, the most important issue is often whether customers are **likely to be confused or deceived**.

Example: Oliver markets hand-made wooden fruit in several local markets under the name Ollie’s Wooden Fruit, for which he has obtained trademark protection. Pollie, an unfriendly neighbour, decides to compete with Oliver and names his products Pollie’s Wooden Fruit. Because Oliver and Pollie have competing products in the same markets that could easily confuse customers, Pollie is infringing Oliver’s trademark.

- **Infringement of copyright** occurs if someone violates any of the **exclusive rights** of a copyright owner. Infringement of craft and visual arts works protected by copyright usually involves unauthorized reproduction, distribution, preparation of derivative works or displaying the work. It does not matter whether the infringer makes five copies or 5,000; or whether the copies are sold for profit or given away. Each act of unauthorized distribution is an infringement. Copyright infringement may also occur if there is a violation of the author’s **moral rights**.

Example: Bart, an artisan, wants to manufacture and sell sweaters featuring a picture of the popular cartoon character Bart Simpson. He cannot do this, as this would infringe the copyright and/or design rights/trademark rights in the cartoon character. And simply changing some aspect of the character – its pose, perhaps, or its clothing – is not enough of a change to avoid infringement.

Example: Joana makes car seat cushions decorated with hand-made embroideries. She decides to market the products online and creates a website. She finds a picture of a car on the Internet, copies it and places it on her own website. Joana is possibly violating copyright. It may depend on, for example, whether or not the image is in the public domain.

Example: Matthew is a photographer. He discovers that a triptych he created and sold has been separated into three pieces for

¹⁰⁶ **Illegal copying** is when someone steals someone else’s IP and passes it off as his or her own. For example, a painter who duplicates another’s painting. **Counterfeiting** usually is used in context with trademark infringements, undertaken with the purpose of exploiting the fake trademark for own commercial activities. For example, an artisan who manufactures crystal tableware and passes his products off as someone else’s brand, by selling them under famous names such as Rosenthal, Royal Albert, and Wedgwood. The expression **piracy**, on the other hand, is normally linked to copyright infringements, again with a notion of acting for commercial purposes. Piracy is sometimes also used for counterfeiting acts.

resale. This is an infringement of Matthew’s moral right of integrity of his work. Matthew can require that the piece be sold as a whole.

- ❑ **Infringement of an industrial design.** An industrial design protects the **novelty and/or originality** of the **appearance** of a product. Infringement occurs if someone makes, offers, puts on the market or imports products incorporating the design, which do not produce **different overall impression**, in the country where the right is in force.

Example: Tibor, a Hungarian artisan, sells artistic porcelain, tableware and coffee sets. For his best-selling product – a tablespoon in the shape of a woman – he has registered industrial design rights with the Hungarian IP Office. He notices that a competitor sells woman-shaped spoons in Hungary similar to his spoons. Such sale constitutes an infringement of Tibor’s design rights.

- ❑ **Infringement of a patent or a utility model.** Patents and utility models protect the **function** of a product. There will be infringement if someone professionally **exploits the invention** without the consent of the owner in the country where the right is in force. Exploitation may take place, for example, by producing, selling, importing, and even offering for sale a product which incorporates the subject matter of protection.

Example: A Canadian guitar manufacturer developed and patented a bracing system, consisting of an innovative way to construct a guitar’s inner structure. Competitors in Canada who produce music instruments using the patented bracing system would infringe the patent.

What should artisans or visual artists do when they notice an infringement of their IPRs?

Before taking any action, the first thing for artisans and visual artists to do is to analyse the infringement and its consequences carefully but quickly, and to evaluate the possible costs of a reaction.

- ❑ An **infringement report** could be made, covering:
 - Which IPR has been infringed;
 - Who has committed the infringement;
 - How, where and when the IPR has been infringed;
 - Which product is related to the infringed IPR (for example, if an artist’s design has been copied, the products this design has been applied to).
- ❑ An **evaluation** should also be made on **how the infringement affects** the artisan’s or visual artist’s business in the short- and long-term perspective.

Should the effect be short-term and of little meaning, the right action could only be to take note of the fact and to be vigilant in the future. In contrast, should the effect be considerable and long-term, preparations should be made for a time-consuming and possibly expensive litigation to protect the rights. Infringement of an IPR may, in the long term, affect the volume of sales, price level and the effectiveness of marketing. The bigger the estimated effect is, the more carefully the litigation or dispute resolution strategy should be planned and prepared for.

- ❑ Finally, the **cost and the likelihood of a favourable outcome** of litigation or alternative dispute resolution methods should be assessed. It would be

prudent to seek legal counsel from a competent IP professional. The cost could be calculated in terms of the time that might be taken to obtain a court decision or other measure, the fees that would have to be paid to the court and to attorneys, and the direct and indirect costs of alternatives that would have to be explored and followed in the event of a negative decision. It is also important to assess the chances of winning a case, the amount of compensation and damages that can be reasonably expected from the infringer, and the likelihood and extent of reimbursement of attorney's and court fees if the court's decision is favourable.

What specific action can be taken against infringement?

Generally, artisans and visual artists will have the following options:

- ❑ In some cases, it may be preferable to **tolerate the infringement**. For instance, if the loss of income, sales or profits appears to be negligible from the artisan's or visual artist's point of view, then it may be wiser to 'accept' the violation of the IPRs rather than running into expensive costs for defending those rights. Conversely, if the scale of violation is already significant or will soon be so, then the artisan or visual artist must find out, as soon as possible, the main culprits and deal with them expeditiously but methodically. It is obvious that dealing with these kinds of situations requires a careful weighing of the pros and cons of different alternatives. The artisan or visual artist will also have to assess the chances of winning the case, the amount of compensation and damages that it can reasonably expect to get from the infringing party as well as the likelihood and extent of reimbursement of attorney's fees in case the final decision is in his or her favour.
- ❑ If artisans or visual artists have a dispute with someone with which they have signed a contract (e.g. a licence contract), then they should check whether there is an **arbitration or mediation** clause in the contract itself. It is prudent to include a special provision in contracts for the dispute to be referred for arbitration or mediation in order to avoid expensive litigation costs. On occasions, it may be possible to use alternative dispute resolution systems such as arbitration and/or mediation even if there is no clause in the contract or no contract altogether as long as both parties agree to it. More on arbitration and mediation can be read at <http://arbitrator.wipo.int/center/index.html>.
- ❑ Artisans and visual artists who notice that someone is infringing their IPRs could send a letter (commonly known as '**warning letter**' or '**cease and desist letter**') to the alleged infringer informing him or her of the possible existence of a conflict between their IPRs and his or her business activity (identifying exact area of conflict) and suggesting that a possible solution to the problem be discussed. This procedure is often effective in the case of unintentional infringement since the infringer will in most such cases either discontinue his or her activities or agree to **negotiate a licence agreement**. It is advisable to seek the help of a legal specialist to draft such a letter.
- ❑ **Sometimes surprise is the best tactic**. In some cases, giving the infringer notice of a claim enables him or her to hide or destroy evidence. In these circumstances it might be appropriate to go to court without giving notice to the infringer and ask for an '**interim injunction**' in order to surprise the infringer at his or her business premises. The court may order that the alleged infringers stop their infringing action pending the outcome of a trial (which can take many months) and to preserve relevant evidence in regard to the alleged infringement. Furthermore, the infringer may be compelled to inform of the identity of third persons involved in the production and distribution of the infringing goods or services and their channels of

distribution. As an effective deterrent to infringement, the court may also order, upon request, that infringing goods be destroyed or disposed of outside the channels of commerce without compensation of any sort.

- ❑ Finally, there will be cases where artisans and visual artists may decide to initiate **civil proceedings**. Bringing legal proceedings against the infringer will only be advisable if (i) the artisan or visual artist can prove the existence and ownership of the IPR; (ii) he or she can prove that there is an infringement of his or her rights; and (iii) the value of succeeding in the infringement action outweighs the costs of the proceedings. The courts generally provide a wide range of civil remedies to compensate aggrieved owners of intellectual property rights. These include damages, injunctions, orders to account for profits, and orders to deliver up infringing goods to right holders. The IP law may also contain provisions that impose **criminal liability** for making or commercially dealing with infringing objects. The penalties for infringement may be a fine or even imprisonment.
- ❑ Many countries have implemented **border enforcement measures**, which allow trademark and copyright owners and licensees to request the detention of suspected pirated and counterfeit goods while they are subject to the control of the national customs authorities.

TIP – Expert advice by an IP agent or attorney, the IP office or the customs authorities is crucial whenever artisans or visual artists discover that their rights are being infringed.

Chapter 6

Case studies

This chapter presents case studies and examples of managing IP assets in marketing, for artisan enterprises and visual artists from developing countries. The case studies are supplemented with a few illustrations from the craft and visual arts sectors in developed countries, in order to show more diversified IP-based marketing means.

IP perception and use for crafts and visual arts in Senegal

Mara

Serigne Mor Niang (*'Mara'*), is a Senegalese plastic artist. He is a painter, sculptor, and graphic designer. He also designs furniture (mainly African-style), textiles and fashion accessories. At present, he is actively researching possible avenues for marketing the fruit of the baobab tree for both utilitarian and artistic value. Mara won the first prize in an international contest organized in 1999 by the President of Senegal in order to create logos for the Government's ministries.

The idea of protecting his works came very early to Mara, even before he had registered at the Fine Arts Institute in Dakar, which in 2002 awarded him a national diploma with honours. Mara wanted to reconcile the need – faced by any genuine visual artist – to exhibit his works with the underlying threat that his artistic expressions could be copied once he would make them publicly known. This early decision is commendable, particularly as he lacked information on IP issues. He later discovered that this is often the case for visual artists in his country, who either are unaware of or neglect to use the tools provided by the IP system, unlike artists in the music sector, who make better use of the IP system.



'Gangunaay' means 'throne' in Wolof, the national language of Senegal. Mosaic on wood, made of fruit and seeds of the baobab tree. The throne has been conceived following the shape of the baobab tree. Dimensions: 1.40 m by 0.70 m.

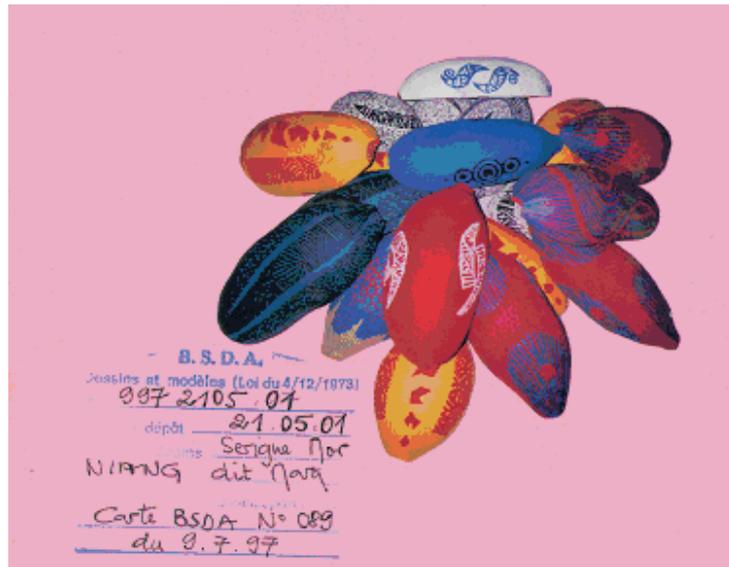


'Ornaments and jewellery in baobab shell', hatching and engraving on shell. Artist's private collection, used for his fashion parades. Dimensions: 15 cm by 5 cm.

Mara first consulted a law specialist at his university, who advised him to approach the African Intellectual Property Organization (OAPI).¹⁰⁷ There, he learned much about IP protection, and found out that many of his original sculptures and designs were protectable under industrial design law. However, he realized that he could not afford the registration fees for such protection – approximately CFA 50,000, around US\$ 80, for each industrial design to be registered. The CFA franc is the currency currently used in 14 formerly French-ruled African countries. The term CFA means: 'Communauté financière africaine' – African financial community for the eight Member States of UEMOA – the West African Economic and Monetary Union; and 'Coopération financière en Afrique centrale' – financial cooperation in Central Africa – for the six Member States of CEMAC – the Central African Economic and Monetary Community.)

Looking for an alternative solution, he consulted the Senegalese Copyright Office (Bureau sénégalais du droit d'auteur – BSDA) and learned that most of his works were also protectable under copyright law. Although a creation is protected by copyright law as soon as it comes into being, without any official procedure, Mara decided to register his works at the copyright office anyway, since this registration is free of charge. Registration may indeed prove useful for identifying and distinguishing titles of works, and may also serve as evidence in case of a court dispute relating to copyright. In addition, Mara reports that this optional copyright registration, which is indicated on his album of works, makes him more trustworthy in the eyes of his commercial partners when starting a new business relationship. He also feels that it has discouraged possible infringers. Finally, he appreciates that copyright is valid posthumously, meaning that his heirs will benefit from the copyright protection of his works for a considerable period of time after his death. Mara is actively spreading the word within the Senegalese visual arts community in support of IP protection practices.

¹⁰⁷ OAPI is the regional IP office headquartered in Yaoundé, Cameroon, for French-speaking Africa, for patents, trademarks, industrial designs and, in the future, geographical indications and layout-designs of integrated circuits, Website: www.oapi.wipo.net/index_angl.html.



'Pile of shells', pile of fruit cut out and hot/cold contrast-painted, following the concept of baobab fibres and seeds, intended for home furnishing. Dimensions: from 25 to 30 cm, by from 10 to 12 cm.

Source: E-mail correspondence between the artist and ITC (December 2002-January 2003). Website: www.baobabfruitco.com.

The Soubédioune craft village

Within the framework of a survey carried out in the Soubédioune craft village in Dakar, artisans were asked to report whether they had registered any of their original creations at the Senegalese Copyright Office. No positive reply was recorded, though the legal texts establishing the Senegalese Copyright Office as well as those defining the applicable copyright law in Senegal (for works of literature, music, visual arts and performing arts) date back to 1973. It is clear that, within the Senegalese craft sector, awareness about the copyright system and its relevance is practically non-existent. However, certain initiatives by well-informed creators augur well for both awareness development and an increased use of IPRs in the foreseeable future: the examples below are self-explanatory.

Source: E-mail correspondence between Maître Youssou Soumaré and ITC (December 2002-January 2003). Maître Soumaré is a copyright specialist holding a diploma in business law from the Cheikh Anta University in Dakar. Aware of the importance of IP protection for the creators in his country, this young jurist proactively works in promoting copyright. He is the legal counsellor of various Senegalese artists, as well as their artistic agent helping formulate their contracts and develop their careers on as many sectors and markets as possible.

Cheikh Gueye

Cheikh Gueye is the founder and owner of Menuiserie Khadimou Rassoul (MKR, rue 9, Angle Corniche Ouest), a woodwork enterprise in Dakar, which produces and exports home and office furniture, including tapestry. Cheikh Gueye's motto is 'innovation within authenticity'. In the past, his business suffered from fraudulent copying by his competitors, which pushed him to protect his designs. He decided to pay for the services of a legal office. To begin with, he was advised to file applications at the Senegalese Copyright Office in order to have his works listed in the national copyright register. Although this registration does not give him additional rights (copyright exists in the works automatically, without any registration), it helps Cheikh Gueye to prove that he is the owner of the copyright in the works that have been registered. More recently, Cheikh Gueye decided to

protect his works as industrial designs. He filed an application at the OAPI. The OAPI system offers wide and harmonized IP protection for all 16 of its French-speaking Member States. To register designs through OAPI, Cheikh Gueye had to pay a registration fee and present photographs of the works to be protected. According to him, the average cost for a design or a model registration under OAPI coverage is around CFA 44,000 (approximately US\$ 70) over a period of five years. The time taken by OAPI to review an application for registration can be more than a month. If the application is accepted, the applicant gets a registration certification bearing OAPI's stamp and the registration date. He or she then receives a copy of the photograph of the protected work designs or models, while another copy is kept in OAPI's files.

Cheikh Gueye admits that, since he started protecting his works and designs, he feels more confident and secure in his business dealings. Moreover, the volume of his transactions and his business development plans, particularly through the Internet, make it necessary for him to systematically ensure IP protection. He has a good reputation and his export business, to the United States, France, Germany and other countries, is expanding.

Source: E-mail correspondence between Maître Youssou Soumaré and ITC (December 2002-January 2003).

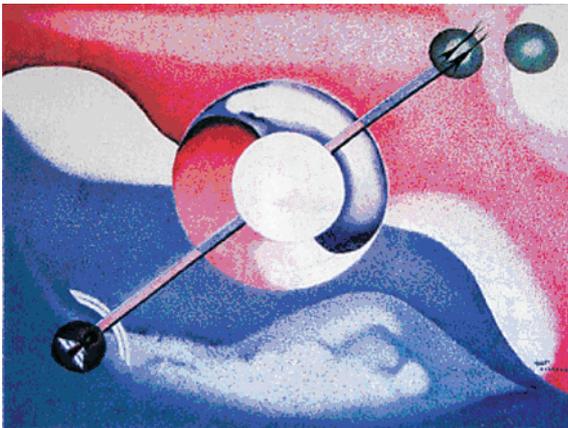
Papa Oumar Fall and Moussa Mballo

Papa Oumar Fall (*Pof*) and Moussa Mballo are visual artists in different fields, but with a common marketing vision. Pof is a self-taught plastic artist, born in Saint-Louis, at the mouth of the Senegal River. He discovered a brush colouring technique, 'textylography', which he defines as 'a technique stemming from the integration of textile as support and stylograph as printing means' (<http://membres.lycos.fr/styloculture/>). Moussa Mballo was born in the green Ziguinchor region. The background of his paintings is an explosion of colour blends, multiple shapes and impressive graduations on large surfaces or narrow spaces. While still at university, he had already realized the importance of artistic heritage.

What do these two artists have in common? The same creed: '*use IP protection mechanisms*'. Both have registered their creations at the Senegalese Copyright Office, and both emphasize the higher credit and the more professional touch that registration brings to their work, besides helping to claim resale rights.

Source: E-mail correspondence between Maître Youssou Soumaré and ITC (December 2002-January 2003).

'Pôle fédérateur', by Papa Oumar Fall (*Pof*), 530mmX480mm, 1 January 2002.



'Debbo', by Moussa Mballo, 1mX79cm, declared at BSDA under number 3110200103 for the painting.



Pape Demba Diop

‘Fare Baye Art’ is the trademark appearing on all 100% leather shoes and accessories (bags, belts) made by a talented and internationally well-known creator, Pape Demba Diop (*MBA*). His workshop is located at ‘la Gueule Tapée’, rue 63X60, Dakar. His logo is an ‘f’ sign surrounded by a circle. ‘The asset of my mark,’ reports MBA, ‘is that customers can easily identify my products.’ Although MBA admits that it is through sheer use that his ‘signature’ has become recognized and is now highly valued by connoisseurs, he is conscious of the need to seek legal protection for his trademark through a formal registration with the OAPI, so that he can prevent others from using it.

‘*Padaam*’, by Pape Demba Diop (*MBA*), declared at BSDA under number 2335130303.



Source: E-mail correspondence between Maître Youssou Soumaré and ITC (December 2002-January 2003).

Legal measures to protect the *mola* in Panama

Context

The Government of Panama has acted to protect a specific kind of indigenous craft: the *mola* (a colourfully handcrafted fabric panel used for decorative purposes). In addition, the country’s Cuna population, which crafts *molos*, is well structured and organized, and the Cuna themselves have taken concrete steps to protect their culture.

The growing interest from industrialized countries in all kinds of indigenous art has contributed to the commercialization of *molos*. To respond to demand and increase their earnings, many souvenir shops have begun to sell copied *molos* to tourists.

This counterfeiting has economic repercussions for the Cuna women who make *molos*. ‘Pirates,’ as the counterfeiters are called in Spanish, take advantage of the women’s creativity and sell many copies of their designs, whereas the original creator can only sell one.



A *mola* from Panama (courtesy of Ms Zuriñe Areta, Geneva, Switzerland).

IP legislation

In 1994 the Government of Panama completely revised its intellectual property legislation but did nothing with respect to the protection of indigenous art. In 1995, however, it passed Act 41, which incorporated various international agreements relating to intellectual property, including the 1983 Paris Convention for the Protection of Intellectual Property. The primary reasons for the Government's change in attitude were the need to comply with new international obligations; the need to protect the production, marketing, and distribution of merchandise from countries that are signatories of those international agreements; and, above all, the desire to link Panama's economy more closely with international markets.

Copyright legislation

Although copyright law guarantees certain rights of creators, the *mola* is not considered to be a protected work. Instead, *molas* and indigenous art in general are regarded as folklore, as defined in Panama's Copyright Act, which defines expressions of folklore as characteristic elements of traditional cultural heritage created in Panama by its ethnic communities and passed along from one generation to the next, reflecting the community's traditional artistic expectations. Moreover, Panama's Copyright Act clearly specifies that it does not cover expressions of folklore.

Patents

Cuna women could obtain patents for any **novel and non-obvious** sewing techniques. However, it is not certain whether the Cuna could be granted any patents on their sewing techniques, as many if not all of their sewing techniques are **traditional and well-known**.

Industrial designs

The Cuna could, however, obtain industrial design registration for their *mola* designs. A shape, motif, design, or decoration used on an industrially made product is considered to be an industrial design or model. For example, a *mola* design copied onto an industrially made tablecloth could be so protected. The woman who produced that *mola* design would then own exclusive rights over it, and no one could use the design without her authorization.

However, many *mola* designs already exist, and an infinite number can eventually be created. Registering a design for each of them would be extremely

complicated and expensive. As the current IP system recognizes only **individual rights**, the Cuna people, on a **collective** basis, cannot be legally considered the creators of *mola* designs, despite the fact that their designs are, in part, the product of collective Cuna imagination and heritage.

Trademarks

A more feasible alternative would be a registered trademark, usually portrayed by a symbol, to differentiate between Cuna creations and non-Cuna products that are similar or identical. A trademark can promote sales because it authenticates the origin of a specific product. Furthermore, the registration procedure for a single trademark is not excessively expensive. A trademark would enable consumers to ascertain that the *molos* they were about to purchase had actually been made by Panama Cuna and not imitated. It could help to make the general public aware that the imitation of indigenous art is a problem, and prompt them to buy genuine indigenous creations. If a trademark is to be effective against imitations, however, its use must be supported by a public awareness campaign.

To register a trademark, the Cuna would require the support of a representative body or organization such as the Congreso General Kuna or the Congreso de la Cultura. If several organizations were to register trademarks, consumers would not know which one was truly representative of the Cuna, and there would be competition for the same market among the different trademarks. It would, therefore, be in the best interest of the various Cuna organizations to come together and obtain a single trademark, which could even be a **collective mark** or a **certification mark**.

Constitutional protection

Panama's Political Constitution (1972) contains provisions intended to protect indigenous art. For example, Chapter Four is devoted entirely to national culture. However, only Article 86 seems to offer a special kind of protection regarding indigenous art. This article asserts that the State recognizes and respects the ethnic identity of its indigenous communities. The Constitution also states that the Government is responsible for conducting programmes that develop material, social, and spiritual values. Another important point in the Constitution is that the State exempts artisans from paying taxes. Nonetheless, despite the advantages that it offers to people who qualify for the status of artisans, the Constitution does not prohibit the production or sale of copies or imitations.

Chapter Four of the Constitution clearly states that *molos* are considered a national product of Panama. This means that they are the property of all Panamanians, not solely of the Cuna. As a result, all Panamanian citizens may produce *molos*. Some Cuna professionals believe that one way to limit the number of copies and provide better protection would be to recognize *molos* as part of the Cuna nation's heritage.

Legislation related to national crafts

As a form of national craft, *molos* are protected by some pieces of legislation. Article One of Act 27, 24 July 1997, for the protection, promotion, and development of artisanship, states that the Act's objective is to promote crafts in Panama by establishing special conditions for protecting, developing, and marketing crafts, and by strengthening the competitiveness of artisans by effectively integrating them into the country's social and economic structures.

Article 10 describes how Act 27 covers the protection of *molas* and other kinds of national artisanship: ‘For the purpose of protecting national traditions and culture, the present law prohibits the importation of artisanal finished products or parts of the same and of merchandise imitating any piece of traditional or indigenous Panamanian clothing such as Panamanian *polleras*, *molas*, *naguas* (*naun*), or *montunos*.¹⁰⁸ In other words, the Act prohibits the sale of imitations made in other countries but does not forbid the exportation of those made in Panama nor the sale of Panama-made imitations within the country. The Act also states that the Department of Commerce and Industry, via the Directorate of National Artisanship (Dirección General de Artesanías Nacionales), must ensure the enforcement of article 10.

Order no. 61 of the Municipal Government of Panama City prohibits peddlers from selling foreign handicrafts in public squares, parks and streets. This order limits the sales of foreign products that compete with *molas*, but it does not restrict the sale of copied *molas*.

Legislation specifically related to molas

Act 26, 22 October 1984, prohibiting the importation of copied *molas* and enacting other provisions, is intended to limit the number of imitation *molas* entering Panama and prevent the market from being flooded with inexpensive counterfeit products. Article 1 of the Act reads: ‘It is forbidden to import *molas* on cloth, engravings imitating *molas* on cloth, other imitations of *mola* designs, and any other cloth or article that in any way imitates or tends to compete with the Cuna artisanship called *mola*.’

Although the National Customs Directorate is in theory responsible for enforcing this Act, it has never been enforced. It is evident that enforcement will not be possible without political advocacy and pressure from the Cuna organizations themselves.

A new law on cultural identity and traditional knowledge

In June 2000, Law 20, on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge, and Enacting Other Provisions, was adopted.¹⁰⁹ The law protects the collective rights of IP and traditional knowledge of the indigenous communities upon their creations such as inventions, models, drawings and designs, novelties contained in pictures, figures, symbols, illustrations, old carved stones and others, and the cultural elements of their history, music, art and traditional artistic expressions, capable of commercial use. These rights are protected through a special registration system.

The law states that the customs, traditions, beliefs, spirituality, religiosity, folkloric expressions, artistic manifestations, traditional knowledge and any other type of traditional expressions of the indigenous communities, constitute part of their cultural assets, and, consequently, they cannot be the object of any form of exclusive right under the intellectual property system (such as copyright, industrial models, trademarks, or indications of regional origins), unless the application is filed by the indigenous community.

¹⁰⁸ A Panama *pollera* is a long, colourful, cone-shaped skirt that fits closely at the waist and flares at the feet. *Naguas* (*naun* in Cuna) are brightly coloured costumes worn by women. *Montunos* are traditional costumes worn by men.

¹⁰⁹ The text of the law is available at www.wipo.int/tk/en/documents/word/panama-law20-spa.doc.

Conclusions

There are crucial strategic options if the imitation of Cuna art is to be restricted and its market opportunities protected and developed.

The use of a trademark, combined with a public awareness campaign, would allow consumers to determine which *molas* are hand-made by Panamanian Cuna. Those interested in quality and authenticity would therefore refrain from purchasing *molas* not identified by a specific trademark.

Political decisions and will at the governmental level would help to enforce the legal protective measures concerning *mola* production and marketing. The question of the ‘nationality’ of the *mola* should also be resolved: the Cuna people and the Government should decide whether *molas* can be better protected if they are defined as belonging to the Cuna nation or to Panama.

Source: This case study is based on, and contains extracts from, the full text by Love Saint-Fleur, published on the website (www.ichrdd.ca/english/commdoc/publications/indigenous/11molaEng.html) of the Rights & Democracy (International Center for Human Rights and Democratic Development), a Canadian independent organization with an international mandate, which initiates and supports programmes to strengthen laws and democratic institutions, principally in developing countries. This case was discussed at the Inter-American Workshop on Intellectual Property Rights held in Ottawa in 1999, organized by the Canadian Committee of the Indigenous Women of the Americas, one of whose priorities is ‘the enhancement of indigenous women’s control over craft commercialization, the protection of their IP rights and the development of sustainable markets for their crafts’.

Maquí – A trademark story

This case study illustrates how trademarks can support advertising potential for the benefit of craftspeople.

Maquí is an Ecuadorian producer of hand-woven straw hats (known worldwide as ‘Panama hats’). The enterprise registered the trademark ‘Maquí’ which means ‘hand’ in the Quechua language, in Ecuador for such hats. The choice of the sign (Maquí) was made carefully, so that it could be **easily recognized**, be **registered** as a trademark in the desired markets, and gradually become a brand in its field through effective use.



In order to market the hats, Maquí has launched progressive programmes that **advertise** the craft of the communities of Ecuador, and emphasize the quality and style of its hand-woven hat products. In 20 years of operation, Maquí has acquired a high reputation throughout the world. On the basis of its advertising campaigns, consumers are now able to easily distinguish between different straw hats and purchase the hat they desire.

By advertising its mark, Maquí also takes on an obligation to maintain a certain **quality**. Today, straw hats are more and more often woven by machine and are made of poor-quality fibres. Hats bearing the Maquí trademark, however, are hand-woven. Maquí has achieved renown as one of the most reliable and prestigious trademarks on the international straw hat market. The trademark is a guarantee for consumers that each hat is quite unique, respects the traditional Ecuadorian art of weaving and braiding, and is made of high-quality straw.

As the Maquí trademark has become increasingly known, its importance on the markets has grown and the value of the trademark has risen. Little by little, the trademark has become a brand which is appreciated by the markets, and has independent economic value.

For more information, see www.equagua.com/negocios/paginas/712.html.

Harris Tweed – A certification mark for cloths

Harris tweed is cloth that is hand-woven by the islanders of Lewis, Harris, Uist and Barra (Scotland) in their homes, using pure virgin wool that has been dyed and spun in the Outer Hebrides.

The Certification Mark was first granted in 1909, registered in 1910, and stamping began in 1911. It ensures that all cloth certified with the Harris Tweed Orb symbol complies with this definition and is genuine Harris tweed, the world's only commercially produced hand-woven tweed.

This is how it normally works:

- ❑ The process begins with pure virgin wools which are blended together to gain the advantages of their unique qualities and characteristics.
- ❑ The wool is taken to the mill where it is dyed into various colour shades. The wool is then weighed, blended and carded. The resultant yarn has a twist imparted to it as it is spun to give it strength. The spun yarn is then warped. This is a vitally important process in which the basic pattern of the colours is prepared by winding the threads on to a frame of wooden pegs ensuring an even tension throughout. The warp is then gathered together in long hanks.
- ❑ The warp is delivered, together with yarn for the weft, to the homes of the weavers. The weavers also receive the design instructions and a pattern sample from the manufacturer.
- ❑ All Harris tweed is hand-woven on a treadle loom by weavers at their own homes. The Hebridean craftsperson weaver works to colour and design instructions provided by the manufacturers. The tweed, which is approximately 78 metres long (85 yards), is collected and is returned to the manufacturers.
- ❑ The tweed is returned in the 'greasy' state to the manufacturers and here it is finished. At this stage dirt, oil and other impurities are removed by washing.
- ❑ The pieces of tweed also pass through the skilled hands of the mending department where any loose ends and broken threads are rectified. This is an essential quality control activity and ensures that there are no imperfections. Various finishes can then be applied to the tweed.
- ❑ After finishing, the Harris tweed is then presented to the **Harris Tweed Authority's** inspectors. If all the necessary regulations (including weight

and thread densities) have been complied with, it is stamped with the Certification Mark – or ‘orb’ mark as it is known throughout the world. The orb stamp is the mark of authenticity and the label confirms it.



For more information, see the Harris Tweed Authority website: www.harristweed.org

Toi Iho – A certification mark for Maori arts and crafts

This is an exciting initiative for Maori artisans, visual artists and businesses.

The **Toi Iho™** mark of authenticity is a promotional initiative recognising Maori (New Zealand) art and artists. It involves a registered certification mark denoting that the products are authentic quality indigenous art forms.

For more than 20 years Maori artists had criticized the ever-increasing quantity of Maori design products that were produced offshore or by non-Maori artists for the tourism sector, and called for assistance to retain ownership and control of their Maori designs. In 2001, Te Waka Toi, the Maori arts board of Creative New Zealand, developed and implemented the creation of the toi iho mark in consultation with Maori artists.

The **Toi Iho™** mark enables artists to identify themselves as authentic and quality Maori artists and enables consumers to purchase products with the full knowledge of their authenticity. The mark is for use by Maori artists on works they produce for sale. It can also be used to authenticate exhibitions and performances by Maori artists.



There are four categories of the toi iho™ mark:

- ❑ The **Toi Iho™ Maori Made Mark**, which is exclusively for artists of Maori descent;
- ❑ The **Toi Iho™ Mainly Maori Mark**, which is for groups of artists, most of whom are of Maori descent, who work together to produce, present or perform works across artforms;
- ❑ The **Toi Iho™ Maori Co-production Mark**, which is for Maori and non-Maori artists and businesses working collaboratively to produce, present or perform works across artforms;
- ❑ The **Toi Iho™ Licensed Stockist Mark**, which is for art and craft retailers and galleries who stock the work of licensed mark users.

The commercial benefits of the Maori Co-production Mark are exciting. A manufacturer, for instance, might collaborate with a Maori designer to produce

fashion wear on a large commercial scale while still maintaining the design's artistic integrity. The Maori designer would have to meet the mark's authenticity and quality requirements.

The Maori Made Mark has been developed to promote Maori arts and artists in the global market, provide Maori artists with a greater incentive to produce high-quality works and help maintain the integrity of Maori culture. The mark also means that customers will be assured that when they purchase what they think is Maori art, it actually is the real thing and not an import that has been mass-produced in another country.

Te Arawa artist June Grant, a retailer and leading figure in the New Zealand tourism industry, is constantly selling Maori art offshore. She says the introduction of the Toi Iho Maori Made Mark will make a major contribution to the New Zealand economy. 'Maori art generates huge foreign exchange for New Zealand,' she says. 'This mark is about integrity both for the artist and for the person wanting to buy authentic, high-quality Maori art. It also means that Maori artists using the mark will be able to command a premium price for their work because they will have a standard of excellence recognized by galleries, retailers and art dealers.'

This comment is reinforced by Rod Mackenzie, General Manager of Marketing at Trade New Zealand, who says 'brands do create value over time'.

Source: www.scoop.co.nz/mason/stories/CU0202/S00022.htm. Further information, copies of rules and application forms can be found at: www.toiho.com

Modranská majolika – A geographical indication for ceramics

Modranská Majolika (which means 'pottery from Modra') is a geographical indication, registered in the database of the Industrial Property Office of Slovakia.

Modra pottery is the favourite in Slovakia of all the traditional ceramics. The brightly painted bowls, pitchers and jugs that can be seen in so many Slovak kitchens are made in Modra, at the Slovak Folk Majolika Cooperative.

The town of Modra is located in Slovakia, 65 kilometres north-east of Vienna in the Northern Carpathians/East European Mountain Range. Modra has been known for the production of wine since Queen Maria Theresa, Empress, Archduchess of Austria and Queen of Hungary and Bohemia in the seventeenth century, who was crowned in the nearby city of Pressburg. Prime wines from Modra were delivered to the castle of Pressburg and served from Majolika pitchers and jugs as a part of the festivities and daily life of the castle. In the fourteenth century Modra was already known for its unique Majolika pottery, as well as its distinctive wine production. In the 1700s, Bohemian, Moravian and Slovak folk pottery integrated the Habaner technique with their own, and developed a style which emerged as a valued folk artform in itself. Today, in the small Slovakian town of Modra, the relationship between renaissance artists and contemporary folk ceramists endures. Using traditional designs and firing techniques, Modra's artisans are committed to being progressive in their work without adopting mechanization. Handcrafted, hand-painted and personally signed, each masterpiece is a unique expression of its creator.

The **Slovak Folk Majolika** is a folk art cooperative, located in Modra, which gathers artisans of decorative and utility ceramics (jug makers, ceramic painters and retouchers). Work in the cooperative does not depend on membership, although three-quarters of the artisans are both employees and members. The assortment of ceramics the cooperative produces is very wide and includes jugs,

vases, clocks, baskets, ring bells, candlesticks, ashtrays, cups, plates, tea and coffee sets, pots, bowls, fine giftware and tiles. Items are either single-coloured glazed without décor or glazed in white or another colour and decorated with paintings. Some featured designs include harvest, grapes and vine motifs.

In order to advertise and promote its products, the Slovak Folk Majolika cooperative uses the geographical indication **Modranská Majolika**, often in combination with registered **trademarks** and/or **certification marks**.¹¹⁰

For more information, visit the website of the Slovak Folk Majolika Cooperative at www.majolika.sk/indexenglish.html.



Mary Engelbreit: Artist and entrepreneur – A licensing story

Mary Engelbreit is known throughout the world for her colourful and intricate designs, and has become a pioneer for art licensing. With a range of licensed products that stretches from cards and calendars to dinnerware and fabric, a successful retail store in her hometown, an award-winning magazine, more than 150 book titles published and hundreds of millions of greeting cards sold, the most apt description of artist Mary Engelbreit may be a line pulled from one of her well-known greeting card designs – she truly is ‘The Queen of Everything.’ Mary’s unmistakable illustration style, imbued with spirited wit and nostalgic warmth, has won her fans the world over.

An entire industry has indeed grown up around Mary Engelbreit, but it all began with a young girl who just wanted to draw pictures. Mary moved into her first ‘studio,’ a hastily vacated linen closet in the home where she grew up, when she was just 11 years old. ‘We jammed a desk and chair in there, and I’m sure it was 110 degrees,’ she remembers. ‘But I would happily sit in that closet for hours at a time and draw pictures.’

Mary’s passion and dedication to her drawing has never wavered, and although her company now employs a small staff that ‘reformats’ her art to make it appropriate for a myriad of licensed products, Mary herself still imagines every concept in her head and draws every original illustration with her hand.

Mary’s road to becoming a professional illustrator was full of unexpected twists and turns. She went to work directly out of high school at an art supply store in St Louis (Missouri, United States). Over the next few years she worked for a small ad agency, accepted free-lance projects on the side, held independent showings of her own art, and even worked for a short time as an editorial cartoonist for the *St Louis Post-Dispatch*. In these early years, Mary learned a lot and managed to make a modest living, but she wasn’t satisfied ‘drawing to order’ for free-lance clients. She knew that she did her best work when it was coming from her own head. What she truly wanted was to be a children’s book illustrator.

In 1977, newly wed and with enthusiastic encouragement from her husband, Phil Delano, she took her portfolio to New York City to try her luck at some

¹¹⁰ The Slovak folk majolika Modra owns a **certificate of the sanitary and hygienic quality** of the products. The importance of this certificate is evident because of the production of ceramics for dining, tea and coffee sets; beer and wine glasses; liquor sets; frying pans; vessels for milk, fruit and vegetables; etc.

well-known publishing houses. She received a ‘mild reception’ from publishers and a suggestion from one art director that she try her hand illustrating greeting cards. ‘I was kind of crushed at the time,’ she recalls. ‘It seemed like a real come-down from illustrating books.’ But soon enough, Mary realized that the suggestion had merit. She found that the greeting card format played well into her style of illustration. Within months, she made her first licensing deal by selling three card designs for US\$ 150 and signed a short-term contract with another greeting card company.

Once Mary shifted her talent and energy to greeting cards, success came quickly. Several well-known card companies bought her designs, and sales were brisk. Mary Engelbreit has been grasping opportunities ever since. As her greeting card line grew in size and popularity, it drew attention from other companies who were anxious to license Mary’s distinctive artwork on a wide range of products including calendars, T-shirts, mugs, gift books, rubber stamps, ceramic figurines and more. By 1986, Mary Engelbreit greeting cards had blossomed into a million-dollar-a-year business. She decided to license her cards to Sunrise Publications to free up more time for her art and to grow her business in other areas. In 1995, she brought on Greg Hoffmann, long time friend and legal counsel, as Chief Executive Officer to run the business. Mary Engelbreit Studios now has contracts with dozens of manufacturers who have produced more than 6,500 products in all. And in 2001, Mary saw her original dream come true when she signed a contract to illustrate children’s books for publishing giant HarperCollins. Her debut book, *The Night Before Christmas*, spent eleven weeks on the *New York Times* best-seller list.

Although the range of Mary Engelbreit licensed product has continued to grow robustly, Mary and her staff are careful to make sure the growth is smart and deliberate as well. They take extreme care in choosing only the best companies to work with and go to great lengths to make certain that Mary’s artwork is reproduced as faithfully to her original work as possible.

In the fall of 1996, Mary took on what was probably her most ambitious project to date. She launched a national consumer magazine, *Mary Engelbreit’s Home Companion*. The home décor and creative lifestyle magazine reflects Mary’s personal decorating vision and showcases the homes of fellow artists. Each issue also covers topics including family life, food, decorating, craft projects, flea markets and collectibles. The magazine has won several prestigious awards and currently enjoys a circulation of over 600,000, with a readership of two million.

Over the years, Mary Engelbreit has shared her good fortune with a range of charitable organizations and worthy causes close to her heart. An avid reader, Mary has always been dedicated to the promotion of literacy. In 2000, Mary launched a partnership with First Book, a non-profit organization that delivers new books to low-income children. Her contribution of a commemorative poster for the organization’s Make a Difference Day event was a key factor in enabling them to deliver two million books to literacy groups for low-income children in 2000.

Today, the Mary Engelbreit companies are headquartered in Mary’s hometown, St. Louis, Missouri, USA. Her companies include: Mary Engelbreit Studios, art licensor; The Mary Engelbreit Store, retailer; and *Mary Engelbreit’s Home Companion* magazine. Thousands of retailers nationally and internationally sell Mary Engelbreit products, spreading what the *Wall Street Journal* coined a ‘vast empire of cuteness.’ Total retail sales soar above \$100 million annually.

It is an amazing degree of success for any company, but even more remarkable considering that it all began with a single-minded young girl who decided at age 11 that she was going to be an artist. And while Mary Engelbreit Studios has

grown into a global licensing and retail business, that same girl still sits at its core, grown up now, but still drawing her pictures with the same sense of wonder, imagination and enthusiasm.

When Mary was young, people told her that being an artist was not a realistic way to make a living, but Mary Engelbreit was never one to be easily discouraged. ‘I believed in myself,’ she says, ‘and now I’m living my dream.’

Mary Engelbreit was honoured with the 2002 Best Art License of the Year award at the 19th Annual LIMA Gala & Awards Ceremony for the International Licensing Industry Merchandisers’ Association (LIMA). A media release can be read at www.maryengelbreit.com/PressRoom/Releases/LicenseAward-06-18-03.htm.

This case study has been retaken, with the permission of Mary Engelbreit Studios, Inc., from Mary Engelbreit’s website at www.maryengelbreit.com/AboutMary/AboutMary.htm. Mary Engelbreit’s products, her craft project ideas, press releases and other information can be viewed on the home page at www.maryengelbreit.com. Mary has also written a *Getting Started* letter for artists, which outlines some practical guidelines for those interested in the art licensing business (see www.maryengelbreit.com/ForArtists/GettingStarted.htm). Her website also offers a *Licensing 101 Presentation* (ppt) that is often given at trade show events (see www.maryengelbreit.com/PPT/Licensing101/sld001.htm).

Source: Staff Writer, *Your Business Magazine*, Aug/Sept 2001.

About making a painting from a picture

Borrowing ideas from other artists: how far can you go? Some basic questions and answers are given below.

Q: I like to paint landscapes but I do not live in an exotic place and do not get to travel often. For instance, I like to paint Caribbean seascapes and Hawaiian waterfalls but I’ve never actually been to those places. My question is, since I paint from landscape photographs I find on the Internet, and since the landscapes depicted in the photographs are not the property of the people who took the photographs, **am I violating any copyright laws by using photographs of nature that I did not take?** The last time I checked, nobody owned the Grand Canyon, but I’m sure many artists have painted it using photographs they didn’t take.

A: **Creating paintings from photographs of exotic places that have been taken by people other than yourself may or may not violate copyright laws.** This can be illustrated through the following example. Let’s say that you’re a professional writer and you’re assigned to write a feature article about the current political climate in Russia. Rather than travel to Russia to conduct personal interviews with politicians and other qualified authorities, you research, read, and accumulate information about Russian politics from previously published content in newspapers, magazines, online databases, and books. Your research notes become the basis for your article.

Your completed article does not violate copyright laws if you take generally known information about Russian politics, currently available in a variety of publications, and incorporate it into an article framework that you structure entirely on your own, and that represents your own personal point of view. If, however, your article contains extensive passages involving specific ideas, thoughts, facts, or theories that are unique to one or another author or resource, then you may well be violating copyright laws. The key here is **how much of**

those specifics you ‘borrow’ and how literally you incorporate them into your writing. Without getting into legal detail, the more you borrow and the more literally you write it into your article, the more likely you are to be violating copyright laws.

Similarly, making paintings from photographs taken by people other than yourself may or may not violate copyright laws. If, for example, a particular photographer is known for portraying landscapes in certain unique ways that are readily identifiable with that photographer, and **you copy her style of portrayal or incorporate it literally into your art, then you may be liable for infringing on her copyright.** This is especially true if you do not notify her that you’ve done some serious ‘borrowing’, and then place your art up for sale. Using her techniques to make money for yourself, without her permission, and without paying her royalties for borrowing those techniques puts you significantly at risk for infringing on her copyright.

On the other hand, if your painting is your own personal interpretation of the photographer’s techniques for achieving certain visual effects, and you use her techniques as inspiration rather than copy her directly, you’re most likely in the clear. Problems only tend to occur when artists extensively and obviously copy or imitate the work of other artists, assuming that what’s copied is readily identifiable with specific artists. Keeping at a distance from copyright issues means that you interpret or are inspired by the techniques of other artists rather than copy or imitate them directly. Artists have taken this moderate approach to ‘borrowing’ the techniques of other artists for centuries.

In your case, the best way to avoid over-reliance on the work of any photographer in particular, whether intentional or by accident, is to **create each one of your paintings from a variety of different views of your chosen subject matter** taken by a number of different photographers. Also **stay away from specific or more unusual views** that have been photographed by only a few photographers. For example, if only one photographer is known for photographing a particular subject from a particular vantage point, you would be well advised not to paint that subject from that vantage point unless you get permission from the photographer. Several years ago, a photographer successfully sued artist Jeff Koons for not consulting her before making a [sculpture] that very closely resembled her photograph of puppies sitting on a park bench.

Source: www.artbusiness.com. Articles © Alan Bamberger 2002. All rights reserved.

The experiences of a Nepalese silversmith

Suman Dhakwa is the proprietor of Valhalla Enterprises, a silversmithing business in Kathmandu, Nepal. After several years of using a company trademark with a very Nepali character, in 1994 he developed a new logo with a more international image during a training workshop on design and marketing. He is still using this logo as his brand image, applying it to all products, stationery, business cards, and packaging. He says that it has helped his business to grow in many ways:

- It has helped him personally to be recognized in the market.
- It has also helped customers to trust him.
- It has built him a company image in the market.
- Sometimes, he could not have done business without it. His agent needed the identity of the manufacturer of the jewellery to confirm orders.

Suman has considerable experience with copying and protection. One European company has copied his logo. He felt that he could not stop them because, at the time, he was doing lots of business with them. They were his biggest customer for a long time until he started selling in Japan. At that time he also thought that the European company copying his logo was a good idea, because it was also a good image for him then. But now he considers it a problem because the customer is not meeting Suman's high quality standards and is selling cheaper products. Another European company, also another customer, has copied the company name 'Valhalla'.

He registered the following three items in Nepal during the last 12 months, so they are protected in Nepal:

- ❑ Valhalla name and the font;
- ❑ His own name – Suman Dhakhwa;
- ❑ His logo of a stylized *stupa* as a trademark.

His logo and his name – Suman Dhakhwa – are on the way to registration in Japan. His agent is working for this and he has already paid US\$ 15,000 for it. He hopes that it will be done in a few months, but it takes quite a long time to register in Japan. He would also like to register in the United States and Europe, but needs help with this. He also knows it will cost him considerable financial investment to do it. He decided that he must register and protect these trademark items if he is to be serious about using them to sell in export markets.

Suman could have avoided the difficulties he experienced if he had registered his trademark in the countries of his export market. Then, he could have allowed the European company to use his trademark based on a duly written licence agreement, subject to strict control of the use of his trademark, and against payment of a fee or royalties.

Source: E-mail correspondence between Suman Dhakwa and ITC (April 2003).

Case study from Le Petit Prince, a Togolese craft enterprise

Finding a niche market, shortening the distribution chain, concentrating on high added value, overcoming commercial barriers – Le Petit Prince, a Togolese crafts producer, has used all these to carve out a position in international trade. But its success has also depended on the dynamism and creativity of the director of the family business, Nadim Michel Kalife, former Dean of the Faculty of Economic Sciences and Business at the Université du Bénin in Lomé (Togo). 'I wanted to translate into practice the economic theory of development through import substitution in labour intensive industry,' he says.

Kalife's father established his general import business in 1929. When Nadim Kalife took over the family business as a young man in 1969, he diversified the product range by specializing in luxury articles. In 1983, he decided to find local substitutes for these items by investing in wood manufacture and, four years later, expanded his sales to European markets. Since then, the business participates in two or three annual professional shows in France and distributes a catalogue of its products. This publicity effort costs Le Petit Prince at least US\$ 20,000 a year. But Kalife reckons that most of the company's sales revenues come from contacts with visitors during these trade fairs. And he insists on that these contacts allowed him to increase a minimum level of 50 workers up to over 170 in 2002, in addition to providing work for his local suppliers. Indeed, every export order value of 1 million CFA (around US\$ 1,500) creates a new job for one year. Today Le Petit Prince estimates its export trade at 50 to 100 million CFA (US\$ 75,000 to 150,000) a year, peaking at US\$ 180,000 in 2002 after a big dip in 1998 when he could not exhibit at the Paris annual shows.

However, the path to success has been steep for Le Petit Prince as regards the constant concern to protect its products from copiers and unfair competition. In 1994, Kalife trained two young business school-certificated French agents during a five-month period and granted them exclusive rights to distribute his products to stationery and gift shops all over France. After six months of activity, these agents asked a group of young French crafts workers producing at cheaper prices and lower quality to copy Kalife's products. He sued them for infringement. Unfortunately, due to the complex procedures and high costs (approximately US\$ 450 for each model), Kalife had filed a registration at the Institut national de la propriété intellectuelle (INPI) for only ten of his models out of the hundreds that he was making. He had to use the expensive services of a lawyer in Paris for two years, until he learned that the two fraudulent agents had filed a petition for bankruptcy. At that point, he decided to stop his legal action. The infringement had caused a decline in his sales for 1995–1996.

Because of his enormous disadvantage compared to Asian companies exporting similar goods, who can make them at half of his producing costs, Kalife also struggled, without success, to find a big French company that would absorb his company and assume his required protection and a better distribution over the European markets.

Kalife acknowledges the difficulties faced by small African artisans – who lack capital and resources – in protecting their original craft items. He says, 'What should be done in favour of African artisans is to establish a national office in each country, entrust it with the registration and protection of their creations, and to make it a rule that every counterfeiter reimburse 7% royalties to the creator. This should stimulate artisans' creativity as they tend to simply copy the models given to them, to the detriment of each other, which discourages the creative effort, a sign of economic and social decay.'

Source: E-mail correspondence between Nadim Michel Kalife and ITC (March–April 2003). The first two paragraphs are updated from *Converting LDC Export Opportunities into Business – A strategic response*, ITC and ODIN 2001.

Garrison Guitars

One of Canada's leading acoustic guitar manufacturers, **Garrison Guitars** specializes in high-end acoustic instruments. It has developed and patented the Griffiths Active Bracing System, an innovative way to construct a guitar's inner structure. Now, instead of using more than 30 individually machined and installed pieces of wood, the company uses one glass fibre, injection-moulded piece. This leading-edge technology not only gives Garrison's guitars enhanced structural stability and increased volume, it has enabled the company to reduce manufacturing time for the bracing system from several hours to 45 seconds. Garrison now exports its guitars all over the world.



Incredibly, this innovative technology was sketched out on an airline napkin. In 1995, founder Chris Griffiths decided

With the help of the Genesis Center, Chris Griffiths founded Garrison Guitars based on an innovative technology he sketched on an airplane napkin.

he wanted to start his own guitar factory when he realized that demand greatly exceeded supply for entry-level guitars. He hired an engineering consultant to join him while visiting factories all over North America to better understand the manufacturing process. On the long flight from California to Newfoundland, Griffiths realized that the guitar bracing system could be designed in one piece and began sketching his idea on a napkin. 'At one point I just started seeing something from a different angle,' Griffiths says. 'I borrowed a pen from the stewardess and began sketching the idea on the napkin while discussing it with the engineer.'

Griffiths found himself with a million-dollar idea but without the technical know-how to follow through. So, in 1997 he entered the Genesis Centre, whose affiliation with Memorial University of Newfoundland gained Griffiths access to the university's Manufacturing Technology Centre (MTC). But he soon realized he needed help with far more than the technological aspects of his idea: 'I had taken the idea as far as I could take it,' Griffiths says. 'There were things needed that I couldn't provide, like financial projections and a business plan. It was so overwhelming.' This is where the incubator staff stepped in.

Genesis Centre was able to assist in several ways, including helping with business development, providing office space, matching Griffiths with a mentor and introducing him to venture capitalists. Ultimately, though, that the success came from Griffiths, says Keelin O'Leary, Genesis Centre manager. 'The entrepreneur really makes or breaks the whole company and [Garrison] was built from what Chris had,' O'Leary says. 'Chris has a very personal approach. He's somebody that everyone likes to work with and is able to get everyone interested.'

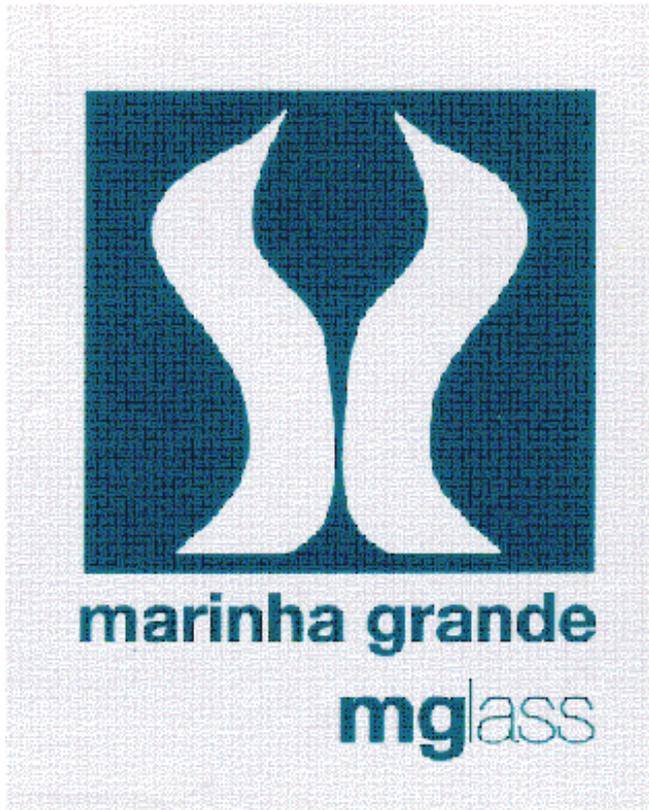
Garrison Guitars is no stranger to success or recognition. It has won several awards, including the 2001 Canadian Innovation Award for Process Efficiency in Lean Manufacturing, several Planet Entrepreneurship Awards and a President's Award for Entrepreneurship. The company started with only Griffiths, graduated in 2001 with 8 employees and now has 56. Its revenue growth has followed suit. With only \$11,169 in revenues at graduation, Garrison has projected fiscal year 2002 revenues at about \$3.59 million.

Griffiths has also continued to give back to his community and the incubator. He logged more than 700 volunteer hours last year with numerous organizations and charities, attends the Genesis monthly networking luncheon (presenting occasionally), and says he regularly recommends Genesis to aspiring entrepreneurs. O'Leary says that the greatest contribution the company has given the incubator is its recognition. 'This is not the first award Chris has won,' O'Leary says. 'He's often out in the public and has been a great ambassador for us. We are thrilled and delighted that he has won another award. He was an ideal client.'

Source: Reprinted with permission from the National Business Incubation Association, www.nbia.org.

Mglass – A collective mark

Mglass is a collective mark that is used to promote the glass industry in Portugal.



Marinha Grande is a region in Portugal with strong traditions in the glass industry. For over 250 years, artisans have created mouth-blown glass and crystal works of art in the region.

After a number of years of decline, a group of private and government organizations banded together, in 1994, forming the Vitrocristal project, which aims to promote glass factories in the region. The project addressed weaknesses in technology, marketing, design and finance. Vitrocristal conceived and developed this initiative, establishing the promotion of quality and design as its defining characteristics. This was achieved by setting standards for the use of a collective mark – Marinha Grande Mglass – and in delivering design and quality awareness campaigns and training.

The Marinha Grande Mglass collection is a project devised by Vitrocristal to promote and publicize the potential of companies belonging to the Marinha Grande glass region. The pieces of the Marinha Grande Mglass collection, which have been developed by young Portuguese designers who worked in member companies, are distributed throughout the world by Vitrocristal. They bear the seal of the collective mark Marinha Grande Mglass and represent the century-old tradition of the Portuguese crystal industry, its development and its commitment to the future.

The Comissão Regional da Cristalaria, since 21 February 2001, is the owner of the collective mark Mglass N° 343.636 and manages it in strict partnership with Vitrocristal ACE, which in turn presides the executive committee of aforementioned Comissão Regional da Cristalaria.

For more information on Marinha Grande Mglass, see www.vitrocristal.pt

Chapter 7

Selected references and information sources

Agencies jointly publishing this Guide

International Trade Centre (ITC)

Street address: 54-56 rue de Montbrillant

Postal address: Palais des Nations
1211 Geneva 10
Switzerland

Tel.: +41 22 730 01 11

Fax: +41 22 733 44 39

E-mail: itcreg@intracen.org

Website: www.intracen.org

World Intellectual Property Organization (WIPO)

Street address: 34 chemin des Colombettes

Postal address: PO Box 18
1211 Geneva 20
Switzerland

Tel.: +41 22 338 91 11

Fax: +41 22 733 54 28

E-mail: wipo.mail@wipo.int

Website: www.wipo.int

Reference and information websites

General trade-related IP issues

www.benedict.com	This 'Copyright Website' portal provides real world, practical and relevant copyright information on basic law and visual, audio and digital fields.
www.catalaw.com	A catalogue of worldwide law on the Internet. It aids legal research by arranging all indexes of law and government into a uniform, universal and unique metaindex.
www.chaillot.com	Links in English and French to French, European and international IP resources.
www.ipmall.info/about/fplchome.asp	Provides information and links to a unique collection of IP resources served up by the Franklin Pierce Law Center, United States, as well as hundreds of others on the Internet.
www.ipr-helpdesk.org	A central reference point, by the European Commission, for IPR inquiries throughout the EU.
www.iprsonline.org www.iprsonline.org/unctadictsd/description.htm	Resources, news and analysis on trade, sustainable development and IPRs, by the International Centre for Trade and Sustainable Development (ICTSD), Geneva, Switzerland. (Periodic French, German, Spanish news editions). UNCTAD-ICTSD project on IPRs and development.

www.loc.gov/copyright	United States Copyright Office – Library of Congress provides key publications, guidance for registration, and links to copyright law and to the homepages of other copyright-related organizations.
www.lostquilt.com/Sources.html	List of web-based sources, books and periodicals on copyright information, particularly for crafts and visual arts.
www.thinkusa.com	About licensing and related issues such as IP: helps understand what licensing is and how it can be used.
www.ustr.gov	The Office of the United States Trade Representative is responsible for developing and implementing trade policies that promote world growth, and creating new opportunities for American businesses, workers and agricultural producers. Provides updated watch lists on IP various countries.
www.wto.org	The only global international organization negotiating and monitoring trade rules. Information on intellectual property in the WTO, news and official records of the TRIPS Council, details of WTO's work with other international organizations in the field.

Crafts

http://crochet.about.com	Network for crochet works, provides information about copyright for crochet patterns.
http://sylvias-studio.com/copyright.htm	Copyright facts for crafters and quilters, by Sylvia Landman: reflections and guidelines on 'original designs' copyright.
www.anu.edu.au/caepr/Publications/DP/2002_DP235.pdf	Australian National University: A discussion paper on some competition and consumer issues in the indigenous visual arts industry.
www.craftassoc.com	Information and resource centre, including information on IP issues for artisans.
www.craftsofcharacter.com/programs.htm	Craft marketing programme in partnership between the Government of Canada and the Government of Newfoundland and Labrador, using the 'Crafts of Character' logo and trade name as a collective mark.
www.craftsreport.com/september02/onlineexclusive.html www.craftsreport.com/july01/craftslaw.html	Business challenges specific to craftspeople who work with gourds – Lessons learned – Internet marketing: A case study from the United States. Protecting craft designs through design patents, and comparing the different types of legal protection.
www.embroideryarts.com/resource/faq.html	Information about embroidery, including frequent asked questions concerning copyright issues.
www.girlfromauntie.com	Information about knitting, including the downloadable 'The Knitter's Guide to Copyright'.
www.gov.nf.ca/itrd/pdf/CraftStratwcover.pdf	Craft industry development strategy, Newfoundland and Labrador, Canada.
www.masterstouchmfg.com	Patented process for making steins (mugs) out of Alaskan birch wood
www.serve.com/marbeth/needlework.html	Information about needlework, including copyright issues.
www.wygent.com/nfpress.htm	Patent for a bagpipe drone reed.

Visual arts (General) Indigenous art and photography follow under separate tables

www.a-n.co.uk	Artists information company: provides material on business management for visual artists.
http://jansenartstudio.com/Title17.html	Copyright website pages for artists, written with the assistance of the Law Department of Cornell University, United States.
www.starvingartistslaw.com/copyright/copyright.htm	Copyright law basic issues for artists and writers looking for self-help legal information.
www.art11.com	Weekly e-zine on French and international contemporary art (news, exhibitions, galleries, artists, links with selected websites, interviews).
www.artscouncil.org.uk/	The website of Arts Council England, the United Kingdom development agency for the arts, offers information for artists, arts organizations, national touring and other people who use the arts in their work.
www.artspan.com	Community marketing and sale on the web for artists, artisans and photographers: individual sites for each of its members showing their work along with pricing, a bio and a personal statement.
www.copyright.org.au	Australian Copyright Council – provides various downloadable papers about IP and Visual Arts, for example: ‘Current & Emerging Copyright Issues for the Visual Arts’ (by I. McDonald) ‘Report for Visual Arts Industry Guidelines Research Project: Copyright and moral rights’ (by I. McDonald) ‘Visual Arts Industry Guidelines Research Project: Copyright & Moral Rights Recommendations’.
www.dacs.co.uk	Design and Artists Copyright Society: information about intellectual property protection. Membership body with 40,000 members worldwide.
www.designfortheworld.org	An international humanitarian organization that gathers graphic designers, industrial designers, interior and architectural designers, around a unique mandate: voluntary design for people in need (disadvantaged populations and the organizations that serve them worldwide).
www.eyestorm.com	An international art media company that brings artists and the creative industries together. Premier retailer for limited-edition artworks by contemporary artists and photographers.
www.fplc.edu	Franklin Pierce Law Center, provides basic IP information such as the downloadable paper ‘Copyright in Visual Arts’ by T.G. Field.
www.funnystrange.com/copyright/index.html	Copyright for collage artists.
www.ibslaw.com/melon/archive/401_mural.html	Marketing public fine art: muralists’ copyright.
www.senkarik.com/making/index.html www.artcalendar.com/Senkarikarticle.htm	Example of an artist’s signature as a registered trademark (SENKARIK).
www.usa829.org/USA/copyright_article.htm	Theatrical makeup designer’s case: lessons to be learned in order to avoid dispute by fully understanding copyright issues and addressing them from the beginning of the business relationship.

Visual arts (Indigenous Art)

www.aic.gov.au/conferences/artcrime/	Australian Institute of Criminology, downloadable papers presented at the ‘Art Crime: Protecting Art, Protecting Artists and Protecting Consumers Conference’, including a paper on ‘Intellectual Property and Aboriginal Art’ by A. Newstead.
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Visual arts (Photography)

www.artscouncil.org.uk	Useful information for photographers, including IP.
www.artspan.com	See under 'Visual Arts (General)'.
www.asmp.org	Useful information for photographers, including IP.
www.eyestorm.com	See under 'Visual Arts (General)'.
www.infiniteimages.com	Useful information for photographers, including IP.
www.pdnonline.com	Useful information for photographers, including IP.
www.photocourse.com	Useful information for photographers, including IP.
www.photosource.com	Useful information for photographers, including IP.
www.stockartistsalliance.com/Documents.asp	An international organization of photographers who produce images for rights-protected licence worldwide.
www.vrweb.org/computator/computator.html#principles-and-definitions	Photographs and copyright.

Other cultural industries

www.chin.gc.ca	The Canadian Heritage Information Network provides information about rights management, licensing issues and guidelines, protecting digital images, virtual exhibition agreements, partnerships and related resources. Downloadable 'Copyright Guide for Museums and Other Cultural Organizations'.
www.franklinfurnace.org/thismonth/vla_artist_questionnaire.doc	Collaborative work: questionnaire for artists in various disciplines.

Chapter 8

Selected reading

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Business guide to the world trading system. ITC and the Commonwealth Secretariat, Geneva and London, 1999. ISBN 0-85092-621-1.

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'Copyright for visual art in the digital age: a modern adventure in wonderland'. Jeanne English Sullivan. *Journal of Arts Management, Law and Society*, Volume 26, Number 1, Spring 1996.

'El valor de las ideas'. *El Exportador*, ICEX magazine, Madrid, March 2003, pp. 1 and 6-15.

Enhancing marketing skills for artisans and artists. An ITC conference paper by John Ballyn, for the ILO Zambian National Workshop on 'Enterprise Development and Employment in the Cultural Sector in Zambia: National and Local Strategies', Lusaka, 2002.

Export development of artisanal products. ITC/The Crafts Center, Geneva and Washington, 1998 (English, French, Spanish).

Intellectual property and international trade / La propriété intellectuelle et le commerce international. Susan Crean, B. Laurie Edwards and Marian D. Hebb. The Canada Council for the Arts, Ottawa, 2000.

Intellectual property rights and economic development. Carlos Alberto Primo Braga, Carsten Fink and Claudia Paz Sepulveda. The World Bank, Washington DC, 2000.

Intellectual property rights, the WTO and developing countries: the TRIPS Agreement and policy options. Carlos M. Correa and the Third World Network. Zed Books, London, 2000.

International craft trade fairs: a practical guide. Commonwealth Secretariat, London; ITC, Geneva; UNESCO, Paris, 2001. ISBN 92-3-103779-X (English, French, Spanish).

La investigación de los mercados exteriores. Olegario Llamazares García-Lomas. ICEX, Madrid, 2002. (www.icex.es)

L'art africain contemporain et le marché international. Rapport de l'Atelier du CCI et de l'OMPI à la Biennale des Arts DAK'ART 2002, Senegal.

Marketing, concepts and strategies. 4th edition. Dibb, Simkin, Pride and Ferrell. Houghton Mifflin, 2001. ISBN 0-395-96244-7.

Marketing culture and the arts. 2nd edition. François Colbert, Jacques Nantel, Suzanne Bilodeau, J. Dennis Rich, William Poole. Chair in Arts Management, École des Hautes Études Commerciales (HEC), Montreal, Canada, 2001, ISBN 2980308188 (English, French, German, Italian, Spanish, Chinese).

Overview of legal and other measures to protect original craft items. ITC, Geneva and UNESCO, Paris, 1997 (Arabic, English, French, Spanish).

Product costing and pricing – artisan as entrepreneur: training module, ITC, Geneva, 2000. Ref. 06.04.03 ART (English, French, Spanish).

Reading the contemporary: African art from theory to the marketplace. Olu Oguibe and Okwui Enwezor. ISBN 1 899846 21 2, distributed by Institute of International Visual Arts (inIVA) mail order, Cornerhouse Publications (Europe), MIT Press (USA and Canada), 2002.

Resumen de las jornadas técnicas CCI/OMPI sobre protección jurídica de la artesanía. La Habana, Cuba, 2001.

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ITC publications can be purchased from ITC's website: www.intracen.org/eshop and from:

- ▶ United Nations Sales & Marketing Section
Palais des Nations
CH-1211 Geneva 10, Switzerland
Fax: +41 22 917 00 27
E-mail: unpubli@unog.ch (for orders from Africa, Europe and the Middle East)

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