

Can intellectual property legislation adequately protect the South African craft industry?

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This article examines the legal protection available to works of craft in South Africa. Current protection in terms of intellectual property legislation is measured by determining whether three different enterprises enjoy protection, and then assessing whether this protection is adequate. The conclusion is reached that, while current protection is insufficient, additional protection cannot be sought in the field of intellectual property law.

Key words: craft protection; intellectual property law

Kan intellektuele eiendomswetgewing die Suid-Afrikaanse handwerkbedryf voldoende beskerm?

Hierdie artikel ondersoek die regsbeskerming wat in Suid-Afrika vir handwerke beskikbaar is. Die huidige beskerming wat ingevolge intellektuele eiendomsreg beskikbaar is, word gemeet aan die hand van drie bestaande handwerkondernemings, en daar word dan bepaal of hierdie beskerming voldoende is. Die gevolgtrekking is dat, alhoewel bestaande beskerming onvoldoende is, daar nie bykomstige beskerming in die gebied van die intellektuele eiendomsreg verwag kan word nie.

Sleutelbegrippe: handwerkbeskerming; intellektuele eiendomsreg

In South Africa, and the majority of countries that are signatories of the Berne Convention, craft and other artisanal works are protected by the relevant copyright legislation as artistic works, more specifically ‘works of craftsmanship’ in terms of the South African definition (s1(c) (‘artistic work’) Copyright Act 98 of 1978). However, craft work is exceptionally vulnerable to counterfeiting, as the individual items are frequently not of sufficient value to make recordal of copyright details, or a claim of copyright infringement, a viable proposition. In some instances, their very nature makes reproduction easy and inexpensive. Despite this, craft works are generally viewed as having major economic force in developing nations, and can empower communities who would otherwise have little prospect of earning a livelihood (Fowler 2004:113).

The position in the same in South Africa, and many craft enterprises are destroyed by imitators and counterfeit copies. Those that are successful often owe their success to the difficulty in reproduction of the items concerned – usually because they are so labour-intensive and because the makers are so skilled. Elsewhere, attempts have been made to increase the protection given to craft works by copyright legislation (Fowler 2004: 114). This has not occurred in South Africa, despite the fact that such works form a valuable contribution to the South African economy and assist those who are particularly vulnerable, the uneducated rural poor.

In this article, we study three successful South African craft enterprises to determine whether the protection that is currently available in terms of existing intellectual property legislation is adequate. All three these enterprises are what the lay person would consider examples of ‘South African craftwork’. Each of the enterprises illustrates a different facet of the protection required by craft enterprises against unauthorised copying. Schmahmann (2000:92) suggests that one should be wary of referring to works as ‘products’ as this automatically defines them as produced “in the context of a factory” or at best as a work of craft produced anonymously,

rather than a piece of ‘art’. Because of different words and categorizations used by interviewees in the different enterprises, we shall use a variety of words such as ‘art’, ‘craft’, ‘product’ and ‘goods’ and do not intend that any should be pejorative, nor do we intend to imply that there is a hierarchical difference between them.

We provide a very brief general outline of the protection that is available when works of craft are copied, and outline some of the problems that might arise in respect of each type of protection.

We then discuss the specific enterprises that form the subject of each study. In each instance, we first sketch the origins and background of the enterprise, and discuss the work produced to illustrate whether it might or should be considered ‘craftwork’. We then discuss the current legal protection available to that enterprise against infringement, and consider whether additional protection is necessary or desirable and, if so, who or what requires such protection

Current legal protection

Copyright

The definition of an artistic work in the Copyright Act reads as follows:

‘artistic work’ means, irrespective of the artistic quality thereof-

- (a) paintings, sculptures, drawings, engravings and photographs;
- (b) works of architecture, being either buildings or models of buildings; or
- (c) works of craftsmanship not falling within either paragraph (a) or (b) (section 1 (1)).

Clearly, works of architecture (b) are not relevant here, but the craftworks discussed below will always qualify under (c), while a few of the large Ardmore works might qualify as sculptures under (a). The distinction is not relevant for present purposes.

The next important matter is to determine ownership of the work, as only the owner can institute action for copyright infringement. The Act provides that the author is first owner of the work, and the author is the person ‘who first makes or creates the [artistic] work’ (section 1(1)). The exception is where a work is made ‘in the course of the author’s employment by another person under a contract of service or apprenticeship’ when the employer is owner (section 21(1) (d)). Two possible problems can be identified here – what happens when more than one person is involved in the creation of a work; and when is a work made ‘in the course of employ’? The second problem, while very relevant in other circumstances, when a person creates something that is only tangentially connected with his or her employment,¹ is generally not an issue in the three enterprises discussed below. However, it is only the craft enterprise that might wish to institute an infringement action – the authors of the types of craftworks discussed below are generally not in a financial position to protect their creations. If a person is not ‘employed’ by the craft enterprise, but works on contract or under some looser arrangement, an assignment of all rights under copyright is essential, as otherwise the enterprise cannot sue for copyright infringement. Even employees should be asked to sign an acknowledgement that the enterprise is owner of any works that they create, so that it is easier to prove copyright if required. The first problem appears easily solved, as the Act makes provision for works of joint authorship (section 3(1)) where two or more persons are involved in the creation of a work. However, if a work has

gone through various phases of development which involve input by different people, it can be difficult to assess whether the different individuals are co-authors or mere assistants.

When is a work in which copyright subsists infringed? The Act provides that only the owner of the work may reproduce, publish or adapt the work (section 7). So anyone else who performs any of these actions infringes the work concerned. The problem arises when it becomes necessary to prove that a work, which shows similarities to the original craftwork, has been reproduced or adapted from that work. The courts have created a two-fold test to determine this. Firstly, objectively speaking, are the works substantially similar? Second, is there a causal connection between the original work and the copy? This is clearly illustrated in a decision on whether the design for a curtain and wallpaper had been copied, for use by another textile manufacturer (*Cavendish Textiles Ltd v Manmark (Pty) Ltd* 115 JOC (T)). The court held that, in determining whether or not there had been an infringement, it had to be determined whether or not substantial features of the artistic work in which the plaintiff held the copyright remained recognizable in the defendant's design. If they did, then there would have been an adaptation of the work as defined in the Copyright Act. The test to be applied was a two-fold test. It had to be determined 1. whether there was any possible causal connection between the two works and 2. whether there was sufficient similarity between the two works objectively determined (at 116). So, for an enterprise to prove infringement, not only similarity but the opportunity to copy must be shown.

Finally, the courts have held that copying of a substantial part of the work is essential before infringement occurs. Here, the test is not one of quantity but of quality - the copying of a small but essential part of the work will constitute infringement (*Galago Publishers v Erasmus* 1989 (1) SA 276 (A)).

Copyright subsists automatically if the inherent (originality and material embodiment) and formal (author a qualified person or work made in South Africa) requirements are met. It is not necessary to record copyright anywhere, although a copyright notice (©) is useful to serve as a warning to others. Copyright lasts for the duration of the author's life plus fifty years (section 3(2)(a)).

Trademark protection

It is easier to prove trademark infringement than copyright infringement. A trade mark must be registered by the person who wishes to use it – here the enterprise concerned, not the individuals constituting the enterprise. Registration takes place in one or more of specific classes – for example, one class includes clothing and footwear, while another class includes textiles (section 11(1) Trade Marks Act 94 of 1993). A trade mark is usually infringed by unauthorised use on the goods for which registered, or on similar goods (section 34(1)(a)(b)). Once registration has taken place, the proprietor can act immediately against parties who use the same or a similar mark, and merely has to show his or her registration certificate to prove entitlement to use the mark concerned. In contrast, in copyright matters, it is always necessary to prove ownership in court, from the author to the current owner, which is time-consuming and expensive.

A trademark registration lasts for ten years, but can be renewed indefinitely on payment of a renewal fee. Copyright, on the other hand, lasts for the duration of the author's life plus fifty years (section 3(2)(a) Copyright Act).

Other intellectual property protection

If a craftwork is copied and it is not possible to prove ownership for copyright purposes, it is possible for the enterprise concerned to institute an action for passing off. This is a common-law action where a trader represents to the public that his or her goods are those of his or her competitor, by using the competitor's marks or getup. However, should the competitor wish to stop this passing off, he or she will have to prove not only that that his or her enterprise has a reputation, but also that the other trader's dealing in similar goods will confuse or deceive the public (*Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* 1972(2) SA 916 (A)). It is an expensive exercise to prove this degree of reputation in court.

Finally, design protection is available, but only for registered designs that are made by an industrial process, which makes it generally not relevant for craft works.

We have shown what legal protection might be available for craftworks against copying, and will now discuss the various enterprises and how this relates to the works they produce

Ardmore Ceramic Art Origin and background

Ardmore Ceramic Art is an enterprise producing decorative ceramics in the KwaZulu-Natal Midlands. It has been in existence for twenty-three years, since 1985. Fée Halsted-Berning, a fine arts major in painting and ceramics, started Ardmore after she married and went to live on her husband's farm, Ardmore, in the KwaZulu-Natal Midlands. The enterprise remains situated on Ardmore Farm, although a second studio with a museum has since been opened at Lavendula Farm near Caversham.²

Halsted-Berning began working with Bonnie Ntshalintshali, a daughter of one of the farm workers, producing ceramics together. Although Halsted-Berning had training in hand-made ceramics, neither woman had been trained to throw pots on the potter's wheel, so they approached ceramics more creatively than would many potters, using clay as an expressive medium. Ntshalintshali, although illiterate and uneducated in terms of western schooling, proved to be exceptionally talented and knowledgeable about Zulu customs and practices. She became a creative and well-known artist and the two women formed a strong, fruitful partnership.

Because the work was noticed by buyers and the art world almost immediately and sold well, more local people joined the studio, making work that initially resembled Ntshalintshali's. Both Halsted-Berning and Ntshalintshali took part in prestigious exhibitions and Ardmore also began to exhibit as a studio. Individual artists then joined Ardmore and made their own, individual work and the studio also produced certain studio lines in larger batch productions to cover costs.

Ardmore has since become famous both nationally and internationally and has achieved the highest prices ever paid for South African ceramics. The work is exceptionally creative and of impeccable quality. Ardmore now employs 50 people working from the two studios.

Design of the products

The design and appearance of Ardmore have changed throughout its history, although the products remain identifiable as Ardmore's. Halsted-Berning, the founder of the enterprise, was influenced

by the lush paintings of Henri Rousseau and traditional European and English ceramics like English Staffordshire figurines, English porcelains and the works of Bernard Palissy. She was also inspired by ethnic ceramics, such as the painted and modelled folk ceramics of Mexico. Ntshalintshali and subsequent local Ardmores artists brought a knowledge of Zulu patterns and decorations, as well as traditions of clay modelling, for example, figurines of small domestic animals.

Initially, Halsted-Berning and Ntshalintshali worked in a creatively symbiotic relationship and the Ardmores style developed relatively quickly. The designs developed through a process of looking at varied pictorial source material, followed by an intense process of making and high productivity. They made painted sculptures because, at that time, neither had ceramic technology skills such as knowledge of glazing. They also developed a more utilitarian line, for example modelled and painted candlesticks and eggcups, to make money.

When more women joined the studio, they would initially copy existing Ardmores products until they developed confidence and began to contribute their own ideas. A major design impetus occurred when men began to join, influenced by the fact that their wives were earning more than they themselves could in the cities. The men began to throw on the wheel and it is they who now do the throwing, the sculptural pieces and almost all the modelling onto thrown vessels. So they have contributed greatly to the designs of Ardmores. Other workers, both men and women, are the painters of the sculpted pots. An Ardmores ceramic piece is usually made by three people: a potter who throws the basic shapes, a sculptor-modeller who models the complex clay additions and a painter who adds the equally complex painted decoration. Ardmores artists are required to be creative and may not produce repetitive work. Each piece, even if its subject is the same as another, must be inventive and unique.

In general, while there is an Ardmores style, based on simple vessel shapes elaborated with complex modelled additions and highly detailed, brightly painted decorative surfaces, there is a great deal of individuality in the work of different artists. The essential Ardmores subject is nature, which is not restricted to South African topics but reflects natural themes from all around the world. The vessels are covered with modelled animals like leopards, lions, cheetahs, panthers, tigers, elephants, zebra, giraffes, fish, birds such as toucans, flamingos and sunbirds, and many flowers that are indigenous or exotic. These are painted with details that elaborate the forms while the spaces between are painted with decorations consisting of flowers, foliage and abstract, geometric patterns (figure 1).

The studio produces what may be seen as three ‘ranges’. The first is the utilitarian line, or ‘curios’, which are sold through upmarket shops and are very expensive compared to most other South African ceramics. These cups, bowls, platters, eggcups, small jugs and candlesticks all have simple modelling, for example, dishes surrounded by modelled leaves or traditional ceramic forms like teacups which have a sculpted handle. They are painted in elaborate and exuberant patterns. The ‘art’ pieces, made by the best Ardmores artists, are kept for exhibitions and are extremely expensive. They consist mainly of larger vessels with inventive and extravagant modelled additions and very elaborate painting. The third range, of which fewer are made, is the purely sculptural ‘tableaux’ depicting, for example, the artists at work or typical rural scenes. These are often left plain white.



Figure 1
Ardmore Ceramic Art. 1992. Modelled and decorated casserole, painted by Punch Tshabalala.
(Photograph, Susan Sellschop).

The Ardmore products were from the beginning viewed as ‘art’ by buyers, curators and collectors, rather than as ‘crafts’, which is the more common categorization of ceramic vessels. This was greatly encouraged when Halsted-Berning and Ntshalintshali jointly won an important South African art award in 1990. Ntshalintshali was invited to participate in the prestigious Venice Biennale in 1993. Events such as these helped to establish both women and the other Ardmore studio artists as noteworthy artists. In keeping with this approach, the work has always been signed by the artists involved in its making and their names have been publicized on exhibitions and in all Ardmore’s publicity material. The work of the best artists is priced much higher than the others and is not sold through shops but on exhibitions. The artists are promoted as individuals and not as part of a collective.

Ardmore is one of South Africa’s most successful craft enterprises judged by its longevity, the number of artists employed, their very high earnings for the sector and the renown of its products, which is reflected in their very high selling prices. They are bought around the world as collectible art or objets d’art. Recently, Ardmore branched into new areas, creating limited edition dinner services, scarves, cushion covers and table cloths. These were created by an outside designer who used key elements of Ardmore ceramic ware to create repeat patterns suitable for fabrics and ceramic sets.³

The aesthetic appearance of Ardmore is not particularly South African in that the natural subjects are taken from all over the world, its historical precedents are certainly in European and English ceramics and its technologies are western. However, Halsted-Berning notes that the ability to observe and model from nature and the rhythms, patterns, repetition and colours of African art and artefacts, particularly Zulu aesthetic sensibilities, form the visual foundations of the work. It is certainly unique and not like anything else being made locally or internationally. It can be seen to be part of the formation of a new or invented South African vernacular, following a postmodern aesthetic that juxtaposes widely divergent, hybrid sources in complex ways.

Protection

Current protection

The name ‘Ardmore’ is a registered trade mark. Ardmore is a registered close corporation, with Halsted-Berning as the sole owner. The logo @, for Ardmore, is also used on the ceramics. The name and logo enjoy trademark protection and the name is registered as a company name.

Ardmore is the name of the farm where the ceramics were first produced, but it is unlikely that it qualifies as a geographical indication (GI). While GIs are not protected per se in South Africa, they can be registered as collective or certification marks (section 42 and section 43 Trade Marks Act). However, such registrations are not appropriate for an enterprise structured like Ardmore, with a proprietor who selects employees on the basis of their skills. Neither does the pottery owe anything to the specific location where it is produced. Also, if the name Ardmore were viewed as a GI, the fact of a second studio elsewhere would be problematic.

At first glance, one would assume that each work enjoys copyright protection. They are original artistic works, and all the makers are qualified persons within the meaning of that term. Additionally, the works are made in South Africa. But a closer study of the artistic process shows that a claim founded on copyright might be problematic. The descriptions indicate that more than one person is responsible for each work, and that many of the works are reworkings of existing designs. None of these matters is insurmountable – a work may be created by more than one person, and an adaptation of a work by the copyright owner also enjoys protection. Unfortunately, problems with proof of authorship make litigation more difficult, and more expensive. Also, copyright does not give protection against derivative works by others produced ‘in the style of’ Ardmore Ceramics.

None of the three ranges enjoy protection in terms of the Designs Act – the two ‘art’ ranges because they fall outside the definition of an aesthetic design, and the ‘bread-and-butter’ range because the pieces are not intended to be multiplied by an industrial process (section 14(1)(a) read with section 14(4) Designs Act 195 of 1993).

The Ardmore products have been copied – in one instance, an Ardmore design that had featured in a book on the enterprise was reproduced on fabric. As illustrated above, the only current remedy would be to institute action for copyright infringement by adaptation of an artistic work (section 23(1) read with section 7(e) Copyright Act). If, at that time, the fabric was marketed as ‘Ardmore’ fabric, and the trademark had been registered in the appropriate class,⁴ an action for trademark infringement could have been instituted. A claim based on unlawful competition might also have been a possibility. While all three of these options are expensive and time-consuming, the Ardmore enterprise is sufficiently successful that its products are worth protecting - smaller craft enterprises would not have the wherewithal to fund litigation.

To protect the new ventures into textile and homeware, Ardmore is seeking trademark protection in a number of classes.

Kaross

Origin and background

Kaross is an embroidery business that has been in existence for more than twenty years. It is situated on a farm in Limpopo Province in a rural area near the town of Letsitele in the Guyani District, surrounded by small, scattered rural villages.⁵

Irma van Rooyen, who was a practising artist, moved to the farm in 1985 with her husband. According to van Rooyen, the wives of the farm employees and women from villages in the area had no work and poverty was rife. They were largely uneducated, illiterate and unsophisticated. While there is no historical, indigenous tradition of embroidery in southern Africa (Nettleton 2000:20), the Shangaan women from the area did have some tradition of decorating their houses and clothes, for example the *minceka* (a flat, rectangular cloth, often decorated with beads or embroidery, that is wrapped around a woman's body as clothing (Nettleton 2000:37). They also made tray cloths and bed spreads embroidered with flowers in a European style that may have been adapted from Afrikaner traditions of embroidery and quilting. So embroidery skills existed. In order to help the women earn some money, van Rooyen offered them cloth and thread, suggesting that they embroider pictures of their lives, which she would try to sell.

The women were initially not able to do this as they lacked design and drawing skills or even any conception of what van Rooyen wanted. So she made drawings of their homes and villages and the surrounding bush and its animals, which they embroidered. Initially her family and friends bought the work. As news of the project spread, more and more women joined, until very soon there were 125 embroiderers. By 1987, Kaross was established as a business. Solomon Muhati, a young local man who showed drawing and design skills, came forward and, with some training from van Rooyen about what kinds of designs were suitable for embroidery, began to assist her by designing and drawing the designs onto cloths. Shops began to buy the embroideries and slowly the enterprise grew.

Kaross is a registered close corporation owned by van Rooyen, which sells its products to many shops as well as through a major craft and curio retailing chain. It has over a thousand crafters, mainly Shangaan women, embroidering from their homes, and a small managerial staff working from a converted tobacco barn on the farm, with three young local men doing all the drawing and design.

Design of the products

The initial Kaross designs came from van Rooyen, because she did the drawings for the first women who attempted embroidery. She also selected the backing cloth, which is usually black, chose the colours and type of thread and advised on stitches and colour combinations. She was inspired by other embroidery projects in the area, such as Xihoko, which had been started in Guyani in 1981, and Chivirika, which started in 1986.⁶ As she admits, the initial 'character' and appearance of Kaross was hers, combined with the embroidering abilities of the women. Much of her style still undoubtedly remains, as the appearance of the smaller animal-and-background cloths has changed little through the existence of the enterprise.

However, van Rooyen has for a number of years done no designing. Instead, the designing and drawing of all designs onto the black cloths is now done by three young local men, Solomon Mohate and Calvin Mahluale, who have been employed for a number of years, and Thomas Khubayi, who joined more recently. They all initially approached van Rooyen asking to design, showed talent and are now remarkably skilled, fluid and rapid in their designing and inventive in their ideas and their interpretation of subject matter. Van Rooyen still discusses ideas and designs with the designers and suggests new ideas when the drawings seem to become too repetitive. So she has a strong advisory and, one might say, a teaching role. She directs and makes suggestions for large commissions, such as the aviation scenes for South African Airways and the scenes for the Oprah Winfrey school, because the local designers are not always familiar with such urban

themes, and she constantly provides them with visual source material.

The most characteristic design of Kaross is a relatively simple one of an animal, bird or plant on a decorative and textured ground created by different stitches in bright colours on a black cloth, surrounded by geometric borders. Van Rooyen refers to these as the ‘bread-and-butter’ cloths, because they remain popular and have been made throughout the existence of the enterprise. These designs are repeated, so that items are linked, for example, a number may be selected as matching place settings, but no two are ever exactly the same. Other designs are produced as one-offs or in limited repeats such as ‘white-on-white’ cloths, which are complex, all-over designs done on white, grey or other subtle colours of cloth in matching colours of thread. These are visually sophisticated, beautiful and quite distinctive, as the light coloured backing cloth gives them a character different from the work of most other South African embroidery projects, which is done on black cloth. (Schmahmann 2000:111) points out that black cloth was often used for the minceka and became the trademark of projects such as Xihoko, Chivirika, Kaross and Mapula. It may also, however, simply be easier to keep clean during the embroidering process and may now, through its familiarity, be demanded by buyers.) Other limited ranges are the ‘interior’ cloths, beautiful and complex designs of birds, flowers and foliage that are made into wall hangings, bedspreads and upholstery material, and ‘story telling’ cloths, which are filled with figures, animals and objects.

The simple ‘bread-and-butter’ embroideries either have portraits or, more commonly, have an animal in the centre and a geometric border, which was initially based by van Rooyen on the geometric painting found on some houses in the area (figure 2). The larger cloths, the ‘theme’, white-on-white or ‘story-telling’ cloths, have more space for numerous objects, such as houses, trees, flowers, people and birds. They tell stories, usually from the area, in complex narrative arrangements of figures and objects. Subjects are very varied and include scenes such as the marula tree, the cattle, the traditional healer or sangoma, the nearby Risaba Crossing with its taxis and buses, and events such as weddings. Some of these theme cloths have a myriad of intertwining motifs across their surfaces and are as complex, decorative and beautiful as oriental carpets. They are highly decorative in their repeating motifs, their patterns and their flowing, curvilinear lines and arabesques. This has developed into the recognizable Kaross signature style or ‘house style’.



Figure 2
Cushion covers (portraits). Anonymous. 2006. Kaross. Thread and backing cloth. Approx. 31 x 30 cm.
(Watterson S.a.:43).

Kaross designs are thus very varied in their subject and forms and also in that they reflect the ideas of three designers, yet are strongly identifiable as coming from Kaross, rather than being the work of individuals. Constant visual elements are the use of black cloth as a backing, the type and ranges of rich embroidery colours and the fact that Kaross cloths are almost all completely covered in stitching, with no ‘open’ areas. This makes them richly colourful and textured, with a dense and complex surface, even on those cloths with relatively simple subject matter and design.

The Shangaan embroiderers do not develop their own designs and are given cloths with designs drawn onto them in white pencil. These designs are in outline and fairly simplified, and do not indicate details of the patterns and textures which will fill them out. Along with a drawn cloth, each embroiderer is given a measured assortment of threads in a variety of colours that have been chosen by the managers in the workshop in good colour combinations that work well together. The women have seemingly few creative decisions to make. However, the amount and placing of colours on the design, the stitches used and textures that result are their decisions, so there is an element of creativity and the work is not in any way mechanical.

Van Rooyen describes the style of Kaross as ‘South African’, and this is a convincing description as the embroideries combine her initial Eurocentric approach with the design inputs of the Tsonga-Shangaan designers and the aesthetic sensibilities of the embroiderers. The approach can be seen as part of a developing South African vernacular. The cloths are marketed as typical and representative ‘South African’ products. The website describes the works as ‘rewriting a culture by exploring its heritage and re-applying it to modern, marketable products and artworks’ (www.kaross.co.za). The website gives general information on the enterprise and its setting and stresses its origins in the Tsonga-Shangaan culture, as all the workers come from this group. The products are sold almost exclusively in South Africa, rather than internationally, as they have a particularly South African style that might be inappropriate overseas.

In summary, Kaross is a well-established, well-managed enterprise with inspired leadership and a long history, producing products of an exceptionally high quality. It provides employment to more than a thousand people and is still expanding due to growing demand for its products. It has become large enough to improve the surrounding communities by uplifting thousands of people to a marked extent, and it has established a tradition of embroidery in the area.

Protection

Current protection

The enterprise Kaross (meaning blanket in Shangaan) has obtained trade mark protection for both the name Kaross and for the logo in a variety of classes, including leather goods, textiles, clothing and embroidery work. The close corporation is called Karosswerkers CC trading as Kaross so the name itself is not a registered company name.

The works are more strongly linked to a single individual than in the case of Ardmore. One of three designers is the author of each individual piece – the embroiderers add their skill in execution but cannot be said to assist in the creative process. As such, it is easier to prove that copyright subsists in the individual works, and Kaross has an excellent method of recording authorship. Each piece of work is photographed on completion and filed by date, so it would be relatively simple to prove copyright in an individual work. However, when Kaross recently wished to prohibit reproduction of one of their works, the photographic evidence that the work originated from Kaross was insufficient, as there was no proof of the identity of the original

author (designer of the pattern), neither was there a written assignment of copyright. So it was impossible to prove current ownership of copyright, which is essential to found a claim of copyright infringement (Jonker 2011).

Some works are made as a linked series of items, for example sets of table mats, but do not enjoy the protection of the Designs Act because they are handmade. Although Kaross works have been copied, the work is so painstaking to make that copies have not affected the success of the original works. Clearly, if machine-made copies were ever feasible, this would be a greater threat. Once again, copies that are made ‘in the style of’ Kaross cannot be prevented unless passing off proceedings are instituted, and, given the existence of other enterprises that also produce embroidered works, this might be problematic.

Monkeybiz South Africa Origin and background

Monkeybiz is a bead making project that has been running for over ten years. It is part of a larger community project that was started in Cape Town in 1999 by two sculptors, Shirley Fintz and Barbara Jackson.⁷ Fintz had an interest in African art and in popular culture and both Fintz and Jackson had extensive collections of, amongst other objects, African art and particularly antique African beadwork. Fintz, inspired by beaded dolls that she had seen at the Grahamstown Festival, encouraged her char, Mathapelo Ngaka, who needed extra income, to make such a doll. Jackson and Fintz supplied beads bought from a local bead shop and the char’s friends and neighbours soon started delivering dolls that they had made. The dolls were bought by Jackson and Fintz, who initially had no market for them. They were primitively made and not marketable as they were. Ngaka organized the group of women making beaded dolls. She was creative and talented, and eventually became one of the directors of the project. Word spread and more and more women turned up, wanting to make beaded objects. Jackson and Fintz bought all the dolls, even the poorly made ones. Eventually they had many thousands of rands worth of dolls, together with some other objects such as bags. The dolls were initially largely unsaleable, as no design aesthetic or style had been established and the work was, and looked, experimental.

Jackson and Fintz began to exhibit the work, alongside regular studio exhibitions of work by established artists. They found that it did not sell well, unless displayed interestingly, for example, as an installation which made the individual pieces more impressive as part of a larger whole. Jackson and Fintz, who both travel overseas regularly, began to show the works to shops encountered on their travels, and, as word spread, sales began to increase. The beaded products diversified to include animals, which became very popular, as well as other objects.

The project, a Section 21 (or not-for-profit) company, now employs a small number of people, such as Fintz, in full time managerial and marketing positions, and has 450 women making beaded objects. The women generally come from very poverty-stricken backgrounds such as urban townships and informal settlements like Khayelitsha, Mandela Park, Samora Machel and Phillipi. The profits are used to run charitable projects started by Monkeybiz, such as an HIV-Aids clinic and a soup kitchen.

Design of the products

Beadwork is an African tradition found in South Africa and throughout the continent. This is important for the project as, firstly, many women still know how to do beadwork or can learn

it from other women, so basic technical training becomes unnecessary. Although it is perhaps a dying tradition, many of the women remember it from their grandmothers. Secondly, when it comes to marketing, bead work can be branded as typically African or South African, which is appealing both to South Africans looking to support local products and to tourists wanting to buy an 'authentic' memento of a visit. More specifically, beads are associated with Xhosa and Zulu decorative arts and most of the members of the project are women from these tribes. So beadwork has the advantage of being a product of indigenous cultures. Products themselves are not traditional in any way.

The aim of Fintz and Jackson was not necessarily to produce African art or craft, although the materials, techniques, the dolls, deriving from Zulu traditions, and the animals, which are associated with Africa, might automatically be associated with Africa. Their aim was to make something contemporary, fresh, unique and colourful. The nature of beadwork itself helps to unify the diverse products and identify them as coming from Monkeybiz. Fine geometric patterns, rhythmic repetition and bright colours with strong contrast are inherent in the material and technique. The actual objects made are now diverse and new ones are added as and when Jackson and Fintz think of them, such as snowmen and Father Christmases at Christmas time. Generally, the products include: dolls and animals in a variety of types and sizes, single, grouped or stacked into totems; renditions of popular consumer products including packaging, logos and labels, like Lion Matches or Marmite bottles transposed into beads; beaded picture frames and flat objects like refrigerator magnets, table place mats or 'pictures'. Some small, colourful sculptural tableaux are also produced (figure 3).

Within these, the range of subject matter is wide: modern and traditionally dressed women and men; narrative scenes of activities such as boxing, weddings or domestic scenes; abstract geometric patterns; portraits such as that of Nelson Mandela; well-known commercial products and labels; political and educational slogans, like Aids education messages; and more. So, while materials and techniques are traditional, the objects are not and the work bears little resemblance either to traditional beadwork or to the ubiquitous beaded curios.

Ideas and themes are developed by Fintz and Jackson or by their full-time assistants and are suggested to the bead makers, who then make the products as they see fit. Individual project workers, whether seen as crafts people or artists, may, within this system, develop more or less individual approaches and styles and are encouraged to do so, according to Fintz. So Fintz and Jackson are the designers in the sense of being the originators of ideas and themes and the controllers of colours, while the bead workers are the designers of their own particular versions of these.

The products of Monkeybiz are marketed as 'authentic' contemporary South African products, which may seem contradictory but their material and techniques are often identifiably 'African', while they are simultaneously innovative and not at all traditional in their forms or subject matter. The objects are generally not functional, but are instead decorative and may be categorized as ornaments or sculptures. They are innovative when compared to the plethora of other beadwork found in South Africa, from curios such as beaded cups and covered bottles to traditional beaded jewellery.

Every doll and animal has a tag on it, signed by the artist and telling a story, often about their circumstances, their lives and their hopes. This helps to personalize each piece, making it more special in the eyes of the buyer. It also helps, by positioning the maker as an individual rather than an anonymous craftsman, to situate the works in the realm of art rather than craft.

This can, and often does, lead to higher prices. The fact that little of the work, except for items such as tablemats, is functional might be a constraint on selling, so its classification as art is necessary to persuade buyers to purchase what are essentially purely decorative object.



Figure 3
Stacked animals. Anonymous for Monkeybiz. 2003. Coloured beads. Sizes varied. (Viljoen 2003:6).

Monkeybiz is a non-profit community project or ‘social’ business which uses its profits for community projects. It has provided an opportunity to earn an income to large numbers of unemployed women from Cape Town’s townships and squatter communities and, furthermore, has provided creative opportunities which have resulted in some of the bead makers considering themselves and functioning as artists. Its products are an innovative combination of African traditions and contemporary ideas.

Protection

Current protection

Monkeybiz has no trade mark protection. The tags on each item identify an individual as its author, and so copyright protection could be available if a direct copy of a specific work is made. This is unlikely, and it is more usual for the style to be imitated than directly copied. To quote one of the founders ‘As we started a revival of beadwork as a craft, many companies opened after seeing that there is a market and beads could be used in a contemporary way. As artists we know there is not much you can do to prevent copying, especially considering everything is a one off’. Once again, design protection is not relevant as the items are hand-made. So, at the moment, apart from copyright, any protection would be in terms of unfair competition law, which requires proof of reputation and so makes litigation notoriously expensive. The company registration merely protects against another company appropriating the same name.

Analysis

We have dealt with these three craft enterprises in some detail. It is clear from the narrative that artists and craftspeople at all three create work that has artistic value and deserves some form of protection against direct imitation. It is equally clear that, from a social viewpoint, all three enterprises are laudable projects that empower many people, mostly women, from extremely disadvantaged backgrounds.

From an intellectual property rights viewpoint, all these works qualify for copyright protection as works of craftsmanship. However, copyright litigation is expensive and it is unlikely that any of the enterprises, except possibly Ardmore Ceramics, would be interested or able to legally protect the artists' works against infringement. But this is the position with artists everywhere, and very few authors of 'art' are able to enforce their intellectual property rights.

Do the South African craftworks described above require more protection than now available?

The specific enterprises we have described above function like any other art or craft collective. The artists work together, under some form of supervision or quality control that they have subscribed to, and they are paid for the works that they themselves produce, either with others or alone. As with any other artistic enterprise, they have the current legal protection of copyright, trade mark and passing off available. Whether this protection is accessible or affordable is an issue that affects all artists and craftspeople, not only these workers.

But this is not to say that craft workers need no further protection. Many other, less fortunate or less skilled workers, spend many hours each day producing handwork for which they are paid a pittance. Maureen Liebel and Tirthankar Roy 'Handmade in India: Traditional Craft Skills in a Changing World' in *Poor People's Knowledge* (2004:53), recount harrowing stories of talented artisans dying from starvation or living in extreme poverty, while their handworks support a flourishing export trade. Similar abuses happen in South Africa. This requires labour or social assistance legislation - intellectual property legislation, no matter how well-intentioned, cannot rescue these people.

The proposed South African Intellectual Property Laws Amendment Bill 8 of 2010 offers no assistance to such craftworks. The policy document accompanying the original Intellectual Property Laws Amendment Bill of 2007 (GN 552 in GG 31026 of 5 May 2008 at 9) states that the country is disadvantaged economically without immediate protection against the poaching of traditional knowledge locally and internationally. At first glance, it would appear that it was designed to also assist the handicraft industry, because it lists a benefit of the Bill as: 'laws of copyright, designs, trade mark and geographical indications may be used to protect indigenous culture. Designs unique to South Africa, for example, could be protected using the laws of design. There is a need for aggressive marketing of these products and there should be market access' (South Africa 2007:10).

This quotation, while legally incorrect, implies that the intention of the legislature is to offer such extended protection for handicrafts, as these are the only craft products that could be 'aggressively marketed'. However, the definition of 'traditional' in the Bill excludes the majority of currently produced South African craft works, as its proposed amendment of the Copyright Act 98 of 1978 includes a definition of a traditional work as '...an artistic work which is recognised by an indigenous community as a work having an indigenous origin and a

traditional character' (s 5(g) draft Bill). Most South African craftwork, and all the enterprises we have dealt with above, are not considered 'traditional' nor are they created by a homogenous 'indigenous community'.

The Bill has come in for much criticism. It is overbroad, and various key concepts are either undefined or ill-defined.⁷ Judge Harms describes such intellectual property legislation as illustrating 'the tendency to adopt unrealistic legislation having little or no practical consequences but that makes political statements and earns politicians kudos' (Harms 2009:176). The Bill will not protect current South African craft work, the 'new South African vernacular'.

Conclusion

We have dealt with three of the most successful craft enterprises operating in South Africa today. These are enterprises that contribute enormously to the welfare of the most vulnerable sector of the South African public. They provide an income for craftspeople without requiring their relocation to an urban environment. They empower specifically women and the rural poor.

It is unfortunate that there is no legislation that can easily and inexpensively protect such craftspeople against imitation of their creations. However, western concepts of intellectual property focus on individuals, not groups, and legal protection of intellectual property rights is only available through the court system.

Protection for these enterprises lies in their skills and the quality of their work. The enterprises remain successful because they create works that are sought-after, and the authors of these works display talent and artistic ability. Their future protection lies in the continued encouragement of younger creators of craftworks, and in their ability to innovate and continue to maintain the quality of their work.

Notes

1. See *King v South African Weather Service* 2009 (3) SA 13 (SCA).
2. We shall refer to the enterprise simply as Ardmore throughout. Ingrid Stevens visited Ardmore over two days, 02/07/2007-03/07/2007), in order to spend a day at each of its two studios, interviewed the enterprise's owner, Fée Halsted-Berning, as well as various others involved as potters, sculptors, painters and managers in the enterprise, investigated the existing literature and the company's website and viewed the company's products both in its own showrooms, on exhibition and in a number of galleries and shops.
3. A couch covered in fabric designed by Ardmore was voted one of the ten most beautiful objects in South Africa (Design Indaba 2011 reported in SA Art Times May 2011:44).
4. Ceramics fall in class 21 while fabrics fall in class 24.
5. Ingrid Stevens visited Kaross on two separate occasions. On a preliminary visit (22/08/2006), she observed the workplace and the products and spoke informally to its employees. On the second visit (01/02/2007), she interviewed the enterprise's owner, Irma van Rooyen, as well as various others involved as managers, embroiderers and designers. She also investigated the existing literature and the company's website and viewed the products both in its own showroom and in a number of galleries and shops.
6. Xihoko no longer exists. It ceased operations when its founder, Jane Arthur, left South Africa and, while Chivirika may still be operational, little information and no craft work that was made recently could be found.
7. Ingrid Stevens visited Monkeybiz's offices and showroom in Cape Town for a day, (05/12/2006), interviewed one of the enterprise's two founder-managers, Shirley Fintz, as well as various others involved

as managers, assistants and craft workers in the enterprise, investigated the existing literature and the company's website and subsequently viewed the products both in its own showroom and in a number of shops.

8. See for example Tracy Renecas 'Protection of traditional knowledge systems in South Africa' part 2 *De Rebus* October 2008 24:25 – 26 and LTC Harms 'A few negative trends in the field of intellectual property rights' 2009 (72) *Tydskrif Hedendaagse Romeins-Hollandse Reg*, p1:14-15.

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