

GENERAL INFORMATION
ON
INDUSTRIAL DESIGNS IN CANADA

Compliments of:

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INTRODUCTION

The success of a product in the marketplace depends not only upon its functionality, but also upon its aesthetic appeal. When it comes to choosing between competing manufactured products, the importance of visual impact cannot be underestimated. Whenever you choose a pattern for dishes or cutlery which is especially pleasing to look at, or a chair which would look great in your living room, you are basing your choice, between two or more functionally equivalent products, upon features of ornamentation, shape, pattern, or a combination thereof.

Everyone has experienced this phenomenon, and manufacturers invest a great deal of money and know-how in designing and producing aesthetically pleasing manufactured articles. Such original industrial designs are considered to be valuable intellectual property, and may strongly influence the success of an entire commercial enterprise.

You may have developed a new design for a functional product that you intend to sell. It could be something as simple as the shape of a picture frame or an air freshener, or as complicated as the hull of a speed boat. If the way the product looks is likely to make it catch on in the market, then you may have a valuable industrial design. At this point, you probably want to know how you can make an industrial design work for the benefit of your business, and how to protect your investment in your design.

The purpose of this brochure is to answer some common questions, and to clarify a few of the misconceptions surrounding industrial designs. Further, we hope that the information provided will start you off in the right direction toward taking full advantage of industrial designs to maximize the protection of your product in the marketplace. If, after reading this brochure, you would like further clarification, we would be pleased to answer your general questions without charge. If the information you require involves providing an opinion on the registrability of your proposed design, or requires a detailed discussion of your particular fact situation, then it will be necessary for you to arrange an initial consultation with one of our lawyers. A flat-rate charge will be levied for an initial one hour consultation, during which time you can obtain further detailed information about the topics covered in this brochure as they relate to your specific situation and receive specific information on how to proceed in protecting your design.

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1.0 WHAT IS AN INDUSTRIAL DESIGN?

An industrial design is defined in section 2 of the Industrial Design Act (R.S.C. 1985, c.19, as amended) as the "features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye." This definition of an industrial design is concise, but it does not explicitly address many of the important considerations which will determine whether your design can be protected by an industrial design registration. In the following paragraphs we will delve further into these considerations.

1.1 Features of Shape, Configuration, Pattern, Ornamentation, Combinations

The *Industrial Designs Act* does not specifically define "shape", "configuration", "pattern" or "ornamentation", but each of these terms is included in the description of a design in order to make the definition as broad as possible. Thus, industrial design protection can be applied to a wide variety of products. For example, the overall **shape** of a chair or a coffee mug would appear to fit within the definition of an industrial design. An original arrangement of shelves, cupboards and compartments in a book case or entertainment centre could be a **configuration** which appeals to the eye, and hence, a registrable industrial design. Designs are not limited to three dimensional designs. A **pattern** formed by the juxtapositions of patches of different colours could be applied to the surface of an article. In fact, the game boards for many board games are protected as industrial designs (in addition to other forms of available protection). Similarly, an inlay wood pattern decorating the doors on the book case discussed above would not be three dimensional, but could be the subject of an industrial design. The **ornamentation** of some part of an article can also be protected as an industrial design. A good example of an industrial design of this type would be the ornamentation on the handles of spoons. The notions of shape, configuration, pattern, and ornamentation are not meant to be discrete categories, and they will often overlap, but considered together, they suggest that almost all of the features of an article which appeal to, or are judged by, the eye are industrial designs. In order to further broaden the range of designs, **combinations** of these features are also permitted. The bookcase discussed above is an example of an industrial design which could feature a combination of design elements, namely, the configuration of the shelves, cupboards, etc, and the inlay wood pattern on the doors.

1.2 Useful Articles and Utilitarian Designs

First of all, in order to be registrable, an industrial design must be a **design** which is applied to a **useful article**. That is, it is not possible to rely on an industrial design registration to protect any of the following: a method of construction, an idea, the useful function of an article, or the materials used in construction of article. The article to which the design is applied must be a useful article, but the features of the design itself cannot be determined solely by functional considerations.

It is not acceptable for the article to be merely a substrate for carrying some artistic work. Thus, a sheet of paper which has a depiction of a bouquet of flowers on it, could not be the subject of an industrial design. The sheet of paper has no useful function except to have the bouquet of flowers printed on it. Accordingly, the picture of a bouquet of flowers is an artistic work which might be capable of copyright protection, but it is not an industrial design. By contrast, if the same representation of the bouquet of flowers were printed on a waste paper basket, it might be the proper subject matter for an industrial design, since the waste paper basket is a useful article.

The contrary situation will also pose a problem for obtaining a registration. If your design is purely functional or utilitarian, then it cannot be registered as an industrial design. For example, consider a design for the tread pattern on the sole of a child's snow boot. That tread pattern would likely be a series of projections and grooves, the shape and orientation of which are designed to grip snow and ice in the most effective manner to improve traction. If the visual appearance of the boot sole was determined solely by those utilitarian considerations, then the resulting tread pattern could not be protected as an industrial design. In such instance, if some functional features of the snow boot sole were novel and not obvious in view of anything that had been done before, they might be protectable by patenting. By contrast, if the tread pattern had an original ornamental aspect, such as fanciful footprints that look like animal tracks or snow flakes, then, even if the tread pattern was effective for gripping snow, it might be protectable as an industrial design because the pattern has a visual appeal to the eye which is not determined only by the utilitarian function of improved snow gripping ability. However, the distinction between functionality and visual appearance is not always clear cut, and professional advice is recommended, especially in close situations.

1.3 Visibility and Fixed Appearance

An industrial design must have features that are intended to have a visual impact or appeal, but the artistic or aesthetic merit of a particular design will not be assessed. In other words, while the ornamentation of a useful article must visually distinguish the appearance of the article from prior designs for the same article, it need not necessarily beautify the article. Keeping in mind that an industrial design is defined in terms of features that appeal to and are judged solely by the eye, this criteria will place limitations upon the types of designs which may be protected. First of all, in order to appeal to or be judged by the eye, the subject item must be visible to the eye. Accordingly, if your design is for the shape of some component part which is incorporated into a larger device and, when in use, is hidden from view by a cover or casing, then this feature is not visible and cannot be protected as an industrial design. A second criteria which is derived from the visual nature of an industrial design, is that in order for a design to be protectable it must have a fixed appearance. Thus, for example, the changing shapes of a beanbag chair could not be protected.

1.4 Mass Production

In order for a design to be protected as an industrial design, it must be intended that the design will be applied in the manufacture of at least 50 copies of the functional article. Thus, if you design "one-of-a-kind" articles, where no two look exactly the same, you might be creating "artistic works" capable of copyright protection; however, your designs are not protectable as industrial designs.

1.5 Colour

The colour of an article, in and of itself, cannot be protected. Nevertheless, the pattern created on an article by arranging contrasting colours in a certain pattern can be protected. Similarly, patterns created by variations in shading, or by the printing or application of some black and white pattern to a useful article, will be acceptable subject matter for an industrial design.

2.0 HOW TO PROTECT AN INDUSTRIAL DESIGN

The visual appearance of the ornamental design may be protected under the *Industrial Designs Act* in Canada. Industrial design protection is purely a creature of statute, such that there is no protection for a design available at common law. Accordingly, (and ignoring the possible availability of copyright protection in certain limited circumstances) if your design has not been registered, you can make no legal claim to proprietary ownership of your design, such that you have no legal protection against imitation of your design by others who learn of it through nonconfidential sources. Thus, any person could make, use, and sell an article embodying your design without compensating you.

In Canada, the registration of an industrial design gives the registered owner the exclusive right to prevent others from making, importing for the purpose of trade or business, selling, renting, or offering or exposing for sale or rent the article in respect of which the design was registered. The duration of this exclusive right is 10 years from the date of registration, but it is necessary to pay a renewal fee after the first five years of the registration in order to keep the registration in effect for the full 10 year period. These rights can be exploited by the creator, sold to another party, or licenced to another party, with a royalty being payable to the owner of the design registration.

In order to obtain a registration for an industrial design, it is necessary to prepare and file an application, together with the government filing fee. An application for an industrial design typically consists of the following: bibliographic information about the proprietor of the design, an indication of what the functional article is to which the design is applied, a description of which features of the design are claimed as original in the application, and a series of formal drawings of the article showing the claimed design from all views.

When a complete industrial design application is filed with the Industrial Designs Office, the application is assigned to an Examiner. The Examiner will analyze the application to ensure that the drawings adequately and consistently show the design, and that the description accurately and adequately describes the design features which are shown in the drawings. The Examiner will then conduct a search of all previously registered and published designs, in order to determine whether the subject design is original and registrable. If the design is the same as or closely similar to a prior design which has already been applied to a similar functional article, then the design cannot be registered. The Examiner will summarize and issue his/her findings in an Examiner's Report, and

the applicant will have a chance to respond to the Examiner's Report by providing written submissions and/or by amending the application. If the Examiner's concerns cannot be satisfied, the application will be rejected in a final report. This final rejection can be appealed. If the Examiner is satisfied, then the application will be approved. A Certificate of Registration will then be issued in respect of the design. The entire process takes a minimum of 6 months from the filing date of the application, but the typical time frame is on the order of 9-15 months. In order to capitalize on your registered industrial design: (1) you can make and sell your product yourself; (2) you can sell your registered industrial design to another party, or (3) you can retain ownership in your design and merely license another person to make and sell items which embody your design, and collect a royalty under the license.

3.0 WHEN TO REGISTER AN INDUSTRIAL DESIGN

Designs which have been made available to the public in any country for more than one year prior to the filing of a Canadian application for design registration may not be protected, as the design, once it has been made public for one year or more, is said to be novelty barred. **Therefore, it is crucial that you file a Canadian Industrial Design Application before the expiry of one year from the publication (anywhere) of the design, and/or sales (anywhere) of the articles embodying the design.** As long as your design has not yet been made public, there is no time limit for filing an application to register your design. Always keep in mind, however, that by delaying filing, you run the risk that someone else (either legitimately or otherwise) will file an application in Canada for the same (or very similar) industrial design and obtain a prior design registration which would prevent your later filed design application from maturing to registration in Canada.

4.0 PROTECTION IN OTHER COUNTRIES

It is not possible to obtain an "international" industrial design registration. Protection must be sought independently in each country where you would expect to sell product and/or license a design. There is an international treaty in place, to which Canada is a signatory, which will allow applicants to follow-up the filing of an initial application for an industrial design in one country with subsequent corresponding filings in other countries where protection is desired. By virtue of this treaty, applicants will have a period of 6 month from the date of the filing of the first application (in

any country) in order to follow-up in subsequent countries and to obtain the filing date of the parent application. This allows an applicant to defer the cost of corresponding filings for the 6 months period, and to have an entitlement under a first to file system based upon the filing date of the original application. Moreover, applications in other countries (which are filed within the 6 month period) will not be novelty barred by any public disclosures or sales made of the design during that time period. If the 6 month period has expired before an applicant files all of the applications which it seeks, then it will be necessary to revert to the novelty requirements in each country in order to determine whether or not a design registration would be statute barred in any particular country.

In the United States it is possible to obtain protection for the visual features of a design in a manner generally analogous to filing an industrial design application in Canada. This protection is obtained by filing and prosecuting an application for a "design patent", (as opposed to the more familiar "utility patent" for functional inventions such as machines, gadgets, etc.). A design patent offers protection for a period of 14 years (without the need for renewal or payment of maintenance fees), and it can be enforced throughout the United States. A design patent application can, within the 6 month treaty period mentioned above, be filed to claim priority from the first regularly filed industrial design application for the same design.

If you are interested in protecting your industrial design in other countries, please let us know, and we can provide you with more detailed advice and cost estimates to further your particular business plan.

5.0 CONFIDENTIALITY

A Canadian design infringement suit cannot be launched until after the Canadian industrial design registration issues. Accordingly, the creator of a design is very vulnerable to infringers during the pendency of his application, as there is a window of opportunity for infringers to practice the design prior to issuance of the original creator's design registrations in either the United States or Canada, with little or no risk of ultimately paying damages for what would be seen as actionable infringement after the respective registration. In any event, it is wise for details of the design to be kept as confidential as possible until all the registrations have issued in major market countries such as the United States and Canada. Ideally, details of a your design should only be made available to those who have a definite need to know in order to further the commercialization of the products.

Moreover, wherever possible, a valid "confidentiality agreement" should be signed by the recipients of such details in all instances prior to their receiving the details.

A confidentiality agreement is a simple contract between the party imparting the confidential information (the "discloser") and the party receiving the confidential information (the "disclosee"), wherein, in consideration for the disclosure of the confidential information which is the subject of the agreement, the disclosee agrees to retain in confidence the information disclosed. The consideration flowing to the disclosee for his promise of confidentiality is the opportunity to receive information which is not otherwise available, typically for the purpose of assessing the merits of same, with a view towards entering into a further agreement (such as, for example, a licence agreement) relating to the commercial exploitation of the confidential information for the mutual benefit of both parties. Thus, the purpose of the confidentiality agreement is to give the discloser (typically the creator) a remedy for breach of contract against those to whom he is most vulnerable until such time as his design registration(s) issue(s) or another more detailed contract (e.g., a licence agreement) is substituted for the confidentiality agreement. Remember, however, that the confidentiality agreement binds only those who are party to the agreement.

A suitable form of confidentiality agreement should be available from your patent agent or patent lawyer for a modest charge. There is no "standard form" for such agreements, which can be as short as one page, or as long as 8-10 pages. Frequently one finds that, the longer the confidentiality agreement, the less willing recipients will be to sign it, particularly without first receiving independent legal advice. If an intended recipient is a larger company, its representatives will typically refuse to sign all but the company's standard confidentiality agreement. Most of such standard confidentiality agreements typically deny that any confidence exists in relation to the material being disclosed to the company, and have the discloser expressly acknowledge that his/her legal rights will be determined by the patent, trade-mark, industrial design, or copyright laws of the company's country of residence, and that he/she should first file for any legal protection that might be otherwise available to protect his/her rights in the information he/she is about to disclose. As such, standard company agreements of this nature are more accurately referred to as "non-confidentiality agreements", and should only be signed in instances where the disclosing party has already filed his initial design application (as previously discussed) and has filed applications for any other types of legal protection that might be available to protect his "invention", such as trade-marks and copyright applications and the discloser feels comfortable that the company he is dealing with is reputable, and will treat him fairly. There is always a leap of faith in making this latter assessment.

The bottom line in deciding whether or not to make a disclosure to a non-related company or third party is: (1) File at least the first design application and/or other application(s) for legal protection as advised by your patent agent or lawyer prior to making any disclosures of the invention to anyone; (2) Get a tightly drafted confidentiality agreement (preferably drafted by your own patent agent or lawyer) signed prior to each and every disclosure of the invention to other parties (including potential investors, partners, prototype makers, and licensees), particularly in the earlier stages of the commercialization, where the window of opportunistic infringement discussed above is the largest; (3) Deal only with reputable parties whom you trust and with whom you feel comfortable; (4) Limit the number of disclosures of details of the invention to only those who need to know; (5) Ensure that all follow-up applications for the invention are filed within the treaty period referenced above (i.e. within 6 months from the initial filing date) claiming priority from the first filed application; and, (6) Vigorously pursue the prosecution of your industrial design or other applications, so as to have them allowed, or ideally, issued contemporaneously with the commercialization of your product.

If you closely follow the steps outlined above, you will greatly reduce the risk of having your invention misappropriated by unscrupulous individuals or companies.

6.0 MARKINGS

It is important to apply appropriate industrial design markings to each and every one of the functional articles which embody a **registered** design. In Canada, the appropriate design marking to use is the letter "D" in a circle, followed by the name of the applicant. The Industrial Designs Act provides that, if a registered design is infringed, the owner of the design may be entitled to monetary relief for such damage. Nevertheless, if there is no design marking present on the allegedly infringing articles, and the infringer can show that he could not reasonably have known that the design was protected, then the only relief available to the owner of the design may be an injunction to prevent further infringement of the registered design. In that case, the owner of the design would not be compensated for the monetary losses incurred by reason of the infringer's activities. **Accordingly, if you have a registered industrial design, it is extremely important to make sure that the articles which incorporate the design are properly marked.**

7.0 OTHER CONSIDERATIONS

7.1 Industrial Designs compared to Trade-marks

Industrial designs are somewhat similar to a particular type of trade-mark known as a "distinguishing guise". This is a type of trade-mark which is registered in respect of the shape of an article. A good example of a distinguishing guise is the shape of a COCA-COLA® bottle. The shape of this bottle is an easily recognizable shape applied to a functional article, and has become recognized as a trade-mark of the owner of the guise. If your design becomes particularly well recognized for its features of shape, and these features of shape are consistently applied to all of your products, then such feature(s) may be registerable under the *Trade-marks Act* as a distinguishing guise. This is a method of obtaining perpetual protection for a well known recognized feature of shape.

There is no statutory distinction made between distinguishing guises (trade-marks) and industrial designs. Thus, arguably, where circumstances warrant, trade-mark protection of a particular shape as a distinguishing guise may be an alternative to industrial design protection, or may be obtained contemporaneously therewith. As with industrial designs, the features protected as a distinguishing guise cannot be purely functional. Trade-mark protection for distinguishing guises is perpetual, but it is necessary to show that the subject matter of the distinguishing guise has become recognized as a guise associated with the owner thereof. The establishment of this type of owner reputation in relation to the subject distinguishing guise is accomplished before the Trade-marks Office by the filing of affidavit evidence, usually several years after the design is made available to the public, in order to show that the design has gained recognition as a distinguishing guise of the owner. Thus, as a practical matter, an application for a registration of a distinguishing guise under the *Trade-Marks Act* could be used to prolong protection for an aging or expired industrial design, once the subject design has gained a reputation in the marketplace. Alternatively, if you have a design which has been on sale in the marketplace for longer than one year, such that it is no longer eligible for industrial design protection, you may want to consider filing an application for a distinguishing guise, providing that you can show a sufficient public reputation of ownership in respect of the guise.

7.2 Industrial Designs compared to Copyrights

The interrelationship between copyright and industrial design is a complex area of the law, and one that is not yet fully settled. The *Copyright Act*, the *Industrial Designs Act* and the Industrial Design Rules each attempt to delineate and distinguish what is the proper subject matter for protection as between the copyright and the industrial design legislative regimes. If a design is capable of being registered as an industrial design, then copyright protection may not be available for the objects embodying the design. Amendments to the *Copyright Act* allow that copyright may subsist in a design applied to a useful article or from which the design of the useful article is derived. But, if the useful article was manufactured in over 50 copies anywhere in the world, it is not an infringement of the copyright to reproduce the article itself, make a drawing or reproduction of the article, or do anything else with the article that a copyright owner could do [*Copyright Act*, Section 64(2)]. (This assumes the original drawings created by the artist were not confiscated and, themselves used to create the copies of the useful article.)

A few exceptions to this provision of un-enforceability have been developed in order to further protect certain types of designs, including: artistic works which are graphic representations applied to the face of an article; trade-marks; woven or knitted patterned materials suitable for making piece goods, surface coverings or clothing; architectural buildings or models; and, representations of real or fictional characters. For example, under this exception, copyrights in the representation of floral patterns etc. etched onto the face of a storage box may still be infringed by copies, despite the fact that the subject box is produced in quantities of 50 or more. Nevertheless, features of the shape of the box itself would not be protected under this exception. Similarly, fabric, wallpaper and rug patterns can still be protected under copyright by relying upon this exception. Apart from this exception, the only protection for the ornamental features of useful articles, produced in more than 50 copies would be under the *Industrial Designs Act*. It is not yet clear, however, whether or not a design can be protected under copyright if, for some reason it was originally registrable as an industrial design, but no longer remains so (ie., if the designs were made available to the public more than one year prior to the filing of an application for an industrial design).

Certainly, in instances where it is unlikely that the design will be reproduced in quantities of 50 or more, or where design protection is novelty barred, registration of the copyright should be completed. Out of an abundance of caution, copyright registration should be obtained as a matter of course for all original designs created. Subsequently, the decision of whether or not to file an

industrial design application can be based upon the commercial success of the design, having regard to the number of articles likely to be produced, and the time frame for publication of the design and/or sales thereof.

8.0 YOUR NEXT STEP

If, after having read this brochure and any others enclosed herewith, you are interested in pursuing legal protection for your design, please contact our office to set up an initial office conference with one of our intellectual property law professionals to review your situation. Such appointment will, in most cases, be set one or two weeks after the date you call. It is advisable to prepare a written summary explaining your design, your plans for its production and marketing, and details of any similar products of which you are aware, prior to your attending your initial office interview. Additionally, please bring any drawings or prototypes of your design with you to the interview, if you wish to derive maximum benefit from the time allotted for your interview, which is normally about one hour.

With regard to confidentiality, all disclosures made to our firm are received in the strictest confidence. As a firm of Barristers & Solicitors and Patent & Trade-Mark Agents, we are subject to the disciplinary proceedings by both the Law Society of Upper Canada (which licences lawyers to practice in Ontario) and the Patent Office (which licences patent agents to practise in Canada). Moreover, we are also members of the Patent & Trade Mark Institute of Canada, which professional organization sets and administers a Code of Ethics for all member patent agents practising in Canada. If requested, we will date and sign a Disclosure Form at the initial interview, so as to provide you with a detailed record of your disclosure to us.

9.0 FEE ESTIMATES FOR CANADIAN INDUSTRIAL DESIGN MATTERS

The following estimates for industrial design related services are estimates, only, and are based upon routine cases of average complexity which entail an average expenditure of time on the part of the professional(s) involved. The estimates are based upon performing the services as routine cases and not on an expedited basis. Premiums may be applied if expedited service is requested. As to the time frames normally required to complete the services, these vary from time to time depending upon our current workloads, and should be discussed with the professional handling your affairs at the time of your initial interview. Thus, the estimates which follow should only be seen as a guide to the charges which you will ultimately incur. Further costs may be incurred during the prosecution of each application, particularly in the U.S.A, where the examination process is more rigorous, and where further government registration fees are required after an application has been allowed. All of the cost estimates given below, except where specifically noted, are exclusive of disbursements and G.S.T., but may include the respective government filing fee, where these fees have been expressly included. In all instances, cost estimates reflect the average time required to undertake particular tasks, and these estimates are subject to change depending upon the complexity and time frames for particular tasks. In all cases, we work on a time spent basis, and tasks are divided between the professionals in our office in order to complete work in a cost effective manner. If more detailed cost estimates are required for particular tasks, please do not hesitate to ask.

Manual Searches

1	In the files of the Canadian Industrial Designs Office, with our written opinion as to registrability (minimum)	\$ 1,750.00
2.	Locate a particular industrial design registration, where registration number is provided	\$ 300.00
3.	Name search, i.e., all applications and/or registrations in the name of a particular party (copies extra)	\$ 350.00

Industrial Design Applications - (excluding all government fees)

- 4. Preparing and filing application for registration and reporting the filing to you \$ 1,500.00
add drawing charges (est.'d) \$ 600.00

- 5. Receiving, docketing and reporting receipt of Certificate of Registration, forwarding same, and docketing for renewal \$ 400.00

Transfers

- 6. Filing industrial design assignment, when received ready for filing (single registration) \$ 250.00

- 7. Preparing industrial design assignment (single application or registration) \$ 250.00

Renewals

- 8. Preparing and sending reminder, advancing renewal fee, and forwarding confirmation of renewal fee payment (includes the government fee) \$ 700.00

FURTHER INFORMATION CONCERNING THESE ITEMS AND CHARGES FOR OTHER MATTERS WILL BE FURNISHED ON REQUEST. ALL AMOUNTS ARE IN CANADIAN DOLLARS.

ABOUT THE AUTHOR

Patrick Hofbauer is a lawyer with over twenty-three years of experience in patent and trade-mark matters. He is also a patent and trade-mark agent registered to practise before both the Canadian and U.S. Patent and Trade-Marks Offices and is a member of numerous legal and professional organizations, including the Canadian Bar Association, The Intellectual Property Institute of Canada, the Licensing Executives Society and the Association Internationale pour la Protection de la Propriété Industrielle. Mr. Hofbauer is a Toronto native who has lived in Burlington, Ontario since 1986.