Beware of imitations! Part 2

About intellectual property, imitation and related issues

Intellectual property is an increasingly topical theme. Appropriating ideas from competitors, blatant imitation, paying no heed to other people's rights - almost every sector in business has to deal with these problems. But relatively speaking, it seems to happen more often in those sectors in which creativity plays a major role. The advertising world, the design sector and indeed the Fairs & Exhibitions sector are frequently confronted with the problem.

Whereas Part 1 of this article dealt with general, more theoretical issues related to intellectual property, in this Part 2 Marcoline van der Dussen, a lawyer at CMS Derks Star Busmann (see box), answers a number of questions about cases that will be familiar to everyone in the sector.

Marcoline van der Dussen, lawyer CMS Derks Star Busmann

CMS Derks Star Busmann

CMS Derks Star Busmann, a large full-service law, notary and tax counselling office with branches in Amsterdam, Utrecht and Arnhem, is affiliated to an international alliance of law and notary offices that operate collectively under the name CMS. CMS Derks Star Busmann has an Intellectual Property and Information Technology division in which nine specialised lawyers focus on procedures and advice related to issues such as brands, models, patents, copyright issues and advertisements.

Stealing ideas

In the Fairs & Exhibitions sector, it is common practice for an exhibitor to organise a competition (a stand design) for inclusion in an expo. A number of parties (usually 3, sometimes more than 5) are asked to submit a design proposal with a corresponding tender.
Although you may not win the competition, at the expo in question you may still see many aspects of your design reflected in the finished stand. One case we handled even involved a 1:1 similarity. In that particular case, an objection was raised and the stand was removed. But what do you do if your losing design was obviously copied but you have no hard evidence? And how can we prevent this type of plagiarism?

The design for a stand can be protected by copyright. On that basis, the copyright holder can take action against third parties that use the design without his permission. However, the action taken by the copyright holder may not always be successful. Copyright is only deemed to be violated if there are 'identical total impressions' because 'copyright-protected features' have been imitated. But this notion is not so easy to apply. In principle, the designer is the copyright holder. However, if the exhibitor (the competition organiser) has stipulated that any rights to a design belong to him, the designer no longer has any control over his design. It is extremely important, therefore, to make solid agreements in advance.

No access!

A design bureau is invited to develop a total concept for an event as part of an unpaid competition. The competition organiser shows a lot of interest in one specific but very relevant part of the concept during the presentation and so the designer works out that part in great detail. In the end, the bureau doesn't win the competition and is even told that it may not attend the event. Is that allowed?

If there are rights to the design and no agreements were made about rights between the bureau and the competition organiser, the bureau owns the rights to the design. That means that the bureau - if the design is used - can file an objection based on those rights. The problem in this case is, of course, that you are not sure whether the bureau's design was used. Only if the bureau can make a reasonable case that the design was used, a court – when requested – could grant the entitled party or a bailiff the right to attend the event. If that fails, there is unfortunately nothing else the bureau can do.

What do you mean buyoff?

Sometimes designers taking part in a competition are paid a sum to reimburse their costs. Does such a payment made by clients buy off all kinds of rights and claims? In other words, who holds which rights?

People often think that when a designer receives a fee (for a competition entry or an assignment) any rights then belong to the competition organiser or the client. This is incorrect. Payment of a fee for design activities has no bearing on the question of who owns the rights. For example, many clients of advertising agencies also wrongly assume that they own the rights to commercials or logos that were designed, simply because they paid to have them made/designed. This is a misconception. In principle, the rights belong to the advertising agencies. Clients that want to own the rights make specific agreements to that effect with their advertising agencies.

The © symbol

What is the meaning/value of adding a © symbol to the presentation of a design proposal? And what must you do to protect your design in such a presentation (for example, in a book or a PowerPoint presentation on CD)?

The © stands for 'copyright'. If a person or company adds the © symbol to a design, they wish to indicate that they are claiming the copyright to that design. That is why the © symbol is often followed by a year and the name of the person or company that believes it is the copyright holder. However, use of the © symbol does not grant the user any rights. In the Netherlands, copyright is based on the sole manufacture of a piece of work that has its own original character. The copyright belongs to the creator (in the sense of the Copyright Act). Even if the © symbol is used, therefore, the design may not necessarily be copyright protected (because the requirements for protection have not been met). Or the design may be copyright protected but the rights do not belong to the person using the © symbol. But if somebody genuinely believes that he can claim the copyright for a particular work/design, it can do no harm to use the © symbol.