

# Industrial Design Rights

An International Perspective

SECOND EDITION

EDITED BY  
BRIAN W. GRAY  
RITA GAO



Wolters Kluwer

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Second Edition

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# Industrial Design Rights

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**Rita Gao**, is an associate at Norton Rose Fulbright in Toronto. As a lawyer in the Intellectual Property (IP) Group, she focuses on creating, enforcing and commercializing intellectual property assets around the world. She helps clients develop and manage national and international intellectual property portfolios and provides strategic advice for patents and industrial designs in various innovative areas. She deals with multinational corporations, mid-size companies, as well as start-ups. She provides freedom-to-operate and patentability opinions. Prior to her legal career, Rita worked at Deloitte Consulting and a leading Canadian telecommunications company. She has a Juris Doctor degree from Osgoode Hall Law School and a Bachelor of Applied Science degree in Electrical Engineering from University of Toronto. She is a member of Intellectual Property Institute of Canada (IPIC). She is an avid traveller and is fluent in Mandarin Chinese.

## Contributors

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Karen strongly advocates the Mediation of IP disputes. She is on INTA's (International Trademark Association) Panel of Neutrals. She is an Accredited Mediator of the Malaysian Mediation Centre and an Association Member of the Chartered Institute of Arbitrators (UK). Karen is the first Malaysian woman appointed on the Board of Directors of INTA. She is also the first Malaysian to sit on the International Association for the Protection of Intellectual Property (AIPPI), where she holds the position of Assistant Secretary General. Karen also sits on the Malaysian Bar Council's IP Committee, ADR Committee and on the Disciplinary Committee Panel of the Advocate and Solicitors Disciplinary Board. Karen has authored several International publications and has presented papers at leading International IP congresses and conferences.

Karen has consistently been recognized as leading lawyer over the last decade in, amongst others, successive editions of the Asia Pacific Legal 500, Asialaw Profiles, Asialaw Leading Lawyers, Chambers Asia Pacific and Who's Who Legal.

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**Mike Chen**, After graduating from Beijing Mechanical Engineering University with a BSc in mechanical engineering, Mike J. Chen received his LLB from the University of Political Science and Law of China in 1995. In 2004, Mr Chen obtained his LLM from London Metropolitan University in the United Kingdom.

Mr Chen began his professional career in 1996, serving as a judge at the IP Tribunal of the Beijing First Intermediate Court for five years. After he left the court, Mr Chen was invited to be legal counsel for Beijing Founder Electronics Co Ltd, where he successfully litigated the famous Trap Evidence Collection case.

Mr Chen specializes in IP litigation and dispute resolution. He has accumulated abundant experience in the legal profession and has been distinguished as one of China's top IP practitioners. He advises clients on IP litigation across a wide range of industries, including mechanical engineering, electrical and electronic engineering, telecommunications, chemistry and biotechnology.

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**Tamara Lee**, is a legal assistant in Shearn Delamore & Co's IP department. She graduated with an LLB (hons) from the University of the West of England, Bristol. She was called to the Bar of England & Wales in 2010, and admitted to the Malaysian Bar in 2012. Tamara advises on protection and maintenance strategies of various IP rights, consumer protection, copyright, domain names and franchising. In addition, she also advises clients on antitrust and competition issues such as exclusive dealing arrangements, licensing and distributorship, territorial restrictions, pricing issues, retail and resale pricing, dominance and potentially abusive conduct relating thereto, discounts, tying and bundling, rebates and intellectual property rights ('IPR').

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Before joining Kangxin Partners, P. C., Ms Li worked as R&D Supervisor (assistant engineer) in Beijing Genecare Water Treatment Tech., Ltd, where she was also responsible for project research and began being acquainted with patent application.

Ms Li joined Kangxin Partners, P.C. in 2007 and collected rich experience in the field of Intellectual Property. As a qualified patent attorney, Ms Li specializes in patent

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**Roberta Arantes Lopes**, is a lawyer and partner of Daniel Advogados since 2013 and has over fourteen years of experience in the field of intellectual property. Her practice is focused in IP litigation and counselling mostly on trademark, trade dress and design infringement cases. Roberta has a master's degree in Public Law and also teaches in several post-graduation programmes in Brazil. Roberta is a member of INTA Enforcement Committee.

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**Ms Ying Zhang**, received her Master's Degree in Civil Law and IP Law from Dalian Maritime University in 2010. Ms Zhang passed the Chinese Bar Exam in 2009, and also passed the Chinese patent attorney Exam in 2012.

Ms Zhang joined Kangxin Partners, P.C. in 2010. Ms Zhang is highly experienced in patent litigation, patent invalidation, patent license and other IP matters. She also has rich experience in handling various kinds of Patent related negotiations and contract reviewing.

Throughout Ms Zhang's career, she has successfully handled a large number of cases for both foreign and domestic clients. She successfully acted for volumes of patent infringement litigation cases for well-known enterprises like Swarovski Co. Ltd, SATA Gmbh & Co., Taiwan Mingmen and others. She also successfully acted for Zhejiang Supor Co., Ltd. and SATA Gmbh & Co. in patent invalidation cases. Ms Zhang also has rich experience in patent license work, such as acting for Unilin Corporation.

# Overview

## Organization of Individual Country or Region Chapters

### Introduction

Highlights of New Developments in This Jurisdiction since Last Edition

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### Subject Matter

Definition/What Constitutes a Protectable Design?

Shape, Configuration

Ornamental or Functional

Originality/Novelty

Test for Originality Generally

Novelty

Prior Use

Prior Publication

Prior Application or Registration

Unobviousness (if appropriate)

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Scope of Infringement Action

Test for Infringement/Criteria to Constitute Infringement

Standing to Sue

Remedies for Infringement

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Functional/Not Ornamental

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Non-infringement

Other Defences

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Other

Interface between Industrial Design and Trademarks

Relationship between Industrial Design and Copyright/Design Copyright

Relationship between Industrial Design and Unfair Competition

## Preface

This is the second edition of a book first published in 2001 under the sponsorship of the International Bar Association. The chapters from that edition have been completely rewritten, in most cases by the original authors, and many new countries have been added.

Since the last edition, much progress has been made in respect of the harmonization of industrial designs. The Community Design Directive was enacted in 1998, leading to increased harmonization among the European Community countries commencing from that time.

This development has been followed by the modifications made to the Hague Agreement in Geneva in 1999 which have resulted in the increasing acceptance of the Hague system.

At the time of the first edition only approximately twenty-nine countries had accepted the Hague Agreement, notwithstanding that it had first come into force in 1928. Absent as signatories were Japan, the United States, Canada, the United Kingdom and all the Scandinavian countries.

At the time of this writing in July 2015, Japan, the United States, Denmark, Norway, Finland and Korea have all acceded to the Hague Agreement, with Canada and others soon to follow. The European Union joined in 2008.

By establishing a system of registration of a single home country application which can be filed in each signatory country, it is hoped that the Hague Agreement will do for Industrial Designs what the Patent Cooperation Treaty has done for patents. Further, although each country is free to apply its own examination standards, the term of protection will be unified at fifteen years and at least some administrative standards relating to the form and content of the international application will be harmonized.

Differences still remain. The form and content of drawings (a fundamental part of any design application) have not yet been harmonized. The United States, unlike the rest of the world, continues to treat designs under its patent statute and apply patent principles to such designs. In addition, in many countries, there continues to be a variety of possible *sui generis* ways to protect designs. As David Musker points out in his chapter on United Kingdom Design Law, one of the striking features of UK Design Law is the plethora of available rights. Setting aside trade marks, unfair competition,



and patents, the set of design rights to be considered in the UK consists of: UK national registered designs; international designs designating the UK (coming in the near future); Registered Community Designs ('RCDs'); international designs designating the EU; Unregistered Community Designs ('UCDs'); UK Unregistered Design Right ('UK UDR'); and UK copyright. In addition, of course, there is still considerable overlap between the protection granted by the trademark and unfair competition provisions which are in place in many countries.

In addition to increased harmonization, we are in a period of increased awareness of the economic importance of Industrial Design. The Apple and Samsung wars over smart phone shapes have sparked attention. As Raynal and Saidman point out in their United States chapter, the recent US Court of Appeals for the Federal Circuit decision in *Apple v. Samsung* has highlighted many important advantages that design rights have over patents in the US, not the least of which is the authorization of an award of total profit from the article of manufacture bearing the patented design without apportionment.

As with the previous edition, we have tried to organize each chapter around a series of identical headings or topics for each jurisdiction so that the scope and subject matter of protection can be more readily compared. In addition, we have entered the modern age, as a digital version of the book will be produced which will also allow easier comparison across jurisdictions.

The labours of the individual contributors deserve recognition. The contributors, of course, are what make the book what it is. For the Canadian chapter, I owe thanks to my co-contributors Christopher N. Hunter and Rita Gao.

Rita Gao has also acted tirelessly as my co-editor. Rita has pushed this book through to completion with organization and dedication. I wish also to thank Jacqueline Byers and Bobby Leung at Norton Rose Fulbright Canada LLP who have helped with the final reviewing and editing process, and to my assistant Cindy Fung who has helped with the manuscripts.

Finally I would like to thank Kluwer, and in particular Miriam Weemhoff, for their patience.

The chapters are current as of 1 July 2015.

Brian W. Gray  
Toronto, 1 July 2015