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THE INTELLECTUAL PROPERTY GUIDE TO....  
FASHION

# PROTECTING & EXPLOITING YOUR RIGHTS

## COPYRIGHT LAW AND INTELLECTUAL PROPERTY PROTECTION

### Introduction

Legal rights can help a fashion designer in two distinct ways:



They can stop someone else benefiting from your hard work by copying or using your textile or product without your permission; and



They can generate revenue from your designs by allowing you to enter into licensing agreements for your designs with third parties.

This guide describes some of the rights you may enjoy. It then gives some practical tips on what you can do to protect them – without costing you a fortune.

### What rights do I have?

The rights that are most likely to be relevant to a fashion designer are: copyright, design rights and trade marks.

### What is copyright?

Copyright regulates the exploitation of ‘cultural goods’, such as drawings, paintings, collages, sculpture and photography. Copyright creates a set of property rights vested in the owner or licensee of the protected work.

### What cannot be protected by copyright?

- Copyright protects the **expression** of creativity by the author, **not ideas**. So you cannot protect an idea for a dress, but once drawn or painted, it is the drawing or painting of the dress, as an expression of that idea, which is protected.
- Copyright will not protect functional objects, such as a washing machine, a chair or a garment. These are often protected by design rights (see below).

### When does copyright arise?

Copyright arises automatically once a work is created. There is no need for registration, unlike other areas of intellectual property (IP) such as patents, registered designs and trade marks.

### What legislation governs copyright?

The main provisions for the protection of copyright are contained within the Copyright, Designs and Patents Act 1988 (CDPA 1988). This can be consulted at [www.opsi.gov.uk/acts/acts1988/UKpga\\_19880048\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1988/UKpga_19880048_en_1.htm).

### How can my designs be protected by copyright?

A design can be protected under s4 of CDPA 1988 as an artistic work; specifically as a graphic work which includes a painting or a drawing. Textile designs may benefit from copyright protection but an actual coat or dress (when made) does not.

**Am I the author of my design?**

The author is the person who creates the work, ie you!

s104 CDPA 1988 provides a statutory assumption of authorship, ie the name that appears on the artistic work as published or on the work when it is made shall be presumed to be the author.

If you have collaborated with another designer in creating the design, the work may be a work of **joint authorship** with both designers sharing in the rights.

**Who is the copyright owner?**

The **author** is the first owner of copyright under s11(1) CDPA 1988. There are, however, exceptions. These are:

- Works made by employees in the course of employment; and
- Commissioned works

**Is the first owner of copyright always the copyright owner?**

No. You can assign your copyright ownership to another party. When this occurs, it means that you can no longer enforce your copyright in the object, ie you can't sue for copyright infringement, object to its use, or license the design to third parties.

**Can a copyright owner do whatever they want with their work?**

Mostly yes. However, if the copyright owner has granted an exclusive licence to a third party, their use of their work is restricted as they are unable to use their work for the duration of the exclusive licence.

**What happens if I create a design while working for a company?**

In the absence of an agreement to the contrary, where an artistic work is made in the course of the employment, the employer is the first owner of any copyright in the work (s11(2), CDPA 1988). Inquire from the company what their practice is for works created by employees.

**As the copyright owner, what can I do?**

A copyright owner has the exclusive right to:

- Copy the work ('reproduction right');
- Issue copies of the work to the public ('distribution right');
- Rent or lend the work to the public ('rental/lending right'); and
- Authorise others to carry out any of these activities (ie **licences**).

**© LICENCES**

There are two main types of copyright licence:

**Non-exclusive licence**

A non-exclusive licence gives someone else the right to use your work non-exclusively in specified circumstances (for example, for 12 months in a particular medium).

By granting a non-exclusive licence you retain ownership of the copyright and the right to use your work, including licensing it to other parties.

**Exclusive licence**

An exclusive licence is an agreement where you permit someone else to be the sole user of your work. You also promise the other person that you will not grant any other licences to third parties or use the work yourself.

**How long does my copyright last?**

For an artistic work, the copyright lasts for 70 years from the author's death. If a design is industrially exploited (which will usually be the case for textiles and fashion designs), the protection is reduced to 25 years from when the work is first exploited.

**Ok, I get the picture with copyright, but what do I really need to do?**

You don't need to formally register your design to acquire **copyright** or **EC design protection** (see below). But keeping a good record of what you have designed is critical.

So put a copyright notice on each design:

© + year of creation + your name + contact details:

© 2009 John/Jane Smith (address and telephone number).

**What are design rights?**

Design rights can be relevant in such areas as:

- fashion design
- furniture planning
- graphic design
- stage design
- costume design
- urban design
- product design
- packaging design
- industrial design

This is a complex area with several possible legal rights. However the most relevant for a designer would be the **EU Unregistered Community Design**. This gives a very broad range of protection and can cover:

'the appearance of the whole or part of a product resulting from the feature of, in particular, the lines, contour, colours, shape, texture and/or materials of the product itself and/or its ornamentation'. **EU Designs Directive, Art 1(a), RDA s1(2)**

Your design can be protected as an unregistered Community Design for three years. You do not need to register your design or fulfill any other formal requirements.

If you decide to register the design, you can choose whether to make a single registration for the entire EU or merely for the UK. A registered design provides protection for 25 years.

There is generally no need to worry about registration due to the fast moving nature of fashion. Even if you chose to register your design, you can delay doing so for 12 months from first marketing the design. This means you can wait and see if the design is likely to become a hit before incurring the registration fees.

In addition to the Community rights just described, there is a further UK right called the **UK unregistered design right**. This protects any aspect of shape or configuration of a design, though not surface decoration. This right can last for up to 10 years from when an article was first made to the design. This right arises from s213 of the CDPA 1988. There is overlap between these various rights. For example, a handbag may be protected as a Community Design and under the UK unregistered design right.

### What are trade marks?

A trade mark is a sign which distinguishes your goods from those of your competitors. Chanel, Louis Vuitton, and Gap are examples of well-known trade marks. Trade marks are important because they are the attractive force that pulls in your customers. Generally, your name or the name of your fashion label may function as a trade mark.

Distinctive shapes can also be trade marks. For example the Burberry check and the classic Louis Vuitton print are registered trade marks.

However, any sign that is customary in the trade is unlikely to be registrable as a trade mark. This applies to standard shapes (eg, the shape of a shoe), words used to describe your goods (eg the word 'coat' for outerwear) or shapes that result exclusively from the nature of the goods themselves (eg the shape of a dress).

If there is a word, phrase, or design that you use repeatedly a trade mark registration may be something you should consider.

### How do I benefit from a trade mark?

Trade marks can be registered just for the UK (at the Intellectual Property Office (IPO)) or throughout the EU (at the Office for Harmonization of the Internal Market (OHIM) in Alicante, Spain). Once registered, protection for your trade mark may last indefinitely as long as you continuing renewing your registration every 10 years.

When registering a trade mark it is generally advisable to instruct a trade mark attorney to ensure that all of the requirements of registration are met.

### What benefits will I get from registration?

Once registered, a trade mark registration generally allows you to stop the use and distributing of goods bearing your trade mark. For example, Louis Vuitton can stop the selling and importing of counterfeit Louis Vuitton bags bearing its registered trade mark design. A registered trade mark can be a very powerful tool.

### If I do not register a trade mark is there anything else to protect my trading name?

If your business has a reputation (goodwill) in the UK, and another trader misrepresents its goods to be yours, you may have a claim based on 'passing off'. Passing off operates in a similar manner as a trade mark claim without the need for a registration, but it can prove difficult and expensive to prove that your name has a reputation. A registered trade mark avoids some of these steps and associated costs.

# ESSENTIAL INFORMATION

## So now I know all about some of my rights, what do I need to do to protect my designs?

You should keep a photographic or photocopy catalogue of your designs, detailing when they were created, so that the date of creation can be proved if there is some future dispute.

### Generally

If you are employed as a designer and create the design in the course of your job, the copyright and/or design right **will belong to your employer**, not to you.

If you are commissioned to create a design the position is more complicated. You should agree with the person commissioning who is to own the copyright and/or design right.

If you are asked to send designs to a prospective client include a standard statement along the following lines:

‘This design is protected by copyright © and/or design rights. It is provided to you “in confidence” and you are not at liberty to disclose the design to a third party. Any infringement of the designer’s copyright and/or design rights will be pursued.’

## What happens to my rights when I sell my work?

When a manufacturer wishes to use your work you should enter into a contract with one another. You may either **LICENCE** or **ASSIGN** your rights.

An **ASSIGNMENT** is more usual since this is an outright transfer of your copyright and the customer will then have full, exclusive, control.

A **LICENCE** is for specific purposes which you and your customer will agree.

For example, you allow use of your design for one season or for one market sector. During the period you have licensed your design you remain the copyright owner.

## What terms should I accept?

### Fees

Usually an *outright fee* is paid to you; more rarely a *royalty* based on sales can be negotiated. You should require your full fee to be paid upfront.

### Signatures

**Signatures:** It is advisable that the invoice detailing the charges and currency is signed by both parties.

### Geographic Area

Usually this is worldwide although you can try and negotiate for a more limited area, eg UK or USA only.

### Exclusivity

An **assignment** is necessarily exclusive to the purchaser but a **licence** can either be exclusive or non-exclusive. Frequently a customer will want exclusivity to stop you licensing your design to another party.

Payment of the agreed FEE should be a condition before the transfer of copyright or other right.

### Commissioned Work

An order detailing the **charges** and **currency** should be signed by both parties. The receipt of a DEPOSIT confirms the acceptance of the planned fees and engages the start of work by the designer. The payment of full fees, depending on the agreed terms, authorises reproduction and transfer of copyright or other legal rights to the customer.

### Applicable Law

It is advisable that your contract states that it is governed by English Law and that, in the event of any dispute, the English Courts will have exclusive jurisdiction.

## What if I have specific questions or concerns about any of my rights?

If you are in doubt about any of the above, or need advice on some other aspect of business law, please feel free to contact [Own-it](#).

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