



## **INTELLECTUAL PROPERTY RIGHTS (Copyright and Design Right. Anti Copying in Design (ACID) – Guidelines for the Flooring sector**

### *Introduction*

The Copyright, Design & Patents Act 1988 (“CDPA”) is the current legislation that governs the intellectual property rights of copyright and design right. Copyright and design right are two separate intellectual property rights that exist on the creation of a work and/or design as long as certain criteria is met pursuant to the CDPA. Unlike many intellectual property rights that exist such as patents and registered design rights; copyright and design right arise automatically on creation. There is no formal registration process needed in order to protect your work and/or design. There is some clear overlaps between both copyright & design right.

### *What is Copyright?*

Copyright can arise in a number of different types of original works, including literary, dramatic, musical or artistic works, as well as films, sound recordings, databases and broadcasts. The rights conferred vary depending on the type of work created. However, in this instance we will focus on artistic works and works of artistic craftsmanship (two distinct types of work) in relation to rugs and carpet designs. In all likelihood, due to the categories of works protected under the law, a rug or carpet itself as a final product will need to qualify for protection as a ‘work of artistic craftsmanship’ if it is to qualify at all. This will require the rug or carpet to have some detail to it, something to distinguish it, a plain rug or carpet would not merit protection. However, the pattern on the rug or carpet could get copyright as simply an artistic work, infringement could then occur if that pattern was applied to anything (i.e. a cushion or painting). This is the widest form of protection likely available in these circumstances and one which designer should be seeking to enforce.

Copyright will subsist in an artistic work and a work of artistic craftsmanship where the work is original, meaning that it needs to have been created with skill, judgement and individual effort by the author(s). It cannot have been copied from a prior work. The threshold for works of artistic craftsmanship has generally been high, however due to recent case law surrounding copyright in designs, this can be seen have been lowered. This differs from copyright in generic artistic works, where there is no assessment of merit, whereas there is such an assessment with a work of artistic craftsmanship. There is however, no difference in the level of protection between the two.

### Rights conferred by copyright

Copyright gives protection to the author(s) of an original work of artistic craftsmanship for the duration of 70 years plus the life of the author. Copyright protection also gives the author(s) of a work of artistic craftsmanship the exclusive right to copy the work, issue copies of the work, to rent or lend the work or to adapt the work.

### Who is the Author(s)?

Copyright will vest in the person who created the work. If more than one person created the work and each individual part of the work cannot be distinguished, this will be a work of joint authorship. It is important to remember that if you are an employee, unless your contract says otherwise, it is likely that any work created through the course of employment will belong to the employer.

### Copyright Infringement

A person infringes copyright in a work if a person does anything that is the exclusive right of the author as mentioned above, and what they have done is a copy of the whole or substantial part of the work. A qualitative approach is taken rather than a quantitative approach. The question to ask is whether what has been copied, does this go to the heart of the work? or is it an important part of the work, even if it is just a small part?

### What is UK unregistered design right?

Design right is an automatic right that protects purely functional products. To be protected by design right, a design must meet a number of conditions;

1. A design must comprise the shape or configuration of the whole or a part of the article.
2. It must be original, and;
3. It must be recorded in a design document or an article made to the design

Design right protection does not protect the surface decoration on a design in the UK.

### Rights conferred by design right?

Design right last for a much short period than that of copyright. A design right lasts for either;

1. 15 years from when the design was first recorded in a design document or an article was made to the design, or;
2. 10 years from when an article made to the design is first made available for sale.

Whichever is the shortest period of protection is the right that will subsist in the design.

Much like copyright, the owner of a design right has the exclusive right to reproduce the design for commercial purposes by making articles to the design or enabling third parties to create the design.

### Ownership of design right

Similarly to copyright, the owner of a design right is generally the designer who first creates a design. However, this may not always be the case dependent on whether a design is created during the course of employment, where the employer will be the owner of design right in the design.

### Does a carpet or rug design attract intellectual property rights?

A rug or a carpet (as a functional item) would be protected either through design right (only the shape and configuration of the rug or carpet, not the surface pattern) or registered design right protection (which would cover the entire carpet or rug, including the pattern). The basic UK unregistered right which would not cover the surface pattern, is not therefore particularly effective here, unless the rug was a particularly unique shape so as to justify design right protection.

However, such a product, if it was one which included a pattern/ design in which the author had expended creative effort, could also attract copyright protection, most likely as either an artistic work (in the pattern) or a work of artistic craftsmanship in the pattern, both alone and as applied to the rug, if the relevant qualifications were met. A design could be classified as a work if it was found to be original in that it is the author's own intellectual creation, and the design created is the expression an author(s) own intellectual creation. If both criteria are met, copyright will subsist. For the rug or carpet to be a work of artistic craftsmanship, it will be also need to have sufficient artistic merit, which would be assessed in each case.

There is a clear overlap that exists between copyright & design right protection. Where an infringement of copyright has taken place in a work, which also includes a design right, it does not follow that design right infringement has taken place. An owner whose design attracts both copyright and design right cannot be remunerated twice over. For makers of detailed carpet and rug designs, copyright will be the preferred right to claim, if that is possible. It lasts much longer than unregistered design rights (and also registered rights) and affords a high level of protection.

### What types of behaviour would constitute an infringement of copyright and/or design right?

- Copying or adapting someone else's work for commercial purposes.
- Providing the means for a person to copy someone else's work for commercial purposes.
- Creating a new work which substantially resembles another work for commercial purposes.

- Assembling motifs from your own archive material in such a way that the result merely adapts the original work of another designer for commercial purposes
- Adapting a work from one medium to another (fabrics to carpets or carpets to posters for example)
- Colour in itself is not copyrightable but could reinforce a claim of infringement, if the colourways are placed too closely to resemble the original. Remember it is the whole or substantial part of the work which is copied.

#### Design Right Infringement

- Making articles to a design which are made exactly or substantially to a previous design.
- Making a design document for the purposes of enabling articles to be made which are made exactly or substantially to the design.

#### General principles that should be adopted moving forward

The following guidelines should be used when dealing with a design;

- Do not wilfully copy any other company's designs for commercial purposes without obtaining consent or a license to do so.
- Do not use source material, which is clearly from a design, the copyright of which is owned by a third party, without obtaining consent or a license to do so.
- Do not put pressure upon employees, clients, agents, and design houses to copy material, which is owned by other designers or companies.
- Do not succumb to pressure from agents, employers, designers or clients to copy or develop designs, from others, which are owned by third parties.
- Where you intend to use the design of another person or company, contact the owners of the design to seek permission to use the design prior to using it.
- At all times, efforts should be made to identify the author of the design, design drawings and carpet samples, which a client brings to your company which the client wants to use. A client may not understand and/or be indifferent to claims of copyright and/or design right infringement. If the owner of a design is unknown, you are still liable for any infringement of rights that subsist in the design.

It is important that designers and other third parties become aware of the rights that can subsist in a product, be it a rug, carpet or another item and what these rights give to a designer. A large number of suppliers to the interior furnishings industry invest in creative

design, and differentiate their offering through the quality and innovation of design. For this to continue the value of a designer's creation needs to be fully appreciated.

**For further information on anything set out above please contact Anti-Copying in Design on (0) 845 644 3617. It should be remembered this is only a very brief outline and further advice should be sought on any specific queries.**

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