

# Copyright vs Design

## 工業設計的保護 - 版權及註冊外觀設計

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## 工業設計的保護 - 版權及註冊外觀設計

設計作品是創作者的知識產權，應受到適當保護。一些設計作品結合到由工業工序製造的商業產品中。在本文中將兩種與工業設計密切相關的知識產權 — 版權和註冊外觀設計並列對比，以討論這兩種知識產權的相似和不同之處。

### 版權和設計介紹

**版權**是一種權利，保護原創作品。根據“版權條例”，這權利存在於文學、音樂、戲劇和藝術作品，以及聲音紀錄、影片、廣播或有線傳播節目，以及已發表版本的排印編排。此外，版權所保護的並不是無形的想法本身，而是表達想法的形式，將想法在特定的表達媒介中實現出來。由於版權是一種自動賦予的權利，它在作品完成時產生。在香港不設有版權登記的程序，而在中國，版權是可以正式登記的。香港的版權並不要求作品具有審美價值或具有創造性，因為對版權而言，原創性較為重要。

**註冊外觀設計**涵蓋藉任何工業工序而應用於某物品的形狀、構形、式樣或裝飾，這在“註冊外觀設計條例”（RDO）中提到。註冊外觀設計的擁有人擁有專有權，可以阻止他人製造、進口、使用、出售和出租設計產品。與能夠保護產品功能特徵的專利相比，註冊外觀設計保護的是產品外觀。受保護的特徵應該由肉眼在經製成的物品上來判別。註冊外觀設計被要求能夠重複地在進行工業規模的生產。換句話說，當所製造物品的數量大於50件並且物品不是由手工製造時，則可認定該設計為“在工業上應用的”。

除此之外，版權與註冊外觀設計在許多方面存在差異：

### 權利的性質

如上所述，版權是自動賦予的權利，而註冊外觀設計僅在註冊後才存在。版權強調原創性，而註冊外觀設計強調新穎性。

### 權利期限

版權從完成作品到作品的創作者去世後50年內存在。另一方面，香港的註冊外觀設計自申請日起計最長可持續25年，而中國的外觀設計專利則自申請日起計持續15年。

### 保護範圍

版權僅能保護原創作品免被複製，並且它不是獨佔性權利，而註冊外觀設計通過賦予專有權，能對抗與註冊外觀設計沒有實質性差異的另一項獨立作品，以保護外觀設計產品。

### 版權和註冊外觀設計的重合之處

從上述可見，版權主題的覆蓋範圍比註冊外觀設計的更廣，版權幾乎涵蓋了所有類型的原創作品。一類同時落入版權和註冊設計範圍的主題是藝術作品。

根據“版權條例”第5條，藝術作品包括：

- (a) 平面美術作品、照片、雕塑品或拼圖(不論其藝術質量);
- (b) 屬建築物或建築物模型的建築作品;或
- (c) 美術工藝作品。

因此，藝術作品包括註冊外觀設計的常見形式，例如屬於平面美術作品的设计圖紙。

根據“版權條例”第87條的規定，對於工業產品中的藝術作品的版權保護，如果該作品為註冊外觀設計，保護期由該作品首次推出市場起計25年。如果該作品未被註冊，保護期則由該作品首次推出市場起計15年。

當了解到版權在设计中因自動賦予而存在，有人可能會問是否值得去註冊外觀設計，特別是考慮到註冊設計從申請日起計最多可持續25年，這遠遠低於版權的保護期限。然而，另一方面，版權僅在對抗複製方面有效，但不能對抗獨立作品。並且如上所述，與註冊外觀設計相比，執行版權的舉證責任更高。為藝術作品設計註冊的好處是能夠迅速執行權力。在某些場合中，例如在展覽場地中，註冊外觀設計的擁有人可有效地阻止侵權展品在展覽場地展出。如果創作者想註冊其設計，則應在向公眾披露設計前提交註冊申請。另外，如果原創作品的創作者希望版權能發揮其價值，建議保留所有草稿，在草稿標籤日期，以展示創作的過程，這對於在訴訟期間證明權利存在是非常重要的。

# Copyright vs Design

Design creations are creator's intellectual properties that should be protected properly. Some of the design works are incorporated into commercial articles and produced in industrial process. By juxtaposition of the two types of intellectual property rights (IPRs) closely related to industrial design —copyright and registered design, this article will discuss similarities and differences with regard to the two IPRs.

## Introduction of copyright and registered design

**Copyright** is a right for protection of original works. According to the Copyright Ordinance (CO), the right subsists in literary, musical, dramatic, artistic works, as well as sound recordings, films, broadcasts or cable programmes, and the typographical arrangement of published editions. In addition, copyright does not protect any intangible idea per se but the expressive form of the idea in which the idea is embodied in a particular medium of expression. As copyright is an automatic right, it arises upon the creation of a work. In Hong Kong, there is no registration procedure for copyright, whereas in China, a copyright can be officially registered. Copyright law in Hong Kong does not require a work to have aesthetic value or being creative as originality weighs more for copyright.

**Registered Design** covers shape, configuration, pattern or ornament applied to an article by any industrial process, as stated in the Registered Design Ordinance (RDO). The owner of a registered design has exclusive right to prevent others from making, importing, using, selling and hiring the design product. Compared with patent which can protect functional features of a product, registered design protects the appearance of the product. The features being protected in the finished article should be judged by the eye. A registered design is required to be repeatable for industrial-scale reproduction. In other words, a design is deemed to be "applied industrially" when the number of articles being manufactured is more than 50 and the articles are not handmade.

Apart from the above, there are differences between copyright and registered design in various aspects:

### Nature of Right

As mentioned, copyright is an automatic right whereas registered design only subsists after registration. Copyright emphasizes originality whereas registered design emphasizes novelty.

### Duration of Rights

The copyright subsists from the completion of work until 50 years after the author of the work dies. On the other hand, registered design in Hong Kong can at most last for 25 years from the filing date while design patent in China lasts for 15 years from the filing date.

### Protection Scope

Copyright can merely protect an original work against copying and it is not a monopoly right, whereas registered design protects a design product by giving exclusive right against another independent creation not substantially different from the registered design.

### Overlap of Copyright and Registered Design

From the above, it is conceivable that the scope of subject matters of copyright is broader than that of registered design. Copyright almost covers all types of original creations. One overlapping subject matter of copyright and registered design is artistic work.

Pursuant to Section 5 of CO, artistic work includes:

- (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality;
- (b) a work of architecture being a building or a model for a building; or
- (c) a work of artistic craftsmanship.

Accordingly, artistic work encompasses common forms of registered design such as design drawings which belong to graphic works.

Pursuant to Section 87 of CO, copyright protection of an artistic work incorporated into industrial articles can last for 25 years from the first

marketing date of the articles if the work is a registered design and 15 years if the work is unregistered.

Knowing that copyright subsists automatically in some designs, someone may ask if it is worth it registering a design, especially considering that a registered design can at most last for 25 years from the filing date, which is much less than the protection term of copyright.

Nevertheless, copyright can only do good against copying but not an independent creation. As mentioned above, the burden of proof for copyright enforcement is higher compared with that of registered design. A significant advantage having design of artistic work to be registered is for swift enforcement of right. On some occasions such as in exhibition, the owner of registered design can effectively stop the infringing exhibit being shown in the exhibition. If the owner would like to register his design, it should be done before disclosure of the design to the public. Besides, if the creator of an original work wants copyright to show its value, it is recommended to keep all the drafts labelled with the dates, illustrating process of the creation, which can be crucial for proving the subsistence of the right in the count of proceedings. 

