

DESIGN AND COPYRIGHT

THE INTERPLAY

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The Conundrum of the Workshops

September 1890

When the flush of a newborn sun fell first on Eden's green and gold,
Our father Adam sat under the Tree and scratched with a stick in the mould,
And the first rude sketch that the world had seen was joy to his mighty heart,
Till the Devil whispered behind the leaves: "It's pretty, but is it Art?"

Rudyard Kipling (1865-1936)

Full poem: <https://www.bartleby.com/103/50.html>

Works of Applied Art

Berne Convention

Article 2(1)

The expression “literary and artistic works” **shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression such as** books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting architecture, sculpture, engraving and lithography, photographic works to which are assimilated works expressed by a process analogous to photography; **works of applied art;** illustrations, maps, plans sketches and three-dimensional works relative to geography, topography, architecture or science.

Works of Applied Art

EU legislation

Directive 2001/29

- Recital 60: protection is without prejudice to industrial property
- Article 2(a): authors have the exclusive right to prohibit the reproduction of their works

Directive 98/71/EC

- Recital 8: cumulation of protection under design and copyright laws
- Article 17: designs registered under Directive also eligible for copyright protection

Regulation 6/2002

- Recital 32: cumulation of protection under design and copyright laws
- Article 96(2): designs protected under Regulation also eligible for copyright protection

Works of Applied Art

Domestic law

Portugal: Article 2 of the Code on Copyright and Related Rights

“1 Intellectual creations in the literary, scientific and artistic fields irrespective of their genre, form of expression, quality, mode of communication and objective shall include inter alia

...

(i) Works of applied art, industrial designs and works of design which constitute an artistic creation, irrespective of the protection relating to industrial property . . .”

UK: Section 4 of the Copyright Designs and Patents Act 1988

(1) In this Part “artistic work” means-

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

Copyright works

CJEU Case law

Case C-5/08 *Infopaq*: (reference from Denmark)

- (1) Art.2 of Directive 2001/29 must be given a uniform autonomous meaning in EU law [27]
- (2) Protection is given to “works” within the meaning of Art.2
- (3) Copyright within the meaning of Directive 2001/29 only arises in relation to subject matter which is original in the sense that it is the author’s own intellectual creation [37]
- (4) Parts of a work enjoy protection provided that they contain elements which are the expression of the intellectual creation of the author [39]

Case C-145/10 *Painer*: (reference from Austria)

- (1) An intellectual creation is an author’s own if it reflects the author’s personality [88] ref Directive 93/98 Recital 17
- (2) That is so where the author makes “free and creative choices” [89]
- (3) By such choices a portrait photographer can stamp a work with his/her “personal touch” [92]

Works of Applied Art

CJEU Case law

Case C-168/09 *Flos*: (reference from Italy)

- (1) Copyright may arise under Directive 2001/29 even if design protection is not available
- (2) Registered designs are also eligible for copyright protection under Directive 98/71 Art.17
- (3) Art.17 second sentence does not allow choice as to whether to confer copyright protection if the design meets the criteria for copyright protection: copyright must be conferred on all designs
- (4) Recital 8 affirms the principle of cumulation of protection
- (5) Term of copyright is also harmonised by Directive 93/98 Art.1(1)
- (6) Consequently Art.17 means that designs which meet the level of originality for copyright protection are eligible to copyright protection for the harmonised term of life of the author plus 70 years: see [41]-[44]

Works of Applied Art

CJEU Case law

Case C-683/17 *Cofemel*: (reference from Portugal)

- (1) “work” is an autonomous EU concept [29]
- (2) A work is the product of the author’s own intellectual creation and the classification as a work is reserved to the elements that are the expression of that creation – see *Infopaq* and *Levola Hengelo*
- (3) It is both necessary and sufficient for subject matter to be considered original that it reflects the personality of the author as an expression of his free and creative choices [30]
- (4) Subject matter dictated by technical considerations, rules or other constraints which leave no room for creative freedom does not possess originality [31]
- (5) The concept of a work requires the existence of subject matter that is identifiable with sufficient precision and clarity [32]
- (6) The last requirement dictates that there is no element of subjectivity in identifying the subject matter of the work because that would be detrimental to legal certainty [33]

Works of Applied Art

CJEU Case law

Case C-683/17 *Cofemel*: (continued)

- (7) EU legislation has opted for a scheme in which protection for designs and copyright is cumulative [43]
- (8) Cumulation is the result of provisions of Directive 98/71 Art.17 and Regulation 6/2002 Art.96(2) read in the light of Recitals 8 and 32 respectively of those provisions [44]-[45]
- (9) Directive 2001/29 preserves the existence and scope of previous legislation relating to designs including the principle of cumulation [46]-[47]
- (10) Designs are “works” if they meet the previously identified qualifying conditions [48]
- (11) The aesthetic effect of a design is an intrinsically subjective sensation of beauty experienced by an individual which does not therefore permit subject matter to be identified with sufficient precision and objectivity [53]
- (12) Consequently the fact that a design may generate an aesthetic effect does not make it possible to determine whether that design constitutes an intellectual creation [54]

Applied Art and Artistic Craftsmanship

Domestic law

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Artistic Craftsmanship

First UK case following *Cofemel*

Response Clothing v Edinburgh Woollen Mill : [2020] EWHC 148 (IPEC)

URL: <http://www.bailii.org/ew/cases/EWHC/IPEC/2020/148.html>

Decision of the Intellectual Property Enterprise Court

The case concerned the design of a wave pattern physically knitted into a fabric. There was no drawing or other graphic work in which copyright could be claimed.

The copy was pretty much identical to the original work

So the case turned on whether the original design was a work of artistic craftsmanship



RESPONSE BACK STRETCH.jpg



ANNEX 4
(CINGO FABRIC)



CINGO BACKSTRETCHED.jpg



CINGO FR STRETCHED.jpg

ANNEX 3
(VISAGE FABRIC)



VIS BACK STRETCH.jpg



VIS FR .STRETCH.JPG.JPG

ANNEX 5
(BENGAL KNITTEX FABRIC)



BK beige stretch back.jpg



BK FR BEIGE STRETCHED.jpg

Artistic Craftsmanship

The court's conclusions

The position in English law:

Well-known case *Hensher v Restawhile* in House of Lords in 1974 provides no clear principle or meaning for “artistic craftsmanship” [32], [44]-[52]

Other case law suggested that the author must be both an artist and a craftsman. A craftsman is someone who exercises skill and takes justified pride in their workmanship. An artist is someone with creative ability who produces something with aesthetic appeal [33]-[35]

Applying that test the original fabric was a work of artistic craftsmanship even though it was produced on a knitting machine [36]-[41]

The House of Lords which decided *Hensher* would not have held it to be so but there is no binding principle of law derivable from that case so the test from the other authorities can be adopted

Artistic Craftsmanship

The court's conclusions

The position in European law:

Levola and *Cofemel* have considered what constitutes a work eligible for copyright protection [56]-[57]

The CJEU has ruled that national law cannot impose a requirement of aesthetic or artistic value [58]

Consequently the Wave Fabric design is original for the purposes of EU law [59]

Pursuant to *Marleasing* the court is required to construe UK law in conformity with EU law as interpreted by the CJEU [61]

Section 4(1)(c) of the CDPA cannot be entirely so construed

Therefore the court will adopt the previous English law authorities which is as close to EU law as it can go

On that test the Wave Fabric is a work of artistic craftsmanship