UCL Institute of Brand & Innovation Law

UK Design Law at the Crossroads

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OPTION 1 = THE NUCLEAR OPTION

- Return to the notion of "industrial copyright for 25 years as a means to balance competition"

- Reject EU law on categories and "original work"

- Reject *Flos, Cofemel, Brompton, Football Dataco (functionality), Levola*

- Parts of *Response and Waterrower* should be rejected (ie the bits referring to EU law)

- Legislative change required - re-introduce s.52 on industrial manufacture; emphasise closed list? Define "artistic" and "craftmanship"? Codify *Hensher* and *Lucasfilm?*

OPTION 2 = THE FLEXIBLE HISTORICAL APPROACH

- No legislative changes required – active court required
- Classification is technical in character without notions of quality, creativity, etc. Basic philosophy is economic.
- 1911 CA = works of artistic craftsmanship = works of applied art - *Art.2 Berne Convention*
- Categories are fluid - cases on circuit diagrams, maps = literary & artistic
- S.4 CDPA - flexible category of works (Berne Convention flexibility) (*Norowzian, SAS Institute, Nova Productions)*
- *Hensher* is open to myriad interpretations, *Lucasfilm* calls for multi-factorial test which can expand to protect designs which are destined for general products / consumer market
- Courts adopt approaches in *Response* and *Waterrower* - but latter decisions straddle two streams of jurisprudence – pre Cofemel (ie applying Hensher and Luscasfilm) and the post Cofemel/Brexit (ie a second layer of analysis on "original work")…. So why not just merge the two approaches? the current approach (*Response Clothing; Waterrower)*

OPTION 3 = ALL DESIGNS ARE PROTECTABLE IF QUALIFY AS "ORIGINAL WORK OF ARTISTIC CRAFTSMANSHIP" UNDER BERNE AND EU RULES [OPEN LIST]

- Court have to apply a single test - whether design constitutes "an original work of artistic craftsmanship"

- "Original work" (*Infopaq, Flos, BSA, Football Dataco, Levola, Cofemel, Brompton) (Response Clothing; Waterrower)*
- 2D and "design documents" protectable to the extent satisfy ss 4 &.51 CDPA ; 3D designs protectable to the extent satisfy s.4 and "sculpture" or "works of artistic craftsmanship"
- Flexible interpretations - *Hensher, Lucasfilm, Response Clothing*
- Introduce or concretise the existing norms in jurisprudence - "free and creative" contribution *[Cramp v Smythson],* personality and a functionality/technical constraints

NEXT STEPS.....

1. Courts have to work on a functionality doctrine - it inherently exists……see Supreme Court in *Lucasfilm*; *Copinger & Skone James* on *Brompton - A functionality doctrine negates the concerns as to the anti-competitive nature of copyright protection* (as it does under trade mark law re shapes)

2. What about categories? Courts have to reason on the open category or flexible category of works - interpretation of EU retained law - "grain of legislation" (*Marleasing/Vodafone 2*)

3. <u>OR</u> Perhaps one slight legislative amendment as follows:

4.– (1) In this Part "artistic work" ~~means~~ **<u>includes -</u>**

a graphic work, photograph, sculpture or collage, irrespective of artistic quality,

a work of architecture being a building or a model for a building, or

a work of artistic craftsmanship.

2021 HMG REVIEW OF S.52 [OPTIONAL SLIDE]

2021 Government post-implementation review of the repeal of s.52, CDPA (following *Flos):*

- imposing equal terms of protection for artistic works (whether they had been industrially manufactured or not), is expected to result in a simpler copyright system and this in turn "could result in an increase of the production of such goods within the UK economy."
- "increasing the term of protection afforded to industrially manufactured artistic goods beyond 25 years was expected to tackle the market failure argument. Without the full term of protection, there was a risk that creators would not be sufficiently incentivized to create industrially manufactured artistic goods – as they may not be able to recoup the investments they made to develop successful products. Greater protection of term might result in greater levels of production, therefore."

FUNCTIONALITY DOCTRINE – OPTIONAL SLIDE

COPINGER & SKONE JAMES ON COPYRIGHT (18TH EDITION)

"For a work to be regarded as one of artistic craftsmanship, it should be possible to say that the creator was both a craftsman and an artist. It has been suggested that determining whether a work is a work of artistic craftsmanship does not turn on assessing the beauty of aesthetic appeal of work or on assessing any harmony between its visual appeal and its utility, but on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations. Accordingly, the more constrained the designer is by functional considerations, the less likely the work is to be a work of artistic craftmanship. It is a matter of degree."