

International **Comparative** Legal Guides



Designs **2021**

A practical cross-border insight into designs law

First Edition

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Designs 2021

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Where Does *Cofemel* Leave Design Rights?

Bird & Bird LLP



Ewan Grist



Louise Vaziri

The Court of Justice of the European Union's (CJEU) decision in *Cofemel* was a landmark decision by the Court in the field of copyright. In seeking to harmonise the criteria for what constitutes a protectable “work”, the Court has potentially upended a significant part of the UK's (and certain other European countries) domestic protection regime, and opened up the potential for copyright to protect the design of many articles that have not previously been considered eligible for copyright protection. This matters because certain articles which might previously only have been protectable through registered and unregistered design rights in the UK (ranging from three years to a maximum of 25 years) may now also be protected by copyright which has a far longer term of protection of 70 years after the death of the designer.

What is Copyright?

Copyright automatically arises to provide protection against unauthorised copying to original “works” created by an “author”, normally for a period of the life of the author plus 70 years. Under English law, it is governed primarily by the Copyright, Designs and Patents Act 1988 (CDPA). Under English law and a limited number of other European territories, there is what is known as a “closed list” of the types of works that can be protected by copyright. Section 1 of the CDPA contains an exhaustive list of the types of works that can qualify for protection:

- (a) original literary, dramatic, musical or artistic works;
- (b) sound recordings, films or broadcasts; and
- (c) the typographical arrangement of published editions.¹

What constitutes an “artistic work” is further sub-categorised in s.4(1) CDPA, which defines “artistic works” as:

- (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.²

In order to qualify for copyright protection, the work in question will need to fit within one of the sub-categories of “artistic work”. For most three-dimensional articles, this means they will either need to be a “sculpture” or a “work of artistic craftsmanship” in order to attract copyright protection. However, neither term is actually defined in the CDPA.

The fact that the CDPA contains a closed set of “types” of work that can benefit from copyright protection is in part a historical legacy that long predates the UK's entry into the European Union. Copyright in England dates back to the 1700s when the Statute of Anne originally provided protection solely for printed books. As technology progressed, so did the list of works that could be protected, for example by the Engraver's Act in 1735, the Models and Busts Act 1789, and the Dramatic

Literary Property Act 1833. This staggered legislative development has continued ever since and accordingly there has been an incremental addition of works in which copyright can subsist, up to and including in the CDPA as set out above.

So, What is a “Sculpture”?

While it may be fairly easy to identify a “sculpture” in everyday life, the English courts have laboured with defining the precise boundaries of this term. The leading case in this area is *Lucasfilm v Ainsworth*,³ which addressed the issue of whether a model of the famous “Stormtrooper” helmet was a sculpture for copyright purposes. In deciding that the helmet in question was not a sculpture, Mann J at first instance stated that a sculpture must be a “three dimensional representation of a concept” and that while there should be no judgment about its artistic value, regard should be had for the *purpose* of the object; it should have “visual appeal which [the author] wishes to be enjoyed as such”.⁴ The judge's approach, which was approved by the Supreme Court, led to a finding that the primary function of the helmet in question was utilitarian, and that it therefore did not qualify as protectable subject matter.

What is a Work of Artistic Craftsmanship?

For a work to be a work of artistic craftsmanship (WOAC), it is necessary to demonstrate that it is both “artistic” and a work of “craftsmanship”. This category has proven even more difficult to define than a “sculpture”, with the leading House of Lords decision dealing with the issue, the 1976 case of *Hensher v Restarile*,⁵ producing several competing views from the presiding Lords as to what was required.⁶ “Craftsmanship” was held by Lord Simon to imply a “manifestation of pride in sound workmanship”, whereas Lord Reid refers to such works as needing to be “durable, useful handmade object[s]”. In addition to being a work of craftsmanship, the work must also have real artistic or aesthetic appeal. Again, their Lordships provided varying explanations of what this required. Lord Reid stated that a work was artistic “if it is genuinely admired by a section of the community by reason of the emotional or intellectual satisfaction its appearance gives”, whereas Lord Kilbrandon held that “the true test is whether the author has been consciously concerned to produce a work of art”. Lord Morris put it another way: “Whether something is or is not artistic is a question of fact, to be decided in the light of evidence, and it is pointless to try to expound the meaning of the word.” As such, whilst the leading authority, *Hensher* does not provide any clear guidance on what constitutes a WOAC, beyond the trite observations that there must be some level of craftsmanship involved and some level of artistic appeal. How these respective requirements can be fulfilled remains open to interpretation.

Absent any clear guidance in *Hensber*, the other case often cited is a 1994 New Zealand case of *Bonz Group (Pty) Ltd v Cooke*.⁷ In this case, the court defined a WOAC as one where the author of the work was both:

- a craftsman in that they made in this case, the fabric, in a skilful way, taking justified pride in their workmanship; and
- an artist in that they used their creative ability to produce something that had aesthetic appeal.

This approach was also approved in *Lucasfilm*; having failed to qualify as a sculpture, the Stormtrooper helmet was not deemed to qualify as a WOAC either because its purpose was not designed to appeal to the aesthetic, a finding which will have surprised some.

In part due to the absence of a statutory definition of a WOAC, in part the lack of clear and consistent judicial guidance as to what it means and in part because of the tendency to set the thresholds which must be met (whatever they are) rather high, until the very recent case of *Response Clothing* (discussed below), the English courts had not previously found *anything* to actually be a WOAC.

The effect has been that, save for three-dimensional articles which are very obviously sculptures (and hence qualify for copyright protection through that route), it has generally been assumed that the appearance of three-dimensional articles, ranging from the utilitarian through to luxury goods, can only be protected in the UK by design law, namely UK registered designs under the Registered Designs Act 1949 (RDA) or UK unregistered designs rights under s.213 CDPA, or registered/unregistered Community Designs under EC Regulation 6/2002 (Community Design Regulation).

For many such articles, the availability of protection under design law, ranging from three years in the case of an unregistered Community design through to 25 years for a registered design, is more than sufficient. Whether through changes in trends or technology, comparatively few designs remain of commercial value to the designer for more than a few years (and in the case of high street fashion, sometimes significantly less than that). However, the design of some articles can be (or become) iconic and therefore of huge ongoing value to the creator almost indefinitely, and certainly well beyond the 25 years offered by design law. For example, luxury items such as handbags or shoes or iconic furniture designs which outlive current trends and remain popular for many decades. It is for such articles that the lack of copyright, which would give protection for some 70 years after the death of the creator, is a real issue.

Cofemel may now have opened the door to the protection of such articles.

CJEU Case Law on Copyright Leading to *Cofemel*

The UK's approach to copyright protection has historically been very different to that taken in many civil law jurisdictions, where works have been protected as extensions of their creator's personality. This tradition has had a significant impact on the development of EU copyright law leading up to and including the *Cofemel*⁸ decision.

The *Cofemel* decision came after nearly two decades of CJEU case law harmonising the criteria for copyright protection, both for copyrighted works more broadly and in respect of designs specifically. It started by looking at the originality requirement, holding in *Infopaq*⁹ that to qualify as original, a work must be considered an “*author's own intellectual creation*”. The English courts have in most cases been able to accommodate this new standard into the English legal canon without too much difficulty.

In another early case concerning a famous lamp design, *Flos*,¹⁰ the CJEU emphasised the principle of cumulative protection, whereby registered designs must also be protected by copyright, where they are the “*author's own intellectual creation*”. Following *Flos*, the UK Government decided to repeal s.52 CDPA, deciding it was no longer compatible with the Copyright Term Directive¹¹ as this provision provided for shorter term copyright protection (just 25 years) for industrially manufactured artistic works than that provided for other types of artistic works. This meant that in the UK, items such as furniture, even to the extent it could be protected under the closed list of protectable works under English copyright law, would still have a shorter term of protection than for other more traditional artistic works.

In a more recent case, *Levola Hengelo*,¹² the CJEU held that copyright protection subsists where the subject matter is original, and where it is a “work”. In assessing the meaning of “work”, the court held that it must be “*expressed in a manner which makes it identifiable with sufficient precision and objectivity*”, further stating that there should be no element of subjectivity in identifying protectable subject matter. This judgment appeared to further support the idea that the CDPA's requirements that work must fall into particular categories could be incompatible with EU law.

G-Star vs *Cofemel*

And so we arrive at *Cofemel*. The decision itself concerned a dispute over whether *Cofemel* had infringed copyright in G-Star's distinctive “Arc” jeans and “Rowdy” t-shirts. The question that the CJEU had to answer was whether Member States could make copyright protection for designs, such as those at issue, subject to requirements over and above “originality”. In short, the CJEU took the view that that originality is the only criteria that must be met for a design to be granted copyright protection.

The CJEU clarified the two cumulative requirements for the existence of a “work”: (i) there must exist original subject matter, in the sense of being the author's own intellectual creation; and (ii) that the protected elements must be the precisely and objectively identified expressions of such creation. Crucially, the court stated that “*it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices*”. In other words, nothing else is required for a “work” to be protected by copyright. This would appear to mean that Member States are not permitted to impose additional requirements, such as the need for any particular artistic merit, in order for a work to attract copyright protection.

Why Does *Cofemel* Matter in the UK?

For the UK, the implications of *Cofemel* are potentially twofold. On one level, it again calls into question the permissibility of the exhaustive list of “works” provided in the CDPA; a question which *Flos* and *Levola* had already raised. However, the subject matter of the *Cofemel* decision makes the implications even harder to ignore. If a work meets the criteria set out in *Cofemel*, it should not matter whether it fits into one of these categories. As a consequence of that, it makes any kind of assessment based on artistic considerations when assessing whether a work is a WOAC, such as those grappled with by the English courts in both *Hensber* and *Stormtrooper*, also potentially incompatible with EU law.

As *Cofemel* is now part of EU law, under the so-called “*Marleasing principle*”, the national courts of each EU Member State must interpret their national law so far as possible to comply with EU law. Thus, given that the UK is, until the end of the transition period on 31 December 2020, subject to EU law,

the English court must, so far as is possible, attempt to interpret the CDPA to comply with the test for copyright subsistence as explained by the CJEU in *Cofemel*. Whether, and if so the extent to which, the English courts feel they can interpret the CDPA to be consistent with *Cofemel*, remains to be seen, but the impending end of the Brexit transition period does not necessarily provide an easy get out: CJEU judgments issued prior to the end of the transition period shall be written into UK law after the end of the transition period with the same effect as a Supreme Court judgment.¹³ This means that, even after the end of the transition period, when the UK is no longer bound by EU law or within the jurisdiction of the CJEU, *Cofemel* should still be regarded as binding authority to lower courts, until such time as it may have overturned.

What might the practical upshot of *Cofemel* be in the UK? Put simply, it seems likely that the *Cofemel* test for determining whether a copyright-protectable work subsists should be easier to satisfy than the test(s) the English courts have previously applied to determine whether something is a WOAC (or sculpture) as set out in *Hensber et al.* To satisfy the *Cofemel* test, one simply needs to show that there is original subject matter (in the sense of being the author's own intellectual creation) and that the protected elements must be the precisely and objectively identified expressions of such creation, but nothing more. Any assessment of artistic merit, or craftsmanship involved, or any other requirements for that matter, appears to have fallen by the wayside. This presumably makes it easier for articles which would previously have stumbled on the *Hensber* approach to satisfy the *Cofemel* test and attract copyright protection. That is not to say that any article will now qualify for copyright protection: the English courts will have to take a view on what the new requirements laid out in *Cofemel* actually mean in practice. But shorn of the requirement to prove artistry, or craftsmanship, some articles (and in particular three-dimensional objects such as furniture or jewellery) might certainly now stand a better chance.

Brompton Bicycle

One of the key decisions post-*Cofemel* to consider the extent of copyright protection on more functional (and less artistic) items was the case of *Brompton Bicycle*, C-833/18. The *Brompton Bicycle* case was a reference from the Belgian court that considered whether copyright could subsist in the appearance of Brompton's well-known folding bicycles. The dispute centred around whether or not the appearance over which protection was claimed was dictated by the bicycle's technical function (i.e. the way it could fold into three different positions) and therefore copyright protection should be excluded. The Belgian court asked the CJEU to consider whether the InfoSoc Directive should be interpreted as excluding works whose shapes are necessary to achieve a technical result from copyright protection.

The CJEU reiterated the *Infopaq* judgment and confirmed that there was no such restriction on copyright protection. It was possible for copyright to subsist in works whose shape is, at least in part, necessary to obtain a technical result. The question was whether or not the author had expressed his or her creative choices. If a technical result entirely prevented the author from expressing his or her creative choices then copyright protection would not arise. However, the mere fact that there were some technical considerations would not of itself provide a barrier to copyright protection if the author still had some creative freedom. In other words, provided the author was not prevented from reflecting his/her personality in the subject matter and had some freedom of expression and creative choices, then copyright could subsist.

That said, using language that closely follows Article 8(1) of the Community Design Regulation, the CJEU went on to state that: "*Where the shape of the product is solely dictated by its technical function, that product cannot be covered by copyright protection.*"¹⁴

The language of Article 8(1) provides that design protection shall not subsist in features of the appearance of a product which are solely dictated by its technical function (the "technical function exemption"). The question of whether or not copyright will subsist in functional items appears to be bound up in the extent to which an author can express their creative choice.

The CJEU went on to clarify factors that should be considered when deciding whether a work is dictated by purely technical considerations and so should not benefit from copyright protection. These factors included the existence of other possible shapes to achieve the same technical result and the effectiveness of the shape in achieving the result should be considered. This accords with previous decisions on how to interpret the technical function exemption under the Community Design Regulation. The CJEU stated that the existence of other possible shapes indicates that it is possible to establish that there was a possibility of choice and so the author had been able to exercise creative freedom, though it is not necessarily determinative.

Response Clothing vs Edinburgh Wool

The first UK judgment dealing, albeit briefly, with the implications of *Cofemel* was *Response Clothing Ltd vs The Edinburgh Woollen Mill Ltd*¹⁵ in January 2020. This dispute concerned the alleged infringement by EWM of Response's copyright in its "wave arrangement" fabric design (the "Wave Fabric"¹⁶). HHJ Hacon was required to decide whether copyright could subsist in the Wave Fabric. It should be noted that this case was commenced in 2017 and hence the parties's positions would have been adopted prior to *Cofemel*, which was only handed down two months before the trial. In his judgment, HHJ Hacon noted:

"The issue I have to resolve is...whether it is possible to interpret s.4(1)(c) [CDPA, which refers to a WOAC as being one category of artistic work] in conformity with [EU copyright law prohibit the copying of an author's work] such that the Wave Fabric qualifies as a work of artistic craftsmanship and thereby its design becomes entitled to copyright protection. In my view it is, up to a point. Complete conformity with [EU copyright law], in particular as interpreted by the CJEU in Cofemel, would exclude any requirement that the Wave Fabric has aesthetic appeal and thus would be inconsistent with the definition of work of artistic craftsmanship stated in Bonz Group. I need not go that far since I have found on the facts that the Wave Fabric does have aesthetic appeal. This part of the definition in Bonz Group is satisfied whether or not, in law, it is required."

Therefore, because HHJ Hacon felt able to find that the Wave Fabric qualified as a WOAC under *Bonz*, he did not need to rely on what the position would have been under *Cofemel*, although he clearly indicated that the requirements under *Cofemel* might be different.

Wycon vs Kiko¹⁷

The Italian court considered *Cofemel* in the case of *Wycon vs Kiko* when the court was asked to rule if the layout of Kiko's stores could be protected by copyright as an architectural plan and, if so, whether then copyright was infringed by the defendant Wycon's stores. Although the Italian copyright system does not include a closed list like the UK, it has traditionally required designs to have some level of artistic merit, more than mere originality. The case went to the Supreme Court.

The Supreme Court upheld the decisions of the lower courts. In applying *Cofemel*, the court held that the interior design plan

was protectable by copyright as an architectural work. This was the case provided that the plans were an original combination of elements that included the “personal touch” of the author. This would not be the case if the arrangement of elements was imposed on the author for solving a technical problem.

The Italian court would therefore appear to agree with the UK court in its understanding of the *Cofemel* decision.

Where Does This Leave Copyright Protection for the Design of Three-Dimensional Articles?

After the decisions in *Cofemel*, *Brompton* and now *Response Clothing*, it appears as if the requirements of artistic value and craftsmanship for a work to qualify as a WOAC under English law, are, at the very least, called into serious doubt. Although HHJ Hacon stopped short of an unequivocal confirmation that UK law had materially changed in light of *Cofemel*, he at least left the door wide open to the possibility. It will be up to the judges in future cases to decide whether to step through that door and embrace resulting the changes to copyright protection in the UK, or find a way to work around *Cofemel*.

Do we still need design protection so much if copyright can protect such a wide range of articles? Probably yes. Whilst copyright protection is seemingly wider and longer lasting, there is still much to be said for having a registered and even unregistered community design. Design protection is relatively cheap to obtain and can strengthen a claimant’s position. A design registration gives the owner a greater level of certainty as to the protected subject matter and there is a publicly available record of its existence. The extent to which copyright can subsist particularly in more functional items is likely to be hotly contested and there is a significant level of uncertainty as to how far the courts will go in recognising such protection.

From a European perspective, the rights granted under the Community Design Regulation are clear and well understood. Registered and unregistered Community designs offer the owner the ability to seek pan EU relief in the form of injunctions and damages and will remain an important tool for tackling infringing articles (although after the end of the Brexit transition period, such Community rights will no longer be available in the UK English courts, where UK national rights will have to be relied upon instead).

While the full impact of *Cofemel* will no doubt need to be played out before the English courts in the years to come with a host of legal, policy and even political factors coming into play, there is now real hope for creators of original three-dimensional articles that their works might, in addition to design law, be protected by copyright, in the same way and crucially for the same duration as, say, a novel or a song, without needing to satisfy any further criteria. There are many sectors, for instance furniture and luxury clothing and accessories, where a strong market for cheaper replicas has sprung up on the assumption, reasonably safe until *Cofemel*, that the creator of the original had, usually through passage of time, become powerless to stop the replicas. That may no longer be so.

Endnotes

1. S.1(1) Copyright, Designs and Patents Act 1988.
2. S.4(1) Copyright, Designs and Patents Act 1988.
3. [2008] EWHC 1878; [2011] UKSC 39.
4. [2008] EWHC 1878 at [118].
5. *George Hensher Ltd vs Restawile Upholstery (Lancs) Ltd*, [1976] AC 64.
6. The case of *Hensher vs Restawile* dealt with the question of whether Restawile had copied a suite of furniture created by Hensher.
7. ([1994] 3 NZLR 216).
8. *Cofemel*, C-683/17.
9. *Infopaq International vs Danske Dagblades Forening*, C-5/08.
10. *Flos*, C-168/09.
11. Directive 2006/116/EC.
12. *Levola Hengelo*, C-310/17.
13. S.6, European Union (Withdrawal) Act 2018, as amended by Section 26, European Union (Withdrawal Agreement) Act 2020. The 2020 Act does contain provisions providing ministers with the power to regulate the extent to which lower courts are to be bound by CJEU judgments, although this power falls away at the end of the implementation period.
14. C-833/18 at [33].
15. *Response Clothing Ltd vs The Edinburgh Woollen Mill Ltd*, [2020] EWHC 148.
16. The design, consisting of multiple lines in a wave pattern, was woven into the fabric itself, rather than being stamped, printed, or embroidered on top of the fabric.
17. Italian Supreme Court Decision 780/2020.



Ewan Grist is a litigation partner in our Intellectual Property Group based in London and head of our International Product Design group. He specialises in protecting and enforcing innovative or high-tech product design and associated branding.

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