

International **Comparative** Legal Guides



Designs **2021**

A practical cross-border insight into designs law

First Edition

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International Comparative Legal Guides

Designs 2021

First Edition

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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.

United Kingdom



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1 Relevant Authorities and Legislation

1.1 What is the relevant Design authority in your jurisdiction?

The relevant design authorities are the UK Intellectual Property Office (the “UKIPO”), the High Court of England & Wales, the Court of Session in Scotland and the High Court of Northern Ireland.

1.2 What is the relevant Design legislation in your jurisdiction?

In the UK, the main relevant legislation is the Registered Designs Act 1949 (the “RDA”) and the Copyright, Designs and Patents Act 1988 (the “CDPA”). (At an EU level, the main relevant legislation is the Community Design Regulation (EC) No 6/2002 (the “CDR”). Like all EU legislation, the CDR continues to apply in the UK until the end of the Brexit transition period, which is currently the end of 2020.)

2 Application for a Design

2.1 What can be registered as a Design?

A UK registered design protects the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation can be registered as a design provided that such design is novel and has individual character.

2.2 What cannot be registered as a Design?

A design cannot be registered if it:

- is not novel; and/or
- does not have individual character.

Note that a design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character: (a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter; and (b) to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character.

Additionally, any aspect of a design which falls within one or more of the following exclusions shall not be protected as a registered design:

- (1) features of appearance of a product which are solely dictated by its technical function; or
- (2) features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

Finally, a design cannot be registered if it is contrary to public policy or to accepted principles of morality.

2.3 What information is needed to register a Design?

The application must contain: representation(s) of the design; a brief description (Locarno class); and administrative details such as the name and address of the applicant. Additional information may include information about any priority claimed to a filing outside of the UK.

2.4 What is the general procedure for Design registration?

An application must first be submitted to the UKIPO. The UKIPO will then assess whether the design satisfies the definition of a design and if the application is correct (*NB* the UKIPO will not carry out any substantive examination of novel or individual character). If there are objections, the examiner will issue a report detailing the reasons why. Applicants have a period of two months to resolve issues raised. If there are no objections raised or the objections are resolved, the design will then be registered, unless the applicant has opted to defer registration (see question 2.16 below).

2.5 How is a Design adequately represented?

It is possible to represent the design using photographs, line drawings, computer-aided design (“CAD”) or rendered CAD. The optimum format will likely depend on which aspect of a design the applicant is seeking to protect. Up to 12 illustrations may be provided in one filing.

2.6 Are Designs registered for specific goods or products?

No, a design registration is not limited to a particular product type, despite the fact that the applicant is asked to identify the

nature of the product depicted in its design for the purposes of Locarno classification. The Locarno identification is to enable designs to be classified and searched within the register.

2.7 Is there a “grace period” in your jurisdiction, and if so, how long is it?

In the UK, there is a grace period of 12 months from the date of first public disclosure.

2.8 What territories (including dependents, colonies, etc.) are or can be covered by a Design in your jurisdiction?

UK-registered designs cover England, Wales, Scotland, Northern Ireland and the Isle of Man.

2.9 Who can own a Design in your jurisdiction?

Any natural or legal person can own a design in the UK.

2.10 How long on average does registration take?

If no objections are raised and the registration is not deferred then registration can be obtained within two weeks.

2.11 What is the average cost of obtaining a Design in your jurisdiction?

At the UKIPO, a standard online application for registration of one design is £50. Additional designs can be filed at a cheaper price, up to a maximum of £50, which is a cost of £150. This excludes associated professional fees of a law firm/attorney.

2.12 Is there more than one route to obtaining a registration in your jurisdiction?

There are currently three routes: a UK-registered design issued by the UKIPO; a registered Community Design issued by the European Union Intellectual Property Office (the “EUIPO”); or an international registration obtained through the Hague Protocol designating either the UK and/or the EU. After the transition period, Community Designs and international registrations designating the EU will no longer cover the UK, but a new equivalent UK-registered design will come into existence automatically at the end of the transition period.

2.13 Is a Power of Attorney needed?

No, a Power of Attorney (“PoA”) is not required.

2.14 If so, does a Power of Attorney require notarisation and/or legalisation?

This is not applicable.

2.15 How is priority claimed?

Priority is claimed at the application stage.

2.16 Can you defer publication of Design applications in your jurisdiction? If so, for how long?

Publication of a design application can be deferred for up to 12 months from the date you apply for registration. The choice to defer must be included in your application.

3 Grounds for Refusal

3.1 What are the grounds for refusal of registration?

The examiner can refuse the application if: the administrative requirements for application are not met; the images used are unsuitable; the design sought to be protected does not satisfy the definition of a design (often because the images show multiple designs rather than a single design); or if the design is contrary to public morality.

3.2 What are the ways to overcome a grounds objection?

How objections are overcome will depend on the type of objection, but will usually involve remedying a deficiency in the application or images.

3.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

Any decision from the UKIPO can be appealed to either the Appointed Person or the High Court in England, Wales and Northern Ireland and the Court of Session in Scotland.

3.4 What is the route of appeal?

There are two routes: (1) to an Appointed Person; or (2) to the High Court in England, Wales and Northern Ireland and the Court of Session in Scotland.

4 Opposition

4.1 Can a Design application be opposed, if so, on what grounds?

Unlike in a trade mark application, there is no possibility for opposition to an application by a third party.

4.2 Who can oppose the registration of a Design in your jurisdiction?

This is not applicable.

4.3 What is the procedure for opposition?

This is not applicable.

5 Registration

5.1 What happens when a Design is granted registration?

A registration certificate is issued and the design is entered onto the register of designs.

5.2 From which date following application do an applicant's Design rights commence?

Once registered, UK-registered design rights take effect from the date of filing the application.

5.3 What is the term of a registered Design right?

Up to 25 years, provided the design is renewed every five years.

5.4 How is a Design renewed?

A design may be renewed online by submitting a DF9A form at the UKIPO up to six months before or six months after the expiry date of the registration (renewals after the expiry date may be subject to additional fees).

6 Registrable Transactions

6.1 Can an individual register the assignment of a Design?

Yes, an individual can register the assignment of a design.

6.2 Are there different types of assignment?

No, there are no different types of assignment.

6.3 Can an individual register the licensing of a Design?

Yes, an individual can register the assignment of a design.

6.4 Are there different types of licence?

Licences may be exclusive or non-exclusive. Exclusive licences give the licensee an exclusive right to use the design registration to the exclusion of all others, including the design proprietor. A non-exclusive licence can be granted to any number of licensees.

6.5 Are there any laws which limit the terms upon which parties may agree a licence?

Licences cannot be anti-competitive.

6.6 Can Designs be the subject of a compulsory licence (or licences of right), and if so, in what circumstances does this arise and how are the terms settled?

In respect of a UK-registered design, no (but note that a person who, before the application date of a design, used a registered design in good faith or made serious and effective preparations to do so may continue to use the design for the purposes for which, before that date, the person had used it or made the preparations to use it).

In respect of a UK-unregistered design, a licence of right is available in the last five years of the term of design protection.

6.7 Can a Design licensee sue for infringement?

Yes, where the licence provides for this, or if the design owner otherwise consents. In addition, an exclusive UK design

licensee can bring infringement proceedings in their own name, although the proprietor must also be joined in the proceedings.

6.8 Are quality control clauses necessary in a licence?

Quality control clauses are not necessary but are desirable to preserve reputation.

6.9 Can an individual register a security interest under a Design?

Yes, an individual can register a security interest under a design.

6.10 Are there different types of security interest?

As designs are considered intangible property, security usually takes the form of a mortgage or charge.

7 Invalidity

7.1 What are the grounds for invalidity of a Design?

The grounds for invalidating a design are:

- the design did not satisfy the definition of a design;
- the design was not new and/or lacked individual character over cited prior art design(s);
- the design is solely dictated by technical features;
- the design is part of a complex product and is not visible during normal use; or
- there are other reasons for which it could have been refused registration (e.g. the registered proprietor is not the proprietor of the design or it involves the use of a distinctive sign or copy-right work that is subject to objection by the rights holder).

7.2 What is the procedure for invalidation of a Design?

The applicant of the revocation action must submit the DF19A form to the UKIPO. The UKIPO will serve this on the design owner who will have two months to file a defence and counterstatement, which will in turn be served on the applicant. Submissions and the filing of evidence will be timetabled subsequently. Once a hearing has taken place or the submissions have been filed and reviewed, a hearing officer will issue a decision in writing.

Alternatively, invalidity can be pleaded as a counterclaim in an infringement action before the English courts.

7.3 Who can commence invalidation proceedings?

Any legal or natural person.

7.4 What grounds of defence can be raised to an invalidation action?

The grounds of defence will depend on the application raised.

7.5 What is the route of appeal from a decision of invalidity?

Appeal may be made either to the Appointed Person or to the High Court.

8 Design Enforcement

8.1 How and before what tribunals can a Design be enforced against an infringer?

A UK design may be enforced against an alleged infringer of the design in the High Court; the Intellectual Property Enterprise Court (the “IPEC”); or in certain county courts.

8.2 Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?

Issues of validity and infringement would be heard in the same proceedings.

8.3 What are the key pre-trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?

The key pre-trial steps may include:

- exchange of pleadings;
- attending a Case Management Conference (“CMC”) to determine the timetable to trial;
- disclosure; and
- exchange of fact evidence and (if any) expert evidence reports.

The Civil Procedure Rules (“CPR”) Directive on Pre-Action Conduct sets out guidance for the parties, which includes ensuring that they understand each other’s positions, and making reasonable attempts to settle the proceedings.

Proceedings might take approximately 12–18 months to reach trial depending on their complexity and the court’s availability.

8.4 Are (i) preliminary, and (ii) final injunctions available and if so on what basis in each case?

Preliminary (or “interim”) and final injunctions are available.

In the UK, preliminary injunctions are only sparingly granted. The Court must be satisfied that there is a serious question to be tried, that the balance of convenience favours the granting of the preliminary injunction and that the claimant will suffer irreparable harm to their business if the defendant’s activities continue (or commence) pending trial. The claimant must also act with due urgency.

A court will typically award a final injunction if infringement is established at trial.

8.5 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so how?

Yes, assuming those documents/materials fall within the scope of the “disclosure” which the court has directed. Disclosure varies depending on whether proceedings are issued in the IPEC or the High Court and what form of disclosure the court has ordered. For example, if the court orders standard disclosure, a party must disclose documents which support or adversely affect its or its opponent’s case, which have been retrieved following a proportionate search. Issue-based disclosure is becoming increasingly common compared to standard disclosure. A party may also apply to the court for specific disclosure of particular documents in certain circumstances.

8.6 Are submissions or evidence presented in writing or orally and is there any potential for cross-examination of witnesses?

Written submissions are made in the form of a skeleton argument submitted shortly before trial, supplemented by oral submissions during the trial. Fact and expert evidence is provided to the court in the form of signed witness statements and the witnesses may be cross-examined during the trial.

8.7 Can infringement proceedings be stayed pending resolution of validity in another court or the Intellectual Property Office?

Where UK-registered design validity proceedings are pending before the UKIPO at the same time as infringement proceedings before the English courts, it is likely that the court proceedings will continue and determine both validity and infringement together.

8.8 Is there any alternative shorter, flexible or streamlined procedure available? If so, what are the criteria for eligibility and what is the impact on procedure and overall timing to trial?

Proceedings in the IPEC are intended to be shorter, simpler and less expensive than High Court proceedings as certain steps such as disclosure and evidence are more limited in scope and trial is limited to two days. Also, damages recovery is limited to £500,000 and costs recovery to £50,000 in the IPEC.

As an alternative to IPEC, the High Court also operates a shorter trial scheme which modifies certain procedural steps, such as disclosure, to allow for a quicker path to trial. To use the High Court’s shorter trial scheme, the case must, however, be capable of being heard within a four-day trial and the issues must be relatively straightforward. In the High Court, damages and costs recovery are uncapped.

8.9 Who is permitted to represent parties to a Design dispute in court?

A solicitor or barrister may represent parties in court proceedings. Alternatively, but this is generally not advisable, the parties may represent themselves as litigants in person.

8.10 After what period is a claim for Design infringement time-barred?

After the expiry of six years from the date of the last infringement, unless there has been deliberate concealment, fraud, or a procedural mistake.

8.11 Are there criminal liabilities for Design infringement?

Yes, a criminal offence exists for deliberate copying of a registered design, but offences appear to be rarely, if ever, prosecuted.

8.12 If so, who can pursue a criminal prosecution?

Normally, Trading Standards would need to recommend a prosecution to the Crown Prosecution Service.

8.13 What, if any, are the provisions for unauthorised threats of Design infringement?

Any person aggrieved by an unjustified threat of design infringement proceedings may initiate proceedings seeking a declaration that the threat was unjustified, an injunction preventing the threats being continued, and damages in respect of any losses resulting from the threat. It is a defence to show that the threat was justified, i.e. that the acts alleged do in fact constitute infringement.

A communication contains a “threat” if a reasonable person would understand that a registered design exists and there is an intention to bring infringement proceedings in relation to an act done in the UK. Threats in respect of primary acts (i.e. making and importing) are not actionable, however.

9 Defences to Infringement

9.1 What grounds of defence can be raised by way of non-infringement to a claim of Design infringement? For example are there “must match” and/or “must fit” defences or equivalent available in the jurisdiction?

Typically, the defendant will argue that the allegedly infringing design does not create the same overall impression on the informed user as the asserted registered design (and hence does not infringe) and that the asserted registered design is in any event invalid for the reasons set out in question 7.1 above.

9.2 What grounds of defence can be raised in addition to non-infringement?

The following are the grounds of defence that can be raised in addition to non-infringement:

- the design was used in good faith (or serious preparations had been made to do so) by the defendant prior to the registration of the design;
- the act of infringement was done privately;
- the use was for experimental purposes or for teaching;
- repair or replacement of spare parts – see question 9.3;
- the rights in the designs were exhausted; or
- the defendant was not responsible for the acts alleged to infringe.

9.3 How does your jurisdiction deal with Design protection for spare parts?

It is not an infringement of a registered design to make a repair to complex products to restore their original appearance.

10 Relief

10.1 What remedies are available for Design infringement?

The following remedies are available: injunction; declaration; damages or an account of profits; delivery up or destruction of goods; or publication of the judgment and recovery of costs.

10.2 Are damages or an account of profits assessed with the issues of infringement/validity or separately?

The UK operates a split trial system with liability (i.e. validity and infringement) determined at trial. If liability is established,

quantum is dealt with in subsequent proceedings, unless it can be agreed between the parties.

10.3 On what basis are damages or an account of profits assessed?

Damages in the UK are intended to put the claimant in the position they would have been in but for the wrong that occurred, and are calculated by one of three methods:

- (a) lost sales (i.e. the sales the claimant would have made but for the infringer’s activity);
- (b) lost licences (i.e. the royalty the claimant would have made from a licence); or
- (c) the user principle (where the claimant is not in the business of licensing, the licence that would have been charged if the parties had reached a deal).

An account of profits is assessed by reference to the net profits the infringer has made from the activity. If the profits are mixed up in legitimate activity or material, then the amount of the award can be reduced to take this into account.

Damages cannot be recovered from “innocent infringers” of registered UK designs.

10.4 Are punitive damages available?

No, punitive damages are not available.

10.5 Are costs recoverable from the losing party and, if so, how are they determined and what proportion of the costs can usually be recovered?

Normally, the unsuccessful party will be ordered to pay a portion of the successful party’s costs. These costs are usually assessed after the trial and can be subject to a detailed assessment by the court if the parties cannot agree on an amount to be paid. In High Court proceedings, the successful party might normally expect to recover (on the standard basis) around 70–80% of its incurred costs from the unsuccessful party. In the IPEC, the successful party can recover up to £50,000 of its incurred costs from the unsuccessful party.

11 Appeal

11.1 What is the right of appeal from a first instance judgment and is it only on a point of law?

Appeals are only on a point of law. Permission is required from either the first instance judge or Court of Appeal. Such permission will be given where the court considers that there is a real prospect of success or another compelling reason for the appeal to be heard.

11.2 In what circumstances can new evidence be added at the appeal stage?

The circumstances are very limited and normally limited to where the evidence could not have reasonably been obtained for use in the lower court, and where the use of such evidence would have had a real impact on the result of the case.

12 Border Control Measures

12.1 Is there a mechanism for seizing or preventing the importation of infringing articles and, if so, how quickly are such measures resolved?

Regulation (EU) No 608/2013 provides for a mechanism allowing Customs authorities in all EU Member States to seize goods suspected of infringing the IP rights of a rightsholder who has filed an “application for action” (i.e. a Customs Notice). Such seizures provide an opportunity for the rights holder to take legal action to determine whether the goods are infringing if a resolution cannot be agreed between the parties themselves. After the Brexit-transition period has ended, UK Customs is expected to continue to operate an equivalent mechanism, based on UK IP rights, including UK designs.

13 Other Related Rights

13.1 To what extent are unregistered Design rights enforceable in your jurisdiction?

In addition to registered designs, there may also be protection for designs by way of:

- the UK-unregistered design right (under the CDPA);
- the Community-unregistered design right (only until the end of the Brexit transition period);
- new UK-unregistered design rights which will be introduced at the end of the Brexit transition period to mirror the protection previously afforded by the Community-unregistered design right; and
- copyright in certain artistic works.

13.2 What is the term of unregistered Design rights enforceable in your jurisdiction?

An unregistered UK design right lasts for:

- (a) 15 years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever first occurred; or
- (b) if articles made to the design are made available for sale or hire within five years from the end of that calendar year, 10 years from the end of the calendar year in which that first occurred.

Community-unregistered designs and the new UK equivalent unregistered rights (when they come into force) last for three years from the date of first publication.

Copyright in artistic works last for 70 years from the death of the author.

13.3 What, if any, are the key differences between unregistered and registered Design rights in your jurisdiction?

Whilst unregistered design protection arises automatically if all the relevant criteria are satisfied, the term of protection is shorter and copying must be proven to establish infringement.

13.4 If unregistered Design protection is available in your jurisdiction, is protection cumulative or mutually exclusive?

Each regime protects different aspects of designs. It is possible

that one or more right may persist simultaneously or that different aspects of the design are protected by different rights. It is also possible to have both registered and unregistered rights simultaneously in a given design.

13.5 Is copyright available to protect industrial Designs?

Generally, industrial designs are protected as UK-unregistered designs rather than copyright (although see the discussion about *Cofemel* in question 14.2 below). The drawings of such articles may be protected by copyright as graphical works, although copyright will not be infringed in circumstances where a person makes an article to the specifications of a design document, so the fact that copyright protection subsists may be of limited benefit.

14 Current Developments

14.1 What have been the significant developments in relation to Designs in the last year?

The UK left the European Union on 31 January 2020 and is now in a transition period until the end of 2020 (unless extended further). During the transition period, EU law remains in force in the UK. After the end of the transition period, Community Designs (both registered and unregistered) will cease to have any effect in the UK. To address the gap that this would create, the UK government has confirmed that: (i) any registered Community Design existing at the end of the transition period will automatically give rise to an equivalent UK-registered design; and (ii) the UK will introduce two new UK-unregistered design rights (the continuing unregistered design and the supplementary unregistered design) to fill the gap left by the absence of the Community-unregistered design right. As a consequence of Brexit, the landscape for design protection has become increasingly complex: up until the end of the transition period (which may still be extended beyond the end of 2020), the UK and EU/Community regimes continue to sit side by side, each having their own registered and unregistered right. Thereafter, only the UK regime will apply but to that will be added two new types of UK-unregistered design rights, to sit alongside the existing UK-unregistered design right. Given the complexity, particularly in respect of the new UK-unregistered design regime, obtaining registered designs where possible is strongly recommended.

14.2 Please list three important judgments in the Designs sphere that have been issued within the last 18 months.

In *Beverly Hills Teddy Bear Company v PMS International Group plc* [2019] EWHC 2419 (IPEC), the English court has referred questions to the Court of Justice of the European Union (the “CJEU”) as to whether the first disclosure of a design needs to take place geographically within the EU for the design to attract unregistered Community design protection, or whether disclosure anywhere will suffice provided it becomes known to those within the EU. The prevailing view has long been that first disclosure probably needed to be geographically within the EU, but that is not clear from the wording of the Community Design Regulation itself. This is obviously a crucial question for businesses who may habitually first display or exhibit their designs outside the EU. Provided the reference is not somehow derailed by Brexit, the CJEU should give clarity on this important question for the first time.

In *Cofemel*, C-683/17 the CJEU issued a decision that could have wide ramifications for what can be protected by copyright in EU Member States, including the UK. The case concerned a dispute over the designs of jeans. The key question referred by the Portuguese Supreme Court was whether EU law prohibits Member States from granting copyright protection to designs subject to requirements other than originality. The CJEU confirmed that with respect to designs, no other criteria are required to be satisfied other than originality in order for a copyright work to exist. This is at odds with the position under UK copyright law where, for copyright to subsist in a three-dimensional design, the work needed to fit within a specified category of artistic work (a sculpture or work of artistic craftsmanship), which required artistic value (in addition to originality).

Response Clothing Ltd v The Edinburgh Woollen Mill Ltd [2020] EWHC 148 (IPEC) (29 January 2020) was the first case in the UK to consider the *Cofemel* decision referred to above. The case concerned the design of a fabric. In the UK, the CDPA protects works that fall within the specified categories contained within the CDPA. The design of a fabric itself (as opposed to any graphical work that might be printed onto it) could only be protected if it could be considered a work of artistic craftsmanship which had traditionally been difficult to prove because certain criteria must be satisfied, including the need for aesthetic/artistic appeal, as well as craftsmanship. However, *Cofemel* confirms that the concept of a work must be approached, uniformly and it is not permissible to impose criteria or requirements above originality when considering whether a work is protectable by copyright, thus presumably making it easier for certain designs

to attract copyright protection than would previously have been the case before the *Cofemel* decision. In this case, the court found that the fabric design itself was a work of artistic craftsmanship because the fabric had aesthetic appeal, and hence did not need to consider what the position would have been if the fabric had not had such aesthetic appeal. However, the court's judgment did leave the door open to the possibility that a more permissive threshold for copyright subsistence should be applied in light of *Cofemel*.

14.3 Are there any significant developments expected in the next year?

See question 14.1 above.

14.4 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

The number of UK design registrations has increased as a result of a change in fees and Brexit.

Design infringement cases continue to be frequently issued in the IPEC in the UK, rather than in the High Court, reflecting their typically lower value and complexity compared to, say, patent cases. However, the recent introduction of the High Court shorter trial scheme is now a good alternative, particularly for more complex cases and for litigants who wish to avoid the damages and costs recovery caps used in the IPEC.



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Ewan is the editor of the Bird & Bird design law bulletin, <https://www.DesignWrites.law>, and serves on the Designs & Copyright Committee of the Chartered Institute of Trade Mark Attorneys (the "CITMA").

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