Kluwer Copyright Blog

WaterRower: Has the UK's approach to 'artistic works' in copyright changed?

Jeremy Blum, Sara Sefton (Bristows LLP) · Wednesday, October 5th, 2022

It seems inevitable that UK copyright law will change at some stage. It increasingly appears that judges are waiting for a case which requires the inconsistencies between EU and UK copyright law to be addressed. Unfortunately, the recent decision in *WaterRower v Liking* [2022] EWHC 2084 (IPEC) was not that case, despite many reporting in the aftermath of the decision that UK copyright has been extended to protect a rowing machine as a *'work of artistic craftsmanship'*.

The decision, which relates to a strike out application, did not actually go so far as to make a finding on whether the rowing machine in question is a work of artistic craftsmanship and therefore protected by copyright in the UK. Instead, it concludes that it might be *possible*, but that the issue would need to go to trial to be determined. Even though it's only an interim decision, it is interesting and well worth a read for any copyright lawyer because Deputy High Court Judge David Stone provides an in-depth analysis of the UK copyright position on artistic works.

The Case

The claim relates to alleged copyright infringement of the Claimant's WaterRower rowing machine by the Defendant, Liking Limited (t/a Topiom).

The decision comes from the Defendant's application to strike out the claim (or alternatively to obtain summary judgment) on the basis that the WaterRower cannot be a work of artistic craftsmanship within the meaning of s.4 of the Copyright, Designs and Patents Act 1994 ("CDPA"), when considered under either UK or EU copyright law.

The Defendant had accepted that if the machine is a work of artistic craftsmanship then copyright does subsist and its machine does infringe.

For the WaterRower to be protected as a copyright work in the UK, it needs to fall within one of the statutorily defined categories of copyright works. A work of artistic craftsmanship is a sub-category of an artistic work.

The WaterRower

Whilst this is only an interim application, it is useful to know a little about the background and the alleged copyright work in order to follow the Judge's decision making process.

The WaterRower is a rowing machine which was designed by John Duke between 1985 and 1987. An image of its first iteration is shown below.

Mr Duke is a former international rower who previously studied naval architecture. He has also designed and built boats and has a life-long interest in various forms of art and crafting with wood. His aim in creating the WaterRower was to recreate the sparse elegance of a Shaker design and to create a rowing machine in which the user has "a welcoming emotional connection, as they would with a piece of art or furniture".

The WaterRower has been recognised as an "iconic design" and even the Defendant conceded that the WaterRower is aesthetically pleasing (this is important later).

Strike Out Application

Procedural rules allow that the Court may strike out a statement of case if it "*discloses no reasonable grounds for bringing or defending the claim.*"

The Defendant conceded that the strike out application and the summary judgment application would stand or fall together, and so the Judge only needed to address the strike out application, although the judgment does refer to the law on summary judgment briefly.

Works of Artistic Craftsmanship

Section 4(1) CDPA provides that a '*work of artistic craftsmanship'* is a protected artistic work. However, it does not provide further explanation on what the term actually means and so it has fallen to case law, with the House of Lords decision in *Hensher* being accepted as the UK's leading case to date.

In *Hensher* the five judges unanimously held that the item in question was not a work of artistic craftsmanship, but their reasoning for this finding was different. It has long been acknowledged that *Hensher* is not particularly straightforward and copyright specialists argue over what the true principles which can be taken from it are.

The Defendant's Case

In summary, the Defendant's case was that the Claimant had no prospects of success at trial and that the claim should be struck out.

The Defendant's case under UK law was that according to 'any view' of any of the judges in *Hensher*, the WaterRower would not be considered artistic as its aesthetic appeal is not enough. The Defendant also argued that the product was not one of *craftsmanship* – claiming that the WaterRower was technical with only limited design choice, not requiring a craftsman's skill.

In relation to the position in EU law, the Defendant submitted that the WaterRower would clearly fail the tests set out by the Court of Justice of the European Union ("CJEU") in *Cofemel* and *Brompton* because the only free choice left for the designer was the choice of wood, which they claimed was insufficient to make the WaterRower a work of artistic craftsmanship.

The Decision

The Judge confirmed that because the Defendant's case was that according to 'any view' of any of the judges in *Hensher* the Claimant would lose – it was (luckily) not necessary for him to distil the decision into a simple definition of what could be considered 'artistic'.

He did analyse the different opinions and ultimately held that he was not in a position to conclude that the WaterRower was not artistic for three reasons:

1. Three of the judges in *Hensher* considered that the intention of the creator was at least relevant to whether a work was artistic.

   In WaterRower there was already some evidence that the creator intended the item to be artistic, which the Judge considered to be sufficient to avoid a strike out.

2. The Judge did not feel able to say at this stage that the WaterRower would not fall within the notion of "work of artistic craftsmanship". It should be decided by the trial judge on the basis of the evidence in front of him.

   Four of the judges in *Hensher* noted that more than eye appeal was needed for a work to be artistic without stating what 'more' consisted of. The Judge queried whether this could be intention or recognition by others. Evidence of both of these are present for the WaterRower and so the Judge could not conclude that the Claimant's case is hopeless.

3. Lord Simon sets out a series of examples of works which he considered could be artistic in *Hensher* and the Judge could not say the WaterRower is less artistic than those examples.

As a result, the Defendant's argument that under *Hensher* 'on any view' the Claimant has no real prospect of showing that the WaterRower is artistic was rejected.

Turning to craftsmanship, the Judge again considered *Hensher,* albeit acknowledging that any comments on this aspect would be obiter. Regardless, he thought that on the basis of evidence before him, he could not conclude that the WaterRower was not a work of craftsmanship. Mr Duke was a craftsman, having studied naval architecture and built boats. He had produced a high quality product that was initially made by hand and continues to be made by hand in part.

It followed that the Defendant's claim that the Claimant has no real prospects of establishing that the WaterRower is a work of artistic craftsmanship under *Hensher* failed.

EU Copyright Law

The Defendant's case under EU law was that the WaterRower would fail to attract copyright protection under principles set out in *Cofemel* and *Brompton*.

In *Cofemel* the CJEU held that there are two cumulative requirements necessary for establishing a copyright work: (i) the existence of an original object; and (ii) the expression of intellectual creation.

In *Brompton*, the CJEU confirmed that functional shapes could in principle be protected by copyright, subject to their being original works.

It is common knowledge that there is an apparent inconsistency between UK and EU law, due to the UK having closed categories of copyright protection, one of which requires a work to be *artistic* to qualify. This discrepancy will need to be resolved at some stage. However, the Judge concluded that he did not need to do so as part of this application. He had already made a finding that the Claimant has a real prospect of success under *Hensher* and in his judgment the Claimant also has a real prospect under the test in these two CJEU decisions. He considered it clear that the WaterRower was original and that it was an expression of Mr Duke's intellectual creation.

On the facts in front of him in WaterRower, the Judge did not need to resolve the apparent inconsistency between *Cofemel*/*Brompton* and the CDPA. However, had the WaterRower not had aesthetic appeal, he may well have had to consider it "*because the Law Lords in Hensher said that eye appeal is necessary (but not sufficient), whereas Cofemel says that eye appeal cannot be required*."

Finally, the Defendant submitted an argument that relied on the decision in *Response Clothing* being wrongly decided. In *Response Clothing* (which was post-*Cofemel),* HHJ Hacon chose to adopt a different test, one set out in *Bonz*, which requires skilful workmanship and aesthetic appeal for a work to be a work of artistic craftsmanship.

However, given that the Defendant had conceded it was aesthetically pleasing and the Judge had already found that the Claimant has a real prospect of demonstrating at trial that the WaterRower meets the requirements of *Hensher and Cofemel*/*Brompton*, he considered it did not actually matter if the requirements in the various tests are not aligned. He also declined to simply 'make a finding' so that the matter could be appealed for further guidance from the Court of Appeal on the issue.

Conclusion

The Defendant's application was rejected on all grounds, as the Claimant's case was not "bound to fail" and should not be struck out. However, the Judge took pains to reiterate that he was not making a finding that the WaterRower is a work of artistic craftsmanship – simply confirming it might be and that will be a matter for the Judge who hears the trial to determine in due course.

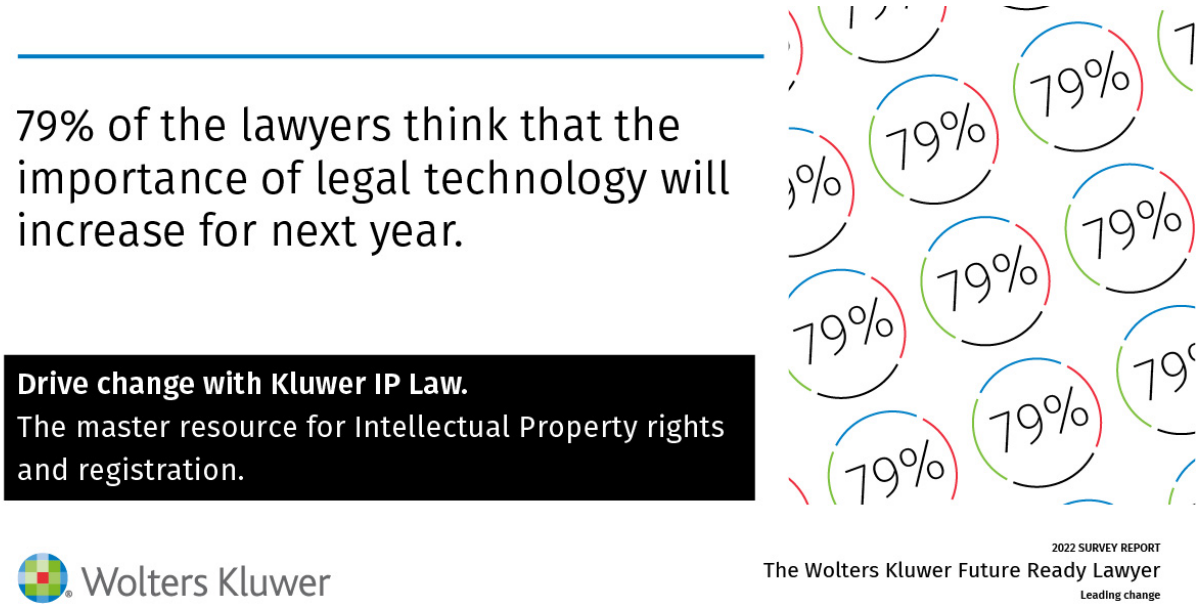
This judgment again discusses the inconsistencies between the UK and EU approach to artistic works, but still provides no answers as to how the English Courts intend to deal with it. It seems that until there is a case which on the facts actually requires the discrepancies to be addressed, they will remain just that. These types of cases are likely to be few and far between, and in any event, it seems to be such a highly debated topic that any first instance outcome will be appealed and so we may be waiting several years yet for answers.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Wednesday, October 5th, 2022 at 10:28 am and is filed under Case Law, European Union, Originality, Subject matter (copyrightable), United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.