

Kluwer Copyright Blog

Horses for courses: English court refuses copyright protection for equestrian garments as works of artistic craftsmanship

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In *Equisafety Ltd v Woof Wear Ltd* (**Equisaftey**) Ian Karat sitting as a Judge in the Intellectual Property Enterprise Court (**IPEC**) rejected the Claimant's copyright infringement claim in respect of various equestrian garments because the garments did not qualify as works of artistic craftsmanship under [s.4 of the Copyright Design and Patents Act 1988 \(CDPA\)](#). Even if the Claimant's garments had qualified for protection the Judge held that the Claimant had failed to demonstrate ownership and the infringement claim would have failed for that reason.

While the outcome on the facts of the case is not particularly exciting, what is more interesting is that the case is another example in a line of cases that have highlighted the tension between the domestic closed category system under the CDPA 1988 and the criteria for protection of works under EU law, most notably the EU approach to originality. This friction has been openly acknowledged by the court in previous cases and is a topic we touched on back in 2020 when we covered the IPEC decision in *Response Clothing* (see [here](#)). Four years on and the inherent conflict between the competing legal principles remains unresolved. However, we hope there will be an answer in the imminent *WaterRower* decision expected very soon, which we will cover once the judgment has been handed down.

Facts & background

The claim emerged after the Defendant exhibited several products at a trade event. The claim was originally brought on the basis of registered design right infringement and unlawful passing off.

However, following a summary judgment in favour of the Defendant, the Claimant was given permission to amend its case to introduce a claim for copyright infringement.

The Claimant alleged infringement of copyright in three high visibility equestrian garments – a waistcoat, an elasticated hat band and a neck band for a horse. Images of the garments taken from the annex to the judgment are pictured below. The Claimant alleged that the garments were protected as works of artistic craftsmanship under [s.4\(1\)\(c\) CDPA 1988](#). The Defendant denied that the garments qualified as works of artistic craftsmanship, but accepted that if copyright did subsist in the works, then its products would infringe.



The Claimant's garments as works of artistic craftsmanship

The key issue in the case was whether the Claimant's garments qualified as works of artistic craftsmanship. Before assessing the Claimant's garments, the Judge sets out the law in relation to works of artistic craftsmanship under s.4(1)(c) and addressed the continuing role of EU law post-Brexit. This is perhaps the most interesting aspect of the case as the judgment illustrates the peculiar legal position on works of artistic craftsmanship and the apparent inconsistency between domestic principles and EU principles which form part of Retained EU Law post-Brexit.

On the one hand, we have a line of domestic cases on the meaning of "artistic craftsmanship" stemming from the House of Lords decision in *Hensher v Restawile*^[1] to more recent decisions including *Response Clothing*. On the other hand, we have a line of EU cases tracing from the CJEU's seminal decision in *Infopaq* through to the more recent decisions in *Cofemel*, *Brompton Bicycle* and *Levola Hengelo*.

The domestic law on works of artistic craftsmanship has long been a source of consternation. Most notably, ascertaining the true legal principle from *Hensher* and the meaning ascribed to "artistic craftsmanship" by House Lords has vexed the courts in subsequent cases. More recently, in *Response Clothing* HHJ Hacon preferred to adopt a formulation from the judgment of Tipping J in *Bonz Group v Cooke*.^[2] According to this formulation, for subject matter to qualify as a work of artistic craftsmanship the author must be a (a) "craftsman", who makes something in a skilful way and takes pride in their workmanship; and (b) an "artist", who has creative ability and produces something which has aesthetic appeal. A key aspect of the domestic test is therefore requirement for works of artistic craftsmanship to have "aesthetic" appeal.

In contrast, according to the EU approach a "work" must satisfy two cumulative conditions;

1. First, the subject must be expressed in manner which makes it identifiable with sufficient precision and objectivity, even though the expression is not necessarily in permanent form; and
2. Second, it must be original in the sense that it is the result of the author's own intellectual creation, which reflects the personality of its author as an expression of their free and creative choices.

The decision in *Brompton* confirms that subject matter influenced by technical or functional considerations can qualify as a work unless those considerations leave no room for creative

freedom or room so limited that the expression does not reflect the author's personality. According to the decisions of the CJEU, the identity and qualifications of the author are not factors relevant to whether a work is original, and in *Cofemel* the CJEU specifically ruled that national law could not impose a requirement of aesthetic or artistic value for a work to qualify for protection.

The apparent conflict between domestic law on works of artistic craftsmanship, most notably the requirement of "aesthetic appeal", has been openly acknowledged by the Court in the *Response Clothing* and the *WaterRower* decisions. However, thus far the court has been able to avoid dealing with the conflict based on the facts and circumstances of each case.

The same was true in this case. When it came to assessing the Claimant's garments, according to a previous Order in the proceedings the Claimant's case was confined to specific versions of its garments and features that were added to those garments in 2019 and 2020. The Claimant was prevented from relying on earlier versions of the garments and the garments as a whole.

In short, the Judge found that none of the changes qualified as works of artistic craftsmanship under the domestic test because the author was not an artist or craftsman. The judge reached the same conclusion applying EU principles, but on the basis that all of the changes in question were functional solutions and did not reflect the author's personality as required by *Cofemel*. For example, when assessing the Claimant's waistcoat the Judge held that the use of a different quality fabric and zip were functional solutions that did not reflect the author's personality, likewise the use of reflective piping around a Velcro tab was deemed to be a variation of a larger, pre-existing element and the addition of a new logo and wording were also functional improvements to enhance visibility and was not derived from free and creative decisions reflecting the author's personality.

Interestingly, the Judge did not refer to the recognised inconsistency between the domestic criteria and the criteria under EU law. Presumably, the reason for that was because the Judge concluded that the outcome was the same regardless of what criteria applied, so the Judge was not required to consider how to reconcile the conflict between the applicable principles.

Given the findings on subsistence the court did not decide the question of ownership, but in any event held that the Claimant had failed to demonstrate ownership and therefore the infringement claim would have also failed on that basis.

Comment

The outcome in *Equisafety* demonstrates the difficulty of obtaining copyright protection for incremental product and design developments. In this case, the crux of the IPEC's decision was that the Claimant's changes to previous iterations of the garments did not meet the threshold for protection under domestic or EU law. The assessment of whether a particular work meets the threshold for protection will turn on the facts of each case. Even so, the outcome here exemplifies the challenges of relying on copyright to protect incremental product developments.

Unfortunately, *Equisafety* is another instance of where the Court has been able to avoid ruling on the inconsistency between domestic and Retained EU Law based on the facts of the cases.

However, given the impending judgment in the *WaterRower* case we are hopeful that in the next blog update we will have more to report on that particular issue.

[1] *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64

[2] *Bonz Group (Pty) Ltd v Cooke* [1994] 3 N.Z.L.R. 216

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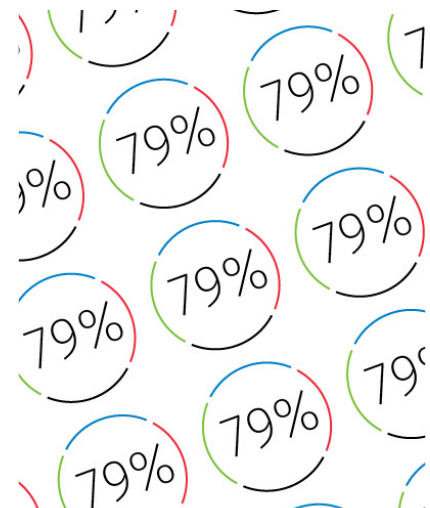
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