EIP

Fabric textures can be "artistic work": Response Clothing v Edinburgh Woollen Mill

Copyright can subsist in a fabric pattern after HHJ Hacon ruled that such designs constitute a work of artistic craftmanship.

In Response Clothing Ltd v Edinburgh Woollen Mill Ltd [2020] EWHC 148 (IPEC) the court considered whether copyright can subsist in a fabric pattern of wave-like ridges, referred to as the Wave Fabric.

Response Clothing had been a supplier to Edinburgh Woollen Mill of clothing featuring the Wave Fabric for three seasons. When Response sought to increase the price of the clothing, Edinburgh Woollen Mill rejected the price increase and supplied samples or swatches of the Wave Fabric to other potential suppliers.

Response claimed that copyright subsisted in the Wave Fabric and when Edinburgh Woollen Mill used new suppliers for the Wave Fabric, Response claimed infringement.

English copyright law dates back over 300 years. It has gradually developed from protecting only literary works, to a wider, but still discrete, list of works such as dramatic works, musical works and films. The category of work applicable in this case is 'artistic work' and to qualify for protection the Wave Fabric has to be a 'work of artistic craftsmanship'.

What constitutes a 'work of artistic craftsmanship' was considered by the House of Lords in George Hensher Ltd v Restawhile Upholstery Ltd (1976). This was 'not a straightforward case' according to the Supreme Court[1], the judges agreeing in obiter that 'it was difficult to identify the true principle of the judgment'. The Hensher case had

laid down fairly narrow definitions for artistic craftsmanship; Lord Reid thought that a qualifying item would be a "durable useful handmade object" and Viscount Dilhorne stated it must be "something made by hand and not mass produced". In the current case, HHJ Hacon went so far as to say that the Wave Fabric would not have been regarded by their lordships as a work of artistic craftsmanship. But, fortunately for the Claimant, the lack of clarity in Hensher led him to conclude that there are no binding principles from it that apply today.

In the recent Cofemel case[2], on a referral from the Portuguese Supreme Court, the CJEU considered whether a work had to have some 'aesthetic effect' in order to receive copyright protection. The CJEU took the view that the concept of requiring any work to have an 'aesthetic effect' was inherently subjective. This element of subjectivity brought an unacceptable risk that it could not be applied uniformly across the EU. With this in mind, the CJEU reinforced earlier decisions, such as the ruling in Levola[3], that the only criteria to be satisfied are that the work is original and an expression of the author's own intellectual creation.

HHJ Hacon, in his judgment, balanced the restrictive approach in the aging Hensher case and the broader EU law. He noted a happy medium in the Bonz Group[4] case, from the New Zealand High Court, which has been approved by English judges in other cases. In Bonz Group the judge held that a work of artistic craftsmanship must have some aesthetic appeal. HHJ Hacon's own finding on copyright subsistence adopted Bonz Group with some clarification. Thus:

(i) it is possible for an author to make a work of artistic craftsmanship using a machine,

(ii) aesthetic appeal can be of a nature which causes the work to appeal to potential customers and

(iii) a work is not precluded from being a work of artistic craftmanship solely because multiple copies of it are subsequently made and marketed.

On this basis, given that the Wave Fabric has aesthetic appeal, it is entitled to copyright protection as a work of artistic craftsmanship.

The result of this case is a win for designers who will have protection for a wider spectrum of designs.

[1] Lucasfilm Ltd v Ainsworth [2011] UKSC 39

[2] Cofemel-Sociedade de Vesturário SA v G-Star Raw CV (Case C-683/17)

[3] Levola Hengelo BV v Smilde Foods BV (Case C-310/17)

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

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