



ABC of design developments

The brief for this article was that I should comment on what has happened in design law over the past year, and suggest what might happen next. The current political environment makes prediction of anything difficult, but I will do my best. The three areas I will focus on are conveniently the ABC of this article...

A is for “Aspect”. Followers of design law will recall that, courtesy of the Intellectual Property Act 2014, the meaning of design was changed so as to exclude “aspects” of articles. It has to at least be a “part” of an article. While this amendment to the law was being devised, the UK IPO acknowledged that the difference was not immediately clear, but the objective was to avoid ever decreasing circles of definition of articles down to the tiny, disconnected bits seen in cases like the *Sealed Air v Sharp* strawberry punnets case. The most useful analysis of this so far has been in the *Neptune v DeVOL* litigation in 2017, in which the (very tragically) late Mr Justice Carr said that “aspects of a design include disembodied features which are merely recognisable or discernible, whereas parts of a design are concrete parts, which can be identified as such”. This begs questions of its own, but it was worthy of note that Carr J referred back to Laddie J’s comments in *Ocular Sciences*, where he suggested that the end portion of the spout of a teapot combined with the top portion of the lid could not be considered a part of the design as they are disembodied from each other. There is further litigation going through the courts that covers this topic, so I would expect to see more on this in the next few months.

B is for “Brexit”. It is inevitable that the biggest thing to (not quite, at time of writing) happen to designs over the past 12 months and the next year has been Brexit. Designs is an area where more change is due to happen than in many other areas of IP, in no small part due to the changes and effect on unregistered designs - both UK and EU. EU27-based designers creating designs after Brexit will no longer have the ability to rely on UK unregistered design, which will be a great loss to them, and all designers will have to think carefully about where they first launch their designs so as to get either the UK or EU versions of the current UCD. As it stands, you will not be able to have both. This could lead to a re-opening of the debate over where you can have a first disclosure for subsistence purposes; the current position appears to be as held by the German supreme court - that it must be physically in the territory of the EU. This leads to inevitable questions about whether a simultaneous global broadcast launch of a new design will constitute a disclosure that allows a designer to qualify for both the UK and EU versions, which will need to be resolved by the courts in due course.

C is for “Consultations”. There may have been understandably little public consultation on Brexit, given the timeframes, but there was a lot of stakeholder-led consultation involving the IP Federation, as well as many others. The EU, by contrast, has been consulting heavily over the past year, on the future of design law as well as on convergence projects. Of most note, a consultation that closed in April this year asked for comments on the whole design regime. Many bodies put in submissions that clarity should be given to the question of how a shape-only design should be represented under the EU system, when the written description is not published and must be disregarded, and cases such as the UK Supreme Court’s decision in *Trunki* observed that a line drawing could mean it is a design for shape only or, by contrast, it could be claiming minimalism as a feature in its own right. Various proposals have been put forward, including permitting the written description to have some effect (but this leads to translation issues) or having some tick boxes to allow applicants to claim shape only, or not. It remains to be seen how the EU will decide to take these issues forward following the close of the consultation. Another review of interest is the catchily-titled “CP10”, which is

looking at how disclosures on the internet should be treated when they are relied upon to invalidate a design. Clearly not everything on the internet should count, given the test involves those operating in the circles specialised in the sector concerned, but knowing where to draw the line is tricky and the EU's attempts to converge practices across the member states will hopefully be of assistance.

Finally, I am pleased to see that design law is continuing its increase in popularity in terms of both the desire to secure design protection and the ability to enforce it. It is clear that smaller companies in particular now feel better able to take on those who copy their designs. This is in no small part due to the diligence of the courts (especially the IPEC) in managing disputes and keeping them proportionate to the issues involved, as well as the significantly reduced filing and renewal fees that the UK Intellectual Property Office introduced a few years ago.

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