

# Work or design – overlaps in European copyright and design law

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# A little history....

- Closed list of copyright protected works in the UK
  - 1710 Printed books
  - 1735 Engravings
  - 1787 Textiles
  - 1798 Sculptures
  - 1862 Fine Arts (paintings, drawings, photographs)
  - 1911 “works of artistic craftsmanship”

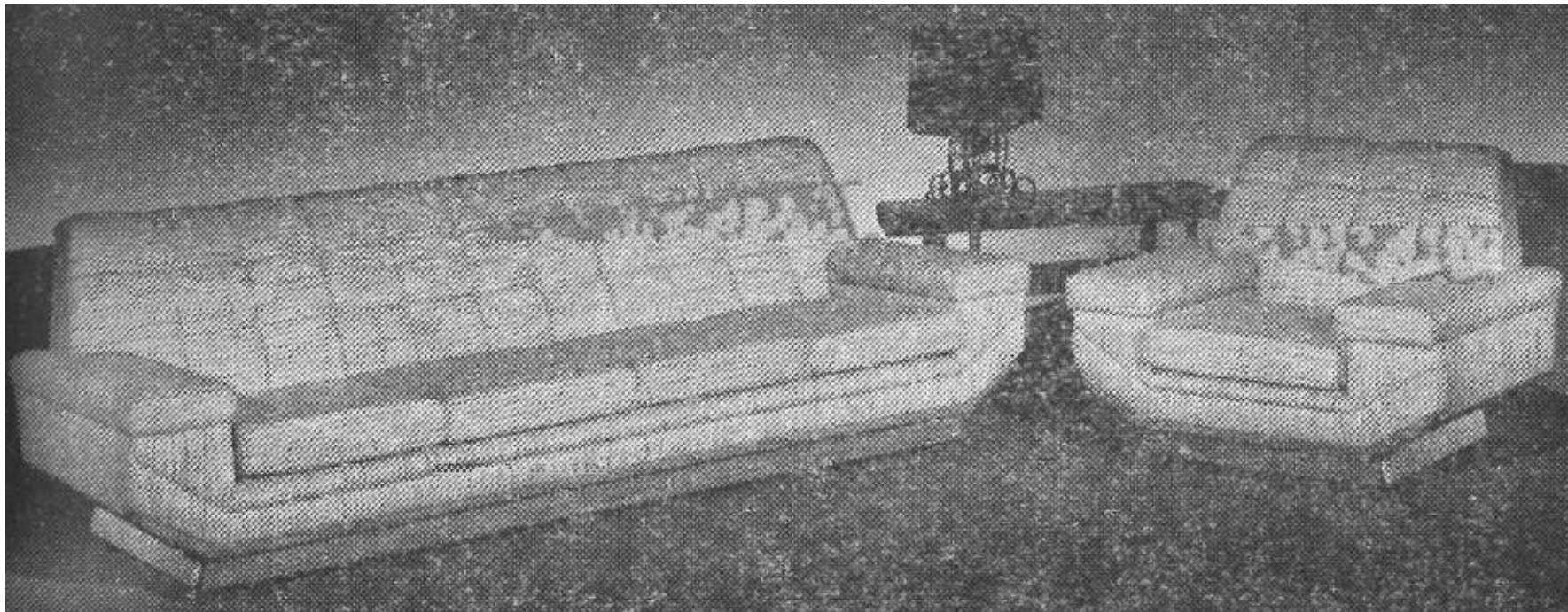
# A little history....

- Copyright Act 1911: excluded copyright protection for:
  - works which were capable of being registered as designs; and
  - were intended to be used as the basis for articles manufactured by an industrial process.
- Copyright, Designs & Patents Act 1988
  - registered designs (now harmonised with EU law)
  - UK unregistered design right for up to 15 years for “shape and configuration”.

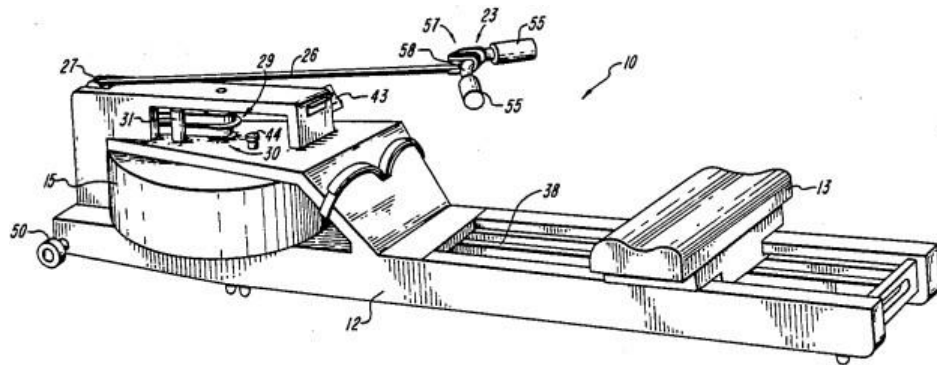
# Current Position

- Registered design law: harmonised with the EU
- 3 year unregistered design right: derived from EU law
- UK specific 10-15 year unregistered design right for shape/configuration
- Copyright – harmonised as at Brexit date (therefore including *Flos*, *Cofemel*, *Brompton Bicycle* etc., but still a closed list)

“work of artistic craftsmanship” – *Hensher v Restawile* [1976] AC 64, [1975] RPC 31



# WaterRower v Liking





# WaterRower - Facts

- ❑ water-resistant rowing machine
- ❑ early version hand-crafted from mahogany
- ❑ first disclosed to the public in 1987
- ❑ recognised as an “iconic design”
  - Museum of Modern Art (NYC)
  - Design Museum (London)
  - Architectural Digest Magazine
- ❑ Defendant conceded that the WaterRower is aesthetically pleasing

# WaterRower – Strike Out

[2022] EWHC 2084 (IPEC) – 5 August 2022

- Defendant admitted copying so the only real question was whether copyright subsisted
  - “work of artistic craftsmanship”?; and/or
  - Under *Levola*, *Cofemel* and *Brompton Bicycle*
- Claimant – WaterRower meets both
- Defendant – WaterRower meets neither

# Strike Out Refused

Real prospects of success of proving:

(A) The WaterRower is a work of artistic craftsmanship

Artistic

(a) it was intended by its creator to be artistic

(b) it has more than eye appeal (which was conceded)

(c) it sits with the examples given in *Hensher*: hand-painted tiles, stained glass windows, wrought-iron gates

Craftmanship

(a) Mr Duke is a craftsman

(b) he produced a high-quality hand-made product

(B) The WaterRower is the author's own intellectual creation under *Cofemel / Brompton Bicycle*

(a) it is an original object

(b) it is an expression of Mr Duke's intellectual creation

# Final Judgment

[2024] EWHC 2806 (IPEC)

- *Cofemel* and *Brompton Bicycle* binding on High Court
- *Hensher* binding on High Court
- WaterRower is:
  - Mr Duke’s own intellectual creation and an original work
  - not a “work of artistic craftsmanship”
- But Court couldn’t reconcile CDPA with EU case law
- Only the prototype is an original work but it is not a work of artistic craftsmanship

# The future?

- The UK will not automatically implement the 2024 Design Directive changes
- The UK is undertaking its own review: root and branch reform is possible
- The UK is not bound by future Court of Justice decisions (*Mio* etc) or any copyright harmonisation

