1989

The New United Kingdom Industrial Design Law

Christine Fellner
Southampton University

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I. INTRODUCTION

Industrial design law in the United Kingdom has just undergone the most fundamental revision of this century. The Copyright, Designs and Patents Act of 1988 (1988 Act) was introduced in the House of Lords (a typical practice with a bill of great technical complexity and allegedly little political, or at least party political, significance) on October 28, 1987. It passed the House of Commons in July 1988, received Royal Assent on November 15, 1988, and came into force on August 1, 1989.

The 1988 Act restates the law of copyright, bringing it up to date where necessary to accommodate new technologies and changing commercial conditions. It therefore repeals the Copyright Act of 1956 (1956 Act), it amends the Registered Designs Act of 1949 (1949 Act), and introduces a new "unregistered design right" in an attempt to resolve the dilemma of protecting functional designs while avoiding the anticompetitive effects which this can cause. Judging by the Parliamentary debates on the bill, the 1988 Act will give rise to as much ill-natured and self-interested controversy as did the previous bizarre system of protecting functional designs by artistic copyright. As stated by the House of Lords in British Leyland Motor Co. v. Armstrong Patents Co., this system developed by accident and was probably not what Parliament ever intended. Indeed, the Gregory Committee, on whose report the 1956 Act was based, foresaw the risk of purely functional designs becoming protected by copyright as a result of some of the reforms they recommended. The Committee therefore attempted to provide against this problem. Unfortunately, because courts of the United Kingdom are generally not permitted to look at background material to legislation when trying to interpret it, they persistently flew in the face of Parliament's probable intention when they developed the system of protection which the House of Lords so deplored.

Since various transitional provisions in the 1988 Act will preserve parts of the old system for up to ten years, an analysis of the old law is required before considering what changes the new system has made.

II. ANALYSIS OF THE OLD LAW

A. Aesthetic Designs

Under the old law, the major division was between "aesthetic" and
“functional” designs. Experts argue at length about the philosophical, and indeed commercial, justification for this division, but such division is well-established in most industrialized countries. Aesthetic designs are those which have features of shape, configuration, pattern, or ornament which “appeal to and are judged solely by the eye.” For example, in Lamsons Application,\(^3\) computer printout paper with alternate collections of lines in green and orange was denied registration under the Registered Designs Act of 1949 because although it had eye appeal in the sense of looking quite attractive, the reason for the alternating colors was the functional purpose of greater ease of reading. Therefore, the court found that the color pattern was not an aesthetic design because it was not being judged “solely” by the eye. The eye which judges the design is that of the customer; however, customers at all stages of the distribution chain are to be taken into account. Thus, in Kevi A/S v. Suspa-Verein U.K. Ltd.,\(^4\) the court held that the eyes to be appealed to were not only those of the office furniture manufacturers, who bought the castors for fitting to their furniture, but also the retailers who bought the furniture to offer for sale to their customers, as well as the ultimate customers themselves.

Further, to be aesthetic, a design must not represent a “method or principle of construction,” since this could lead to a monopoly over such a method. The most frequently quoted example is Moody v. Tree,\(^5\) wherein a design for a basket in which the weaving of the osiers in single file with all the butt-ends to the outside was alleged to have produced a novel pattern. This was held invalid because it would protect a method of construction which might legitimately be used by others. Other examples concern the pattern of bones in old-fashioned corsets.\(^6\)

The third requirement is that the design should not, whether in shape or configuration, be “dictated solely” by the function which the article to which it is applied has to perform. In the leading case of Amp v. Utilux,\(^7\) the House of Lords said this happened when the designer took into account in making his design only functional considerations, even if he happened to produce something which looked nice or whose appearance might appeal to engineers as signifying particular suitability for its purpose. The artefact involved was an electrical terminal forming part of the internal workings of a washing machine, which the designer freely admitted he had designed having regard only to purpose, interlocking, material, and price, but which, to his surprise and pleasure, had turned out to have a novel and attractive shape. But in Interlego AG v. Tyco Industries Inc.,\(^8\) the Privy Council, contrary to the view taken in some common law countries, decided that the

\(^3\) 1978 R.P.C. 1.
\(^7\) 1972 R.P.C. 103.
\(^8\) 1988 R.P.C. 343.
appearance of Lego bricks was not "dictated solely by" the function of interlocking with other bricks, because they were toys and toys must look attractive.

The old definition of a registrable design was contained in section 1(3) of the Registered Designs Act of 1949. This definition governed not only the term of protection for aesthetic designs under copyright, but also the extent to which there could be cumulative protection by both registration and copyright. Section 1(4) and Designs Rule 26 made thereunder also excluded from registration certain other aesthetic designs "primarily of a literary or artistic character" such as sculpture, medallions, calendars, greeting cards, plans, stamps, share certificates, sewing patterns, and maps, which were left to be protected by copyright alone.

B. Protection By Copyright

Aesthetic designs were protected in two ways. As soon as they came into being, they were automatically protected by copyright provided they were derived from an "original artistic work." These works were (and, with minor alteration of terminology, still are under the new Act) drawings, sculptures, paintings, engravings and photographs (all "irrespective of artistic quality," so as to avoid the temptation by the judiciary to exercise aesthetic judgment), works of architecture, and works of artistic craftsmanship (the latter, exceptionally, require the court to have regard to "artistry," on which they listen to both lay and expert evidence and evidence of the designer's motivation). "Original" had (and still has) the usual copyright meaning in common law countries—it required only that the work not be actually copied from another work, with no required standard of creative achievement or personal stamp. This protection endured for fifteen years from first marketing, whether in the United Kingdom or elsewhere.

These designs were infringed by "reproduction," which meant copying. This might be indirect, by copying another copy, through a verbal description, or by some form of subconscious copying. Subconscious copying has been found to have occurred where the defendant's designer has been proved to have attended an exhibition at which the plaintiff's product was displayed, but swears that he or she has no recollection of having seen the product before producing the defendant's design. It may then be held that the design must have registered subconsciously and recurred to the designer on setting to work. Note that this may of course be merely a polite

10. The United Kingdom, as a Berne Convention country, does not require deposit or marking as a prerequisite to subsistence or enforcement.
12. Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 3(1).
13. Id. § 10(3) as amended by Design Copyright Act 1968.
14. Id. § 3(5)(a).
way of disbelieving the designer. Reproduction might be of the whole or of a substantial part. This included making a three-dimensional copy of a two-dimensional work and vice versa. Authorizing another person to make a reproduction would also be an infringement. There was also "secondary infringement" by importing or dealing with what were known to be infringing copies. Remedies included the notorious "conversion" damages, whereby the infringer had to hand over to the successful plaintiff virtually the whole of the price he received for each infringing copy, not merely the loss of profit which the plaintiff had suffered, or a reasonable royalty.

C. Protection By Design Registration

Aesthetic designs could also be protected optionally, by registration under the 1949 Act for a maximum of fifteen years (three five-year periods) from the date of application, provided the design was novel in the United Kingdom and original, which in this context seemed to mean something like nonobvious in patent law. This was a monopoly right, infringed by anyone who produced the same design even by independent creation, and the Paris Convention regime applied to it. Registration could only be obtained for "the-design-as-applied-to-an-article." This did not affect "shape or configuration" designs significantly, except for the mental contortion required to envisage, for example, a basic shoe to which all the features of the design were then "applied." It could, however, be a disadvantage for "pattern or ornament" designs, where it was not possible to register something like a popular cartoon character so as to prevent anyone else from applying it to anything, but only to register it as applied to T-shirts, pencil boxes, children's plates, and so on, for each of which a separate registration was needed.

An important point was that copyright and design registration were cumulative for aesthetic designs. This was only the case after the Design Copyright Act of 1968, which was passed to enable the Birmingham jewelry industry to protect its products from copying without having to wait for a registered design to be granted, which was usually too late. That Act gave copyright to aesthetic (registrable) industrial designs, but limited it to the registered design period of fifteen years.

D. Functional and Other Designs

All other industrial designs, those which were "primarily literary or

16. Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 49(1).
17. Id. § 48(1).
18. Id. § 1(2).
19. Id. § 5(2).
20. Id. § 18.
"Artistic" and those which were wholly functional, were protected only by copyright, for the full period of the author's life plus fifty years. Thus, because they started life as engineering drawings, because copying could be indirect as well as direct, and because it could be done by reproducing a two-dimensional work (the plaintiff's drawing) in three-dimensional form, a host of wholly functional, nonregistrable articles designed without regard to appearance achieved the same protection as the modern equivalents of a Rembrandt, a Beethoven symphony, or a Shakespeare play. Among the worthy articles of commerce thus privileged have been screws, bolts, washers, clerical collars, paper-mache bedpans, pulley wheels, and plastic knock-down drawers.

There were three exceptions. The first was where a design was not derived from an "original artistic work" because it started life as a prototype in three dimensions which was neither a "sculpture" nor a "work of artistic craftsmanship." The leading case of Hensher v. Restawile concerned a suite of ordinary mass-produced furniture which could have been registered as a design but was not. There was a prototype consisting of a rough wooden frame with upholstery tacked to it, but no "artistic work." The House of Lords accordingly refused to find that this was a "work of artistic craftsmanship," and the action failed. Again, in Merlet v. Mothercare, a waterproof cape for a baby was cut and stitched as a prototype before any pattern was made, and the designer, who was actually a professional fashion designer, admitted that when she made it she was not setting out to make a "work of art." The garment, therefore, could not be a "work of artistic craftsmanship," and so was unprotected against copying.

The second exception was where a three-dimensional allegedly infringing copy "would not appear, to persons who are not experts in relation to objects of that description, to be a reproduction" of a two-dimensional drawing. This was known as the "section 9(8) defense," or "lay recognition" test, and was a more or less faithful reflection of a recommendation by the Gregory Committee designed to prevent functional objects from getting copyright protection.

22. "Artistic works" "irrespective of artistic quality." Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § § 3(1), 48(1).  
28. It should be remembered that sculpture is protected "irrespective of artistic quality." For example, in WHAM-O Mfg. Co. v. Lincoln Indus., 1985 R.P.C. 127, the original wooden model of a "frisbee" flying disc was held to be a "sculpture," under the New Zealand Copyright Act, which was similar to the United Kingdom 1956 Act.  
30. In fact, there were some sketches, but these failed the Copyright Act § 9(8) "lay recognition" test.  
32. See supra note 2.
protection based on drawings. The idea was that while anyone would recognize that a Popeye brooch was a three-dimensional reproduction of the cartoon character, owing most of its appeal to the artistic skill which went into the drawing, the average person unused to reading blueprints would not readily recognize the vacuum cleaner component held in their hand as the thing depicted in the drawing, which in any event functioned only as an instruction to the manufacturer and had no artistic value of its own. But the subsection lacked effect, as its woolliness perhaps deserved, since the Gregory Report itself was never referred to. Judges declined to entertain parades of nonexperts called by each side to swear to their entire ignorance of the subject matter in question and the consummate ease or total bewilderment with which they compared the object and the drawing. Judges constituted themselves lay recognizers being, after several days of a trial, fully familiarized with the articles in suit.33 Almost without exception,34 they were duly recognized.

Perhaps the most notable exception which survives the passing of the 1988 Act is what Lord Scarman tactfully described as “the principle latent in our law but not fully discussed or expressed until the present case”—the “spare parts exception” disclosed in British Leyland Motor Co. v. Armstrong Patents Co.35 Where an article based on a copyright work (such as an exhaust pipe made from a drawing) forms part of a larger article (such as an automobile) with a longer life expectancy than the part, so that the part will have to be renewed or replaced several times during the life of the work, it would be a “derogation from the grant” of the automobile to use the retained copyright in the exhaust pipe drawing to prevent other manufacturers from making replacement exhausts and thereby allowing the automobile owner to have his vehicle repaired as cheaply and conveniently as possible without having to go back to the original equipment (OE) manufacturer for spares and pay whatever price he chooses to demand. As Lord Templeman put it, without the spare parts exception which he invented, “[T]he purchaser of a BL car sells his soul to the company store.” It was also said that the OE manufacturer “exhausts his copyright” by first sale of the vehicle with the exhaust pipe fitted to it, and that outside component manufacturers do the same with the parts they make. The spare parts exception cannot be excluded by contract, although it does not apply where a part is covered by a patent or registered design. Such parts, however, might be caught by the “implied license” which permits the owner of a patented or design-registered or copyright-protected article to have it repaired by someone other than the original manufacturer.36

This decision was one of policy, which trawled for the legal garments to

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33. The defense was a last-ditch effort, the test never being made until copying had been found to have occurred.
34. The main exception was the late Judge Walton.
cover its nakedness in the murky waters of real property and European Economic Community (EEC) law. Many questions, unfortunately, have been left unanswered. It is clear that the exception applies to mass-produced multi-component articles which regularly need parts replaced, and thus covers household appliances, most vehicles, and machinery such as agricultural equipment. But does it apply to atomic power-station machinery and high-technology aircraft which are very expensive to develop and of which relatively few are made? Does it apply where quality control is crucial, and cannot be ensured by simply reverse engineering? What happens if a government department wants parts of its carpets replaced because they have worn out, and finds a manufacturer who can do this more cheaply than the original supplier? Perhaps most important, does the exception apply only where the competing spares manufacturer must copy in order to make a part which will fit and do the job it is intended to do, so that the original equipment manufacturer's copyright would otherwise give him a monopoly on the spares? Or could it also cover any spares where it is economically desirable for the competing manufacturer (and hence probably for the consumer) to copy rather than develop his own alternative? There are also concerns over parts which have to be a copy at one end in order to fit an existing machine, but could otherwise be different, like add-on ploughing and harrowing devices for tractors.

III. NEED FOR REFORM

In the *British Leyland* case, the House of Lords was dealing with a design which had to be copied in order to work—the shape of the exhaust pipe itself, which was governed by the track left for it around the other components on the underside of the vehicle. Their Lordships were therefore trying to put right the anticompetitive results which followed from the unforeseen and unintended development of copyright to give owners a monopoly on designs which were not patentable because they were not inventive and would not have been entitled to design registration, not only because they were functional rather than aesthetic, but often because they were neither novel nor original. Moreover, the application of copyright meant that these designs were being protected, not just for the normal fifteen- or twenty-year term which is usual for monopoly industrial property rights, nor even for the compromise fifteen-year term given for copyright in aesthetic designs, but for the full copyright term of the author's life plus fifty years.

A similar problem with the stifling of competition was also found to exist with aesthetic designs in certain circumstances. For example, with respect to the replacement of car body panels, the Office of Fair Trading and the Monopolies and Mergers Commission found that the Ford Motor

Company was refusing to license other manufacturers to make replacements and was charging inflated prices for its own spares. This practice was castigated from the consumer's point of view, but under copyright law as it stood before British Leyland, the Monopolies and Mergers Commission felt nothing could be done about it. It should be stressed that in both these cases the competitors were not "pirates" in the sense of counterfeiters passing off inferior and sometimes dangerous products on an unsuspecting market, but highly respectable manufacturers, often original equipment makers themselves, who were perfectly open about what they were doing. Indeed, the complaining manufacturers themselves often operated their own parts divisions through which they provided unlicensed spares for their competitors' vehicles. This led to a good deal of schizophrenia within the industry and its trade association, the Society of Motor Manufacturers and Traders.

After a couple of false starts in Green Papers,\(^{39}\) the government took the opportunity of the reform of copyright law to try to take care of these problematic designs by means of a specially-tailored right which would give some protection to design effort and investment while guarding against anticompetitive abuses. Its views were laid out in a 1986 White Paper,\(^{40}\) in which it firmly rejected a statutory "unfair copying" provision, on the lines of the statute- or code-based unfair competition jurisdictions of many European countries, which might have provided a reasonably workable means of protecting even "deserving" functional designs while preserving freedom of competition where desirable. Instead, in the interests of "certainty" for industry, it opted for a threefold system which it has now attempted to enact. Copyright is retained for "genuinely" artistic designs; design registration for aesthetic designs is strengthened but restricted in scope by the introduction of some competition-enhancing devices; and a new "unregistered design right," which is a hybrid of both, is provided for functional designs and, as an alternative or supplement to registered protection, for aesthetic designs as well.

The government provided to interested parties a series of "Notes on Clauses" indicating what it thought it was doing in each clause of the bill. Further light (or obscurity) was cast by the utterances of diligent but sometimes confused government spokesmen during these Parliamentary debates, duly reported in Hansard, together with the persistent and often ill-informed clamorings of those briefed by particular pressure groups. These expressions of intent are referred to in what follows as a matter of interest, thereby allowing the readers of this Article to be in a better position than Her Majesty's judges, who will never be allowed to look at them in the

\(^{39}\) Reform of the Law Relating to Copyright, Designs and Performers' Protection, 1981, Cmnd., No. 8302 (proposal to deny copyright as well as design registration to designs whose appearance is "dictated by function"); Intellectual Property Rights and Innovation, 1983, Cmnd., No. 9117 (withdraw copyright from "functional articles manufactured in quantity" but extend design registration to novel functional designs).

\(^{40}\) Intellectual Property and Innovation, 1986, Cmnd., No. 9712.
course of their duty since *Hansard* may never be referred to in arguing or deciding a case, however ambiguous the statute under interpretation may be.

IV. **UNREGISTERED DESIGN RIGHT**

A. **What It Covers**

The new right is defined by section 213 as "a property right which subsists . . . in an original design." "Design" means "the design of any aspect of the shape or configuration (whether internal or external) of the whole or any part of an article." It is important to note that, subject to certain exclusions dealt with below, no distinction is drawn or intended between aesthetic and functional designs; both are intended to be covered. All that is necessary is that the design be applied to an "article." The Notes on Clauses suggest that the designer's intention is somehow material. However, there seems no warrant for this gloss in the actual wording, unless it can be argued that "design" is a purposive word and the statute deliberately speaks of an article's "design" rather than simply its "appearance." Under the Copyright Act of 1911 (1911 Act), which prohibited cumulative protection by both copyright and design registration, the test applied was both whether the design was registrable and whether it was intended to be industrially exploited at the time it was first made. If it was only industrially exploited as an afterthought, then copyright protection was not lost. The 1956 Act, which before its amendment by the Design Copyright Act of 1968 also prevented cumulative protection, abandoned this system and made either actual registration or industrial exploitation of a registrable design, whenever occurring, the trigger for loss of copyright. Perhaps the new definition is an attempt to reintroduce the 1911 test through the back door. It certainly is consistent with the government's own understanding of what it has achieved by sections 51 and 52.

There are several exclusions from design right. The first, whose significance has yet to be determined, is that only "original" designs qualify. "Original" is defined as "not commonplace in the design field in question at the time of its creation." A government spokesman indicated that design right was not meant to be given to "mundane routine designs" in "common currency." He suggested, as an example of something "original" attached to something "commonplace," the fins which are beginning to appear on the tips of aircraft wings. No doubt the designers of aircraft wings would take a different view on whether their basic wing designs are mundane, routine, and commonplace. The Notes on Clauses said that "original" was to be understood in the copyright sense of "not [being] . . . a copy, but not necessarily novel." What the 1988 Act's definition means in

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41. Copyright Act, 1911, 1 & 2 Geo. 5, ch. 46, § 22; see also King Features Syndicate v. O. & M. Kleeman, (1941) 58 R.P.C. 207.

42. Copyright Act, 1911, 1 & 2 Geo. 5, ch. 46, § 10.
practice will depend on whether the courts continue to apply a low copyright standard of originality or whether they evolve some different standard. They might choose to consider the registered design “nonobvious” originality test, or perhaps even something like the registered design novelty test, which inquires whether the proposed design differs from an existing one only in immaterial details or in features which are common trade variants. The White Paper in paragraph 3.21, incidentally, spoke of protecting designs on which money had been spent. This criterion, however, has not been enacted as a test, although it will apparently be taken into account in fixing a royalty under the licenses-of-right which will be a feature of the new system.

Further exclusions which are undoubtedly of major importance are contained in section 213(3), which provides, in pertinent part, that design right does not subsist in the following:

(a) a method or principle of construction
(b) features of shape or configuration of an article which
   (i) enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function [known as the “must-fit” exception], or
   (ii) are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part [known as the “must-match” exception], or
(c) surface decoration.

Exception (a) obviously derives from the same expression used in the Registered Designs Act of 1949, and presumably will be treated in the same way. The exceptions in (b) have caused a significant amount of controversy, and go much farther than the government indicated in the White Paper.

“Must-fit” is effectively a statutory enactment of the British Leyland decision. It will allow spare parts to be copied so as to fit into, onto, or around an existing piece of machinery. It seems, and means according to the government, to allow copying only of the interfaces, not of the rest of a part, which will, if original and not otherwise excluded, have design right. Nevertheless, the spokesman indicated that there was to be no design right for the interfaces even if they do not have to be the same in order to fit. Whether this is really so seems to depend on the meaning of the word “enable” in exception (b)(i), which does seem benign enough to suggest that even if there is more than one way in which one article can be made to fit into another, the competitor is under no obligation to choose a different one from the originator. This provision naturally caused an outcry among OE manufacturers who, it must be observed, existed without functional design protection until the mid-1960s when they suddenly realized what miracles

43. Recently somewhat qualified as to these wilder excesses by Interlego AG v. Tyco Indus. Inc., 1988 R.P.C. 343.
the 1956 Act could do for them.\textsuperscript{44} It was pointed out that functional copyright has been a valuable weapon against counterfeiters who put dangerous parts on the market. The government's answer, however, was that trademark and consumer protection laws are available to deal with those problems. It was also urged that rather than exclude design right altogether, the government should take steps to exclude certain categories of products only if it was shown to be necessary to safeguard free competition. This too was refused. It should be observed that the "must-fit" exception will also cover what would normally be regarded as "accessories" rather than "spare parts," like printer and typewriter consumables.

The "must-match" exception is aimed primarily (in politics if not in law) at car body panels, so that Ford cannot hold motorists and their insurance companies for ransom in repairing accident damage. The government says it is not meant to apply to commonplace, mundane, routine, independently-designed freestanding struts which someone else subsequently copies many times over to make a grill, arguing that each bar of the grill "must match" the others. In other words, the thing must originally be designed as part of something else to the overall appearance of which it owes its own shape. Concern was expressed by the china and pottery industry, since for example, replacement lids for teapots and soup tureens certainly owe features of their shape to the appearance of the teapot or soup tureen as a whole. The government made soothing noises, apparently on the basis that the need for the article which "must match" to form an "integral" part of another article would exclude things like teapots which belong in two parts and are not permanently fixed together. It is not clear that this is the correct view. The "must-match" exception has been criticized, even more passionately than the "must-fit" exception, as being the result of a government obsession with the motor industry and its particular problems. It will undoubtedly encompass numerous other types of outer casing, for example computers.

Unlike registered designs, which can be for pattern and ornament as well as shape and configuration, design right expressly excludes "surface decoration," for which copyright is still the primary method of protection. The basic principles of artistic copyright and its infringement are retained largely unaltered in the 1988 Act, but exclude most of the field of industrial designs, with certain exceptions. If such decoration is two-dimensional, it will no doubt qualify as a "graphic work" (a new expression in the 1988 Act, apparently replacing drawings, paintings, and engravings).\textsuperscript{45} If it is three-dimensional it will probably qualify as a sculpture, or it may be a three-dimensional reproduction of a graphic work. If, however, the decoration is partly painted and partly wire filigree work designed without drawing,

\textsuperscript{44} For technical reasons, the 1911 Act would not have worked in the same way because it classified engineering drawings as literary rather than artistic works, and one could not reproduce a literary work in three dimensions.

unless the filigree is a work of artistic craftsmanship (with the attendant difficulties of proof), its only protection will be by design registration. Three different rights in one article! And the copyright may belong to a different person, because if the designer is freelance then the copyright will belong to him in the absence of assignment, while the design registration and the unregistered design right will belong to the person who commissioned him. Another point about the exclusion from unregistered design right of "surface decoration" is that printed matter which is technically of an "artistic" character in that it uses lines and shapes rather than words and figures, but is of a purely commercial nature, will still have full copyright for fifty years after the author's death. Computer stationery used with particular accounting packages springs to mind. It is not entirely self-evident that these basic commodity items should have such a long period of protection.

B. How the Right Arises

With one exception, relating to first marketing, design right only comes into being once the design has been recorded in a "design document" or an article has been made to the design. A design document is "any record of a design, whether in the form of a drawing, a written description, a photograph, data stored in a computer or otherwise." This is the equivalent of the copyright requirement that a work be "reduced to a material form" or "fixed." The specific mention of data stored in a computer lays to rest any question of whether a design is adequately "fixed" if no hard copy has yet been made. The point at which fixation takes place will be a matter of evidence.

What is particularly interesting about the definition of a "design document" is the inclusion of a written description, because this appears to introduce the concept of reproducing a literary work in three-dimensional form by following the instructions contained in it. There have been several copyright cases where a drawing has been held indirectly reproduced through the medium of a written or oral description. In each of those cases, however, there was an "artistic work" in the form of a drawing which could be reproduced. The normal rule was exemplified in Brigid Foley Ltd. v. Elliott, where the plaintiff was a knitwear designer and the defendant was reproducing her work on a commercial scale by following the pattern instructions. But these instructions were in the standard "k1p1wfdk2togs1k1psso5" form and there was no illustration. Accordingly, there was only a literary

46. See supra notes 10, 28.
48. Solar Thomson Eng'g Ltd. v. Barton, 1977 R.P.C. 537; see also Plix Prods. v. Frank M. Winstone (Merchants), 1986 F.S.R. 608 (copying found in New Zealand where plaintiff's design for kiwi fruit packing trays was translated into an industry standard written specification, and defendant's designer had followed this without ever seeing plaintiff's product, let alone its drawings).
work and this could not be infringed by reproducing it in three dimensions. The same reasoning is applied to arguments that one can infringe the copyright in a recipe by making the cake (subject to any implied license to do so on a noncommercial scale). With the new definition, however, infringement will occur by making the article described in a written design document even though there is no artistic work involved.

The creation of a design right by virtue of making a prototype will have the sensible and welcome result of giving protection to designs like those in *Hensher v. Restawile* and *Merlet v. Mothercare*. In these cases, the furniture and the baby's cape, respectively, started life as nonartistic prototypes. An interesting question arises with textile designs where the pattern is woven into the fabric, as in the Jacquard process, since the prototype piece of fabric is made without any drawings. If the pattern is treated as "surface decoration," then it will be excluded from design right, even though the piece of fabric is a three-dimensional model. Under these circumstances, the designer will be thrown back into copyright with the need to show that the prototype piece is a work of artistic craftsmanship.

Being unregistered, design right comes into being automatically, like copyright, since there are no deposit requirements and there is no central, searchable record of such designs. Nor is there to be any requirement for marking. Although the right is not registrable, and is only to be infringed by copying, it has some built-in monopoly safeguards like a provision restraining unwarranted threats of infringement proceedings. Under section 253, one must not threaten anyone other than a manufacturer or importer with proceedings for infringement of a design right unless one is prepared to put one's subsistence, ownership, and validity where one's mouth is, because a person aggrieved by such threats (which, according to cases decided under the similar provisions relating to patents, can include general threats made in circulars), can sue for a declaration that the threats are unjustifiable and for an injunction, as well as damages. It is then for the person who has made threats to prove infringement, the idea being to discourage the often effective campaigns to frighten off customers by aggressive allegations without troubling to test the right in court. Another "monopoly" safeguard is the existence of Crown user provisions covering defense (including United Nations and treaty obligations) and health services. There are also the important license-of-right arrangements considered in more detail below.

C. Who Gets It and Who Owns It

Because design right is (whether rightly or wrongly) not regarded as either a Berne or a Paris Convention right subject to "national treatment," it will not be available to just anyone. One has to be a bit special. As with the

United States Semiconductor Chip Protection Act, the right will be available to foreign-originated designs and designers only on a reciprocal basis. The designer is normally the first owner of the right, but if he or she creates it pursuant to a commission or in the course of his or her employment, then the commissioner or employer will be considered the original owner. In the case of computer-generated designs, the designer is considered to be "the person by whom the arrangements necessary for the creation of the design are undertaken."

There is a similar formula in the 1956 Act for allocating copyright in a motion picture to the producer. Having decided who is prima facie entitled to a design right for any particular design, it is then necessary to see whether this is a "qualifying person," who may be either an individual or a corporation. A qualifying person is a citizen or subject of, or habitually resides in either

* the United Kingdom, or
* any other EEC member state, or
* the Channel Islands, the Isle of Man or any United Kingdom colony if the Act has been duly extended to these territories, or
* a country designated as enjoying reciprocal protection by virtue of extending "adequate" protection for British designs.

A corporation must be formed under the law of, or have a place of business at which substantial business activity in goods actually present in the country is carried on in, one of the above areas in order to be a "qualifying person." The term "adequate" is not defined, so the government retains a wide discretion to exclude foreign designs if the Secretary of State for Trade and Industry does not fancy what is on offer for British designs in the country of origin.

There is one other way in which a design right may arise, and that is by first marketing under section 220. If the design is a foreign one which does not qualify for protection under sections 217 to 219 because there is no qualifying person, the person who first markets the articles made to the design in the United Kingdom becomes entitled to design right for it under section 215 if he is a qualifying person and is exclusively authorized to put such articles on the market in the United Kingdom. "First" marketing seems to mean first marketing anywhere. The effect would seem to be that if a Japanese designer (Japan not having been designated a reciprocal country) exclusively licenses a United Kingdom company to be the first distributor of his

52. "Foreign-originated" in this context means designs and designers other than those from EEC.
54. Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 13(10).
56. Or an EEC member state, Channel Islands, Isle of Man, or United Kingdom colony, but not a reciprocal country.
57. By the person who would be the design right owner if he were qualified.
product, and that company first markets it in, for example, either the United Kingdom or France, the company will get design right and, presumably, will be able to use it to keep out the designer's own products when he begins to market them. This would be separate and distinct from the distributor's action for breach of the contract of exclusivity. The exclusive authorization must be "capable of being enforced by legal proceedings in the UK," a caveat adopted to take into account the fact that EEC competition law (directly applicable in the United Kingdom) will not permit exclusivity to be enforced if its effects would be anticompetitive or interfere with the free movement of goods between member states. For example, a United Kingdom exclusive licensee cannot keep out parallel imports where the goods have been marketed in France by the French exclusive licensee, and vice versa. The exact scope of operation of the caveat in section 220 is not immediately apparent at the time of this writing.

D. Duration and Licensing

Design rights last for fifteen years from the end of the calendar year in which the design was first recorded in a design document or a prototype was made. The design right normally lasts for ten years from the end of the calendar year in which the first sale or hire occurred. However, where articles have been made available, prior to an actual sale or hire, then an additional grace period of five years will be granted from the end of that year.58 The idea is that the designer gets ten years from first marketing of the article itself, but if the design is for something like an aircraft which is often sold off the drawing board before one has actually been made, one gets an extra five years to bring it to a saleable state.

During the last five years of the term, licenses-of-right (compulsory licenses without the need to prove nonexploitation or nonsatisfaction of the market) are available to anyone who demands one, subject to the terms being settled by the Designs Registry if they cannot be agreed upon.59 The earliest date on which an application to the Designs Registry can be made is one year before licensing must begin.60 The factors to be taken into account are apparently to be prescribed by regulations, and are likely to include at least the licensor's development costs. The factors to be specified may allow a little de facto unfair competition jurisdiction to be established, taking into account the originality of the design, ease of copying, value to the licensee of the right granted, loss of the licensor's exclusivity if it is a high-fashion design, and ease of acquiring valuable know-how once reverse engineering is established. In the alternative, the regulation may take a totally different approach. The whole question of know-how and show-how will need to be considered, as the licensee's ability to provide genuine competition (which is

59. Id. §§ 237, 246-250.
60. Id. § 247.
supposed to be the reason for imposing licenses-of-right) may depend on whether the licensee can insist on getting associated know-how. Safety may also be a consideration with some products. It is notable that under section 254 a licensee of right may not, without the licensor's consent, be described on the goods or in advertisements as a licensee of the design right owner.

These matters are obviously important both politically and commercially, and it is hoped that the government will provide a lead by indicating what it wants done. The trouble with the device of licenses-of-right is that in their long-standing patent law application they were essentially voluntary, in that a patentee could reduce the cost of renewal fees by inviting applications, but was not bound to do so. "Compulsory" licenses-of-right were introduced in the Patents Act of 1977, when the patent term was extended, even in relation to some existing patents, from sixteen to twenty years. During that extra four years, to which they would not otherwise have been entitled, these patentees had to submit to licenses-of-right which proved a most fruitful source of litigation before both United Kingdom and EEC courts. There is no denying that courts of the United Kingdom seem to regard these patentees with considerable sympathy when settling terms, overlooking the fact that but for the four-year extension the patents would by now have expired. Indeed, the pharmaceutical industry has been so effective in its lobbying effort that the 1988 Act abolished licenses-of-right for pharmaceutical patents. If the government genuinely wants design licenses-of-right to enhance competition, it had better explicitly tell the Designs Registrar and the courts.

There is one further safeguard for the maintaining of competition—where an inquiry by the Monopolies and Mergers Commission finds that, during the first five years the goods are on the market, the design right owner has refused to grant voluntary licences on reasonable terms or has attempted to impose unduly restrictive conditions, and that this refusal or attempt is likely to be against the public interest. Under such circumstances, the Secretary of State for Trade and Industry may cancel or modify the offending conditions and/or provide that licenses-of-right are to become available immediately. This looks very nice on paper, but how readily the Secretary of State will make a reference to the Monopolies and Mergers Commission, what attitude they will adopt, and how long the whole procedure will take, remains to be seen.

Voluntary licenses and assignments of design right are governed by sections 222 to 225. Assignments must be in writing signed by or on behalf of the assignor. Licenses, on the other hand, need not be in writing unless they are exclusive. Exclusive licensees have concurrent rights of action for infringement, subject to the apportionment provisions under sections 234 and 235.

61. Id. §§ 293-294.
62. Id. § 238.
E. Infringement and Remedies

Under section 226, the design right owner has the exclusive right "to reproduce the design for commercial purposes by making articles to that design or by making a design document recording the design for the purpose of enabling such articles to be made." "Reproduction" of an article has been further defined to mean copying the design "so as to produce articles exactly or substantially to that design." Reproduction may be direct or indirect, and it is immaterial whether any intervening acts themselves infringe the design right. Presumably this is meant to cover a case where someone merely orally describes a design (not an infringing act), but from that description an infringing article can be made. Primary infringement occurs where an unauthorized person does or authorizes another to do something within the design owner's exclusive right. Secondary infringement, however, occurs where an unauthorized person imports, has possession for commercial purposes, or deals in the course of business with, an article which is, and which the person knows or has reason to believe is, an infringing article. Moreover, section 260 proscribes any infringing act in relation to a kit of parts for making an infringing article.

There are one or two refinements in the section 228 definition of an "infringing article." An imported article infringes if its making in the United Kingdom would have infringed or would have been a breach of an exclusive license (except insofar as EEC law otherwise provides). This means that parallel imports even of the design owner's own legitimate goods will be infringing copies where there is an exclusive license in force. One may brandish an exclusive license where the goods come from abroad except where they come from an EEC member state and have been marketed there by the design right owner or with the owner's consent. Where an article is made to a design in which a design right subsists or has subsisted at any time, section 228 provides a rebuttable presumption that the article was made during the time the right subsisted. Finally, an "infringing article" does not include a design document, even though its making may have infringed design right.

There is the usual range of remedies set out in sections 229 to 232. Examples of such remedies are: injunctions (interlocutory injunctions, Anton Piller search and seize orders, and Mareva asset-freezing orders will be granted where appropriate); damages (including "additional" damages where the defendant has behaved particularly heinously); account of profits; and delivery up of infringing articles or anything specifically adapted for making them which the infringer knows or has reason to believe has been or will be used to make them. Delivery up can be sought as an interim as well.

63. Id. § 226.
64. Id. § 227.
as a final measure, but at the end of the day the court must decide whether or not to make an order for forfeiture, destruction, or defacement and must in every case consider whether financial compensation or an injunction will provide adequate security for the plaintiff. If they will, the court may decline to make an order for delivery up and the defendant will get the goods back. One novel provision is that applications for delivery up may not be made if more than six years have elapsed since the infringing articles were made, and order for delivery up may not be made after this date unless accompanied by an application for a final disposal order.

Innocence of the existence of a design right is only a defense to damages. But in the case of secondary infringement (importing, possessing, dealing), where the infringer proves that he or his predecessor in title acquired the infringing article unaware of such infringement, the only remedy is damages not to exceed a reasonable royalty. Injunctions are not available. This is a new idea in intellectual property, and it will be interesting to see whether applications for interlocutory injunctions can successfully be fought off where the defendant says he is going to prove innocent acquisition.

Section 246 gives the Designs Registrar (who is the Comptroller of Patents) jurisdiction to deal with disputes as to the subsistence or term of a design right or the identity of the first owner. The Registrar's decision is binding, and no court may decide any such matter except on a reference or appeal from the Registrar, in an infringement action or other proceeding where the issue arises incidentally, or in a proceeding brought with the agreement of the parties or leave from the Comptroller.

F. Important Considerations

Although it will be possible to have both an automatic design right and a design registration for the same article, design right and copyright protection are not intended to be cumulative. Where a copyright and a design right coexist (as in relation to a design document), if one infringes copyright one cannot also infringe design right, and one does not infringe copyright in a design document or model "recording or embodying a design for anything other than an artistic work" by making the article depicted in the design, or by copying an article so made. This cleavage between copyright and design right is the jewel in the government's crown and it is dealt with under section 51. Thus, if a design document is a drawing of a piston, one will infringe design right but not copyright by making the piston, and one will infringe copyright but not design right by photocopying the drawing. One can of course sue for both, but the same act cannot be an infringement of both a copyright and a design right. However, if the design document is a preliminary sketch for an ornamental sculpture (that is, artistic work in

which a design right does not subsist), one will infringe the copyright both by photocopying the drawing and by making the sculpture.  

Arguments have already arisen among lawyers as to whether section 51 is apt to achieve the result claimed for it. Sculptures and works of artistic craftsmanship are still “artistic works” under section 4 of the new Act, the former “irrespective of artistic quality.” New designs for automobile bodies, for example, are often made with the aid of clay or wooden models rather than drawings, and it is probable that these would be classified as “sculptures.” Could it therefore be argued that such a model “embodies a design for” an artistic work, or that a sketch of it would “record” a design for an artistic work—the artistic work being the sculpture itself, regardless of what it was a representation of—in this case a motor vehicle? In the Notes on Clauses, the government cites this very example as one where the design would clearly be “for” an automobile, not for a sculpture of one, and would therefore be a matter for design right rather than copyright, unless someone copied the model itself as such, perhaps with a view to exhibiting it in his or her garden, or mass-produced it to sell to other people to exhibit in theirs. This sounds very reasonable, and if the section is given a common sense application, in nine cases out of ten it will be quite obvious that the design, even though itself technically an artistic work, is really “for” something else. However, “for” is another of those purposive words; what it means is “intended for,” and the Notes on Clauses say as much. Are we to go back to looking at the designer’s intention as under the 1911 Act?

This discussion will have for American lawyers queasy undertones of costume jewelry and Balinese dancers, problems from which, up to now, lawyers in the United Kingdom have been free. Hitherto, “functional” for us has meant the opposite of “aesthetic” rather than raising the specter of “intrinsic utilitarian function,” and the question of whether a picture hung on your bedroom wall is not in fact as functional as wallpaper, in that it serves the same purpose of covering up the blank bits, a conundrum which has bothered some European lawyers. The same questions will apply, only probably more so, to “works of artistic craftsmanship.” We probably would not have hesitated, up to now, in treating a handmade piece of costume jewelry, like a watch bracelet, as such a work and giving it fifteen years copyright, even though it was actually intended as the prototype for hundreds or thousands of copies to be sold as part of the Christmas trade, and had the utilitarian function of holding the watch in place. But could its designer now say, hand on heart, that it was a model “for” an artistic work rather than “for” a piece of costume jewelry? Or put the other way, would a court accustomed for years now to giving copyright protection to pulley wheels and bedpans happily agree that an attractive piece of costume jewelry,

67. Copying a two-dimensional work in three-dimensional form, which continues to be an infringing act in relation to “genuine” artistic works.
designed with every regard to appearance, was just a "basic commodity item" like Madame Merlet's baby's waterproof cape?69

G. Transitional Provisions

A design right only applies where the design is recorded in a design document, or a prototype is made, after the new Act came into effect.70 All then existing articles made from artistic works will continue to enjoy copy­right protection for ten years after commencement, but during the second half of that period the identical license-of-right provisions that apply to design right will apply to that copyright.71 Moreover, the new state of affairs is not to affect "the operation of any rule of law preventing or restricting the enforcement of copyright in relation to a design," and this is apparently intended to preserve the British Leyland defense in relation to spare parts.

"Aesthetic" (registrable) designs, which have the shortened fifteen-year term of copyright under section 10 of the 1956 Act as amended, will be able to enjoy their declining years in peace but will not benefit from the extension of similar such rights to twenty-five years under the 1988 Act.

V. REGISTERED DESIGNS UNDER THE NEW ACT

A. Changes

The 1988 Act makes certain important changes to the Registered Designs Act of 1949, in particular to the definition in section 1. A design no longer has to be judged "solely" by the eye, and it need only be "new," not "original" as well. More importantly, there is now a "must-match" restriction like that applying to unregistered design rights. Furthermore, there is another intriguing exclusion in section 1(3) under which no design can be registered for an article "if the appearance of the article is not material, that is, if aesthetic considerations are not taken into account to a material extent by persons acquiring or using the article, and would not be so taken into account if the design were to be applied to that article." This apparently means that one first decides whether people care what an article of this general nature looks like from an aesthetic point of view (this is to exclude the engineer who goes into raptures over a well-designed crankshaft because it is so obviously fit for its purpose—he is a notional person who has greatly troubled some of Britain's finest legal minds). If one concludes that ordinary people do not care what these articles look like, one then has to envis­age what they would look like if this design were applied to them and decide whether people in that case would take the resulting appearance into

71. There is automatic licensing during the second five years and licensing in cases of abuse during the first five years.
account. If so, the design is registrable. How this is to work in practice is anyone's guess, but the government spokesman said that it is only meant to exclude things like internal structural girders, ordinary nails, screws, and so on. It is intended that the evidence filed by a successful applicant for a design of this nature be open to public inspection, so that would-be infringers can see the kind of evidence they will need in order to attack validity.

The period of protection is extended (although not for existing registered designs) from fifteen years (three five-year periods) to twenty-five years (five five-year periods). This is quite surprising, because it throws the United Kingdom out of line with most other countries which operate a system of registered designs. It also makes this monopoly right last longer than a patent. The definition of infringement under section 7 has also been amended and is extended to cover making or dealing with a kit of parts for an article as well as the article itself. Although (except as mentioned below) there is no automatic licenses-of-right provision for registered designs, there will be a power for the minister to make a registered design subject to licenses-of-right where the Monopolies and Mergers Commission finds that there has been anticompetitive abuse.

B. Transitional Provisions

Where a design applied for between January 12, 1988, and August 1, 1989, would not be registrable under the 1988 Act (because it would fall within the new "must-match" exclusion or is for an article whose appearance is not "material"), it expires ten years after the 1988 Act came into effect, and during the whole of that ten years (not just the last five) it is subject to licenses-of-right. The date of January 12, 1988, is significant because that was when the new restrictions were first proposed in the House of Lords, thereby giving covetous would-be design proprietors the chance to apply quickly for registrations which the government had already decided would not be available in the future. They will still get registrations, but these will be severely limited.

VI. COPYRIGHT IN INDUSTRIAL DESIGNS UNDER THE NEW ACT

The government's intention in the 1988 Act, as stated in Parliament, was to exclude copyright altogether from the field of industrial designs with one exception for surface decoration. It was to be design right, with or without design registration, or nothing. The pathetic pleas from interest group representatives in Parliament that it would do no harm to allow a shortened term of copyright to coexist with design registration, as under the then existing section 10, were cruelly rejected. So does the 1988 Act purport to make copyright noncumulative, not only with design right but also with registered

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(or registrable) designs, unless the design is "for" an artistic work? Many commentators do not seem to think it does, but I am not so sure. Section 51, it will be recalled, provides that it is not an infringement of copyright in a design document or model embodying a design for anything other than an artistic work to make or copy the "article" depicted. So unless the "article" is itself an artistic work (graphic work, sculpture, collage, work of architecture, or of artistic craftsmanship), copyright cannot be invoked to prevent reproduction in three dimensions. Registered, like unregistered, designs apply to "articles,"73 which may of course be artistic works, as artistic works may be articles under section 51. But design registration is not now and will not under the 1988 Act be obtainable for articles "primarily of a literary or artistic character" or for wall plaques, medals, medallions, or works of sculpture other than casts or models used or intended to be used as models or patterns to be multiplied by an industrial process.74 If section 51 has the effect contended for, it may well have succeeded in separating copyright not only from design right but from registered and registrable designs as well. Only for two-dimensional pattern designs would the rights continue to coexist, and possibly costume jewelry and the like, as discussed above.

What is to happen where a design document or model records or embodies a design for what is accepted to be an artistic work, but the artistic work is in fact industrially exploited (by more than fifty copies being made, at least one of which is marketed)?75 What about a bust of a leading politician which, perhaps following a change of government, the artist decides to market in sets of ten for use instead of ducks in a shooting gallery? What about a painting of a sunset over the capitol, which the artist, falling on hard times, decides to exploit by licensing its use on tin trays? The government's answer to these questions is section 52 which, like the old section 10 as amended, provides that where an artistic work is industrially exploited by or with the copyright owner's consent, copyright in all kinds of industrial exploitation of the work (the politician as paperweight as well as duck, the capitol on T-shirts as well as trays) will expire twenty-five years from first marketing, although copyright in the work in its original form will continue for the rest of the normal copyright period.

This is all very nice and apparently much like the old section 10. But the whole tenor of the Notes on Clauses and the debates was by reference to works intended at the outset to be purely artistic, having no "intrinsic utilitarian function." The Notes on Clauses point out that "the application of copyright to the making of articles to a design is already limited by clause 51 (now section 51) which provides that copyright cannot be infringed by

73. Registered Designs Act, 1949, 12, 13 & 24 Geo. 5, ch. 46, §§ 1, 7, 44.
74. Id. § 1(5); Registered Designs Rules, S.I. 1989, No. 1105, Rule 26.
75. This will probably be the test adopted under the 1988 Act. It is the current one, contained in the Copyright (Industrial Designs) Rules, S.I. 1957, No. 867.
the making of certain articles or the copying of such articles”; and they say that clause 52 (now section 52) is subject to that provision. This would suggest that section 52 would apply only to those articles which are themselves artistic works. At first glance, however, the 1988 Act itself does not do this. Section 52 merely talks about “an artistic work” being industrially exploited, and “artistic work” is defined only in section 4 which covers graphic works and sculptures irrespective of artistic quality, without overt reference to the severe limitations imposed by section 51. Section 52 would therefore appear to allow twenty-five years of copyright protection to any such work industrially exploited, whether aesthetic or functional. Section 52(1)(a) refers to an artistic work exploited “by making by an industrial process articles failing to be treated for the purposes of this Part [of the 1988 Act] as copies of the work”; and “this Part” includes section 17 which spells out the continuing two-dimensional/three-dimensional reproduction definition. Nevertheless, “this Part” includes section 51, so its limitations may be said to be inherent in section 52. These two crucial sections are likely to be the focal point of litigation until their meaning and interaction is clarified.

This question is also important in the light of prospective United Kingdom obligations, under the Paris text of the Berne Convention, for the protection of works of applied art by copyright insofar as they are not covered by special design protection. For this reason, it may perhaps be assumed that section 52 will protect “aesthetic” designs as well as purely artistic works, as section 10 did. Certainly the extension of the term to twenty-five years as required by Berne article 7(4), for works of applied art protected by copyright, suggests that this will be the case, since the United Kingdom has now adhered to the Paris text of the Berne Convention. But in the light of the government's own explanation of section 52 as being limited by section 51, perhaps we are to suppose that section 51 is not after all meant to be as restrictive as the Notes on Clauses would suggest.

To the extent to which copyright still operates in the mass market, it is important to note that the Act has abolished “conversion” damages even for “continuing” copyrights, except in relation to legal proceedings begun before it came into effect.

VII. CONCLUSION

That is the new United Kingdom system for industrial design protection. Much of it may seem rather less strange to American lawyers and industrialists than it does to us and to Europeans. I have not presumed to comment on the United States Bill S. 791, but it does appear as if our civil servants had a look at it. They also had the precedent of our own Semicon-

ductor Products (Protection of Topography) Regulations in 1987, made pursuant to EEC Council Directive 87/54/EEC, which I believe is the measure which inspired then-President Reagan to proclaim EEC countries entitled to protection under the United States 1984 Act. This regulation provides an example of a specially-tailored hybrid right of relatively short duration, containing several provisions which reappear in the 1988 Act.

How our new system will go over in Europe, I should not like to prophesy. From being rivalled only by France (sporadically) in the generosity of our protection for industrial design, we have apparently moved much closer to the miser's end of the spectrum, inhabited by Germany and Italy. To make things more confused, the European Commission and Court, which have for some years been able to be relied upon to treat intellectual property rights with suspicion and to be "defendant's men," seem to be kicking up their heels and wantonly enforcing such rights—and now even murmuring about copyright as a fairly good way of protecting industrial designs. Never trust a bureaucrat or a judge.