

2. PROTECTING INDUSTRIAL DESIGNS IN THE REGION: IDENTIFYING AREAS OF CONVERGENCE AND DIVERGENCE BETWEEN CARIBBEAN COUNTRIES, AS WELL AS OPPORTUNITIES FOR REFORM WHERE LACUNAE ARE FOUND TO EXIST.

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local designs are protected upon registration,

A. EYE APPEAL

According to WIPO's Commentary on the Model Law for Developing Countries on Industrial Designs, reference to 'special appearance' is synonymous with a design appealing to and being judged by the eye. Thus, although some pieces of regional legislation, like Barbados' Industrial Designs Act,¹⁰

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plain textual reading of the regional provisions, that design right can only be claimed in respect of the appearance of a product as a whole, rather than in respect of a part of a product.

A related issue concerns the fact that whereas Bermuda's Copyright and Designs Act 2004 indicates that design rights

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Subject to the provisions of this Act, a design shall not be registered thereunder unless it is new or original and in particular shall not be so registered in respect of any article if it is the same as a design which before the date of the application for registration has been registered or published in the United Kingdom in respect of the same or any other article or differs from such a design only in immaterial details or in features which are variants commonly used in the trade.

In *AMP Incorporated v Utilux Pty. Limited and Another*,²⁴ the Court of Appeal, in interpreting this provision, considered that in order for design right to subsist in an article, there must be substantial novelty or originality, having regard to the nature of the article in question. Differences between the design in question and the prior art which are imU2.7 (d)]TJ12.4 (e)0.7i Td[(a), fmuse. (n)3 ()-3.s0gnad

author, and not being copied by the author from another: see *Farmers Build Ltd v Carrier Bulk Materials Handling Ltd* [1999] RPC 461 at 475, 482. In *Magmatic v PMS* at [84] I expressed the view that the test is whether sufficient skill, effort and aesthetic judgement has been expended on the new design to make it original.³⁴

Meanwhile, Laddie J's sentiments in *Ocular Sciences Ltd. & Anr. v Aspect Vision Care Ltd. & Ors. Geoffrey Harrison Galley v Ocular Sciences Ltd*³⁵ on the question of 'commonplace' designs are worth repeating:

'commonplace' covered designs which were ordinary, nothing more than banal, and trivial.

Any design which is trite, trivial, and common-or-garden, hackneyed or of the type which would excite no peculiar attention in those in the relevant art is likely to be commonplace. This does not mean that a design made up of features which, individually, are commonplace is necessarily itself commonplace. A new and exciting design can be produced from the most trite of ingredients. But to secure protection, the combination must itself not be commonplace.³⁶

In this case, the design of the soft contact lens in issue were held to not be unique, and thus commonplace in the design field in question.

A more nuanced pronouncement on the notion of commonplace can be found in the decision of Mummery LJ in *Farmers Build Ltd v Carrier Bulk Materials Handling Ltd*.³⁷ Here, his Lordship explained that the Court must compare how similar the proprietor's design is to the design of similar articles in the same field of design made by persons other than the parties or persons unconnected with the parties. In

this connection, the closer the similarity of the v th oare thios (e)0.7 (r)-1on1.7 (m)-7 (t)-2.3 (i)-1.7 (l)4 (o)-10.is tl2.4 (h)1 (e5)

regional registered design legislation, it would seem that novelty, in the sense of an identical or substantially similar design not having previously been disclosed to the publ

silent on this issue; as such, it could be assumed that methods or principles of construction might obtain protection in these islands, since it is arguable that if the respective legislatures wished to exclude methods or principles of construction, they would have said so explicitly.

For interpretative purposes, the decision of *Bailey v Haynes*,⁴⁴

which excluded from protection the design of a fis1.4 (>>BDC 0 Tc 0 Tw 9 -14.8 ->.7 (t)-15.7 (hTJ-0.0h3 (n)1 (EEMC iTc 0 Tw1.7 (g)-13 (n)1 (o

dimensional features of a design, such as decorations lying on the surface of an article (for example, a painted finish). On the facts of *Neptune*, however, the Court rejected the argument that the cock-beading and moulding on the Claimant's Chichester kitchen units were excluded from design right protection because they were surface decorations. Instead, the Court found that they were truly three dimensional in nature, and formed a prominent and striking part of the shape of the doors in question.

On another note, it is submitted that an important consideration to bear in mind when interpreting the Bermudan statute is that even if surface decorations are excluded from protection by virtue of design law, copyright law may nonetheless afford them the requisite protection, if they, indeed, amount to original artistic works.

5. RIGHTS CONFERRED

question is an infringing article. On the court's approach to the question of secondary infringement, the judgment of *Action Storage Systems Limited v G-Force Europe.Com Limited, Fletcher European Containers Limited*⁶⁹ is instructive. In that case, the Claimant, who had designed 'eXtreme Lockers', succeeded in an action for secondary infringement against the defendant who had sold 'SuperTuff' lockers, which were created by copying the design of the eXtreme lockers, and were unsurprisingly made substantially to the overall design of the eXtreme lockers.

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