Introduction

Estelle Derclaye

The world (hi)story of the protection of designs\(^1\) has been extremely diverse. It is so because of the special, hybrid, nature of such works: they often combine utility and beauty so that it involves deciding whether to protect the work only by design law or only by copyright law, or by both. For over a century, legal systems, not only at national but also at regional and international level, have struggled to find the most adequate solution: a single protection may be under- or overprotective and two or more can be overprotective. The relationship or interface between copyright and design law at regional and international level crystallised over the years because of the entrenched and opposite positions (from minimal protection to maximal protection) the different countries have carried on taking on the issue. Indeed, countries and periods when protection for designs changed can be grouped in five different categories according to the type of interface chosen: single protection by copyright law (i.e. no design law exists), demarcation (i.e. no cumulation between copyright and design law), partial cumulation, full cumulation and total cumulation.\(^2\) Furthermore, the countries and periods with some cumulation can be subdivided between those with rules and those without rules regulating the interface. In addition, the criteria to regulate the interface (in the main protection requirements, term of protection, authorship and ownership, infringement) vary considerably among the cumulation countries along with the type of right (anti-copying right or monopoly right). What’s more, the UK is even more special as it is the only country in the world to have a national unregistered design right along with very detailed rules regulating the registered and unregistered design/copyright interface.

Since the Design Directive was adopted in 1998, design applications from all over the world have soared especially in Europe, the United States,

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\(^1\) I use the ‘neutral’ term designs on purpose to include both works of applied art and industrial designs. These terms are often used to demarcate the boundary between art (the domain of copyright law) and industry (the domain of design law).

\(^2\) For a definition of these terms, see below.
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Estelle Derclaye

Australia and Asia. EU and national case law on designs has increased as well. Therefore, design law is no longer the ‘Cinderella’ of intellectual property law it once was. Nevertheless, the interface between copyright and design is still in disarray. Looking at the EU alone, the Design Directive legislated very minimally on the interface as the EU legislature only required the Member States to cumulate copyright and design laws without specifying rules to regulate the overlap (art. 17 Design Directive, art. 96 Design Regulation and art. 9 Infosoc Directive). Subsequently, Member States have in the main kept to their traditions, which means that some have full cumulation and others partial cumulation between the two bodies of law, with very different rules organising the interface or no rules at all. The recent CJEU Flos judgment, which seemingly imposes the author’s own intellectual creation level of originality for unregistered designs but leaves the level of originality for registered designs to Member States, has created even more uncertainty. Post Flos, some national courts still apply a higher level of originality for unregistered designs (e.g. Germany, the UK and Italy). The Flos decision also triggered the repeal of section 52 of the UK Copyright Act, which organised the overlap between registered designs and copyright. The CJEU Donner decision also illustrates well the problems caused by the lack of harmonisation relating to designs (furniture whose protection expired in Italy parallel-imported in Germany where protection was still in force). Therefore, the current state of affairs is paradoxical – design protection is gaining momentum but it is far from harmonious. Rules to regulate the overlap between copyright and design law are badly needed, at the very least at EU level. To find the most appropriate rules, it is essential to review how Member States’ and other relevant countries’ laws have organised the interface in the past and how successfully (or not) they have dealt with it. It is only by comparing national experience through history that an adequate solution can be found.

The book has the triple aim of:

1. tracing the history of the design/copyright interface or in other words of the protection of designs, of several countries, selected for their rules regulating the interface, for their absence of rules or for their choice to protect designs only by one body of law,

3 See WIPO statistics at http://ipstats.wipo.int/ipstatv2/.
6 For sharp criticism of Flos and the decision to repeal s. 52, see L. Bently, ‘The Return of Industrial Copyright?’ (2012) EIPR 654.
7 Case C-5/11, Re: Donner [2012] ECDR 349.
Introduction

2 examining how these countries have coped with the problems engendered by the rules they applied over the years and the reasons for legislative changes,

3 in order to find the most appropriate rules that can be used to regulate the interface at EU level, and even at global level.

I recognise that it is ambitious to aim to find such rules as it may not be possible. But if these rules cannot be found, at least, the book will have summarised the advantages and disadvantages of each system, allowing for a better understanding of the interface. That said, in the final chapter, I propose what I think are achievable and workable rules to regulate the copyright/design interface. I chose only fifteen countries, namely, the USA, the UK, France, Germany, Italy, Greece, the three countries that form the Benelux, Sweden, Norway, Finland, Denmark, Australia and Japan, because they are among the most striking in terms of the copyright/design interface. It is not necessary for the number of countries to be bigger let alone exhaustive to achieve the desired result. In addition, there must be sufficient differences between countries and ample case law to make the comparison worthwhile and interesting. Thus, for instance, Malaysia and Singapore have followed the UK law closely (with only very small differences) and have relatively little relevant case law. Thus taking only the UK is sufficient as it has a wealth of case law and is the prime example as former colonies modelled their law on UK law. On the other hand, Australia has departed from the UK relatively early and more drastically and has an abundant case law. There is no EU chapter. This is deliberate. Legislatively speaking, there is nothing to say as the interface was left unharmonised. On the judicial front, we only have the \textit{Flos} decision but the judgment is obscure and by definition partial as constrained by the questions posed to the CJEU. Some commentators address it in their chapters and, otherwise, much commentary has already been written on the issue.\footnote{E. Ventose, ‘ECJ Rules on Legislative Limitations on Copyright Protection for Designs in Europe’ (2011) JIPLP 367; L. Bently, ‘The Return of Industrial Copyright?’; A. Tischner, ‘Focus on the Polish Regulation of Copyright and Design Overlap after the Judgment of the Court of Justice in Case 168/09 (\textit{Flos} v \textit{Semeraro})’ (2012) IIC 202; B. Lauriat, ‘Copyright for Art’s Sake?’ (2014) EIPR 275; P. Masiyakurima, ‘Copyright in Works of Artistic Craftsmanship: An Analysis’ (2016) OJLS 505–4; and literature cited at \url{https://curia.europa.eu/jcms/jcms/Jo2_7083/en/}.

The chapters only review substantive law, leaving procedural law (in the main, design registration and remedies) aside. This is not to say that no differences exist there but I had to work with a set word limit and the line had to be drawn somewhere. Protection of designs by unfair competition laws is also not discussed. It could have been reviewed but it is not
necessary in order to find the best rules to organise the interface. As I have already explained in previous writings, it is sufficient to say in this respect that the overlap between slavish imitation and any intellectual property right cannot be sustained when a specific right has been introduced simply because the intellectual property right replaces the unfair competition action for slavish imitation in this case and that there is no problem to cumulate the unfair competition action involving a risk of confusion with an infringement of copyright or design rights as the two causes for the actions (copying as opposed to causing confusion) are different.

That said, some chapters do discuss unfair competition law. This is inevitable as contributors map the history of the interface and some countries used unfair competition law instead of or in addition to copyright law before design protection existed (e.g. the Netherlands and Greece). While it would be interesting and totally comprehensive to examine the interface with trademark law, like with unfair competition law, there was no space. Furthermore, in contrast with the copyright/design interface, it is regulated at EU level, even if not fully, and is also addressed in detail elsewhere.

The chapters follow the same structure, except the final chapter, which analyses all the chapters and compares countries’ experiences in an attempt to find the most adequate rules to regulate the interface at international level. There is one chapter for all three Benelux countries, focusing on Dutch law and the Uniform Benelux Law on Designs and Models, one on all four chosen Nordic countries and two on US law, one focusing on copyright, the other on design patents. The chapters start with a table detailing the periods that the country has had in relation to the way it has dealt with the interface. A country could have started with full cumulation, then amended its law to adopt a partial cumulation system, etc. The table lists the different acts the country has enacted in the field of protection of designs during these periods. The table also adds if courts have followed or deviated from the legislature’s mandate (e.g. an Act could have mandated demarcation but the courts applied cumulation).

For each period, the tables list the total and average numbers of designs filed and registered. This data is analysed in the last chapter and shows that, in some cases, there is a link between the legal system chosen to

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Introduction

regulate the copyright/design interface and the high or low number of applications. Graphs drawn from WIPO and national IP offices data can be found in the last chapter's annex.

Each chapter then maps the history of the interface for the country or countries in question, in short the evolution of the statutory and case law on the protection of designs and the problems encountered over the years. Many chapters dealing with EU Member States stop with the implementation of the Design Directive as even if their design law was amended to comply with it, their law on the interface did not change. The chapters analyse the success or failure, advantages and disadvantages of the various mechanisms used in their countries to organise the interface over the several periods and explain why the legislatures and/or courts changed the rules over the years. Some then venture to conclude by giving their opinion as to what the best rules regulating the interface could be.

All chapters follow the same terminology regarding the different systems elaborated to deal with the interface. The terms used are: demarcation, partial cumulation, full cumulation and total cumulation. While such terminology is very rarely used by legislatures11 or courts, many commentators used similar terminology over the years and in different countries, albeit not always consistently.12 Accordingly, we define the several terms as follows:

*Total cumulation:* if the requirements of one law are fulfilled, there is automatic protection under the other law and this is whether or not the requirements of that other law are fulfilled. In other words, there is assimilation of the protection requirements of one law with that of the other. Among the countries reviewed in this book, this was the case only in France between 1902 and the implementation of the Design Directive.

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11 The European Commission’s Green Paper on the legal protection of industrial design uses some of this terminology when it explains the different Member States’ systems dealing with the interface.

Full cumulation: both copyright and design right can subsist if the protection requirements are fulfilled and the two laws apply in tandem whether it raises regime clashes and/or overprotection, or not. In other words, there are no mechanisms in the legislation to deal with these problems.

Partial cumulation: both copyright and design right can subsist if the protection requirements are fulfilled but either or both laws (i.e. the Copyright Act or Design Act) has or have one or more mechanisms to regulate the interface. For instance, if copyright and unregistered design right both subsist and are infringed, the UK Copyright Act states that only copyright infringement subsists (s. 236). Another example is alignment of rules to avoid regime clashes, e.g. same authors and owners in both copyright and design laws.

Demarcation: if something is protected or protectable by design law then it cannot be protected by copyright or by unregistered design right or vice versa.

Finally, the chapters in the book are ordered by type of system, starting with total cumulation systems and finishing with demarcation systems. Note, however, that most countries have changed systems over the years and thus the countries’ place in the book reflects the longest period in which they have retained the respective system.
8 The Copyright/Design Interface in Italy

Estelle Derclaye*

8.1 Introduction

As Table 8.1 summarises, the copyright/design interface in Italy has known two main periods, one of full cumulation (1865–1925) and the second of partial cumulation (1925 onwards with a very brief interruption). However, in this second period, partial cumulation was based on different criteria at different times. In the main, separability (scindibilità) was used from roughly 1925 until 2001 with high consistency and legal certainty albeit excluding most three-dimensional designs, and from 2001 onwards, the criterion of artistic value took over that of separability, also excluding many designs. 1 Section 8.2 traces the history of the Italian copyright/design interface from the first copyright and design Acts of the Italian state to the adoption of the Design Directive. Section 8.3 analyses the successes and failures of this history and draws conclusions as to which period or system worked best, if any.

8.2 History of the Copyright/Design Interface in Italy

8.2.1 First Period: 1865–1925: Full Cumulation

The first Italian Copyright Act dated from 1865 (Act of 25/6/1865 n. 2237) and the first Design Act from 1868 (30/8/1868 n. 4578). 2 As can be

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1 For details especially on the last period, see P. Marzano, ‘An ill-designed protection for a well-designed product: Italy and its copyright protection of industrial design’ (2014) 240 Revue Internationale du Droit d’Auteur 119 at 219–25.

2 There were copyright and design laws before these, but as they pre-dated the modern Italian state, they are not reviewed here. N. Stolfi, La Proprieta Intellettuale, 2nd edn (Turin: UTET, 1915), p. 185; G. Valeri, Corso di Diritto Industriale: Anno Accademico 1928–1929 (Firenze: Poligrafica Universitaria, 1929); M. Fabiani, Modelli e Design Industriali (Padova: Cedam, 1975), p. 9.
Table 8.1 Chronological table of legislation and statistics

<table>
<thead>
<tr>
<th>Period</th>
<th>Legislation</th>
<th>Amendments</th>
<th>Interpretation (i.e. by courts)</th>
<th>Further information</th>
<th>Design applications</th>
<th>Design registrations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 1865–1925</td>
<td>Copyright Act 1865&lt;br&gt;Design Act 1868</td>
<td></td>
<td>Full cumulation</td>
<td>Designs were also governed by Industrial Property Acts 1859 and 1864</td>
<td>5,162 (123)</td>
<td>4,690 (91)</td>
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<tr>
<td>2. 1925–1941</td>
<td>Copyright Act 1925&lt;br&gt;Design Act 1868 and then 1940</td>
<td></td>
<td>Discrepancy between legislation (full cumulation) and court interpretation (partial cumulation)</td>
<td>Designs were also governed by the Patent Act 1939</td>
<td>14,151 (943)</td>
<td>12,641 (790)</td>
</tr>
<tr>
<td>3. 1941–1996</td>
<td>Copyright Act 1941&lt;br&gt;Design Act 1940</td>
<td>Design Act 1940 lengthens duration of design right to four years. Act of 23/5/1977 lengthens duration of design right to 15 years</td>
<td>Partial cumulation and demarcation for 3D designs</td>
<td></td>
<td>151,493 (2,754)</td>
<td>99,663 (1,812)</td>
</tr>
<tr>
<td>Period</td>
<td>Law/Act/Directive</td>
<td>Description</td>
<td>Figures</td>
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<tr>
<td>1883–1940</td>
<td></td>
<td>Cumulation? (literature disagreed, norm was unclear) — no reported decision in that period</td>
<td></td>
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<tr>
<td>1941</td>
<td>Copyright Act 1941</td>
<td>Return to previous state of the law, i.e., partial cumulation and demarcation for 3D designs</td>
<td>25,836 (5,167) 17,564 (3,512)</td>
<td></td>
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<tr>
<td>1940</td>
<td>Design Act 1940</td>
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<td>1941–1943</td>
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<tr>
<td>5. 1997–2001</td>
<td>Copyright Act 1941</td>
<td>Return to previous state of the law, i.e., partial cumulation and demarcation for 3D designs</td>
<td>25,836 (5,167) 17,564 (3,512)</td>
<td></td>
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<tr>
<td>1940</td>
<td>Design Act 1940</td>
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<tr>
<td>5. 1997–2001</td>
<td>Copyright Act 1941</td>
<td>Return to previous state of the law, i.e., partial cumulation and demarcation for 3D designs</td>
<td>25,836 (5,167) 17,564 (3,512)</td>
<td></td>
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<tr>
<td>1940</td>
<td>Design Act 1940</td>
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</tbody>
</table>

* Source: Created by the author based on statistical data published by WIPO
* Figures in parentheses: average annual numbers
* data incomplete for years before 1874
* data for applications must be wrong as less high than for registrations; but these are the numbers given by WIPO and no data is missing per year.
* Another explanation may be that some registrations were delayed and counted from previous years.
* data incomplete for years before 1883
expected for copyright laws at the time, the first Italian Copyright Act was rather laconic. It protected all works of the mind and gave their authors a right of reproduction (art. 1). The Act did not spell out a list, even exemplary, of protected works. If a work was jointly created, there was a rebuttable presumption that all co-authors had an equal part and could exercise the right fully (art. 5). The right lasted the life of the author and forty years after his or her death or eighty years from first publication. The rights could be alienated (art. 15) and reproducing the work without the author’s consent was infringement (art. 29). The Act did not establish an infringement test nor were there provisions on protection requirements, employee works, commissioned works or limitations to the exclusive rights. However, it was accepted that it was the designer who was the owner ab initio of the copyright.

The 1868 Act on industrial designs and models was inspired by the French Act of 18/3/1806. It had just eight articles. Apart from these articles, it referred to the Acts on industrial property rights of 30/10/1859 n. 3731 and 31/1/1864 n. 1037 and the Royal Decree of the same day n. 1674. This meant that designers had to follow the same procedure as that of inventors. In view of the silence of the Act, the literature agreed that ornamental designs and models could be two- or three-dimensional. The 1868 Act referred to the protection requirements for inventions but the literature disagreed on the meaning of this. According to article 3 of the 1859 Patent Act, novelty meant ‘never known’ or ‘when known there was ignorance as to the particular means to actually make the invention’. Some commentators disagreed that novelty equated with originality in the sense of original presentation of existing elements. Otherwise, commentators interpreted the Act as requiring two types of novelty. Intrinsic novelty meant originality or priority of the invention while extrinsic novelty meant that there was no divulgence before the filing of the design or model. Thus it was not an absolute novelty. Even insignificant changes could modify the design’s aspect and make it new.
Likewise, a new application of a known design could be new. Designs contrary to laws, morality and public security could not be protected (art. 6 of the Patent Act 1859).

The patent and design Acts were silent on ownership when the inventor or designer was an employee. It was possible to transfer the design or model in whole or part, according to the general property rules. The transfer was only valid towards third parties if it was registered at the intellectual property office. The designer obtained an exclusive right to reproduce the design in whole or part by any means (art. 2 of the Design Act). The right lasted just two years from the day of publication and it ceased if the designer had not made use of the design within a year of publication (art. 4 of the Design Act). There were no limitations or exceptions to the exclusive right.

Therefore, the Italian system was one of full cumulation. However, as early as 1905, E. Piola Caselli, the father of the separability doctrine (the so-called *scindibilità*), which came to be adopted later by courts and then the Italian legislator (see sections 8.2.2 and 8.2.3), was already advocating the non-cumulation between copyright and design laws. For him, for a work of applied art to remain protected by copyright, it had to keep artistic individuality even if it had practical use. On the other hand, if the aesthetic element was an integral part of the product, the work could only be protected by the Design Act.

The vast majority of commentators thought that the Design Act was very defective owing mainly to the right’s short duration. This state of fact was reflected in the very low numbers of designs applied for. In the first ten years of the Act’s application (1869–78), only five designs were...
Therefore, the courts did not have much to decide either. Supposedly only one case arose out of the Act. In this case, the Court of Appeal of Milan rejected protection to a sugared almond’s design having the shape of a button for lack of novelty (controversially, though, as it was the application of a known design to a new product, which all commentators agreed was sufficient for novelty). Therefore, the gap was filled by the Copyright Act, which protected all works of the mind. Nonetheless, the few decisions dealing with a work of applied art in that period held that they were not protected. In a 1914 decision, the works in question were bronze street lamps. The Court of Appeal of Milan held that for them to be protected by copyright, they had to conserve their artistic individuality, independently from the use they can have in practical life. The court found that even if the lamps had an ornamental and artistic aim, they were not works which could live independently from the industrial product and thus were not artistic works. This 1914 decision thus already embraced the separability doctrine advocated by Piola Caselli.

8.2.2 Second Period: 1925–1941: Full Cumulation in Theory but Partial Cumulation in Practice – Adoption of the Separability Doctrine

This period saw two new Acts: the Copyright Act 1925 and the Design Act 1940. As early as 1906, the legislator wanted to reform the Design Act. As a matter of fact, a new Act was adopted in 1934 but never came into force. This Act already stated that the Copyright Act’s provisions were not applicable to designs and models, thus incorporating the separability doctrine and codifying the case law and literature. It is only in

18 Foà, ‘De la protection des arts décoratifs en Italie’, p. 125. See also Table 8.1.
21 The first decision to clearly state that works of applied art were protected by copyright was Cass. Turin (sic), 21/11/1903, Sirven v. Coen and Carli e De Carolis, Il Foro Italiano, 1905, p. 171.
22 CA Milan, 17/9/1914, Il Foro Italiano, 1914, p. 542 (lamp). See also CA Turin, 20/7/1894, Il Foro Italiano, 1894, p. 394 in which the court held that once the author extracts the aesthetic aspect of a work and uses it to decorate an object, copyright protection ceases and only the industrial property protection can apply.
23 It also did not help that most of the designs were in the public domain.
24 Bertolini, I Disegni e Modelli di Fabbrica: Testi per l’Esame di Laurea in Giurisprudenza, pp. 128–44.
25 Royal Decree of 13/9/1934 n. 1612, arts. 66–73.
26 V. De Sanctis, ‘I disegni e modelli ornamentali nella legge di riforma delle privative industriali e dei marchi’ (1934) D. Aut. 482 at 484.
1940 that the new Design Act, with rules similar to the aborted 1934 Act, came to see the light of day. Since the next Copyright Act dates from 1941, we will examine the Design Act 1940 during the third period.

The Copyright Act of 7/11/1925, n. 1950, made very few substantial changes. Article 1 of the 1925 Copyright Act stated that all works of the mind were protected whatever their merit or destination and its second paragraph specifically included works of applied art. The rest remained almost unchanged, except that the term was increased to fifty years p.m.a. Like the previous Act, there were no provisions on protection requirements, employee works, commissioned works or limitations to the exclusive rights. Thus full cumulation was still applicable as per the legislation and favoured by most commentators. However, as we saw in the previous section, before the new Copyright Act of 1925, Italian courts and commentators had started to drift from the unity of art approach to a partial cumulation system, using the separability test. In fact, both the courts and the literature elaborated several theories to determine under which conditions works of applied art could be protected by copyright, slowly but surely paving the way to a partial cumulation system. There were no less than six different theories, namely means of reproduction (if made industrially or in a high number of copies, the work cannot obtain copyright protection), destination (if the work’s essential destination is aesthetic then it can be protected by copyright and vice versa), the accessorial character that the design or model may have in relation to the industrial product, the level of artistic content, the author’s intention or aim (art is created without aim whereas a design is a creation with an aim, e.g. a mural as opposed to coins, stamps and labels) and the prevalence of the work’s artistic character. The prevailing theory was that of artistic character – one must consider whether the artistic aspect prevails


28 Di Franco, Trattato della Proprietà Industriale, pp. 218–23 (he lists the different theories).

29 Di Franco, Trattato della Proprietà Industriale, pp. 218–23 (he lists the different theories).


over the industrial one. Only if the utilitarian function can be separated from the artistic one can the design be protected by copyright. This was also known as the separability theory or doctrine. It is not an artistic value criterion. As Marzano puts it, the test was ‘a sort of “conceptual reverse engineering” aimed at verifying the persistence in the work, once applied to a useful article, of the characteristics possessed by a corresponding work of “pure”, non-applied art’. This theory won in the end. As already mentioned, it had been elaborated by E. Piola Caselli in the first twenty years of the twentieth century, was gradually adopted by courts and culminated in its adoption in the 1941 Copyright Act. This came rather unsurprisingly as Piola Caselli was a judge at the Italian Supreme Court during the period preceding the adoption of the 1941 Copyright Act and then senator and rapporteur of the Copyright Bill. There was therefore a discrepancy between the literature and the case law on the one hand and the Act on the other. Some commentators also lamented that the copyright’s term was too long for industrial designs and the Design Act one was too short.

In the 1930s, the judiciary adopted and then devotedly applied the separability doctrine. The first Supreme Court (Court of Cassation) decision which adopted the separability test dated from 1931 and involved a stove. The court rejected the protection of the stove as a work of applied art

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32 Di Franco, Trattato della Proprietà Industriale, p. 228; M. Ghiron, Corso di Diritto Industriale, I marchi, i Sígni Distintivi e le Insegne, le Invenzioni, i Modelli ed i Disegni Industriali, 2nd edn riveduta ed ampliata (Rome: Società editrice del ‘Foro Italiano’, 1937) XII, 422, p. 387; Biamonti, ‘Sulla natura e sui limiti della tutela giuridica dei lavori d’arte applicata all’industria e dei disegni e modelli ornamentali’, p. 443 and De Sanctis, ‘I disegni e modelli ornamentali nella legge di riforma delle private industriali e dei marchi’, p. 482 (who admits the double protection by copyright and design law, in the case in which the works of applied art can also have the aspect of works of pure art); A. Musatti, ‘Opera del ingegno e disegni o modelli di fabbrica’ (1915) II Riv. Dir. Comm. 1164.

33 Marzano, ‘An ill-designed protection for a well-designed product’, p. 121.


in copyright law on the basis of the separability test as well as for absence of originality, which it defined as ‘an intellectual creation which reveals the personality of the author’.\(^{36}\) The Court of Cassation laid down the criterion of separability as follows: ‘the industrial product which, because of its nature, cannot be separated from a certain shape matching also with aesthetic lines, can be an artistic entity in as much as the artistic attitudes extrinsic to the making of the object can be dissociated from it and from its industrial destination and assume an autonomous depiction which is added to the object’. A year later the Supreme Court restated its theory but here found that the works were protected. The works were wooden figurines representing ordinary people from the Val Gardena, which were added on top of corks and which had the possibility of moving via a mechanism.\(^{37}\) The court also confirmed that the fact that the figurines were made industrially did not affect their copyrightability. The Supreme Court then confirmed two decisions which, using the separability doctrine, had held two-dimensional works unprotectable, namely typefaces\(^{38}\) and the design at the back of playing cards.\(^{39}\) As regards the latter, the Court of Cassation agreed with the Court of Appeal that any playing cards need to have a design at the back and the author’s aim is to make the industrial product more attractive in order for it to be commercially successful. Several decisions from courts of appeal and of first instance also endorsed the doctrine.\(^{40}\) Of note are two from the Court of Appeal of Milan. One found that an advert was not protectable by copyright for lack of separability and of originality\(^{41}\) and the other that fashion sketches were protected by copyright as works of pure art.\(^{42}\)


\(^{41}\) CA Milan, 17/7/1933, Laboratorio Chimico Farmaceutico E. Granelli v. Zanoni, Riv. Propr. Intel. ed Indus, 1933, p. 298, also published in D. Aut. 1934, p. 39. The advert in question was a panel in wood in the form of a parallelepiped on which were placed on the left a box of San Pellegrino magnesium and on the right a glass with water in it. At the top there was a spoon in wood in which the magnesium was poured into the glass. The spoon was fixed by hooks on the panel. Then there were the words ‘Magnesia S. Pellegrino’ and ‘it is a spoon of health’. For the court, no one with minimal taste and common sense would want to acquire the work for his home, nor appreciate or contemplate it for its artistic value independently from its advertising aim.

Thus, by the end of the period, the separability doctrine was well established and accepted in Italian case law and literature.

8.2.3 Third Period: 1941–1996: Partial Cumulation and Demarcation for 3D Functional Objects

The new Design Act was adopted on 25 August 1940 and the new Copyright Act on 22 April 1941. During this period, there were two failed attempts at changing design law. First, at the end of the 1970s, a new design Bill added one more year of protection (i.e. five years) but did not change much else. The second attempt (the Minervini Bill of 29 March 1984) aimed at unifying the regulation of industrial design in one single Act, though still rejecting cumulation. Finally, an Act was adopted to lengthen the duration of the design right to fifteen years from filing (Act n. 265 of 23/5/1977).

Apart from its codification of the separability doctrine in its article 2(4) which read ‘[i]n particular the following shall be protected: works of sculpture, painting, drawing, engraving and similar graphic arts, including scenic art, even when such works are applied to an industrial product if their artistic value is distinct from the industrial character of the product with which they are associated’, the Copyright Act 1941 in substance did not change much; it was just more detailed on the rights and added exceptions to the rights. Article 1 of the Copyright Act 1941 stated: ‘[i]ntellectual works having a creative character and appertaining to literature, music, the graphic arts, architecture, the theatre and cinematography, whatever their mode or form of expression, shall be protected according to this Law’. The words ‘whatever the merit or destination’ which appeared in the previous Copyright Act were deleted to avoid protecting trivial works and replaced by ‘whatever mode or form of expression’. The Act required two protection requirements, namely creative character and intellectual effort (arts. 1 and 6).

43 On this see M. Rotondi, ‘Un progetto di legge tipo per brevetti, modelli e marchi e proposta di una legge tipo in materia di diritto di autore’ (1977) 1 D. Aut. 89.
could be joint ownership (art. 10 and arts. 1100–1116 civil code). The Act was silent on employee works, so contract law was applicable. The general rule was that the works made by employees belonged to the employee even if created during the course of employment. But the courts sometimes ruled that economic rights were implicitly transferred to the employer. There were also no rules for commissioned works. In general, the copyright vested in the author unless there was a contract to transfer the right to the commissioner and the transfer was only valid ‘to the extent that it [was] necessary to fulfil the purpose of the commissioning agreement’. Transfers needed to be in writing (art. 110) and transfer of future copyright was allowed under certain conditions. Economic rights (reproduction, communication to the public, etc.) were provided for in articles 12–19 and moral rights in articles 20–24. There was infringement even if there were small differences between the work and the infringing copy. What was important was that the essential creative characteristics of the first work were recognisable in the subsequent work and the judge did not have to examine the quality and quantity of all the differences and similarities. A few exceptions and limitations were provided in articles 65–71. The term of protection was fifty years p.m.a. (art. 25).

As in the previous Design Act, article 1 of the new Design Act of 25/8/1940, n. 1411, provided that the Patent Act of 29/6/1939, n. 1127, applied to ornamental designs, except for the provisions expressly stated in the Design Act. Article 5 of the Design Act stated that ‘can be registered as ornamental designs and models the new models and designs which can give, to industrial products, a special ornament, either by the shape or the combination of lines, colours or other elements. The provisions of the Copyright Act are not applicable to such designs and models.’ The second paragraph of article 5 did not mean that the protection of the Copyright Act and the Design Act could not be cumulated. There could be cumulation if the provisions of the two Acts were fulfilled. In other words, it meant that the provisions of the Copyright Act could not

47 Cass., 29/4–29/7/1957, Ditta Fontanini v. Giardini, D. Aut., 1958, p. 72 (if a work is created by several persons, all of them must have contributed to the characteristics of the indistinguishability and inseparability which are required by law in order to have copyright protection).

48 Suthersanen, Design Law in Europe, p. 214. Contra: Pavanello, ‘The protection of industrial design under Italian law’, p. 165; the majority opinion was that economic rights belonged to the employer, at least those rights that the parties intended to transfer, citing Trib. Milan, 22/5/1972 (1972) D. Aut. 315.


apply to registered designs but only the Design Act’s provisions could; in other words, copyright protection did not apply to objects actually registered as ornamental designs or models. Designs had to be new, have industrial application and be lawful. Again, the Act did not define novelty and the literature and courts carried on requiring the twin concepts of intrinsic and extrinsic novelty. Intrinsic novelty now meant more precisely a new creative contribution which gives the object a special ‘ornament’, i.e. an autonomous aesthetic or decorative value by the shape, a particular combination of lines, colours or other elements. Thus a new form (fulfilling the requirement of extrinsic novelty) could not be protected if anyone could create it without individual creative effort (intrinsic novelty). For the majority of commentators, novelty was relative, unlike in patent law.


The requirement of industrial application of the design or model is the one referred to in article 12 of the Patent Act 1939. For Fabiani, ‘Problemi di protezione del design industriale’, pp. 277–8, industrial application is not a reproducibility of the design or model as pure aesthetic creation but the adaptability of the model to the product object of industrial use, with the aim to confer to it a ‘special’ ornamental character. For Suthersanen, Design Law in Europe, p. 221, industrial applicability means reproduction by mechanical means and also adapting the design to an industrial product for decorative purposes. For G. Guglielmetti, Le invenzioni e modelli industriali dopo la riforma del 1979 (Turin: Utet, 1982), p. 191, industriality is implied in the destination of the industrial products.

Pavanello, ‘The protection of industrial design under Italian law’, p. 165; Fabiani, Modelli e Design Industriali, p. 61 (only the external aspect of the object is subject to the morality requirement).

For an application, see Trib. Brescia, 25/3/1954, Santini v. Polloni, Riv. Prop. Int. ed Indus., 1955, 131 (is void for lack of intrinsic novelty the design which is divulged to third parties before application. A typical case of divulgation is the sale of object to an undetermined number of people).

See Fabiani, Modelli e Design Industriali, p. 55 and E. Bonasi Benucci, ‘Forma del prodotto e sua tutela’ (1958) Riv. Dir. Industriale 426, at 428. For an application, see Trib. Milan, 6/10/1955, Ditta Mario Giamperi v. Fratelli Mariani S.p.a., Riv. Prop. Int. ed Indus., 1955, 253 (simple objective novelty, i.e. a differentiation from what existed before, is not sufficient to have a valid ornamental design or model. One needs the expression of a new ornamental idea, the existence of elements capable to give, to those who cultivate aesthetics in the field of the objects in question, the sensation of a new aesthetic). There were two trends in the courts’ interpretation of this criterion, one quite strict and the other more liberal: for decisions, see Guglielmetti, Le invenzioni e modelli industriali dopo la riforma del 1979, p. 190 and note 19.

considered abstractly.59 So there was extrinsic novelty when there was a figurative expression which, even if the elements or a combination of these were already known or already applied to other products, met an aesthetic result ulterior and different in the field of the activity considered.60 There was also no need to show high level of artistry or artistic merit.61

According to article 7 of the Design Act, the exclusive right belonged to the author of the new design or its assignees. Unless otherwise provided in a contract, those designs which were made by employees in the course of their employment belonged to the employer (art. 7(2)). The designer had the right to be recognised as the author of the design and have his or her name written in the register of patents. Commissioned designs belonged to the commissioneer but the delivery transferred the ownership of the commissioner.62 Co-authors, i.e. persons who contribute to the creativity, could be co-owners.63 The rights of the design right holder could be transferred between living persons for free or for a price, or inherited. The transfer of the design right could be limited in time or object and licences were possible.64 Transfers had to be done in writing, notarised and registered at the intellectual property office.65 The right holder had the exclusive right to use the design as in the Patent Act.66 There was infringement if the whole or substantial part of design was used in a commercial context. The test was that of overall impression.67 Reproduction or importation of the design for personal use was free.68 The term of protection was four years from filing (art. 9). If a design was not worked within a year of grant, the right was null (art. 13).69

61 Suthersanen, *Design Law in Europe*, p. 221.
63 Ibid., pp. 90; Suthersanen, *Design Law in Europe*, p. 222.
64 Suthersanen, *Design Law in Europe*, p. 222. 65 Ibid., p. 219.
In short, nothing much changed compared to the previous Act apart from the provisions about commissioned designs, the infringement test was overall impression, the reproduction or importation for personal use was not an infringement and the term was doubled (four instead of two years).

The transition was therefore a very smooth one compared to the previous period. The vast majority of both courts and literature carried on applying the separability doctrine, clarifying that it was to be understood not in a material, mechanical sense but in a conceptual, ideal sense.\(^{70}\)

However, this ideal separability was understood in two different ways by courts and commentators. For some commentators, a creation was protectable by copyright if it could be reproduced on media different from the product to which it is originally associated (Auteri), i.e. when one can assume the artistic value even if executed on or with materials other than that of the industrial product (Greco-Vercellone). According to the second interpretation, an object was separable ideally when it could be enjoyed as pure aesthetic fact, e.g. as when one contemplates an exhibition, independently from its use in the practical function to which it is destined (Sena). This interpretation meant a higher artistic level of the object instead or in addition to separability.

Whilst the courts embraced the ideal separability concept, it is not always easy to determine which of the two interpretations they adopt as they use ambivalent language. If a court follows the first interpretation, there is never protection by copyright because the object of industrial design is the fusion of the aesthetic with the functional and thus can only be the shape of this object and cannot be thought of in relation to a different object. On the other hand, quasi all two-dimensional designs are protected under this first interpretation. If one follows the second interpretation, industrial design will not normally be protected by copyright but will be only in the rare hypotheses of objects particularly successfully designed.

72 For Auteri, 'Industrial design', in Dizionari di diritto privato a cura d'Irti, vol. 11, in U. Carnevali, Diritto Commerciale e Industriale (Milan (s.d. ma), 1985), p. 588, ideal separability means that it is not necessary that the work can be removed materially from the product but it is sufficient that the creation can be reproduced on different media than the product to which it is originally associated.
74 Bergomi, ‘Industrial design’, p. 971.
75 Ibid., who prefers the first interpretation because the second makes a value judgment and this is dangerous.
That said, the end result of the application of the doctrine was that a lot of worthy three-dimensional works of applied art, most famously furniture designed by Le Corbusier and other well-known designers, ended

\[\text{Figure 8.1 The so-called lamp ‘Nesso’ produced by Artemide and designed by Giancarlo Mattioli}\]

...
This meant the courts favoured the first interpretation of the doctrine, i.e. artistic merit or value was not up unprotected by copyright law.\textsuperscript{79} This meant the courts favoured the first interpretation of the doctrine, i.e. artistic merit or value was not up unprotected by copyright law.\textsuperscript{79} This meant the courts favoured the first interpretation of the doctrine, i.e. artistic merit or value was not up unprotected by copyright law.\textsuperscript{79} This meant the courts favoured the first interpretation of the doctrine, i.e. artistic merit or value was not up unprotected by copyright law.\textsuperscript{79} This meant the courts favoured the first interpretation of the doctrine, i.e. artistic merit or value was not up unprotected by copyright law.\textsuperscript{79} This meant the courts favoured the first interpretation of the doctrine, i.e. artistic merit or value was not up unprotected by copyright law.\textsuperscript{79} This meant the courts 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\textsuperscript{79} See e.g. Auteri, ‘Industrial design’, p. 582.

\footnotesize

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{wassily_chair}
\caption{Marcel Breuer’s Wassily chair}
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required. On the other hand, paradoxically, two-dimensional works of little value were protected, something the Act had in fact tried to avoid. It was, on the other hand, clear in the case law that the number of copies was an irrelevant criterion, as well as the criterion of aim or destination, even if it was favoured by some commentators. In conclusion, for both the case law and literature, Italy was in a state of partial cumulation.

Then, in the 1990s, the courts embraced an even stricter interpretation of the separability doctrine, based on an article written by another judge of the Court of Cassation, and also expert in copyright law, Paolo Vercellone. Already in 1956, Vercellone advocated ‘excluding from copyright protection those three-dimensional works of applied art which, if reproduced on a different substance or embodied in another object, would lose their aesthetic value, since they could be conceived as merely an aesthetic quality of a certain industrial product.’ This did not mean that sculptural works were excluded but only useful articles. Only sculptures applied to articles could have received copyright protection, not works reflecting designs and modelling activities (for example, the sculpture of the “flying lady” applied to the hood of Rolls Royce automobiles would be copyrightable but not the design – however aesthetically motivated or pleasing – of the car itself).

This trend started with a 1990 decision of the Court of Cassation, which held that copyright does not apply to those three-dimensional forms which cannot be other than the form of a certain product, e.g. a fork, a television set, a bag, a shoe. The Court added that some


84 Bonasi Benucci, ‘Forma del prodotto e sua tutela’, at 430, 446–8.


two-dimensional designs are also excluded because they are not separable, e.g. typographical characters, symbols on a watch or clock and railings, while other two-dimensional designs are separable, such as combinations of lines and colours for scarves, ties and cloth for dresses. It also held that it was clear that the legislator of 1941 rejected all the other criteria except that of separability and that one cannot try to circumvent the separability criterion by trying to classify the work in another category (e.g. work of architecture or an atypical category of work of industrial art) in order to have copyright protection.

Many commentators were still unsatisfied with the new Design Act, for the duration of the right was still too short, the procedure too complex and the fees too high. While many commentators were happy with the separability criterion, and thought cumulation ought to be limited as too far as it would exclude all sculptures, which have no other function than decorative and are listed as copyright works in the Act. So it probably meant to include only functional objects.


much as possible, some proposed to use other, previous, theories to complement the separability criterion when it does not give satisfactory results, e.g. the function of the product, destination of the form, reproducibility by mechanical means, aesthetic prevalence, autonomous character of the work of art as opposed to the accessorial character that the design or model may have as regards the industrial product, and the absence, in the work of art, of utilitarian aims which would be characteristic of designs and models.

Some other commentators were against the separability doctrine because it is difficult and arbitrary to apply or plainly ‘wrong’, ‘illusory’ or ‘without sense’.

In conclusion, at the end of this long period, even if the criterion of separability did not find unanimous agreement, it worked rather well even if it excluded most three-dimensional works of applied art. Because of this, if restrictive, effect, the law was very predictable.
In 1996–7, there was a short period of about eight months during which Italy abolished the separability criterion. On 23/12/1996, Act n. 650 was adopted and its article 1(58) provided that ‘copyright on works of industrial design is comprised in the protection of the Act of 22/4/1941, n. 633’. ‘The exact limits, the procedure and the requirements for and manner of this protection were left to regulations that should have been issued by the Italian government.’

Supposedly, article 1(58) eliminated the separability criterion, thus reverting back to the first period of full cumulation. However, the norm was unclear and the literature disagreed on the meaning of the article. Act n. 650/1996 was abrogated just a few months later by Act n. 266 of 7/8/1997 and, between 1997 and 2001, the country reverted back to the situation in the third period described above in section 8.2.3.

Act n. 266/1997 also enacted in its article 27(2) a rule which said that ‘the duration of copyright protection for works of industrial design, under the 25/8/1940 Act n. 1411, cannot be superior to 15 years until the design directive is transposed’. Oddly, the provision did not specify the moment when the fifteen years had to be calculated. The provision was contrary to the EU Term Directive and it was also not clear whether article 27(2) of Act n. 266 abolished article 5(2) of the Design Act 1940 according to which the provisions of the Copyright Act were not applicable to industrial designs and models. Possibly, the provision meant to shorten the copyright term of protection of works of applied art to a maximum of fifteen years to coincide with the term of protection of designs under the new Design Directive but the commentators had different interpretations of the norm.

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98 Suthersanen, *Design Law in Europe*, p. 209; Pavanello, ‘The protection of industrial design under Italian law’, p. 153; Morri, ‘Le opere dell’industrial design tra diritto d’autore e tutela come modelli industriali: Deve cambiare tutto perché (quasi) nulla cambì’, pp. 193–4. Marzano, ‘An ill-designed protection for a well-designed product’, p. 199, however, thinks that ‘the plausible meaning of this provision was that of eliminating any distinction between the level of creativity requested for the protection of industrial design and that ordinarily required for other works of authorship’.
100 Ibid.
101 For a list of commentators and summary of their views, see Morri, ‘Le opere dell’industrial design tra diritto d’autore e tutela come modelli industriali: Deve cambiare tutto perché (quasi) nulla cambì’, p. 195.
8.2.5 Fifth Period: 1997–2001: Back to Partial Cumulation and Demarcation for 3D Functional Objects

During the fifth period, the 1941 Copyright Act and the 1940 Design Act still applied as well as the 1939 Patent Act. Apart from article 27 of Act n. 266/97 limiting the duration of works of applied art to fifteen years, the fifth period resembled the third in all points. Therefore, separability and demarcation for three-dimensional objects applied.

8.2.6 Sixth Period: 2001 to Present: ‘Artistic Value’ Test

An Act of 2 February 2001 implemented the Design Directive in Italy.\(^\text{102}\) For the rest, the copyright remained in the main unchanged in relation to the provisions relevant to works of applied art,\(^\text{103}\) and with the Design Directive having left almost no options to Member States, the legal picture is the same as in other Member States.

Article 22 of the Act implementing the Design Directive amended article 2(4) of the 1941 Copyright Act by removing the requirement for separability and adding to the categories of protected works, as a new point 10: ‘industrial designs which possess in themselves creative character and artistic value’.\(^\text{104}\) Separability is therefore a thing of the past. However, the double criteria of creative character and artistic value have been interpreted in various ways by courts.\(^\text{105}\) Some courts have clearly stated these two requirements were different, others merged them into a single criterion and in any case gave either or both very different meanings. Most recently, many courts have interpreted the criterion of artistic value as ‘the judgment of history’; in other words, art experts and

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\(^\text{103}\) One exception is that, unless agreed otherwise, the economic rights on works of industrial design created by employees during the course of their employment belong to the employer (art. 12 ter. of the 1941 Copyright Act as amended). Following the adoption of the InfoSoc directive, Act n. 68 of 9 April 2003 also implemented in Italian law more exceptions and re-worded the rights of reproduction, communication to the public and distribution.

\(^\text{104}\) Article 2.10's ambiguous wording ('in themselves' and 'artistic value') does not mean that the criterion of separability has been reintroduced. See A. Musso, Diritto di autore sulle opere dell’ingegno letterarie e artistiche (Bologna: Zanichelli), p. 80; P. Marchetti and L. Ubertazzi, Commentario breve alle leggi su proprietà intellettuale e concorrenza, 4th edn (Padova: Cedam, 2007), p. 345.

museums decide which works of applied art are protectable. Much litigation on designs has been fought in this last period with varied results, best illustrated by the continuation, post implementation of the Design Directive, of the Le Corbusier chair saga started in the 1980s and concluded in the mid-1990s. The resulting situation on the copyright/design interface in Italy during that period was therefore one of high legal uncertainty, owing to the different criteria the courts use to determine if a work of applied art can enjoy copyright protection.

However, in 2015, the Supreme Court endorsed the ‘judgment of history’ criterion and clarified that the two criteria of creative character and artistic value are separate. The first means a ‘personal and individual expression’. As to the second, the court first uttered that the criterion cannot be defined exhaustively but a series of objective and subjective parameters can be listed. The subjective parameters, such as the taste, artistic sensibility, aesthetic sense, etc. of the person who considers the work, must be corroborated with objective parameters, the most relevant of which is the recognition, by the relevant cultural institutions, of the value of the design and which transcends functionality and mere elegance. This parameter can be evidenced by the exhibition of the design in museums, prizes, publication in non-commercial specialist reviews, etc. This decision ends the period of uncertainty. That said, the ‘judgment of history’ criterion is problematic as it decides what is protectable ex post and is discriminatory against young, upcoming designers. The court recognised the problem and said that the criterion is not an absolute one and each case has to be decided on a case-by-case basis.

8.3 Analysis

In this final section, we draw conclusions as to the efficiency of the law in the different periods and the reasons for changing it. We also evaluate whether one type of system (full cumulation, partial cumulation or demarcation) is better on the basis of the Italian experience, also drawing from Italian economic and design history.

The Italian history of the copyright/design interface prior to the Design Directive in practice boils down to two periods: one of full cumulation...
and one of partial cumulation with demarcation for 3D functional objects. Over a century and a half, a system of all or nothing shifted between two extremes. The first period spanning sixty years from 1865 to 1925 was definitely a disaster in terms of design protection – since the Act’s term of protection was so short, there was an extremely low number of designs registered. What can be said, though, is that in the only reported decision on a registered design, the court held it was unprotected. Copyright therefore filled the gap, but since there was so little litigation, it is hard to say whether full cumulation was a satisfactory system. However, in theory, provided a design was original and new, there could be an overlap and there could have been some regime clashes.

While the Patent Act provided for the right to belong to the employer if the employee created the design during the course of his duties, the Copyright Act was silent, so a clash could have occurred if the courts had interpreted the Copyright Act the opposite way. The same could have happened if the courts had interpreted the infringement conditions differently or created different exceptions.

Italian economic and design history for this period and up to the Second World War is a probable additional cause for the small amount of litigation. Italy had a very late industrial revolution. Society was mainly rural and there was very low industrialisation until the 1890s and very little mass production until after the Second World War, so Italian design boomed only thereafter. It must have meant that it was hard to manufacture copies of 3D products at least. In addition, as there was very little export, Italian design must have been barely known abroad, and thus it must have been rare for cheap knock-off copies made abroad to flood the Italian market. Most probably, the combination of a short design protection making knock-off copies less interesting to make as the cost of the original must have gone down anyway after the two or four years of protection had lapsed, and the economic structure in the design industries (a vast majority of small family-owned workshops), must have made it useless to litigate: most designers had no money nor time to sue, while the time that litigation takes would have been working against them.

From 1925 to 2001 (not counting the few months in the mid-1990s where full cumulation arguably resumed during which in any case there was hardly any relevant case law), there were more decisions but the vast majority of the 3D objects were declared unprotected by copyright while the vast majority of 2D designs were declared protectable. On the other hand, design protection was still very short – four years until 1977 – and

hardly litigated upon, probably for that very reason. For the period from around 1940 to 1977, one of the factors from the previous period, i.e. in the vast majority, a structure made of very small companies, can also explain the relatively low registered design application and litigation level. In addition, the fact that much design was highly or solely functional may also explain why there was no protection by either copyright or design and thus virtually no litigation on registered design right. Instead, the aura and quality of the design that justified high prices which helped recoup costs, and/or the patronage that designers benefited from, probably meant there was no need for design protection or no need to sue if there was. Also, the mid-1970s were years of profound insecurity in Italy – economically, socially and culturally. Indeed, design applications went down a lot in 1973–5 (there is no data for 1976–7), then go up hugely in 1978–9 (9,464 in 1978 and 8,172 in 1979 from 2,984 in 1975, ca. triple) because by the mid-1970s the economic slump was over but most probably also because of the increase in the duration of registered design protection from four to fifteen years with the 1977 Act. Thereafter and until the 1990s, the economic structure remained rather similar (majority of small firms in the field of design) and high quality design still sold well abroad. From then on, it seems that fluctuations in applications vary with economic slumps. Applications go down a lot in 1981–3, are back up between 1984 and 1986, then down again in 1987–9 and the early 1990s. They shoot off in 1998 until 2002, most likely because of the adoption of the Design Directive (this effect is also seen for many other Member States). Then applications go down dramatically from 2003. (A probable cause is the entry into force of the Community Design System; this effect is also seen in other Member States.) Applications then more or less stabilise between 2008 and 2014.

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110 P. Sparke, Design in Italy, 1870 to the Present, p. 92 and p. 165 respectively. (In 1947, 90 per cent of Italian firms employed only five people and fewer, and in 1971, 81.8 per cent of manufacturing firms had fewer than five workers.)

111 Ibid., pp. 112–13, 176. For instance, the brothers Castiglioni made lamps whose appearance was dictated solely by their technological and utilitarian constraints, e.g. the Tubino lamp which stood up by twisting its tubular structure (1951). Another example by the brothers is the Luminator consisting of a stand with three feet, a column and a light bulb (1955). Another example is Colombini’s plastic dustbin manufactured by Kartell in 1955. See ibid., pp. 121 and 128–9.

112 Ibid., p. 116.
113 Ibid., p. 195.

114 Ibid., p. 205. In Italy in 1980–3, there was a slump in domestic demand and exports, with a small recovery in 1983.

115 For the detailed statistics, see graph in the Annex in the last chapter. Interestingly, the financial crisis does not seem to have had a big effect; a probable reason may be the banks’ bail out.
on steadily. Litigation on the registered design also picked up after the implementation of the Design Directive.\footnote{See Derclaye (above, note 105) (at least around twenty reported cases between 2001 and 2009 in the – broadly defined – area of fashion design).} It could well be because the separability doctrine disappeared leading, among others, to a renewed interest in copyright protection by firms holding rights on iconic designs, as the Le Corbusier recent saga suggests. Of course, empirical analysis must be carried out to verify these suggestions but we have already highlighted a number of important factors which will enable us to start such analysis.

As to why the Italian legislature modified the law on the copyright/design interface in 1941, it was a very particular situation as it was only down to a single man and his special influence as member of the Supreme Court and senator rapporteur of the 1941 Copyright Bill.\footnote{Thanks to Prof. Ricolfi for confirming this and adding that Piola Caselli had a lot of personal prestige.} Of course, Piola Caselli also managed to convince other judges, commentators and members of Parliament and that must have helped. The separability test also had a very long life and the question to be asked at this juncture is whether the separability criterion worked well. It seemed like it did as, in the end, its application by the vast majority of courts was quite consistent and simply boiled down to the exclusion of functional three-dimensional objects and a few functional two-dimensional ones (such as those mentioned as examples by the Court of Cassation in its 1990 decision, e.g. typographical characters, symbols on a watch). Because of its relatively straightforward interpretation, it was rather simple to use, much less arbitrary than some commentators had criticised and certainly better than the current criterion of artistic value, which definitely is arbitrary as it leaves the art experts as judges of the copyrightability of works of applied art. This demarcation for 3D objects helped avoid overlap problems down the line since only one type of protection could apply, that of the Design Act or that of the Copyright Act. In effect, it was impossible to find any decision where an overlap problem arose. This did not mean that overlap problems did not exist in practice but the lack of decisions at least shows that the iceberg was probably very small. The lack of lobbying to change the criterion over such a long period of time shows that the design industry was not so unhappy with the test as to push for reform.\footnote{M. Ricolfi also shares this view.} On the other hand, the design industry was unhappy with the 1868 and 1940 Design Acts, especially the term of protection, but, despite numerous attempts, did not have enough clout to effect a legal change until the 1977
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Act, which lengthened the duration of the design right, and then until the Design Directive, which gave Italy a ‘proper’, in the sense of efficient and full-blown, design law. This may mean that design creation (at least for 3D products) was not really affected by the Design Act’s poor protection and even possibly in some cases was incentivised by it.\textsuperscript{119} A number of factors helped Italian design to thrive including quality, patronage and incessant innovation.\textsuperscript{120} Indeed, this constant innovation may well have been caused by the short period of protection especially for designs affected by fashion effects and thus quickly became outdated.

In summary, the separability criterion was a success in terms of its ease of application and relatively strong legal certainty. It seems, therefore, simply on the basis of the Italian experience (for a complete analysis examining all systems, see Chapter 12), that a system based on conceptual separability (understood in the first interpretation explained in section 8.2.3) would work well. However, it would need to be coupled with a reasonably long registered design protection so that 3D designs, and the remainder of uncopyrightable 2D designs, are adequately protected. This is the case now with the Design Directive. As to whether a system of full cumulation would work, it is not possible to say on the basis of the Italian experience as it did not really exist because of the extremely short (two years) period of protection for designs during 1868 and 1925 which led to very low numbers of registered designs and consequently scarce case law. Both the copyright and design laws were also rather sketchy or non-existent on certain points, so it was unclear whether regime clashes could have occurred. Under a full cumulation system, however, legal certainty is also high as it is clear that each design or work of applied art is protected both by the Design and the Copyright Acts if it meets all conditions, provided such conditions are clear. But a full cumulation system can only work if the rules are well aligned so as to avoid regime clashes and overprotection.\textsuperscript{121} As the law stands in most EU countries, there is at present a high potentiality of regime clashes, mainly owing to the different tests of infringement and exceptions in copyright and design law. In conclusion, both systems

\textsuperscript{119} See e.g. P. Belleflamme, www.ipdigit.eu/2010/09/what-is-the-link-between-competition-and-innovation, pointing out that establishing the link between competition and innovation is complex and depends on many economic relationships that vary across market environments. Many empirical research findings thus have found contradicting results on this issue.

\textsuperscript{120} On such innovation, see Sparke, Design in Italy, 1870 to the Present, pp. 165, 195, 205.

could therefore work but giving very different results – with full cumulation, double protection creates very strong and long protection for all designs, while under a system of partial cumulation with demarcation for 3D designs, the protection is weaker as it is generally unique (i.e. via design law only) and shorter. The vast majority of 2D designs, on the other hand, are almost always separable, and therefore benefit from both copyright and design protection if they fulfil both laws’ protection requirements. Thus full cumulation and the separability doctrine lead to identical results for most 2D designs.
12 A Model Copyright/Design Interface: Not an Impossible and Undesirable Task?

*Estelle Derclaye*

12.1 Introduction and Preliminary Thoughts

This final chapter draws from all the chapters in an attempt to determine the most adequate rules to regulate the interface between copyright and design protection. The main standard to determine such rules is a balanced protection, namely avoiding both under- and over-protection. To achieve such balanced protection, criteria to regulate the interface used in the countries reviewed are evaluated, and simplicity and efficiency of the system for both designers and users are also important criteria which guide the chapter. The chapter starts with a historical account of the efforts made both at international and EU level to regulate the interface (12.2). It then compares the experiences of the countries reviewed in this volume over the years to discover similarities, differences and trends (12.3). The chapter carries on by assessing the adequacy of the possible models and criteria to organise the interface (12.4). It then compares the experiences of the countries reviewed in this volume over the years to discover similarities, differences and trends (12.3 and Annex at 12.7). The chapter carries on by assessing the adequacy of the possible models and criteria to organise the interface (12.4) and finishes by proposing a model copyright/design interface (12.5–12.6).

The first thing to discuss before embarking on this chapter is if it makes sense or is desirable to find a model for the copyright/design interface. Two arguments can be made against finding such a model. The first argument is whether harmonisation is always by definition a good thing.1 This first

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argument is further divided in two. First, harmonisation is contestable because there is not always one good way of doing something but several equally good ways; and, secondly, it prevents the possibility of testing different laws – several countries toying with different laws can act as laboratories, showing which laws work and which do not. In response to this second argument, one can say that this has already been done for the copyright/design interface for over a century. So many different models have been used or, if not, discussed extensively that the interface has reached a level of maturity so that we know with a high degree of certainty which experiments work and which do not. As to the first argument, if several equally good models can work, there is no reason not to leave a choice to countries if such choice does not lead to negative effects including at international level, i.e. for the relations between countries’ industries and communities, creators and users.

The second argument is well known: it is that a single level of IP protection is not always suited for all of the world’s countries. This is not specific to design protection. Countries are at different stages of development, are IP importers or exporters and may need more or less IP protection. Provided all countries are at more or less the same level of development, and are net exporters of IP, and the vast majority of those reviewed in this book are, they can adopt the same IP laws. Provided every country eventually aspires to an elevated level of development, once they reach it, such a model can be adopted. In the meantime, articles 25 and 26 of the TRIPs Agreement (TRIPs) allows them to choose a minimal level of protection.

12.2 Historical Lessons from International Efforts

As the national chapters of this book show, there were and still are wide divergences between countries in the way they deal with the interface, not only between the countries but also during different periods in each individual country. This was, and still is, at the origin of the difficulty in attempting to reach a solution to the interface in international conventions.

12.2.1 International Efforts

12.2.1.1 Sui Generis Design Right

International efforts on a sui generis right for designs were launched by the Association Litteraire et Artistique Internationale (ALAI) in 1956. In 1958, Kingsbury, ‘International harmonisation of designs law’, 385: ‘The concept that there exists a single solution to designs protection that would be optimal across all jurisdictions is itself highly challengeable. What constitutes an appropriate designs regime will vary considerably across jurisdictions, depending on factors including level of development, indigenous design requirements, competition and tax regimes, and trade policy.’ And ibid., 395.

The 1956 ALAI congress took a unanimous resolution stating that there should be a study at international level on the topic between the international organisations. See 7th edn
the three unions (Berne, Paris and Geneva) agreed to form a group of experts tasked to find a solution for the protection of designs at international level. In 1959, experts from twenty-one countries agreed that a *sui generis* right was necessary but did not agree on how the interface with copyright law would work, thus leaving countries to choose between cumulation and demarcation. They also thought that cumulation would not pose many problems. The group discussed subject-matter, protection requirements and formalities, but reached no agreement on those. They only agreed on minimal aspects, mainly duration (minimum ten years) and prohibition of exact reproduction. Meanwhile, the question of a *sui generis* right for designs was debated at the 1960 congress of the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI) and again in 1964 with a text unanimously adopted at the AIPPI Tokyo congress in 1966. This text in short states that: the object of protection of a design right is appearance and it can be two-dimensional (2D) and three-dimensional (3D); cumulation is possible but not mandatory; and if a design or model shows no creative effort or if it is exclusively dictated by a technical necessity, registration can be refused. The designs and models must be deposited to be protected and there can be secrecy for one year. Protection is for a minimum of ten years and is against exact reproduction and imitation. The experts again did not think cumulation would create many difficulties. Incidentally, the text closely resembles that of TRIPs adopted thirty years later, showing no further progress to reach

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the three unions (Berne, Paris and Geneva) agreed to form a group of experts tasked to find a solution for the protection of designs at international level. In 1959, experts from twenty-one countries agreed that a *sui generis* right was necessary but did not agree on how the interface with copyright law would work, thus leaving countries to choose between cumulation and demarcation. They also thought that cumulation would not pose many problems. The group discussed subject-matter, protection requirements and formalities, but reached no agreement on those. They only agreed on minimal aspects, mainly duration (minimum ten years) and prohibition of exact reproduction. Meanwhile, the question of a *sui generis* right for designs was debated at the 1960 congress of the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI) and again in 1964 with a text unanimously adopted at the AIPPI Tokyo congress in 1966. This text in short states that: the object of protection of a design right is appearance and it can be two-dimensional (2D) and three-dimensional (3D); cumulation is possible but not mandatory; and if a design or model shows no creative effort or if it is exclusively dictated by a technical necessity, registration can be refused. The designs and models must be deposited to be protected and there can be secrecy for one year. Protection is for a minimum of ten years and is against exact reproduction and imitation. The experts again did not think cumulation would create many difficulties. Incidentally, the text closely resembles that of TRIPs adopted thirty years later, showing no further progress to reach

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agreement on more details at international level. While it does not appear in the text, the experts generally preferred relative to absolute novelty.\footnote{Pérot-Morel, \textit{Les Principes de Protection des Dessins et Modèles dans les Pays du Marché Commun}, p. 302. Ladas, \textit{Patents, Trademarks and Related Rights}, p. 832 also reporting that the patent approach for designs was criticised for its stringent criteria including absolute novelty.} BIRPI and WIPO also came up with a model design law in 1970.\footnote{BIRPI and WIPO, \textit{Model Law for Developing Countries on Industrial Designs}, Geneva, 1970. See Ladas, \textit{Patents, Trademarks and Related Rights}, p. 871; Reichman, ‘Design protection in domestic and foreign copyright law’, 1143 at 1165; Ricketson and Ginsburg, \textit{International Copyright and Neighbouring Rights}, p. 469.} Lastly, the latest AIPPI resolution on the interface advocates cumulation, and a very broad one at that, but without many more details (in short the scope of copyright for industrial products should not be different from that for other copyright works, and designs solely dictated by technical function can be excluded).\footnote{See Resolution on question 231, Seoul Congress, 2012, available at http://aippi.org/wp-content/uploads/committees/231/RS231English.pdf.}

However, even if there is a WIPO model law, it is optional and the design protection as enshrined at international level in TRIPs is extremely flexible and thus could lead countries to adopt the ‘right type’ of \textit{sui generis} design protection which, if coupled with the ‘wrong type’ of copyright protection,\footnote{Or vice versa: the ‘wrong type’ of design protection with the ‘right type’ of copyright protection. For more on this, see below, sections 12.3–12.5.} will not produce the desired effects.

12.2.1.2 Copyright Protection of Designs
Copyright protection of designs has encountered even slower and more meagre progress and this since the nineteenth century and both at international and regional level.

Since the beginning, the issue was a thorny one as there were great differences in how to approach the protection of works of applied art between Berne members, mainly between France on one hand and Italy, the UK and Japan on the other. The question was not raised until the revision of the Berne Convention in 1908, and only one article applying national treatment to works of art was adopted. However, this led to a serious imbalance since nationals of countries applying unity of art or full cumulation would not be protected in countries with a demarcation system and vice versa. Therefore, some countries gave reservations on this article so they could escape this imbalance.\footnote{Ricketson and Ginsburg, \textit{International Copyright and Neighbouring Rights}, pp. 456–7.} During the Rome revision in 1928, countries could not find a compromise and thus nothing changed.\footnote{Ibid., pp. 458–60.} A solution by way of articles 2(7) and 7(4) was found in Brussels in 1948 albeit with difficulty\footnote{M. Oppenheimer, 12th report, ‘Dessins et modèles d’art appliqué’, ALAI (ed.), \textit{Travaux de la réunion d’Amsterdam}, 1956, p. 149 at 151.} and
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remained unchanged until the last revision in 1971. Because no solution was found to entirely resolve the problem, countries’ choice was limited to embarking on bilateral negotiations.

ALAI did work in parallel. ALAI was always in favour of copyright protection for works of applied art even in the presence of a *sui generis* design right. Over the course of twenty-seven years, from 1956 to 1983, ALAI accumulated the declarations and resolutions, in the main repeating its attachment to a copyright protection of works of applied art, even if a *sui generis* design right is adopted. However, while ALAI was in favour of cumulation, it did not specify its form (partial or full).

12.2.2 EU Efforts

EU design law is the most harmonised regional design regime in the world. It is an amazing feat since it saw the light of day from a wild patchwork of design laws and some countries had no design law at all

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21 Ibid., referring to the 1957 ALAI declaration to keep copyright even if a special protection of designs is adopted at international level; at the Munich congress of 1963, ALAI adopted a resolution on the interface and constituted a study commission on works of applied art but then not much followed. See Pétor-Morel, *Les Principes de Protection des Dessins et Modèles dans les Pays du Marché Commun*, p. 307; in 1965 ALAI was in favour of cumulation: see Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt communautaire en matière de dessins et modèles industriels’, 67–9; H. Cohen Jehoram, ‘Protection of industrial design, between copyright and design laws: A comparative study’, ALAI (ed.), *Travaux de la Réunion de la Mer Egée*, 1983, p. 77 at 125 referring to the 1983 resolution declaring the same.
While EU design law is highly harmonised and has had tremendous success, it nevertheless left the copyright/design interface untouched. The work at EU level started as early as 1960 with a committee formed of staff in charge of IP services in the different Member States of the then European Community and a report on the work of this committee written by Professor Roscioni. However, there was no follow-up, probably because the issue was not yet ripe. Then the Max Planck Institute for Intellectual Property Law drafted a model design law which was presented at a symposium in 1990. Another model law was also drafted by an international group of experts in connection with a seminar about design law held in 1988 in Treviso and was close to the Max Planck draft. The European Commission’s proposal for a legal protection of design was similar to the Max Planck draft in most part and the said draft is also quite close to the text of the Directive and Regulation. However, again the Max Planck draft left the copyright/design interface untouched. The drafters thought that the Member States’ copyright laws on the topic were too hard to reconcile, with which I can certainly agree. But they also

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27 The system is described in ‘Towards a European design law’, 5 and 6. In short, it adopts a design approach because the patent approach is suitable for big business but not SMEs and this is the category that needs an efficient protection of design the most. It is a two-tier system, i.e. a short (two-year) unregistered right along with a registered right. The right had a grace period, duration for an initial five years renewable up to twenty-five years, and had a criterion of relative novelty and distinctiveness. Years before, many experts also were in favour of relative novelty and a grace period: see e.g. Cohen Jehoram, ‘Protection of industrial design, between copyright and design laws: A comparative study’, 106 and 114, reporting interventions by Pérot-Morel and Mout-Bouwman.

thought that their proposed design system, which included an unregistered design right, would reduce the problem of the interface to nought. Hence it did not have to be resolved. Cumulation would exist in theory but not in practice. The Commission also wanted to leave copyright untouched and thought the need for copyright would diminish because of the Community registered and unregistered design rights. So both the Max Planck drafters and the Commission were rather naïve because it is clear – and this will be discussed in detail below – that if the copyright’s level of originality is low, even if the design law is attractive, many designers will not use it since there is no need to register or, if designers register, their two rights will cumulate and they will obtain double protection, because of an unresolved interface.

In conclusion, all twenty-eight Member States now have almost identical substantive national registered design laws and, in addition, every designer can benefit from the Community unregistered design right (UCD) and Community registered design right (RCD). It is undoubtedly a major advancement compared to the period before 1998 and, indirectly, a major achievement in relation to the interface, as a well-functioning and balanced design system is crucial to a well-functioning interface, as we shall see in section 12.3. However, like at international level, the copyright/design interface was left unregulated at EU level (in article 17 Design Directive and article 96(2) Design Regulation32), leading most Member States to keep their systems of full cumulation, partial cumulation or demarcation. Only one thing is clear: that following the CJEU decision in *Flos*, the term of copyright protection for works of applied art may not be shorter than the full term, i.e. seventy years p.m.a., and this despite the relatively clear or at least very broad language of article 17 Design Directive. What is less clear following the same decision is

29 Ibid., 5: ‘the problem of the relation between design law and copyright law that has led to enormous difficulties in all countries, is to be mitigated by offering an efficient design protection so that the need for an additional protection will be confined to exceptional cases’; and at 55: draft provisions ‘will render it unnecessary for designers to have much resort to copyright law’.
32 Article 17 reads: ‘A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.’ Article 96(2) reads: ‘A design protected by a Community design shall also be eligible for protection under the law of copyright of Member States as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.’
whether the level of originality for all designs (registered and unregistered) is harmonised.34

12.3 Comparing National Experiences: Similarities, Differences and Trends

The foremost and strongest commonality in the countries’ experiences is that a badly designed design law is not going to help the interface. This is because if the system is one of full or partial cumulation with a high level of originality in the copyright Act and a patent approach in the design Act, i.e. a strict registered design system, inevitably, designers use the more protective unfair competition law (if it exists) and/or copyright law, convincing courts to lower the originality level to compensate the inadequate registered design protection. The pendulum then switches from under-protection to over-protection.35 This happened in France, the Benelux, the Nordic countries and the USA at various moments of their history. An adequate level of design protection is fixed now in the EU at least36 so that such issue is resolved at EU level.

Two other very strong commonalities emerge from the statistics on the number of design applications and, to a lesser extent, design registrations.37 Granted, it is hard to measure the effects of a piece of legislation.38 In the case of designs, there are many other factors which can affect design applications such as industrial ones (sectoral composition, shorter product lifecycles, industry structure, awareness and knowledge of design rights), legal ones (legal traditions, legal strength of unregistered rights, wide or narrow range of IPR options, enforcement regimes, diffuse qualification, existence and efficacy of competing private databases, rise of open source collaborations) and administrative ones (simplicity and ease of application procedure and registration cost).39 And there may be others such as the abolition of copyright formalities making copyright more attractive than

34 Ibid., para. 34. Arguably only unregistered designs must abide by the level imposed by Infopaq and its progeny. L. Bently, ‘The return of industrial copyright?’ (2012) EIPR 654 at 660ff. See Chapter 3 (Greece) in this book where it is argued that the issue of originality has been fully harmonised on the basis of the CJEU’s case law.
36 It may be argued that a similar situation now exists in Australia as it has adopted a design law very similar to that of the EU except for the relatively short duration (ten years).
37 See the graphs and the consolidated country tables in the annex at the end of this chapter.
38 J. Schovsbo and S. Teilmann-Lock, ‘We wanted more Arne Jacobsen chairs but all we got was boxes – Experiences from the protection of designs in Scandinavia from 1970 till the directive’ (2016) IIC 418 at 426.
registered design right. Last but not least, the national and global economic history is also a strong determining factor.\textsuperscript{40} It is thus very difficult to analyse the statistics in a meaningful way, especially to determine the effect of a change in legislation or judicial trend, without embarking in proper statistical, empirical economic research. This is something which I will not do in this chapter but leave for future research.

That said, there are some cases where one can venture rather confidently to say that it is hard to see what factors other than the legislation could have influenced the statistics. This is the case for design applications. The first striking feature is the huge decrease in national applications in the EU Member States reviewed in this book\textsuperscript{41} and the commensurate enormous rise in EUIPO (former OHIM) applications from 2003 onwards, which corresponds with the introduction of the RCD. The Benelux is the most striking illustration in this respect: applications go from 3,649 in 2003 to a drastic and steady decrease down to 72 applications in 2014. This general trend may be explained by the relatively cheap fees, and easy and quick procedure, including the possibility of online filing at the EUIPO, considering the right is applicable in all the EU Member States.

When one compares the applications by residents and non-residents for the periods prior to and post design regulation, one sees that residents tend to carry on filing for national design rights in their country rather than RCDs while the non-residents tend to prefer filing RCDs. This may be explained by the fact that most non-residents are probably companies looking to protect specific export markets, whereas national applications are preferred by nationally based non-exporting businesses.\textsuperscript{42}

That said, some of these foreign companies may also prefer to file national designs rather than RCDs or in addition to RCDs to prevent a ‘central attack’. In any case, these statistics show the great success of the RCD.

The second striking feature is that whereas at first sight, generally, legislative changes do not seem to have affected design applications, there are some cases where it is hard to see what factors other than the legislation could have had an influence. As J. Schovsbo and S. Teilmann-Lock note about Denmark:

\textsuperscript{40} Strangely the BOP Consulting 2011 report does not mention this factor.
\textsuperscript{41} At least those reviewed in this book but the statistics show a very similar trend exists in the other EU Member States.
Clearly the shortage of litigation suggests that right holders did not consider registrations to be important enough to warrant the costs of litigation. Yet, the fact that parties did engage in registration and chose to incur the costs thereof indicate some level of impact of the system. Hence, registration practices may be a useful measure of the effects of the Act. At any rate user behaviour as evidenced by registration and litigation activity are markers of whether the Act did in fact produce the effects intended by the legislator.\footnote{Schovsbo and Teilmann-Lock, ‘We wanted more Arne Jacobsen chairs but all we got was boxes’ (2016) \textit{IIC} 418 at 426.}

The statistics show a similar effect as that described by J. Schovsbo and S. Teilmann-Lock in other countries. Italy had a very low level of applications until 1940 when the right’s duration was doubled to four years, with an increase then, and again a big surge in 1977 when the term was increased to fifteen years. Equally, there was very little litigation on registered designs until the implementation of the Design Directive in Italy. In Sweden, the design Act seems to have had a huge impact as applications shot from ca. 500 to ca. 3,500 in the space of one year (1971), stayed around that level until the introduction of the RCD and then decreased dramatically from 2003 onwards down to 437 in 2014. It makes sense as Sweden had a stricter level of originality for a much longer period than Denmark and there is a slight decrease in applications in the 1990s onwards when Sweden started to lower its copyright’s originality level. Another interesting example is Japan. For most of its history (1899 until today), the Japanese interface was the strictest of all countries reviewed in this book, with a high hurdle design law (visibility requirement, absolute novelty, principle of specialty and confusion as infringement test) as well as virtually no copyright protection for mass-reproducible 3D designs. Despite a slight decrease in applications since the 1990s, it seems that the Japanese legislation does not deter applications, which remain very high in Japan especially in comparison with other big economies such as the UK, France and Germany. A probable explanation is that designers have no choice but to register whether the design system is generous or strict because they cannot fall back on copyright or unfair competition law.

Nevertheless, it seems, unsurprisingly, as it is the case for each country examined, that the key driver for the level of design applications is not so much the law but the economic history\footnote{This includes the decline in manufacturing as is apparent in France, Germany and the UK after the Second World War, with a much bigger decline in the UK compared to France and Germany. See BOP Consulting 2011, ‘Design economics chapter four: Design rights, an international comparison’, 15–17. Other reasons why the UK could have fewer applications compared to France and Germany are: a weaker awareness of} of each country as well as global
economic history, especially world wars and world recessions. The most striking examples are Australia and Japan, which have known sustained economic booms; the continuous general upward trend of design applications for these countries seems to reflect this economic success. This is also shown, generally, in the amount of domestic applications over time compared to foreign ones. Also, generally, smaller markets receive fewer applications, so the Nordic countries, the Benelux and Greece have constantly lower numbers of applications than Germany, France, the UK and Japan. Italy is an outlier here as numbers never reach 10,000 and are more often, on average, between 4,000 and 6,000. The USA is an outlier too, as numbers only pick up and continuous grow at the end of the 1970s (before that the number of applications was between 5,000 and 10,000 maximum). Several factors, unrelated to change in the statutory law as such, explain this surge in design patent applications: (1) more favourable case law; (2) faster turn-around times at the USPTO; (3) the USPTO grants the vast majority of design applications; and (4) increase in the application and thus registrations for design patents on computer icons.

When one compares the number of applications with the number of registrations per country, the number of registrations is quite close to the number of applications even if obviously it is lower. This is because the procedural aspects in most countries are straightforward and examination formal, i.e. not substantive. Two interesting examples are the USA and Japan. In these two countries, the contrast between applications and registrations is far starker, owing to the substantive examination of design applications. At all times except between the 1970s and now, there is a huge difference between the number of applications and the design law among designers; less favourable procedural aspects such as no simplified procedure for short-term designs; no online filing; higher registration fees; higher enforcement costs and the courts’ less IP-friendly attitude; and one substantive law aspect, namely that unlike other countries, there is a national unregistered design right. See ibid., 17–34. The UK introduced online filing on 30 September 2015.

Yearly design application figures look roughly like this. In the Benelux, the peak was around 3,500. The Nordic countries have between 1,000 and 4,000 on average depending on country. Greece peaks at 2,000. By contrast, France, Germany and the UK post-war applications are generally around the 10,000 mark on average; Australia’s application numbers have always been growing, from zero to ca. 7,000 at present; Japan peaks at ca. 60,000 and has on average around 30,000 applications.

M. Leaffer, presentation at ALAI Congress, Rome, 15–16 September 2016. See also J. Reichman, ‘Design protection after the copyright act of 1976: A comparative view of the emerging interim models’ (1983) 31 Journal of the Copyright Society 267 at 364 stating: ‘Since 1974 however the US has had a better functioning design patent law in the sense that it now better covers 3D objects not covered by copyright law via a less stringent non-obviousness condition.’ See also Reichman, ‘Design protection and the legislative agenda’, 285, mentioning more favourable case law since the 1980s.
number of registrations: only about a third of designs get registered in Japan and about half in the USA. However, it does not seem to have deterred applications in Japan, the probable explanation being that designers have no choice, having no recourse to copyright or unfair competition. In the USA, examination became far less stringent at the start of the 1970s and the statistics show a corresponding increase in applications and registrations, which is explained partly because of that, as stated in the previous paragraph. And the test for works of applied art to acquire copyright protection was also a little less stringent than in Japan, probably explaining at least partly the lower level of design applications. Thus a strict procedural system, i.e. one with substantive examination such as the Japanese one (and the US one before the 1970s), shows that it lowers drastically the number of registrations compared to other countries which have a formal check, where the number of applications is close to the number of registrations (Germany, Greece, France, the Benelux, Italy). This shows that the law has a strong effect in lowering the number of registrations. The experience of the USA also seems to show that if the substantive examination is replaced by a more lax examination, applications increase.

Leaving the statistical analysis and coming back to the legal analysis alone, differences but also common trends exist in the mechanisms used to regulate the interface. The countries can be classed in two broad categories, depending on the period: the full cumulation system on the one hand and the partial cumulation and demarcation systems on the other hand. The partial cumulation and demarcation systems use first a mechanism or test to pass at the level of protection requirements in order to limit the number of designs which can obtain copyright protection. In the main, two tests emerge as ‘winners’ over time: a higher level of originality via a criterion of artistic value or merit (be it judged by experts (Denmark, Italy, Germany and the UK at times), the (educated) public (UK and Germany at times) or the courts themselves (Japan, Australia)); and the separability test (Italy and USA). Other tests were proposed by the literature and sometimes adopted by the legislature or courts but were abandoned for their inadequacy (such as intention in the UK, Australia and the Netherlands) or simply pre-empted by authority (other tests

48 The Nordic countries also had a substantive examination until the implementation of the Design Directive but only Sweden shows a similar pattern as the USA and Japan. Australia and the UK had substantive examination at times (Australia 1906–2003) and formal examination at other times (Australia 2003–present), and show a similar trend in the difference between the number of applications and the number of registrations, albeit less pronounced than that of the USA and Japan.
proposed in Italy and France were ‘crushed’ by the overwhelming influence of respectively E. Piola Caselli and E. Pouillet.\(^{49}\)

The full and partial cumulation systems also vary in their regulation of the conflicts or clashes caused by the overlap. They range from no mechanism to some to many. In France, the interface is not regulated at all at legislative level but courts often align the copyright framework with the design framework in some troublesome areas, namely ownership and exploitation contracts. In Japan, Norway and Sweden, courts sometimes use a narrower scope of protection if the design is functional. In the Benelux, there is alignment for ownership and duration at legislative level; in Japan the ownership rules are aligned. In the UK and Australia, over the years, the legislatures adopted a detailed regulation of the interface in relation to ownership, rights, defences and duration.

Yet another interesting emerging aspect is that some countries’ legislatures always wanted demarcation or partial cumulation and never full cumulation, namely the UK, Australia and Japan. These countries grappled with how to do it, so did not think it was impossible – unlike France, which adopted unity of art by giving up trying to find an interface after deciding that all criteria were flawed.

These evaluations lead us to two main interim conclusions. First, even if it is not the only factor, legislation does often have an important effect on the success of the design regime and of its interface with copyright. Secondly, there have been and still are very big differences between countries in the way they regulate the interface. As we shall see, such entrenched national positions owed to legal cultures are probably the biggest hurdle to overcome before a single copyright/design interface model can be adopted at regional let alone international level.

### 12.4 Possible Models and Criteria

As we have seen in section 12.3, a deeper statistical analysis needs to be done to have a conclusive account of the relative impact of the several factors influencing the level of design applications, which is beyond the scope of this book. What can be done at this stage is compare the success and failure of the different models (section 12.4.1) and of the different

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\(^{49}\) Y. Gaubiac and A.-E. Khan confirmed to me that Pouillet had a lot of prestige and influence and thus also a lot of followers. Gaubiac adds that it is really the arguments in favour of the thesis which were decisive and shared by many protagonists. Reichman, ‘Design protection in domestic and foreign copyright law’, 1154–5, 1159, also mentions ‘Pouillet and his followers’. Note that according to Z. Algardi, Giuffrè, (Milan: Giuffrè, 1977), pp. 65–6, Pouillet was anticipated by Huard, so Pouillet was not the first to propose the theory of unity of art.
criteria used to regulate the interface (section 12.4.2) by reviewing the legal history and by examining arguments developed by the literature and the courts.

12.4.1 The Models: Copyright or Sui Generis Design Right(s), Artistic Property or Industrial Property, or Both?

For a long time, there were heated discussions about whether designs should be classified as part of intellectual or instead industrial property law.\footnote{Ladas, 
Patents, Trademarks and Related Rights, para. 483, p. 828.} Design law as a branch of industrial property originates from the French 1806 Act, which was copied by other countries afterwards.\footnote{Ibid., p. 829.} Before that time, copyright protected designs and models, as for instance in the UK. So the classification of designs as industrial property can be said to be a historical accident.\footnote{Ibid., p. 830.} The French courts then on the basis of this law made a differentiation between artistic and industrial designs.\footnote{Ibid., p. 830.} They also required novelty and more generally the patent approach rather than the copyright approach, and then most European countries followed this example.\footnote{Ibid., p. 830.} That being said, because of the hybrid nature of 3D design which combines function and aesthetics, the grant of such industrial property protection may have happened anyway later in another country. So maybe it is only a historical accident that it happened in France at that very specific point in time.

This division is now enshrined in international instruments and it is clearly difficult to go backwards now even if the Paris Convention and TRIPs still give a choice between the two types of property rights.\footnote{Confirming this for the Paris Convention, see S. Ricketson, The Paris Convention for the Protection of Industrial Property: A Commentary (Oxford: Oxford University Press, 2015), p. 487, n. 11.20.} More convincingly, it seems fairer to have both systems so that designers can choose which one suits their needs best. This is because the field of design varies enormously, from 2D to 3D, and from fashion design (which is quickly outdated) to other more lasting designs such as the Tripp-Trapp or Le Corbusier chairs.\footnote{Cohen Jehoram, ‘Protection of industrial design, between copyright and design laws: A comparative study’, 121, reporting intervention by Levin. (For M. Levin, formal requirements (i.e. registration, cost, etc.) for designs do not fit the designers’ needs as they are.}
industry and third parties with certainty but the system must take into account the interest of small creators too and thus provide an unregistered right. As we have seen in section 12.2.2, this is what drew the Max Planck Institute to propose not only a choice between copyright and a registered design right but also an unregistered design right. Submissions to the European Commission before it issued its Green Paper on the legal protection of industrial design also stated that the mode of protection, i.e. registered or not, depends a lot on ‘the nature of the design, type of product it is applied to and the market in which the product manifests itself’. Hence, the toy, textile and fashion industries prefer unregistered design rights, whereas the manufacturing industries prefer the registered design right.

The vast majority of commentators echo this and advocate choice and potential cumulation between copyright and design right. Most commentators also prefer a design approach rather than a patent approach for the design right, be it registered or not. They also believe that the mostly unaware of the law, e.g. that the design loses novelty if it is made public. So she stresses that works of applied art must be protected by copyright law.) See also, in a similar vein, the Johnston Committee’s views, as referred to in Chapter 6, above (UK), which also thought that cumulation is an adequate system as registration does not serve the interests of all design industries.

57 Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt communautaire en matière de dessins et modèles industriels’, 75.
59 Ibid.
60 For Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt communautaire en matière de dessins et modèles industriels’, 35, the number of design registrations is low and depends on the country and sector. The number of registrations has little relation to the mass of creations generally. Also the costs often outweigh advantages to register, especially for short-lived designs and for individual designers of SMEs. So he thinks that copyright is necessary for the small creator so he or she can fall back on it. P. Combeau, then co-president of the International Commission within AIPPI studying the protection of designs (stating a report will soon be presented in Paris), H. Papakonstantinou, A. Argyriadis (adding that it is better without a too-long term for design protection so as to stifle follow-on competition) and J. Liedes all thought a cumulative system is better. See respectively at pp. 108, 112 and 114 in Cohen Jehoram, ‘Protection of industrial design, between copyright and design laws: A comparative study’. Very few commentators advocated protecting designs only by copyright. In 1989, Cohen Jehoram, ‘Cumulative design protection: A system for the EC?’ 87, proposed a single copyright uniform law to deal with the interface issue so there would no longer be any interface but reckons it may be too much for some countries to abolish their registered design laws entirely. Six years earlier, he advocated cumulation and suggested that the European Community should opt for it, especially as most Member States had a cumulative system. See Cohen Jehoram, ‘Cumulative design protection: A system for the EC?’ 87. Also, nowadays very few countries protect designs only by copyright; in other words, most countries have a design act.

61 See e.g. Ladas, Patents, Trademarks and Related Rights, p. 832; A. Muhlstein and M. Wilkinson, ‘Whither industrial design’ (1999–2000) 14 Intellectual Property Journal 1, criticising the patent approach taken by the US design patent, preferring the UCD and
copyright protection for designs must be limited so as not to be over-
protective, as the experience of some countries has shown. 62 It is only
French commentators and courts, albeit a decreasing majority of them
since the Design Directive, who believe that full cumulation is the only
way to go. 63 The reason is historical. As A.-E. Kahn’s chapter recounts,
during the entire nineteenth century, France battled for years with five
different criteria, trying to find the right one to distinguish between
artistic and industrial designs. But it failed and France adopted the
unity of art in 1902. 64 French commentators supporting the unity of art
theory thus think it either impossible or subjective and therefore arbitrary
to make this distinction. 65 Some also think the unity of art solution is
simple. 66 Indeed it avoids the complexity of fixing the boundary between
artistic and industrial designs. 67 However, the simplicity of a solution is
not a sufficient argument as simplicity does not by definition entail

adding that Canada could adopt something similar; also Reichman, ‘Design protection in
domestic and foreign copyright law’, 1223ff. For
instance, prior to the Benelux design law, Belgium protected designs by copyright with-
out requiring any level of originality.

62 Reichman, ‘Design protection in domestic and foreign copyright law’, 1223ff. For
63 See Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt commu-
nautaire en matière de dessins et modèles industriels’, 65. Reichman, ‘Design protection in
domestic and foreign copyright law’, 1159-60, notes, however, that ‘the “unity of art” theory
continues to elicit scepticism even in France … Arguably, France and Belgium, which had
sought to rescue artistic designs from the exigencies of patent law, were now converting
copyright law into a de facto industrial property law without the characteristic safeguards of
the industrial property paradigm.’ More recently see F. Greffe, Propriété littéraire et artistique, 2013, chron. 4.
A. Lucas, H.-J. Lucas and A. Lucas-Schloetter, Traité de la Propriété littéraire et artistique, 4th edn (Paris: Lexis-Nexis, 2012), n. 94, p. 109, however, recognise that full cumulation
undermines the cohesion of authors’ rights and industrial property. However, P. Y. Gautier,
Propriété littéraire et artistique, 7th edn (Paris: PUF, 2010), n. 100, p. 120, criticises
the theory and P. Kama, ‘Fasc. 1155: Règles Spécifiques a Certaines Oeuvres – Arts
appliqués’, JurisClasseur Propriété littéraire et artistique, 2016, J. Passa,
Droit de la propriété industrielle, 2nd edn (Paris: LGDJ, 2009), pp. 1ff, and A.-E. Kahn,
‘Un an de droit de la mode’, Communication Commerce électronique no. 9, Septembre 2016, chron. 10, are not
for total cumulation but full or partial cumulation.

64 Reichman, ‘Design protection in domestic and foreign copyright law’ reports at 1159 that
‘the soundest writers caution that it was a victory by default rather than by persuasion’.

66 Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt commu-
nautaire en matière de dessins et modèles industriels’, 45, 63, 73; Cohen Jehoram,
‘Protection of industrial design, between copyright and design laws: A comparative
study’, reporting intervention by A. Francon, 115; Ricketson and Ginsburg,
International Copyright and Neighbouring Rights, pp. 454–5; Pérot-Morel, Les Principes de

67 Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt commu-
nautaire en matière de dessins et modèles industriels’, 46–8.

Ricketson and Ginsburg, International Copyright and Neighbouring Rights, p. 455; Lucas,
Lucas and Lucas-Schloetter, Traité de la Propriété littéraire et artistique, n. 94. Except that
it is not that simple to exclude functional designs according to the application of the idea/
expression dichotomy, some of which of these commentators do not acknowledge.
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adequacy. Often a complex situation, such as that concerning designs, needs a sophisticated answer. Also I do not think that it is impossible to find a workable criterion, as will be shown in the following sections. I would therefore reject it in view of the obvious overprotection and subsequent stifling of competition it leads to and on the basis of some countries’ actual experience proving this.

Advocates of demarcation are rare and are not surprisingly coming from countries which have had the system, such as Italy and Japan. However, it has become quite clear that forcing registration with no choice for either a limited copyright or unregistered design right protection is unfair to many designers, namely those whose designs are short-lived and do not justify the expense, thus those mainly created by individuals and SMEs.

In conclusion, it seems clear, and the experience of the European Union has now proved it, that a cumulative system of some sort rather than either copyright only or registered design right only is the best way to accommodate all the different design sectors. What the EU system has not done but the experience of many EU Member States prior to the EU design system has shown is that since the interface is concerned with two branches of the IP system – copyright and design laws – one cannot envisage regulating the interface by tweaking, fixing or tinkering with only one of the two systems: the two have to be dealt with in a holistic way.

The next problem is therefore to determine how the two, or possibly three, rights interact with each other; in other words, how to regulate the copyright/design interface.

12.4.2 The Criteria to Fix the Boundary of the Interface

Over the years, countries have toyed with a variety of criteria to fix the boundary between artistic and industrial designs, i.e. the subject-matter

68 In 2016, the European Commission commissioned a report on the status of design law in the EU. The purpose of the study was to find out in the main if the harmonised and unitary design system in the EU works well or whether further harmonisation or changes are required. See ‘Legal review on industrial design protection in Europe’. The report found that both the level of harmonisation and the functioning of internal market in relation to goods embodying designs have been achieved but also that there are areas where the smooth functioning of the internal market has not been achieved. See ibid., 2016, 11. For instance, registration and administration costs are usually cheap; there is less delay than with multi-jurisdictional applications; and the filing/grant success rate has been overwhelming. Ibid., 13. However, some notions such as those of design, individual character, industrial sector, functionality, disclosure and the scope of protection need further clarification at legislative level. That said, harmonisation should carry on via the EUIPO and CJEU and national courts should carry on aligning their case law with that of EUIPO and CJEU. Ibid., 12–14.

69 As explained in Chapter 4 (Scandinavia).
of protection. Some criteria have proved inadequate (12.4.2.1), whereas some, if not perfect, have proved more suitable (12.4.2.2). In addition, countries have also used different legal mechanisms to regulate the interactions between the different rights (these will be examined in detail in section 12.5). When I refer to one of the legal systems reviewed in this book, I automatically refer, without adding a footnote, to the contributors’ chapters for more detail. Also, as a reminder, the criterion to fix the borderline applies in addition to the normal copyright protection requirements, i.e. that only original expressions are protectable.

First of all, it seems clear that fixing the border is really only necessary, in the main, for 3D designs. Designers of 2D designs have been allowed to cumulate copyright and design rights in most countries most of the time (e.g. even in partial cumulation and demarcation countries such as the UK, Australia and Italy in most cases, although not always in Japan). The monopoly is much less powerful on a 2D design since it does not concern a functional object but its ‘decoration’. The only problem is to demarcate the border between 2D and 3D designs, but this is not insurmountable. In the UK, the case law developed well and the tests are now well established. The distinction is more precisely between non-functional surface decoration and functional surface decoration. Surface decoration is excluded from UK unregistered design right (UKUDR) and covers not only 2D designs but also 3D designs which are decorating the object. Some 2D designs can be excluded because they are mass-produced. This was the case in the UK with, for example, carpets and wallpaper as per the Copyright (Industrial Process and Excluded Articles) (No. 2) Order 1989, at 2(b), which provided that an article is meant to be made by an industrial process (and therefore its duration reduced to twenty-five years from first marketing) if ‘it consists of goods manufactured in lengths of pieces, not being hand-made goods’. Surface decoration can be in 3D. Surface features which had significant function should not be regarded as ‘surface decoration’.

In Australia, there remains uncertainty whether embroidered designs are 2D or 3D. The last case on this issue held they were 2D as they were not part of the shape of garment, but the previous case did not give such a clear-cut answer. See Australian chapter.

Mark Wilkinson v. Woodcraft Designs [1998] FSR 63, 72–3 (‘The expression “surface decoration” in section 213(3) and in section 51 is apt to include both decoration lying on the surface of the article (for example, a painted finish) and decorative features of the surface itself (for example, beading or engraving)’). Jo-Y-Jo Ltd v. Matalan Retail Ltd [2000] ECDR 178 (embroidery was surface decoration since it was comprised of stitches added to the garment after it was made). A. Fulton Co. Ltd v. Grant Barnett & Co. Ltd [2001] RPC 257 (the seams at the edges and corners of an umbrella case were not surface decoration). Dyson Ltd v. Qualtex (UK) Ltd [2006] RPC 31, paras. 80, 81 and 83 (there was no reason why the decoration should not come into existence with the surface. Surface decoration can be in 3D. Surface features which had significant function should not be regarded as ‘surface decoration’). In Australia, there remains uncertainty whether embroidered designs are 2D or 3D. The last case on this issue held they were 2D as they were not part of the shape of garment, but the previous case did not give such a clear-cut answer. See Australian chapter.

Section 52 UK Copyright Act prior to 2016. Mass-produced 2D designs of primarily artistic character such as book jackets and postcards were, however, excluded from s. 52’s application.
12.4.2.1 Inadequate or Unworkable Criteria

1. A first criterion is that of destination. It was proposed by some commentators in Italy before the adoption of the separability doctrine and was the prevailing theory in France before the adoption of the unity of art theory. According to this criterion, if the designed object’s (essential) destination is aesthetic then it is protected by copyright, but if it is industrial or functional then it is protected by design right. There is an evident problem with the criterion; it occurs when the object has no predominant destination or utilitarian purpose but is both aesthetic and functional. Another objection is, why should copyright protection be refused to a beautiful object simply because it is utilitarian? Therefore, commentators are generally against the criterion of destination and currently none of the legal systems reviewed in this book are using it.

2. The designer’s intention has been used in the UK and Australia’s copyright legislation respectively in 1911 and 1912, and was most famously applied in the King Features v. Kleeman decision. In the USA, the designer’s intention may in some cases determine the outcome of the separability test. It was also proposed by some Italian commentators before the adoption of the separability test. In the UK, the Gregory Committee was against this criterion because making the protection of copyright turn upon the intention of the artist can lead to inequitable results. It can be used strategically in order to gain the protection that the designer wants rather than the one suited to the object. Indeed, the author can also always claim a posteriori that he or she wanted to do something aesthetic. Taking the user’s perspective, he or she can almost never be certain of the author’s intention, making the criterion almost always work in favour of the author. Therefore, the user will always have to err on the side of caution and refrain from using the work, even if the author’s intention was not to create a work of art. The criterion was more generally criticised and abandoned in Australia but is still found in the UK for sculptures, although not works of artistic craftsmanship, the latter constituting the vast majority of 3D designs.

75 King Features Syndicate Inc. and Betts v. O & M Kleeman Ltd [1941] AC 417, HL.
76 See Lucasfilm v. Ainsworth [2008] EWHC 1878 (Ch), aff’d by [2011] UKSC 39. However, it is not the artist but the judge who decides according to a list of criteria.
3. The criterion of the **status of the author** was used in France before the adoption of the unity of art theory. If the author was a manufacturer or a craftsman, design law applied, but if he was an artist, copyright law applied. It is also used for works of artistic craftsmanship in the Australian *Burge v. Swarbrick* case, even if arguably not in isolation.\(^{77}\) However, like the criterion of destination, the criterion does not work if the manufacturer or craftsman is also an artist or when the artist transfers his or her rights to a company.\(^{78}\)

4. The French also experimented with the criterion of the **method of reproduction**. The Italian literature also proposed it. Japan arguably still uses it. According to this criterion, handcrafted items were copyrightable while works reproduced by mechanical means were not.\(^{79}\) The criterion was famously rejected in the UK in *George Hensher v. Restatwile*,\(^{80}\) even if the House of Lords agreed it could be an indicator to determine craftsmanship. The criterion has been criticised as inequitable and arbitrary.\(^{81}\) Indeed, even if it can arguably be less frequent, a work can be very artistic even if it is not handmade.

5. Another criterion the French experimented with was that of the **secondary or accessory character of the aesthetic features** in the work embodying the design.\(^{82}\) The Italian literature also suggested it. However, it is impossible to use when form follows function as the aesthetic features of the work do not have a secondary or accessory character.

6. Last but not least, the criterion of **artistic merit or value** has been used a lot over the years and is still used by countries such as the UK, Germany, Italy and Japan. The French also used this criterion as a last resort after having tried all the others.\(^{83}\) Because of its subjectivity, France rejected it to adopt the unity of art theory. Indeed, a criterion based on artistic value leaves the decision to the whim of judges (or the experts or the public) and thus is highly subjective, inevitably leading to inconsistent decisions. It is therefore uncertain and bad for creators.

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\(^{79}\) Ibid., 44–5.

\(^{80}\) *George Hensher Ltd v. Restatwile Upholstery (Lancs)* Ltd [1975] RPC 31 (HL).

\(^{81}\) Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt communautaire en matière de dessins et modèles industriels’, 63.


This is perhaps most famously illustrated by the still ongoing 'saga' relating to works of artistic craftsmanship in the UK, where there is no agreed criterion at Supreme Court level but a plurality of different ones (although it seems lower courts are now settling for the criterion of artistic merit judged by a substantial part of the public\(^\text{85}\)). Italy had its 'Le Corbusier saga' which ended with the Supreme Court holding in 2015 that artistic merit was to be judged by experts (museums and the like).\(^\text{86}\) Nevertheless, whether it is the judge, the experts or the public deciding whether a work is artistic or not, it is clear that the criterion is subjective and unfair to the designer. Some young designers may see their designs unfairly refused protection because they are ahead of their time (just think of Van Gogh in the field of painting).\(^\text{87}\) The criterion of artistic merit or value can therefore definitely not be adopted. In fact, it goes totally against the copyright's principle of originality which categorically rejects such a criterion. Why then should it be reintroduced for works of applied art? When a high threshold of originality is set for works of applied art, it distorts copyright law in the sense that the criterion of originality is harder to achieve and thus it does not reward many authors, whereas it is the aim of copyright law to foster creativity. The argument according to which such criterion also has the perverse effect that more mundane works such as directories, simple drawings, etc. are protected but not highly creative 3D works is, however, not valid. It is fine to exclude highly creative works of applied art from copyright law if artists can fall back on (an) adequately crafted design right(s).\(^\text{88}\)

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\(^{84}\) Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt communautaire en matière de dessins et modèles industriels’, 46; Reichman, ‘Design protection after the copyright act of 1976’, 368.


\(^{86}\) See Italian chapter. Marzano criticises the Italian criterion for its possible corruptibility (having connections helps artists place their work in a museum) and that not all museums are equally relevant, e.g. national gallery as opposed to municipal museum of the designer’s summer residence.

\(^{87}\) See also Oliver Wendel Holmes’ famous rejection of a merit criterion in copyright law in general in Bleistein v. Donaldson Lithographing, 188 US 239, 251–2 (1903):

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Many thanks to Jane Ginsburg for pointing this out to me.

\(^{88}\) Reichman, ‘Design protection after the copyright act of 1976’, 369–70.
Clearly, the first five criteria have been rightfully rejected. The criterion of artistic merit or value does not stack up even if it has been used for years and is still used nowadays in some countries. Surely a more objective criterion can be found.

12.4.2.2 Possible Workable Criteria

A first objective criterion is that of the number of copies made. This is the system that the UK had prior to 1968 and which excluded from copyright protection works embodying designs made in more than fifty copies, and that Australia still uses. This system was praised as workable by a French expert even if she doubted it was the best criterion. More enthusiastic was H. Cohen Jehoram who thought it was ‘a nicely clear cut and arbitrary system’ which provided maximum certainty. An Italian commentator also found the UK criterion adequate because once the work has been reproduced so many times it loses its aesthetic value. However, it is doubtful whether this is a valid reason for the adequacy of the criterion. Rather, it is to do with the fact that, since the object is functional, the protection should be less strong to prevent undue monopolisation. It is true that the criterion of the number of copies is arbitrary but, on the other hand, contrary to all the others reviewed above, it is not subjective and it is extremely predictable for both the designer and the public. Presumably it is sufficient for the artist to stamp the numbers of copies at the back of the article, e.g. ‘1 of 40’, ‘10 of 100’ or ‘5 of 2,000’, or simply the public can assume that if an object is available in supermarkets or similar stores it is produced in more than the amount of copies set out by the legislature. For 2D works such as wallpaper and carpets, like in the UK order of 1989, the criterion would be lengths or pieces, not the number of copies.

The main trouble with this criterion is that it is against the Berne Convention if works of applied art are classified as artistic works. This does not mean that it is per se impossible to adopt this criterion but, of course, it is extremely difficult to change the convention so, realistically, one has to work with it.
the number of copies can be set at fifty or whatever number one wants to choose. It could also be a different number depending on the sector. An additional criterion can be added to it to make it less harsh, namely excluding some works even if they are reproduced in more than fifty copies, as the UK did in its Copyright (Industrial Process and Excluded Articles) (No. 2) Order 1989.\textsuperscript{97}

However, if such exclusion is added, we go back to the distinction problem: what is a sculpture and what is printed matter primarily of literary or artistic character, as the order phrases the latter as a non-exhaustive list. Indeed, as reported in the UK chapter, the courts and literature sometimes struggled to make this distinction.

A system similar to the old section 52 of the UK Copyright Act overprotects if a number of copies below the number that triggers the section’s effect overcompensates the designer because he or she can sue on both copyright and registered right. This is a risk when one uses such a criterion unless the law stipulates, like in the UK per section 236 of the Copyright Act, that infringement of one right gives way to the other if both rights are infringed. The UK did not have a provision similar to section 236 for the infringement of registered design right and copyright but section 52 was combined with the criterion of artistic merit for works of artistic craftsmanship (in which the vast majority of 3D designs fall), which reduces the number of cumulation cases. However, we saw that this criterion was not adequate.

A second possibly workable criterion is separability. Despite its troubled application in the USA, which has not ended with the

\textsuperscript{96} See also the similar provisions in Australia: Designs Regulations 1969, reg. 2. The UK had a similar, but more complex, section prior to s. 52 of the 1988 Copyright Act, namely s. 10 of the 1956 Copyright Act. See UK chapter for more details.

\textsuperscript{97} SI 1989/1070. See the similar system of the 1956 Copyright Act.
Supreme Court decision in *Varsity Brands*, the criterion was more successfully applied in Italy, even if more harshly (i.e. excluding the vast majority of 3D designs). Some commentators also find it more suited than all the others, among others not surprisingly many Italian commentators. For Pérot-Morel, even if the separability criterion is difficult to apply, it can give a more adequate protection to such designs than copyright protection. This leads her to conclude that separability could be kept in principle as it can conciliate the points of view of partisans and adversaries of the unity of art theory. Reichman praises separability for its degree of precision and finds it ‘more successful than others in drawing the distinction without offending the principle that forbids discrimination on the basis of merit’. It is objective if it is not travestied into a subjective criterion such as that of artistic value or merit (as some courts have done in Italy) or that of the creator’s intention, as some courts have done in the USA. Defenders of the separability criterion also prefer it to the artistic value criterion as it does less violence to copyright law principles.

Separability (at least ‘Italian style’) has the additional advantage that it clearly separates copyright and design protection. There is very rarely cumulation for 3D designs, so very rarely overprotection. There is also rarely underprotection: even if the author does not have copyright protection and does not register his or her design, at least in the EU and the UK, the author can potentially benefit from the unregistered design right(s) if the work meets those regimes’ protection requirements.

The current US Copyright Office regulations seem to match closely the Italian regime which existed until 2001, in short excluding all entire

98 *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 478 (6th Cir. 2015), aff’d 2017 US Lexis 2026. For a discussion of this decision, see Chapter 9.


101 Reichman, ‘Design protection in domestic and foreign copyright law’, 1181. Reichman wrote in the 1980s when the US case law was not as chaotic as it is now. He also wrote about the separability doctrine in general and not only how it is applied in the US courts.

102 Reichman, ‘Design protection after the copyright act of 1976’, 376. It is arguable that the very purpose of the separability theory is to avoid making value judgements.

103 Reichman, ‘Design protection in domestic and foreign copyright law’, 1121.

104 Reichman, ‘Design protection after the copyright act of 1976’, 369. However, it is contentious that this is the case especially if the separability test in fact favours certain kinds of designs over others, namely ornate as opposed to simple. On this, see below.
shapes of useful articles and considering aesthetic value as an irrelevant factor. However, unlike Italian courts, the US judiciary has struggled to interpret the separability requirement. In her chapter, Jane Ginsburg explains that the Supreme Court’s recent approach to separability could still pose an intractable line-drawing exercise in some cases, and thus may well prove unworkable anyway. As a result of this almost impossible line-drawing exercise, the test may also not avoid being discriminatory. ‘Form follows function’ objects would be excluded from copyright protection even if they are very aesthetically pleasing, and equally or less aesthetically pleasing designs may fall on the (copy) right side of the line, or, pushing aesthetics aside as this is not an adequate criterion anyway, if we use the originality criterion, designs could fall on either side of the line.

P. Goldstein believes that, alternatively, normal copyright criteria, namely the idea/expression dichotomy (excluding elements dictated by function), merger doctrine and originality, can do the trick. However, then a lot of designs would fall within copyright’s scope (even form-follows-function designs) and be protected for the full term. In effect, this boils down to the unity of art principle.

Drawing from the lessons of this vast and lengthy experience, is it possible to draft the contours of a model copyright/design interface?

### 12.5 A Model Copyright/Design Interface

A model copyright/design interface is one which is as clear and simple for everyone involved so that it entails strong legal certainty and is as balanced as possible in the sense that there is as little over- and under-protection as possible. To have a working copyright/design interface, as we stated in section 12.3, countries’ experiences show that we first need an adequate sui generis design right. This means a design law which does not follow a patent approach (i.e. high fees, absolute novelty, speciality principle, too short a duration), otherwise there is underprotection and designers revert to unfair competition or to copyright and courts tend

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105 P. Goldstein, *Goldstein on Copyright*, 3rd edn (New York: Aspen, 2014), 2015 Supplement, §2.5.3.c. If these criteria work, it is not necessary to use separability; separability need only be used in the ‘hard’ cases. A. Quaedvlieg also suggested this to me in view of the relatively adequate way the system functions in the Benelux.

106 This is because lamps, chairs, etc. can come in (quasi?) infinite types of shapes and still perform their function (allowing lighting, sitting), so almost no shape is dictated by function except the shape of entirely new products perhaps. Even so, it will be rare. Consider, for instance, the shape of the very first vacuum cleaner ever invented; its shape might at first be thought to be dictated by function but we now know there are also an almost limitless number of shapes for vacuum cleaners.
to push the criterion of originality down in order to protect designs, and then there is overprotection. 107

We have ascertained that the EU design system in terms of its substance is a (near) adequate model 108 and we can therefore adopt its provisions for the model. We have two possibilities: this unregistered right is copyright or it is a new unregistered design right which can be added to copyright. If it is copyright and protection is based on a criterion such as separability or the number of copies, it can be rather harsh to small creators who may be deprived of any protection and sometimes as soon as the object is marketed. This is because they cannot rely on an automatic unregistered design right unfettered by these criteria and often will not have thought to register at all or to register within the grace period if there is one (like in the EU). So it seems that taking all designers into account, big and small, IP-savvy and not, a three-rights system would be best. 109

However, this is without taking into account a rule, as the one I propose below, shortening the term of copyright to twenty-five years if the number of copies set out in the legislation is reached. In that situation, and if the requirements for copyright protection are easy to meet, which is the case

107 This is well illustrated by the Dutch story and the UK legislative changes in 1968 where cumulation made design registrations fall dramatically. See also Reichman, ‘Design protection in domestic and foreign copyright law’, 1223ff; ibid., ‘Design protection after the copyright act of 1976: A comparative view of the emerging interim models’ (1983) 31 Journal of the Copyright Society 267 at 354 and also stating at 364 that since 1974 the USA has had a better functioning design patent law in the sense that it now better covers 3D objects not covered by copyright law because the Patent Office interprets the non-obviousness condition less stringently; Reichman, ‘Design protection after the copyright act of 1976’, 369, 371; Reichman, ‘Design protection and the legislative agenda’, 281–5. See also Schovsbo and Tellmann-Lock, ‘We wanted more Arne Jacobsen chairs but all we got was boxes’ and J. Ginsburg’s chapter in which she proposes the adoption of a sui generis design right based on the current Vessel Hull design act.

108 The authors of the report written for the European Commission in 2016 (‘Legal review on industrial design protection in Europe’) suggested some improvements (in the main clarification of some notions). See above, note 68. Some doubt remains as to whether the scope of protection of the design right is strong enough at least in the UK after the UK Supreme court decision in PMS v. Magmatic [2016] UKSC 12. The strength of such scope would thus depend on how the Court of Justice of the European Union would interpret it when a case is referred to it on this issue.

109 In the same vein, see A. Ohly, ‘Where is the birthday train heading? The copyright design interface in German law’, in G. Karnell et al., Liber Amicorum Jan Rosen (Visby: Eddy, 2016), p. 603: ‘A model of graded protection – three years protection against imitation for unregistered designs, up to twenty-five years absolute protection with registration, full copyright term for highly creative designs – is by no means outdated. On the contrary it takes account of the need to allow future designers the freedom they need.’ The Commission in its Green Paper on the Legal Protection of Industrial Design hinted at this (p. 143): ‘a fair overall protection of industrial design may require the possibility of invoking, at least in certain cases, copyright protection’.
in most countries, this makes an unregistered design right redundant. The proposal thus is to have only registered design right and copyright.

In the correct EU system, whether cumulation between an EU and a national right is necessary, whether it is the unregistered or registered design right, is however controversial. The Commission had taken the view that the national and Community registered rights should not be cumulative.\(^\text{110}\) And in fact, this is the case for plant variety rights (PVR).\(^\text{111}\) A system like the PVR could very well work for designs too. So if a designer opts for a national registered design, he or she cannot then obtain a Community registered design, but if he or she changes his or her mind, he or she can convert the national right into a Community one and vice versa.

In order to avoid underprotection, demarcation is out. To avoid overprotection, a model copyright/design interface means partial cumulation rather than a total or full cumulation. Having chosen this approach, another important aspect of a good interface is to have a simple, precise, objective and non-discriminatory criterion or criteria so that all designers, especially the non-IP savvy ones, as well as third parties, can know their rights with relative ease.\(^\text{112}\) In that respect, then, as developed in section 12.4, a criterion based on the number of copies is superior to any other, including one based on separability.

The system would work as follows. It is based on the UK rules regulating the interface between the registered design right and copyright as it is a good starting point to find a model copyright/design interface, but the proposed rules are also more refined compared to the UK rules. To start with, the criterion of the number of copies used in the now repealed section 52 of the current UK Copyright Act could be adopted.\(^\text{113}\) If the designer makes more than the amount of copies set by the legislature, copyright and registered design right would co-exist for the minimum of twenty-five years from the making of the work set by article 7(4) of the Berne Convention (or less if we were not constrained by the Convention\(^\text{114}\)). This number of copies can be lower or higher than fifty (the old section 52 stated fifty) and could vary depending on the design sector. If the designer makes fewer copies than the

\(^{110}\) Green Paper on the Legal Protection of Industrial Design, p. 138. It had left the cumulation of the UK unregistered right (UKUDR) with the UCD intact as UKUDR replaces copyright in some cases. Ibid., p. 139.


\(^{112}\) Cohen Jehoram, ‘Protection of industrial design, between copyright and design laws: A comparative study’, 107, reporting intervention by Duchemin.

\(^{113}\) G. Ghidini, ‘Cumulation of copyright with registration protection of products of industrial design: An alternative proposal’, Working Paper, 11 March 2016 (available on www.ssrn.com), shares this opinion and proposes a system to regulate the interface based on the old s. 52 of the UK Copyright Act.

\(^{114}\) See below for the ideal term of protection.
amount set by the legislature, there will be works which can be registered as
designs as well, namely sculptures and works of applied art, and both copy-
right and registered design right could also co-exist if the designer chooses to
register. Arguably, this will be less frequent since probably the designer would
not go through that expense if he or she is not going to make that many copies.

UK law is also good as it aligns the provisions on ownership in copyright
and design right regimes.\textsuperscript{115} Thus, first, one would make the provisions on
commissioned and employee designs coincide in the two rights. Secondly,
the UK also has the same primary and secondary infringement provisions
for copyright and UKUDR; again, this could be extended to the registered
design right. Thirdly, a system based on section 236 of the UK Copyright
Act would also be good. Section 236 ensures that where a design is
infringed and attracts both UKUDR and copyright, a claimant can only
sue on the basis of copyright. This avoids overprotection\textsuperscript{116} for what is in
essence the same act of infringement. The rule laid out in section 236 could
be made applicable to the registered design right. But in this case since the
claimant has registered his or her design, it should be the registered design
right that prevails at the level of infringement. Granting a narrower scope of
copyright protection if the design is rather functional (along the lines of
Swedish and Norwegian case law\textsuperscript{117}) could also be a nifty mechanism to
avoid overprotection. Arguably, the idea/expression dichotomy already
plays that role. Finally, all exceptions and excluded subject-matter should
be aligned. This means that copyright law should include a repair exception
or alternatively exclude must-fit and must-match features from its scope.
This system would leave purely functional designs out of copyright protec-
tion and out of registered design right protection if the designer chooses not
to register. This is not leaving a gap since it is filled by patent law. Last but
not least, one would leave the rights of attribution and integrity untouched
or one could make the right of attribution inapplicable as the UK
Copyright Act did when section 52 was applicable. The contractual pro-
tection of authors which exists in many civil law countries may also have to
be watered down or made inapplicable.

\textsuperscript{115} See ss. 11, 51, 53, 215, 224, 226, 227, 236, 244A and 244B of the UK Copyright Act
and s. 2 UK Registered Designs Act, some of which were amended by the Intellectual
Property Act 2014. The exceptions are aligned between all design rights but not with
copyright. The Benelux law also aligns ownership provisions.

\textsuperscript{116} There is a real risk of overprotection here as the infringement tests for copyright and
unregistered design are different, leading to one right not being infringed while the other
could very well be, thereby ‘filling the protection gap’. The same applies for copyright
and registered design infringements.

\textsuperscript{117} Although, at EU level, this is now probably conflicting with the \textit{Painer} decision (Case C-
145/10, \textit{Eva-Maria Painer} v. \textit{Standard Verlags GmbH} [2011] ECDR 297), this is not
reversible provided counter-legislation is passed.
As the UK example shows, it is not distorting copyright law to ‘twist’ its rules to accommodate designs. In fact, the Berne Convention allows it and there are other works which have a special regime in copyright law such as computer programs and databases. Borderline cases require adjusting the rules. This does not mean that the copyright framework is weakened or no longer coherent.

A good working copyright/design interface also needs an adequate duration for both copyright and design rights. If the copyright term is too long, in a similar way as the level of originality being too low, it will undermine the design rights, and even if it does not have that effect because the interface criterion works well, the term makes copyright law arguably overprotective. As the Italian experience shows, if the registered design right term is too short (e.g. a term of two years or less, and arguably four is too short too), the right will very rarely be used.

How long should the registered design right last for? For many commentators, fifteen is an adequate number of years for a design right. Before the implementation of the Design Directive, this was the term in Germany, in Italy as of 1977, in the UK from 1907 to 1988, and in the Benelux and Nordic countries. Some also suggested a term no longer than the patent term. That makes sense as many 3D designs are functional, and in that respect thus closer to inventions than works. The term could also vary depending on the sector, e.g. a shorter term for the fashion sector and a longer term for the manufacturing sector. This is somewhat the case in the EU with the Community unregistered design right but also via the possibility to renew the national or Community registered right every five years, up to a maximum of twenty-five years. So, in a system which gives the choice between unregistered and registered design rights, one can vary the term of the registered and unregistered design rights to match the different sectors’ interests, and allow one to be transformed into the other after a grace period, as is the case in the EU. In my proposal, the grace period would function between copyright and the registered design. In sum, a term of between fifteen and twenty-five years

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118 Duchemin, ‘La protection des arts appliqués dans la perspective d’un dépôt communautaire en matière de dessins et modèles industriels’, 85; W. Cornish, ‘Cumulative protection for industrial designs’ (1973) 8 University of British Columbia Law Review 219 at 242, 243, 245 citing in agreement the Johnston Committee report of 1962, also citing that a Canadian Commission recommended five or seven years.

119 During her presentation at the ALAI annual conference in Rome on 15–16 September 2016, D. Lipzicz mentioned that a significant number of Latin American countries such as Argentina, Brazil, Paraguay and Uruguay also have a fifteen-year term of protection.

120 Cornish, ‘Cumulative protection for industrial designs’, 242.

for the registered design right would be adequate and arguably the EU system of renewals provides flexibility to the different designing sectors. Virtually every expert agrees that the Berne standard copyright term of life of the author plus fifty years is too long for works of applied art. If one wants to protect works of applied art as artistic works and wants to respect international law, then the minimum copyright term must be twenty-five years from the making of the work as per article 7(4) of the Berne Convention. But it could be lower than twenty-five, say fifteen, if the Berne Convention did not have to be respected or did not apply, i.e. if a country decided not to classify works of applied art as artistic works. So if it was felt that twenty-five years was too long for industrial designs/works of applied art, an alternative would be to exclude them from copyright protection and have an unregistered design right lasting less than twenty-five years and a registered design right modelled on what we already have in the EU, five years renewable to a maximum of twenty-five years, or, if this was felt to be too long, a maximum of fifteen years. I am not ruling out this system but simply then copyright would be replaced by an unregistered design right, and the same rules I propose above in this section to regulate the interface between copyright and RDR would apply between the UDR and the RDR. I have a preference for the copyright/RDR interface over the UDR/RDR interface as we already have a well-settled body of copyright case law to rely on and, as we have seen with the database sui generis right, new rights create uncertainties. One possibility is to say that the copyright rules will apply to the newly created UDR, but in my view, it is still a riskier option.

In a partial cumulation scenario, twenty-five years is certainly enough since the right is cumulated at least potentially with the registered design right. If it is not cumulated, whether the duration is adequate is debatable as any term is. It will be too much for some designs and too little for others. At the end of the day, as with any IP right, duration is by definition arbitrary. For some, it would be a good idea to match the copyright and design right term to twenty-five years (it was almost the case for artistic works made in more than fifty copies, or in lengths or pieces in UK law prior to the repeal of section 52 in 2016). This is certainly a good idea which works at international level if one wants to keep protecting works of applied art by copyright, but it is problematic in the EU owing to the

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122 In 1992, the Australian Law Reform Commission had recommended this term for any protection an article would receive. See S. Ricketson, ‘Towards a rational basis for the protection of industrial design in Australia’ (1994) 5 Australian IP Journal 193 at 207.
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Term Directive and the Flos decision. A modification of either the case law or the directive would be in order to allow such alignment.

To sum up, a model copyright/design interface would have two rights: copyright and registered design right (or alternatively unregistered design right and registered design right) either only at national level or leaving a choice of the regional and national level, but once that choice is made it would not be cumulative, yet it would be reversible (like the PVR). The system would be a partial cumulation system, based on the number of copies (or lengths or pieces for 2D designs), with provisions in all the rights aligned as far as possible. The duration would be no longer than twenty-five years for both copyright and the registered right and the length of the registered right may be set differently depending on the sectors. A grace period like the one provided in the EU legislative framework between the UCD and the RCD could work but instead between copyright and the registered design. This model respects both Berne and TRIPs but runs counter to EU statutory law and CJEU case law. This is not problematic since this case law can be overridden by a legislative initiative. Of course, whether the EU legislature’s agenda will include this issue in the near or distant future is guesswork.

12.6 Conclusion

The copyright/design interface has been on the agenda of international organisations and bodies for over a century. Despite years of discussion and negotiations, almost no progress has been made even at regional level, as exemplified by the EU treatment of the interface. Countries have rarely changed their positions (e.g. Japan) or if they have, like France or Greece, it is because they have had to as required by EU law. Countries’ positions nowadays still seem entrenched. This has led S. Ricketson and J. Ginsburg to write that the current Berne text on the issue is probably the most that can still be achieved at the moment and that the current situation under which each member remains free to choose which protection to give to works of applied art under sui generis design laws is unlikely to change in the near future.124 Therefore, trying to find a workable interface may well be an impossible and thus useless task. That may be so at international level, but it does not prevent individual countries having a go. At EU level it may well be that the interface will get harmonised ‘by the back door’, i.e. by CJEU case law ‘generously’ interpreting the current legislative framework rather than or before the EU legislature acts on it, as it has already done with Flos.

What is clear is that a holistic approach looking both at copyright and design law together rather than in isolation is needed to solve the problem. And this is not what the CJEU has done so far; on the contrary, its decisions have arguably started to undermine the EU design system. But it is never too late to correct course. My modest hope is that this book sheds some light on how to deal efficiently with the copyright/design interface so that no legislature or court repeats the mistakes of the past. My less modest hope is that this book has shown that solving the interface is not as difficult and therefore as utopian as it seems at first sight.


126 See the Nordic countries chapter, speaking of the EU.
12.7 Annex: Graphs

*Design Application and Registration Figures by Country*

**Australia: Split by Applicant Type**

Figure 12.1 Total number of design applications, Australia, split by applicant type

**Belgium: Split by Applicant Type**

Figure 12.2 Total number of design applications, Belgium, split by applicant type
Figure 12.3 Total number of design applications, Benelux, split by applicant type

Figure 12.4 Total number of design applications, France, split by applicant type

Figure 12.5 Total number of design applications, Germany, split by applicant type
Figure 12.6 Total number of design applications, Greece, split by applicant type

Figure 12.7 Total number of design applications, Italy, split by applicant type

Figure 12.8 Total number of design applications, Japan, split by applicant type
Figure 12.9 Total number of design applications, EUIPO, split by applicant type

Figure 12.10 Total number of design applications, UK, split by applicant type

Figure 12.11 Total number of design applications, USA, split by applicant type
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Figure 12.12 Total number of design applications, Denmark, split by applicant type

Figure 12.13 Total number of design applications, Finland, split by applicant type
Figure 12.14 Total number of design applications, Norway, split by applicant type

Figure 12.15 Total number of design applications, Sweden, split by applicant type