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Case No: IP-2022-000001

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice,

Rolls Building Fetter Lane, London, EC4A 1NL

Date: 11 November 2024

Before :

CAMPBELL FORSYTH

(sitting as a Deputy High Court Judge)

Between :

WATERROWER (UK) LIMITED

Claimant

-and-

LIKING LIMITED (T/A TOPIOM)

Defendant

Hearing dates: 24 and 25 July 2023

Further written submissions on 27 July 2023, 24, 28, 29, 30 October 2024 and 8 November 2024

APPROVED JUDGMENT

Ms Jacqueline Reid (instructed by **Moore Commercial Law Limited**) for the **Claimant**
Mr Jonathan Moss and Ms Kendal Watkinson (instructed by **Gunnercooke LLP**) for the **Defendant**

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Introduction

1. The Claimant ("WaterRower Ltd") is a company registered in England & Wales (WATERROWER (UK) Limited). Its business is a designer and retailer of exercise equipment, including the water resistance rowing machines sold under the trade mark, WaterRower. The Defendant ("Liking") is a company incorporated under the law of Hong Kong (LIKING LIMITED). It retails water resistance rowing machines in the UK under the name TOPIOM (TOPIOM Models 1 and 2).
2. WaterRower Ltd asserts various of its water resistance rowing machines are each works of artistic craftsmanship within s.4(1)(c) Copyright Designs and Patents Act 1988 (as amended) ("CDPA"). These are defined by WaterRower Ltd as embodied in the water resistance rowing machines shown in Annex 1 to the Amended Particulars of Claim dated 1 April 2022 ("APOC") and defined as the Works (Annex 1 to the APOC is reproduced as Annex 1 to this judgment and is referred to as Annex 1 throughout this decision).
3. WaterRower Ltd's case is that Liking has copied the Works, reproduced a substantial part of those Works in its TOPIOM machines and has therefore infringed its copyright in the Works.
4. Liking alleges no copyright subsists in the Works (as defined in WaterRower Ltd's APOC and additionally has a counterclaim for a declaration that no copyright subsists in the Works as they are not works of artistic craftsmanship. There is also a dispute regarding which articles are pleaded within the Works.
5. The CMC Order of David Stone sitting as a Deputy High Court Judge dated 8 August 2023 lists the Issues for trial ("the List of Issues"):

Copyright: subsistence

- (i) Is Version 1 of the Works a work of artistic craftsmanship in which UK copyright subsists?
- (ii) Are each of the subsequent Versions of the Works original copyright works of artistic craftsmanship?

Copyright: infringement

- (iii) Did the Defendant:
 - (a) Copy any Version of the Works (as shown in Annex 1 to the Amended Particulars of Claim) directly or indirectly in the creation of the Topiom Model 1 and/or the Topiom Model 2?
 - (b) Reproduce a substantial part of each of the above Works in:

- i. The Topiom Model 1; and/or
- ii. The Topiom Model 2?

(c) Have the relevant knowledge required for the acts of infringement alleged in paragraph 11 of the Amended Particulars of Claim?

Counterclaim

(iv) Is the Court satisfied that it is appropriate and necessary to make each of the declarations sought in relation to UK copyright?

Pleading issue

6. Late in Liking's closing arguments there was discussion of a point regarding the 'first copyright work' of the series of WaterRower rowing machines relevant to this case. Liking argue "*There is also no copyright claim for the prototypes of the WaterRower*". It alleges "...*Mr Duke's mahogany prototype is not relied upon as a copyrighted work.*" and that therefore "*any copyright in Version 1 could at most be the changes set out in Mr Duke's witness statement*". Mr Duke is the asserted creator of the WaterRower design. Version 1 of the WaterRower machines is one of the models in dispute in the case. Liking does not accept the '*first copyright work*' is a pleaded work within the case. This issue was first raised in the Liking's skeleton argument.
7. There is no photographic image of the '*first copyright work*'. The unchallenged evidence of Mr Duke is that the '*first copyright work*' ("the Prototype") is reproduced in 2-D drawings in the May 1987 patent application US No. 049616 ("the Patent Application"). Mr Duke's explains that, subsequent to the creation of the Prototype, the "*final finished prototype*", using mahogany wood was displayed at the Small Boat Show in Newport, Rhode Island - also in May 1987 ("the Boat Show Prototype"). The Boat Show Prototype had some adaptations from the Prototype. There was some mixing of terminology used in the case between the Prototype and the Boat Show Prototype. The Prototype is asserted by WaterRower Ltd as the '*first copyright work*'.
8. WaterRower Ltd's position in opening was that "*The task for this court is to assess whether the WaterRower, as first created by Mr Duke, is a work of artistic craftsmanship.*". WaterRower Ltd's, counsel, Ms Reid, confirmed she had further rebutted Liking's position on this pleading point during opening. Unfortunately, the transcript did not record that relevant statement as it was inaudible.
9. There therefore appear to be two related points to consider in the context of whether the issue of any copyright subsisting in the Prototype is appropriately set out in the pleadings: (1) is the Prototype a Work, and (2) if the Prototype is not a Work, do the pleadings nevertheless suitably circumscribe the need for an assessment of whether copyright subsists in the Prototype. Where the case does not involve any assessment of the subsistence of copyright in the Prototype this could have a substantial impact on the claims relating to the later modified models of the WaterRower. Therefore, due to the

potential importance of this argument and the lateness of it being expounded, the parties provided post-trial submissions on the issue.

Argument about the Prototype's status in the case

10. Liking's position is that WaterRower Ltd did not take any issue on this pleading point in opening and its cross-examination at the trial was therefore prepared on that basis. Liking's counsel, Mr Moss, explained that had Liking known the "*prototype being a copyright work*" was being asserted by WaterRower Ltd the "*cross-examination would have been different because I would have cross-examined Mr Duke much more heavily on the prototype that was in the Newport Boat Show*". It is not clear if Mr Moss meant the Boat Show Prototype or the Prototype here – I have assumed, despite his statement, that in the context of Liking's arguments on this point being about the first copyright work, that he likely meant the Prototype. On the evidence, the Prototype and Boat Show Prototype are very similar shapes (Liking acknowledge this – for example see the excerpt from the closing argument of Mr Moss in the following paragraph) and were created close together in time. There seems little relevance in any of the minor differences between the two designs. For the purpose of this case, the Boat Show Prototype and any differences with the Prototype are not asserted as creating a separate copyright work. The Prototype was the "*first hand-made version of the Works*" as described in paragraph 9 of the APOC and confirmed in its 24 February 2023 response to Liking's Request for Further information ("the RFI Response"). Liking's position is disputed by WaterRower Ltd.
11. Liking's counsel, cross-examined Mr Duke on the genesis of the original drawings in the Patent Application and the development of the Prototype into later versions of the WaterRower rowing machine. Mr Moss explained in closing, "*... we know the prototype, the picture that is in the patent is the one that was on show or very close to the one on show at the Newport boat show. That means that itself must also be a work of artistic craftsmanship, if they are right, in which case version 1 is not actually, version 1 is an iteration*". Liking also argue there were previous iterations of the Prototype, mainly based on earlier partial sketches prepared during its development, and that these have relevance to the question of the '*first copyright work*' in the case. I accept WaterRower Ltd's evidence that the design of the Prototype was reproduced in the drawings of the Patent Application. It is not disputed that there was earlier developmental work, years of it, culminating in the Prototype. This point on earlier iterations was not debated with any real force. Based mainly on the explanation of Mr Duke, I accept WaterRower's position that the Prototype was the '*first creative work*' in the series.
12. Liking's position is a formal point that the Prototype is not a pleaded work in the case, is not covered by the issues to be determined as set out in the CMC Order and therefore, under CPR63.23(2), and, lacking any exceptional circumstances, WaterRower Ltd cannot place any reliance on the Prototype at trial. WaterRower Ltd has not made an application to the Court for any amendment to its pleadings

on this point. Therefore, the question to be determined is whether the pleadings specify WaterRower Ltd's case with sufficient precision on this issue, such that the arguments did not come as a surprise to Liking at the trial.

13. Prior to commencement of these proceedings, WaterRower Ltd provided draft Particulars of Claim ("draft POC") to Liking. These refer to Mr Duke's hand-drawn drawings in the Patent Application as the "*original design*", the Boat Show Prototype and a later version of the WaterRower design. The draft POC identify the earliest WaterRower design as the Prototype.
14. Liking allege that subsequently the APOC changed such that the Prototype is no longer in issue in the case. A key point is therefore how the relevant products/works in the case are defined in the Statements of Case. WaterRower Ltd defines "Works" in the APOC at paragraph 3 as:

"The Claimant is the owner of UK copyright subsisting in the original artistic works embodied in the series of water resistance machines shown in Annex 1 (the "Works")."
15. Annex 1 starts with a photograph of a rowing machine referenced as Series 1 Version 1. Annex 3 to the APOC (Annex 3 to the APOC is reproduced as Annex 2 to this judgment and is referenced as Annex 2 throughout this decision) sets out modifications to iterations of WaterRower Ltd's products – starting with Series 1 Version 1. WaterRower Ltd confirmed in the RFI Response that there are no photographs of the first hand-made version of the Works (the Prototype) and that the Boat Show Prototype is not the same as the Prototype.
16. The APOC describes the Prototype in various ways, including: (1) the "*first version of the rowing machine was created in the period 1985-1987 by John H. Duke*" (paragraph 4), (2) "*The initial design was created solely by Mr Duke and recorded in drawings created from approximately 1985 to 1987.*" and "*The initial design was handmade by Mr Duke. It is a feature of the Works that they continue to be hand-made.*" (paragraph 7), (iii) "*The first version of the Works was created and subsequently modified by Mr Duke In late 1987 Mr Duke presented his hand-made version at a public boat show and received his first orders.*" (paragraph 9).
17. The List of Issues in the CMC Order of Deputy High Court Judge David Stone uses the language of the Statements of Case and refers to Works under both the headings of Copyright subsistence and infringement.
18. Liking refers to the partial transcript of the CMC and the fact that Series 1 to 4 of the Works (as set out in Annex 1) were the only versions of the WaterRower discussed at the hearing, and not the Prototype. However, these discussions focused more on infringement than subsistence of copyright. Earlier in that transcript there was also discussion of an issue relating to the pictures in US4846460 ("the US Patent") and in the Patent Application. This related to an ancillary point (which was not progressed) regarding fraud on the US patent office. WaterRower Ltd's position on the drawings in the Patent Application prepared by Mr Duke also appears to have been discussed.

19. The IPEC Guide (4.6(c)) states:

The issues in dispute. These should clearly emerge from the statements of case. The parties must draw up a list of issues which the court will have to resolve at trial. It is not necessary to list every sub-issue that may arise and this should not be done. The parties will be permitted to argue at trial any point which is both covered by the pleadings and which the opposing side should reasonably contemplate as falling within one or more of the listed issues. The trial judge may refuse to hear argument at trial on a point which does not satisfy those criteria.

20. The reference in the List of Issues to subsistence of copyright in Version 1 (as defined in Annex 1) does, at first, seem at odds with the position that the Prototype is pleaded within the case. In the case, Version 1 is asserted as a reproduction embodying the copyright (intellectual creation) expressed and subsisting in the Prototype and, separately, attracting separate copyright protection resulting from its iterative changes. In context, it was an understandable choice of terminology for the CMC List of Issues based on the descriptions of the WaterRower products in Annex 1 and 2. I do not believe in the context of the dispute that the reference in the CMC List of Issues to Version 1 (not Series 1 (Version1) as expressed in Annex 1) was somehow intended to be exclusory. Whether the Prototype attracts copyright protection is a core issue contained within the Statements of Case, for example in paragraphs 4, 5, 7, 9, 10 of the APOC. It is quite possible the phrase used in the CMC List of Issues simply meant the first version of the work (rather than the defined term used) – that would be in-line with the other positions. Regardless, in the context, the expression was implicitly including the requirement of an assessment of any copyright subsisting in the Prototype. In order to determine any copyright subsisting in Version 1 or the later versions it is important to understand the nature of any earlier copyright subsisting in the Prototype.
21. Subsequent to the CMC and the exchange of evidence, Liking's RFI dated 8 February 2023 asked a series of detailed questions about the "*first hand-made version of the Works*" (APOC paragraph 9) and the "*finished prototype*" referred to in paragraph 30 of the Statement of Mr Duke dated 25 January 2023. As noted, the RFI Response clarified the distinction between the Prototype and the Boat Show Prototype. Therefore, at this latter stage in the preparation of the case, after the evidence, Liking were asking, in the context of CPR Part 18, detailed questions relating to the earliest versions of the Works – the Prototype.
22. WaterRower Ltd's position is that the Works are 3-D objects. Annex 1 contains 2-D images of a series of water resistance rowing machines which embody the original artistic works where copyright subsists, not the Works themselves i.e. the images of the various versions set out in Annex 1 are not limiting in that there are earlier relevant versions (such as the Prototype and the Boat Show Prototype) which are not set out in Annex 1.
23. Liking did not adopt WaterRower Ltd's pleaded definition of Works in its pleadings and instead used the term "WaterRower". Liking's pleadings did not separately define the scope of this term.

Paragraph 3(b) of the Re-Amended Reply and Defence to Counter-Claim dated 22 August 2022 ("RDCC") notes for the purpose of the case that WaterRower Ltd will assume Liking's reference to WaterRower is intended to be to the Works. This was not disputed. The Defence in paragraph 12.6 avers that, "*The first designs of the WaterRower are those embodied in US Patent no. 4846460*" and that the designs WaterRower Ltd pleads (the Works) differ from that disclosure (the drawings in the US Patent appear to be professional reproductions of the sketches in the Patent Application). In its RDCC WaterRower Ltd's case is that the Works differ from the images in the US Patent and that the images are 2-D compared with 3-D articles embodying the Works. What is relevant about the exchange is the preceding paragraph 12.5 in the Defence where Liking makes clear the WaterRower could, "*only be protectable in the form it was first designed. Any iterations would not amount to being a work of artistic craftsmanship*". WaterRower Ltd's Reply dated 2 August 2022 takes the position that a Work that is a work of artistic craftsmanship (and explains the "*Works were created as set out in the APOC.*" i.e. from the Prototype) can be modified (and the Works were modified into a number of iterations over the years) and can still benefit from copyright protection subsisting in the earlier Work.

24. The scope of the term Works is also referred to in the APOC at paragraph 10; the "*...assignments of the copyright in the Works...*" was set out in various assignment documents annexed to the pleadings. These documents note in their internal definition of Works that this includes "*... the original and all subsequent "WaterRower" rowing machines ... related drawings and related prototypes...*" and attaches a non-limiting sets of images of versions of the WaterRower's in dispute (although not the drawings of the Prototype).
25. Finally, Liking have counterclaimed for a declaration that no copyright subsists in the Works. It would be possible, but unusual, if such a declaration was not intended to cover all the relevant WaterRower designs where copyright may subsist.

Assessment

26. The question is therefore, bearing in mind these points on the Statements of Case, the CMC, its Order and the clarifications in the Response to the RFI, did the Statements of Case suitably define the issues in dispute to include the Prototype as a Work or suitably circumscribe the need for an assessment of any copyright that subsists in the Prototype and thereby allow Liking access to relevant disclosure and evidence to be examined before the court?
27. WaterRower Ltd explained there were no photographs of the Prototype. Paragraph 9 of the APOC confirms (rather than extends) that the Prototype (and the Boat Show Prototype) are part of the asserted Works. The Response to the RFI further clarifies this pleaded position. Although not directly relevant to the pleaded case, the Response to the RFI serves to demonstrate the issues of the first created Work were being actively considered by both parties through this detailed exchange of relevant information on the Prototype. However, at no point prior to Liking's skeleton argument was

its position on this central issue raised. WaterRower Ltd responded to the point in the opening argument at trial. If Liking had really felt the Prototype was not in the case, that was the time to deal with the point, prior to the evidence being tested.

28. The purpose of Statements of Case are such that the overriding objective is properly served and the case – and the relevant issues therein – are heard fairly. Liking notes it would have prepared its cross-examination differently if it had appreciated the subsistence of copyright in the Prototype was part of the case. On the basis of the above analysis, I am not convinced by this or that Liking suffered any prejudice in the circumstances.
29. The issue of the creation of the Prototype and whether copyright subsists in it as a work of artistic craftsmanship (and by extension its reproduction in later versions, such as Series 1 Version 1 in Annex 1) was at the forefront of consideration of both parties during the preparation for this case and during the trial. Drawing these points together and bearing in mind the overarching nature of the claim being brought, the definition of Works in WaterRower Ltd's Statement of Case is not limited by the pictures of embodiments in the referenced APOC Annex 1 or in the List of Issues and includes the Prototype. Alternatively, if I am wrong and the Prototype is not a Work, then the issue of any copyright that may subsist in the Prototype was suitably set out in the Statements of Case. WaterRower Ltd do not claim any copyright in the Boat Show Prototype and therefore I have not made any finding on whether it may have been included within the definition for Works. The parties could both have ensured the pleadings and the List of Issues were better expressed, but in the overall context of the pleaded exchanges, the meaning was clear enough. The subsequent evidence and further exchanges between the parties re-enforces this position.
30. If I am wrong that the Statements of Case suitably circumscribe the Prototype as a Work in the case or that they do not satisfactorily set out the issue of any copyright that may subsist in the Prototype, in the alternative, based on the noted extensive contextual information, the evidence, submissions, cross-examination and timing on this central point, then this is an example of a case where it is just to allow such a non-pleaded issue to be determined. The issue was suitably set out in the evidence, disclosure and related RFI exchanges and by way of cross-examination and argument regarding the Prototype and Boat show Prototype at the hearing.
31. The Prototype is therefore a work asserted by WaterRower Ltd as a Work defined in its APOC and its Annexes or the issue of any copyright subsisting in the Prototype was one that was suitably circumscribed in the Statements of Case to be determined.

Witnesses

32. WaterRower Ltd relied on three witnesses of fact. Mr Duke, the original creator of the WaterRower product, came across as a witness trying to assist the Court. He answered promptly and fairly. This was clearly a subject he was passionate about and he provided helpful detail. Mr Caccia was a

director/shareholder of WaterRower Ltd for a period of time. His evidence was somewhat distanced from the subject matter at times and was not always factual in nature. In general, his evidence was given in a fair manner, but was of limited assistance. Mr King is currently a director and shareholder of WaterRower Ltd. His views strayed into opinion. In some of his answers he appeared, perhaps unsurprisingly, influenced by his role at WaterRower Ltd. I have considered this in the context of the evidence provided. Otherwise he came across as a reasonable witness.

33. Liking relied on two witnesses. Ms Pearse is Liking's legal representative in the case. WaterRower Ltd raised an issue relating to Ms Pearse's evidence dated 26 January 2023 and the limited extent to which that evidence was factual in nature. This was mainly resolved with Liking providing a redacted version of that evidence prior to cross-examination. Much of Ms Pearse's evidence was a vehicle for introducing documents into the case. Ms Pearse gave evidence in a fair manner, albeit it was of modest relevance and I have placed little weight on it. Concerns were also raised by WaterRower Ltd's counsel regarding certain exhibits where Ms Pearse was not able to confirm they related to products in the proceedings. There did appear to be a discrepancy, but it does not impact the evidence in any material way. Mr Fu is the Vice President and Research and Development Director of Liking. His role was limited by the fact it was a previous employee who had been involved in the relevant history and had left Liking. Mr Fu's evidence was provided with the benefit of a translator. His evidence was also of modest relevance. It was provided in an open and reasonable manner.
34. There were a number of other preliminary matters raised at the start of the trial. Upon hearing these, including the Claimant's Application dated 8 March 2023 for relief from sanction under CPR 3.9(1) due to late filing of its witness evidence, the outcomes were that; the requested relief was ordered, Liking could rely on Mr Fu's statement as evidence at trial and Liking would not rely on their Amended Defence and Counterclaim to the extent it was evidence in the case.

The WaterRower rowing machines and their creation

35. The following history was set out in the evidence and unless otherwise noted was unchallenged. Mr Duke was actively involved in competitive rowing from a young age, starting at secondary school. During that time he enjoyed sculling (a scull is a narrow single person rowing boat with two oars) on a large pond in Long Island, USA. At University he continued rowing at Yale College and in the summer of 1975 was selected for the US lightweight rowing team. Later, attending Massachusetts Institute of Technology ("MIT"), Mr Duke completed a Master's degree in Oceans Systems Management. Although his course was mainly about international shipping, it also had courses in naval architecture.
36. Soon after graduating from Yale, Mr Duke built his own 'experimental' scull. Working from information provided by a company called Gougeon Brothers, it was built from a "*cold moulded*

system of laminated thin veneer wood" with an epoxy. Mr Duke explains he used this experimental scull but that it had too much longitudinal flex and was abandoned.

37. After this exercise (and before attending MIT) in 1978 Mr Duke worked for Composite Engineering (also known as Van Dusen Racing Boats). He worked building carbon fibre sculls and learned how these boats were *"put together"*. After a period of time working in bulk commodity shipping Mr Duke decided to try his *"hand at being an inventor"* and in 1984 set up a company which later became known as the Providence Design Company ("PDC"). Mr Duke explains he narrowed in on the idea he could *"design a rowing machine that was better than the 'original' 'Model A' Concept II"* (shown in the evidence as a metal monorail rowing machine with a vertical flywheel). After some experimentation working on his own in his basement, in 1985 he started work on a rowing machine with a water flywheel, which later became the first WaterRower, the Prototype.
38. Mr Duke's evidence on his inspiration and design ethos for what became the Prototype and later versions of the WaterRower was also largely unchallenged. It stems from his experience in competitive rowing in *"beautiful cedar shells down the Squamscott River under cool blue New Hampshire skies."* His view is that rowing wooden single sculls is different to the larger fours and eights (referring to the number of rowers in the boat), *"You are even more connected to the water because they are so narrow – even narrower than your own legs. You don't even see the boat directly below you. So your body feels like it is flying over the water."*
39. Other aspects stressed by Mr Duke are: (1) the sound of water *"rushing under the hull"*, particularly in cedar boats made by George Pocock, which were *"just beautiful"*, and (2) the feel of the water through the oar or scull. Mr Duke explained the impact of his experience rowing in *"graceful and light"* wooden shells – including sculls (this feeling was referred to by him as *'kinaesthetics'*). This sound and feel of the water led Mr Duke to create the water flywheel used in the WaterRower as a *"non-mechanical experience."*
40. WaterRower Ltd and Liking rely on a number of published articles about WaterRower products in support of their asserted positions in the case, for example regarding Mr Duke's intention as regards the nature of the creation of the Prototype.
41. WaterRower Ltd relies on articles including in the Wall Street Journal, a number of UK newspapers and specialist health and rowing journals going back to 1995. The excerpts chosen emphasise the relevant publication's views of the WaterRower product. They focus on the WaterRower being *"stylish"*, *"a beautiful object"*, and an *"attractive piece of furniture"*.
42. In addition, WaterRower Ltd rely on two examples of how they say the WaterRower product has been recognised as an iconic design by institutions/stores whose opinions are held in high regard.
 1. MOMA (Museum of Modern Art) Design Store in New York City, USA where it describes Mr Duke's design process and resulting product as;

"He wanted to make an indoor machine that felt as much like a real rowing as possible, with a focus on aesthetics. It took him two years to get the design right, moving past failed ideas such as a flipper in the tank instead of a clutch. What began as a series of doodles at his desk turned into a sculptural piece of exercise equipment that upends expectations in two ways: by bringing water indoors, and by looking elegant and artful when stored."

2. The Conran Shop described the WaterRower as:

"Classic WaterRower

Description

The original series Classic WaterRower is exquisitely handcrafted in the United States of America from sustainably sourced solid American black walnut.

As with all natural timbers, there will always be a degree of variation in the colour of the wood, but the eco-friendly premium hardwood frame ensures longevity and quality of performance. In the final stages of construction, the design is hand finished with Danish oil to give it a warm tone and deep lustre.

The WaterRower has been designed to set it apart from other fitness equipment, featuring an attention to design refinement unseen in other exercise apparatus. As a self-regulating piece of apparatus, the harder you stroke, the more resistance is created, and the WaterRower exercises up to 84% of the body's muscle mass. Designed to stimulate both the physiological dynamics of rowing on water, the WaterRower's classic design also enjoys an extremely smooth and gentle glide, when in motion. This motion is silent, with only the soothing sound of moving water to motivate your moves.

The WaterRower perfectly combines high-quality materials, innovative design with a handsome aesthetic, making for a luxurious addition to a home gym or living area as the compact frame stores easily when not in use."

43. There is no dispute on the accuracy of these excerpts. The WaterRower series has been in the MOMA Design Store for 16 years. Its inclusion is said to be "curator approved". In cross-examination Mr Caccia explained (for the first time) that a WaterRower had been installed in the Design Museum in London, separately to being sold in a Conran shop. The limited information on this fact would not impact my assessment in this case, but in any event, the lack of context or support for this statement means it adds little additional weight to the issues.
44. Liking relies on articles closely contemporaneous with the creation of the earliest WaterRower including:

Rowing In Style - New York Times 24 April 1989

"rrSensory (sic) simulation keeps an exerciser motivated and alleviates boredom, according to John Duke, inventor of the WaterRower. The only sound the cherrywood rowing machine makes, Duke said, is "the soothing rush of water keeping time with the natural rhythm of your stroke".

St Louis Post Dispatch – 5 November 1989

"My main goal was to create a fitness product that is truly a pleasure to use and that gives people the motivation for sticking with their exercise program.' Duke says."

Boston Phoenix – 26 January-1 February 1990 issue

"Inventor John Duke, a former member of the US Olympic Rowing Team, says that his machine, "a harmonious marriage of elegant and practical engineering," offers an alternative to "aesthetically unappealing metal exercisers."

45. Liking also rely on a video entitled "Inventors - News Network" Episode 1 1993. This includes an interview with Mr Duke on the development of the WaterRower. It supports much of his evidence on his process arriving at the first WaterRower product, the Prototype. Mr Duke explains he had been working for three years on "all kinds of different rowing machines". He describes the resulting WaterRower as one that had a stainless steel blade that rotated in a sealed unit filled with water, the water was spun acting like a flywheel, an advantage was that water has a "tendency to absorb shock" such that the motion feels smoother to muscles and joints, the balance between the inertial and viscous forces when rowing give a feeling of "gliding between strokes", that this sound, feel and visual gives a sense of connection you do not get in a purely mechanical resistance and creates the "same kind of rhythm you get by accelerating a shell and having it glide between strokes, that's what all of the tweaking was about."

Identifying the Works

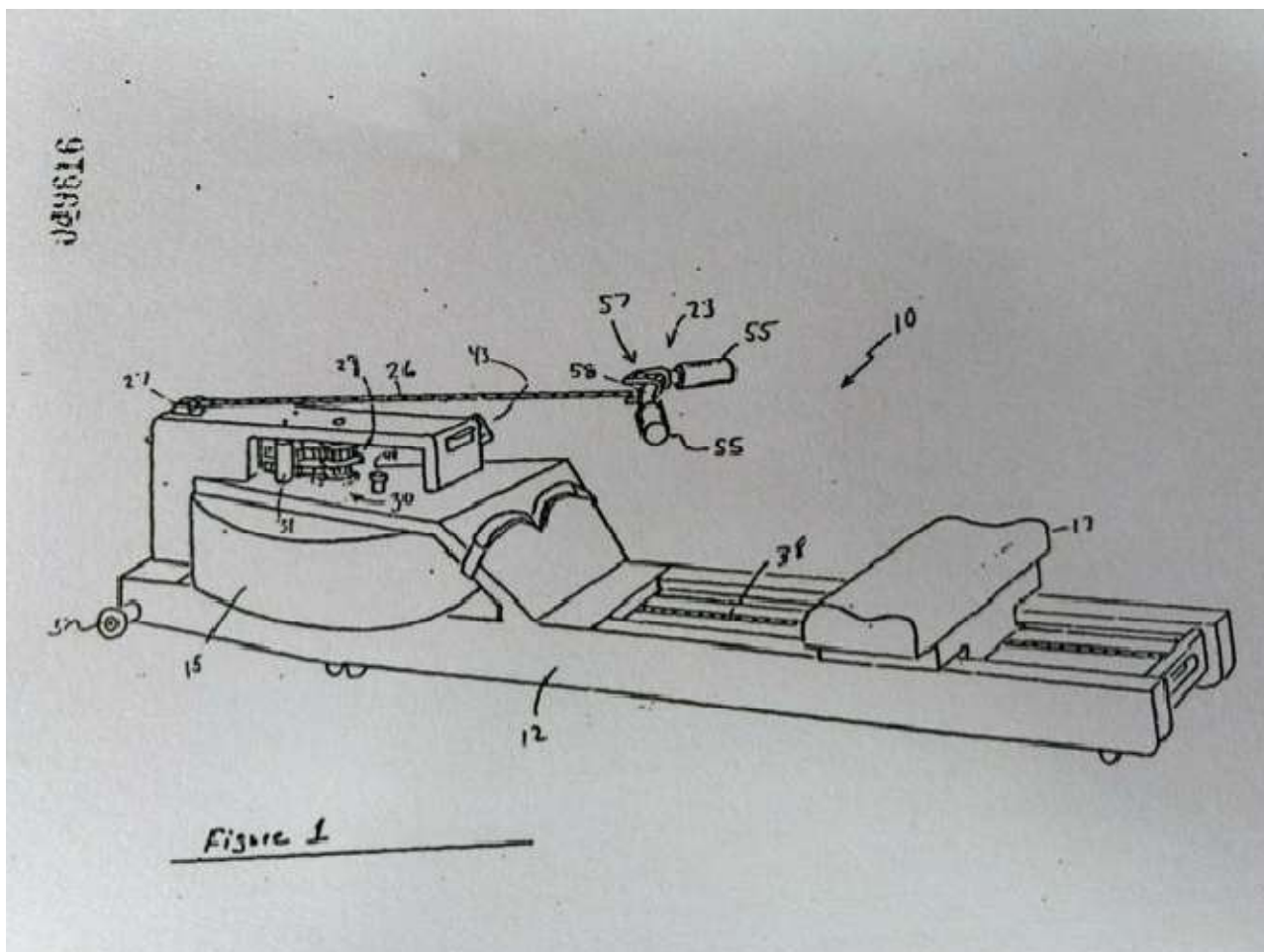
The Prototype

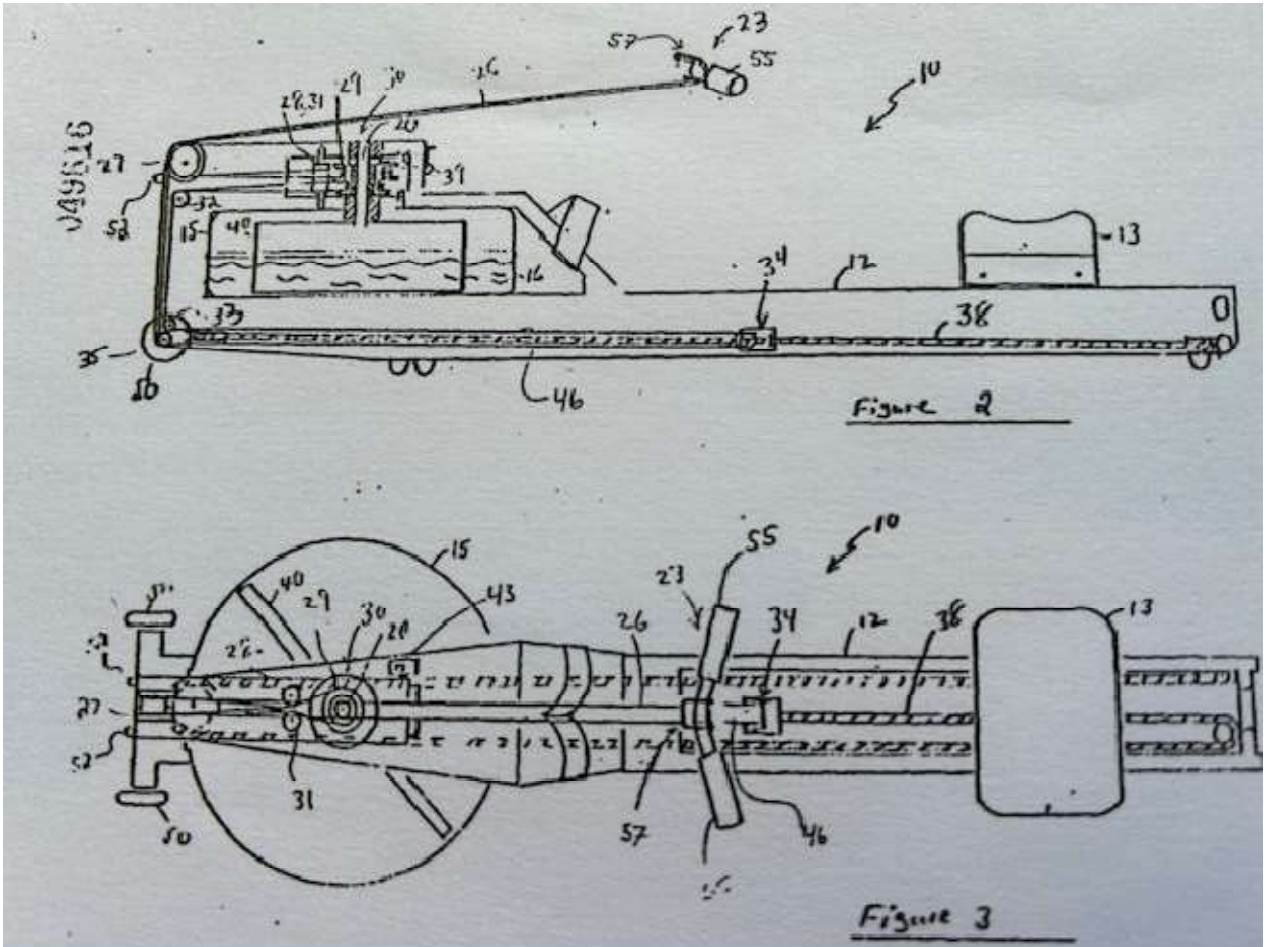
46. The process leading to the Prototype was conducted by Mr Duke involving sketches, testing parts and 'learning as he went' – culminating in a finished Prototype. Mr Duke's sketches in the Patent Application are the earliest surviving drawings of the Prototype. Figures 1, 2 and 3 of the Patent Application are reproduced below.
47. Mr Duke further described the Prototype (the individual elements of the description are generally self-explanatory, the table and annotated diagrams in Annex 2 assist with orientation) explaining aspects of the development of design as one where he strove "... to create an aspect of structural purity in the WaterRower in the "form follows function" approach to design, one thing led to another; The main rowing force was to the Forward Strap Pulley. Firstly, the Pulley Shaft had to be held down to the forward ends of the twin Main Rails. My answer was two parallel vertical boards

that I called the Forward Risers, which also enclosed the Pulleys. Secondly, I felt that the Pulley Shaft had to be held forward away from the top of the Footboard. Here my answer was two parallel horizontal boards over the fly wheel Tank. I later called these the "Top Deck" and "Bottom Deck", and they also supported the Paddle Shaft and Guide Rollers - which I regarded as very important. What I developed in this way was a repeating motif of parallel structural elements in different planes and scales: parallel Main Rails, parallel Forward Risers, then parallel Top and Bottom Decks. Lastly, this refrain was repeated again in smaller scale in the parallel Seat Risers. I feel this repeating pattern of parallel structural elements is fundamental to the design identity of the WaterRower as a whole."

48. Liking takes the position that the court does not know what the early prototypes looked like. However, Mr Duke's evidence that the contemporaneous drawings reproduced in the Patent Application represent the Prototype was not seriously contested. Although the drawings do not come with precise measurements it was clearly designed, as were the later models, for use by a human. This gives some scale to the drawing. I have proceeded on the basis that this was the first completed WaterRower product, that its shape and structure was as described in his witness statement and as drawn in the Patent Application, and that Mr Duke was the sole creator.

Figures 1, 2 and 3 of the Patent Application





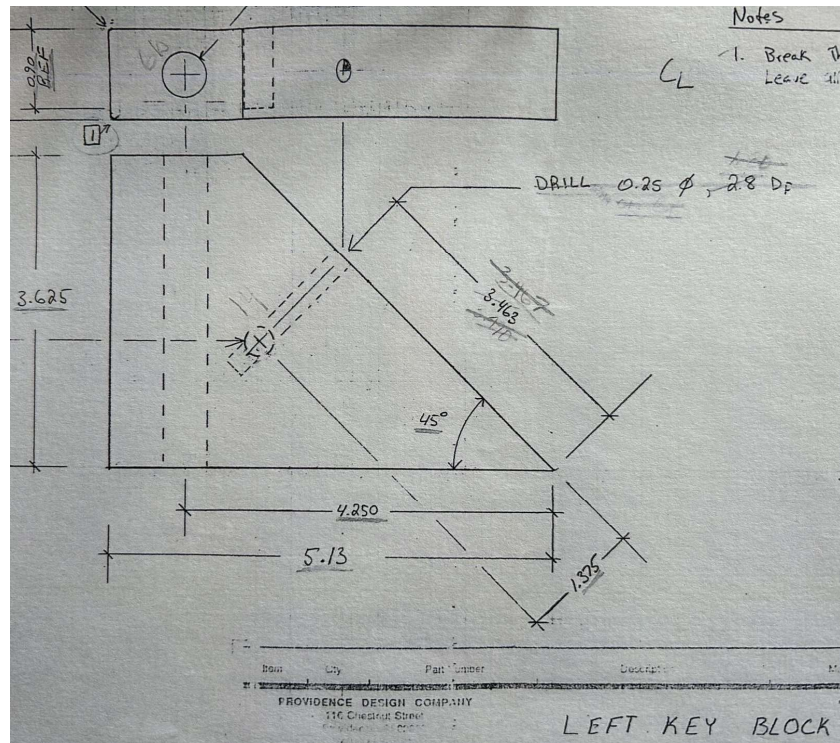
49. The Boat Show Prototype was prepared and displayed at the Small Boat Show in Newport, Rhode Island in May 1987. Mr Duke notes distinctions between the Prototype and Boat Show Prototype were due to manufacturability, for example the thermoform moulds of the 22 inch polycarbonate Tank halves were improved and mahogany was used as the wood due to its stability, but that the frame design was "largely the same" and contained the "repeating motif of parallel structural elements".
50. Mr Duke explains his design was intended to create an aspect of "structural purity" bearing in mind the "Shaker furniture" style of "well-made objects with sparse elegance that could be used in everyday life". This noted guiding aesthetic led Mr Duke to a "clean design ... with lots of plain edges without fancy ornamentation ... in the structure it follows the "form follows function" school of design". The shape of the frame was also consciously designed bearing in mind the loading forces required in order to "drive" the rower. The flywheel tank needed to be round but the cross section was made largely rectangular, "to reprise the rectangular cross section of the wood parts" and the seat was "stitched as you would find in the seats of a fine sports car."
51. Mr Duke wanted to create a "welcoming emotional connection" and explained that "A big part of that was the sound and feel of the water... the use of wood for the frame" and from the geometry

"trying to invoke the feeling of sitting in a wooden scull". The main aesthetics for the Prototype "arise from the wood of its Frame". It was also designed to be stored vertically, to be "beautiful and in view standing upright in a living room".

Other modifications to the different WaterRower versions

52. Subsequent to the Prototype, the WaterRower rowing machines have gone through a considerable number of iterative changes. Mr Duke explains the *"distinctions between the 'boat show' prototype and the present WaterRowers were largely manufacturability changes"*. The types of changes noted include: eliminating glued joints, creating modular parts with bolted connections for shipping, and devising and moving a pair of trapezoidal 'Key Blocks'. Following the Small Boat Show in 1987, Mr Duke formed a corporation named WaterRower Inc with other partners interested in launching the business. Initially this was Mr Duke and Ralph Beckman (also an engineer /architect) and later Henry Sharpe.
53. Amongst these various changes to the WaterRower products, WaterRower Ltd's counsel drew attention specifically to the Key Blocks (see below an early technical drawing of a Key Block prepared by Mr Duke) and their re-positioning from Series 2 onwards. The two Key Blocks are said to complete the critical juncture at the top of the Footboard to connect the *"Footboard to both the Top Deck and Bottom Deck"* eliminating the need for several glued joints and preventing shear between the Top and Bottom Deck. The main visual point is that the positioning of these trapezoidal Key Blocks means the footplate was moved from being flush with the top of the Main Rails which the seat moves along (see this below in a picture of a Series 1 Version 1 model) to being tucked down between the Main Rails – putting the users heels between these Main Rails (see below in a picture of a Series 2 model). Mr Duke's evidence is that this *"opened up the volume"* as a result, widening the distance between the Main Rails (noted as an increase in width between the rails from 8.5" to 10.25") and that this change *"was an important aesthetic improvement that went beyond manufacturability"*. Mr Duke's view is that regardless of this change between Series 1 and 2, *"Both ways it was narrow like the gunnels of a single scull"*. As a consequence of the change Mr Duke also noted the flared footplate in the Prototype and Series 1 Version 1 was changed to a footplate with parallel edges.

Technical drawing of a Key Block



54. In cross-examination Mr Duke described his responsibility for the "important movement of the key blocks from the forward end of the top and bottom deck ... back to the rear end under the forward riser. That was my choice, and I think was critical to the identity of the whole machine, because that is what established the repeating motif of the parallel structural elements. Before the key block was moved, the whole front end looked like a solid mass and did not have the beautiful juncture of the top and bottom decks parallel structural elements meeting the parallel elements of the forward risers perpendicular to each other."
55. Responding to this answer, Mr Moss asked Mr Duke in relation to the Patent Application/US Patent:
- "Q. The top and bottom were parallel in the patent, correct?
- A. Correct. But the other difference was the bottom deck were parallel in a horizontal plane but the vertical planes were not parallel, because the bottom deck was a V-shape, because the foot board was glued with epoxy directly to the bottom deck in what is called a finger joint. So that the end of the bottom deck was as wide as the top end of the foot board. It was by moving the key blocks back that I was able to narrow the ... bottom deck because it no longer had the same connection to the foot board."
56. This change from the 'flared' v-shaped footboard (as can be seen in Figures 1 and 3 of the Patent Application) to the vertical (as well as previously horizontal) parallel planes of the Top and Bottom Decks can be seen in the below photograph of a Series 2 WaterRower. However, it can also be seen in the below photograph of the Series 1 WaterRower that this change to vertical parallel lines of the Top and Bottom Decks was present prior to the footplate being moved (i.e. prior to the move from

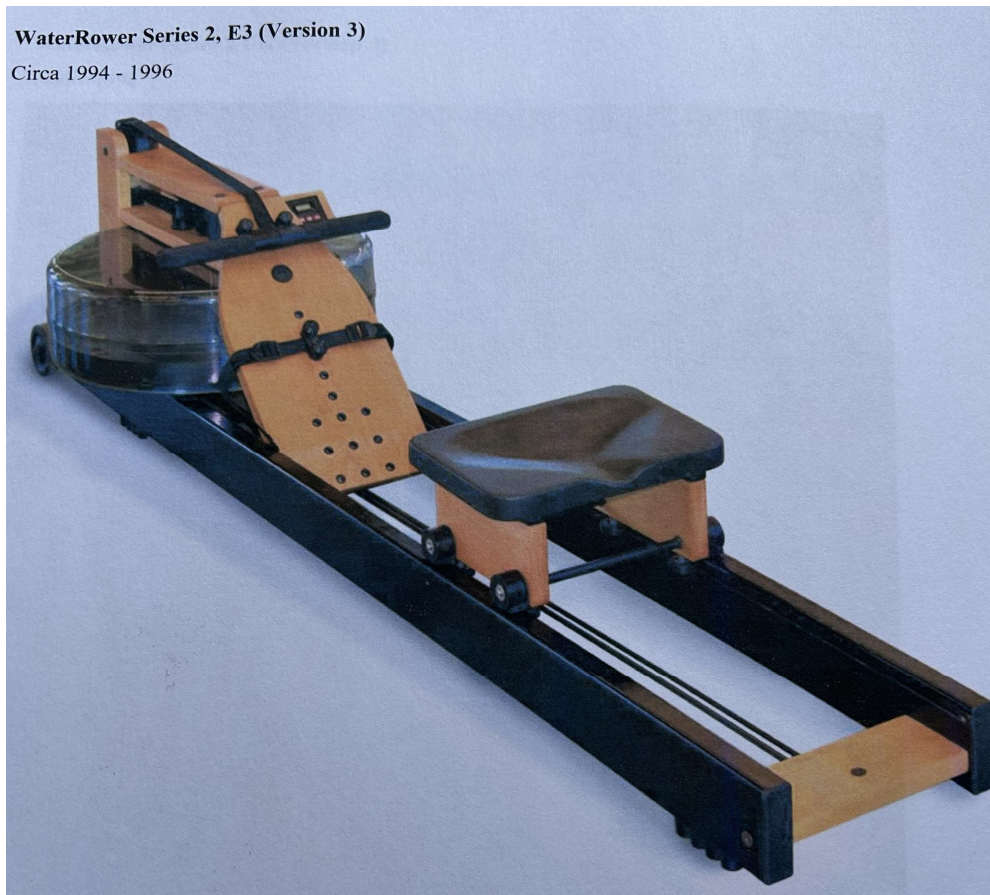
being flush with the top of the Main Rails to being tucked down between the Main Rails). This contradicts the statement made by Mr Duke in his answer above that the reason the Bottom Deck was a v-shape was due to the connection of the foot board directly to the Bottom Deck and that it was only once the key block had been moved and the Main Rails widened with the footboard lowered that he was "*able to narrow the ... bottom deck*".

57. I do not believe this calls into question the credibility of Mr Duke's evidence. However, it does alter the position on the timing of the iterative change to the vertical parallel Top and Bottom Decks to the Series 1 model.

Series 1 Version 1



Series 2 Version 3 (with aluminium Main Rails)



58. Annex 1 identifies the other asserted Works from Series 1 Version 1 to Series 4 Version 8 which are all iterations based on the Prototype. Annex 2 provides a useful table setting out the individual incremental changes to these versions/series of the WaterRower. Each WaterRower shown in Annex 1 is asserted as reproducing the intellectual creativity of the Prototype. Each is also asserted as being a work attracting copyright based only on the relevant iterations to that model.
59. The descriptions and iterative differences between each of the Works set out in Annexes 1 and 2 were not challenged and I accept WaterRower Ltd's evidence, including that of Mr Duke, Mr Caccia and Mr Duke, in that regard.
60. WaterRower Ltd's counsel explained that (other than the electronic monitor which is not relied on as part of the shape or intellectual creation of Mr Duke) the shape of each entire work is relied on as the author's intellectual creation and/or as works of artistic craftsmanship. I therefore need to consider the claims to each of the different intellectual creations in the different models claimed as Works.
61. Around January 1989 Mr Beckman and Mr Sharpe ceased to be formally involved in WaterRower Inc. By 1991 there was a recession and Mr Duke had to 'lay off' everyone employed at WaterRower Inc. Around this time, Mr Duke "*started making changes in the design to create the Series 2, Version*

2. *This was an effort to lower the costs of goods*". Also around this time, Mr Dixon Newbold became a consultant to WaterRower Inc, assisting with some of the designs for Series 2 Version 3. These included modifications including a teardrop shape for the Handle "*that would be more comfortable to hold*", an injection moulded Collar made out of glass-filled polycarbonate for the Handle and adapting the hardware connecting the Main Rails to each other to allow the heel support to be lowered between the Main Rails.

62. In 1992 Mr Duke set up a European distribution agreement with Alex Caccia, initially for the Series 1 Version 1 model. The UK based distributor company was WaterRower Ltd. In 1998 Mr Duke sold out his interest in WaterRower Inc to WaterRower Ltd and left the company.
63. Around 1994 Peter King joined WaterRower Ltd. He has a background in mechanical engineering and a wide range of manufacturing experience. Mr King applied his experience to "*source the parts and build them effectively and efficiently*". Mr King also designed visible variations to the WaterRower models including – the "*2" corner radius injection moulded Tank first seen on the Series 2 Version 4*", "*the Handle Rest, Footboard Heel Rest and Strap, and Dolly Wheel*".
64. Further examples of the adaptations to the models of the WaterRower include the following changes. In Series 2 a move from an earlier 5" diameter travel wheel to a 4" travel wheel. In Series 3 this diameter was further reduced in size to a 3" wheel. In Series 3 Version 7 a "*Floating plastic heel rest, fixed foot strap was introduced*". Earlier versions had a fixed wooden heel footrest (Series 1 Version 1) and a "Fixed steel heel rest" in Series 3 Version 5. From Series 2 the "Teardrop Shaped Handle" was introduced and the rectangular spacer added (from the earlier cylindrical one). Also of note were the different sized corner radii of water tanks and the move from these being vacuum formed to injection moulded.

Does copyright subsist in the Works?

65. WaterRower Ltd claim each of the Works is protected by copyright as work of artistic craftsmanship under section 4(1)(c) of the CDPA. Whether the Works qualify as works of artistic craftsmanship is therefore the key issue in the case. This question is a complex one. I therefore address the issue of the relevant law in more detail than usual.

The Law

66. The relevant sections of the current CDPA for this case are:

S.1 of the CDPA

"1. Copyright and copyright works.

(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—

(a) original literary, dramatic, musical or artistic works,

(b) sound recordings, films or broadcasts, and

(c) the typographical arrangement of published editions.

(2) In this Part “copyright work” means a work of any of those descriptions in which copyright subsists.

(3) Copyright does not subsist in a work unless the requirements of this Part with respect to qualification for copyright protection are met (see section 153 and the provisions referred to there)."

67. Under the CDPA, only a work listed in section 1(1) is able to attract copyright protection. Artistic works are protected by copyright under subsection 1(a). Section 4(1) of the CDPA sets out different categories of artistic works referenced in section (1)(a).

"4. Artistic works.

(1) In this Part “artistic work” means—

(a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,

(b) a work of architecture being a building or a model for a building, or

(c) a work of artistic craftsmanship."

68. The term "artistic craftsmanship" has no statutory definition. A key question that needs to be grappled with in this case is how to assess what is a work of artistic craftsmanship in accordance with s.4(1)(c) CDPA.

Legislative background

69. The meaning of "a work of artistic craftsmanship" and the limits of its application involve a particularly difficult tension which the parties say exists between the operation of the CDPA on this issue and EU law. The parties therefore directed me to a number of helpful background documents, including texts setting out the history and development of the law and the application of copyright to "applied art" – such as works used for industrial purposes or ordinary utilitarian objects with artistic elements.
70. The following excerpt from *International Copyright and Neighbouring Rights, The Berne Convention and Beyond (Third Edition) Ricketson and Ginsburg* pp457-458 ("*Ricketson and Ginsburg*") serves as a useful starting point which encapsulates the relevant history relating to the underlying issues:

"However, it seemed anomalous that many applications of artistic works in the industrial sphere should be denied copyright protection, where they quite obviously displayed artistic elements. If the painter of an indifferent landscape or portrait received copyright protection, why should not the artist-craftsman who designed and made ornate and aesthetically pleasing table or dinner service? In France, the view came increasingly to be held during the course of the nineteenth century that the makers of such objects were entitled to copyright protection under the Law of 1793, and likewise that artists did not lose the protection which they enjoyed in relation to their 'pure' works by reason of the fact that they turned these to an industrial use, for instance, by using them as designs for utilitarian objects. In other words, there occurred a total assimilation of all works of art, however they were manifested or applied, to full copyright protection. So far as the separate designs laws were concerned, these continue to exist, but the possibility of cumulative protection under these as well as the copyright law was accepted (the former, of course, was of far less duration). This development did not take place immediately. Indeed, it took nearly a century before French law fully recognised the doctrine that has become known as 'unity of art'. In the course of this development, French courts and legislators experimented with a range of different criteria that would serve to distinguish artistic works from subject matter which was industrial and 'non—artistic' in character. These included the method of reproduction of the work, the purpose behind its creation, the predominant purpose of the work, the status of the creator, and its artistic value. Each was found unsatisfactory, because exceptions could always be envisaged which made the criterion in question unworkable or uncertain. They depend too much on the making of subjective and often arbitrary judgements. For example, utilitarian purposes may exist equally with artistic purposes, or maybe mixed together in differing degrees. How are such matters to be ascertained and weighed against each other? On the other hand, work may be intended to have a purely utilitarian purpose but still have clear artistic value, and vice versa. Again, 'pure' artistic works may still be made by processes that are 'industrial', while manufacturers of commonplace articles may still be artists, and vice versa. It was against this background of uncertainty that French law moved towards the adoption of the doctrine of 'unity of art', which has been explained by one distinguished commentator as follows:

The theory of 'unity of art' has its basis in the refusal to make any distinction between 'pure art' and 'industrial art'. It extends protection insured by copyright law to all creations of form, even the most modest, those which, on the 'lower' frontier of applied art, depend on what is called 'industrial aesthetics'. It finds its explanation – and, we think, its justification – in the idea that an adequate distinction is impossible between 'major art' and 'minor art', all criteria to which one may have recourse to this effect being subject to

the accusation of subjectivity or being powerless, in other ways, to solve the borderline cases.

In adopting this view, the French were taking the most extreme position. Although its all embracing nature may be criticized, it is logical and avoids the manifold difficulties that arise when an attempt is made to fix a boundary beyond which works of industrial art will not be protected. This was the case in many other European countries, including Italy and Germany, where their respective laws sought to exclude the more 'industrial' kinds of work from protection. Even more reluctant to protect such works was the UK which maintained a far more rigid separation, and after 1911 denied copyright protection altogether in the case of an artistic work, which was 'industrially applied' (defined to mean the multiplication of more than fifty objects to which the work was applied). On the other hand, the UK law after that date did accord protection to three-dimensional objects which were entitled 'works of artistic craftsmanship'. The origins of this new subcategory of artistic work were to be found in the Arts and Crafts movement of the late nineteenth century and the influence of such figures as William Morris and John Ruskin. The scope of the protection conferred, however, was uncertain, and give rise to considerable judicial difficulty in determining the degree of artistic merit that was required for protection to be accorded to such works, particularly in light of the fact that, as regards other kinds of artistic work, British law expressly excluded any requirement of artistic merit. ... In consequence, it is unsurprising that no reference to 'works of applied art' or 'works of decorative art' was to be found in the definition of 'literary and artistic work' adopted in article 4(1) of the Berne Act 1886."

71. The International Convention for the Protection of Literary and Artistic works signed at Berne on 9 September 1886 ("the Berne Convention") first introduced the term "applied art" in 1908, under its Berlin Revision. The words "[w]orks of art applied to industrial purposes, shall be protected so far as the domestic legislation of each country allows" were inserted into Article 2(4).
72. The Brussels Revision of the Berne Convention in 1948 incorporated the words "works of applied art" into Article 2(1) of protected works – dropping the reference to industry due to an objection by the UK that this was too restrictive as it was possible to envisage the application of artistic works in domains other than industry. Article 2(4) became Article 2(5):

"It shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. ..."

73. The UK and the EU are signatories to the agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") through their agreement establishing the World Trade Organisation signed in 1994.
74. Article 9(1) of TRIPS provides that signatories to that agreement must "*comply with articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.*". The UK and other EU Member States are also directly signatories of the Berne Convention.
75. Article 2(1) of the Berne Convention as amended on 28 September 1979 provides that:
- "(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ... works of applied art ..."*
76. The wording of Article 2(7) of the Stockholm Convention on 14 July 1967 (which remains in the latest version of the Berne Convention) sets out the discretion available to the UK to determine the extent of the application of its laws to works of applied art:
- "2(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works."*
77. Liking's position is that Article 2(7) of the Berne Convention means it has been left to Convention countries, including the UK, to determine at a national level how they protect works of applied art at the interface of copyright and design protection. Therefore, this court has a discretion whether to follow the relevant EU legislation and CJEU case law. WaterRower Ltd's position is that the relevant EU legislation and case law is binding. I therefore first consider whether this discretion exists and can be applied by this court.
78. Following 31 December 2020 and the withdrawal of the UK from the EU, any UK law which transposes an EU directive remains binding, subject to any repeal or amendment. The CDPA remains as set out above. The principle of supremacy of EU law applies to the CDPA, "*so far as relevant to the interpretation, disapplication, or quashing of any enactment or rule of law passed or*

made before" 31 December 2020 (section 5(2) of the European Union (Withdrawal) Act 2018) ("the EU Withdrawal Act") as amended by the European Union (Withdrawal Agreement) Act 2020 ("the Withdrawal Act"). In *Equisafety Limited v Woof Wear Limited* [2024] EWHC [2478] (IPEC) – a case referenced in post-trial submissions - Mr Ian Karet, sitting as a Deputy High Court Judge, referred in this context to *Wright v BTC Core* [2023] EWCA Civ 868. In that case, Arnold LJ explained at [34] the legislation which transposed an EU directive into domestic law prior to 31 December 2020 remains part of UK law unless and until it has been repealed or amended. Therefore, for this matter, the rule of supremacy of EU Law remains and European directives should continue to be interpreted according to the rules developed by the CJEU.

79. The Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent on 29 June 2023 and formally came into force on 1 January 2024 ("REULA"). This repealed elements of the EU Withdrawal Act. Section 22(5) of REULA provides that "*Sections 2, 3 and 4 do not apply in relation to anything occurring before the end of 2023.*". The relevant legal background is also set out in more detail in *Lipton v BA Cityflight* [2024] UKSC 24 ("*Lipton*") [10]-[24] and [52]-[57] and was the subject of post-trial submissions. Therefore, for this case, the rule of supremacy of EU Law remains and European directives should be interpreted according to the rules developed by the CJEU.
80. The relevant EU legislation referred to by Liking is set out below (in chronological order):

The Design Directive

Article 17 of EU Directive 98/71/EC (the "Design Directive") made on 13 October 1998 (and implemented in the UK by the Registered Design Regulations 2001) states:

"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." (underlining added)

The InfoSoc Directive

European Parliament and Council Directive 2001/29/EC made on 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (and implemented in the UK by the Copyright and Related Rights Regulations 2003, amending the CDPA) ("the InfoSoc Directive") states in its recitals and operative articles;

"(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the

laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

Article 1

Scope

This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...

Article 4

1. *Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.*

Article 9

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract."

The Designs Regulation

81. Article 96(2) of the Designs Regulation made on 12 December 2001 is directly effective. The relevant wording is identical to that in Article 17 of the Design Directive:

"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."

Is the UK bound by EU legislation such that it no longer has discretion to apply Article 2(7) of the Berne Convention?

82. Liking argues that the wording of the InfoSoc Directive does not suggest it is repealing Article 17 of the Designs Directive. Also that the relevant European Commission Green Papers which preceded the InfoSoc Directive did not consider this issue (the details of these Green Papers were not addressed) and that it was not an explicit or implicit objective of the InfoSoc Directive to harmonise or remove Member States' discretion as set out in Article 17 of the Design Directive. Liking also relies on the Designs Regulation postdating the InfoSoc Directive. It retains the wording of Article 17 of the Design Directive - that Member States have the discretion to set their own threshold for copyright protection for works which could have cumulative protection, as provided for under the Berne Convention. The question is therefore whether this EU legislation interpreted as far as possible in a manner consistent with the international obligations of relevant international agreements (*SAS Institute Inc v World*

Programming Ltd [2013] EWCA Civ 1482) allows the UK to retain its discretion under Article 2(7) Berne Convention for works of applied art.

83. Liking's resulting submission is that, if that discretion exists, the application of relevant CJEU cases *C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV ('Cofemel')* and *SI, Brompton Bicycle Ltd and another v Chedech/Get2Get ('Brompton')*(Case C-833/18) [2020] E.C.D.R. 9 (referred to as '*Brompton*' after the name of the foldable bicycle which was the subject of the case) would not be binding on Member States (or the UK).
84. In this context Liking refers to *Flos SpA v Semeraro Casa e Famiglia SpA* (C-168/09) at [39] and *Funke Medien NRW GmbH v Federal Republic of Germany* (C-469/17) at [57]-[58] to support its positions that the CJEU accepts: (1) Article 17 of the Designs Directive in respect of copyright protection for designs operates to permit this discretion, and (2) that the InfoSoc Directive aimed to safeguard a fair balance between rights owners and users of protected subject matter and that this balance was contained in the Directive – such that it only harmonises certain aspects of copyright law.
85. In *Cofemel*, the UK (and other Member States) made representations on this asserted legislative incoherence. The AG Opinion (AG Szpunar) in that case acknowledged the arguments on the timing of the noted EU legislation and the provisions on the relevant discretion:
33. *By way of reminder, Article 17 of Directive 98/71 enshrines the principle of cumulative protection of designs under design law and under copyright law. The second sentence of that article provides that the extent to which, and the conditions under which, such protection by copyright is conferred, including the level of originality required, is determined by each Member State. Similar wording is found in Article 96(2) of Regulation No 6/2002.*
34. *According to the Italian, Czech and United Kingdom Governments, those provisions leave it to the Member States to establish the conditions under which copyright protection is conferred on designs, notwithstanding the adoption of Directive 2001/29. Those Governments also claim that Article 17 of Directive 98/71 constitutes lex specialis in relation to the provisions of Directive 2001/29 as interpreted by the Court. A similar position is advocated in academic writing.*
86. However, the AG was not convinced by the Member States' representations. Dealing with the various points in turn and summarising the conclusion that the protection of applied art by copyright is harmonised under the InfoSoc Directive:
48. *Accordingly, Article 17 of Directive 98/71 and Article 96(2) of Regulation No 6/2002 must be interpreted as an assertion of the principle of cumulative protection: a work of applied art should not be excluded from copyright protection on the ground that it enjoys sui generis protection as a*

design. By contrast, those provisions cannot be interpreted as derogating from the provisions of Directive 2001/29 or any other EU legislation concerning copyright.

87. The AG advice is effectively that the InfoSoc Directive removes (even if by silence on the issue) a Member States ability to apply Article 2(7) of the Berne Convention. The wording of Article 2 – "*For Authors, of their works*", being broad enough to ensure full harmonisation of copyright protection and therefore removing the previous discretion under Article 2(7) of the Berne Convention. The AG advice to the CJEU is not binding. However, the CJEU in *Cofemel* (and *Brompton* and its earlier decisions in this line of authorities) interpreted the wording of the InfoSoc Directive to provide harmonised copyright protection for subject matter to be protected as works on the basis they are original, without any further limitation i.e. including works of applied art. Member States (and the UK) are therefore no longer able to apply the principle of national treatment via Article 9(1) TRIPS.
88. I do not therefore accept this court has the discretion to ignore the relevant CJEU cases, including *Cofemel* and *Brompton* in relation to its treatment of applied art under section 4(1)(c) CDPA. In any event, even if I had agreed with Liking's submissions on this issue, it is not for this court to go behind this CJEU case law (which Liking also appear to accept is binding on this court). It is therefore the interaction of this EU legislation and relevant CJEU cases and the UK legislation and case law that is material to my decision in this case. As a result, I will also need to consider the issue of conforming legislation when interpreting this EU legislation and case law in the context of the CDPA and UK case law.

UK Law

89. The term "work of artistic craftsmanship" was first introduced in the 1911 Copyright Act, prior to the general use of gender neutral drafting. I have therefore used this expression as set out in the CDPA.
90. In October 1952 the Report of the Copyright Committee ("the Gregory Report") considered the interaction of artistic copyright and industrial designs. "*With a view to minimising the overlap between artistic and industrial copyright caused by the widening extent of protection given to artistic copyright*" the 1911 Copyright Act excluded protection of copyright for works capable of being registered as a design and mass production of that design. The Gregory Report also considered the definition of 'artistic works' in the context of 'works of artistic craftsmanship'. It did so in the context of the existing law where copyright protection was not available for works capable of being protected by industrial designs. Its focus was on "*works of craftsmen working in many media (silversmiths, potters, woodworkers, hand-embroiderers and many others)*" and that these works

should attract copyright protection. Its conclusion at [260] was that it was not "*practicable to draft a statutory definition equally applicable to each of the whole range of activities and of the varieties of materials used. Faced with these almost endless possibilities we feel that, as now, the decision in doubtful cases must be left to the Courts to decide on the facts before them, and we recommend that while the protection given to "works of artistic craftsmanship" should remain, the term should not be defined in the Act.*".

91. The 1956 Copyright Act ("the 1956 Act") maintained the wording of the 1911 Copyright Act at section 3(1) protecting works of artistic craftsmanship:

"Copyright in artistic works

3(1) In this Act "artistic work" means a work of any of the following descriptions, that is to say,—

(a) the following, irrespective of artistic quality, namely paintings, sculptures, drawings, engravings and photographs;

(b) works of architecture, being either buildings or models for buildings;

(c) works of artistic craftsmanship, not falling within either of the preceding paragraphs."

It also reduced the limitations of the 1911 Act on overlapping rights in design and copyright.

92. The leading case on the meaning of section 4(1)(c) of the CDPA is the House of Lords case *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64 ("*Hensher*"). Their Lordships consideration of the meaning of works of artistic craftsmanship in this case comes with an important caveat. The case was decided on the basis of a concession that the works in question were ones of craftsmanship – it was only the artistic element of the statutory phrase which was disputed.

93. In *Response Clothing Limited v The Edinburgh Woollen Mill Limited* [2020] EWHC 148 (IPEC) ("*Response*") His Honour Judge Hacon noted the difficulty in clearly identifying the ratio in *Hensher* as regards the meaning of a 'work of artistic craftsmanship'. He, in turn, referred to the decision in *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39; [2012] 1 AC 208. In that case Lord Walker and Lord Collins (in combined judgments with which Lord Phillips and Lady Hale agreed) agreed with Mr Justice Mann's comments at first instance [29]:

"Before discussing these four cases it is appropriate to make a further brief reference the decision of the House of Lords in Hensher [1976] AC 64. Since Lucasfilm is no longer contending that the helmet is a work of artistic craftsmanship it is unnecessary to make much further reference to Hensher, which Mann J discussed at some length, drawing attention to

the difficulty of identifying the true principle of the decision. ... The speeches in Hensher, difficult though they are, show a general inclination to start with the ordinary meaning of the words of the statute..."

94. *Hensher* concerned an item of prototype furniture. The House of Lords found unanimously that the furniture was not a work of artistic craftsmanship. The decision was in the context of the 1956 Copyright Act. The relevant wording of the CDPA has not altered since the 1956 Act.
95. The CDPA sections 4(1)(a) and (c) operate in the same manner as the equivalent 1956 Act sections 3(1) (a) and (c). In *Hensher*, Lord Reid explained, "...section 3(1)(a) makes explicit that the works to which it refers need have no artistic quality. ... But section 3(1)(c) preserves the limitation that there must be "artistic" craftsmanship."
96. Parliament therefore intended a distinction between the tests for the protection of forms of copyright such as graphic works, photographs, literary, dramatic, musical, and for works of artistic craftsmanship. Works of artistic craftsmanship have the additional requirement that the work must have an artistic quality in its craftsmanship.
97. Lord Simon (p91C) recognised the nature of the concession in *Hensher* could tend to, "*distort the argument by concentrating exclusively on the meaning of the word "artistic" in the statutory phrase.*". His Lordship went on to explain that, "... *"works of artistic craftsmanship" is a composite phrase which must be construed as a whole.*". The issue for this decision is in part the application of meaning to a word (albeit within a composite statutory phrase) which "*is not an easy word to construe or apply not only because it may have different shades of meaning but also because different people have different views about what is artistic.*" (Lord Reid p78B).
98. Their Lordships each provided a speech with reasoning relating to the interpretation of the statutory phrase. I set out below relevant excerpts from these speeches. I do so in some detail due to their relevance to the central issue in this case. Where possible, I have tried to extract a consensus of views and ratio in the context of the issues in this case.

How not to approach the meaning of "work of artistic craftsmanship"

99. Lord Morris (p81D) was of the view the statutory definition would not benefit from attempts by the judiciary to "*formulate any kind of judicial definition of a word which needs no such aid*" ... "*... I consider that in its place in the phrase "work of artistic craftsmanship" the word "artistic" will be well understood. As a word it can stand on and by its own strength. It needs no interpretation.*". Viscount Dilhorne (p86H) agreed; "*... proper interpretation of the words of the statute does not*

involve the formulation of any test or the application of any particular formula. Indeed, to lay down any such test or formula is to add to what is contained in the Act and I can see no justification for doing so." and that *"The phrase "works of artistic craftsmanship" is made up of words in ordinary use in the English language. Unless the context otherwise requires, they must be given the ordinary and natural meaning."*

100. Lord Reid (p78E) continued, *"... we must avoid philosophic or metaphysical argument about the nature of beauty, not only because there does not seem to be any consensus about this but also because those who are ignorant of philosophy are entitled to have opinions about what is artistic. I think that by common usage it is proper for a person to say that in his opinion a thing has an artistic character if he gets pleasure or satisfaction or it may be uplift from contemplating it. No doubt it is necessary to beware of those who get pleasure from looking at something which has cost them a great deal of money. But if unsophisticated people get pleasure from seeing something which they admire I do not see why we must say that it is not artistic because those who profess to be art experts think differently."* and in discussing how to assess the virtue of an object being artistic Lord Morris (p82A) explained the potentially circular nature of deciding whether an object has the character or virtue of being artistic, *"...some persons may take something from their idea as to what constitutes beauty or as to what satisfies their notions of taste or as to what yields pleasure or as to what makes an aesthetic appeal. If, however, there is a resort to these or other words which may themselves have their own satellites of meanings there must follow a return to the word "artistic" which is apt without expression to contain and convey its own meaning."* and Viscount Dilhorne (p87B) *"I am conscious ... of the need to avoid judicial assessment of artistic merits or quality..."*. I do not understand Viscount Dilhorne to be saying that the judicial assessment does not have to grapple with the question of whether a work has artistry in the craftsmanship as a quality of that work but rather that it is a determination of its presence rather than any qualitative or value based comment on that presence.
101. The view that the judicial assessment of works of artistic craftsmanship needs to avoid focusing on any qualitative assessment of the merits of the artistry is confirmed elsewhere in the speeches by their Lordships: (Lord Reid p78D) *"... a court ought not to be called on to make an aesthetic judgment. Judges have to be experts in the use of the English language but they are not experts in art or aesthetics."*, Lord Simon (p94G) *"Not only is artistic merit irrelevant as a matter of statutory construction, evaluation of artistic merit is not a task for which judges have any training or general aptitude."* and Viscount Dilhorne (p87B) *"I am conscious ... of the need to avoid judicial assessment of artistic merits or quality, but I do not think that any such assessment is involved in deciding whether a work is an artistic work."* The focus instead should be on the factors which assist a court in obtaining consistent findings on the issues in context in all but the most finely balanced cases; *"...the court will endeavour not to be tied up to a particular metaphysics of art, partly because*

courts are not naturally fitted to weigh such matters, partly because Parliament can hardly have intended that the construction of its statutory phrase should turn on some recondite theory of aesthetics ..." (Lord Simon p95A).

102. *The Modern Law of Copyright* (Fifth Edition) (generally referred to as Laddie, Prescott and Vitoria) picks up this point on p230:

"...no test concerning what is a work of artistic craftsmanship can have been entrusted to the courts by Parliament unless it is one from which there are excluded any questions of taste, subjective quality and personal opinion; it exceeds the functions of a court of law to adjudicate on these, indeed they are inconsistent with the very concept of the rule of law. ... The question the court must pose itself must be one which will always yield the same answer irrespective of the individual judge who has to decide it, save of course in borderline cases where we must expect a certain amount of uncertainty, as in any other type of case."

How to approach the meaning of "work of artistic craftsmanship"

103. Their Lordship's speeches in *Hensher* are more diverse in their views regarding the approaches to be applied in the assessment of the statutory phrase.
104. Lord Simon emphasises that, *"... the statutory phrase is not an "artistic work of craftsmanship," but a "work of artistic craftsmanship", and that this distinction accords with the social situation in which Parliament was providing a remedy."* This social situation, the Arts and Crafts movement ideology and the legal background against which Parliament was legislating this section (in the 1956 Act) are set out comprehensively by Lord Simon at p88–91 with the objective that this historic context provides a landscape upon which to usefully assist when ascertaining the meaning of this statutory phrase. He concluded with the explanation that, *"... "works of artistic craftsmanship" cannot be adequately construed without bearing in mind the aims and achievements of the Arts and Crafts movement, "craftsmanship" in the statutory phrase cannot be limited to handicraft; nor is the word "artistic" incompatible with machine production."*
105. Lord Reid (p78G) was of the view that, *"It is I think of importance that the maker or designer of a thing should have intended that it should have an artistic appeal but I would not regard that as either necessary or conclusive. If any substantial section of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual, from looking at it, I would accept that it is artistic although many others may think it is meaningless or common or vulgar."* and that, *"Many people- probably too many- buy things on eye appeal or because they are of a new or original design. But they would not claim therefore they thought that*

their purchase had artistic merit." (Lord Reid p79C). Therefore, works of artistic craftsmanship may often be aesthetically pleasing but such artistic expression in the craftsmanship and the aesthetic effect can come in different forms – it is not a popularity contest. For example, a craftsman's expression communicating a complex idea, emotion or view may have little or no traditional aesthetic value but could still benefit from protection as a work of artistic craftsmanship.

106. Lord Morris (p80H) followed this with his view that "*...to qualify as a work of artistic craftsmanship a work must at least be a work of craftsmanship: but it must not only be that: it must have the added character of being artistic.*" and considered that (p81C) "*... in this field personal judgment has to be formed: there are no absolute standards: there could be no scientific precision in measurement. Nor can there be unanimity in conclusion through a general consensus of opinion among those whose views command respect will surely be firm ground on which judgment in a court of law can be based. ... If it is asked whether there is artistry if there is appeal to the eye I would say that something more is needed. ... In deciding whether a work is one of artistic craftsmanship I consider that the work must be viewed and judged in a detached and objective way. The aim and purpose of its author may provide a pointer but the thing produced must itself be assessed without giving decisive weight to the author's scheme of things. Artistry may owe something to an inspiration not possessed by the most deft craftsman. But an effort to produce what is artistic may, if forced or conscious, for that very reason fail. Nor should undue emphasis be given to the priorities in the mind of a possible acquirer. ... the object under consideration must be judged as a thing in itself. Does it have the character or virtue of being artistic?'*"
107. In this context, Lord Morris (p82B), in line with Lord Reid's view, emphasises the importance of contextual evidence in the assessment, "*Though it is a matter of individual opinion whether a work is or is not artistic there are many people who have special capabilities and qualifications for forming an opinion and whose testimony will command respect.*"
108. Lord Simon (p94H) also noted that relevant evidence could come from experts; "*... whether the subject matter is or is not a work of artistic craftsmanship is a matter of evidence and the most cogent evidence is likely to be from those who are either themselves acknowledged artist-craftsmen or concerned with the training of artist-craftsman- in other words expert evidence.*". In evaluating the evidence Lord Simon explained (p95B); "*It is probably enough that common experience tells us that artists have vocationally an aim and impact which differ from those of the ordinary run of humankind. Given the craftsmanship, it is the presence of such aim and impact- which will determine that the work is one of artistic craftsmanship.*". Lord Simon explained that 'eye appeal' was not determinative, "*... the intention of the designer to produce an article which appealed to the eye of the beholder; I have already ventured to indicate why this is an inadequate criterion of art or the*

artistic". I do not take that as meaning it is not relevant, rather that, on its own, aesthetics are unlikely to be enough.

109. Viscount Dilhorne (p85H, p86D) was of the view that, "*An "artistic work" is no more and no less than a work of art. Every work of art is an artistic work and vice versa. How does one distinguish between what is a work of art and what is not? ... mere originality in design does not make a thing an artistic work of art, I do not think that whether or not a work is to be regarded as artistic depends on whether or not the primary inducement for its acquisition or retention is its functional character. ... A work which is one of artistic craftsmanship does not, I think, lose that character on account of its functional qualities. ... I do not think it is right to say that every work which has eye appeal is necessarily a work of art, though some may be.*". His Lordship also identified (at p87C) that expert evidence and contextual views of a relevant section of the public may assist, but not that "*...it suffices to show that some section of the public considers the work to be artistic, though that fact will be one for the judge to take into account....*".
110. The repeated phrase from *Hensher* quoted to me in this case is the need for more than "*eye appeal*" (Lord Morris, Lord Simon and Viscount Dilhorne). This can be regarded in the same way as the statement by Lord Reid, that beautiful aesthetics may be assessed objectively as being present but eye appeal is "*an inadequate criterion of art*". That is not to say utility in design could not have "*more than eye appeal*". A driving characteristic of the Arts and Crafts movement was that "*Artistic form should ... be an emanation of regard for materials on the one hand and for function on the other.*" (Lord Simon p93C). Lord Simon concluded that "*... the whole antithesis between utility and beauty, between function and art, is a false one – especially in the context of the Arts and Crafts movement.*" (p93B).
111. Lord Simon also provided some useful examples (p91-92) of crafts which craftsman may describe as artistic craftsmanship, some not. Regarding woodworkers, which has some relevance in this case, "*In these intermediate- or rather, straddling- classes come, too, the woodworkers, ranging from carpenters to cabinet- makers: some of their work would be generally accepted as artistic craftsmanship, most not.*".
112. Lord Kilbrandon (p96G, p97E) viewed artistic works of craftsmanship as works of art and focused on the intention of the author rather than the views of any section of the public on the work itself: "*In my opinion, the first essential of a work of art (which I think an artistic work must be) if it is to be distinguished from a work of craftsmanship- a distinction which parliament insists- is that it shall have come into existence as the product of an author who is consciously concerned to produce a work of art. The work either is or is not a work of art before anyone except the author has seen it; it does not depend for its artistic character, whether favourable or unfavourable, of other people*

who may make value judgments about it. It must be possible to deduce conscious purpose of artistic creation from the work itself or from the circumstances of its creation, but this act arises only when the question whether it is a work of art becomes one for discussion or a decision by others than the author. Merit is another matter altogether. It's been said that the courts will be reluctant to make aesthetic appreciations, and that is right, not because so to do would be difficult for a judge or unseemly, but because it is a decision which in this context, is not required. ... The conscious intention of the craftsman will be the primary test of whether his product is artistic or not; the fact that many of us like looking at a piece of honest work, especially in the traditional trades, is not enough to make it work a work of art. ... You will get no assistance, until you have exercised that judicial function, by asking the opinion of an expert; if he says "I regard that object as artistic," the next question which must be asked in order to make his answer intelligible is "What do you mean by artistic?" That question is incompetent, because the answer would be irrelevant. Since the word is a word of common speech it requires and permits of, no interpretation by experts. It is for the judge to determine whether the object falls within the scope of the common meaning of the word."

113. Regarding an objective of commercial success for an object in question Lord Kilbrandon (p98A) focused on the process taking place, "*... in that factory as those draughtsman worked on their job. No one thought he was assisting at the delivery of a work of art. ... During all his hours and weeks of hard work which the witnesses describe there was no suggestion that there was present to their mind any desire to produce something of beauty which would have an artistic justification for its own existence. The objective was equally honourable but fundamentally different one of producing a commercially successful chair, whether its creators thought that it had intrinsic beauty or that it had not.*"
114. Lord Simon (p91D) in recognising the issue created by the concession in this case went on to consider the identification of a craftsman in this context: "*A work of a craftsmanship, even though it cannot be confined to handicraft, at least presupposes special training, skill and knowledge for its production. ... " Craftsmanship," particularly when considered in its historical context, implies a manifestation of pride in sound workmanship- a rejection of the shoddy, the meretricious, the facile. But the craftsmanship- not the work itself- must, in addition, be artistic.*" ... (p94E) "*It is therefore misleading to ask, first, is this a work produced by a craftsman, and secondly, is it a work of art? It is more pertinent to ask, is this the work of one who was in this respect an artist-craftsman?*". The statutory phrase does not break down into discrete questions - is this the work of a craftsman and is it art.
115. The parties also addressed me on a considerable number of other relevant cases. These included in the context of the findings in *Hensher: Response, Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216 ("*Bonz*"), *Vermaat (t/a Cotton Productions) v Boncrest Ltd (No.1)* [2001] FSR 5, ("*Vermaat*"),

Burge v Swarbrick [2007] HCA 17 (High Ct of Aus) ("*Burge*") and *Lucasfilm Ltd v Ainsworth* [2008] ECDR 17 ("*Lucasfilm*").

116. In *Lucasfilm* Mann J applied *Hensher* in considering the meaning of artistic craftsmanship - a case about Stormtrooper helmets and armour. In doing so, the Judge referred to the *Bonz* case of the New Zealand High Court (a case about woollen sweaters). In that case, Tipping J considered *Hensher* and other relevant authorities. Tipping J confirmed the relevant provision in the New Zealand statute was identical to the one we are concerned with in this case.
117. At [131] Mann J noted Tipping J's summary of his view on the interpretation of artistic craftsmanship:
- "... [F]or a work to be regarded as one of artistic craftsmanship it must be possible fairly to say that the author was both a craftsman and an artist. A craftsman is a person who makes something in a skilful way and takes justified pride in their workmanship. An artist is a person with creative ability who produces something which has aesthetic appeal." ("the Bonz Test")
118. In coming to this conclusion Tipping J considered (p224 13-5 *Bonz*) the product, viewed objectively, would have a bearing on the question of whether it was a work of artistic craftsmanship. Tipping J was not making "... the Court an arbiter in comparative terms of the merits of an allegedly artistic product. It simply recognises that for a work to be one of artistic craftsmanship it must ... have some artistic quality.". Tipping J therefore follows *Hensher* in recognising that the work of an artist craftsman must have "some artistic quality".
119. Mann J also endorsed the view of Tipping J that a work of artistic craftsmanship can be created by combining the "*artistry of the designer and the craftsmanship of the knitters*" where there is an appropriate nexus between two people - working together with one conceiving the design and others working (as the designer intended) from those designs.
120. *Vermaat (t/a Cotton Productions) v Boncrest Ltd (No.1)* [2001] FSR 5 was also referred to by Mann J. This case dealt with bedspread designs. The Judge, Evans-Lombe J, approved Tipping J's analysis and found that it may be "... the making of the samples by the Indian seamstress was a work of craftsmanship, I do not find that the result was sufficiently artistic ... The result of the second claimant's designs may be pleasing to the eye but do not seem to me to exhibit the necessary requirement of creativity."
121. Mann J [134] found in *Lucasfilm* that the production of the articles by Mr Ainsworth was an act of craftsmanship; "... he produces high quality products and has a justifiable pride in his work. He is

not a slavish copier, or a jobbing tradesman. The production of the helmets and armour required the activity of a craftsman to realise the vision of the creators of the film in this respect.", but the articles were not works of artistic craftsmanship. The Judge considered the intention of the craftsman as being relevant: *"Their purpose was not to appeal to the aesthetic at all. It was to give a particular impression in a film. ... It was no part of their purpose that it should in any way appeal as a piece of art; or that it should be admired for any aspect of its appearance as such ..."*.

122. In the context of the assessment of a work of artistic craftsmanship Mann J proposed a further consideration (albeit one specifically noted not to be a general test) was to review the products of the Arts and Crafts movement as exemplars. In doing that, he found at [134], considering the products objectively, that the helmet and armour *"... share nothing of the conceptual purpose of such products. A work of artistic craftsmanship does not have to be something of which William Morris would have been proud, but it is a not wholly irrelevant test in a case like the present to consider whether he would recognise it as having anything at all with what his movement was seeking to do. ... Unlike a work of artistic craftsmanship, they were not intended to sustain close scrutiny."* This is similar to Lord Simon's position in *Hensher* that *"works of artistic craftsmanship" cannot be adequately construed without bearing in mind the aims and achievements of the Arts and Crafts movement*" (p91B). However, just because William Morris *"would have been proud"* of a work does not mean it is protectable as a work of artistic craftsmanship, just as, for example, not all Shaker styled furniture would necessarily be protected.
123. The other main authority focused on by the parties in the interpretation of the relevant approach in the post-*Hensher* line of cases is *Burge* (referenced by the Supreme Court in *Lucasfilm* [2011] UKSC 39). This case dealt with the subsistence of copyright in a "plug" from which the mould of a yacht hull could be derived. The Judges of Australia's highest court applied the Copyright Act 1968 (Cth) as amended by the Copyright Amendment Act 1989 (Cth) considering the statutory phrase "a work of artistic craftsmanship". In that context, the legislative purpose [50] *"...was the encouragement of "real artistic effort" in industrial design."* was argued by Liking to skew the underlying analysis.
124. In coming to their conclusion that the relevant works were not ones of artistic craftsmanship the court referred extensively to *Hensher* and the UK legislative background. The relevance of different forms of evidence in that exercise was considered at [63]: *"The answer to the question whether the Plug is a "work of artistic craftsmanship" cannot be controlled by evidence from Mr Swarbrick of his aspirations or intentions when designing and constructing the Plug. His evidence was admissible. But the operation of the statute does not turn upon the presence or absence of evidence of that nature from the author of the work in question. The matter, like many others calling for care and discrimination, is one for the objective determination by the court, assisted by admissible*

evidence and not unduly weighted down by the supposed terrors for judicial assessment of matters involving aesthetics."

125. The court determined [73] that: "... *taken as a whole and considered objectively, the evidence, at best, shows that matters of visual and aesthetic appeal were but one of a range of considerations in the design of the Plug. Matters of visual and aesthetic appeal necessarily were subordinated to achievement of the purely functional aspects required for a successfully marketed "sports boat" ...*"
126. The thread the court identified as running through Lord Simon's speech in *Hensher* is the significance of functional constraints. Recognising the importance of avoiding any attempt at an "*exhaustive and fully predictive identification of what can and cannot amount to a "work of artistic craftsmanship"*" the Judges confirmed the assessment [83] did not "... *turn on assessing the beauty or aesthetic appeal of work or on assessing any harmony between visual appeal and its utility. The determination turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations. ... The more substantial the requirements in a design brief to satisfy utilitarian considerations ... the less the scope for that encouragement of real or substantial artistic effort.*"
127. However, an article designed for mass production or created via a machine is not a determinative factor on whether copyright would subsist (*Hensher*, Lord Simon p91B). HHJ Hacon in *Response*, following Tipping J in *Bonz*, confirmed a craftsman in this context does not need to make the object with their own hands. There is a spectrum within which – in HHJ Hacon's example - a potter could be a putative craftsman: "*at one end a pot is made only using the hands of the potter, then using a foot-driven wheel, then using an electric wheel, through various further stages of development leading finally to a process at the other end of the spectrum which, although controlled and directed by the potter, is carried out by a high-technology machine so the potter does not touch the clay or the pot until finished and fully decorated.*". In any spectrum, such as the one referenced by HHJ Hacon, there will come a point where, in context, the distancing of the craftsman and their creativity from the creation of the object is such that they are no longer creating a work that would be considered as utilising craftsmanship. The relevance of a machine in the manufacture and shaping of an object is a factor to be considered in the context of whether the creative actions were those of an artist craftsman.
128. Finally, on these core authorities, the decision of HHJ Hacon in *Response* considered whether copyright subsisted in a wave arrangement design woven into fabric. In that case, the Judge considered a number of the authorities referred to above, including *Lucasfilm*, *Bonz* and *Hensher*. In summarising the inconsistencies in *Hensher* the Judge considered the wave fabric would not have been assessed a work of artistic craftsmanship under any of the differing analyses in *Hensher*.

However, on the basis of that lack of a unifying binding principle of law in *Hensher*, the Judge adopted the summary of a work of artistic craftsmanship in *Bonz* and arrived at the conclusion the Wave Fabric satisfied the requirements of s.4(1)(c) CDPA.

129. The Judge also considered the impact of EU law on his decision and concluded that there were potentially significant issues of conformity with the UK law: "*Complete conformity with art.2, [Art.2 of Directive 2001/29/EC of 22 May 2001] in particular as interpreted by the CJEU in Cofemel, would exclude any requirement that the Wave Fabric has aesthetic appeal and thus would be inconsistent with the definition of work of artistic craftsmanship in Bonz Group.*".
130. The English and other linked authorities referred to in this case exemplify the differences taken in approaches to determining what is a work of artistic craftsmanship, including the relevance of the author's intention and expert evidence. As a result, the parties focused on different factors in the evidence as being the material ones to be considered and the appropriateness of others being allowed as part of the consideration.
131. The leading copyright texts take differing views in approaching this issue:

The Modern Law of Copyright (Fifth Edition) at p230 stresses (contrary to views in *Hensher*) that "... *expert opinion purporting to go to the questions 'Is it art?' must be rigorously excluded.*". Rather, it ventures an alternative test that: (1) the medium "*is the working of materials by manual dexterity (craftsmanship)*", and (2) the visual appearance is significant if it would cause at least some members of the public to wish to acquire and retain the object due to the appearance.

Copinger and Skone James on Copyright (Eighteenth Edition) at p206 lists factors from the relevant cases which may assist in approaching the assessment including: expert evidence from someone with relevant qualifications whose evidence commands respect and evidence of some aesthetic quality and the fact that, "...*evidence from ordinary members of the public that they do or would value the work for its appearance or get pleasure or satisfaction from it, whether at an emotional or an intellectual level ...*" (but that a section of the public buying the article based on its visual appearance is not enough).

132. One analogy presented to exemplify the relevance of context in this approach was Liking's counsel's description comparing two identical 'piles of bricks' – one presented in the Turbine Hall of the Tate Modern Gallery and the other on a construction site. The point being to draw out the contextual relevance of the evidence. A craftsman's intention to create a work of artistic craftsmanship could well, depending on the context, be relevant in the assessment, although it is unlikely to be determinative. For example, a craftsman, acknowledged for their artistry in crafting works, may

have decided to make a commercially valuable artistic work product for mass production using AI software to come up with a relevant design and a 3-D printer to make it. Alternatively, a craftsman with the best of intentions to create a hand-made work of artistic craftsmanship may fall short of fulfilling the statutory requirements. When considering recollections of an author's intention it will usually be important to bear in mind how much time has elapsed since the creation of the article and the assistance of relevant contemporaneous documents.

133. These differing and overlapping approaches again demonstrate the difficulty in attempting to further define how the court should approach the evidence and assessment of the statutory phrase.
134. I am not aware of any discernible binding precedent in the case law considered which would exclude me from construing s.4(1)(c) CDPA to allow an assessment of that provision to include consideration of all the relevant evidence in performing this multi-factorial analysis. Therefore, for example, the evidence from experts, views of relevant parts of the public and the intentions of the author may all be relevant. I accept the arguments that such evidence will likely involve elements of subjective personal opinion. For example, expert evidence is to some extent simply derivative, addressing the same questions the court needs to avoid addressing directly. However, the court is familiar with the evaluation of such evidence, considering it as a whole and considering it as part of its objective assessment. This nature of some of the evidence is not a reason to proscribe certain classes of evidence.
135. His HHJ Hacon noted in *Response* that the differing views in the speeches in *Hensher* make it difficult to identify binding principles of law. However, with some hesitation, it is worth trying to draw together some of these threads (although not necessarily unanimous and non-exhaustive in nature) from *Hensher* and the other authorities to assist with the approach to the relevant statutory question.
 1. Parliament has created a distinction between copyright protection accorded to works within with CDPA s.4(1)(c) and the other artistic works under s.1. The former requires artistic quality, the latter do not.
 2. A work of artistic craftsmanship involves a medium that has been worked with craftsmanship, wherein the visual appearance involves artistic expression, which is not wholly constrained by functional constraints.
 3. The ordinary meaning of the statutory phrase requires no further formulation or judicial definition.
 4. The statutory phrase should be assessed as a whole.

5. Copyright protects expression. The process of creating a work of artistic craftsmanship and the resulting work of artistic craftsmanship are intrinsically interrelated. The craftsmanship creating the work must be artistic; the work will be one of artistic craftsmanship.
6. The court can rely on any evidence it views as relevant to assist it forming an objective view on the statutory question.
7. The assessment is not one that requires any value "*assessment of artistic merits or quality*" in order to decide whether a work is one of artistic craftsmanship.
8. Mass manufacture of the work does not preclude it from being a work of artistic craftsmanship. Neither do commercial aims or the involvement of technology or tools in the creation of the work.
9. The author of the work can be multiple people provided there is a sufficient nexus.
10. More than eye appeal is needed – visually appealing aesthetics will often be present in works of artistic craftsmanship but such evidence does not determine the underlying question of whether that work is one of an artist craftsman.
11. It is the craftsmanship in the work that is relevant – not the qualification or training of the craftsman – although skill and training will assist in assessing the presence of craftsmanship.

136. At the CMC in this case Deputy High Court Judge David Stone considered a strike out/summary judgment claim in this action. His decision, *WATERROWER (UK) Ltd v Liking Ltd (t/a TOPIOM)* [2022] EWHC 2084 (IPEC) addresses some of the issues relevant to this case, albeit from the perspective of an interim hearing. I have considered his helpful comments in the context of this decision.

EU law

137. In addition to being bound by the House of Lords in *Hensher*, this court is bound by the retained EU case law, including relevant CJEU decisions which interpret the InfoSoc Directive as implemented by the CDPA in the UK. Liking argue the CJEU's decision in *Cofemel* does not require any consideration of aesthetic visual effect and therefore of artistic merit, while *Hensher* requires more than eye appeal (more than visual appeal, that it must be artistic). Its position is there is a conflict of the laws of the UK and EU in the application of such protection.

138. *Cofemel* was a case about the protection of various clothing designs by copyright. It follows a line of case law of the CJEU on copyright protection under Art. 2(a) of the InfoSoc Directive. Referring to the earlier CJEU decisions of *Infopaq International* (C-5/08) [2009] E.C.D.R 16, and *Levola Hengelo BV v Smilde Foods BV* (C-310/17) [2019] E.C.D.R. 2, the court confirmed [21] the concept of "work" is "... clear from the Court's settled case-law, an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, that concept entails that there exist an original subject matter, in the sense of being the author's own intellectual creation. Second, classification as a work is reserved to the elements that are the expression of such creation...".
139. The court went on at [30] to explain in the context of the first condition that for subject matter to be capable of being original "... it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices ...". Subject matter with these characteristics qualifies as a work and therefore attracts copyright protection in accordance with the InfoSoc Directive.
140. If the realisation of that subject matter has been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required for it to constitute a work. The issue of technical constraints is considered in more detail by the CJEU in *Brompton*.
141. The court also confirmed at [32] the *Levola Hengelo* (C-310/17) decision that, regarding the second condition, giving guidance on the visual appearance of a potential work the CJEU explained an "...aesthetic effect that may be produced by a design is the product of an intrinsically subjective sensation of beauty experienced by each individual who may look at that design. Consequently, that subjective effect does not, in itself, permit a subject matter to be characterised as existing and identifiable with sufficient precision and objectivity...", as a work protected by copyright. Aesthetic considerations can play a part in creative activity but such an aesthetic effect [54] "... does not, in itself, make it possible to determine whether that design constitutes an intellectual creation reflecting the freedom of choice and personality of its author...". Liking argue this (see [50]-[54]) means that in considering *Cofemel*, the test for what is original and the interpretation of intellectual creation must have something more than aesthetic baked into it and that as a result this puts "reins on the "necessary and sufficient category" ..." set out in [30]-[31] in order to be consistent with the protection of designs and the protection associated with copyright being cumulative "only in certain situations". If it is right that some form of 'higher' threshold than mere aesthetic effect is required then the test may be closer to that in *Hensher* and the related authorities. Assessing how to gauge what is or is not original is a matter that will develop over time. However, there is adequate guidance in *Cofemel* itself and English authorities applying the test to decide whether a work is original. The

analysis by Liking regarding this issue, and particularly on the suggested influence of the protection of designs on the interpretation of whether an article is an author's intellectual creation, lacks definition, and does not change the underlying questions to be addressed in this case in identifying whether the Works are original in the context of the InfoSoc Directive. The question is, however, considered more generally below in the context of conformity with UK law.

142. The court in *Cofemel* therefore interpreted 'works' within the meaning of the InfoSoc Directive as "... precluding national legislation from conferring protection, under copyright to designs such as the clothing designs at issue in the main proceedings, on the ground that, over and above their practical purpose, they generate a specific, aesthetically significant visual effect.". This harmonised test makes no distinction about the nature of any 'work' beyond its being original. This statement and the test in *Cofemel* resembles the approach of the continental European '*unity of art*' principle described in the noted *Ricketson & Ginsberg* article. Aesthetically significant visual effects can therefore be a factor in considering originality in the context of a work but is neither required nor sufficient. The InfoSoc Directive does not require a work within the meaning of the InfoSoc Directive to have any aesthetic effect.
143. *Brompton* followed *Cofemel* (and *Response*). This case focused on the freedom of choice of the author for a work where there are constraints on the design necessary to obtain a technical result.
144. *Cofemel* explained that where a shape is dictated by technical considerations [31] "... which left no room for creative freedom ..." the subject matter would not possess the requisite originality. *Brompton* picked this up at [26] and confirmed that "... even if [the article's] realisation has been dictated by technical considerations, provided that its being so dictated has not prevented the author from reflecting his personality in that subject matter, as an expression of free and creative choices.". However, where the shape of a product is "solely" dictated by its technical function, that product cannot attract copyright protection. Applying this to the situation where there is a related patent, the CJEU determined such a patent is only relevant to the extent "... the effectiveness of the shape in achieving the same technical result ... should be taken into account only in so far as those factors make it possible to reveal what was taken into consideration in choosing the shape of the product concerned."

Conformity between EU and UK law

145. *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) ECLI:EU:C:1990:395 [1990] ECR I-4135 ("*Marleasing*") set out the principle by which domestic legislation (here amended domestic legislation implementing the InfoSoc Directive) must be construed "*as far as possible in conformity with, and to achieve the result intended by, the directive*" (summarised by

Arnold J (as he was then) in *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch) at [163]. In that case the Judge provided further related guidance in considering how to interpret a European directive: "... [a directive] falls to be interpreted according to principles of interpretation of European Union legislation developed by the Court of Justice of the European Union." and at [166-168] what is sometimes referred to as the teleological approach to interpretation in the light of the purpose of the legislation, referring to relevant contextual materials and (so far as possible) consistent with relevant international law. Liking's Counsel pointed out that "as far as possible" does not allow a Judge to distort the meaning of the domestic legislation. The meaning should "...go with the grain of the legislation being construed..." (*Duke v GEC Reliance limited* [1988] AC 618 (p639-640); *Webb v EMO Air Cargo (UK) ltd (No.1)* [1992] 4 All ER 929 (p939-940); [2001] UKHL 9, *Vodafone 2 v HM Revenue & Customs* [2009] EWCA Civ 446 [38] and [70].

146. Liking does not believe it is possible to reconcile the CJEU's decision in *Cofemel* with the House of Lords decision in *Hensher*. WaterRower Ltd acknowledge the difficulty and endorses the approach taken by HHJ Hacon in *Response*.
147. In *Response*, HHJ Hacon decided the Wave Fabric was original, in that its design was its author's own intellectual creation, and therefore a work within Art. 2 of the InfoSoc Directive. The Judge considered the conformity of this position with the CDPA. HHJ Hacon approached this difficult issue by first applying the EU law to assess if the Wave Fabric was original [59], "in that its design was its author's own intellectual creation, that design is a work within the meaning of art.2 of Directive 2001/29." He assessed the author had exercised their free and creative choices in devising the design and that, "in principle the design is entitled to copyright protection if Directive 2001/29 is applied."
148. Therefore, what needed to be resolved [63] was "... whether it is possible to interpret s.4(1)(c) of the 1988 Act in conformity with art.2 of Directive 2001/29 such that the Wave Fabric qualifies as a work of artistic craftsmanship and thereby its design becomes entitled to copyright protection." The Judge found there was conformity "up to a point". The reason being that Art.2 of the InfoSoc Directive as interpreted by *Cofemel*, "...would exclude any requirement that the Wave Fabric has aesthetic appeal..." and therefore would be inconsistent with the "definition of work of artistic craftsmanship stated in *Bonz Group*".
149. The Judge then applied at [64] the summary definition of work of artistic craftsmanship from *Bonz*, with "clarifications which I believe to be consistent with the definition: (i) it is possible for an author to make a work of artistic craftsmanship using a machine, (ii) aesthetic appeal can be of a nature which causes the work to appeal to potential customers and (iii) a work is not precluded from being a work of artistic craftsmanship solely because multiple copies of it are subsequently made and

marketed. No binding English authority has been drawn to my attention which prevents me from construing s.4(1)(c) in that way. Accordingly, the Wave Fabric is a work of artistic craftsmanship."

150. Therefore, the Wave Fabric was assessed as being original and a work entitled to copyright protection where the InfoSoc Directive is applied. On the facts in *Response*, the Judge also found that the Wave Fabric was additionally a work of artistic craftsmanship under the UK law as set out by the Judge.
151. WaterRower Ltd's claim is restricted to the Works being protected by copyright as works of artistic craftsmanship pursuant to s.4(1)(c) CDPA. As in *Response*, if the Works in issue are not works of artistic craftsmanship, then the articles are not protected by copyright under the CDPA. In arriving at my decisions in this case I have been required to consider the impact of the InfoSoc Directive, including its noted purpose to provide a harmonised legal framework for copyright. Although the Issues before this court do not require me directly to decide whether the InfoSoc Directive has the effect of removing any 'gaps' there may be in UK copyright protection under the CDPA for works within the meaning of the InfoSoc Directive, such a decision is necessary to reach a conclusion on the Issues.
152. My finding (set out below) is that the Prototype was Mr Duke's own intellectual creation and an original work within the meaning of the InfoSoc Directive. However, unlike in *Response*, the Prototype is not entitled to copyright protection under s.4(1)(c) CDPA on the application of *Hensher* and the line of related authorities considered in this case. It is therefore necessary to address the situation that HHJ Hacon identified in *Response* as the inconsistency between the EU and UK positions.
153. In *Bonz* [131], as applied by HHJ Hacon, the Judge determined that an artist craftsman "... produces something which has aesthetic appeal.". As noted at [118] in this judgment Tipping J in *Bonz* also confirmed that the subject matter must have "some artistic quality". *Hensher* arguably goes further and requires something beyond "eye appeal" for there to be artistry in the craftsmanship of a work, "the craftsmanship- not the work itself- must, in addition, be artistic." [Lord Simon], "In my opinion, the first essential of a work of art (which I think an artistic work must be)..." [Lord Kilbrandon], to be a work of artistic craftsmanship "it must have the added character of being artistic." [Lord Morris]. Lord Reid made the point by addressing the plain words of the statute referring to sections 3(1) and (c) under the 1956 Act pointing out the fundamental difference - "...section 3(1)(a) makes explicit that the works to which it refers need have no artistic quality. ... But section 3(1) (c) preserves the limitation that there must be "artistic" craftsmanship."
154. In principle, *Cofemel* and the InfoSoc Directive's meaning of a work could subsume the requirements of s.4(1)(c) CDPA within its scope. In that situation, the requirements of the statutory

phrases in s.1 / s.4 CDPA including "*artistic craftsmanship*" and "*artistic quality*" would need to have the same meaning – whether considering the situation where such artistic quality was required or where it was irrespective of that artistic quality. The only requirement being the work is original in that it was the author's intellectual creation. Therefore, it is necessary to either merge or diverge from the statutory demarcation between the different requirements of artistic quality in s.4(1)(a) and s.4(1)(c) of the CDPA.

155. To achieve the harmonised position in *Cofemel*, the comments in *Hensher* regarding artistry and the need for more than "*eye appeal*" would need to be interpreted as equating to a work, which is not dictated by technical constraints, reflecting "*the personality of its author, as an expression of his free and creative choices*".
156. These tests have significant similarities and can be influenced by the standard applied to originality. However, in my view, it is not possible to reconcile these two positions. My reasoning on this issue includes: the interpretation of *Cofemel*, including the lack of any requirement of any aesthetic effect; the explanations in the line of English and linked authorities, including *Bonz* of the specific requirements for a work to satisfy s.4(1)(c) CDPA as compared to other works in s.1 CDPA; the relevance of the underlying ethos of the Arts and Crafts movement as explained by Mann J in *Lucasfilm* in the approach to considering s.4(1)(c), and the plain language of Parliament stating a different statutory test for works protected by copyright under s.4(1)(c) as compared to s.4(1)(a). To do otherwise would require the wording in s.4(1)(c) CDPA to have no meaning. The requirements of originality which harmonise copyright protection and the requirements under s.1 and s.4 of the CDPA (excluding s.4(1)(c)) do not stretch to the requirement of artistry in craftsmanship; to do so would go against the grain of the wording of the CDPA and distort the intention of Parliament.
157. In the circumstances, s.4(1)(c) CDPA cannot be reconciled with the InfoSoc Directive. HHJ Hacon foreshadowed this with his comment in *Response* that any UK law requirement that an original work, as construed under the InfoSoc Directive, must have "*aesthetic appeal*" would be inconsistent with the CJEU interpretation of that Directive.
158. It is therefore necessary to consider how to address the issues in this case. That is, how to construe s.4(1)(c) of the CDPA. *Hensher* and the line of authorities relied on in UK cases could simply be applied directly (a form of *sui generis* test) or, although s.4(1)(c) cannot be construed to conform with the InfoSoc Directive, it could still be applied along with *Hensher* and the UK and related authorities.
159. The court is under a strong duty of interpretation in considering the conformity of UK law in the light of the InfoSoc Directive. In this context, despite my conclusion that the provisions cannot be reconciled, there is still relevance in the application of the InfoSoc Directive in the assessment of

s.4(1)(c) CDPA. As HHJ Hacon explained in *Response* when considering the Wave Fabric, "*If it was not original, copyright does not subsist anyway and the meaning of 'artistic craftsmanship' is academic.*". Therefore, in the application of s.4(1)(c) CDPA there should first be a consideration of whether the relevant work is original in the meaning of the InfoSoc Directive, that the "*subject matter reflects the personality of its author, as an expression of his free and creative choices*". I therefore now first consider each of the Works in the context of the EU law and noted ECJ decisions, including *Cofemel* and *Brompton*. This partial conformity would provide the assessment of originality of a work in accordance with the meaning of the InfoSoc Directive as a form of gateway. Only where a work is original is it necessary to then consider the application of the statutory phrase in s.4(1)(c) CDPA in the context of *Hensher* and the line of English and related authorities noted. I now apply this analysis of the law to the facts of the case. In doing so, I am conscious of the need to carefully assess all the evidence, including the circumstances of the creation and expression of the Works and their development, to allow the totality of the matter to be considered objectively.

Are any of the Works original within the meaning of the InfoSoc Directive?

The Prototype

160. Although the evidence shows there were a number of early partially completed prototypes, I have accepted the evidence that the Prototype is the first relevant completed article.
161. A rowing machine used by a human will to some extent require a shape that allows for the biomechanical movement of the human body to operate the machine. The precise ergonomics of the interaction of the human with the rowing machine is what can dictate the shape or part of it – for example the need for a rolling seat in a system where the human pulls on the handle and the line connected to the handle and thereby transfers forces to the footplate to allow the body to transfer energy from the leg movement. Mr Duke accepts these aspects of the WaterRower were 'copied' from the design of a scull.
162. The Prototype is technically restricted in certain aspects of its design to allow for the rowing machine to function mechanically. In other words, those aspects of its shape help achieve the technical result and were taken into account in choosing the shape of the product.
163. In this context I also considered the impact Mr Duke's US patent on these technical design choices, the Prototype shape and any remaining freedom of expression. Liking argued the US Patent teaches technical requirements that show how Mr Duke arrived at the shape and features of the Prototype i.e. in order to help him come up with the solution to the technical problem presented in the US Patent. There was no expert evidence on the US Patent (and in this case such evidence would have

been unlikely to assist). To the extent the evidence on what the US Patent taught went to any relevant issues it deals primarily with how the water in the sealed container (tank) is turned around by the paddle/blade to simulate in-water rowing. This does present some restrictions on how that invention may be adopted, but even those are not entirely without flexibility. The US Patent also describes other aspects of a rowing machine. As noted, the diagrams in the Patent Application are those representing the Prototype. The argument goes that the other aspects shown in the US Patent demonstrate the elements needed to design the WaterRower rowing machine. For example, the sliding seat and the footrest - you cannot use the tank to simulate in-water rowing unless you have the seat, wheels on the seat, rails to move along and footrest to push against that allow you to simulate rowing. I do not agree that the teaching of a particular shape in the US Patent dictated the form of the claimed shape in the Prototype. For example, it did not explain the need for any required materials and how these should be constructed. The technical constraints dictated by the US Patent mainly relate to the sealed tank and the motion of the rotating paddle/blade.

164. Regarding the other technical constraints on the shape of the Prototype based on its functional requirements, Liking's counsel complained WaterRower Ltd have not set out precisely what intellectual creation in the shape of the Prototype is being claimed to attract copyright (and the other iterations). If, for example, it was just the seat, then the argument on functional restrictions is clearly more relevant. WaterRower Ltd's position is that copyright subsists in the intellectual creation of the overall shape of the Prototype. I agree that, in the circumstances, trying to break down the assessment into component elements making up the Prototype would be an impermissible dissection of parts of the claimed overall expression.
165. The evidence supports the position that Mr Duke is the sole author of the Prototype. Liking does not dispute this position. Mr Duke is open about his inspiration in creating the Prototype, including the '*beautiful*' sculling boats and the end goal of developing a rowing machine that is '*better*' than the noted Concept II Model A. Mr Duke did not copy the design for the Prototype. Any discussion that he copied the design from, for example, the overall shape of wooden shell sculls was necessarily a matter of interpretation not laborious replication.
166. Mr Duke has provided extensive evidence of the reasons he made the various creative and functional choices in his design of the Prototype back in 1987. These reasons included the experience Mr Duke was trying to re-create, like the sound and feel of rowing. These subjective experiences are not protectable. It is only the expression of the layout of the design that is relevant. His objectives in that expression are largely supported by the evidence from both parties, that the Prototype (or the genus of the WaterRower - as the articles discussing the various WaterRower's are dealing with a variety of models) is accepted by both consumers of the WaterRower, specialist and general news

publications and design focused retail as being aesthetically pleasing. Also, Liking "*doesn't deny that the WaterRower looks nice.*".

167. In creating the Prototype, Mr Duke made choices in the layout of the Upper Deck and Lower Deck, the (relatively narrow) width of the Main Rails, the materials used (wood), the shape and finish of those materials (hand sanding/rounded edges/oiling), the carefully thought through relationships of the angles, spacings and joins relating the various component parts of the shape - including the Upper and Lower Decks to create "*a repeating motif of parallel structural elements in different planes and scales*".
168. Some of these choices made in creating the Prototype were functional constraints needed for the end use. There are a number of alternate ways the Prototype rowing machine could have been designed; each would have been subject to the noted functional constraints. The shape of the Prototype is primarily influenced by its requirement to operate as a rowing machine but its shape is not "*solely*" dictated by its technical function. There is room for Mr Duke to reflect his personality in the subject matter combining these striking visual elements as an expression of his free and creative choices. Mr Duke's Prototype is therefore original in that the design is his own intellectual creation as a work within the meaning of the InfoSoc Directive.
169. Although Liking accept that separate IP rights can be cumulative they make a policy point that in assessing any subsistence of copyright in this context the impact on the carefully calibrated levels of protection between IP rights should be considered. In this case, no design right was registered by WaterRower Ltd, although another company in its group, WaterRower Swiss GmbH did register a design in the UK which looks like a version of the WaterRower. The appropriate assessment for assessing the originality of a work is explained in *Cofemel* and *Brompton*. There is nothing in Liking's arguments that impacts this position.

Other modifications to the different WaterRower versions

170. The various modifications to the different Works claimed from Series 1 to Series 4 (Versions 1-8) are set out in Annex 2 to this judgment. WaterRower Ltd claim that each of these iterative Works from Series 1 to 4 reproduce the intellectual creation of the Prototype. Separately, it is claimed the combination of changes in each of these separate Versions 1-8 attracts its own copyright protection. I have therefore considered the evidence in relation to each of these iterations and set out below some of the salient features.
171. In Mr King's view the WaterRower "*hasn't really altered that much Series 1 Version 1 and Series 4 Versions 8. Of the changes which were made, the main visible changes (i.e. not the internal parts or electronics or gears) were actually made between Series 1 Version 1 and the Series 2 (Versions 2,*

3 and 4). ... I do not regard the overall visual design of the Series 2 machines and what is now sold (Series 4 Version 8) as having changed very much).".

172. Mr Duke's evidence largely concurs: "*The distinctions between the 'boat show' prototype and present WaterRowers were largely the manufacturability changes described ...*" and that some of the changes actually moved away from that aesthetic – such as the move from the stitching of the seat that "*you would find in the seats of a fine sports car*" to an artificial leather design "*but I understood the change was necessary for manufacturability*".
173. Other than the changes resulting from the movement of the Key Blocks which I deal with below, the iterative adaptations of the different versions of the Works appear designed to improve manufacturability, efficient assembly and supply issues. The details of these are best understood from the table related tabulated diagram in Annex 2, and also the explanation set out above under the section "Identifying the Works/Other modifications to the different WaterRower versions" [52]-[64]. I accept some of these changes could have been expressed in other, equally workmanlike, practical alternative designs. For example, even with the fine tolerances required in the product, the width of the seat wheels can be altered, the radius of the water tank corner can be increased from 1 inch to 2 inches and the material and fixings of the heel rests can be changed. However, these changes are all firmly in the camp of functional constraints or practical alternatives. Taken as a whole, the set of changes for each iterative version are technically constrained and mundane in nature, arising from the workmanlike, practical decisions behind the development of these adaptations. They do not reflect the personality of its author as an expression of their free and creative choices.
174. I accept the design choices for the Prototype and the design choices and changes arising out of the movement of the Key Blocks in Series 2 were solely down to Mr Duke. However, there were other contributors to the various iterative changes in the Works set out in Annex 2 including; Ralph Beckman, Henry Sharpe, Alex Caccia, and Peter King. On the basis of my conclusion that each of the Works in Series 1 to 4 / Versions 1 to 8 are not original works as set out in *Cofemel and Brompton* and in accordance with the InfoSoc Directive, it is not necessary to go on and consider any impact of the situation where there were multiple authors of some of the noted changes. If my decision had included these further adaptations in these models as being original, on the evidence it appears there would have been sufficient nexus between these other contributors.
175. The movement of the Key Blocks in Series 2 was an alternate practical solution to the positioning of the feet for the rower from above the Main Rails to between the Main Rails. The explanation from Mr Duke is that this change resulted in the creation of the memorable shape of a WaterRower "*because that is what established the repeating motif of the parallel structural elements*". However,

as set out earlier in this judgment, the resultant change of the vertically parallel planes of the Top and Bottom Decks was present in Series 1. WaterRower Ltd only claims the iterative changes to the Series 2 model where the Key Blocks were moved to the new position. The assessment here excludes those elements claimed in the shapes from the earlier versions. Where the resulting changes improved the feeling of the user of being in a scull rowing on water, these changes are subjective, are not expressed in the article and cannot therefore be protected. A consequence of moving "*the Key Blocks system was the new bolted on Footboard had to extend further up, all the way to the Top Deck, so this required a new shape for the Footboard.*". Although not determinative, the 'consequential' and 'required' technically constraining nature of these noted changes reduces the ability of the author to reflect his personality in that subject matter.

176. The functional constraints in the adaptations in the Series 2 Model, including the movement of the Key Blocks, limited the creative decision making available to Mr Duke. It did leave some elements of choice and design for Mr Duke. For example, due to the new position, the footboard went from 'v-shaped' to having parallel edges. However, in part this was dictated by the location of the footboard being partly between the parallel Main Rails. Overall, the remaining freedom of the author to express his creative choices was modest. Taking all of these points into account, overall these changes do not reflect the personality of its author, as an expression of his free and creative choices and are not original within the meaning set out in *Cofemel* and *Brompton* and the InfoSoc Directive.

Are any of the Works works of artistic craftsmanship within the meaning of s.4(1)(c) CDPA?

177. On the basis of my assessment that only the Prototype is an original work within the meaning of the InfoSoc Directive, I need to consider whether it would also qualify as a work of artistic craftsmanship. As the other Works are not original there is no need to consider whether they would qualify as works of artistic craftsmanship but, in the context of the developing nature of this area of law, I have briefly also set out my assessment on their positions.

The Prototype

178. Mr Duke's evidence evokes an idyllic impression of a graceful wooden scull being rowed. He compares the feeling of the slightly unstable, narrow scull shell, the noise of the rushing water and the graceful movements of the rower in sync with the boat with the feeling he wanted a user of the Prototype, and later model WaterRower's, to experience. I have no doubt that Mr Duke has a history and connection with this type of rowing or that he decided to develop a better rowing machine and that he did this mainly by hand, on his own, as the creator of the Prototype.

179. Mr Duke does not have a particular background in any trade associated with craftsmanship. His evidence demonstrated significant effort and skill in the creation of the early development of Prototype. This included the choice of materials, the wooden frame, the nature of the joints, the shapes chosen for the different parts of the Prototype frame and the hand finish – for example sanding edges to create a "*smooth and blended*" corner. In the circumstances, this demonstrates "*a manifestation of pride in sound workmanship- a rejection of the shoddy, the meretricious, the facile.*".
180. Liking correctly point out the design of the WaterRower products, including the Prototype, have considerable technical functional constraints in the choice of shape - such as the rolling seat, the need for some form of footboard for the human user to exert force against and the distances involved in the dimensions of the device to fit with the biomechanics of a human using the machine. However, there remains considerable room for Mr Duke to make choices in the design. For example, the narrow proximity of the Main Rails and the choice of a repeating horizontal and vertical parallel motif in different planes and scales. I also accept that the Prototype was created in a careful manner to preserve and enhance the beauty of the natural wood used in the design.
181. The evidence supports the argument - including from the articles in general newspapers and commercial journals - that a significant section of the public found the WaterRower design aesthetically pleasing. The presence of the WaterRower models in commercial design store's – including MOMA – indicates the high regard for the quality of the design.
182. However, in my view, these useful contemporaneous documents do not give the impression the subject matter was the result of a mind with a desire "*to produce something of beauty which would have an artistic justification for its own existence*" (Hensher Lord Kilbrandon p98C) or "*was an artist in that he used their creative ability to produce something which has aesthetic appeal.*" (Bonz). The early video interview of Mr Duke on the "*Inventor - News Network*" supports the view that WaterRower was a commercial development, chosen from a number of rowing machine ideas, as the design most likely to achieve Mr Duke's business goals of creating a commercially successful rowing machine with a design of aspirational sensory impact. I do not accept Mr Duke's evidence that his intention (there could of course have been more than one intention) was to create a work that went further, one where the craftsmanship in its creation was artistic.
183. The carefully hand-crafted, visually striking Prototype appears to have achieved Mr Duke's goals of creating a rowing machine with a sensory and visual experience that was different to other rowing machines at that time. These, along with the other factors that have been discussed are relevant, but none are determinative in this assessment.

184. I have not been addressed on any binding ratio in *Hensher* or other English authority that prevents me from assessing all these factors in my assessment when construing the statutory phrase.
185. In the circumstances, construing the statutory phrase, given its "*ordinary and natural meaning*" as a composite question, and considering the multi-factorial nature of the evidence, I have decided the Prototype is not a work of artistic craftsmanship within the meaning of s.4(1)(c) CDPA.
186. The cited authority relied upon in *Response* and other authorities noted was *Bonz*. In the circumstances, with due respect for the noted line of authorities, I have also considered in the alternative whether the Prototype would satisfy the *Bonz* summary of what constitutes a work of artistic craftsmanship.
187. With some noted clarifications (each of which I have dealt with in this judgment) HHJ Hacon adopted Tipping J's summary of what constitutes a work of artistic craftsmanship. As set out in *Response* at [36] it is necessary to consider if Mr Duke was both: "*(a) a craftsman in that he made the Prototype in a skilful way, taking justified pride in his workmanship and (b) was an artist in that he used their creative ability to produce something which has aesthetic appeal.*". In *Hensher* Lord Morris explained, "*... proper interpretation of the words of the statute does not involve the formulation of any test or the application of any particular formula. Indeed, to lay down any such test or formula is to add to what is contained in the Act and I can see no justification for doing that for doing so.*". The challenges which come with approaching s.4(1)(c) CDPA do not improve by deriving a further framework for that approach. In the *Bonz* Test craftsmanship and artistry are stated as separate requirements, albeit as conjunctive requirements. The rephrased test requires the artist to "*produce something which has aesthetic appeal*". In this context I understand that such aesthetic appeal is not to be limited to "*eye appeal*". Although formulated differently in the context of the facts in *Hensher*, Lord Simon indicated, "*It is therefore misleading to ask, first, is this a work produced by a craftsman, and secondly, is it a work of art? It is more pertinent to ask, is this the work of one who was in this respect an artist-craftsman?*".
188. Mr Duke can be considered a craftsman in the context of his creation of the Prototype for the reasons explained. I have found that Mr Duke used his skills to create the Prototype and that it has aesthetic appeal. However, Tipping J explained, in coming to his summary view, that "*for a work to be one of artistic craftsmanship it must, in my judgment, have some artistic quality.*". I have determined that in his creation of the Prototype, Mr Duke did not have the character of an artist craftsman. I accept the arguments are somewhat circular. This reflects the difficulty in formulating any additional test beyond the application of the statutory phrase. Therefore, in my view, the work would also not have been one of artistic craftsmanship following *Bonz*.

189. I was addressed on other authorities, including *Burge*, but, although useful context, in my view these do not take the approach any further forwards. The correct approach is to address the evidence with an objective assessment and apply the statutory wording, as set out above.

Other modifications to the different WaterRower versions

190. On the basis the Works claimed by WaterRower Ltd, other than the Prototype, were not original, there should be no need to separately consider whether they are works of artistic craftsmanship under s.4(1)(c) CDPA. As HHJ Hacon noted in *Response*, "if [the article] was not original, copyright does not subsist anyway and the meaning of 'artistic craftsmanship' is academic.". However, in the context of the issues in this case it is prudent to provide my views on the alternative, where I am not right on my primary view.

191. The evidence and analysis above at [173] supports Liking's position that the amendments made to the Works set out in Annex 2 to this judgment were undertaken for the purpose of improvements to manufacturing and the commerciality of the WaterRower products. For example, the change in number (from 3 to 4) of the Rail bumper feet and their spacings, the width of the Seat wheels or the Handle rest becoming injection moulded. These are just examples. It is important not to perform an over-meticulous dissection of the individual features rather than considering the overall changes for each claimed model. The nature of the changes are workmanlike, practical alternative adaptations. The purpose of the changes is also predominantly of a practical nature improving the manufacturability and commerciality of the WaterRower. Many of the changes are based on cost and efficiency. I accept Liking's position. The changes in each of the different models claimed as Works in Versions 1-8/Series 1-4 (and subject to the comments on the Key Blocks change below) are not works of artistic craftsmanship. This view would be the same whether assessed on an objective multi-factorial assessment construing the composite statutory phrase or on the basis of the *Bonz* Test.

192. The movement of the Key Blocks and the resulting changes to the expression of the Series 2 model allow for more creative freedom in the choices. However, for the same reasons discussed in [175] – [176], including the points noted in the evidence regarding the change in emphasis to manufacturing and construction efficiency and cost from the creation of the Prototype, the movement of the Key Block in Series 2 (and the other associated modifications noted in Annex 2) is not a work of artistic craftsmanship. My view is the same applying *Bonz*.

193. Therefore regarding Issues 1 & 2 - copyright subsistence - none of the Works are works of artistic craftsmanship.

Ownership

194. WaterRower Ltd's claim to ownership in the copyright is based on a number of assignments set out in Annex 4 to the APOC and is unchallenged. WaterRower Ltd is the owner of any copyright subsisting in the Works (including the Prototype) in this case.

Infringement

195. Although I have determined no copyright subsists in the Works as works of artistic craftsmanship, for the same reasons noted previously, I have provided some views on the issue of infringement. On the basis I did not accept any of the Works other than the Prototype was original I have restricted these comments to the issue of indirect infringement based on the Prototype.

Copying

196. Liking accept that the TOPIOM models 1 and 2 are copies of Series 4 Version 8 model of the WaterRower. This is subject to there being copyright subsisting. It also accepts the models have been sold and/or offered for sale in the United Kingdom.

If the Series 4 Version 8 model reproduces the Prototype is there indirect copying?

197. As well as copying, the partial transcript of the CMC in this trial bundle indicates that Liking may accept infringement if the Series 4 WaterRower is a work of artistic craftsmanship and copyright subsists. However, the issue still appeared to be in dispute at trial. I have therefore made the following comments.
198. The changes made between the Prototype and the Series 4 Version 8 model are mainly detailed in Annex 2. There were also some referenced changes between the Prototype and the Boat Show Prototype, see [49] where Mr Duke confirms they were "*largely the same*". Over the different series there are a considerable in number of changes but they have a limited impact on the overall visual appearance. The most significant change is in Series 2 with the movement of the Key Blocks. The main visual changes of note are the lowering of the footplate with the movement of the Key Blocks and the introduction of the vertically parallel Top and Bottom Decks.
199. The same evidence relating to the contemporaneous review articles and, for example, the placement of a WaterRower in the MOMA Design shop over the last 16 years is relevant to the Series 4 Version 8. The manufacturing and commercially motivated changes through the various models does not

appear to have impacted on the views that the WaterRower remains aesthetically pleasing. The Series 4 Version 8 model has not become dictated by technical function in a way the Prototype was not. It effectively has the same overall shape and expression as the Prototype: the layout of the Upper Deck and Lower Deck, the (relatively narrow) width of the Main Rails, the materials used (wood), the look of the finish of those materials, the carefully thought through relationships of the angles, spacings and joins relating the various component parts of the shape - including the Upper and Lower Decks to create "*a repeating motif of parallel structural elements in different planes and scales*". The increased distance between the Main Rails does not detract from this overall image. Considering the overall shape of the entire work, the expression of the Series 4 Version 8 WaterRower model is original as a reproduction of intellectual creation of the Prototype. Annexes 4 and 5 to the APOC provide a detailed comparison between the WaterRower Series 4 Version 8 model and each of the TOPIOM models 1 and 2. The TOPIOM Models 1 and 2 and the WaterRower Series 4 Version 8 are virtually identical. There are some minor differences but there is no question they reproduce a substantial part of the Series 4 Version 8 model, retaining Mr Duke's intellectual creation of the Prototype.

200. As regards knowledge for indirect infringement, HHJ Hacon sets out the relevant law in *Response* at [89]-[93] and [102]. Liking appear to take the point that, as it did not appreciate the Works attracted copyright (for which, on my view, they were right), if copyright had subsisted, this would have been a defence even where they were aware of other relevant facts (including, as the disclosure and evidence of Mr Fu shows, assessing the other intellectual property rights in the WaterRower products – such as trade mark and patent rights). If it was taking that point, it would not succeed.
201. The evidence of Mr Fu and related disclosure establishes that Liking was "*involved in the specification of the design and the packaging of the product*" and was well aware of the WaterRower products in the context of the development and marketing of its TOPIOM models. In cross-examination it was confirmed that the disclosure documents recorded one of the manufacturers Liking worked with acknowledging it was adopting a counterfeit of the WaterRower – not via any independent creation. Mr Fu also accepted the product (the TOPIOM models) made by another manufacturer, chosen later, was different to the WaterRower counterfeit proposed by the other manufacturer but that it was "*not a huge difference*". Considering the evidence and the facts known to Liking, the similarity of the TOPIOM models 1 and 2 would have been obvious. Viewed objectively, Liking would have arrived at the belief the TOPIOM Models 1 and 2 were infringing copies (or a reasonable person would believe that dealing in the copies would be in breach of the copyright held by another party). In any event, if there was any question over this knowledge, it would have been dealt with by the letter before action from WaterRower Ltd on 29 November 2019.

202. On the basis of my decision that the Works do not attract copyright the answers to Issue 3 are not relevant. However, if I am wrong and the Prototype was a work of artistic craftsmanship the answers to Issue 3 are: (a) Yes, Series 4 Version 8 was copied, (b) Yes, a substantial part of the Prototype was reproduced in TOPIOM models 1 and 2, and (c) Yes, Liking had the relevant knowledge.

Counterclaim

203. Liking has a counterclaim for a declaration of non-infringement on the basis that no copyright subsists in the Works. The requested declaration is in the form "*That the WaterRower is not a work of artistic craftsmanship.*". As explained, the parties' pleadings use different definitions for the Works in dispute. Here 'WaterRower' means the Works. On the basis of my assessment that the Prototype is part of the Works, it would be included in any declaration. My decision is that the Works are not works of artistic craftsmanship. I can therefore make the requested declaration.

204. The Senior Courts Act s.19 provides the court with the jurisdiction to make such a declaration. CPR Part 40.20 provides this Court with discretion on whether to grant a declaration, whether or not any other remedy is claimed. *Nokia Corp v Interdigital Technology Corp* [2006] EWHC 802 (Pat) sets out considerations a Court should take into account when deciding whether to grant such a negative declaration. The salient issue here is whether the declaration serves a useful purpose. Every case where there is a decision similar to the one in this case does not require a related declaration. There needs to be a purpose which is useful to help ensure the aims of justice.

205. The evidence of Mr Fu on this point is that the case brought by WaterRower Ltd has resulted in Liking reducing staff numbers due to "*business relating to the Topiom Model 2 and new product development difficult and uncertain in the UK*". On cross-examination Mr Fu could not "*predict if the defendant wins the case, we can reach the sales like before.*". Liking want a declaration for the purpose of certainty in the market place.

206. The decision in this case should bring some certainty to the situation. The explanation and detail in the evidence supporting the counterclaim and the asserted impact of the claim on market uncertainty is very limited. It does not, other than indirectly, give any insight into the likely market reaction to this case or the assistance any declaration may have on that uncertainty. In the circumstances, I do not accept the requested declaration would serve a useful purpose.

207. In relation to Issue 5 the requested declaration is refused and the counterclaim is dismissed.

Intervening decisions

208. Subsequent to the preparation of this judgment there have been two interposing decisions in quick succession which relate to aspects of this case. The parties have provided brief post-trial submissions.

Equisafety Limited v Woof Wear Limited [2024] EWHC [2478] (IPEC)

209. This is a recent judgment of Ian Karet sitting as a Deputy High Court Judge in IPEC. The claims concerned infringement of copyright in works of artistic craftsmanship under s.4(1)(c) CDPA. The subject matter was high visibility equestrian products.
210. WaterRower Ltd note the Judge appears to have accepted Liking's submission that the position under CDPA and retained EU law was the same [47] "*whether analysed under the cases on the CDPA alone or also considering the EU law approach*". I am not sure this is correct. The statement referenced by the Judge is one of outcome – whichever test is applied the result is the same on the facts of this case. That is not necessarily the same as accepting the law under the CDPA and EU law is the same. WaterRower Ltd additionally criticises the application of retained EU law by the Judge, relies on the different facts and the lack of an explanation of any analysis of *Hensher* or if/how that case impacts on his assessment. The Judge explains at [49] that whether applying EU law or "*An analysis under the older UK law*" the result is the same. The decision explains the outcome applying s.4(1)(c) on the basis the work was "*not the work of a craftsman*". The Judge was addressed on *Hensher*. It is not clear if/how the Judge incorporated *Hensher* into his assessment.
211. Liking's position is that there is no new law in *Equisafety* and that the case reflects the difficulties in items being classed as works of artistic craftsmanship. This court is not bound by *Equisafety* but in any event I do not believe there is any ratio in it that impacts on the reasoning set out in this judgment.
212. Finally, WaterRower Ltd briefly addressed Liking's argument relying on the Defendant's position in *Equisafety* regarding *Harper v National Coal Board* [1974] QB 614: "*In a case where the later court cannot discover the reasoning on which the majority of the House of Lords based their decision, the later court is free to adopt any reasoning so long that that supports the decision of the House.*" with the effect that "*any work that would not have satisfied their Lordships in Hensher cannot now meet the statutory test.*". WaterRower Ltd submits that the decision of the House of Lords in *Hensher* binds the lower court but not the reasoning, as it could not be discerned. I have noted the difficulties with the ratio in *Hensher* and my approach to the decision. These submissions and the ratio of *Equisafety* do not change that position.

Kwantum Nederland and Kwantum België v Vitra Collections AG, case number C-227/23

213. On 24 October 2024 the CJEU gave judgment in *Kwantum Nederland BV v Vitra Collections AG* ("*Kwantum*"). The first point to consider is whether any CJEU judgment post implementation period ("IP") Completion Day on 31 December 2020 is binding on this court in this case (the Withdrawal Act introduced the concept of the IP after Brexit, and of IP Completion Day which would mark the

end of that period). *Lipton* provides some guidance on this issue in the context of the Complete Code (that the EU Withdrawal Act is a complete code by which Parliament dealt comprehensively with the application in the United Kingdom of EU law following IP completion day). The Complete Code analysis being where a set of facts occur pre-Brexit (as here) which [59], "*having regard to EU law which applied at that time, gives rise to a cause of action, the claimant's right to pursue that cause of action is brought forward as part and parcel of the bringing forward of the law itself...*". Therefore section 6(1)(a) of the EU Withdrawal Act applies to this case and this court is not bound by *Kwantum* as a post IP Completion Day CJEU judgment. However section 6(2) of the EU Withdrawal Act provides that "*a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.*". In the context where this court can "*have regard*" to any relevant matters in *Kwantum*, Liking's position is that the decision simply underlines the divergence of the "*closed categories of work set out in the CDPA and the Cofemel requirements*". WaterRower Ltd's position is *Kwantum* is directly relevant in that it concludes that Articles 2(a) and 4(1) of the InfoSoc Directive apply to works of applied art and that the decision follows the applied art conclusions of *Levola* and *Cofemel* as to that test for the recognition of a work.

214. My conclusion above on this point at [88] is that prior to *Kwantum*, the EU legislative framework and ECJ case law removed the discretion of Member States under Article 2(7) of the Berne Convention and that the InfoSoc Directive and ECJ case law created a harmonisation of copyright providing for the conditions that works, including works of applied art relevant to s.4(1)(c) CDPA, are protected by copyright where they are original. Although the focus of *Kwantum* is on the second sentence of Article 2(7) of the Berne Convention (the material reciprocity clause) in my view the court confirms the full harmonisation of copyright under Articles 2(a) and 4(1) of the InfoSoc Directive and the consequential removal of a Member State's, including the UK, discretion under Article 2(7) of the Berne Convention. The Opinion of Advocate General Szpunar in *Kwantum* as approved by the judgment and in particular at [47], [75]-[80] and [89]-[90] of the judgment, confirms these points. Based on my earlier views it is not necessary to '*have regard*' to the decisioning in *Kwantum*, but to the extent it is relevant, it supports my earlier assessment on this issue.

Conclusion

215. Addressing the Issues before this court;

Issues 1 and 2 – no copyright subsists in the Works (including the Prototype) as works of artistic craftsmanship.

Issue 3 – As a consequence of the outcome of Issues 1 and 2 Liking did not infringe the Works. The claim is dismissed.

Issue 4 – The counterclaim is dismissed.

216. Finally, in this legally complex case, I would like to thank the parties and their representatives for their assistance, in particular with additional submissions on the above noted recent cases. I also apologise to the parties for the delay in providing this judgment which has been due to various circumstances. I do not propose to allow such delay to occur again.
217. I direct that time for seeking permission to appeal shall not run until after the hearing on the form of Order (or the making of such Order if it is agreed).

Annex 1

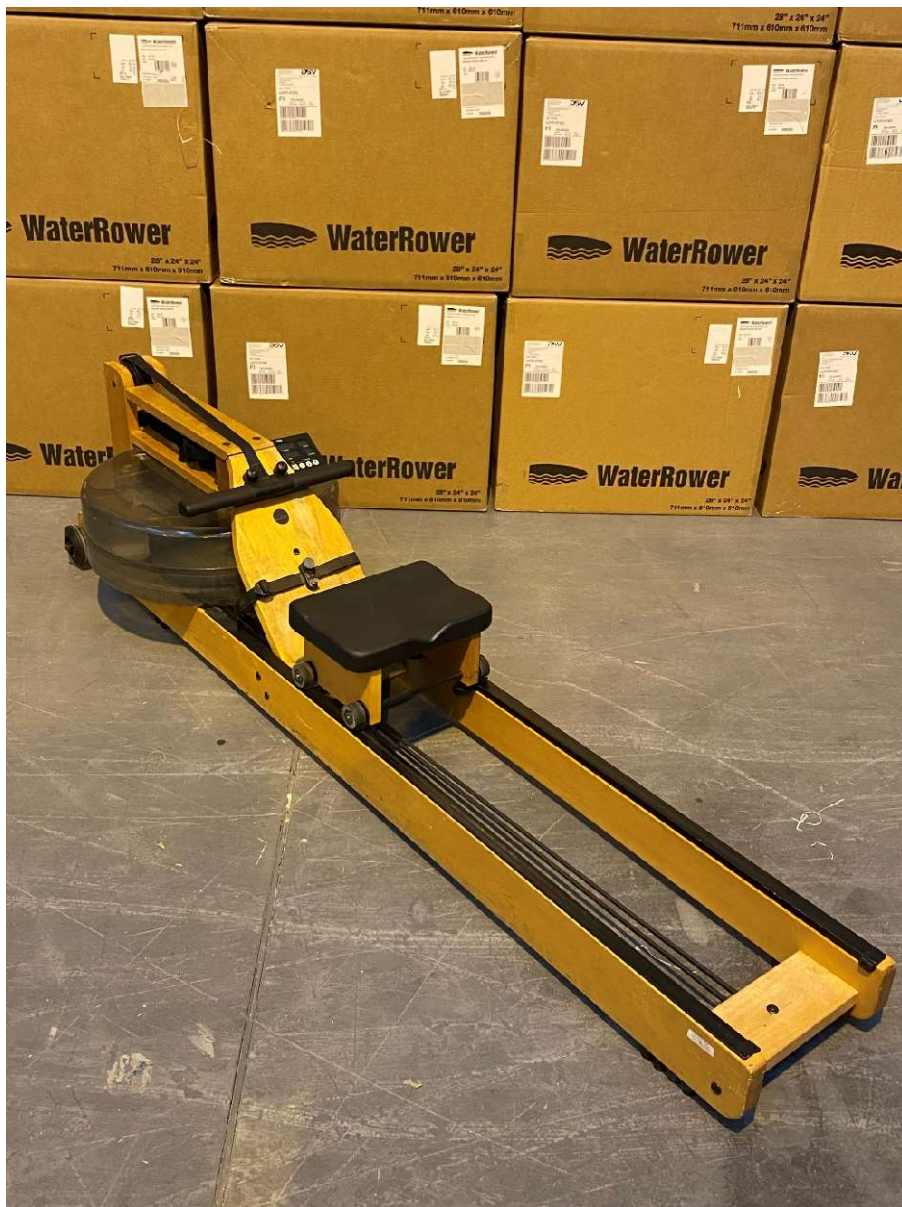
WaterRower Series I (Version 1)

1987-1992



WaterRower Series 2 USA 1992 – 1996 (Version 2)

WaterRower Series 2 UK 1992 – 1995 (Version 4)



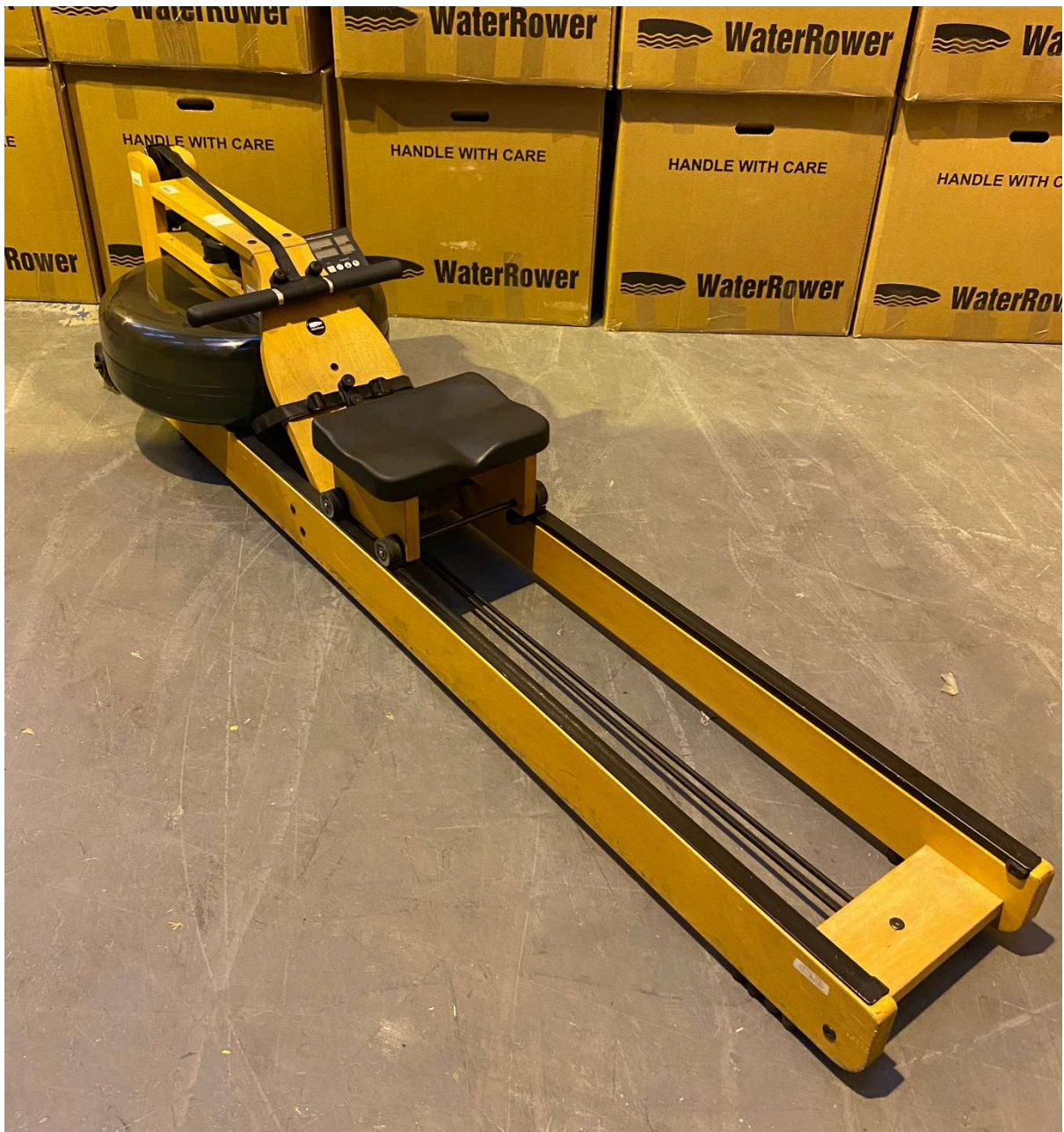
WaterRower Series 2, E3 (Version 3)

Circa 1994 - 1996



WaterRower Series 2 UK (Version 4)

1995 - 1998



WaterRower Series 3 (Version 5)

1996 - 2000



WaterRower Series 3 UK (Version 6)

1998 - 2000



WaterRower Series 3 Worldwide (Version 7)

2000 - 2004



WaterRower Series 4 (Version 8)

Circa 2004 – present



Annex 2

Designers

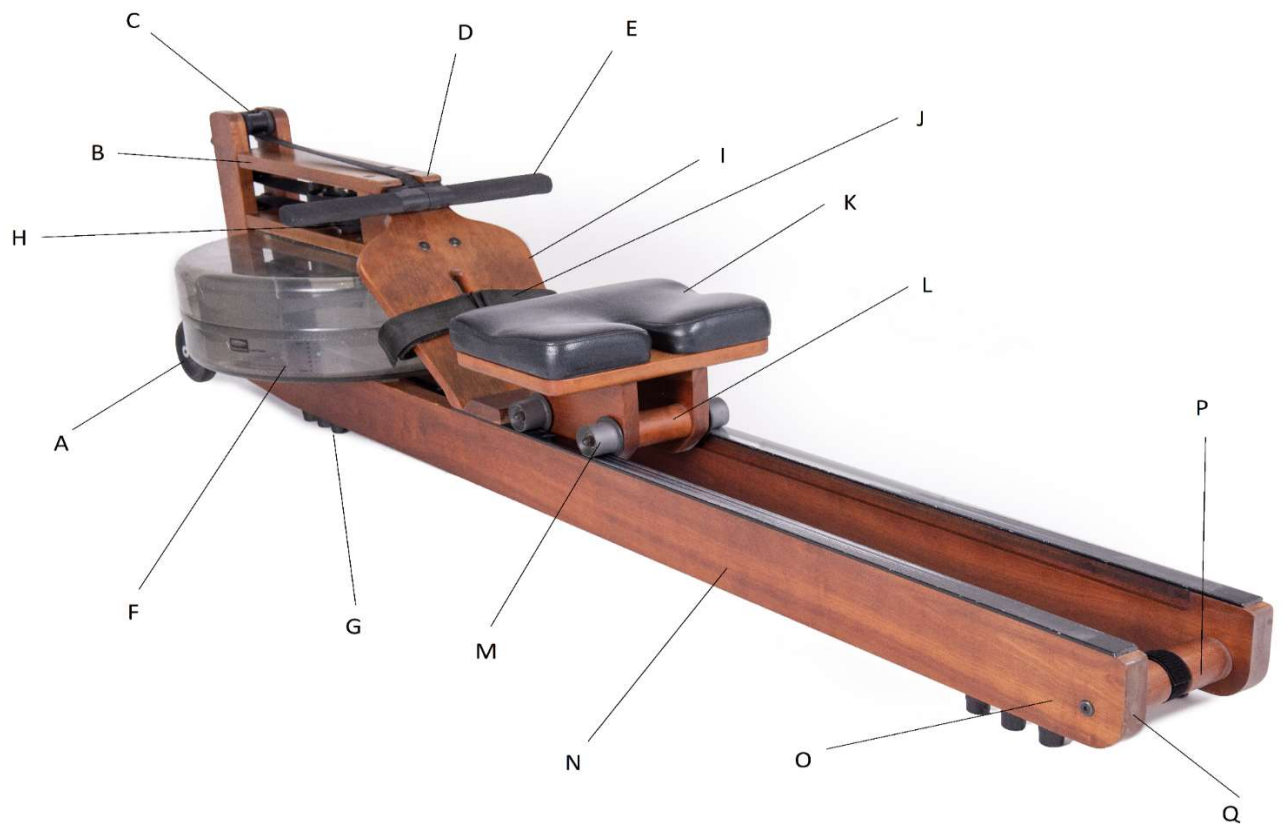
	<u>Name</u>	<u>Company</u>	<u>Nationality</u>	<u>Location</u>
	John Duke	Providence Company	American	Rhode Island, USA
	John Duke	WaterRower Inc	American	Rhode Island, USA
	Alex Caccia	WaterRower (UK) Ltd	British	England, UK
	Peter King	WaterRower (UK) Ltd	Australian	England, UK

	Series Number	Series 1	Series 2		Series 3			Series 4	
	Version	V1	V2	V3	V4	V5	V6	V7	V8
	Circa Sales Period	1988-1992	1992-1996	1992-1996	1992-1998	1996-2000	1998-2000	2000-2004	2004-Present
	Location where first sold	US	US	US	UK	US	UK	Global	Global
	Wood Types	Cherry	Cherry Maple	Cherry Maple	Beech Cherry Maple Walnut	Ash	Ash Cherry Beech Walnut	Ash Cherry Walnut	Ash Beech Cherry Maple Oak Walnut
A	Travel/dolly wheels diameter	5". 1987.	4". 1991.		3". 1995.				
B	Top deck position relative to forward riser	3" between top deck and top of forward riser, double forward riser pulleys. 1987.	1" between top deck and top of forward riser, single forward riser pulley, handle strap retained by forward riser wire. 1991.						
C	Forward riser pulley	Double. 1987.	Single. 1991.						
D	Handle rest	Wood. 1987.	Rubber bumper. 1992.			Rubber bumper. Part 1998.	Injection moulded plastic. 1998.		
						Injection moulded plastic. Part 1998 to 2000.			
E	Handle	Round Handle. 1987.	Teardrop Shaped Handle. 1991.			Colour of highlighted cell changed From green to blue			

F	Water tank	Vacuum formed, 1" corner radius. 1988.	Vacuum formed, 1" corner radius. 1988.	Vacuum formed, 1" corner radius. 1988.	Injection moulded, 2" corner radius. ??		
G	Rail bumpers (feet)	3 with 1" gap. 1987.	4 with no gap. 1991.				
H	Key bracket material	Wood. 1987	Wood. 1992 to 1995.	Steel. 1995.			
I	Footboard	Heart shaped. 1987.	Parallel. 1992.				
J	Footboard construction	Fixed wood heel rest. 1987.	Movable, screw-in wood heel rest. movable screw-in foot strap. 1992.	Fixed steel heel rest, height adjustable sliding foot strap. 1994.	Movable screw-in wood heel rest, movable screw-in foot strap. 1994.	Floating plastic heel rest, fixed foot strap. 2000.	Floating plastic heel rest, fixed foot strap. 2000.
K	Seat shape	13.5" x 9" x 9", cut out section for tail bone, leather seat cushion. 1987.	Dimensions changed to 9" x 7", tailbone indent replaces cut-out, polyurethane seat cushion. 1991				
L	Seat connector/axel	Cylindrical, wood. 1987.	Rolled steel axel. 1992.				
M	Seat wheels	1.75" diameter. 1.4" width. 1987.	1.75" diameter, 0.8" width. 1991 Colour of highlighted cell changed From green to blue				

N	Rail material	Wood. 1987.	Aluminium. 1991.	Wood. 1987
O	Rail wood section	1.25" x 4.5". 1987.		1.05" x 4.5". 1995.
P	Rear Spacer	Cylindrical. 1987.	Rectangular. 1991.	
Q	Width apart of rails	8.5". 1987.	10.25". 1992.	

WaterRower Series 1 – (Version 1)



WaterRower Series 4 (Version 8)

