

CHAPTER 8**DEFINITION OF "DESIGN"****INDEX**

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INTRODUCTION

- 8.1 The definition of "Design" is fundamental to understanding the nature of the protection which the *Designs Act 1906-1973* was formulated to give.

"Design" has to do with the physical, visible **appearance** of an article. It does not protect the article itself.

The terms "shape, configuration, pattern and ornamentation" are taken to refer to all the visible qualities of an article. Thus they are taken to include both the visible two dimensional and the three dimensional qualities possessed by physical objects. That is not to say that there is a clear difference between what may be two dimensional and what may be three dimensional. The two qualities may overlap.

The design must be applicable to an article. That is, it must be able to give a specific and individual appearance to a physical object.

"Design" does not include the way the article is made.

DEFINITION

- 8.2 The *Designs Act (1906)* makes the following definition:

"design" means features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction;

The following paragraphs will expand on the meaning of individual terms within the definition and on the concepts implied by it.

VISUAL APPEARANCE

- 8.3 To extract the intent of the definition:

"design" means features of...an article...that...can be judged by the eye...

Thus, basic to the understanding of "design" in the context of industrial property, is the concept that "design" has only to do with attributes of an article that can be judged by the eye. That is, "design" has to do with visual appearance only. Or to put it still another way, it refers to what things look like and **nothing** else. (See *Firmagroup Australia Pty Ltd v Byrne & Davidson Doors (Vic) Pty Ltd* (1987) 9 IPR 353 @ 355 and *Re Wolanski's Registered Design* (1953) 88 CLR 278 @ 279) This does not include the aesthetic appeal of the article as British Design legislation does, since features of the article that are only functional may be included in the design (s.18(1)) and the features need not appeal to the eye, but need only be judged by it.

Applicants can be confused by the term "design" because of its very broad range of meanings in normal usage. Websters Third International Dictionary Unabridged (1981)

lists at least 36 shades of meaning for the word "design" none of which includes the industrial property definition.

Thus, if it is apparent that an applicant is seeking protection for something other than the appearance of an article, they must be told to seek another more appropriate form of protection or to modify their application in such a way that its subject matter is suitable for design protection.

JUDGED BY THE EYE

- 8.4 When assessing the registrability of a design it will be the examiner's eye that will be doing the judging. However ultimately, if a registered design becomes the subject of legal proceedings, the "eye" will be that of the court. See *Dart Industries Inc v Decor Corp Pty Ltd* (1989) 15 RPC 403 at 408-409.

FEATURES OF SHAPE, CONFIGURATION, PATTERN AND ORNAMENTATION

- 8.5 Taken as a whole the features of shape, configuration, pattern and ornamentation encompass all the visible qualities of an article, and would thus define the two and three dimensional aspects of an article. They do not refer to the aesthetic appeal of the article though an article of a particular form and decoration will have a particular "aesthetic".

In the Designs Office these terms have been grouped into "shape and configuration" (referring to the three dimensional aspects) and "pattern and ornamentation" (referring to the two dimensional aspects). This follows the persuasive reasoning given in *Kestos v Kempat Ld* (1936) 53 RPC 139 At 152 the judge clearly stated his understanding of how the terms should be construed:

"Shape and configuration are for all practical purposes considered synonymous Each signifies something in three dimensions; the form in which the article is fashioned. "Pattern" and "ornament" can, I think, in the majority of cases be treated as synonymous. It is something which is placed on an article for its decoration. It is substantially in two as opposed to three dimensions. An article can exist without any ornament upon it, whereas it can have no existence at all apart from its shape and configuration."

In some cases aspects of "pattern and ornamentation" may also be features of "shape and configuration" and vice versa. For example, the decoration in cut crystal could equally be referred to as "shape and configuration" since it is cut into the crystal or "pattern and ornamentation" since its effect is one of surface decoration. See *Re Rollason's Registered Design* (1989) 15 RPC 441 @ 446. In such cases allowances can be made such that the features may be claimed as "pattern and ornamentation" or "shape and configuration" or both. In most cases though, as stated above, the distinction will be clear and unambiguous.

- 8.6 The examiner should remember that the terms are used according to their statutory meaning as expounded by the courts and not their general every day usage. Confusion does arise from the common usage of the words which does not always equate with their statutory meaning.

For example, one argument has been that "configuration" can refer to the arrangement of two dimensional elements in a particular graphic "pattern". While this may be so in common usage, it is not applicable when considering Design Registration where the meaning of the words must needs be restrictive.

Another argument has been that a three dimensional element placed on an object can be considered as "ornamenting" the object . This may be so, but such an element must have more to do with the surface of the article than its shape. For example, registered design number 119116 granted registration to:

"...the ornamentation of a cistern lid, the ornamentation arising from a centrally and forwardly located pair of operating buttons which are arranged within an elongated yet substantially oval shaped periphery."

The buttons and housing were such that they appeared flattened on the surface of the lid and did not significantly alter the shape of the lid. They were thus considered as ornamentation.

Thus if the question arises as to whether a particular feature is one of shape and configuration or pattern and ornamentation two rules may be kept in mind:

- 1) If the effect of the feature is predominantly to the surface of the article then that feature is most likely to be ornamentation. If it is removed, the article should remain with its form untouched. There is likely to be some element of repetition in the surface treatment.
- 2) If the effect is to the three dimensional sculptural form of the article such that the form of the article would alter if the feature were removed then that feature is most likely to be shape and configuration.

APPLICABLE TO AN ARTICLE

- 8.7 A design must be able to give a physical appearance to an object. The object may be two dimensional, as in textile material, or three dimensional. Thus a graphic element of itself cannot be considered to be a design since it is not an object. However if that graphic is applied to an object, say a T-shirt, then the T-shirt with the graphic applied can be considered to be a design.

METHOD OR PRINCIPLE OF CONSTRUCTION

- 8.8 Referring as it does to the appearance of an article only, the way the article is made has no relevance in design registration. Any suggestion in the application that the way the article is made is being protected should be rejected.

Also, a method or principle of construction exists when a number of different appearances are possible from the one design (apart from the movement of integral elements eg. the

limbs of a doll). A design must be of fixed appearance. If an application for registration seeks protection for a design where more than one appearance is possible it must be rejected on the grounds that it shows a method or principle of construction. See *Firmagroup Australia Pty Ltd v Byrne and Davidson Doors (vic) Pty Ltd (1987) 9 IPR 353 at 355*. At 356 of this case The Court approved the statement in *Russell-clarke on Copyright in Industrial Designs*, 5th ed, 1974, p.27 which says:

"What he gets a monopoly for is one particular individual and specific appearance. If it is possible to get several different appearances, which all embody the general features which he claims, then those features are too general, and amount to a method or principle of construction".

Method or principle of construction is treated more fully in Chapter 4.

FUNCTIONAL FEATURES

8.9 See chapter 3.

COLOUR

8.8 See chapter 2.