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We wanted more Arne Jacobsen chairs but all we got was boxes

- experiences from the protection of designs in Scandinavia from 1970 till the Directive

***Abstract.** The Nordic design laws, which were enacted in the 1970s, may be viewed as a forerunner for the EU-system. This article sets the scene for the evolution of the Nordic Design Acts. Furthermore, it examines case law and registration practices to test how functional designs were de facto protected by the Design Act considering also the development in copyright law. It is concluded that the designers thanks to whom there was 'Danish Design' made no or only marginal use of the registered designs system which had been put in place for them. The reasons for the failure are discussed and attributed to a combination of legal and cultural factors. . Finally, the article reflects on the lessons learned and their implications for the ongoing EU design law reform.*

Jens Schovsbo and Stina Teilmann-Lock¹

1. Introduction

At present the EU design system² is under review and changes may well be initiated before long.³ The EU-design protection system represents, historically and internationally, an ambitious attempt to protect designs and designers in and on their own right in the IPR-system, which has traditionally been dominated by copyright and patent law. In the 1960s and 1970s, the effort to establish a Nordic registered design system represented a similar ambition to provide for an independent protection system for 'modern' functional designs that did not conform to the categories of existing IPR schemes.⁴

The inclusion of purely functional designs in the Design Acts was a hallmark of the Nordic design regulation. At the time, the European Community (EC) was expanding into Scandinavia (Denmark joined in 1973 and Finland and Sweden in 1995). There was a growing fear that EC harmonization in the area of design law would – as it was put by the Swedish professor Seve Ljungman – 'tame' the 'Nordic black horses in the

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² Consisting of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

³ As part of the process an Economic Review of Industrial Design in Europe was published in 2015, *The Economic Review of Industrial Design in Europe — Final Report* MARKT/2013/064//D2/ST/OP, January 2015 available at http://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection/index_en.htm.

⁴ The 1970 design law reform was a Nordic reform. Thus similar acts were adopted in Denmark, Norway, Sweden, and Finland. In this article the focus is on the particular Danish experience. Moreover, a number of comparisons will be drawn to, especially, the Swedish and Norwegian situations as a common bulk of law relative to design protection has developed in the three Scandinavian countries.

international design parade'⁵ and restrict the Nordic design system to a 'Geschmacksmuster' regime that would not suit 'modern' functional designs.⁶

In the following we will analyse how the 'Nordic black horses' performed in the 30-odd years they marched in the design parade. First, we will describe the background for the Nordic design law reform and present the cultural and legal contexts in which it was conceived and evolved. We will then examine how, in Denmark, functional designs were *de facto* protected by the Design Act taking into view at the same time the development in copyright law. We point out that the designers thanks to whom there *was* 'Danish Design' made no or only marginal use of the registered designs system which had been put in place for them. We submit that the opting out of the registered design system by its prime users was due to a failure on two accounts. Firstly, and from a legal perspective the increasing reliance by designers on copyright protection eroded the basis for the system of registered designs. Secondly, as seen from a cultural perspective it was fatal that the designers did not see their norms and practices reflected in the Design Act. On the basis of these discussions we will reflect on the lessons learned and ponder their implications for the ongoing EU design law reform.

2. The Nordic design law reform

In the mid-twentieth century Scandinavia gained an international reputation for its design. Designers including Hans Wegner, Arne Jacobsen, Bruno Mathsson and Alvar Aalto skilfully united form and function in their designs, setting a new standard for the design of everyday objects, see more *infra* at 2.2.2. The Nordic legislators, therefore, knew what they wanted when they set out to reform their Design Acts:

'Along with growing wealth consumers will demand that products – industrially made or craftmade – are not only suited for their purpose but have also an attractive outer form. This goes in particular for personal articles for everyday use such as apparel and furniture but the demand for good design has also increased considerably in relation to tools, industrial machines, transport and so forth. In

⁵ Ljungman S, The Scandinavian approach in design protection – aims and outcome – in comparison with the new Benelux legislation 117-128 in Jehoram H C (ed.) *Design protection*, Sijthoff, Leyden 1976, 117. Ljungman had introduced the metaphor of the black horses in Ljungman S The New Nordic Design Legislation Under Comparative Aspects, *International Review of Intellectual Property and Competition Law* 1973 336-351, 350-351.

⁶ The 'untamed and wild nature' of the Nordic design legislations was according to Ljungman, *ibid.* mainly due to the decision to offer protection to the appearance of *purely functional design* which was according to Ljungman unique in the world at that time (even though the approach had been known in Norway since the 1910-Act). Significantly, as far as the object of design protection was concerned what in effect happened was that the Nordic model for design law eventually prevailed over the mainstream European models to provide a base line for the 'EU Design Approach'. This development was probably not least due to the works of another eminent Swedish professor of intellectual property law: Marianne Levin. Professor Levin was part of the group which laid the foundations for the EU design model with the MPI Diskussionsentwurf eines europäischen Musterrecht, see *GRUR Int.* 1990 565-586. Apart from M Levin the group consisted of professors A Kur, F-K Beier and K Haertel. Levin's doctoral dissertation *Formskydd*, LiberFörlag, Stockholm 1984 contained some of the nuclei of what were to become the 'design approach' of the EU.

order to meet such demands it seems fair to encourage innovation in craft-based and industrial design.⁷

Nearly identical Design Acts were passed in the Nordic countries in 1970 (Denmark, Norway, and Sweden) and 1971 (Finland).⁸ The system established by the Acts remained in force until they were amended as a result of the adoption of the EU Design Directive in 1998, which has been implemented by all Nordic countries (including Norway which is part of the EEA).

The Nordic Design Acts were based on the *patent approach*. Using the Danish Design Act of 1970⁹ as an exemplary model the Act defined the object of protection as ‘a model for a commodity’s appearance or for an ornament’ (Section 1). Significantly, the definition is neutral: the intention was to allow protection of the appearance of purely functional designs.¹⁰ In order to be registered, a design was to be ‘novel’ and to ‘differ

⁷ See the *Parliamentary Report leading to the Danish Design Act No. 417/1966*, 34 (Betænkning 417/1966 vedrørende en ny dansk lov om mønstre udarbejdet af den af handelsministeriet den 5.2.1960 nedsatte kommission i samarbejde med tilsvarende finske, norske og svenske kommissioner (mønsterlovsbetænkningen’) (herinafter ‘the Report of the Nordic Design Law Committee’)). The Report is available (in Danish) at http://www.statensnet.dk/betaenkninger/0401-0600/0417-1966/0417-1966_pdf/searchable_417-1966.pdf. This and the following citations of the Report are all translated by the authors. The Nordic countries set up a joint committee and on that basis national reports were drafted. See for an account for the discussions from a Swedish perspective (and in English), Ljungman, *supra* note 5 (1973).

⁸ Denmark (Lov om mønstre No. 218/27.5.1970), Finland (Mönsterrättslag No. 221/1971 of 12.3.1971), Norway (Lov om mønster, No. 33/29.5.1970) and Sweden (Mönsterskyddslag 1970:485). The particular international legal context of the Nordic law reform was the inclusion of Article 5*quinquies* in the Paris Convention in 1958 (Lisbon). According to this (still valid) rule ‘Industrial designs shall be protected in all the countries of the Union’. The obligations created by the provision are very vague and do not even require the protection of designs by sui generis legislation. Nonetheless, the amendment necessitated changes in the Nordic legislations. The Swedish Design Act was from 1899; it was rudimentary and limited to ornaments within the metal industry. Finland had no specific legislation relating to design. Denmark and Norway had Design Acts in place that in principle would meet the requirements of the Paris Convention yet in both countries governments decided to amend their legislations. Joint Nordic reforms of copyright law, trade mark law and patent law had already taken place in the 1950s and 1960s. Most importantly as seen from a design law perspective, common Patents Acts were enacted in the late 1960’s (in Denmark Act 479 of 20 December 1967) based on a common parliamentary report from 1963, *Nordiskt Utredning* (NU) 1963:6 (available at http://www.statensnet.dk/betaenkninger/0401-0600/0417-1966/0417-1966_pdf/searchable_417-1966.pdf). The tradition for Nordic legislative cooperation is long-standing and includes common Acts on contracts and sales of goods in the beginning of the 20th century and including a Nordic Draft [Civil] Code in 1962 which included all IPR Acts (including an Act on design), see Vinding Kruse Fr., *En Nordisk Lovbog – Udkast til en fælles borgerlig lovbog for Danmark, Finland, Island, Norge og Sverrig med motiver*, Gads forlag, Copenhagen 1962 (English language version in 1963 (‘A Nordic Draft Code’)).

⁹ English and French language versions are available at WIPO’s webpage; the English one at <http://www.wipo.int/wipolex/en/details.jsp?id=1121>.

¹⁰ The *function* itself was not protected under the Design Act. The committees considered introducing a utility model protection system but decided not to. See the Report of the Nordic Design Law Committee *supra* note 7, 56 (with the slightly surprising observation that an extension of design protection to cover the *appearance* of functional design would render a protection of the *function* superfluous). See to the background Ljungman, *supra* note 5 (1976), 123 *et seq.*

essentially' from what was known prior to the filing (priority) date. Novelty was defined in the sense familiar from patent law (objective and global and included 'everything made available to the public by depiction, by exhibition, offer for sale, or in any other way' (Section 2). Patent law also provided the base line for exclusivity. Design was not protected in 'the abstract' but only against the use of similar design in regard to goods which incorporate the design or goods of a similar kind.¹¹ Specific limitations were contained for prior use (Section 6) and repair of aircrafts (Section 7). A narrowly defined compulsory licensing rule was also provided for in cases where a third party had 'very particular reasons' and had no knowledge of the application and, moreover, had not reasonably been able to acquire such knowledge (Section 28). The rule was never applied in case law.

Protection could only be obtained on the basis of a written application (Section 10). In terms of formalities an application was to contain a statement of the goods to be covered by the registration, the name of the originator of the design and a representation showing the design (or a model). Furthermore, the application was to be accompanied by a declaration signed personally by the applicant, to the effect that to his knowledge the design was not known prior to the filing date in the sense described just above.

The Nordic design system was based on pre-examination of all conditions.¹² In the examination of an application for registration of a design, the Registration Authority (i.e. the Nordic national Patent and Trade Mark Offices (PTO)) was to examine whether the conditions for registration of the design were fulfilled, including the requirements of novelty and 'essential difference'. In principle, the search was to include all information available to the PTO. However, in practice it was limited to design registrations in force, applications and previous registrations which had been cancelled within the past five years.

If the application conformed to the formal requirements and no objection to the registration had been found, the application was published in order to give the public an opportunity to file oppositions. If no oppositions were filed within two months, the design could be registered for up to 15 years.

2.1. The Nordic design law reform in its context

¹¹ Section 5(1) thus provided that no one 'may, without due authority, exploit the design commercially by manufacture, import, offer for sale, transfer or lease of goods which do not differ essentially from the design, or goods which incorporate any matter which does not differ essentially therefrom.' Subsection 2, contained a provision known from trade mark law that restricted protection to 'to goods covered by the design registration or to goods of a similar kind.'

¹² This was much debated in the committees e.g. Levin, *supra* note 6, 326 *et seq.* The then previous Danish and Norwegian systems had been based on an examination of just the formal requirements (not novelty etc.) whereas a full examinations system had been in place in Sweden. In reality the picture was less clear at least for Denmark, see notably Olsen J, Nogle spørgsmål om mønsterbeskyttelse og illoyal konkurrence, *Nordiskt Immateriellt Rättsskydd* 1960 227 (pointing out that in regard to the administration of the 1905-Act the Danish Office did in fact refuse design solely dictated by function even though this was not required by the formality-examination).

When the Nordic legislators framed their vision for a modern design protection system they had a particular conception of design in mind. Notably they subscribed to a functionalist understanding of design. As cited above, the *travaux préparatoires* of the Danish Design Act passed in 1970 and the similar Design Acts passed in the other Nordic countries, reveal considerable appreciation of the tasks of the ‘modern’ designer: ‘Industrial Designs’, as was stated, would need an ‘attractive outer form’¹³. And as was concluded, ‘the distinction between ornamental designs and what has been called useful designs seems to be obsolete and cannot be maintained in modern industrial design’¹⁴. In this way the Nordic legislators, adopting the functionalist notion of aesthetic value, intended to create a law that would sustain the interests of designers and design manufacturers on (and in) their own terms. The examples of protectable subject matter that were offered in the 1966 Report of the Nordic Design Law Committee are suggestive of the way that the Nordic governments envisioned the new design law as a regulator of a market for middle class consumption: ‘glass- and porcelain ware, cutlery, furniture, apparel and leather ware’ as well as independent parts of ‘e.g. armrests for chairs, straps for handbags, heels for shoes.’¹⁵ The aim in short was to promote ‘inexpensive furniture for the people’ (as was the wording of an advertising campaign by a leading Danish design manufacturer of the time).¹⁶

2.1.1. The legal background

Today chairs, lamps, coffee pots, cutlery and other items by Danish Modern designers are considered to be significant artistic and cultural achievements. Many of the designs by Arne Jacobsen, Hans Wegner, Finn Juhl and others are found at museums of modern art.¹⁷ Yet, at the time when the Nordic design system was established the courts in the Nordic countries were consistently denying copyright protection to modern, functionalist designs.¹⁸ Thus it was a part of the legal basis for the Nordic committees that goods ‘fit for function’ would generally not qualify for copyright protection. At the time of the

¹³ By the same token, it was understood that ‘As a rule, the modern designer does not merely add an ornament to an already existing article but engages himself primarily with the making of new articles’, the Report of the Nordic Design Law Committee, *supra* note 7, 40.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 36.

¹⁶ On this topic see Per Hansen, *En lys og lykkelig fremtid – historien om FDB-møbler*, København Samvirke, 2014.

¹⁷ MoMA, for example, has seventeen of Arne Jacobsen’s designs in its collection. See http://www.moma.org/collection/works?locale=en&utf8=%E2%9C%93&q=jacobsen&classifications=&date_begin=Pre-1850&date_end=2015

¹⁸ E.g. Levin, *supra* note 6, 289 and Rosenmeier M, *Værkslæren i ophavsretten*, Jurist- og Økonomforbundets Forlag, København 2001, 235 *et seq.* with references including to the decisions from Denmark and Sweden from the 1930’s that refused copyright protection of Mart Stam and Marcel Breuer’s Freischwinger chairs. Until 1970 works of applied art were only protected for 10 years in Sweden. This changed with the adoption of the Design Act when protection was prolonged till 50 years *post mortem auctoris* but only for works of ‘real’ aesthetic quality, see *infra*, note 41.

reform, Denmark had a Design Act from 1905 in place.¹⁹ However, the 1905 Design Act, in the view of the legislator, provided inadequate protection for purely functional designs. The impotence of that Act to deliver in this regard was the result of a development in case law whereby the protection had been limited to designs with an aesthetic effect or that were designed according to aesthetic intentions ('smagsmønstre').²⁰ In a similar vein, the protection offered by unfair marketing law against the imitation of products was very limited²¹ and trademark law did not extend to cover 'the shape of a product in itself'²². For these reasons 'functional designs' simply fell through the IPR-protection system of the time. Accordingly, it was with the aim of fixing a systemic error that the Nordic governments set out to reform the system for the protection of designs in the late 1950's and early 1960's.

2.1.2. The design historical context

The sense of a void in the IP system and the realization that legal protection was missing for a whole category of valuable new products did not emerge out of the blue but was the result of a long and complex development outside of the realms of the courts and the legislator.

The perception that 'the distinction between ornamental designs and what has been called useful designs seems to be obsolete and cannot be maintained in modern industrial design'²³ which would crystallize in the preparatory works leading up to the Design Acts has its roots in a significant institutional reform in the education of designers which had taken place in the 1920s. By then teaching at The Royal Danish Academy of Fine Art began to focus on the 'functional' aspects of design, applying the aesthetic ideal that the form of a design should be given by its function.

In 1923, a furniture school was founded within the Royal Academy with the architect Kaare Klint acting as its leader from 1924 to 1954. It is noteworthy that the generation of designers who became famous for 'Danish Modern' in the 1950s –including Arne Jacobsen, Hans Wegner, Finn Juhl and others – were all educated by Klint in accordance with his 'functionalist' principles for design. Thereby the Royal Academy and the furniture school make important contexts for understanding not only twentieth century design history but also for understanding twentieth century developments in Danish and Scandinavian design law. The formation of a professional class of designers (or 'furniture architects as they are called in Danish) consisting of graduates from the Royal Academy of Art provided a key set of actors on the Danish design scene. New constellations of social power were created; via their professional bodies, their positions

¹⁹ Lov om mønstre No 107 of 1 April 1905, see Schovsbo J & Svendsen N H, *Designret* 2nd edition 2013, DJØF Publishing Copenhagen, 30 *et seq.*

²⁰ See on the 1905 Act, Olsen, *supra* note 12, 227 and Schovsbo & Svendsen, *supra* note 19.

²¹ Lund T, Forholdet mellem Konkurrencelov og speciallov inden for Eneretsområdet, *Nordiskt Immateriellt Rättskydd* 1958 43-57, 49.

²² Kockvedgaard M, *Immateriellrettspositioner*, Jurist- og Økonomforbundets Forlag Copenhagen 1965, 418 *et seq.*

²³ Report of the Nordic Design Law Committee, *supra* note 7, 41,

as public figures and as court-appointed experts the academy-trained designers came to contribute substantially to the direction of intellectual property law with regard to design.

The official stance of Danish designers towards design law, as expressed in a publication of 1943 by the National Association of Danish Crafts and Industrial Art, was that the Danish 1905 Design Act, despite a number of deficiencies, was a 'useful supplement to artistic copyright.'²⁴ In a similar vein, in 1961, in their response to a proposal for design law reform their position was positive even if somewhat critical of formalities and there was concern that design registration might afford a false sense of security inasmuch as no substantial novelty test was performed.²⁵ Notwithstanding, among themselves, designers were expressing serious reservations towards the design bill. Thus in a memorandum for the National Association of Danish Crafts and Industrial Art of the late 1940s, written by Thorolf Møller (in his capacity as chair of the Association's Legal Affairs Committee), some further views on the situation for designers in relation to intellectual property law were articulated.²⁶ In particular, design law was described as a type of protection which was at best inferior and at worst inappropriate for designers. Formalities, the uncertain status and short term of protection, the lack of moral rights all contributed to the unsuitability of design law for protecting the interests of Danish designers, Møller pointed out.²⁷ The immediate background for the hostility towards design law was that the leading Danish academic copyright lawyer at the time, Torben Lund, had aired the view that design should be excluded from copyright law to be protected by an extended design act only.²⁸ Møller in reply pointed out that a distinction between art and design, between free art and applied art that is, would in any case be unsustainable. He could comfortably maintain this as a theoretical as well as a practical standpoint: visual artists and industrial designers were educated at the same academy.

The critical stance towards design law was, to a large degree, a defense against any attempt to exclude design from copyright law. As such, it was also indicative of the social position (and self-perception) held by Danish designers, of the way they acted as

²⁴ Landsforeningen Dansk Kunsthaandværk og Kunstindustri, ed. *Kunstnerret: Kunsthaandværk Og Kunstindustri*, Copenhagen: G. E. C. Gads Forlag, 1943, 25.

²⁵ [Minutes from meeting in the Danish Association of Industry concerning design law reform. National Association of Danish Crafts and Industrial Art] 'Notat fra Møde vedr. revision af mønsteretten i Industriforeningen mandag den 13. februar 1961 kl. 14', Foreningen Dansk Kunsthåndværk og Industriel Design. Erhvervsarkivet. (The Danish National Archives)

²⁶ [Minutes from meeting concerning problems with artistic copyright and royalties in relation to applied art. National Association of Danish Crafts and Industrial Art] Møller T, *Referat angaaende Problemer vedrørende Kunstnerretsbeskyttelse og Kunstnerhonorarer indenfor Brugskunsten*. Foreningen Dansk Kunsthåndværk og Industriel Design, 1946-1949, Erhvervsarkivet. (The Danish National Archives)

²⁷ *Ibid.*, 12 *et seq.*

²⁸ *Ibid.*, 11 *et seq.* A similar voice was raised in e.g. Sweden where the result was a limitation of copyright protection of 'the small change' in the form of a 'raising of the bar', see *infra* note 41. According to Reichman J H, Design Protection and the Legislative Agenda, *Law and Contemporary Problems* Vol. 55: No 2 (1992) 281, 287 the artistic nature of industrial design is regularly referred to by designers as a defense against the rigid and stringent requirements of a patent-style system.

professionals in relation to manufacturers and consumers. Møller carefully pointed out how well-suited copyright law was for not only protecting the works of industrial designers but also for securing the dissemination of artistic work to the wider public.²⁹

Arguably – considering the view represented in the minutes from internal meetings in the National Association of Danish Crafts and Industrial Art cited above – the view of professional designers of the time was that copyright law would be the appropriate means of regulating the market for design. The relationships of designers with their manufacturers (where designers held the status of celebrated Academy artists rather than that of ‘normal’ employees) and the relationships of designers with consumers (who purchased ‘Arne Jacobsen lamps’ and ‘Finn Juhl chairs’ recognizing the added-value of a designer name) were of a nature to motivate such a position. On this basis, as far as designers were concerned, design law was perceived to have only a minor role to play in intellectual property protection of design.

3. The protection of functional designs *in action*

In the following we will describe how Danish law for the protection of functional designs developed after the adoption of the Design Act in 1970. We will focus on the effects of the Design Act in terms of registered designs but also describe the development in copyright law.

3.1. *The uses and users of the Design Act*

The Nordic Design Acts have left remarkable little trace in national case law. In Denmark merely two examples of successful infringement cases were reported in the entire 30-year history of the Act.³⁰ In the absence of case law, a survey of registration practices during the period may serve as an indicator of the effects of the legislation. To be sure the ‘effects’ of a piece of legislation are hard to measure. Clearly the shortage of litigation suggests that right holders did not consider registrations to be important enough to warrant the costs of litigation. Yet, the fact that parties did engage in registration and chose to incur the costs thereof indicate some level of impact of the system. Hence, registration practices may be a useful measure of the effects of the act. At any rate user behaviour as evidenced by registration and litigation activity are markers of whether the Act did in fact produce the effects *intended* by the legislator.

Altogether historical registration records suggest that, during the twentieth century, design law was of no real significance in the Nordic countries.³¹ It is nonetheless

²⁹ *Supra* note 27, 8.

³⁰ I.e. the decision from the Maritime and Commercial Court of 2 May 1987 reported in *Nordiskt Immateriellt Rättskydd* 1990 269 *et seq.* and the decision from the Western Court of Appeal of 20 May 1994 reported in *Nordiskt Immateriellt Rättskydd* 1996 335 *et seq.* see Schovsbo and Svendsen, *supra* note 19, 38. For the other Nordic countries the experiences were equally limited.

³¹ In Sweden, under the Design Act of 1899 – which protected metal works only – applications and registrations were few. Activity increased under the 1970 Design Act (which applied the Locarno classes) going up to annual numbers of approximately 2,000-3,000 applications and 1,000-2,000 registrations. In Norway the numbers of applications and registrations climbed from, respectively, 317 and 280 in 1911 to

worth looking into the types of subject matter for which applicants sought protection. The Nordic governments had expected that the producers of a range of designed goods for the home – ‘glass- and porcelain ware, cutlery, furniture, apparel and leather ware’³² – would make use of the 1970 and 1971 Design Acts. This would seem logical: the Nordic design industry counted many successful manufacturers of these types of products. However, as an examination of the records of the period from 1970 to 2014 of the Danish Patent and Trademark Office reveals, the highest level of activity was in Locarno Class 9: ‘Packages and Containers for the Transport or Handling of Goods.’ The makers of ‘closing means and attachments’, ‘bottles, flasks, pots, carboys, demijohns and containers with dispensing means’ and ‘boxes, cases, containers, (preserve) tins or cans’ were the major applicants for design protection. During the 31-year period when the Danish 1970 Design Act was in force a total of 3,653 designs were registered in Locarno Class 9. In comparison, during the same period, out of the thirty-two Locarno Classes, in thirteen classes there were less than 500 registrations. In ten classes there were less than 1,000 registrations; in six classes there were less than 2,000 registrations. In Locarno Class 6, ‘Furnishing’, there were 2,808 registrations; in Locarno Class 7, ‘Household goods’, there were 2,069 registrations.³³

approximately 1,000-2,000 in the 1930s and the following decades until activity decreased in the 1960s and figures fell below 1,000 per year. In the first year of the Danish 1905 Act there were 501 applications and 422 registrations. By 1933 the numbers of applications had gone up to 3,534 and registrations to 3,482. During WW2 numbers decreased only to peak in 1946 with 4,084 applications and 3,901 registrations. After 1946 the annual numbers of applications and registrations dropped and remained under 1,000 per annum until 1974. Under the 1970 Design Act applications stabilized at 1,000 to 1,500 per year; of these typically about 80% were granted registration. By comparison, in the period from 1883 to 1982, the highest level of applications and registrations in the countries that were signatories of the Paris Convention for the Protection of Industrial Property was to be found in France, Germany, Britain and Switzerland. Activity in these countries peaked in the late nineteenth century and the early twentieth century. Thus, in 1897, there were 73,964 applications and registrations in France; in 1909 there were 221,991 applications and registrations in Germany; in 1912 there were 43,015 applications and 42,077 registrations in Britain. In 1913 in Switzerland the records show 483,648 applications and 483,545 registrations. Following their early peaks the number fell substantially with some ups and downs during the twentieth century. By 1970 and for the rest of the period the number of applications and registrations in France ranged between, respectively, 4,000 to 13,000 and 12,000 to 16,000; in (Western) Germany between, respectively, 1,000 to 6,000 and 34,000 to 76,000; in Britain between, respectively, 4,000 to 9,000 and 3,000 to 6,000; and in Switzerland the number of applications and registrations both ranged between 500 to 900. Source: WIPO historical data, available at <http://www.wipo.int/ipstats/en/statistics/designs/>.

³² Report of the Nordic Design Law Committee, *supra* note 7, 36.

³³ Records from the Danish Patent and Trademark Office. Interestingly this has since changed. For the period 2004-2008 the top Locarno Class in Denmark was furnishing, see *The Economic Review of Industrial Design in Europe*, *supra* note 3, 83 *et seq.* (relying on WIPO statistics).

Locarno Class	Number of registrations (r) with DKPTO in the years 1970 to 2000
9 'Packages and Containers for the Transport or Handling of Goods.'	3,653
6 'Furnishing'	2,808
7 'Household goods'	2,069
8, 12, 14, 23, 25, 26	999 < r < 2000
2, 10, 11, 13, 15, 19, 20, 21, 24, 28	499 < r < 1000
1, 3, 4, 5, 16, 17, 18, 22, 27, 29,30, 31, 99	r < 500

The dispersion over the diverse Locarno Classes may simply reflect the composition and rivalry of industry in Denmark. Indeed the sector producing furnishing and household goods has traditionally been a strong one. However, as a closer study reveals, there is a remarkable absence of the leading manufacturers of these fields in the records of the Danish Patent and Trademark Office's register of designs. Many of the principal manufacturers and designers – the creators of the familiar designs that are now emblematic of 'Danish Modern' – simply never made use of design registration as a means of protecting their intellectual property. This includes the manufacturers Fredericia Furniture, Carl Hansen, Salesco, PP Møbler and Rud Rasmussen as well as industrial designers Hans Wegner, Finn Juhl, Poul Kjærholm, Mogens Koch, Grete Jalk, Grethe Meyer, Poul Volther, Ole Wanscher and Mogens Lassen. Moreover, those who did apply for registration of their designs did so only sporadically. Thus the industrial designers Verner Panton, Børge Mogensen, Nanna Ditzel, Erik Magnussen and Jørgen Bækmark figure in one or two applications during the period. In a similar vein, a number of manufacturers of 'Danish Design' including Royal Copenhagen (porcelain), Fritz Hansen (furniture), Le Klint (lamps), Holmegaard (glass), Georg Jensen (silverware), Louis Poulsen (lighting), Stelton (tableware and kitchenware) and Søborg Møbler (furniture) have each registered no more than four designs.³⁴ (Of the above-mentioned

³⁴ Verner Panton: sculpture/furniture (1998); Børge Mogensen: barbecue (1986); Nanna Ditzel: chair (1993), two benches, (1996); Erik Magnussen: kettle, lamp and bracket lamp (1988); Jørgen Bækmark: table (1992); Royal Copenhagen: bottle openers (1980 and 1981), cord rewriter (1986); Fritz Hansen: a partition wall (1996); Le Klint: lamp (1979), lamp shade (1979); Holmegaards: capsule (1985); Georg Jensen: bottle opener (1980), cup holders (1982 and 1983); holders for milk cartons (1983); Louis Poulsen: lantern and lantern head (1996), lamp (1999), lamp (2000); Stelton: kettle (1988); and Søborg Møbler: child seat and table (1993).

designers and manufacturers, only Louis Poulsen, the lighting manufacturer, has registered designs under the Danish 2001 Design Act.³⁵) Only two manufacturers of 'Danish Modern' design deviate from the norm described here: Bang & Olufsen (a consumer electronics company founded in 1925) has, to some extent, used design registration systematically: 84 registrations figure in the period from 1976 to 2014.³⁶ Still, a majority of the registrations (58 out of 84) were not filed under the 1970 Act but date from the period 2001-2014. Bodum (tableware and kitchenware company founded in Denmark in 1944 by Peter Bodum) initially followed the norm of making little use of the design registration system: only two registrations of designs are recorded, both from the 1970s.³⁷ However, in the years 2000-2001, 107 designs of coffeemakers, cutlery, cups, stationary and more from Bodum are registered in the name 'PI-Design.' The background to this is that in 1978 Jørgen Bodum, the son of the founder, moved the headquarters of Bodum to Switzerland setting up PI-Design, a department of in-house designers two years later, in 1980.

The presences and absences in the Danish design register may be interpreted as a widespread lack of interest among Danish designers and manufacturers in this form of legal protection. It is remarkable that even the manufacturers and designers of industrial design who did register designs did so unsystematically or incidentally. The general picture is that they would make a few attempts at using design registration as a form of protection of their intellectual property, only to abandon the idea soon after. Even in companies like Bodum where it seems for some years to have been a part of a business plan to register designs (considering the large number of registrations in 2000-2001), this strategy was not sustained and may in retrospect seem to have been more accidental than a matter of policy.

3.2. Copyright protection of works of applied art

As far as the relationship to copyright is concerned, the Design Act allowed the principle of double protection ('cumulation'); designs that met the requirements for protection by copyright law as well as by design law were legible for protection according to both systems.³⁸

As already mentioned *supra*, 2.2.1., it was a starting point for the Report of the Nordic Design Law Committee that the overlap between copyright and design law was limited and did not include purely functional designs that would normally not qualify for copyright protection because of their lack of 'artistic standard'. The same position had been expressed in the 1950s when a reform of the Nordic copyright legislation was

³⁵ After the implementation of the EU Design Directive in 2001 Louis Poulsen registered eleven designs of lamp and lamp fittings in the years 2000-2007.

³⁶ Many of the designs by David Lewis and Jacob Jensen. Figures derived from the register of the Danish Patent and Trademark Office.

³⁷ Coffee maker (1974) and tea maker (1979).

³⁸ See The Report of the Nordic Design Law Committee, *supra* note 7, 92. The was not regulated specifically in the Design Act. A special provision was instead found in the Copyright Act (Section 10(1)).

initiated.³⁹ However, in retrospect it becomes clear that by the beginning of the 1960s positions in copyright law had begun to change: courts were opening the gates to allowing purely functional designs the status of ‘works of applied art’. Thus, when copyright legislation was proposed in 1960, the Danish Parliamentary Report⁴⁰ specified that works of applied art were to be protected according to the ‘normal standards’:

‘Emphasis ought to be on whether the article is an artistic creation which fulfils the usual requirements for a work as defined by the law. In that case it ought to be protected without taking into account its practical purpose even when the consideration of the functionally appropriate has had a decisive role in the shaping of the article’⁴¹

The message from the legislator was that copyright protection was to be available even to products where functional considerations had played a substantial part in their making. While courts had formerly remained restrictive⁴² this paved the way for a more liberal

³⁹ This too was a joint Nordic effort. See for Denmark the Parliamentary Report *Lov om Ophavsretten til Litterære og Kunstneriske Værker*, 1951, available at http://www.statensnet.dk/betaenkninger/0601-0800/0621-1951/0621-1951_pdf/printversion_0621-1951-u.pdf 95 (limiting protection to products with ‘substantial artistic characteristics’).

⁴⁰ For Norway and Sweden the situation was different. Unlike in Denmark, it was thus explicitly stated in those national Reports that since it was the function of the design protection system to protect the ‘small change’ such works should be kept out of copyright by relying on a strict application of the originality criterion for works of applied art. The courts followed suit and copyright protection of works of applied art in Norway and Sweden became limited (i.e. based on a high level of creativity) when compared to notably Denmark where no limitations were envisaged. See for Norway Rognstad O-A, *Ophavsrett*, Universitetsforlaget Oslo 2009, 94 *et seq.*, the (Swedish) Parliamentary Report SOU 1965:61, *Mönsterskydd betänkande med förslag till lag om mönster mm* available at http://weburn.kb.se/metadata/342/SOU_626342.htm 205 *et seq.*, Ljungman, *supra* note 5 (1973 and 1976), Levin, *supra* note 6, Rosenmeier, *supra* note 18, and Schovsbo J, Rosenmeier M and Salung Petersen C, *Immaterialret*, DJØF Publishing Copenhagen 4th ed. 2015, 100 *et seq.* In practice the differences are maybe becoming more blurred see Rosenmeier M, *Nordiskt Immaterialt Rättskydd* 2009 498 *et seq.* in a comment to the decision from the Swedish Supreme Court reported in *Nytt Juridiskt Arkiv* 2009 159 to grant copyright protection to the ‘Maglite-torch. The Danish Maritime and Commercial Court had arrived at the same conclusion already in its judgment of 29 October 1999 reported in *Ugeskrift for Retsvæsen* 2000 212. For Norway, however, the traditional, stringent criteria would seem to be upheld, see Lund A, *Høyesteretts dom om Tripp Trapp-stolen – et gjennomslag for Tharp? Vern for verket eller også for den kunstneriske idé som det uttrykker*, *Nordiskt Immaterialt Rättskydd* 2014 178-203 (pointing out that the decision by the Norwegian Supreme Court in its judgment of 27 June 2012, HR-2012-1325-A, reported in *Nordiskt Immaterialt Rättskydd* 2014 161-177 to accept copyright protection for the Tripp Trapp chair was based on the traditional stringent criteria). The Tripp Trapp chair has also been accepted under copyright by the Danish Supreme Court, *infra* and by the Swedish Hovrätten for Western Sweden in a judgment of 7 December 1998, T 548-97, see Levin K, *Lärobok i immaterialrätt*, 10th edition, Norstedts Juridik, Stockholm 2011, 102.

⁴¹ Cited from the Parliamentary Report, *Folketingstidende* 1960-1961, Till. B 628-629.

⁴² At the time of the Parliamentary Report most notably the decision from the Danish Supreme Court reported in *Ugeskrift for Retsvæsen* 1956 237 where copyright protection of a bread cutter was denied because of the predominantly practical consideration underlying the form of the product.

assessment of works of applied art under Danish copyright law. Still, it was unclear how generous courts were expected to be. According to the literature a stringent originality criterion for works of applied art was to be adopted.⁴³ Nevertheless courts gradually liberalized the requirements. In a Supreme Court ruling of 1961 a very simple ribbed handle design on cutlery had been found to be protectable under Danish copyright law.⁴⁴ The decision sparked a trend in case law: in the years to follow Danish courts were very generous in their granting of copyright protection to works of applied art. Even mundane creations were found worthy of protection, including a dish drainer, a coffee grinder, a holder for a dishwashing brush and a pocket-torch.⁴⁵

The lowering of the threshold of originality required for protection of design was accompanied by a narrowing of the scope of protection. Danish case law culminated in two Supreme Court rulings of 2001 and 2002, the one concerning the Tripp Trapp Chair⁴⁶ and the other Arne Jacobsen's Ant-chair⁴⁷. The copyrightability of the two chairs was not questioned but the Supreme Court specified that copyright protection as it applies to the category of works of applied art is *a priori* 'narrow' in the sense that the criterion for infringement is limited to 'close imitation'.⁴⁸

3.3. *The Danish experiences*

After 1970, the legal protection for functional designs increased considerably under Danish law. However, ironically the increase was not the result of the design law reform: what had not been anticipated by the legislators was that copyright would expand its coverage to include a large portion of the functional designs which had been seen as the exclusive domain of the sui generis design system. In this way copyright eventually came

⁴³ See for a detailed discussion Rosenmeier, *supra* note 18, 244 *et seq.* and Schovsbo J, Rosenmeier M and Salung Petersen C, *supra* note 41, 78 and 102 *et seq.*

⁴⁴ Judgment from the Supreme Court of 26 October 1961 reported in *Ugeskrift for Retsvæsen* 1961 1027.

⁴⁵ See respectively: Judgment from the Supreme Court of 24 April 1967 reported in *Ugeskrift for Retsvæsen* 1967 482, Judgment from the Supreme Court of 16 October 1969 reported in *Ugeskrift for Retsvæsen* 1969 851, Judgment from the Maritime and Commercial Court of 10 December 1997 reported in *Ugeskrift for Retsvæsen* 1998 941 and Judgment from the Maritime and Commercial Court of 29 October 1999 reported in *Ugeskrift for Retsvæsen* 2000 212. According to Rosenmeier, *supra* note 18, 252 works of applied art are usually granted copyright protection as long as an expert opinion statement declares that the product in question is 'original' or 'new'. The case law is comprehensive, for an overview see Schovsbo J, Rosenmeier M and Salung Petersen C, *supra* note 41, 100 *et seq.*

⁴⁶ Judgment from the Supreme Court of 5 January 2001 reported in *Ugeskrift for Retsvæsen* 2001 747.

⁴⁷ Judgment from the Supreme Court of 8 May 2002 reported in *Ugeskrift for Retsvæsen* 2002 1715/2.

⁴⁸ The standard test for determining infringement in Danish law is based on a comparison of the works in question. If they leave the beholder with a 'sense of identity' ('identitetsoplevelse') the later work constitutes an infringement provided that it is made with knowledge of the earlier work and that the sense of similarity is not related to unprotected aspects of the earlier work (e.g. that the both perform the same technical function or express the same idea), see Schovsbo J, Rosenmeier M and Salung Petersen C, *supra* note 41, 208 *et seq.* The test of identity was developed by Koktvedgaard M, *supra* note ??? 118 *et seq.*

to take the place intended for design law and this in turn eroded the basis for the registered design system since users could simply rely on copyright.⁴⁹

The decision to include all types of designs including purely function ones was a hallmark of the Nordic Design Acts. As was the clear intention of the legislator the usage of a neutral definition would expand the scope of protectable designs to embrace the cherished ‘functionalist designs’. From a Danish perspective what emerged was paradoxical. Copyright expanded and eventually lifted the ‘valuable’ functionalist designs out of the design system and what remained was rather mundane. Although cardboard boxes, carboys and containers with dispensing means may well be valuable as seen from a societal perspective (and arguably worthy of design protection) clearly it was clearly not solely to encourage the producers of such products that the Nordic legislators put the design system in place such as glass- and porcelain ware, cutlery, furniture, apparel and leather ware (see *supra* 2.1.).

The demise of the registered design protection is most likely due to a push and a pull. The push came out of a what we have identified *supra* 2.1.2. as a principal rejection by designers of the representations of design and of the professional practices of designers in the Design Act. While Danish designers were happy to label themselves ‘industrial designers’ they were not prepared to identify with what would be an industrialist’s view of them: labourers deprived of their status as ‘artists’. It was unsavoury to designers to have to accept the bureaucracy and expenses of the registration system⁵⁰ and unacceptable to them that the validity of the registrations remained uncertain due to the inability of the PTOs to guarantee that novelty destroying material would not surface after registration⁵¹. The pull came mainly from the development in copyright law where courts, by the late 1960s, began to embrace functional designs. Users opt for the protection system they find to have comparative advantages. For the Danish designers the advantages of copyright law were obvious: recognition as ‘artists’ along with cheaper, longer and in some ways even stronger protection⁵².

⁴⁹ In practice copyright protection was (and is) often been relied upon in a combination with unfair marketing law. Despite of the restrictive position at the time when the design law reform was initiated, *supra* note 21, Danish court have thus expanded the protection offered by unfair marketing law against imitation in parallel with the copyright protection, see generally Borchert E, *Produktefterligninger* Forlaget Thomson København 2003 and Schovsbo J, *Produktefterligninger: ‘Hvorfor Fanden’ – dog ikke?*, 165 - 180 in Lego Andersen E et al. (ed.) *Sø- og Handelsretten 150 år*, Karnov Group Copenhagen 2011 (pointing out how protection is presently sometimes provided even without any clear identification of concrete unfair practices going beyond the mere imitation).

⁵⁰ Levin, *supra* note 6, 482.

⁵¹ Koltvedgaard M, *Lærebog i Immaterialret*, 5th ed. Jurist og Økonomforbundets Forlag, Copenhagen 1999, 269 and Schönning S, *Mönsterlagen i praxis (Danmark)*, *Nordiskt Immaterialt Rättsskydd* 1978 20-23, 22 *et seq.*

⁵² Copyright protection was “stronger” since unlike in copyright the Design Act did not protect the design in “the abstract” but only against the use of designs as applied to products designers. For this reason the use of design for a model (‘3D’) in a photograph (‘2D’) would arguably not have violated the design right according to the Nordic Acts. According to the EU design rules the situation is different (and like in copyright law), see most notably the decision from the German Supreme Court, Case I ZR 56/09, *ICE*

As envisaged by the legislator the design protection system was meant to be based on a combination of two forms of protection: firstly, the broad category of ‘functional designs’ that would be protected for 15 years after registration under the registered designs system. Secondly, there would be a small class of ‘aesthetically valuable’ designs that would be covered by copyright protection. Plainly, the overall plan for a two layer-design protection system as devised by the Nordic legislator failed. Rather than providing protection to the select few copyright came to constitute the base line for the protection of mundane designs too. As a result the level of protection is stronger than intended by the legislator: rather than a 15-year design protection designers enjoyed a full copyright term of protection (at the time 50 years *post mortem auctoris*). We maintain that granting this extent of protection may not be problematic as regards the Arne Jacobsens of this world. However, problems arose out of the readiness by courts to accommodate – as framed by Professor Mogens Koktvedgaard – ‘various creations of economic value without any regard to their quality or societal value’⁵³.

Denmark and the other Nordic countries are not alone in their failure to live up to policy objectives in the area of design protection. In a study from 1992, Professor Jerome Reichman identified a ‘recurring, cyclical pattern [on both sides of the Atlantic] that swings from states of chronic underprotection to states of chronic overprotection and then back to underprotection once again’ in the field of design law.⁵⁴ Besides, as Reichman argues, the patent style design approaches constitutes an institutionalization of underprotection.⁵⁵ In the latter regard the Danish experiences might have qualified Professor Reichman’s point. No doubt it is correct that Danish law, from the perspective of registered designs protection, provided minimal protection. Yet, if one takes into consideration the protection offered by the totality of the legal system – including copyright law – the designers of functional design are excessively provided for. Indirectly, the effect of the patent style registration system for the protection of design was to create a rush for copyright law for protection. Because the Danish courts were willing to give in to that rush the need for the protection according to the design system evaporated. The overall effect of the demise of the registered design system was thus an increase of the level of IPR-protection for the designs which had come to be covered by copyright protection.

GRUR 2011 1117 (finding the two-dimensional rendering of a three dimensional design to constitute ‘use’ of the design).

⁵³ Koktvedgaard M, Europæisk begrebsjustering på ophavsrettens område 341 – 348 in Gorton L *et al.* (ed.) *Festskrift till Gunnar Karnell*, Carlsson Law Network Stockholm 1999, 344 (the original version, which does not translate easily, reads as follows: ‘... en beskyttelse af diverse ydelser, der kan tjenes penge på, ganske uden hensyntagen til disse ydelsers kvalitet eller samfundsmæssige existensberettigelse’ (warning against the over all effects of this development and calling for an EU driven effort to limit protection by increasing the minimum threshold)).

⁵⁴ Reichman, *supra* note 29, 287.

⁵⁵ *Ibid.* 291.

4. Discussion and perspectives

The European design system is under review these years and it may be expected that ‘Design for the [EU] people ver. 2.0.’ will be launched in a few years with a view to increasing the effectiveness of the EU design system.⁵⁶

The Nordic experience is relevant in this context since the Nordic design system, which pioneered protection of purely functional designs, may be seen as one of the forerunners of the EU-system. By the same token a number of similarities exist between the Nordic experience and the present situation at the European level:

- In both cases there are a set of clearly defined policy goals, including the objective of supplying quality goods to (middle class) consumers;
- Nordic as well as EU legislators operate with a broad notion of what may constitute a ‘design’: in both cases purely functional designs are included;
- The situation in Scandinavia 45 years ago and the situation in the EU today is that the purpose of the exercise is to ensure regional harmonization of national laws, on the basis of associated but not identical national circumstances; and
- In both cases there has been a clear choice of legal model; i.e. the ‘patent approach’ and the ‘design approach’ respectively;

To be sure to assess the overall success or failure of a complex legal protection system – such as the one adopted in the Nordic countries – is difficult. Nevertheless, it is striking (from a Danish perspective) that the class of ‘Danish Modern’ designers and their manufacturers collectively rejected the design system that had been put in place to serve them. No Hans Wegner, no Poul Kjærholm, no Grethe Meyer figure in the records of Danish design registrations. In lieu of chairs, lamps, tableware and other well-designed consumer goods the Danish legislator got cardboard boxes, carboys and containers with dispensing means.

This study suggests that the success of the design law system depends not only on the configuration of the system as such but equally much on the responses of users and of its position in the general legal landscape.

The ‘users’ in this context is a disparate category: potential applicants for design registration may include designers with very different types of training and expertise – from artistic to technical – and in very different employment situations (designers may be

⁵⁶ A study by the Office for Harmonization in the Internal Market/European Patent Office estimated that design intensive industries generated 12.2% of EU employment and 12.8% of EU GDP in 2013, see *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union Industry-Level Analysis Report*, September 2013, 7 *et seq.*, available at http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf. The Economic Review of Industrial Design in Europe, *supra* note 3, 164 *et seq.* points to a need for improving the granting process and enforcement system and reports suggestions from the stakeholders to improve the existing system e.g. to increase awareness amongst small businesses and start-ups.

working as, say, in-house designers in teams, as free-lancers or as designers who own their own brands.) By the same token, companies that apply for design registration will be different in kind. Their main industry may or may not be design, they may deal in high end or anonymous designs, their products may range from items for personal use to items for industrial environments and so forth. As it should be clear the group of potential users of design law may well be too diverse for their needs and interests in relation to legal protection to converge.

As far as the situation of design law in the broader legal landscape is concerned, arguably, it was a problem that the Nordic legislator – and the Danish one in particular – failed to define a clear enough role for design law within the overall legal system. The flexibility of copyright law – for example the elastic criterion of ‘originality’ – allowed courts to develop case law in ways not anticipated by the legislator.⁵⁷ Some attempts were made to delineate the border between design law and copyright law by maintaining that high aesthetic standards were required for copyright protection. In Danish law, however, attempts were never more than tepid and by no means sufficient to stem the tide of the persistent pressure on courts for more copyright protection that designers and manufacturers were exerting.

The demise of the registered design system in Denmark reveals how the different ‘pillars’ of IPR are interconnected and how the developments in one pillar through a system of feedback loops has spill-over effects. Once the gates were opened for copyright protection courts protected ever more designs, setting the bar still lower. Crucially, this increased the rush towards copyright law. Moreover, the expansion of copyright protection had the effect, notably in Denmark, that the cases litigated on the basis of the Design Act have been few. Besides, the limited case law deals with mundane creations (the leading Danish case is on T-shaped diapers⁵⁸). Accordingly no firm legal principles for the practice of design law were developed: probably this contributed to the legal uncertainty and unattractiveness of the design system which in turn increased the pressure for copyright protection even more.

The borderline between design and copyright law has proven difficult in many jurisdictions. As has been pointed out above the Nordic legislators and courts have employed a variety of methods for defining the appropriate application of the two branches of law, i.e. strict originality requirements⁵⁹ and a principle of narrow protection

⁵⁷ High-profile designers were routinely used as court-appointed experts in copyright infringement cases. In this capacity they have probably had a considerable influence on the development of copyright case law. See, e.g. Rosenmeier M, ‘Nogle bemærkninger om sagkyndiges medvirken i ophavsretssager’, *Ugeskrift for Retsvæsen* 2001 B 102 – 109.

⁵⁸ Decision of the Maritime and Commercial Court from 24 November 1989, reported in *Ugeskrift for Retsvæsen* 1990 334. The court upheld the registration of the design for a T-shape diaper. Even though the court acknowledged that the shape was largely limited by technical and economic considerations resulting from the production the design was found to be sufficiently different. In Norway the design had been rejected, Hæreid G O Skildnadskravet i mønsterretten, *Nordiskt Immateriellt Rättsskydd* 1995 550 – 594, 587.

⁵⁹ *Supra* note 41.

for works of applied art⁶⁰. Due to developments in EU-law, in recent years, the room for manoeuvre for national courts has been radically diminished. In particular, the Painer case may challenge the principle that works of applied art have a narrow scope of protection and are, accordingly, protected against ‘close imitations’ only.⁶¹

Moreover, with Infopaq and subsequent decisions the criterion for a work to be copyrightable has been harmonized by the CJEU and defined as an ‘intellectual creation of the author reflecting his personality and expressing his free will and creative choices’⁶². It is unclear whether this affects works of applied art (‘designs’) too. It follows from Article 17 of the Design Directive that designs are eligible for copyright protection and that ‘the extent to which, and the conditions under which, such protection is conferred, including the level of originality required, shall be determined by each Member State’⁶³. This wording suggests that it is left to national courts to determine the level of copyright protection for designs. Notwithstanding, the CJEU’s decision in the Flos-case seems to indicate that the assessment of the copyrightability of works that may also be protected as designs must take place according to the Infopaq-standard.⁶⁴ Still, the Norwegian Supreme Court implicitly rejected this view in its Tripp Trapp Chair decision, stating that the notion of what constitutes a work has not been harmonized.⁶⁵ By the same token, the German Supreme Court in its Birthday Train case on the protect ability of a toy train under German copyright law found that EU-law did not bind national courts with regards to defining which works to protect.⁶⁶ Yet, the court added that for the sake of consistency in the field of copyright law it would use the EU criterion as the benchmark also for works of applied art. The result was, so to speak, an ‘indirect’ harmonization of the test for copyrightability.

Thus, the exact impact of EU law in terms of the standards for assessing originality and the scope of protection in relation to designs remains unclear. Yet, there is no doubt that the recent developments in CJEU case law diminishes the flexibility and ‘freedom of method’ for Nordic and other national courts to seek to restrict copyright

⁶⁰ *Supra* point 3.2. A similar principle is applied in Norway, see Lund, *supra* note 41.

⁶¹ Judgment of the CJEU of 12 December 2011 in Case C-145/10, *Painer v Standard*, ECLI:EU:C:2011:798. It thus follows from para. 96 of that decision that protection must be given ‘a broad interpretation’. Also point 98 and 99 would seem to rule out national models which singles out specific work categories and provides for inferior (or stronger for that sake) protection. See Rosenmeier M & Schovsbo J, *Brugskunstbeskyttelsen mod ‘meget nærgående efterligninger’*. *Er Højesterets praksis på kant med EU-retten*, *Ugeskrift for Retsvæsen* 2015 B 181-185.

⁶² Ohly A, *Where is the Birthday Train Heading? The Copyright-Design Interface in German Law* 589-605 in Karnell G *et al.* (ed.) *Liber Amicorum Jan Rosén*, eddy.se ab, Visby 2016 590 with references to the Judgment of the CJEU of 16 July 2009 in Case C-5/08, *Infopaq v DDF*, ECLI:EU:C:2009:465, para. 33 *et seq.* and *Painer v Standard*, *supra* note 61 para. 87 *et seq.*

⁶³ Similarly for Community Designs, see the Design Regulation Article 96(2).

⁶⁴ Judgment of the CJEU of 27 January 2012 in Case 168/09, *Flos v Semeraro Casa*, ECLI:EU:C:2011:29, para 34.

⁶⁵ *Supra* note 41 and critically towards that position Lund *ibid.*

⁶⁶ Bundesgerichtshof decision of 13 November 2013 - I ZR 143/12 ‘Birthday Train (Geburtstagszug)’, *International Review of Intellectual Property and Competition Law* 2014 831 (GRUR 2014 175). See for a comment Ohly, *supra* note 62.

protection of works of applied art for the sake of providing an independent space for design law protection within their national systems. The Danish experiences clearly suggest that too liberal an approach in copyright law has a negative impact on the effectiveness of design law. If too many designs are protected by copyright⁶⁷ then design protection becomes redundant.

The above observations are also relevant with regard to the relationship between the European national copyright systems and the Community Design system established by the Design Regulation. It is a cornerstone of the EU Design Approach that there is a choice between the 3-year protection as an unregistered design and the 25 years offered to registered design. In order for the distinction to be of any use the overlap between copyright and design law has to be reduced.⁶⁸ Presently, this aspect of the relationship between copyright and design protection is not specifically addressed in EU legislation, neither in relation to design nor to copyright. For the time being it is therefore up to the CJEU to clarify the proper application of the existing rules. Hopefully, the Court will allow national courts flexibility in their interpretation of the criteria of protection and their setting of the bar at a sufficiently high level so as to prevent copyright protection from expanding downwards which would undermine the EU design system in the same way as the Nordic design system became undermined. For future changes of the EU design system the interrelation between copyright and design law should also be taken into account. The Nordic experiences demonstrate how difficult it is for legislators to guide national courts to limit protection by adhering to strict principle of originality. Nonetheless, the effort should be made.

⁶⁷ Or through a generous protection through unfair marketing law against imitation.

⁶⁸ Ohly, *ibid.* 601 *et seq.*