



The Informed User

Legalistic or Realistic?

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Individual Character

- 1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date before the date of filing of the application for registration, or, if priority is claimed, the date of priority.*
- 2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.*



Recital 14 CDR

- *The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.*



Scope of Protection

- 1. The scope of the protection conferred by a design right shall include any design which does not produce on the informed user a different overall impression.*
 - 2. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration.*
- Same test and test person as for validity



Interpretation of the design?

- ... the determination of what design is actually registered is a matter for the court. Once the design has been identified, then questions of overall impression and so on are matters to be decided by reference to the informed user. I reject the submission that it is the informed user who is supposed to be employed to interpret the representations of the design which are placed on the register.
- 21. I can see no reason why the informed user needs to be brought into the analysis at this stage. The design register fulfils an important function of giving notice to the public ... In practice users are much less likely to consult the register than manufacturers and designers. HHJ Birss in *Sealed Air v Sharp Interpack*, followed in *Utopia*



Real or fictional? - (1) - realistic

- *An informed user (not designer or manufacturer) with extensive technical knowledge would be very unlikely to exist in reality. Accepting as I do that the "informed user" is a legal construct, it is unlikely that the legislation intended the legal construct to bear no relation to reality. Lewison J (as he was), *Procter & Gamble* 1st inst. (2006)*



Procter & Gamble v Reckitt Benckiser

0001 . 2



0001 . 3



0001 . 4



Karen Millen v Dunnes - realistic

- *Procter & Gamble followed as to informed user: “a woman with a keen sense of fashion, a good knowledge of designs of women’s tops and shirts previously available to the public, alert to design and with a basic understanding of any functional or technical limitations on designs for women’s tops and shirts.”*



Karen Millen v Dunnes (2007)

- [2007] IEHC 449
- Only subsistence & validity were in issue
- NOW ON REFERRAL TO CJEU



Informed User (2) – artificial

- *I add that the informed user is also interested in the products concerned and shows a relatively high degree of attention when he uses them, and conducts a direct comparison of the designs in issue unless there are specific circumstances which make it impractical or uncommon to do so.... In at least some, and perhaps all, of these ways the informed user of design law – who is, after all, a legal construct - is unlike some, and perhaps many, beer drinkers in the real world. HH Douglas Campbell, re beer glasses in *Utopia v BPP* (IPEC, 2013)*



But ...

- *the proposition that no beer drinkers in the real world are interested in design is too broadly stated. Some would be interested, even if others might not be.*
- **So** – are we talking about a real(istic) consumer or a purely artificial construct?
We still don't know.



Acceptable evidence?

- Survey evidence (*Interflora v M&S*):
 - Irrelevant on similarity
 - Admissible on buying habits
- Direct evidence of selected consumers
 - Irrelevant – *Interflora, Karen Millen v Dunnes*
- Expert evidence
 - Irrelevant on similarity – *Procter & Gamble*
 - Relevant as to design constraints
 - Not relevant to informed user's knowledge?



Children and managers – Pepsico (CJ)

- 53. ... that concept must be understood as lying somewhere between that of the average consumer, applicable in trade mark matters, who need not have any specific knowledge and who, as a rule, makes no direct comparison between the trade marks in conflict, and the sectoral expert, who is an expert with detailed technical expertise. Thus, the concept of the informed user may be understood as referring, **not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question.**
- 54. It must be held that it is indeed that intermediate formulation that was adopted by the General Court in paragraph 62 of the judgment under appeal. This is, moreover, illustrated by the conclusion drawn from that formulation by the General Court ..., in identifying the informed user relevant in the present case as **capable of being a child in the approximate age range of 5 to 10 or a marketing manager** in a company that makes goods which are promoted by giving away ‘pogs’, ‘rappers’ or ‘tazos’.



But which one?

- For validity,
 - Proprietor will argue for manager
 - Competitor will argue for child.
- For infringement,
 - Proprietor will argue for child
 - Competitor will argue for manager.
- Not enough to leave the question open – unless identity is completely irrelevant.



End user or trade user of promotional items - *Sphere Time* (GC)

- ... *In relation to [promotional] items, the concept of informed user ... includes, firstly, a professional who acquires them in order to distribute them to the final users and, secondly, those final users themselves.*
- *Consequently, in this case, the informed user should be held to be both the average consumer, referred to in the contested decision, and the professional buyer, mentioned by the applicant.*
- ... *the fact that one of the two groups of informed users mentioned above perceives the designs at issue as producing the same overall impression is sufficient for a finding that the contested design lacks individual character.*
- But – what about infringement? Is it always the least discriminating “informed user”? Or do both judgments go against the designer?



Private User or Professional? *El Hogar* (GC)

- *The Board of Appeal did not therefore err in finding that the informed user of the design in question is both the private individual and the professional [sommelier] who uses the products covered by that design.*
- *El Hogar v OHIM, Wenf; T-337/12*



End user or trade user of component? *Kwang Yang* (GC)

- *account must be taken, in the present case, of the normal use of the complex products concerned. Therefore, the Board of Appeal has not committed any error in holding that an informed user was a person wishing to use one of those products.*
- *Kwang Yang v OHIM, Honda; T-10/08, T-11/08*



End user or trade user of packaging?

- *Sealed Air v Sharp Interpack* (IPEC, 2013)
- 28. It was **common ground** that the informed user is not a member of the public who buys soft fruit in these punnets but is a buyer of the punnets themselves, typically for a supermarket chain, fruit grower or fruit marketing company.



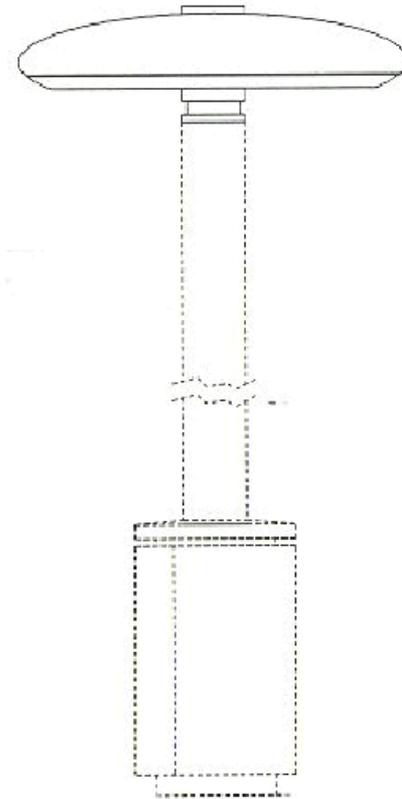
Buyer or Operator? *Louver-Lite* (IPEC, 2013)

- *We know that the informed user is not a manufacturer, designer or seller (see the references given in paragraph 34(i) of my judgment in Samsung v Apple) but that does not distinguish between a person who buys or chooses the products and a person who operates them. Who buys the goods in this case? Are they chosen and bought by consumers and fitted by them? Are they chosen by architects/building interior designers so that the people who draw the blinds have never seen them close up and do not care about details? Or are we somewhere in between with both kinds of activity taking place? **Generally it seems to me it is safe to start from the premise that a user of a product is likely to be a person who is involved in buying or selecting it as well as in operating it.** Birss J, *Louver-Lite v Harris**



Woodhouse v. Architectural Lighting

- GB 2082157
- Street lighting
- Informed user could have been local authority buyer
- HHJ Fysh



Magmatic v PMS – child or parent?

- *The Rodeo, the CRD and the Kiddee Case are all ride-on suitcases for a child aged 3-6. Accordingly, it is common ground between the parties that the informed users in the present case are (i) a 3-6 year old child and (ii) a parent, carer or relative of such a child. I have to say that I am dubious about (i), since the child will not be a purchaser (unlike Grupo Promer/PepsiCo, this is not a case about toys which might be purchased by a child with his or her pocket money), but since this is agreed I shall proceed on that basis. I doubt that it makes any difference either way.*
- Suggests “point of purchase” rather than “point of use” comparison – compare with *Communications Equipment* (GC)



Point of use/point of purchase?

- *Magmatic, Louver-Lite* emphasise purchaser.
- *However, “as the case-law has made clear, the assessment must concern the overall impression produced by a design on the informed user, thus including the manner in which the product represented by that design is used (see, to that effect, Communications Equipment ... [Taiden], and Watch attached to a lanyard, ...[Sphere Time])”*
- *El Hogar v OHIM, Wenf; T-337/12*



Knowledge of the product, sector

Does the informed user know about:

- Everything in the state of the art?
- Old prior art?
- Adjacent product sectors?
- Is the informed user a European?
- Is the test “realistic” or “artificial”?



Design Corpus – the decider in *Samsung v Apple*

- *This case illustrates the importance of properly taking into account the informed user's knowledge and experience of the design corpus. When I first saw the Samsung products in this case I was struck by how similar they look to the Apple design when they are resting on a table. They look similar because they both have the same front screen. It stands out. However to the informed user (which at that stage I was not) these screens do not stand out to anything like the same extent. HHJ Birss, Samsung v Apple HC 2012*



Court of Appeal in *Proctor & Gamble*:

- aware of the “existing design corpus.” (though she does not have an “archival mind” like the skilled person of the patent world)
- “has experience of other similar articles” and is therefore “reasonably discriminatory”
- more extensive knowledge and is more discriminating than the “average consumer” used as a test person in trade mark cases



Design Corpus in *Samsung v Apple*

- Included TVs, photoframes etc.
- *Samsung's Schedule A represented its case on the design corpus. ... Apple accepted it ... It is not possible to attach images of the whole design corpus to this judgment*



Apple - Design Corpus

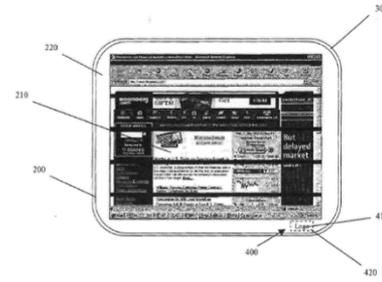


Fig. 5

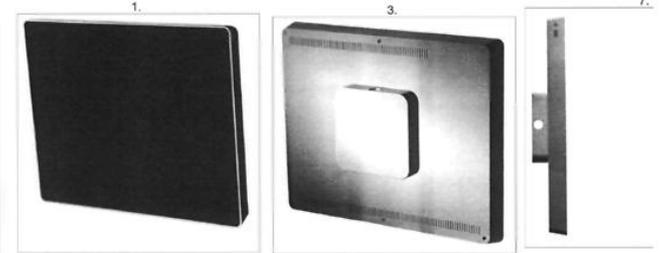


FIG. 1

FIG. 2

FIG. 6

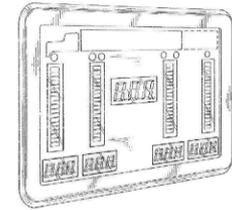
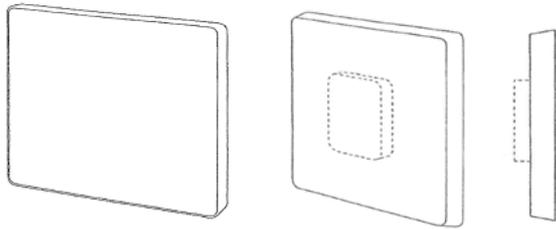


FIG. 1

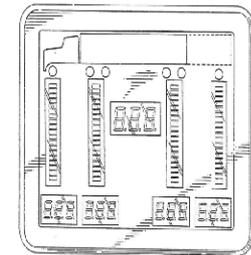


FIG. 2



FIG. 3



FIG. 4



The Broad View – *Procter & Gamble*

- *Here the "design corpus" of which the informed user is taken be aware are other sprayers generally known – not just sprayers for air fresheners or **even those of the kind purchased by ordinary consumers.** There was no dispute about this.*



The Broad View – *Rolawn v Turfmech*

- *The informed user, in my view, is one who uses machines in the turf growing industry. He is not as narrow as someone who is familiar only with mowers (or wide area mowers), without more, but he is certainly familiar with them (and with other machinery). I did not detect much difference between the parties on that point. Such a person would have some familiarity with agricultural equipment other than mowers, and so the design corpus encompasses wide area mowers and other agricultural machinery towed or mounted on the back of tractors for cultivating wide areas. Mann J, *Rolawn v Turfmech*, HC 2008*



The narrow view – *Gimex v Chill Bag*

- 64. ... *the law permits the "indication of the product" to be used as a convenient place to start but the issue in fact turns on consideration of the design itself. The fact that consideration of the design itself leads to a narrower definition of the product in question than is provided for by the indication on the register is neither here nor there. It can certainly do so.*
- 65. ... *The informed user is characterised by their use of the relevant type of product. Their design awareness relates to and arises from use of that type of product.* *On the other hand using products different in nature from the type of product for which the design is registered does not contribute to the informed user's design awareness. HHJ Birss*



Old designs – *Procter & Gamble*

- *I do not consider that the "existing design corpus" is intended to bring in more than what Judge Fysh referred to as product trend and what has been available in the recent past. First, the design corpus to which the recital refers is the "existing" design corpus; not the whole history of product development. Second, the word "corpus" is, at least to my mind, indicative of the general body of design rather than each and every example of it. Lewison J*



Obscure Prior Art - Magmatic

- 46. *PMS contends that the design corpus includes all designs which qualify as prior ... Magmatic ... contends that the design corpus consists of the designs with which the informed user is likely to be familiar. Thus there may be designs which ... can be relied upon as prior art for the purposes of Articles 5 and 6, but nevertheless do not form part of the design corpus when assessing the overall impression created by other designs for the purposes of Article 10. ... I agree that Grupo Promer and PepsiCo support Magmatic's contention.*



“Banal” features – *Pepsico* (GC)

- *"as regards the assessment of the overall impression produced by the designs at issue on the informed user, the latter will automatically disregard elements 'that are totally banal and common to all examples of the type of product in issue' and will concentrate on features 'that are arbitrary or different from the norm'."* (citing BoA)
- *"Two designs for cars do not produce the same overall impression simply because they have four wheels, headlamps, red lights at the back, a windscreen and side and rear windows and so forth."* (*Pepsico* BoA judgment, obiter example)



The “spectrum of banality”

- *“The degree to which a feature is common in the design corpus is a relevant consideration. At one extreme will be a unique feature not in the prior art at all, at the other extreme will be a banal feature found in every example of the type. In between there will be features which are fairly common but not ubiquitous or quite rare but not unheard of. These considerations go to the weight to be attached to the feature”*
Birss, *Samsung v Apple*
- *“the exercise of considering where on the spectrum discussed by HHJ Birss in *Apple v Samsung* any particular feature belongs”* Ian Purvis, *Mainetti v Hangerlogic*”



“Saturation”, “Density” and the “Crowded Field” - T-83/11, T-84/11

- Proprietor argued that *“the crowded field rendered small differences in the internal proportions of the designs more readily perceptible by an informed user.”* The General Court noted that neither the Invalidity Division nor the Board of Appeal had expressly considered the argument put forward by the applicant. Contrary to OHIM's assertions, it found that the relevance of the exception could not be disputed.

