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ART, CRAFT, GOOD TASTE AND MANUFACTURING : THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAWS

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This paper looks at the intellectual property protection that emerged in the English textiles industry from the 17th to the early 20th century. Textiles serve as an interesting intellectual property law focus for a number of reasons.

Firstly, the story of the industrial revolution is a tale of developments in manufacturing processes. The textile industry was at the forefront of changes in technology, workplace organisation and the development of consumer markets. In addition to the significance of textiles to the United Kingdom's economy, in the mid 19th century the legislature assessed British cultural accomplishment with reference to the quality of the products of this industry. Modernisation of the nation state involved a complex interaction between politics, economics and aesthetics. A study of textiles regulation allows us to see how these interrelationships were constructed and supported in law.

Secondly, calls for protection took place over a very important period in the development of intellectual property laws. At the beginning of this period the only form of legal protection available was patents. By the end of the 18th century literary property rights had developed, been widely debated and, though with some lingering disagreement about their nature,² received judicial endorsement. By the 19th century 'the case of authors' had been argued as analogous to the situation of many other kinds of cultural producers, including those producing textile designs. As well as involving questions of 'art', however, textile design also involved basic issues of 'manufacture'. The push for stronger design protection took place alongside an important debate about the respective status of art and manufacture in aesthetic theory. In the process of fashioning a response to such demands for legal protection there ensued a detailed evaluation and public discussion of possible solutions that forced the development of patents, copyright, and design as legal concepts.

Lahore argues that-

There would appear to be no reason for the development or retention of a separate branch of the law dealing with designs outside the Copyright Acts other than historical accident and the fact that at the time of the passing of the first designs legislation the law of copyright was not developed beyond giving protection to a very narrow range of intellectual works, not at all to be equated with the work of the industrious artisan. *It is the continuance of this inclination to distinguish and separate art and manufacture that has caused so much confusion in this area of the law.* Certainly, to the extent that any thought had been given to the nature of design protection in the early Parliamentary debates, the discussion was in terms of copyright but there was no conscious formulation of any principle based upon patent or copyright law for distinguishing designs as a separate branch of industrial property. (1971-72:189 emphasis added).

This paper does not argue that any great progress in the legal definition of intellectual property concepts when the first modern design laws were enacted in the mid 19th century. Independent of each other, patent, copyright and design law continued to develop as legal categories after this. However it is wrong to conclude that because intellectual property laws failed to wholeheartedly endorse a distinction between art and manufacture, leading to a significant overlap in coverage between copyright and design law, that these legal categories were a product of "historical accident" or a mistaken adherence to an arts/manufacture distinction.

Most texts on the subject fail to delve deeply enough into the shared origins of copyright and design. Copyright and design are faithfully traced to separate legislative enactments, ignoring any detailed observations about the common political and economic environment in which they originated. A more interdisciplinary study of 18th and 19th century textile laws is useful because it allows for an exploration of the development of intellectual property law categories in terms of their social and economic functioning. It is possible that patent, copyright and design law developed in a mutually supportive way, the three regimes being specifically tailored to foster and support different features of 19th century British mass manufacturing. This paper explores that possibility. It is argued that the various laws and categorical distinctions were used to help stabilise the direction of British mass manufacturing and to construct consumer markets. Differentiation between art and manufacture, and beyond this, between craft and mass manufacturing, was integral to the development of the law. This argument draws heavily on the commodification thesis of Jean Baudrillard, from his work *The System of Objects* (1988; 1996).

The application of Baudrillard's thesis to intellectual property law is an original and highly speculative venture. It is hoped, however, that it and the textiles case study are helpful in raising some important questions about our expectations of intellectual property law and the relationship between law and society. In particular it involves questioning what is at stake in the development and redevelopment of these laws. Is the objective of legal analysis and of law reform that of securing a more 'developed' intellectual property regime? If so, what does that look like? What are its jurisprudential characteristics? What conceptual closures are essential to it, and at what cost? What kinds of social and economic relations should be supported by law? Can we address this last question outside of the conventionally narrow property issues of private incentive, entitlement and reward?

Once we abandon the 'accidental' development thesis we can conceptualise modern intellectual property laws in a way that considers more sophisticated social relationships. Speculating about these with the benefit of some historical analysis may also help us to reflect upon our current expectations of laws, law reform and their role in structuring the future direction of our society, encouraging the development of a more critical dialogue about contemporary intellectual property laws and how they should support the process of commodification.

I. Patents, Protectionism and Class Distinctions

Armstrong notes that the earliest recorded English patent was granted "in 1331 to John Kemp the Fleming so that he would be encouraged to import his weaver's mystery. Over successive generations, a number of monopolies were created to induce the immigration of highly skilled craftsmen from the Continent". However soon "royal monopolies applied to currants, salt, iron, powder, cards, calfskins, ox shinbones, potash, vinegar, steel, brushes, pots, bottles, saltpeter, lead, oil, glasses, paper, starch, tin, and many other products. Indeed, monopolies became so endemic and abusive that, in the words of Macaulay, 'there was scarcely a family in the realm that did not feel itself aggrieved by the oppression'" (Armstrong, 1987:83). The *Statute of Monopolies* of 1623 restricted patents to a term not to exceed 14 years for "the sole working or making of any manner or manufactures, within this realm, to the true and first inventor".

Patents did not recognise individual creativity per se, but rather rewarded those who assisted the development of British manufacturing. The grant of a patent was discretionary, in that inventions had to be 'useful', must not raise the price of domestic commodities, injure 'trade' or otherwise inconvenience the state. Further, the 'inventor' need not be the actual originator of the technology or skill. Lessons learnt overseas could receive a grant of patent back home. Consequently, instead of encouraging the immigration of highly skilled craftsmen the *Statute of Monopolies* sanctioned continual acts of appropriation of other workers' skill, ingenuity and traditions. The textile industry was one such industry that developed with the assistance of foreign know-how and ingenuity.³

In Europe printing was a relatively primitive method of decorating textiles from the 12th to the 16th centuries. Pigments mixed with linseed oil were applied to cloth by a block-printing technique similar to that used with woodcuts. The dyes were not fast to washing and hence generally unsuited to clothing. Printed cloth was produced only as a very inferior alternative to woven silk and velvet.

In the early 17th century the Dutch, English and French East India Companies began importing technically superior painted and dyed Indian silks, linens and cottons. As exotic, light weight, washable fabrics these imported prints were in great demand.⁴ By 1670 an 'imitation' industry for the manufacture of 'indiennes' was successfully established in France, England and Holland. In England it was supported by the granting of a patent to William Sherwin in 1676 for "the only true way of East Indian printing and stayning . . . never till now performed in this kingdom" (Harris, 1993:224.) The process of dyeing was based upon the use of metallic oxides or minerals, most commonly obtained from a reddish root called madder.

Unlike the labour intensive Indian process where designs were hand painted onto the cloth, "imitations" were impressed with dye by wood block, and sometimes pencilled in by hand to create more complex designs and colours, such as greens. Repetition of the pattern was dictated by the size of the wood block, which had to remain easily manipulable by hand. The earliest patterns were florals "in the Indian manner", but adaptations of Chinese lacquerware, embroidery and wallpaper, 'classical' designs and English tapestry and needlework were soon utilised, especially for furnishing fabrics (Montgomery, 1970:111-142). French imitations were also extremely popular and were generally regarded in Europe as a source for the best, high class fashions.⁵

Industrialisation meant a rapid increase in middle class and skilled working class buyers wanting to purchase fancy cloth for personal adornment. By today's standards a comparatively large amount of income was expended upon personal adornment. Homes, on the other hand, were rather sparsely decorated (Thornton, 1965:17). Access to the East Indian goods and techniques and an emerging consumer demand led to a diversification in the range and prices of fabrics available.

Design became increasingly important because-

Since there were no fashion journals appearing regularly at that time, the cut of costume changed only comparatively slowly. *It was the pattern on the fashionable silk dress materials that changed instead, and they changed each year.* (Thornton, 1965:18 his emphasis).

The market for higher class manufacturers of silk and woollen cloth was not directly challenged by the East Indian and London printed textile trade. Only a small number of people could afford the most luxurious materials which were often embellished with silver or silver gilt thread. However the 'high class' trade was indirectly challenged by the loss in obvious social stratification that occurred once the 'best' designs could

proliferate on cheaper fabrics purchased by social and economic inferiors.⁶ Further, the growth in the printed textile trade directly cut into the 'fashion' market of the weavers of medium priced silks, worsteds and woollens.

Silk manufacturers and weavers began petitioning Parliament in the late 17th century over the effects of foreign competition upon British weavers (see for example *Journals of the House of Commons*, 29 January 1699 & of 8 December 1699). In 1700 the importation, use and wear of East Indian and Persian silks and calicoes were prohibited. This 'success' led to many more petitions to Parliament, including complaints about the economic implications of the domestic calico printing industry. For example two petitions from the Weavers of Worcester argued-

that the wearing of calicoes, printed and stained Linen, is very pernicious to the Woollen Manufacturing of this Kingdom, and hath very much reduced the Woolsted trade therof;

(*Journals of the House of Commons*, 28 January 1719) and

that the Clothing Trade, joined with the rest of the Woollen Manufacturies of this Kingdom, has, for many Years last past, been the greatest Support of the Landed interest, the Employing of the Poor, and the Strength of the Nation: that the said Trade is in a very declining Condition, and many thousands of poor Families ready to perish for want of Labour; which is occasioned by the export of Wool to Foreign Markets, and by Wearing of stained linens in Great Britain. . .

(*Journals of the House of Commons*, 24 November 1719).

This petitioning led to a prohibition upon the sale, use and wear of English printed calicoes in 1721.⁷

These enactments are not usually recognised as 'design laws', however the printed textile trade was largely a threat to the silk and woollen trade because of the use of designs. Does this mean that these enactments should be seen as proto-modern design laws?

Baudrillard argues that-

In the 18th century there was simply no relationship between a 'Louis XV' table and a peasant's table: there was an unbridgeable gulf between the two classes of object, just as there was between the two corresponding social classes. No single cultural system embraced them both. Nor can it be said that a Louis XIII table is the model of which the countless tables and chairs that later imitated it are the serial form. A limited dissemination of craft techniques did occur here, but there was no dissemination of values: the model remained absolute . . . (1996:137).

The above textile laws reflect an awareness of a cultural nexus developing between classes of goods. Silks and fancy woollens had become 'models' for the design and manufacture of cheaper printed calicoes. However the legislation that ensued was an attempt to keep the circulation of the expensive cloths apart from the commoner ones, as well as an attempt to protect the more established weaving trade. Thus these laws restricting access to designs do not support the development of modern commodity relations. They embody resistance to this development.

Another aspect that differentiates these laws from their modern counterparts is the lack of interest in any form of protection of the designs themselves. The French had made moves in this direction by developing government and guild regulations to prevent the copying of designs. Given the close relationship at least between the French and English silk manufacturers it seems unlikely that the English were unaware of these continental developments.

Parliamentary records, though incomplete at this time, show little to suggest that a form of 'design copyright' was even considered as a possibility. The English tradition of protecting the wool trade may largely explain this.⁸ By the early 18th century the silk industry had come to be discussed in similar terms.⁹ Given the widespread acceptance of the significance of weaving as a source of employment for the poor, continuing

broad protection of these industries rather than fashioning new and perhaps uncertain forms of protection would make sense.

However a further reason why design protection may not have been considered relevant can be found by comparing the status of designers in France to that in England. Thornton argues that the French quickly perceived the importance of the designer to the silk industry and by 1676 attempts had been made to establish a school of design. It was realised that the designer had to be more than a talented composer or drawer because weaving is a mechanical process in which patterns must be repeated without too obvious detection and unevenness. Different types of patterns suited different types of weaving, yet in spite of the technical differences involved it was expected that the general style be consistent across the range of fabrics. In France the designer was expected to be able to translate paper sketches into instructions for the placement of warp and weft at the loom. Designers were often partners in the weaving firm. Many also had interests in the mercers shops that retailed the fabrics. Overall they were very well paid, reflecting their status in the manufacturing and retailing of cloth (Thornton, 1965:24-29;78) But in England the silk-designer was treated with much less regard. Most often the designer was a freelance artist who sold sketches to different customers. There was little concern for formalised training,¹⁰ and in any case they were often engaged for the sole purpose of imitating the latest French patterns that weaver's agents were sending back across the Channel. Few weavers were mercers or had interests in the retailing outlets for the fabrics and often it was the mercer who would initiate and direct the manufacturing of designs, through requests and advice offered to weavers (Thornton, 1965:57). Compared with the position of the French designer, the English designer lacked status in both workplace and industrial hierarchies. Given the highly derivative nature of textile designing in England, it is not surprising that the issue of 'design copyright' did not arise as a means of protecting the silk trade.¹¹ In England there was comparatively little regard for the individual skills and creativities that contributed to the manufacture of these fabrics.

The laws prohibiting the trade in printed textiles could have prevented the lower classes from mimicking the fashions of their social and political superiors. However printed textile manufacturers were not so easily put off. It was not illegal to print for export and as a consequence the domestic source did not entirely dry up, although the penalty was £5 for wearing printed calico, £20 for using it as a home furnishing and £20 for selling the cloth. Printers devised legal loopholes, such as printing on calico/linen blends (fustian) which was not explicitly prohibited by the 1721 statute. Over objections, in 1736 Parliament recognised the legitimacy of this practice, provided that the warp thread was entirely made of linen (9. Geo. II. c.4). Montgomery notes that ". . . despite legislation, the grumbling of weavers, and high taxes, cloth printing continued in England, and merchants found ready markets for these goods" (1970:17).

Textile printers had a significant boost with the development of copperplate printing during the mid 18th century.¹² Copperplate printing was an intaglio printing technique where metal plates were engraved with designs, the plates were then inked and wiped clean so that the dye adhered to the incised lines, and under pressure the ink was drawn out onto the fabric. The main advantage over block printing was that although more expensive to engrave, the plate was more durable than wooden blocks. It was possible to achieve a much finer pattern and shading although only in monochrome, and the plate was about three feet wide, compared with the wooden block's width of 10 - 12 inches. Designs were less likely to be 'adapted' from the silk trade, which in England went into decline in the latter half of the 18th century, and more likely to be adapted

from wares in other media. For example, artisans decorating transfer-printed enamelwares and ceramics availed themselves of the same prints for use in textile design (Montgomery, 1970:214) Copperplate prints in naturalistic motifs 'adapted' from painting and book illustration and from wallpaper designs were also extremely popular throughout the second half of the 18th century. They were much desired as an alternative to the polychrome wood block prints, and were also used as a base that was block-printed over for more intricate patterns.

Whilst some writers have called the development of copperplate printing "revolutionary" (e.g. Montgomery, 1970:28) copperplate printing did not require any major reorganisation in the way labour was used in the workshop. As with wood block printing, designs were sketched, engraved or carved and pressed onto the cloth a table length at a time. Because the metal was wider and could withstand pressure better than the woodblocks it was possible to print slightly greater volumes of cloth from the one engraving. However the engraving of metal plates was more expensive and time consuming than with wooden blocks. The new development was not necessarily much more efficient than the old one. In so far as profits depended upon the volume of production, for any dramatic increase in quantity it was necessary to hand engrave more blocks or plates and build more tables "since each additional block had to be cut by hand, it made little difference if it was made to a new design or duplicated an existing one" (Forty, 1986:58). The 'revolution' in copperplate printing concerned the style of designs, rather than the role of design in the printing process itself.

The textile printers overcame the last obstacles created for them by the silk and woollen manufacturers in 1774 when restrictions upon the domestic trade were lifted in recognition of the "many thousands of poor persons . . . so employed." (14. Geo. III. c72).

II. Design Copyright

Soon after the lifting of restrictions on the domestic trade the industry lobbied Parliament for its own protection. However now protection was sought in terms of protecting designs-

That the petitioners and others have, with great industry and expence, severally invented, designed or engraved, divers sets of new and original patterns for printing Linens and Callicoes, and Muslins, in Hopes to have reaped the Benefit of such their own Labours, and the Credit thereof; but divers Callicoe Printers, and other Persons, to save themselves the Expence of original Designs, have of late too frequently taken the liberty of copying, printing and publishing of great Quantities of base and mean copies and imitations thereof, to the great Detriment of the Petitioners and other artists, and to the Discouragement of the said Arts and Manufactures.

(Petition of 15 March 1787. *Journals of the House of Commons*..

It is clear from references to a committee set up in response to such petitions, reporting to Parliament on 27 March 1787, that the objection was to the proliferation of designs manufactured by northern printers on inferior cloth, which also attracted a lesser duty. The reason for protection mirrored the earlier complaints of the silk and woollen industry - that the sale of higher class designs and goods was detrimentally affected by the appropriation of the pattern by the lower classes. However the request for protection took a different form to that previously sought for textiles. Petitioners asked for a form of a copyright, "in the same manner as the laws now in being have preserved the properties of authors of books . . . and the inventors and engravers of historical and other prints" (as quoted in Lahore, 1971-72:185).

Throughout the 18th and 19th century copyright was expanded by Parliament from protection of literary works to protect other cultural forms. Engravers achieved a form of copyright protection in 1735.¹³ Given the role of the engraving process in the copperplate printing, a copyright extension to cover this new use of engraving seems one explanation why the request was in the form of copyright. *An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof in the Designers, Printers and Proprietors for a limited Time* was passed in 1787 however protection was only granted for two months from first publication, and later extended to a maximum of three months.

“Design copyright”, as it was then called, compared extremely unfavourably with copyright protection of other forms. For example, under the *Statute of Anne* 1709/10 books had protection for 14 years, and a further 14 years if the author still lived. Under the *Engravers’ Act* 1735 protection was for 14 years from the date of the print. If the designer deserved copyright protection, why was the protection in so limited a form?

Lahore argues that the inclusion of 'novelty' and 'inventiveness' in the Act shows uncertainty about how to deal with artistic works of an industrial character, as well as suggesting that the limited term may be a reflection of northern discontent with the granting of monopoly rights in connection with textile inventions (1971-72:185) His comments suggest that a conceptual separation of art from industry had occurred.

The conventional view is that such a distinction had taken hold in English and French aesthetic theory by the latter half of the 18th century. Kristeller, for example, argues that the existence of a category of 'fine arts' - which often included architecture, gardening, statuary, dance and eloquence as well as the more familiar painting, sculpture, poetry and music; was taken for granted. Art, craft and science were considered as distinct kinds of practice. In science, for example, progress reflected an accumulation of knowledge brought about through advances in mathematical calculation, whereas excellence in art was dependent upon individual talent and the taste of the critic (Kristeller, 1951-2). Excellence in craft involved a test of both functional and decorative mastery, with craft coming to be understood in opposition to art and science, and in the face of ongoing mechanisation, also in opposition to manufacturing.

How did these philosophical developments impact upon law?

Whilst 'design copyright' was influenced by changes in aesthetic theory, 'copyright' itself was not immune to such considerations. It was no accident that the famous literary property cases of the late 18th century involved works of poetry, however it was also well understood that literary property was not limited to works of this calibre. There was no general reliance on aesthetic theory to determine if intellectual property protection was warranted or unwarranted. Nevertheless where aesthetic theory supported the case for protection, clearly the case was seen as stronger. The social status of textile designers was low, but this alone did not disentitle them to protection, nor clearly distinguish the textile case from the literary one.

The *Journal of the House of Commons* provides some clues as to why so short a term for design protection was sought, with reference to a discussion of the 'originality' of these valuable textile designs-

Mr. Kilburne being again called, was asked, What is meant by an original Pattern? he replied, That it is an Assemblage of Flowers or Fruits placed in a Variety of Colours, so that they shall strike the Trade as something new, and not seen before. (27 March 1787).

Where commodity relations are seen as paramount, originality is understood in terms of the cultural nexus that embraces all goods, relating each to the other. As Baudrillard argues, higher class goods become working models for cheaper commodities. But where-

The model has a harmony, a unity, a homogeneity, a consistency of space, form, substance, and function; it is, in short, a syntax. The serial object is merely juxtaposition, haphazard combination, inarticulate discourse. As a detotalised form, it is nothing more than a collection of details relating in mechanical fashion to parallel series. Suppose that the uniqueness of . . . (an) armchair lies in its particular combination of tawny leather, black steel, general silhouette and mobilisation of space. The corresponding serial object will emerge with plasticised leather, no tawny, the metal lighter or galvanised, the overall configuration altered and the relationship to space diminished. The object as a whole is thus destructured: its substance is assigned to the series of objects in imitation leather, its tawny is now a brown common to thousands of other objects, its legs are indistinguishable from those of any tubular chair, and so on. The object is no longer anything more than a conglomeration of details and the crossroads of a variety of series. (1996:148).

Design laws are called for to assist in formally differentiating models from series, and series from series. They break up the conglomeration by demarcating boundaries between goods. In the process design laws suggest that the consumer is empowered by a significant choice in the marketplace. However the reality is largely of choices measured in class distinctions and idiosyncracies. The financially better off have the capacity to purchase a model and the comparatively poor may purchase one of a series derived from such models. Hence the originality that 'strikes the Trade as something new' is an originality awarded to serial objects by marketplace relations.

This originality is of a very different kind to the authorial originality of the romantics. Authorial originality suggests a nexus between the artist and their progeny, a unique work of art. The significance of a work of art is defined in terms of a personal narrative—the monograph (a study of the artist's life and work), and the *catalogue raisonné* (the collection of the complete *oeuvre* of the artist whose coherence as an individual creator is produced by assembling all of his or (rarely) her work in an expressive totality). (Pollock, 1980: 57).

This places art outside of the daily grind of the marketplace and suggests a contrast between the uniqueness of art and the seriality of consumable works. However in a system of commodity relations art may be used as a model for numerous imitations. In this sense, art remains part of the broader cultural nexus of commodity relations, with copyright law mediating the translation of art into a commodified form.

Montgomery suggests that in the late 18th century responsibility for designs lay with the London drapers and that patterns were made to their precise specifications. Changes in taste from year to year and season to season were governed by their demands (1970:34). Given that the 'designer' was not generally responsible for the conception of the design but rather executed it as directed, as often as the draper judged that the market required something 'new', it is not surprising that only a limited term of protection was perceived as necessary. Originality in design referred to a commercial, rather than an artistic context. Commerce did not require a lengthy form of protection for differences Baudrillard calls "illusory" (1996:152-3).

That design protection would belong to the industrialist was an automatic consequence of the lowly status of the textile designer. This status had not improved despite a revolution in the role of the designer coming about with the development of roller printing in the late 18th and early 19th centuries.¹⁴ Roller printing drastically reduced the cost of printing and it radically increased the value of popular designs. Roller printing meant that once a design had been engraved it could be produced in a continuous length-

Where it had been possible to print only six pieces a day on a single table, a steam-powered roller printing machine could print up to five hundred pieces a day. Between 1796 and 1840, as a result of the

introduction of these machines, the annual production of printed textiles in the United Kingdom increased from one million pieces to sixteen million pieces. (Forty, 1986:47).

Increasing the volume printed of a particular design no longer required an additional capital outlay. Whilst the width of the pattern handled by the rollers was initially only a foot wide, the fabric could be overprinted in numerous colours. Advances in chemistry also improved the quality of dyes. The industry was also boosted by a repeal of the excise on printed fabrics in 1831 which further reduced the cost of fabrics by about 30-40%.

These developments led to a further increase in the range of consumers interested in decorative fabrics, with differing requirements-

. . . even quite modest houses would now contain decorative fabrics, used on beds, tables and at windows. Printed cotton also allowed domestic servants upwards to dress fashionably. . . The relatively low cost of printed textiles compared with woven silks and velvets facilitated, in particular, the more rapid turnover of furnished styles. (Harris, 1993:229).

The greatly increased output provided a growing demand for new designs, as reflected in the following comment-

There is a morbid craving in the public mind for novelty as *mere novelty*, without regard to intrinsic goodness, and all manufacturers, in the present mischievous race for competition, are driven to pander to it. It is not sufficient that each manufacturer produces a few patterns of the best sort every season, they must be generated by the score and by the hundreds.

(*Journal of Design and Manufactures* 1849 as quoted in Montgomery, 1970:289).

Ideas were still often taken from Indian and Chinese textile and artefacts, from Kashmir shawls, classical arrangements and Egyptian motifs, and by 'adapting' earlier designs for roller printing design costs were also reduced.

Designers were perceived as 'salaried servants' employed on a weekly wage by 'print masters'. The practice was to have a large number of designs prepared but to engrave and print only a few. The preparation of a design for printing was undertaken by another class of employee- the pattern-drawer. The drawer would re-arrange the designer's pattern so that the repeats were equidistant and fitted the width of the fabric, and prepare a sketch so that it fitted the roller (Mr Stirling, *Select Committee on the Copyright of Designs*, 1840:3430;3431)-

One large Manchester manufacturer said that in 1838 his pattern drawers had prepared between two to three thousand designs of which only five hundred had been engraved and printed.

(*Select Committee on the Copyright of Designs, Minutes of Evidence*, 1840 in Forty, 1986:47).

The sketch was not generally engraved 'in-house' but was sent out to a specialist (Floud, 1960:6). The application of electro-magnetism to engraving reduced the process from one that could involve months to a process that could be completed in a few hours.

The application of electro-magnetism led to a reconceptualisation of the function of design in the manufacturing process. Whilst there was an increase in the demand for and the value of designs, divisions of labour were also strengthened. Whereas a traditional artisan, such as a silk weaver, had had to master both functional and decorative aspects of production, here the manufacturing of the object was radically separated into aesthetic and technical components¹⁵. The designer came to be seen as skilled in the putting on of style, with a knowledge and expertise distinct from the giving of form. This separation distinguished the status of the designer from that of a craftsperson.

One may have thought that the increased value of a good design and the change in practice so that "the pattern is drawn by the designer from his own ideas, and not with reference to whether it is workable or not" (Mr Stirling, *Select Committee on the Copyright of Designs*, 1840:3422) could have enhanced the position of the designer.

However this was not to be the case. Rather than being respected as an artist, designers were widely criticised as inferior workers to the traditional artisans. Thus it was claimed that-

Wherever ornament is wholly effected by machinery, it is certainly the most degraded in style and execution; and the best workmanship and the best taste are to be found in those manufactures and fabrics wherein handicraft is entirely or partially the means of producing the ornament.

(Richard Redgrave *Great Exhibition of 1851*, as quoted in Forty, 1986:49).

Nostalgic generalisations about the superiority of the hand-crafted pattern and print, such as that quoted above were common. In the hierarchy of cultural producers, the designer was neither artist nor craftsman, but merely a specialist employee.

At least one industry observer directed attention to the question of workplace organisation-

the talents of our artisans (are) being employed in a more profitable direction . . . The great object with every English manufacturer is quantity; with him, that is always the best article to manufacture of which the largest supply is required; he prefers much a large supply at a low rate to a small supply at a higher . . .

(J.C. Robertson *Parliamentary Committee on Arts and Manufacture 1835* as quoted in Forty, 1986: 60)

However generally attention did not fix on the change to mass manufacturing, but on the skill of designers. The focus was on whether British designers were up to the mark, compared with their French counterparts. Out of concern for the state of British design Parliamentary Select Committees were set up in 1835-36, 1840 and 1849 (see Forty, 1986:49-60).

III. The Ornamental Designs Act 1842 & The Utility Designs Act 1843

The French were widely credited as masters of design and one factor in which they differed to the British was in their attitude to copyright. The 1840 *Select Committee on the Copyright of Designs* noted-

It was likewise a strong and striking fact that in the only country which was confessedly superior to England in all the departments of industrial art, in France, the copyright of designs was the most complete and effectual, giving the inventor a property in them for any term of years, from one to a perpetuity, for which he might feel disposed to claim it. Under the influence of this law the productions of French taste had attained a reputation for beauty which ensured for them a price infinitely beyond the more homely and less elegant manufactures of England. . .

(Mr Emerson Tennant, *Parliamentary Debates*, Vol. LVI col 483).

Revolutionary France had enacted a general law of copyright that encompassed all pictures and design, *dessins de fabrique* and *dessins artistiques*. Commercial designs could also be protected by registration from 1806, without having to demonstrate artistic quality which was necessary under the broader copyright law. The period of protection could be secured for a number of years or in perpetuity. Design protection was enforced by commercial tribunals, rather than through the courts (Lahore, 1971-2:222). Why allow manufacturers to choose the length of protection? How could this enhance the overall quality of industrial design?

If the manufacturer chose the desired term of protection, that could make a calculated assessment about whether or not they had produced a 'model' or a 'series'. Baudrillard argues that-

The model is a kind of 'essential' quality which divided and multiplied by the concept of mass production, ends up in the series. It is like a more concrete, more solid, condition of the object which sees itself, subsequently diffused into a series of its image. (1988:175)

Presumably investment in a model is greater than in the derivative of it. However English law did not formally provide any way of distinguishing the model and derivative designs. English textile laws protected designs within discrete classes of fabric. As Mr Emerson Tennant told Parliament-

The state of the law, therefore, presented this singular anomaly, at present, that there was one law to regulate patterns upon calico, and another for woollens and silk; and what must appear still more

incongruous and absurd, for the same design if woven upon silk there was a protection for twelve months, and if printed upon calico only three. . .

. . . It had been over and over again shown, that a great many articles were made, the designs for which took a great amount of time and labour, which were nevertheless subject to be pirated, before they could find their way into the market. (*Parliamentary Debates* Vol XLV col 747-748).

In this environment the 'essential' qualities of a model were too easily seized and diluted by the manufacturers of cheaper cloths.

Objections went beyond complaints that there was no incentive to produce models in this legal environment. Objection was also taken to the damage being caused to social relationships. As one fabric merchant explained-

I consider that copying is detrimental in this way, that except the higher class of printers, who give a tone to the print trade generally, derive a remunerative price for their goods, the general taste of the country will be deteriorated; and in that way, I think, they are entitled to their protection; nothing more than that (Mr R Barbour, *Select Committee on the Copyright of Designs*, 1840:8488).

As the 19th century progressed concern over the taste of the masses entailed more than aesthetic considerations-

many entrepreneurs and professional men found the world in which they worked increasingly brutal and deceitful. While participating in it, they felt it necessary to find some way of experiencing and expressing the moral virtues and honest emotions that they saw being submerged in the commercial world. The home, therefore came to be regarded as a repository of the virtues that were lost or denied in the world outside. . . It was to turn the home into a place of unreality, a place where illusions flourished. (Forty, 1986:101).¹⁶

The comment that “the general taste of the country will be deteriorated” harboured real social and political fears about the 'social fabric'. The furnishing of the home and the presentation of its occupants was a sign of political stability and well-being. In response to concerns over cultural values and to support the development of certain markets- Copyright of design gave manufacturers a form of protection which interfered with free market competition, while the government subsidy of schools of design represented a form of state assistance to industry - another kind of interference with the ‘natural laws’ of the economy. Design was therefore a sufficiently important issue to cause people to advocate remedies contrary to laissez-faire principles which dominated politics at the time. (Forty, 1986:59).

Interestingly enough, the assistance given to industry by government support for regional schools of design was not so that manufacturers would have access to artistically skilled employees, but was offered with a view to raising the standard of public taste (Sparke, 1986:158). It was suggested that consolidating design protection, allowing for a longer term of protection and design registration could assist in the production of British works of excellence.

Not all industrialists supported design law reform. Opposition was founded in the claim-

that there was no such thing as originality in design - that old patterns were perpetually recombined and reproduced. The measure would be productive of nothing but endless litigation and constant disputes. . . The fact was, that originality of invention may be said to have been exhausted, and the production of original new designs could hardly be expected. . . . The whole system of patternmaking was not the forming of patterns on original ideas, but the combining of them from existing designs. (Mr Williams, *Parliamentary Debates*, Vol LXI cols 684-85).

This commentator suggests that there was nothing distinctive enough to constitute a model deserving legal protection. Conversely, any distinction claimed by these works would merely be a creation of the law. By permitting certain manufacturers to elect their works as 'special', their distinctiveness denoted by registration, these designs become special. This reading is supported by the characterisation of registration as a form of design insurance-

He did not propose to make this compulsory on the part of owners of designs; but merely to give them the opportunity of taking advantage of the law if they thought fit to do so. (Mr Poulett Thomson, *Parliamentary Debates*, Vol XLV col 747).

Design protection, it was argued, was contrary to laissez faire principles and was an attempt to discriminate against the successful Northern printers.

Evidence given at the various inquiries overwhelmingly named large Northern manufacturers as the instigators of piracy. For example, Mr Stirling complained to the Committee that in the course of one month, an entire 83 patterns were copied by a Manchester firm and offered for sale in competition with his own at a reduction of 20% on cheaper cloth, and were then considered too common to be reordered from him (Select Committee on the Copyright of Designs, 1840:3320; 3337). However he then went on to explain his own practice of copying-

We are in the habit of getting patterns from every place we can . . . our object in getting these patterns is to enable us to keep pace with the trade to know what is suitable and what is worth copying. (Select Committee on the Copyright of Designs, 1840:3390).

This apparent double-standard, whereby appropriation by 'quality' manufacturers was approved of and called copying the 'style' but a similar practice undertaken by different printers for the broader mass market was frowned upon and called 'piracy', clearly evidences acceptance of a model/series dynamic. Further whilst there is no doubt that often mass market manufacturers were involved in piracy,¹⁷ even when an exact reproduction was not involved, but rather the adaptation of a print, it was still resented and disapproved, as if it too was piracy. This demonstrates that copying per se was not perceived as the problem. What was objected to was the lack of distinction between derivative series of works.

It was proposed that the Board of Trade could run a registration process from fees arising from the entry of designs so that no expense would be imposed upon the public. This arrangement shows that there was no exclusive property in the design, for if it deserved protection 'of right' concern for the cost on the public purse should not have come into it. Because of this logic it would be necessary that the manufacturer register each use of the design, ultimately leading to a cumbersome process whereby it was necessary to register the same design separately in respect of different classes of product.¹⁸

In 1839 design protection was offered for metals for three years; for silk weaving, carpet making and paper hanging and all other articles in which the value of patterns forms an essential element in computing the value of the whole, for twelve months; provided that the pattern was lodged for registration (*The Copyright of Designs Act 1839*). The scheme was initially rejected by the calico industry as "inconvenient" but by 1841 the scheme was considered successful enough for calico-printers to be willing to be included.¹⁹

These reforms satisfied the more immediate complaints of London textile designers. However the manufacturers of other kinds of works continued to push for further reform. The Legislature was responsive, but how should they define the essential qualities of these other commodities that required legal protection and in what terms: in copyright, design and/or patent law?

Bently notes that "Patent law by the 1820s was a mongrel of custom, prerogative, statute and judicial. . . There was uncertainty over what was protectable, over the nature and role of specification, and of the role of claims and drawings. Moreover, the patent administration was complex. . ." (1997: 28) Some argued for design protection in terms of patents, however-

what was still wanted was protection for those inventions which were only wanted for a very short time, and the inventors of which could not afford to go to the expense of obtaining patents in the ordinary way.

It also appeared to him, that one of the reasons why all previous attempts to secure protection for the articles in question had failed was, that the promoters of them had endeavoured to extend the provisions of the patent-laws to those articles which were not by their nature capable of receiving the protection they afforded.

(Mr Poulett Thomson, *Parliamentary Debates Vol XLV col 747-748*).

In response to such concerns the British Legislature repealed all existing design laws and replaced them with the *Ornamental Designs Act* 1842 protecting the ornamenting of an article and the *Utility Designs Act* 1843 protecting the shape and configuration of the article. Under both Acts designs had to be registered and protection was for a term of up to three years.

These laws suggested that a kind of distinction between art and manufacturing existed within the sphere of industrial design itself. This created enormous difficulties. If the *Ornamental Designs Act* protected the aesthetics of the object and the *Utility Designs Act* protected the technical aspects of the work, what was the role of patent law?

Patent law could be distinguished from the *Ornamental Designs Act*. Whilst the Act required that the design be novel or original, unlike patent law's expectation that novelty mean that the idea had not been previously published- a design may well be novel although all the parts are old, and were common general knowledge or were trade variants at the date of registration, for the combination of two or more old and well known designs or parts of designs will certainly constitute novelty, if the effect, ie. the appearance of the combination as a whole, is new.

(*Copyright in Industrial Design*, 1930, quoted in Blakeney & McKeough, 1992:262).

Whereby 'everything old is new again' allowed for discrimination between printers and regulated access to design styles. Mr Stirling and his friends could, if they so chose, protect quality designs from Northern reproductions of them. However- in interpreting the (*Utility Designs*) Act, the central focus of dispute turned out to be the relationship of this system with the patent system - a matter over which the statute said nothing. Some commentators took the view that the *Utility Designs Act* and the patent system were simply alternative way of protecting mechanical devices and that an applicant could elect between the *Utility Designs Act* protection which cost £10 for three years' protection throughout the whole nation and the alternative patent system at a cost of £300 but for the longer term of 14 years. For these commentators, the *Utility Designs Act* was an act to make patents cheap. Other commentators took a different view, that is that the subject matter of each system (was) essentially distinct: the *Utility Designs Act* protected merely the form of an article, whereas patent protection covered not form but the 'principle' by which an invention worked - its function. (Bently, 1997: 29).

Bently suggests that the social environment of the mid 19th century was capable of supporting both understandings of the *Utility Designs Act*. Competing groups of specialists helped sustain this conflict in interpretation of the law. Agents for registrants of designs sought a broad interpretation of the Act effectively trying to steal away the business of established patent agents. The latter sought a restrictive interpretation of the Act in order to protect their client base and prestige. Bently notes that this conflict was never resolved conclusively at a judicial level.

It is hardly surprising that it proved difficult to universally define the relationship between form and function within modern design. Whereas excellence in craft was defined by an essential unity between form and function, in modern design the relationship between the two is more complicated.

Mass manufacturing techniques require the standardisation of forms so that divisions of labour can be utilised.²⁰ Mass manufacturing means that differences between objects tend to be in "inessential details". For example-

The sole way to personalise cars is for the manufacturer to take a serially produced chassis, a serially produced engine then change a few exterior characteristics or add a couple of accessory features. A car

cannot be personalised in its essence as a technical object, but only its inessential aspects. (Baudrillard, 1996: 142).

Hand in hand with the increased value of 'applied decoration' as protected by ornamental designs law, there is an increased value in standardised forms. But with mass manufacturing the relationship between form and function embodied in the standardised form changes depending upon the nature of the goods.

For example, potential profits in the textile industry would have relied upon an expanding industrial base providing the required machinery. In servicing this demand the suppliers of technology standardised their manufacturing processes. That textiles are retailed in rolls of standardised widths and lengths is a product of mechanical limitations, handling issues, the need to service a human scale, and also because generalised presentation maximises the number of shapes that the fabric can ultimately take. Thus the form of this product is a consequence of technology, marketability and the fact that textiles are subject to further processing down the line by dressmakers and decorators etc. Form is related to allowing for a number of possible end functions. Other products have quite specific functions and have no need for processing further down the line. Consequently the difference between a one refrigerator and another, or a television set and another, may be quite limited. In such a case function does, to a large degree, dictate form. With modern design the relationship between form and function is complex, involving a chain of interdependencies incorporating issues of technology, manufacturing, wholesaling, storage, sales and consumer preference.

In moving away from design laws that discriminated between and within classes of goods and towards more generalised design laws, the 19th century debate over form and function was played out in rather abstract philosophical terms, with each side selecting favourable examples to advance their cause. The overlap with patent law was only diminished after reforms simplified and reduced the cost of patents, and the two designs Acts were merged into one (*Patents Designs and Trade Marks Act* 1883). After this date the scope of protection in design law was strictly interpreted and after 1919 protection of "mere mechanical devices" was formally excluded (Bently, 1997:31).

The question remains, why did patent law supersede the *Utility Designs Act* and what purpose does patent law serve?

Baudrillard notes that one difference between a pre modern economy and a modern one is that in the former the use value or ongoing functionality of the object maintains its value. However where commodity relations predominate value is dictated by the inbuilt obsolescence of objects-

One can voluntarily limit the life-style of an object or render it useless by acting on:
its function- it is outclassed by a technically superior alternative (but this is a form of progress);
its quality- it is broken or worn out at the end of a given time which is usually short;
its presentation- it is made deliberately unfashionable, it ceases to please, while it retains its functional quality. (quoting Vance Packard, 1988:174).

Desire to protect standardised forms has little to do with maintaining the actual functionality of the invention. In this regard the relationship between form and function hardly matters. What matters is the maintenance of the cycle of objects. A longer term of protection, coupled with significant tests of novelty and inventiveness (patent law) might better facilitate the cycle of demand. It provides a stronger incentive to invest in the pursuit of technical obsolescence (progress) than utility design law.

Support for this view can be found in Armstrong's analysis of the demise of the 'utility' requirement in patent law. As one treatise writer explained in 1883-

patents are never held to be void for want of utility, merely because the things covered by them perform their functions poorly . . . In such cases no harm results to the public from the exclusive right, because few will use the invention . . .

(*Text-Book of the Patents Laws of the United States* as quoted in Armstrong, 1987:94)

An invention need not be of quality in order to gain protection and the value of the monopoly should be detrimentally affected by this anyway. The important rule is that market forces will decide the value of the patent and therefore the life-span of the grant. As the patent is secured by a process of registration and renewal it allows the investor to elect the appropriate term of monopoly required, in line with in-house research, development and marketing strategies. Competition can be kept at bay by maintaining the patent, but its market value will depend upon external factors. It may make good business sense to allow it to lapse because of a superior form of standardisation that led to the grant of another patent, or redundancy may be judged by consumer demand.

IV. Works of artistic craftsmanship under the Copyright Act 1911

In the latter half of the 19th century artisans agitated for a greater public appreciation of their skill and products under the auspices of the Arts and Craft Movement. As Lord Simon explains-

The significant feature of this part of the law before 1911 was that the artistic works given protection were works of fine art. This accorded with the almost universal concept current in 1862: a work of art was a product of the fine arts and primarily an easel painting. But almost from the moment of the Fine Arts Copyright Act 1862, there was a reaction, which came to be known as the Arts and Craft movement. In 1862 itself William Morris founded "The Firm" producing a wide variety of work of decorative and applied art. . .

. . . For the essence of the Arts and Crafts ideology was that "art" did not mean merely, or, even primarily, the fine arts. Art was a way of life, standing in contrast to the prevailing industrialism and commercialism, which was seen as a threat to mankind's spiritual and physical well-being. . . (*Hensher v Restawile*).

The law posed a problem for this class of works. They were not 'fine arts' under copyright and they were consciously different to the mass manufactured goods protected under design and or patent law. Design law was of little assistance because it protected-

mere originality in points of design aimed at appealing to the eye as commercial selling points. . . Moreover, although true originality (in the way of a new sensibility or ideology or world view or technique) may be relevant aesthetically, mere novelty can hardly be so. A gimmick is almost the negation of a work of art. Its appeal, as Russell L.J. implied, is likely to be directed at satisfying other demands in the purchaser than the contemplation of beauty - desire for change, for modishness, for prestige, for example (*Hensher v Restawile*).

Design law was seen as being for serial objects, not for the protection of art/craft.

Why did such works require copyright protection? There is something incongruous about copyright protection, that is, a reproduction right, for works that are consciously produced in opposition to mass manufacturing. Why craftworks needed intellectual property protection can be gleaned from Lord Simon's explanation for the term "artistic craftsmanship" being in the *Copyright Act*, instead of the more familiar term "handicraft"-

however ideologically opposed to current industrial and commercial society, at least some of the leaders of the Arts and Crafts movement recognised that they would have to come to terms with the machine. As early as 1850 Philip Webb designed table glassware for Powell & Sons of Whitefriars. During the 1880s even Morris acknowledged that the machine could be useful in extinguishing all irksome and unintelligent labour, leaving us free to raise the standard of skill of hand and energy of mind of our workmen. . .

. . . The Central School of Arts and Crafts, though foremost a school of handicrafts, had as a declared aim to encourage "the industrial application of decorative design".

(*Hensher v Restawile*).

Technological advances had affected the crafts, so that the distinction between craft and mass manufacture was not really a test of the use of machinery. Further the political objective of disseminating craft required short-cuts in processing that might increase the quantity of such works. Technology and the use of divisions of labour were considered appropriate so long the quality of the work was not comprised. Quality was the real test of a work of artistic craftsmanship, by which was meant the work had a durability that contrasted with the inbuilt obsolescence of function, quality and presentation of commodity items. The category "works of artistic craftsmanship" was established out of respect for the manufacture of 'quality' industrial works.

Legal protection of art/craft reflected anxiety about consumption of the products of mass manufacturing, however the legislation in no significant way impeded the progress of these other markets. The objects protected as "works of artistic craftsmanship" clearly stood out as models to be emulated in series production. In this sense it could be argued that this category is not ultimately for the benefit of the artisan, but work in the interest of the mass manufacturer who needs to draw upon the artisanal effort to maximise profits.

V. Conclusion

Copyright, design and patent laws may not have been created in line with a master plan for commodification, but that does not mean that the categories grew by accident or default. Their legal definition and redefinition provided an impetus for a commodification process, the divisions between the regimes reflecting the requirements, organisation and structure of those industries deemed to be at the forefront of British economic advancement in the 19th century. It was understood that supporting and developing markets involved more than a legislative allocation of economic rights. Economic development was also a cultural affair. Manufacture would not progress unless art, craft and good taste were also supported.

We should reflect on this as we address our own law reform needs. 'How can laws support industry?' should be considered as related to debates about 'what kind of society do we want to build?', 'what social relations are we supporting?' and 'what other values and institutions could be affected and how?'

From a contemporary point of view where it is taken for granted that artistic works such as paintings, sculptures, drawings and engravings need not possess aesthetic quality in order to attract copyright, copyright and design law appear to serve a similar purely economic function. The category "works of artistic craftsmanship" seems an anachronism. However if we are to discard such distinctions in law we should consider the cultural consequences. This state of affairs may merely demonstrate the progress of commodity relations to the point where we are unable to discern any real difference between a model and a series, the relatively durable object and the immediately consumable item. In such a society, all that separates and distinguishes goods is the signs in their advertising™. Is this to be the point of our 21st century intellectual property laws? Is this what fully developed intellectual property laws look like?

References

Armstrong, G. (1987), 'From the Fetishism of Commodities to the Regulated Market: The Rise and Decline of Property', 82 *Northwestern University Law Review*, 79

- Baudrillard, J. (1988) 'The System of Objects' in *Design After Modernism. Beyond the Object*, Thackara, J. (ed) Thames & Hudson, London
- Baudrillard, J. (1996) 'The Socio-Ideological System of Objects and Their Consumption' in Baudrillard, J. *The System of Objects*, James Benedict (trans.) Verso, London
- Bently, L. (1997) 'Visuality and Textuality in Nineteenth Century Intellectual Property Law: The Utility Designs Act 1843' *Intellectual Property Forum*, :28
- Blakeney, M. & McKeough, J. (1992) *Intellectual Property Cases and Materials*, Law Book Company, Sydney
- Cornish, W. (1974) 'Cumulative Protection for Industrial Designs', 8 *U.B.C. Law Review*, 219
- Floud, P. (ed) (1960) *English Printed Textiles 1720-1836*, Victoria and Albert Museum, London.
- Forty, A. (1986) *Objects of Desire. Desire and Society since 1750*, Thames & Hudson, London
- Gregory, D. (1982) *Regional Transformation and Industrial Revolution. A Geography of the Yorkshire Woollen Industry*, Macmillan Press, London
- Harris, J. (1993) 'Printed Textiles' in *5000 years of Textiles*, Harris, J. (ed) British Museum Press, London, 224-235
- Hayden, D. (1981) *The Grand Domestic Revolution*, MIT Press, Boston
- Hunter, D. (1987) 'Copyright protection for Engravings and Maps in Eighteenth Century Britain', 9 *The Library*, 128-147
- Kristeller, P.O. (1951-2) 'The Modern System of the Arts: A Study in the History of Aesthetics', *Journal of the History of Ideas*, 12:496-527 and 13:17-46
- Lahore, J. (1971-72) 'Art and Function in the Law of Copyright and Designs', 4 *Adelaide Law Review* 182
- Montgomery, F. (1970) *Printed Textiles: English and American Cottons and Linens 1700-1850*, Thames and Hudson, London
- Patterson, L. (1968) *Copyright in Historical Perspective*, Vanderbilt University Press, North Carolina
- Pollock, G. (1980) 'Artists, Mythologies, and Media- Genius, Madness, and Art History', 21 *Screen*, No 3: 57.
- Rose, M. (1993) *Authors and Owners. The invention of copyright*, Cambridge, Massachusetts. London: Harvard University Press

Ross, T.(1992) 'Copyright and the Invention of Tradition', 26 *Eighteenth-Century Studies* 1-27

Saunders, D. (1992) *Authorship and Copyright*, London: Routledge.

Schwartz Cohen, R. (1983) *More Work for Mothers*, Basic Books, New York.

Sparke, P. (1986) *An Introduction of Design and Culture in the Twentieth Century*, Unwin Hyman, London

Thornton, P. (1965) *Baroque and Rococo Silks*, Faber and Faber, London

Legislation

An Act for ascertaining the Duty on printed, painted stained and dyed stuffs, wholly made of cotton and manufactured in Great Britain, and for allowing the use and Wear thereof under certain Regulations 1774. (14. Geo. III. c 72).

*An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned (Statute of Anne)*1710 (8. Anne c19).

An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof in the Designers, Printers and Proprietors for a limited Time 1787 (27. Geo. III. c38; 34 Geo. III. c23).

An Act for employing the Manufacturers and encouraging the consumption of Raw Silk and Mohair, by prohibiting the Wearing of Buttons and Button Holes made of cloth, serge or other stuffs 1721 (7 Geo. I c.12).

An Act to preserve and encourage the Woollen and Silk Manufacture of this Kingdom; and for more effectual employing the Poor by prohibiting the Use and Wear of all printed, painted, stained or dyed calicoes, in Apparel, Household-Stuff, Furniture or Otherwise 1721 (7 Geo. I c.7).

Copyright Act 1911

The Copyright of Designs Act 1839 (2 & 3 Vict. c.13; 2 & 3 Vict. c.17)

Engraving Copyright Act 1734/5 (8 Geo. II. c.13).

Fine Arts Copyright Act 1862 (25 & 26 Vict., c.68).

Ornamental Designs Act 1842 (5 & 6 Vict. c.100)

Patents Designs and Trade Marks Act 1883 (46 &47 Vict. c.57)

Statute of Monopolies 1623 (21 Jac I, c.3)

Utility Designs Act 1843 (6 & 7 Vict. c.65)

Cases

Hensher v Restawile [1976] A.C. 64 (H.L.)

Reports

Select Committee on the Copyright of Designs, Minutes of Evidence, Parliamentary Papers, 1840 vol VI

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² For example see Rose, M. (1993) *Authors and Owners. The invention of copyright*, Cambridge, Massachusetts. London: Harvard University Press; Ross, T. (1992)

"Copyright and the Invention of Tradition" 26 *Eighteenth-Century Studies* pp 1-27; Saunders, D. (1992) *Authorship and Copyright*, London: Routledge.

³ Unless otherwise indicated the following history is taken from a composite reading of Harris, J. (1993) "Printed Textiles" in *5000 years of Textiles*, Harris, J. (ed) British Museum Press, London, p224-235; Montgomery, F. (1970) *Printed Textiles: English and American Cottons and Linens 1700-1850*, Thames and Hudson, London; and from Floud, P. (ed) (1960) *English Printed Textiles 1720-1836*, Victoria and Albert Museum, London.

⁴ The success of these designs is evident in our usage of the word "Chintz" which is still generally used to refer to cottons with small conventionalised printed patterns. Montgomery notes that it is a derivation of the Hindi word *chint*, meaning variegated (1970:13).

⁵ One of the earliest records of the English practice of design notes that "the French designers of ornaments have been most happy in their inventions. . . No wonder that all the rest of European nations take the French patterns of ornaments for their rule and pattern to imitate." This was particularly the case with silk-patterns, he continued. Godfrey Smith "Designing and Drawing Patterns for the Flower'd-silk Manufactory" from Godfrey Smith *The Laboratory; or School of Arts* (1756) as quoted in Thornton 1965:22.

⁶ Godfrey Smith also noted that "With respect to drawing of patterns for the callico-printers, they are, for the generality, in imitation of the flowered silk-manufactory, with such variations as may best answer the nature of the different sorts of works. . ." as quoted in Montgomery, 1970:28.

⁷ *An Act to preserve and encourage the Woollen and Silk Manufacture of this Kingdom; and for more effectual employing the Poor by prohibiting the Use and Wear of all printed, painted, stained or dyed calicoes, in Apparel, Houshold-Stuff, Furniture or Otherwise* 1721. In the same term Parliament enacted further protectionist legislation, including *An Act for employing the Manufacturers and encouraging the consumption of Raw Silk and Mohair, by prohibiting the Wearing of Buttons and Button Holes made of cloth, serge or other stuffs* 1721.

⁸ For example Gregory notes that "As early as 1454 Parliament had declared that 'the making of cloth within all parts of the realm is the greatest occupation and living of the poor commons of this land'" (1982: 26).

⁹ For example in 1722 Daniel Defoe maintained that "the broad silk manufacture . . . is an Encrease of this very age. It is a Surprise to the World as well in its Quantity as in its value, and in the admirable Perfection which our people are arrived to in it. . . It is but a few years ago that the making of Broad silks began here in England." as quoted in Thornton, 1965:56.

¹⁰ Montgomery dates the establishment of English schools of design in 1740.

¹¹ A further obvious point to consider is that *The Statute of Anne* concerning "literary property rights" was not enacted until 1709, and even then it is generally accepted that this was enacted for the benefit of printers and not for the benefit of the original author. see Patterson 1968:147

¹² Francis Nixon is reputed to have sold the secret of copperplate printing to a Surrey printer George Armyand, for a very large sum in 1757. (Montgomery, 1970: 29).

¹³ see Hunter, 1987:128-147. Interestingly enough other artistic works in 2D form were not protected until 1862.

¹⁴ The initial patent for roller printing was granted to Thomas Bell in 1783 however it was only useful for cheap monochrome dress prints with small patterns. Despite continuous mechanical improvements it was not until 1810 that it was sufficiently developed to be used for larger patterns required for furnishing fabrics. (see Floud, 1965:5).

¹⁵ For a discussion of this distinction see Sparke, P. (1986) *An Introduction of Design and Culture in the Twentieth Century*, Unwin Hyman, London, 1986 at 38.

¹⁶ For a feminist analysis of this renewed interest in the home see Hayden, D. (1981) *The Grand Domestic Revolution*, MIT Press, Boston and Schwartz Cohen, R. (1983) *More Work for Mothers*, Basic Books, New York.

¹⁷ Harris writes of an example where to save time and money a pattern was not even adapted to fit the new width of the cloth, but rather was simply cut away, destroying the repeat. (1993:230).

¹⁸ Note that Cornish seems to suggest that this cumbersome approach is the result of "caution", rather than appreciating that it logically flows from the rationale of protection against pirating, which is different to protecting a right in the design itself. See Cornish, W 1974:223.

¹⁹ Mr Emerson Tennant told Parliament that "The state of the law, therefore, presented this singular anomaly, at present, that there was one law to regulate patterns upon calico, and another for woollens and silk; and what must appear still more incongruous and absurd, for the same design if woven upon silk there was a protection for twelve months, and if printed upon calico only three. In the meantime the system of registration had been tested and proved; the inconveniences which the calico-printers foresaw had been ascertained, and were in process of correction, and the calico-printers, having thus had their apprehensions and objections removed, came now to accept the terms offered them in 1839. . ." *Parliamentary Debates*, Vol. LXI col 670.

²⁰ For an interesting discussion of this see Forty's discussion of Josiah Wedgwood in "The First Industrial Designers", (1986: 29-41).