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**THE EVOLUTION OF MARKET ENTRY INDUSTRIAL DESIGN PROTECTION: AN INTERNATIONAL COMPARATIVE ANALYSIS**

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Legislation: Vessel Hull Design Protection Act 1998 (United States)

Semiconductor Chip Protection Act 1984 (United States)

Subject: INTELLECTUAL PROPERTY. Other related subjects: Shipping

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Abstract: Steps taken by US to improve industrial design protection in specific industries including boat industry and chip manufacturing compared to UK design right, Community Design proposals and Japanese unfair competition law.

\*618 The recent U.S. enactment of the Vessel Hull Design Protection Act is another step in the trend for improved industrial design protection of products when they are first introduced into the market ("market entry protection"). The goal has been relatively prompt enforcement of a right occurring at the time of market entry. The United States has cautiously added market entry protection for selected products when the economic situation has justified the change.

The United States' slow development of market entry industrial design protection is in contrast with other countries, like France, where copyright protection has served that purpose for many years. [FN1] Some foreign design registration systems have given fairly prompt market entry protection by granting rights back to the filing date. These registration systems had some delays in initiating enforcement owing to the registration procedures. An early example of market entry protection for products was the U.K. design right. [FN2] It protected most appearance features of a product against copying for five years' exclusive right, followed by a requirement to license the design for the following five years. Another example of improved industrial design market entry protection was in Japan, with its new unfair competition law that prevented slavish, almost identical copying of a product for three years from product introduction. [FN3] In a similar manner, a proposed E.U. registration system will give a three-year right to prevent copying product industrial designs without requiring registration. [FN4]

The United States has several laws that may protect an industrial design. [FN5] It is traditional to rely on design patents for product appearance protection. [FN6] A design patent right is granted for 14 years only after examination for novelty, usually taking about two years. [FN7] Up to the time of design patent grant there is no right of enforcement and protection is not retroactive. The U.S. trade mark law, primarily the federal Lanham Act, can provide market entry protection for certain product design features under limited circumstances. [FN8] U.S. trade mark law on product design protection is complex and developing. [FN9] As a final alternative, the U.S. copyright law protects some product designs, but for most products the separability test excludes protection. [FN10] Since the United States joined the Berne Convention, copyright protection of architectural works, including buildings, has been provided. [FN11]

The United States has taken two recent steps in the direction of improved market entry protection of product appearance. This article will analyse these steps, discuss their practical implications, provide an international comparative analysis with similar protection forms and recommend the next step for the United States and for a global approach to market entry design protection.

#### The United States' First Step for Market Entry Protection of Product Designs

The United States' recent, first step for improved market entry design protection was in 1984, when the Semiconductor Chip Protection Act (Chip Act) was \*619 enacted. [FN12] It provided semi-conductor chip manufacturers with the right to prevent copying of a chip design created by a mask work, including purely technical features. In effect this law protected a chip circuit, as represented by the appearance of a circuit layer. [FN13] Under the Chip Act, the right began on commercial introduction of a chip with a mask work design, or registration of the design. A substantially identical copy was needed to infringe this right. Before bringing a suit for infringement an application for registration had to be filed. [FN14] The right was lost if no application for registration was filed within two years from the first commercial introduction of the product with the design. The Copyright Office was given the responsibility to review the chip design registration application for formalities without conducting a substantive review. The statute provided that a protected design had to have originality and not be a common design, essentially creating a low-level novelty requirement similar to U.S. copyright law. [FN15] Slight variations in combination on these common designs were not original. [FN16] It created a low-level skill of the art (obviousness) type standard, [FN17] In essence, the Chip Act has many features that are common with the U.S. copyright law, but it is a separate law. The Chip Act created a relatively simple protection system to prevent copying of original computer-chip circuit designs.

The Chip Act features combined to allow relatively prompt legal action on market entry against infringers who made a substantially identical copy. The fact that there has been only one reported decision involving the Chip Act raised questions on whether this law was effective. In that decision the Federal Circuit, Court of Appeals, upheld the lower court's decision of infringement under the Chip Act, after a detailed review of its legislative history. [FN18] The lack of litigation may be evidence that the Chip Act has served its purpose, forcing competitors to use their own chip design, or make enough modifications in existing designs to avoid infringement.

The basic features of the Chip Act were used in the second recent step for improved U.S. market entry design protection, the enactment of the Vessel Hull Design Protection Act ("Vessel Hull Act").

#### The United States' Second Step for Market Entry Protection of Product Designs

In 1997 the U.S. boat industry asked Congress to help solve a problem with copiers of boat hulls. The existing intellectual property laws were not considered effective to create a fair level of competition. The boat industry had attempted to use special state laws and failed. [FN19] Trade secret law was found useful in certain situations. [FN20] Lawsuits based on unfair competition laws had not been effective. [FN21] The design of a fibreglass boat hull and related components, like the deck and cabin, is expensive, taking many months to create. The hull or other component shapes are created first in the form of a plug. The plug is used to make the master mould. Hulls are produced quickly from this mould. The market problem for new boat designs was that a competitor could buy the new boat and use it as the plug to make a mould of the hull. In this manner a competitor could be on the market with the same design in a few months, without incurring major cost for the hull design.

The boat industry wanted a simple, immediate protection system against copying new boat hull designs. In 1998 the Vessel Hull Act was enacted on a test basis for two years, to see if it would help solve the boat industry's problem. [FN22] It utilised the basic features of the Chip Act, including market entry protection against copying, with a requirement to register within one year of market entry to continue protection for 10 years and to bring an infringement suit. The protection began only when a boat hull was built and ready for use and made public, or introduced in

a working form. The underlining principle was that the product must have been in use or in the marketing stage. There was no protection for merely having drawings of the boat design or a model, or a partially completed boat. The protection term was for a total of 10 years, if registration was applied for within one year of market entry.

In contrast to the Chip Act, the Vessel Hull Act did not protect purely functional features. It required that the protected design must be original, attractive or distinctive and excluded features that were essential technical ones and that were common for that type of product. [FN23] Trivial variations of these common design \*620 features were excluded also. [FN24] The Vessel Hull Act clearly stated that non-essential technical features that were original as well as distinctive or attractive, and not common or trivial variations of common features, could be protected as an integral part of boat hull or deck designs. [FN25] The general test for infringement followed the copyright law approach, with the requirement of showing access to the protected design and that the copy was substantially identical to it.

In essence, the Vessel Hull Act created a protection system similar in many ways to the U.S. copyright law. The test for originality and the requirement for registration before a legal action were two of the common features. Both systems excluded protection of subject-matter needed for general product development. The Chip Act and Vessel Hull Act's common structures and close development with copyright law were due to the earlier general design legislation that served as their model. [FN26]

#### Practical Example of the Vessel Hull Act Use

Some U.S. boat manufacturers were excited about the Vessel Hull Act, but they had a real dilemma, owing to the two-year test period for the Vessel Hull Act. [FN27] Lawsuits cannot be brought on registrations made under this law after the two-year period, which will end on October 27, 2000, unless the law is extended. A joint report from the Copyright Office and the Patent and Trademark Office will be completed during the two-year test period, with a recommendation on whether the law should be continued.

As a practical matter, a boat manufacturer can wait to see if there is an infringement, and register the boat design only if necessary to proceed with a lawsuit. In many cases the alleged infringer may agree to stop manufacturing the copy without the need for bring a suit. The absence of law suits under the Vessel Hull Act during the two-year test period may not be a good indication of whether the new law is effective. As with the Chip Act, the new law could be establishing an accepted fair level of competition. The two-year limit could discourage registrations where no current dispute exists. On the other hand, the best strategy would be to register hull designs that are going to be produced in large quantities. Congress may extend the law and make it retroactive, based on prior registrations.

In practice, an infringement would be measured by whether a copy was made by using a mould of the original hull or deck parts. If a mould was made from a boat hull, for example, the copier would include all design features and there should be original features of a distinctive or attractive nature that were copied, increasing the likelihood of infringement. Moulding techniques allow moulds to be made of parts of moulds taken of other hulls and adding or removing features, thereby putting altered moulded parts into a new hull design. A competitor who makes these changes can come up with a different design that might avoid infringement. The Vessel Hull Act would have accomplished its goal, even if these additional steps were used, as it would deny the easy way to duplicate a new hull design.

#### The Copyright Office Registration Process Rule

The Copyright Office has set up a registration process for the Vessel Hull Act similar to the Chip Act registration now performed in that office. [FN28] While the U.S. copyright registration procedures may be a useful administrative guide, the Vessel Hull Act sets up a new system for product design protection substantially different from

copyright registration for useful articles.

The Copyright Office has published Interim Regulations and registration forms for the Vessel Hull Act designs. [FN29] These forms should be designed so they are easy for the individual boat manufacturers to fill out and should not require legal statements that would limit the design owners' rights. The registration form should not require an applicant to make statements on what is the original or novelty part of design, or analyse the related prior art known to the applicant. A lawyer may be able to word such statements correctly, but a boat designer would not be likely to avoid legal pitfalls. In these respects the application form should be user-friendly and not a legal trap for the user. The Interim Regulations and application can create some problems for applicants. The information requested should be \*621 very general, to avoid any problems. If information is required that might be difficult for a user to present without creating legal issues, the regulations should state that the application information cannot be used in interpreting the scope of protection, leaving it to an appropriate legal proceeding, with the facts developed there, to make that determination. A similar approach of eliminating any legal effect for summarising an invention in an application is used for utility patent abstracts. [FN30] The purpose of this registration process is to make it simple enough for a boat design owner to fill the application and obtain registration for most boat designs. The simplified approach and prompt processing are consistent with procedures under the copyright law, and the main reasons the Copyright Office was chosen to administer the Vessel Hull Act.

The Copyright Office review of a Vessel Hull Act application for registration will be a determination of whether all parts of the application are properly filled out. It will determine whether the application on its face shows a design that may be protected under the Vessel Hull Act. The Copyright Office should not determine originality using the applicants' statements, unless the facts show no basis for protection. Originality and the low level of novelty it requires for protection are difficult lines to draw under the circumstances of a Copyright Office review. Where there is some basis in the application for protection, the registration should be approved and the issue left for court determination, as is the practice for most copyright registration application reviews. In the past, for most items on which copyright protection has been sought, the procedures have worked quite well. Perhaps the procedures used for the examination under copyright law for jewellery and architectural works would be most applicable to the Vessel Hull Act applications. The Chip Act registration procedures should provide useful guidance also. The Vessel Hull Act does provide a standard of distinctive or attractive that gives more flexibility in accepting original designs. One of the Vessel Hull Act's purposes is to prevent copying by moulding, where small visual impressions will be copied that are sufficiently distinctive to be recognised on close inspection by a user. These distinctive features in the overall design shown in the registration should be the basis for protection.

#### International Comparative Analysis of the Vessel Hull Act

As mentioned in the introduction, there is a clear international trend to establish market entry protection against copying product designs. Certain industries have demanded this protection to stop copying that can cause a business to fail. This section will review the laws of several countries and compare them with the Vessel Hull Act approach, illustrating the trend of market entry protection.

Perhaps the greatest progress for market entry product design protection will come from the European Union ("E.U.")-proposed Community Design Regulation that is close to completion. [FN31] In summary, the E.U. Design Regulation will provide protection only against copying for a period of three years from the time a product with the design is made public. [FN32] If longer protection is needed, there is a stage-two procedure to obtain registration for exclusive rights against copying and independent creation. The novelty level requirements differ on the effective date, with the unregistered right based on comparison with what was public before the market entry of the new design in the E.U. region, and the registered right based on what was public before the application filing date. [FN33] There is no need for design registration to enforce the market entry right. A design must be distinctive from

prior designs to be novel, and infringement requires the designs to be substantially identical.

The U.S. Vessel Hull Act has several similar features to the E.U. Design Regulation. For example, the Vessel Hull Act level of protection is the same as the stage-one E.U. Design Regulation, requiring copying for an infringement. These parallel infringement approaches show a general agreement that certain product design features should be protected against copying on market entry, to prevent an unfair business practice.

The interface with design registration protection in the E.U. Design Regulation is quite different from the U.S. Vessel Hull Act approach. The E.U. Design Regulation will provide a reasonable period of three years' protection for short-life designs without registration. It anticipates that longer protection should be by registration and provides an exclusive right like a patent after registration. In contrast, the U.S. Vessel Hull Act requires registration to continue the protection against copying for more than one year. In the United States a design can be protected using a design patent filed within the one-year period after market entry, or earlier under certain circumstances to meet patent law bar requirements. Vessel Hull Act protection will continue after registration until the design patent issues. [FN34] This overlap is very favourable to design owners and it is necessary because of the delays in obtaining grant of design patent protection. [FN35] In this respect the Vessel Hull Act interfaces well with the design patent system. The E.U. Regulation did not need an overlap since relatively prompt registration will automatically convert the copying-only protection to an exclusive-patent type right for a longer period.

\*622 In contrast to the E.U. Design Regulation novelty standard, the Vessel Hull Act applied a copyright-type determination of what subject-matter was protected using an expanded originality standard. The Vessel Hull Act excluded protection of features that were common to that type of product, such as a shape that had set a trend, as evidenced by being used in many products. [FN36] Minor variations of these common features were not protected either. The E.U. system compared any prior design that was public in the E.U. and protected a later design only if it was distinctive from prior designs. The Vessel Hull Act allowed a wider range of similar products to be used than the E.U. system, each product with its protection against copying. This contrast in subject-matter protected reflected the basic differences in the two systems, with the U.S. system applying concepts similar to copyright law, and the E.U. following more of a patent approach. Each of these systems has its advantages and disadvantages. While time will tell which one is more practised, it appears that the Vessel Hull Act's expanded originality test will be quicker to evaluate and require less effort to locate relevant prior designs.

A big difference between the E.U. Design Regulation and the Vessel Hull Act is scope of subject-matter protection. The E.U. Design Regulation has a broad range of product design protection covered, excluding for the present spare parts. [FN37] The United States has chosen for the present to define protected subject-matter narrowly, starting with the computer chip designs in the Chip Act and now vessel hulls and decks in the Vessel Hull Act. The spare parts issue stopped the United States' recent efforts for broader market entry protection. [FN38] Most U.S. attorneys would prefer the E.U. approach to subject-matter. The problem is how to convince Congress that additional design protection is needed for a broad range of products. Overall the E.U. Regulation has a very effective approach to market entry design protection.

The Japanese unfair competition system has its strengths and weaknesses in comparison to the Vessel Hull Act. [FN39] The experience under the amended Japanese unfair competition system has verified that the law is effective. [FN40] While it has a broader scope of subject-matter protection than the Vessel Hull Act, it has a narrow scope of infringement protection, requiring almost an identical copy. This Japanese law addressed the most serious form of copying. The Vessel Hull Act had a substantially identical infringement test that should be more effective than the Japanese Unfair Competition Law in preventing slight differences from avoiding infringement. The U.S. Vessel Hull Act registration requirement is another point of distinction from the Japanese Unfair Competition Law. There is a measure of simplicity in the Japanese unfair competition system, allowing immediate access to a court. The Japan-

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ese system's three-year term should fit most short-life designs, but it lacks the opportunity to extend protection that the Vessel Hull Act has. The Japanese Unfair Competition Law has a creative approach to market entry protection.

The U.K. design right statute, enacted in 1988, was one of the first answers to the need for market entry protection. [FN41] It was created as a substitute for a rather complex copyright law that protected some product designs. The U.K. design right required no registration and protected a broad range of products only against copying, with some limitations on what subject-matter could be covered. The important benefit was it created a level of competition forcing competitors to at least make their products with a different appearance on many features. The five-year design right initial term before a licence of right could be obtained was adequate for many products. The U.K. design registration was available for longer protection, with higher standards, and gave protection also against independent creation. In a historical view, the U.K. design right statute has proved, over a 10-year period, that a non-registration system could function effectively to provide market entry protection. [FN42] This experience had a strong influence on the E.U. plan to incorporate a market entry, simplified system into its Design Regulation, as discussed above. [FN43]

The U.K. design right and the U.S. Vessel Hull Act have several similar structural features that allow these systems to provide effective market entry protection in a \*623 balanced, competitive way. Each system requires originality [FN44] and a protected design must be copied for infringement. [FN45] Protection is available in each system when a product goes on the market. The U.K. Court of Appeal in its first design right case recently analysed the originality provision that excluded commonplace designs. [FN46] The approved test boiled down to a comparison of the later design to see if it was distinctive from earlier designs. It appears that the U.K. courts so far have decided to use the E.U. Design Regulation novelty test, comparing prior designs to see if the later design is distinctive. The U.K. courts may find, after further review, that the system's copyright nature and history dictate that it use an approach essentially like the Vessel Hull Act's expanded originality test. The U.K. design right and Vessel Hull Act differ also on the design features that must be excluded. As a result of the intense debate in the United Kingdom over the protection of spare parts, the design right statute excluded features required to interconnect with the product or to retain an overall design appearance in a product. [FN47]

The U.K. design right has proven to be a workable approach to market entry protection. It has not created a large number of court cases in its 10-year history. Its success should be an encouragement to consider expanding the products protected in the United States using the Vessel Hull Act as a model. In the United States appropriate adjustments will be needed in the product features covered, and the U.K. design right system offers a good example to consider in developing the necessary compromises with affected industries.

## Conclusions

The U.K. Design Right statute, the U.S. Chip Act, the Japanese Unfair Competition Law, the very recently enacted U.S. Vessel Hull Act, and the proposed E.U. Community Design Regulation show the worldwide trend to provide market entry product design protection. While these laws differ in details, they have in common several key features. Protection against copying is available immediately on product market entry, and in most systems no registration requirements exist. In many of these systems a design owner can go directly to court to stop the infringement. While the extent of protection varies, with the Japanese Unfair Competition Law targeting almost identical infringers, the impact centres of these laws are essentially the same. The term of protection varies also, with a three-year limit being most common to protect against copying, and the design registration or patent being the next step for strong and longer protection.

The U.S. steps to provide market entry protection have been very inadequate when compared to the international trend for improved market entry protection. While the Chip Act and the Vessel Hull Act were needed, there are many more products that should receive the same type of protection. Other U.S. laws do not provide prompt, market

entry protection. Now is the time for the U.S. Congress to recognise the worldwide trend to provide design market entry protection. This trend should help persuade Congress to enact limited-term market entry design protection against copying for a wider range of product designs.

On a global level, other countries should consider adding an appropriate market entry design protection system. It should be a topic for discussion at the World Trade Organization level. The United Kingdom, Japan and the United States have systems in operation that offer a choice, and the E.U. Design Regulation proposal is another approach worth serious consideration. Each of these systems has been carefully crafted to support development of new products, while keeping a balance so competition can occur. Encouraging improved industrial design is a way to enhance economic development, to the benefit of developed and developing nations.

While harmonisation of the world's design systems may not be a realistic goal for the near future, it is conceivable that, in general terms, harmonisation of design laws on market entry protection can be achieved. The basic features to adopt would be to prevent copying of original and distinctive designs on market entry. It will establish a fairness standard in competition that many countries have recognised.

FN1. See Alison Firth, "Aspects of Design Protection in Europe" [1993] E.I.P.R. 42 at 45; Herman Cohen Jehoram, "Design Laws in Continental Europe and their Relation to Copyright Law" [1981] E.I.P.R. 235.

FN2. See nn. 41-47 below, and accompanying text.

FN3. See nn. 39-40 below, and accompanying text.

FN4. See nn. 31-33 and 37 below, and accompanying text.

FN5. See William T. Fryer III, "Industrial Design Protection in the United States of America--Present Situation and Plans for Revision" (1988 27 WIPO Industrial Property 115 (the survey in this article of enacted U.S. design protection is generally current; the design protection legislation reviewed in this article was not enacted, but that legislation served as the model for the enacted Chip Act and Vessel Hull Act discussed in this article. The same article was published in (1988) 70 J. Pat. T. M. Office Soc'y 820.

FN6. 35 U.S.C. §§ 1-376 (1999) (U.S. patent law has several specific provisions on design patents: §§ 171-173.) Where not in conflict with these provisions or applicable case law, all other patent law provisions apply to design patents. See William T. Fryer III, "Design Patent System for the Twenty-First Century", (1997) 24 AIPLA Quarterly J. 331 (several design patent system features that can be improved are discussed in this article and statistics are provided on the system's performance).

FN7. 35 U.S.C. § 173 (1999).

FN8. 15 U.S.C. § 1051-1127 (1999) (Lanham Act).

FN9. See, for example, *Thomas & Betts Corp. v. Panduit Corporation* 138 F.3d 277, 46 U.S.P.Q. 2d (BNA) 1026 (7th Cir. 1998) (this case involved trade mark protection for the shape of cable ties; it has been in litigation over five years and a final decision has not been reached yet); *Pebble Beach Co. v. Tour* 155 F.3d 526, 48 U.S.P.Q. (BNA) 1065 (5th Cir. 1998) (the appellant court in this case upheld a decision for trade mark protection of a golf course hole design).

FN10. 17 U.S.C. §§ 101-810, 1001-1010 (1999). Copyright industrial design protection statutory provisions are: "useful article" definition, § 101; and the separability test that determines what features are protected by copyright law, § 113; see Jerome H. Reichman, "Design Protection After the Copyright Act of

1976: A Comparative View of the Emerging Interim Models" (1984) 31 J. Copyright Society of the U.S.A. 267.

FN11. See Steven J. Strauss, "Don't Be Burned by Berne II: Recent Changes to the Copyright Act Regarding Architectural Works" (1991) 73 J. Pat. & T. M. Office Soc'y 993 (this article reviews the extent of copyright protection for architectural works before and after the 1990 amendment that increased architecture protection).

FN12. 17 U.S.C. §§ 901-914 (1999) (Semiconductor Chip Protection Act of 1984).

FN13. *ibid.*, at §§ 901 and 902 (a) (1) (1999).

FN14. *ibid.*, at § 905 (1999).

FN15. 17 U.S.C. § 902 (b) (1999); see n. 5 above, at 125 (the low level novelty analogy was applied in this article).

FN16. *ibid.* at § 902 (b) (2) (1999).

FN17. See n. 5 above, at 125 (the obviousness analogy was applied in this article).

FN18. *Brooktree Corp. v. Advanced Micro Devices, Inc.* 977 F. 2d 1992, 24 U.S.P.Q. 2d (BNA) 1401 (Fed. Cir. 1992).

FN19. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* 489 U.S. 141 (U.S.S.C. 1989). (Florida statute made moulding a vessel hull illegal, without the permission of manufacturer. The U.S. Supreme Court held that the Florida law was pre-empted by the federal patent law.)

FN20. *Irving Reingold v. Stoiftships, Inc.* 126 F. 3d 645, 44 U.S.P.Q. 2d (BNA) 1481 (5th Cir. 1997). (A fiberglass boat mould was constructed over a nine-month period at a cost of \$1 million. It was used by Swiftships under contract. The Circuit Court held the facts presented an issue of whether the Louisiana trade secrets law was violated.)

FN21. *The O'Day Corp. v. Talman Corp.* 136 U.S.P.Q. (BNA) 1 (1st Cir. 1962). (This case involved a suit brought under 5 U.S.C. § 1125 (a), a federal unfair competition law, for copying features of a sailboat. The Circuit Court held that there was no likelihood of confusion as to who was the manufacturer of each boat, since their trade marks were clearly different and displayed. The copied boat features were not protectable under unfair competition law.)

FN22. 17 U.S.C. §§ 1301-1332 (1999) ("Vessel Hull Act") (effective October 28, 1998). A collection of key Vessel Hull Design Protection Act legislative resources with introductory analyses are on Professor Fryer's web site at <http://www.fryer.com/vhdpap.htm>, including the original and revised House Bills, conference report, enacted law text, and House hearing testimony; site was last visited July 1, 1999. The terms "industrial design" and "design" are used hereinafter as interchangeable for product appearance, unless otherwise stated.

FN23. *ibid.*, at §§ 1301 (a) (1), 1301 (b) (1), 1302 and 1309 (f). The term "original" is defined in § 1301 (b) (1) as "a design is 'original' if it is the result of the designer's creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source". The copyright nature of the Vessel Hull Act suggests that independently



created, identical or similar works can co-exist and be protected. The reference in § 1301 (b) (1) to "distinguishable variation" does not create a requirement to distinguish from all prior art designs. It is a criteria for a low-level novelty standard, to prevent use of commonplace and essential technical features for a distinctive appearance, with the excluded subject-matter listed in § 1302 (commonplace, trivial variations on commonplace, and technically essential features are excluded). In the alternative, if an absolute novelty standard is the one to be applied, then at least all prior designs publicly known anywhere in the world would have to be examined to determine that the design for which protection is applied for is distinctive from this prior art. The low-level novelty approach would provide the simpler, more effective right needed for market entry protection, the primary purpose of the Vessel Hull Act.

FN24. *ibid.*, at § 1302 (3) (1999).

FN25. *ibid.*, at § 1303 (1999).

FN26. See n. 5 above and n. 38 below.

FN27. Public Law 105-303, § 505 (Effective Date) (Digital Millennium Copyright Act of 1998). This unique provision stated: "The amendments made by sections 502 and 503 [of the Vessel Hull Act] shall take effect on the date of the enactment of this Act and shall remain in effect until the end of the 2-year period beginning on such date of enactment. No cause of action based on chapter 13 of title 17, Untied States Code, added by this title, may be filed after the end of that 2-year period" [explanation inserted]. This provision was the result of a decision at the House/Senate conference on the legislation, to satisfy that the Senate would have an opportunity to revisit the legislation after a trial period. A report evaluating the two years' experience will be prepared jointly by the Copyright Office and the Patent and Trademark Office.

FN28. 17 U.S.C. § 1331 (1999).

FN29. The Vessel Hull Act Interim Regulations, application forms, and helpful information on completing the form are available on the Copyright Office web site, [Http://www.loc.gov/copyright/vessels](http://www.loc.gov/copyright/vessels); this site was last visited on July 15, 1999. The registration process was initiated on July 1, 1999. It is beyond the scope of this article to review in detail the Interim Regulations and registration forms. Several general comments are provided in this article that should be helpful in finalising the regulations and forms.

FN30. 37 C.F.R. 1.72 (1999). This patent rule addressed a problem essentially the same as the one that would be experienced in preparing the Vessel Hull Act registration application. The rule stated: "The purpose of the abstract is to enable the Patent and Trademark Office and the public generally to determine quickly from a cursory inspection the nature and gist of the technical disclosure. The abstract shall not be used for interpreting the scope of the claims."

FN31. Amended proposal for a Council Regulation on Community Design, published June 21, 1999 ("E.U. Design Regulation"); available on the web site of the European Commission, DG-XV: <http://europa.eu.int/comm/dg15/en/intprop/indprop/design.htm>; web site last visited on July 1, 1999. For background on this proposal, see Herman M. H. Speyart, "The Grand Design: An Update on the E.U. Design Proposal, Following the Adoption of a Common Position on the Directive" [1997] E.I.P.R. 603.

FN32. E.U. Design Regulation, Arts 12 and 20 (2) (1999).

FN33. *ibid.*, at Arts. 5 and 8.

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FN34. Vessel Hull Act § 1329 (1999).

FN35. See n. 6 above, at 338 (appendices with design patent pendency statistics).

FN36. See n. 23 above, and accompanying text.

FN37. E.U. Design Regulation, Art. 10a (1999).

FN38. Background on the U.S. legislative development for broad market entry protection is found in the Industrial Design Protection Symposium publication issue (1990) 19/1 & 2 U. Ball. L. Rev.; articles of special interest on the spare parts topic were: Kenneth Enborg, "Industrial Design Protection in the Automobile Industry" at 227; James F. Fitzpatrick, "Industrial Design Protection and Competition in Automobile Replacement Parts--Back to Monopoly Profits?" at 233; and William Thompson, "Product Protection Under Current and Proposed Design Laws" at 271. A report on the legislative history of U.S. efforts to obtain market entry copying protection is given by David Goldenberg, "The Long and Winding Road, A History of the Fight Over Industrial Design Protection in the United States" (1997-1998) J. Copyright Society of the U.S.A. 212 (this article concluded that the need for improved design protection remained, but the United States continued to undervalue the importance of industrial design).

FN39. The history of Japanese unfair competition protection and the recent changes related to design protection are reviewed in Guntram Rahn and Christopher Heath, "What is Japanese about the Japanese Unfair Competition Act" (1994) 25 I.I.C. 343 at 352.

FN40. Opinion based on conversations with Japanese professors and patent attorneys.

FN41. Copyright, Designs and Patents Act 1988, Pt III §§ 213-264 ("CDPA 1998"). A detailed review of the U.K. design right history can be found in the following sources: Christopher Tootal, *The Law of Industrial Designs, Registered Designs, Copyright and Design Right* (1990), pp. 185-232; and Elizabeth Green, "The New Design Right in the United Kingdom" (1993) 35 *Copyright World* 26. Analysis of recent design right cases are provided in the following articles: Ian Rosenblatt, "Mark Wilkinson Furniture v. Woodcraft Designs (Radcliffe) Ltd" [1998] E.I.P.R. 111; Clive Thorne, "The Containment of Copyright: Pig Fenders and Design Right Protection in the U.K." (1993) 29 *Copyright World* 33, and Brian Turner, "A True Design Right: C & H Engineering v. F. Klucznik & Sons" [1993] E.I.P.R. 24. The Thorne and Turner articles are on the same design right decision, and they agree on two points: the design right law is developing its own approach, and a product that looks different overall will not infringe even if parts of the product look the same.

FN42. For a survey of design right cases decided during this period, see David Barron, "Unregistered Design Right: Ten years on" (June/July 1999) *Copyright World* 27.

FN43. See nn. 31-33 and 37 above, and accompanying text.

FN44. CDPA 1998 s. 213 (1) "Design right is a property right which subsists in accordance with this Part in an original design."; s. 213 (4) "A design is not 'original' for the purposes of this Part if it is commonplace in the design field in question at the time of its creation"; see n. 23 above on the Vessel Hull Act originality requirements.

FN45. CDPA 1988, ss. 226 (1) and 226 (2); Vessel Hull Act § 1309 (f).

FN46. See Nicholas Caddick and Jonathan Radcliffe, "When is a Design Commonplace?" [1999] E.I.P.R.

264.

FN47. CDPA 1988 s. 213 (3).

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