

**DESIGN PROTECTION IN PRACTICE
A COMPARATIVE ANALYSIS**

BY

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As long as the manufacture of products was carried out by hand it was about as costly to produce a copy as an original. In industrial production, on the other hand, where there are no originals, the design of an object is often of paramount commercial interest. Also increasing affluence has made more people interested not only in the functional qualities of an object but also in its aesthetic appeal. Imitation of industrial design has subsequently become an economic as well as a legal problem.

This paper is centred around problems arising in the protection of such industrial design, often referred to by jurists as “applied art” and by others as “the real art of the twentieth century”.¹ It is design of, broadly speaking, aesthetic character, design which can be said to be vital to the purchaser and thereby an important element in competition. Examples of designed products are glassware, ceramic ware, cutlery, furniture, wallpaper, textiles, fashion, jewelry, metal works, artistic typography and books. Boats, domestic appliances and toys can also be included in the modern concept of “applied art”, but a strict delineation based on kinds of products is not feasible.

The protection of industrial designs against imitations cannot be regarded as a uniform issue involving only one kind of legal protection. Industrial designs involve issues concerning copyright law as well as registered designs law. Furthermore, certain aspects of competition law and trademark law must also be considered.

In this paper a presentation will be offered of the legal protection of industrial design in the Nordic countries on a comparative basis. The presentation will be concerned with how the various aspects of design protection have been treated in the various Nordic countries.

Four of the Nordic countries, Denmark, Finland, Norway and Sweden, have cooperated and have adopted more or less the same statutory language in the fields of copyright, registered designs and trademarks.² Correspondence between laws as well as between *travaux préparatoires* (e.g. committee reports, explanatory notes and government bills presented to their respective parliaments, which in the Nordic countries are regarded as important sources for the interpretation of Acts) does not, however, necessarily mean that case law will

¹ See J. Lahore, in 20 *CML Rev* 1983, pp. 23 ff., espec. pp. 241 ff.

² Iceland is not dealt with here, as the country did not participate in the unified legislation, but Icelandic law is normally close to Danish.

develop along similar lines in each of these four countries. In a border area like design protection, where adequate and modern protection is basically lacking, fairly small differences in national attitudes can tip the scale.³ This makes a comparison most interesting. But the Nordic legislative committees have not succeeded in working out unified laws governing unfair competition, which blurs the picture somewhat when comparing design protection as a whole.

1. COPYRIGHT PROTECTION

In the Nordic countries “applied art” is expressly protected under the same conditions as other works of art.⁴ In practice, however, it is more of an exception that products of industrial design are found to correspond to a “work of art” in the sense used by the Nordic Copyright Acts of 1960–61, while, at the same time, quite simple texts, drawings and music are normally protected. The reason is, at least partly, the existence of the special Registered Designs Acts of 1970–71, intended for the protection of industrial designs.⁵ There has also been a traditional resistance against regarding industrial designs as “artistic”.

1.1 *The Historical Background*

The question of copyright protection for applied art arose in legal discussions in the early 20th century. In 1914, a *Swedish* proposal was made in order to provide works of artistic craftsmanship with the same protection as that given to other works of art.⁶ Craftsmanship could be regarded as being of cultural interest, and the creators were often among the best artists. In parliament, however, there were divergent views on the subject, and, as a result, works of artistic craftsmanship were not protected under the Act on Works of Art and Photographic Pictures, enacted in 1919. After initiatives by the interested parties a new proposal was adopted, according to which works of artistic craftsmanship (“konsthantverk och konstindustri”) would be protected under the Act. This new provision came into force in 1926.⁷

³ For a more detailed presentation and additional references, see M. Levin, *Formskydd*, Stockholm 1984, chapters 10–12.

⁴ Sec. 1. (Sections refer to Copyrights Acts—Denmark: *Lov om ophavsretten til litterære og kunstneriske værker*, 31.5.1961; Finland: *Upphovsrättslag*, 8.7.1961; Norway: *Lov om opphavsrett til åndsverk m.v.*, 12.5.1961; Sweden: *Lag om upphovsrätt till litterära och konstnärliga verk*, 20.12.1960 (SFS 729).)

⁵ In Denmark: *Lov om mønstre*, 27.5.1970; Finland: *Lag om mönsterrätt*, 12.3.1971; Norway: *Lov om mønster*, 29.5.1970; Sweden: *Mönsterskyddslag*, 29.6.1970 (SFS 485).

⁶ *Förslag till lag om rätt till litterära och musikaliska verk, lag om rätt till verk av bildande konst samt lag om rätt till fotografiska bilder, avgivna den 28 juli 1914 av därtill inom Kungl. Justitiedepartementet förordnade sakkunniga*, Stockholm 1914, pp. 160 ff.

⁷ Act 31.3.1926; *prop.* 1926: 2, pp. 19 ff.

However, the period of protection for works of applied art was not, as for other works, thirty years *post mortem auctoris*. It was limited to ten years from the time the work had been made public, and ten years after the year of the author's death for works not made public. Clothing, as well as the materials for making such products, were excluded from protection for the reason that these industries were dependent on foreign models and because of fashion changes in the leading countries. (The exception was not abolished until the new Swedish Copyright Act of 1960.)⁸

In the previous copyright acts in force in *Denmark, Finland and Norway* the period of protection for applied art was fifty years *post mortem auctoris*, i.e. the same as for other works of art. Finnish and Norwegian courts have always been very restrictive in admitting copyright protection for applied art. The same applied to Denmark before the new Copyright Act of 1960.

It seems that it was particularly the fact that applied art was *useful* as well as aesthetic and ornamental, which created doubts as to whether applied art should be protectable or not. The idea that useful is beautiful had not yet been accepted. But even for those who claimed that copyright protection should be reserved for artistic works in the traditional sense, i.e. works of a purely decorative kind, copyright protection for applied art could not have been revolutionary. At that time industrial design mainly comprised the superficial decoration of more exclusive items, such as glassware, china and furniture.

1.1.1 Denmark

In Denmark, applied art protection under the Copyright Act of 1904 was introduced in 1908, after a well-known blue-white china design ("Muselmalet") had been denied protection in a Supreme Court decision of 1907.⁹ But even after 1908, copyright protection was denied when functionality and aestheticism were integrated in a product design. Cases concerning lamps,¹⁰ a bread knife¹¹ and the well-known *Mart Stam* chair¹² are examples of this restrictive attitude.

1.1.2 Finland

In the Finnish Copyright Act of 1927 works of artistic craftsmanship and art industry were included. The legislative committee said that it was important to

⁸ *Prop.* 1960: 17, pp. 43, 50.

⁹ 1907 UfR 619 H; cf. 1926 UfR 251.

¹⁰ 1931 UfR 376 ØL.

¹¹ 1935 UfR 692, 699 H; cf. RG, *GRUR* 1932, p. 892—*Stahlrohrstuhl*, the same chair was protected by copyright in Germany.

¹² 1956 UfR 237 H.

state the social importance of artistic design and that designers had the same right as independent artists not to be robbed of the fruits of their labour.¹³

1.1.3 Norway

Whether applied art protection existed in Norway before the Copyright Act of 1930 is doubtful. There, “applied art” is mentioned as an example of copyrightable works. Nevertheless, the Norwegian attitude was that applied art should rather be protected by the Design Act instead, and, in practice, the mention of applied art in the Copyright Act did not make much difference. In Norway, overlap of design and copyright protection was not permitted before 1970.¹⁴

1.1.4 Sweden

The breakthrough for applied art protection in Sweden came in 1931 when the Supreme Court decided that some engraved Orrefors drinking-glasses were protected as works of artistic craftsmanship.¹⁵ But other decisions from this period show that the courts had difficulty in accepting the modern and functionally directed applied art works as protectable under copyright law. For example, according to a Supreme Court decision of 1935 the *Mart Stam* chair was denied copyright protection.¹⁶

Over the years copyright protection was admitted more frequently—and more frequently than in the neighbouring countries—until 1970. The Supreme Court held that a modern chair,¹⁷ a plane asymmetrical mirror¹⁸ and a functional bookcase called *String*¹⁹ were protected. This more generous attitude in Sweden was, however, mainly the result of the lack of general design protection. If at least some applied art could not be protected by copyright, it would be totally unprotected. In addition to this the copyright protection period for applied art, as mentioned, was only ten years, and the possible negative effects were not regarded as too damaging.

1.2 “Work Level”

The Nordic Copyright Acts of 1960-61 provide, without the necessity of any formalities, automatic protection valid from the creation of the work to fifty

¹³ *Lagberedningens förslag till upphovsmannarätt*, Helsinki 1920, pp. 52 ff.

¹⁴ See *Innst.* 1967, pp. 36 ff.

¹⁵ 1931 NJA 506.

¹⁶ 1935 NJA 712; cf. also *supra* note 11.

¹⁷ 1958 NJA 58.

¹⁸ 1965 NJA 532.

¹⁹ 1962 NJA 750.

years after the year in which the author died. The protection provided is against the copying and exploitation of “works”. A “work” within the meaning of these Acts requires a certain “work level”, which according to the *travaux préparatoires* means a certain expression of individuality and originality in relation to other works of the same kind.²⁰

First, this includes a requirement of subjective novelty; a work must be executed independently by the author himself, and not be a mere copy. In addition, a demand is placed on individuality. The author’s personality should be felt, which is not the same as being recognizable. The latter only indicates a manifestation of a certain style or manner, which of course is not protectable. The “work level” requirement is often referred to as the criterion of the *absence of double creation*. A work must be so individual that the probability of two persons arriving at the same result is virtually excluded.²¹

It is important to observe that the Danish as well as the Swedish *travaux préparatoires* stress that the “work level” has nothing to do with quality.²² “Good” or “bad” art is irrelevant for copyright protection purposes in these countries. The Finnish and the Norwegian *travaux préparatoires* are not as clear on this point, and a quality decision is not excluded.

1.3 Protection of Designs under the 1960–61 Copyright Acts

Except for in Denmark, court decisions concerning copyright protection for applied art in the Nordic countries are relatively few. In neither Norway, nor Sweden are there any reported cases from the Supreme Courts after 1970, when the new rules of applied art protection came into force in these countries. Cases in Finland are also few. But in Denmark, Finland and Norway decisions before 1970 are also relevant, as the fifty-year protection *post mortem auctoris* already existed. This enlarges the number of relevant cases that can be decisive, except for changes in opinions of what is “a work of art” over a period of time.²³

The situation in Sweden is different. Case law before 1970 is expressly made irrelevant. According to the *travaux préparatoires*, the “work level” after 1970 for

²⁰ See *prop.* 1960: 17, pp. 42, 379; *SOU* 1956: 25, pp. 66 f. (Sweden); *Forslag til lov om ophavsretten*, Folketinget 1959–60, p. 14; *Udkast til lov om ophavsretten*, Undervisningsministeriets kom. 1951, p. 92 (Denmark); cf. the notion “work level” (*verkshöjd*) with the German *Werkshöhe*. In Sweden, the notion was presented by Professor S. Ljungman in *Nordisk gjenklang* 1969, pp. 179 ff. (= *NIR* 1970, pp. 21 ff.).

²¹ See S. Ljungman, *op.cit.*, p. 190.

²² *Forslag til lov om ophavsretten*, Folketinget 1959–60, p. 14; *prop.* 1969: 17, p. 49.

²³ See concerning continuity, G. Karnell, *Rätten till programinnehållet i TV*, Nyköping 1970, pp. 70, 72.

applied art should be substantially raised compared to that required for the earlier ten-year protection. And the three previous Supreme Court decisions mentioned earlier were held as examples of what was no longer a sufficient creative expression.²⁴

1.3.1 Denmark

The difference between Danish case law and that of the other Nordic countries is not solely the number of cases. The scope of Danish copyright protection for applied art also seems broader; its requirements resemble those for the ten-year protection provided in Sweden before 1970. Today it is said that the requirement of “work level” in Denmark is “rather high”. In practice, there seems to be a stress on “rather”, at least compared with the other Nordic countries. But applied art does not always receive the same scope of protection as that provided to other protected works.²⁵

It has even been said that the scope of protection does not cover much more than an identical imitation. Also, if this is the case, Danish case law shows that a rather narrow scope of protection can be valuable for someone whose work is copied, especially as copyright protection is automatic and without fees.

In many Danish cases the scope of protection has at least encompassed pure copies. There are, however, some exceptions where the scope of protection has not been sufficient. One example is a foot-formed shoe, where the possibilities of variation were obviously limited. As the defendant’s product was not identical with the plaintiff’s in this case, the court found no infringement.²⁶

In a case concerning a copied glassware set the court decided that the set was protected under copyright law, but that there was no infringement, as the defendant’s copies were not identical. The difference between each glass was enough to avoid infringing the originals. But the wilful imitation was obvious; the defendant was found to have committed an act of unfair competition. The imitation was systematically made, and there was a risk of confusion of origin.²⁷

Normally, risk of confusion is regarded as an indication of infringement of copyright according to Danish case law, and in most cases, the alleged copies have been very close or even identical. One example was a plastic mould of a wooden dinghy, in which the very minor changes did not really change the impression of the boat as a whole.²⁸ Another case concerned a mould of a

²⁴ Mentioned *supra* notes 17–19.

²⁵ See W. Weincke, *Ophavsrett*, Copenhagen 1974, pp. 43 ff.

²⁶ 1979 UfR 844 SH.

²⁷ 1982 UfR 987 SH.

²⁸ 1978 UfR 944 SH, *NIR* 1982, p. 120.

loket.²⁹ Great similarity also occurred in a case concerning the imitation of some exclusive chairs made of leather and steel, which expert opinion submitted by the Designers Committee against Plagiarism called “rude and unfair”.³⁰

There was not such great similarity in a Supreme Court case concerning a coffee-mill for shops, and the decision was not unanimous. Nevertheless, there was no doubt that there was an imitation. The design and also the name of the coffee-mill were similar. Disagreement did, however, centre around which law was applicable on the imitation. While the majority of the Supreme Court found the imitation to be a copyright infringement, the minority held that the imitation constituted unfair competition.³¹

1.3.1.1 *Novelty*. According to the Danish courts, lack of novelty is often pointed out as the main reason for not granting copyright protection to applied art. The novelty requirement in these cases is not limited to a *subjective*, i.e. unqualified, novelty (not an imitation). The courts also seem to require *objective*, i.e. qualified, novelty in order to accept the appropriate “work level”.

Lack of novelty was the reason for not giving copyright protection in two cases involving fabrics for furniture,³² in one case concerning a set of lamps and in another relating to an alleged imitation of library bookcases.³³ A similar result was reached in a case involving a moulded copy of a sailing boat. There the court held that the original did not differ essentially from previously known types of boats.³⁴ But it should be observed that the novelty requirement in Danish copyright decisions does not seem to be too far-reaching.

1.3.2 Finland

Finnish case law also shows that the courts, in practice, speak of objective novelty.³⁵ But the novelty requirement in Finland seems to be higher than in Denmark. As already mentioned, the Finnish courts have always been very restrictive with copyright protection except for some jewelry³⁶ and for a rug of the “rya” type.³⁷ But, contrary to the expert opinion of the art industry

²⁹ 1965 SHT 63, *NIR* 1969, p. 281.

³⁰ VL, *NIR* 1979, p. 347.

³¹ 1969 UfR 851 H, *NIR* 1970, p. 198.

³² 1965 UfR 137, VL, *NIR* 1966, p. 130, the imitations were, however, found illegal because of unfair competition.

³³ 1968 UfR 189 ØL, *NIR* 1969, p. 94, and 1968 UfR 576 H, *NIR* 1969, p. 182.

³⁴ 1979 UfR 588 SH, *NIR* 1982, p. 111; the imitation was found illegal because of unfair competition.

³⁵ Cf. also KB 1953: 5, p. 45.

³⁶ HD 1962 II 60 and HD 1980 II 3, T.J. Kemppinen, pp. 199 and 218.

³⁷ HD 1971 II 4, *NIR* 1971, p. 196.

organization, Ornamo,³⁸ a three-piece suite was denied copyright, as also were decorative electrical fittings, made by a well-known artist.³⁹

1.3.2.1 *Quality Judgment.* The court's decisions in the two latter cases are based on lack of novelty. But they have also been interpreted as subjective quality judgments, which might be a consequence of the statement in the *travaux préparatoires* that the copyright is only available for such applied art as appeals to the sense of beauty.⁴⁰ The essential thrust of Finnish Supreme Court decisions is that functionality, in practice, has been the main reason for denying copyright protection.

The three-piece suite and the electrical fittings are primarily useful, while the jewelry and the rug can be regarded as almost purely decorative, and so the impact of the latter on the sense of beauty is more apparent. Of course, where the latter type of work is concerned, the designer has greater freedom of variation, which is why the first explanation can be regarded as a function of the second and vice versa.

1.3.3 Norway

Norwegian case law is even more restrictive than Finnish when it comes to copyright protection of applied art. There is still much of the expression from the 1930s that the protected "work" should be something "intellectually valuable". And case law has hardly changed since that time, except that it has probably become more difficult to obtain a copyright protection since the enactment of the Design Act of 1970.⁴¹

Norwegian case law is not only restrictive in granting protection, its scope of protection must also be regarded as extremely limited. This is well illustrated by a Supreme Court case of 1962 concerning an imitation of a piece of furniture created by the well-known Danish designer Hans Wegener.⁴² Copying was apparent. The divided Court gave copyright protection to the piece, but the obvious imitation was held not to infringe the copyright because the copy had been made in a non-artistic manner.

From the decision it can be seen that copyright protection covers only the artistic creation as such, considered apart from the useful product. The Court has consequently ignored the fact that a work might also need protection

³⁸ HD 1975 II 25, *NIR* 1976, p. 302, T.J. Kemppinen, p. 217; cf. *Svenska Slöjdföreningens Opinionsnämnd* no. 108.

³⁹ HD 1976 II 48, T.J. Kemppinen, p. 218.

⁴⁰ Cf. also B. Godenhjelm, in *NIR* 1981, pp. 287 ff.

⁴¹ See *Innst.* 1967, pp. 37 ff.

⁴² 1962 NRt 974, *NIR* 1963, p. 204.

against vulgarization. Even if the copy cannot substitute the original, the author should be entitled to protection of his *droit moral*. From an economic standpoint, it can further be argued that such imitations destroy the value of the original.⁴³ In this case, however, the imitation was regarded as unfair competition.

Other examples of Norwegian case law may be given, such as a table which the court found to have some aesthetic value, but to lack the qualified originality required for copyright protection;⁴⁴ fabrics; decorative rugs, where the court stated a need for more than just good taste for there to be an “intellectual work”;⁴⁵ a case involving a special type of pullover (“skigense”) which seems to indicate that fashion products cannot be regarded as copyrightable at all;⁴⁶ in a recent case about the so-called Cabbage Patch Kids, the court denied copyright because these dolls did not represent a new concept of dolls.⁴⁷

An interesting comparison can be made with a case concerning ornamental pieces of metal work used for such things as keyholes, where copyright was upheld and the imitations were regarded as infringements.⁴⁸ The pieces of metal work were said to represent such an original and personal creation that they differed from earlier types. It is noteworthy that though they were useful the designs were governed by the function only to a minor extent.

Figures of trolls have also been protected under copyright law.⁴⁹ But in this case, the court used an analysis similar to the one in the Wegener furniture case mentioned above. The difference in artistic expression was considered to be substantial, and this, in combination with some small differences in the products of the defendant, resulted in the ruling: no infringement. The court, however, found that the defendant had committed an act of unfair competition.

1.3.3.1 Quality Judgment. In conclusion, the Norwegian cases, to a greater extent even than the Finnish, indicate that functionality is most decisive for copyright protection, and that the judgments are based on an assessment of artistic quality in cases concerning copyright protection for applied art. As mentioned above, such an assessment is, however, not contrary to the Norwegian *travaux préparatoires*.⁵⁰

Another observation is that the object of applied art as such is not protected

⁴³ M. Koktvedgaard, *Immaterialretspositioner*, Copenhagen 1965, pp. 260, 394.

⁴⁴ Oslo Byrett, *RtG* 1957, p. 432, *NIR* 1958, p. 125.

⁴⁵ Oslo Byrett, *NIR* 1961, p. 196, *RtG* 1962, p. 106, and *NIR* 1967, p. 410.

⁴⁶ Jæren herredsrett, *NIR* 1957, p. 225.

⁴⁷ Drammen namsrett 20.2.1984.

⁴⁸ Oslo Byrett, *NIR* 1968, p. 227.

⁴⁹ Oslo Byrett, *NIR* 1968, p. 323.

⁵⁰ See *Innst. O. XI* 1960.61, pp. 10 ff.

by copyright. It is only the author's artistic creation separated from its useful elements that is protected. This view results in the elimination of the practical value of copyright protection, even in the few cases where such protection has been granted. As the imitations normally are vulgarizations of the originals these do not infringe the copyright.

The Norwegian attitude to copyright for applied art does not, however, mean that all authors who have not a registered design are unprotected against imitators. In those cases where the entitlement to copyright protection has been upheld, the imitators have, even if they have not infringed upon the copyright, been held to violate the law of unfair competition. The existence of copyright protection seems to have some influence upon the finding of unfair competition. At least it is an indication of a sufficient distinctiveness or originality that justifies invoking the unfair competition law.⁵¹

1.3.4 Sweden

As no cases concerning applied art protection exist from higher courts since 1970, when the higher "work level" was introduced, it is difficult to tell where and how the lowest level of copyrightable works is determined in practice.⁵² The *travaux préparatoires* have, however, recommended that the judgment should be based primarily on what art and design specialists consider artistic.⁵³ These specialists are represented by the Swedish Board of Design (*Svensk Forms Opinionsnämnd*), which was formed in 1926.

According to previous case law the view of what is protected by copyright and what is an infringement of a work has been the same as the view held by the Board. In fact, the courts have never ruled against the Board, and there is not much reason to believe that the situation will change in the future. Its opinions might therefore be of some interest.

The Board has decided a little over forty cases since 1970. In only seven of these has copyright protection been suggested: a steel chair,⁵⁴ three textile patterns,⁵⁵ four lace works,⁵⁶ a carved candle stick,⁵⁷ dolls,⁵⁸ a telephone⁵⁹

⁵¹ For an example, see the cases mentioned *supra* notes 42 and 49.

⁵² Two appeal court decisions concern, however, the temporary regulation 1970–80: Svea Hovrätt, *NIR* 1976, p. 236, and Göta Hovrätt 27.4.1978, DT 55/78, T 232/77; in the latter case, the Appeal Court did not mention in the decision that the protection was only to be enjoyed until 1980.

⁵³ *Prop.* 1969: 168, p. 136.

⁵⁴ Opinion nos. 95, 96.

⁵⁵ Opinion no. 117.

⁵⁶ Opinion no. 126.

⁵⁷ Opinion no. 132.

⁵⁸ Opinion no. 133.

⁵⁹ Opinion no. 134.

and metal candle holders.^{59a} This means an opinion in favour of copyright in fewer than 15 per cent of the cases. It is interesting to compare these opinions with the situation before 1970 when about 75 per cent were in favour of copyright protection.

Today the Board expressly uses the criterion of “absence of double creation” mentioned above concerning the overall appearance. This applies at least to three-dimensional objects. The criterion can be regarded as a requirement of a qualified objective novelty. In relation to two-dimensional objects, however, the opinions establish a mere subjective novelty requirement. A possible explanation for this is that the scope for free variation is proportionally much greater in two-dimensional works than it is in three-dimensional ones.

It is also noteworthy that the Board previously used terminology which suggested that it judged the artistic quality.⁶⁰ But this is no longer the case since the change of chairmanship in 1984. This also seems to indicate that the previous very restrictive attitude towards the copyright protection of applied art after 1970 has been relaxed somewhat. In three out of seven opinions (1984–86) copyright has been upheld.

1.3.5 A Comparison

No broad conclusions concerning similarities and differences between the Nordic countries as regards the likelihood of being granted copyright protection for applied art can be drawn from the rather few court cases that exist. But there are, without any doubt, clear differences between the countries, although the laws are more or less the same and despite the cooperative work of the legislative committees. Also worth noting in relation to design protection as a whole is that laws, other than copyright laws, can be used to achieve the same material result. This is especially the case where the *Norwegian* unfair competition law is concerned.

1.3.5.1 The View of Copyright. Differences in case law appear to be based primarily upon divergent views of copyright protection. In *Denmark*, it seems that copyright protection of applied art is regarded as an economically important instrument in relation to market competition. Legal scholars have probably had considerable influence on this attitude. Many such prominent scholars have claimed that the protection of intellectual property can in practice be regarded as a part of competition law.⁶¹

^{59a} Opinion no. 138.

⁶⁰ Also criticized by B. Godenhjelm, *op.cit.*, pp. 287 ff.

⁶¹ See J. Kobbernagel, *Konkurrencens retslige regulering* I-II, Copenhagen 1957 and 1961; M. Koktvedgaard, *Konkurrenceprægede immaterialretspositioner*, Copenhagen 1965.

This attitude is far from the *Norwegian* intellectualized view of copyright protection of applied art. The explanation is probably that Norwegian copyright, as opposed to Danish, has in this respect been developed neither in theory nor in practice since the 1930s.⁶² The *Finnish* and *Swedish* attitudes to copyright protection of applied art lie somewhat between these two, but are closer to the Norwegian view than to the Danish.

1.3.5.2 *Quality Judgments in Practice*. The possibilities of being granted protection of designs under copyright law—or rather the lack of such possibilities—would seem to be more or less the same in *Finland*, *Norway* and *Sweden*, even if Norway is still more restrictive in granting copyright protection than the other two countries. But there is a basic difference in attitude.

As mentioned above, the *Norwegian travaux préparatoires* do not expressly deny a quality judgment of applied art. There is also a certain support for such an appraisal in the *Finnish* explanations, and the Finnish Supreme Court has probably been guided by quality aspects in applied art cases. The *Swedish travaux préparatoires*, on the contrary, express the view that appraisal of artistic quality is irrelevant to the granting of copyright protection.⁶³

As a result, in *Sweden* the theoretically objective criterion of “absence of double creation” has been recommended as a guideline for the copyright protection of applied art. In practice, however, the Swedish view of what is applied art protected by copyright law becomes a quality judgment, as this decision, according to the *travaux préparatoires*, is to be made by art and design specialists. Due to the lack of court decisions, the rulings of the Swedish Design Board have been decisive on the question of what is protected by copyright and what is not. The situation, in practice, in *Finland*, *Norway* and *Sweden* can thus best be described by the following conclusion. Only such applied art as can properly be called “pure art” is protected by copyright laws, even if during the last two years there has been a tendency to change this approach in the Swedish Design Board.

1.3.5.3 *Novelty*. Although originality, individuality and personality—and not novelty—are to be the criterion for copyright, a common feature in *Danish*, *Finnish* and *Swedish* case law is that “work level” is determined as a function of a more or less qualified novelty. In Denmark, however, this novelty requirement does not seem to be too demanding.

In *Finland* and in *Sweden*, the novelty requirement appears to be proportionally related to the practical scope for free variation. With little room for free

⁶² See R. Knoph, *Åndsretten*, Oslo 1936, who, however, for his time, had a very radical view.

⁶³ *Supra* under 1.2.

creation, because of the need to satisfy functional aspects, the courts seem to apply a very strict novelty requirement. The work has to be "unique" so as not to create any obstacles for competitors. The need for this can, however, be questioned. Copyright only protects against copying and does not purport to grant a sole right in the sense of a monopoly.⁶⁴

In *Norway* the attitude towards the protection of applied art under copyright law has constantly been very restrictive. In order to regard a work as intellectual ("åndsverk"), there seems to exist a requirement for a new type of work. But not even objective novelty has always been sufficient in order to protect an item of applied art by copyright. Norwegian practice shows that some works are excluded because they cannot by their nature be regarded as intellectual; fashion is an example.⁶⁵ In Norway, it is only the aesthetic qualities that are protected by copyright, not the functional elements. Only a conceptually distinct work of art is, in practice, protected.⁶⁶ This attitude can perhaps be explained by the fact that the partial overlap of copyright and design protection has traditionally not been accepted in Norway.

1.3.5.4 *The Criterion of "Absence of Double Creation"*. So far as copyright protection of applied art in *Sweden* is concerned, the recommended criterion of "absence of double creation" can be regarded as a complication.⁶⁷ In relation to applied art, this guideline results in practice in an exclusion of almost all three dimensional works. As these are functional as well as aesthetically directed the possibility of a double creation is normally presumed. An exception might be odd and peculiar works, and perhaps also a few products appreciated as "very good" design, although the latter should be totally irrelevant as regards copyright protection.

In *Denmark*, legal doctrine also states that for copyright protection, the risk of double creation should be more or less excluded. But the guideline is more narrowly applied there than in Sweden. Details count. So the criterion really becomes a judgment of the possibilities of free variation, and of how well these have been used. Originality and individuality are considered within the limited field as a result of the fact that also functional needs have to be satisfied.⁶⁸

Such a view implies that the question of what constitutes a work of art is not merely determined by the overall impression of a particular creation. And as

⁶⁴ Cf. Registered Designs and Patents.

⁶⁵ *Supra* note 46.

⁶⁶ Cf. also the Italian criterion *scindibilità*; a similar view is expressed in the American case *Mazer v. Stein*, 347 US 201 (1954).

⁶⁷ Cf. also B. Godenhjelm, *op.cit.*, pp. 285 ff.; M. Koktvedgaard, *op.cit.*, pp. 129, 354 ff., 379 ff.

⁶⁸ Cf. also P. Krüger Andersen, *Markedsføringsret*, Copenhagen 1978, p. 285; W. Weincke, *op.cit.*, pp. 41 ff.; M. Koktvedgaard, *op.cit.*, pp. 229 ff., 254 ff., 264, 379.

details also count, it is an infringement to have copied a work especially with respect to what is free for variation. But the scope of protection is of course dependent on the individuality expressed in the work.

1.4 *Conclusions on Copyright Protection*

The above seems to indicate that the acceptance of copyright protection for applied art on the same conditions as for other works of art has been more of a gesture than a reality. Applied art is only formally equal in relation to copyright protection. This is the present state of affairs in the four Nordic countries. In practice the "work level" of applied art is judged on the basis of a more qualified standard than is the case with other "works" within the meaning of the laws. This view has also been criticized.⁶⁹

But it is not impossible that the aim has always been to exclude most applied art products from copyright protection. The official view has probably been that copyright protection of applied art was no longer needed after the enactment of a new design protection in the Nordic countries. At least this seems to have been the predominant attitude in *Finland, Norway and Sweden*. According to a conservative view articles designed for everyday use have nothing to do with copyright protection.⁷⁰

It has also been stated that behind the restrictive view on copyright protection for applied art a legal political standpoint can be found. Idea, motive or content can never be given copyright protection *per se*. As with style, manner and other "technical" elements these have to be free for everyone's use. But in applied art such free elements are often integrated with the aesthetic ones, and functionality is more difficult to separate from the total artistic impression. The result is a resistance to granting a sole right to such works, especially as the economic importance of them is comparatively high.⁷¹

Such viewpoints have often been strongly emphasized in the Nordic discussion. They also seem to have overshadowed the question of the possible economic and cultural importance of granting original works of applied art a comparatively easily acquired and automatic protection against imitations. The economic importance of making copyright protection available could also support the idea of not raising the "work level" too high.⁷² The only Nordic country holding this view is *Denmark*.

⁶⁹ See above note 67.

⁷⁰ See E. Hedfeldt, in *NIR* 1960, pp. 189 ff.

⁷¹ See S. Strömholm, *Upphovsrättens verksbegrepp*, Stockholm 1970, pp. 98 f.; cf. also M. Koktved-gaard, *op.cit.*, pp. 205, 255 ff.

⁷² Cf. also G. Karnell, *op.cit.*, pp. 109 ff., also cited by B. Godenhjelm, *op.cit.*, p. 295.

2. REGISTERED DESIGNS

The uniform Nordic design laws have been regarded as unique, because they expressly protect both ornamental and functional designs.⁷³ The term “design”, according to sec. 1 in these Acts, means “the prototype embodying the appearance of an article, or the prototype of an ornament”.⁷⁴ In practice the equal protection might not be unique when compared with some other Western systems, like the Benelux and the French systems.⁷⁵ But it still indicates a difference in attitude, and awareness of the protection of functional designs has been decisive for the creation of the Nordic system and its limits.

The Design Protection Acts of 1970-71 represented a major departure from previous systems. In *Denmark*, there once existed an Act which, in practice, was applied to protect just ornamental designs. In *Finland* there was no design protection at all. In *Norway*, the Design Act protected ornamental as well as functional designs. *Sweden* had a design protection just for certain ornamental prototypes of the metal industry.

2.1 Novelty

The legislators of 1970-71 decided to have novelty and not originality as the only prerequisite for protection. But the novelty requirement is absolute and objective in relation to everything that has been known prior to the filing date of the application. In addition there is a subjective novelty requirement, as the design must be a personal and independent work, which could, however, even be created virtually by accident.⁷⁶

As functional designs were also to be protected by the law, the Nordic Design Committees concluded that an objective and absolute novelty requirement was inevitable.⁷⁷ The alternative might have been a dual system, one for ornamental designs and one for functional. But this would have created difficulties in judging cases on the borderline between ornamental and func-

⁷³ C. Ugglä, in *Wipo Studies*, June 1977, p. 3; cf. M. Levin, in [1984] 12 *EIPR*, pp. 340 ff.

⁷⁴ The Nordic protection of functional designs must not be confused with the often used German notion *Gebrauchsmuster*, a protection of a technical idea below the patent level.

⁷⁵ In Benelux, a design may be registered as long as it is not purely functional; in France all designs might be registered except those that can enjoy patent protection; in Sweden design protection has been limited by case law during the last years to exclude pure functional—see the Supreme Administrative Courts decisions:

RR 4.2.1980, *RA* 1:20, *NIR* 1981, p. 419; RR 4.2.1980, *RA* 1:20, *NIR* 1981, p. 421; RR 3.2.1982, *RA* Ab 44; RR 10.3.1982, *RA* 2:22; RR 7.9.1982, *RA* 2:56; and finally the full session decision of 12.9.1984, *NIR* 1985, p. 456.

⁷⁶ Here is, however, a difference between the wording of the Danish and the Norwegian texts in sec. 1, para. 1, on the one hand, in translation: “He who has *produced* a design . . .”, and the Finnish and Swedish texts on the other: “The *creator* of a design . . .”.

⁷⁷ *SOU* 1965:61, pp. 110 ff.

tional works. The Swedish Registration Authority in particular had unfortunately experienced a number of such problems under the previous system.

Another compelling reason for the choice of the objective novelty requirement was that the suggested design right concerned objects where a risk of independent double creation seemed to be probable. It was feared that a subjective novelty requirement alone could lead to claims for the protection of two or more parallel designs, and in such cases the difficulty of proving an independent creation was obvious.⁷⁸

According to the Swedish Committee it could not be fair from a general point of view to grant a sole right to designs other than those that from an objective standpoint had added something new to the design entity.⁷⁹ As the Committee held the view that the most important object of design rights was to stimulate the production of new technical as well as aesthetic designs, it also seemed appropriate to choose the Patent Act as a prototype for the new Nordic Design Acts, especially as the Nordic Uniform Patent Acts were regarded as very successful pieces of legislation.

2.2 *Pre-examination and Registration*

Another strong argument for the objective and absolute novelty requirement was the need for a pre-examination and registration that did not seem to be compatible with mere subjective novelty. The informative function of the registration systems was also regarded as essential in the commercial context that was in question. Producers and designers should have an opportunity of knowing which designs they could not steal.⁸⁰

The value of the pre-examination as well as the informative function of the registration systems has, however, been doubted; the latter function being especially uncertain in the light of the possibility of partial overlap with copyright.⁸¹ Furthermore, the pre-examination can, of course, only be limited.

Instead, the applicant's own statement of novelty becomes the central proof. The Registration Authority mainly conducts an infringement search.⁸²

After the authority's pre-examination, design applications are published in special gazettes, and the public, especially people in the relevant field of trade, might support the examination by raising objections to designs that are not

⁷⁸ *SOU* 1961:65, pp. 111 ff.; *Betänkning* 1966 no. 417, p. 55; C. Uggla, in *Industrial Property* 1971, p. 242.

⁷⁹ *SOU* 1961:65, pp. 106 ff.

⁸⁰ *SOU* 1965:61, p. 105.

⁸¹ See *NIR* 1966, p. 211, and *NIR* 1959, pp. 214, 218.

⁸² As a safeguard there is always the possibility of cancelling a registration which is not made in accordance with the requirements.

new.⁸³ But publication has also been regarded as part of a legal right to know what is protected, as the design right is of a monopoly type. An unintentional similarity between a later design and a registered one can be an infringement.

One of the strongest arguments for the system chosen is that the pre-examination is supposed to create a stronger right than just an application. But, of course, there is a limit to the reasonable time spent on pre-examination, as more time and money spent on a more precise examination would not render proportional gains.⁸⁴ It has also been pointed out that thanks to the pre-examination system the authorities do not have to stall a great number of invalid registrations that could be a bar to competitors by the fact that they are registered. The proportionally high costs of the pre-examination system have also been regarded as an advantage, as they themselves lead to restriction of the number of applications.⁸⁵

2.3 "Design Level"

Within the novelty requirement it is assumed that a design identical to another previously known design is not new. This applies generally, and novelty is not only limited to similar articles.⁸⁶ Novelty is concerned with the question of what constitutes the essential elements of a design. But an additional prerequisite for design protection is a certain "design level", which means that, in order to be registered, a design must "differ substantially" from what is previously known.⁸⁷ In contrast to a corresponding requirement in patent law this is a quantitative requirement of distance as regards appearance, or more than a minor difference to similar articles. In patent law, difference is a question of quality.

According to the Swedish *travaux préparatoires*, difference cannot be regarded in the same way in all fields. For furniture, textiles, and clothing, the difference requirement should be very strictly construed in order not to create problems for competitors. On the contrary, for cutlery sets a small difference should be sufficient. These special recommendations constitute exceptions to the general rule that the substantial difference requirement should be applied less strictly in fields where many new original designs are developed and more strictly in fields where there are few.⁸⁸

⁸³ Publications are made in special bulletins with pictures of the applicants' designs.

⁸⁴ *SOU* 1965:61, pp. 139 ff.

⁸⁵ S. Ljungman, in *GRUR Int.* 1973, p. 405.

⁸⁶ Cf. the "substantial difference" requirement below, which only applies to articles of the same kind.

⁸⁷ See sec. 2.

⁸⁸ See *SOU* 1965:61, pp. 122 ff., 159; cf. G. Moore, in *NIR* 1973, p. 43.

2.4 Differences in Practical Application of the Design Acts

Coordinated Nordic design protection has been viewed as desirable, not only with regard to the statutory law, but also with regard to how it is interpreted in case law and administrative practice. The differences from country to country are, however, obvious and have partly historical explanations, and they can be found in the respective *travaux préparatoires*.⁸⁹ The differences are also partly due to different economic and cultural views on the importance of designs and design protection.

The differences in the application of the Design Acts can easily be seen in relation to the pre-examination of *novelty*, the requirement of *substantial difference*, and the exception from the general rule of deciding *substantial difference*. There is also an interesting difference in the way of treating designs that are “*banal*”. Finally, the Swedish Supreme Administrative Court has applied a totally new (and contrary to the *travaux préparatoires*) approach concerning functional designs^{89a} which has no counterpart in the practice of the three other countries.

2.4.1 Novelty

The difference in the pre-examination of novelty in the Nordic countries could to a great extent be explained by the fact that it was primarily Sweden that wished to have a pre-examination system. After discussions, the committees agreed on a minimum examination, and it has been up to each country to specify its administrative procedure. In *Denmark* the pre-examination is more limited than in the other Nordic countries. There, the examination extends only to previously registered designs, and for no more than five years back.

The *Norwegian* examination, too, is meant only to be an infringement search, but the registration authority does not feel obliged to follow this limitation. The search might be made more in depth but it has been stated that this is not equal to the more creative search endeavour that is expressed in the *Finnish* and the *Swedish travaux préparatoires*.⁹⁰ The *Swedish* registration authority is to check a design “to the extent occasioned by the contents of the design and to the extent this may be done without delaying the examination of the application”.⁹¹

⁸⁹ Cf. also R. Röed, in *NIR* 1974, pp. 64 ff.

^{89a} Referred to *supra* note 75.

⁹⁰ R. Röed, *op.cit.*, p. 69.

⁹¹ Sec. 13, para. 3, Decree on Design Registration Formalities (1970:486).

2.4.2 Difference Requirement

Also when it comes to the “substantial difference” requirement, *Denmark* in particular seems to apply lower standards. In Denmark, applications are normally accepted as long as there is no identity between the opponent’s material and the application. This can hardly be said to be a “substantial difference” as required in the Design Act and the practical result is of course a very narrow scope of protection. The other three countries seem to have a more uniform application of the difference requirement. This can, for example, be observed through a comparison of the registration of variations. What can be registered as a design variation in *Finland*, *Norway* and *Sweden*, often requires a separate registration in Denmark.⁹²

This does not, however, mean that the difference requirement is substantial in *Finland*, *Norway* and *Sweden*.

In *Norway* the view is that the requirements of “design level” are comparatively low. Combinations of old elements are accepted as novel, and case law also shows a low “design level”. The substantial difference is stressed in the Norwegian *travaux préparatoires*.⁹³ But in practice this requirement only tends to mean basic novelty without qualification.⁹⁴ In comparing *Norway* with *Sweden* and *Finland* at least a difference in attitude can be found. In the two latter countries the difference requirement is said to mean a certain qualified novelty, which also ought to be reflected in administrative practice.

The *Finnish* design registrations are not only fewer in number than the *Swedish* ones, the applications also result in proportionately fewer registrations.⁹⁵ This could mean that the Finnish registration authority has made a more careful examination than its Swedish counterpart, though this does not seem to be the case in practice. Differences in details are often sufficient for registration. The application of the difference requirement seems therefore to be quite liberal in *Finland*, and more liberal than in *Sweden*.⁹⁶

2.4.3 The Exception for Furniture, Textiles and Clothing

The imposed strict application of the difference requirement concerning furniture, textiles and clothing seems to be upheld in *Sweden*. The Administrative Supreme Court has, for example, refused registration of four Burberry designs

⁹² See paper presented by A. Guldhav at the Nineteenth Nordic Patent Office Meeting in Stockholm, October 14–15, 1974, *Mönsterfrågor*, Suppl. B.

⁹³ See *Ot. prp.* 1969–70 no. 40, p. 18; *Innst.* 1967, p. 27.

⁹⁴ See Oslo Byrett, *EIPR* 1981, D 179.

⁹⁵ About 60 per cent of the applications; cf. 80 per cent in *Sweden*.

⁹⁶ See K. Raffnsøe, in *NIR* 1983, p. 260; V. Tiili, in *NIR* 1983, pp. 182 ff.

The various attitudes concerning banal designs can probably be explained by the previous experiences with design protection. Only Sweden had made use of pre-examination, while general design protection in Denmark for ornamental designs and in Norway for ornamental as well as functional designs was based on application. This is probably the reason why banality in *Sweden* (and in *Finland*) is only regarded as a rule of evidence.¹⁰⁵ In *Denmark* and *Norway* it is treated as a rule of substantive law. If the registration authority in Sweden denies a registration because the design is found to be banal, the burden of proof shifts to the applicant, as it has also been found essential that the authority acts in the interest of society as a whole. Everybody ought to be entitled to use a pre-existing well-known design.¹⁰⁶

Without any doubt, opinions as to what constitutes banality can differ remarkably, even among specialists in design.¹⁰⁷ This seems to strengthen the Danish-Norwegian attitude. It is essential that a design be proved banal through tangible examples. Such a requirement should result in a more objective decision. And if a design really is banal, proof of this fact should not be difficult.

Swedish caution in denying registration on the sole ground of banality results, in practice, in a reduction of the differences between attitudes in this respect. In *Denmark* and in *Norway* the answer to an applicant in the equivalent situation will be that the difference requirement is not fulfilled. In all four countries, furthermore, a study of registered designs leads to the conclusion that the "design level", in practice, is substantially lower than the intentions presented in the *travaux préparatoires*.¹⁰⁸

3. TRADEMARK LAW

The Trademarks Acts in Denmark, Finland, Norway and Sweden, like the Copyright and the Registered Designs Acts, were created in cooperation, and resulted in more or less identical Acts. Trademark case law as a whole is also similar, and the possibilities of design protection under trademark law appear to be rather limited.

The Trademark Acts from the years 1959–64 expressly provide that trademark protection can be acquired for a "distinctive get-up" of the goods.¹⁰⁹ The law, however, also states that "rights in a trade symbol shall not be

¹⁰⁵ C. Sandgren, *ibid.*

¹⁰⁶ See NIR 1978, pp. 40 f., 48.

¹⁰⁷ See expert opinions in the decision of Göta hovrätt 6.3.1975, DT 26, T 150/74.

¹⁰⁸ Same opinion C. Sandgren, *ibid.*

¹⁰⁹ Sec. 1, Denmark: *Varemærkelov* no. 211, 11.6.1959; Finland: *Varumärkeslag* 10.1.1964 no. 7; Norway: *Lov om varemærker* 9.3.1961, no. 4 (V); Sweden: *Varumärkeslag* 2.12.1960 (SFS 644).

extended to such parts of the symbol as mainly serve to make the goods more practical, or otherwise serve to fulfil some function other than that of being a trade symbol".¹¹⁰

This restriction is needed as the trademark protection is neither limited in time, nor has a novelty requirement for protection. This means that hindrance of competitors could easily be the result if a sole right could be acquired for functional or technical elements. The fear of interference with free competition has led to a very restrictive view on trademark protection for get-ups in *Sweden*, which is also found in the *travaux préparatoires*.¹¹¹

3.1 Differences

Similar references cannot be found in the *travaux préparatoires* of the other Nordic countries. But in *Finland*, for instance, the view is that the distinctiveness of a get-up ought to be higher than for normal trademarks.¹¹² In *Norway*, it has been pointed out that the Patent Office is more restrictive in allowing trademark registration for get-ups, and may be even more restrictive than was originally intended.¹¹³

In practice, there are, nevertheless, some differences between Sweden, on the one hand, and the other Nordic countries, on the other. A massage "brick" has, for instance, been registered in *Finland*, but not in *Sweden*.¹¹⁴

An example of a difference in practice between *Norway* and *Sweden* is the case of the Philishave shaver, which was registered in Norway but was denied registration in Sweden by the Administrative Supreme Court.¹¹⁵ This case has been greatly criticized, and today such a registration does not seem impossible.

Registration is, however, not the only means of acquiring trademark protection in the Nordic countries. A trademark established on the market is also protected where it is generally known to those to whom it is addressed as the symbol of the goods of the proprietor of the mark; get-ups are similarly protected. But in Sweden it has been considered possible that this protection is available only for *per se* distinctive get-ups. If this is the case, it means a different treatment in comparison with, for instance, descriptive trademarks.¹¹⁶

¹¹⁰ Sec. 5.

¹¹¹ *Prop.* 1960: 167, pp. 49 ff.; cf. *SOU* 1958: 10, p. 218.

¹¹² V. Tiili, *op.cit.*, p. 176.

¹¹³ C.F. Villars-Dahl, in *NIR* 1983, p. 522.

¹¹⁴ Reg. no. 840994, cf. RÅ 1980 Ab 278.

¹¹⁵ Reg. no. 103.733, cf. RR 1.3.1966, RÅ 1966, p. 35, *NIR* 1968, p. 165; a similar opinion to Sweden was expressed by the Finnish Administrative Supreme Court 10.9.1962, HD 1962 II 475, T.J. Kemppinen, *op.cit.*, p. 327.

¹¹⁶ L. Pehrson, *Varumärken från konsument synpunkt*, Stockholm 1981, p. 186.

3.2 Design Protection

It is obvious that trademark law is used only to a very limited extent as protection against imitation of industrial design. But the opportunity for trademark protection of products might be underestimated in *Denmark*, *Norway* and *Finland*. The same cannot be said about *Sweden*, where the *travaux préparatoires*, as mentioned, stress that trademark rights can only be admitted for such elements as fulfil trademark functions exclusively.

In cases where a get-up really has a distinctive function it seems difficult to understand why trademark protection for product design should create any real drawbacks.¹¹⁷ Besides, the protection is, of course, limited to the trademark function, and conflicts with the natural right to use commonly-known and regularly-appearing elements of design need not occur.

A closely-related possibility for protecting product designs that can create goodwill exists in *Denmark* and *Norway* and to a certain extent also in *Finland* under the law of unfair competition. In *Sweden*, on the contrary, there are obstacles similar to those encountered concerning trademarks. In other words, packaging is to a certain extent regarded as distinctive in the legal sense but that is not the case with product designs.¹¹⁸

4. PROTECTION BY LAWS ON UNFAIR COMPETITION

Theoretically, unfair competition laws cannot be used to broaden the scope of intellectual property rights. The latter protect an object containing certain elements which conform to criteria set up by the legislature, while rules against unfair competition mean that legal measures might be taken against conduct of a certain kind by a tradesman in a situation that involves competition. But in practice, the effect of the sole right systems often resembles what is achieved through the application of the unfair competition law to what are known as slavish imitations.

4.1 Basic Differences

As is mentioned above, the rules against unfair competition in the Nordic countries, and especially those relating to design imitations, are far from identical. This is in line with the legislative intent.¹¹⁹ In *Sweden*, the basic objectives of the Marketing Practices Act have been to protect consumers against tradesmen marketing in a way contrary to good commercial standards,

¹¹⁷ Cf. also L. Pehrson, *op.cit.*, pp. 183 ff.

¹¹⁸ Cf. also L. Pehrson, in *NIR* 1983, p. 529.

¹¹⁹ Cf. also *SOU* 1966: 71, p. 229.

including the problem of misleading commercial origin.¹²⁰ In the other Nordic countries the purpose of the legislation in this field has instead been to protect consumers and at the same time regulate competition between tradesmen.¹²¹

Although the rules in *Finland* that regulate fair conduct between tradesmen are entirely separate from the Consumer Protection Act,¹²² case law concerning design imitations as an act of unfair competition is more restrictive there than in *Denmark* and *Norway*, where the rules against unfair competition, like those of Sweden, are found in the respective Marketing Practices Acts.¹²³ As regards the opportunities for attacking imitations on the basis of unfair competition, Danish as well as Norwegian laws are quite similar to West German case law.

4.2 Additional Protection

In *Denmark* and *Norway* case law upholds, under certain conditions, protection for individualized products in addition to intellectual property rights. A close and wilful imitation of a distinctive product design is often regarded as an act of unfair competition. If the imitator has not clearly marked his product in order to avoid confusion, this is regarded as unlawful; not only because of the risk of deception, but also the act itself.

It is especially reprehensible when the imitator tries to reap the fruits of someone else's popular product design, hoping that the imitation will be taken for or purchased instead of the original. The protection granted is theoretically a protection of goodwill, but in practice it resembles the protection of an object. This is especially the case in *Norway*.¹²⁴

In *Finland*, close imitations might be regarded as unfair more in a trademark sense, and the Swedish view is similar to this. But a comparison between *Finland* and *Sweden* still shows an essential difference in unfair competition law. Finnish doctrine and case law regard what can function as a distinctive mark much more broadly than does the Swedish Market Court.

4.2.1 The Same Case, Different Decisions

The differences in attitude between *Finland* and *Sweden* are shown by the cases of imitations of Fiskar's scissors. In Finland this pair of scissors was found

¹²⁰ *Marknadsföringslag* 15.12.1975 (SFS 1418).

¹²¹ Denmark: *Lov om markedsføring* 14.6.1974, no. 297; Finland: *Lag* 22.12.1978 om otillbörligt förfarande i näringsverksamhet; Norway: *Lov om kontroll med markedsføring* 9.6.1972, no. 47.

¹²² Cf. *Konsumentskyddslag* 20.1.1978, no. 38.

¹²³ For a further presentation of the respective Acts and case law related to them, see M. Levin, *op.cit.*, chapters 12.2–12.5.

¹²⁴ Most Norwegian imitation cases based on unfair competition law are decided extra-judi-

sufficiently individual to have a trademark function in a broad sense.¹²⁵ Marketing of a copy without the imitator having done anything to avoid the risk of misleading commercial origin was regarded as confusingly misleading by the Finnish Board of Chamber of Commerce (*Finska Centralhandelskammarens Opinionsnämnd*—ON) under the 1978 Act relating to unfair conduct between tradesmen.

In Sweden, on the contrary, the same pair of scissors was deemed to lack individuality and therefore no distinctive character was to be found. The decision might be a result of the fear of broadening the scope of intellectual property rights, which would be against the expressed intention of the legislature as contained in the *travaux préparatoires*.¹²⁶ But the Swedish Market Court does not generally seem to have comprehended the extent to which product designs can be identifying, i.e. seen through the consumer's eyes. And yet, this consumer viewpoint is exactly what the Market Court should base its decisions on.

4.3 Effect—or Unfair Conduct

In *Denmark* and *Norway*, subjective circumstances often determine the outcome of a case of unfair competition, and a similar product is, of course, not unlawful only because of likeness; it has to be an imitation. In these countries disloyal conduct is unlawful when there is a risk of deception. But even where there is no risk of confusion about the commercial origin, an imitation can be regarded as unfair competition if the conduct is deemed to be serious.

The restrictive *Finnish* use of the rules of unfair competition looks to the objective circumstances. Subjective elements should not—at least not consciously—be decisive. Even an unintentional product similarity is unfair competition, if there is a risk of confusing the consumer as to commercial origin. This results in an essential difference, on the one hand between the *Danish* and the *Norwegian* view of unfair competition, which is focussed on the unfair conduct, and on the other hand the *Finnish* and *Swedish* views, where only the effect need be unlawful.

4.4 Similar Basis

Even if there are differences in the attitudes displayed by *Denmark*, *Finland* and *Norway* towards unfair competition in relation to product imitations, there are

cially by a special board, *Næringslivets Konkurransetvalg*; cf., however, also *supra* 1.3.3 and *Eidivating Lagmansrett* 3.10.1980, C.F. Villars-Dahl, *op.cit.*, p. 525.

¹²⁵ ON 607/1982; cf., however, ON 604–606 where marking/packaging sufficiently neutralized the risk of confusion; cf. also FMD 1985: 5 concerning marketing of imitations of Cabbage Patch Kids.

¹²⁶ MD 1977:25, *NIR* 1978, p. 243.

still some types of cases in which product imitation is regarded as unfair in all three countries:

- when imitations result in a risk of confusion about the commercial origin in a broad sense; in *Denmark* and *Norway* this must, however, be a result of intentional or negligent behaviour;
- when imitations are made systematically; in *Denmark* and *Norway* such conduct is looked upon as an indication of intention, while in *Finland* it is regarded as creating an increased risk of confusion on the market;
- when the imitator has not tried hard enough to eliminate a risk of confusion.

4.4.1 Sweden Isolated

In *Sweden*, no case of product imitation has been decided under the above-mentioned principles of unfair marketing practices.¹²⁷ The explanation must be that the Swedish attitude towards product imitations is an isolated one, and the application of the Marketing Practices Act in relation to slavish design imitation seems to be a mere repetition of provisions in the Trademark Act.¹²⁸

In the other Nordic countries, the law of unfair competition adds another dimension to the protection provided by intellectual property laws, as unfair competition decisions are based on other criteria. It is noteworthy that this additional protection does not cover an object. But it is nevertheless unlawful to act unfairly in the market, or if the effects of an act of imitation might be illegal.

5. FINAL CONCLUSIONS

As many products are sold on the home market *and* exported—which is very much the case in the Nordic countries—the differences in the extent to which protection is possible create problems. What is protected by copyright in one country requires design registration for protection in the other. In one country rules against unfair competition might offer remedies in cases of imitation, while a similar situation in another country does not provide the basis for successful legal action. This presents problems for those seeking design protection.

Regarded as a whole, the opportunities for protecting applied art in the various Nordic countries are far from being the same, despite the uniform

¹²⁷ The relevant cases for such a conclusion are: MD 1976: 11—Kevi, *NIR* 1976, p. 407; MD 1977: 25—Fiskars, *supra*; MD 1981: 2—Conex, *NIR* 1983, p. 452, and MD 1983: 23—Prince Pro; cf. MD 1972: 10—Catalina, *PKF* 1972: 9, p. 90, *NIR* 1972, p. 463, but this case was decided on a purely trademark basis; cf. also, for instance, MD 1983: 3—Ajax, *NIR* 1985, p. 458.

¹²⁸ Cf. also U. Bernitz, in *Festschrift till Jan Hellner*, Stockholm 1984, p. 140.

intellectual property laws. Fundamental attitudes concerning protection, free competition and the approach to pure art in relation to applied art and industrial design make a great difference; this is reflected in case law and administrative practice.

In *Denmark*, the combination of protective opportunities as a whole results in a fairly good design protection. Copyright protection is often granted to useful products; and designs are registered more generously than in the other Nordic countries. Furthermore the law against unfair competition provides complementary protection.

In *Finland* and *Norway*, the opportunities of protection are more limited. Copyright protection is very restricted, especially in Norway. Design registration is more difficult to obtain than it is in Denmark. In *Norway*, however, the rules against unfair competition add an important element of protection to the intellectual property laws, but in *Finland* this is the case only to a limited extent. Even so, imitations that might mislead the consumers about commercial origin are often grounds for legal action. In Finland the scope of copyright protection is a little more extensive than in Norway.

Sweden, finally, applies a strict view of copyright protection for applied art in combination with a comparatively strict view of what can be registered as a design, especially in vital design fields such as furniture, textiles and clothing. In these fields it is often impossible to even obtain a design registration because of the increased difference requirement. Furthermore, design registration is not available for purely functional designs. Sweden does not provide any complementary protection against "slavish imitation".

In practice, the means of protection which are decisive are those which are available without formalities and costs, primarily copyright. A restrictive view of copyright protection might, however, be compensated for by an easily obtained registered design right in combination with protection against slavish imitations under the unfair competition law. Nevertheless, the formalities involved, the absolute novelty requirement which makes any marketing or publication of a design destructive of novelty, and the cost of design registration, are always obstacles.

Finally it can be remarked that the problems of design protection in the Nordic countries have not been satisfactorily solved, either from a legal, systematic viewpoint or from an economic one. This does not, however, seem to be an isolated Nordic problem. Most Western countries suffer from the same disease.¹²⁹

¹²⁹ Cf. also M. Levin, in *NIR* 1985, pp. 215 ff. and 311 ff.; for a discussion of these problems in general and a proposal for possible changes of the Swedish design protection system—see further M. Levin, *op.cit.*, chapters 13–15; for special problems concerning fashion products, see the same author, *Formskydd för modeprodukter*, Stockholm 1984.