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Date: 05/10/2012

Before :

HIS HONOUR JUDGE BIRSS QC

Between :

ABRAHAM MOON & SONS LIMITED

Claimant

- and -

(1) ANDREW THORNER

(2) STEPHEN THORNER

(3) ANDREW SLIPPER

(4) SUSAN MUNNS

(5) NB FABRICS LIMITED

Defendants

Anna Edwards-Stuart (instructed by **Lupton Fawcett LLP**) for the **Claimant**
Jonathan DC Turner (instructed by **Taylor**) for the **Defendants**

Hearing dates: 9th, 10th July 2012

Judgment

His Honour Judge Birss QC:

Introduction

1. This is an action for copyright infringement. The claimant (“Abraham Moon”) is a woollen mill based in Guiseley in Yorkshire. The case relates to a design of woollen plaid fabric for use in upholstery and furnishing. The design is called Skye Sage. The claimant’s case is that a woollen upholstery and furnishing fabric called Spring Meadow is an infringing copy of Skye Sage.
2. The Spring Meadow fabric has been sold to retailers by a firm called “Art of the Loom” based in Clitheroe in Lancashire. The four partners in Art of the Loom are Andrew Thornber, Stephen Thornber, Andrew Slipper and Susan Munns, the first four defendants. Spring Meadow was woven by the fifth defendant, NB Fabrics Ltd, based in Huddersfield in Yorkshire. NB Fabrics is run by Mr Andrew Wellings. Mr Wellings supplies the woven fabric on to one of the companies associated with Mr Brendan Clayton. Those companies are Calder Weaving Co. Ltd and Metropolis Interiors Ltd of Mytholmroyd. Mr Clayton supplies the fabric on to Art of the Loom either directly or via a company associated with Art of the Loom called Woven Art Ltd.
3. The defendants deny infringement. Their case is that Spring Meadow was designed independently of Skye Sage. If that is right then Spring Meadow cannot be an infringement of any rights in Skye Sage regardless of how similar the two patterns may or may not be. Secondly the defendants contend that even if Spring Meadow is a copy of Skye Sage (which they deny), there can be no infringement of copyright because a careful consideration of the facts and circumstances shows that there is no relevant copyright work in which Abraham Moon can claim a copyright which could be infringed by Spring Meadow. There are other matters in issue but those are the main ones.
4. At trial Abraham Moon was represented by Ms Anna Edwards-Stuart instructed by Lupton Fawcett LLP and the defendants were represented by Mr Jonathan Turner instructed by Taylors. The trial took two days.

Technical introduction

5. This case relates to the design of woollen plaid fabrics. This is a specialist area of weaving and merits a short technical introduction. Both sides had permission to call expert evidence from an in-house expert to deal with technical practices and constraints in the British weaving industry. In the event the technical issues were largely agreed.
6. Plaid fabrics consist of criss-crossed horizontal and vertical bands in multiple colours. Tartans are examples of plaids. Traditional tartan designs use yarns of bold solid colours with the same colours appearing in the warp and the weft. Traditional tartans for use in kilts are made from worsted, a wool processed into long fine fibres. Worsted yarns are unsuitable for upholstery and soft furnishings which require “woollen” yarns.

7. A piece of woven fabric has a warp (down the length) and a weft (across the width). The use of threads of different colours, or combinations of threads of different colours in the warp and the weft creates the design of the woven fabric. The number of threads in the warp and the weft, the colours and combinations of the colours of those threads can be used to make an almost infinite variety of patterns or designs.
8. The maximum warp (i.e. width) of a particular piece of fabric is determined by the size of the loom. The fixed width of the warp has an important effect on the design of a patterned fabric because it will dictate the number of repeats of the pattern that can be achieved across the warp. Obviously, large patterns can be repeated fewer times than smaller patterns across a given warp. Similar considerations apply to the weft, except that there is no constraint on the length. A design will typically be repeated down the weft as well as across the warp. In practice, the weft repeat is often the same size as the warp repeat to ensure a balanced design.
9. Once woven, the fabric is 'finished' i.e. scoured and milled such that the final width (and length) is less than the "off loom" or "greasy" width. This shrinkage needs to be taken into account during the design process.
10. Woollen plaids (and worsted tartans) are woven on dobby looms in which the warp threads are moved up and down as the shuttle passes backwards and forwards threading the weft over and under the warp threads. In a plain weave, alternate warp threads (or 'ends') are lifted up and down to create a simple "over and under" weave. In more complex designs, groups of threads in the warp are lifted in different combinations to make the gap for the weft threads (or 'picks') to pass through.

Background

11. The company Abraham Moon was founded in 1837. Its first mill was built in Guiseley the 1860s. Today Abraham Moon is a fully integrated vertical mill. All the dyeing, blending, carding, spinning, warping, weaving and finishing take place on site. As Abraham Moon dyes its own yarns, it is able to produce unique blended yarns which are not otherwise available on the market. Mr John Walsh, a director, gave evidence that these yarns gave Abraham Moon a unique competitive edge although he accepted that the company does also buy in some yarns.
12. Abraham Moon's fabrics are at the top end of the market. Today it has a customer base including Ralph Lauren, Dolce & Gabbana, Burberry, Lacoste, Daks, and Paul Smith. Mr Walsh said that creativity and innovative fabric design remained at the heart of the survival and success of the Abraham Moon business. Even allowing for the mild hyperbole, I accept Mr Walsh's evidence that design is crucial to the survival of his business.
13. The Skye Sage fabric was part of a new departure for Abraham Moon. Until 2005 Abraham Moon's focus had been on fabric for apparel but at about that time Abraham Moon started selling furnishing fabrics.
14. Abraham Moon employs 170 people including six designers who create new collections as well as bespoke ranges. Skye Sage was designed by Martin Aveyard, the design director in October 2004. He has worked for the company since 1975. It was first sold in January 2005 as part of a range of furnishing fabric called the

Heritage Collection. The Heritage Collection consists of designs with a Scottish theme called Aberdeen, Balmoral, Highland, Loch, Mac, Skye, St Andrew and Troon. The designs are in various colourways. One of the colourways of the Skye design is called Sage.

15. In 2010 Abraham Moon discovered that Art of the Loom were selling a furnishing fabric called Spring Meadow. The fabric was available at one of Abraham Moon's best customers, the John Lewis Partnership. Abraham Moon believed that Spring Meadow was a copy of Skye Sage and these proceedings ensued.
16. The details of how Spring Meadow came to be made and the arrangements between Art of the Loom and others will be considered in detail below. The following outline of how this dispute arose is not contentious.
17. Art of the Loom stock and distribute natural fibre fabrics. Their January 2011 trade price list has a range of twenty two fabrics, including woollen plaid and herringbone fabrics and cotton, linen and viscose blends. The woollen plaids consist of a range of eight fabrics called Autumn Berry, Autumn Gold, Chestnut Tree, Moorland Heather, Olive Grove, Orchard Fruits, Spring Meadow and Spun Honey. I was provided with an Art of the Loom "cascade" consisting of swatches of these eight woollen fabrics. The eight woollen fabrics are made by Mr Wellings at the fifth defendant company and supplied to Art of the Loom via Mr Clayton.
18. Mr Nick Murphy is the sales director of a trading division of a furniture company called Tetrad Plc. The trading division is called Contrast Upholstery. In early 2010 Mr Murphy became aware that woven woollen fabric for upholstery was becoming increasingly popular. He knew Abraham Moon and approached its sales director, Mr John Pickles. Exactly what went on at the meeting is in dispute but there is no doubt Mr Murphy thought Abraham Moon's price was too high. Nothing came of the meeting.
19. Some months later Mr Murphy met Andrew Thornber, the first defendant. A price was agreed and Mr Murphy ordered some fabric. Tetrad/Contrast covered a sofa and chair in fabrics from the eight woollen fabrics in Art of the Loom's range and these trial samples were provided to the John Lewis Partnership. Spring Meadow was not used to cover the furniture but was available as a swatch.
20. In November 2010 Mr Pickles saw a chair at the John Lewis Partnership covered in a fabric he thought was a copy of one of Abraham Moon's Skye designs. He could not see the colour exactly. In any event it seems most likely that the Art of the Loom fabric used on the chair was actually Autumn Gold.
21. Mr Pickles telephoned Mr Murphy. There is a dispute about that telephone call. It is common ground that Mr Murphy indicated his source was "Templewood". Templewood is another business associated with the Thornber family and that led to the claimant identifying Art of the Loom as the trade source of the fabric complained of. Mr Pickles also says that Mr Murphy told him that he (Mr Murphy) had arranged for Skye Sage to be copied by Templewood but that is disputed. In any case these proceedings ensued.

The general law

22. Copyright subsists in original literary or artistic works (s1(1)(a) of the Copyright Designs and Patents Act 1988). Amongst other things “literary work” means any work which is written (s3(1)) and copyright does not subsist in a literary work unless and until it is recorded in writing or otherwise (s3(2)). Amongst other things “artistic work” means “a graphic work, photograph, sculpture or collage irrespective of artistic quality” (s4(1)(a)). “Graphic work” is given a partial definition in s4(2) as including “(a) any painting, drawing, diagram, map, chart or plan and (b) any engraving, etching, lithograph, woodcut or similar work”. A “work of artistic craftsmanship” is also within the definition of artistic work as a result of s4(1)(c) but the claimant did not put its case on that basis.
23. Copyright is infringed by reproducing the whole or a substantial part of a work in a material form (s16 and s17 of the 1988 Act).
24. In *Designers Guild v Russell Williams* [2000] 1 WLR 2416, [2001] FSR 11 p113 Lord Millett said the following:

The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

25. I will take it as a summary of the correct approach. The legal burden of proof to prove infringement rests on the claimant. However an inference of copying may be drawn from considering the similarities between the claimant's work and the defendants' work, the nature of those similarities and whether the defendants had prior access to the claimant's work. If an inference of copying may be drawn, then the evidential burden shifts to the defendants to rebut that inference. If they establish that their design was produced independently then, regardless of the similarities, it does not infringe. At paragraph 25 of my judgment in *Mitchell v BBC* [2011] EWPC 42 I said:

However in the end, beyond stating that the matter is one for the civil standard of the balance of probabilities, it is impossible to lay down any sort of general proposition. Speaking entirely generally, it seems to me that the more strikingly similar two works may be, the more likely the proposition may seem that there has been copying, and that will

mean that one might expect even more cogent evidence to rebut such a case than one might expect in a different case in which the similarities are less striking. It can only ever be a matter for weighing up the evidence.

26. Apart from copying a work, there are other acts which infringe the copyright in a work. Section 16 defines a number of acts restricted by copyright and by s16(2) the Act provides that copyright is infringed not only by doing one of those acts without a licence but by authorising another to do any of those acts.
27. The issue to the public of copies of a work is itself an act of copyright infringement (s18(1)). By s18(2)(a), reference to the issue to the public of copies of a work are to the act of putting into circulation in the EEA copies not previously put into circulation in the EEA by or with the consent of the copyright owner. The issue to the public does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation (s18(3)).
28. The Act also defines certain acts of secondary infringement of copyright. The sale of an infringing copy of a work is an act of infringement if the seller knew or had reason to believe that it was an infringing copy (s23(b)).
29. There is a defence to damages for copyright infringement in s97(1). If it is shown at the time of infringement that the defendant did not know and had no reason to believe that copyright subsisted in the work to which the action relates then the claimant is not entitled to damages against him without prejudice to any other remedy.
30. Finally the case involves allegations of joint liability. Joint infringers are persons who act in concert with one another pursuant to a common design in the infringement (*CBS v Amstrad* [1988] RPC 567).
31. A number of detailed questions arise on the application of the various matters of general law I have mentioned but they are best dealt with after I have dealt with and found the facts of this case.

The witnesses

32. I heard from the following witnesses for the claimant: John Walsh, Martin Aveyard and John Pickles. Mr Walsh gave evidence about Abraham Moon's business and put this claim into context. Mr Aveyard gave evidence about how he came to design Skye Sage and also acted as the claimant's in house technical expert, dealing with the technical issues arising in relation to weaving. Mr Pickles evidence related to his dealings with Mr Murphy.
33. The claimant also relied on a witness statement from Mr David Johnson of Comrie, Perthshire. The defendants had submitted that Mr Johnson's evidence was irrelevant hearsay and should not be admitted. I decided to admit the statement with no cross-examination. Part of Mr Johnson's evidence identifies "Templewood" as the trade source of "a range of 'Moon' type fabrics" including Spring Meadow. Beyond that I will not place weight on Mr Johnson's evidence.

34. Mr Turner submitted that although Mr Walsh's oral evidence was very honest, his written evidence contained some exaggeration. I think Mr Turner is correct although the points are minor. I have taken Mr Turner's submission into account in considering them.
35. My impression of Mr Aveyard and Mr Pickles was that each of them gave their evidence fairly and was seeking to assist the court. Mr Turner submitted that Mr Aveyard was evasive in his evidence when an example of Armstrong tartan relied on by the defendants was put to him. I do not accept that. Mr Aveyard simply did not accept the point being put to him. I will deal with the merits of the point below.
36. For the defendant I heard factual evidence from Andrew Thornber, Brendan Clayton, Andrew Wellings and Nick Murphy. I also heard from Stephen Thornber who acted as the defendants' in house technical expert.
37. Andrew Thornber gave evidence about Art of the Loom's business and how in 2010 he identified a need for traditional woven woollen plain upholstery fabrics. He contacted Mr Clayton. Mr Clayton's evidence explained his dealings with Mr A. Thornber and with the weaver, Mr Wellings. Mr Wellings evidence dealt with his dealings with Mr Clayton and with the creation of the Spring Meadow fabric. The upshot of the evidence of Mr A. Thornber, Mr Clayton and Mr Wellings is that no copying took place. The fabric designs arrived at were created without reference to Abraham Moon and so any similarity is coincidental. Mr Murphy's evidence related to his dealings with Mr Pickles. He denied telling Mr Pickles that he had arranged for Abraham Moon's fabrics to be copied.
38. I will address my impressions of the defendants' witnesses in context, below.

The issues of primary fact

39. The issues of primary fact which fall to be resolved on the evidence can be divided up as follows:
 - i) The origin of Skye Sage
 - ii) Mr Murphy and Mr Pickles
 - iii) The origin of Spring Meadow

The origin of Skye Sage

40. An image of the Skye Sage fabric designs is annexed to this judgment but the colours do not reproduce well, so I will describe the design. Skye Sage is a large check design in a muted light brown colour. The pattern repeat is 22.5 cm W x 24.5 cm H. The pattern consists of a large light reddish-brown block running vertically downwards with a paler purple-grey vertical block in between. Superimposed on top is a bold check pattern consisting of a pair of thick vertical lines running downwards, each line being on the boundary between the light reddish-brown block and the paler purple-grey block, and a pair of thick horizontal lines of the same general size and spacing as the thick vertical lines. The thick horizontal lines are a darker brown colour. The thick vertical lines are a paler grey/brown. The large light reddish-brown

block running vertically downwards is somewhat paler in the rectangular region inside the pair of thick horizontal lines and somewhat darker in the square region outside the pairs of thick horizontal lines. The paler purple-grey vertical block is lighter in the square region inside the pair of thick horizontal lines and a little darker outside the pairs of thick horizontal lines.

41. The pattern also has a series of smaller lines, as follows. There is a purple vertical medium thickness line running down the centre of the purple-grey vertical block, inside the thick vertical lines. Across ways there is a corresponding maroon line of medium thickness running horizontally inside the thick horizontal lines. Each thick line has a pair of thin darker brown lines running parallel to it on its inside edge. These pairs of thin lines cross inside the square made by the crossing of the thick lines to form an inner square pattern. Finally there is a pair of pale thin lines running down the centre of the light reddish-brown vertical block and a corresponding pair of pale thin lines running horizontally.
42. Overall Skye Sage is a large plaid pattern in muted natural light brown/pale purple-grey shades with highlights in darker purple and maroon. The design has two aspects, the pattern (Skye) and the colourway (Sage).
43. Mr Aveyard did not draw a sketch of the Skye Sage design as part of his design process and he did not use a CAD system. He made the design using his extensive experience and skill as a fabric designer in the following way.
44. Mr Aveyard first created a “mood board” of influences. These have pictures of relevant images and swatches of colour and fabric. The relevant mood board has not been kept but Mr Aveyard gave evidence that it reflected the fact that Abraham Moon wanted a Scottish influence for the design. Scottish hillside or country colours were important. He remembered there was a picture of St Andrews, pictures of Scottish castles, and swatches of colour and designs. He said there were no tartan patterns on the board because although they wanted a Scottish influence on large checks, they did not want the design to look like traditional tartans because those were already on the market.
45. Next Mr Aveyard decided upon the initial combinations of threads and numbers of threads for each colour and recorded this on a “ticket”. The ticket is an instruction to the production team as to how to set up the machines in order to produce the required design. The ticket has two pages. The first page deals with the warp and weft counts for the various threads (12 threads of colour 1, 2 threads of colour 2, etc.). The second page deals with colourways. The ticket for the Skye plaid design was in evidence. The first page records the pattern of threads in the Skye plaid and the second records various colourways being considered by Mr Aveyard. All the threads for the Skye plaid were of the particular type chosen by Mr Aveyard for the Heritage collection and colours and colour combinations reflected the theme he was working on. On the Skye ticket there are seven possible sets of threads in the warp and nine sets in the weft. That makes sixty three different colour variations in the design.
46. The various combinations are made into a “patchwork” blanket which has a small square of each design in the collection. The patchwork blanket is based on a grid matrix comprised of a series of warp designs and colourways and the series of weft designs and colourways. The wefts may be the same or different from the warps. The

warps and wefts intersect and allow the designer and the evaluation team to assess the intersecting designs, which make up each patch of the patch work. Thus each patch represents is a distinct design which can be assessed by its look and feel. Mr Aveyard explained that it was very important to be able to see and feel each design in woven fabric “in the flesh”, as he put it. Once made, a fabric would not look the same as it did on a CAD system even if one was used. With CAD, it would not be possible to feel the fabric, which is an important part of the process.

47. From the sixty three possible combinations on the Skye ticket, Mr Aveyard and his team selected five to be part of the Heritage collection. One of them was Skye Sage. A modification was made to the ticket by the person operating the warping machine in order to make the patchwork blanket but nothing turns on that.
48. The defendants challenged the originality of the Skye Sage design. The defendants contend that the Skye pattern is the same as the pattern of Armstrong tartan. Mr Turner submitted that a swatch of Armstrong tartan must have been on Mr Aveyard’s mood board for the Skye design, given the similarity between Armstrong and Skye and that this aspect of the Skye Sage design was not original. It must have been influenced by (i.e. copied from) Armstrong.
49. An example of an Armstrong tartan is annexed to this judgment but as with the other fabrics, the colours do not reproduce well and I will describe it. The pattern of Armstrong tartan is essentially as follows. There is a bold check pattern consisting of a pair of thick vertical lines and a pair of thick horizontal lines of the same general size and spacing. They are dark, if not black. The smaller squares formed by the crossing pairs of thick lines are blue. The other blocks are green. Each thick line has a pair of thin black lines running parallel on its inner edge. There is a red line of medium thickness running inside the pairs of thick vertical and horizontal lines. There is a pair of thin black lines running down the centre of the green vertical block and a corresponding pair of black thin lines running horizontally.
50. Expressed simply in terms of lines and blocks, as I have done above, the patterns are the same. Every line in the Skye pattern has a corresponding line in Armstrong. There are no lines in either pattern which cannot be found in the other. However expressing the matter in this way highlights the similarities between the designs and takes no account of the differences in the relative thicknesses and sizes of the lines and the blocks.
51. Various different Armstrong designs were in evidence including a version downloaded from the internet, one from a book called the Tartan Weaver’s Guide by James Scarlett and one from Lochcarron Weavers. The description I have given above applies to all of them but they are different from each other because the relative thicknesses and the spacing of the various parts are not the same. An illustration of this is as follows. Two of the Armstrong patterns mentioned have a generally square appearance. The relative spacing of the thick lines is on a square grid so that the (blue) square inside the crossed thick lines is surrounded by shapes which are also squares (in green). The Skye pattern does not have the same generally square appearance. There is a small square inside the crossed thick lines (it is blue-grey in Skye Sage), a large square (light brown) where the broad blocks cross, and rectangular regions in between. The overall appearance is quite different. The defendants found a version of the Armstrong pattern with the combination of squares

and rectangles a bit more like the Skye pattern. It was the Armstrong pattern obtained from the internet (a website called Find a Tartan).

52. The defendants also drew attention to “warp counts” for Armstrong and Skye. The warp count is a way of representing the numbers of threads of different coloured yarn used to make up the warp of a pattern. The defendants relied on the warp count for a version of Armstrong appearing in the Tartan Weaver’s Guide and compared it to the Skye pattern. The counts are not identical but they are similar, as I would expect given the similarity in the patterns I have already described.
53. Mr Turner put to Mr Aveyard that on at least one occasion he had produced a design for a plaid fabric based on a pre-existing tartan. It was called Knebworth Indigo. Mr Aveyard agreed that its pattern was based on Black Watch tartan. Black Watch was a tartan he was familiar with whereas Armstrong was not. Mr Turner put another design to Mr Aveyard and suggested it was based on Dress Stewart. Mr Aveyard did not agree. His view was that any large scale multi-colour check you do would ultimately bear some resemblance to any one of the 6,000 tartan designs he thought were out there. He did not accept that the Skye pattern was based on Armstrong.
54. I accept Mr Aveyard’s evidence that there were no tartan fabrics on his mood board and I accept his evidence that he was not aware of the Armstrong tartan when he created the Skye plaid. In my judgment the fact that the lines and blocks of the Skye pattern correspond to the lines and blocks of Armstrong is most likely simply a reflection of the fact that they are both large scale multi-colour check patterns. Even if Mr Aveyard had been unconsciously influenced by an Armstrong pattern to some degree (and I make no finding that he was), the Skye pattern itself is distinct from all of the various Armstrong patterns relied on. The Skye pattern has its own arrangement of the relative thicknesses and the spacing of lines and blocks. I find that the Skye pattern was designed by Mr Aveyard himself as part of his overall design process. He did not create it by copying.
55. I also reject the defendants’ suggestion that the Skye pattern was somehow nothing more than a commonplace variant of Armstrong even if Mr Aveyard was unaware of it. The particular Skye pattern is unique and has its own qualities and appearance. It is not the same as any of the various Armstrong patterns in evidence. In any case what is important is the combination of the pattern and the colours which make up Skye Sage. That is nothing like Armstrong at all.
56. In my judgment considerable artistic skill, labour and judgment was employed by Mr Aveyard to produce the Skye Sage design. It is his original work. It is his own intellectual creation. It was not copied from another source. The extent to which any relevant copyright subsists is a matter I will return to below.
57. As I have mentioned above the Heritage Collection of furnishing fabric was launched in January 2005. It was a success. Skye Sage was one of the claimant’s best selling fabrics.

Mr Murphy and Mr Pickles

58. It is convenient to deal with the conflict of evidence between Mr Murphy and Mr Pickles briefly. There is no doubt Mr Pickles met Mr Murphy and discussed the

possibility of Mr Murphy buying furnishing fabric from Abraham Moon in March 2010. Mr Pickles said he gave Mr Murphy a Heritage Collection sample book to take away. The sample book would have included all the Heritage Collection fabrics including Skye Sage. Mr Murphy said he did not remember being given the sample book. I accept Mr Pickles' evidence. It makes sense for him to have given such a sample book to Mr Murphy.

59. There is also no doubt that in Autumn 2010 Mr Pickles saw furniture in a John Lewis Partnership store covered in a fabric Mr Pickles thought was a copy of a Skye design. The source of the furniture had been identified as Contrast Upholstery and that led back to Mr Murphy. Mr Pickles called Mr Murphy. Mr Murphy says he told Mr Pickles that the fabric came from Art of the Loom (which is true). Mr Pickles says Mr Murphy told him that he (Mr Murphy) had taken the sample book to "Templewood" (i.e. Art of the Loom) and sourced the Abraham Moon fabric he wanted from them instead. In effect this would be an admission of copying or of arranging for copying to take place. Mr Murphy denied this.
60. Both Mr Pickles and Mr Murphy gave clear evidence but they contradict each other. Mr Pickles has a contemporaneous note of the telephone call. It has the word "Templewood" on it. That fits Mr Murphy's version of events as much as Mr Pickles. The document does not go further and have any record of an admission by Mr Murphy of copying. I am not satisfied that Mr Murphy did say anything relevant to Mr Pickles other than that the source of the fabric he was using was Art of the Loom/Templewood. I find there was no admission of copying.

The origin of Spring Meadow

61. An image of Spring Meadow is annexed although, as with the other images, the colours have not reproduced well. Overall, like Skye Sage, Spring Meadow is a large plaid pattern in muted natural light brown/pale purple-grey shades with highlights in darker purple and maroon. The designs are not actually identical but they are very similar. The pattern and colourway can be looked at separately.
62. The pattern of lines and blocks of Spring Meadow is virtually identical to the Skye pattern. As I mentioned above, the Skye pattern differs from Armstrong in the relative thicknesses and sizes of the lines and blocks, however these relative thickness and sizes in the Spring Meadow pattern are almost identical to Skye Sage. The warp counts are not identical but the similarity I have referred to can be seen in the warp counts. The patterns of Skye Sage and Spring Meadow are much more like each other than either is like any of the Armstrong patterns.
63. The colours of Spring Meadow and Skye Sage are not actually identical but they are very similar. The only real difference is that Spring Meadow is to my eye a little paler overall than Skye Sage. Spring Meadow has reddish-brown blocks and purple-grey blocks which cross in a pattern of squares and rectangles just like Skye Sage. There is the same bold check superimposed on top and made of thick lines. There is a purple vertical medium thickness line and that crosses with a maroon horizontal medium thickness line. There are corresponding sets of crossed pairs of lines in both patterns.

64. I have seen numerous tartan and plaid patterns in evidence in this case. They vary in all sorts of ways but amongst all that variation there are many which are similar to one other in various ways. However the similarity between Spring Meadow and Skye Sage is of a different degree. There was a suggestion that design constraints might explain the similarity in patterns. I reject that. If the patterns were not so close and if the colours were entirely different, then that might have been an explanation. However it is hard to believe that the combination of the similar thickness and spacing of the lines and blocks in the pattern along with the choice of colours of the various threads, is a coincidence. Neither could be said to derive from Armstrong on any view. There is no doubt that Skye Sage was on the market and could have been copied by someone interested in selling upholstery fabric in the UK in 2010.
65. A point arose from the fact that the colours of Spring Meadow were not precisely identical to those in Skye Sage. The defendants produced a further fabric sample for the purposes of this case which was made to be even closer to Skye Sage than Spring Meadow was. The point of this was to show that it was possible to reproduce the colours of Skye Sage even more closely and thus to suggest that Spring Meadow was not a copy because, if it had been made with the intent of copying, it would have been closer to Skye Sage colours. It is true that the sample is an even closer colour match to Skye Sage than Spring Meadow. However the evidence showed that Spring Meadow is made using readily available and relatively inexpensive threads from a supplier called Gledhill. The special fabric exhibit had been made using more expensive threads than the Gledhill threads used in Spring Meadow. In my judgment this special fabric exhibit does not assist. There is no evidence before me that, using Gledhill threads, a closer match to Skye Sage could have been produced. I reject the argument that the special fabric assists the defendants' case.
66. The similarities between the fabrics coupled with the overall circumstances raise a strong inference of copying. I infer that the later in time (Spring Meadow) was produced by copying the earlier (Skye Sage). Although the legal burden of proof always rests on the claimant to prove infringement, in this case the defendants bear an evidential onus to rebut that inference.

Independent design?

67. The defendants' case that Spring Meadow was derived independently of Skye Sage depends on the evidence of Mr Wellings, Mr Clayton and Mr A. Thornber. The essence of the story is that in 2010 Mr A. Thornber decided he wanted to procure woollen plaid upholstery fabrics in soft neutral colours. He approached Mr Clayton. Mr Clayton himself could not do it but he thought he knew someone who could. Following the discussions between Mr A. Thornber and Mr Clayton, Mr Clayton then approached Mr Wellings. As a result of the discussions between Mr Clayton and Mr Wellings, Mr Wellings wove two patchwork blankets with various different designs across the warp and weft. The blankets were in fact woven for Mr Wellings by A Batley Ltd but nothing turns on that. The warps and wefts were based on adapting various tartans selected in discussions between Mr Clayton and Mr Wellings. They were Armstrong, Farquharson, Chisholm, Half Gordon, Ancient Colquhoun, Gunn, Ancient Hunting Lindsay, and MacDonald Lord of the Isles. Each blanket had four tartan warps and four corresponding wefts. This makes a total of 32 samples including 8 "true" tartans in which the warps and wefts match and 28 "bastard" patterns in which, for example, an Armstrong warp crosses a Farquharson weft.

Images of the 32 samples form exhibit DD27. In order to use up the minimum warp length of 10m, after the region on the blankets which included the true tartan patterns, further wefts were used to produce more permutations of design and colour. These latter parts of the blankets were referred to as “experimental”. These consisted of a further 144 samples. Images of these samples form exhibit DD26.

68. Mr Clayton collected the two blankets from Mr Wellings in an unfinished state. Mr Clayton finished them, cut them into samples and showed the 8 true tartan samples to Mr A. Thornber. Mr A. Thornber selected a short list of three to think about and then chose one. It was based on Armstrong. Mr A. Thornber invited Mr Clayton to produce more colourways based on this pattern in a “section range” and Mr Wellings did so, in further blankets. He made blankets consisting of 7 Armstrong warps in various colourways and one Chisholm warp. This led to Mr A. Thornber selected the pattern and colourway which became Spring Meadow. The same process also produced the Spun Honey design and the other patterns. Some samples from this second stage were also in evidence.
69. Mr A. Thornber said that before proceeding with the production of the “section range” he was careful to ask Mr Clayton to confirm that the tartan he selected was free of copyright and available for use. He said Mr Clayton assured him that it was. All three of Mr A. Thornber, Mr Clayton and Mr Wellings stated that they had not seen Skye Sage until these proceedings (or the complaint leading up to them).
70. Thus in essence the defendants’ case is that the process had two stages. The first stage produced initial blankets of adapted tartan designs. That led to the selection of the adapted Armstrong pattern by Mr A. Thornber. The second stage produced a section range based on blankets of adapted Armstrong patterns in different colourways (and one adapted Chisholm). From this second stage Spring Meadow and the other patterns were chosen. All this had nothing to do with Skye Sage. It was independent and there was no copying.
71. It became abundantly clear in cross-examination that DD27 simply cannot be what the defendants say it is. The simple reason is that when one looks at the fabric samples in DD27 and considers how they are alleged to have been created, there are serious inconsistencies. One approach is to consider the selvages. The selvedge is the unfinished outer edge of a fabric. It is possible to see whether a fabric has a selvedge or not fairly clearly by simply looking at it. If they were made in two blankets then there will be 16 squares with selvages and 16 without. In fact in DD27 there are 17 squares with selvages and 15 without. Too few selvages might be explicable if the selvedge had been cut off but too many is not. There were more inconsistencies. The selvedge pieces should have comprised four separate warps, each with four wefts. In fact of the selvedge pieces there were six samples for one warp, five for another and only three each for the other two warps. So there were too many examples of some warps and too few of others. Another problem was that all the selvedge pieces were true tartans whereas only half of them should have been.
72. There are also problems with exhibit DD26. DD26 is supposed to consist of the 144 further experimental designs run on to use up the same warps. DD26 does indeed consist of 144 samples, but overall there are too many warps. There should only be a total of 8 warps in DD26 and DD27 together. However there are more warps than that. Exactly how many more was not clear but what was is clear is that there were

more than 8. Furthermore, within DD26 there were true tartans with the same design in different colourways. These should not exist in this exhibit.

73. A further point related to some of the colourways of the samples in DD26. The exhibit included four samples which each had so called Armstrong warp patterns but each of whose colourways were very similar to a different colourway from Abraham Moon's Skye pattern (Skye Heather, Skye Claret, Skye Sage and Skye Burnt Orange). Even if these samples present in DD26 in fact came from the later blankets produced after Mr A. Thornber had selected the Armstrong pattern, Ms Edwards-Stuart submitted that the fact that four Abraham Moon colourways of the Skye pattern had appeared was beyond coincidence. It was a tell tale sign of copying. I agree with Ms Edwards-Stuart.
74. Finally, in the exhibits which related to the later Armstrong blankets, Ms Edwards-Stuart pointed to a sample (called Chisholm by the defendants) which was very similar in pattern and colourway to another Abraham Moon design from the Heritage collection called Troon. She submitted this was another tell tale sign of copying. I agree.
75. In order to understand the position of the defendants and the defendants' witnesses in the light of these points it is necessary to consider how the matters arose in cross-examination. Mr A. Thornber gave evidence first. He said he had not been given the original blankets but only samples cut from blankets. On the question of whether the samples he was given had come from the blankets alleged, he could not say they had done (since he did not see the blankets) but his view, based on his 20 years' experience, was that the samples he was given had been processed together. He agreed that questions about the blankets should be put to Mr Clayton and Mr Wellings. Mr Clayton gave evidence next. The problem of there being too many selvages in exhibit DD27 was put to him. He could not explain it and suggested the matter should be put to Mr Wellings. Mr Clayton did suggest that the exhibits must have been muddled up.
76. When Mr Wellings gave evidence he could not explain the problems either. He could not explain what had gone wrong with exhibits DD26 and DD27. In re-examination Mr Wellings confirmed that whatever the exhibits were, they were not what the witness statements said they were. Although I doubt it was a matter for the witness in any event since it is self-evident, Mr Wellings also accepted that the various samples I have referred to above were similar to the other Abraham Moon designs. He maintained he had never seen an Abraham Moon sample book.
77. The evidence on the first day of trial finished during Mr Wellings' re-examination. The following morning, Mr Wellings' re-examination was completed and the defendants' final witness was Mr S. Thornber. He was the in-house technical expert and had not been intended to give evidence about these factual matters. I permitted Mr Turner to elicit from Mr S. Thornber some evidence which was the result of the defendants working over night to see if an explanation of some kind could be found. The upshot of this evidence was that amongst the samples in exhibits DD26 and DD27, the defendants and their advisers had been able to find 29 samples which could be fitted together like a jigsaw to recreate most of the two original adapted tartan blankets. This involved taking some samples from DD26 and some from DD27. There was no explanation for the other points raised (such as the presence of too

many warps and of designs which were similar to other Abraham Moon fabrics) and no explanation how the exhibits and written evidence had come to be given in the form they had been.

78. Thus the defendants' submission was that the essential story of how their designs came to be produced was true and that all that had happened was a highly regrettable mix up with exhibits. The confusion was embarrassing but nothing more than that. It should not be taken as undermining the defendants' evidence. Mr Wellings, Mr Clayton and Mr A Thornber all said they had not seen the claimant's Skye Sage design until they heard about the complaint in this case.
79. Mr Turner submitted that Mr A. Thornber, Mr Clayton and Mr Wellings were honest witnesses. My impressions of the witnesses were as follows. Mr Wellings was obviously nervous but that does not mean he was dishonest. I take into account the fact that Mr Wellings has difficulty reading and writing. Mr Clayton had explained that he dealt with Mr Wellings orally and not in writing for that reason. Mr Clayton gave his evidence clearly. I was less impressed with Mr A. Thornber. He came across a glib witness but that again does not mean he was dishonest.
80. Mr Turner submitted that getting samples muddled was consistent with the samples being used innocently in the course of producing fabric and inconsistent with a concocted case. If the case had been concocted for the purposes of litigation then, Mr Turner submitted, the defendants would have made a better job of it. He also submitted that given the scale of the defendants' sales of the fabric complained of, concocting a story like the one presented would be an odd thing to do.
81. I do not accept Mr Turner's submission that the muddle is inconsistent with a concocted case or that concocting a story of independent design would be a odd thing to do in the context of the value of this dispute. On the first point, although with hindsight after cross-examination the problems with the exhibits are glaring, the fact is that no-one on the defendants' side noticed them until they were pointed out in cross-examination. As for the idea that concocting a story would be odd, I am not satisfied that this case is of such little commercial significance to place weight on the point. The case is worth enough to fight in the Patents County Court. If it is worth enough to fight, it is worth enough for defendants to make up a defence of independent design.
82. There were various other points which arose at trial but the foregoing is a sufficient summary of the evidence to deal with the matter in hand. At one stage Mr Wellings could not provide an answer to a point being put in cross-examination and there were shouts from the defendants' side of the court to suggest an answer to him. That did not help.
83. There was a suggestion that not every point had been put to all the witnesses in cross-examination. In my judgment the relevant points were put fairly to the defendants' witnesses. This case is proceeding in the Patents County Court. Cross-examination is permitted for a limited time in order to be proportionate to the nature of the dispute. Necessarily therefore cross-examination of witnesses in the Patents County Court will often be more truncated than it might be in the High Court. That does not preclude a judge sitting in the Patents County Court from making appropriate findings on the evidence. In this case Mr A. Thornber, Mr Clayton and Mr Wellings understood the

significance of the evidence they were giving and of the questions they were asked. The cross-examination did not cover every point on either side but I am sure it was proportionate and allowed justice to be done to both sides.

84. I am not persuaded that the evidence is simply muddled. I am not satisfied about the defendants' explanation about how Spring Meadow was designed. Without it there is no defence of independent design.
85. My decision is not based on the demeanour of the defendants' witnesses. My decision is based on my view that, taken as a whole, the evidence presented to me in support of the case of independent design does not make sense. It is not sufficiently cogent to rebut the inference of copying which arises from the close similarity between Skye Sage and Spring Meadow and the public availability of Skye Sage. The fact that a partial jigsaw of the allegedly initial pair of adapted tartan blankets can be reconstructed does not explain all the problems and inconsistencies with the defendants' exhibits and evidence.
86. I find that the pair of adapted tartan blankets were not made at the start of the process which led to the production of Spring Meadow. The adapted tartans allegation is a key part of the chronology and is the key to the defendants' defence. If and insofar as such a pair of blankets was made at all, I think it was a later production, probably in an attempt to show how Spring Meadow (and the other Art of the Loom fabrics) could have been produced starting from an Armstrong tartan instead of being copied from Skye Sage. I am not satisfied that I can place any weight on the evidence of Mr Clayton or Mr Wellings as regards the origin of Spring Meadow. Although Mr A. Thornber's testimony put him at a distance from the actual blankets produced by Mr Wellings, in rejecting the allegation that the process began with a pair of adapted tartan blankets I am also rejecting evidence given by Mr A. Thornber. His evidence purported to support independent creation specifically by dealing with the chronology: receiving eight samples and ordering a section range. I do not accept his evidence about that. I am not satisfied I can place weight on the evidence of Mr A. Thornber any more than I can place weight on the evidence of Mr Clayton or Mr Wellings.
87. It is not necessary to attempt to reconstruct in detail how the Spring Meadow fabric was actually produced along side the other Art of the Loom fabrics which bear similarities to the Abraham Moon Heritage collection. However I infer that all of Art of the Loom, Mr Clayton and Mr Wellings were involved in and responsible for the copying of Skye Sage because that conclusion makes the most sense. Art of the Loom sells furnishing fabric and therefore operates in the same market as Abraham Moon. By 2010 Skye Sage was a successful furnishing and upholstery fabric, freely available on the market. Art of the Loom therefore would have had a motive to copy Skye Sage. Moreover one of Art of the Loom's customers (Tetrad/Contrast Upholstery/Mr Murphy) was interested in Abraham Moon's Heritage collection but the price from Abraham Moon was too high. Whether Mr Murphy was actually responsible for organising the copying of Spring Meadow I do not know and I make no finding about that. Art of the Loom are the commercial source of Spring Meadow from the point of view of retailers and wholesalers. Spring Meadow appears on an Art of the Loom cascade with at least one other "Moon" type fabric. Mr A. Thornber, one of the partners in Art of the Loom, gave evidence designed to support the case of independent design of Spring Meadow, which I have not accepted. The idea that Art

of the Loom were not involved in the copying but that it was all done by Mr Wellings alone (or by Mr Wellings and Mr Clayton together but separately from Art of the Loom) does not make sense.

Apply the law to the facts

88. A finding that Spring Meadow is a copy of Skye Sage does not mean that any infringement of copyright has taken place. To address that question I need to consider the copyright works relied on by Abraham Moon and consider how they may have been reproduced. The works relied on are:
- i) The Skye Ticket Stamp.
 - ii) The original patchwork blanket representing the Skye plaid in a number of colourways known as the Skye Section Range.
 - iii) The fabric sample from the Skye Section Range in the Sage colourway.
89. The Skye Ticket Stamp is said to be a literary work and an artistic work. The other things are relied on as artistic works.

The Skye Ticket Stamp as a literary work

90. Mr Turner did not seriously challenge the allegation that the Skye Ticket Stamp was a literary work within s3 of the 1988 Act but in any event I find that it is. I also find that it is an original work. It was the product of what I have found to be Mr Aveyard's original work in designing the Skye pattern and (on the second page of the ticket) the Skye Sage colourway. It is his own intellectual creation. Although there was an issue about title to copyright at one stage, it fell away.
91. All Skye Sage fabric is made on a loom which has been set up in accordance with the Skye Ticket Stamp (one way or another). Thus anything copied from Skye Sage fabric is, indirectly but necessarily, itself derived ultimately from the Skye Ticket Stamp. The claimant pleaded that there must be a ticket stamp used to set up the loom which produces Spring Meadow. It was produced in evidence. At first sight it looks nothing like the Skye Ticket Stamp. For one thing it is headed "Spring Meadow". It represents the thread counts for the various yarns used to produce Spring Meadow. As I have mentioned above the thread counts for Spring Meadow are not identical to Skye Sage but they are similar and reflect the similarity between the fabrics. The yarns in Spring Meadow are not identical in colour to the yarns in Skye Sage but they combine with the thread counts to produce a fabric which is a copy of Skye Sage.
92. I find that the key information on the Spring Meadow ticket was derived from the Skye Ticket Stamp. The relationship between the two is like the translation of a text from one language to another. The "language" of the Skye Ticket Stamp is that used by Mr Aveyard and Abraham Moon's looms whereas the "language" of the Spring Meadow ticket is that used by Mr Wellings and his looms. The derivation was indirect in the sense that the chain of derivation was from the Skye Ticket Stamp to Skye Sage fabric and then from Skye Sage fabric to set up the loom on which Spring Meadow is made to be a copy of Skye Sage. I think the Spring Meadow ticket reproduces a substantial part of the literary work embodied in the Skye Ticket Stamp.

It was made by (indirectly) copying the literary work. Although the point was not argued before me, I do not see why it is not also an adaptation of the literary work within s21 of the 1988 Act (see s21(3)(a)(i)). I find that the Spring Meadow ticket is an infringing copy of the claimant's literary copyright in the Skye Ticket Stamp.

93. Spring Meadow is made by following instructions which themselves reproduce Abraham Moon's literary copyright. Does that infringe? Mr Turner submitted that copyright in a literary work was not infringed by making an article (such as fabric) in that way. He cited a number of cases. One was the judgment of Sir Robert Megarry VC in *Brigid Foley v Elliott* [1982] RPC 433 concerning knitting guides as artistic works. In that case the Vice Chancellor held that a garment made following the instructions embodied in the knitting guides was not a reproduction of the instructions and so did not infringe. Another was *J & S Davis v Wright Health Group* [1988] RPC 403 concerning dental impression trays. Here Whitford J observed that you do not infringe copyright in a recipe by making a cake. Another was *Interlego v Tyco* [1988] RPC 343 in which Lord Oliver referred to the definition of "reproduction" in the 1956 Copyright Act (at s48(1) of that Act) which brought conversion of a work into a three dimensional form within the scope of reproduction but only for artistic works and not for literary works. So he held that to produce an article by following written instructions does not infringe the author's copyright in those instructions (see p373). In effect s17(3) of the 1988 Act has the same result by including within the scope of "copying" of an artistic work, making a copy in three dimensions of a two dimensional work. Mr Turner also cited *Lambretta Clothing v Teddy Smith* [2003] RPC 41 paragraph 78 where Etherton J held:

"Finally, it is convenient to mention here the literary copyright which Lambretta claims in the written specifications at the bottom of LMK 5310 and the more extensive specifications in the second half of the Specification Document. Those specifications formed, in substance, directions to the manufacturer as to the manner in which to produce the Lambretta Track Top. It is clear, in my judgment, that the making of a garment according to those instructions cannot in law constitute an infringement of copyright by reproducing the literary work in a material form: 1988 Act, s.17(1) and (2). The point is lucidly and simply explained in Laddie, Prescott and Vitoria at para.3.148:

"The instant problem is quite distinct from the case of a literary work consisting of a series of instructions which do not describe an end product but only say how it is to be brought about—a recipe for making a rabbit pie, to take one judicial illustration. There, the end product does not reproduce the work in a material form—to follow the instructions is not to reproduce them, but merely to perform them. To adopt a mathematical expression, the instructions do not 'map on' to the end product. The literary skill and labour has not been taken."

94. This point made by Etherton J was not addressed on the appeal in *Lambretta*.

95. Mr Turner also submitted that certain other cases concerning fabrics (*Lerose v Hawick* [1974] RPC 42 (Whitford J), *Guilford Kapwood v Embsay Fabrics* [1983] FSR 567 (Walton J), and *Entec v Abacus* [1992] FSR 332 (CA)) can only be explained on the basis that the fabrics could not be said to infringe copyright in written instructions of one kind or another. All of them involved attempts to compare the fabric with some sort of sketch or diagram.
96. Mr Turner submitted this view of reproduction was consistent with the Information Society Directive 2001/29/EC which requires member states to provide an exclusive right of reproduction in Art. 2. That definition refers to direct or indirect reproduction “by any means and in any form”. Although the ECJ in *Infopaq* (Case C-5/08) referred to an objective of the directive being to introduce a high level of protection for authors (paragraph 40-43), Mr Turner submitted that the directive had to be interpreted in the light of the existence of separate design protection in EU law and so there was no need to stretch the concept of reproduction to cover this case.
97. In summary, Mr Turner argued that there was clearly no visual resemblance between the Spring Meadow fabric and the Syke Ticket Stamp and therefore a claim that the fabric infringed should be rejected.
98. For the claimant Ms Edwards-Stuart submitted to the contrary. She pointed out that the definition of reproduction in s17(2) of the 1988 Act was broad. By definition it includes storing a work in any medium by electronic means. She also referred to Laddie J in *Autospin v Beehive Spinning* [1995] RPC 683 in which he considered that reproduction included transforming a computer data file which defines a three dimensional shape into that article and said that the Court should not be hide bound by the particular forms of work. Ms Edwards-Stuart submitted that Article 2 of the directive was very broad and Recital 21 of the directive was an indication that reproduction should be given a broad scope. Also in addition to paragraph 43 of *Infopaq* (mentioned above) Ms Edwards Stuart referred to paragraph 96 of the CJEU’s judgment in *Painer* (Case C-145/10) in which it was said that the scope of copyright protection should not depend on the possible differences in the degree of creative freedom in the production of various categories of works. Fundamentally her submission was that the comments in the cases I have referred to above should be regarded as of dubious validity in the light of the Directive (moreover *Brigid Foley* was an interim decision). The Directive envisages the protection of all intellectual creations by the same reproduction right and distinctions between literary and artistic works are no longer justified. So the limitation of three dimensional copying in s17(3) of the 1988 Act to artistic works was no longer appropriate.
99. However tempting it may be, I do not propose to go down the road suggested by Ms Edwards-Stuart to the extent of denying the existence of differences between literary and artistic works. At this stage of the case I am concerned with literary copyright. As a literary work the Skye Ticket Stamp embodies a series of instructions which define how to make something. In my judgment it is just not accurate to say that this Spring Meadow fabric is a reproduction of this *literary* work. It is not a copy of the instructions. Although the Spring Meadow ticket is an infringing copy of the Skye Ticket Stamp, I find that the Spring Meadow fabric is not.

Skye Ticket Stamp as an artistic work

100. Mr Turner contended that the Skye Ticket Stamp is not an artistic work at all and thus it does not matter whether it could be said that the appearance of the fabric derives in some way from the ticket. That derivation does not infringe artistic copyright because there is no artistic copyright. He submitted that the document was not a “graphic work” (s4(1)(a) and s4(2)), which is the kind of work the claimant relied on, nor could it be said to be an “artistic work” within any normal usage of that phrase. He pointed out that in *Lerose v Hawick* Whitford J had held that the knitting point patterns before him (which comprised written instructions and sketches) were artistic works because they were lines drawn on paper and not as a result of the writing. He also referred to *Entec* for a similar reason and referred to *Interlego* in which Lord Oliver had emphasised that the essence of an artistic work is that which is visually significant. In that case the addition of new writing (figures) on drawings did not create original artistic works.
101. Ms Edwards-Stuart submitted that the Skye Ticket Stamp was an artistic work (she relied on “graphic work” as defined in the 1988 Act) and that Spring Meadow was a reproduction of that artistic work.
102. The Skye Ticket Stamp is not a drawing of the Skye Sage fabric and if a layman looks at the Skye Ticket Stamp, all they see are two pages of words and numbers. However Mr Aveyard and Mr Wellings gave clear evidence which shows in my judgment that to an experienced fabric designer, the ticket has real visual significance. Mr Wellings said he could look at a weaving ticket and visualise what the fabric looks like. Mr Aveyard said that he visualised the design and then recorded it in a ticket. Thus it seems to me that to those people, the ticket has a visual significance. I do not see why it matters that the visual significance is only apparent to some people. Apart from anything else the people concerned are the very people working in this field. Moreover there is no problem of subjectivity in this conclusion. We can all see what Mr Aveyard and Mr Wellings can see, albeit we need the loom to actually make the fabric in order to do so. Experts however can see it without the loom.
103. It seems to me that the fact the ticket was not produced by drawing lines must be irrelevant. The ticket was produced by someone with sufficient artistic skill to record the visual appearance he wanted to create in the form of the numbers and letters on that document. If Mr Aveyard had sketched out a picture of Skye Sage, then derived the details for the ticket stamp, and thrown away the sketch as superfluous, the result would be the same but Mr Turner could not then deny the existence of an artistic work recording the appearance of Skye Sage. I do not see why it matters that there was no sketch because the artist did not need to draw one in order to record the visual impression he wanted to create and thereby fix it in a material form.
104. Fixation is an important aspect of literary and artistic copyright (c.f. Art 2 Berne Convention). Although s3(2) of the 1988 Act only refers to literary, dramatic and musical work, and s4 has no corresponding provision, I presume that is just because it is assumed that s4(1) inevitably requires a record of the work in a material form. If the image of Skye Sage had not been fixed, that would be a different matter, but the ticket acts as a record of the image.
105. The artist David Hockney has recently created works of art on his iPad tablet computer (see “A Bigger Message: *Conversations with David Hockney*” by Martin Gayford ISBN 9780500238875). The images drawn by Mr Hockney on his computer

were ephemeral as they were being created. The images may not even have stayed on the screen all the time they were being drawn. The only thing which makes sense to be referred to as the artist's work in that case is the computer file recording the image. The same images, hanging on the wall of the Royal Academy in London earlier this year, are not the actual pictures drawn by the artist, they are "copies" produced from the computer file. Although Mr Hockney creates the image visually by drawing on a touch screen, and in that sense uses a technique different from that of Mr Aveyard, in both cases the only record fixed in a material form of the visual image the artist created is an organised table of essentially numerical data which, when looked at directly by a layman, means nothing. The visual image is only visible, at least to a layman, as a result of using the fixed record to tell a machine (a loom or a computer) to produce something.

106. Artistic copyright must relate to the content of the work of the artist and not the medium in which it is recorded. It is or should be a "content" copyright and not a "signal" copyright. The visual image of Skye Sage if it was fixed in a material form as a drawing would be protected by artistic copyright. It seems to me that to deny artistic copyright in this case – despite the fact that the visual image is indeed fixed in a material form – is to confuse the medium with the message (c.f. *Content copyrights and signal copyrights: the case for a rational scheme of protection* by Sir Richard Arnold writing extra-judicially in the Queen Mary Journal of Intellectual Property Vol 1 No 3 2011 p272).
107. I find that the Skye Ticket Stamp is an artistic work within s4 of the 1988 Act. I think it is best described as a "graphic work" within s4(1)(a) and 4(2). Mr Turner submitted that terms like "graphic work" should be given their ordinary meaning. I do not think it is doing violence to the language to regard the ticket as a graphic work. It may be of an unusual sort but it is a record of a visual image.
108. Mr Turner submitted that there was no visual resemblance between the Spring Meadow fabric and the Skye Ticket Stamp. That is true in the sense that, as a lay person looking at them, one is a plaid design of fabric while the other is a collection of words, letters and numbers. However I rely again on the impact of the evidence of Mr Wellings and Mr Aveyard. To someone who can see the fabric design from looking at the ticket (or vice versa) the one has a clear visual resemblance to the other. In my judgment the appearance of Spring Meadow reproduces the whole or a substantial part of the appearance of Skye Sage and thus is a reproduction of the whole or a substantial part of artistic work embodied in the Skye Ticket Stamp within the meaning of s17 of the 1988 Act. Making Spring Meadow fabric involves an act of copying that artistic work and is an act of infringement.
109. This conclusion is not inconsistent with my finding on literary copyright. The process by which Spring Meadow is made is irrelevant. A cotton fabric printed with an image of the Spring Meadow plaid would be just as much of an infringement. Spring Meadow infringes the artistic copyright because it reproduces the appearance of Skye Sage. Whether its manufacture could be said to involving carrying out instructions on the ticket is not the point. The point is that the ticket is not simply a set of instructions which can be performed on a loom, it is also a record of an image and the image has been reproduced.

110. The fact that Skye Sage is a fabric design does not seem to me to provide a reason why artistic copyright should not subsist in it. Many works of art are exploited in the textile and fashion industries such as by reproducing them on fabric. In any event, although it is currently under review, I note that in its present form section 52 of the 1988 Act would probably apply to Skye Sage and would limit the effective industrial monopoly in this case to one lasting 25 years.

Section 51 of the 1988 Act

111. Mr Turner submitted that the defendants had the benefit a defence to infringement of copyright in the artistic work(s) as a result of s51 of the 1988 Act. S51(1) provides that it is not an infringement of any copyright in a design document or model recording or embodying a design for anything other than an artistic work or a typeface to make an article to the design or to copy an article made to the design. By s51(3) “design” in s51 means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article, other than surface decoration. Mr Turner submitted that the Skye Ticket Stamp was a design document within the section and so the section applied and there was no copyright infringement by making Spring Meadow fabric to the design recorded in the Skye Ticket Stamp.
112. The argument raises a number of issues but Ms Edwards-Stuart concentrated on one. She submitted that even if Mr Turner’s other submissions were correct, the Skye Sage design represented “surface decoration” and so was excluded from the operation of s51 by the definition of “design” in s51(3). For this Ms Edwards-Stuart relied on paragraphs 30-32 of the judgment of Jacob LJ in *Lambretta Clothing*. In fact that judgment was concerned with the expression as it appears in s213 of the Act as part of the definition of unregistered design right. In my judgment the term is meant to mean the same thing in both sections 51 and 213. I recognise that the Court of Appeal held in *Lambretta* that it is not correct to approach s51 and s213 as if there should be no “gap” between them but that is a different point. It would be odd if Parliament used the same expression in two related contexts with an intention that they mean different things.
113. In paragraphs 30-32 of *Lambretta* Jacob LJ held that “surface decoration” covered both the case in which a surface was covered with a thin layer and where the decoration runs through the article. The effect of the conclusion in *Lambretta* was that there was no unregistered design right in the design of the garment in that case.
114. I accept Ms Edwards-Stuart’s submission. It seems to me that applying Jacob LJ’s approach to surface decoration in this case means that the design of Skye Sage is “surface decoration”. It decorates the surface of the fabric. The fact that the colours run all the way through the fabric because they arise from the colours of dyed yarn is irrelevant. Accordingly I reject the defence under s51 of the 1988 Act.

The Skye Section Range

115. The claimant also puts its case on the first fabric sample which was made. The sample was made in a single blanket called the Skye Section Range and part of that blanket was the Skye Sage colourway. The argument is that the original fabric sample is an original artistic work (either as the whole blanket or the smaller cut out piece).

116. Mr Turner submitted that despite the numerous cases on fabric designs, it had never been suggested or held that a fabric sample was a drawing or other graphic work. He said that a fabric sample did not fall within any of the items in the (non-exhaustive) list of things which are graphic works in s4(2) and drew attention to the words “or similar work” at the end of the passage in s4(2) relating to graphic work. He also submitted that design law provided adequate protection for this sort of “applied art” (using the language of Art 2 and 7(4) of the Berne Convention) and so there was no reason to expand the scope of copyright in artistic works to cover fabric samples.
117. Ms Edwards-Stuart drew my attention to *Nova v Mazooma* [2006] RPC (14) 379 (Kitchin J) and on appeal [2007] RPC (25) 589 (Jacob LJ). At first instance Kitchin J pointed out that the definition of “graphic work” in the Act is inclusive and not restricted to the exemplars given. On appeal Jacob LJ qualified that to exclude moving images but not otherwise. She suggested, based on a passage from *Russell-Clarke and Howe on Industrial Designs* (8th Ed 5-006) that two things characterised a graphic work within s4(2). There must be a visual image and it must be essentially two dimensional. On that basis the design of Skye Sage would qualify. She also submitted that any other conclusion would be surprising and arbitrary since it would mean that a design which was sketched first would be protected whereas one which was rendered in fabric first would not be, and it would protect printed fabrics - since they would obviously be similar to lithographs – but not woven patterns. She submitted that the upshot of the European cases (bearing in mind Art 2 of the Information Society directive 2001/29/EC) was that all “intellectual creations” should be protected. Moreover she argued that if the fabric design is in the field of “applied art” then paragraph 34 of the decision of the CJEU in *Flos SpA v Semararo Casa e Famiglia SpA* (Case C-168/09) indicated that national courts may be required by the Information Society directive 2001/29/EC to provide protection for such works. If the fabric sample was Mr Aveyward’s intellectual creation then it should be protected in copyright.
118. Since I have found that the Skye Ticket Stamp is an original artistic work, the copyright in which is infringed by making the Spring Meadow fabric, it is not necessary for me to resolve whether the Skye Sage fabric sample itself is also an artistic work. I will not do so. That also means that I do not need to grapple with a further point raised by Mr Turner, that even if copyright subsisted in the original fabric sample there was no chain of derivation running from that sample through to Spring Meadow.

The liability of Art of the Loom (the first to fourth defendants)

119. The upshot of my findings so far is that making Spring Meadow fabric is an act of infringement of Abraham Moon’s copyright. However Art of the Loom do not make the fabric themselves, it is made by the fifth defendant. Mr Turner submitted that even if the fifth defendant was liable for acts of primary copyright infringement, Art of the Loom were not.
120. The claimant contended that Art of the Loom were liable on a number of bases, as follows:
- i) Art of the Loom issue copies to the public and are caught by s18 of the 1988 Act;

- ii) Art of the Loom are jointly liable with the fifth defendants as a joint tortfeasor.
- iii) Art of the Loom authorise the copying done by the fifth defendant and are caught by s16(2) of the Act.
- iv) Art of the Loom are liable for secondary infringement as the rolls of Spring Meadow fabric they sold were infringing copies of Abraham Moon's copyright, sold with knowledge or having reason to believe that they were infringing.

121. Mr Turner denied that any of these points had been established. It is convenient to deal with them in turn.

Section 18 – issue to the public

122. On s18, Mr Turner pointed out that s18(2) defined “issue to the public” as being the act of putting into circulation copies not previously put into circulation and s18(3) made it clear that subsequent sale or distribution of copies was outside the section. So he contended that in this case, when the fifth defendant, NB Fabrics, sold unfinished Spring Meadow fabric to whichever of Mr Clayton's companies it was (probably Metropolis Interiors), that was the act of “issuing to the public” or “putting into circulation” of the copy. Thus the subsequent sale by Art of the Loom was outside the section.
123. Mr Turner submitted that it was clear that s18 was not intended to be narrower than the concept of putting on the market in European trade law and he submitted that in *Peake Holding v Axolin* (Case C-16/03) the CJEU had held that goods are placed on the market for the purposes of the EU's law of exhaustion when they are sold to an independent undertaking. Thus the sale from NB Fabrics to Metropolis was the act of putting on the market.
124. Ms Edwards-Stuart submitted that on the facts of this case, the entity which makes the copy available to the public is Art of the Loom and not either NB Fabrics or Metropolis. If NB Fabrics (or Metropolis) were themselves selling to the public then the matter would be different. Art of the Loom would be nothing more than another normal customer and their resale would not be caught by s18.
125. I accept Ms Edwards-Stuart's submission. It seems to me that the CJEU in *Peake Holdings* were not considering a factual situation like this one. In this case, as a matter of reality, it is Art of the Loom which puts the Spring Meadow fabric on the market. Neither NB Fabrics nor Metropolis sell to anyone other than Art of the Loom (or another Thornber company). I do not know whether this is pursuant to a formal supply agreement or simply based on the tacit understanding of the parties to this arrangement but it is clear in my judgment that NB Fabrics and Metropolis are making and finishing this fabric for supply on to Art of the Loom and no one else. If the supply chain includes other entities related to the Thornber family as well, that makes no difference. The purpose of these arrangements with NB Fabrics and Metropolis is in order for Art of the Loom to sell the finished product on the open market. In my judgment Art of the Loom are putting into circulation on the market copies not previously put into circulation and are infringing under s18.

Joint liability

126. Mr Turner relied on *CBS v Amstrad* [1988] RPC 567 and submitted that, to establish joint liability it was necessary for there to be a common design which included agreeing to something being done which constitutes infringement. He referred to the words of Lord Templeman at p607 line 32 which state that “joint infringers are two or more persons who act in concert with one another pursuant to a common design in the infringement”. He said that in this case, while his clients may have had a common design to get a particular product on the market, they did not have a common design to do so by copying.
127. Mr Turner submitted that Art of the Loom had no common design (with anyone else – i.e. Mr Wellings or Mr Clayton) to infringe anyone’s rights. He submitted that the evidence of given by Mr A. Thornber showed that he had never agreed to Spring Meadow being made by copying (if that is what was done). This point was based on evidence given by Mr A. Thornber when he had said that before ordering the section range, he had checked with Mr Clayton that the tartan he selected was free of copyright and Mr Clayton said it was.
128. I reject Mr Turner’s submission on the facts. As I have already found, Art of the Loom were involved in and responsible for the copying of Skye Sage. I have not accepted Mr A. Thornber’s evidence about the origin of Spring Meadow. Mr A. Thornber’s evidence about the conversation with Mr Clayton was not specifically challenged in cross-examination but it was given as part of his evidence about the chronology of events said to prove independent design. I have not accepted that chronology.
129. The creation of Spring Meadow by copying Skye Sage was something done by all three parties (Mr Wellings, Mr Clayton and Art of the Loom) together. All these persons have acted in concert with one another pursuant to a common design in the infringement. Art of the Loom is jointly liable for the primary act of infringement committed by NB Fabrics in making Spring Meadow fabric.

Authorising copying

130. Since I have held that Art of the Loom are liable under s18 and jointly liable for the acts of making Spring Meadow, there is no need to consider whether Art of the Loom are also liable under s16(2).

Secondary infringement

131. On the basis of my findings of fact, it seems to me that the sales of Spring Meadow by Art of the Loom are acts of secondary infringement. When the fabric was sold Art of the Loom must have known or had reason to believe that the fabric amounted to infringing copies of Abraham Moon’s copyright since Art of the Loom were part and parcel of the copying of Skye Sage in the first place.

Section 97 of the 1988 Act

132. All of the defendants seek to rely on s97 as a defence to damages for copyright infringement. To establish the defence it must be shown that at the time of the

infringement the defendant did not know and had no reason to believe that copyright subsisted in the work to which the action relates. The argument relied on here is that the letter before action of 11th May 2011 did not identify the claimant's copyright works and that given the similarity to Armstrong and the inadequacy of information provided by the claimant in correspondence, even up to the trial, the defendants did not know or have reason to believe that copyright subsisted.

133. I reject this defence. To establish it would require much more cogent evidence than the defendants have put forward here. Whatever the inadequacies of the solicitor's correspondence at an early stage, this case arose because these defendants had already copied the claimant's fabric. I do not say that it would be impossible for a copyist to make out the s97 defence but it would require a very special set of facts to do so. There are none here. These defendants copied the Skye Sage fabric. They had every reason to suppose that in doing so they were copying something (a work) in which copyright subsisted. It does not matter whether they knew about the existence of the Skye Ticket Stamp when the fabric was copied (although I am sure they would have had reason to believe a ticket existed).

Conclusion

134. I find that all of the defendants are liable for infringement of copyright.

Postscript

135. Before this judgment was handed down Mr Turner pointed out that paragraph 77 is in error in stating that I permitted the evidence of the jigsaw of samples produced overnight to be given by Mr S. Thornber. He is right and that is indeed a mistake on my part. What in fact happened was that I allowed the defendants to put in the jigsaw of samples and give the explanation for them by way of submissions, since that was the proportionate way to proceed, but I did not admit them as evidence given by Mr S. Thornber.

Annexes

(The colours have not reproduced well in these images)

Skye Sage



Spring Meadow



Armstrong (one example)

