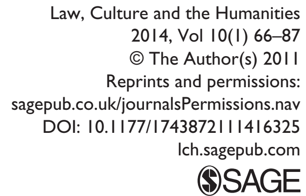
Commentary



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Looking Right: The Art of Visual Literacy in British Copyright Litigation

Jose Bellido
Birkbeck College, University of London

Abstract

The essay explores the interactive role of experts in the construction of the intangible object in copyright law. It pays special attention to the interventions and eventual connections of a British design consultant and fashion designer, Victor Herbert, in different copyright cases such as the well-known *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2001]. The article traces the background of his early court appearances as an expert witness and the range of visual techniques and experiments he developed to "materialize" the incorporeal in copyright law.

Keywords

Copyright, visual literacy, expert evidence, intangible, design, fabrics, law and the senses

> In a sense much of the history of intellectual property can be seen as one of the law attempting to contain and restrict the intangible – to capture the phantom.[1]

I. The Basis of Experience

1. Difference and Repetition

When the trial was at one of its most tedious discursive moments, just when the expertise of the expert was checked against his CV, something curious happened.[2] Upon

1. Lionel Bently and Brad Sherman, *The Making of Modern Intellectual Property Law. The British Experience, 1760–1911* (Cambridge: Cambridge University Press, 1999) p. 59.
2. *Designer Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803.

Corresponding author:
Jose Bellido, School of Law, Birkbeck College, University of London, Malet St., London WC1 E7HX.
Email: jose.bellido@bbk.ac.uk

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cross-examination, Victor Herbert went beyond the typical process-related answers to his formal qualifications and described his expertise as "the art of visual literacy."[3] He was not alone in employing that smart term in order to justify the call of his expertise, and to explain his professional engagement with the object under litigation. According to Lord Hoffmann, such a remarkable expression was a suitable depiction for Victor Herbert's role.[4] Indeed, when he appeared at the trial of *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* in November of 1997 he was no novice. This was not his first time in a courtroom; he had been called on many other occasions.

In fact Herbert was used to handling the stress of cross-examination. He had often visited the Chancery Division of the High Court of Justice after being asked by a variety of litigants to look into their cases. He was able to produce visual comparisons to strengthen the credibility of their position. His visual expertises were not just called for his experience and scrutiny in art, fashion and design, but precisely for having developed a rare and particular ability within a trial. His expertise was therefore qualified: his fluency and ability called for was not that of an art expert but that of an artistic *copyright* expert.[5] His taxonomical ability to detect what Justice Laddie once called "fingerprints of copying"[6] was well documented by specialists, and his ability to discern similarities and differences between materials after an "instant impression on looking at" the subject matter was commented upon with awe.[7]

2. Cycles of Credit

Having developed a sensitive kind of visual experience in the 1970s, Herbert's perception was therefore not confined to one specific case; his work as a "design guru" was potentially useful in a wide range of situations.[8] Despite the fact that he was not the first

3. "The plaintiff's expert Mr. Herbert described his expertise as 'the art of visual literacy.' This seems to me to be right" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 at 707 *per* Lord Hoffmann.
4. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 at 705 *per* Lord Hoffmann.
5. And he identified that accredited experience in his CV. See "Curriculum Vitae. Victor Herbert" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2001], *Parliamentary Archives*, UK., HL/PO/JU/4/3/2065-2065A
6. *Department of Culture, Arts and Leisure (Northern Ireland) and others v. The Automobile Association,* Chancery Division, 29 Jan. 2001, *per* Laddie J. in *All England Official Transcripts* (1997–2008). For an interesting commentary written by the lawyers who represented the plaintiff, see Sarah Whalley Coombes and Nick Rose, "The Anatomy of a Copyright Dispute," *Copyright World*, May 2001, pp. 13–15.
7. "His report and his evidence were admirably clear" in *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others,* Chancery Division, 14 November 1990, *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).
8. Amy Williams "I taught Bruce Oldfield and Rifat Ozbek…and I learned from them, too," *The Evening Standard,* April 21, 2005, p. 57.

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or the only design consultant to appear in high profile copyright cases,[9] Victor Herbert may be considered the precursor of what has now become an ordinary ingredient in British copyright case law.[10] He turned out to be for artistic copyright what Guy Protheroe would become later for British music copyright litigation: a competent copyright expert.[11] His particular brand of visual art expertise assisted in the leading controversies arising in British copyright at the end of the twentieth century. His appearances underpinned judicial struggles to make sense of section 4(1) of the Copyright, Designs and Patents Act (1988)[12] and, before that, his name also haunted legal controversies over the intelligibility of section of 3(1) of the previous Copyright Act (1956).[13]

Without doubt the most significant entry in his biography, the one most likely to be remembered for posterity in the history of copyright law, was his intervention in a case – *Designers Guild v. Russell Williams* [1998] – that reached the House of Lords three years after his intervention.[14] However, the trajectory of his copyright expertise can be traced to many other controversies in which he contributed to the judicial decision-making, and even more frequently to cases settled out of court. His expertise was the common denominator of the decision to a case reported as *Merlet v. Mothercare* [1984];[15] the one

9. Mr. Carter was a design consultant who appeared as expert witness in *Hensher v. Restawhile* [1973] 3 All ER 414.
10. "Sometimes the court will benefit from tutoring from experts to appreciate the similarities and differences between the claimant's and defendant's work and to appreciate better how those in the art design the type of works with which the action is concerned. They can also give evidence of what are common design in the trade" in *IPC v. Higbury* [2004] EWHC 2985 at [40] *per* Laddie J.
11. Guy Protheroe is a musicologist who consecutively appears as expert witness in a number of copyright cases such as *Hadley v. Kemp* [1999] EMLR 589; *Fisher v. Bjork* (1995); *Brown. v. Mcasso* (2005) mentioned with an insightful commentary of expert copyright evidence in Lionel Bently, "Authorship of Popular Music in UK Copyright Law," *Information, Communication & Society*, 12(2), 179–204.
12. Section 4(1) Copyright, Designs and Patents Act (1988) reads "In this Part 'artistic work' means— (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality; (b) a work of architecture being a building or a model for a building, or (c) a work of artistic craftsmanship."
13. Section 3(1) of the Copyright Act (1956) read as follows "In this Act 'artistic work' means a work of any of the following descriptions, that is to say,— (a) the following, irrespective of artistic quality, namely paintings, sculptures, drawings, engravings and photographs; (b) works of architecture, being either buildings or models for buildings; (c) works of artistic craftsmanship, not falling within either of the preceding paragraphs.
14. *Designer Guild Limited v. Russell Williams (Textiles) Limited (Trading As Washington D.C.)* [2001] FSR 11. For a commentary, see Ronan Deazley, "Copyright in the House of Lords: Recent cases, judicial reasoning and academic writing," *Intellectual Property Quarterly*, 2, 2004, pp. 121–37.
15. *Merlet and Another v. Mothercare Plc* [1984] FSR 358. One commentator suggests that "expert evidence (the testimony of a Herbert)" was crucial in furnishing a way for this case to be decided. See Shelley Wright, "A Feminist Exploration of the Legal Protection of Art," 7 *Canadian Journal of Women and Law* 59(1994), pp. 59–96; at 94.

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called *Bernstein v. Murray* [1981][16]; and the unreported *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd* [1990].[17] In retrospect, what is surprising is not his consistent and integral place as a reliable evidential source in the early struggles of the field of artistic copyright,[18] but rather the lack of resonance of his name, and the lack of awareness of his role, in the leading commentaries of the discipline.[19]

3. Reporting the Report

Nevertheless, we still need a pretext for our inquiry. Before the assistance of expert knowledge, before the appearance of any expert, we need to ask about the material condition of the visual itself in copyright litigation: how claims over the intangible were brought to the courtroom, how exhibits were arranged, how they were presented in the preparation of the case.[20] Although each of the four cases mentioned had their own evidential trajectory and their own instances of chance and necessity, there are several pointers that might be distinguished from the outset. As we can read in any textbook account of the discipline, intangible property protected by copyright arises automatically from the act of creation.[21] However, in producing an itinerary for its infringement, any controversy needs material to address, things to which to refer. In that conditional sense, evidence in modern copyright uncannily resembles recursive ways of capturing the intangible, in order to present it for legal scrutiny. The requirement of proof entails the

16. *J. Bernstein Ltd V. Sydney Murray Ltd* [1981] RPC 303 *per* Fox J.
17. *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others,* Chancery Division, 14 November 1990 *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).
18. Despite the fact that Lionel Bently and Brad Sherman acknowledge that "given the technical and novel nature of intellectual property, it is not surprising that the courts frequently rely on experts for a range of different matters" in Lionel Bently and Brad Sherman, *Intellectual Property Law,* Oxford University Press, 2009, p. 1088.
19. Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs* (London: Butterworths, 2000) and Kevin Garnett, Gillian Davies and Guy Harbottle, *Copinger and Skone James on Copyright* (London: Sweet and Maxwell, 2005). More recently, an interesting book that produces extensive commentaries on *Designers Guild v. Russell Williams* [Lionel Bently, Jennifer Davies and Jane Ginsburg (eds), *Copyright and Piracy. An interdisciplinary critique* (Cambridge: Cambridge University Press, 2010)] continues without paying attention to the ubiquity of Victor Herbert in British copyright litigation. The references provided tend to concentrate on the more general and normative question on the admissibility of expert evidence in copyright law.
20. "It is necessary to appreciate that the legal conception of the intangible embodies a number of conflicting demands that pull the law in different directions" in Lionel Bently and Brad Sherman, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999), p. 55.
21. Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2009), p. 31 ["The intangible property protected by copyright is distinctive in that it arises automatically and usually for the benefit of the author"].

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desperate search for spatial and temporal co-ordinates from which visions of the work can emerge.[22]

For instance, despite the fact that copyright does not need any registration, the gaze in copyright infringement litigation is often constituted as a retrospective narration in which a recurrent type of material (tangible) evidence emerges. Everywhere the same evidential conundrum meets the judicial eye. Material objects and witness testimonies that could refer to the intangible are produced for inspection to the court.[23] Not surprisingly, the four cases mentioned above are not an exception to a peculiar fascination with the visual that sometimes affects even the reporting of the cases. A typical example of such visual attraction – one among many possible examples – is *Bernstein* [1981]. Not only were different drawings of ladies' suits and also dresses seen at the trial,[24] but its report also included the reproductions of some of those drawings and dresses for the visual pleasure of its readers.[25] It is no surprise then that one of the main copyright treatises praised the quality of copyright law reports in relation to their use of illustrations.[26] The same could be said about intellectual property textbooks.[27] If the source of friction in *Bernstein*, *Merlet* or *Designers Guild* was the way different things looked, it is assumed that a case-report which combines verbal descriptions and visual images, and follows the judicial struggle to translate these impressions of the eye into words, could reveal itself as a way

22. The relationship between *evidence* and the semantics of vision (*video*) is explored in Piyel Haldar, "The Evidencer's Eye: Representations of Truth in the Laws of Evidence," *Law and Critique,* 1991, pp. 171–89; 172; also in Piyel Haldar, "The Return of the Evidencer's Eye: Rhetoric and the visual technologies of proof," 8(1) *Griffith Law Review* 1999, pp. 86–101; Claudia Blümle, "The Omnipresent Eye of the Judge. Juridical Evidence in Albrecht Dürer and Lucas Cranach," 14/4, *Parallax*, 2008, pp. 42–54; and Carlos Lévy and Laurent Pernot, "Phryné dévoilée" in Carlos Lévy and Laurent Pernot (eds), *Dire l'evidence* (Paris: L´Harmattan, 1997), pp. 5–12 especially pp. 11–12.
23. There is one phrase in *Topward v. Goodman* that is particularly enigmatic: "I add that both Mr Herbert and Miss Kemeny had actual copies of the Defendants' dress whereas no such copy was before the Court," *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others*, Chancery Division, 14 November 1990 *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).
24. "This is a copyright action concerning ladies' dresses. Both the plaintiffs and the defendants design and sell dresses. The plaintiffs claim to be the owners of the copyright in certain original design drawings. Those drawings I will refer to as numbers 208, 215, and 230 respectively. Numbers 208 and 215 are for suits consisting of a matching skirt and top. Number 230 is for a dress […]. The garments complained of are the defendant's dress numbered 6536 and the defendants' suit numbered 6510" in *J. Bernstein Ltd v. Sydney Murray Ltd* [1981] RPC 303 at 307–308 *per* Fox J.
25. *J. Bernstein Ltd v. Sydney Murray Ltd* [1981] RPC pp. 304–306 [reproductions of drawings and sketches]; pp. 317–18 [photographs of dresses].
26. "The report in [1975] RPC 31 is better because illustrations of the furniture are provided, and so are the decisions of the lower courts." Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, (London: Butterworths, 2000), p. 198.
27. Lionel Bently and Brad Sherman, *Intellectual Property Law*, (Oxford: Oxford University Press, 2009), pp. 173–4 [*Designers Guild v. Russell Williams*]; p. 81 [*Merlet v. Mothercare*].

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of attempting to represent the intangible.[28] Yet despite the fact that these reports serve as a legal record for the establishment of precedent and that they may satisfy a normative and doctrinal demand, they do not constitute a sufficient representation of the past for historical purposes. It is by looking at these blind spots that we may appreciate how litigation allowed the imperceptible passage, the transition that characterizes copyright infringement disputes: from the difference in the materials to the material differences in what is assumed to be the copyright "work." More precisely, artistic copyright litigation illustrates the contingencies involved in the specific route that comprises the dramatic technology of the material display at the trial.

II. In the Witness Box

1. Receiving a Call

During the summer of 1980, after having been selected as an impartial juror in fashion fairs in London, Victor Herbert was called by a firm of solicitors to become an expert witness in a copyright case. It was his first appearance in court. The controversy involved a copyright dispute between drawings and dresses. More specifically, it was a particular case of medium transformation; a particular situation in which copying, if indeed there had been any, had shifted from two to three dimensional configuration, from sketches to actual fabric.[29] If copyright litigation was about textiles, Herbert seemed a good candidate to testify: fashion in all its forms was his career.[30] Despite the fact that he could have been considered as an expensive designer,[31] his accredited credentials and, perhaps more importantly, the convergence of his academic and industrial background made him a special witness, at least on paper: a medal for work of special distinction at the Royal College of Art,[32] student of the celebrated British designer Janey Ironside,[33] and also now

28. See, for instance, *Merlet and Another v. Mothercare Plc* [1986] RPC pp. 118–19 [photographic reproductions of babycape and diagram] and *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* FSR [1998] pp. 830–31 [photographic reproductions of the fabrics].
29. "It was discussed whether defendants have manufactured and sold dresses and suits which could be considered as a reproduction in a three-dimensional form of a substantial part of the plaintiffs' design drawings."
30. Jackie Modlinger, "Rome wasn't dressed in a day," *Daily Express*, Feb. 19, 1979, pp. 20–21.
31. Lesley Ebbets, "Fashion. Fun at a Fair," *Daily Mirror*, March 26, 1980, p. 16.
32. "The expert called by the plaintiffs was Mr. Victor Herbert. He is a graduate of the Fashion School of the Royal College of Art, where he obtained a First Class Honours degree and was awarded the College medal for work of special distinction. He was subsequently a part-time Research Fellow of the College for some six years, when he was engaged on a project at the Research Centre of the College to enquire into the qualities of various fabrics" in *J. Bernstein Ltd v. Sydney Murray Ltd* [1981] RPC 303 at 305 *per* Justice Fox.
33. Janey Ironside mentions him in her article "Fashion Design," *The Times*, November 2, 1967, p. iv. There are also references to them in Victor Herbert, "Two-piece suit," Victoria & Albert Museum, 1970, ref. number: T.485:1 to 2-2001 and in her biographical account *Janey* (London: Michael Joseph, 1973), p. 165 ["Fortunately, one of my best and most intelligent students that year, Victor Herbert, was equally interested and had some scientific training"].

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a recognized design consultant.[34] Such a gifted endowment and professional credibility was that of someone who had just been described a few months earlier as "a name to watch" in the design industry.[35] Therefore, if the case was about medium transformation, something that had troubled copyright law for some time,[36] Herbert seemed a suitable candidate to appear in court. Not only was he a "calm and well organised" man, a self-confessed "fanatically meticulous" designer,[37] he was also someone versed in the two dimensional; someone flexible enough to have learned the whole repertoire of activities "in the process of design from concept to reality."[38] However, as a witness, he had yet to be tested.

Three days before his scheduled appearance, Herbert received the bundle of papers from each of the parties with their accompanying materials. His forensic eye was further furnished with the vision of the three or four mannequins placed in court. His visual analysis is narrated extensively in the case report.[39] On comparing the materials, he emphasized similarities by highlighting their effects. Undoubtedly it was an analytical exercise showing parallelisms. But Herbert focused on the materiality of the similarities. Proportions, fabric, location and the way garments were fitted to the body were among the comparisons deployed.[40]

Cross-examination, however, focused on what Herbert had not emphasized: differences. Throughout the procedure he accepted that differences between materials also existed but he "remained of the view" that one of the two "must have been a copy from the other."[41] More dramatically, he suggested that "at first sight" a sketch and a drawing looked alike, but under cross-examination he recognised "on closer inspection" that they were dissimilar.[42] Despite the defensive insistence that cross-examination put on

34. Prudence Glynn, "Fashion. From Appollo to apparel," *The Times*, May 28, 1968, p. 9, Prudence Glynn, "Fashion," *The Times*, July 8, 1980, p. 10; Susy Menkes, "Fit for the family," *The Times*, June 3, 1983, p. 11.
35. "Herbert, Victor. […] Watch this name" in "Geared for Action," *Daily Express*, Oct. 15, 1979, pp. 24–5.
36. Basically as a consequence of *Burke & Margot Burke Ltd v. Spicers* [1936] Ch. 400. But see *Radley Gowns Ltd v. Spyrou* [1975] FSR 455 at 467.
37. Alexandra Buxton, "Victor has designs on big business," *The Guardian*, May 16, 1988.
38. See Bruce Oldfield, *Rootless. An Autobiography* (Arrow Books, 2004), p. 178 ["Victor's experience, speed and accuracy were invaluable to me. He came round every Thursday and at weekends. We'd sit puzzling over *ways to translate my drawings into wearable garments*, listening to music and swapping ideas"] (my emphasis). See specifically that phrase in the self-description Herbert gave in "Expert Report of Victor Herbert" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] HL, Parliamentary Archives, HL/PO/JU/4/3/2065-2065A.
39. *J. Bernstein Ltd v. Sidney Murray Ltd* [1981] RPC 303 at 316 *per* Fox J.
40. *J. Bernstein Ltd v. Sidney Murray Ltd* [1981] RPC 303 at 316–23 *per* Fox J.
41. Also see "Mr. Herbert, in his final comparison of the drawing 230 with the dress 6536 towards the end of his cross-examination, did not, in terms, refer to the fact that 230 has a longer sleeve. I do not think that is of consequence. It is clear from the earlier part of his evidence that Mr. Herbert did not regard the length of the sleeve as a significant style feature" in *J. Bernstein Ltd v. Sidney Murray Ltd* [1981] RPC 303 at 321 *per* Fox J.
42. *J. Bernstein Ltd v. Sidney Murray Ltd* [1981] RPC 303 at 321 *per* Fox J.

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differences, Herbert's comparative exercise succeeded. His scrutiny was not only almost identical but also corroborative to the one that the judge performed.[43] Nevertheless, not all of Herbert's findings were acknowledged by the judge. Their tiny disagreement captured a legal anxiety involved in drawing a distinction between expert and non-expert vision when looking at several inferences and potential marks of copying.[44] Finally, it is possible that Herbert's professional expertise made visible too many issues that were not evident to the lay eye.[45]

2. The Law Report as a Locus of Communication

That lawyers read law reports is certainly no news. However, that a case report can almost be converted into an advert and a brochure for an expert is a remarkable situation. In the eyes of barristers and solicitors preparing new cases, there is no more interesting communicative feature than a precedent peppered with words of praise for the performance of an expert witness. The case report is a recordable and objective medium. The evidence of a safe and reliable expert is therefore something to take into account for the future. The rapidity with which new copyright-related issues sprang up at Herbert's door indicates the impact of his first performance at the witness box. The emergence of Herbert's long-term relationship with copyright issues can be variously explained by glimpses of the case reports or by the word-of-mouth spread of his impact. His immediate move towards consultancy in artistic copyright was not premeditated; it was more a result of an unforeseen contingency: a case and the references revealed in its report.

Consultancy is perhaps the best way to define Herbert's business sense and commercial approach towards art and design. And that was the expression that one deputy judge would choose a few years later with which to define him.[46] Not surprisingly, a few years later he would write in an academic journal about the need for companies to secure managerial assistance from design consultants.[47] Becoming an expert in issues related to artistic copyright also fitted with his interest in a technical approach to the world of

43. *J. Bernstein Ltd v. Sidney Murray Ltd* [1981] RPC 303 at 330 *per* Fox J. ["I accept Mr. Herbert's analysis of the dress 230 and the defendants' dress 6536 and of the similarities between them. I also accept his analysis of the drawing 230 and his evidence of the common features which he finds between the drawing and the dress. Further, I accept Mr. Herbert's views"].
44. *J. Bernstein Ltd v. Sidney Murray Ltd* [1981] RPC 303 at 328 *per* Fox J. ["careful and thoughtful witness"].
45. The legal obstacle was section 9(8) of the Copyright Act (1956) "The making of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions, if the object would not appear, to persons who are not experts in relation to objects of that description, to be a reproduction of the artistic work."
46. "Mr Herbert has worked as a design consultant for more than 30 years"; and he has been both a garment and fabric designer" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 *per* Lawrence Collins Q.C.
47. Victor Herbert and Caroline Otto, "A Square Peg in a round hole? Integrating a Design Consultant into a Textile/Clothing Company." *Design Management Journal*, 1994, pp. 51–7.

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fashion and design, beyond the academy and the catwalk.[48] He found he had a facility with the cases and he began accumulating experience as to what the lawyers expected from his expertise. Slowly he gained a professional reputation among lawyerly circles by giving opinions on comparative copyright assessments. Keeping a low profile in the media, his bright analyses were nevertheless extremely useful for lawyers in preparing their strategies for litigation. A Herbert analysis came to be considered a reliable forecast of a lawyer's probability of success in court. Despite the fact that he claimed no special interest in the law of copyright, his frequent contact with copyright lawyers made him aware of important milestones in the history of British copyright law, such as the "furniture" or the "football coupons" cases.[49] Within a few years he was asked for so many copyright opinions that he had to reject a substantial number of petitions on the basis of conflict of interests.

One issue that was not settled out of court materialized in another reported case tried during Easter of 1984. Less than four years after his first appearance in court, Herbert was called again as an expert witness. Ironically, the *mise-en-scène* of the case is reminiscent of the first one. The cases shared not only the same expert witness (Victor Herbert) and the same courtroom (Chancery Division) but also a similar legal conundrum around artistic copyright, each having to consider the fact that copying could involve a material shift from two to three dimensions.[50] However, the precise material subjected to transformation and inspection ostensibly changed the storyline. Rather than looking at dress and suit sketches, the case gathered different evidential material that imposed a different demand on the judicial eye. Herbert returned to the witness box to assist the judge in the ways of producing parallelisms between a cutting plan and a baby cape.[51] What seems interesting to note is that the visual gap between expert and non-expert also survived here, acquiring now a greater intensity.[52] Despite of the fact that Walton J. praised him again as a "most distinguished" witness, the differences in the

48. The conference paper he gave in Georgia, Atlanta (1974) is an extraordinary account of this interest for chemical, mechanical and visual aspects of design. See Victor Herbert, "Photographic Anthropometric Study for the Design of Pre-Shaped Clothing: Design Aspects" in *First International Symposium on Garment Moulding Technology,* October 15–16, 1974, pp. 243–8.
49. Interview with Victor Herbert, February 2011. He was referring to the following copyright cases from the House of Lords: *Hensher v. Restawhile* [1976] AC 64 and *Ladbroke v. William Hill* [1964] 1 WLR 273.
50. References to *Bernstein* [1981] were obviously produced in *Merlet and Another v. Mothercare Plc* [1984] FSR 358 at 366 *per* Walton J.
51. *Merlet and Another v. Mothercare Plc* [1984] FSR 358 *per* Walton J.
52. "In evaluating the evidence, the court will endeavour not to be tied to a particular metaphysics of art, partly because courts are not naturally fitted to weigh such matters, partly because Parliament can hardly have intended that the construction of its statutory phrase should turn on some recondite theory of aesthetics – though the court must, of course, in its task of statutory interpretation, take cognisance of the social-aesthetic situation which lies behind the enactment, nor can counsel be prevented from probing the reasons why a witness considers the subject-matter to be or not to be a work of artistic craftsmanship" in *Merlet and Another v. Mothercare Plc* [1984] FSR 358 at 369 *per* Walton J.

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materials with which they were factually confronted exemplified the tension. Material differences made the comparison for a lay eye almost unbridgeable and perhaps even incommensurable.[53] It is probably for that reason that the defence succeeded and why the appeal was also dismissed.[54] Nevertheless one commentator suggested a few years later that "expert evidence (the testimony of a Herbert)" was crucial in furnishing a way for this case to be decided.[55]

III. From the Courtroom to the Chamber

1. Mastering the Bundle

As Herbert continued working in artistic copyright consultancy, he became increasingly aware of the legal concerns that haunt copyright lawyers. He already knew what was expected by the judge: if a suit was brought into the court, his professional expertise had to be capable of describing what "the man of the street" would see. He was ready to solve the expectation gap. Yet he was not fully acquainted with the technicalities and contingencies of the everyday experience of copyright lawyers when preparing a case.

Further, there is a basic difference between the aforementioned cases, all in the 1980s, and Herbert's future work. The difference is not only in the nature of the controversy but also the extent and the timing of Herbert's intervention. And it is so because his participation in the preparation and handling of cases notably increased and expanded. Not only did he begin receiving the paperwork produced by solicitors from the very beginning of a legal inquiry, but he participated in the numbering and identification of the material suitable for the preparation of the bundle and for inspection.[56] Additionally, although Herbert was consistently the final recipient of documents, in order to provide his analysis he frequently put an order and a chronology to the material provided.[57]

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53. It is not a surprise then that copyright doctrine would consider the problem as an issue of possibility of creation in itself. As Bently and Sherman suggest "of course, other cases, such as *Hensher* itself or *Merlet v. Mothercare*, would require the court to face up to the difficult question as to how much design freedom would suffice to render a work one of artistic craftsmanship" in Lionel and Brad Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2009), pp. 83–4.
54. *Merlet and Another v. Mothercare Plc* [1986] RPC 115.
55. See Shelley Wright, "A Feminist Exploration of the Legal Protection of Art," 7 *Canadian Journal of Women and Law* 59(1994) pp. 59–96; at 94
56. An example of the activities that constitute this "background" to proceedings is given in *Designers Guild Limited v. Russell Williams (Textiles) Limited (T/A Washington D.C.)* [1998] FSR 803 at 808–809 *per* Lawrence Collins, Q.C.
57. This highlighting structures the perception for the material parameters of the work to be elucidated. As Barron suggests, "[i]n order to position an intangible entity as an object of property, the law must be able to see it as an identifiable and self-sufficient 'thing', attributable to some determinate author and perceptible to the senses through the physical medium in which it is recorded or embodied." Anne Barron, "Copyright, Art, and Objecthood" in D. McClean and K. Schubert (eds), *Dear Images: Art Copyright and Culture* (London: Ridinghouse ICA, 2002), 277–306 at 292.

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Realizing how much was at stake in the ordering and supply of evidential material, it was crucial for him to see the alleged development sequence and to investigate around the different stages of the creative process. As was evidenced throughout the difficult process of establishing "the chain of causation" and in order to bridge the expectation gap in *Merlet*,[58] Herbert realized that the practical concern *of* and the fascination *with* dates and documents were so cogent in modern copyright litigation that the stuff lying around the litigated thing often grew more important than the thing itself.[59] His concerns began to focus on the specificity of the material in order to trace the vicissitudes of the intangible in space and time.[60] This timetabling exercise which he started to perform was crucial for his attempt to make commensurable comparisons. In fact, minutes of meetings in which the "thing" in question was mentioned,[61] letters in which it was referred to[62] or broader contexts about it and reference to it inevitably featured in controversies around copyright.[63]

For lawyers on both sides and also for Herbert, the perusal of notebooks, diaries and design calendars was often more illuminating than any direct looking at the work.[64] Herbert became more and more interested in looking at the sequence of drawings where the material reference could emerge to assist lawyers, even though many of the issues he would consider at the outset or he would flag up would not be included in the final report he was asked to produce for the court. Now fully integrated into the lawyers' pleading strategies, his physical relation within the context of the litigation proceedings also changed: Herbert began sitting behind the barrister throughout the proceedings to provide expert assistance.

58. *Merlet and Another v. Mothercare Plc* [1984] FSR 358 at 370 *per* Walton J.
59. For instance, the exhibition ("But on 16 March 1978 the Copenhagen Trade Fair took place. All three styles (i.e. 208, 215 and 230) were shown there" in *J. Bernstein Ltd v. Sydney Murray Ltd* [1981] RPC 303; see also *Frayling v. Premier Upholstery Ltd and others*, Chancery Division, 5 November 1998, *per* Park J. (unreported).
60. To a certain extent because – we all assume – at the end of the day that creativity has been planned, invoiced and ticketed; "On 16 March 1978 the plaintiffs invoiced various garments, including styles 208, 215 and 230 to their agent in Amsterdam" in *J. Bernstein Ltd v. Sydney Murray Ltd* [1981] RPC 303.
61. The typical example is *Hensher v. Restawhile* [1973] 3 All ER 414.
62. For instance, see *Merlet and Another v. Mothercare Plc* [1986] RPC 115 at 131 *per* Walton J.
63. Of all these referencing instances, the catalogue is undoubtedly what constitutes the key material, the medium of circulation, the pathway of the intangible. Their explanatory potency for lawyers in litigation is multiform. They basically constitute the disseminating platform from which images and data can be circled and highlighted See Lionel Bently and Brad Sherman, "Copyright Aspects of Art Loans in UK," *Art Loans and Exhibitions* (London: Institute of Art and Law, 1996), pp. 12–13 and see also *Purefoy v. Sykes Boxall* (1955) 72 RPC 89.
64. For instance "the Style Book" in *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others*, Chancery Division, 14 November 1990, *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).

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2. Making Expert Reports

The new type of involvement also concerned a qualitative shift: cases were now mediated by an expert *report*. The previous experience and the new understanding of the context of litigation helped him to produce comparative reports that were intelligible to the untrained eye. In his attempt to produce objectivity, in his desire to work for the case as a whole, Herbert's reports continued looking at the visual effects of clothes and textiles. The following case, in which he participated and that was brought to trial, concerned frocks.[65] After the last trial in which Herbert had been called as expert witness, the Privy Council had delivered a crucial decision in relation to infringement of artistic copyright;[66] therefore, a context to understand what Herbert considered as the "rendition" of a drawing had been provided.[67]

In this new appearance at the court, Herbert's "long written report" and also his "cross-examination" were again described as "admirably clear."[68] The most interesting feature of the expert report that he submitted was not the similarities he highlighted between the litigating materials but his decision to include the differences.[69] The inclusion of differences or arguments to the contrary could be explained as an overall assessment that Herbert gave to the case. It also had the consequence of anticipating and therefore diminishing some of the difficulties that might arise in cross-examination. The same could be said about the influences and references to the original material that the plaintiff was going to produce in court. Identifying and showing influences was not a risk but just the opposite.[70] It was a way of anticipating strategic surprises developed by the

65. *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others*, Chancery Division, 14 November 1990, *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).
66. *Interlego AG v. Tyco International Inc* [1988] 3 All ER 949, [1988] RPC 343 *per* Lord Oliver of Aylmerton.
67. "But copying, per se, however much skill or labour may be devoted to the process, cannot make an original work. A well executed tracing is the result of much labour and skill but remains what it is, a tracing" in *Interlego AG v. Tyco International Inc* [1988] 3 All ER 949, [1988] RPC 343.
68. *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others*, Chancery Division, 14 November 1990, *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008)].
69. For instance: "In some places the treatment of the elements is slightly different. It can be seen that the upward curved seam (towards the bust), on the plaintiff's design sketch, rises more steeply towards the centre front than on the defendants' dress. […] The plaintiff's design sketch shows two buttons on the cuff, the defendants' dress has none." in *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others*, Chancery Division, 14 November 1990, *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).
70. See fig. 4. The original painting was created by reference to, and was influenced by, the style and color of the works of Henri Matisse. *Parliamentary Archives*, UK, HL/PO/JU/4/3/2065-2065A.

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Figure 1. Victor Herbert – Colour Forecasting at the Royal College of Art (1970s).
Courtesy of the RCA Archives, London.

defendant. He would repeat these anticipatory and comparative patterns in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998].[71]

3. Techniques of Vision

Herbert basically relied on his own handiwork and exploratory procedures as apparatuses of proof. Instead of photographs or other representations of the controversial material, he frequently asked for direct inspections that allowed him to select the *samples* and material copies from which infringements could have been inferred.[72] For his fieldwork and gathering activity at the other party's premises, he always carried two portable recording and observational devices: a camera and a fabric magnifying glass (see fig. 2). These technologies allowed him to produce knowledge that was useful for

71. "Of course *Ixia* and *Marguerritte* are not identical" in "Expert Report of Victor Herbert" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] HL, *Parliamentary Archives*, HL/PO/JU/4/3/2065-2065A.
72. For instance, in his selection at *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803.

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preparing the report and for counselling his client. He used the camera to single out and to record what he considered to be awkward and therefore important to be examined,[73] to be highlighted or just to be photographed again by professional cameras. His meticulousness helped him to find crucial marks such as dates, rubbings and other traces that could highlight similarities between the works or that could debilitate the argument of the defence. In that sense, the fabric magnifying glass was also fundamental for him to see the detail of the fabric in order to extract figures and measurements that he could use to explain the dimensional shifts between the materials litigated.[74] However, his forensic creativity did not end with the visit to the defendant's office. Herbert frequently requested enhanced versions of photographs, acetates and prints in reverse negatives to perceive and isolate lines and contours in a more pronounced manner. Placing the transparencies and acetates into windows or light boxes, rotating the images and putting transparencies over the materials allowed him to suspect the addition of embroideries and other traces. Redrawing and finding the internal logic of the material also facilitated for Herbert ways of elucidating the existence of similarities in the intangible. It was as if his simultaneous expertise on clothing construction and textile design was complemented by thorough forensic techniques. These techniques helped him to visualize distinctive visual effects and the different ways they could be infringed. If the intangible is a hologram, Herbert tried a variety of tangible resources in order to capture its evanescent intensities.[75]

IV. Image Settings

1. Side-by-side

Since litigation over artistic copyright infringement could culminate with an assessment of substantial copying, Herbert's activities became exercises in comparisons between the works.[76] Through techniques of juxtaposition, through a peculiar

73. "There is then the question that if 095 did in fact precede 299 why it was that the numbers were changed – why not leave 095 as the style number throughout?" in *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others*, Chancery Division, 14 November 1990, *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).
74. "Mr Silverleaf, for the Plaintiffs, drew attention to Mr Herbert's figures in Exhibit P6 which show that the pattern measurements for 095 and 299 are the same […]" in *Topward Ltd (trading as Kim Fashions) v. Goodman Brothers Ltd and others*, Chancery Division, 14 November 1990, *per* Mervyn Davies J. in *All England Official Transcripts* (1997–2008).
75. "The contours of the tangible object in which the work manifests itself may sometimes be coextensive with the work, it is important to appreciate that the copyright work transcends the tangible material form" in Brad Sherman, "What is a copyright work?" 12 *Theoretical Inquiries of Law* (2011), pp. 99–100.
76. "In the leading case of *Designers Guild*, two fabric patterns were *compared* by the court" in "A similar pattern in Design Right cases," *Business Law Review*, November 2001, pp. 263–4.

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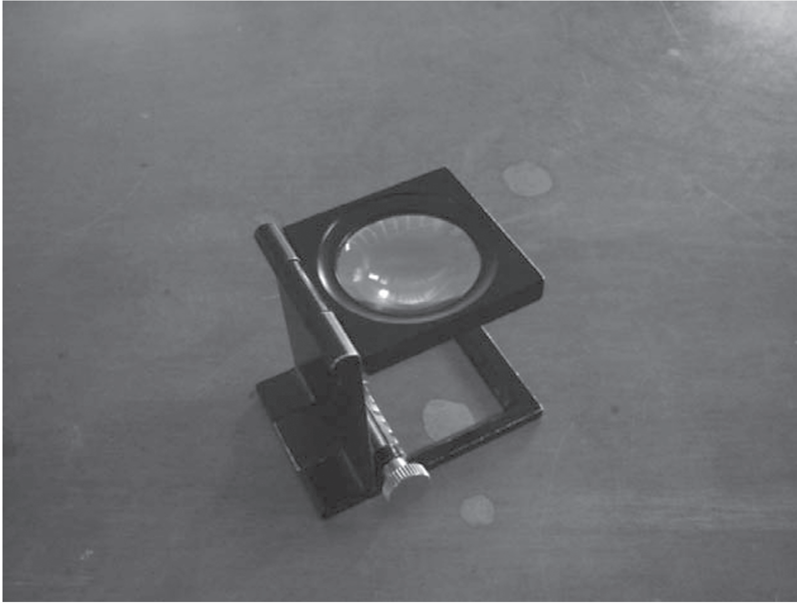

Figure 2. Fabric Magnifying Glass.
Courtesy of Victor Herbert.

comparative endeavour, the work and the possibility of substantial copying could be elucidated.[77] The most important technique of juxtaposition by which the desired "objectivity" was produced was to create comparative side-by-side *compositions* and diagrams.[78] With this particular technique Herbert was definitely on the right track. He may not have realized it, but the majority of landmark cases in British copyright shared that particular feature. They all had "support" structures (charts and diagrams); they all had visual objects to think "with" that served to expose the substantial infringement in copyright.[79] At this precise moment in these trials, bales of fabrics began to disappear and a very specific form of (diagrammatic) drawing was creatively introduced in order to help the judge to *see* the works. There was something peculiarly attractive about the comparative techniques developed throughout the artistic copyright litigation in which

77. "What evidence law does is to separate what was conjoined through technology, namely the thing and its proof. In so doing, it sets up a relationship between viewing subject and object based on visual discernibility" in Piyel Haldar, "Watermarks," *Parallax,* 14:4, 2008, pp. 101–113; at 104.
78. Andrew Joyce, "Substantiality in copyright infringement," *Corporate Briefing*, June 2001, vol. 15, number 6, pp. 76–7; Andrew Joyce "Copyright Infringement: Side-by-side comparisons," *Corporate Briefing*, March 2005, vol. 19, number 3, pp. 3–5.
79. See figure 5 (*L.B. (Plastics) Ltd v. Swish Products Ltd* [1979]) *Parliamentary Archives*, UK, HL/PO/JU/4/3/1351-1356 and see also *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] *Parliamentary Archives*, UK, HL/PO/JU/4/3/1121.

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Herbert was the expert witness. When the comparisons were produced and figures were matched in relation to the artistic subject matter, the irony was that there was a drawing of a drawing; a frame over a frame; almost an image within an image. When the issue was about substantiality, the legal eye was momentarily focused on the comparative diagrams, removing the narrative particularities that had been already deployed. The appearance of the expert vision opened that possibility of removal and the submission to a delocalized view. Having enabled the visual medium to show material derivation, the legal imagination was now left to be assisted by other means of proof.

2. Visual Appendix

As I have pointed out, Herbert's reports involved a singular system of display and comparison.[80] His method of analysis took the form of analogical and physical examinations instead of producing genealogical connections. In other words, he organized the comparison by the visual effects rather than taking into account the chronological record of the vicissitudes of the intangible. In his attempt to construct parallels, his approach moved away from the contingencies of the case. And it did so, for instance, by creating an immediate visual appendix, a photomontage (fig. 3) from which he called attention to similarities and differences. The visual appendix included here comes from *Designers Guild Ltd v. Russell Williams* and it is an example of a visual prosthesis from which the comparison can be made. It enhanced a particular type of visual geometry already present in the mentioned charts deployed in earlier copyright litigation.[81] The layout was meticulously prepared. The image of the plaintiff's material had to be "obviously" located on the left while the defendant's material had to appear on the right; producing, therefore, the "ying and the yang" as described by Herbert.[82] The peculiar shape of these images was embodied into a stable and framed surface that facilitated the reference to a possible (plausible) copyright infringement. The mirror-image was an acetate sheet of the defendant's original that "if placed side by side against the Plaintiff's *Ixia* design the particular inflexion of the line of the flowers and the stems appear[ed] to be the same."[83] And it is because of the way it was made that the appendix readily invited comparison between the materials. To a certain extent, we could say that the photomontage spoke "for itself."

80. "*I have placed* the Defendant's *Marguerite* beside the three pieces of the alleged antecedent work" in "Expert Report of Victor Herbert" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] HL, *Parliamentary Archives*, HL/PO/JU/4/3/2065-2065A.
81. See figure 5 (*L.B. (Plastics) Ltd v. Swish Products Ltd* [1979]) *Parliamentary Archives*, UK, HL/PO/JU/4/3/1351-1356.
82. Interview with Victor Herbert, February 2011.
83. "Expert Report of Victor Herbert" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] HL, Parliamentary Archives, HL/PO/JU/4/3/2065-2065A.

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Figure 3. Visual Appendix – Designers Guild v. Russell Williams (1997).
Courtesy of the Parliamentary Archives, London.

V. Expert Evidence

1. The Expert before the QC

In November 1997 Herbert was required to return to the witness box for the fourth time in less than twenty years.[84] He had received two different instructions related to major copyright theoretical anxieties. That is, he was instructed by *Designers Guild Ltd*, the plaintiff, to focus on two major questions. First of all, his assignment was to give his

84. "Dramatis Personae" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 806 *per* Lawrence Collins Q.C.

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"opinion as to whether the Defendant had copied all or substantial part of the Plaintiff's design." More curiously, his second task was "to give [his] opinion as to whether the Defendant had gone beyond taking the idea and actually copied it."[85] This second litigating strategy was an attempt to inscribe the report within an anticipatory horizon. That is, the adversarial technique here was to anticipate the possibility of the recourse to the idea-expression dichotomy in copyright law; a risk that was well forecasted by the amount of ink devoted to it not only in the House of Lords' decision but also in a long decade of commentaries devoted to the case.[86] When Herbert presented his CV he emphasized his experience as a design consultant and in copyright litigation.[87] And the impression the judge had of his performance was again positive. He defined Herbert as a "careful and helpful witness,"[88] and acknowledged that he "expressed his views forcefully" (and sometimes passionately) without lacking "objectivity."[89]

Through cross-examination another issue became clear. While his former colleague at the Royal College of Art, Professor John Foulds, was renowned for a developed sensitivity in relation to textiles – he could identify them just by touch[90] – Herbert had not only excelled merely in relation to a single area, but in a rich combination of visual and tactile senses in order to adapt them to the circumstances and expectations of his clients (lawyers) and the court. He had the capability to produce devices that could adapt the visual to the technological conditions of possibility for an image to be produced. He also had the sagacity to identify visual-decision making patterns by looking at different elements, such as the number of repeated vectors and the number of colours and textures.

A remarkable caveat that was frequently overlooked in the commentaries of *Designers Guild v. Russell Williams*[91] was evident to the litigants at the time of the trial. Perhaps even more curious was the fact that the novice in the trial was Lawrence Collins Q.C.,

85. "Expert Report of Victor Herbert," p. 2 in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] HL, Parliamentary Archives, HL/PO/JU/4/3/2065-2065A.
86. It is precisely almost immediately after reading *Designers Guild* when Cornish and Llewellyn say that "[t]he imprecision of any line between idea and expression causes some commentators to castigate the whole notion" in William Cornish and David Llewellyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 2007), p. 455; see also Graeme B. Dinwoodie, "Refining notions of idea and expression through linguistic analysis" in Lionel Bently, Jennifer Davies and Jane Ginsburg (eds), *Copyright and Piracy. An interdisciplinary critique* (Cambridge: Cambridge University Press, 2010), pp. 194–206 especially at 204–205; and Lichtman appreciation that "[w]ithout solid evidence, however, expression blurs into idea" in Douglas Lichtman, "Copyright as a Rule of Evidence," 52 *Duke Law Journal*, 2003, 683.
87. The appointment of the design consultant Victor Herbert (agreed with CNAA) as member of the validating group of the BA (Hons) Clothing London College of Fashion was in November 1988, see *Council for National Academic Awards*, DB3/2901 in National Archives, UK.
88. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 *per* Lawrence Collins.
89. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 812 *per* Lawrence Collins.
90. Interview with Brian Marsh, February 2011.
91. Simon Stokes, "Copyright: infringement – ideal expression – reproduction of a substantial part," *European Intellectual Property Review* (2001), 23(4), pp. 49–50.

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the deputy judge who had been appointed just a few months earlier. It was probably his first copyright experience in Chancery. He was very keen on making distinctions between opinions and expertise. Nevertheless, and after the difficulties that plagued *Merlet*, it is no surprise that Herbert decided to adapt his analysis to the untrained and "naked eye."[92] He had already understood what was at stake and the expectations that arose in copyright litigation. The insertion of the photomontage, the limitation of the report to very specific points constituted an attempt towards what Herbert considered as the most difficult exercise: to be able to describe the similarities and differences of the intangible to the "man in the street." Perhaps he did not exaggerate when, many years later, he said that the key to producing an expert report was precisely "not to be an expert."[93] However, as I have just suggested, his expert role was not limited to a single type of setting (the preparation of *report* and *cross-examination*) but also to assistance outside the court. This comprised in his assistance with structuring the litigating or negotiating strategies developed by law firms. His intervention helped to establish persuasive inferences that supported lawyers in their establishment of copyright claims. If there is one case in British copyright law in which there is a creative infrastructural way of combining visual similarities and narrative explanations of the possibility to copy the copyright work, it is precisely *Designers Guild v. Russell Williams*.[94]

As the case dealt with the question of substantial copying through inferences derived from an overall visual comparison, it was clear that the decision was going to be an important one. However what seems so interesting from the contemporary commentaries of the case is not only their debate around the tests on substantiality but the systematic lack of attention to one twist in the case, reflected in the cross-examination of witnesses carried out by the plaintiff's barrister, Mr. Alastair Wilson Q.C.[95] During the course of the trial Herbert saw "paint marks and smudges,"[96] ingredients that were understood by the plaintiff as possible traces of copying. The plaintiff's strategy was to take the defendant's witnesses "by surprise."[97] And as the decision suggested, "Mr. Alastair Wilson Q.C.'s submissions left some very important questions unanswered."[98] According to

92. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 818 *per* Lawrence Collins.
93. Interview with Victor Herbert, February 2011.
94. Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2009), pp. 172–3; see also the doctrinal hermeneutical complexity developed to read the case in Timothy Endicott and Michael Spence, "Vagueness in the scope of copyright," *Law Quarterly Review* 2005, 121 (Oct), 657–80.
95. "These marks were raised for the first time at the trial, in the cross-examination of Miss Ibbotson. Mr. Alastair Wilson, Q.C. told me that the marks had been noticed at a consultation before the trial, and that a deliberate decision had been made to take Russell Williams' witnesses by surprise" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 821 *per* Lawrence Collins.
96. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 820–824 *per* Lawrence Collins.
97. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 820–821 *per* Lawrence Collins
98. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 820–823 *per* Lawrence Collins.

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Herbert, the impact that that incident had on the development of the trial was significant.[99] In fact, the collision between the parties points out the importance of litigating strategies in an adversarial environment in order to persuade the judge. We will never be sure as to the real impact that that contingent episode had, because it was rapidly eclipsed as the case was heard in higher courts.[100] But it is not mere speculation to suggest that such an unforeseen introduction would have probably contributed to the debilitation, or at least to making more difficult, the defendant's position. It also seemed to have contributed to their decision to appeal, taking into account even more so that tests of substantiality have historically attracted the interest of British copyright law.[101] Yet again, one of life's little ironies made Michael Fysh Q.C., a barrister who had worked with Herbert in *Merlet*, the defendant on appeal. Fysh Q.C. was now representing the other party in the case (*Russell Williams Ltd*) and the surprising outcome was that the Court of Appeal approached the issue differently, by dissecting the individual features of the design.[102] Nevertheless, that was a short and temporary victory for the defendants: the House of Lords unanimously overturned the Court of Appeal's decision. In what has interested us throughout this essay, Lord Hoffmann extensively highlighted the crucial support provided to the trial judge by one expert witness: Victor Herbert.[103]

99. Interview with Victor Herbert, February 2011.
100. Despite the fact that Lawrence Collins Q.C. already attempted to close this speculation in the following manner: "since I have already come to a clear conclusion that, irrespective of the marks and smudges, the acetate and striped artwork were created together" in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [1998] FSR 803 at 824 *per* Lawrence Collins.
101. "As useful (and often provocative) as these various elucidations have been, they remain by and large solitary insights upon disparate points of law and statutory interpretation within an ever-changing copyright regime. Nevertheless, there is one issue that has received the repeated attentions of the House of Lords – that of substantiality" in Ronan Deazley, "Copyright in the House of Lords: Recent cases, judicial reasoning and academic writing," *Intellectual Property Quarterly*, 2, 2004, pp. 121–37 at 122.
102. *Designers Guild Limited v. Russell Williams (Textiles) Limited (T/A Washington D.C.)* [2000] FSR 121.
103. "So I think that the judge, having heard Mr Herbert, was well placed to assess the importance of the plaintiff's designer's brush strokes, resist effect and so forth in the overall artistic work" in *Designers Guild Limited v. Russell Williams (Textiles) Limited (T/A Washington D.C.)* [2001] FSR 113 at 122 *per* Lord Hoffmann.

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Figure 4. Highlighting – Designers Guild v. Russell Williams (1997).
Courtesy of the Parliamentary Archives, London.

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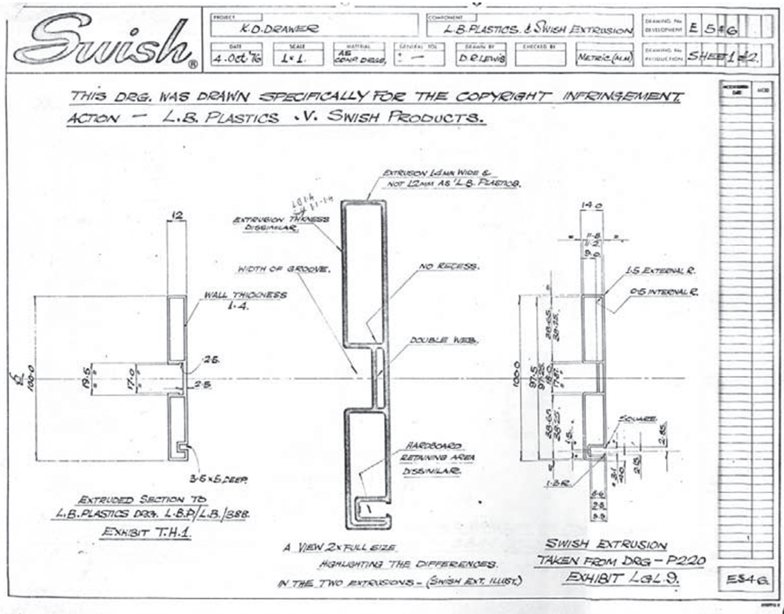

Figure 5. Diagram – L.B. (Plastics) Ltd v. Swish Products Ltd. [1979].
Courtesy of the Parliamentary Archives, London.

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