Copyright at the CJEU: Back to the start (of copyright protection)

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On this day 10 years ago, the Court of Justice of the European Union (CJEU) issued the judgment that set a new course for the development and construction of EU copyright law, a course in which the role of EU judiciary would become as important as and, in certain areas, even more important than that of EU legislature.

That decision is the one in Infopaq, C-5/08.

E Rosati, 'Today's the 10-year anniversary of the CJEU judgment that changed EU copyright', The IPKat, 16 July 2019

Abstract

In its 2009 decision in *Infopaq* (C-5/08), the Court of Justice of the European Union (CJEU) achieved a landmark result: the *de facto*, horizontal harmonization of the originality requirement. After that, nothing could stay the same.

After providing an overview of the harmonization process in the copyright field over the past 30 years or so and, with that, the environment in which *Infopaq* came to be, this chapter considers *Infopaq* and the expansive effect of subsequent case law on other copyright subsistence requirements. The analysis also notes how the eventual outcome of *Cofemel* (C-683/17), insofar as works of applied art are concerned, is perfectly in line with such a jurisprudence. The chapter further considers the legal and institutional difficulties that such a string of CJEU decisions has given rise to and is yet to resolve before concluding that further questions are likely to be posed to the CJEU in the not too distant future. In other words: the construction of EU copyright is far from over.

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On beginnings in (professional) life and EU copyright law

My first encounter with the world of Jeremy Phillips was in 2009, but it was not through The IPKat. It was, instead, thanks to the *Journal of Intellectual Property Law & Practice* (JIPLP), of which at that time Jeremy was the Editor.

While sitting in the Library of the European University Institute at the beginning of my PhD in autumn 2009, I came across an announcement by JIPLP that they were seeking to 'recruit' reviewers of IP books. This, I thought, would be a great opportunity for me to start building my personal library and writing for an academic publication. I contacted the then Book Review Editor of JIPLP and expressed my interest in being considered for this task. Surprisingly, JIPLP took a chance and, over the next several months, I indeed got to read and review books and also exchange emails with the JIPLP Team, including of course Jeremy.

A couple of years later, when I was close to the completion of my legal traineeship at the Milan office of Bird & Bird and preparing to sit the Italian bar, I had an opportunity to spend 6 months in London, on secondment at the global headquarters of Bird & Bird. One day, a partner – Trevor Cook, if my memory does not fail me – emailed everyone in the IP department to say that he could no longer attend an event taking place that night in central London. Therefore, he was giving away his ticket to whomever wanted to attend instead. That event featured, as main speaker, Jeremy Phillips himself. At that time, I had never met him in person.

I hit the reply button and apparently did so before anyone else. The night came and I finally got to meet Jeremy. Don't ask me what Jeremy and I spoke about because the truth was that I could not understand a word of what he said to me!

Jeremy and I at the Old Nick in Holborn in 2017 - By that time, I could understand him better

Despite the *slight* language barrier, Jeremy did not give up on me, as he never gave up on any IP enthusiast. Over the next few months, I started writing contributions for the (now closed) 1709 Blog, one of the several blogs of the 'Jeremy galaxy' which was entirely devoted to copyright issues.

I have no hesitation in saying that, if now I work in IP, it is thanks to Jeremy. When one is at the beginning of their career, the most difficult thing is not to learn how to *do* the job (you get there eventually), but rather how to *enjoy* the job. And you learn how to enjoy that if you have people who take the time and have the patience to teach and encourage you. I owe this to Jeremy and his generosity. Indefatigable in providing feedback while at the same time also offering support; invariably patient in answering questions and sharing wisdom; always showing that life is about opportunities

and what's next, not obstacles and feeling defeated. These are just some of the traits that have made Jeremy Phillips a mentor to generations of IP lawyers.

After The 1709 Blog, Jeremy offered me to start writing for The IPKat. In 2012, he was one of my PhD examiners, and I fondly remember the dinner that we shared by the Florence Synagogue. In 2013, he appointed me Deputy Editor of JIPLP. All the opportunities that matter the most, that is those given to you at the beginning of your career, came – for me – from Jeremy. תודה לך ג'רמי!

My PhD defence at the European University Institute in 2012. Left to right: Giovanni Sartor, Jeremy, myself, Lionel Bently, and Hans Micklitz

During his IPKat days, Jeremy was famous for live blogging entire conferences: here Jeremy and his laptop are being held 'captive' by a plug at the Fordham IP Conference in New York City in 2014

The IPKat's 15th birthday celebration at the London office of Bird & Bird in 2018. In the back row, left to right: Nedim Malovic, Ieva Giedrimaite, Cecilia Sbrolli, Frantzeska Papadopoulou, Annsley Merelle Ward, and Rose Hughes. In the middle row, left to right: Tian Lu, Nicola Searle, Jeremy, Eibhlin Vardy, and Hayleigh Bosher. In the front row, left to right: myself and Veronica Rodriguez Arguijo

Now, it's time to change subject and focus on the topic of this chapter.

This book project shared with my IPKat colleague Hayleigh Bosher and writing this introduction have allowed me to think back about the *start* of my own career (incidentally, my PhD thesis was about originality in EU copyright law). Now my hope is that this chapter will offer some reflections on the impact that the Court of Justice of the European Union ('CJEU') has had in shaping the very *start* of copyright protection, that is the answer to the question:

When does copyright arise?

While formally, at the time of writing, the Court has expressly and solely touched upon the notion of 'work' and 'originality' in a long and consistent string of cases originating from the landmark ruling in *Infopaq* in 2009[1], in substance there is now an EU approach to everything that is mandated for this IPright to arise, including fixation and categorization. Under EU law, what is needed is an original work of authorship: nothing less, nothing more. In other words, and to borrow from a former Advocate General ('AG') who is currently a judge at the CJEU, the law that national courts and authorities are now to apply in the copyright field is "no longer a purely domestic affair".[2]

The chapter is structured as follows. After providing an overview of the harmonization process in the copyright field over the past 30 years or so and, with that, the environment in which *Infopaq* came to be (§1), the analysis will turn to consider *Infopaq* (§2) and the expansive effect of subsequent case law on other copyright subsistence requirements (§3). It will be also noted how the eventual outcome of *Cofemel*, insofar as works of applied art are concerned, is perfectly in line with such a jurisprudence (§4). The chapter will then consider the legal and institutional difficulties that such a string of CJEU decisions has given rise to and is yet to resolve before concluding that further questions are likely to

[1] *Infopaq*, C-5/08, EU:C:2009:465 ('*Infopaq*'), discussed by The IPKat on the same day of publication of the judgment: 'Eleven words that axed a thousand trees' (16.07.2009), available at https://ipkitten.blogspot.com/2009/07/eleven-words-that-axed-thousand-trees.html. *Infopaq*'s direct progeny (in chronological order) consists of: *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816 ('*Bezpečnostní softwarová asociace*'); *Football Association Premier League*, C-403/08 and C-429/08, EU:C:2011:631 ('*FAPL*'); *Painer*, C-145/10, EU:C:2011:798 ('*Painer*'); *SAS Institute*, C-406/10, EU:C:2012:259 ('*SAS Institute*'); *Football Dataco and Others*, C-604/10, EU:C:2012:115 ('*Football Dataco*'); *Levola Hengelo*, C-310/17, EU:C:2018:899 ('*Levola Hengelo*'); *Cofemel*, C-683/17, EU:C:2019:721 ('*Cofemel*'); and *Brompton Bicycle*, C-833/18, EU:C:2020:461 ('*Brompton Bicycle*'). Several blogposts discussing *Infopaq* and its progeny have been published over time on The IPKat: see https://ipkitten.blogspot.com/search/max-results=7?q=Infopaq.

[2] N Jääskinen, 'Europeanisation of national Law: a legal-theoretical analysis' (2015) 5 EL Rev 667, p. 668.

be posed to the CJEU in the not too distant future (§5). In other words: the construction of EU copyright is far from over.

1. The drivers of EU copyright harmonization and the role of the CJEU

The EU copyright harmonization project saw its official start in 1988 through the release, by the European Commission ('EC'), of its *Green Paper on Copyright and the Challenge of Technology*.[3] Over time, the copyright harmonization agenda has been invariably supported by an internal-market building rationale to which, over time, other justifications have been added, including to ensure a high level of protection[4], enhance the competitiveness of the EU copyright system, and – more recently – remedying perceived imbalances in the copyright marketplace.[5]

Aside from these, a further driver of harmonization has emerged over the past decade or so. This has been the need, on the side of EU legislature, to 'react' to CJEU case law, whether by 'codifying' or 'erasing' it. Just take the latest addition to the EU copyright *acquis*, the 2019 DSM Directive[6]: Article 14 codifies CJEU case law on originality and the uniform standard of 'author's own intellectual creation', while Articles 12 and 16 were inserted specifically to 'erase' (or at least water down) some CJEU case law – it was *Soulier*[7] for the former and *Reprobel*[8] for the latter.

While it may be normal for copyright reform – at any level – to address shortcomings emerged in practice due to the wording and content of pre-existing rules, in the EU things have been a bit different. Not only has the body of CJEU case law – through the system of referrals for a preliminary ruling – become increasingly rich and diverse over time, but the Court's decisions have contributed greatly to the overall EU copyright harmonization project. Various factors have made all this possible.

A first factor has been the need to interpret and adapt to new realities norms written for a different, analogue and less interconnected world than those we live in today. All internet issues – ranging from

[3] Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action*, COM (88) 172 final ('1988 Green Paper'). Nevertheless, already a decade earlier (in 1978) Adolf Dietz had published a study on copyright harmonization prepared at the request of the then Commission of the European Communities: A Dietz, *Copyright law in the European Community* (Sijthoff & Noordhoff:1978).

[4] Ensuring a high level of protection of copyright and authors/rightholders has supported adoption, amongst others, of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19 ('InfoSoc Directive').

[5] For a more detailed discussion of the rationales supporting the EU copyright harmonization project, see: A Ramalho, 'The competence and rationale of EU copyright harmonization', in E Rosati (ed), *Routledge Handbook of EU Copyright Law* (Routledge:2021), p. 3; E Rosati, 'From the early days of harmonization to the DSM Directive 2019/790: continuity and complexity of the EU copyright framework' (in press) *Auteurs & Media*.

[6] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125 ('DSM Directive').

[7] *Soulier*, C-301/15, EU:C:2016:878 ('*Soulier*'); in the same sense, see also *Spedidam and Others*, C-484/18, EU:C:2019:970. The IPKat discussed these cases in a number of blogposts: see 'BREAKING: CJEU follows AG and holds French law on out-of-print books contrary to EU law' (16.11.2016), available at https://ipkitten.blogspot.com/2016/11/breaking-cjeu-follows-ag-and-holds.html; 'The CJEU decision in *Soulier*: what does it mean for laws other than the French one on out-of-print books?' (17.11.2016), available at https://ipkitten.blogspot.com/2016/11/the-cjeu-decision-in-soulier-what-does.html; 'French Counseil d'État invalidates decrees implementing law on out-of-commerce works' (08.06.2017), available at https://ipkitten.blogspot.com/2017/06/french-counseil-detat-invalidates.html.

[8] *Reprobel*, C-572/13, EU:C:2015:750 ('*Reprobel*'). The IPKat discussed this case in 'Breaking news: Reprobel ruling out at last' (12.11.2015), available at https://ipkitten.blogspot.com/2015/11/breaking-news-reprobel-ruling-out-at.html; and 'The *Reprobel* decision: fair compensation justified by actual harm (so is it OK to have a levy-free private copying exception?)' (13.11.2015), available at https://ipkitten.blogspot.com/2015/11/the-reprobel-decision-fair-compensation.html.

linking[9] to platform liability[10], from cloud-based services[11] to seeding[12] – have required the CJEU to adjust the right of communication/making available to the public under Article 3 of the InfoSoc Directive to such realities.

A second factor, connected to the former, has been the objective need to add some flesh to thinly worded provisions, one such example being Article 3 of the InfoSoc Directive itself. One may criticize notions like that of 'new public'[13] or the weight given to subjective elements like knowledge and intention and the consequent blurring of primary and secondary liability concepts[14] as much as they like. The truth, however, is that the Court has had to work with very little at its disposal in the text of relevant provisions, while also having to achieve an extremely challenging objective: to reconcile 'a high level of protection' of intellectual property (recitals 4 and 9 of the InfoSoc Directive) with the guarantee of a 'fair balance of rights and interests' (recital 31 of the same directive) and do all that, not just from the point of view of compliance with copyright standards, but also fundamental rights instruments that have the rank of primary source of EU law.[15]

A third factor, which will occupy my attention in this chapter, is a desire, on the side of the Court, to build a truly internal market for copyright goods and copyright-based services. Such an ambition cannot be considered an unexpressed or even unconscious one, as it has been clearly spelled out in several, landmark decisions.[16]

It may be also said that the internal market-building rationale has been supported by the Court's own frequent reliance on the interpretative standard according to which, when a concept of an EU directive makes no reference to the laws of Member States, then such a concept is to be regarded as an

[9] *Svensson*, C-466/12, EU:C:2014:76; *BestWater*, C-348/13, EU:C:2014:2315; *GS Media*, C-160/15, EU:C:2016:644; *Filmspeler*, C-527/15, EU:C:2017:300; *VG Bild Kunst*, C-392/19, EU:C:2021:181. The IPKat has focused extensively on CJEU case law on linking: a collection of blogposts may be viewed at https://ipkitten.blogspot.com/search/max-results=7?q=GS+Media.

[10] *Ziggo*, C-610/15, EU:C:2017:456; *YouTube*, C-682/18 and C-683/18, EU:C:2021:503 ('*YouTube*'). The IPKat has focused extensively on CJEU case law on platform liability: a collection of blogposts may be viewed at https://ipkitten.blogspot.com/search/max-results=7?q=C-682%2F18.

[11] *VCAST*, C-265/16, EU:C:2017:913; *Austro-Mechana*, C-433/20, EU:C:2022:217. Both decisions have been discussed on The IPKat: see 'The VCAST decision: how to turn a private copying case into a case about communication/making available to the public' (29.11.2017), available at https://ipkitten.blogspot.com/2017/11/the-vcast-decision-how-to-turn-private.html; and 'CJEU rules that private copying also applies in the cloud and warns against thinking that everything is communication to the public' (06.04.2022), available at https://ipkitten.blogspot.com/2022/04/cjeu-rules-that-private-copying-also.html.

[12] *Mircom*, C-597/19, EU:C:2021:492, discussed on The IPKat too: see 'CJEU rules on seeding, trolls, and interplay between copyright enforcement and data protection rules' (10.06.2021), available at https://ipkitten.blogspot.com/2021/06/cjeu-rules-on-seeding-trolls-and.html.

[13] *Ex multis*, see the discussion in: PB Hugenholtz and SC Van Velze, 'Communication to a new public? Three reasons why EU copyright law can do without a 'new public'" (2016) 47 IIC 797; S Karapapa, 'The requirement for a 'new public' in EU copyright law' (2017) 42 EL Rev 63; JP Quintais, 'Untangling the hyperlinking web: in search of the online right of communication to the public' (2018) 21 J World Intellect Prop 385; E Rosati, 'When does a communication to the public under EU copyright law need to be to a 'new public'? (2020) 45(6) EL Rev 802.

[14] *Ex multis*, see the discussion in B Hanuz, 'Direct copyright liability as regulation of hosting platforms for the copyright-infringing content uploaded by their users: *quo vadis*?' (2020) 3 JIPITEC 315; C Angelopoulos, 'Primary and secondary liability in EU copyright law', in E Rosati (ed), *Routledge Handbook of EU Copyright Law* (Routledge:2021) 193.

[15] Recently, see *YouTube*, in particular [63]-[64]; *Funke Medien*, C-469/17, EU:C:2019:623 ('*Funke Medien*'), in particular [50]-[51]; *Spiegel Online*, C-516/17, EU:C:2019:625 ('*Spiegel Online*'), in particular [35]-[36].

[16] One such clear instance is *Ziggo*. In his Opinion, Advocate General ('AG') Szpunar conceded that the liability of platform operators could be a matter of national law, rather than EU law, but found that leaving the treatment of such situations to the different laws of the now 27 EU Member States would be unhelpful: Opinion of Advocate General Szpunar in *Ziggo*, C-610/15, EU:C:2017:99, [3].

autonomous concept of EU law. The result is that such a concept is to be given a uniform interpretation and application across the EU.[17] Such a standard has allowed the Court to achieve two main results.

The first has been to reduce, when not to annul altogether, divergences between Member States. There can no longer be, e.g., a French or Belgian concept of 'parody': instead, there is an EU standard of 'parody' that needs to be applied uniformly across the EU.[18]

The second has served to highlight the (mis-)perceived freedom of several Member States when transposing EU directives into national law. Just to make but a few examples: the CJEU has looked into the copyright laws of the Dutch[19], the Belgians[20], the Spanish[21], the Italians[22], the French[23], the Germans[24], and found them incompatible with EU law. Despite all this, Member States are still (regrettably) continuing to make the same mistakes, including recently through their own transpositions of the DSM Directive into national law.

All the above said, a clear internal-market building concern supported the outcome in *Infopaq* and its dual result: the establishment of an EU-wide test of copyright infringement (specifically: *prima facie* infringement of the right of reproduction for authorial works[25]) and the *de facto*, horizontal harmonization of the standard of copyright subsistence, that is originality. In this chapter I will only have the opportunity to focus on the latter.

2. From 0 to 100 in … 1 decision: The landmark result of *Infopaq*

Before *Infopaq* and subsequent case law, IP law students in Europe could well be taught the following. For copyright protection to arise, what is required is a work authored by someone, which fulfils the originality requirement. In some jurisdictions, further conditions would also need to be satisfied, e.g.,

[17] See the discussion in E Rosati, *Copyright and the Court of Justice of the European Union* (OUP:2019), p. 42-43.

[18] This follows from *Deckmyn*, C-201/13, EU:C:2014:2132, [15]-[17], discussed extensively on The IPKat too. For a collection of blogposts, see https://ipkitten.blogspot.com/search/max-results=7?q=Deckmyn.

[19] *ACI Adam*, C-435/12, EU:C:2014:254 (private copying), also discussed on The IPKat: see 'BREAKING NEWS: CJEU says that private copying may only apply to reproductions from lawful sources' (10.04.2014), available at https://ipkitten.blogspot.com/2014/04/breaking-news-cjeu-says-that-private.html; and 'What does the ACI Adam decision mean for InfoSoc system of exceptions and limitations? (18.04.2014), available at https://ipkitten.blogspot.com/2014/04/what-does-aci-adam-decision-mean-for.html.

[20] *Reprobel* (private copying).

[21] *EGEDA*, C-470/14, EU:C:2016:418 (private copying), also discussed on The IPKat: see 'BREAKING: CJEU says that fair compensation for private copying cannot be funded through general state budget' (09.06.2016), available at https://ipkitten.blogspot.com/2016/06/breaking-cjeu-says-that-fair.html.

[22] *Microsoft Mobile Sales*, C-110/15, EU:C:2016:717 (private copying).

[23] *Soulier* (out-of-print works).

[24] *Funke Medien* and *Spiegel Online* ('free use' exception).

[25] Whilst extracts of works may be protected by copyright provided that they contain elements which are original in the sense that they are the expression of the intellectual creation of the author of the work, the right of the other reproduction rightholders in Article 2 of the InfoSoc Directive (performers in relation to fixations of their performances; phonogram producers in relation to their phonograms; producers of the first fixations of films in respect of the original and copies of their films; broadcasting organizations in respect of fixations of their broadcasts) protects "not intellectual creation but financial investment" (Opinion of Advocate General Szpunar in *Pelham*, C-476/17, EU:C:2018:1002, [28]). This means that also the standard of infringement is not based on originality, but rather investment. See the discussion in E Rosati, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790* (OUP:2021), p. 264-267, with regard to the right of reproduction of press publishers under Article 15 of the DSM Directive.

fixation and/or categorization (that is: to be a work of the 'right' kind).[26] In addition, in some countries, for works like those of applied art, copyright protection would only be available subject to the work at hand satisfying requirements like producing an aesthetic effect or possessing artistic value.[27]

Such a teaching, today, is no longer correct.

What we have now is an EU-wide approach to *all* the foundational requirements of copyright protection. In other words: an EU approach to 'work', 'originality', 'fixation', 'categorization' and, clearly and despite that no referral has yet reached the CJEU specifically on this issue, 'authorship' (and joint authorship).

If we looked for statutory definitions of the basic requirements of copyright protection in international or EU instruments, our quest would be disappointing, if not altogether vain. Despite that, as early as 1988, the EC noted that "significant differences in the protection available to particular classes of copyright works can *clearly* fragment the internal market in those works in an undesirable way"[28], the truth is that the legislative framework does not say much on what very basics of copyright protection mean.

Starting with 'work', Article 2(1) of the Berne Convention (BC) merely *describes* what the expression 'literary and artistic works' encompasses and hints at the idea/expression dichotomy when it refers to this notion as requiring a 'production'.[29] In general terms, it may be said that "[t]he term 'production' […] only indicates that the protected object must have emerged from the mind of a person, left the sphere of the mind and become realized. This coincides with the term 'expression' also contained in the definition."[30] The InfoSoc Directive is equally inconclusive; it only provides for various exclusive rights of authors in relation to their *works* (Articles 2(a), 3(1), 4(1)) but does not define such a notion.

A bit more is said in relation to 'originality' and 'authorship', at least in EU legislation (the BC is also silent in this regard) though hardly anyone could consider such hints akin to a definition. Originality under EU law is considered fulfilled where the work at issue – formally only computer programs, photographs, and databases given the limited harmonization of such a requirement[31] – is "its author's

[26] An example is the United Kingdom, where both requirements have had real 'teeth': see, e.g., *Merchandising Corporation of America Inc v Harpbond Ltd*, [1983], FSR 32 ('*Harpbond*'; copyright protection denied to facial makeup as there was no medium in which it was fixed); *Creation Records Ltd. & Ors v News Group Newspapers Ltd* [1997] EWHC Ch 370 (25 April 1997) and *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39 (27 July 2011) (copyright protection denied to, respectively, the assembly of a scene and the Stormtrooper helmet from Star Wars films due to impossibility to identify suitable copyright category in the Copyright, Designs and Patents Act 1988).

[27] See the discussion in Opinion of Advocate General Szpunar in *Cofemel*, C-683/17, EU:C:2019:363 ('*Cofemel* AG'), [3], referring to the laws of Italy, Germany, and the United Kingdom.

[28] 1988 Green Paper, p. 4 (emphasis added).

[29] According to the 2003 WIPO Guide, although the general tone of the BC suggests that it is not possible to speak about a complete definition, "the context in which the words "work" and "author" are used in the Convention – closely related to each other – indicates that only those productions qualify as works which are intellectual creations (and, consequently, only those persons qualify as authors whose intellectual creative activity brings such works into existence)". M Ficsor, *Guide to copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms* (2003), BC-2.2 and BC-2.3.

[30] S von Lewinski, *International copyright law and policy* (OUP:2008), §5.66. See also S Ricketson – JC Ginsburg, *International copyright and neighbouring rights – The Berne Convention and beyond* (OUP:2006), 2nd edn, Vol I, §§8.01-8.03.

[31] For computer programs, see Article 1(3) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42–46 and, now, Article 1(3) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), OJ L 111, 5.5.2009, p. 16–22 ('Software Directive'). For photographs, see Article 6 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, p. 9–13 and, now, Article 6 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related

own intellectual creation". Specifically for designs, it then appears that EU Member States enjoy the freedom to establish the level of originality required for copyright protection to arise.[32]

For authorship, nothing is said regarding its foundational requirements, that is: *what* makes one an author. The only hints we may find relate to *who* may be regarded an author: the SatCab Directive refers to authorship of cinematographic or audiovisual works[33], the Software Directive and the Database Directive consider, respectively, computer programs and databases[34], and – more recently – the DSM Directive refers to this concept to determine eligibility for the application of its contract-specific provisions.[35]

Finally, insofar as fixation and categorization as concerned, EU law says nothing. The BC, instead, indicates that the provision of a fixation requirement is a matter of national law (Article 2(2)) and suggests – by using the phrase "such as" in its Article 2(1) – that the system of categories should not be an exhaustive one.

In the EU, all the above – admittedly not much – needs to be complemented with (or rather: replaced by) the rich and *consistent* body of case law that the CJEU has developed since its 2009 decision in *Infopaq*.

The *Infopaq* referral concerned (infringement of) the right of reproduction for authorial works under Article 2(a) of the InfoSoc Directive, not the notion of originality. Yet, the discussion of originality served the Court to tackle the question, posed by the Højesteret (Denmark), concerning the notion of reproduction 'in part' of a work. [Incidentally: how is it still possible, several years later, to have IP lawyers saying that in *Infopaq* the CJEU ruled that 11-word extracts are *protected* by copyright is beyond me - It is *almost* worse than hearing a child say that they do not believe in fairies[36]]

The CJEU noted at the outset that the concept of reproduction 'in part' should be given an autonomous and uniform interpretation throughout the EU, in that the InfoSoc Directive does not define the concepts of either 'reproduction' or reproduction 'in part'.[37] The meaning must be one that has regard of the wording and context of Article 2, as well as the overall objectives of the InfoSoc Directive and international law.[38] All this said, to understand that ruling and what came next, it is necessary and sufficient to focus on paragraphs 33-38:

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rights (codified version), OJ L 372, 27.12.2006, p. 12–18 ('Term Directive'). For databases, see Article 3(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28 ('Database Directive'). Before *Infopaq* and its progeny, M van Eechoud – PB Hungeholtz – S van Gompel – L Guibault – N Helberger, *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Wolters Kluwer:2009), p. 41, wondered whether the meaning of the phrase 'author's own intellectual creation' in those directives should be the same or whether, instead, the standard for photographs should higher, given the reference in Article 6 of the Term Directive to the requirement that the author's own intellectual creation reflect their personality.

[32] Article 17 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28.10.1998, p. 28–35 ('Design Directive').

[33] Article 1(5) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21.

[34] Article 2 of the Software Directive; Article 4(1) of the Database Directive.

[35] Recitals 72 and 74 of the DSM Directive.

[36] In JM Barrie's *Peter Pan*, when this happens, there is a fairy somewhere who falls down dead.

[37] In its subsequent ruling in *FAPL*, [154] the Court held that also the concept of 'reproduction' must be given an autonomous and uniform interpretation throughout the EU.

[38] *Infopaq*, [32].

> 33 Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author's right to authorise or prohibit reproduction is intended to cover 'work'.
> 34 It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.
> 35 Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.
> 36 In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto.
> 37 In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.
> 38 As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.

In answering the question relating to the notion of reproduction 'in part', the CJEU could have simply omitted paragraphs 35-37 altogether, so that the answer could have been: there is reproduction in part of a work in accordance with Article 2(a) of the InfoSoc Directive, when that part that is reproduced is original, and thus protectable, in its own right. This would have implied that, since the InfoSoc Directive does not harmonize the standard of originality for works falling under its scope of application, it would be a matter of national law to determine the conditions of protection.

The CJEU, however, did nothing of this sort.

The revolutionary part of *Infopaq* is indeed what the Court stated at paragraphs 35-37 which, bluntly, can be summarized as follows: there is reproduction in part of a work in accordance with Article 2(a) of the InfoSoc Directive, when that part that is reproduced is original, and thus protectable, in its own right *and that is the case when that part is its author's own intellectual creation*.

In so doing, the Court achieved two landmark results: it introduced both an EU standard of infringement (of the right of reproduction of authors) and an EU standard of originality. All this was prompted by an internal market-building concern, which – surprisingly – EU policymakers had not considered necessary to address just a few years earlier. Indeed, the 2004 EC review of the then existing copyright and related rights legal framework had concluded that there was no sufficient evidence that supported the view that diverging standards of originality across the EU would impair the functioning of the internal market.[39]

After *Infopaq*, nothing could stay the same. It was also unavoidable that further questions (and referrals for a preliminary ruling) would follow.

[39] Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, §3.1, 14.

3. After *Infopaq*: covering (nearly) all copyright bases

The outcome in *Infopaq* has given rise to a discussion of the role of the CJEU, including what has been labelled by some as "harmonization by stealth".[40] In the first decision after *Infopaq*, *Bezpečnostní softwarová asociace*, the CJEU elaborated further on the notion of author's own intellectual creation by discussing copyright protection of graphic user interfaces. It clarified that 'creation' is to be intended as requiring 'creativity': the standard of originality mandates that the author has expressed their "creativity in an original manner".[41]

Such an understanding of originality was confirmed in *FAPL*: originality as author's own intellectual creation requires exerting "creative freedom", this being something that football matches – being subject to the rules of the game – do not display.[42] The CJEU refined its construction of the standard of protection further in its subsequent decision in *Painer*. In relation to the originality requirement for photographs, in particular portrait photographs, what is required is for the author "to express [their] creative abilities in the production of the work by making free and creative choices, so that [they] can stamp the work created with [their] 'personal touch'".[43]

The EU standard of originality – as also acknowledged, first, by AG Mengozzi in his Opinion in *Football Dataco* and, subsequently, by the CJEU in the resulting judgment – entails a "'creative' aspect, and it is not sufficient that the creation of [the work] required labour and skill."[44] In addition, the originality criterion is not satisfied when the creation of a work "is dictated by technical considerations, rules or constraints which leave no room for creative freedom".[45]

In sum, in light of what the CJEU itself regards as "well-established case-law", "[i]n order for an intellectual creation to be regarded as an author's own it must reflect the author's personality, which is the case if the author was able to express [their] creative abilities in the production of the work by making free and creative choices."[46] All this implies that there is no freedom of Member States to envisage different standards of originality (and of infringement). Such a conclusion applies horizontally, including to works of applied art, despite the wording of the Design Directive. In this sense, as stated above, the judgment in *Cofemel* is not at all surprising.[47]

Equally unsurprising are the broader implications of *Levola Hengelo*, a case in which the CJEU was expressly asked to provide guidance on the notion of 'work'. There, the Court *confirmed* (albeit

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[40] L Bently, *Harmonization by Stealth: Copyright and the ECJ*, Fordham IP Conference 2010, New York City (NY, USA). Also discussing *Infopaq* from the perspective of CJEU activism, see J Griffiths, 'The role of the Court of Justice in the development of European Union copyright law', in I Stamatoudi and P Torremans (eds), *EU copyright law – A commentary* (Edward Elgar:2014), 1st edn, §§20.06-20.16.

[41] *Bezpečnostní softwarová asociace*, [50].

[42] *FAPL*, [98]. More recently, the Spanish Supreme Court applied the same reasoning to a *corrida* (traditional Spanish bullfighting): Tribunal Supremo, decision No. 82/2021, 16.02.2021, also discussed on The IPKat: 'Spanish Supreme Court applies Cofemel and rules that bullfighting cannot be protected by copyright' (06.03.2021), available at https://ipkitten.blogspot.com/2021/03/spanish-supreme-court-applies-cofemel.html.

[43] *Painer*, [89] and [92].

[44] Opinion of Advocate General Mengozzi in *Football Dataco and Others*, C-604/10, EU:C:2011:848, [35].

[45] *Cofemel*, [31] (emphasis added), referring to *Football Dataco*, [39]. See also *Brompton Bicycle*, [24].

[46] *Funke Medien*, [19].

[47] Despite this, nearly three years later, the *Cofemel* judgment is still the subject of conferences, eg, ECTA ®etreat, *The Never-Ending Challenge of Shape Protection, Design, Trade Mark, and Copyright, Milan* (Italy), 07.04.2022 and appears to have caused, at least in some, something akin to a post-traumatic stress disorder.

implicitly) that exhaustive lists of protectable works are incompatible with EU law. Such a conclusion was clear as early as *Infopaq* ("copyright […] is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation"[48]) and was confirmed further in *Bezpečnostní softwarová asociace* [49] and *FAPL*.[50] Attentive national judges also noted this as the correct reading of early CJEU case law on originality.[51]

For copyright protection to arise, what is required is a work that is original – nothing more, nothing less. Since earlier case law had focused on the 'originality' prong of the subsistence test, what *Levola Hengelo* added was a definition of 'work':

> for there to be a 'work' as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form.[52]

The definition thus provided, by requiring that the subject matter be "expressed", contains an implicit reference to the idea/expression dichotomy. In imposing the conditions of precision and objectivity, it also clearly borrows from trade mark law (this is evident if one reads the AG Opinion in that case[53]) and its representation requirement. All this further implies that there should be no element of subjectivity in the process of identifying the protected subject-matter.[54]

Unlike AG Wathelet, who had excluded the existence of a fixation requirement under the InfoSoc Directive[55] – the judgment introduces an EU approach to fixation by specifying that the expression at hand does not need to be "necessarily in permanent form". The latter represents a further harmonization achievement of the CJEU: it is fair to say that, in the EU, fixation is no longer a matter of national law (as it would appear from the BC), but it is rather an EU-mandated requirement.

Above all, by correctly holding that the notion of 'work' is an autonomous concept of EU law, the CJEU has mandated equal protection across the EU. Member States are prevented from excluding protection for works that, instead, fall within the EU notion due to categorization issues.

At the time of writing, the most recent achievements in this long string of jurisprudence remain *Cofemel* and *Brompton Bicycle*. Neither of them adds anything that was not known already. The

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[48] *Infopaq*, [37]. I advanced this view in E Rosati, 'Closed subject-matter systems are no longer compatible with EU copyright' (2014) 12 *GRUR Int* 1112.

[49] *Bezpečnostní softwarová asociace*, [28].

[50] *FAPL*, [96]-[97].

[51] In *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch) (23 July 2010), [27], Arnold J (as he then was) held that "[i]n the light of a number of recent judgments of the CJEU, it may be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed in section 1(1)(a) of the Copyright, Designs and Patents 1988 and defined elsewhere in that Act. Nevertheless, it remains clear that the putative copyright work must be a literary or artistic work within the meaning of Article 2(1) of the Berne Convention". In *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPCC 37 (05 October 2012), Judge Birss QC (as he then was) considered it "tempting" [99] to abandon the different treatment of different categories of works under UK law, following the CJEU judgments in *Infopaq* and *Painer*. See the discussion in E Rosati, *Copyright and the Court of Justice of the European Union* (OUP:2019), p. 181-185.

[52] *Levola Hengelo*, [40]. This case has been also discussed extensively on The IPKat. For a collection of blogposts, see https://ipkitten.blogspot.com/search/max-results=7?q=levola+Hengelo.

[53] Opinion of Advocate General Wathelet in *Levola Hengelo*, C-310/17, EU:C:2018:618 ('*Levola Hengelo* AG'), [56], referring to *Sieckmann*, C-273/00, EU:C:2002:748, [55].

[54] *Levola Hengelo*, [40]; *Cofemel*, [32].

[55] *Levola Hengelo* AG, [59].

principal holding of *Cofemel*, that is that works of applied art should be protectable under copyright at the same conditions as any other type of subject-matter, was already evident as early as 2011 when the CJEU decided *Flos*.[56] The main holding of *Brompton Bicycle*, that is that IP overlaps are allowed and that functional shapes can be also protected by copyright insofar as they display 'free and creative choices', is equally unsurprising.[57] As early as *Bezpečnostní softwarová asociace*, the CJEU had held that choices that are dictated by technical considerations, rules, and constraints do not confer originality. What is required is an exercise of 'dissection' of a work: choices that are not free and creative should be separated from those that are free and creative, as only the latter are protectable under copyright.

4. The case of works of applied art: how a case about a jeans design did *not* change EU copyright

As stated, after *Infopaq* different originality standards could no longer be tolerated – both across the EU and across different types of copyright works, including works of applied art.

Despite the struggle of the latter to find their place within the IP system[58] and the historically different treatment under the copyright laws of EU Member States, as stated, such a conclusion became apparent when the CJEU decided *Flos*. This was a reference from the Tribunale di Milano (Italy) asking about the compatibility with EU law of certain Italian transitional provisions introduced when this Member State transposed the Design Directive into its own legal system.

The CJEU held that, while unregistered designs are outside the scope of the Design Directive, they may qualify for copyright protection under the InfoSoc Directive "if the conditions for that directive's application are met"[59], that is if they are their author's own intellectual creation.[60] In other words: if a work of applied art is eligible for protection under the InfoSoc Directive and is, as such, original in the sense clarified by the CJEU, then Member States cannot deny such a protection.

Despite that this was the (correct) reading of *Flos* that AG Jääskinen also advanced in his Opinion in *Donner*[61], that judgment gave rise to contrasting interpretations. Ultimately, it prompted the Supremo Tribunal de Justiça (Portugal) to make a reference to the CJEU – the one in *Cofemel* – and ask expressly about the conditions for copyright protection in works of applied art and industrial models and designs.

The CJEU moved from the notion of 'work' in Article 2(a) of the InfoSoc Directive, recalled its character of autonomous notion of EU law, and – by referring to both *Infopaq* and the then recent ruling in *Levola Hengelo* – considered that such a notion presupposes the fulfilment of two cumulative requirements. First, it implies the existence of an original object, that is an intellectual creation of its author. Secondly, the concept of work is reserved to those elements which are, objectively speaking, the expression of such a creation.

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[56] *Flos*, C-168/09, EU:C:2011:29 ('*Flos*').

[57] Recently, see also *Gömböc*, C-237/19, EU:C:2020:296, [48]-[55]. This case has been also discussed on The IPKat: see 'The CJEU (again) on 3D trademarks: the Gömböc judgment' (01.05.2020), available at https://ipkitten.blogspot.com/2020/05/the-cjeu-again-on-3d-trademarks-gomboc.html; 'The non-systematic relevance of earlier IP rights: from *Gömböc* to *Brompton Bicycle*' (02.05.2020), available at https://ipkitten.blogspot.com/2020/05/the-non-systematic-relevance-of-earlier.html; '3D trade marks return to equilibrium? The end of the *Gömböc* saga' (05.01.2022), available at https://ipkitten.blogspot.com/2022/01/3d-trade-marks-return-to-equilibrium.html.

[58] *Cofemel* AG, [1].

[59] *Flos*, [34].

[60] See (critically) L Bently, 'The return of industrial copyright?' (2012) 34(10) EIPR 654, p. 660-661.

[61] Opinion of Advocate General Jääskinen in *Donner*, C-5/11, EU:C:2012:195, [31].

While the same subject-matter can be protected through different rights (for example the Design Regulation[62] and the InfoSoc Directive), in line with the principle of rights cumulation, when such a subject-matter falls within the scope of the InfoSoc Directive, then the only requirement for copyright protection under that piece of legislation is that the design is a 'work' fulfilling both requirements above. The Court further noted that, if a national law were to require some sort of 'aesthetic' value for a design to be eligible for copyright protection (as it was the case of *inter alia* Portuguese law), this would be contrary to the requirement of objectivity mandated under EU law.

Overall, *Cofemel* simply brings to its natural consequences the evolution already signalled by earlier case law. While the judgment explicitly removes the possibility of national approaches that make copyright protection of works of applied art subject to fulfilling requirements of artistic, aesthetic, etc value, it also makes it clear that originality is, in fact, a threshold that needs to be passed and, therefore, its assessment needs to be a thorough one. Despite not being a court on the merits, the CJEU itself has suggested in the past that certain photographs like the one pictured below would not be protected by copyright.[63] The same would be true of purely informative documents like military reports.[64]

The photograph at issue in Renckhoff. *According to AG Campos Sánchez-Bordona "it seems doubtful to me that a simple shot of the city of Cordoba, with the Roman bridge in the foreground, satisfies the […] requirements of the* Painer *judgment." (source: curia.eu)*

[62] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24.

[63] See clearly Opinion of Advocate General Campos Sánchez-Bordona in *Renckhoff*, C-161/17, EU:C:2018:279, [53]-[54], holding that "According to [the *Painer*] judgment, a portrait photograph can be protected by copyright 'if … such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph'. However, without in any way wishing to detract from the merits of the photograph, it seems doubtful to me that a simple shot of the city of Cordoba, with the Roman bridge in the foreground, satisfies the aforesaid requirements of the *Painer* judgment." Also noting the need to satisfy the originality requirement, see *Renckhoff*, C-161/17, EU:C:2018:634, [14]: " As a preliminary point, it must be recalled that a photograph may be protected by copyright, provided, which it is for the national court to determine in each case, that it is the intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph".

[64] See clearly Opinion of Advocate General Szpunar in *Funke Medien*, C-469/17, EU:C:2018:870, [18]-[19] stating that: "It seems to me to be rather unlikely that the author or authors of [military reports], whose identity is unknown but who are probably civil servants or officers of the federal armed forces, were able to make free and creative choices in order to express their creative abilities when drafting those documents. The content of purely informative documents that are inevitably drafted in simple and neutral terms is entirely determined by the information they contain, so that such information and its expression become indissociable, thus precluding all originality. A degree of effort and skill is required to draw them up, but those elements on their own cannot justify copyright protection." For a substantial endorsement, see *Funke Medien*, [24]: "If military status reports, such as those at issue in the main proceedings, constitute purely informative documents, the content of which is essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable and that those reports are thus entirely characterised by their technical function, precluding all originality, it should be considered […] that, in drafting those reports, it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author's own intellectual creation".

Overall, national courts will need to identify what makes a work of applied art *original*, also bearing in mind its functional nature and, with that, the CJEU's considerations – elaborated further in *Brompton Bicycle* – regarding the copyright assessment required for this type of subject-matter.

Brompton Bicycle was a referral from the Tribunal de l'entreprise de Liège (Belgium), which was made in the context of copyright infringement proceedings concerning copyright protection of a functional shape (that of Brompton's folding bicycle).

The work at issue in Brompton Bicycle *(source: curia.eu)*

The national court had asked the CJEU to clarify the copyright treatment of such works under copyright and whether any of the following criteria would be relevant to conducting the required assessment: the existence of other possible shapes which allow the same technical result to be achieved; the effectiveness of the shape in achieving that result; the intention of the alleged infringer to achieve that result; the existence of an earlier, now expired, patent on the process for achieving the technical result sought.

The CJEU reviewed earlier case law and, in line with the *Cofemel* holding, confirmed that – for copyright protection to arise – it is "both necessary and sufficient" that the work at issue is original, in the sense that it is its author's own intellectual creation that results from their *free* and *creative* choices and reflects their personality. As it had been spelled out at least since *Bezpečnostní softwarová asociace*, originality is not fulfilled where the realization of a subject-matter has been *exclusively* dictated by technical considerations, rules or other constraints which have left no room for creative freedom. Also considering that copyright extends to the expression of ideas, not ideas *per se*:

> a subject matter satisfying the condition of originality may be eligible for copyright protection, even if its realisation has been dictated by technical considerations, provided that its being so dictated has not prevented the author from reflecting his personality in that subject matter, as an expression of free and creative choices.

Turning to the criteria referred to by the national court to assess whether a functional shape is eligible for copyright protection, the Court considered the existence of other possible shapes which allow the same technical result to be achieved "not decisive"[65] and the existence of an earlier patent

[65] *Brompton Bicycle*, [35].

"irrelevant"[66] (once again, in line with the principle that allows rights cumulation). As for the remaining criteria, "they should be taken into account only in so far as those factors make it possible to reveal what was taken into consideration in choosing the shape of the product concerned."[67] In any event, the assessment needs to be conducted having regarded to "all the relevant aspects of the present case, as they existed when that subject matter was designed, irrespective of the factors external to and subsequent to the creation of the product."[68] Such 'factors' include the subsistence of other IP rights at any point in time.

5. EU copyright in its 30s: time to settle down?

Over a decade after the *Infopaq* ruling, despite a consistent approach that the CJEU itself regards as "well-established case-law"[69], some national courts have correctly acknowledged that "[t]he CJEU ruled that national law could not impose a requirement of aesthetic or artistic value".[70] Others, however, still display a stubborn reluctance in accepting and applying the resulting principles.[71]

[66] *Ibid*.

[67] *Ibid*, [36].

[68] *Ibid*, [37].

[69] *Funke Medien*, [49].

[70] *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd (Rev 1)* [2020] EWHC 148 (IPEC) (29 January 2020) ('*Response Clothing*'), [58]. In that case Judge Hacon also noted ([63]) that "[c]omplete conformity with art.2 [of the InfoSoc Directive], in particular as interpreted by the CJEU in *Cofemel*, would exclude any requirement [of] aesthetic appeal." For a Kat-take, see 'UK court applies CJEU *Cofemel* decision for the first time: "complete conformity" with EU law would preclude any requirement of aesthetic appeal' (30.01.2020), available at https://ipkitten.blogspot.com/2020/01/uk-court-applies-cjeu-cofemel-decision.html.

[71] E.g., Tribunale di Milano, decision 10280/2021, 13.12.2021, in which the Milan Court of First Instance – by insisting on the requirement of artistic value – refused to acknowledge that the design of Longchamp's *Le Pliage* bag would be protected by copyright. The IPKat also discussed this case: see 'How do you protect an iconic handbag? Milan court considers IP rights vesting in Longchamp's *Le Pliage*' (10.03.2022), available at https://ipkitten.blogspot.com/2022/03/how-do-you-protect-iconic-handbag-milan.html.

The fabric design at issue in Response Clothing *(source: bailii.org)*

Longchamp's 'Le Pliage' design at the centre of Tribunale di Milano, decision 10280/2021, 13.12.2021 (source: Tribunale di Milano)

This situation is further complicated by the circumstance that the EU legislation that has given rise to this string of decisions does not lay out a secure basis on which the Court could adopt an EU-wide understanding of originality that applies horizontally. As a result, it is not clear whether courts in EU Member States could and should disapply existing statutory provisions that appear to be in contrast with EU law, not because of EU directives as such but rather because of the interpretation thereof provided by the CJEU.

The CJEU has famously developed a consistent approach to the question of direct effect of EU directives, only admitting the possibility of vertical – and not also horizontal – direct effect. This has been the case in copyright case law too. In *OSA*, for example, the CJEU held that that a national court is required, when applying provisions of domestic law of EU derivation in a dispute between private parties, to consider the whole body of rules of national law. This entails an interpretation of such rules

that is, so far as possible, in the light of the wording and purpose of the relevant directive and allows to achieve an outcome consistent with the objective pursued by the directive. Such a mandate follows from the seminal 1990 decision in *Marleasing*.[72] In any event, this prevent an interpretation of national law that is *contra legem*.[73]

Such a conclusion differs from the one reached by AG Sharpston in her Opinion in the same case. The AG observed that, first, when national courts apply domestic law, they are bound to interpret it in accordance with *Marleasing*. If such an approach is not possible, it is necessary to consider whether a relevant provision of a directive has direct effect and, if so, whether that direct effect may be relied on against a party to the national dispute. The AG also stressed that it is for national courts to do whatever lies within their jurisdiction, for example taking the whole body of domestic law into consideration and applying the interpretative methods recognized by it, to ensure that a directive (in that case: the InfoSoc Directive) is fully effective, and thus achieve outcomes consistent with the objectives pursued by it. She concluded that an interpretation of national law that would be inconsistent with an EU directive is not permissible.[74] The AG did not state expressly what the legal consequences of incorrect implementations of the InfoSoc Directive would be. Nevertheless, she appeared to agree with OSA's suggestion that this would be disapplication of incorrect national provisions.[75]

To exemplify with regard to the issues dealt with in this chapter: the Italian Copyright Act (Article 2 No 10 Law 633/1941) provides that protection of works of applied art under copyright is allowed insofar as such works display "creative character and artistic value". After *Cofemel*, a requirement of 'artistic value' is no longer allowed. Nevertheless, lacking a legislative intervention that reformed the wording of the Act, could and should an Italian court disapply Article 2 No 10 and follow instead the approach mandated by the CJEU and do so under an EU legislative framework in which (1) originality is formally harmonized for certain categories of works *only* and (2) the wording of Article 17 of the Design Directive still stands? In substance, an answer in the affirmative would be correct, and could also draw support from the codification of CJEU case law on originality as undertaken in Article 14 of the DSM Directive.[76] Nonetheless, there may be also several reasons, including of an institutional kind, that make such an approach problematic and likely prone to criticism. How to solve all this then?

The safest and probably best option would be for the CJEU itself to provide guidance. That, however, would require a referral for a preliminary ruling prompting the consideration of such an issue with specific regard to copyright. While this chapter focused on the basic requirements for copyright protection, there are several other areas in which the Court has supplemented the scarce wording of legislative provisions and pushed the boundaries of harmonization well beyond such a wording and, likely, beyond the formal intention of EU legislature. Regrettably, where the opportunity of a referral along these lines emerged, courts have so far decided not to seize it.

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[72] *Marleasing*, C-106/89, EU:C:1990:395, [7].

[73] *OSA*, C-351/12, EU:C:2014:110, [42]-[48].

[74] Opinion of Advocate General Sharpston in *OSA*, C-351/12, EU:C:2013:749, [44]-[47].

[75] *Ibid*, [38] and [43].

[76] See the discussion on The IPKat: 'DSM Directive Series #3: How far does Article 14 go?' (09.04.2019), available at https://ipkitten.blogspot.com/2019/04/dsm-directive-series-3-how-far-does.html. See also: European Copyright Society, *Comment of the European Copyright Society on the Implementation of Art.14 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market* (26.04.2020), available at https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs_cdsm_implementation_article_14_final.pdf; and E Rosati, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790* (OUP:2021), p. 244-247.

As the discussion of the very basic requirements for protection has shown, there are still several issues that copyright law needs to resolve before entering a more mature age. So far, case law has focused specifically on the notions of 'originality' and 'work' and, in so doing, has also implicitly touched upon fixation and categorization requirements. The picture, however, is far from complete. A key missing piece is authorship. While some guidance on the question of joint ownership of a copyright might be provided when the CJEU decides the pending trade mark referral in *Legea*[77], EU legislation does not provide express guidance on *what* makes one an author whose *intellectual creation* renders a work original and, thus protectable. If and when the CJEU is asked to provide guidance on the notion of 'author', it will adopt the same approach as that concerning 'originality' and 'work': the notion of author is to be interpreted in light of the objectives underlying EU legislation and is to be regarded as an autonomous concept of EU law, which requires uniform interpretation and application across the EU.

In sum: over 30 years after the beginning of the harmonization project, EU copyright law is no longer in its infancy. At 30+, the question whether it is time, for it, to settle down may be as annoying as when posed to any 30 year-old at family gatherings. For EU copyright, at least, the answer is clear: not yet. The same – hopefully – goes for The IPKat who – in any case – is a bit younger: at 20, there is plenty of adventures to live, and stories and developments waiting to be told. Long live copyright then … and The IPKat!

[77] *Legea*, C-686/21 (in progress). The referral is asking the CJEU to clarify the rules relating to joint ownership of a trade mark.