Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 8 May 2025 [1]

Joined Cases C-580/23 and C-795/23

Mio AB,
Mio e-handel AB,
Mio Försäljning AB
v
Galleri Mikael & Thomas Asplund Aktiebolag
(Request for a preliminary ruling from the Svea hovrätt Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm, Sweden))
and
konektra GmbH,
LN
v
USM U. Schärer Söhne AG

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary hearing – Copyright and related rights – Directive 2001/29/EC – Article 2 – Reproduction right – Concept of a 'work' – Copyright protection of works of applied art – Examination of the originality of a work of applied art – Concept of 'free and creative choices' – Criteria for the assessment of free and creative choices – Assessment of the infringement of exclusive rights)

Introduction

1. Two recent decisions from the courts of two Member States, concerning iconic subject matter in the world of design, are a good illustration of the dilemmas relating to the issue raised in the present joined cases, namely the protection by copyright of works of applied art. First, the tribunal judiciaire de Paris (Court of Paris, France) recognised the 'Kelly' and the 'Birkin', two handbag models from the brand Hermès, as a 'work', within the meaning of copyright law. [2] A

[1] Original language: French.

[2] Judgment of 7 February 2025, RG 22/09210. See also Söğüt, A., *Design or art? French court rules that Birkin Bag is a copyright work*, https://ipkitten.blogspot.com.

few days later, the Bundesgerichtshof (Federal Court of Justice, Germany, one of the referring courts in the present joined cases) refused to give the same classification to two models of sandals from the Birkenstock brand. [3]

2. The difficulties encountered in protecting intellectual property in respect of this category of subject matter arise from the fact that they are on the borderline between 'pure' works of art and mere utilitarian objects: they belong to both of those groups, without fully coming within either one of them. Moreover, the category of works of applied art itself is not uniform, in so far as it includes both genuine works of art with an additional utilitarian function and utilitarian objects to which the creators have given an 'artistic' aspect, in the broadest sense of the term. Not to mention subject matter that would be difficult to classify as works of pure art or works of applied art, such as haute couture, jewellery or certain perfume bottles.

3. Consequently, although *sui generis* systems of protection exist for that type of subject matter, such as the system of protection for design under EU law, the question of their protection by copyright still needs to be addressed. Different legal systems provide different answers to that question, ranging from the exclusion of utilitarian objects from copyright protection to full protection, based on the same criteria as those applied to other categories of works, under the theory of the unity of art, [4] with protection limited by or subjected to stricter requirements than for other categories of works found somewhere in the middle.

4. The common feature of those systems seems to be dissatisfaction with regards to their operation. That relates, first, to the absence of a clear demarcation between utilitarian objects which are eligible for copyright protection and utilitarian objects that are excluded from it and, secondly, to the unpredictability and lack of legal certainty that result therefrom. For that reason, national systems for the protection of works of applied art are constantly changing through legislation and case-law in a quest for solutions that are better adapted to the needs of the interested parties. [5]

5. EU copyright law enshrines, in respect of works of applied art, the principle of protection without specific requirements. The question of the terms of that protection has already been raised before the Court of Justice. [6] In the present joined cases, the Court has been asked to refine its case-law on the matter. This is not a question of establishing a single standard of protection that would make it possible to determine with certainty whether a subject matter is covered by that protection; such an ambition would be utopian. Classification as a work in copyright law requires complex and, necessarily, in part, subjective assessments which can only be made on a case-by-case basis. That classification should, however, be harmonised within the internal market so that the eligibility for protection of the 'Birkin' bag and that of Birkenstock sandals are assessed on the basis of the same criteria in every Member State.

[3] Judgment of 20 February 2025, I ZR 16/24. See also Pemsel, M., *Birkenstock's sandals are not sufficiently artistic to enjoy copyright protection*, https://ipkitten.blogspot.com.

[4] According to that theory, there is no difference between 'pure art' and 'applied art', since all creations are equally worthy of protection, irrespective of their intended purpose.

[5] For an overview of the situation in different European and non-European countries, see Derclaye, E. (ed.), *The Copyright/Design Interface*, Cambridge University Press, 2018.

[6] See, in particular, judgments of 12 September 2019, *Cofemel* (C-683/17, 'the judgment in *Cofemel*', EU:C:2019:721), and of 11 June 2020 (C-833/18, 'the judgment in *Brompton Bicycle*', EU:C:2020:461).

Legal framework

European Union law

6. Articles 2 to 4 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[7] provide:

‘Article 2

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

…

Article 3

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

…

Article 4

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

…’

Swedish law

7. Under Paragraph 1(1)(6) of the lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (Law (1960:729) on copyright in literary and artistic works), works of applied art, inter alia, are protected.

8. According to Paragraph 2 of that law, copyright includes, subject to certain limitations, the exclusive right to dispose of the work by reproducing it and making it available to the public, in its original form or in a form that is modified, translated or reworked in another literary or artistic genre or by another technique. Reproduction means any direct or indirect, temporary or permanent reproduction, by any means and in any form, of all or part of the work. The work is made available to the public, for example, when the work is transmitted to the public or where copies of the work are offered for sale, rental or loan, or otherwise disseminated to the public.

[7] OJ 2001 L 167, p. 10.

German law

9. Paragraph 2 of the Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965,[8] entitled 'Protected works', provides, in subparagraph 1(4) thereof, that protected works include works of fine art, including works of architecture and applied art and sketches of such works, and, in subparagraph 2 thereof, that only personal intellectual creations are works within the meaning of that law.

Facts, the main proceedings and the questions referred for a preliminary ruling

Case C-580/23

10. Galleri Mikael & Thomas Asplund Aktiebolag, a company incorporated under Swedish law ('Asplund'), manufactures and designs indoor goods and furniture, including tables in the 'Palais Royal' series.

11. Mio AB, Mio e-handel AB and Mio Försäljning AB, companies incorporated under Swedish law (jointly referred to as 'Mio'), engage in retail trade in the furniture and interior decoration sector. Mio's range of furniture includes, in particular, tables from the 'Cord' furniture series.

12. In October 2021, Asplund brought an action before the Patent- och marknadsdomstolen (Patent and Commercial Court, Sweden), seeking, in essence, to prohibit Mio from manufacturing, marketing or selling the 'Cord' table, on the ground of infringement of its copyright in respect of the 'Palais Royal' table.

13. Mio claims that the 'Palais Royal' table is not protected by copyright since the table is not sufficiently original to obtain such protection. Furthermore, in its view, even if it were, that protection would be limited and restricted, and the differences between the two tables at issue would be sufficient to find that there was no infringement of Asplund's copyright. In addition, Mio maintains that the 'Cord' table was developed independently and is not a copy of the 'Palais Royal' table.

14. The Patent- och marknadsdomstolen (Patent and Commercial Court) upheld Asplund's action by judgment of 19 October 2022. Mio appealed that decision before the referring court.

15. In those circumstances, the Svea hovrätt Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm, Sweden) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the assessment of whether a subject matter of applied art merits the far-reaching protection of copyright as a work within the meaning of Articles 2 to 4 of [Directive 2001/29], how should the examination be carried out – and which factors must or should be taken into account – in the question of whether the subject matter reflects the author's personality by giving expression to his or her free and creative choices? In that regard, the question is in particular whether the examination of originality should focus on factors surrounding the creative process and the author's explanation of the actual choices

[8] BGBl. 1965 I, p. 1273.

that he or she made in the creation of the subject matter, or on factors relating to the subject matter itself and the end result of the creative process and whether the subject matter itself gives expression to artistic effect.

(2) For the answer to Question 1 and the question of whether a subject matter of applied art reflects the author's personality by giving expression to his or her free and creative choices, what is the significance of the facts that

(a) the subject matter consists of elements that are found in common designs?

(b) the subject matter builds on and constitutes a variation of an earlier known design or an ongoing design trend?

(c) identical or similar subject matter has been created before or – independently and without knowing whether the subject matter of applied art for which protection as a work is claimed – after the creation of the subject matter in question?

(3) How should the assessment of similarity be carried out – and what similarity is required – in the examination of whether an allegedly infringing subject matter of applied art is covered by a work's scope of protection and infringes the exclusive right to the work which, according to Articles 2 to 4 of [Directive 2001/29], must be conferred on the author? In that regard, the question is[,] in particular[,] whether the examination should focus on whether the work is recognisable in the allegedly infringing subject matter or on whether the allegedly infringing subject matter creates the same overall impression as the work, or what else the examination should focus on.

(4) For the answer to Question 3 and the question of whether an allegedly infringing subject matter of applied art is covered by a work's scope of protection and infringes the exclusive right to the work, what is the significance of

(a) the degree of originality of the work for the scope of the work's protection?

(b) the fact that the work and the allegedly infringing subject matter of applied art consist of elements found in common designs or build on and constitute variations of earlier known designs or an ongoing design trend?

(c) the fact that other identical or similar subject matter has been created before or – independently and without knowledge of the work – after the creation of the work?'

Case C-795/23

16. USM U. Schärer Söhne AG, a company incorporated under Swiss law ('USM'), manufactures and markets a modular furniture system under the name 'USM Haller'. That furniture system is characterised by the assembly of round, shiny chrome tubes by means of connecting balls to form a structure into which coloured metal panels are inserted. The structures thus created may be combined freely both vertically and horizontally.

17. Konektra GmbH, a company incorporated under German law, and LN, its director (together, 'konektra'), offered online, without objection from USM, replacement and extension parts for the 'USM Haller' system, the shape and, for the most part, colour of which corresponded to USM's

components. Since 2018, konektra's website has listed all the components necessary for the complete assembly of 'USM Haller' furniture and also advertises with images of the assembled furniture. In addition, konektra's deliveries are accompanied by instructions for the assembly of complete furniture and it offers its customers an assembly service.

18. According to USM, konektra no longer merely offers spare parts for the 'USM Haller' system, but manufactures, offers and markets its own furniture system, identical to that of USM. USM considers that konektra's offer infringes its copyright over the 'USM Haller' system as an applied work of art or, at the very least, constitutes an unlawful imitation under competition law.

19. Accordingly, USM brought an action against konektra before the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) seeking a prohibitory injunction, the provision of information and the presentation of accounts, reimbursement of the costs of the formal notice, and a declaration of its obligation to pay compensation. That court granted those requests, basing its decision, principally, on copyright.

20. By contrast, the appeal court, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), by judgment of 2 June 2022, dismissed USM's copyright claims and upheld only those based on competition law.

21. Both parties brought appeals on a point of law against that decision before the Bundesgerichtshof (Federal Court of Justice), the referring court. That court considers that the success of USM's appeal on a point of law depends on the interpretation of the concept of 'originality', as interpreted by the Court, and on the relationship between copyright protection and design protection.

22. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is there a … relationship [of rule and exception] between design protection and copyright protection in the case of works of applied art, such that, when assessing the originality of those works for copyright purposes, [stricter] requirements are to be imposed with respect to the creator's free and creative choices than for other types of work?

(2) When assessing originality for copyright purposes, it is (also) necessary to consider the creator's subjective view of the creation process and, in particular, does the creator have to make the free and creative choices knowingly in order for them to be regarded as free and creative choices within the meaning of the case-law of the Court …?

(3) If, in the context of the assessment of originality, the decisive consideration is whether and to what extent artistic creation was objectively expressed in the work: Can circumstances occurring after the date of design creation that is relevant for the assessment of originality, such as the presentation of the design in art exhibitions or museums or its recognition in professional circles, also be taken into account for the purposes of that assessment?'

The procedure before the Court

23. The requests for a preliminary ruling in Cases C-580/23 and C-795/23 were received at the Court on 21 September and 21 December 2023, respectively. Written observations were submitted, in Case C-580/23, by the parties to the main proceedings, the French Government

and the European Commission and, in Case C-795/23, by the parties to the main proceedings, the French and Netherlands Governments and the Commission. By decision of the President of the Court of 13 May 2024, the two cases were joined for the purposes of the oral part of the procedure and the judgment. The parties to the main proceedings in the two cases, the French Government and the Commission were represented at the hearing held on 30 January 2025.

Analysis

24. The questions referred for a preliminary ruling in the present joined cases concern the concept of a 'work', within the meaning of EU copyright law, as interpreted by the Court, and raise a number of legal issues, namely the relationship between copyright protection and the protection afforded by design law (first question in Case C-795/23), the criteria for assessing the originality of a work (first and second questions in Case C-580/23 and second and third questions in Case C-795/23) and the criteria for assessing the infringement of protected copyright (third and fourth questions in Case C-580/23). It is in that order that I will address those issues in this Opinion.

The relationship between copyright protection and design protection

25. By its first question, the referring court in Case C-795/23 asks, in essence, whether there is, in EU law, a relationship of rule and exception between protection under design law and protection under copyright law that means that, when examining the originality of applied works of art, stricter requirements must be applied than in the case of other types of work.

26. It is apparent from the explanations provided by the referring court that that question was raised in connection with the Court's statement, in paragraph 52 of the judgment in *Cofemel*, that, 'although the protection of designs and the protection associated with copyright may, under EU law, be granted cumulatively to the same subject matter, that concurrent protection can be envisaged only in certain situations'. As part of the analysis of that question, I shall briefly recall the foundations of protection under those two systems.

27. According to settled case-law, the concept of a 'work', within the meaning of EU copyright law, requires two cumulative conditions to be satisfied. First, that concept entails that there exists an original subject matter, in the sense of being the author's own intellectual creation. Secondly, classification as a work is reserved to the elements that are the expression of such creation. [9]

28. With regards to the first condition, in order for a subject matter to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his or her free and creative choices. However, when the realisation of a subject matter has been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required to constitute a work. [10]

29. With regards to the second condition, the Court has stated that 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

[9] See the judgment in *Cofemel* (paragraph 29 and the case-law cited).

[10] See the judgment in *Cofemel* (paragraphs 30 and 31 and the case-law cited).

author from reflecting his or her personality in that subject matter, as an expression of free and creative choices. However, not only must the possibility of choice as to the shape of the subject matter have existed, but its author must also have expressed his or her creative ability in an original manner by making free and creative choices and must have designed the product in such a way that it reflects his or her personality. [11]

30. The reflection of the author's personality in the shape of the subject matter for which protection is claimed is therefore the cornerstone of the concept of 'originality' and, consequently, the fundamental condition for protection under EU copyright law. The author's personal imprint may express itself to varying degrees, it may even be very faint, but it must be present. It is that which gives the subject matter its 'unique' character, in the sense that it is distinct from any similar subject matter created by another person.

31. It is in that context that the expression 'free and creative choices' used by the Court must be understood. Thus, not only are choices that are not free, in the sense that they are dictated by technical or other constraints, not creative, but nor are those which, although not shaped by such constraints, result either from purely utilitarian considerations, or from methods or standards commonly used in the manufacture of the subject matter at issue, and nor are choices which are completely insignificant or banal.

32. Consequently, although every material subject matter necessarily has a shape and that shape is the result of the more-or-less free choices of its creator, only a subject matter for which the shape, determined at least in part by the creative choices of its author, reflects the personality of that author may benefit from copyright protection. It is therefore a criterion of subjective protection which is used in copyright law. [12]

33. By contrast, design law uses an objective criterion of protection, namely that of novelty and individual character. [13] That criterion is assessed in relation to earlier designs: any design which is sufficiently distinctive to create a different overall visual impression may qualify for protection. There is no requirement as to the features of the design themselves, unless they are not solely dictated by the technical function of the subject matter to which the design is applied.

34. I do not think therefore that the Court's statement in paragraph 52 of the judgment in *Cofemel* can be understood as establishing a relationship of rule and exception between protection under design law and the protection ensured by copyright.

35. With regard to those two protections, in paragraph 50 of that judgment, the Court of Justice noted the differences in their objectives and the rules governing them. It also emphasised, in the following paragraph, that the grant of protection under copyright must not have the consequence that the objectives are undermined.

36. Against that background, paragraph 52 of the judgment in *Cofemel* seems to me to be a simple reminder to the national courts that there is no automatic connection between the grant of protection under design law and protection under copyright law and that the conditions for such

[11] See, to that effect, the judgment in *Brompton Bicycle* (paragraphs 26 and 32 to 35).

[12] On the concept of 'originality' in French law, which appears to be similar to that adopted by the Court, see, in particular, Pollaud-Dulian, F., *Propriété intellectuelle. Le droit d'auteur*, Economica, Paris, 2014, pp. 156 to 168.

[13] See Articles 3 to 5 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28), and Articles 4 to 6 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

protection, namely novelty and individual character on the one hand, and originality on the other, must not be confused. Indeed, a subject matter does not necessarily have to be original, within the meaning of copyright law, in order to be regarded as new and having individual character for the purposes of design law. Conversely, although in practice this situation arises less frequently, an original subject matter may not have individual character if it is not sufficiently distinctive, in terms of visual appearance, from existing shapes.

37. It is in that sense that the Court's finding that cumulative protection under those two mechanisms can be envisaged only 'in certain situations' is to be understood. However, it does not seem to me that it is possible to conclude from that statement that, in order to limit such cumulation to certain cases, a higher threshold of originality must be applied to utilitarian objects than to other categories of works. Such a conclusion would run counter to what clearly follows from paragraph 48 of the judgment in *Cofemel* and from the general scheme of that judgment, namely that the originality of works of applied art must be assessed according to the same criteria as those used for other categories of works.

38. I therefore propose that the Court's answer to the first question in Case C-795/23 should be that, in EU law, there is no relationship of rule and exception between protection under design law and protection under copyright law that means that, when examining the originality of works of applied art, stricter requirements must be applied than in the case of other types of work.

The criteria for assessing originality

39. By the first and second questions in Case C-580/23, and the second and third questions in Case C-795/23, which I propose should be analysed together, the referring courts ask, in essence, how the originality of works of applied art must be assessed for the purposes of the application of Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29 and, more specifically, whether those provisions must be interpreted as meaning that, in that assessment, it is necessary to take into account factors relating to the creative process and the creator's intentions or only the factors that are perceptible in the work itself. Those courts also ask what role additional elements play in that assessment, such as the use in the creation of the work of shapes that are already available, the inspiration taken by the creator from existing subject matter, the likelihood of similar independent creation or the recognition of the creation by professional circles.

Assessment of the originality of works of applied art

40. With regards to the preliminary question of how the originality of a work of applied art is to be established, the answer is apparent from my remarks, in points 27 to 32 of this Opinion, on the concept of 'originality' in EU copyright law. Thus, the court must assess whether the subject matter for which protection is sought constitutes the expression of the free and creative choices reflecting the personality of its author. It seems to me that no further clarification can be made at this stage in the abstract. Indeed, the concept of 'originality' is very general, not to say vague, and is intended to apply to subject matter of very different kinds, so it does not lend itself well to a rigorous and systematic definition in case-law. [14] Its application must be on the basis of a factual assessment in each individual case.

[14] For an in-depth legal analysis, see *The Protection of Works of Applied Art under EU Copyright Law. Opinion of the European Copyright Society in MIO/konektra (Cases C-580/23 and C-795/23)* (europeancopyrightsociety.org).

41. That application must, however, take into account the specific nature of the type of works concerned. Works of applied art differ from other categories of works by the fact that they are primarily utilitarian objects. Such subject matter is the result of the know-how and choices of their creators. Those choices may be dictated by technical, ergonomic or safety constraints, or may result from standards or conventions adopted in the sector concerned. They may also be free, but if no personal touch is added to the subject matter, they could have been the same if someone else had been the creator. It is not necessary, however, to make creative choices, within the meaning of points 28 to 31 of this Opinion, in order to create a utilitarian object. Creative choices are a possible, but not necessary, addition to the very essence of the subject matter in question. While those choices may be intrinsic to the shape of a given subject matter,[15] the fact remains that another subject matter, with the same utilitarian functions, may be created – as is often the case – without the addition of such creative choices.

42. The court before which the question of the originality of such a subject matter is brought must therefore seek out and identify those creative choices in the shape of that subject matter in order to be able to declare it protected by copyright. Unlike other categories of works, for which the decision to create alone is already a creative choice, there is no presumption in that respect in the case of works of applied art. In particular, the fact that the creator of a utilitarian object has made choices that are not dictated by technical or other constraints does not give rise to a presumption that those choices are creative, for the purposes of copyright.

43. I must add a final remark of a terminological nature. Indeed, it seems to me that a risk of confusion arises when the terms 'artistic' or 'aesthetic' are used to characterise the choices made by the author of a work or the result of his or her creation. It is true that, in certain senses, those terms may be understood as synonymous for 'creative choices'. It is also true that, through the use of language, we are talking of works of applied *art*. However, the term 'artistic' evokes a value judgment in the sense of a relatively high degree of artistic success. However such judgments are not relevant in copyright law: protection is in no way conditional on the artistic (or other) quality of the work, including in the case of works of applied art. As for the term 'aesthetic', it may be understood as referring to all the creator's choices that are not linked to technical or functional constraints. However, not every aesthetic choice necessarily reflects the personality of the creator and therefore not every aesthetic choice confers originality.[16] It is thus more prudent, in my view, to stick to the words 'free and creative choices reflecting the personality of the author'.

Taking into account the creative process and the author's intentions

44. The referring courts ask, more specifically, whether the originality of the subject matter for which copyright protection is claimed must be assessed by taking into account the author's intentions during the creative process or whether it must be visible in the work itself. It seems to me that the answer can be inferred from the Court's case-law on the concept of a 'work'.

45. As I have already mentioned, according to that case-law, if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that it *reflects* the personality of its author, as an *expression* of his or her free and creative choices.[17] The use of the words 'reflects' and

[15] By this, I do not mean that the shape must necessarily be separable from the subject matter itself, in accordance with the theory of 'conceptual separability', which appears to give rise to difficulties of application for the Courts of the United States. See, on this point, Ginsburg, J.C., '*Courts Have Twisted Themselves into Knots' (and the Twisted Knots Remain to Untangle): US Copyright Protection for Applied Art after Star Athletica*, in Derclaye, E., op. cit., p. 297.

[16] See, to that effect, the judgment in *Cofemel* (paragraphs 53 to 55).

[17] See the judgment in *Cofemel* (paragraph 30 and the case-law cited) and point 28 of this Opinion.

'expression' clearly indicates that such choices and the author's personality must be visible in the subject matter for which protection is claimed. It is therefore not enough that the creator made free and creative choices: those must still be perceptible to third parties through the work itself.

46. Consequently, the Court held that, in addition to originality, the concept of 'work' necessarily implies the existence of a subject matter that is identifiable with sufficient precision and objectivity. That is because, first, the authorities responsible for ensuring that the exclusive rights inherent in copyright are protected must be able to identify, clearly and precisely, the subject matter so protected. So must third parties against whom the protection claimed by the author of that subject matter may be asserted. Secondly, the need to exclude any element of subjectivity, which is detrimental to legal certainty, in the process of identifying that subject matter means that the latter must have been expressed in an objective manner. [18]

47. The requirement of the existence of a subject matter that is identifiable as a work reflects the fundamental principle of copyright, according to which not ideas but only expressions are protected. However, the author's intentions lie within ideas. They are protected only in so far as the author has expressed them in the work, that is to say, the identifiable subject matter, which is their only relevant expression. Consequently, the court dealing with the question of the originality of the subject matter for which protection is claimed cannot base its assessment decisively on elements which are not expressed in that subject matter itself.

48. Furthermore, it is possible that evidence of the intentions of the creator of the subject matter for which protection is claimed will simply not be available before the court dealing with that question or that the court will not consider such evidence convincing. The only element that must necessarily be presented to the court is the subject matter itself, without which the court will not be in a position to deliver its decision.

49. That consideration also answers the question of whether the author's creative choices must necessarily be deliberate. Those choices must be identified and taken into account such as they appear in the work. Since the author's intentions are not decisive, it would be superfluous to try to establish the author's state of mind during the creative process.

50. However, if proof of the creator's intentions is available, the court hearing the case may take it into account, along with other evidence, when assessing the originality of the subject matter at issue. However, that cannot be considered sufficient. The court must be convinced that it is in the presence of a subject matter which reflects the personality of its author as an expression of the free and creative choices of that author. It is only in that case that it is possible for it to establish the originality of that subject matter and thus classify it as a work protected by copyright.

Taking account of other factors

51. The referring courts also ask what weight is to be given, when assessing the originality of a work of applied art, to factors such as the use by the creator of generally available shapes, the inspiration taken by the creator from existing subject matter, the fact or the possibility of similar independent creation or circumstances subsequent to the creation of the work, such as its presentation in exhibitions or museums or, more generally, recognition by professional circles.

[18] See the judgment in *Cofemel* (paragraphs 32 and 33 and the case-law cited).

52. The Court has already stated that, in order to assess whether the subject matter at issue is an original creation and therefore protected by copyright, it is for the court hearing the case to bear in mind all the relevant aspects of the dispute.[19] With regard to an earlier patent and the effectiveness of the shape of the subject matter at issue in achieving the same technical result, the Court thus held that 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.[20]

53. The same applies to the circumstances referred to by the referring courts. All those factors may constitute relevant circumstances for assessing the originality of a work. However, the fundamental element of that assessment must always be borne in mind: the pursuit, in the work, of the expression of the author's free and creative choices reflecting his or her personality.

54. Accordingly, first, the use by the creator of generally available shapes does not, in itself, exclude originality. Those shapes may in fact be supplemented by original shapes. A work composed solely of available shapes may also be original, provided that the author has expressed his or her creative choices in the arrangement of those shapes. By contrast, a subject matter composed of available shapes with a conventional arrangement will not be eligible for copyright protection, even if its creator has made free choices in the selection or arrangement of those shapes, since those choices are not creative.

55. Secondly, as regards inspiration, different situations may arise. Where the new work is a variant of another work, which is itself original, by the same author, it can, in my view, be fully protected. Indeed, the creative elements reproduced in the new work remain therein and constitute the imprint of the personality of the same author. By contrast, where, in this scenario, the authors are different, the new work would then be a derivative or inspired work.[21] Nevertheless, it may also benefit from protection, provided that – and to the extent that – it has its own creative elements. The protection will thus be limited to those elements.

56. Thirdly, although copyright does not lay down a requirement of novelty, the independent creation of subject matter that are similar or even identical to a particular subject matter, before or after the creation of the latter, may nevertheless constitute an indication of the low degree, or even the absence, of originality of that subject matter. Indeed, as I have already stated,[22] by making creative choices that reflect his or her personality, the author is deemed to create a unique work, different from those that have been, or will be, created independently by others.

57. However, that consideration easily applies to categories of works in respect of which the creative freedom of authors is not very limited or where the complexity of the form of expression makes identical parallel creation practically improbable. I am thinking here, in particular, of 'pure' works of art, musical works and literary works.

58. By contrast, in the case of works of applied art, where various constraints severely limit authors' freedom and where there are often few creative elements, it cannot be completely ruled out that two authors may have made very similar, or even identical, choices and that those

[19] The judgment in *Brompton Bicycle* (operative part).

[20] The judgment in *Brompton Bicycle* (paragraph 36).

[21] By 'inspired work' I understand a work that does not reproduce the creative elements of another work as such, but draws on them in some other way.

[22] See point 30 of this Opinion.

choices may still be creative. The fact or possibility of a similar independent creation cannot, therefore, in itself, and without further indications of the lack of originality, exclude a utilitarian object from copyright protection.

59. Fourthly, and lastly, as regards the presentation of the subject matter in art exhibitions or museums and recognition in professional circles, those circumstances are external to and subsequent to the creation of the subject matter for which protection is claimed. Yet, in paragraph 37 of the judgment in *Brompton Bicycle*, the Court held that the assessment of originality must be carried out 'irrespective of the factors external to and subsequent to the creation of the product'.

60. Nevertheless, the Court did not include that proviso in the operative part of that judgment, holding only that the court hearing the case must ascertain whether the subject matter for which protection is claimed is original, 'bearing in mind all the relevant aspects of the dispute'. I therefore understand that proviso to mean that factors external to and subsequent to the creation cannot be regarded as decisive for the purposes of that verification. By contrast, circumstances such as the presentation of the subject matter in art exhibitions or museums and its recognition by professional circles may constitute a confirmatory indication of the artistic value of that subject matter and, therefore, of its originality. Indeed, although it is not necessary for a subject matter to have a high artistic quality to be regarded as original, it may, however, be assumed that a work with a high artistic quality will be considered original, in so far as artistic activity consists precisely in creating unique subject matter which bear the imprint of the personality of their authors.

61. The subject matter at issue must also have been presented in an exhibition or a museum on account of its creative value. It may be that the recognition of a design by professional design circles is simply due to its novelty, technical prowess or exceptional functional values, without the design having the creative characteristics required for works protected by copyright. The presentation of the subject matter at issue in art exhibitions or museums and its recognition by professional circles is therefore in no way necessary and nor is it sufficient to establish the originality of the subject matter for which protection is claimed. Those circumstances may, at most, constitute one indication, amongst others, of that originality.

Response to the questions

62. I therefore propose that the Court's answer to the first and second questions in Case C-580/23 and to the second and third questions in Case C-795/23 should be that Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29 must be interpreted as meaning that a subject matter which reflects the personality of its author as an expression of his or her free and creative choices (original subject matter) constitutes a work within the meaning of those provisions. Choices dictated by various constraints that bound the author during the creation of the subject matter at issue are not creative, and nor are those choices which, although free, do not bear the imprint of the author's personality by giving the subject matter a unique appearance. In particular, the possibility of making free choices, at the time of creation, does not give rise to a presumption that those choices are creative. Circumstances such as the author's intentions during the creative process, his or her sources of inspiration and the use of known shapes, the likelihood of a similar independent creation or the recognition of the subject matter by professional circles may be taken into account for the purposes of assessing the originality of the subject matter at issue. However, those circumstances are in no way decisive, since the court hearing the case must satisfy itself that the subject matter is original in order to be able to declare it protected by copyright.

Assessment of the infringement

63. By its third and fourth questions, which I propose should be analysed together, the referring court in Case C-580/23 asks, in essence, how the assessment of a possible infringement of the author's exclusive rights under Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29 must be carried out. That question concerns, more specifically, first, whether the work in question must be recognisable in the allegedly infringing subject matter or whether the same overall visual impression is sufficient and, secondly, the impact on that assessment of factors such as the 'degree of originality' of the work, the common inspiration of the two subject matter at issue, and the fact or the possibility of a similar independent creation.

64. By way of initial comment, I would emphasise the importance of those questions for the preservation of the respective objectives of the two systems of protection in question. In my view, the correct application of the respective criteria of each system for determining infringement is as important as the correct application of the criteria for granting protection. It seems to me, however, that both legal and academic thinking are too often focused on the second aspect, to the detriment of the first.

The criteria for infringement

65. The criteria for establishing an infringement are based on different rationales in the two systems of protection in question. In copyright law, infringement is the consequence of the use of the work without the author's permission. [23] That use may consist, inter alia, of the reproduction of the work and, possibly, of a subsequent communication of that reproduction to the public or the distribution of copies of the reproduced work. Concerning reproduction, the Court has stated that it may be partial and may even concern a relatively minor part of the work, provided that that part, as such, expresses the author's own intellectual creation. [24] The Court has also found, in essence, with regard to phonograms, that, in order to constitute an infringement, the reproduction must be recognisable in the infringing subject matter. [25] That finding, in my view, can be applied to works.

66. By contrast, in design law, the reproduction of elements of the protected subject matter is in no way necessary to establish infringement. The scope of protection conferred by that law extends to any design which does not produce a different overall visual impression from the protected design. [26] In that system of protection, it is therefore irrelevant whether the protected design is recognisable in the allegedly infringing subject matter, because it is the overall impression that counts, and whether the similarity between the two subject matter at issue results from reproduction or independent creation, because the criterion of protection is objective.

67. Thus, in order to establish a copyright infringement, the court hearing the case must determine whether creative elements of the protected work, that is to say, those elements that are the expression of choices reflecting the author's personality, have been reproduced in a recognisable manner in the allegedly infringing subject matter. Of course, the reproduction of creative elements in a utilitarian object of the same type may also lead to the finding that there is no different overall impression between the two subject matter at issue. However, that cannot be

[23] And outside, of course, exceptions and limitations to exclusive rights.

[24] Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 48).

[25] See, to that effect, judgment of 29 July 2019, *Pelham and Others* (C-476/17, EU:C:2019:624, point 1 of the operative part).

[26] See Article 9 of Directive 98/71 and Article 10 of Regulation No 6/2002.

considered sufficient to establish copyright infringement and, in practice, should not even be raised by the court. In copyright law, what distinguishes two works is not the overall impression but the details that uniquely personalise them.

Taking account of other factors

68. First, as regards the taking into account of the 'degree of originality' as a determining factor of the scope of protection, that solution seems to me to be modelled on the logic of design law. Indeed, under that system, both the eligibility of a subject matter to be protected and the infringement of its protection are assessed by comparing the overall visual impressions produced by the designs at issue, with the degree of the creator's freedom being taken into account for the purposes of that comparison.[27] Thus, the level of individuality determines the scope of the protection.

69. In copyright law, however, that logic has no place. Originality does not depend on the difference between the protected work and other subject matter, but is inherent to the work and results from the author's personal imprint. Once a work is original, it is protected, in particular, against the reproduction of creative elements, notwithstanding the 'intensity' with which the author has expressed that creativity. Accordingly, the Court has expressly stated that the scope of protection under Directive 2001/29 does not depend on the degree of creative freedom exercised by its author and that that protection is therefore equal for all works coming within the scope of that directive.[28]

70. That conclusion applies, of course, subject to the rule that, in the case of partial reproduction of a work, only the recognisable reproduction of creative elements constitutes an infringement of copyright.[29] However, in the case of such a reproduction, the fact that changes have been made to elements that are not creative does not mean that infringement cannot be established.

71. Secondly, with regards to the common source of inspiration of the two subject matter at issue, different situations may arise, but the principle remains the same, namely to identify the perceptible reproduction of creative elements. Where the subject matter for which protection is claimed consists of known elements of which only the arrangement is original, a reproduction of that arrangement will constitute an infringement, whereas the mere reproduction of known elements will not. Where the two subject matter at issue are inspired by the same prior subject matter or design, only the 'new' creative elements are original to the derivative work and only the reproduction of those new elements constitutes an infringement of that work. Lastly, the mere fact of following the same artistic trend or current as the author of an earlier work does not, of course, constitute infringement in the absence of the reproduction of creative elements of that work.

72. Thirdly, with regard to the possibility of a similar independent creation, as I have already noted,[30] in the case of works of applied art, for which the creative margin of authors is relatively limited, such a possibility is not excluded, even in the presence of a certain degree of originality. In the main proceedings in Case C-580/23, Mio maintains, inter alia, that its allegedly infringing design was developed independently and does not constitute a reproduction of Asplund's design. If the referring court were to find, on the basis of the relevant elements in the main proceedings,

[27] The greater the degree of freedom, the more remote the designs at issue have to be in order to produce a different overall impression.

[28] See, to that effect, the judgment in *Cofemel* (paragraph 35 and the case-law cited).

[29] See point 65 of this Opinion.

[30] See point 58 of this Opinion.

that that were indeed the case, that would lead it to conclude that there was no infringement. By contrast, the mere possibility of a similar independent creation cannot justify a refusal of copyright protection if the reproduction of creative elements were established.

Response to the questions

73. I therefore propose that the Court's answer to the third and fourth questions in Case C-580/23 should be that Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29 must be interpreted as meaning that, in order to establish copyright infringement, the court hearing the case must determine whether creative elements of the protected work have been reproduced in a recognisable manner in the allegedly infringing subject matter. The mere absence of a different overall impression between the two subject matter at issue cannot be regarded as sufficient to establish such an infringement. The concept of the 'degree of originality' of the protected work is not relevant for the purposes of that assessment. While a similar independent creation does not constitute copyright infringement, the mere possibility of such an independent creation cannot however justify a refusal of copyright protection where the reproduction of creative elements of the protected work has been established.

Conclusion

74. In the light of all of the foregoing considerations, I propose that the Court reply to the questions referred for a preliminary ruling by the Svea hovrätt Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm, Sweden) and the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

(1) In EU law, there is no relationship of rule and exception between design protection and copyright protection that means that, when examining the originality of works of applied art, stricter requirements should be applied than is the case in respect of other types of works.

(2) Article 2(a), Article 3(1) and Article 4(1) 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

must be interpreted as meaning that a subject matter which reflects the personality of its author, as an expression of the author's free and creative choices (original subject matter), constitutes a work, within the meaning of those provisions. Choices dictated by various constraints that bound the author during the creation of the subject matter at issue are not creative, and nor are those choices which, although free, do not bear the imprint of the author's personality by giving the subject matter a unique appearance. In particular, the possibility of making free choices, at the time of creation, does not give rise to a presumption that those choices are creative. Circumstances such as the author's intentions during the creative process, his or her sources of inspiration and the use of known shapes, the likelihood of a similar independent creation or the recognition of the subject matter by professional circles may be taken into account for the purpose of assessing the originality of the subject matter at issue. However, those circumstances are in no way decisive, since the court hearing the case must satisfy itself that the subject matter is original in order to be able to declare it protected by copyright.

(3) Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29

must be interpreted as meaning that, in order to establish a copyright infringement, the court hearing the case must determine whether creative elements of the protected work have been reproduced in a recognisable manner in the allegedly infringing subject matter. The mere absence of a different overall impression between the two subject matter at issue cannot be regarded as sufficient to establish such an infringement. The concept of the 'degree of originality' of the protected work is not relevant for the purpose of that assessment. While a similar independent creation does not constitute copyright infringement, the mere possibility of such an independent creation cannot however justify a refusal of copyright protection where the reproduction of creative elements of the protected work has been established.