Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 December 2025*

(References for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Articles 2 to 4 – Reproduction right – Concept of 'work' – Copyright protection of works of applied art – Assessment of the originality of subject matter of applied art – Concept of 'free and creative choices' – Criteria for the assessment of those choices – Assessment of the infringement of exclusive rights)

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

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Sweden) (C-580/23) and from the Bundesgerichtshof (Federal Court of Justice, Germany) (C-795/23), made by decisions of 20 September 2023 and 21 December 2023, respectively, received at the Court on 21 September 2023 and 21 December 2023, respectively, in the proceedings

Mio AB,

Mio e-handel AB,

Mio Försäljning AB

v

Galleri Mikael & Thomas Asplund Aktiebolag (C-580/23),

and

USM U. Schärer Söhne AG,

v

konektra GmbH,

LN (C-795/23)

THE COURT (First Chamber),

* Languages of the case: German and Swedish.

composed of F. Biltgen, President of the Chamber, T. von Danwitz, Vice-President of the Court, acting as Judge of the First Chamber, I. Ziemele (Rapporteur) and A. Kumin and S. Gervasoni, Judges,

Advocate General: M. Szpunar,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 30 January 2025,

after considering the observations submitted on behalf of:

– Mio AB, Mio e-handel AB and Mio Försäljning AB, by Å. Hellstadius, M. Johansson and R. Wessman, advokater,

– konektra GmbH and LN, by R. Hirsch and N. Tretter, Rechtsanwälte,

– Galleri Mikael & Thomas Asplund Aktiebolag, by M. Bruder and H. Wistam, advokater,

– USM U. Schärer Söhne AG, by E. Keller and V. Zipperich, Rechtsanwälte,

– the French Government, by R. Bénard and E. Timmermans, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J.M. Hoogveld, acting as Agents,

– the European Commission, by C. Faroghi, J. Samnadda and G. von Rintelen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2025,

gives the following

Judgment

1 These two requests for a preliminary ruling concern the interpretation of 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 (OJ 2001 L 167, p. 10).

2 The requests have been made in two sets of proceedings between, first, Mio AB, Mio e-handel AB and Mio Försäljning AB, companies governed by Swedish law ('Mio'), on the one hand, and Galleri Mikael & Thomas Asplund Aktiebolag, a company governed by Swedish law ('Asplund'), on the other (C-580/23), and, second, USM U. Schärer Söhne AG, a company governed by Swiss law ('USM'), on the one hand, and konektra GmbH, a company governed by German law, and LN, its director ('Konektra'), on the other (C-795/23), concerning alleged copyright infringements.

Legal context

European Union law

Directive 2001/29

3 Recitals 4, 9, 10 and 60 of Directive 2001/29 state:

‘(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

…

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

…

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.’

4 Article 2 of that directive, headed ‘Reproduction right’, provides:

‘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;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'

5 Article 3 of that directive, headed 'Right of communication to the public of works and right of making available to the public other subject matter', provides:

'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.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, in respect of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

6 Article 4 of that same directive, headed 'Distribution right', provides:

'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.

2. The distribution right shall not be exhausted within the [European] Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.'

7 Article 5 of Directive 2001/29, headed 'Exceptions and limitations', provides:

'1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

…

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

8 Article 9 of that directive, headed 'Continued application of other legal provisions', provides that that directive is to be without prejudice to provisions concerning other areas.

Directive 98/71/EC

9 Recital 8 of Directive 98/71/EC of the European Parliament and the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28) states:

'Whereas in the absence of harmonisation of copyright law, it is important to establish the principle of cumulation of protection under specific registered design protection law and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred'.

10 Article 17 of that directive, headed 'Relationship to copyright', provides:

'A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.'

Regulation (EC) No 6/2002

11 Recital 32 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), states:

'In the absence of the complete harmonisation of copyright law, it is important to establish the principle of cumulation of protection under the Community design and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred.'

12 Article 3(a) of that regulation defines the concept of 'design' in the same terms as Article 1(a) of Directive 98/71.

13 Article 96 of that regulation, headed 'Relationship to other forms of protection under national law', provides, in paragraph 2 thereof:

'A design protected by a Community design shall also be eligible for protection under the law of copyright of Member States as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.'

Swedish law

14 Under Paragraph 1 of the lagen om upphovsrätt till litterära och konstnärliga verk (1960:729) (Law on copyright in literary and artistic works (1960:729)) (SFS 1960, No 729), in the version applicable to the dispute in the main proceedings in Case C-580/23 ('the Law on copyright in literary and artistic works'):

'the person who has created a literary or artistic work has copyright in that work, irrespective of whether it is:

1. a fictional or descriptive representation in written or spoken form,

2. a computer programme,

3. a musical or staged work,

4. a cinematographic work,

5. a photographic work or any other work of visual art,

6. a work of architecture or applied art, or

7. a work that has been given expression in any other way.'

15 Under Paragraph 2 of the Law on copyright in literary and artistic works, 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 of a work' is to be understood as meaning any direct or indirect, temporary or permanent reproduction, by any means and in any form, of all or part of the work. A work is made available to the public, for example, when it is transmitted to the public or where copies of it are offered for sale, rental or loan, or otherwise disseminated to the public.

16 Paragraph 53b of the Law on copyright in literary and artistic works provides that a court may prohibit, on pain of a penalty, a person who takes, or participates in, a measure infringing copyright from continuing that measure.

German law

17 Paragraph 2 of the Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (Law on copyright and related rights; 'the Law on copyright') of 9 September 1965 (BGB1. 1965, p. 1273), in the version applicable to the dispute in the main proceedings in Case C-795/23, headed 'Protected works', provides, in subparagraph 1(4), that protected literary, scientific and artistic works include works of fine art, including works of architecture and applied art and sketches of such works. Under Paragraph 2(2), only personal intellectual creations are works within the meaning of that law.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-580/23

18 Asplund designs and manufactures indoor goods and furniture. Asplund's product range includes, inter alia, dining tables in the 'Palais Royal' series.

19 Mio engages in retail trade in the furniture and interior decoration sector. Mio's product range includes, inter alia, dining tables in the 'Cord' furniture series.

20 In October 2021, Asplund brought an action against Mio before the Patent- och marknadsdomstolen (Patent and Commercial Court, Sweden), for infringement of copyright. In that action, Asplund claimed, inter alia, that that court should prohibit Mio, on pain of a penalty, from manufacturing, marketing or selling dining tables in the 'Cord' furniture series, arguing that the tables in the 'Palais Royal' series were protected by copyright as works of applied art and that, consequently, the dining tables in the 'Cord' furniture series amounted to a copyright infringement in so far as they exhibited strong similarities to the tables in the 'Palais Royal' series.

21 Mio disputed that the tables in the 'Palais Royal' series were protected by copyright, contending that those tables were not sufficiently original to obtain the corresponding protection. According to Mio, the design of those tables is based on mere variations of earlier known designs contained in the database of designs registered in the European Union. In any event, even if the tables in the 'Palais Royal' series were protected by copyright, that protection would be limited and restricted and the differences between the two models of table concerned are sufficient to demonstrate that there is no infringement of copyright by the Mio tables.

22 The Patent- och marknadsdomstolen (Patent and Commercial Court) upheld Asplund's claim, finding that the tables in the 'Palais Royal' series were protected by copyright as works of applied art and that the dining tables in the 'Cord' furniture series amounted to a copyright infringement.

23 Mio brought an appeal against the decision of the Patent- och marknadsdomstolen (Patent and Commercial Court) before the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm, Sweden), which is the referring court.

24 The referring court harbours doubts, in essence, as to whether the tables in the 'Palais Royal' series are eligible for copyright protection as 'works'. It raises questions regarding the criteria for determining the originality of subject matter in order for it to be considered a 'work', within the meaning of Article 2(a) of Directive 2001/29, in accordance with the line of case-law deriving from the judgment of 12 September 2019, *Cofemel* (C-683/17, EU:C:2019:721).

25 The referring court states that, in order for subject matter 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. Where the realisation of the subject matter has been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom, it cannot be regarded as possessing the originality required to constitute a work. Nevertheless, the referring court observes that subject matter may meet that requirement of originality, even if its realisation has been dictated by technical considerations, provided that its being so dictated has not prevented its author from reflecting his or her personality in that subject matter, as an expression of free and creative choices.

26 In that regard, the referring court recalls that, in order to assess whether subject matter constitutes an original creation, it must take into account all relevant aspects as they existed when that subject matter was designed, irrespective of factors external and subsequent to the creation of that subject matter.

27 However, according to the referring court, uncertainty remains as to how the specific assessment of the originality of subject matter is to be carried out and what factors should be taken into account in order to determine whether subject matter of applied art reflects the personality of its author, by giving expression to his or her free and creative choices.

28 According to the referring court, it is sufficient that the author of the subject matter had a degree of leeway and in fact made different kinds of choices when creating the subject matter, that those choices were not dictated by technical considerations, rules or constraints, and that they were somehow reflected and expressed in the subject matter. Such a broad interpretation would mean in practice that the starting point of the assessment of the originality of subject matter is the creative process itself and the choices that the author made in that process. That interpretation would also mean that, in principle, all the choices made by the author when creating that subject matter that were not dictated by technical considerations, rules or constraints should be considered free and creative.

29 In that regard, the referring court considers that, according to that interpretation, the assessment of the originality of subject matter by the court having jurisdiction focuses on the creative process and the choices made by the author in that process, rather than on the question whether the subject matter itself, or the end result of the creative process, actually gives expression to an artistic effort. The question whether the subject matter displays sufficient originality thereby becomes 'a matter of evidence rather than a matter of law'.

30 In addition, the referring court observes that such an interpretation of the requirement that the subject matter be original entails imposing relatively low requirements as to the free and creative choices that the author needs to have made and to which that subject matter is deemed to give expression. That risks leading to subject matter not meriting classification as 'works' eligible for copyright protection. Furthermore, it could lead to simple subject matter, which has not been created with an artistic purpose – or, in any event, does not possess 'individual artistic character' – being protected as works.

31 The referring court considers that a low originality requirement for subject matter of applied art also risks undermining the importance of the less generous protection of designs. In that respect, the referring court expresses doubts as to how a low originality requirement for subject matter of applied art would be reconciled with the requirement of individual character necessary to obtain design protection. Although the law of copyright and design law have different objectives, it does not appear reasonable for a design to be eligible for copyright protection as a work when it is not sufficiently individual to be protected as a design. According to the referring court, as the Court of Justice held in the judgment of 12 September 2019, *Cofemel* (C-683/17, EU:C:2019:721), although the protection of designs and copyright protection may be granted cumulatively to the same subject matter of applied art, that concurrent protection can be envisaged only in certain situations. A very low originality requirement would risk leading to the situation where subject matter of applied art could be eligible for dual protection in the majority of cases.

32 On the other hand, another interpretation could be that the starting point of the assessment as to whether subject matter of applied art reflects the author's personality, by giving expression to his or her free and creative choices, should be the subject matter concerned itself. That subject matter should, in itself, reflect the author's personality and exhibit a degree of artistry or reach what has been referred to – at least in the past – in Sweden and in Germany, among others, as 'the threshold of originality' ('*verkshöjd*'). An assessment according to that interpretation could mean that the subject matter must have a certain individual character and be somewhat unique. To put it another way, it must be subject matter which has attained a certain degree of independence and originality and which gives expression to the author's individuality.

33 In those circumstances, the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm) 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 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

34 For decades, USM has been manufacturing and marketing a modular furniture system under the name 'USM Haller'. That furniture system is characterised by the fact that round, shiny chrome tubes are assembled by means of connecting balls to form a structure into which coloured metal panels are inserted. The structures thus created may be freely combined and mounted on top of one another or next to one another.

35 Konektra offers, via its online shop, replacement and extension parts for the USM Haller modular furniture system, the shape and, for the most part, colour of which correspond to USM's components. After initially confining itself purely to the sale of replacement parts, without objection from USM, Konektra reorganised its online shop in 2017. Since 2018, Konektra's website has listed all the components necessary for the complete assembly of USM Haller furniture, which it also advertises with images of the assembled furniture. In addition, Konektra offers its customers an assembly service for assembling the individual parts delivered into a complete piece of furniture and its deliveries are accompanied by instructions for how to assemble complete pieces of furniture.

36 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 in the USM Haller system as a work of applied art or, at the very least, constitutes an unlawful imitation under competition law.

37 Accordingly, USM brought an action against Konektra seeking 'a prohibitory injunction, the provision of information and the presentation of accounts', as well as 'reimbursement of the costs incurred in giving formal warning, and a declaration that it was liable to pay damages'. The Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) upheld those claims, principally on the basis of the law of copyright.

38 However, on appeal, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) dismissed those claims under the law of copyright. That court found that the USM Haller modular furniture system was not a work of applied art protected by copyright since it did not satisfy the conditions laid down in the Court's line of case-law deriving from, inter alia, the judgments of 12 September 2019, *Cofemel* (C-683/17, EU:C:2019:721), and of 11 June 2020, *Brompton Bicycle* (C-833/18, EU:C:2020:461), to be considered a work of applied art, for the purposes of Articles 2 to 4 of Directive 2001/29.

39 Both USM and Konektra lodged appeals on a point of law (*Revision*) against the decision of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) before the Bundesgerichtshof (Federal Court of Justice, Germany), which is the referring court.

40 The referring court considers that the outcome of the dispute in the main proceedings depends on the interpretation of the concept of 'work', for the purposes of Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29, according to which subject matter must have two

characteristics in order to be classified as a work, namely, first, the subject matter in question must be original, in the sense that it must be the author's own intellectual creation, as an expression of his or her free and creative choices, and, second, the realisation of that subject matter cannot have been dictated by technical considerations, rules or other constraints, which left no room for creative freedom.

41 The referring court acknowledges, in that regard, that the USM Haller modular furniture system constitutes a 'sufficient expression' within the meaning of the second criterion laid down in the case-law deriving from the judgment of 12 September 2019, *Cofemel* (C-683/17, EU:C:2019:721), which requires the subject matter to be identifiable with sufficient precision and objectivity even if that expression is not necessarily permanent. In the referring court's view, the USM Haller modular furniture system allows for 'objective identification', given that it is composed of a limited number of individual elements which are combined in a system and which convey a characteristic and recurrent overall impression.

42 In that regard, the referring court does not rule out the possibility that, in the case of subject matter of applied art, there is a relationship of rule and exception between design protection and copyright protection, such that, when assessing the originality of that subject matter for copyright purposes, stricter requirements are to be imposed with respect to the author's free and creative choices than for other types of subject matter.

43 It also states that the question arises as to whether the assessment of the originality of subject matter depends on the author's subjective view or whether an objective criterion should be applied. The referring court considers, in that regard, that it has not yet been clearly established in the Court's case-law whether, in assessing the originality of subject matter, account may be taken of circumstances external to and subsequent to its creation, such as its display in art exhibitions or museums, or its recognition in professional circles.

44 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, is it (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?'

Procedure before the Court

45 By decision of the President of the Court of 13 May 2024, Cases C-580/23 and C-795/23 were joined for the purposes of the oral part of the procedure and the judgment.

Consideration of the questions referred

The first question in Case C-795/23

46 By its first question, the referring court in Case C-795/23 asks, in essence, whether Directive 2001/29 must be interpreted as meaning that there is a relationship of rule and exception between design protection and copyright protection, such that, when assessing the originality of subject matter of applied art, it is necessary to apply stricter requirements than are laid down for other types of works.

47 In the present case, the referring court's questions specifically concern the classification of a utilitarian object as a 'work', for the purposes of Directive 2001/29. That court seeks, inter alia, to clarify the scope of paragraph 52 of the judgment of 12 September 2019, *Cofemel* (C-683/17, EU:C:2019:721), in which the Court held 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.

48 In that regard, it should be borne in mind that the concept of 'work' covered by Article 2(a) of Directive 2001/29 constitutes, as is clear from the Court's settled case-law, an autonomous concept of EU law which must be interpreted and applied uniformly and which requires two cumulative conditions to be satisfied. First, that concept entails that there exists original subject matter, in the sense of being the author's own intellectual creation. Second, classification as a work is reserved to the elements that are the expression of such creation (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 29 and the case-law cited).

49 As regards the first of those conditions, it follows from the case-law that, in order for subject matter 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. However, when the realisation of 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 for it to constitute a work (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraphs 30 and 31 and the case-law cited).

50 Thus, the requirement that the author's personality be reflected in the subject matter for which protection is claimed, through the expression of that author's free and creative choices, is decisive for the concept of 'originality' and, consequently, for copyright protection under EU law.

51 By contrast, as regards the protection of designs covered either by Directive 98/71, applicable to designs registered in or in respect of a Member State, or by Regulation No 6/2002, applicable to designs protected at EU level, another objective protection criterion applies, namely that of novelty and individual character. That criterion is assessed by reference to earlier designs and, in that context, any design which is sufficiently distinctive to create a different overall visual impression may qualify for protection.

52 That distinction between the criteria for protection is explained by the fact that the protection of designs, on the one hand, and the protection afforded by copyright, on the other, pursue different objectives and are subject to distinct rules. The purpose of the protection of designs is to protect subject matter which, while being new and distinctive, is functional and liable to be mass-produced. Further, that protection is to apply for a limited time, but sufficient time to ensure a return on the investment necessary for the creation and production of that subject matter, without thereby excessively restricting competition. For its part, the protection attached to copyright, the duration of which is significantly greater, is reserved to subject matter that merits being classified as works (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 50).

53 For those reasons, the grant of copyright protection to subject matter that is protected as a design must not have the consequence that the respective objectives and effectiveness of those two forms of protection are undermined (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 51).

54 It follows that, first, subject matter protected as a design is not as a general rule capable of being treated in the same way as subject matter constituting works protected by Directive 2001/29 (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 40). Second, there is no automatic connection between the grant of protection under the law on designs and protection under the law of copyright. Third, the conditions for such protection, namely novelty and individual character, on the one hand, and originality, on the other, must not be confused.

55 Although the protection reserved for designs and the protection ensured by copyright are not mutually exclusive (see, to that effect, judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 43) and may be granted cumulatively to the same subject matter, that concurrent protection is limited to certain situations (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 52), since an author is deemed to create a unique work bearing the imprint of his or her personality, which, as such, is protected in accordance with Directive 2001/29.

56 However, there is no relationship of rule and exception between the protection reserved for designs and the protection ensured by copyright.

57 It must therefore be held that a design may be classified as a ‘work’, for the purposes of Directive 2001/29, if it meets the two requirements set out in paragraph 48 above (see, to that effect, judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 48) and that the originality of subject matter of applied art must be assessed according to the same requirements as those used to assess the originality of other types of subject matter.

58 In the light of the foregoing, the answer to the first question in Case C-795/23 is that Directive 2001/29 must be interpreted as meaning that there is no relationship of rule and exception between design protection and copyright protection, such that, when assessing the originality of subject matter of applied art, it is necessary to apply stricter requirements than are laid down for other types of subject matter.

The first and second questions in Case C-580/23 and the second and third questions in Case C-795/23

59 By the first and second questions in Case C-580/23 and the second and third questions in Case C-795/23, which it is appropriate to examine together, the referring courts ask, in essence, whether Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29 must be interpreted as meaning that, when assessing the originality of subject matter of applied art, it is necessary to take into account factors relating to the creative process and the author's intentions or only the elements that are perceptible in the subject matter itself. In that regard, the referring courts are uncertain as to the role played in that assessment by additional factors, such as the use in the creation of the subject matter concerned of shapes that are already available, the inspiration taken by the author from existing subject matter, the likelihood of a similar independent creation or the recognition of the creation in professional circles.

Assessment of the originality of subject matter of applied art

60 As regards the assessment of the originality criterion, it should be borne in mind that, in the present case, the two referring courts are uncertain as to how creative choices that are made in the creation of utilitarian objects, such as furniture, are to be assessed.

61 It follows from the case-law cited in paragraphs 48 and 49 above that, in order to establish whether a work is original under the law of copyright, the court seised must assess whether the subject matter for which protection is claimed constitutes the expression of free and creative choices reflecting the personality of its author.

62 As the Advocate General emphasised in point 41 of his Opinion, that assessment must be carried out taking 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 objects are the result of the creators' know-how and choices, which may be dictated by technical, ergonomic or safety constraints, or may result from standards or conventions adopted in the sector concerned.

63 In that regard, the Court has stated that subject matter satisfying the condition of originality may be eligible for copyright protection, even if its realisation has in part been dictated by technical considerations, provided that its being so dictated has not prevented the author from reflecting his or her personality in that subject matter, as an expression of free and creative choices (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 26).

64 It follows from the case-law that the criterion of originality cannot be met by the components of subject matter which are differentiated only by their technical function, since copyright protection does not extend to ideas. Where the expression of those components is dictated by their technical function, the different methods of implementing an idea are so limited that the idea and its expression become indissociable (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 27 and the case-law cited).

65 It follows that, under the law of copyright, the creative nature of the choices made by the author of the subject matter cannot be presumed. Thus, the court before which the question of the originality of a utilitarian object is brought must seek out and identify the creative choices in the shape of that subject matter in order to be able to declare it protected by copyright, it being specified that even where the author has made choices that are not dictated by technical or other

constraints, it cannot be presumed that those choices are creative, for the purposes of copyright (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 32).

66 As regards the components of a utilitarian object, those components are subject to the same rules as the object as a whole. The components of a work thus enjoy protection under Article 2(a) of Directive 2001/29 provided that they contain elements which are the original expression of the author of that work and, as such, they share the originality of the whole work (see, to that effect, judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 38 and 39.

67 It should be added that, while it is true that artistic or aesthetic considerations play a part in creative activity, the fact that a design generates such an effect does not, in itself, make it possible to determine whether that design constitutes an intellectual creation reflecting the freedom of choice and personality of its author, thereby meeting the requirement of originality (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 54).

68 Thus, the fact that a design generates, beyond its practical purpose, a specific and aesthetically or artistically significant visual effect is not, in itself, such as to justify that design being classified as a 'work', within the meaning of Directive 2001/29 (see, to that effect, judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 55).

Consideration of the creative process and the author's intentions

69 The referring courts ask whether the originality of a utilitarian object, such as the furniture for which copyright protection is being claimed in the present case, must be assessed taking into account, inter alia, the intentions of its author during the creation process.

70 It follows from the case-law referred to in paragraphs 48 and 49 of the present judgment that, in order for subject matter to be capable of being considered an original creation, 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.

71 As the Advocate General observed in point 45 of his Opinion, the use of the words 'reflects' and 'expression' clearly indicates that such choices and the author's personality must be visible in the subject matter for which protection is claimed.

72 As regards the second element referred to in paragraph 48 above, the Court has stated that the concept of 'work', that is the subject of Directive 2001/29, entails the existence of 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 also must third parties against whom the protection claimed by the author of that subject matter may be asserted. Second, 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 (see, to that effect, judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraphs 32 and 33 and the case-law cited).

73 Thus, as recalled in paragraph 65 of the present judgment, the court called upon to examine the question of the originality of subject matter must seek out and identify the creative choices 'in the shape' of that subject matter in order to declare it protected by copyright as a work.

74 That requirement for subject matter that is identifiable as a work is based on the fundamental principle of the law of copyright, according to which it is not ideas that are protected, but only their expression (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 27). However, the author's intentions lie within the realm of ideas. They can therefore be protected only in so far as the author has expressed them in the work concerned.

75 Consequently, the court considering the question of the originality of that subject matter may take into account the creative process and the author's intentions, provided that those elements are expressed in that subject matter itself, but it cannot, however, base its assessment decisively on those elements.

Consideration of other factors

76 The referring courts ask what weight is to be given, when assessing the originality of subject matter of applied art, to factors such as the use by its author of shapes that are already available, the inspiration taken by the author from existing subject matter, the existence or likelihood of a similar independent creation, or circumstances subsequent to the creation of the subject matter, such as its display in exhibitions or museums or, more generally, its recognition in professional circles.

77 It must be borne in mind that, in accordance with settled case-law, in order to assess whether subject matter constitutes an original creation and is thus protected by copyright, it is for the court seised to take account of all relevant aspects of the particular case as they existed when that subject matter was designed, irrespective of the factors external to and subsequent to the creation (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 37).

78 In that regard, first, as the Advocate General recalled in point 54 of his Opinion, the author's use of already available shapes does not, in itself, exclude originality. Indeed, subject matter composed solely of available shapes may be original where its author has expressed his or her creative choices in the arrangement of those shapes.

79 Second, as regards the situation in which the author of the subject matter has taken inspiration from existing subject matter, copyright protection will be limited to identifying the author's own creative elements. Where the subject matter in question is a 'variant' of an existing work, created by the same author and original by definition, it may be eligible for copyright protection as long as the creative elements reproduced remain therein and constitute the imprint of that author's personality. By contrast, where the authors are different, that subject matter must then be regarded as an inspired work, that is to say, as a work that does not reproduce the creative elements of another work as such, but draws on them in some other way. That new work may nevertheless also enjoy that protection as such, provided that the requirements laid down by the case-law cited in paragraph 48 above are met.

80 Third, it should be noted that, even if the law of copyright does not lay down a requirement of novelty, the creation by a different author of subject matter that is similar or identical to given subject matter, before the creation of the latter, may constitute a relevant indication of the low degree, or even lack, of originality of the given subject matter. The fact remains that, in the case

of subject matter of applied art, where various constraints characterised by their technical function limit authors' freedom, it cannot be completely ruled out that two authors may have made, independently, similar, or even identical, creative choices.

81 Fourth, and lastly, as regards circumstances such as the display of subject matter in art exhibitions or museums and its recognition in professional circles, those circumstances, which are external and subsequent to the creation of that subject matter, are not, in accordance with the case-law cited in paragraph 77 above, either necessary or decisive as such.

82 In the light of the foregoing, the answer to the first and second questions in Case C-580/23 and to the second and third questions in Case C-795/23 is that Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29 must be interpreted as meaning that subject matter which reflects the personality of its author as an expression of his or her free and creative choices constitutes a work, for the purposes of those provisions. Choices dictated by various constraints, particularly technical, that bound that author during the creation of that subject matter are not free and creative, and nor are choices which, while free, do not bear the imprint of the author's personality by giving that subject matter a unique appearance. Circumstances such as the author's intentions during the creative process, his or her sources of inspiration and the use of shapes that are already available, the likelihood of a similar independent creation, or the recognition of that subject matter in professional circles may be taken into account where appropriate, but are not, in any event, necessary or decisive for the purpose of establishing the originality of the subject matter for which protection is claimed.

The third and fourth questions in Case C-580/23

83 By its third and fourth questions in Case C-580/23, which it is appropriate to examine together, the referring court asks, in essence, whether 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, it is necessary, first, to determine whether the creative elements have been reproduced in the subject matter in a recognisable manner, or whether the same overall visual impression is sufficient in that regard, and, second, to take into account the degree of originality of the work concerned and the existence of a similar creation.

84 In that regard, in the first place, it should be borne in mind that, under the law of copyright, an infringement is the consequence of the use of a work without the author's authorisation (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 21).

85 The Court has held that the unauthorised use of a work is capable of constituting such an infringement even where it concerns a relatively minor part of that work, provided that that part, as such, expresses the author's own intellectual creation (see, to that effect, judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraph 47).

86 Thus, in order to establish a copyright infringement, it is for the referring court, first, to find an unauthorised use of at least the original creative elements of the protected work and, second, to determine whether those elements, that is to say, those that are the expression of choices reflecting the author's personality, have been reproduced in a recognisable manner in the allegedly infringing subject matter (see, to that effect and by analogy, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 39).

87 On the other hand, for the purpose of assessing a copyright infringement under Article 2(a), Article 3(1) and Article 4(1) of Directive 2001/29, a comparison of the overall impression created by the subject matter in conflict cannot be decisive, since that criterion concerns the protection of designs.

88 In the second place, as regards consideration of the degree of originality of the protected work, it should be borne in mind that, where subject matter has the characteristics set out in paragraph 48 above and therefore constitutes a work, it must, as such, enjoy copyright protection under Directive 2001/29, and it must be added that the extent of that protection does not depend on the degree of creative freedom exercised by its author, and that that protection cannot therefore be inferior to that to which any work coming within the scope of that directive is entitled (see, to that effect, judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 35).

89 In that regard, the Court has held, in particular as regards utilitarian objects, that even though the existence of different possible shapes which can achieve the same technical results makes it possible to establish that there is a possibility of choice, it is not decisive in assessing the factors which influenced the choice made by the author. Likewise, the intention of the alleged infringer is irrelevant in such an assessment (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 35).

90 In the third place, as regards the existence of a common source of inspiration for the subject matter in conflict, as the Advocate General observed, in essence, in point 71 of his Opinion, first, where the subject matter in conflict is inspired by the same prior work or, indeed, design, only the 'new' creative elements are original to the derivative work and only the reproduction of those new elements constitutes a possible infringement of copyright. Second, the mere fact of following the same artistic trend or current as the author of an earlier work does not constitute such an infringement unless specifically identifiable creative elements of that earlier work have been reproduced.

91 Lastly, as regards the existence of a similar independent creation, while, for technical reasons, the possibilities for creativity are limited in the case of subject matter of applied art, such a situation is not entirely excluded and, even if it were established, would not constitute a copyright infringement. In order to establish a potential copyright infringement, it is for the court seised to assess whether such a similar independent creation does in fact exist, taking into account all the relevant aspects of the particular case as they existed when the subject matter in question was created, irrespective of factors external and subsequent to its creation. The mere possibility of such a situation cannot justify a refusal to grant copyright protection.

92 In the light of the foregoing, the answer to the third and fourth questions in Case C-580/23 is 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 a copyright infringement, it is necessary to determine whether creative elements of the protected work have been reproduced in a recognisable manner in the allegedly infringing subject matter. The same overall visual impression created by the subject matter in conflict and the degree of originality of the work concerned are irrelevant. The possibility of a similar creation cannot justify a refusal to grant protection.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **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 there is no relationship of rule and exception between design protection and copyright protection, such that, when assessing the originality of subject matter of applied art, it is necessary to apply stricter requirements than are laid down for other types of works.

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

   must be interpreted as meaning that subject matter which reflects the personality of its author as an expression of his or her free and creative choices constitutes a work, for the purposes of those provisions. Choices dictated by various constraints, particularly technical, which bound that author during the creation of that subject matter are not free and creative, and nor are choices which, while free, do not bear the imprint of the author's personality by giving that subject matter a unique appearance. Circumstances such as the author's intentions during the creative process, his or her sources of inspiration and the use of shapes that are already available, the likelihood of a similar independent creation or the recognition of that subject matter in professional circles may be taken into account where appropriate, but are not, in any event, necessary or decisive for the purpose of establishing the originality of the subject matter for which protection is claimed.

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, it is necessary to determine whether creative elements of the protected work have been reproduced in a recognisable manner in the allegedly infringing subject matter. The same overall visual impression created by the subject matter in conflict and the degree of originality of the work concerned are irrelevant. The possibility of a similar creation cannot justify a refusal to grant protection.

[Signatures]