



The Status of Three-Dimensional Functional Works Post-*Cofemel*. An Empirical Analysis of the Member States' Copyright Case Law

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Research

- E. Derclaye, “The Status of Three-Dimensional Functional Works *Post-Cofemel*. An Empirical Analysis of the Member States’ Case Law Which Had an Artistic Merit Requirement”, Reto Hilty’s Festschrift, Springer, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4300926
- + book with Hart/Bloomsbury, 2025



Gap & methodology

- A lot written on CJEU case law but not on how Member States' courts apply it => fills this gap
- Hypothesis/RQ: is there is disharmony in national case law (i.e. courts' decisions do not comply with the copyright acquis) + is it owed to misimplementing EU copyright legislation or misinterpreting CJEU case law
- Funded by ESRC Impact Accelerator Account, British Academy and Google: 50 most recent court decisions on copyright law's limits handed down by the civil courts at all levels in all Member States + UK

Methodology (cont'd)

- Cut off date 21/4/2021 (not beyond 2000 or beyond joining EU), mostly publicly accessible databases + Darts-IP, research assistants
- Compliant with the CJEU case law = national court neither contradicts the letter nor the spirit of the acquis (i.e. if it adds to the CJEU's interpretation, it does not contradict it)
- Non-compliant decisions contradict the letter or the spirit of the acquis (so if it adds to it, it contradicts it) so those which, for instance, apply different (or not all) conditions or criteria etc. than those set out by the Directive or by the CJEU

Copyright for designs post-*Cofemel*

- *Cofemel*: 12/09/2019: requirement of originality is the same for all works including works of applied art, namely AOIC, same test for infringement
- The 7 jurisdictions (DK, IT, PT, DE, FI, ES, SE) which had a higher level of originality (artistic value or merit) before *Cofemel* in the majority do not follow the CJEU (all except ES, FI and SE) => **54% are not complying (NC)** => uncertainty and unfairness
- 13 decisions only => very small sample
- 77% protected, 50% infringed

Important because

- To see **if harmonisation happens in practice** i.e. at the level of national courts and thus for litigants and anyone seeking legal advice, not just at the level of the CJEU
- *Cofemel* has effectively lowered the bar in many Member States => many functional works can now be protected by copyright, having an impact on innovation:
 - it may act as an incentive to create but also block follow-on innovation because copyright => much easier to prove protection and infringement – the *Infopaq* originality standard mimicked at infringement being easy to fulfil
 - => possibly reducing the attractiveness of registered design protection as copyright is almost as protective, if not to some extent more protective

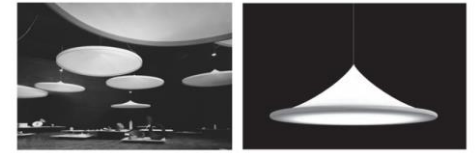
Court decisions post-*Cofemel* - 1



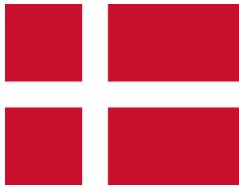
- Portuguese supreme court: G-Star Raw jeans, sweatshirt and t shirt - not protected (NC): “even though such models are characterized by their novelty and their unique character - requirements on which the specific protection granted to industrial models and designs depends”, => not sufficient for copyright protection. Court abundantly refers to CJEU decision in *Cofemel* and purports to follow it, but turns it upside down.
- [Germany: all NC
 - cot (protected but not infringed), does not refer to CJEU but AOIC but applies higher threshold + also uses overall impression to decide protection
 - dress (protected and infringed), tries to reconcile *Geburtstag* train with *Cofemel* but applies higher threshold
 - Minigolf, on remand pre-*Cofemel*, protected as per higher threshold, no ref to CJEU]



Court decisions post-*Cofemel* - 2



- Italy: no ref to CJEU case in any of the 3 decisions
 - seat protected and infringed (NC),
 - decorations not protected as not creative (does not refer to artistic value) (C),
 - lamp protected and infringed (NC)
 - New decisions post April 2021: trying to comply but not there yet...
- Denmark:
 - boots (not protected) (NC)
 - pots and vases (protected, infringed and not infringed) (C), but also uses prior art to determine originality
 - plant box (protected but not infringed) (C)
- Finland: [chair](#) protected and infringed (C)



Court decisions post-*Cofemel* - 3

- Spain: [lamp](#) post protected (C) but also uses prior art to determine originality (only moral rights involved)
- [Sweden: backpack protected and infringed (C); dissenting opinion holding the backpack unoriginal]



Other Member States seemingly having a stricter originality requirement

- Poland, Slovakia, [Czechia]: creativity and individuality (PL) or uniqueness i.e. statistical unrepeatability (CZ, SK) < Max Kummer theory, for all works not just WAA
- Two interpretations: one boils down to constraints, rules as elaborated in *FAPL*, *Football Dataco*, *Cofemel* and *Brompton* but the other not
- In addition, for WAA, Polish courts tend to look at prior art; however sometimes courts still protect very basic WAA such as candles for cemeteries

Other Member States

- Luxembourg: no higher requirement but “personality, individuality, taste, intelligence and know-how” => does not comply but does not require stricter requirement for WAA
- All other Member States comply with the AOIC for WAA, even Ireland (no case law but © act complies), eg:
- Belgium: *Brompton* on remand, CFI and CA confirmed features of bike are not original
- France: requires strict proof of originality for all works; SCT annuls decisions where the lower court has not addressed whether the claimant proved originality of the work
- => CSPLA, Bénazéraf & Barthez, Rapport de mission, La Preuve de l’originalité, December 2020.
- However, some French courts have used prior art to decide originality in some recent cases (post April 2021)



France: example:

- SCT (Betec light, 7/10/2020) annulled the CA's decision to reject the lamp's originality as follows:
- 'To reject the requests for compensation for acts of copyright infringement, the judgment holds that the length of the lamp tube as well as its half-curved arches without a determined position have a functional character and that this combination chosen between several features, which are part of an old trend, do not reflect an aesthetic bias manifesting the personality of its author. By making this determination without taking into consideration, as it was required to do, all of the characteristics whose combination was claimed to establish the originality of the work, the court of appeal did not provide a legal basis to his decision.'

Other linked issues: scope of protection/infringement test

- Many courts **do not apply** the *Infopaq* test of infringement but look at differences and similarities and overall impression // design law approach to infringement, NB: also in the NL
- Non compliance with *Painer*: low scope of protection for low originality work and high scope for high originality works: some courts in Sweden, Italy, Lithuania, Germany, Belgium and UK (pre- and post-Brexit: *Kenrick v Lawrence*, *THJ v Sheridan* and *Lidl v Tesco*) and not just for WAA
- => double blow to harmonisation
- Resistance from national courts to too generous or unclear *Cofemel* and to overbroad *Infopaq/Painer* infringement test?
- Both issues to be decided in *MIO*



EU Design law reform

- Design Directive recast - COM(2022) 667 final & Regulation amending Design regulation 2002/6 - COM(2022)666 final, Brussels, 28.11.2022
- **Relationship with copyright:** draft legislation simply deletes bits of the old article to codify CJEU case law i.e. new art. 23 (ex-17) Design Directive:
- “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 by copyright as from the date on which the design was created or fixed in any form **provided that the requirements of Union copyright law are met.**”

Vielen Dank für ihre Aufmerksamkeit!



Photo: University of Nottingham School of Law

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