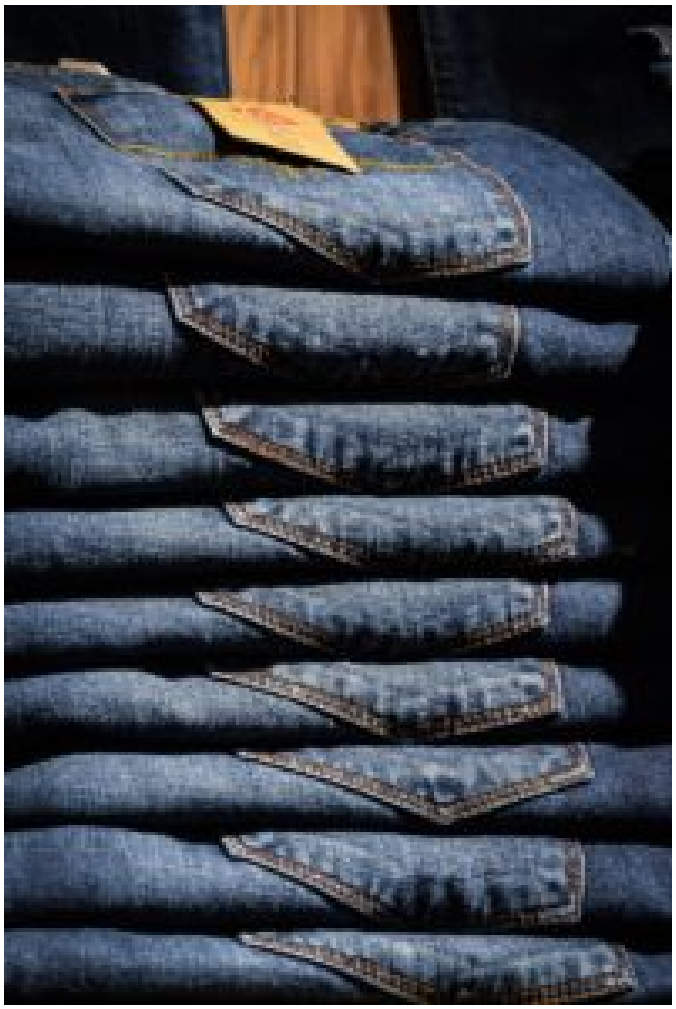
Kluwer Copyright Blog

CJEU decides that the originality level is the same for all copyright works, including works of applied art

Estelle Derclaye (The University of Nottingham) · Wednesday, September 18th, 2019

On 12 September 2019, the CJEU held that according to article 2(a) of Directive 2001/29 (the InfoSoc Directive), Member States' copyright laws can no longer protect models (in other words works of applied art or designs) on the ground that, beyond their utilitarian purpose, they generate a distinctive and significant visual effect from an aesthetic viewpoint (*Cofemel v G Star Raw*, not yet available in English).



The case concerned designs for t-shirts and jeans made by G-Star Raw, which Cofemel copied. In essence, the question posed by the Portuguese Supreme Court was whether Member States have the freedom to choose the level of originality pertaining to works of applied art, industrial designs and works of design or whether they must apply the CJEU standard of "the author's own intellectual creation" to such works. Like AG Szpunar (blog post on his opinion here), the CJEU chose the latter option but came to it in a slightly different and more muted way.

The court begins by restating its case law on the notion of work and originality (mainly *Infopaq*

and *Levola*) to deduce that the author's intellectual creation criterion is *necessary and sufficient* to establish originality and that the work must be in a precise and objective form of expression. Thus, at paragraphs 29 and 30, it clearly states that if the jeans and t-shirt fulfil these conditions, then they are protected by copyright.

At paragraph 50 the court however notes that "the protection associated with copyright, whose duration is very significantly higher, is reserved for objects worthy of qualifying as works." And in the following paragraph, the court, referring to paragraphs 51-55 of the AG opinion, continues, stating that "the grant of copyright protection to an object protected as a design cannot lead to the undermining of the respective purposes and effectiveness of [copyright and design laws]". Concluding at paragraph 52 that "although the protection of designs and the protection associated with copyright may, under EU law, be granted cumulatively to the same object, that cumulation can be envisaged only in certain situations."

But then the court does not keep the momentum and stops short of restating the reasons the AG gave relating to these statements, namely the risk that copyright law undermines the design law system with the following negative effects: devaluation of copyright because it would protect banal objects, restriction of competition owing to copyright's long duration and legal uncertainty because competitors cannot know if an expired design is still protected by copyright. That said, the – albeit timid – approval of the AG on this aspect is clear in the court's paragraphs 50, 51 and 52.

In short, without stating these very reasons explicitly like the AG did, the court still endorses the AG's cautious approach so it could be said that the court's judgment, as read in the light of the AG's opinion, means that national courts must be very careful when applying copyright to utilitarian objects so that copyright's limits (the idea/expression dichotomy and originality criterion including checking for the existence or lack of free and creative choices) are applied both when determining whether the objects are protected and whether they are infringed. It may well be, as it often is, that it was more difficult for the court to go into these details since it is never a one-person judgment and dissents do not exist; the judges in this case came from different traditions on the very question asked (the Netherlands, Czech Republic, Luxembourg, Italy and Sweden) and may have had to compromise.

That said, the reason the court gave for its answer to the question posed by the national court is different from that of the AG. It held, relying firmly on its *Levola* decision, that it is not desirable to use a subjective criterion to qualify a work for copyright protection. For the court, as a result of the usual meaning of the term "aesthetic", "the aesthetic effect likely to be produced by a model is the result of the intrinsically subjective sensation of beauty felt by each person called to look at it" (para. 53). Therefore, because of *Levola*, it had to conclude that this was not a suitable criterion for a work to receive copyright protection. This is in itself a good decision: as we have stated elsewhere, subjectivity is not an appropriate criterion to accept or reject copyright protection even for works of applied art. That said, other criteria are available and workable (such as the number of copies made of the work) and the court could have hinted at those. But the court has closed the door fully on this option, as from now on no other criterion can apply apart from the author's own intellectual creation.

Will the Portuguese court decide that the jeans and t-shirts are protected by copyright or, like AG Szpunar, decide that they are not? This will be the first test to see how national courts apply the CJEU's *Cofemel* decision. There is a worry that they will simply follow the result of the CJEU decision and not its entire reasoning. It is hoped that the Portuguese court and national courts

confronted thereafter with the same issue will read the judgment's paragraphs 50-52 in light of the AG's opinion and always have in mind the consequences of their decisions for the survival of the carefully crafted and, so far, successful EU design system.*[1]* In view of the Court's pithy judgment, the biannual national judges' symposium that EUIPO organises will be very important.*[2]* Not only closed meetings between judges to exchange experience*[3]* but also training for judges are crucial, and in the EU critical not only to understand the CJEU decisions but also to achieve harmonisation at the practical level. Additionally, the European Commission, which has recently consulted to see if the EU design system should be reformed, might wish to reverse the *Cofemel* decision, or else address more forcefully the important concerns it raised in its paragraphs 50-52.

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[1] *See e.g. DG Growth, Legal Review on Industrial Design Protection in Europe (2016), Final report, MARKT2014/083/D, available at http://ec.europa.eu/growth/content/legal-review-industrial-design-protectioneurope-0_en*, European Economics (2016) *Economic Review on Industrial Design in Europe*, available at http://ec.europa.eu/growth/content/economic-review-industrial-design-europe-0_en; *L. Bently, "The Return of Industrial Copyright" (2012) EIPR 654; E. Derclaye, "A Model Copyright/Design Interface: Not an Impossible and Undesirable Task?", in E. Derclaye (ed.), The Copyright/Design Interface: Past, Present and Future, Cambridge University Press, 2018, 421-458;* A. Tischner, « The Role of Unregistered rights – A European Perspective on Design Protection » (2018) Journal of Intellectual Property Law & Practice, 303-314.

[2] See https://euipo.europa.eu/ohimportal/en/web/observatory/news/-/action/view/3883489 The next symposium is scheduled for 7-8 November 2019.

[3] See at EUIPO: https://euipo.europa.eu/ohimportal/en/web/observatory/news/-/action/view/5188372 In 2018, WIPO started to organise international meetings for judges across all IP fields, see https://www.wipo.int/pressroom/en/news/2018/news_0007.html ; the next one is in November this year: https://www.wipo.int/meetings/en/2019/judgesforum2019.html

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