

# Kluwer Copyright Blog

## European Copyright Society Opinion on CJEU MIO/konektra cases

Lionel Bently (University of Cambridge), Estelle Derclaye (The University of Nottingham), Caterina Sganga (Scuola Superiore Sant'Anna), Alexander Peukert (Goethe-Universität Frankfurt am Main), Thomas Margoni (KU Leuven Centre for IT & IP Law), and Tatiana Synodinou (University of Cyprus)  
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Yesterday, the European Copyright Society (ECS) published its Opinion on the CJEU MIO/konektra cases C- 580/23 and C-795/23 (originality and infringement test of works of applied art). The Executive Summary is reproduced below and the full Opinion is available here: [ecs-opinion-mio-konektra.pdf](#)



### Executive summary

**Background.** In *Cofemel*, the CJEU recognized that (i) the standard test of originality, first adopted in *Infopaq*, applies as much to works of applied art as other works but nevertheless indicated (ii) in order that the copyright regime does not undermine the balance inscribed in EU design law, the circumstances in which designs benefited from copyright protection as works of applied art would be limited. In two pending references, *Mio* and *konektra*, it will fall to the CJEU to develop and apply these propositions.

In this opinion, the ECS draws on the existing case-law of the CJEU to highlight how these two propositions can be reconciled. It begins by explaining why it is important that copyright not be available too readily in this field.

Following the AG in *Cofemel*, the Opinion argues that much of the necessary work to delimit overlaps between copyright and *sui generis* design law can be achieved by a “rigorous” application of the CJEU’s criterion of originality that takes account of the factual restrictions on creativity in the context of works of applied art.

As regards protection, the opinion elaborates from the case-law a four-stage approach to the assessment of the work, which according to the CJEU case law includes determining whether there is expression and originality:

- (i) Identify expression, excluding from consideration basic ideas, where ideas merge with expression, and building blocks such as materials, shapes and colours;
- (ii) Identify “free choices”, ie those that were “unconstrained”, noting that the notion of “free choice” does not include situations where there are only a small number of ways to express a functional goal;
- (iii) Identify the “creative choices” taken by the author (designer). These do not include copying existing works, trivial variations, or obvious choices or choices which follow existing trends, or choices that are determined by functional goals. They do not include skillful or workmanlike choices.
- (iv) Determine whether the creative choices, if any, mean that the personality of the author is expressed in the final production. This requires that the output itself must have some features that reflect the individual characteristics of the author. The features in the work should reflect the fact that its author is a different human being from other potential authors of works of the same sort: the effect must be to “set his work apart from that of other authors”. We suggest this depends on the quality and quantity of the “creative choices” that have been made.

In assessing these matters, all relevant evidence should be taken into account and assessed objectively including:

- (i) The designer’s account of their own motives and decisions
- (ii) Prior patents or patent applications over particular features
- (iii) Evidence of independent creation of identical or similar designs (either before or after the work in issue)
- (iv) Evidence of experts and of museums.

That said, careful scrutiny will need to be made by a national court as to precisely how the evidence has a bearing on the issues in front of the tribunal. In particular, we sound caution over the likely relevance of the fact that a design is now in a museum: this may reflect judgments about fame, aesthetics or ergonomics and have nothing to do with whether there were creative choices.

The Opinion urges the CJEU to clarify these hitherto vague criteria and indicate how they might apply to different concrete circumstances. Although lacking the benefit of the evidence in these two cases, the Opinion tentatively and respectfully offers indications as to how the elements of the test might bear on the examples of a modernist designed dining table and modular system for shelving.

The Opinion goes on to consider the scope of protection afforded to works of applied art. In many cases, works of applied art that pass the originality threshold will exhibit low levels of originality, because of the many constraints on free choices, and the presence of only a few creative choices. In such cases, following *Infopaq*, the Opinion argues that there will only be

infringement if a person has reproduced that which made the claimant's work original. This will often require exact duplication. We argue that the rough shorthand that "low originality" works obtain "thin" protection is consistent with this principle, and that suggestions to the contrary, based on Painer, are a misunderstanding.

Finally, the opinion provides answers to each of the questions posed in the two references.

*The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law and policy. Its members are scholars and academics from various countries of Europe, seeking to articulate and promote their views of the overall public interest on all topics in the field of authors rights, neighbouring rights and related matters. The ECS is neither funded nor instructed by any particular stakeholders. Its Opinions represent the independent views of a majority of ECS members. The ECS sees it as part of its mission to give opinions on cases pending at the Court of Justice of the EU (hereinafter CJEU or Court).*

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The graphic features a central image of a gavel resting on a glowing digital circuit board with blue and red light trails. The text is overlaid on a dark background with a light blue horizontal line at the top.

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compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.”>CJEU, Design Rights, European Union, Originality

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