

Kluwer Copyright Blog

AG Szpunar's opinion in Mio/konektra: A welcome clarification of the CJEU's case law on works of applied art

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On 8 May, coinciding with the 80th anniversary of the end of WWII, Advocate General Szpunar delivered his long-awaited opinion in joined cases [Mio/konektra \(C-580/23 and C-795/23\)](#). The two cases were referred by the Svea Court of Appeal, Patent and Commercial Court of Appeal in Stockholm and the German Federal Court of Justice in cases concerning furniture (respectively a table and a modular shelving system). The questions referred to the CJEU concerned the protectability of works of applied art by copyright (the concept of work and originality) and the concept of infringement (articles 2, 3 and 4 of the [Information Society Directive](#)). In short, Mio made copies of the claimant's (Asplund) 'Palais Royal' table with its 'Cord' table and konektra made copies of the claimant's (USM Haller) shelving furniture. Both defendants deny that these works are protected by copyright.

After having introduced the issue and restated the legal framework and the facts of the case, the AG addressed each issue raised by the referring courts in turn namely the relationship between copyright and design protection, the criteria for assessing originality and the criteria for assessing copyright infringement.



Mio table. Source: judgment from the Swedish court referring the case to the CJEU



Example of USM Haller shelving furniture. Source: USM Haller website

Relationship between copyright and design protection

It is good that the AG spends some time (almost as much as on infringement) on this issue. The main question was whether higher requirements of copyright protectability must apply for works of applied art. In *Cofemel*, the Court replied in the negative but one of its statements (paragraph 52: “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”) left a doubt. After having recalled the Court’s case law on originality, the AG concludes that the statement at paragraph 52 of *Cofemel* is “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 protection, namely novelty and individual character on the one hand, and originality on the other, must not be confused” (para 36). In addition, the said paragraph does not mean that a higher requirement of originality must be applied to works of applied art to limit their protection by copyright, because it would also run against the Court’s statement in paragraph 48 of *Cofemel* and the general scheme of the judgment that the same criterion of originality applies to all works.

Originality

The referring courts had asked what criteria should be taken into account to determine originality.

Firstly, the AG states that the application of the criterion of originality must take into account the specific nature of the type of works concerned. For him, compared to other works, there is no presumption of creativity for utilitarian works (para. 42). Another important clarification is terminological. He rightly says that confusion can ensue when a court uses the terms ‘aesthetic’ or ‘artistic’ in relation to the choices made by the author. In some senses those two terms can imply that the work is creative, but not always. He thus recommends using the terms ‘free and creative choices reflecting the personality of the author’ and not the terms ‘artistic’ and ‘aesthetic’. The *European Copyright Society* (footnote 48 of its opinion) had recommended that the Court uses such terminology in a clear way to avoid any confusion especially in view of the fact that Court’s decisions are translated into all languages of the EU. It is pleasing to see that the AG embraced this view and went even further.

As to the criterion of the author’s intention to determine a work’s originality, AG Szpunar rightly says that as long as this intention can be seen in the work, it can be taken into account. But if it is not seen in it, it is irrelevant. This is because for a work to be original, as the CJEU has held, “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” (author’s emphasis) (para. 45). So, if a court has been given evidence of the author’s intentions, it must always check whether these are indeed reflected in the work itself. He adds that an author does not need to intend to create, therefore an author’s state of mind when s/he created is irrelevant.

Building on *Brompton*, for the AG, all remaining factors listed by the referring courts can be taken into account to assess originality, provided the court keeps firmly in mind the criterion of originality. Therefore, if an author uses generally available shapes, the work can be original if such combination reflects the author’s free and creative choices. The AG then affirms the copyright principle of independent creation, adding that while it is true that works of applied art created independently can look similar or identical because of the constraints naturally posed to their authors, such works can still be original for copyright purposes. Finally, the exhibition of works in

museums and recognition in professional circles can be elements which can confirm the originality of the work because a work which is very artistic is usually unique in the sense of reflecting the personality of the author, but it can never be neither necessary nor sufficient. Courts must check if the work is in a museum or recognised by professional circles because of its creativity not, for instance, because of its technical prowess or novelty.

Infringement

The Swedish court also asked questions about the infringement test and which factors can be taken into account.

To start with, AG Szpunar stresses again that copyright and design law are different bodies of law and that the correct application of the infringement test in the two rights is as important as the application of their protection requirements. This refers to the fact that the global impression test is used in design law but foreign to copyright law, as per the case law of the CJEU. He then reiterates the infringement test in copyright law namely that an original part, even small, of a work needs to be copied (*Infopaq*) and considers that the *Pelham* test of recognisability established for sound recordings can be applied to original works too. So, for him, a court should check whether “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” (para. 67). The overall impression is not sufficient and he goes further: it should not even be raised by the court, killing off the test completely in copyright law.

As to the factors courts can take into account, first, he believes that the degree of originality has no place in copyright law. For him, what the Court had said in *Cofemel* and *Painer* also extends to infringement i.e. that the scope of protection does not depend on the degree of originality of the work. Second, “[w]here 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” (para. 71). Third, simply following the same artistic trend or current as the author of an earlier work does not constitute infringement if the creative elements of that work are not copied. Finally, he refers to the point he made previously on originality: if it is proven that the allegedly infringing work was created independently, there is no infringement and vice versa.

Comment

The protection of works of applied art by copyright is a notoriously thorny topic. The Court has had to grapple with it chiefly in *Cofemel* and *Brompton* and left several questions unclear, hence why two national courts from different Member States referred a long list of questions to the Court for clarification. AG Szpunar can be congratulated on his opinion overall. The AG’s most notable and laudable contribution is to indeed clarify fully these issues. It is now crystal clear that there is no higher or stricter requirement of originality for works of applied art, that some factors can be taken into consideration but not others to assess originality, and that neither the test of overall impression nor the degree of originality of the work can be used to assess copyright infringement.

Three important points need to be highlighted.

First, on originality, one of the interesting points the Court may pick up on is the presumption of creativity for works that the AG creates. If there is no such presumption for works of applied art, this means correspondingly that there is a presumption for all other works. This seems too sweeping a statement because works of applied art are not the only utilitarian works, software and databases for instance are too. It is debatable there should be a presumption of originality for other utilitarian works, especially for databases. In any case, creating a presumption may not be within the competence of the Court as this may be regarded as a procedural aspect and the principle of procedural autonomy applies. For a discussion see [Cabay](#). In any case, the Court would do well to tread carefully here.

Two things must be noted on the infringement test. First, there is the point about applying the recognizability test to original works and not just sound recordings. If this means that the defendant must have taken the author's own intellectual creation, it boils down to the *Infopaq* test. But the AG does not elaborate on this. This is one point where his opinion could have been clearer. But arguably, this is implicitly what he means by "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". In *Pelham*, the court said recognizable to the ear, but did not lay down a specific person to do this. This is normal in copyright law as it is the judge who makes this assessment. It would be new if the Court added a specific fictitious person like in design, trade mark or patent law. The Court should not create such a person and should stick to the *Infopaq* test, and if it uses recognizability, it should say that the two tests are the same. Incidentally, the German legislature equated the two tests when amending article 23 of its copyright act following *Pelham* (cf. Explanatory Memorandum, German Parliament, 19. Wahlperiode, Drucksache 19/27426, p. 78-79). Even in the case of a non-identical reproduction, it is possible to recognise the claimant's work, such as in a parody.

The second point is about the degree of originality of the work. Here the Court should not follow the AG. It is simply not right that a low originality work be protected as strongly as a high originality one. This would be over-rewarding little effort and unfair to those authors who have created highly original works. Arguably, it also goes against *Infopaq* and can be reconciled with *Painer* and *Cofemel*, i.e. the Court did not arguably say this expressly and thus this would not amount to overturning its previous decisions.

The – surely purely coincidental – timing of the opinion on the anniversary of WWII's end thus augured well as it a victory for clarity and so a victory for authors, right holders, users, and lawyers, including judges. It is hoped that the Court will follow the AG on all points except on the degree of originality for assessing infringement. It should also be careful about the presumption of originality point. Most crucially, the Court will hopefully adopt the same clear and detailed style as the AG. Lack of clarity in its case law is the main cause of the disharmony on these issues at national level (as expounded in my forthcoming [book](#)), leaving great uncertainty and unfairness for EU citizens.

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