

CLIENT ALERT

EU's Top Court Confirms Copyright for Design, but Looking Good Will Not Do the Trick

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On September 12, the Court of Justice of the European Union (CJEU) has pronounced yet another ruling on the interpretation of EU copyright law. With its Cofemel-decision (C-683/17), the CJEU harmonized the requirements for utilitarian objects, which might also be protected by a (registered or unregistered) design right, to benefit from copyright protection. Provided that the conditions explained hereunder are met, the Cofemel-decision confirms that lighting equipment, clothing items, furniture, motor vehicles, etc. enjoy copyright protection in all the EU Member States.

Going back several years, the implementation of the InfoSoc Directive (2001/29/EC) into national law marked the start of a harmonized EU copyright law. Several rulings of the CJEU later, it is now established case law that any work fulfilling the following two conditions will enjoy copyright protection. First, the work has to constitute the author's own intellectual creation (*Infopaq*, C-5/08). The author must express his creative abilities in the production of the work by making free and creative choices so that the work is stamped with his "personal touch" (*Painer*, C-145/10). Second, the work must be an expression of such a creation in the sense that the object can be accurately and objectively identified (*Levola Hengelo*, C-310/17).

With regard to the specific relationship between copyright and design rights, the CJEU established in 2011 in its *Flos*-ruling (C-168/09) that any work, whether or not it is, or has been subject to (registered or unregistered) design right protection, can enjoy copyright protection. According to the CJEU, basically reiterating Article 17 of Directive 98/71/EC on the protection of designs, it was up to the Member States "to determine the extent to which, and the conditions under which, such a protection is conferred, including the level of originality conferred". As a consequence, differing national approaches had been developed throughout the EU. Hence, the question arose whether, in such circumstances, the level of copyright protection would not be harmonized and could thus differ from the standards imposed by the CJEU in its earlier case law.

In the dispute between G-Star and Cofemel concerning a jeans, sweater and T-shirt model, the Portuguese Supreme Court asked the CJEU whether the national standard for copyright protection for utilitarian works, could be upheld. In essence, Portuguese copyright law required utilitarian works (i.e. works of applied art, industrial designs and works of design) to invoke an individual, aesthetically remarkable, visual effect.

The CJEU first of all explained the different ratios and objectives pursued by copyright and design right protection. As long as these objectives are pursued, nothing prevents both intellectual property rights to protect one and the same subject cumulatively. Moreover, any such cumulative application, does not affect, nor alter the conditions under which protection is awarded. Said differently, the CJEU explicitly confirmed that the harmonized (two) conditions of EU copyright law still apply and that no other national requirements can be relied upon. With regard to the specific Portuguese standard, the CJEU thus ruled that whereas the existence of aesthetic considerations is part of the creative activity, this alone does not suffice to establish whether the work constitutes the author's intellectual creation, reflecting the freedom of choice and the personality of the author and thus fulfilling the originality requirement of EU copyright law.

With the CJEU's *Cofemel*-ruling, also the requirements for utilitarian works to benefit from copyright protection are now harmonized across the EU. As a consequence, certain national standards for copyright protection for designs will have to be adapted. It remains to be seen how harmonised the views of the national courts of the Member States will be when appreciating if a design expresses the author's individual creation and personal touch and therefore should enjoy copyright protection.

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