IPRinfo VERKKOLEHTI
IPR UNIVERSITY CENTER

AG's Opinion in Cases Mio and Konektra Clarifies Criteria for Assessing Copyright Infringement

3/2025 5.6.2025

On 8 May 2025, Maciej Szpunar, Advocate General at the CJEU, delivered his Opinion in the joined cases *Mio* and *Konektra*. This article, written at the request of IPRinfo readers, analyses the key aspects of the Opinion.

The long-standing topic in copyright debates, *the copyright protection of works of applied art*, is back on the agenda. Although the Court of Justice of the EU (CJEU) has resolved many of the ambiguities in recent years in

cases C-168/09 *Flos* (2011), C-683/17 *Cofemel* (2019) and C-833/18 *Brompton* (2020), certain issues remain unresolved. Sweden and Germany had asked the CJEU, in their request for a preliminary ruling C-580/23 *Mio* (Sweden) and C-795/23 *Konektra* (Germany), to clarify, in particular, (i) the relationship between copyright and design rights, (ii) the criteria for assessing the originality of a work of applied art, and (iii) the criteria for assessing copyright infringement. Some of these issues were previously analysed in the IPRinfo magazine in August 2024. The saga has now moved forward with the recent Opinion of the Advocate General **Maciej Szpunar**.

This article outlines what is new, what remains unchanged, and what is surprising for European IPR practitioners in Szpunar's Opinion. It concludes with some comments and criticisms.

Summary of the Question for Preliminary Ruling

In the AG's opinion, a total of seven (4 + 3) questions of two different references for a preliminary ruling are grouped together thematically, concerning the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) (InfoSoc Directive) to the following topics:

1. The relationship between copyright protection and design protection;
2. Criteria for assessing originality; and
3. The assessment of copyright infringement.

All these themes are addressed primarily from the point of view of the applied art, but (at least most of) the results can be applied to all types of works.

Question 1: The Relationship between Copyright and Design Right – are there Main Rules and Exceptions?

The first question asks, whether there is a relationship in EU law between the protection afforded by design law and the protection afforded by copyright law, in the form of a rule and an exception, such that the examination of the originality of works of applied art must be subject to stricter requirements than in the case of other types of work.

I was a little surprised that the referring court even decided to ask such a question. After all, there should not have been any ambiguity on this issue for years, thanks to the *Cofemel* case (which confirmed that Member States may not impose any requirements for the copyright protection of an identifiable work of applied art other than meeting the originality standard of 'author's on intellectual creation'). In *Cofemel* the Court stated that

> '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.' (paragraph 52)

As I see it, the above should be interpreted to mean that, although cumulative protection of design and copyright is by no means excluded, situations in which an object of protection meets both the requirements of copyright (originality) and design right (novelty and individual character) are relatively rare in practice. However, it now seems that this paragraph has also been interpreted as establishing a kind of relationship between the rule and the exception to it, whereby the originality of works of applied art must be subject to stricter requirements than other types of works.

In his Opinion, Szpunar draws attention (once again) to the different normative justifications of design rights and copyright, and the different objectives of these forms of protection (see, inter alia, paragraphs 33, 35). The above-cited paragraph 52 of the *Cofemel* case is merely a reminder of these fundamental differences and does not establish any relationship between rule and exception (paragraphs 36–38). Any other interpretation would run counter to the central message of the *Cofemel* case, namely that originality is assessed on the same basis for all types of work (paragraph 37).

The first question referred for a preliminary ruling should therefore be answered, according to Szpunar, in such a way that there is no rule/exception relationship in European Union law between the protection afforded by design law and the protection conferred by copyright law, such that the examination of the originality of works of applied art must be subject to stricter requirements than in the case of other types of work. This solution is, in my view, self-evident and does not really add anything new to the debate on copyright in works of art.

However, the proposed solution in this respect should serve as a good reminder to some Member States, and to all those who do not pay attention to every twist and turn of the CJEU's originality jurisprudence. Due to the reasons I have mentioned in my research, I would include Finland to the list of not-so-observant Member States (Härkönen 2020).

Question 2: Evaluation of Originality in Products of Applied Art

The second question in the proposed solution deals with how to assess originality of works of applied art for the purposes of the InfoSoc Directive, and whether the provisions of the directive should be interpreted as meaning that the assessment must take into account the factors relating to the creative process and the purpose of the author, or only the factors that are perceptible in the work itself. The referring courts also ask what role additional elements play in that assessment. By additional elements they mean, for example, the following:

- the use in the creation of the work of shapes that are already available,
- the inspiration taken by the creator from existing subject matter,
- the possibility of similar independent creation, or
- the recognition of the creation by professional circles.

The second question with its sub-questions offers the possibility of new interpretations of EU law, as especially the question of the meaning of the creative process and the subjective assessment of the author has not been addressed before. Personally, I see the *Painer* case from 2011 as a strong indication that the creative process has (at least some) relevance in the assessment of originality, as in the preliminary ruling 'free creative choices made in the creative process' are given a lot of weight. In legal literature, the relevance of the creative process has been addressed, inter alia, by **Mikko Antikainen**, who has pointed out that originality is not necessarily apparent from the work itself (Antikainen 2021, p. 71).

Szpunar begins addressing this question by pointing out that the concept of originality is necessarily rather general, and cannot be refined indefinitely, since it must be possible to apply this standard to a subject matter of very different kinds on a case-by-case basis (paragraph 40). After this, however, Szpunar goes on to make some rather unfortunate generalisations about the creation processes of applied art (especially paragraphs 41 and 42). According to Szpunar, in 'pure' art the very decision to create can be a free creative choice, but this could not be the case in applied art. I find this argument strange – even wrong – and will return to it later.

Regarding the importance of the creative process and the subjective perception of the author, I summarise Szpunar's solution as follows: first, free creative choices must be conveyed by the subject matter of protection, i.e. the mere creativity of the process is not sufficient (paragraph 45). This is linked to the fact that the subject matter of protection must be identifiable with sufficient precision and objectivity (paragraph 46), i.e. here Szpunar applies the so-called *Levola Hengelo* criterion (see case C-310/17 *Levola Hengelo*). The creative intention of the author is not necessarily apparent from the subject-matter of the protection, but it may nevertheless have some relevance (paragraphs 47–58). However, its importance may not be decisive (inter alia) because *evidence* of the author's creative intent may not be available or credible. However, if evidence of the author's intent *is* available to the deciding court, it may be considered alongside other evidence in the analysis of the originality of the alleged 'work' (paragraphs 49, 50). I find the idea of considering the author's purpose when assessing originality interesting. This possibility is, in my view, in line with previous CJEU's case law on the assessment of originality. In my previous research, I have argued that although copyright as such does not require uniqueness of the subject matter, *the author's intention to create something unique* (i.e. the aim to create something that stands out from the prior art) could nevertheless indicate the presence of free creative choices

and that the end result of the creative work could then reflect the author's personality (Härkönen 2025, p. 302, 317). I hope that this conclusion of AG Szpunar will also find its way into the CJEU's judgment.

The Opinion also addresses the use of known shapes, the source of inspiration, the likelihood of a similar independent creation, and their impact on originality. Szpunar's views on the importance of these factors for originality can be summarised as follows: they may or may not have an impact (paragraphs 51–58). I am not referencing the 'on the one hand–on the other hand' type of reasoning presented in the Opinion here, but I do want to highlight an interesting point about applied art. Szpunar argues that, although there is no novelty requirement for copyright, the independent creation of products similar or even identical to the product in question, either before or after the creation of the object in question, may nevertheless indicate that the product in question has little or no originality. This applies above all to 'pure' art (paragraphs 56, 57), *but not to applied art*. The possibility or existence of a similar independent creation is not in itself a sufficient indicator of lack of originality and therefore does not justify the exclusion of a utilitarian object from copyright protection (paragraph 58). This is an interesting observation, and it challenges some national law traditions that have 'helped' courts in Member States to assess originality. For example, in Finland, the traditional 'additional criteria' for assessing originality has been 'a work is original if no one else, who started working on the same creative work, could have come up with a similar end result'. This 'additional criteria has been criticised for not being in line with the EU standard of originality (see Mylly 2016; Härkönen 2024), although it has had its supporters as well (Thesleff 2024).

Additionally, it should be mentioned that Szpunar also points out that the artistic quality of the subject of protection does not matter anyway (paragraph 44) – although this should not come as a surprise to anyone who has read the *Cofemel* judgment. And, as the CJEU already pointed out in the *Brompton* case, the fact that an alleged 'work' is exhibited in museums etc. does not say anything decisive about its originality (paragraph 59). A utilitarian object may be in a museum for many reasons other than its originality – for example, because it is new or innovative (paragraphs 60 to 61).

So, what was *new* in Szpunar's solution to question two? In my opinion, not much, apart from the mention of what *can be* considered (and what cannot) in the assessment of originality. In addition, the proposal for a solution provided numerous reminders of points that are already derived from the normative justification and basic principles of copyright.

Question 3: Infringement Assessment

If you have read this far, congratulations! Now we come to the exciting part, because question three of the AG's opinion, namely the copyright infringement standard, has not yet been addressed by the CJEU, at least not to any significant extent. In the third question, Szpunar examines how the possible infringement of the exclusive rights granted to authors under the InfoSoc Directive should be assessed. Specifically, this question concerns, on the one hand, whether the work in question is *recognisable* in the allegedly infringing subject matter or whether the allegedly infringing subject matter creates the same *overall impression* as the work, and, on the other hand, whether this assessment is influenced by factors such as the degree of originality of the work, the common source of inspiration of the two subject matter at issue, and the fact or the possibility of a similar independent creation.

It is important that also in the infringement assessment we bear in mind the different objectives of design and copyright protection. The infringement assessments are based on different logics for the two IP protections. In copyright, infringement is based on the use of a work without authorisation, whereas in design law, the making of a copy (i.e. reproduction) is not a necessary condition for establishing infringement. In design law, the *recognizability* of the protected design in the allegedly infringing product is irrelevant, as what matters is the *overall impression*. (In the case of a *registered* design right), it makes no difference whether the same overall impression results from copying, or from independent creation. Infringement of copyright, on the other hand, requires that the reproduction should be *recognisable* from the infringing product, as Szpunar deduces from, inter alia, CJEU case C-476/17 *Pelham* (paras 64–66).

According to Szpunar, in the assessment of copyright infringement, it is always essential to determine whether the creative elements of the protected work – i.e. the elements expressing the author's free creative choices and reflecting their personality – have been copied in a recognisable manner in the allegedly infringing subject matter. Of course, the reproduction of creative elements in a utilitarian object *may also lead* to the same *overall impression*, but this cannot be considered sufficient to establish copyright infringement. In fact, the question of the same overall impression should not even be raised by the court in the context of a copyright infringement proceeding (paragraph 67). This would seem to be self-evident, but apparently it is not. In this respect, the Opinion should serve as a friendly reminder to some courts and others who have focused on various tests of overall impression or similarity in copyright infringement cases (see Bently et al. 2025, para 61 and footnote 56 – Finland is mentioned, and the case KKO:2018:21, where in para 27 the Supreme Court for some rather odd reason focuses on the 'similarity effect' of the painting and photograph in question).

Szpunar's view that the degree of originality does not determine the scope of protection of a work (paragraph 68) challenges the national traditions of many Member States. For example, courts in Sweden, Italy, Germany and Belgium have held that a low degree of originality leads to a narrower scope of protection (Bently et al. 2025, paragraph 67). However, in my view, Szpunar's interpretation is a natural consequence of the *Painer* judgement (particularly in the light of paragraphs 97–99), although I consider that there are several factors which militate against the reasonableness of this interpretation. The interpretation that the degree of originality does not affect the scope of protection has been criticised, inter alia, by Henning Hartwig (2023). It must also be noted that as opposed to copyright, in design law is the degree of individuality linked to the scope of protection.

Szpunar also states that only a recognisable reproduction of the creative elements of a work constitutes copyright infringement. Making changes to non-creative elements does not mean that infringement cannot be established (paragraph 70). For example: **Designer A** creates a dress with an original detail – for instance, a neckline cut. This detail is protected by copyright. Otherwise, the dress consists of non-original, everyday shapes. **Designer B** reproduces the neckline from A's creation, *but* changes everything else about the garment that inspired it – in fact, their garment is not even a dress; it is a jacket. The overall effect of the products of designers A and B is different and gives a different sameness experience. There is still copyright infringement at hand, because the overall impression, or any illusion of similarity does not matter. (See also paragraph 73.) (Of course, this conclusion brings forward many interesting questions related to, for example, quotation in the field of applied art – but those issues shall be topics for follow-up research.)

Szpunar further clarifies the elements to be considered in the infringement assessment later in his Opinion, but the core message is clear: it must be possible to identify the reproduction of creative elements from the infringing subject matter. He also points out that participating in the same trend does not, of course, constitute infringement, nor does independent creation. If the creative elements have been reproduced, the mere possibility of a similar independent creation does not justify a refusal of copyright protection (paragraphs 71, 72). I am left to wonder how the 'recognizability requirement' for infringing activity translates into the context of artificial intelligence (AI). If the creative elements of the copied work must be identifiable from the allegedly infringing product (etc.), what does this mean in situations where AI has been trained using the author's works as source data (against the author's will), but these works cannot be identified from the content created by the AI?

Compared to the first two questions, the answer to question three, in my view, clearly offered something new to the European copyright debate and to the harmonisation of copyright law in the internal market. Prior to this, the issues affecting the existence of infringement have not been addressed in such depth in the AG/CJEU level.

Comments, Criticisms and Personal Experiences

The proposed solution gets both compliments and critique from yours truly. I particularly like the fact that the second question specifies how the author's intention (and other subjective factors) *can* play a role in assessing originality. I think that this makes sense, because the normative justification of copyright is based above all on specific relationship between the author and the work. However, (like Szpunar) I would not consider it

reasonable to give *decisive weight* to the author's own perception of the originality of their work (or of the freedom and creativity of their choices) – it would be risky to give too much weight to subjective perceptions, since the court's assessment must be objective as such, even if subjective circumstances do matter. (See my more detailed analysis in Härkönen 2025, p. 315–316). In general, the proposed solution contains many interesting additions and good clarifications to the European originality standard, although – as Szpunar himself writes – these new elements of originality are not decisive.

The aspects of the Opinion relating to the assessment of copyright infringement provide particularly welcome new insights. The CJEU has been refining the harmonised originality standard since the 2009 *Infopaq* judgment, but the link between the degree of originality and the scope of protection – and thus the assessment of copyright infringement – has not been addressed to anywhere near the same extent.

It is regrettable, however, that the Opinion contains several generalisations regarding the creation process of applied art (in particular paragraphs 40–42). Although EU copyright law has clearly moved towards the application of the theory of the unity of art *(unité de l'art)*, the Opinion, nevertheless, reveals several prejudices concerning the creation of applied art and industrial design. In my view, these are often untrue.

I am now writing from my own experience as a lawyer, a designer and an artist: when I decide to create applied art, the process usually requires me to do a lot more planning and thinking, and to make various (at least in my opinion) creative choices. In contrast, when I decide to create a work of 'pure' art, I usually try to to reproduce what I see (for example, a landscape, a still life or a person) as skilfully as possible with a brush or pencil. In the latter case, I observe the real world through my visual sense, seeking the most accurate eye-hand collaboration possible, using my fine motor skills. But in the first case, when I create applied art, I tend to use my imagination – and my creative freedom – in a much broader way.

For example, I recently designed and made a swimsuit for non-commercial purposes from recycled materials, which I had a limited supply of. It is precisely because of this limited material supply that I had to – or *ended up* to – making numerous creative choices, as the limited material supply did not allow for so-called conventional fabric cutting and usage choices. Therefore, I needed quite a bit of creativity to be able to make the garment from these materials. The material scarcity had a big impact on, for example, the size of the pattern pieces and the cut and pattern of the garment. In the above-described examples, is my decision to paint, say, a landscape a 'free and creative choice' in itself, but my decision to make a swimsuit from recycled materials not? From my own perspective, I would say that the decision to paint a landscape is no more creative than my decision to give a new life to a material that would otherwise go to waste. Creative decisions can come from a wide variety of sources, and it is not worth making generalisations based on the category of the work.

Thus, as a creator (let alone a copyright researcher), I cannot agree with Szpunar's argument that the mere decision to create is a creative choice for pure art, but not for applied art. It would be good if copyright lawyers would familiarise themselves with the creative processes and free creative choices in the various creative fields they are dealing with. Of course, I am not saying that a lawyer assessing originality should have some artistic background. But even some familiarity with the creative field under consideration might help to see more clearly the elements that constitute originality – or lack of them.

Final Remarks

For many reasons, I have come to the conclusion that the division between 'applied art' vs. 'pure art' in copyright discourse is often largely artificial and, to some extent, unnecessary. It is very difficult to maintain this distinction: where would we place, for example, *an haute couture* gown that is difficult to move in, or a designer chair that is almost impossible to sit on? What if I glue a pair of shoes, a cap, jewellery, and some underwear on a canvas base, pour a can of paint over them, let it dry and hang this 'artwork' on the wall – is my creative contribution a 'purer' art than the previous examples of haute couture and design furniture? I have previously pointed out in my research that there is a lot of generalisation and oversimplification in the legal debate about the process of creating applied art. This in turn can lead to a situation where originality – or lack of it – cannot always be assessed correctly.

I think it would be by all means easier to focus on originality, or lack of it, rather than on categorising the works. In other words: instead of making assumptions about a potential subject of protection based on which work category it falls into, the focus should be solely on the manifestation of free creative choices in the work. Thus, if we were assessing the originality of a lamp, for example, we would not begin our assessment by saying 'this is a product of applied art', but by considering the question 'how are the author's free and creative choices reflected in the product?'. Such a process of assessing eligibility for protection that focuses purely on originality (rather than on the category of work) would also help to minimise the above-described risk that a lack of knowledge of the creative processes of applied art and industrial design would negatively affect the copyright treatment of a potential subject of protection.

Advocate General Szpunar's Opinion is exactly what it claims to be: an opinion. We will likely receive the CJEU's decisions in the *Mio* and *Konektra* cases this coming autumn. An IPRinfo analysis will surely be written about the judgment as well. This article was just the top of the iceberg of my thoughts on the themes addressed by Advocate General Szpunar, and I would be happy to discuss the Opinion further with anyone interested.

Heidi Härkönen

Postdoctoral researcher, University of Turku Faculty of Law

Adjunct Professor in Fashion Law

Editor-in-Chief, IPRinfo

P.S.: This article started the IPRinfo magazine's 'Readers' Request' series. An analysis of the Opinion was requested on the IPR University Center's Instagram account . Do you have a topic you'd like to see covered in an IPRinfo article? Contact the editorial team and we will put your suggestion under consideration!

Kannen kuva: iStock / CarlosAndreSantos

Aiheet: Lukijoiden toiveet, Tekijänoikeus

Lisää aiheesta

Antikainen, Mikko: Surviving technological change: towards more coherent regulation of digital creativity through EU copyright and design law. Doctoral dissertation. Publications of the Hanken School of Economics Nr 353, Helsinki, 2021. Available at: https://helda.helsinki.fi/items/d2301a8f-69ac-4931-a48c-c6a3e07663d1 .

Bently, Lionel; Derclaye, Estelle; Sganga, Caterina; Peukert, Alexander; Margoni, Thomas & Synodinou, Tatiana: The Protection of Works of Applied Art under EU Copyright Law – Opinion of the European Copyright Society in Mio/konektra (Cases C-580/23 and C-795/23). IIC – International Review of Intellectual Property and Competition Law, 2025. Available at: https://link.springer.com/article/10.1007/s40319-025-01579-4 .

Hartwig, Henning: Reciprocity in copyright law. IPKat 30.10.2023. Available at: https://ipkitten.blogspot.com/2023/10/guest-post-reciprocity-in-copyright-law.html .

Härkönen, Heidi: A Narrative Approach to the Standard of Originality in EU Copyright Law: The Story of a Dress. IIC – International Review of Intellectual Property and Competition Law Vol. 56, 2025. Available at: https://link.springer.com/article/10.1007/s40319-025-01562-z .

Härkönen, Heidi: Onko teoskynnyksellä tulevaisuutta? IPRinfo 2/2024, 3.4.2024. Available at: https://iprinfo.fi/artikkeli/onko-teoskynnyksella-tulevaisuutta/.

Härkönen, Heidi: Luovan prosessin, tekijän subjektiivisen käsityksen ja teoksen taiteellisen arvon merkitys omaperäisyyden arvioinnissa. IPRinfo 4/2024, 19.8.2024. Available at: https://iprinfo.fi/artikkeli/luovan-prosessin-tekijan-subjektiivisen-kasityksen-ja-teoksen-taiteellisen-arvon-merkitys-omaperaisyyden-arvioinnissa/.

Härkönen, Heidi: Tekijänoikeus ja käyttötaide: EU-tuomioistuimen C-683/17 Cofemel -ratkaisun vaikutukset suomalaiseen tekijänoikeustraditioon. Defensor Legis 1/2020. Available at: https://lauda.ulapland.fi/bitstream/handle/10024/64810/Article%20II.pdf?sequence=3&isAllowed=y .

Mylly, Ulla-Maija: Tekijänoikeuden omaperäisyyden harmonisointi Euroopan unionissa. Lakimies 6/2016.

Thesleff, Alexander: Teoskynnyksen ylittyminen vai teoksena pitäminen? IPRinfo 3/2024, 28.6.2024. Available at: https://iprinfo.fi/artikkeli/teoskynnyksen-ylittyminen-vai-teoksena-pitaminen/.

Kirjoittajat

Heidi Härkönen

Muotioikeuden dosentti, yliopistonlehtori, IPRinfo-lehden päätoimittaja Turun yliopisto
heidi.harkonen@utu.fi

Uusimmat artikkelit

5/2025
7.10.2025