COPYRIGHT AND THE CJEU
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CONSTITUTIVE ELEMENTS FOR PROTECTION

ORIGINALITY = FREE & CREATIVE CHOICES
(+ INTENTION/PURPOSE?)

1. *Infopaq International A/S v Danske Dagblades Forening (C-5/08)* – "apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject matters as artistic or literary works presupposes that they are intellectual creations…copyright within the meaning of Article 2(a) of Directive 2001/29 was liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation."

2. *BSA (*C-393/09): GUI could be protected under InfoSoc Directive if represents author's own intellectual creation (i.e., capable of qualifying as a work)

3. *Painer v Standard Verlags GmbH (C-145/10)* – author must "express [their] creative abilities in the production of the work by making free and creative choices, so that [they] can stamp the work created with [their] personal touch"

4. *Football Dataco and Others (C-604/10)* - the criterion of originality is not satisfied when the setting up of a database is dictated by technical considerations, rules or constraints which leave no room for creative freedom… fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author cannot as such justify the protection of it by copyright, if that labour and that skill do not express any originality in the selection or arrangement of that data.

5. *Funke Medien (C-469/17) - "*intellectual creation ….must reflect the author's personality; which is the case if the author was able to express [their] creative abilities in the production of the work by making free and creative choices."

6. ***Funke Medien*** **…AGO takes into consideration 'intent' of authors and/or purpose of work? "…inevitably drafted in simple and neutral terms…information and its expression become indissociable thus precluding all originality" CJEU confirms - "the content of which is essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable…impossible for the author to express his or her creative…"**

CONSTITUTIVE ELEMENTS FOR PROTECTION

WORK

1. *FAPL v QC Leisure* C-403/08: football match would not be protected because cannot be classified as a work

2. *Levola Hengelo BV* C-310/17: "..for there to be a 'work', the subject matter protected by copyright must be expressed in a manner which makes it identifiable **with sufficient precision and objectivity**, even though that expression is *not necessarily in permanent form.*"

3. No fixation? No categorization?

4. *Cofemel, C-683/17 - factors which court can take into account include technical considerations, existence of earlier patents, existence of other possible shapes, whatever reveals what was taken into consideration in choose shape*

5. *and Brompton Bicycle, C-833/18 ….*

Rosati –

- *"Neither of them – bluntly put – adds anything that was not known already"…I agree! – from Flos, C168/09 and BSA C393/09.*

- *Effect of Art. 14, 2019 Copyright in DSM Directive – "codified the case law of the CEJU on originality.."*

Uma –

- *Purpose of shape/product?[destination in market]*

- *Intention of author [see Funke Medien]*

- *Perception of the public – that element is essential or informational [Louboutin considerations re aesthetic functionality]*

- *Too much borrowing from trade mark law?* ***Rosati:*** *"In imposing the conditions of precision and objectivity, it also clearly borrows from trade mark law"..citing AG Wathelet citing Sieckmann*

POST-BREXIT TREATMENT OF WORKS OF APPLIED ART

1. Rosati book: I came to these thoughts from reading the book:

- Sets out that courts have other tools if concerned with competition
- Concept of public domain from Art. 14,, DSM Directive …something that is new and open to a UK version - flexible
- Functionality is flexible – because we have struggled since *Lucasfilm* decision when all 3 tribunals flirted with the concept without settling its contours
- introduce or concretise the existing norms in jurisprudence - "free and creative" contribution *[Cramp v Smythson],* personality and a functionality/technical constraints
- Classification is unnecessary as introduces qualitative and subjective tests: original work / infringement tests could suffice

2. My view

- s.4 CDPA - flexible category of works (Berne Convention flexibility) (*Norowzian, SAS Institute, Nova Productions)Hensher* is open to myriad interpretations, *Lucasfilm* calls for multi-factorial test which can expand to protect works which are destined for general products / consumer market - similar to *Brompton factors*
- Courts adopt approaches in *Response* and *Waterrower* – pre Cofemel (ie applying Hensher and Luscasfilm) and the post Cofemel/Brexit (ie a second layer of analysis on "original work")…. So why not just merge the two approaches?
- Flexible interpretations - *Hensher, Lucasfilm, Response Clothing*
- Introduce or concretise the existing norms in jurisprudence - "free and creative" contribution *[Cramp v Smythson],* personality and a functionality/technical constraints

POST-BREXIT TREATMENT OF WORKS OF APPLIED ART

3. **We cannot return to the notion of "industrial copyright for 25 years as a means to balance competition"** – despite several calls to return to the good 'ol days – see CREATE working papers – Luis H Porangaba (2022) 44(1) EIPR and L. Bently -

- that was part of reason for demarcation within UK copyright law via categories, via s.10, 1956 CA, via ss 51/52, CDPA [which is a bit wonky now without s. 52 anyway]
- Rejecting EU law on categories and "original work" - rejecting *Flos, SAS, Cofemel, Brompton, Football Dataco , Levola*
- Overturning parts of *Response and Waterrower* (ie the bits referring to EU law)
- Requiring legislative change - re-introduce s.52; emphasise closed list; define "artistic" and "craftmanship"? Codify *Hensher* and *Lucasfilm.*

4. **Open to judicial reform** – functionality doctrine & public domain and free choices - it inherently exists…… Supreme Court in Lucasfilm; - A functionality *doctrine negates the concerns as to the anti-competitive nature of copyright protection* (as it does under trade mark law re shapes) - What about categories? Courts have to reason on the open category or flexible category of works - interpretation of EU retained law - "grain of legislation" (*Marleasing/Vodafone 2*)

5. 2021 UK Government post-implementation review of the repeal of s.52, CDPA (following *Flos):*

- imposing equal terms of protection for artistic works (whether they had been industrially manufactured or not), = a simpler copyright system = "could result in an increase of the production of such goods within the UK economy."
- "increasing the term of protection afforded to industrially manufactured artistic goods beyond 25 years …might result in greater levels of production."