NEW DEVELOPMENTS IN THE EU CONCEPT OF COPYRIGHTED WORKS

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Abstract: *In the paper, the author discusses the recent developments of the EU concept of copyrighted works in the EU legislation and CJEU case law. First, the author discusses several CJEU decisions and addresses the issue of the ‚expression' of the work and its ‚sufficiently precise and objective identifiability'. Afterwards, the author comments on the reasoning of the CJEU's judgment in Brompton Bicycle case and concludes that a work which the senses can simply perceive may still need to be ‚sufficiently precise and objectively identifiable'. Therefore, the requirement of ‚expression' is primarily directed towards the requirement of materialization of the copyrighted work, while the requirement of ‚sufficient precision and objective identifiability' is directed towards the exclusion of those elements that are too subjective or vague so that they undermine the legal certainty of other subjects that are obliged to respect copyright related to the subject matter in question, as well as of the authorities enforcing copyright protection.*

1. Introduction[1]

Unlike patent law,[2] designs protection,[3] trademarks,[4] designations of origin,[5] geographical indications[6] or plant varieties,[7] copyright protection in EU law is not based on unification through regulations but on harmonization through directives. The exceptions are two EU regulations which, however, regulate very specific copyright issues. The first exception is the Portability Regulation,[8] which regulates copyright protection more indirectly and mainly affects the contractual freedom of copyright content providers.[9] The second exception

1 This paper is the result of a project funded by the Grant Agency of the Czech Republic [Copyrighted Works and the Requirement of Sufficient Precision and Objectivity (GA22-22517S)].

2 Art. 2(b) of Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, pp. 1–8; Art. 2(2) of Regulation (EU) No 1260/2012 of the European Parliament and of the Council of 6 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361, 31.12.2012, pp. 89–92; Art. 4 of Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning supplementary protection certificates for medicinal products (codified version), OJ L 152, 16.6.2009, pp. 1–10.

3 Art. 3(a) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, pp. 1–24.

4 Art. 4 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, pp. 1–99.

5 Art. 5(1) Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on agricultural products and foodstuffs, OJ L 343, 14.12.2012, pp. 1–29.

6 Art. 5(2) Regulation (EU) No 1151/2012.

7 Art. 6 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1.9.1994, pp. 1–30.

8 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168, 30.6.2017, pp. 1–11.

9 Hoffman, Jacklyn, Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union Note. George Washington International Law Review. Volume 49, Issue 1, 2016, pp. 143–173; Spindler, Gerald, Die Modernisierung des europäischen Urheberrechts Der Vorschlag zur Portabilitäts-VO und die Planungen der EU-Kommission. Com-

is the Visually Impaired Regulation,[10] which nevertheless regulates specific issues of cross-border exchange of copyrighted works for visually impaired persons.[11]

The fundamentally different understanding of copyright in the *common-law* countries (*copyright system*) and the continental concept of copyright (*droit d'auteur* system) has not yet allowed the creation of a unified regulation which would regulate the substantive issues of copyright law.[12] However, in view of the challenges posed by economic and technical developments in the field of reproduction and communication technologies, file sharing on information networks, and the growing phenomenon of internet piracy, the European Commission, at an early stage in the development of European integration, created the conditions for the adoption of EU rules on copyright protection through its legislative initiatives.

Over time, the paradigm of the concept of copyright protection, which originally fell, like industrial rights protection, into the field of industrial/economic policy,[13] has changed to an approach where copyright is conceived as protection of the creative activity and interests of authors, entrepreneurs operating in the cultural and scientific sector (publishers, broadcasters), consumers and also as satisfying society interests.[14] The legislative instrument of EU copyright law has been the gradual harmonization of national laws in the Member States through directives that need to be transposed into national laws.[15]

In contrast to the protected objects of industrial property rights, which EU regulations have apparently formulated, the notion of copyrighted works has yet to be explicitly defined in the EU legislation. However, the first copyright directives were adopted in the 1990s, containing certain features of copyrighted works that could be used to establish the characteristics that qualify works of authorship in the EU law. Precisely on this basis, the CJEU, in its case law, started to define the autonomous notion of copyrighted works.[16]

The concept of copyrighted works has been defined explicitly in EU legislation only for three types of copyrighted works:[17] software,[18] databases[19] and photographs.[20] Using slightly different wording, the three different European Directives employ the criterion of "*author's own intellectual creation*", with only a low level of originality required. The consistency of the definitions goes so far that the minor differences can be attributed to less precise translations of the EU legislation rather than to the intention of the EU legislator. Most recently,

puter und Recht. Volume 32, Issue 2, 2016, p. 73–88; Engels/Nordemann, The Portability Regulation (Regulation (EU) 2017/1128): A Commentary on the Scope and Application. JIPITEC. Volume 9, Issue 2, 2018, pp. 179–200.

10 Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, OJ L 242, 20.9.2017, pp. 1–5.

11 Banasuik, Joanna, Implementation of the Marrakesh Treaty-An Input into Discussion from the Perspective of the European Union. Journal of the Copyright Society of the USA. Volume 65, Issue 3, pp. 335–344.

12 Myška, Matěj, Jednotné evropské autorské právo. In: Dobrovolná, Eva et al., Evropské soukromé právo v čase a prostoru. II. díl: Část deskriptivní, analytická a systémově analytická. Masarykova univerzita, Brno 2018, p. 287.

13 Dietz, Adolf, Möglichkeiten der Harmonisierung des Urheberrechts in Europa. GRUR-Int. Issue 3, 1978, p. 104.

14 Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action. COM (88) 172 final, 7 June 1988.

15 Ramalho, Anna, The competence and rationale of EU copyright harmonization. In: Rosati, Eleaonora (ed.) The Routledge Handbook of EU Copyright Law. Routledge, New York (NY) 2021, pp. 3 ff.; Hugenholtz, Bernt, Is Harmonization a Good Thing? The Case of the Copyright Acquis. In: Ohly/Pila, The Europeanization of intellectual property law: towards a European legal methodology. Oxford University Press, Oxford 2013, pp. 58 ff.

16 Rosati, Eleanora, Originality in EU copyright: full harmonization through case law, Edward Elgar, Cheltenham 2013, p. 97 ff.; König, Eva-Marie, Der Werkbegriff in Europa. Mohr Siebeck: Tübigen, 2015, pp. 26 ff.

17 [Ramalho In Rosati, 2021, p. 219].

18 Article 1(3) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), OJ L 111, 5.5.2009, pp. 16–22.

19 Article 3(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, pp. 20–28.

20 Article 6 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, pp. 9–13.

the requirement of a work of authorship as author's "*own intellectual creation*" appears in Article 14 of the DSM Directive.[21]

In this context, we should underline that neither software, nor copyrighted databases, nor photographs are classical works that we would traditionally characterize as "artistic or scientific" works in the light of Article 2(1) of the Berne Convention.[22] On the contrary, the software has been copyrighted since the 1980s;[23] photographic works have several exceptions compared to the traditional works of art,[24] and databases were eligible objects of copyright protection in rather exceptional cases before the adoption of Directive 96/9/EC.[25]

It worth noting that it is precisely on the basis of deviations from the traditional concept of copyrighted works the CJEU began to build its case law on the autonomous EU-wide concept of copyrighted works in 2009.[26] The ground for its legal reasoning was not only the provisions of the harmonization directives, but especially the provisions of Articles 2 to 7 of InfoSoc Directive,[27] which literally became the catalyst for the CJEU's extensive case law on the characteristics of authorial works.

If there were no harmonization of the concept of copyright work through the CJEU case law, it would probably cause malfunctions and disruptions in the whole European copyright system. Specifically, there could be a legislative gap if the concept of a copyrighted work, which is the cornerstone of the entire copyright system, was not defined. As stated by Advocate General *Szpunar* in his opinion on the *Cofemel* judgment, "*it would [...] be pointless to harmonize the various rights enjoyed by authors if the Member States were free to include in or exclude from that protection, whether by legislative means or through case-law, particular subject matter. Sooner or later, the Court was bound to be called on to fill that lacuna through questions referred for a preliminary ruling by courts questioning whether copyright directives are applicable in specific situations*".[28]

2. Characteristics of Copyrighted Works in EU Law

Even at the time of the 2009 *Infopaq* decision there may have been doubts about how far the CJEU intended to harmonize the concept of copyrighted works. However, subsequent decisions have made it clear that the CJEU deliberately set out to create a new line of case law[29] that unifies the characteristics of copyrighted

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21 Article 14 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125.

22 Blomqvist, Jorgen, Primer on International Copyright and Related Rights. Edward Elgar Publishing, Cheltenham (UK), Northampton, MA (USA) 2014, p. 83; Dreier, Thomas (ed.) Concise European copyright law. 2nd ed. Kluwer Law International, Alphen aan den Rijn 2016, p. 14; Goldstein, Paul, International copyright: principles, law, and practice. Oxford University Press, Oxford (UK); New York (USA) 2001, p. 160.

23 Lehmann/Spindler, Computerprogramme. In: Loewenheim, Ulrich (Hrsg.). Handbuch des Urheberrechts, 3. Auflage, C. H. Beck Verlag, München 2021, pp. 110 ff.

24 Dreier, Thomas (ed.) Concise European copyright law. 2nd edition. Kluwer Law International, Alphen aan den Rijn 2016, p. 40.

25 Derclaye, Estelle, The legal protection of databases: a comparative analysis. Edward Elgar, Cheltenham (UK); Northampton (MA) 2008, pp. 2 ff.

26 Judgment of the CJEU in *Infopaq International A/S. v Danske Dagblades Forening* (C-5/08), ECLI:EU:C:2009:465. See also Rosati, Eleanora, Originality in a work, or work of originality: the effects of the *Infopaq* decision. European Intellect Property Review, Volume 33, Issue 12, 2011, pp. 746–755; [Hugenholtz In Ohly/Pila, 2013, pp. 62 ff.].

27 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp. 10–19.

28 Opinion of Advocate General *Szpunar* delivered on 2 May 2019 in *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* (C-683/17), ECLI:EU:C:2019:363, paragraph 24.

29 CJEU judgement in *Bezpečnostní softwarová asociace – Svaz softwarové ochrany proti Ministerstvu kultury* (C-393/09), ECLI:EU:C:2010:816; *Eva-Maria Painer v Standard VerlagsGmbH and Others* (C-145/10); *Football Dataco Ltd and Others v Yahoo UK Limited and Others* (C-604/10), ECLI:EU:C:2011:798; *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08), ECLI:EU:C:2011:631; *Karen Murphy v Media Protection Services Ltd* (C-429/08), ECLI:EU:C:2011:631. See also the opinion of Advocate General *Szpunar* in *Cofemel* case (C-683/17), paragraphs 27 to 29.

works for all categories of authorial works.[30] Quite clearly, then, this general concept of copyrighted works is apparent from the three recent CJEU judgments in *Levola Hengelo*,[31] *Cofemel*[32] and *Brompton Bicycle.*[33]

In its settled case law, the CJEU has defined a work of authorship as "the author's own intellectual creation", which is an autonomous concept of EU law that must be interpreted and applied uniformly.[34]

The CJEU has defined identical criteria of copyright originality for short texts,[35] graphical user interfaces,[36] computer programs,[37] databases,[38] photographs,[39] designs[40] or even works of applied art.[41] What matters for assessing the EU concept of a work of authorship is whether it is the result of the author's own creative intellectual activity.[42] In this respect, the question is to what extent the creation in question was technically or functionally predetermined,[43] since only if the author can combine several elements freely can the work be regarded as the author's own intellectual creation.[44] If, on the other hand, there is no space for creative freedom, copyright protection does not apply to the intellectual result in question, since "*the various ways of carrying out the idea are so limited that the idea and the expression are interchangeable*".[45] Similarly, copyright protection does not apply to creations where there is no scope for "*creative freedom in the copyright sense*" at all, such as in the case of football matches, for example.[46]

Since the author must have creative freedom while creating his or her works of authorship, copyright protection does not extend to "*ideas, processes, methods of operation [...] as such"*[47] because the monopolization of ideas could be detrimental to technical progress and industrial development. For example, suppose the technical function determines the expression of the individual elements. In that case, the various ways of implementing the idea are so limited that the idea and its expression are interchangeable.[48] For that reason, they cannot be subject to copyright protection.

As regards the concept of the author's work as his or her own intellectual creation, it also follows that it must bear the "*stamp of his/her personality*",[49] since through individual decisions made within the framework of

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30 Rosati, Eleanora, Copyright and the Court of Justice of the European Union, Oxford University Press, Oxford 2019, p. 75 ff.

31 Judgment of the CJEU in *Levola Hengelo BV v Smilde Foods BV* (C-310/17), ECLI:EU:C:2018:899, paragraph 36.

32 Judgment of the CJEU in *Cofemel – Sociedade de Vestuário S.A. v G-Star Raw CV* (C-683/17), ECLI:EU:C:2019:721, paragraph 29.

33 Judgment of the CJEU in *SI and Brompton Bicycle Ltd v Chedech / Get2Ge* (C-833/18), ECLI:EU:C:2020:461, paragraphs 22 to 24.

34 *Levola Hengelo*, paragraph 33; *Cofemel*, paragraph 29.

35 *Infopaq International A/S*, paragraph 37.

36 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany*, paragraphs 45 and 56.

37 *Ibid*, paragraph 45.

38 *Football Dataco Ltd*, paragraph 37.

39 *Eva-Maria Painer*, paragraph 87.

40 *Cofemel*, paragraphs 29, 49 and 56.

41 *Brompton Bicycle*, paragraph 26.

42 Although the CJEU has not yet expressed directly on whether the creative activity must be of artistic or scientific character, in our view, the artistic or scientific nature of authorial works originates from the international obligations of the European Union, under the TRIPS Agreement [Article 9(1)], respectively Berne Convention. Therefore, when interpreting EU law, it is necessary to take into account, in particular, the provisions of Article 2(1) of the Berne Convention, which states that "*the expression 'literary and artistic works' includes all creations in the literary, scientific and artistic fields, whatever their mode or form of expression*". The obligation to consider international obligations while interpreting the EU copyright law has been highlighted, for example, in paragraphs 38 and 39 of the *Levola Hengelo* decision, and paragraph 59 of the CJEU judgment in *Martin Luksan v Petrus van der Leto* (C-277/10), ECLI:EU:C:2012:65.

43 *Cofemel*, paragraph 31; *Brompton Bicycle*, paragraph 27.

44 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany*, paragraph 50; *Eva-Maria Painer*, paragraphs 89 and 91; *Football Association Premier League*, paragraph 98; *Cofemel*, paragraph 29; *Brompton Bicycle*, paragraph 22.

45 *Brompton Bicycle*, paragraphs 27 and 31.

46 *Football Association Premier League*, paragraph 98.

47 CJEU judgement in *SAS Institute Inc. v World Programming Ltd* (C-406/10), ECLI:EU:C:2012:259, paragraph 33. See also Inguanez, Daniel, A Refined Approach to Originality in EU Copyright Law in Light of the ECJ's Recent Copyright/Design Cumulation Case Law. IIC, Volume 51, Issue 7, 2020, pp. 797 ff.

48 Tischner, Anna, Copyright protection for a functional shape in so far as it is original. GRUR International, Volume 69, Issue 9, 2020, p. 974.

49 *Eva-Maria Painer*, paragraph 88; *Football Dataco Ltd*, paragraph 38; *Cofemel*, paragraph 30; *Brompton Bicycle*, paragraph 23.

a creative freedom, the author can imprint his or her "*personal touch*"[50] into the result created. Thus, for example, in the case of portrait photography, the personal touch may consist in the choice of "*background, the subject's pose and the lighting*".[51] Furthermore, when taking a photographic portrait, the author may also "*choose the framing, the angle of the image, and the atmosphere created*".[52] Finally, when reproducing a photographic image, the author can choose between "*variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software*".[53] A similar conclusion regarding the reflection of the author's personality applies to the databases protected under the copyright law[54] or, last but not least, to the bicycle.[55]

3. Development of the Requirement of Sufficient Precision and Objective Identifiability of the Copyrighted Subject-Matter in the case law of the CJEU

While the characteristics as mentioned above of the autonomous concept of a copyrighted work under the EU law can be considered more or less consistent with the notion of works of authorship in continental jurisdictions,[56] the CJEU has recently started to use a rather peculiar feature, which consists in the fact that a particular work is a "*sufficiently precise and objectively identifiable subject matter*".[57]

The CJEU adopted this criterion from the area of industrial rights protection, namely trademarks and industrial designs. Regarding trademark protection, the requirement of sufficient precision and objective identifiability of the protected subject matter is particularly relevant for the (non)registrability of non-traditional trademarks, such as scent or taste signs.[58] As regards industrial designs, the requirement means that the protected appearance of the product is clearly identifiable in the Community designs register so that the protected design provides the competent authorities, such as registration offices, with a clear and precise scope of the elements constituting the design, under the requirement of legal certainty.[59] In addition, this criterion aims to enable economic operators to ascertain with clarity and precision what "*registrations or applications for registration*" have been made by "*their current or potential competitors*" so that they can "*obtain relevant information about the rights of third parties*".[60]

The requirement of sufficient precision and objectivity has been used by the CJEU also in the IP Translator case,[61] where the CJEU expressed its opinion on the question of the scope of trademark protection in terms

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50 *Eva-Maria Painer*, paragraph 92.

51 *Eva-Maria Painer*, paragraph 91.

52 Ibid.

53 Ibid.

54 *Football Dataco*, paragraph 38.

55 *Brompton Bicycle*, paragraphs 27 and 31.

56 Probably the closest to the EU concept of a work of authorship, as provided by the Court of Justice, is the French concept of originality, which also consists in the work bearing the personal touch of the author (*l'empreinte de la personnalité de l'auteur sur son œuvre*: Cf. decision of the Cour d'appel de Paris, 1re Chambre, 1er Avril 1957); (*l'empreinte du talent créateur personnel*: Cf. decision of the French Court of Cassation, Chambre civile 1, 13 November 1973, Case No 71-14469). See also Lucas/Lucas, Traité de la propriété littéraire & artistique. Litec, Paris 1994, p. 78. In our opinion, the influence of the French doctrine on the reasoning of the Court of Justice is evident, since the CJEU, like the French courts, concluded that the criterion of originality in the meaning of the imprint of the creator's personality in photographic works lies in the choice of point of view, pose, lighting, photographed subject, etc. See also Vivant/Bruguière, Droit d'auteur et droits voisins. 2nd edition, Dalloz, Paris 2013, pp. 118, 177.

57 *Levola Hengelo*, paragraph 41; *Cofemel*, paragraph 34 a 35; *Brompton Bicycle*, paragraph 25.

58 CJEU judgment in *Ralf Sieckmann v. Deutsches Patent- und Markenamt* (C-273/00), ECLI:EU:C:2002:748, paragraphs 33 and 46; *Shield Mark BV v. Joost Kist h.o.d.n. Memex* (C-283/01), ECLI:EU:C:2003:641, paragraph 55.

59 CJEU judgment in *Mast-Jägermeister SE v EUIPO* (C-217/17-P), ECLI:EU:C:2018:534, paragraph 54. Nevertheless, the CJEU also applied the criterion to unregistered Community designs in *Ferrari SpA v Mansory Design & Holding GmbH and WH* (C-123/20), ECLI:EU:C:2021:889, paragraph 39.

60 Ibid.

61 CJEU judgment in *Chartered Institute of Patent Attorneys v. Registrar of Trade Marks* (C-307/10), ECLI:EU:C:2012:361, paragraphs 47 to 49.

of the classification of the trademarks. Again, this criterion was applied for the sake of third parties' legal certainty regarding the scope of trademark protection.[62]

It is questionable to what extent the criterion of "*sufficiently precise and objective identifiability*", which the CJEU originally applied to registered IP rights, makes sense for copyrights that arise informally. We should also ask about the purpose of this criterion. It is obvious that it is based on the requirement of legal certainty. However, we need to determine whether it is an exclusionary (negative) or an inclusive (positive) criterion.

Whereas in the first decisions in *Levola Hengelo* and *Cofemel* the criterion of precision and objective identifiability was used in the same meaning as in the case of industrial property rights (*Sieckmann*, *IP Translator*, *Mast-Jägermeister SE*), i.e. in an exclusionary (negative) meaning thus it was used to exclude certain features from the intellectual property protection, in *Brompton Bicycle*, on the contrary, it was used in an inclusive (positive) meaning.[63] Moreover, the CJEU used it in a way that gives the strong impression of equating this criterion with the requirement of materializing of the copyrighted work.[64]

4. Sufficiently Precise and Objective Identifiability and Legal Certainty

One of the distinctive features of intellectual property rights is their absolute nature (these rights operate *erga omnes*). For this reason, these rights must have a clearly defined subject matter, their rightsholders, content and scope in order to play their role in society and the market. One of the main principles governing all property rights is thus the principle of legal certainty.[65] It must therefore be evident to third parties (*tertii*) what behavior is expected of them regarding the rules of the legal regulation (in other words, which behavior is legally approved and which can be sanctioned). If we look at the CJEU case law cited above through this lens, we see that the requirement of "*sufficiently precise and objective identifiability*" corresponds to the principles absolute nature of intellectual property rights as traditionally applied in continental jurisdictions.

In its case law, the CJEU establishes two main functions of the requirement of "*sufficiently precise and objective identifiability*". The first is the impact against public authorities registering intellectual property rights[66] or acting as IPRs enforcing authorities.[67] Second, the requirement has effects vis-à-vis individuals or business entities, in particular economic operators (competitors), who "*must be able to identify, clearly and precisely, what is the subject matter of protection which third parties, especially competitors, enjoy*".[68]

The requirement of legal certainty then also justifies the removal from absolute protection all elements that are too subjective to enable third parties to determine whether or not they are under an obligation to refrain from interfering with rights vested in an unclearly defined subject matter. These considerations were also the reason why the CJEU excluded the taste of food from copyright protection[69] or refused to consider the aesthetic effect of the work.[70]

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62 *Chartered Institute of Patent Attorneys v. Registrar of Trade Marks*, paragraph 60.

63 *Brompton Bicycle*, paragraph 28.

64 Ibid.

65 Hazucha, Branislav, Intellectual Property, Private Ordering and Legal Certainty. In: Fenwick/Wrbka (eds.) Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives Springer Singapore Pte. Limited, Sinapore 2016, p. 38; Peukert, Alexander, Güterzuordnung als Rechtsprinzip. Mohr Siebeck, Tübigen 2008, p. 22.

66 *Sieckmann*, paragraph 50; *Chartered Institute of Patent Attorneys*, paragraph 47; *Mast-Jägermeister SE*, paragraph 53.

67 *Levola Hengelo*, paragraph 41; *Cofemel*, paragraph 33.

68 *Levola Hengelo*, paragraph 41; *Sieckmann*, paragraph 51; *Chartered Institute of Patent Attorneys*, paragraph 47; *Mast-Jägermeister SE*, paragraph 54.

69 *Levola Hengelo*, paragraph 41.

70 *Cofemel*, paragraph 53.

5. Requirement of Sufficiently Precise and Objective Identifiability and the Materialization of Authorial Work

It follows from the considerations mentioned above that the requirement of sufficiently precise and objective identifiability produces rather exclusionary consequences in the sense that certain elements are excluded from copyright protection for the sake of legal certainty since their perception and evaluation are too vague or subjective.

However, the requirement of sufficiently precise and objective identifiability should not be equated with what is traditionally referred to in copyright doctrine as the materialization of the work in a perceptible form.[71] In its case law, the CJEU has stated that the EU concept of authorial works includes "*the existence of an original subject-matter in the sense that it is the author's own intellectual creation*" and, at the same time, only those elements which are "*an expression of such a creation*" qualify as a work.[72] According to Article 2(1) of the Berne Convention, literary and artistic works include all creations in the literary, scientific and artistic fields, regardless of the manner or form of their expression. Moreover, according to Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPS Agreement, only expressions, and not ideas, processes, modes of operation or mathematical concepts as such, may be subject to copyright protection.[73]

The result of an author's creation must have a form in which it can be perceived by the human senses (*warnehmbare Formgestaltung*, *perceptible par les sens*). It is, therefore, impossible to protect an idea that has yet to be captured or expressed. In continental jurisdictions, fixed materialization is not necessary.[74] In contrast to United States copyright law,[75] results that have not yet been captured in writing, such as improvised poems or musical performances, may also be protected.[76] Computer graphics and images that temporarily appear on the screen may also be eligible for copyright protection.[77] It is also irrelevant whether the work can be perceived by the human senses directly or only indirectly through a technical device.

In the CJEU's judgment in *Brompton Bicycle*, where the court addressed the question of whether or not a bicycle can be subject to copyright protection, the CJEU, in our view, nevertheless largely merged the requirement of materialization with the requirement of sufficiently precise and objective identifiability stating that "*it appears that the bicycle can be identified with sufficient precision and objectivity*".[78] These are, however, two different things. The first is whether the work is an expression of one's own intellectual creation in a form perceptible to the senses;[79] the second is whether it is an expression which is "*sufficiently precise and objectively identifiable*". The second requirement (precision/objectiveness) here rather develops the first feature (expression), not *vice versa*.

However, in paragraph 28 of the *Brompton Bicycle* judgment, the CJEU incidentally stated that the bicycle can be identified with sufficient clarity and precision. Consequently, the referring court should focus not on the "expression" of the work, but on the issue of the "originality of the author's own intellectual creation", and in this regard, the CJEU develops its reasoning concerning the exclusion of those elements of technical predetermination and those that sufficiently reflects the author's personality.[80] Nevertheless, the reasoning about the notion of expression used by the CJEU gives the impression that an object which the human eyes can easily

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71 [Vivant/Bruguière 2013, p. 140 ff.]; [Loewenheim/Leistner, Das Geschützte Werk. Schutzvoraussetzungen. In: Loewenheim 2021, p. 71].

72 *Levola Hengelo*, paragraph 37; *Cofemel*, paragraph 29.

73 See also reasoning of the CJEU in *Cofemel*, paragraph 39.

74 [Vivant/Bruguière 2013, p. 138]; [Loewenheim/Leistner In: Loewenheim 2021, p. 72].

75 [Goldstein 2001, p. 196].

76 [Vivant/Bruguière 2013, p. 139]; [Loewenheim/Leistner In: Loewenheim 2021, p. 72].

77 Opinion of Advocate General *Yves Bot* in *Bezpečnostní softwarová asociace – Svaz softwarové ochrany proti Ministerstvu kultury* (C-393/09), ECLI:EU:C:2010:611, paragraphs 56, 70 to 78.

78 *Brompton Bicycle*, paragraph 28.

79 *Cofemel*, paragraphs 29 and 32.

80 [Inguanez 2020, p. 807].

perceive (at first glance) is also "*sufficiently precise and objectively identifiable*". Nonetheless, such reasoning suffers from a weakness since the taste of food can also be perceived simply by the human senses just like sounds or images. Also, some visual perceptions, such as flash, gloom, fog, darkness, etc., are perceptible by sight but are not sufficiently precise and objectively identifiable. On the other hand, improvised creations that are not materialized permanently, but only in the form of sound waves, may nevertheless be sufficiently precise and objectively identifiable for the audience (for example, a simple chant that the audience will whistle when leaving the concert). It is therefore not decisive whether the result is simply perceptible to the senses, which aims at fulfilling the condition of materialization in the copyright meaning, but whether the creation is sufficiently precise and objectively identifiable in terms of the legal certainty that is expected by third parties who are obliged to refrain from interfering with absolute rights that might relate to the creation in question.

6. Conclusion

The traditional copyright protection requirement of materializing the author's work, even in ephemeral form, implies that the concepts of "*expression*" and a "*sufficiently precise and objectively identifiable object*" should not be considered synonymous but that the latter concept merely develops the former. From the example of tasteful creations, we can see, that an expression which is perceptible to the senses satisfies the traditional condition of materialization of a copyrighted work in continental jurisdictions; however, it may not be so far "*sufficiently precisely and objectively identifiable*".

Thus, the correct reasoning in paragraph 28 of the *Brompton Bicycle* judgment should have been "*... that the referring court's questions do not refer to the second condition mentioned in paragraph 22 of the present judgment, because the bicycle appears to be expression* ***perceptible by senses*** *and identifiable with sufficient precision and objectivity, but the first condition*". Such a justification would be consistent with the requirements for the materialization of the author's work and the requirement for a sufficiently precise and objective identification of the subject matter of protection.

It can also be concluded that the requirement of sufficiently precise and objective identifiability is intended to have rather exclusionary effects. It thus serves to exclude expressions which are not sufficiently precise and objective identifiable due to the requirement of legal certainty of third parties who are obliged to refrain from interfering with copyright, as well as the legal certainty of the authorities that enforce copyright.

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