REEXAMINING PRECISION AND OBJECTIVITY IN COPYRIGHT PROTECTION FOR NON-TRADITIONAL CREATIONS

Pavel Koukal

Pavel Koukal, Associate professor, Masaryk University, Faculty of Law, Department of Civil Law and Institute of Law and Technology
Veveří 70, 61180 Brno, CZ
pavel.koukal@law.muni.cz

Key words: ***non-traditional creations, copyrighted works, legal certainty, sufficient precision and objectivity***

Abstract: *This paper explores the requirement of „sufficient precision and objectivity" for copyright protection in the EU. It emphasizes the importance of this requirement for legal clarity and delineates its two primary functions: safeguarding against overly subjective elements and enabling clear identification of protected subject matter. While originality remains vital in copyright, the paper focuses on the objectivity of expression. The paper discusses a case involving bullfighting in Spain, where a toreador's performance sought copyright protection but was rejected by the Spanish Supreme Court. The court emphasized the need for the work to reflect the author's personality and be objectively identifiable. It underscores that the requirement for sufficient precision and objectivity primarily pertains to expression, not the issue of originality. In conclusion, the paper highlights the importance of the „sufficient precision and objectivity" requirement in copyright law, clarifying protection boundaries and excluding highly subjective expressions, promoting clarity in intellectual property rights for creators and businesses.*

1. Introduction[1]

Copyrighted works, as established by the case law of the Court of Justice of the European Union (CJEU), are grounded in the principle of originality. In the field of EU copyright protection, the concept of originality stands as a fundamental cornerstone, surpassing national borders and playing a key role in shaping the copyright protection.[2] Nonetheless, this paper will not dive deep into the complex concept of originality.[3] Our

[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] König, Eva-Marie. Der Werkbegriff in Europa: Eine rechtsvergleichende Untersuchung des britischen, französischen und deutschen Urheberrechts. Mohr Siebeck, Tübigen 2015, pp. 44 ff.; Rosati, Eleonora. Copyright and the Court of Justice of the European Union. Oxford University Press, Oxford 2021, pp. 135 ff.; Van Gompel, Stef. Creativity, autonomy and personal touch. A critical appraisal of the CJEU's originality test for copyright. In: Van Eechoud, Mireille (ed.). The Work of Authorship. Amsterdam University Press, Amsterdam 2014, pp. 96 ff.

[3] The concept of originality varies across legal cultures. Initially, in the UK, it required authors to create independently, as seen in the case of *London Press v. University Tutorial Press* ([1916] 2 Ch 601). Later, UK judges considered „labor," „skill," and „judgment," influenced by the United Kingdom House of Lords decision in *Ladbroke v. William Hill* ([1964] 1 All ER 465). In the US, judges adopted two views: one emphasizing intellectual creation and the other, like the „sweat of the brows" doctrine. Nevertheless, the pivotal *Feist* decision (*Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340 (1991), rejected the latter, asserting that copyright should be based on genuine creativity and not mere effort or data collection. Hence, copyright subsists in originality, requiring a minimum level of creativity. In Germany, the „personal intellectual creation" (*persönliche geistige Schöpfung*) requirement in Sec. 2(2) of the *Urheberrechtsgesetz* is crucial for protecting various art forms (Loewenheim, Ulrich; Leistner, Matthias „Persönliche geistige Schöpfung" In: Loewenheim, Ulrich et al. Handbuch des Urheberrechts. 3rd ed. München: C. H. Beck Verlag, 2021, pp. 69 ff.). However, in the past, applied art faced challenges due to the distinction between „limited" copyright for designs and „full" copyright for „pure art." Thus, product designs had to demonstrate a high level of creativity, an „aesthetic surplus," to qualify for copyright protection, limiting it to exceptionally unique designs. Nearly a decade after the Design Directive's (Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection

primary focus here is on another aspect of copyrighted works, specifically the requirement of sufficient precision and objectivity as established by the CJEU in *Levola Hengelo*[4] and *Brompton Bicycle*[5] decisions. In the other CJEU's decisions[6] and the associated doctrine that interprets these rulings,[7] it is understood that for a work to be eligible for copyright protection, it must serve as an expression of the creator's individuality. This means that the work should reflect the author's personality and provide them with a means to express their individuality through the creative choices they make during the creative process.[8]

Although these attributes of the autonomous concept of a copyrighted work under EU law align with the idea of works of authorship in continental jurisdictions, the CJEU has recently introduced a rather specific criterion. This criterion revolves around the notion that a specific work must be a sufficiently precise and objectively identifiable subject matter.[9]

The CJEU has incorporated this criterion into its jurisprudence from the realm of industrial rights protection, specifically in the context of trademarks and industrial designs. In the realm of trademark protection, the stipulation of a „sufficiently precise and objectively identifiable subject matter" holds particular significance when considering the registrability of non-traditional trademarks, such as scent or taste signs.[10] In this context, it ensures that the protected subject matter can be clearly and objectively identified, providing both legal certainty and clarity to registration offices and interested parties.

Concerning industrial designs, this requirement ensures that the visual appearance of a product, which is subject to protection, is readily distinguishable within the Community designs register. By meeting this cri-

---

of designs, OJ L 289, 28.10.1998, pp. 28–35) implementation, the Federal Supreme Court (*Bundesgerichtshof*) in the *Geburtstagszug* case harmonized copyright protection criteria across all categories (BGH, Urteil von 13. 11. 2013 – I ZR 143/12). This ruling removed the need for heightened protection standards for applied art, eliminating the requirement for product designs to surpass the average level of creativity (See Schack, Haimo. [BGH, 13.11.2013 – I ZR 143/12. Urheberrechtsschutz von Werken der angewandten Kunst]. JuristenZeitung. Volume 69, Issue 4, 2014, pp. 201–208; Schulze, Gernot „Werke der angewandten Kunst" In: Loewenheim, Ulrich et al. Handbuch des Urheberrechts. 3rd ed. München: C. H. Beck Verlag, 2021, p. 165). In France, which greatly influenced the CJEU's case-law, the Berne Convention's Article 2(3) emphasizing „original works" has always been highlighted. Although the French *Code de la Propriété Intellectuelle* only mentions originality in Article L 112-4, doctrine and case-law have developed the concept of „original character" as a fundamental aspect of *droit d'auteur* protection ([Caron, Christophe. Droit d'auteur et droits voisins. 6th ed. LexisNexis, Paris 2020, p. 83]; Vivant, Michel; Bruguière, Jean-Michel. Droit d'auteur et droits voisins. 4th ed. Dalloz, Paris 2019, p. 219). According to the classical French definition, originality reflects the author's personality, making it subjective and centered on the author ([Caron 2020, p. 84]; [Vivant/Bruguière 2019, p. 302]). The CJEU adopted this definition in cases like *Infopaq International A/S v Danske Dagblades Forening* (C-5/08), ECLI:EU:C:2009:465 and subsequent rulings. Access to copyright protection, according to the CJEU, requires demonstrating „originality" as „a creation specific to its author," expressing a „personal touch" and „individual expression," along with „free and creative choices." This perspective aligns with French legal principles and has been reinforced by the CJEU in various cases since 2009 [Caron 2020, p. 90]; [Vivant/Bruguière 2019, p. 317].

4 CJEU judgement in *Levola Hengelo BV v Smilde Foods BV* (C-310/17), ECLI:EU:C:2018:899.

5 CJEU judgement in *SI and Brompton Bicycle Ltd v Chedech / Get2Ge* (C-833/18), ECLI:EU:C:2020:461.

6 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; *Cofemel – Sociedade de Vestuário S.A. v G-Star Raw CV* (C-683/17).

7 See mainly Rosati, Eleonora. Why originality in copyright is not and should not be a meaningless requirement. Journal of Intellectual Property Law & Practice. Volume 13, Issue 8, 2018, p. 597–598; [Rosati 2021, pp. 135 ff.]; Sganga, Caterina. The Notion of „Work" in EU Copyright Law after Levola Hengelo: One Answer Given, Three Question Marks Ahead. European Intellectual Property Review. Volume 41, Issue 7, 2019, p. 415 ff.; Stamatoudi, Irini A.; Torremans, Paul, eds. *EU copyright law: a commentary*. Edward Elgar, Cheltenham 2014, p. 1103.

8 *Eva-Maria Painer*, paragraph 88; *Football Dataco Ltd*, paragraph 38; *Cofemel*, paragraph 30; *Brompton Bicycle*, paragraph 23; *Land Nordrhein-Westfalen v. Dirk Renckhoff* (C-161/17), ECLI:EU:C:2018:279, paragraph 53.

9 *Levola Hengelo*, paragraph 41; *Cofemel*, paragraphs 34 and 35; *Brompton Bicycle*, paragraph 25.

10 Geiregat, Simon. Trade Mark Protection for Smells, Tastes and Feels – Critical Analysis of Three Non-Visual Signs in the EU. IIC – International Review of Intellectual Property and Competition Law. Volume 53, Issue 2, 2022, p. 22; Kur, Annette; Senftleben, Martin; Von Bomhard, Verena. European trade mark law: a commentary. Oxford University Press, Oxford 2017, p. 99. See also 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.

terion, the protected design offers registration authorities a clear and well-defined scope of the elements that constitute it, promoting legal certainty.[11]

Furthermore, this criterion serves the purpose of enabling economic operators to easily discern the registrations or applications for registration made by their current or potential competitors. It provides them with the essential information required to understand the rights held by third parties in a clear and precise manner.[12] This clarity empowers businesses to make informed decisions regarding their activities in light of existing intellectual property rights.

2. The Role and Function of the Requirement for Sufficient Precision and Objectivity

Within its jurisprudence, the CJEU delineates two primary functions of the „sufficiently precise and objective identifiability" requirement. Firstly, it serves as a safeguard against public authorities responsible for registering intellectual property rights or enforcing intellectual property rights.[13] Secondly, this requirement carries significant implications for individuals and business entities, particularly economic operators (such as competitors), who must possess the ability to clearly and precisely identify the scope of protection afforded to third parties, especially competitors.[14]

The imperative of legal certainty underpins the necessity of excluding elements that are excessively subjective from receiving absolute protection. This exclusion arises because such subjective elements would impede third parties' ability to determine whether they are obligated to refrain from infringing upon rights associated with a subject matter that lacks a clearly defined scope. Consequently, the CJEU has cited these considerations when it decided to preclude copyright protection for the taste of food[15] and declined to assess the aesthetic effect of a work in certain cases.[16]

It is important to emphasize here that the necessity of sufficient precision and objectivity in copyright is not tied to the originality of the creative outcome but rather pertains to the notion of the expression. When interpreting the relevant case-law of the CJEU, it becomes evident that, as seen in the *Brompton Bicycle*[17] and *Cofemel*[18] cases, a copyrighted work must meet two key criteria. Firstly, it should be the result of the author's original intellectual creation. Simultaneously, this result must be expressed with sufficient precision and objectivity. Therefore, it is our contention that the requirement for sufficient precision and objectivity in

---

[11] [Geiregat 2022, p. 222]. Karimov, Elnur. Non-traditional trade marks in the European Union and Japan: is there an inflating trade mark balloon? Journal of Intellectual Property Law & Practice. Volume 17, Issue 2, 2022, pp. 136–137. 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.

[12] *Mast-Jägermeister SE v EUIPO*, paragraph 54.

[13] Von Bomhard, Elena; Von Mühlendahl, Alexander, eds. Concise European Design Law. Kluwer Law International, Alphen aan den Rijn, 2023, p. 46; [Kur/Senftleben/Bomhard 2017, p. 97]. See also *Sieckmann*, paragraph 50; *Mast-Jägermeister SE*, paragraph 53.

[14] *Levola Hengelo*, paragraph 41; *Sieckmann*, paragraph 51; *Mast-Jägermeister SE*, paragraph 54.

[15] In 2011, *Levola* acquired the intellectual property rights for ‚*Heks'nkaas*,' a curd spread with herbs, along with a patent and trademark. In 2014, *Smilde* began producing a similar product called ‚*Witte Wievenkaas*,' sparking a legal dispute. *Levola* argued that, similar to fragrances (see mainly Judgment of the Hoge Raad der Nederlanden of 16.6.2006 in Case C04/327HR, in *Kecofa B.V. v. Lancôme Parfums et Beauté et Cie S.N.C.,* ECLI:NL:HR:2006:AU8940), the taste of a food product should be eligible for copyright protection based on its originality. *Smilde* disagreed, citing the perishable nature of food products and the subjectivity of taste perception (see decision of the Cour de cassation, civile, Chambre commerciale, 10 décembre 2013, 11-19.872). Recognizing a discrepancy in EU court decisions regarding smell and taste copyrights, the Dutch Court of Appeal sought clarification from the CJEU. They questioned whether EU law permits copyright protection for the flavor of a food product. The CJEU ruled that the subjective and perishable nature of taste precludes it from copyright protection, emphasizing the need for precise and objective identification in copyright law (*Levola Hengelo*, paragraph 41).

[16] *Cofemel*, paragraph 53. See also Güven, Koray. Eliminating 'Aesthetics' from Copyright Law: The Aftermath of *Cofemel*. GRUR International. Volume 71, Issue 3, 2022, p. 221.

[17] *Brompton Bicycle*, paragraph 22.

[18] *Cofemel*, paragraph 29.

EU copyright is not intricately linked to the concept of originality, and it is not primarily concerned with delineating subjective and objective facets of originality.[19] Drawing insights from decisions like *Brompton Bicycle* and *Cofemel*,[20] it becomes clear that this requirement is more closely associated with the aspect of expression (form) itself rather than the notion of originality.[21]

In accordance with the CJEU's jurisprudence, the notion of a copyrighted work is inherently tied to how the subject matter is expressed, ensuring that it can be identified with an adequate level of precision and objectivity, even if this mode of expression is not always permanent.[22] As a result, copyright protection encompasses original modes of expression while excluding ideas, processes, operational methods, or pure mathematical concepts from its scope.[23]

The requirement for sufficient precision and objectivity in copyright law has significant implications, primarily in terms of exclusion.[24] It leads to the exclusion of certain expressions from copyright protection to ensure legal certainty.[25] This exclusion is driven by the recognition that the perception and evaluation of these expressions are too ambiguous or subjective to meet the required standards.

For instance, consider taste identification, which is inherently tied to the subjective experiences and sensory perceptions of individuals when consuming food. Unlike forms of creative work like literature, graphics, cinema, or music, which are conveyed in a clear and objectively identifiable manner, taste identification relies heavily on sensory and perceptual factors influenced by an individual's age, preferences, eating habits, and even the context in which the product is tasted.[26]

Similarly, some visual phenomena, such as fleeting moments of light, shadows, fog, or darkness, while perceptible by sight, may not meet the criteria of sufficient precision and objectivity required for copyright protection.

In essence, the requirement for adequate precision and objectivity precedes the evaluation of originality or the assessment of the creative freedom and choices made by the author to express their personality. It functions as a fundamental filter that excludes results from copyright protection when their perception and assessment lack objectivity.

3. Sufficient Precision and Objectivity in Light of the Spanish Faena Decision

In the upcoming section of this paper, we will explore the matter of precision and objectivity through a specific example involving the Spanish Supreme Court (*Tribunal Supremo*) decision.[27] This example pertains to the question of whether the toreador's movements during the bullfighting performance known as „*faena*"

[19] Differently argues Güven who contends that a closer examination of CJEU case-law reveals that *Cofemel* expanded its role beyond what AG Wathelet had initially envisioned in *Levola Hengelo* (Opinion of AG Wathelet in Levola Hengelo BV v Smilde Foods BV (C-310/17), ECLI: EU:C:2018:618, paragraphs 44–46). In *Levola Hengelo*, AG Wathelet emphasized a distinction between the requirement of being a „work" as an independent condition for protection and the requirement of originality. His primary focus was on achieving objectivity in the „work" condition. However, much like its position in *Levola Hengelo*, the CJEU in *Cofemel* seems to have blended these two conditions. By treating both conditions equally, Güven asserts that CJEU has established objectivity as the central principle, even in evaluating originality. This implies that the issue at hand is not solely whether the subject matter can be objectively identified but also whether the originality of a work can be assessed with precision and objectivity. See [GÜVEN 2022, p. 221].

[20] *Brompton Bicycle*, paragraphs 25 and 28; *Cofemel*, paragraphs 29 and 32.

[21] [Caron 2020, p. 70].

[22] *Levola Hengelo*, paragraph 40.

[23] Mccutcheon, Jani. Levola Hengelo BV v Smilde Foods BV: The Hard Work of Defining a Copyright Work. The Modern Law Review. Volume 82, Issue 5, 2019, p. 947; [Sganga 2019, p. 419]. See also Opinion of AG Wathelet in *Levola Hengelo BV v Smilde Foods BV* (C-310/17), paragraph 55.

[24] [Güven 2022, p. 215], [Mccutcheon 2019, p. 947].

[25] Sganga, Caterina. Say nay to a tastier copyright: why the CJEU should deny copyright protection for taste (and smells). Journal of Intellectual Property Law & Practice. Volume 14, Issue 3, 2019, p. 189.

[26] Opinion of AG Wathelet in *Levola Hengelo BV v Smilde Foods BV* (C-310/17), paragraph 42.

[27] Sentencia civil No. 82/2021, Tribunal Supremo, Sala de lo Civil, Sección 1, Rec 1443/2018 de 16 de Febrero de 2021. [online; Accessed 15. 11. 2023]. Available at: https://vlex.es/vid/861561649.

can be eligible for copyright protection, or if such performances lack the required precision. Finally, we will conclude with our final analysis.

Bullfighting, also known as „*toreo*" or „*tauromaquia*" in Spanish, is a traditional practice observed in various countries worldwide, including Mexico, Colombia, Ecuador, and Portugal.[28] However, it is most renowned for its association with Spain. The bullfight, referred to as „*corrida*" or more broadly as „*faena*" in Spanish, involves a physical contest where toreros, and sometimes other animals like horses, attempt to subdue a bull breed native to the Iberian Peninsula, until its demise. Bullfighting is often regarded by its enthusiasts as both a sport and a performance art.[29]

Bullfighting has a long history in Spain, dating back to ancient times, and has evolved into a highly ritualized and symbolic practice. The event typically consists of three stages, each with its own set of rules and conventions.[30] The first stage involves the torero using a large cape to assess the bull's behavior and agility. In the second stage, the picadors, mounted on horseback, weaken the bull by lancing its neck muscles, making it less dangerous for the matador. Finally, in the third stage, the matador, on foot, engages in a series of intricate maneuvers with the bull, ultimately leading to the bull's demise with a well-placed sword thrust.

In this context, although copyright protection automatically arises upon the creation of a work in Spain, the prominent Spanish torero *Miguel Ángel Perera Díaz* still opted to register a specific bullfight[31] under the name „Fuero de 2 orejas con petición de rabo al toro curioso nº94, de peso 539 Kg, nacido en Febrero de 2010, Ganadería Garcigrande, feria de San Juan, día 22 de Junio de 2014" with the Spanish Copyright Registry.

Perera's application included an audiovisual recording of the bullfight and a description detailing various human body and hand movements, as well as the bull's actions.[32] The Copyright Registry declined to register the mentioned bullfight, citing that it did not meet the necessary legal criteria to qualify as a work.[33] The initial decision of the Commercial Court of Badajoz[34] aligned with the Registrar's stance, and this ruling was subsequently appealed before the Provincial Court of Badajoz,[35] where the decision mirrored that of the lower court.

Ultimately, the matter was taken to the Spanish Supreme Court through a cassation appeal.[36] In this final stage of the litigation, the Supreme Court introduced new arguments into the ongoing controversy and, after careful consideration, concluded by rejecting the registration of the bullfighter's performance in the copyright registry.

The court of first instance dismissed the claim on the basis that it did not qualify as an artistic creation, drawing inspiration from a CJEU ruling in *Football Association Premier League*, where the Court specifically dealt with the question of whether the actions or matches played by a football player could be eligible for copyright protection. The CJEU concluded that, given the comprehensive regulations governing football

---

[28] Vega, Angie. Legal Framework of Bullfighting and Societal Context in Colombia. Journal of Animal & Natural Resource Law. Volume 14, Issue 1, 2018, p. 103.

[29] Xalabarder, Raquel. „Football, Copyright … and the Art of ‚Tiki-Taka'?" In: Senftleben, Martin. Intellectual Property and Sports: Essays in Honour of P. Bernt Hugenholtz. Kluwer Law International, Alphen aan den Rijn, 2021, p. 140.

[30] Thompson, Kirrilly. Narratives of Tradition: The Invention of Mounted Bullfighting as „the Newest but Also the Oldest". Social Science History. Volume 34, Issue 4, 2010, p. 530.

[31] Santos, Martín; Sofía, Victoria. Bullfighting denied copyright protection by Spanish Supreme Court. Journal of Intellectual Property Law & Practice. Volume 16, Issue 3, 2021, p. 198.

[32] Altaba, Simon. Marc. Is a Bullfight a Work of Art? Not in Spain Apparently. IIC – International Review of Intellectual Property and Competition Law, Volume 52, Issue 6, 2021, p. 810.

[33] In this instance, the submission for registration pertained to a specific performance characterized by the following actions: „The bullfighter executes a ‚mano izquierda al natural' maneuver, switching hands behind his back, and then performs a pass with his right hand. Subsequently, as the bull charges, the bullfighter approaches, executing a pass over the top with his right hand" (Sententia civil No. 110/2017, Juzgado de lo Mercantil, Sección 1 de Badajoz (10 de abril de 2017). [online]. Available at: https://www.todanelo.com/sites/default/files/common/170419_pi_-_sentencia_toreo.pdf).

[34] Sententia civil No. 110/2017.

[35] [Altaba 2021, p. 811].

[36] Sentencia civil No. 82/2021, Tribunal Supremo, Sala de lo Civil, Sección 1.

matches and the limited creative freedom of players within those regulations, football matches did not leave room for creative freedom in the context of copyright.[37]

This interpretation was then applied to the current case, contending that bullfighters' performances were also subject to extensive regulations that restricted creative freedom. The comprehensive regulations in bullfighting covered various aspects of the performance, from the characteristics of the bull to the dimensions of the bullring, thereby limiting the bullfighter's artistic expression. Consequently, the initial court believed that the bullfighter lacked the necessary creative freedom to be eligible for protection under intellectual property law.[38]

Subsequently, the plaintiff appealed to the Provincial Court of Badajoz, but the outcome remained still negative.[39] In this instance, the rejection was based on questioning the originality of the bullfighter's performance. The argument put forth was that it was impossible to describe a specific „*faena*" (bullfighting performance) in a manner that distinguished it sufficiently from others, leading to inevitable confusion among similar performances. Additionally, it was argued that during the intense moments of a bullfight, where the bullfighter's safety was at stake, it would be impractical and potentially dangerous for bullfighters to consider whether their actions might infringe on copyright. Furthermore, accepting such applications could lead to a flood of registrations from bullfighters, potentially jeopardizing the practice of bullfighting.

Despite these rejections, the plaintiff pursued an appeal in cassation with the Spanish Supreme Court, alleging violations of specific articles related to intellectual property. In this appeal, the plaintiff contended that Article 10 of the Spanish Copyright Act[40] had not been correctly interpreted, emphasizing that this article included an open list of cases eligible for copyright protection.

In the end, the Supreme Court rejected the appeals, stating that the CJEU's doctrine regarding sports events did not apply to bullfighting. Bullfighting, it argued, had both artistic and cultural dimensions, making it unique and distinct from sports events. However, this did not immediately qualify bullfighting performances for copyright protection. To be eligible for such protection, bullfighter performances had to meet the specific criteria set forth by the CJEU for works subject to copyright.

The Spanish Supreme Court highlighted the two cumulative elements that constituted a work eligible for copyright protection, as outlined by the CJEU's case law. Firstly, there needed to be an original object representing the author's intellectual creation. Secondly, this object had to be identifiable with sufficient precision and objectivity. The Court emphasized that for an object to be considered original, it had to demonstrate the author's personality, reflecting their creative choices made freely. Additionally, the object had to be precisely and objectively defined, ensuring clarity for both authorities responsible for protection and third parties seeking to avoid copyright infringement.[41]

The Court argued that the uniqueness of a bullfighting performance depended on various factors, including the specific characteristics of the bull, making each performance inherently distinct. Additionally, the interpretation of bullfighting by individual bullfighters contributed to its originality. However, it stressed that these performances had to adhere to both criteria set forth by the CJEU.

In this context, the Spanish Supreme Court referenced the *Levola Hengelo* ruling and determined that it was not possible to definitively delineate a „*faena*" with the required precision since the resulting artistic work could not be objectively identified. Moreover, the Supreme Court rejected the comparison between „*faenas*"

37 *Football Association Premier League*, paragraphs 98 and 99.

38 Sententia civil No. 110/2017, Juzgado de lo Mercantil, Sección 1 de Badajoz.

39 Sentencia civil No. 82/2021, Tribunal Supremo, Sala de lo Civil, Sección 1, part 1, paragraph 4.

40 Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, Publicado en núm. 97, de 22. 4. 1996 [online; Accessed 15. 11. 2023]. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930.

41 Sentencia civil No. 82/2021, Tribunal Supremo, Sala de lo Civil, Sección 1, part 3, paragraphs 7 and 8.

and choreographic works, noting that choreographies typically articulate a sequence of steps and movements in a manner that facilitates their precise and objective recognition.[42]

4. Defining the Quality (Preciseness, Objectiveness) of the Expression

Since 2013 in France[43] and 2018 in European Union law,[44] jurisprudence has required that the expression of the copyrighted works possesses new qualities: it must be sufficiently precise while remaining objective.

On one hand, it is essential that the expression of a work be sufficiently precise. This precision serves a critical purpose by enabling the clear demarcation of the boundaries between what falls within the domain of copyright protection and what exists within the public domain. In the realm of copyright law, this precision holds particular significance since there is no requirement for formal registration, unlike in industrial property law, where registered trademarks, patents, or designs offer third parties and economic actors' explicit information about the extent of protection.[45]

We contend that the criteria of sufficient precision and objectivity predominantly relate to the expression of the work rather than the originality of the specific outcome. While it is equally imperative to assess originality objectively,[46] it is equally essential to distinguish between the quality of originality and the quality of expression (form). The decisions made in cases such as *Brompton Bicycle*[47] and *Levola Hengelo*[48] by the CJEU underscore that both expression and originality are distinct concepts. Therefore, when evaluating the prerequisites for copyright protection, the initial step is to identify the expression and ascertain whether it has been taken with sufficient precision and objectivity. This ensures that „authorities responsible for safeguarding exclusive rights" and „individuals, especially economic operators," can identify the protected elements with a high degree of legal certainty.[49]

Drawing from existing case law that deals with the requirement of sufficient precision and objectivity, it becomes evident that this criterion serves the purpose of excluding non-conventional expressions from copyright protection. Examples include tastes, perfumes, or overly broad genres such as „faenas."

In this context, it is crucial to emphasize that in addition to being sufficiently precise, the expression of a work must also be universally objective to qualify for copyright protection. In other words, it should be perceived in an identical manner by all without subjective interpretations. Indeed, if each person were to perceive a different form based on their individual tastes or the physical movements of a toreador, it would become virtually impossible to make a clear distinction between what is protected and what is not, as interpretations would vary widely among individuals.[50]

For these reasons, forms of expression such as fragrances in perfumes, tastes, the movements of toreadors or similar genre performers, and elements that are highly subjective like the atmosphere, feelings, applause, and the like are considered ineligible for copyright protection. This is because they not only lack precision but are also subject to varying, subjective interpretations among different individuals.

---

42 „This precise and objective identification, in addition to facilitating reproduction, allows both third parties and authorities responsible for protecting intellectual property to identify the nature of the creation. The same cannot be said for a bullfight, where, beyond the specific passes, maneuvers, and skills, for which exclusivity cannot be claimed, it is very difficult to objectively identify the original artistic creation to grant it the exclusive rights typical of a work of intellectual property". Sentencia civil No. 82/2021, Tribunal Supremo, Sala de lo Civil, Sección 1, part three, paragraph 8. See also [ALTABA 2021, p. 816].

43 Cour de cassation, civile, Chambre commerciale, 10 décembre 2013, 11-19.872.

44 *Levola Hengelo*, paragraphs 40 and 46.

45 [Caron 2020, p. 70].

46 [Güven 2022, p. 222].

47 *Brompton Bicycle*, paragraph 22.

48 *Levola Hengelo*, paragraphs 35 – 37.

49 *Levola Hengelo*, paragraph 41.

50 Sentencia civil No. 82/2021, Tribunal Supremo, Sala de lo Civil, Sección 1, part 3, paragraph 8.

5. References

Altaba, Simon Marc. Is a Bullfight a Work of Art? Not in Spain Apparently. IIC – International Review of Intellectual Property and Competition Law, Volume 52, Issue 6, 2021, pp. 807–819.

Von Bomhard, Elena; von Mühlendahl, Alexander (eds.) Concise European Design Law. Kluwer Law International, Alphen aan den Rijn 2023, pp. 416.

Caron, Christophe. Droit d'auteur et droits voisins. 6th ed. LexisNexis, Paris 2020, pp. 715.

Geiregat, Simon. Trade Mark Protection for Smells, Tastes and Feels – Critical Analysis of Three Non-Visual Signs in the EU. IIC – International Review of Intellectual Property and Competition Law Volume 53, Issue 2, 2022, 219–245.

Güven, Koray. Eliminating 'Aesthetics' from Copyright Law: The Aftermath of Cofemel. GRUR International Volume 71, Issue 3, [online]. 2022, pp. 213–225.

Karimov, Elnur. Non-traditional trade marks in the European Union and Japan: is there an inflating trade mark balloon? Journal of Intellectual Property Law & Practice Volume 17, Issue 2, 2022, pp. 132–148.

König, Eva-Marie. Der Werkbegriff in Europa: Eine rechtsvergleichende Untersuchung des britischen, französischen und deutschen Urheberrechts. Mohr Siebeck, Tübigen 2015, pp. 448.

Kur, Annette; Senftleben, Martin; Bomhard, Verena von. European trade mark law: a commentary. Oxford University Press, Oxford: 2017, pp. 796.

Loewenheim, Ulrich et al. Handbuch des Urheberrechts. 3rd ed. C. H. Beck Verlag, München 2021, pp. 2718.

Mccutcheon, Jani. Levola Hengelo BV v Smilde Foods BV: The Hard Work of Defining a Copyright Work. The Modern Law Review, Volume 82, Issue 5, 2019, pp. 936–950.

Rosati, Eleonora. Why originality in copyright is not and should not be a meaningless requirement. Journal of Intellectual Property Law & Practice. Volume 13, Issue 8, 2018, pp. 597–598.

Rosati, Eleonora. Copyright and the Court of Justice of the European Union. Oxford University Press, Oxford 2021, pp. 512.

Santos, Martín; Sofía, Victoria. Bullfighting denied copyright protection by Spanish Supreme Court. Journal of Intellectual Property Law & Practice Volume 16, Issue 3, 2021, pp. 198–199.

Sganga, Caterina. Say nay to a tastier copyright: why the CJEU should deny copyright protection for taste (and smells). Journal of Intellectual Property Law & Practice, Volume 14, Issue 3, 2019, pp. 187–196.

Sganga, Caterina. The Notion of „Work" in EU Copyright Law after Levola Hengelo: One Answer Given, Three Question Marks Ahead. European Intellectual Property Review, Volume 41, Issue 7, 2019, pp. 415–424.

Schack, Haimo. [BGH, 13.11.2013 – I ZR 143/12. Urheberrechtsschutz von Werken der angewandten Kunst]. *JuristenZeitung*. Volume 69, Issue 4, 2014, pp. 201–208.

Stamatoudi, Irini A.; Torremans, Paul, eds. EU copyright law: a commentary. Edward Elgar, Cheltenham 2014, pp. 1227.

Thompson, Kirrilly. Narratives of Tradition: The Invention of Mounted Bullfighting as „the Newest but Also the Oldest". Social Science History. Volume 34, Issue 4, 2010, pp. 523–561.

Van Gompel, Stef. „Creativity, autonomy and personal touch. A critical appraisal of the CJEU's originality test for copyright". In: VAN EECHOUD, MIREILLE (ed.). The Work of Authorship. Amsterdam University Press, Amsterdam 2014, pp. 95–144.

Vega, Angie. Legal Framework of Bullfighting and Societal Context in Colombia. Journal of Animal & Natural Resource Law, Volume 14, Issue 1, 2018, pp. 103–130.

Vivant, Michel; Bruguière, Jean-Michel. Droit d'auteur et droits voisins. 4th ed. Dalloz, Paris 2019, pp. 1385.

Xalabarder, Raquel. „Football, Copyright … and the Art of „Tiki-Taka"? In: SENFTLEBEN, MARTIN. Intellectual Property and Sports: Essaysin Honour of P. Bernt Hugenholtz. Kluwer Law International, Alphen aan den Rijn 2021, pp. 131–142.