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ARTICLE

# A Narrative Approach to the Standard of Originality in EU Copyright Law: The Story of a Dress

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**Abstract** "Originality" is the key requirement for copyright protection in the EU. Judgements of the Court of Justice of the European Union (CJEU) such as *Painer* and *Brompton* show that many aspects of the *standard of originality* are linked as much to the creative process as to the resulting subject matter. This is particularly true for the "free and creative choices" that authors must make when producing a copyright-protected work. However, we do not have much information about how the standard of originality is manifested in the practices of the creative sectors, especially when it comes to applied arts and industrial design, such as fashion design. Combining a narrative approach to research with the doctrinal study of law, this article examines a creative process by following the journey of the design of a garment – a dress – from idea to expression. The narrative is used as a case study to illustrate the kinds of choices made in the creative process that are significant for the dress to merit copyright protection. The significance of these copyright-relevant choices is contrasted with EU design law where they may lead to a different protection outcome. It is concluded that the more information we have about the creative process of an artistic work – regardless of category – the more accurately we can assess whether it qualifies for copyright protection. The article further argues that the process of fashion design is not inherently any less creative than other, less controversial, areas of copyright protection.

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## 1 Introduction

In European Union (EU) copyright law, the concept of "originality" – the *sine qua non* for a work to be protected – focuses on the "free and creative choices" that authors make when producing work. The importance of such choices was highlighted in CJEU judgments *Painer* (2011) and *Brompton* (2020).[1] The emphasis on the "free and creative choices" in the production of the work signals that the ability of a subject matter to meet this standard depends not only on the *outcome* of the creative process, but also on the *process itself*.[2] However, the problem is that we do not have much information about how these "free and creative choices", and thus fulfilment of the standard of originality, work in practice. By focusing on the choices made in the creative process, *Painer* and *Brompton* suggest that the fulfilment of this standard depends in part on *subjective* factors. This creates tension with the fact that the assessment of originality in courts must be objective. However, there seems to be a gap in legal scholarship when it comes to examining the creative *process* from a copyright perspective. Using a method that is rather unorthodox in legal scholarship – a *narrative approach* to research – this article aims to fill this gap by examining how the EU standard of originality functions in practice during the creative process.

Recently, it has become clear that the EU copyright regime still lacks a practical, clear framework for courts to assess whether a creation truly results from the "free and creative choices" made by its authors in the production process. The lack of such guidance can be seen, *inter alia*, in recent requests for preliminary rulings from the CJEU. In *Mio* (September 2023),[3] the Svea Court of Appeal (Sweden) asked the CJEU, *inter alia*, about the relevance of factors relating to the creative process when assessing originality. In *USM Haller* (December 2023), the German Federal Supreme Court asked the CJEU, *inter alia*, whether, when assessing originality under copyright law, the court should also take into account the author's subjective view of the creative process and their consciously made creative decisions.[4] Interestingly, both *Mio* and *USM Haller* concern products of applied art: in *Mio* a table, and in *USM Haller* a modular furniture system. This may reflect the fact that applied art is perhaps the most controversial category of work in the history of copyright. Although this article is not intended to suggest what the CJEU should decide in either *Mio* or *USM Haller,* these references make the theme of this article timely, as they suggest that there is a need to have a look at how the copyright-

[1] Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH et al*. ECLI:EU:C:2011:798; and Case C-833/18 *SI, Brompton Bicycle Ltd v. Chedech/Get2Get* ECLI:EU:C:2020:461.

[2] Mattila (2022), pp. 35, 42, 45.

[3] Case C-580/23 *Mio et al*., 21 September 2023.

[4] Case C-795/23 *USM Haller,* 21 December 2023.

relevant free and creative choices and the personality of the creator can manifest themselves in the field of design.[5]

Applied art – i.e. a product that combines artistic character and utilitarian purpose – includes categories of work that have traditionally been treated with scepticism by courts and copyright law scholars in terms of eligibility for protection. One example of such a category of work is *fashion design*. Fashion designers' ability to make free and creative choices is often questioned, as it is generally assumed that external factors, such as functionality and trends dominate their creative process. But how can we know this when we have very little or no information about these creative processes, specifically about the free and creative choices that their author(s) may or may not have made?

Part of the problem is that the scholarly view of garment design tends to be from the *outside*: it is safe to assume that most legal scholars are not themselves familiar with garment design processes and thus can only examine the originality of subject matter externally by focusing on the *result* of the creative process. Although the result is certainly not meaningless, this perspective may not provide much information about the copyright-relevant free and creative choices made by the author in the production of the subject matter. However, changing the perspective from an external to an *internal* view of the creative process can help us to find new information about how the EU standard of originality works in practice. A *narrative approach* to copyright research can be useful in achieving this goal. Using a narrative case study, this article illustrates how these copyright-relevant free and creative choices can appear in the creation of a fashion design. The aim of this article is to demonstrate that the process of fashion design is not inherently less creative than other, less controversial, areas of copyright protection. Authors of original fashion designs therefore deserve to have their works protected, just as authors in any other field of creativity do.

The narrative approach of this article introduces a reverse perspective, a "bottom-up" approach to the EU standard of originality. Originality is examined not only from a doctrinal viewpoint, but also from the *inside of the creative process*. The author of this article is both a non-commercial fashion designer and a lawyer. This article includes a narrative ("Narrative"), which is written by the author as a designer. The Narrative is used as a case study for the doctrinal analysis, which is written by the author as a legal scholar. The main academic contribution of this article is to use the narrative approach to identify copyright-relevant choices in fashion design, and more generally, to clarify how the EU standard of originality applies to works of applied art. This article aims to clarify the issue by showing how free and creative choices can emerge in a creative process that is, in part, constrained by functional considerations, a strict dress code and other restrictions on creativity.[6] The legal significance of these copyright-relevant choices will then be contrasted with EU design law where they may lead to a completely different

[5] *See also* Tischner (2020), p. 974.

[6] The focus is on the "birth" of originality. Reciprocity between originality and the scope of protection is excluded and remains a topic for further research.

outcome in terms of qualification for protection.[7] The copyright relevance of the choices made by designers are analysed against the background of recent developments in EU copyright law, in particular CJEU case-law and its interpretation of the InfoSoc Directive.[8]

The article is structured as follows: First, there is a brief overview of the chosen methodologies. The article then analyses the EU standard of originality from a garment design perspective. The copyright analysis is then contrasted with EU design law by examining how the requirement of "individual character" can be incorporated into a garment inspired by earlier designs. Next, the article considers what originality in fashion design is *not* about, focusing on some common misconceptions. The final section presents concluding remarks and recommendations to national courts in the EU Member States.

## 2 Combining the Doctrinal Study of Law with a Narrative Research Approach

A narrative approach to research structures our experience of the world around us into meaningful units. One such meaningful unit is a story, a narrative.[9] This approach to research is a relatively new branch within the tradition of qualitative research.[10] As a qualitative method, a narrative research approach relies on criteria other than validity, reliability, and generalisability. Instead, apparency, verisimilitude and transferability may be more appropriate criteria.[11] A narrative is a frame of reference and a way of reflecting.[12] A good narrative is an "invitation" to participate: it invites the reader to look where the narrator has looked, and to see what they have seen.[13]

Narratives have been used, *inter alia*, in education studies[14] and social sciences.[15] In law, a narrative approach to research is rather unusual, but not unknown.[16] Narratives can provide an illuminating context for legal rules and a

[7] The comparison between copyright and design law protection requirements is included to reinforce the power of the narrative approach, which focuses on the author's journey, reflecting the author-centric standard of originality in EU copyright law. Due to the limited length of the article, no deeper analysis of the relevance of free and creative choices from the perspective of design law has been made.

[8] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, pp. 10–19.

[9] Moean (2006), p. 57.

[10] Connelly and Clandinin (1990), p. 3; Moean (2006), p. 65.

[11] Connelly and Clandinin (1990), p. 7.

[12] Moean (2006), p. 57.

[13] Connelly and Clandinin (1990), p. 8.

[14] Moean (2006), p. 57; Connelly and Clandinin (1990), p. 2.

[15] Heikkinen (2002), p. 14.

[16] Wolff (2014), p. 14; Brooks (2002), p. 2. Narratives have been used, *e.g.*, in multidisciplinary legal studies. For example, Tatu Tuominen uses a narrative approach to authorship by analysing his own work as an artist (Tuominen 2020). Heidi Härkönen and Rosa Ballardini analyse narratives concerning Heidi Pietarinen's and Melanie Sarantou's artistic creation from a copyright point of view in Härkönen et al. (2023).

certain frame of reference for dogmatic analysis. After all, "law lives on narrative".[17] Narratives are not just stories that describe "hard facts"; they *construct* the facts of which they are comprised. Much of human reality and its "facts" is therefore constituted by narratives.[18] In legal practice, clients tell stories to their lawyers, who must then figure out their legal relevance.[19] In legal research, a narrative approach combined with a more traditional legal research method can illuminate how legal rules work in practice.[20] It can link real-life events to legally meaningful concepts in a way that helps lawyers and judges understand areas with which they are unfamiliar. In courts, narratives by fashion consultants have occasionally been used to bridge the visual literacy gap between lawyers and fashion experts.[21]

In particular, a narrative approach can add information to research topics that relate to the innermost experiences of a natural person.[22] In intellectual property (IP) law, the notion of *originality* is particularly worthy of analysis using a narrative approach. As Annette Kur notes, most often "creative processes cannot be watched directly, but are necessarily appraised on the basis of the results they have yielded".[23] A narrative can act as a window through which to view this creative process. As noted above, the EU standard of originality is closely linked to the free and creative choices of the author. Anthony G. Amsterdam and Jerome Bruner stress that the *choices* that people make can have legal significance, and narratives are a way of revealing those choices.[24] The narrative approach was chosen for this article to illuminate the making of such legally relevant choices, to show how the requirement for copyright protection – originality – is fulfilled in practice, and what kind of factors in the creative process affect the fulfilment of such requirement. The Narrative may also highlight some discrepancies between the creator's perspective and the lawyer's perspective when it comes to originality in fashion design.[25] On a practical level, combining the doctrinal study of law with a narrative approach can provide tools for courts and litigators when assessing whether a work meets the threshold of originality. Even though laws per se must be objective, leaving little room for subjective factors, the latter are not legally irrelevant, as they will be considered in depth by the courts.

The Narrative in this article, the "story" that provides a frame of reference for the doctrinal analysis, is that of the design and production process of the doctoral

[17] Amsterdam and Bruner (2000), p. 110.

[18] *ibid.*, pp. 111, 116.

[19] *ibid.,* p. 110.

[20] Wolff (2014), pp. 5–6, 14.

[21] Bellido (2014), pp. 74–75.

[22] Wolff (2014), pp. 14–15.

[23] Kur (2019), p. 10.

[24] Amsterdam and Bruner (2000), p. 111.

[25] On mismatches between the understanding of IP rights in various creative fields and in the legal profession, *see* Murray et al. (2014).

defence[26] dress created by the author of this article. The Narrative is an invitation to look at the creative process of this dress through the eyes of its creator, and to see what she saw. The Narrative consists of journal-type notes on the creation of this dress, describing the most significant choices made when producing it. Starting from Section 3.4 "The Intersection Between Inspiration, Imitation, and the Author's Own Intellectual Creation", the Narrative goes hand-in-hand with the doctrinal analysis of this article. The narrative parts of the text are italicised and indented. The Narrative is divided into meaningful elements from an IP law perspective: for example, limitations on creativity; the balance between inspiration and innovation; functionality and technical considerations.

Before introducing the Narrative to the reader, it is important to address some issues regarding this approach and its divergence from more traditional legal research. Typically, legal research aims to create an illusion of objectivity. It may therefore be difficult to see the place of narrative within the legal research tradition. However, behind every piece of legal research there is a real person with their own view of the world,[27] even if their research is not written in a narrative form. "The subjectivity of cognition" is the central difference between traditional qualitative research and narrative research.[28] Subjectivity is therefore essential to the narrative research approach. Unlike traditional qualitative research, which is primarily concerned with appearing "scientific" in the empirical sense of the word, narrative research has different aims. It does not seek objective or generalised knowledge, but rather *local*, *personal* and *subjective knowledge*.[29] The narrative research approach is thus open to criticism because of the risk of falling into narcissism or solipsism.[30] Therefore, when using this research approach, it is important that the narrative storyteller never attempts to mislead the reader: this undermines the story's authority and the author's credibility.[31] It is further noted that narratives play a central role in the fashion sector: Véronique Pouillard points out that luxury fashion houses in particular promote their narratives of authenticity with the help of IPR systems in order to market their goods and services. These fashion narratives can be partly historical and partly fictional, and should therefore not be substituted for, or confused with, academic study.[32]

In the light of the above, it is worth highlighting a few points in relation to the Narrative in this article. Firstly, although the Narrative sheds light on the authorial process of a particular fashion creation, its observations cannot be generalised to apply to *all* authorial processes in the same category: each creative process is different. Secondly, the subject of the Narrative is a non-commercial design made for private purposes. Therefore, in assessing its originality, any bias on the part of

[26] The public defence of the author's doctoral dissertation "Fashion and Copyright: Protection as a Tool to Foster Sustainable Development", University of Lapland, Faculty of Law, 10 September 2021.

[27] *See also* Heikkinen (2002), pp. 21–22.

[28] *ibid.,* p. 18.

[29] *ibid.*

[30] Connelly and Clandinin (1990), p. 10.

[31] Heikkinen (2002), p. 25.

[32] Pouillard (2021a), pp. 403–404, 416.

the author of this article – the subjectivity of the Narrative – has no commercial or pecuniary significance. Finally, the doctrinal analysis is not based on the Narrative, but on EU copyright law and its interpretation. The Narrative itself does not aim to provide a complete or definite answer to the question of originality in fashion design. Instead, it acts as a "window" through which the reader can look at complex legal concepts, as they arise in practice, from the perspective of an author of a work of applied art.

## 3 What is Originality?

### 3.1 Originality in Fashion and Works of Applied Art

The conditions for copyright protection of *works of applied art* constitute one of the most sensitive issues in copyright law, even among EU Member States.[33] In the copyright tradition, the distinction between "pure art" and "applied art" draws a line between creations that are purely aesthetic (such as paintings, sculptures, and other works of fine art) and creations that also have a functional purpose, like clothing, accessories, jewellery, and home décor. A certain "subcategory" of the academic debate on applied art has been the possibility of protecting *fashion designs*.[34]

What may cause some confusion in the fashion/copyright debate is that there are essentially two interrelated industries in fashion: haute couture and ready-to-wear (RTW), which exist in a symbiotic and productive relationship. Yet there are strong narratives of opposition between these two very different industries, owing to the divergent nature of the two: the couture trade is based on local craftsmanship in fashion capitals, and RTW is generally based on mass production in countries where manufacturing costs are low.[35] For more than 100 years (i.e. the entire existence of the RTW industry), couturiers have tried to distance themselves from RTW fashion.[36] Of these two interrelated industries, haute couture undeniably involves artistic creation, and this subcategory of fashion has marketed itself as a form of high art. Véronique Pouillard describes how, in the 1920s, French author's rights case-law was developed to elevate haute couture to the status of art.[37] RTW designs, on the other hand, are often influenced by haute couture, but generally interpret couture creations in a much more toned-down manner. IPRs have "helped" to manage this tension by making a distinction between fine art, applied art and industrial design, utilising the different scope of the copyright and design regimes.[38]

[33] Kur (2019), p. 14.

[34] *See, e.g.*, Raustiala and Sprigman (2006, 2012), Derclaye (2010), Teilmann-Lock (2012), Kur (2014), Härkönen (2021) and Monseau (2023). The theme also addresses the ability of works of applied art to meet the originality threshold under the same conditions as other categories of work, as well as the overlap in protection between copyright and design rights; *see, e.g.*, Bently (2012); Derclaye (2020); Kur (2019).

[35] *See also* Pouillard (2021b), p. 3.

[36] *ibid.*, p. 38.

[37] *ibid.*, p. 54.

[38] *See, e.g.*, Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 3 and Kur (2014), pp. 182–183.

Such a distinction has generally pushed applied art and industrial design, including RTW fashion, towards the design regime, while reserving copyright for fine art, including haute couture.[39]

However, the usefulness of the distinction in IP law described above is questionable. A strict separation between fine art and applied art, or between haute couture and RTW, is difficult to follow in practice. What would be the criteria for an item to be considered haute couture, and what would cause it to fall into the category of RTW?[40] There are countless fashion creations that fall between these categories and cannot be labelled as either. For example, bespoke – but not luxurious – garments, products from quirky indie labels, upcycled fashion designs, handicrafts, and the dress in the Narrative are neither haute couture nor RTW. Maintaining a convincing, solid boundary is virtually impossible. Moreover, from the perspective of the "free and creative choices" element of the EU standard of originality, a strict separation may lead to incorrect protection outcomes, as it is impossible to conclude that RTW fashion design would never involve such choices. It is hence easy to agree with Annette Kur that the distinction between haute couture and RTW is irrelevant in IP law[41] – all the more so as it can easily be argued that recent developments in CJEU case-law (as detailed in the following subsection) are forcing Member States to move away from traditions of such strict separation.

The copyright debate concerning the ability of fashion designs to meet the originality criterion typically revolves around the fact that designers tend to "borrow" from each other and follow trends. It has therefore been considered difficult for fashion designs to be original.[42] However, the prevailing assumption that fashion designs, as products of applied art, inherently struggle to meet the standard of originality,[43] has never been universally true. Now, the harmonised EU standard of originality seems to interpret the word "originality" quite literally, requiring a work to originate from the personality of its author, from their inner world.[44] Nevertheless, much of the debate about originality in fashion has stemmed from the belief that the motives for garment design are mostly *external* – commercial, functional, or imitative, for example. This may very well be the case for many fashion designs, especially the highly commercial ones, but certainly not for all garments and accessories. The case study provided by the Narrative sheds light on the many other motives for creating garments: the kind of demands, aims and objectives that originate from the author herself.

[39] Among EU Member States, France has been an exception in this regard. For more than a century, the French law on author's rights has been very protective of fashion designs; *see* Pouillard (2021b), 48.

[40] The UK has relied on such a distinction and required that a copyright-protected garment be highly artistic, that there be "artistic intention and result", and that the garment generally be hand-made (Derclaye 2010, pp. 328–329). However, such requirements, would not fly in modern EU copyright law; *see* Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:721.

[41] Kur (2014), pp. 182–183.

[42] *See also* Pouillard (2021b), p. 47.

[43] *See* Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 3.

[44] *See also* Rosati (2013), pp. 70–71.

### 3.2 Originality in the EU

The standard of originality has been harmonised in the EU through both directives and CJEU judgments. It is the "author's own intellectual creation", initially codified in the Software Directive (for computer programs), Database Directive (for databases) and Term Directive (for photographs),[45] and extended to all other categories of work by the CJEU's *interpretation* of the InfoSoc Directive.[46]

The CJEU began to harmonise the standard of originality with its revolutionary *Infopaq* judgment (2009). In *Infopaq,* the CJEU stated that copyright "is 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*" (emphasis added).[47] Eleonora Rosati argues that such an interpretation of originality brings this requirement closer to the French, and more generally, the continental concept of copyright (*droit d'auteur*),[48] which is characteristic of many civil-law countries. Historically, the copyright regimes of civil-law countries have been more concerned with protecting the person of the author than those of common-law countries, and are often referred to as "author's right countries".[49] It therefore appears that *Infopaq* embedded the understanding of copyright held by traditional author's right jurisdictions into the EU copyright regime. Subsequently, in 2011, the *Painer* judgment clarified the meaning of "author's own intellectual creation":

> [A]n intellectual creation is an author's own if it reflects the author's personality. That 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.' […] By making those various choices, the author […] can stamp the work created with [their] personal touch.[50]

*Painer* continued to infuse the EU standard of originality with continental views of copyright, where one important function is to protect the author's personality and the special bond between the author and their work. According to Tuomas Mattila, *Painer* reflects the idea of the uniqueness of the author's identity, which is then

[45] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5 May 2009, pp. 16–22, Art. 1(3); 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 March 1996, pp. 20–28, Art. 3(1); and Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27 December 2006, pp. 12–18, Art. 6.

[46] The InfoSoc Directive requires Member States to grant authors exclusive rights in their works without defining the concept of "work" or referring to any particular standard of originality. Given the lack of express reference to laws of Member States for the purpose of determining the meaning and scope of a copyright-protected "work" and the notion of "originality", these concepts must be given autonomous and uniform interpretation throughout the EU (Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* ECLI:EU:C:2009:465, para. 27).

[47] Case C-5/08 *Infopaq*, para. 37.

[48] Rosati (2013), pp. 66, 71, 98.

[49] However, the differences between copyright and author's right regimes have been scaled down (Rosati 2013, p. 70; Ginsburg 1990, pp. 992–993).

[50] Case C-145/10 *Painer*, paras. 88–89, 92.

manifested in the form of the work. The uniqueness of the author's personality connects exactly with the *choices* that the author makes in the creative process.[51] *Painer* is thus closely linked with the Narrative of this article, which examines how the author's personality can be manifested in her creation through the *choices* she makes in the creative process.

Prior to the 2019 *Cofemel* judgment,[52] which concerned clothing designs, there was no consensus among EU Member States as to whether the "author's own intellectual creation" was the sole criterion for protection for all categories of works. There was some confusion as to whether Member States were allowed to maintain different approaches for the copyright protection of works of applied art and industrial designs,[53] for example by requiring that such works, over and above their practical purpose, create their own visual and distinctive effect from an aesthetic point of view. *Cofemel* confirmed that Member States may not impose such additional requirements for any works to qualify for copyright protection: the requirements must be the same for all categories of work.[54] It also ruled out artistic merit in the assessment of originality.

The originality of a functional shape was assessed in *Brompton* (2020), which concerned a folding bicycle. In *Brompton,* the CJEU held that copyright protection applied to a product whose shape was, at least in part, necessary to obtain a technical result, provided that, through that shape, its author expressed their creative ability in an original manner by making free and creative choices in such a way that that shape reflected their personality.[55] Like *Painer*, *Brompton* emphasises the importance of the creative *process* and not just the end result. However, the result of the process is by no means unimportant: it can give us an indication of the choices that have been made during production, and whether there is intellectual creation behind the subject matter.[56] The result might also manifest the author's "personal touch", or "reflect their personality".[57] As noted by Anna Tischner, and as can be seen in the *Mio* and *USM Haller* referrals, it is still quite unclear how national courts should apply the *Brompton* standard: the CJEU does not give the national courts guidance on *how* to determine whether choices made in a constrained creative environment can be "free and creative".[58]

The standard set by the CJEU in the above judgments (together with other judgments such as *BSA*,[59] *Football Dataco*[60] and *SAS*[61]) can be characterised as

[51] Mattila (2022), p. 30.

[52] Case C-683/17 *Cofemel*.

[53] *See, e.g.*, Bently (2012); Tischner (2020), pp. 971–972.

[54] Case C-683/17 *Cofemel*, paras. 29, 38, 56.

[55] Case C-833/18 *Brompton*, para. 38.

[56] Mattila (2022), p. 50.

[57] Case C-145/10 *Painer*, paras. 88, 92.

[58] Tischner (2020), p. 974.

[59] Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury* ECLI:EU:C:2010:816.

[60] Case C-604/10 *Football Dataco Ltd et al. v. Yahoo! UK Ltd et al*. ECLI:EU:C:2012:115.

[61] Case C-406/10 *SAS Institute Inc. v. World Programming Ltd* ECLI:EU:C:2012:259.

neutral, because it does not differentiate between categories of work.[62] This has practical implications, particularly for those areas of creativity that strike a balance between aesthetics and functionality, and that have historically been discriminated against within the copyright regime. This concerns applied art, like fashion. *Cofemel* and *Brompton*, in particular, give us a reason to re-evaluate the way that legal scholars and courts have traditionally viewed fashion designs' eligibility for copyright protection. Despite recent developments in the standard of originality at CJEU level, Member States still have much to do in this area. Research by Estelle Derclaye shows how national courts in Portugal, Germany, Italy, Denmark, Finland, and Spain are still struggling to apply the standard of originality correctly.[63] According to her, there appears to be (implicit or veiled) resistance from the national courts to some CJEU case-law. The areas where most of this resistance occurs are originality in general, and works of applied art in particular.[64]

### 3.3 Limitations to Creative Freedom

According to Stina Teilmann-Lock, the Kantian distinction between "art" and "craft", and between "free art" and "mercenary art", has long influenced the legal protection of expressions that combine aesthetic character and functionality.[65] Dividing creative outputs into these categories has had a fundamental influence on the development of continental copyright law.[66] Ultimately, this distinction has led many European countries to rigorously separate the fields of "pure art" and "applied art" in their national copyright laws and/or legal praxis.[67] This has been detrimental to the protection of apparel design. Limitations on creative freedom – real or imagined – have made copyright scholars and judges reluctant to include works of applied art in the scope of protection on the same conditions as other categories of work. But is this the right approach? Is the creative process in works of applied art truly so restricted, without the possibility of genuine creative freedom, that these works should be treated differently by copyright law? The Narrative in this article begins with an assessment of the limitations on creative freedom:

> *Black, black, black. Colour is the first determining factor, when I start designing my doctoral defence outfit. My university's website tells me that "[i]n the public defence, the attire of the doctoral candidate, opponent and custos will be dignified and suited to the occasion". For women, this means "[a] black, high-necked, long-sleeved dress or two-piece (skirt or trousers)". My design journey hence begins from the limitations set by the academic dress*

[62] Levin (2021).

[63] Derclaye (2022).

[64] Derclaye (2024), p. 605.

[65] *See, e.g.*, Teilmann-Lock (2016), p. 130. Even the term "low art" has been used, *see* Rosén (2021), p. 353.

[66] Teilmann-Lock (2016), p. 130. *See also* Güven (2021), pp. 1163–1164.

[67] Härkönen (2021), pp. 53–54; Kur (2019), pp. 12–13.

*code. If I want to both respect the traditional dress code, and strive for originality, I must express my creativity within the given framework.*

The dress in the Narrative will be black and modest, because these choices were dictated by a rule. It has been argued that it is difficult for products of applied art to be original in the sense required by copyright law, because their author's creative process is often influenced by an *external* motive, such as the need to fulfil a practical purpose, functionality in a particular use – or a dress code,[68] such as in the Narrative. "Pure art" or "free art" has been seen as "true" art, since its creation is supposedly not guided by any kind of further purpose; the work is an end in itself.[69]

However, the "category" of a work does not necessarily tell us much about its purpose. A garment, or any other work of applied art, may equally be an end in itself, with no other purpose. For instance, haute couture and other forms of wearable art can hardly be described as functional or serving any purpose other than to look spectacular or thought-provoking, or any of the other adjectives typically used to describe works of pure art.[70] Moreover, even if a garment must fulfil a practical purpose, this does not prevent it from being original. Under the harmonised standard of originality, it is highly questionable whether external requirements imposed on creative output are as detrimental to originality as the copyright traditions of various EU Member States suggest. *Brompton*, in particular, requires Member States to re-evaluate their practice of applying the originality threshold to subject matter where the creative process has been influenced by external requirements. In *Brompton,* the CJEU held that copyright protection applied to a functional shape, as long as, through that shape, its author expressed their creative

[68] *See, e.g.*, Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 3.

[69] *See* Teilmann-Lock (2016), pp. 131–132. Another common argument is that a work of applied art does not merit protection that lasts as long as copyright, since the author monetises the work on each sale of each reiteration thereof, *see* Inguanez (2020), p. 801. Purely artistic works merit copyright protection because the opportunities for commercialisation are limited, given that these works can (usually) be sold by the author only once (*ibid*). This argument is not convincing, as authors of pure art may also have financial motives and be able to commercialise their creativity. Furthermore, works of applied art might be created without any intention to commercialise them (*see* Section 4.2 "Dual protection and coherence in IP law"). Moreover, it has been claimed that protecting works of applied art by copyright could potentially hamper competition and industrial development (*see, e.g.*, Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 52 and Derclaye 2020, pp. 8–9, 15. *See, also*, Teilmann-Lock 2012, p. 40). However, this is not a risk if only expressions are protected and not ideas (Case C-406/10 *SAS*, para. 40). The threshold of originality only applies to concrete works as *expressions* of ideas, meaning that a neutral standard of originality ought not to be associated with detriment to competition or industrial development. Permitting works of applied art within the scope of copyright protection has also caused concern regarding the potential undermining of design protection by copyright protection (*see, e.g.*, Schovsbo and Teilmann-Lock 2016, p. 434). However, it has also been argued that the differences between the benefits that copyright and design protection offer are so significant that there is no real risk of the design protection system being undermined (Kur 2019, pp. 11–12). These concerns have inspired many Member States to apply various measures aimed at keeping applied art outside the scope of copyright (*ibid.,* pp. 12–14).

[70] *See also* Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 4.

ability by making free and creative choices, resulting in the shape reflecting their personality.[71] The CJEU thus highlights the presence of free and creative choices above everything.[72] Instead of merely looking at the presence of external motives and demands, it is much more important to evaluate whether the author has made free and creative choices *regardless thereof*.

> *Because the colour of the dress is such a limiting factor, I must look elsewhere to add my personal touch to the design. At first sight, the academic dress code would seem to guide me towards a modest and understated dress design. But that kind of style does not reflect who I am. I do not want to force my creativity into a direction that is not my own. However, I do not want to disrespect the academic dress code either. Therefore, I need to make the dress code work with my personality, and create something that does not compromise either. I can do this, for example, through the choice of material, silhouette, and subtle, refined, and decorative details. These choices add some drama to the dress, and help to achieve the desired visual effect.*
> *It is important to me that my dress differs from the doctoral defence outfits of my peers. Frivolous as it may sound, the design of the dress, and its ability to stand out, is almost as important to me as the defence event itself. My intention is to come up with a unique, one-of-a-kind, creation.*

The Narrative illustrates the point where the author's free and creative choices start. Daniel Gervais has suggested that a copyright-relevant creative choice (in the copyright regime of both civil-law and common-law systems) could be defined as "one made by the author that is not dictated by the function of the work, the method or technique used, or by applicable standards or relevant 'good practice'".[73] Gervais's definition is a helpful lens through which we can inspect the creativity of the design choices in the Narrative. We immediately notice that, in the Narrative, the author's choices are to some extent restricted by external rules: a strict dress code. In general, simply following the rules that are typical of a particular type of creative work can preclude originality.[74] In Gervais's terms, these are the "applicable standards" or "relevant 'good practice'" that could be seen as dictating the author's choices in the Narrative. But what is worth noticing is that, in the Narrative, the author has a strong intention to "bend" the rules. She wants to stand out, to take her creativity in an independent direction, resulting in something different from what would be an obvious choice within the framework provided by the strict dress code. The aim, therefore, is to *avoid* the restrictive effect of the dress code as an external requirement, "applicable standard" or "relevant 'good

[71] Case C-833/18 *Brompton,* para. 38.

[72] *Ibid.,* para. 37. The CJEU also stressed the significance of the circumstances under which a subject matter was created by noting that, to assess whether a subject matter is original, a court of law must consider all the relevant aspects of the case "as they existed when that subject matter was designed". Yet, in *USM Haller*, the referring court asks whether account can also be taken of circumstances that arise subsequent to the creation of the product. In the light of *Brompton,* the answer appears obvious: circumstances *after* the creation do not matter.

[73] Gervais (2017), pp. 114–116.

[74] Mattila (2022), p. 52.

practice'". It could also be said that the author is trying to make her "personal touch" visible in the design result. Such intentions in the creative process could have a positive effect on the assessment of whether the resulting subject matter meets the threshold of originality. The author's intention is also mentioned as a relevant factor in the opinion of Advocate General M. Campos Sánchez-Bordona in the *Brompton* case.[75]

> *I also must consider my ability to move, sit and stand comfortably while wearing the dress. The defence day will be long. The dress has to feel good as well as look good.*

Above, the Narrative describes functionality considerations that further limit the author's creative freedom. This situation is rather typical in garment design, which tends to take place within a narrower creative framework than, for instance, fine art. However, possible differences in the degree of creative freedom in the production of different categories of work are not as relevant as one might think. In *Painer* and *Cofemel* the CJEU held that nothing in the InfoSoc Directive, or in any other applicable directive, supported the view that the extent of copyright protection should depend on any differences in the degree of creative freedom involved in the production of various categories of works.[76] Consequently, we should not let any differences in the degree of creative freedom in different categories of work dictate the assessment of originality.[77] We must look beyond these differences, and evaluate how the author has de facto made use of the framework given to them. Instead of first classifying and labelling a work in a certain category and only *then* assessing its level of originality, we should focus merely on the latter.[78] A work is a work, and there is no need to attach any labels to it other than "original".

### 3.4 The Intersection Between Inspiration, Imitation and the Author's Own Intellectual Creation

> *I begin my creative process by thinking about my personal style icons and all-time favourite looks. I search for inspiration in my mind, and in vintage fashion books. I think of Audrey Hepburn eating a croissant while gazing at diamonds through a window at Tiffany's, wearing Givenchy. I inspect the sleek silhouettes of Wallis Simpson's outfits. I admire Grace Kelly's wedding*

[75] Opinion of AG M. Campos Sánchez-Bordona in Case C-833/18 *SI, Brompton Bicycle Ltd. v. Chedech / Get2Get,* 6 February 2020, ECLI:EU:C:2020:79 paras. 92–93: "the court is entitled to explore the inventor or designer's original intention […] in order to assess whether its author was really seeking to achieve [their] own intellectual creation […]". *See also* Mattila (2022), p. 43: Mattila views creative intention as a significant factor in terms of qualifying for protection. The relevance of intention has also been criticised; *see* Rosati (2023).

[76] Case C-145/10 *Painer*, paras. 97–99, and Case C-683/17 *Cofemel*, para. 35. Henning Hartwig is of the opinion that *Painer*, paras. 97–99, and *Cofemel* conflict with each other (Hartwig 2023). As his notions concern mostly the *scope* of protection and not *eligibility* for protection, the possible conflict is not further analysed here.

[77] However, in design law, the degree of freedom of the designer is taken into consideration when considering the qualifications for protection.

[78] *See also* Rosati (2013), p. 127.

*attire, designed by Helen Rose. These vintage styles inspire me and feed my creativity. At the same time, I want to create something unique: something that is just for me*.

Fashion is a constant balancing act between innovation and references to past designs. As in the Narrative, it is common for designers to draw inspiration from the work of others. Ongoing trends create similarities between collections of different brands and designers, and certain basic elements of garments change only minimally over the decades. This is particularly true of RTW fashion, but haute couture also uses recurring elements. Undoubtedly, most of the clothes sold are unoriginal.[79] With this in mind, one might well ask: is there really anything in fashion that is so innovative that it deserves to be protected? Can garment design be the kind of "intellectual creation" that the InfoSoc Directive seeks to foster through a high level of protection, to ensure the maintenance and development of creativity in the interests of, *inter alia*, authors, consumers, culture, and the public at large?[80]

Given the trend-driven nature of fashion, one might conclude that all garments and accessories would be imitations of each other to some extent. Lawyers dealing with fashion copyright cases have been puzzled by this paradox for more than a hundred years.[81] But such a conclusion would be incorrect. Certainly, the presence of trends and the overall tight balancing between inspiration and innovation leads to a lot of unoriginal, "inspired by", creations, knockoffs, and plain copies of earlier designs. But that is not the whole story. One needs to look deeper into the nature and history of fashion, and distinguish between "trend", "fashion", and "fashion design" to get the full picture. *Fashion* is a form of visual art that plays a broad and complex role in our society, going beyond the industry of making and selling clothes. It reveals a lot about our culture and about people as individuals.[82] In the fashion system, a *trend* is a style that is popular at a particular time. A trend is something intangible that is often hard to pin down with sufficient precision and objectivity. A *fashion design* is not a trend itself, but it can be an *interpretation* of a trend. The fashion–fashion design–trend classification relates to the idea–expression dichotomy of copyright law, which holds that copyright applies only to concrete expressions and not to (abstract) ideas. A designer, like any artist, can legitimately find inspiration in previous works. Drawing inspiration from trends, past fashions, or vintage styles to create a new garment design is equivalent to using an existing idea to create a different expression thereof. If that expression is its author's own intellectual creation, there are – and should be – no additional requirements for the garment to pass the threshold of originality. Moreover, copyright recognises that dialogue, inspiration, and reformulation are inherent in intellectual creation.[83]

The effect on originality of re-using old elements in the design of a garment can also be assessed in the light of *Infopaq*. In the *Infopaq* judgment, the CJEU held

[79] Härkönen (2018), p. 919.

[80] Preamble to the InfoSoc Directive, recital 9.

[81] Pouillard (2021b), p. 47.

[82] For a more detailed characterisation of fashion in a legal context, *see* Härkönen (2021), p. 18.

[83] *See* Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 55.

that: "Words as such do not […] constitute elements covered by [copyright] protection".[84] However, "[i]t is only through the choice, sequence and combination of those words that the author may express [their] creativity in an original manner and achieve a result which is an intellectual creation".[85] Translated into fashion terms, this means that, when a designer chooses between known, unoriginal elements, and arranges or combines them in a creative way, the result can be original. This approach is appropriate to fashion because designers rarely come up with elements of garments that are completely "new" – design is often about selecting, arranging, and combining non-original elements of garment design in a way that creates an entity that can be original.

> *An idea sparks in my mind, and I reach for a pen and paper. I start to sketch my dress. For me, drawing something that will be produced as a three-dimensional work is a different process from when I paint or draw for its own sake. When I create fine art, I usually paint or draw cityscapes or landscapes, trying to reproduce what I see in real life as accurately as possible on my canvas or paper. But when I design fashion, I make various conscious decisions, such as how to create a certain visual effect, how to differentiate my creation from the state of the art, and how to manifest my personality. I feel that, when I design fashion, I have more room for creativity than when I produce works of fine art. Maybe this has something to do with my style: my drawing and painting styles are very realistic. But in fashion design, I try to come up with garments that have no counterpart in this universe.*

The Narrative continues with the act of transforming an idea into its first form of expression: an illustration. At this stage, the question of copyright protection is unlikely to arise. Few will doubt that an illustration, a two-dimensional depiction of a dress, is typically protected by copyright. But it is when the dress is brought to life that the problems begin, as the eligibility of three-dimensional fashion designs for copyright protection is often questioned.[86] This may seem paradoxical for designers, as the Narrative hints. When one starts to identify the free and creative choices in the illustration, one may find that the drawing is original, not only because of the lighting, line strength, etc., but also because it represents a design resulting from free and creative choices that will *ultimately* be three-dimensional. When a designer imports these free and creative choices from their sketch into a three-dimensional form, the originality does not simply disappear.

### 3.5 A Step Towards Design Law: Novelty and Individual Character

It has now been illustrated what kinds of hardship works of applied art have encountered within the copyright regime. Nevertheless, applied art and industrial

[84] C-5/08 *Infopaq* para. 46.

[85] *Ibid.,* para 45.

[86] The dimensional transformation issue arises also in situations where 3D copies of fashion designs are produced on the basis of illustrations and sketches thereof; see Pouillard (2023), p. 114; Bellido (2014), p. 68.

design have generally been considered worthy of some form of protection, although typically not as strong and long-lasting as copyright.[87] In the EU, the design regime, which currently[88] consists of the Design Directive (DD)[89] and the Community Design Regulation (CDR)[90], has been developed for the benefit of industries that mass-produce designs and works of applied art.[91] Thus, we will now view the Narrative from the perspective of design legislation:

> *I design a long, floor-length gown. It consists of a strapless, structured bodice with princess seams, a concealed corset and heart-shaped décolleté combined with a pencil skirt. It has details made of lace and of layered, horizontally aligned bias strips. For coverage and to respect the academic dress code, the dress comes with a matching, bolero-length lace jacket with a high collar and long sleeves. A long row of tiny buttons and a small bow at the waist decorate the jacket. The ensemble looks quite dramatic. Although the design is a subtle reference to a wedding dress from a Catholic ceremony in 1956, it looks nothing like a dress you would wear to walk down the aisle.*

At this stage, the Narrative describes the author's choices to combine elements of vintage fashion, typically seen in garments from the 1950s, into a new design. This is fascinating to analyse from a design law perspective, because, to qualify for design protection, a fashion design must be "new" and have "individual character".[92] Therefore, the requirements for design protection are significantly different from the EU standard of originality as the gatekeeper of copyright.

> *In my vintage-inspired design, I combine several elements that the fashion world has already seen. However, I combine them in a way that I personally have never seen before.*

The Narrative describes a typical situation in clothing design. In fashion, popular designs seem to be born, disappear, and then, at some point, reappear. An intriguing question, therefore, is: if a garment is inspired by earlier designs, what does this mean for its novelty and individual character?

The CJEU's *Karen Millen* judgment (2014) touches on the issue described above. The judgment is, *inter alia*, about whether a fashion design can have "individual character" if it consists of a combination of known design features from various earlier designs, such as the dress in the Narrative. According to both the CDR and the DD, individual character is evaluated based on the "overall impression" that the

[87] *See, also*, Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979), Art. 2(7).

[88] The EU design regime is soon to be reviewed. However, the reform will not affect the requirements of novelty and individual character.

[89] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28 October 1998, pp. 28–35.

[90] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5 January 2002, pp. 1–24.

[91] Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363 para. 51.

[92] CDR Art. 4(1), DD Art. 3(2).

design produces on the informed user, and whether this overall impression differs from that produced on such a user by any earlier design.[93] In *Karen Millen*, the CJEU clarified that this assessment must be conducted "in relation to one or more specific, individualised, defined and identified designs from among all the designs which have been made available to the public previously".[94] Importantly, for a design to have individual character:

> "[T]he overall impression which that design produces on the informed user must be different from that produced on such a user *not by a combination of features taken in isolation and drawn from a number of earlier designs, but by one or more earlier designs, taken individually*". (emphasis added)[95]

The standpoint taken by the CJEU in this judgment is significant from the perspectives of both fashion and the Narrative: it confirms that a combination of several elements from previous designs, such as vintage fashion, may well result in a design that satisfies the requirement of individual character. Influences from fashion history do not rule out the possibility of design protection. However, this does not mean that any combination of commonplace design elements would have individual character: for instance, in *Rosae Paris v. Seven August* (2024), the Paris Judicial Court ruled that a simple combination of shoulder ruffles, gathers, press studs, and oversized cuts did not give a design individual character.[96] Nor did it result in originality.

When it comes to drawing inspiration from vintage fashion, it is noticeable that, through the reasoning in the design law judgment *Karen Millen*, we *could* arrive at the same protection result as by drawing an analogy from the copyright judgment *Infopaq* in the previous Subsection. In both cases, it was concluded that a combination of unoriginal/old elements could lead to protected subject matter. However, it should not be taken for granted that the copyright and design routes will lead to the same result, as the assessment processes are very different. As we have seen in *Karen Millen*, no attention was paid to the expression of creativity by the designer, because that is irrelevant in design law. Furthermore, it is noticeable that *Karen Millen* did not assess whether the designs reflected the personality of the designer, or whether the designer made free and creative choices. This is because, unlike copyright law, design law is not interested in the connection between the designer/author and their work.

[93] CDR Art. 6(1), DD Art. 5(1).

[94] Case C-345/13 *Karen Millen Fashions Ltd v. Dunnes Stores, Dunnes Stores (Limerick) Ltd* ECLI:EU:C:2014:2013, para. 25.

[95] *Ibid.,* para. 35.

[96] Judgment of Paris Judicial Court of 5 April 2024, *Rosae Paris v. Seven August* (21/15174); *see, also, infra*, note 115.

## 4 What Originality Is Not About

### 4.1 Originality's Relationship with Novelty and Individual Character

> *I do not know whether my dress is unique. There might be another person in the world who has come up with a similar design. All I know is that I created my dress without copying, with the intention of being unique and wanting the dress to reflect who I am.*

It must be emphasised that copyright and design protection are based on different "relationships".[97] Copyright concerns itself very much with the literal *origin* of the subject matter – protected subject matter is the result of the author's own intellectual creation; it reflects the author's personality. The author infuses their work with originality by stamping it with their "personal touch".[98] The requirement of originality in copyright law is fundamentally based on the intimate connection between an author and their work. The Narrative also illustrates this deep connection by describing how the author desires her creation to manifest the uniqueness of her personality.

Design law, on the other hand, has no interest at all in the relationship between the designer and their creation. Instead, design law is concerned with the relationship between the design and the public. This can be seen, *inter alia*, in how the protection requirement of individual character is assessed – by asking whether the overall impression produced by the design on an informed user (an outsider) differs from that produced on such user by any other design that has been made available to the public.[99] Design law has no interest in the source of the creation either. It does not care whether a design is an extension of the personality of its creator. The creative process, and the free and creative choices of the designer do not matter, because design law is only interested in the *result*. Design law seeks objectivity, whereas it can be argued that, although the test of originality ought to be objective, it contains an important subjective element, owing to the focus on the work's relationship with its author.

The figure below shows the design of the dress of the Narrative. It also illustrates how the assessment of originality concerns the relationship between the author and their creation, while the assessment of novelty and individual character pertains to the relationship between the creation and society in general (Fig. 1).

These different relationships – and hence eligibility for protection – must be assessed using different tools and evaluation processes. Because novelty and individual character are objective requirements, they are easier for an outsider to assess than originality. However, as originality is based on the bond that an author has with their work, it is almost inevitable that information about the creation process is needed to decide whether a subject matter is original in the sense required by EU copyright law.

[97] *See also* Kur (2019), pp. 9–10.

[98] Case C-145/10 *Painer*, paras. 88, 92.

[99] DD Art. 5(1), CDR Art. 6(1).

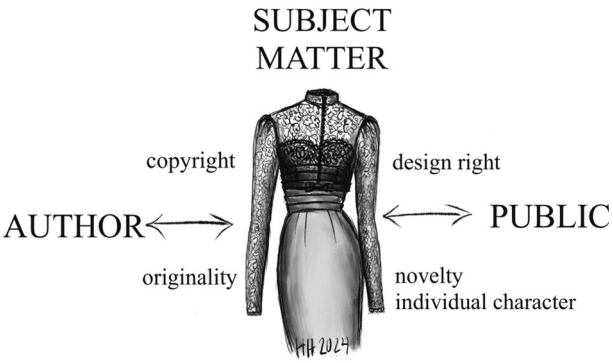


**Fig. 1** Subject matter's meaningful relationships from copyright and design law perspectives (© the author, CC BY-NC-ND 4.0). DESCRIPTIVE CAPTION FOR BLIND READERS: the illustration portrays the "work" of the Narrative of this article: a black dress with a bolero-length lace jacket with a high collar and long sleeves

Useful information about the creative process might include, for instance: What triggered the creation? What inspired the author? How did the author interpret their inspiration? How did the creative process evolve? Did anything influence the choices that the author made, and was this an internal or an external factor? In particular, it is worth knowing whether anything came between the author and their work during the creative process. If a work has a commercial purpose, the likelihood of interfering factors may be higher than in non-commercial works and works that are not intended for mass production. In the case of commercial fashion design, such factors may include consumer demand, marketability, and production costs.[100] One-of-a-kind creations, on the other hand, are hardly affected by such factors. In the relationship between an author and their work, too much engagement with external demands can risk becoming a third wheel, to the detriment of originality.[101] Creating for "selfish" purposes – i.e. ignoring everything but the author's own preferences – could be good for originality. The Narrative shows a moderate amount of "selfishness" in creation – the author tries to find ways to adapt the academic dress code to her personal preferences, striking a balance between accommodating design, personal touch, and self-expression.

To return to the differences between copyright and design law, one must keep in mind that *originality is not about objective novelty*.[102] This is something that national courts of the Member States seem to have considerable difficulty understanding.[103] When discussing the copyright protection of fashion designs, it is not uncommon to hear that fashion does not really produce anything *new*, but merely circulates and reinterprets old ideas.[104] This might even be true of the dress in the Narrative. But this argument is not relevant to copyright. Strictly speaking,

[100] Härkönen and Särmäkari (2023), pp. 54–55. *See also* Inguanez (2020), p. 811.

[101] *See, also*, Mattila (2022), p. 52.

[102] *See, also, ibid.*, p. 36 and Rosati (2013), p. 63.

[103] Derclaye (2022), pp. 5–7.

[104] *See, also*, Pouillard (2021b), pp. 47, 56.

copyright does not care whether a fashion design is similar to an earlier design. In copyright, prior art is irrelevant.[105] What matters is the *source* of the creation: Is it the author, or something/someone else? It is the *subjective novelty* that is important: a work must be new only to its author. Consequently, two authors may, without knowing each other, create identical works, both of which meet the standard of originality, and qualify for protection.[106] Neither work would infringe the copyright of the other. The similarity of one work to another is not necessarily an indication of lack of originality, because *originality is not about uniqueness*.[107] Originality is not about the relationship of the work to other works.[108] Therefore, any requirement of novelty and individual character must be strictly separated from considerations of originality. The following figure illustrates the situation described above, where two authors, A and B, have created visibly similar designs (Fig. 2).

As can be seen in the figure above, Subject Matter A and Subject Matter B look very similar. Subject Matter A was created first. But the question of whether Subject Matter B is original, regardless of its similarities with Subject Matter A, is *not* resolved by comparing these two creations with each other. The same starting point should apply when considering whether Subject Matter B infringes the copyright of Author A. Instead of comparing the two, we need to examine the relationship between Author B and Subject Matter B, and Author B's possible relationship with Subject Matter A. The real question here is: does Subject Matter B result from Author B's free and creative choices, or has Author B followed a road paved by Author A's creation? Comparing Subject Matters A and B would only be relevant if it were certain that an act of copying had taken place, and one would have to determine whether the later work infringed the copyright of the earlier. If the originality of the later creation (Subject Matter B) were to be determined by comparing it to the earlier creation (Subject Matter A), we would end up in a situation reminiscent of the design law approach to protection requirements. This is where the national courts of the EU Member States tend to stumble. It is not uncommon for courts to import requirements from design law when assessing originality and copyright infringement.[109]

Confusing the requirements of design law with those of copyright law was at issue in the CJEU judgment *Cofemel*. The main question in *Cofemel* was whether a Member State's national legislation could confer copyright protection only on works of applied art, industrial designs and works of design that, "over and above their practical purpose, create their own visual and distinctive effect from an aesthetic point of view".[110] Such a criterion is not about the relationship between the author and their work, but an additional requirement imposed on works of

[105] Derclaye (2020), p. 12.

[106] In practice, situations like this in the fashion industry are surely rare. In other fields, *e.g.* photography and architecture, they might be more common. *See also* Rosén (2021), p. 362; Kur (2019), p. 10.

[107] *See also* Mattila (2022), pp. 36–38. Moreover, a peculiar appearance is not an indication of originality (*ibid.,* pp. 43–44).

[108] However, *see* Rosén (2021), pp. 256, 359, who seems to take a different view.

[109] Derclaye (2022), pp. 3, 5–6, 8–9.

[110] Case C-683/17 *Cofemel,* para. 25(1).

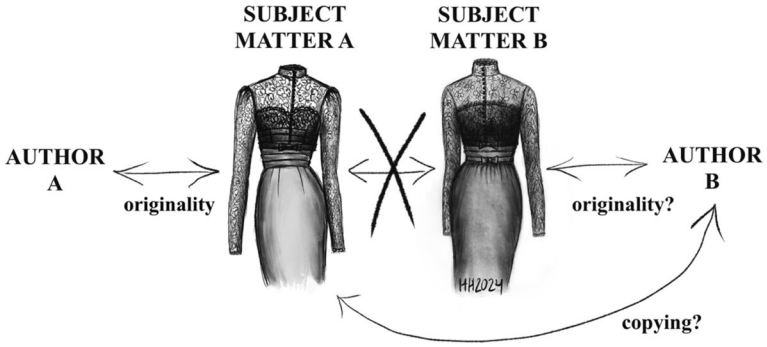


**Fig. 2** A situation where it is assessed whether Author B's creation is original regardless of it resembling Author A's earlier creation. © the author, CC BY-NC-ND 4.0). DESCRIPTIVE CAPTION FOR BLIND READERS: the illustration portrays two black dresses, accompanied with bolero-length lace jackets that have high collars and long sleeves. The two outfits look very similar but have slight differences

applied art. This is a questionable approach to originality, because the requirement of aesthetic distinctiveness means that subject matter is compared with other creations.[111] Therefore, this criterion assesses a relationship that is not relevant from the perspective of the European standard of originality. It imports design law thinking into copyright law. The CJEU has corrected this confusion by stating that the InfoSoc Directive (in particular, Art. 2(a) thereof, "Reproduction right") precludes national legislation from conferring protection, under copyright, to designs on the ground that, over and above their practical purpose, they generate a specific, aesthetically significant visual effect.[112] The only criterion to be applied is the "author's own intellectual creation", and no additional requirements may be imposed.

All in all, originality is a rather sensitive issue because it is so tied up with the author's person, and the delicate relationship between the author and their work. Therefore, an outsider comparing a fashion design with previous creations cannot necessarily tell us anything about its originality.[113] Without any information about the creative process, it is very difficult for even the most experienced fashion expert to determine whether a design is original or not (unless it is, for instance, notorious, mundane or banal[114] – since it would be hard to see how such a design could truly be the intellectual creation of its author or reflect anyone's personality).[115] This is

[111] Comparison (side-by-side) with other designs of the same kind is a design law criterion; *see* Derclaye (2021), p. 64. It ought not to be confused with the assessment of originality.

[112] Case C-683/17 *Cofemel,* para. 56.

[113] *See* Antikainen (2021), p. 71: the author's free and creative choices are not necessarily visible and thus may not be seen merely by looking at the work.

[114] *See also* Rosén (2021), pp. 354, 356, 363; Kur (2019), p. 8; Mattila (2022), p. 50.

[115] This was the case in the Paris Judicial Court's judgment of 5 April 2024 in *Rosae Paris v. Seven August* (21/15174), which concerned RTW clothing. The Court noted that certain design elements (in this case, shoulder ruffles, gathers, studs, and oversized cuts) were commonplace and not protected as such. The claimant unsuccessfully argued that it was the combination of those elements, and the contrast between opposing styles, that made its designs original. The mere idea of combining opposing styles was

not to say that expert witnesses are of no use at all in court: in copyright infringement cases, for example, an experienced fashion expert can provide a valuable perspective on whether the alleged copyist has gone beyond borrowing the idea and has actually copied the *expression* of the idea.[116] But when it comes to assessing the *originality* of a subject matter, the best source of information may very well be the author(s) themselves. They are likely to have the most knowledge about the journey of their creation from idea to expression. Relevant information in this respect could be in the form of a mind map, a mood board, a sketch, a toile,[117] a design journal – or a narrative inquiry. This documentation could then be commented on by an expert witness. Describing the role of the expert witness in English fashion copyright litigation in the 1980s to 1990s, Jose Bellido notes that going through notebooks, diaries and design calendars was often more illuminating for lawyers than looking directly at the work in question.[118] This kind of documentation of a creative process can also be valuable in situations where the creative process took place a long time ago, or the author is deceased or otherwise unavailable.

In summary, the more accurately the creative process is documented, the more it will help the legal analysis of originality. Interviewing the author could also provide valuable information. However, this is not to say that the author themselves is the best person to *decide* whether their creation is original or not. Unless the author is a copyright lawyer, their subjective view of the possible originality of their creation is likely to be of limited relevance at most.[119] There may be a mismatch between the perspective of the law and that of the creator on what makes a subject matter worthy of copyright protection (and what constitutes infringement).[120] Originality is a delicate legal criterion, the application of which requires a legal education.[121] As Jens Schovsbo insightfully notes, originality is not a prize awarded to good design.[122] Even the most praised, well-known designs might fail to meet this standard, regardless of their value in the eyes of art and design professionals.

### 4.2 Dual Protection and Coherence in IP Law

Returning to the interplay between copyright and design rights in fashion, it should be noted that originality, novelty, and individual character are not mutually

Footnote 115 continued
not sufficient to establish originality for each of them by reflecting their author's personality. Bercimuelle-Chamot (2024), notes that an overly descriptive characterisation of originality that focuses on inapplicable characteristics can only lead to rejection. In this case, the claimant's characterisation of originality was too light and brief.

116 *See* Bellido (2014), p. 83.

117 The three-dimensional "draft version" of a garment, typically sewn from muslin or other inexpensive fabric.

118 Bellido (2014), p. 76.

119 *See also* the *USM Haller* reference.

120 *See* Robertson (2014).

121 Schovsbo (2020).

122 *ibid*. *See also* Teilmann-Lock (2012), p. 39.

exclusive – a garment can be all of these and therefore be protected by both copyright and design rights. However, it is essential to keep in mind the boundary between the two. Maintaining the boundary between the protection criteria of copyright and those of the design regime is important for ensuring coherence in IP law. On the other hand, such coherence could not be achieved by a strict separation between categories of works "entitled" to copyright (fine art) and categories that could be protected mainly by design law (applied art). As suggested above, it is impossible to draw a precise and fair line between "art" and "design". Excluding works of applied art such as fashion designs from the scope of copyright would lead to unjustified protection outcomes, as their "status" as applied art does not necessarily say anything about the free and creative choices made by their authors. Therefore, the current, neutral, EU standard of originality is the best solution to this issue.

All of the above means that, when it comes to works of applied art, notions from design law should not be imported into copyright law, as these two IPRs are designed to serve different purposes.[123] What may have caused confusion here is that design law has sometimes been considered as the primary form of protection for works of applied art and industrial designs.[124] Granting works of applied art protection that lasts as long as copyright – 70 years *post mortem auctoris* – has raised concerns about the freedom of competition.[125] However, even if the risk of hampering competition were real,[126] special attention would have to be paid to cases where such a work was not even made for commercial purposes or mass production. The fashion world is full of examples of original creations that are one-of-a-kind works, never intended to be commercialised or mass-produced. Haute couture shows and red-carpet events, for example, feature designs that have no intention of ending up behind shop windows. Fashion design can be a medium for an author to exercise their freedom of expression, to express themselves as an artist in the form of wearable art.[127] This is also the case with the Narrative, where the author aims for a unique expression within the framework of a strict dress code. It is difficult to justify why the authors of this type of original creation should not deserve to enjoy the rights and benefits of copyright simply because their creations are labelled as applied art.[128]

[123] *See* Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 51.

[124] *See, e.g.,* Haarmann (2005), p. 87. It seems that the referring court in *USM Haller* is also confused in this respect, as it (incorrectly) assumes that "[…] given that works of applied art may also be considered to be protected as designs, the court of appeal correctly assumed that copyright protection was of exceptional nature […]" (German Federal Supreme Court 2023).

[125] *See supra*, note 69. *See also* Tischner (2020), p. 975.

[126] Rather than the protection of works of applied art and industrial designs, what *really* hampers competition, innovation, and freedom of business in the internal market is the misapplication by Member State national courts of the standard of originality (and the copyright infringement test) in these works. *See* Derclaye (2022), p. 2.

[127] On the relationship between fashion and art, *see* Geczy and Karaminas (2012), pp. 6–7.

[128] *See* Opinion of AG Szpunar in Case C-683/17 *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* ECLI:EU:C:2019:363, para. 4; and Teilmann-Lock (2012), pp. 30–31.

### 4.3 Originality and technical considerations, rules, and constraints

> *As I sketch my dress, I think of ways to execute my idea in practice. There are "laws" that I must obey: for example, fabrics do not behave the way we want them to unless we know the rules they follow. I know these laws because I have been sewing clothes for most of my life.*
> *For the main fabric, I choose a raw silk with an opaque shimmer. This woven fabric has "body" (as opposed to drape), which is a good choice for a very structured dress. As a complementary fabric, I choose a French Alençon lace. For the lining, I choose viscose and sheer organza. I choose these fabrics not only for their look and feel, but also for how their qualities work together.*
> *I begin to draw the pattern. I combine the bodice and jacket patterns from an old BurdaStyle magazine with patterns that are self-drafted. First, I trace the BurdaStyle pattern and break it down. Then I restructure it and combine it with the self-drafted pattern parts, creating a mixture of new and old: my own and borrowed.*

Creative work often involves technical considerations. In pure art, these considerations are usually limited to the production process. For example, a painter knows the exact ratio of turpentine to oil paint to use to get the desired opacity. But when the painting is finished, the technical considerations usually end there: the work itself has no technical function to fulfil. In applied art, these technical considerations often extend to the life of the work after it has been made. The author must consider how the finished work can serve a particular functional purpose. However, copyright law has typically treated functional elements with caution. If the creation of a subject matter is entirely dictated by technical considerations, rules or constraints, and there is no room for creative freedom, the standard of originality cannot be met, as the CJEU concluded, for example, in the *BSA* and *Football Dataco* judgments.[129]

Fashion design involves many technical considerations, not only regarding the manufacturing process, but also regarding the life of the garment: its wearability, durability, maintenance, and so on. Some considerations relate to the need for a garment to serve a functional purpose. The shape of the human body imposes certain constraints on the shape of clothing. The qualities of different materials impose limits on design, as some combinations would lead to an uncomfortable experience for the wearer (or even to disturbing visual effects to the trained eye).[130] For example, lining a silk dress with polyester would undermine some of silk's most valued features, such as breathability. Sewing silk with polyester thread would cause the fabric to slowly "burn", fraying over decades and causing the garment to fall apart. On the other hand, using a cotton thread on silk would make the seams too stiff. Such considerations require technical knowledge, and the designer must use this knowledge to make various choices. There may be some room for creative

[129] Case C-393/09 *BSA*, paras. 48, 49; Case C-604/10 *Football Dataco*, para. 39. *See also* Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd et al. and Karen Murphy v. Media Protection Services Ltd* ECLI:EU:C:2011:631, para. 98.

[130] *See* Bellido (2014), p. 75.

freedom here, but only to a very limited extent. And these kinds of technical choices are not the kind of free and creative choices that play a significant role in establishing originality in the EU. Instead, they resemble engineering. As the Narrative illustrates, such considerations relating to materials may also require a great deal of skill, labour, and judgement. The Narrative also tells us how skilled and experienced one must be to make the dress in question. Some standards of originality recognise the importance of such talent and expertise on the part of the author. In the United Kingdom, "skill, labour, and judgment" used to be the approach to the notion of originality prior to EU harmonisation. However, the CJEU has held that skill, labour, and judgement are not relevant to the EU standard of originality.[131] Therefore, factors such as a designer's talent, effort and hard work do not play a role when assessing the originality of their creation.

> *I make a total of three toile versions of the dress until I am satisfied. While making the toiles, I constantly alter and re-alter the pattern in search of a perfect fit.*
> *My consideration of the technical issues continues throughout the manufacturing process. I aim for a dress that is durable, that will last for decades. So I must think about a lot of small technical details. At the same time, I have the freedom to make various creative choices, such as regarding decorative details, proportions, lace pattern placement and material combinations. Sometimes my creativity and technical considerations overlap, such as when I choose seam types that I use on the wrong side of the sheer lace jacket based on the visual effect they will have on the right side of the garment.*
> *I spend two months constructing and sewing the dress. A seam ripper becomes a permanent extension of my hand. I strive for quality, for excellent craftsmanship, for a result that will stand up to scrutiny. The final stitches are made by hand, with care and precision, while I practise my* lectio praecursoria.[132]

Although technical considerations can limit creativity, it is important to understand that they do not automatically preclude originality. The Narrative illuminates how technical considerations, and free and creative choices can coexist in harmony. As the CJEU confirmed in *Brompton,* these considerations may even dictate the creative process to some extent. What matters is whether, despite those considerations, the author still expresses their creative ability in an original manner by making free and creative choices in such a way that the subject matter reflects their personality.[133] As the Narrative describes, the free and creative choices may

[131] *See* Case C-604/10 *Football Dataco* paras. 42, 46. Moreover, originality is not about "sweat-of-the-brow", Rosati (2013), p. 76.

[132] A *lectio praecursoria* is a 20-minute presentation about the background and most interesting points of a doctoral research, given at the beginning of a public defence.

[133] Case C-833/18 *Brompton*, para. 38. *See also* Mattila (2022), p. 43: the author's intention to come up with a *creative* result effects in the background. Even if the technical end result *looks* creative, if it is not a result of its author's free and creative choices, it is not original. Interestingly, the initial shape of the Brompton bicycle partly resulted from the lack of proper tools: the bike featured a "humpback" frame because the tools that were available for designers in the 1980s were not sophisticated enough to create a

sometimes be small, but, in combination, they are significant for the outcome of the process. A garment can therefore have a functional shape and at the same time be the intellectual creation of its author, meriting copyright protection – at least in theory. However, although technical considerations, rules, and constraints can coexist with originality, the more functional the garments are, the narrower the space in which such coexistence is de facto possible. What makes this space narrow is that, if an author is eagerly following considerations of technical function, they may, for example, prioritise practicality over creativity in the choices they make. If the space for creative freedom is very limited, it can lead to the idea and expression becoming indissociable.[134]

## 5 Concluding Remarks

*Finally, the dress is ready. I wear it with joy and pride when I publicly defend my doctoral thesis. The design fulfils its functional purpose and follows the academic dress code, while also making an aesthetic statement; a statement that comes both from my head and my heart. I see the dress as a part of my academic identity, reflecting my personal touch.*
*When I look at my dress, I ask myself what exactly makes it special. For me personally, it will always be special, because it originates from my creation and expresses my vision. More objectively, perhaps the specialness lies in the dramatic combination of black silk and lace, sculpturally arranged bias strips on the waist, and the structured, refined figure. It is in the illusion of modesty created by the long sleeves, high collar, and long skirt, which is then challenged by the subtle transparency of the lace. It is in the way that all the small decorative elements – bows, buttons, lace trims, and so on – are arranged, and in the entity they form.*

The Narrative has provided a window through which the reader has been able to view the free and creative choices made in the production of a fashion design, and the creation's meaningful relationship with its author. This is something that traditional methods of legal research, such as the doctrinal study of law alone, cannot provide.

By combining doctrinal analysis with the Narrative, this article has shed light on what kind of information about the creative process of a fashion design may be relevant for assessing originality, and why. Because the EU standard of originality emphasises the importance of the choices made in the creative process, this process is something that copyright scholars and national courts in the Member States would benefit from looking at.[135] The standard stresses the importance of the author's

Footnote 133 continued
gentle bend; *see* Wilhide (2019), p. 439. Thus, this shape did *not* result from the bicycle designer's free and creative choices. An example of a functional shape that was considered original is the Tam Tam stool (Lyon Court of Appeal (22 February 2024) *Stamp v. La Foir'fouille* (20/06309).

[134] Case C-833/18 *Brompton*, para. 31 and Tischner (2020), p. 974.

[135] *See* Mattila (2022), p. 35.

personality being reflected in their work, and of the circumstances in which the work was created; factors external to and subsequent to the creation of the product are not relevant.[136] Therefore, the more we know about the creative process, the more certain we can be about whether the creation truly results from its author's free and creative choices. It is hoped that the CJEU will take this into account in the *Mio* and *USM Haller* cases.

Against this backdrop, the author may sometimes be the best source of relevant information for assessing originality. Courts should bear this in mind when assessing evidence in copyright cases. Similarly, courts should be cautious when calling outsiders, such as art or fashion experts, as witnesses in cases where the originality of a particular creation is at issue. Without any information about the creative process, even the most experienced art expert would struggle to determine whether the author has made free and creative choices in the production of the contested work. However, this does not make the author the most qualified person to assess originality. Nor does it mean that the test of originality itself should be subjective. An author's relationship with their work is unlikely to be neutral. The CJEU's own phrases "stamp the work created with [their] 'personal touch'" and "reflects the author's personality"[137] already suggest that this relationship can be very intimate. The author is likely to have their own interests at stake. A subjective demonstration is hence not sufficient to establish originality.[138] Although the standard of originality undoubtedly contains subjective elements, which must be considered in depth by a court of law, the assessment of originality by the courts must be objective.[139] This certainly requires careful balancing. One way for courts to avoid problems arising from navigating between the subjective nature of the standard of originality and the objective test of originality is to rely on procedural law rules concerning the reliability of witnesses and the burden of proof. Deposition (particularly the documentation of the creative process) has great potential for demonstrating the author's path to originality. The more information about the creative process that is gathered from the author, the more accurate the legal assessment of originality will be.

The Narrative in this article has demonstrated how free and creative choices can be made in the production of a work of applied art. However, neither the Narrative, nor the doctrinal analysis thereof, should be interpreted as providing a definitive conclusion on the originality of the dress of the Narrative, precisely because of the subjectivity of the latter and the positionality of the author. Rather, the dialogue between the Narrative and the doctrinal analysis wraps a creative process in a legal package that may provide interesting insights for copyright lawyers seeking to understand how free and creative choices can be made in constrained creative environments. Perhaps one of the most interesting findings of the Narrative is the juxtaposition of originality and uniqueness: there is no certainty about the uniqueness of the dress in the Narrative, but uniqueness was the *goal* of the

[136] Case C-833/18 *Brompton*, para. 37.

[137] Case C-145/10 *Painer*, paras. 88, 92.

[138] *See* Bercimuelle-Chamot (2024).

[139] *See, also*, Kur (2019), p. 9.

creative process. Although the threshold of originality does not require a subject matter to be unique, an author's *intention for uniqueness* could be counted as a factor that has a positive effect on originality. Moreover, the Narrative has illustrated both the complexity – but also the *possibility* – of combining creative freedom with considerations regarding various external demands. It has also clarified some of the complications related to originality in fashion design. This article has illustrated that the creative process involved in fashion design is not inherently less creative than that of other categories of work that have not been subjected to similar levels of scepticism by the courts and copyright scholars. Fundamentally, originality in works of applied art is no different from originality in works of pure art. It is just that, in the case of applied art, extra sensitivity is sometimes required on the part of the legal evaluators to recognise the free and creative choices.

> *Throughout the design and production process, I asked myself: "Is my dress original?" After the defence is over, I explain my many considerations to my opponent, a professor of commercial law, who is sitting next to me at the defence dinner. I tell her that I have not yet decided where I stand on the question of the possible originality of my dress design, that I have my hesitations. After all, originality is anything but an easy question. However, my opponent, has a clear opinion.*
> *"I think your dress is original", she tells me.*
> *I think she is right.*

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## References

Amsterdam AG, Bruner J (2000) Minding the law. Harvard University Press, Cambridge

Antikainen M (2021) 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

Bellido J (2014) Looking right: the art of visual literacy in British copyright litigation. 10 Law. Cult Hum 1:66–87

Bercimuelle-Chamot K (2024) Simple combination of clothing styles does not confer originality. IPKat 24 April 2024. https://ipkitten.blogspot.com/2024/04/simple-combination-of-clothing-styles.html Accessed 28 June 2024

Bently L (2012) The return of industrial copyright? 34 E.I.P.R. 10:654–672

Brooks P (2002) Narrativity of the law. 14 Law Lit 1:1–10. https://doi.org/10.1525/lal.2002.14.1.1
Connelly FM, Clandinin DJ (1990) Stories of experience and narrative inquiry. 19 Educ Res 5:2–14
Derclaye E (2010) Are fashion designers better protected in continental Europe than in the United Kingdom? A comparative analysis of the recent case law in France, Italy and the United Kingdom. 13 J World Intellect Prop 3:1747–1796
Derclaye E (2020) *Doceram*, *Cofemel* and *Brompton*: how does the current and future CJEU case law affect digital designs? In: Pasa B (ed) Il design, l'innovazione tecnologica e digitale, Un dialogo interdisciplinare per un ripensamento delle tutele—design, technological and digital innovation. Interdisciplinary proposals for reshaping legal protections. ESI Press. https://ssrn.com/abstract=3507802. Accessed 24 June 2024
Derclaye E (2021) EU design law: transitioning towards coherence? Fifteen years of national case law. In: Bruun N, Dinwoodie GB, Levin M, Ohly A (eds) Transition and coherence in intellectual property law. Essays in Honour of Annette Kur. Cambridge University Press, Cambridge
Derclaye E (2022) The status of three-dimensional functional works post-Cofemel. An empirical analysis of the Member States' case law which had an artistic merit requirement. https://ssrn.com/abstract=4300926. Accessed 24 June 2024
Derclaye E (2024) Is copyright harmonisation in the EU achieved in practice and if not, what can we do about it? 73 GRUR Int 7:605–606
Geczy A, Karaminas V (2012) Fashion and art: critical crossovers. In: Geczy A, Karaminas V (eds) Fashion and art. Bloomsbury, London
German Federal Supreme Court (2023) Federal Court of Justice submits questions to Court of Justice of the European Union concerning concept of "works" as used in copyright law. Press release. 21 December 2023. https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/EN/2023/2023210.html?nn=17683472. Accessed 25 June 2024
Gervais DJ (2017) (Re)structuring copyright. Edward Elgar Publishing, Cheltenham
Ginsburg JC (1990) A tale of two copyrights: literary property in revolutionary France and America. Tul L Rev 64:991–1032
Güven K (2021) Unities of art: reconciling function and copyright. IIC 52:1161–1189. https://doi.org/10.1007/s40319-021-01117-y
Haarmann P-L (2005) Tekijänoikeus ja lähioikeudet [copyright and related rights]. 3rd edn Talentum
Hartwig H (2023) Reciprocity in copyright law. IPKat 30 October 2023. https://ipkitten.blogspot.com/2023/10/guest-post-reciprocity-in-copyright-law.html. Accessed 27 June 2024
Heikkinen HLT (2002) Whatever is narrative research? In: Huttunen R, Heikkinen HLT, Syrjälä L (eds) Narrative research: voices from teachers and philosophers. SoPhi Academic Press, Jyväskylä
Härkönen H (2018) Muoti tekijänoikeudellisena teoksena: näkökulmia käyttötaiteen teoskynnykseen ja kopiointiin Suomessa [fashion as a copyright protected work: perspectives to the copyright threshold and copying of applied art in Finland]. Defens Legis 99(6):908–922
Härkönen H (2021) Fashion and copyright: protection as a tool to foster sustainable development. Doctoral dissertation. Acta electronica Universitatis Lapponiensis 311, Rovaniemi
Härkönen H, Särmäkari N (2023) Copyright and digital fashion designers: the democratization of authorship? 18 JIPLP 1:42–57
Härkönen H, Ballardini R, Pietarinen H, Sarantou M (2023) Nature's own intellectual creation. Copyright in creative expressions of bioart. NuArt J 4(2):100–110
Inguanez D (2020) A refined approach to originality in EU copyright law in light of the ECJ's recent copyright/design cumulation case law. IIC 51(7):797–822. https://doi.org/10.1007/s40319-020-00962-7
Kur A (2014) Protection for fashion: the European experience. In: Cooper Dreyfuss R, Ginsburg JC (eds) Intellectual property at the edge: the contested contours of IP. Cambridge University Press, Cambridge
Kur A (2019) Unité de l'art is here to stay—*Cofemel* and its consequences. Max Planck institute for Innovation and Competition Research Paper No. 19–16
Levin M (2021) The *Cofemel* revolution—originality, equality and neutrality. In: Rosati E (ed) The Routledge handbook of EU copyright law. Routledge, Taylor & Francis Group, New York
Mattila T (2022) Yhteistyö tekijänoikeudessa [collaboration in copyright law—a study of original copyright holders in creative processes based on cooperation and communality]. Doctoral thesis. Suomalainen Lakimiesyhdistys, A-series, No 345, Helsinki
Mensitieri G (2020) The most beautiful job in the world: lifting the veil on the fashion industry. Natasha Lehrer tr. Bloomsbury

Moean T (2006) Reflections on the narrative research approach. Int J Qual Methods 5(4):56–69
Monseau S (2023) Protecting creativity in fashion design. US laws, EU design rights, and other dimensions of protection. Routledge, New York
Murray L, Piper T, Robertson K (2014) (eds) Putting intellectual property in its place: rights discourses, creative labor, and the everyday. Oxford University Press, New York
Pouillard V (2021) Intellectual property rights and country-of-origin labels in the luxury industry. In: Donzé P-Y, Pouillard V, Roberts J (eds) The Oxford handbook of luxury business. Oxford University Press, Oxford
Pouillard V (2021) Paris to New York. The transatlantic fashion industry in the twentieth century. Harvard University Press, Cambridge
Pouillard V (2023) Intellectual property rights and the mediation of luxury. In: von Wachenfeldt P, Petersson McIntyre M (eds) Luxury fashion and media communication. Between the material and immaterial. Bloomsbury
Raustiala K, Sprigman C (2006) The piracy paradox: innovation and intellectual property in fashion design. Virginia Law Rev 92(8):1687–1777
Raustiala K, Sprigman C (2012) The knockoff economy: how imitation sparks innovation. Oxford University Press, New York
Robertson K (2014) no one would murder for a pattern: crafting IP in online knitting communities. In: Murray L, Piper T, Robertson K (eds) Putting intellectual property in its place: rights discourses, creative labor, and the everyday. Oxford University Press, New York
Rosati E (2013) Originality in EU copyright: full harmonization through case law. Edward Elgar Publishing, Cheltenham
Rosati E (2023) Originality in copyright law: an objective test without any artistic merit requirement, recalls Arnold LJ. IPKat 30 November 2023. https://ipkitten.blogspot.com/2023/11/originality-in-copyright-law-objective.html. Accessed 27 June 2024
Rosén J (2021) Novelty, idea or new meaning as criteria for copyright protection? Transitions in Swedish design law. In: Bruun N, Dinwoodie GB, Levin M, Ohly A (eds) Transition and coherence in intellectual property law. Essays in Honour of Annette Kur. Cambridge University Press, Cambridge
Schovsbo J (2020) Danish Supreme Court denies copyright in rubber boots. JIPLP 15(9):679–681
Schovsbo J, Teilmann-Lock S (2016) We wanted more Arne Jacobsen chairs but all we got was boxes—experiences from the protection of designs in Scandinavia from 1970 till the Directive. IIC 47:418–437
Teilmann-Lock S (2012) The fashion designer as author: the case of a Danish t-shirt. DesignIssues 28(4):29–41
Teilmann-Lock S (2016) The objects of copyright. A conceptual history of originals and copies in literature, art and design. Routledge, Taylor & Francis Group, New York
Tischner A (2020) Copyright protection for a functional shape in so far as it is original. GRUR Int 69(9):969–976. https://doi.org/10.1093/grurint/ikaa115
Tuominen T (2020) En ole yksin: Kollaasintekijän suhde tekijyyteen' [I am not alone: a collage author's relationship with authorship]. In: Alén-Savikko A, Kurjenmiekka V, Nyqvist S, Oja O (eds) Muuttuva tekijä: kirjoituksia tekijänoikeudesta ja taiteesta. Helda Open Books, Helsinki
Wilhide E (2019) Design. The whole story. Thames & Hudson, London
Wolff L (2014) Let's talk about lex: Narrative analysis as both research method and teaching technique in law. 35 Adelaide Law Rev 1:3–22