# Delineation Between Plagiarism, Inspiration and New Creation

## The Distinction Between Copyright Protection and EU Design Law Protection for Chairs

Author: Josefine Tillman

Supervisor: Johan Axhamn

Master's Thesis in European and International Trade Law

HARN63

Spring 2022

LUND UNIVERSITY

SCHOOL OF ECONOMICS AND MANAGEMENT

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# Abstract

Industrial design can double up in protected, by copyright protection as well as registered community design protection within EU.[1] Thus, there can be seen a tendency for right holders to take comfort in copyright protection.[2] The boundaries between the scope and extensions of the protection forms are not clear, neither to legal professionals nor the industrial professionals.[3]

The purpose of the thesis is to examine similarities and differences for copyright respectively RCD protection for chairs as well as the delineation between plagiarism, inspiration and new creation.

For the purpose of the thesis, EU legal method has been consequently.

The commercial market for designs are often in the literature called the design intensive market, whereas IPRs more frequently plays an crucial role for designers and for actors on the market. A highly recognized design can create a great value for the company's role in the market.[4]

European copyright protection takes its base in Berne Convention from 1884,[5] in addition the European Union have by directives harmonized the legislation with

[1] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 229.

[2] Lewis, J, The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

[3] See for example Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 224 ff, or Schovsbo, J.. Design protection in the Nordic countries: Welcome to the smörgåsbord. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 323 ff or Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 230 ff.

[4] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

[5] Berne Convention for The Protection of Literary and Artistic Works (Paris Act of 24 July 1971) as amended on 28 September 1979.

containing concepts. It is foremost the Infosoc-directive that is of referral within the relevant cases.[6]

National legislation have previously sought to distinguish the concept of applied work of art from traditional types of work, by being restrained in justifying copyright protection. However, several CJEU judgment have in the recent years emphasized the importance of interpreting work of applied art on the same wavelength as traditional work.[7]

For industrial designs, for protection within EU design law, on an international level, the legislation takes base from Paris Convention and the TRIPS agreement.[8] In the aspect of EU´s harmonization purpose, EC established the Directive of Design as well as Regulation of Community designs.[9]

A design within the RCD system represents either a registered design or an unregistered design.[10]

Cofemel-case can be considered a landmark decision when it comes to copyright protection of work of applied art. The decision have changed the landscape of protection for designs, including chair design, with a pull for copyright protection according to the author.

This further means, that for chair within EU, there is a double protection, which makes the author, among others, question the RCD protection.

Still, there are similarities and differences for the different forms of protection. Both protection forms require design and function to be separate and for the design to be able to stand alone and not be obligated be the technical features.

The concepts of ‘originality’ respectively ‘novelty’ can also be considered similar, however not identical according to the author. The purpose of the legislator was to

[6] Directive 2001/29/EC on The Harmonisation of Certain Aspects of Copyright And Related Rights in The Information Society (InfoSoc-directive).

[7] See for example C-168/09 Flos SpA v Semeraro Casa, ECLI_EU:C:2011:29 or Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others,ECLI:EU:C:2019:721, or Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721.

[8] Paris Convention for the Protection of Industrial Property (as amended on September 28, 1979) and Agreement on Trade-related Aspects of Intellectual Property, 1994.

[9] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

[10] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs preamble (17).

put the bar a bit lower in regards of ‘novelty’. Still, the author is not convinced that the difference is as high as the legislator had hoped for when the concepts puts to a test.

To be able to enjoy RCD design protection, the design needs to fulfil the prerequisites of individual character as well as novelty. Which are strongly linked together according to the author. To show novelty, the design needs to possess individual character and produce a different overall impression on the informed user as any other design. The informed user, is according to the author a professional within the industry of furniture design in this case. The concept of individual character have also been closely connected to the concept of ‘degree of freedom of design’, initiated by the legislator. A low degree of freedom would lower the bar for individual character and vice vera. Which is an incorrect assessment according to the author.

Nevertheless, the assessment is highly subjective. A phrasing that is frowned upon within copyright protection legislation, where the assessment always should be objective.[11] To enjoy copyright protection as work of applied art, which is the category that a chair design would fall under, the design must first of all fulfil the prerequisites. The design must be considered ‘work’ as well as ‘original’ and also fulfil the AOIC-test including a free and creative choice, which can be put in parallel with individual character and freedom of design.

This also shows, the different purposes of the protection forms. Hence, copyright is on a higher level connected to the author on a personal level in the opinion of the author.

The delineation between what is considered plagiarism versus inspiration for the two protection forms can be considered rather blurry, if the author can express her opinion. Nevertheless it is a little bit more straight forward within RCD design protection legislation, since it takes the perspective of the informed user. Hence, the same overall impression will equal plagiarism, and a different overall impression will equal inspiration. However, the author would like to point out again, that this is highly subjective.

[11] Case C-310/17 Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899.

In regards of copyright protection the assessment is much more complex. The line between plagiarism and inspiration is much thinner and vague. Through the Swedish scapegoat case, it states, that the adapted work needs to be able to stand alone for it to be considered a new work, hence not just an adoption as such as in the Painer-case, however if the work is put in a new context this would give the work a new meaning and thereby put the work on its own legs.[12]

[12] Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court) and Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others, ECLI:EU:C:2019:721.

# Foreword

I would like to express my heartly *thank you* to several people, most of all my husband and my family. It has been a hectic year, to say the least. With this thesis some of it comes to an end. So, lets cheer for achieved goals. Now it is time for new beginnings. But first a little vacation.

Best regards,

Josefine Tillman

# Abbreviations

| | |
|---|---|
| AG | Advocate General |
| AOIC | Authors own intellectual Creative Choice |
| CJEU | Court of Justice European Union |
| DDir | Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs |
| EC | European Commission |
| EU | European Union |
| EUIPO | European Union Intellectual Property Office |
| EUR | EURO |
| GC | General Council |
| GDP | Gross domestic Product |
| IP | Intellectual Property |
| IPR | Intellectual Property Rights |
| PMD | Patent- and market court (patent- och marknadsdomstolen) |
| PMÖD | Patent- and market supreme court (patent- och marknadsöverdomstolen) |
| RCD | Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs |
| SME | Small and Medium-sized Enterprises |
| UCD | Unregistered Community Design |
| WIPO | World Intellectual Property Office |

# 1. Introduction

Chapter one will provide the reader with an introduction and background in the area of intellectual property protection for industrial designs within EU market. Chapter one will as well provide the purpose and the research questions that the thesis is based upon and furthermore provide for the legal method used and the structure for following chapters.

## 1.1 Background

Intellectual property refers to the creation of the mind of a human and serves to protect this various forms of work, art or inventions etc,[13] not mere the idea and the concept.[14]

The processes of designing new products for commercial value require significant creative activity and investment in time, knowledge and capital. Industrial design can be described as a combination between art and utility of copyright and industrial property.[15] In addition, an industrial design can present so much more than just a formal or ornamental appearance, it can give raise to high freedom of design which in turn can provide a meaning that costumers give to such product.[16]

It is essential for exclusive rights be given to the creator or owner for protection, otherwise any part or the work would be free to replicate and take value from the investment made by the original creator. A strong design protection is therefore an excellent tool to enhance the investment in the design creation and work.[17]

[13] World Intellectual Property Organization, What is Intellectual Property? World Intellectual Property Office https://www.wipo.int/about-ip/en/ accessed: 2022-05-26.

[14] Tordoir, F. and Noorlander, Y. European Design protection – worth your money?, IAM Innovation & Invention Yearbook 2022, 26 October 2021 https://www.iam-media.com/global-guide/innovation-invention-yearbook/2022/article/european-design-protection-worth-your-money accessed: 2022-04-12.

[15] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

[16] Ibid.

[17] Ibid.

According to the European Commission, protection of design is an economic force to be reckon with for the ability to promote innovation and growth.[18] Design-intensive industries also contribute heavily to the employment within EU.[19] There is thereby a present and increasing need of modernise and streamline the European design protection regulations as a part of the commissions "IP action Plan".[20] However, even though the regulation still seem to fit the purpose, there is still a need for a upgrade to benefit design-intensive industries, SME and individual designers.[21]

It may not be obvious as a designer on how to navigate within the different forms of intellectual property rights according to the author of thesis. Several different forums or field within intellectual property law and protection serves the purpose and are available as a platform for protection of designs; EU design protection regulations and directives, unfair competition law, trademark law and copyright protection, as well as the national counterparts. This can according to Schovsbo be considered a "Smörgårdsbord" of protection.[22]

However, there is an relative and certain issue in regards of the overlap of protection that provides. From an EU perspective this is not considered harmonized and there is a non-existent guidance left for the courts.[23] There is also an question regarding the existence of the design protection system provided by EU and the tendencies to be overridden in favour of copyright protection.[24]

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[18] European Commission, *Commission staff working document evaluation of EU legislation on design protection {SWD(2020) 265 final}*, Brussels, 6 November, 2020 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1846-Evaluation-of-EU-legislation-on-design-protection_sv accessed: 2022-05-26.

[19] European Commission, *Inception Impact Assessment,* Brussels, 24 November 2020. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1846-Evaluation-of-EU-legislation-on-design-protection_sv accessed: 2022-06-26.

[20] European Commission, *Making the most out of EU's innovative potential – An Intellectual Property action plan to support the EU's recovery and resilience,* COM(2020), 760, Brussels, 25 November, 2020, https://ec.europa.eu/docsroom/documents/43845 accessed: 2022-05-26.

[21] European Commission, *Inception Impact Assessment,* Brussels, 24 November 2020.

[22] Schovsbo, Jens. Design protection in the Nordic countries: Welcome to the smörgåsbord. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, Johan (red), issue 2, 2020, volume 89, p. 340.

[23] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 224.

[24] Harnesk, L. Design Protection in the Nordic countries – looking back and forward. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 296.

Hence it can be considered just in line that there is an evaluation of EU legislation of EU design protection amended in 2019.[25] Several professionals within the legal field are also questioning the necessity of a separate national framework and what benefits this brings to the table.[26] Several issues within design protection are to be dealt with in the near future.[27] However, it is not just the legal authorities and professional that are tending to see clouds in the sky. Also industry professionals are asking themselves the question on how to navigate in the landscape of overlapping frameworks according to the author.

Copyright as well as EU design protection system are areas of law that provides protections of the artistic creation of a design, or what also can be named "applied work of art". However, even though their purpose is not the same, since copyright protects against reproduction and copying of an existing work and EU design protection system protects against rip off and infringement[28], several professionals, according to their opinion, sees tendencies of designers taking faith in copyright protection for their designs. Which surely wasn't the intention of the establishment when producing the legal frameworks of design on a EU level, or for that matter the copyright framework.[29]

A major change of perspective have also been on the horizon in the last decade, especially since 2017, as the interpretation of CJEU have started to take ground.[30] Still there is are blurry delineation between what can be considering copying or rip off and what can be considered as inspiration and new creation.[31]

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[25] European Commission, Commission staff working document evaluation of EU legislation on design protection {SWD(2020) 265 final}, Brussels, 6 November, 2020.

[26] See for example Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 224 ff, or Schovsbo, J. Design protection in the Nordic countries: Welcome to the smörgåsbord. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 323 ff or Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 230 ff.

[27] Ibid.

[28] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 229.

[29] Schovsbo, J. Copyright and design law: What is left after all and Cofemel? – or: Design law in a 'double whammy', In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 289.

[30] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 224.

[31] Ibid.

It should also be regard as a valid point from Levin, who in her opinion underline that work are not exclusively the same as design and that all designs cannot not be considered work.[32] This area of law, is in her opinion, not as straight forward as one could wish for. Levin describes this area as "vivid and challenging hybrid area, where law meets life, art, culture and technology meet and interweave.[33]

It should be noted that the purpose of the EU design protection system was to have a genuine design approach and thereby to promote the effect of design on the market.[34]

Both copyright and design protection present in their backbone that the artistic work should be novel or original and both allow for protection of designed work, two- or three dimensional. However it is established, that a lot of designers relay on copyright protection when it comes to their intellectual property rights (IPRs) of design, even though design-intensive industries are of increasing importance.[35] According to the author these two protection forms assumingly and inevitably confuses the minds of the strategy makers of the design-intensive industries.

Since the Cofemel case[36] the overlap between copyright and design protection has been declared, which increased the complexity of the situation in favour of copyright protection.[37]

The question to be asked, when representing the commercial market, is whether or not Registered European Design Protection is worth your money? This question was brought up by Tordoir and Noorlander, who believes that design protection has been forgotten and underestimated.[38] And although not expressed in the same

[32] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 229.

[33] Ibid.

[34] Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Towards a European Design Law, Munich, 1991, p.47.

[35] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

[36] Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721.

[37] Kur, A. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 240.

[38] Tordoir, F. and Noorlander, Y. European Design protection – worth your money?, IAM Innovation & Invention Yearbook 2022, 26 October 2021.

words, this opinion goes in the same direction as the European Commission's opinion judging by the initiative to evaluate design protection.

The company, who raised the question, is major player in the design-intensive industry, especially within the field of furniture design and can be considered a market leader in the world of designs. The designs for the company should be protected as a valued treasure and not leave the protection to uncertain interpretations of the CJEU.

However, it has never been told that intellectual property law provides an easy territory to navigate in. Many questions arises when you are in the position of developing a new strategy of protection of designs and the value that they bring. Not only is a clear delineation needed between the forms of protection between copyright and design protection within EU, but there is also a gap of knowledge of how far the different protection forms extends and interprets. The boundaries are in the current unclear and need to be set in order to develop the best strategy for the commercial purpose.

The company in question, as mentioned, is a market leader in various furniture groups, however it is not obvious how to best protect the designs from a commercial standpoint, especially when it comes to applied art and works with practical use and how far this protection extends when it comes to copying versus inspiration and new creation.

Rulings over the last decade have also been giving an indication that copyright protection of furniture design may be getting more strained and complex which requires designers to approach furniture designs with a heightened sensitivity and take design and copyright protection regulations into consideration. Several courts have shifted focus of their analysis of originality of the furniture design into its utility according to the analysis of Robins and Staba.[39] There should be a distinguish line between the function and the design and the work needs to be able to stand alone according to author.

[39] Robins, L. R. and Staba, K. L., Copyright Protection in the Furniture Industry , *Furniture World,* May 2010 https://www.furninfo.com/furniture-world-archives/11012 accessed: 2022-04-12.

From the mentioned company´s perspective, chair design protection is of essential value and various cases, interpreted in CJEU, have given raise to interesting questions relating to chair designs and how far different protection forms stretches and the fact that there is an historic tendency to relay on copyright protection. Chair designs does also includes utility function which is hard to overlock..

So, with above mentioned, there are complexities in the applied differences and the extension of the scope and the interpretations between the different forms of design protection that is in need of  further examination.

## 1.2 Purpose and research question

The purpose of this thesis is to describe and analyze the scope of protection in EU copyright and design law, as applied to the potential protection of chairs. This includes a description and analysis of the delineation between plagiarism, inspiration and new creation in these areas.

To fulfill the purpose, the following research questions will be answered:

- Under what conditions may chairs be protected by EU copyright (as applied art) and design law?
- What are the similarities and differences between these types of protections, as applied to chairs?
- How can one make a delineation between inspiration and plagiarism, for these types of protection, as applied to chairs?

## 1.3 Delimitations

Design protection law can be considered areas of several different forums, playing different roles within design protection. As described above by Schovsbo it can be considered as a "smorgasbord" for the one who would like to obtain protection.[40] All with different purposes of course. A design can be considered a trademark and obtain protection under trademark law, it can be considered playing a role in unfair competition and thus fall under unfair competition law. It can also be considered as applied work and obtain protection by copyright, as well as national and international design legislations.

Following thesis will delimit some of the above mentioned areas and focus solely on copyright protection and design protection regulations and directives from an EU perspective. However, for the purpose of statements made in the thesis, parallels may occur to national legislation or other areas of law.

[40] Schovsbo, J. Design protection in the Nordic countries: Welcome to the smörgåsbord. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019*, Axhamn, J. (red), issue 2, 2020, volume 89, p. 340.

## 1.4 Materials and method

Below is a descriptive section for the material and method chosen to convey with the purpose of this thesis. The methodology is the way to describe a journey with starting point at the research question, trough the material, and achieving the aim of the objective of the thesis.[41]

The purpose of this thesis is to navigate in a complex area of intellectual property law and more precise within legislation applicable for the European Union and the member states within. The purpose of the thesis is also to traverse in the intersection between different intellectual property rights, design protection according to the EU system, as well as EU Copyright protection.

### 1.4.1 Legal Dogmatic Method

To be able to achieve the purpose given in subsection 1.2 of this thesis a traditional legal dogmatic method has been conducted. Legal dogmatic method is a method, more often than not, used when producing a legal thesis as following, and which have been proven beneficial over several decades.[42] The thesis aims to describe the current law – *de lege lata*.[43] To achieve the purpose of this thesis a comparison will be made for different protection form of IPRs, by using legal dogmatic method, not to be confused with the comparative method.

### 1.4.2 EU-legal method

For the following thesis and the objective it may seem relevant for EU legal method to permeate trough out the thesis.[44] This, due to the perspective of the thesis and that IP law within EU aim to be harmonized. The union has legislative competence which is divided into exclusive and shared legislative competence, as well as supportive competence in specific areas.[45] EU legal system is built upon an

[41] Sandberg C. *Rättsvetenskap för uppsatsförfattare*, second edition, Stockholm, Norstedts Juridik, 2007, pp. 35-36.

[42] Sandberg C. *Rättsvetenskap för uppsatsförfattare*, second edition, Stockholm, Norstedts Juridik, 2007, pp. 35-36.

[43] Ibid p. 57.

[44] Lenaerts. K.. and Gutierrez-Fonz, A. J. To Say What the Law of the EU Is: Methods for Interpretation and the European Court of Justice, *EUI Working Papers*, September 2013.

[45] Treaty on the Function of the European Union (TFEU) article 3-4 and 6.

autonomous legal system divided into primary law: TEU, TFEU and EU charter, general legal principles and finally secondary and supplementary law.[46]

Secondary law can further be allocated into different shapes of binding acts which further have various legal implementation methods to achieve harmonization within EU (i) regulations, that are directly applicable within the EU[47], (ii) directives, which are in-direct binding, for the result to be achieved, it is upon each Member State to choose of form and method for implementation.[48] The system also provides for non-binding source law for example recommendations and opinions.[49] Even though the preambles are not binding, it is likely for the CJEU to refer to these in the rulings.[50]

The sources of law to convey in have predominantly with a few exceptions been EU legislation and case law from CJEU, for example the Cofemel, Doceram, Swedish Scapegoats and the Brompton Bicycle cases have been of specific relevance to get an understanding of the current landscape and interpretations. For these cases the Advocate Generals opinion as well as the court decision have been of high relevance.

Further, legal doctrine has been used to create an understanding of the complexity of the areas, there among literature, publications and articles of different sort, as well as legal opinions and guidelines, not to leave out reports and evaluations from EUIPO.

The case law within CJEU plays a central role in the development of EU law and have high legal source value and a binding effect, as a result CJEU often refers to older case law in their judgements. This also applies for the AG´s opinion, which notably is not a judgement, but often contains a richer and more nuanced analysis and reasoning, and which often is more comprehensive than what is put forward in the judgement by CJEU. The AG's opinion thus provides for a embraced addition

[46] Pila, J. and Torremans, P. *European Intellectual Property Law*, Second edition, Oxford: Oxford University Press, 2019, p. 225ff.

[47] Treaty on the Function of the European Union (TFEU) article 288.

[48] Ibid.

[49] Ibid.

[50] Pila, J. and Torremans, P. *European Intellectual Property Law*, Second edition, Oxford: Oxford University Press, 2019, p. 25ff.

in the understanding of a judgement.[51] The CJEU convey to four different methods when interpreting EU regulation and directives: textual, systematic, interpretation and EU conform interpretation.[52]

## 1.5 Structure

The following thesis, going forward with chapter two, will provide the reader an insight in the commercial market of design as it can be seen in the second decade of the twenty-first century. It is essential to get an understanding of the market to be able to absorb the purpose of the thesis. A quote repeated by Levin originally said by Jim Lahore professor at Queen Mary Collage, London, "Design is the real art of the twentieth century. This is even truer of the twenty-first century, at least from a lawyers point of view."[53]

Chapter two will start off with a introduction section, which will include statistics of the design intensive market followed by a walk trough of possible design protection possibilities within Europe, registered or unregistered design protection according to EU design law or via copyright protection as applied art. Chapter three and four will later provide for a more in-depth analysis of respective protection form. Chapter two will end with a summary of the presented chapter.

Chapter three will go into depth on the copyright protection, with a focus of furniture design, and especially on chairs. Chapter three will be initiated by giving the reader an overview of applicable legislation and the legal framework that applies from an EU copyright protection perspective, as well a brief understanding on what that legislation implicates. The chapter will then continue with an introduction of the subject at large and the relation to work of applied art. Thereafter follows a section in regards to chair design. Last provides a summary of chapter three in total.

[51] Lenaerts. K.. and Gutierrez-Fonz, A. J. To Say What the Law of the EU Is: Methods for Interpretation and the European Court of Justice, *EUI Working Papers,* September 2013.

[52] Reichel, J., 'EU-rättslig metod', p. 115 in Kohrling & Zamboni, Juridisk Metodlära, 2013 and Lenaerts. K.. and Gutierrez-Fonz, A. J. To Say What the Law of the EU Is: Methods for Interpretation and the European Court of Justice, *EUI Working Papers,* September 2013.

[53] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 229.

The fourth chapter of the thesis build on the same structure as the chapter before but from an EU design law protection perspective, with a focus on community registered design, and will similar to chapter two, be initiated by an overview of the legislation and the legislative structure that applies, followed by a brief overview, to bring benefit to the reader who is initially not fully versed in design protection legislation. The chapter will then go into depth of the concept of novelty and individual character. Thereafter the chapter will, in the same way as the chapter before, draw parallels for protection of chair designs. The last subsection is, accordingly with the overall structure, a short summary of the chapter at hand.

The fifth chapter will then bring together the two above-mentioned in-depth chapters, chapter three and four, and give an analysis of the current situation from the perspective of the author. The fifth chapter will also make sure to answer the research questions and the purpose of the thesis presented in chapter one, subsection 1.2. The fifth chapter will also provide for a conclusion that has been drawn by the author, followed by a summary of the chapter.

## 1.6 Summary

Industrial design, also called work of applied art, can be protected both by copyright protection as well as unregistered and registered designs within EU.[54] Thus, there can be seen a tendency for design owners to take comfort in copyright protection.[55] The boundaries between the scope and extensions of the protection forms are not clear, neither to legal professionals nor the industrial professionals.[56]

Which gives raise to the purpose of the thesis which can be concluded as; what are the similarities and the differences for protection of design chairs within the field

[54] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 229.

[55] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

[56] See for example Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 224 ff, or Schovsbo, J. Design protection in the Nordic countries: Welcome to the smörgåsbord. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 323 ff or Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 230 ff.

of copyright protection and according to EU design law and what is the delineation between plagiarism, inspiration and new creation.

For the purpose and perspective of the thesis EU legal method has been used consequently, including an analysis of the directives and regulations as well as, cases and interpretations of CJEU.

The thesis is structured with an initial chapter on the design market, followed by a chapter with a copyright focus, and there after a chapter with a design law focus. The final chapter, chapter five, gives an analysis and conclusion of chapter three and four.

# 2. The Design Intensive Market

Following chapter deals with designs, especially furniture designs, from an commercial perspective and gives a background to the importance of IPRs in the field of designs. The commercial market of design is often referred to in the literature as 'the design intensive market' and it is in this market that a strong IP protection plays a crucial role. The chapter is designated to provide the reader a richer background to the complexity and the purpose of the thesis. This chapter does not aim to side with either copyright protection nor design law. The chapter start with a introduction of the commercial, design intensive market, as well relevant statistics. Subsection 2.2 in the following chapter aim to give the reader an overview of how the commercial design market intertwine with IP protection in Europe.

## 2.1 The Commercial Market of Design

"Design is everywhere" is the initial statement by Jessica Lewis in her presentation in Alicante December 2020.[57]

The revenue for the furniture market amounts, according to forecast, to US $715.60 billion in 2022[58] and the market is expected to grow annually by around 5% between 2022 and 2026. Within the furniture market the largest segment is living room furniture with a market volume of predicted US $248.40 billion in 2022.[59] The key factor driving the market development is the increasing technology advancements as well as the e-commerce platforms.[60] Other factors propelling the growth of the market may be the increasing preference for branding and positioning.[61]

[57] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office*, December 2020.

[58] Statista, Costumer Markets Furniture, 2022, https://www.statista.com/outlook/cmo/furniture/worldwide accessed: 2022-05-26.

[59] Ibid.

[60] Mordor Intelligence, Report Global Furniture Market (2022-2027) https://samples.mordorintelligence.com/63956/Sample%20-%20Global%20Furniture%20Market%20(2022-2027)%20-%20Mordor%20Intelligence1645706027629.pdf accessed: 2022-05-26.

[61] Ibid.

Design-intensive industries substantially contribute to the economy of the European Union, during the period 2014-2016, design-intensive industries represented almost 16% of EU GDP and 14 % of all jobs. As well as EUR 67 billion of EU trade surplus was generated by design-intensive industries.[62] It is recognized that a further improvement on the EU design protection system would benefit the economic development and competitiveness of designers as well as promote innovation.[63] And it is also recognized that IP plays an crucial role of the market according to the author.

As technology developments increases, furniture designer are also focusing on innovation and eco-friendliness on a more extensive scale.[64]

Europe have a long history of furniture design and is a key player in the field of furniture industry and remains the second largest manufacturing region in the world as well as world leading in the high-end segment of the furniture market.

According to Lewis, and what is presented in The Economic Review of Industrial Design In Europe 2015, are that often cited reasons why designs are seen as an important part of the business strategy are the following:

- It improves the image of the company
- It increases sales, turnover, profits, business productivity
- It increases employee motivation,
- It improves customers satisfaction, communication with customers,
- It can help with the development of new products and services and allows firms to access new markets. [65]

And let's keep in mind that there is an underlying creative choice in making the design appealing in the form of its shape, its colour or by the chosen material.[66] In

[62] Ibid European Union Intellectual Property Office, IPR-intensive industries and economic performance in the European Union, Industry Level analysis report, September 2019, 3rd edition, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/IPR-intensive_industries_and_economicin_EU/WEB_IPR_intensive_Report_2019.pdf accessed: 2022-05-26.

[63] European Commission, *Inception Impact Assessment,* Brussels, 24 November 2020.

[64] Ibid.

[65] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

[66] European Commission, *Inception Impact Assessment,* Brussels, 24 November 2020.

many cases the design is a key factor for purchasing the product and gives the producer its market advantages.[67]

## 2.2 IPR's in the Design Intensive Industry

Intellectual Property Rights for applied art or design, either by copyright protection or by registered design (RCD) or unregistered design (UCD) protects the appearance of a product, and one would say that this is even more important today, than a couple of decades ago.[68]

This can easily been seen from the increasing numbers within EU design protection registration, see table 1 below.[69] The interest in registered design protection rests in the intersection between innovation, industrial design and engineering.[70] In theory, the economic rationale for registered design protection lies in the promotion of creativity[71] and to have a genuine design approach and thereby to promote the effect of design on the market.[72]

Any potential increasing number in copyright protection of work of applied art is, obviously, significantly more difficult to compile, since it is, as well as UCD, an unregistered form of protection.

Although, according to Lewis, companies in the design-intensive industries have a tendency to relay on informal protection.[73] Lewis continue to state that registered design protection contribute to higher value compared to other more frequently used IP rights, by which she indirect refers to copyright protection and unregistered design. She also points out that IPRs no longer can be underestimated as a tool

[67] Ibid.

[68] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 229.

[69] Harnesk, L. Design Protection in the Nordic countries – looking back and forward. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 298.

[70] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

[71] Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Towards a European Design Law, Munich, 1991, p.47.

[72] Ibid.

[73] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office,* December 2020.

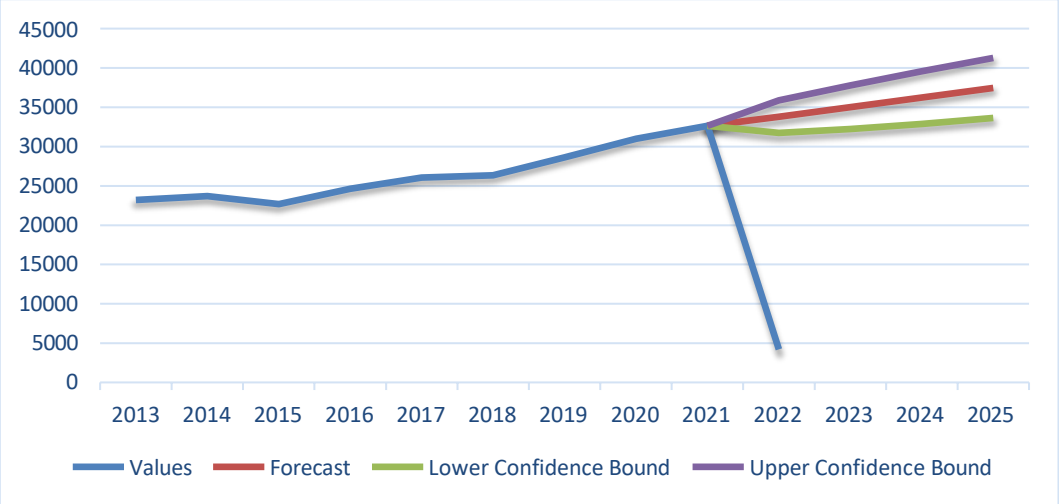
among the legal instruments; instead, it has developed a strategic benefit exploited by a wide variety of organizations, to attain innovation and value creation.[74]

Increasing volumes of RCD within EU design protection system also testify to the increasing impact of design intensive industries[75], see table 1.

RCD filings grew by 6.5% annually between 2003 and 2019 and more than 813 000 RCDs were in force on 1 January 2020.[76]

EUIPO Statistics for Community Designs 2003-2022 increasing number of application.[77]

*Table 1 RCD applications received*




### 2.2.1.1 Furniture Design in the Design Protection System

Locarno Classification system is an international classification system used for industrial design registration administered by World Intellectual Property Organization (WIPO). EUIPO have further compiled a list of products called "EuroLocarno"-system, which relies on the Locarno classification system and are

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] European Intellectual Property Office, EUIPO Statistics for Community Design 2003-01 to 2022-04 Evolution https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-community-designs_en.pdf accessed: 2022-05-26.

used for RCDs. RCD applications are strongly recommended to use the terms submitted in the Locarno/Eurolocarno system.[78]

For furnishing classification, code 6 is used, which further can be divided into subsections.[79] According to statistics provided by EUIPO, for year 2020-2021, the classification for furniture designs receives the highest number of application in the classification system. 10355 respectively 10408 number of application of RCD have been received 2020 and 2021.[80] In total since 2008, 1 471 496 publication of RCD have registered at EUIPO.[81] Charis or seats within the Locarno classification system have code 6 combined with subsection 01 and have in May 2022 65918 registrations.[82]

Given by the numbers presented above, it is safe to say that furniture and especially chairs are of great value when it comes to design protection for RCD. Unfortunately there is a lack of data when it comes to copyright protection for the same, but as in that case as work of applied art. However, the author makes the assumption that since the awareness of design appears to raise, based on the growing design-intensive market, which also is true according to the increasing number of RCD applications, a conclusion is drawn by the author, that there is also, a hidden, increasing number of reliance on copyright protection for furniture design as well as for UCD. Which may even be higher since designers have a historical tendency to relay on unregistered protection.[83]

[78] European Union Intellectual Property Office Webpage, Locarono Classifications (designs), last update 2018 https://euipo.europa.eu/ohimportal/en/locarno-classification?p_p_id=csnews_WAR_csnewsportlet/pl accessed: 2022-05-26.

[79] Ibid.

[80] European Intellectual Property Office, EUIPO Statistics for Community Design 2003-01 to 2022-04 Evolution https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-community-designs_en.pdf accessed: 2022-05-26.

[81] Ibid.

[82] Ibid.

[83] Lewis, J. The Importance of Design in the EU design marketplace: How does the Industrial Design Contribute to the Economy?, *European Intellectual Property Office*, December 2020.

Unfortunate, given by the European harmonization of IPRs within EU, it can be concluded the national design protections, at least in the Nordic countries, have decreased rapidly since the implementation of EU community design regulation.[84]

The primary purpose of the regulation was to harmonize the substantive national law and to provide equal opportunity and legal certainty and predictability throughout the European Union, the aim would be to benefit the users, however the purpose never was to replace current national legislation, but still this was the outcome.[85]

In the aspect of protection of designs there have been nothing and then nothing and then a splash.[86] The ketchup bottle analogy was used by Marianne Levin in the introduction of the documentation from a meeting of Nordic Intellectual Property Protection in 2019 specified on design protection[87] and describes the case law development in design protection area and its hybrid- and challenging area pretty well, Levin continuous and states that this is where, law, life, art, culture and technology meet.[88] Design cases have only taken place in the CJEU the last decade. Today the boundaries between copying, infringement, inspiration and new creation is blurry and highly complex.[89] Which according to the author makes hard navigated complex situation.

[84] Harnesk, L. Design Protection in the Nordic countries – looking back and forward. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 298.

[85] Ibid and European Commission, *Inception Impact Assessment*, Brussels, 24 November 2020.

[86] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 229.

[87] Ibid.

[88] Ibid.

[89] Ibid p. 225.

## 2.3 Summary

The commercial market for designs are often in the literature called the 'design-intensive market', whereas IPRs more frequently plays an crucial role for designers and for actors on the market. A highly recognized design can create a great value for the company's role in the market. Provided by Lewis and EU reports, are numbers of revenue representing the growing design-intensive market, and especially the increasing role of furniture design. This, as well as, an increasing number of RCD's gives an indication to the author there is a hidden number of reliance of copyright protection as well. A conclusion made by the author, is that IPR's for the design intensive market will increase in prominence.

# 3. Copyright Protection in the Design-Intensive Market

Following chapter presents copyright protection and essential concepts in relation to protection of chair designs. The chapter starts with presenting the applicable legal framework, followed by an introduction of copyright within in EU. Thereafter, a little deeper section in regards to *work of applied art*, followed up with functional designs. The chapter also takes into account, as it is of essence for the purpose of thesis, presented in subsection 1.2, the delineation between plagiarism, inspiration and new creation. The chapter closes of with copyright protection in relation to chair designs, and very last presents a brief summary of the chapter.

## 3.1 Applicable Legal Framework

Copyright protection takes its ground in Berne Convention for protection of literary and artistic works from 1886. As well as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) from 1994 and World Intellectual Copyright Treaty from 1996.[90]

From an European perspective with EU legal sources several different directives are applicable. Of central importance among these, and the most referred to in this thesis, and most relevant to applicable case law described below, is the Information Society Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society e.g. InfoSoc-directive, which provides for basic code governing the recognition and protection of copyright within the jurisdiction of EU.[91] As well as, Directive 2006/116/EC on the term of Protection of Copyright and Certain Related Rights.

[90] Pila, J. and Torremans, P. *European Intellectual Property Law,* Second edition, Oxford: Oxford University Press, 2019, p. 226.

[91] European Intellectual Office Webpage, The Eu Copyright Legislation, last update 2022, https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation accessed: 2022-05-26.

## 3.2 Introduction

Copyright protects the expression of an original idea and provides exclusive rights to the author of a literary or artistic work from being copied.[92] Copyright, inevitably and automatically, attaches to authorial works such as poems, sketches and sculptural works, to give a few examples out of many, and protects the author or designer, 70 years after death.[93] Copyright is a limited right and confers on its holder an exclusive right of various different types including right of prohibit copying and communication to the public etc..[94] In contrast, copyright does not confer rights in regards of protection against subsistence independently created works, in which respect copyright confer less protection, if it is to be measured against industrial property (patent) or registered designs (RCD).[95]

For copyright to be a conferred right there is a prerequisite of an original work to be at hand. Which further can be divided into, what constitutes as a "original" and respectively, what constitutes as a "work". [96] The harmonization of the concept of "works" has been driven by CJEU in a remarkable way, beginning with the Infopaq-case in 2009[97], which have progressed around article 2 of the Infosoc-directive.[98] As an autonomous concept of EU law the concept of "work" should be interpreted independently and uniform throughout the EU.[99]

To be able to gain protection according to EU copyright law, a work needs to contain elements which are the expression of the intellectual creation of the author.[100] For establishing the present of a "work" the AOIC-test must be fulfilled, e.g. Author's Own Intellectual Creation. Following criteria for "originality" was developed in the Painer-case.[101]

[92] See for example Directive 2001/29/EC on The Harmonisation of Certain Aspects of Copyright And Related Rights in The Information Society (InfoSoc-directive) article 2 or Berne Convention for The Protection of Literary and Artistic Works (Paris Act of 24 July 1971) as amended on 28 September 1979 article 2.

[93] 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 article 1.

[94] Pila, J. and Torremans, P. *European Intellectual Property Law*, Second edition, Oxford: Oxford University Press, 2019, p. 221-222 ff.

[95] Ibid s. 222 ff.

[96] Ibid s. 222 ff.

[97] Case C-5/08 Infopaq international A/S v Danske Dagblades Forening. ECLI:EU:C:2009:465.

[98] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 281.

[99] Ibid p. 282.

[100] Ibid.

[101] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others,ECLI:EU:C:2019:721.

i) The result of the author´s free and creative choice

ii) Not determined by technical constrains or by following rules and

iii) Stamped with the authors own personal touch.

The concept of work thereby serves as the gate keeper of copyright protection.[102]

According to Schovsbo the originality concept of copyright protection constitutes a floor and a ceiling at the same time, meaning that court are under no circumstances allowed to step away from the "Authors Own Intellectual Creation" (AOIC)- frame.[103]

### 3.2.1 Work of Applied Art

Design, which in the field of copyright, is named word of applied art, needs to be the authors own intellectual creation, with the author's personality being reflected in the creative choice made.[104]

Initially legislators around the globe have had a hard time dealing with design protection under copyright as "works of applied art" and not being as liberal to granting the same type of conferred rights to works of applied art as for any other more traditional set of works.[105]

The Infopac-decision played a major role in harmonizing the concept of work.[106] However, it did not consider work of applied art, which still was considered as an independent and limited category of works. This is also declared in article 17 DDIR (Design Directive) and article 96(2) RCD (Registered Community Designs):

> "Relationship to copyright
>
> A design protected by a design right registered in or in respect of a member state in accordance with this directive shall also be eligible for protection under the law of copyright of that state as from the date on which the design was created of fixed in any form. The extent to which, and the conditions under which, such protection is conferred, including the level of originality required, shall determined by each Member state."[107]

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[102] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 283.

[103] Ibid p. 281.

[104] Ibid.

[105] Derclaye E. *The copyright/Design interface, past, present and the future*., Cambridge university press, 2018 and Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 280.

[106] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 280 p. 283.

[107] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 17.

And in the InfoSoc-directive itself it states in article 9:

> "Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property."

The meaning of above articles, according to Endrich-Laimböck, are the intention to be without discrimination to provisions concerning i.a. design rights.[108] Nevertheless, work according to the Infopaq-decision had a tendency to raise the bar for what could be considered "work", which to some extent tended to disqualify work of applied art.[109]

Even though, this wasn´t laid down in the Flos v Semeraro case[110], where the court states with reference to article 17 DDIR (see above), that it is limiting towards the member states for making their own decisions on what should be conferred as works in regards of copyright protection.[111]

However, according to Schovsbo, article 17 DDIR, would merely reflect the procedural fact that it is up the specific state to determine on what work to protect, but on the other side, he points out, that it says nothing about on what legal basis in which such decision is to be made and it does not point to national substantive copyright law.[112]

Schovsbo also refers to point 8 DDIR which describes the decision to national states to set the conditions of copyright protection of designs as being available in the absence of harmonization of copyright legislation. However, this would today not appear to be an issue along with the Infopaq-decision. And as will be declared below, the Cofemel-case closed al uncertainties regarding this issue according to Schovsbo.[113]

Schovsbo explains the attempts of CJEU and EU-law to prevent national legislation to consider work of applied art as "special". He further gives examples of Flos v Semeraro[114] who banded

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[108] Endrich-Laimböck, T. Little guidance for the application of Copyright Law to designs in Cofemel, *GRUR International Journal of European and International IP law,* Volume 69, March 2020 p. 264-269.

[109] Ibid.

[110] C-168/09 Flos SpA v Semeraro Casa, ECLI_EU:C:2011:29.

[111] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 284.

[112] Ibid.

[113] Ibid.

[114] Case C-168/09 Flos SpA v Semeraro Casa, ECLI_EU:C:2011:29.

discrimination due to duration and Painer v Standard Verlags[115] who banned discrimination due to scope.[116]

In 2011 an action by Flos, in regards of the famous "Arco" lamp, was brought against Semeraro who imported the imitated, in aspect of style and aesthetic, lamp "Fluida" from China to Italy. The court concluded that the Arco lamp, which was introduced to the market in 1962, initially design protected, after expiry of the right now was protected by copyright. According to Semerano, Flos had no right to prohibit any imitating designs to enter the market since the Arco-lamp fall into public domain in 2001 (when the design protection right expired). The court ruled in favour of Flos, and stated that the Arco lamp enjoy copyright protection, even though the design falls into public domain.[117]

The CJEU have also given its decision in the Painer v Standard Verlags case which is of importance. The dispute is centred around a portrait photo taken by a freelance photographer, Ms Painer, that later was used in the newspaper, after this turned into a missing persons case. A newspaper, years later, used the same portrait photo, as well as a photo-fit image adapted from the portrait photo, to show how the person might look like today. Ms Painer objected to the republication of her work, as well as the adaptation of her work. The newspaper argued that the scope in regards of portraits photographs should be narrower than for other type of works, since the degree of freedom for the designer is limited. Nevertheless, the court explained that portrait photograph hold up the AOIC-standard and shows a personal touch. The court further states that there nowhere in the EU copyright legislation indicates that the scope should be narrower if the degree of freedom is lower. And that same applies to all types of works.[118]

Schovsbo also describes the Cofemel-case as a bolt in the window for any further discrimination against work of applied art.[119] It basically puts works of applied art at the same wavelength as any other type of work.

[115] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others,ECLI:EU:C:2019:721.

[116] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 280 p. 281.

[117] Case C-168/09 Flos SpA v Semeraro Casa, ECLI_EU:C:2011:29.

[118] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others,ECLI:EU:C:2019:721.

[119] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 280.

According to the Cofemel-case[120], which can be considered a landmark decision in the field of copyright and design protection, a design can be protected by copyright protection simultaneously as being protected by EU design protection.[121] On the fundamental obligation that it meets the same terms that is stated for copyright protection.[122]

Cofemel v G-star relates to copyright protection for designer jeans, whereas G-star claims that Cofemel have copied the "Elwood" jeans. The Cofemel case is of importance due to CJEU ruling that, as far as design affected, no other requirements are considered required for copyright protection to arise under the Infosoc directive, as long as the original work prerequisites are met.[123] The CJEU thereby, and by including earlier judgements[124] prohibit member states from denying copyright protection for any type of designs that meets the requirements of copyright.[125]

The Cofemel-case is likely to have consequences on the design protection landscape going forward. There is a liberal attitude against copyright protection from a design protection perspective under the CJEU approach of "unité de l´art" to works of applied art.[126]

#### 3.2.1.1 Copyright Protection of Functional Designs

In relation to copyright protection for functional design, the subject has been touched upon in the Brompton Bicycle-case in 2020[127], where CJEU was referred to interpret copyright legislation and how it applies to functional designs. Unlike trademark law and design protection law, EU copyright legislation has no written exclusion in regards of functionality.

Brompton Bicycle is a foldable bike that previously was protected by a patent, today expired.[128] Brompton brought an infringement claim against Get2Get who had launched a similar looking version. However, Get2Get argued that Brompton's bicycle could not benefit from copyright protection since it was dictated by its technical features. To the contrary, Brompton argued that

[120] Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721.

[121] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. article 96(2).

[122] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 240.

[123] Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721.

[124] C-168/09 Flos SpA v Semeraro Casa, ECLI_EU:C:2011:29 or Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others,ECLI:EU:C:2019:721.

[125] Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721.

[126] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 245.

[127] Case C-833/18 SI and Brompton Bicycle v Chedech/Get2Get EU:C:2020:461.

[128] Ibid.

according to the multiplicity of forms approach, there are variations of possible designs that will fulfil the same purpose of the device. The court sought clarification in the case, since it was expressed in the Doceram-case, that a causality-based approach is applicable and that it must be established that the technical feature in question needs to be the only factor which determines those features. The court thereby sought clarification on which approach is to be chosen under EU copyright law where the appearance of the product is closely related to the purpose or technical effect. [129]

> "Must EU law, in particular Directive [2001/29] … be interpreted as excluding from copyright protection works whose shape is necessary to achieve a technical result?"[130]

The referring court further asked regarding factors that would be relevant for ascertain whether a shape is necessary to achieve a technical result.[131]

Explained by the Advocate General in the case is an interesting note saying that in relation to copyright protection, patent protection serves a rather short term, up to 25 years (the same would apply for design protection according to the author), the purpose by the "short term" in patent legislation is for the technical solution to enter into the public domain, and benefit others and to promote new inventions. However, by then after expiration of patent "re-enclose" by claiming copyright protection the purpose of the patent legislation losing its position. Alternatively, inventors may by-pass the patent and design protection and go straight for copyright protection.[132] The AG in the case draws parallels to other cases where the technical constrains limits the designer to make any creative choices. The CJEU delivered a ruling saying that copyright protection can be granted for designs whose shape, at least to some extent, is necessary to obtain a technical result, provided that the other prerequisites are met. [133]

## 3.3 Plagiarism v Inspiration or New Creation

A high profile Swedish case from 2017 that has been fallen into the debate is the case "Swedish Scapegoats".[134] The case provide guidance on the delineation between what is considered adaption of existing work versus what can be considered a new creation. According to Rosén

[129] Dr. Fhima, I. The CJEU decision in Brompton Bicycle (Case C-833/18): an original take on technical functionality? *European Intellectual Property Review*, Volume 42, Issue 11, 2020, p. 761-767.

[130] Ibid.

[131] Case C-833/18 SI and Brompton Bicycle v Chedech/Get2Get EU:C:2020:461.

[132] Ibid.

[133] Ibid.

[134] Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court).

the judgement adds on to the confusion of the prerequisites of what may represent a work protected by copyright protection.[135] The Swedish Scapegoats case have arisen from the murder of the Swedish Prime minister, Olof Palme, and the once found guilty of the murder, Christer Pettersson. Pettersson was followed by a photographer a couple of days, who eventually managed to take a close-up portrait photograph of him. The close-up portrait was in the coming years frequently used in media when presenting the murder case. However, several years later, a professional painter used the same portrait photograph for inspiration, or adaption of work, in a painting displaying Pettersson in a desert landscape together with a goat. The painting was then exhibited at the Modern Art Museum in Stockholm. The photographer then claimed reproduction and communication to the public of his copyright protected work, hence made an infringement claim toward the painter.[136]

The question at hand, was what is needed for a new and original creation to arise in this situation. Thus, how far can one extent the concept of "inspiration of..".[137]

The first instance in the Swedish Scapegoats case came to the conclusion that the painting was a reproduction of the original copyright protected work, whilst the supreme court came to the opposite conclusion.[138] The court states the following:

> "the face of Christer Pettersson has … been highlighted and the face seems less angular than in the photograph. In addition, the colors in the painting are more subdued and adapted to the background, which also causes some differences in how the light falls over the face"[139]

The interesting fact in the reasoning from the supreme court is that although they considered the painted portrait the be a dependent adaption of the photograph it did now appear in e new context, with a new meaning and thereby undergone a "change". The overall impression led to the conclusion that a new original independent work had emerged.[140]

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[135] Rosén, J. Novelty, Idea or New Meaning as Criteria for Copyright Protection? Transitions in Swedish Design Law. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 350.

[136] Case T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75.

[137] Rosén, J. Novelty, Idea or New Meaning as Criteria for Copyright Protection? Transitions in Swedish Design Law. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 350.

[138] Ibid p. 351.

[139] Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court).

[140] Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court) and Rosén, J. Novelty, Idea or New Meaning as Criteria for Copyright Protection? Transitions in Swedish Design Law. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 352.

In the opinion of Rosén this provokes for future challenges since millions of works are on a daily basis presented in a new context, especially in the digital environment.[141] He further describes the challenges that a work loses its copyright protection on the mere principle that a work is only transformed merely enough to give it a new meaning and placing the work in a new context.[142]

For a work to "keep" its copyright protection the original features must be left unaltered. And to be able receive copyright protection of an adaption, the adaption must be so independent and original that a new work have been produced, in the assessment the inspirational work has to be taken into consideration. According to Malovic, it should be a consideration of dominance whether or not it should be considered as a new creation or just a dependent adaption.[143]

## 3.4 Copyright Protection for Chairs

In a decision from 2017 the Swiss federal court was the deciding part in an infringement case, of a claimed to be copyright protected, minimalistic chair "The cross frame Chair" from 1952 designed by the industrial designer Max Bill. Max Bill passed away in 1994, and handed over his copyright rights to the Bill foundation. The counterpart argued that the chair did not enjoy copyright protection since it did not meet the necessary requirements of individual character hence could not be considered "works" according to copyright protection. The court states that individual character is depending on the freedom of the designer. If the freedom of the designer is limited, it means even smaller deviations can be considered as "individual character". They considered the degree of freedom for stools and chairs to have a high degree of freedom, their form is not determined exclusively by its technical considerations.[144]

Copyright protection for chairs, as well as other types of applied work of art, or work in general, are granted if the AOIC test is fulfilled and the originality requirement is exceeded. Inherently this can vary with the type of design in question and how this relates the work in question. The originality threshold can be seen as relatively high for work of applied art according to Markkanen, however this is not true according to the aftermath of the Cofemel decision, the

[141] Rosén, J. Novelty, Idea or New Meaning as Criteria for Copyright Protection? Transitions in Swedish Design Law. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 352.

[142] Ibid.

[143] Malovic, N. Swedish Supreme Court says that painting based on photograph is new and independent creation and hence…non infringing, *The IPKat,* March 19, 2018 https://ipkitten.blogspot.com/2018/03/swedish-supreme-court-says-that_19.html accessed: 2022-05-26.

[144] Schweizer, M. Copyright Protection of minimalistic furniture design, *The IPKat,* July 26, 2017 https://ipkitten.blogspot.com/2017/07/copyright-protection-of-minimalist.html accessed: 2022-05-26.

author would like to point out. The threshold shall be set the same no matter if it is work of applied art or traditional work. Nevertheless, Markkanen further states that furniture must be truly creative to be able to be copyright protected.[145]

Though, she point out valuable copyright protected designs.

- Eames Lounge Chair by Charles and Ray Eames
- Balls chair by Eero Aarino
- Barcelona Chair by Ludwig Mies van der Rohe (1186-1996) copyright protected until 2039
- Egg Chair by Arne Jacobsen (1902-1971) copyright protected until 2041

On the contrary, the chair "Tulip", designed by Knoll, a US based company with subsidiary in France, does not enjoy copyright protection according to the French Supreme court according to a decision in October 2020. The court stated, according to Berne Convention article 2(7), that the chair is not protected by copyright in France since it is not protected in the country of origin (US). In the judgement the court states that according to US copyright law, the chair is a utilitarian object, and thereby only separate artistic elements which can stand alone and be seen as pictorial, graphic or sculptural works can be protected. Further the court stated, that the Tulip chair meets functional objectives (i.e. limitations of construction costs, solidity and comfort for the user) and that no artistic element can "stand alone" or be separated from the chair itself and thereby not be protected by US copyright law.[146] According to the author this further reflects on designs designed outside of EU, and may there conflict with EU copyright legislation.

## 3.5 Summary

European copyright protection takes its base in Berne Convention from 1884, in addition European Union have by directives tried to harmonize the legislation with containing concepts. It is foremost the Infosoc-directive that is of referral within the relevant cases. Copyright provides protection for authors of literary and artistic original work, 70 years after the death of

[145] Markkanen, H-K., Is Inspired by Design a Copyright Infringement? *IPRinfo,* March 1, 2016 https://iprinfo.fi/artikkeli/inspired_by_design_a_copyright_infringement/ accessed: 2022-05-26.

[146] Spitz, B. The French Supreme Court Rules that Knoll 'Tulip' Chair is not protected by copyright, *Kluwer Copyright Blog, February 8, 2021,* http://copyrightblog.kluweriplaw.com/2021/02/08/the-french-supreme-court-rules-that-knoll-tulip-chair-is-not-protected-by-copyright/ Accessed: 2022-05-26.

the author.[147] To fulfil the prerequisites of copyright protection, provided by the Painer-case, the AOIC-reequipment should be met. [148]

National legislation have previously sought to distinguish the concept of work of applied art from traditional types of work, by being restrained in justifying copyright protection. However, several CJEU judgment have in the recent years emphasized the importance of interpreting work of applied art on the same wavelength as traditional work.[149]

When it comes to functional design, the judgement in the Brompton Bicycle case stated that as long as there is a creative chose made in the design, hence the design is not only restricted by its functional features, it can be considered a "design" and thereby enjoy copyright protection, as long it fulfil the general prerequisites. However, this was not the case in a copyright case is the US, who stated the contrary.

Another important aspect to take into account when reviewing the copyright legislation, is the delineation between plagiarism and inspiration. This delineation was touch upon in the Swedish Scapegoats-case, who ruled that as long as there is a new context and meaning of the work it cannot be considered plagiarism. The adapted work should as well not be of dominant art in the new work.[150] However, this, according to the author, contradicts the decision in the Painer case. Where a adaption of the photograph, was not considered "a new context".[151]

Several famous designer chairs have enjoyed copyright protection for their designs. Based on the prerequisites that work of applied art shall be hold to the same threshold as traditional work, it is, according to the author, safe to say that a chair can enjoy copyright protection, even the minimalistic ones, as long as there features that can be separated from the technical features, and as long as the origin is within EU. Thus, prior art needs to be taken into consideration for determining the copyrightable aspects according to the author.

[147] 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 article 1.

[148] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others, ECLI:EU:C:2019:721.

[149] See for example Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721 or Case C-168/09 Flos SpA v Semeraro Casa, ECLI_EU:C:2011:29.

[150] Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court).

[151] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others, ECLI:EU:C:2019:721.

# 4. Registered Community Design Protection

Following chapter refers design protection within the territory of EU in accordance with the Design Directive as well as Regulation on Community Design, which will start with a brief overview of applicable legal framework followed by a general introduction to the subject. Thereafter, a deeper presentation of the applicable concepts within the legislative framework. In addition, a section will follow, that put RCD in relation to protection of chairs. The chapter will end with a summary of the chapter at hand.

## 4.1 Applicable Legal Framework

Applicable legal framework for protection of industrial design consist, on an international level, the Paris Convention for protection of industrial property, which also includes Industrial Designs, adopted in 1883 and TRIPS-agreement on trade related aspects on Intellectual Property Right, article 25-26, however the TRIPS agreement only state the floor requirements.

The European Commission have for the sake of harmonization created legislation to ensure better coexistence and consistence regulation and directives to apply direct- or in-direct within the European union[152]; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (RCD) and Directive 98/71/EC of Design (DDIR) of the European Parliament and of the council of 13 October 1998 on the legal protection of designs

[152] European Commission Webpage, Internal Market, Industry, Entrepreneurship and SMEs, https://ec.europa.eu/growth/industry/strategy/intellectual-property/industrial-design-protection_en accessed: 2022-05-26.

## 4.2 Introduction

To avoid a division of the internal market and limiting the trade and movement of free goods the commission established a unitary design right to apply for the territory of EU.[153]

The Regulation on Community Design (RCD) no. 6/2002 provides for two sub-categories; registered community design and unregistered community design (UCD).[154]

RCD, both registered and unregistered community designs, protects the appearance e.g. the design of the whole or a part, of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation, which is disclosed in article 3(a) RCD.[155]

The purpose of UCD have always been to complement registered community design, to be able to provide protection while awaiting registration.[156] It was brought forward as a response from the industry and trigger protection for three years from the disclosure and cannot be extended.[157] The demand is also based on product designs with short life cycles as in the fashion industry without the necessity to elaborating costly, timely and formal registration proceedings, which is disclosed in recitals 16 and 25 of mentioned regulation.[158]

Both types of community designs, registered and unregistered, benefits from the same scope of protections and are subjected to the same requirements, article 5(a) and (b) and article 6(a) and (b).[159]

However it should be declared that there are some differences when it comes to registered and unregistered design. For unregistered design, the protection is only granted against copying, article 19(2) RCD[160], and it should be underlined that a registered design can be protected up

[153] Ibid

[154] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs preamble (17).

[155] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 3.

[156] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019*, Axhamn, J. (red), issue 2, 2020, volume 89, p. 235.

[157] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 11(1) and Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019*, Axhamn, J. (red), issue 2, 2020, volume 89, p. 235.

[158] Hirsch, B. Unregistered community designs: a secret weapon in design protection?, *schonherr*, August 30, 2021, https://www.schoenherr.eu/content/unregistered-community-designs-a-secret-weapon-in-design-protection/ and Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019*, Axhamn, J. (red), issue 2, 2020, volume 89, p. 235.

[159] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 5 and 6 and Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019*, Axhamn, J. (red), issue 2, 2020, volume 89, p. 235.

[160] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 19(2).

to 25 years, hence providing a relative long term and strong monopoly for the designers (measured against UCD)[161], not only against copying but provides the right holder of the design exclusive right, article 19(1) RCD.[162]

According article 3(2) and 4 DDir the requirements for protection of a design are novelty and that the design present individual character. For which it further states, for an individual character to be present the overall impression that the design produces on the informed user shall differentiate from any other overall impression on such user.[163] Art 5.2 DDir states that in assessing the individual character, the degree of freedom for designer shall be taken into consideration.[164] For a design to be considered novel, there shall be no identical design available to the public prior application or priority claimed.[165] The article further states, design shall be deemed to be identical if their features differ only in immaterial details.[166]

Scope of protection have by the CJEU been interpreted in Easy Sanitary and EUIPO v Group Nivelles case[167], where it states that prior art are not only to be considered within the field of the design in question, but should cover all segments.[168] Which is also states by Hartwig in his example of the Pencil Sharpener.[169] Where "prior art" consist of a classic pencil sharpener, who inspired the designer for RIVA in 1920 Temperino a seating furniture as well as a third party product making it into a container.[170]

Furthermore, when it comes to infringement proceedings, any registered design should be treated as valid even though there is a lacking of ex-offico examination of prior art giving it up to the challenger to present proof of invalidity, article 85(1) RCD.[171] While no such benefits was given to the right holder of a unregistered design.[172]

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[161] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 235.

[162] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 19(1).

[163] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 5.1.

[164] Ibid article 5.2.

[165] Ibid article 4.

[166] Ibid.

[167] Joined cases C-361/15 & C-405/15 Easy Sanitary Solutions BV and EUIPO v Group Nivelles NV, ECLI:EU:C:2017:720.

[168] Pennant, J. Easy Sanitary Solutions: scope of design protection, *D Young & CO Knowledge Bank,* November 3, 2017 https://www.dyoung.com/en/knowledgebank/articles/designs-easysanitary accessed: 2022-05-26.

[169] Hartwig, H. Subject matter, scope of protection and infringement under community design law. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 276.

[170] Ibid.

[171] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 85(1).

[172] See for example case C-345/13 Karen Millen Fashions v. Dunnes Stores Ltd, ECLI:EU:C:2014:2013.

In an article written on the subject by Birgit Hirsch, she gives her view on the differences of the registered and unregistered designs when it comes to infringement proceedings.[173] She explains in her article that copying occurs when there is another design which gives the same overall impression by an informed user, she further states that this is the objective point of view. Subjectively, she continues, that is not often the case. A design is a result from an independent work who may claim not be aware or familiar with the design available to the public, hence no copying taking place. She further explains the issues of designers who unintentionally, or claim to unintentionally, infringe unregistered community designs will not be prosecuted. In such cases the burden of proof is left to the right holder to prove the existence of imitation.[174]

According to her opinion it creates a degree of legal uncertainty for third parties when a design is not a subject to a registered community design and instead relay on unregistered protection. She states the lack of public record that allows for information, such as economic or in relation to a specific design, to be of public knowledge, as it would in cases of registered designs. The lack of official registration and publication also contributes to difficulties for third parties to identify in advance the specific features of a perhaps challenged subject. Hence, it will repeatedly only in the context of claimed infringement that the designer will specify the scope of protection in question, which brings an disadvantage to the designer being challenged.[175]

In infringement proceedings, the RCD article 85(2) specifies that a unregistered design shall presume to be "valid if the right holder produces proof that the conditions laid down in Article 11 RCD have been met and indicates what constitutes the individual character of his Community design. However, the defendant may contest its validity by way of a plea or with a counterclaim for a declaration of invalidity."[176]

Furthermore, a design benefits from protection as an unregistered community design in EU if it has been made available to the public within the community, according to the procedures stipulated in article 11(2) RCD, without necessary and officially having to register for a registered community design. Article 11(2) RCD states one solitary requirement for the purpose of determining whether a design has been made available to the public, namely that the design has been 'published, exhibited, used in trade or otherwise disclosed in such a way

[173] Hirsch, B. Unregistered community designs: a secret weapon in design protection?, *schonherr,* August 30, 2021.
[174] Ibid.
[175] Ibid.
[176] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 85(2).

that, in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned'.[177]

It should also be pointed out that it is naturally hard to get a grip of the potential success, or lack thereof, of UCD since there is no registration or data connected to it.[178]

### 4.2.1 Novelty and Individual Character

The proposal (MPI) for a new legal framework in regards of design protection on a EU level consisted of a reconceptualization of patent and copyright legislation and the approach given in these protection forms. Neither a strict novelty, as in the requirement given for patent protection, since this would give comprehensive disadvantages for those showing their designs too early and too enthusiastically, or the requirement of originality, was considered to be appropriate in consideration.[179]

The novel requirement was replaced by a long grace period for the respect of prior art. However, the lack of novelty was criticised and was accused of being to EU-centric and would incite to steal designs. The critic of the EU-centric approach led to what is now known as article 4, 5, and 7(1) in Regulation of Community Design with the exemption that if novelty is challenged the design holder could argue that the challenged design was un-known, in normal course of business, to a person within EU. [180] A design thereby needs to fulfil the requirement of novelty, hence no existing identical designs are allowed.

Design needs a certain degree of creativeness and instead was the term *individual character* adopted.[181] Thus, the design needs to show an individual character as well as it need to distinguish itself from other designs.[182] Hence, there needs to be a certain degree of freedom when producing the design, which is stated in article 5(2) DDir. Which leads to the definition of the term "*Degree of freedom"*. This also raises the question on who possess the knowledge

[177] Hirsch, B. Unregistered community designs: a secret weapon in design protection?, *schonherr,* August 30, 2021.

[178] Church, O. and Derclay, E. & Stupfler, G. An Empirical analysis of the design Case law of the EU Member States, *International Review of Intellectual Property and Competition Law,* Volume 50, 2019, pp 685-719.

[179] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 232-233.

[180] Ibid p. 233.

[181] Ibid p. 232-233.

[182] Ibid.

of a distinguished designs that involves an 'individual character'. The concept of the 'informed user' is thereby introduced in the legislation.[183]

In the case Karen Millen v Dunnes Stores CJEU ruled:

"in order for a design to be considered to have individual character, the overall impression which the design produces on the informed user must be different from the 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."[184]

### 4.2.2 Informed User

PepsiCo is the most important and guiding case in the definition of who is the informed user as a fictive character. Still the informed user is not easy to explain. It is not the ordinary costumer nor the expert.[185] It is a flexible persona capable of taking completely different position relevant to the case in question.[186] The Informed User can thereby be explained as a person between the average costumer and the sectoral expert.[187] The informed user shall review the overall impression of the design in question. Parallels can also be drawn the Swedish cases for Daniel Welling watches[188] and Tom Hope anchor bracelets[189] where the interpretation have been made from an overall impression of the product, and not of the features as such. In these cases the informed user could be anyone who can assess an overall impression[190], which is also the guideline that is developed GC.[191]

### 4.2.3 Overall Impression

A relevant decision was published in 2018, the Meda Gate-decision. Where the court ruled on whether or not a design produces a different overall impression, in the decision the court emphasized on the term 'overall impression'. The case relates to 'wait bench systems' and what can be considered a different overall impression. The court confirm in the judgement that the

[183] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 5(1).

[184] Case C-345/13 Karen Millen Fashion v Dunnes Stores Ltd, ECLI:EU:C:2014:201 para. 35.

[185] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 233.

[186] Levin, M. Welcome to the Design Market. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 225.

[187]Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 236.

[188] Case no. PMT 1803-17 Ankar bracelet Tom Hope (PMD).

[189] Case no. PMT 5885-18 Daniel Wellington v Ur & Penn, (PMÖD).

[190] See footnote 187 and 188.

[191] See for example following: Cases T-525/13 H&M Hennes & Mauritz v OHMI – Yves Saint Laurent (Sacs á main), ECLI:EU:T:2015:617 and Case T-57/16, Chanel v EUIPO & Jing Zhou EU:T:2017:517.

scope of protection of a design registration indeed depends on the distance to previously published designs as well as the degree of freedom to create. Thus meaning, the greater the distance the higher degree of freedom. On the contrary, according to the author, it would appear limiting if the situation was reversed. Hence, several similar designs, shorter distance, lower degree of freedom and thereby a higher threshold for 'individual character'.

The essential aspect of the judgement emphasizing on the overall impression and the indication that certain characteristics weight heavier than others. It has thereby been clarified by the judgement that it is not acceptable to consider features detached from the overall impression.

Thus, even if a prior design include a specific feature which has been adopted by the new design, the prior design may not limit the scope of protection as long as the overall impression shows sufficient distance.[192]

### 4.2.4 Degree of Freedom for the Designers

The term 'degree of freedom' are used rather inconsequently, according to the author. The term is put in relation to both the degree of freedom relative the technical constrains, as well as in the aspect 'individual character'. The relationship between the informed used and the term 'freedom of the designer' remains rather unclear.[193]

In regards of technical constraints, it needs to be demonstrated that alternative approaches exist for achieving the same technical features with a variation of different designs, which also tend to make it harder for the assessment of separating the function and the form according to the author.

And on the other, in relation to 'individual character', one would say that a low degree of freedom sets the bar low for the individual character. In these cases even the smallest creative choice can be considered an individual character. Opposed to the opposite situation, a high degree of freedom, will raise the bar, and make it harder for designer to distinguish the design.[194] Thus, it implies, according to the author, that freedom of designer is of very subjective nature and closely related to prior art as well as degree of technical features.

[192] Meda Gate, German Federal Supreme Court, 24.01.2019, I ZR 164/17, ECLI:DE:BGH:2019:240119UIZR164.17.0.

[193] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 236.

[194] Hartwig, H. Subject matter, scope of protection and infringement under community design law. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 275.

### 4.2.5 Design Protection of Functional Designs

For a design to be categories as a design commendable of design protection, the design in question needs to stand alone from its features and functions. There needs to be creative choice involved in the creation of the design and a certain degree of freedom for the designer as explained above. A designer should be able to present the same features or functions with variations of designs.[195]

*Causative approach* have been used in order to separate the function from the form, nevertheless it is troubled with the inconvenience to assessing the motivation out of which the design has been given a particular shape[196], which seems especially true for chairs as an example, according to the author.

According to RCD article 8 and DDIR article 7:

"a design shall not subsist in features of appearance of a product which are solely dictated by its technical function".[197]

*The multiplicity of forms* – test was developed and according to the approach, only design who does not leave any room for variations can be denied design protection.[198] Which means as long as there is as little as one other choice for the designer to make in the designing of the product the design can benefit from design protection.[199]

However this test have been criticized in the literature on the ground that it will open the door for other products that where not aimed to be covered by the design protection, for example purely functional machine parts will left out. Too few exceptions appears from the design protection and denial will only apply during truly exceptional circumstances.[200]

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[195] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 237.

[196] Ibid p. 238.

[197] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 291 and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 8 and Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 7.

[198] The EU Design Approach: A Global Appraisal s. 148.

[199] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 291.

[200] Kur, A., Levin, M. and Schovsbo, J. T*he EU Design Approach: A Global Appraisal,* Edward Elgar Publishing Ltd, 2018 p. 148.

Nevertheless, the issue was put at rest with the Doceram decision in 2018.[201] The court in the case states the following in accordance with article 8(1) RCD:

> "excludes protection under the law on community designs for features of appearance of a product where considerations other than the need for that product to fulfil its technical function, in particular those related to the visual aspect, have not played any role in the choice of those features, even if other designs fulfilling the same function exist."

Schovsbo explains this further by rephrasing that is not a question whether alternative forms are available or not. The question instead is if the function is the only factor that dictates the features of the appearance of the product.[202]

He continuous to wonder about the extent of limitation that is followed by the Doceram decision, and if this has created a risk that design protection is going to be limited for those products, which the Cofemel decision seem to left out of the copyright protection.[203]

In the courts opinion, the design examination shall be carried out in four steps to be able to receive the benefits of protection according to EU design regulation 6/2002:

i) To what sector can the design/product in question be categorized
ii) Who is the informed user, which knowledge does this person possess in the art and field at hand.
iii) What is the designers Degree of Freedom for developing the design in question.
iv) The result of all of the above.

[201] Case C-395/16 Doceram v CeramTec GmbH ECLI:EU:C:2018:172.

[202] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 292.

[203] Ibid.

## 4.3 Community Design Protection for Chairs

According to above mentioned prerequisites, for a chair design to be available for protection in accordance with community design. It needs to show novelty, as well as individual character.[204] As well as it cannot be constrained by its technical features.[205]

### 4.3.1 Informed User for Chair Design

The informed user is not the ordinary costumer nor the expert.[206] This fictive person is highly blurry to provide an assessment of the overall impression. According to EUIPO guidelines the informed user lies between the average costumer and sectoral expert. The informed user have no specific knowledge, and it is not a user who possesses any technical expertise.[207] Further, the informed user does not require any knowledge of how the design relates to its technical features. However the informed user is aware of various designs in the sector concerned, without being any kind of sectorial expert. The informed user possesses as well a certain degree of knowledge with regard to features that those designs normally include, as well as show a high attention to details. The guideline further states that the informed user firstly, is a professional that acquires such products and secondly, the end user.[208] Which according to the author contradicts the statement, that the informed user is not an ordinary costumer.

In the case of chair designs, the informed user would, in the opinion of the author be a professional within the furniture design industry at first hand, and at second hand a costumer with a high interest in the field of chair design. The professional could for example be professional purchaser for designer chairs, or designer furniture in general.

The author also believes it to be necessary to take into consideration in which the context the chair design is to be used. Is it used, for example as in the Mede Gate case above, a wait bench system, often placed on official environments, an informed used who often reside in this type of environment would be quite appropriate. However in regards of home furniture, the informed user should have a connection to this sector.

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[204] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 3-5.

[205] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 7.

[206] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 233.

[207] European Intellectual Property Office Webpage, Guidelines, Design Guidelines, Last update 2020, https://guidelines.euipo.europa.eu/1803372/1789008/designs-guidelines/5-5-2-3-individual-character Accessed: 2022-05-26

[208] https://guidelines.euipo.europa.eu/1803372/1789008/designs-guidelines/5-5-2-3-individual-character.

### 4.3.2 Degree of Freedom for the Designer or a Chair

For a chair to show individual character restrictions must be set in relation to the degree of freedom for the designer. A high degree of freedom, will make it harder, also stated above, to show individual character according to Kur.[209] However, the author disagrees, this type of thinking with high correlation would set out a higher challenge for those designers in an area without many other designs. The same is true in the judgment in the Mede Gate Case. Where the court sates that when the degree of freedom is low, smaller features can demonstrate as individual character.[210] The author disagrees, and would like to emphasise on the disadvantages this would bring into a non-explored trend.

For example this would bring disadvantage in relation to chairs. A chair can be designed in several different ways, and still fulfil the same purpose, thus the degree of freedom for a chair is according to the author considered high. This would in turn constrain the assessment of individual character. Still, this is subjective and refers to the informed user and the overall impression in the end. The opinion of the author, also complies with EUIPO guidelines that states that the degree of freedom of the designer is not affected by the fact that similar designs coexist on the market and form a 'general trend'.[211]

#### 4.3.2.1 Restrictions entailed by the exception of functional designs for chairs

According to article 7 DDir designs which are limited by its technical features should be expected from protection.[212] Hence, if the design is controlled, in total, not just in part, by its technical features it is not considered protectable.

The purpose of the chair, and the utility function of a chair, is the fact that a person should be able to sit on it, more or less. However, there are various types of ways to fulfil this purpose. Which, in the opinion of the author, would indicate that a chair is not constrained by its technical features, and that the degree of freedom for the designer in relation to technical features, would be considered high.

[209] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 236.

[210] Meda Gate, German Federal Supreme Court, 24.01.2019, I ZR 164/17, ECLI:DE:BGH:2019:240119UIZR164.17.0.

[211] European Intellectual Property Office Webpage, Guidelines, Design Guidelines.

[212] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 7.

## 4.4 Summary

Applicable legal framework for protection of industrial design on an international level takes its base from Paris Convention and the TRIPS agreement. In the aspect of EU´s harmonization purpose, EC have established the Directive of Design as well as Regulation of Community designs.

The be able to protect a design within the territory of European Union the design needs to fulfil the prerequisites of novelty and that the design shall present individual character.[213] A design within the Europe design system that constitute as either a registered design or an unregistered design. The differences lies in the scope of protection as well as the term. UCD have a term of three years from the date of disclosure meanwhile registered designs can be renewed up to 25 years.[214] In regards of scope of protection, UCD protects solely from copying while RCD protects from similarities which give raise to the same overall impression.[215]

The overall impression is measured on the impression the design produces on the informed user. The informed user is further a person, who are able to assess the impression, however not an ordinary costumer nor an sectorial expert.[216] The overall impression takes its stand from the individual character of the design.[217] It can be argued on the subjectivity of the individual character and the degree of freedom there is for the designer to create these individual characters. Some argues, that a low degree of freedom give raise to small differences to be considered as individual character, and a change of the overall impression.[218]

For a chair the degree of freedom can, according to the author be considered high, as well as the author believe that the bar is low in regards of technical constraints for a chair design. However, this can obviously be related to the type of chair in question, a ‘chair’ in that sense can be considered a wide concept.

[213] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 3-5.

[214] European Intellectual Properyt Office Webpage, Guidelines, Design Guidelines.

[215] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 235.

[216] European Intellectual Property Office Webpage, Guidelines, Design Guidelines.

[217] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs article 4.

[218] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 236.

# 5. Comparison Between Copyright and Design Protection for Chairs

The following chapter aims to compare copyright protection and RCD design protection and analyzing the similarities and the differences, with a deeper focus on chair designs. It will start by giving a little bit more general description and meaning and then a deeper analysis towards chair designs. The chapter will present the different concepts within the legislation, followed by analysis of the scope of protection and of the confusion between the legislations, which is of high importance. Then the author will present the conclusions of the thesis and answer the research questions presented in subsection 1.2. Finally an summary will be presented of the chapter.

## 5.1 Double up in Protection

The Cofemel case can be seen as a significant mark on the copyright timeline, a shift in the approach can be seen as before- and after the Cofemel-case according to the author.

The Cofemel-case among others earlier mentioned cases serves a high value for the interpretation on how to navigate in the design protection landscape, with both copyright and registered or unregistered protection as an option.

Nevertheless the interpretation of the overlap between copyright protection and RCD design protection have changed in the last three to four years and give a pull for copyright protection in the opinion of the author.

The Cofemel-case concerns copyright protection in fashion design and as a part of the infringement case the Portuguese Supreme Court asked CJEU the following:

> "The InfoSoc-directive precluded a national legislation … which confers copyright protection on works of applied art, industrial design and works of design which, over and above their practical purpose, create their own visual and distinctive effect from an aesthetic point of view, their originality being the fundamental criterion which governs the grant of protection area of copyright?"

Schovsbo rephrased the question as presented below:

> "May national copyright discriminate works of applied art by havening additional protection criteria on top of originality?"[219]

The CJEU answered the question negatively. Works of applied art are not to be seen as a separate and standalone category of works that in any way would differentiate from traditional works.[220]

First of all the CJEU states that 'work' is a harmonized concept, which only confirms the Infopac-decision in 2009.[221] Secondly, and what is considered 'new' in the perspective of harmonization, the court states that this as well includes 'works of applied art'. Third, the court states that, as an autonomous concept within EU-law, the concept of work shall apply with the AOIC test and shall be objectively identifiable (which was stated in Levola-case[222]). The echo of Cofemel into the future that will follow is nonetheless that 'work of applied art' shall be treated as any other type of work.

The intersection between copyright protection and EU design laws relates heavily to the Cofemel case in 2019 for copyright and the Doceram decision in 2018. The AOIC-test sets the bar for the application of copyright protection. Nevertheless there is a risk of overextension of copyright and suggest a rigorous application.[223]

It should also be made clear that copyright protection and RCD design protection are two establishments that serves two different purposes, hence the legislator had two separate contexts in mind when formulating the legislation. In regards of design protection, through RCD, the purpose is to benefit the driving force within the market of design within EU, thereby counteracting divergence in the internal

[219] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 285.

[220] Ibid.

[221] Case C-5/08 Infopaq international A/S v Danske Dagblades Forening. ECLI:EU:C:2009:465.

[222] Case C-310/17 Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899.

[223] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 286.

market of EU by creating a harmonized system.[224] Whilst for copyright protection it is the creative process and the relationship with author that stands in focus.[225]

After several decisions in the last years from the CJEU there seems to be a trend of double protection according to the author. The question is how this stand in relation to the intention of legislator. This question was also brought up by AG in the Doceram-case. By freely granting copyright protection for industrial design, the purpose of the registered design is lost according to the author. This is for example true as well in the Arco lamp decision.[226] In the case CJEU confirmed extended copyright protection for works of applied art or industrial design from 25 years to 70 years after death of designer on the condition that the design meets the requirements of copyright protection.[227]

Nevertheless, since copyright protection and UCD are both applicable as unregistered forms of protection for designs. Especially since after Cofemel, copyright protection can be considered a form of protection for design or more often referred to as 'work of applied art', according to the author, the evaluation processes will often overlap in their results.

Since there is a large gap in the protection period between the two unregistered form of protection (copyright and UCD), UCD will turn up on the losing end, no doubt about that, in the view of the author. Copyright is under these circumstances offering a rather comfortable, long-long-term fall back protection regime, which is expressed by Kur and which goes along with what the author deems as well.[228]

[224] Pila, J. and Torremans, P. *European Intellectual Property Law*, Second edition, Oxford: Oxford University Press, 2019, p. 221.

[225] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 241.

[226] Case C-168/09 Flos SpA v Semeraro Casa, ECLI:EU:C:2011:29.

[227] Ibid.

[228] Kur, A.. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 241.

*Table 2*

| | Registered Design | Unregistered Design | Copyright Protection |
|---|---|---|---|
| **Subject Matter** | Appearance of an article or product or parts of it | Appearance of an article or product or parts of it | The rights of an author of Literary and Artistic works |
| **Requirement for protection** | Novelty; individual character | Novelty; individual character | Original; Objective; work; Authors free and creative choice with a personal stamp |
| **Acquisition of right** | For registered designs, examination by the IP office | For unregistered designs, no examination by the IP office required | Automatic conferred right |
| **Conferred right** | Exclusive right to use the design and to prevent any third party from using it without the rights holder's consent | Protection from copying the protected design | Exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. Right of communication to the public of works and right of making available to the public other subject-matter and distribution right |
| **Duration** | 25 years (in successive 5-year terms) | 3 years from the enclosure | 70 years after the death of the author |

Let's also remember that the scope of protection between copyright and design law differentiate. While design law protects against other products or designs that gives the same or similar "overall impression" on the informed user and also protects against designer who had no intention or knowledge of the prior art. Copyright does not grant protection to the motif and does not protect against independent, double, creations. This distinction is of high importance when it comes to deciding on the most beneficial protection form.[229]

The relationship between copyright and design protection law is a principle of cumulation, which conclude that one design can benefit from protection of design law and copyright law simultaneously. As long as the design fulfil the requirements

[229] Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 287.

for both, e.g. original and objective set of work and present novelty and individual character.[230]

In this way, the protection systems compete for the designers favours in the overlapping area.[231] The main reason to relay copyright protection is, as mentioned before, the long-term protection period and according to Schovsbo the moral rights, it is also effortless and free in the contrary of registered design protection. Design law´s selling point is mainly the scope of protection and the presumption of validity of a registered right according to the author.

Schovsbo also presents an additional problem that should be noted concerning products with a functional design. He means that the AOIC-test cut off a category of product designs, the requirements for that product to qualify under the test it should be (i) the result of the authors of intellectual creation and (ii) not determined by technical constraints.[232] Schovsbo further states that seen from a copyright perspective, that design with a function is left free from the copyright protection scope. In other words, products that are too functional to satisfy the AOIC-test, as the function and the form are non-separatable. He also further raises the question to what extent design law is in fact available for such designs.[233]

There is a possibility going forward that design protection would be undermined, especially by copyright protection. Maybe even, as the opinion of Kur, that right holders trying to escape limitation and exceptions in one system by seeking refuge in the other.[234]

## 5.2 Intellectual Property Protection of Chair Designs

In relation to chair design, several questions needs to be asked before deciding on which protection form to relay on, copyright protection attaches effortless and automatically to the design, hence no action required, same serves for UCD.

[230] Ibid p. 290.

[231] Ibid.

[232] Case C-833/18 SI and Brompton Bicycle v Chedech/Get2Get EU:C:2020:461 and Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 290.

[233] Ibid p. 291.

[234] Ibid p. 294.

Otherwise a formal registration is required, which necessitate more effort from the designers part.[235]

### 5.2.1 Technical Constraints

First of all, there needs to be a question raised in relation to the function of the chair and the technical constraints. Is the potential technical feature on the chair constraining the design. Hence, according to the earlier mentioned multiplicity of forms approach, is the technical feature the only factor that dictates the features of the appearance of the chair design. Following three points needs to be taken into consideration:

i. The result of the author´s free and creative choice
ii. Not determined by technical constrains or by following rules and
iii. Stamped with the authors own personal touch. [236]

Rephrased, the author would like to turn above points into the following question to be asked in regards of the design:

I. Can the purpose of the design be achieved, by retaining the technical features, in different ways and thereby not affect the purpose of the product?

If the answered is positively, this would indicate that chair designs are able to enjoy copyright protection, as well as RCD design protection. Since both these protection forms, hold the same standard when it comes to technical constraints according to the author.[237]

When looking at design protection (note: by design protection it is not specified if this is in form of copyright protection or as registered or unregistered design protection) for a chair, several attempts for copyright protection have been proven to succeed in the past, hence it could be considered that there is various ways of

[235] Kur, A. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 239-240.

[236] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others, ECLI:EU:C:2019:721 and Schovsbo, J. Copyright and Design Law: What is left after all and Cofemel? – or: Design law in a 'double whammy'. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 282.

[237] Kur, A. The EU design Approach – what is left and what is right?. In *Proceedings from the NIR 2019 Nordic Design Seminar in Copenhagen 7 November 2019,* Axhamn, J. (red), issue 2, 2020, volume 89, p. 237-238.

designing a chair, without it being constraint to the technical features, hence the degree of freedom is high.

### 5.2.2 The Complexity of Degree of Freedom, Individual Character and the Informed User

For RCD design protection to apply, or for that matter UCD, the chair needs to show individual character and the expression needs to be novel.

These prerequisites can, according to author, be rather complex. The Meda Gate-case, along with several different other authors, indicates that individual character is in correlation with the degree of freedom. This also means that it needs to be taken into consideration the trend of other designs on the market. Are there a lot of similar designs on the market, smaller deviations could show as individual character. However, this goes against the guidelines of EUIPO and the opinion of the author of this thesis.[238]

The degree of freedom for chairs can at a first glance be considered high, according to the author, however if looking at specific trends or for example the Meda Gate Case the degree of freedom can be narrower which would lower the bar of what can be considered individual character.[239]

In any circumstances, it is of importance how the produced overall impression on the informed user plays out. Which, according to the author, should be a professional or highly knowledgeable person within furniture design. However, this informed user, can as well have an affected impression due to designer trends, but in this case it would be reversed according to the author. A design that is on high trend would easily produce the same overall impression in the mind of the informed user. However, there are split opinions on the subject, and an effective guideline from the CJEU would be to wish for since the 'overall impression' is highly subjective.

[238] European Intellectual Property Office Webpage, Guidelines, Design Guidelines.

[239] Case no. ZR 164/17, Meda Gate (German Federal Supreme Court) ECLI:DE:BGH:2019:240119UIZR164.17.0.

### 5.2.3 Work of Applied Art

For copyright to apply for the design, or work of applied art, it needs to be the authors (e.g. designers) own intellectual creation. As well as the chair need to express originality. Hence, this puts the bar a little bit higher than the prerequisite of novelty for RCD. But still not non-achievable. The design needs to be objective, which a chair design often is, the author assumes.

However, the prerequisite of originality can show the same complexity as for RCD and novelty and the overall impression. However, in case of copyright, there is no requirement related to the overall impression. No matter that courts (for example the Swiss court in 2017[240]) have put these concepts into the context of copyright, which according to the author is incorrect reasoning. The court instead needs to reason around what is considered original when it comes to copyright, and the delineation between plagiarism, inspiration and new creation, and what constitutes a new 'original' work according to the author.

### 5.2.4 Plagiarism v Inspiration or New Creation

The assessment of 'plagiarism, inspiration or new creation' can be measured against the prerequisites of 'novelty, overall impression and individual character' according to the author.

In relation to chair design, and in relation to copyright, it is difficult to base the Swedish Scapegoat-case in the terms of chair design.[241] However, the author draw the parallels that one or more features of a design for a chair can be the same as for a challenged chair design, as long as the features appears in a new context. Parallel can be drawn to RCD, the same features needs to provide different overall impression, for it to be considered a new work in the meaning of copyright according to the author.

Hence, for a chair to be able to enjoy copyright, the chair design cannot be identical as any other chair design on the market, however it can have identical features, that has been put in a new context based on the court's reasoning in the Swedish Scapegoat case. A identical design can also exist, but may not be used as a chair,

[240] Schweizer, M. Copyright Protection of minimalistic furniture design, *The IPKat*, July 26, 2017.

[241] Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court).

then the design have a new purpose and meaning, hence it is copyrightable. However, according to the author, this would instead question the integrity of the copyright protection.

One case that never made it to the court room was Emeco v IKEA case. Emeco, an American furniture brand, sued IKEA for Copyright Infringement 2015 on 20-06 Stacking Chair by the British designer Norman Foster in 2006. This is, according to the author, a very minimalistic chair and question is if this would pass the bar for copyright. And since the case took place in Munich in Germany, EU legislation would apply. Unfortunately, the case was settled, the question in the Emeco case would be if the Emeco chair could be considered as inspiration or right of plagiarism? In the case, two questions would be interesting to contest and have a reasoning on and if the chair actually enjoy copyright all together.

i. Does this minimalistic chair actually enjoy copyright, where is the line of a chair being a chair, in regards of the utility?

Hence, how minimalistic can a chair get before the function of a chair is lost? US have proven to set the bar rather high in the 'Tulip' chair case by denying it copyright protection. EU seems to go in the contrary direction with the multiplicity of form approach. Which would indicate that, if Knoll was a Europe origin company, the 'Tulip' would without doubt enjoy copyright protection. However, similar to the 'Tulip'-case, Emeco origin from US, which puts a question mark on the enjoyment of copyright protection. However, this question will be left for another thesis to answer.

Second question to consider in this case:

ii. Where is the delineation between plagiarism, inspiration or new creation in regards of this chair?

*Figure 1 Norman Foster's 20-06 Stacking Chair for Emeco v Melltorp dining chair by Ola Wihlborg for IKEA*[242]

Features such as material are different, hence the two chairs would give different feel produced on the user, which the author consider is of importance. As well as the chair is not identical. However, you can clearly see that is has been used as inspiration. One could consider, based on the reasoning in the Swedish Scapegoat case that it is an adaption of the work. The court did not conclude that the painted picture of Mr. Pettersson was a standalone work (even though it is not identical), you can clearly see the similarities, even if it was made from a different material (photograph v painting). Hence, same would go for the Emeco chair. But on the other side, copyright does not protect against two independently created works. However, in this case RCD would.

The author would also like to bring forward, if the Emeco stacking chair, instead would be a registered community design, and thereby apply to design law. This would be a question of individual character. Hence, the court would have to take the degree of freedom for minimalistic chairs into consideration. And in the potential that 'minimalistic chairs' would be a 'trend', there would be a low degree of freedom for the designer. Hence, lower the threshold for individual character according to the author. If one would reason in line with earlier cases.[243]

[242] Picture borrowed from Fairs, M. IKEA settles with Emeco over claims it copied a Norman Foster Chair, *dezeen*, May 17, 2016 https://www.dezeen.com/2016/05/17/ikea-settles-with-emeco-copy-norman-foster-20-06-chair/ accessed: 2022-05-26.

[243] Case no. ZR 164/17, Meda Gate (German Federal Supreme Court) ECLI:DE:BGH:2019:240119UIZR164.17.0.

*Figure 2 Swedish Scpaegoat case - Mr Lembergers picture left, Mr Anderssons painting right*[244]

## 5.3 The Scope of Protection

This means so far that both forms of protection are highly applicable, in most cases. The choice of route thus needs to lie in the scope of the protection according to the author.

In regards of copyright protection, the scope of protected refers to reproduction rights, right to communicate and making available to the public and distribution rights. Hence, no protection of similarities or in regards of products that gives the same overall impression are protected. It needs to be up to the court in each case to reason around the concept of a 'standalone' work and what can be considered original. It also needs to be up to the court on where to draw the line between inspiration and new creation. This type of reasoning if very welcomed according to author.

Two chair designs can consider giving the same overall impression, however, but differ in smaller features, it would not infringe on a copyright protection. Copyright protection does thereby not protect against similarities and if a feature is used in a new context. However it do protects if the new work is not considered as a 'standalone' work.

[244] Malovic, N. Swedish Supreme Court says that painting based on photograph is new and independent creation and hence…non infringing, *The IPKat,* March 19, 2018.

The same goes for UCD according to article 19(2) RCD. The scope of RCD is wider in the protection rights, hence it protects against similarities and unintentional copying. Consequently, it can be considered as direct and in-direct protection. Copyright protection protects against direct copying of a product, and RCD protects against similarities and a to high degree of inspiration (without it being in a new context) that will end up as the same overall impression.

The question that remains is then, what type of protection if preferred when it comes to protection of chairs. Since copyright is an automatic conferred right it is not necessary for the designer to deselect the option. However, does RCD bring much more value to the table that it outweighs the disadvantages of formalities and costs?

In the authors opinion the question to the legislator is why bother to protect trough RCD if copyright easily applies? Even more so after Cofemel.

The question to sort out, is if this is a case of direct copying or not? And in the opinion of the author, copyright as well have proven to have a rather wide scope maybe not as wide as RCD, but still wide than the initial thought of the author.

However, copyright does not protect against products in a new context, whilst RCD does. However, this view does not seem to be harmonized according to the author, if you compare the reasoning in the Painer-case and the Swedish Scapegoat-Case.[245] RCD has also a lower bar in regards of similarities. But still, it seems not impossible to claim copyright protection for similarities as well. However, this ruling is still awaiting from the CJEU in the future. RCD also protects against unintentional copying, which copyright does not.

## 5.4 The Confusion Between Copyright and Registered Community Design Protection

There as well seems to be an confusion between the concepts within RCD and copyright for work of applied art. Terms as informed user and overall impression seems to sip through in the case law for copyright according to the author.

[245] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others, ECLI:EU:C:2019:721 and Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court).

Even though, judgements seems to have taken inspiration from RCD concepts when determining whether or not there is an infringement at hand. This is true for the Cofemel case as well as for the Cross Frame chair.[246]

Max Bill, designer of the Cross Frame Chair, benefit (according to his own admission) copyright protection. Counterpart claims the design does not to have "Individual Character", hence cannot be claimed "work" and thereby protected by copyright. Court draw parallels between "Individual Character" and "Degree of Freedom" for the designer. A high degree of freedom sets the bar high for individual character and vice versa. This is all a logical interpretation, but the question is whether or not this is in the wrong forum and the judgement should take a closer look into the prerequisites for copyright protection instead in the opinion of the author.

According to the author even the court seems to have an issue with straight lines between RCD and copyright. Both individual character and degree of freedom is concept used for RCD design protection. The Cofemel-case stated that all "works" should be considered the same, hence no special treatment for works of applied art. Still the court are not reasoning in this perspective according to author. Maybe the reasoning would be different if the timeline was different between the Cofemel-case and the Cross Frame Chair case.

Basically if you apply for RCD you are protected for protection in the nearby area for up 25 years, thereafter you doesn't fall short, you can still be protected trough copyright until 70 after the designers death. So, RCD protects for replica, as well as from designs that have the same overall impression (without being an identical). The Author draw the conclusion from earlier stated judgements from CJEU, that they still include concepts of individual character, freedom of designer and overall impression when deciding on an copyright infringement case, that this will in-direct include in-direct copying according to the opinion. Even though, this is incorrect, and the author would prefer the CJEU to interpret this for a clear guidance.

[246] Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721 and Schweizer, M. Copyright Protection of minimalistic furniture design, *The IPKat*, July 26, 2017.

## 5.5 Conclusion

To conclude the presented thesis the author would like to point out the beneficial legislation of EU copyright protection that stretches and cover work of applied art as well. The author, the key opinion leaders, the legal professionals, the legislator and legal professional providing the rulings, all seems to be unsure of just how far copyright can be stretched in regards of work of applied art.

The biggest question of them all is how plagiarism, inspiration and new creation applies for work of applied art, an interpretation that the author are awaiting. Instead the courts seems to draw parallels to RCD in these cases. Which according to the author is wrong, then instead the legislation needs to be reviewed. Which also seems to be the intention.[247]

It is, according to the author, obvious that a chair design can enjoy copyright protection, the designs exempted from the enjoyment of copyright protection would appear to be few and under extraordinarily exceptional circumstances. However, it is the scope that would make the intellectual property strategists concerned. The concepts of 'overall impression' and 'inspiration of' seems to be rather entangled.

Nevertheless, lets the author still draw the conclusion that a chair can enjoy copyright protection, and the scope of protection stretches to the end of, same features can be used in a new context and it would still be considered original, however the work needs to be able to stand alone, and not to be considered an adaption of another work. The big question mark is how far this adaption stretches.

Compared to RCD, it would stretch, to the limit of giving an overall impression produced on the informed user according to the author. This is also how the author believe that the court would reason in a claimed case. However, this is for the future to tell.

### 5.5.1 Answer to the Research Questions

To fulfill the purpose of the thesis, the following research questions will have to be answered:

[247] European Commission, Commission staff working document evaluation of EU legislation on design protection {SWD(2020) 265 final}, Brussels, 6 November, 2020.

#### 5.5.1.1 Under what conditions may chairs be protected by EU copyright (as work applied art) and design law?

For a chair to be considered work of applied art, the prerequisites first and foremost needs to apply; it needs to be considered a ‘work’, as well as an ‘original work’. The chair design as well needs to fulfil the AOIC-test. Hence, being the authors own intellectual creation. It needs to be a standalone work, not adapted in the same context. But it can still contain features identical to other designs, however they need to be applied in another context.

The author assume further, that de chair needs to produce another overall impression on the informed user as any other design, which is the same baseline as for RCD, which according to the author is not correct, but the reality.

For a chair to be protected by European Design law the design needs to fulfill the prerequires of individual character and novelty based on prior art. Which, like above, means that the chair needs to produce a different overall impression on the informed user.

#### 5.5.1.2 What are the similarities and differences between these types of protections, as applied to chairs?

The similarities between these two types of protection are in definite the constraints of technical features. As well as the requirement of originality and novelty, which are not identical, but similar according to author. The purpose of the ‘novelty’ concept was to put the bar a little bit lower than for the ‘originality’ concept. However, after producing the thesis the author is not convinced that there actually is a difference of the size that the legislator had in mind when put to a test. Novelty is close connected to the concept of the overall impression that is produced on the informed user. Whilst originality are founding the concept on whether or not a work can stand alone in its context in total. The court also seems to confuse the concepts and intertwine them when it comes to work of applied art.

The most obvious difference between the two type of protection is the term of protection. UCD have the term of three years after disclosure, RCD can be renew

up to 25 years and copyright protection protect 25 years from the death of the author.[248]

Another difference, on the other hand, are the connection to the designer or author. Copyright states that a work shall be the authors (e.g. designers) own intellectual creation, whilst no such statement is made within EU design law, which shows on the importance of the authors (e.g. designers) position. Which emphasize on the different purposes of the legislations according to the author of the thesis.

According to design law, the design shall also show individual character in connection to freedom of the designer, whilst copyright protection require free and creative choices according to the AOIC-test.[249] Which draws parallels back to the concepts of originality and novelty. Originality and the free and creative choices should thereby according to copyright and design right legislators be a higher threshold compared to individual character and novelty.

The assessment of infringement on RCD design protection is performed out of the perspective of the informed user, no such character exist within copyright. Hence, according to the author, the assessment of whether or not infringement is at hand, in regards of copyright, would be much more objective than for RCD infringement, that have a more subjective approach.

According to the legislative text there are differences in the scope of protection.[250] Copyright protects against, what the author calls, direct copying and the use of it, reproduction, communication to the public, distribution etc.[251] As for RCD design protection protects against similar designs that give the same overall impression, thus has RCD a much wider scope in regards of design protection.

In regards of chair designs, the scope of protection can be considered rather close. Since the judgements have been taken adapted work into consideration as well, and

[248] 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 article 1 and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 12.

[249] Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and others, ECLI:EU:C:2019:721.

[250] See for example 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 and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs article 2.

[251] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2.001 on the harmonisation of certain aspects of copyright and related rights in the information society article 2-5.

work that is not altered enough to make it stand alone.[252] Hence, in regards of work of applied art, the scope of copyright protection can, according to the author be considered wider, than for a traditional work. Which will go against the Cofemel-case saying that every work should be considered the same.[253]

The reason why the author consider the scope wider for copyright in relation to work of applied art, is that copyright, draw parallels to RCD when assessing infringement, which in turn would give a more subjective approach. The author also believes, that copyright, is not black or white in the concept of copying and protect more than just copied works.

In regards of the scope of protection, the knowledge of the author or designer is also of importance in the assessment. Two similar looking designs can emerge from two different designers on two different places within the EU territory. Both of these design would be considered copyrightable, since the designer had no prior knowledge. However, RCD would protect against this, but it lays on the challenger to prove the existence of the prior design, Which also makes the scope for RCD a bit wider in that aspect.

#### 5.5.1.3 How can one make a delineation between inspiration and plagiarism, for these types of protection, as applied to chairs?

The delineation between plagiarism, inspiration and new creation are blurry to say the least, according to the author. Within all areas of copyright as well as RCD design protection. However, the distinction is bit humbler when it comes to RCD design registration, since the approach is of subjective nature. RCD design protection bases their assessment on the overall impression produced on the informed user. Same impression equals plagiarism, different impression equals inspiration, this goes for chairs as well, in the opinion of the author.

However, when it comes to copyright protection, the informed user does not exist, thus the approach of the assessment needs to be done objectively. Which also is stated in the Levola-case[254], for a work to be considered a work it needs to be objective, hence cannot produce a different overall impression on different users.

[252] Case no. T 1963-15 Swedish Scapegoats (Svenska Syndabockar), NJA 2017 s.75 (Swedish Supreme Court).
[253] Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721.
[254] Case C-310/17 Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899.

Which makes the delineation harder, and maybe even more so when it comes to chairs according to the author, since it is hard to question how far inspiration can go, and when this turns into adaption of an work. According to the Swedish Scapegoat case, one delineation goes by the context or meaning, hence, in relation to chairs, the author interpret this as the same features as exist in another work can be used in a different context, as well as features from products that is not considered a chair, which would give the design a new purpose. Another delineation goes by the adaption of the work. Which would mean, in regards of chair design, that as long as it is considered a standalone work it can be considered new or original. However, this line is a bit harder to draw in regards of work of applied art. In this case the author believes that the court would glance at the RCD design protection and base their assessment on the overall impression.

## 5.6 Summary

Cofemel-case can be considered a landmark decision when it comes to copyright protection of work of applied art. The decision have changed the landscape if protection for designs, including chair design, with a pull for copyright protection according to the author.

This further means, that for chair within EU, there is a double protection, which makes the author, among others, question the RCD protection.

Still, there are similarities and differences for the different form of protection. Both protection forms require design and function to be separate and for the design to be able to stand alone and not be obligated be the technical features.

The concepts of ‘originality’ respectively ‘novelty’ can also be considered similar, however not identical according to the author. The purpose of the legislator was to put the bar a bit lower in regards of ‘novelty’. However, the author is not convinced that the difference is as high as the legislator had hoped for when the concepts puts to a test.

To be able to enjoy RCD design protection, the design needs to fulfil the prerequisites of individual character as well as novelty. Which are strongly linked together according to the author. To show novelty, the design needs as well possess individual character and produced a different overall impression on the informed

user as any other design. The informed user, is according to the author a professional within the industry of furniture design in this case. The concept of individual character have also been closely connected to the concept of ‘degree of freedom of design’, initiated by the legislator self. A low degree of freedom would lower the bar for individual character and vice vera. Which is an incorrect assessment according to the author.

Nevertheless, the assessment is highly subjective. A phrasing that is frowned upon within copyright protection legislation, where the assessment always should be objective. To enjoy copyright protection as work of applied art, which is the category that a chair design would fall under, the design most first of all fulfil the prerequisites. The design must be considered ‘work’ as well as ‘original’ and also fulfil the AOIC-test including a free and creative choice, which can be put in parallel with individual character.

This also shows, the different purposes of the protection forms. Hence, copyright is on a higher level connected to the author on a personal level in the opinion of the author.

The delineation between what is considered plagiarism versus inspiration for the two protection forms can be considered rather blurry, if the author can express her opinion. Nevertheless it is a little bit more straight forward within RCD design protection legislation, since it takes the perspective of the informed user. Hence, the same overall impression will equal plagiarism, and a different overall impression will equal inspiration. However, the author would like to point out again, that this is highly subjective.

In regards of copyright protection the assessment is much more complex. The line between plagiarism and inspiration is much thinner and vague. Through the Swedish scapegoat case, it states, that the adapted work needs to be able to stand alone for it to be considered a new work, hence not just an adoption as such, however if the work is put in a new context this would give the work a new meaning and thereby put the work on its own legs.

# Appendix A

Data to table 1

| Timeline | Values | Forecast | Lower Confidence Bound | Upper Confidence Bound |
|---|---|---|---|---|
| 2013 | 23196 | | | |
| 2014 | 23702 | | | |
| 2015 | 22655 | | | |
| 2016 | 24607 | | | |
| 2017 | 26063 | | | |
| 2018 | 26343 | | | |
| 2019 | 28604 | | | |
| 2020 | 30953 | | | |
| 2021 | 32630 | 32630 | 32630,00 | 32630,00 |
| 2022 | 4202 | 33790,112 | 31736,08 | 35844,14 |
| 2023 | | 35008,429 | 32243,64 | 37773,22 |
| 2024 | | 36226,747 | 32898,58 | 39554,91 |
| 2025 | | 37445,065 | 33634,95 | 41255,18 |

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