

## Newsalert

*IP, TMT & Data Protection Department*

Brompton case C-833/18 - functional shapes are eligible for copyright protection, providing they are original works

On 11 June 2020, the Court of Justice of the European Union (CJEU) published a relevant copyright decision in Case C-833/18, between, on the one hand, the company Brompton Bicycle Ltd., which manufactures and markets a folding bicycle called 'Brompton Bicycle', and, on the other hand, the Korean company Chedech/Get2Get, which manufactures and markets similar bicycles and was accused of infringing the copyright on the 'Brompton Bicycle'.

The case was prompted by the question referred for a preliminary ruling by the Belgian national court, which asked the CJEU whether a bicycle, the folding system of which was protected by a patent which has now expired, could be classified as a work eligible for protection under copyright law. He was asked whether such protection is excluded when the shape of the object is '*necessary to achieve a technical result*' and what criteria should apply for the purposes of that assessment.

The Court of Justice, in the present case, recalled that "an original subject matter which is the author's own intellectual creation" (par. 22) may be classified as a "work": it follows that "a subject matter satisfying the condition of originality may be eligible for copyright protection, even if its realization has been dictated by technical considerations, provided that its being so dictated has not prevented the author from reflecting his personality in that subject matter, as an expression of free and creative choices" (par. 26). Therefore, regardless of whether the form adopted appears necessary to achieve a given technical result, "it is for the referring court to ascertain whether, in spite of that fact, that bicycle is an original work resulting from intellectual creation" (paragraph 30). The CJEU also pointed out that it did not take into account the fact that the object in question had previously been protected by a patent.

The referring court will therefore have to assess whether, in the present case and in the light of all the relevant factors existing at the time of the creation of the product, through the specific choice of the shape of the product, the author of the product expressed his creative capacity in an original way, making free and creative choices and modelled the product to reflect his own personality.

The present case is in line with the recent ruling of the Court of Justice so-called "Cofemel" (C-683-17), in which it was established that, in order for a design to be protected by copyright, in addition to being identifiable with adequate precision and objectivity, so that both third parties and the authorities can know the

protected objects precisely, it is necessary and sufficient that it is original and therefore reflects the personality of its author, making free and creative choices.

Therefore, both decisions of the CJEU are particularly significant because, focusing on the requirement of originality/creativity, they lead to the conclusion that further requirements, such as the "artistic value" provided for in Article 2 no. 10 of our copyright law, are basically irrelevant for the purpose of the copyright protection and now, by virtue of the ruling on the "Brompton" case, they specify that any technical functions of the product shape are not in themselves preclusive of protection by copyright, even if they have led to patent protection of that shape .

It will therefore be interesting to see what effects these decisions will have in our country, both at a legislative and jurisprudential level, and which areas of extension of copyright protection on design will be consolidated in the future, also through the cumulation with other intellectual property protection (registration of designs, patents ).

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