

HOW TO PROTECT FOOD PRESENTATION BY INTELLECTUAL PROPERTY

Como proteger a apresentação de alimentos por meio da propriedade intelectual

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“We eat with our eyes first!”

(Apicious)

ABSTRACT

The protection of food presentation through intellectual property law is an evolving area that intersects culinary arts, branding, and legal frameworks. Food plating and presentation may receive protection under copyright, design, trademarks, trade dress, trade secret or other means, namely self-regulatory standards, confidentiality agreements and fiduciary duties. This paper explores the legal mechanisms available to safeguard unique food presentations, including the impact that intellectual property rights may have on innovation and competition in the culinary industry. We highlight the equilibrium between artistic expression, commercial identity, and fair competition in food presentation. The right balance between protection and public domain, difficult to

RESUMO

proteção da apresentação de alimentos por meio do direito da propriedade intelectual é uma área em evolução que cruza as artes culinárias, o branding e os enquadramentos jurídicos. A montagem e a apresentação dos pratos podem receber proteção por direitos de autor, desenho ou modelo (design), marcas, trade dress, segredo comercial ou outros meios, nomeadamente normas de autorregulação, acordos de confidencialidade e deveres fiduciários. Este artigo explora os mecanismos jurídicos disponíveis para salvaguardar apresentações de alimentos únicas, incluindo o impacto que os direitos de propriedade intelectual podem ter na inovação e na concorrência na indústria culinária. Destacamos o equilíbrio entre expressão artística, identidade comercial e concorrência leal na apresentação dos alimentos. O justo equilíbrio entre a proteção e o domínio

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achieve, must guide us in an area based in heritage and innovation.

público, o que é difícil de alcançar, deve orientar-nos numa área baseada na herança cultural e na inovação.

Keywords: Food presentation; #foodporn; Self-regulation; Non-disclosure agreements; Cumulation of protections.

Palavras-chave: Apresentação de alimentos; #foodporn; Autorregulação; Acordos de confidencialidade; Aumulação de proteções;

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1 INTRODUCTION

Food presentation is the art of modifying, processing, arranging, or decorating food to enhance its aesthetic appeal. Everyone loves their food to be arranged and served correctly creating theatre effect. The various presentation techniques impact the customers psychologically. Also, people judge the hygiene standards, taste and quality of a restaurant or a place by looking at the way the food is presented even before tasting it.

The presentation of food often refers to its visual composition on the plate, ready to be eaten, that is, to the presentation, or “plating” of the dish. It is a critical aspect of the customers dining experience. Presentation techniques allow the food to be displayed to its best potential. “Plating” of the dish adds colour and texture to the it. Garnishes and ac-

companiment also play an important role. Presentation makes food more tasteful.

Dinning can also be an art experience. I still remember what I felt at “Mesa de Lemos”, by Chef Diogo Rocha. It was like an experience in a museum, but further better than many museum exhibitions. In my memory remains the way the food was presented, in different types of pottery, with different colours and heights. I close my eyes and still feel the visual aspect of the food, with its different and unexpected textures, shapes and colours. The order by which the food was served, the ambience of the restaurant, with its minimalistic architecture and fabulous view over the vineyards, the accompanying wines, were also part of this unique experience. The surprising flavours, just by looking at the way the food was presented, were anticipated and felt in my brain before any taste.

But we can refer to food presentation in a broader sense. Because there is not just the actual food experience in the restaurant.

The explosion of interest in culinary creations we witness today began in the mid-20th century. From time on, thousands of flashy cookeries, recipe books and e-books became available.

The introduction of TV cooks and TV cookery programs (e.g., Master Chef, Top Chef, Good Eats, Cake Boss, Chopped, Iron Chef, Ramsay’s Kitchen Nightmares, Anthony Bourdain: No Reservations, Jamie at Home, Hell’s Kitchen, Nigella Lawson) brought attention for the culinary world to an unprecedented level. Television networks started to fight for the most popular chefs and cooks, who now have prime time programs where they perform cooking shows or where they evaluate cooking skills of contestants’ talent shows.

We witness the phenomenon of the “superstar chef”².

² See CEREIA, Elena and RURALE, Andrea, “Haute Cousine System and its Cultural Dimension: When Chefs are the New Artists”, ESA Research Network Sociology of Culture Midterm Conference: Culture and the Making of Worlds, October 2010, Available at SSRN: <https://ssrn.com/abstract=1692084> (last access on 03-02-2025); JANSSENS, M-C, “Copyright for Culinary Creations: a seven course tasting menu with accompanying wines”, Centre for Intellectual Property Rights, University of Leuven, January 2013; CUNNINGHAM, E., “Protecting Cuisine Under the Rubric of Intellec-

Displaying photos or videos of food on social media is common now. The “#foodporn” is used on social media to tag photos or videos of visually appealing food. It refers to the trend of sharing highly stylized and often indulgent images of food that are meant to evoke a strong emotional response (like how glamour or pornography is intended to arouse). According to Wikipedia, food porn is an over-glamourized visual presentation of food.

Our current fixation with looking at food is teetering on obsession. The coined phrase “food porn” describes this obsession.

Using social media has also become a new way to present and sell food and beverages, and there are websites and Apps to help you to find the best places where you can eat (e.g., TheFork, TasteAtlas, Michelin Guide, TripAdvisor).³

tual Property Law: Should the Law Play a Bigger Role in Kitchen?”, 9 **J. HIGH TECH. L.** 21, 2009, pp.21-51.

³ Here are some popular shows and series on YouTube, Facebook, Instagram, and Streaming Food Series that focus on food:

a) YouTube: Mark Wiens - Migrationology – Travel and food vlogs featuring authentic local cuisine from around the world; Best Ever Food Review Show – Sonny Side explores unique and exotic foods globally; First We Feast (Hot Ones) – Celebrities eat increasingly spicy wings while answering questions; Tasty by BuzzFeed – Quick and creative recipe videos; Sorted Food – British chefs and friends explore food trends, recipes, and cooking challenges; Luke Martin (Chopstick Travel) – Focuses on street food and authentic cuisine in Asia and beyond; Strictly Dumpling (Mike Chen) – Travels across continents to review famous restaurants and hidden gems; The Food Ranger (Trevor James) – Covers deep street food experiences in Asia, the Middle East, and beyond; Great Big Story (Tastemade & CNN) – Short documentaries on unique food traditions around the world; Guga Foods – Focuses on BBQ, meat, and food experiments; Street Food Around the World (DW Documentary & BBC Food) – Features vendors and local culinary traditions.

b) Facebook: Tasty by BuzzFeed – Quick recipes and global food trends; Food Insider – Covers unique foods, restaurants, and food traditions worldwide; So Yummy – Features creative food hacks and quick recipes; Twisted (Jungle Creations) – Over-the-top recipes with a fun twist; Chef’s Table (Netflix via Facebook) – High-end culinary storytelling from famous chefs worldwide.

c) Instagram (Food Influencers & Shows): @foodgod (Jonathan Cheban) – Shares luxury and viral food trends; @actionbronson – Rapper & chef showcasing worldwide food culture; @buzzfeedtasty – Short and eye-catching recipe videos; @nytcooking – Recipes and food stories from The New York Times; @thefoodranger – Trevor James’

Along with the growing success of cookery books, e-books, magazines, e-magazines, TV and Netflix shows, websites, cookery blogs, Facebook and Instagram images and videos relating to food, food web forums, many chefs and their reviewers, costumers and fans, look upon cooking as a form of art. There are overall museums dedicated to food (e.g., Food Museum in Hangzhou, China; Museum of Food and Drink (MOFAD) in New York, USA; Amsterdam Cheese Museum in the Netherlands; China Watermelon Museum in Beijing, China; Shin-Yokohama Ramen Museum in Yokohama, Japan; Museum Kimchikan in Seoul, South Korea; Alimentarium in Vevey, Switzerland; Cité du Vin in Bordeaux, France; Cup Noodles Museum in Osaka and Yokohama, Japan. In Portugal, we highlight Museu do Pão, in Seia; Museu da Cerveja, in Lisbon; Museu do Vinho do Porto, in Porto; WOW, in Vila Nova de Gaia; Museu da Alimentação, in Coimbra; Museu do Azeite, in Moura, Alentejo; Museu do Chocolate, in Óbidos).

Chefs are culinary artists. Their recipes and dishes are as pleasing to the palate as to the eye⁴. The same applies to drinks and barmen. Thus, the question of whether food can be protected by intellectual property laws is still a pressing subject.

We have already written about this topic in a broader sense, dealing with copyright and related rights protection, industrial property rights

travel-food discoveries; @strictlydumpling – Mike Chen’s global food adventures; @streetfoodglobal – Showcases Street food vendors from various countries.

d) Streaming Food Series (Available on YouTube, Netflix, or Social Media): Street Food (Netflix) – A deep dive into local food vendors in Asia, Latin America, and the U.S.; Somebody Feed Phil (Netflix) – Host Phil Rosenthal travels the world eating diverse foods; Anthony Bourdain: Parts Unknown (CNN, YouTube, HBO Max) – Legendary food and culture show; MasterChef & Hell’s Kitchen (Gordon Ramsay) – Popular cooking competitions with global reach; Chef’s Table (Netflix & Facebook) – Documentary series featuring top chefs; Ugly Delicious (Netflix) – David Chang explores how food connects cultures.

⁴ In this sense, REED Natascha N., “Eat your art out: Intellectual Protection for Food”, **Blog Trademark, Copyright, Advertising & the Law**, 21, June, 2016, at Eat Your Art Out: Intellectual Property Protection for Food | Trademark, Copyright, Advertising & the Law | Foley Hoag LLP, last access on 03-02-2025.

protection (patents, design, trademarks and other distinctive signs) as well as with rules against unfair competition and trade secrets.⁵

In this article we focus mainly on food presentation and the way to protect it by Intellectual Property, or by other means, always trying to find the right balance between open source and exclusive rights protection. The culinary world is and will remain a mix of tradition and innovation, thus fair competition is an important goal to achieve.

2 COPYRIGHT PROTECTION OF FOOD PRESENTATION

In most cases culinary creations and their aesthetic presentation do not qualify to be protected by copyright. Either because the subject matter is not protectable (e.g. a common recipe has only ideas and methods which cannot be protected)⁶, because it lacks originality (most recipes are trivial, basic, and should remain in public domain), or because of both reasons. Food presentation can also be too trivial to deserve copyright protection.

We must never forget that an overprotection by copyright (or other exclusive intellectual property rights) may have a “chilling effect” on creativity. A correct balance must be struck between protecting the works of creators on one hand, while also maintaining a culture of free artistic inspiration⁷.

⁵ See ROCHA, M. Victória, “The Mondrian Cake: may Intellectual Property protect signature food?”, **Revista Eletrônica de Direito (RED)**, 19, Junho 2019, 2, pp. 165-184.

⁶ Copyright does not protect ideas or methods [See Portuguese Copyright Code/Código do Direito de Autor e dos Direitos Conexos (CDADC) Article 1, nº2].

⁷ See BONADIO, Enrico, WEISSENBERGER, “Food Presentations and Recipes: Is There a Space for Copyright and Other Intellectual Property Rights?”, **A Philosophy of Recipes**, January 2022, pp.199–214 DOI: 10.5040/9781350145948.ch-14. We read the pre-copyedited, author-produced version this book chapter accepted for publication in Andrea Borghini – Patrick Engisch (eds.), **A Philosophy of Recipes: Making, Tasting, Valuing** (Bloomsbury 2021), following peer review, available at food presentation copyright - This is a pre-copyedited, author-produced version of a book chapter - Studocu (last access on April, 29, 2025). In this article we refer to the pages of this version.

There is also confusion regarding the relation between the recipes and the final dishes. We consider the dish the result of the recipe, like the sculpture is at the end of the project, or the building is the result of the architecture project. Considered as an immaterial good, the sculpture and the building can both be protected by copyright (the buyer of the house or the buyer of the sculpture, as a rule, don't become copyright owners of either).

If we are talking about the aesthetic appearance of a fine dining dish, that is, the “plating” of the dish, the recipes ought to be followed. We could say that there may be a two-dimensional phase (the project) and a three-dimensional one (the three-dimensional result). We are trying to protect the result, but that doesn't mean that the intermediate phases cannot be protected if the criteria deserve protection by copyright (as does the project of architecture works, or even the first sketches or drawings, the same happening with sculptures, and food). It all depends on what we are trying to protect when we are talking about culinary art. Some recipes might deserve protection (few), some cookbooks also deserve protection. The same happens with some menus or titles of dishes.⁸

We have higher concerns with the aesthetics of the final dish, that is, its “plating”.

For the culinary creation to be protected by copyright in Portugal and in the European Union (EU), it must be an original exteriorized creation of the intellect of a human being. This creation must be of the literary, artistic or scientific domain.

The culinary creation must come from a human being (as a rule, companies cannot be authors, but there may be exceptions in the case of collective works, cf. articles 16 and 19 of CDADC). The work cannot be an independent creation of nature, animals or an output of artificial intelligence. Namely, it cannot be the simple result of the prompts, in case of Generative Artificial Intelligence (which is now commonly used to create

⁸ With detail see ROCHA, “The Mondrian Cake...”, pp. 167-170. For a deep approach regarding protection of food by Spanish Copyright, see ROBERT GUILLÉN, Santiago, **Alta Cocina y Derecho de Autor**, Reus, Madrid, 2017. The Portuguese Copyright Code (CDADC) is more demanding regarding the protection of titles (cf. Article 4).

new dishes and food presentations, according to the prompts given by the user). Though nature, animals (and artificial intelligence) may be used by the author as instruments.

The work must come from the mind. It doesn't matter who executes it. Nevertheless, in many cases the author creates and executes the work (e.g., the sculptor, the chef, the cook, the writer). If the immaterial good is expressed through a physical medium, which often occurs, we must distinguish the author of the immaterial good, the work, from the owner of the physical medium where the work is incorporated, who doesn't get copyrights just by owning of the tangible medium where the work is incorporated (see Article 10 of CDADC, exceptions in Articles 157 and 167).

Without exteriorization the work remains within the mind of the author and cannot be perceived by the senses of others. Thus, it cannot be protected. Even if the author decides not to disclose the work, it must be separated from the mind of the author in the sense that it may be cognizable by others. If that occurs, it can be protected.

Originality is fundamental for a work to be protected. The concept normally is not defined in copyright laws, and can differ a lot from country to country, mainly when we compare Continental copyright systems with Anglo-American copyright ones. In the European Union (EU) there has been a strong effort to harmonize the concept, in four directives, and, mostly in the case law of the Court of Justice of the European Union (CJ/CJUE). EU legislature has provided a limited harmonization of the standard of originality, in respect to software (Article 1, nº3, of the Software Directive 91/250, now Article 1, nº3, of the Software Directive 96/9), databases (Article 3, nº1 of the Database Directive 96/9), photographs (Article 6 of the Term Directive 93/98, now Article 6 of the Term Directive 2006/116) and works of visual art in the public domain (Article 14 of the Digital Single Market Directive 2019/790). In all these Directives originality is intended as the "author's own intellectual creation". The Info-Soc Directive 2001/29 is based on the same principles of those directives. Thus, the work is protected under the InfoSoc Directive 2001/29 if it is original because it is its author's own intellectual creation.

The CJ, in its case law, has progressively intended to clarify the meaning of the expression “author’s own intellectual creation”. The “originality” requirement is only fulfilled when there is a space of freedom (*Spielraum*), and the author makes creative choices, namely choosing elements, its sequence, and combination (like words, figures or mathematical concepts), in an original manner⁹ and exercising creative freedom.¹⁰ As Eleonora ROSATI¹¹ summarizes, what is required is for the author “to express [their] creative abilities in the production of the work by making free and creative choices” so that they can “stamp the work created with [their] personal touch”.¹² In fact “mere intellectual effort and skill” in creating a work are not relevant to establishing originality.¹³ Also, the originality criterion is not satisfied when the creation of a work “is dictated by technical considerations, rules or constraints which leave no room for creative freedom”.¹⁴

The CJ considers “originality” an autonomous concept of the EU.¹⁵

The concept of “work” as also been defined by the CJ as referring to subject matter that is “expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form”.¹⁶ The CJ considers “work” an autonomous concept of the EU.

⁹ In this sense, *Infopaq*, C-5/08, EU:C:2009:465, at 45; *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816 at 50; *SAS Institute*, C-406/10, EU:C:2012, at 67.

¹⁰ See **Football Association Premier League**, C-403/08 and C-429/08, Eu:C:2011:631, at 98.

¹¹ ROSATI, Eleonora, **Copyright in the Digital Single Market, Article-by-Article Commentary to the Provisions of Directive 2019/790**, Oxford University Press, Oxford, 2021, pp.80-81.

¹² *Painer*, C-145/10, EU:C:2011:798, at 89 and 92.

¹³ *Funke Medien*, C-469/17, EU:C:2019:623, at 23.

¹⁴ *Cofemel*, C-683/17, EU:C:2019:721, at 31; *Football Dataco*, C-604/10, EU:C:2012:115, at 39; *Brompton Bicycle*, C-833/18, EU:C:2020:461, at 24-26.

¹⁵ See *Funke Medien*, C-469/17, EU:C:2019, 623, at 19; *Cofemel*, C-683/17, EU:C:2019:721, at 30.31; *Brompton Bicycle*, C-833/18, EU:C:2020:461, at 23.

¹⁶ In this sense, see *Levola Engelo*, C-310/07, EU:C:2018:899, at 40. The CJUE denied protection to a flavour, because it was too subjective to be considered a work. The same was decided in *Cofemel*, though it is not clear why, because in this case the subject matter was the design of G-Star Denim jeans, hoodies and T-shirts. See *Cofemel*, C-683/17,

Let us make clear that thought the CJ considers “work” an autonomous concept of the European Union, the *Cofemel* ruling was far from being clear about the requirements for protection of works of applied art, designs, and works of design in the EU. This means that until now, the EU Member States have been deciding according to national law traditions. In fact, there has been no harmonization, despite the *Cofemel* ruling.¹⁷

Besides satisfying the above mentioned four requirements, the work is only protected if it is a work of the literary, artistic, or scientific domain (Article 1, nº1 CDADC). Literary domain means that the work uses a language (e.g., software uses a language), it doesn’t mean that we must be before a work of literature. If the work is expressed through images, textures, colours, shapes, amongst other aspects, and creates an aesthetic emotion of any kind, it will be considered a work of the artistic domain.¹⁸

3 COPYRIGHT PROTECTION OF FOOD PRESENTATION IN A BIDIMENSIONAL WAY

As we wrote above, there is much interest in gastronomy, which means that there are many cookbooks and e-books, cook magazines and

EU:C:2019;721, at 32. In the same sense, *Brompton Bicycle*, C-833/18, EU:C:2020;461, at 25.

¹⁷ With detail, see our ROCHA, M. Victória, “PROTEÇÃO AUTORAL DAS OBRAS DE DESIGN NA UNIÃO EUROPEIA APÓS O ACÓRDÃO COFEMEL” **RRDDIS- Revista Rede de Direito Digital, Intelectual & Sociedade**, V. 3, n. 6, 2023, p. 71-121.

¹⁸ The scientific domain, referred to in Portuguese CDADC and other national copyright laws, is criticizable. First because it can lead to confusion. If there is an invention of the scientific or technical domain, it can only be protected through industrial property law, either as patent or utility model, or as a secret of commerce, using the general rules against unfair competition, or referring to law abuse. Copyright doesn’t protect the scientific contents. If someone writes a book about a new cooking device, and doesn’t protect it by industrial property rights, namely a patent, copyright won’t prevent a company from manufacturing that device using the information that is in the book. Copyright prevents the copying of the book’s expression. And the work is a work of the literary domain because it uses language. If the work has images, it can be a work of the artistic domain. It is not a work of the scientific domain. There are very seldom cases of works of the scientific domain, namely diagrams that cannot be considered artistic. For all these reasons we think it would be better if this domain wasn’t referred to in copyright.

e-magazines, gastronomic guides, cook shows and documentaries that can be considered audiovisual works, and many food photographs or videos in social media.

If we want to protect this type of presentation, gastronomy doesn't present special problems. A cookbook or a cook magazine, a gastronomic guide, audiovisual works related to cooking, or works of photography can all be protected by copyright if the requirements above mentioned meet. For example, imagine the author, a famous chef, decides to create a book or an e-book with his most important signature dishes (in Portugal, the cookbook of Maria de Lurdes Modesto inspired generations). Choosing some recipes instead of others, choosing the sequence of the recipes, the layout and even images to make the book more appealing, are sufficient elements to create a work that can be protected by copyright, as a compilation or creative database. If no images are used, it will be a work of the literary domain. If images, namely appealing photos are used, it will be both a work of the literary and artistic domain. If it is an interactive digital book, where cook shows or documentaries, and gastronomic critics appear, and the user can choose the path within the work, it can be multimedia work.

But a book about the hundred ways to cook pasta can also be protected by copyright, because there is a space of freedom and the author can make choices, even if the author is not a well-known chef or cook. Copyright also protects the so called “small change” (*Kleine Münze*), works where originality exists because the work is not commonplace, trivial, being the result of free choices of the author.

There are menus or titles of dishes that deserve protection by copyright, because they have “originality” in the above-mentioned sense.¹⁹

¹⁹ Thought in Portugal, according to Article 4 of the CDADC, the protection of titles is more demanding. Article 4 (Title of the work) “1 - The protection of the work extends to the title, regardless of registration, if it is original and cannot be confused with the title of any other work of the same genre by another author that has been previously disseminated or published. 2 - These requirements are deemed not to be met: a) Titles consisting of a generic, necessary or usual designation of the subject or object of works of a certain genre; b) Titles consisting exclusively of the names of historical, historical-dramatic or literary and mythological characters or the names of living per-

Also, given the ever-growing culinary obsession for food in the form of culinary shows, food blogs, omnipresence of the social media “foodie” culture, the question of protecting recipes is becoming increasingly relevant.

Recipes may or may not be protected by copyright, depending on the type of recipe. In most cases they don’t deserve protection because they are just a set of ingredients and instructions to follow to get the result, the dish, or the cake (that are also too trivial and don’t deserve protection, as a rule). But there are recipes that either by the way they are written, or by the complexity they present, or because of both, deserve protection also by copyright. We are thinking of recipes that are in romances, or novels, or written in a poetic way. They can be protected as literary works. But let’s address the recipe itself. Recipes of complex signature dishes, created by chefs, that have a complex architecture to reach the dish (e.g. “Viaje a la Habana” or of “Menestra de verduras en texturas”, culinary works already considered classics, the first by the brothers Roca, the second by Ferran Adrià²⁰) also ought to be protected, as the project of a sculpture, or of a work of architecture is.²¹ One may not

sonalities. 3 - The title of an undisclosed or unpublished work is protected if it fulfils the requirements of this article and has been registered together with the work.”

²⁰ Considering that recipes of signature dishes can be protected by copyright, see ROBERT GUILLÉN, ob. cit., p. 68 ff. As the author points out, if we take a work like the “Menestra de verduras en texturas” of Ferran Adrià, the recipe has more than 25 ingredients, and 25 or more manipulations, the recipe is so complex that the probability to reach the same result without copying it is almost zero. The originality can exist in the interior architecture of the work. All the elements of the recipe reflect what is essential in the dish. Thus, it is not a simple list of ingredients and orders, it has originality. In a culinary work creativity has two main characteristics, related, but with two ways of expression: visual and taste. The creation of taste is an intellectual and creative activity, that joins imagination, intuition and intelligence. There is a mental taste that appears first in the brain. Chef Roger Vergé wrote: “faire la cuisine, c’est faire oeuvre créatrice, c’est marier des mets comme le poète des mots, c’est plaquer des accords de saveurs, c’est inventer des harmonies nouvelles et subtiles”. LAFFONT, Robert, *Ma cuisine du soleil. Les recettes originales de Roger Vergé*, Robert Laffont ed., Paris, 1996, p. 11. The protection of recipes is also addressed by BONADIO, WIESENBERGER, “Food presentation...”, cit., predominantly under US law, pp. 8-13.

²¹ BONADIO, WIESENBERGER, “Food presentation...”, cit., pp. 9-13, refer the protection of recipes via social norms and case law. Certain guidelines and self-enforced norms already exist within the culinary industry, with cooks that are found copying other

forget that the partial presentation of the several parts of the final dish can also be protected because the final presentation of the dish may be a

chef's recipes being exposed to negative gossip and exclusion within the community. A famous case is the one of Melbourne-based chef Robin Wickens who in 2005 became known for his uber-creative culinary creations, such as his pickled cucumber-dried mango concoction or his smoked yoghurt. It was discovered that these creative works were not his own but had been copied from recipes developed at several American restaurants (from the plating to the accompanying silverware). Chef Robin Wickens was exposed for his "recipe plagiarism" by the online culinary forum eGullet after he published photos of the creations on his restaurant website.

Case law in the US send mixed signals. The first decision is of 1884 in *Belford, Clarke & Co v. Scribner*. The plaintiff contested that over 170 recipes from his cookbook had been fully copied. The lower Court sided with the plaintiff. The ruling was upheld by the District Court and by the US Supreme Court. In 1924, the *Fargo Mercantile Co v. Richter Co* involved a bottle label with new an original recipe. The Eighth Circuit found that the recipes on the label were protected by copyright because they were "original compositions serving the useful purpose of advancing the culinary art". After the publication of MELVILLE NIMMER, *Nimmer on Copyright*, in 1963, a legal scholar that maintained that recipes should not be protected by copyright, the US courts began to exclude recipes from copyright protection. In *Publications Int'l Ltd v. Meredith Corp*, decided by the Seventh Circuit, the protection 50 yoghurt Danone recipes was denied. The District Court considered that the recipes ought to be protected by copyright, but the Court of Appeal took the opposite stance, because they were methods and contained lists of facts. Nevertheless, the Court left open the question of whether and to what extent a recipe laced with a particular creative language might be protected. In *Lambing v. Godiva Chocolatier*, the plaintiff claimed that the famous chocolatier Godiva had copied both recipe and design of its distinct chocolate truffle named "David's Trinidad". The Sixth Circuit rejected the claim, considering recipes just functional directions for achieving a result, excluded from copyright protection. In the case *Barbour v. Head*, the plaintiffs sued the defendants arguing that they had published recipes from the Cowboy Chow cookbook in an online magazine and a cookbook. The District Court of Southern Texas, in 2001, found the recipes in question were more than mechanical listings of ingredients and cooking directions, being sufficiently expressive to be protected by copyright.

What emerges from the US case law is "a scant and somewhat muddled picture of the copyrightability of recipes (BONADIO, WEISSENBERGER, op. cit., p. 13).

In the EU Member States, the situation doesn't differ. In France, for example a Court considered recipes mere sets of instructions or methods of assembling ingredients, thus they are know-how and lack originality for copyright protection. On the contrary, in Italy a Court found that copyright is available for recipes, considering that their language and text, as well as the selection process and the research underpinning them, show the creative nature of the chef's personal contribution -Milan Court N° 9763/2013 (BONADIO, WEISSENBERGER, ob.cit., p13).

We can conclude that like in the US, case law regarding recipes in Continental Copyright is scarce and somehow contrasting.

complex work, resulting from assembling all these parts, which can also be considered works.

Because of 3-D printing evolution, that now allows also to print 3D food, it is also important to protect the contents of the 3D file, if it contains an original culinary work, even if the tridimensional shape is not yet printed.

4 COPYRIGHT PROTECTION OF THE TRIDIMENSIONAL PRESENTATION OF THE DISH

4.1 Subject matter

The sensible shape of the culinary work has been described by philosopher Jean-Paul Jouary as a “melody of flavours on a plastic art background”.²²

The culinary work, as immaterial good protected by copyright, can be represented in various ways, can be expressed in several sensible shapes. What we want to protect is not the physical shape, but the immaterial good. One of the sensible shapes of the culinary creation is the result of the creative process, that is the dish that we are going to see and taste, which is presented in three dimensions.

While it has long been common to draw inspiration from, or even copy, culinary creations of highly qualified chefs or cooks with little interest in legal suits, several cases and disputes gave rise to the question of whether the “plating” of the dishes could be protected by copyright, thereby granting chefs and cooks protection over their food presentation. In the Information Society, where information (and misinformation) is more accessible than ever, and now with the problems raised by Generative Artificial Intelligence, the phenomenon of food plagiarism, or food copying, became a hot trend.

²² The translation is ours. JOUARY, Jean-Paul, FERRAN ADRIA, ¿COCINERO O ARTISTA? **Un filósofo en El Bulli**, Alianza Editorial, Madrid, 2012, p.21.

Food presentation, or food “plating” is not mentioned in the copyright laws as protectable subject matter. This also has to do with the fact that the creativity that exists in the culinary world today was not foreseen a few decades ago when copyright laws in several countries in the world were introduced. That is no problem because copyright laws only give examples of protected works (see, in Portugal, Article 2 of CDADC). Portuguese law is in line with the Bern Convention for the Protection of Literary and Artistic Works of 1886 which provides a non-exhaustive list of works subject to protection. Also, copyright was born thanks to technology (the printing machine by Guttenberg) and evolves every time new technologies appear and give rise to new types of works (the hot trend now relates to artificial intelligence generated works).

The culinary world has advanced to such an extent that today it would be difficult not to recognize the creative activity of chefs (and well-known cooks) as works of art and chefs (and well-known cooks) as artists, and thus authors.

The food presentation on the plate ought to enter the category of artistic works, because we can consider that we are before sculptural creations. Certain food presentations fit very well in the definition. There are many sculptural artists that use food as their material of choice (as they use trash, plastics, or crochet. In Portugal, well-known Bordalo II uses trash, and well-known Joana Vasconcelos uses plastics or fabrics, namely crochet). Moreover, food presentations are perfectly comparable even to more traditional forms of sculptural works which use wood, stone or metal. It is undoubtful that if certain food presentations were made of such traditional materials there would be no doubts in considering them artistic copyright protected works. The mere fact that authors, like chefs, use less conventional materials in their creations cannot be an obstacle for protecting these works.

Work is an immaterial good and protection by copyright doesn't depend on the material where the work is expressed.

As a conclusion, because any type of material can be used to create a sculptural work, the same copyright protection that applies traditional

or not so traditional sculptures, may equally apply to sculptures made of food. Enrico BONADIO and Natalie WEISSENBERGER give the example of sculptures made of salmon roe and sweet red onion crème fraiche, topped with salmon tartare resembling ice cream cones, as if these appetizers were made of traditional materials, like marble, stone, or wood²³.

4.2 Work of applied art

A culinary work is a work of applied art, because beyond aesthetics it has the nutritional function. No doubt it can be an artistic work that we can compare to other areas of human creation, like art, architecture, music, theater, dance or cinema. We can be before a creative intellectual creation. But it has a function to fulfill. The presentation of the dish can only be protected by copyright if there is a space of freedom for the aesthetics, beyond the shape that is necessary to fulfill the nourishing function. And besides that, if choices were made in such a way to consider the presentation original, according to the above-mentioned criteria.

If the food presentation is common, trivial, it cannot be protected²⁴. But that doesn't mean that less common, more extravagant, unexpected culinary presentations which combine, namely colours, textures and placement in an artistic way should not be protected. If the above-mentioned requirements of originality meet, we are before artistic protectable work. In haute cuisine the originality in the food plating is normally very high (e.g. the examples of "Oysters and Pearls" and "Salmon Cornet" signature dishes of late chef Thomas Keller at the French Laundry; the "Orkney Scallop, Hazelnut, Clementine and Manjimup Truffle", at The Clove Club

²³ BONADIO, WEISSENBERGER, "Food Presentations...", cit., p. 13; see also SMITH, CATHAY Y. N., "Food Art: Protection "Food Presentation" Under U.S. Intellectual Property Law", **The John Marshall Review of Intellectual Property Law**, 14, 1, 2014, pp. 2-23, in particular pp. 6-7.

²⁴ The *Kim Seng Co v. J & A Importers Inc* (C.D. Cal 2011) exemplifies this. The issue was to know whether a bowl of food containing rice sticks, egg rolls and grilled meet was original enough to be copyrightable. The plaintiff alleged that the defendant had infringed the copyright on their "bowl of food sculpture", by using the exact same image on their packaging. The Court ruled that the bowl in question was comprised of unprotectable common elements, thus the dish lacked the originality requirement.

in London's Shoreditch district; the "Almond's Nougat" dessert, at the Quique Dacosta in Spain, which is described as "pure poetry").²⁵

Originality in food presentations may come in many ways. It may result from multiple elements that are selected and arranged in such a way that they create an innovative and original visual food work. There are abundant examples of such arrangements in modern gastronomy. Modern chefs create their plates by combining, elaborating and twisting already known components and ingredients. Although the individual elements of such dishes may not deserve protection, the created combination can embody a high degree of creative selection thereby qualifying as original artistic works.

Because chefs and cooks often draw inspiration from their colleagues' creations or even from other forms of art (e.g., the Mondrian Cake by Caitlin Freeman), the plating of the dish can be a derivative work, implying the consent of the authors that allowed the use of their creations if they didn't fall under public domain (See Article 3 CDADC).²⁶

²⁵ These examples are given by BONADIO, E., WEISSENBERGER, N., "Food Presentations...", cit., p.3.

²⁶ Chefs are often deemed to work in an open-source model. This model entails that the chefs' ideas, besides deriving from fellow chefs and other art creators, often originate from the predecessors that passed along their knowledge creating a culinary tradition shaped by several generations. According to BUCCAFUSO, C.J. ("On legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?", **Cardozo Arts & Ent. L. J.**, 24, 2007, pp. 1122-1155), this specific factor of the culinary world is referred to as the "hospitality gene". This entails a certain "culture of hospitality", meaning that chefs view food as something to be shared, and possibly used as inspiration. This makes it more difficult for many "plating" presentations to meet the originality criteria. We don't agree. Contrary to what the author states, we don't consider this to be specific of the culinary world. Several traditional artistic movements are related to the practice of borrowing images and details from other artists, as well as from popular culture (e.g., Pop Art, that challenged the traditional concept of fine art by incorporating elements from the news, celebrities and advertising, taking the material out of its initial context and transposing it into an opposite artistic location), and "appropriation art" (e.g., Picasso, Georges Braques and Marcel Duchamp) which is based on the use and arrangement of preexisting objects or images). Also, the fashion world functions as a very similar approach as the culinary world. Sharing our view see BONADIO, WEISSENBERGER, "Food Presentations..." cit., pp.3-5.; see also CUNNINGAM, E., "Protecting Food under the Rubric of Copyright: Should the Law Play a Bigger Role in the Kitchen? **Journal of High Technology Law**, 9, 21, 2009, pp. 22-51; ROCHA, "The Mondrian Cake..." cit., pp.167-170, especially p. 170.

The culinary creation, in its physical presentation, depends on time and space. Food dishes are (for the most part) destined to vanish because they are designated and intended to be eaten. It has durability limited to the duration of the support on which it is expressed. Its material permanence can only exist in its repetition. The repetition allows the durability of the ephemeral. But even if the expression of the result is ephemeral, because the dish is created to disappear, that doesn't affect the protection of the work by Continental copyright. The ephemeral character of the support does not affect the protection of the work. Article 2, nº2 of the Bern Convention and Article 2 of the WIPO Copyright Treaty of 1996 give freedom for each Member Country to decide if they grant protection to works that haven't been fixed in durable material support. In Continental copyright, namely in Portugal, the protection doesn't depend on the fixation of the work in a tangible medium of expression, opposite to what occurs, as a rule, in the United States.²⁷ In Portugal the protection

²⁷ The US copyright Act provides that a work is subject to copyright if the relevant subject matter is an original work of authorship, fixed in a tangible medium, and contains artistic aspects separable from its utilitarian functions. The requirement of fixation seems problematic due to the inherently non-permanent nature of food. In the *Kim Seng Co v. A Importers Inc* (C.D. Cal 2011) the Court found that culinary creations are perishable and therefore not fixed, thus non eligible for copyright protection. The Court quoted previous case law from the US Seventh Circuit's *Kelley v. Chicago Park District Case* (7th Cir. Feb. 15, 2011), that revolved around the question of whether an artistically conceived garden could be copyrightable. Because it changes all the time, the Court out the copyright protection of the garden.

But in *Kelley Case* the Seventh Circuit Court expressly stated that the physical impermanence does not necessarily conflict with the fixation requirement. The Court recognized that "no medium of expression lasts forever". What is likely of importance, as BONADIO and WEISSENBERGER point out and the Court recognized in *Kim Seng Case*, is the purpose of the requirement, which is to "ease problems of proof of creation and infringement" (op.cit., pp. 5-7). As both authors exemplify, fixation does not equate to permanence, and there are many examples outside the culinary world that confirm this. The authors use the famous *My Bed* exhibition by Tracey Emin, displayed in Tate Britain in London in 1999, finalist for the Turner Prize. The work had an inherently impermanent nature. Inspired by a difficult time in the artist's life, the work was an unmade, disheveled bed surrounded by various items varying from bottles of Absolut Vodka to house slippers. Each time the piece was exhibited in a new location, it needed to be taken apart and reassembled, changing its composition. It was easy for passers-by to touch the bed if they wished to do so. In 1999 two performance artists even jumped on the bed believing that the piece could be improved. Despite the work not being appreciated by all, no critic ever doubted it was a work of art, despite the

is independent of the gender, the form of expression, the merits, the way of communication and the function. As an exception, the protection depends on fixation only in case of choreographies and pantomimes [Article 2, n^o1, (d) CDADC].

This means that, though culinary works have a function and are ephemeral, because in their expression in a dish or cake, or other type of food tastable presentation, they have a limited period of protection, they can be protected by copyright. However, if they are to be repeated, there are many forms of expression that allow repetition, namely if they are represented in the ways seen above (3). Nevertheless, sometimes the goal is not to repeat the experience, and that doesn't prevent protection of ephemeral immaterial work. There are many ephemeral works besides culinary creations, like oral works, musical improvisations, ephemeral art, amongst others.

5 PROTECTION FOOD PRESENTATION AS DESIGN

The visual presentation of food can be protected by design if it has novelty, individual character and applies to the aesthetic appearance of the product.

In the EU we have two types of design protection: as registered design (the protection can go up to 25 years counting from the application for register, 5 years renewable, up to 25 years); as nonregistered design (the protection is of 3 years from the moment the design was disclosed within the EU, there are no costs, and we have "a copyright approach", because the protection only prevents from copying).

According to new Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation 6/2002 on Community designs and repealing Commission Regu-

lack of physical permanence. If we accept that fixation requires permanence, we will reach the absurd result of exclude from copyright artistic works that are movable and impermanent. We may add other examples, like street art which is doomed to change and disappear. Or outside sculptures whose shape changes with the weather and the wind.

lation 2246/2002²⁸ (from now on mentioned as EUDR), the concept of product has been enlarged, because certain products cannot be separated from their appearance, which happens, namely with digital products. In Article 3 of the new EUDR, which includes definitions, (1) “design” means the appearance of the whole or a part of a product resulting from the features, in particular the lines, contours, colours, shape, texture and/or materials, of the product itself and/or of its decoration, including the movement, transition or any other sort of animation of those features; (2) “product” means any industrial or handicraft item, other than a computer program, regardless of whether it is embodied in a physical object or materializes in a non-physical form, including: (a) packaging, sets of articles, spatial arrangements of items intended to form an interior or exterior environment, and parts intended to be assembled into a complex product; (b) graphic works or symbols, logos, surface patterns, typographic typefaces, and graphical user interfaces; (3) “complex product” means a product that is composed of multiple components which can be replaced, permitting disassembly and reassembly of the product.” The same changes are repeated in Article 2 of UE Design Directive (from now on mentioned as EUDD), mentioned in footnote 27. EUDD entered into force on 8 December 2024, with a transposition deadline for EU Member States by 9 December 2027.

The new definition of “product” excludes expressly computer programs [Article 3 (2) of EUDR and Article 2 of the EUDD], which must be interpreted with some flexibility because the concept of product now includes nonphysical objects and graphical user interfaces. The concept of “design” is enlarged reflecting the evolution of information technologies, clearly including the movement, transition or any other sort of animation of the characteristics that define the appearance of a product [Article 3 (1) of the EUDR and Article 2, (1) of the EUDD]. The concept of “product” now includes expressly spatial arrangements of items intended to

²⁸ Access the EUDR at Regulation - EU - 2024/2822 - EN - EUR-Lex. The EU design reform also implied the adoption of new Directive (EU) 2024/2823 of the European Parliament and of the Council of 23 October 2024 on the legal protection of designs, which revokes former European Community Design Directive 98/71/CE. Access the new Directive at Directive - EU - 2024/2823 - EN - EUR-Lex.

form an interior or exterior environment (e.g., the interior of a store or the appearance of a children's playground, or, more important, in our case, the interior of a restaurant or bar).²⁹

This means that digital presentations of food can now also be protected by design in the EU and in the future design laws of the Member States, after the transposition of the EUDD.

In Portuguese CPI (Articles 173 ff) we only have registered designs, and the UE reform didn't reach the Portuguese law yet.

Protection through design is a very interesting way of protecting the visual appearance of a dish, or other types of protection of food presentation. Nevertheless, because most recipes come from generations, and are usually shared, in many cases the requirements of novelty and/or of individual character are difficult to fulfill.³⁰

²⁹ See KUR, Annette, ENDRICH-LAIMBOCK, Tobias., HUCKSCHLAG, Marc, "Position Statement of the Max Planck Institute for Innovation and Competition of 23 January 2023 on the "Design Package" (Amendment of the Design Regulation and Recast of the Design Directive, **Max Planck Institute for Innovation & Competition Research Paper n° 23-05**, at Position Statement of the Max Planck Institute for Innovation and Competition of 23 January 2023 on the 'Design Package' (Amendment of the Design Regulation and Recast of the Design Directive) by Annette Kur, Tobias Endrich-Laimböck, Marc Huckschlag :: SSRN, (last access 25.06.2025), pp.8-9; SILVA, P. Sousa e, "A Revisão da disciplina europeia dos desenhos ou modelos. Traços essenciais. **Revista de Direito Intelectual**, 1, 2024, pp. 97-99.

³⁰ According to Articles 4, 5 and 6 we find the concepts of novelty and individual character. Article 4 (1) of EUDR states that "A design shall be protected by an EU design, if it is new and has individual character". There were no substantial changes in the concepts of novelty and individual character, as we can see reading the amended version of Regulation 6/2002, available at Consolidated TEXT: 32002R0006 — EN — 01.05.2025. Article 5, (1) determines that "design shall be considered to be new if no identical design has been made available to the public:(a) in the case of an unregistered European Union design, before the date on which the design for which protection is claimed has first been made available to the public; (b) in the case of a registered European Union design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority". According to (2) the same Article, "designs shall be deemed to be identical if their features differ only in immaterial details". Article 6 deals with individual character. According to (1), a "design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:(a) in the case of an unregistered European Union design, before the date on which the design for which protection is claimed has first been made available to the

6 CUMULATIVE PROTECTION BY COPYRIGHT AND DESIGN

In the EU, and in Portugal, designs, works of applied art and works of design can have cumulative protection by copyright and industrial property rights. The exterior appearance of a product can be protected as work, by copyright, and as design, by industrial property.

Article 96 (2) of Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs,³¹ already dealt with cumulation of protections, and a similar approach can be seen Article 96 (2) of amended version introduced by EUDR. Article 17 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs³² (DD) and Article 23 of the EUDD, that revoked the first one, is also substantially similar³³.

The Portuguese Industrial Property Code³⁴ (CPI) addresses the protection of design in Article 173 and ff. The Portuguese Copyright Code (CDADC)³⁵ addresses the protection of this subject matter by copyright.

The exterior appearance of a product may be protected as exclusive industrial property right and as copyrighted work. The requirements of

public; (b) in the case of a registered European Union design, before the date of filing the application for registration or, if a priority is claimed, the date of priority". Article 6, (2), determines that in "assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration." The EUDD also doesn't change these concepts.

Articles 175, 176 and 177 CPI have identical concepts of novelty and individual character for Portuguese registered design.

³¹ OJ L 3, 5.1.2002, p. 1–24. According to the consolidated text, Article 96 (2) now stated that "design protected as an EU design shall also be eligible for protection by copyright as from the date on which the design was created or fixed in any form, provided that the requirements of copyright law are met".

³² OJ L 289, 28.10.1998, p. 28–35

³³ Article 23 of EUDD, headed "Relationship to copyright", determines that "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 by copyright as from the date on which the design was created or fixed in any form provided that the requirements of copyright law are met".

³⁴ Código da Propriedade Industrial 2018 (DL n.º 110/2018, 10 de dezembro).

³⁵ Código do Direito de Autor e dos Direitos Conexos 1986 (DL n.º 63/85, 14 de março).

both protections are different. In certain situations, there may be a cumulation of protections, as stated under Articles 194 CPI, 96 (2) 6/2006, first version, and current version as amended by EUDR, and 2 (1) (i) CDA-DC. The cumulation of protections was imposed by article 17 of Directive 98/71 (DD), but each Member State might seemingly determine the conditions of protection, including the degree of “originality”, as stated in the second sentence of this provision.

The Portuguese legislator did not define the concept of “originality”, leaving that matter to be addressed by legal scholarship and case law. The legislator transcribed the wording of the first part of Article 17 of the CDE³⁶ ignoring the invitation of the second part of the same provision. Article 194 CPI (that repeats Article 200 CPI 2003) titled “Relationship with copyright” states that “any registered design shall also be eligible for protection under copyright law as from the date when the design was created, or defined, in any form”.

The inertia of the national legislature led to doubts on the meaning and scope of article 194 CPI regarding the requirements for cumulation of protection.

Because of the wording of Article 194 (and before that, of art 200 CPI 2003), which only refers to “registered design”, doubts on whether unregistered design could benefit from cumulation of protections were also raised. Nevertheless, if the EU law protects unregistered design, it also applies for copyright protection.³⁷

³⁶ Article 17 of Directive 98/71 headed ‘Relationship to copyright’ states: “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 or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.”

³⁷ In the judgment of the Court of Appeal of Guimarães of 27 February 2012, Case *JM Carvalho Araújo v Bruma* (Proc 1607/103TBBRG), when the 2003 CPI was in force, and the provision concerning cumulation of protections of design and copyright was Article 200 of said CPI (repeated in Article 194 CPI 2018), the Court of Appeal ruled that cumulation of protections was only possible when the design is registered. That interpretation is wrong. Article 96(2) CDR allows copyright protection to any design protected by the CDR, regardless of whether it is registered or unregistered (the latter is protected under Article 11 CDR). In Portugal, the cumulative protection of unregis-

It is crucial to know whether and when design may be protected by copyright, namely because copyright grants much longer protection and does not require any formality to arise.

Regarding works of applied art, such as the signature dish in its three-dimensional presentation, there were always doubts about the standards of originality necessary for copyright protection. Article 96, nº2 CDR and Article 17 CDD point towards a partial cumulation of protections, though traditionally the French system approaches the total cumulation of protections³⁸, the German system has been very strict, demanding a higher degree of originality (the so called, now abandoned, *Gestaltungshöhe*³⁹) in order to allow cumulation of protections⁴⁰, and the Italian system, as others, before the EU legislation did not allow cumulation of protections⁴¹. Since the *Flos* Case, this last option has been denied

tered Community designs is inevitable because of CDR. Article 194 CPI 2018 cannot be understood by considering only the wording of the provision. Recent amendments of the CDR and the new Directive on EU Design reflect this idea. About unregistered design, see LOUREDO CASADO, Sara, **El Diseño Industrial no Registrado**, Aranzadi-Thomson Reuters, 2019, p. 237 ff.

³⁸ In France the principle that art entails a unitary concept, and that one should not distinguish pure art from applied art, for the purpose of protection, always prevailed. The French system is based in the position of POUILLET, E., **Traité Théorique et Pratique de la Propriété Littéraire et Artistique et du Droit de Représentation**, 1 ed., 1879 and **Traité Théorique et Pratique des Dessins et Modèles**, 1 ed., 1868, though misinterpreted by the French courts. See, ROCHA, “Proteção autoral...”, cit., *RRDIS* cit., pp.76-77.

³⁹ *Gestaltungshöhe* is a German legal concept used in intellectual property law, especially in copyright and design law. It refers to the required “level of creativity” or “creative height” that a work must reach in order to qualify for legal protection. In translation, it is often rendered as “threshold of originality” or “degree of creative originality.” The concept is used to distinguish between mere technical, functional, or commonplace creations and those that reflect sufficient individual artistic expression to deserve protection.

⁴⁰ The German system is based in ULMER, E., *Urheber und Verlagsrecht*, Springer, Heidelberg, p.111 ff. With more detail, ROCHA, “Proteção autoral...”, cit., *RRDIS*, pp.77-78.

⁴¹ On these three systems see SILVA, Pedro SOUSA e, **Direito Industrial. Noções Fundamentais**, Almedina, Coimbra, 2022, pp.163-168; GONÇALVES, Luís Manuel COUTO, **Manual de Direito Industrial**, 11ª ed., Almedina, Coimbra, 2024, pp. 164-169; ROCHA, above mentioned “Proteção Autoral...”, *RRDIS* cit., pp.74-83.

by the CJ⁴². Thus, in the EU, the choice is between a partial cumulation or an almost total cumulation of protection.

In Portugal case law, before the *Cofemel* preliminary ruling⁴³ was erratic and unpredictable because Portuguese scholarship had (and still has) divergent approaches regarding the concept of “artistic” creation under Article, 2, n^o1 (i) CDADC. Article 2 provides a non-exhaustive list of protectable subject matter, including in section 1, subparagraph (i) “works of applied art, industrial designs and design work that constitute and artistic creation”^{44/45}

⁴² C-168/09, *Flos SpA v. Semero Casa e Famiglia SpA*, paras. 36, 37, 38. With more detail, see, ROCHA, “Proteção autoral...”, *RRDIS* cit., pp. 83-84.

⁴³ C-683/17 *Cofemel v G-Star Raw*, EU:C:2019:721.

⁴⁴ Regarding the relation between article 194 of CPI 2018 (before, article 200 CPI 2003) and article (2)(1)(i) CDADC, though scholars considered that Portugal had a partial cumulative protection, many of them demanded a higher degree of artistic value for cumulation of protections to be possible. Bárbara Ribeiro Quintela considered that the artistic creation “was an extra obligation imposing an assessment of the merits of the subject matter in question” (QUINTELA, Bárbara RIBEIRO “A tutela jurídica da moda pelos regimes dos desenhos ou modelos”, **Direito Industrial**, Vol. V, 2008, p. 477 ff., p. 501 ff, p.506 ff.). This approach is still shared by Menezes Leitão, who considers that cumulation of protections shall only be possible if there is a qualified artistic creation, in the sense that the protected design raises, in addition to its functional application, an assessment of merit in aesthetic terms, which is the subject of external recognition (LEITÃO, Luís Manuel TELES de MENEZES, **Direito de Autor**, 5^a ed., Almedina, Coimbra, 2023, p.93.) Oliveira Ascensão considered that works of applied art could only be protected by copyright when their artistic character clearly prevailed over the industrial destination of the object (ASCENSÃO, José de OLIVEIRA, **Direito de Autor e Direitos Conexos**, Reimpressão, Coimbra Editora, Coimbra, 2012, p. 92 ff, p. 94).

⁴⁵ Most Portuguese scholars have always been against the idea of entering into the artistic value because copyright protection is independent of the merits of the creation (as stated in the general clause of Article 2 CDADC). Designs, works of applied art, and works of design ought to be protected by copyright if, as happens with any type of work, the requirements of copyright protection meet. In the opinion of many Portuguese scholars, if we are considering an artistic work, recognized as such by the work’s specialized circles, the subject matter at issue ought to be protected by copyright as work. Not all designs should be protected by copyright, but only those that constitute an “artistic work”, which has nothing to do with merits but has to do with the recognition as such by specialized circles. If deemed necessary, there should be expert evidence. Whether or not something is an “artistic work” is a fact that must be proved.

See ROCHA, Maria Victória, “Proteção autoral para modelos de vestuário? [Ac. do Tribunal de Justiça da União Europeia no caso *Cofemel/G-Star* (C-683/17) de 12.09.2019]”,

Due to the lack of clarity in Article 2, n^o1, (i) CDADC and the lack of consensus among Portuguese scholarship, together with the lack of a general definition of the concept of “work” and of “originality” regarding works of applied art on the part of the EU legislator, it was impossible to predict how Portuguese courts would decide the issue of cumulation between design protection and copyright protection⁴⁶.

Revista de Direito Intelectual, 1, 2021, p.221, pp.228-231; SILVA, P. Sousa e, “Desenhos ou modelos no novo CPI. O que muda e o que não muda com o Ac. *Cofemel*”, **Revista de Direito Intelectual**, 2, 2019, p.189, pp.196-197.

Scholars like José Alberto Vieira, criticizing the way design, works of applied art, and works of design appear in the CDADC, consider that the reason why subparagraph (i) uses the expression “artistic creation” instead of the usual expression “intellectual creation”, which appears in the body of Article 2, n^o2, and in Article 1 CDADC, is only because creativity in this type of works has to do with its aesthetical aspect. The expression does not mean that an extra requirement is needed. Subparagraph (i) is just a different way of saying that the general requirement of “intellectual creation” must exist for the subject matter to be protected by copyright

⁴⁶ The following are the most important examples of Portuguese case law before the CJEU *Cofemel* preliminary ruling: (1) Court of Appeal of Porto, in 2006, granted copyrights to a furniture designer of a model of armchair and ordered the defendant to pay the author compensation for the infringement of those rights [Decision of 23 November 2006 (Proc 0633334, dgsi.pt)]; (2) Court of Appeal of Guimarães, in 2012, refused copyright protection to a range of designer taps for the kitchen and bathroom, conceived by architect Carvalho de Araújo, because they were not considered an artistic creation [Decision of 27 February 2012 (Proc 1607/103TBBRG, dgsi.pt)]; (3) Court of Appeal of Lisbon, in 2017, considered that design of jeans, sweatshirts, and t-shirts should be protected by copyright [Decision of 21 February 2017 (Proc 268/13.2YHLSB, dgsi.pt)]. This decision was appealed to the Portuguese Supreme Court (STJ) which decided to stay the proceedings and requested a preliminary ruling from the CJEU, which was the basis of the STJ decision of 15 January 2020, *Cofemel v G-Star* (Proc 268/13.2YHLSB.L1. S1, Rel Maria do Rosário Morgado); (4) Court of Appeal of Porto, in 2018, considered that it would be inappropriate to classify a line of garden furniture as an artistic creation [Decision of 25 October 2018 (Proc 364/12.3TVPRT, dgsi.pt)]; (5) Court of Appeal of Lisbon, in 2018, refused to protect paper bins, garden benches, and concrete planters as copyrighted works. They were considered objects of urban furniture, of an industrial nature, with a merely functional design. Thus, they could not be considered artistic creations [Decision of 9 January 2018 (Proc 76/14.3YHLSB, dgsi.pt), confirmed by the STJ decision of 27 September 2018 (dgsi.pt)]; (6) Court of Appeal of Lisbon, in 2018, considered that the design of light fittings by architect Souto de Moura deserved protection by copyright [Decision of 10 April 2018 (Proc 225/13/13.9YHLSB.L1-7, dgsi.pt)]. On the same grounds, the STJ confirmed this decision without waiting for the results of the CJEU’s preliminary ruling on the *Cofemel* case.

This led to the request for a preliminary ruling by the CJ in the *Cofemel* Case. The Portuguese Supreme Court decided to stay the proceedings and refer two questions to the CJ for a preliminary ruling.⁴⁷

With the first question, the STJ wanted to know if the interpretation by the CJ of Article 2 (a) of Directive 2001/29⁴⁸ precluded national legislation -in the case, the provision in Article 2 (1) (i) of CDADC-which confers copyright protection on works of applied art, industrial designs and works of design which, over and above their practical purpose, create their own visual and distinctive effect from an aesthetic point of view, being their originality the fundamental criterion that grants the protection in the area of copyright.

With the second question the STJ wanted to know if the interpretation by the CJ of Article 2 (a) of Directive 2001/29 precludes national legislation – in the case, the provision in Article 2 (1) (i) of CDADC- that confers copyright protection on works of applied art, industrial designs and works of design if, in light of a particularly rigorous assessment of

⁴⁷ The *Cofemel* case has been the subject of extensive analysis by national and international scholarship. Besides the Portuguese scholars already mentioned, see CARBAJO CASCÓN, Fernando, “Objetos Industriales, Derecho de Autor y Libre Competencia, Consideraciones a partir de las SSTJEU de 12 de Septiembre de 2019 (“Cofemel”) y 11 de Junio de 2020 (“Brompton”)”, **Cuadernos de Derecho Transnacional**, 2020, 12 (2) p. 913; CARBAJO CASCÓN, Fernando, “La protección de los diseños de moda en la Unión Europea (entre el diseño industrial y el derecho de autor)”, **Cuadernos del Centro de Estudios de Diseño y Comunicación**, 2020, 106, pp. 139–162; ENDRICH-LAIMBÖCK, Tobias, “Little Guidance for the Application of Copyright Law to Designs in *Cofemel*” *GRUR-International*, 2020, 69 (3), pp. 264-269; GÜVEN, Korey, “Eliminating “Aesthetics” from Copyright Law: The Aftermath of *Cofemel*” *GRUR-International*, 2022, 71(3), pp 213-225; KUR, Annette, “Unité de l’Art Is Here to Stay- Cofemel and its Consequences”, **Max Planck Institute for Innovation and Competition Research Paper**, December 2019, nº 19-16, pp. 1-22; LEISTNER, Matthias, “Einheitlicher europäischer Werkbegriff auch im Bereich der angewandten Kunst - Warum sich für die deutsche Praxis dennoch nicht viel ändern sollte”, *GRUR*, 11, 2019, pp. 1114-1119; ROSATI, Eleonora, “CJEU Rules that Copyright Protection for Designs Only Requires Sufficient Originality”, **Journal of Intellectual Property Law & Practice**, Vol. 14, (12), December 2019, pp. 931–932; RENDAS, Tito, “Copyright Protection of Designs in the EU: How Many Originality Standards Is Too Many?” **Journal of Intellectual Law & Practice**, Vol. 13(6), 2018, June 2018, pp. 439-441.

⁴⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167, 9 (already mentioned above as InfoSoc Directive).

their artistic value and taking account [of] the dominant views in cultural and institutional circles, they qualify as an “artistic creation” or “work of art”.⁴⁹

6.1 *Cofemel* Preliminary Ruling

In the *Cofemel* Preliminary Ruling (Case C-683/17) the CJ made the following key decisions:

(i) Designs (such as clothing, furniture, or industrial products) can be protected by copyright law under EU law, but only if they meet the standard requirement of “originality”. This means the design must be the author’s own intellectual creation, without any additional requirement of artistic or aesthetic merit. Thus, national laws cannot impose stricter requirements. The CJ confirmed that a uniform standard of “originality” applies across the EU, including all types of works.

Copyright and design rights are separate. The ruling clarified that copyright and design rights are independent legal regimes. While design

⁴⁹ What the STJ wanted to know, given the divergent positions in Portuguese scholarship and in Portuguese case law, was whether the reference to “artistic creation” in Article 2(1)(i) CDADC, means that the works of applied art, designs, and works of design listed in this subparagraph must satisfy a different, higher threshold to achieve copyright protection, or whether all categories of works are subject to the common standard of “originality”. But instead of asking whether the standards for protection of works of applied art are the same as for other categories of works, the STJ referred two questions with two different types of qualifiers: one requiring an aesthetically significant visual effect, going beyond the subject matter’s utilitarian function; the other referring to a markedly strict assessment of artistic character according to the opinion prevailing in cultural and institutional circles. The way the STJ put the first question created a dilemma for the CJ. The Court wanted to use the criteria enunciated in *Infopaq* and subsequent case law, but the CJEU and especially the Advocate General (AG), did not want to grant protection to the subject matter at issue. Therefore, both declared that while cumulation of design and copyright cannot be excluded, this is not the general rule, but rather an exception in certain cases, with a clear subtext meaning, excluding cases like this (see C-683/17 *Cofemel*, para 52; see also the reasoning of AG Spuznar, regarding the harmful consequences of overprotection of works of applied art or designs by copyright (C-683/17 *Cofemel*, EU:C:2019:363, Opinion of AG Spuznar, paras 50–66). Criticizing the way the STJ questioned the CJEU, see KUR, cit., pp. 5-6; ROCHA, “Proteção autoral...”, **Revista de Direito Intelectual**, cit., p.234; ROCHA, “Proteção Autoral...”, **RRDDIS**, cit., p.91.

rights protect the appearance of a product for a limited period, copyright provides longer protection but only for works that meet the “originality” threshold.

The *Cofemel* harmonized the concept of “work” under EU copyright law, reinforcing that a design can qualify as copyright-protected work if it meets two key conditions. The first is the “originality” requirement. The work must be the author’s own intellectual creation, meaning it reflects the author’s free and creative choices and is not dictated by technical, functional, purely utilitarian considerations or by orders of a third party (namely in the case of works made for hire or under an employment contract). The second is the identifiable expression. For something to be “work,” it must be expressed in a way that makes it identifiable with sufficient precision and objectivity. Ideas are not protected, but only the expression of those ideas. But not all exteriorization can be protected. If we are before a striking visual effect, but it is subjective, it cannot be considered a “work”. The “work” must have a precise and identifiable form (which was not the case, according to the CJ).

The decision of the CJ was not clear in many aspects, but it established the unequivocal solution of partial cumulation of protection.⁵⁰

For some scholars, the indication that cumulation can only occur in “certain cases” seems too vague. A total overlap of protections between design and copyright of a certain subject matter is precluded by the structural diversities between those fields. The author-centered concept of originality in copyright law entails the concept of subjective novelty and the possibility of protecting parallel creations. Copyright protects a design against acts of copying, while design law grants absolute protection against any new design producing the same overall impression (though nonregistered EU designs have a “copyright approach” protection). Differences between design law and copyright law are conceptual, not gradual. Partial cumulation exists independently of the “level” of originality required for the protection of designs. Partial cumulation is a description, not a goal that must be achieved by applying the criterion of

⁵⁰ Paragraph 42 mentions C-310/17, *Levola Hengelo*, EU :C:2018:899, para 38.

“originality” (Paragraphs 50 to 52 of the CJ ruling regarding copyright/design interface are merely descriptive statements).⁵¹

Other scholars consider that paragraphs 51 and 52 of the CJ decision formulate rules or guiding principles for interpreting copyright law. Since copyright lasts longer, copyright protection is broader and must be limited to certain designs that are particularly worthy of protection. Total cumulation, by granting longer copyright protection to designs, would undermine the still nuanced legislative decisions regarding design law with its narrower scope of protection (namely, defined by its length, the need to register, and stricter exceptions or limitations). From this could follow a rule-exception ratio that seeks to limit cumulative protection.⁵² We agree with the authors that believe the CJ was clear in requiring a restricted partial cumulation of protections.

The CJ made clear that not all types of exteriorization are enough for a “work” to exist. The CJ further determined that the concept of “work”, according to the InfoSoc Directive, implies “the existence of a subject matter that is identifiable with sufficient precision and objectivity” (paras 32 and 33).⁵³ The work is the expression of the author’s individual creation. Precision and objectivity do not exist when the identification of the subject matter is essentially based on the sensations of individuals that perceive it, which are necessarily subjective (para 34).⁵⁴

For the first time, the CJ stated unequivocally that the concept of “work” is harmonized in the EU (going further than C-310/17 *Levola Hengelo*, para 33, which was not so assertive). Since C-5/08 *Infopaq*, the CJ has decided that if a work falls within the application of the InfoSoc Directive, the protection only exists when the work is “its author’s own intellectual

⁵¹ See ENDRICH-LAIMBÖCK, op. cit., p. 267 ; KUR, op. cit., pp. 10–11.

⁵² CARBAJO CASCON, “Objetos industriales...” cit., pp. 925-933 and “La protección de los diseños de moda en la Union Europea” cit., pp. 148-156; SILVA, P. SOUSA e, “Tutela Jusautorale...”, cit., pp. 179-182;

⁵³ In this paragraph, the CJEU mentions C-310/17 *Levola Hengelo*, EU:C:2018:899, paras 40 and 41.

⁵⁴ In this paragraph, the CJEU mentions C-310/17 *Levola Hengelo*, EU:C:2018:899, para 42.

creation”, the work is the result of “free and creative choices” (C-403/08 *Football Association Premier League and C-429/08 Karen Murphy*), and the subject matter displays the personal touch of the author (C-145/10 *Painer*).⁵⁵

Though the CJ stressed that the conditions for granting copyright protection to works of applied art, works of design, and designs are a matter for uniform interpretation throughout the EU, the Court only stated general principles and did not give clear and sensible guidelines. It sent an ambiguous message, repeating standard formulae already known from previous case law, instead of clarifying the concepts of “work” and of “originality” in what concerns designs, works of applied art, and works of design. The approach that the CJ did not follow would have been especially important to elucidate those concepts, giving substantive notions that would replace the ones existing in national laws.⁵⁶ Besides giving no guidelines, the CJ’s decision is confusing and somewhat contradictory. Indeed, it may be said that, rather than clarifying the issue, it complicates the solution to a problem that is becoming more and more acute in the market due to the tendency of design creators and industry to invoke copyright to protect designs for a longer period. The CJ does not provide an objective and coherent hermeneutical basis for delineating the scope of the protection that should be granted to hybrid intangible goods such as design creations. The Court does not solve the design/copyright interface and its application to designs, creating uncertainty in what regards competition in an increasingly important market sector. The CJ was faced with a dilemma. Regarding the concept of “originality”, it applied the criteria enunciated in *Infopaq* and subsequent case law. But the CJ, and especially AG Spuznar, knowing that this concept could lead to too broad a cumulation of copyright and design protection, felt the need to clarify that such cumulation is not the general rule, but rather an exception, applicable only in “certain cases”, with a clear subtext reading “but not in a case like this”.⁵⁷

⁵⁵ See ROSATI, “CJEU Rules...”, cit., pp. 931–932.

⁵⁶ In this sense, SILVA, P. SOUSA e, “Tutela Justaautoral...”, cit., pp.183-184.

⁵⁷ See the wording in KUR, op. cit., p. 6; see also CARBAJO CASCON, “La protección de los diseños de moda en la Unión Europea”, cit., p. 153.

The AG claimed that this could be inferred from the idea/expression dichotomy that governs copyright. He held that characteristics such as the “specific composition based on shapes, colours, words and numbers”, the “combination of colours”, the “placement of the pocket on the stomach”, or “the way the jeans are made by assembling the three pieces”, which *Cofemel* was alleged to have copied, should be considered as ideas capable of being expressed differently, or even as practical solutions, and should not be protected by copyright (para 60). By relying on the innovative and unique (at that time) character of its G-Star Elwood design, which was introduced in 1996, the AG considered that it seemed that G-star was seeking copyright protection for its reputation and distinctive character of its goods, which are normally protected as trademarks (para 61). Though the infringement of copyright exists even if only parts of the work are reproduced, they must contain elements that are the expression of the intellectual creation of the author’s work.⁵⁸ That is not the case when the copied elements are merely inspired by the ideas expressed by the work. Though the assessment of whether the elements are ideas or parts drawn from the work must be carried out by the national court on a case-by-case basis, in the context of that assessment, that court must grant that the subject matter in respect of which protection is sought is sufficiently identifiable (para 61).⁵⁹ Copyright differs from design protection. An exclusive design right is being infringed, in line with the wording of article 10(1) CDR, if a design does not produce on the informed user a different overall (visual) impression. The concept of the overall (visual) impression is completely alien to copyright (para 63). Copyright protects a specific work, not a work which has a visual aspect that causes a different overall (visual) impression. Copyright does not require objective novelty. Parallel creations, provided they are original, are lawful and enjoy full protection as separate works. The same is true if a creation is inspired by earlier works. If that creation does not constitute an unauthorized reproduction of original elements of another’s work, there

⁵⁸ In this paragraph, the AG refers to C-5/08 *Infopaq International*, EU:C:2009:465, para 39.

⁵⁹ In this paragraph, the AG refers to C-310/17 *Levola Hengelo*, EU:C:2018:899, para 40.

is no copyright infringement, irrespective of whether the overall (visual) impression is different (see paras 64 and 65). In the opinion of the AG, the Court must distinguish what may fall within design protection and what may fall within copyright protection because the protections have different requirements and different purposes, thus avoiding confusion between the two protection regimes (para 66).

The CJ emphasized that the subject matter of copyright must be expressed in a way that makes it identifiable with “sufficient precision and objectivity” (paras 33 and 34, with reference to C-310/17 *Levola Hengelo*, para 40). The Court held that the ‘aesthetic’ appearance of an object is necessarily subjective. Moreover, the presence of an ‘aesthetically significant visual effect’ of a design cannot justify the protection of such design as work, under copyright (para 50).⁶⁰

In *Cofemel*, both the CJ and the AG send mixed signals between the words being used and the standards that the Court wants to apply.⁶¹ The AG, quoting the description of the special features of the clothing of G-Star, includes them in the field of unprotectable ideas. We think that the AG confuses such description, which may convey an idea with several options for its expression, with the actual clothing of G-Star, which presents a specific and identifiable manifestation of such ideas.⁶²

The reference made by the AG to functionality could be understood as establishing a rule that the closer an item corresponds in its appearan-

⁶⁰ LEISTNER stresses that the CJ’s emphasis on the requirement that subject matter of copyright “be expressed in a manner which makes it sufficient precision and objectivity” seems to conflate the criteria for concretizing the object of protection with sufficient certainty and the criteria for assessing originality of a work. This author assumes that the CJ was concerned that if the aesthetic appearance ought to be considered relevant, practically every design would qualify for copyright protection. See LEISTNER, op. cit., p. 1117. ENDRICH-LAIMBÖCK, cit., p. 266, contends that the CJ rejection of the “aesthetical significant visual effect” is motivated by the consideration that the assessment ought to be focused on the creative process itself and not on its result. According to the CJ, requirements that relate to the characteristics of the subject matter that do not necessarily reflect the required characteristics of the process of creation cannot be part of the originality criterion or be an alternative to such criterion.

⁶¹ In this sense, KUR, op. cit., p. 7, with whom we totally agree.

⁶² KUR, op. cit., p.7

ce to the gender (jeans, t-shirts, sweatshirts), the less it appears to rely on creative choices. But if this reasoning is followed in relation to works of applied art or designs, more will be required to demonstrate that there is a personal creation, re-establishing different standards in relation to other categories of works.⁶³ The creative choices do not concern the motive, which may be “prototypical” (like in the *Renckhoff* case) but find their expression in the details. In *Cofemel*, the designs at issue were the result of the free choices of the designers of G-Star regarding details of the clothing. Also, no clear guidance results from the CJ’s contention that the assessment of whether a subject matter qualifies as “work” must be based on objective criteria rather than on a subjective appreciation of aesthetic quality. Aesthetics, in the sense of “beauty” or “eye-pleasing character” of an object, is a matter of personal taste, and is totally inappropriate and obsolete in the context of copyright. But the CJ does not address the subject matter in this sense. In the ruling, the sense of “aesthetic” seems to represent the opposite of “functional”. The term is very close in its meaning to what the CJ regards as the result of free creative choices made by the authors of the works.⁶⁴

The CJ made it clear that the only valid concept of “originality” in EU copyright law is the subjective criterion, according to which originality is the author’s own intellectual creation that reflects their personality and is the result of free creative decisions in the sense that it is not affected by technical considerations. Therefore, the criterion of creative originality or creative degree applied by several national courts of the Member States was ruled out. Thus, the access of designs to the protection offered by copyright can no longer be justified by the appreciation of a greater creativity expressed in more recognizable aesthetic-artistic visual elements. At the same time, however, the CJ states that the cumulation of protections can only exist in certain situations. Not every design can be considered a work. But if all intellectual creations of the author that reflect their personality may qualify for copyright protection, including

⁶³ See, for photographs, C-161/17 *Land Nordrhein-Westfalen v. Dirk Renckhoff*, EU:C:2018:634.

⁶⁴ See KUR, cit., 7–9.

works of design and works of applied art, how can one differentiate those creations that only deserve protection as design from those that deserve cumulative protection under copyright?

The CJ suggests that the differentiating element does not reside in the concept of “originality”, but in the previous concept of “work”. But, at the same time, the CJ states that the existence of a work cannot be characterized solely by the presence of a visual aesthetic effect in a creative object. How is it possible to know when a work is protected by copyright? There seems to be a subtext in the CJ ruling. A “plus” is required to distinguish between design and an artistic work. But is this not confirmation that the difference lies in the identification in the object of a “plus” of creativity?

The CJ refuses to resort to the aesthetic element to identify the presence of an original work, but in the field of designs, the aesthetic element is always present because what is protected is the form or ornament of a product when it is novel and has individual character. The “plus” of creativity that allows affirmation that a design is also a work lies in the identification of aesthetic-artistic elements in the object, especially when the type of work (work of applied art) constitutes a sub-type of an artistic work (that has an intrinsic artistic character).⁶⁵

⁶⁵ For more detail, in this sense see CARBAJO CASCÓN, “La protección de los diseños de moda en la Unión Europea”, cit., pp. 153–56. Basically, it seems that the CJ advocates a solution like that established by US case law: a design can only access copyright protection if the object in which it is applied presents aesthetic elements that allow us to identify it as a work of art separable from the practical use of the industrial object. The huge difference is that in the US the industrial object and its elements are protected separately (the US “useful doctrine”), while in the EU the protection can be cumulative. If the object presents artistic elements, it will be able to enjoy both, the protection granted by design law and that offered by copyright (which will remain once the design protection has expired).

Where artistic features are incorporated into a functional product (e.g., garment, design table, food plating) these features are still eligible for protection subject to various conditions. In several jurisdictions, including the US, such artistic features are protected if they are separable from the underlying product. This doctrine is based on the idea that for a creative work which also as a utilitarian function to attract copyright, it must be conceptually separable from the product in which it is incorporated.

After *Cofemel*, national provisions expressly differentiating between the relevant work categories must be considered as infringing EU law as interpreted by the CJEU. Nevertheless, the standards applied are a matter of court practice, and national courts may simply adapt to the CJEU language regime while heeding the subtext implied in *Cofemel* that protection for works of applied art should not be granted too easily. This means, in practice, that national courts may continue to interpret the cumulation of protections in different ways. The *Cofemel* ruling did not lead to harmonization in this area. The restrictive interpretation the CJ offers of what should be considered original work seems to lead to a dead end.

The ruling of the CJ was that article 2(a) of the InfoSoc Directive must be interpreted as precluding national legislation from conferring protection, under copyright, to designs such as the clothing designs at issue in the main proceedings, on the ground that, over and above their practical purpose, they generate a specific, aesthetically significant visual effect. Nevertheless, reading the ruling and looking to what was proved in the main proceedings, it is not clear why the designs of G-Star could not be protected as individual creations of its authors, reflecting their personality and freedom of choices, and why the creations were not recognized as being identifiable with sufficient precision and objectivity.

The food as presented on a plate is “useful” in the sense that it provides nutritional value to who consumes it. The relevant issue here is to know whether the dish stimulates in the mind of the consumer a concept separate from its nutritional value. According to BONADIO, WEISSENBERG (op. cit., p.8), as consumers of fine dining (or even not so fine cuisine) know, the experience of enjoying a dish may go well beyond simply obtaining its nutritional value. The growing of haute cuisine world, as well as the success of culinary television shows, and the pervasive social media “foodie” culture, testimony the consumers’ desire for beautifully presented culinary creations and the increasing emphasis placed on the plating of the food than the food itself. Thus, it may be argued that even in countries like the US most dishes and their visual appearance may also be determined by creative expressions independent of their functional influences and therefore possibly attract copyright. In *Star Athletica v. Varsity Brands* (580 U.S.2017), the Supreme Court held that the pictorial and graphic features of cheerleaders’ uniforms could be applied to other medium and could be protected by copyright. Considering this decision, culinary presentations that contain artistic qualities independent of any functionality might now receive copyright protection (in this sense, see also SMITH, op. cit., p. 142).

The reasons for the ambiguous decision seem to be in the subtext conveyed by the CJ, which, in a certain way, defies the standard promoted.

6.2 What happened after *Cofemel*?

After the CJ *Cofemel* ruling, many cases came before the courts of EU Member States with different rulings, and the CJ ruled in the *Brompton* Case of 11 June 2020.

6.2.1 The Brompton Case

In the *Brompton* Case⁶⁶, of 11.6.2020, in which the aesthetics of a folding bicycle was at stake, the CJ reaffirmed the criteria of the *Cofemel* Case, stating that if a subject matter has originality, it can also benefit from the protection granted by copyright, even it has a functional character, provided there is space of freedom, that is, if the technical constraints do not prevent the author to make free and creative choices. If the shape is determined only by technical constraints, rules, or other limitations that don't leave space for creative freedom or leave such a short margin that there is confusion between the idea and its expression, there cannot be copyright protection. The CJ repeated that the technical character of a product doesn't prevent copyright protection. If we are before an individual creation of the author, able to reflect the author's personality, manifesting their free and creative choices (which corresponds to the concept of "originality") and manifesting itself in an object identifiable

⁶⁶ CJ ruling of 11.06.2020, SI, *Brompton Bicycle Ltd v. Chedech/Get2Get*, ECLI:EU:C:2020:461. The decision was this: "Articles 2 to 5 of 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 must be interpreted as meaning that the copyright protection provided for therein applies to a product whose shape is, at least in part, necessary to obtain a technical result, where that product is an original work resulting from intellectual creation, in that, through that shape, its author expresses his creative ability in an original manner by making free and creative choices in such a way that that shape reflects his personality, which it is for the national court to verify, bearing in mind all the relevant aspects of the dispute in the main proceedings".

with sufficient precision and objectivity (that is, that may be considered a “work”) there can be copyright protection.⁶⁷

6.2.2 *Portugues case law*

In Portugal there is already case law after the CJ *Cofemel* ruling, starting with the judgment of the Portuguese Supreme Court (STJ) in the case that originated the request for the preliminary ruling. The Portuguese courts, following the idea that there is a subtext hidden in *Cofemel* ruling, initially became very strict. Only if the works of applied art are recognized as “artistic” by the experts in the field, there can be copyright protection (institutional criterion).

In *Cofemel* Case, Portuguese STJ denied copyright protection to the *G-Star* designs. In the main proceedings⁶⁸ the essential question was whether the “ARC” jeans design and the graphic design incorporated into the “ROWDY” sweatshirts and t-shirts, both belonging to *G-Star* and imitated by *Cofemel*, under the trademark “Tiffosi”, which were not protected by industrial property, could be protected as works according to Portuguese copyright. To ascertain whether the subject matter at issue could be considered copyright protected work, the Supreme Court followed entirely the ruling of the CJ ((nº 11 of the STJ decision, 62-67).

It was proved that the *G-Star* “ARC” design is characterized by the way each of the three denim modules of different lengths and shapes is cut and assembled. Using such modules of different lengths and shapes, a leg with a 3D effect is created, folding in and back, and thus twisting around the user’s leg (twisted leg effect); further contributing to this effect are the darts included in the model for the placing of the knee, one on each leg. The “ARC” design is characterized by the alluded design with 3D effect and its leg cut with twisted leg effect, resulting from the position of the assembled three modules, the vertical position of the seams, and the seams

⁶⁷ About this case see, SILVA, P. SOUSA e, “Tutela Justaautoral...”, cit., pp. 184.185; ROCHA, “Proteção autoral...”, **RRDDIS** cit., pp. 102-103.

⁶⁸ Judgment of 15 January 2020, *G-Star Raw CV v Cofemel—Sociedade de vestuário* (STJ Proc. 268/13.2YHLSB.L1. S1).

on the back of the knees in the form of darts. Nevertheless, the *G-Star* design of the “ARC” jeans, created by designers Rixt van der Trol and Pierre Morriset, working for *G-Star*, according to the STJ, could not be protected by copyright because they were not appropriable. Regarding the fashion industry, clothes, ideas, and concepts are often expressed in fashion trends, or in a common fashion fund, part of the public domain, thus they cannot be protected by copyright. The STJ considered the “ARC” design elements as trends, thus not protectable by copyright. The same applies to the *G-Star* design of the T-shirts and hooded sweatshirts “ROWDY”, created by designer Ruud de Bruin, who also works in the design department of the company. These designs include several elements in their composition, namely the image stamped on the front of the T-shirts and hooded sweatshirts, the colour scheme, the numbers, and the placement of the pockets. Though *G-Star* invests in unique and innovative design, with new materials, cuts, and styles, that does not mean that the designs conceived by the company’s designers qualify for protection as works by copyright. Even if they are new and have a singularity, that is not enough for copyright protection; nor is the visual striking effect from an aesthetic point of view, namely achieved by the “ARC” jeans or by “ROWDY” T-shirts and hooded sweatshirts (nº 11 of the STJ decision, 67-72).

The STJ considered that the case law of the CJ harmonized the concept of “originality”, but annulled the decision of the Court of Appeal of Lisbon, ruling that the designs at issue could not be classified as works according to Article 2, nº1 (i) CDADC in an interpretation consistent with EU law, *maxime* with the InfoSoc Directive (nº 12 of the STJ decision, 76-77). Thus, *Cofemel* won the case in the Portuguese Supreme Court of Justice.

The CJ ruling went too far, giving this guidance to STJ in relation to facts. The STJ was in some way bound by the indications wrongly given in the specific case by the CJ in its preliminary ruling, clearly pointing to the effect that the design of the clothing at issue could not be classified as “work”.⁶⁹

⁶⁹ See the in-depth analysis of CARBAJO CASCÓN, “La protección de los diseños de moda en la Unión Europea”, cit., pp. 151–156; SILVA, P. SOUSA e, “Tutela Jusautoral de Obras de Design na esteira do Acórdão Cofemel”, cit., p. 184.

The Court of Appeal of Lisbon, in a judgment of 21 April 2020⁷⁰ in which an alleged imitation of markers of the well-known trademark “STABILO BOSS” was at issue, decided that the protection of the design of “Stabilo PEN 68” by copyright is only possible if we are looking at a work. This was not the case. Quoting the *Cofemel* decision, amongst others, and stressing that Portugal has a partial cumulation, but going beyond *Cofemel*, the Court of Appeal considered that artistic work is not just a creation of someone’s intellect. Besides being original, it must involve intellectual work, going beyond the commonplace, and enriching the available cultural framework and must be recognized by art experts as such (institutional approach).⁷¹

The Court of Appeal of Lisbon, on 18 May 2021,⁷² in which the alleged copy of a design of a passenger shelter of the *Larus* Company was at issue, decided in a similar way. To protect the design passenger shelter by copyright, it would have been necessary to prove that the same was included in a creative project of expression and was personal interpretation of the object at issue transcending its functional vision. The aesthetic effect that the Court recognized in the passenger shelter was not sufficient to support this understanding. Beyond the requirements for protection of design by industrial property, that is, novelty and individual character, copyright protection demands the subject matter to be the result of an individual creation of the author that reflects their personality, because the author makes free and creative choices. The Court of Appeal, in this judgment, quoted both *Cofemel* and *Stabilo* and denied copyright protection.⁷³

⁷⁰ Proc 279/18.1YHLSB.L1-PICRS (Rel Ana Pessoa), dgsi.pt. In this case, *Shwan-Stabilo Schwanhauser GmbH e Co KG* brought an action against *Branco e Negro, Lda* and *Clave Denia, S.A.*, amongst other reasons, because the latter companies produce, distribute, and sell in physical stores in Portugal, named Ale-Hop, and on the internet, pens that copy the design of Stabilo Pen 68, allegedly protected by copyright (amongst other intellectual property rights).

⁷¹ See 30–34 of the decision. The Court quotes SILVA, P. SOUSA e, “Desenhos ou modelos no novo CPI...”, cit., p.198 and p. 202.

⁷² Proc 146/20.9YHLSB.L1 (Rel Isoleta de Almeida Costa), *Larus—Artigos para Construção e Equipamento, Lda v. Bricantel—Comércio de material eléctrico de Bragança, SA e outros* (dgsi.pt).

⁷³ See II-B of the decision. The Court also stated that there was no evidence in the process to determine who could be the author (the designer or the company) for

The Court of Appeal of Lisbon, on 18 May 2022,⁷⁴ delivered a judgment involving the trademark and design “CAVALINHO”, where the plaintiff sought to protect the drawing of a horse through copyright. The Court denied protection. Referencing *Cofemel*, the Court held that partial cumulation is possible if we are before copyright protected work, which implies that the subject matter at issue reflects the personality of its author, their free, arbitrary, and creative choices, and that it is identifiable with sufficient precision and objectivity. In this case, there was no evidence in relation to the authorship of the subject matter at issue. The Court could not establish if the author was an artist, a designer, a craftsman, a worker of the company, a team, or an anonymous artist. Not knowing who the author might be, the Court could not conclude whether the design reflected their personality. The requirement of originality was not fulfilled.⁷⁵ As for the second requirement, the aesthetic effect of a design or of a distinctive sign of commerce is subjective, experienced by everyone who looks at it. The subject matter here was not identifiable with sufficient precision and objectivity to be qualified as “work” under the InfoSoc Directive.⁷⁶ For these reasons, the Court decided that the design of a horse, used in the distinctive signs and design patterns of the appellant could not qualify for copyright protection under the CDADC.⁷⁷

That said, the Appeal Court ruled that even if both requirements referred to were met, the design of the horse used in the distinctive signs of the appellant did not fulfil the degree of originality demanded by Article 2^o CDADC. This question was not addressed in either the *Cofemel* CJ ruling or in the *Cofemel* STJ decision. The Court of Appeal deepened the concept of artistic creation and held that to determine the degree of originality demanded by the CDADC the work of art must be created by

the purpose of art 14 CDADC, related to works made for hire (see II-A of the decision).

⁷⁴ Proc 286/21.7YHLSB.L1-PICRS (Rel Paula Pott) in: dgsi.pt.

⁷⁵ See para 103 of the decision.

⁷⁶ See paras 101–04 of the decision.

⁷⁷ See paras 103–05 of the decision.

an artist and is only artistic if society recognizes it as such.⁷⁸ In assessing whether a work is artistic from the perspective of its surroundings, the Court should not consider its conception of art because such a criterion would be controversial and arbitrary. Factors such as the opinion of experts, artists in the same field, or art dealers, as well as publications in art books, its presence in museum collections, or expertise, are decisive.⁷⁹ In this case, in the absence of allegation and proof of these elements, the Court could not find that the degree of originality required by article 2(1)(i) CDADC existed. As before, the Court followed the institutional approach.

In *Secto 4200 lamps*⁸⁰ (created by a very well-known architect, Seppo Koho, in cooperation with the plaintiff), Case of 05.02.2024, the Court of Appeal of Lisbon recognized copyright protection if the intellectual creation is the expression of free and creative choices, if there is autonomy before technical, or external restraints and if the work reflects the personality of the author (being the author's own intellectual creation). The evaluation should be done by the judge, regardless of the judge's personal taste and regardless of institutional recognition. The Court ruled that *Secto lamps* deserved copyright protection. The Court followed the rulings of the CJEU, namely the *Cofemel* Case. The Court stated that originality is a legal concept, thus it is up to the Court to rule if a certain subject matter has originality or not. Personal tastes or conceptions of the judges are irrelevant. The institutional recognition by the specialized circles may exist or not, though such recognition may be a strong indicator that we are before a protected work. But even if there is no institutional recognition we may be before work. Art history shows that major art movements weren't immediately recognized by the establishment (see what happened with impressionists and the French *droit de suite*) The only criteria to determine if a work is original is to assess if the subject matter is the author's own intellectual

⁷⁸ See para 106 of the decision, quoting SILVA, P. SOUSA e, *Direito Industrial, Noções Fundamentais*, cit., p. 191.

⁷⁹ See paras 107–10 of the decision.

⁸⁰ Proc. 253/21.0YHLSB.L1-PICRS (Rel. Alexandre Au-Yong Oliveira).

creation. To be protectable work the subject matter at issue must also be expressed in an identifiable subject with sufficient precision and objectivity.

In this case, the Court of Appeal of Lisbon stresses that originality is a subjective concept, allowing parallel creations, and considers that the institutional criteria (of the three former cases of the Court of Appeal of Lisbon) is far from being essential.

In Case Design Lava BV⁸¹, regarding a design that the plaintiff uses and sells on its mattresses, of 02.05.2025, the Court of Appeal of Lisbon emphasized that the originality is a law concept, not an artistic one. What must be proved is that there is originality and that the design is a work. There is no need for recognition by the artistic circles (cf. specially n^{os} 45,46,47, 48). Once again, the Court stresses that what is important is that originality and work, as recognized by the TJUE in *Cofemel* exist in the subject matter in question. Once again, the Court abandoned the institutional criteria.

As we can see, not even in Portugal the *Cofemel* concepts are nowadays interpreted in the same way by the Courts.

6.2.3 Case law in the EU Member States

In the EU Member States, the rulings continued to diverge, though the CJUE had considered in *Cofemel* Case that the concepts of “originality” and “work” were harmonized concepts of the EU. And this, though the national courts repeated the *Cofemel* standards.

In the UK, in the Case *Response Clothing*, the ruling from the Intellectual Property Enterprise Court of 21.01.2020, considered that a tissue pattern for women’s blouses could be considered a work according to the *Cofemel* criteria. The national courts cannot treat in a different way works of pure art and works of applied art. One cannot be demanding in terms

⁸¹ Proc. 371/23.OYHLSB.L1-PICRS (Rel. Alexandre Au-Yong Oliveira).

of originality. The pattern didn't exist before and was the result of free and creative choices of its author.⁸²

Referring to *Cofemel* Case, the Corte Suprema di Cassazione, in Case Kiko, ruling of 08.02.2020, qualified as work of architecture, subject to Article 5, n^o2 of Legge sul Diritto d'Autore, the interior design of a shop of cosmetics. The Italian Court considered that the project reflected a unitary conception, adopting a defined and visual relevant scheme, revealing a clear stylistic approach or organized and coordinated components to create a functional and harmonic ambience, manifesting the personal touch of the author.⁸³

In the opposite sense, in the *Ilse Jacobsen* Case, the Supreme Court of Denmark (IJH) decided, in 10.06.2020, that the RUB1 boots created by the stylist could not be a copyright protected work, though they created visual significative aesthetical effect. The design of the boots brought together elements of the traditional leader boots with long boot laces and rubber elements. Unlawful competition was also denied.⁸⁴

In the *Krakatau Parka* Case, a Court of Appeal in the Netherlands considered the design of a parka of two pieces, an internal part and an external part, is protected by copyright according to the *Cofemel* criteria,

⁸² Proc. IP-2017.000174 [2020] EWHC 148 (IPEC) case *Response Clothing Ltd v. The Edinburgh Wollen Mill Ltd*. About this case read **The Bird and Bird Team** "Fashion-related IP decisions round-up 2020", Vol. 16, 6, June 2021, pp. 595-625; SILVA, P. SOUSA e, "Tutela Justaatorial...", cit., pp. 185; ROCHA, "Proteção autoral..." **RRDDIS** cit., pp. 104-105.

⁸³ Proc. 17223/2018, *Wycon, S.p.a. v. Kiko S.p.a.*. About this case, read "Caso KikoWycon:la tutela del concept store tra diritto d'autore e concorrenza sleale", **Italy Intellectual Property Blog** (ipinitalia.com), last access on 30 September 2024; ROSATI, Eleonora, "Italian Supreme Court applies CJEU Cofemel decision to make up store layout", *JIPLP*, Vol. 15,7,2020, p. 501; The Bird and Bird Team, **JIPLP**, Vol. 16, 6, June 2021, pp. 595-625; SILVA, P. SOUSA e, "Tutela Jusatorial..." cit., pp.185-185; ROCHA, "Proteção autoral..." **RRDDIS** cit., pp. 105.106.

⁸⁴ Decision of the Supreme Court of Denmark of 10 June 2020, Case N^o BS-7741/2019-H-JR A/S v. *Morso Sko Import A/S Danish Consolidated Act on Copyright n^o 1144 of October 2014, Sec 1 (1)*, last access on 30 September 2024; About this case, read KIANZAD, BEHRANG, "Did the Danish Supreme Court Give the Fashion Industry a Kantian Boot? **GRUR International**, 70, 2, 2021, pp. 159-163; **The Bird and Bird IP Team**, **JIPLP**, Vol. 16, 6, June 2021, pp. 595-625; SILVA, P. SOUSA e, "Tutela Jusatorial..." cit., p.186; ROCHA, "Proteção Autoral..." **RRDDIS** cit., pp. 106-107.

because it is the result of creative choices and is clearly recognizable as a creation of the author. The decision led to the opposite consequences of what occurred in the *Cofemel* Case.⁸⁵

The Supreme Court of Spain, in the ruling of 16.02.2021, *Laureano* Case, denied copyright protection to a bullfighting fight, referring to *Levola Engelo* and *Cofemel* Cases, because the subject matter could not be identifiable with sufficient precision and objectivity, that is, we were not before a “work”.⁸⁶

6.3 Does the EU design harmonization change the present uncertainty EU situation?

The EU regulation of design, and the harmonization of design has been a huge success. Nevertheless, the technical evolution demanded a revision of the Regulation 6/2002 and of Directive 98/71/CE. The revision aims to adapt design protection for the digital environment and 3D printing, simplify the EU register, and align European and national procedures. Some changes aim to align design protection with trademark changes occurred in 2017.

Nevertheless, in what concerns the controversies of the overlapping of protections by copyright and design, there is no evolution. The EUDR and the EUDD reflect the guidance given by the CJ in *Cofemel* and *Brompton* Cases.

The main change regarding this issue in Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) 6/2002 on Community designs and repe-

⁸⁵ Decision of the Court of Appeal of Anhem-Leewarden, Proc. 2020:4773, *The Sting v. Krakatau*. Sobre o caso, leia-se SILVA, P. SOUSA e, “Tutela Jusautoral...”, cit., p.186; ROCHA, “Proteção Autoral...” **RRDDIS** cit., pp. 107-108.

⁸⁶ Proc. 82/2021, *Laureano v. Registrador Territorial de la Propiedad Intelectual de Extremadura*. About this case, read ALTABA, M. S., “Is bullfight a work of art? Not in Spain, apparently”, *IIC*, 52, 2021, pp. 807-819; SILVA, P. SOUSA e, “Tutela Justautoral...”, cit., p. 186; ROCHA, “Proteção Autoral...” **RRDDIS** cit., p.108.

aling Commission Regulation (EC) 2246/2002⁸⁷ is that Article 96, (2), doesn't refer to the national legislation of the Member States. It now states that a "design protected as an EU design shall also be eligible for protection by copyright as from the date on which the design was created or fixed in any form, provided that the requirements of copyright law are met." The same happens with Directive (EU) 2024/2823 of the European Parliament and of the Council of 23 October 2024 on the legal protection of designs⁸⁸. Article 23, that deals with the relationship to copyright, determines that 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 by copyright as from the date on which the design was created or fixed in any form provided that the requirements of copyright law are met". There is no reference to the law of the Member States, as occurred with Article 17 of Directive 71/98.

If the CJ considers, both, "originality" and "work" concepts of the EU, it makes no sense to insist on a remission to national law of Member States.⁸⁹

Nevertheless, the harmonization that was granted by *Cofemel* was insufficient, as the erratic case law in the EU in relation to cumulative protection of design and copyright proves.

This means that in relation to this subject, the design reform doesn't add anything to what happened after the *Cofemel* ruling.⁹⁰

⁸⁷ JO L, 2024/2822, 18.11.2024, ELI: <http://data.europa.eu/eli/reg/2024/2822/oj>

⁸⁸ OJ L, 2024/2823, 18.11.2024, ELI: <http://data.europa.eu/eli/dir/2024/2823/oj>

⁸⁹ Consideration 36 of the Regulation 2024/2822 determines that "Given the advanced harmonization of copyright law in the Union, it is appropriate to adjust the principle of cumulation of protection under Regulation (EC) No 6/2002 and under copyright law by allowing designs protected by EU design rights to be protected as copyright works, provided that the requirements of copyright law are met".

⁹⁰ In the same sense, KUR, Annette, ENDRICH-LAIMBÖCK, Tobias, HUCKSCHLAG, Marc, "Position Statement of the Max Planck Institute for Innovation and Competition of 23 January 2023 on the 'Design Package' (Amendment of the Design Regulation and Recast of the Design Directive) (January 23, 2023). **Max Planck Institute for Innovation & Competition Research Paper N° 23-05**, Available at Microsoft Word - MPI_Opinion on the Design Package_01-25_clean.docx (last access, 10.04.2025); see also SILVA, P. SOUSA e, "A revisão da disciplina europeia dos dese-

Getting back to food presentation, in its three-dimensional shape, this means that in Portugal and in all EU countries, it can be protected cumulatively by copyright and design, if the requirements of both sets of rules meet. Anyway, for the time being the concept of “originality” and of “work”, because of the inconsistencies of the *Cofemel* ruling, may lead to uncertainty. Doubts remain whether to know in which circumstances works of applied art, such as three-dimensional artistic presentations of food, which are very similar to sculptures, though having functionality (because ultimately, they are meant to be eaten and have a nutritive value) can be qualified as intellectual creations of the author. Also, it is not clear which factors should be considered for that qualification (e.g., the opinion of experts in that field, reproductions in art books, presence in museums? Or is the institutional recognition not decisive?).

The harmonization of the CJ was too abstract and somewhat contradictory, not being sufficient to solve actual cases with a reasonable degree of certainty and legal security. The inconsistent case law across EU Member States after *Cofemel* demonstrates the inadequate harmonization of design protection by copyright.

In the CJ two preliminary rulings are still pending that may bring some light to the matter, because they are intended to clear up many of the problems that still exist. We are referring to *Mio and others*⁹¹ and to *Konektra*⁹² Cases. These cases also prove that harmonization in the EU is far from being achieved.

nhos ou modelos. Traços essenciais”, **Revista de Direito Intelectual**, 1, 2024, pp. 93-104, p. 103; FIDALGO, V. PALMELA, “O novo regime jurídico europeu em matéria de desenhos e modelos. As alterações substântivas”, **Revista de Direito Intelectual**, 2, 2024, pp. 171-193, pp. 190-193.

⁹¹ Case C-580/23, *Mio and Others*: Request for a preliminary ruling from the Svea Hovrätt, Patent- och marknadsöverdomstolen (Sweden) lodged on 21 September 2023 — *Mio AB, Mio e-handel AB, Mio Försäljning AB v. Galleri Mikael & Thomas Asplund Aktiebolag*, OJ C, C/2023/964, 27.11.2023, ELI: <http://data.europa.eu/eli/C/2023/964/oj>.

⁹² Case C-795/23, *Konektra*: Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 21 December 2023 — *Konektra GmbH and LN v. USM U. Schärer Söhne AG*. OJ C, C/2024/1844, 11.3.2024, ELI: <http://data.europa.eu/eli/C/2024/1844/oj>.

7 PROTECTION OF FOOD PRESENTATION BY TRADEMARK AND TRADE DRESS

Trademarks are signs, namely words, names, symbols, colours, slogans, shapes of a product or of its packaging, holograms, sounds, smells, patterns, textures, which manufactures or sellers use to distinguish their products or services from identical or similar products or services of other manufactures or sellers, thus avoiding confusion in the market regarding the source of the good or service. Trademarks have also other functions, besides indication of source, namely they can be indicators of quality (e.g., prestige trademarks, or notorious trademarks) and reduce customers' search time (advertising function).

Chefs and restaurants may trademark their names and the typical menus. The same happens with manufacturers and sellers that trademark their products or services. They also have the possibility of registering as trademark shapes, as three-dimensional trademarks, leading to the protection of the visual typical appearance of a food item or a dish. A three-dimensional trademark refers to the shape of the product or to its packaging in three dimensions (length, width and height). The notion of three-dimensional trademark ought to be strict, that is, refer only to shape and not include any other elements (e.g., nominative, graphic or colours). The distinctiveness requirement should only be related to the shape itself. The CJ seems to be in line with this opinion.⁹³

Nevertheless, the EUIPO, since the UE Trademark Regulation of 2017, accepts the so called "enlarged three-dimensional trademark", that is, a three-dimensional trademark that besides the shape also includes other elements, namely nominative, graphic or labels.⁹⁴

Anyway, we must not forget that in the EU (and in Portugal) three-dimensional registration of trademarks is strict⁹⁵. It must not comprise

⁹³ This is the opinion of GONÇALVES, L. M. COUTO, **Manual de Direito Industrial**, cit., p. 210. See also the famous Louboutin Case, CJ Ruling C-163/16, of 12 June 2018.

⁹⁴ Mentioned by GONÇALVES, L. M. COUTO, **Manual de Direito Industrial**, cit., p. 211, footnote 487.

⁹⁵ With detail, see GONÇALVES, L. M. COUTO, **Manual de Direito Industrial**, cit., pp. 207-215. Registry of the smell, taste or texture of food as trademark is even more

the shape or other characteristic imposed by the nature of the product; the shape or other characteristic necessary to obtain a technical result; the shape or other characteristic that grant substantial value to the product (in this sense TM Directive 2015, Article 7 n°1, (e) and Article 209, n°1, (b) of the Portuguese CPI). The goal is to avoid distortion of free competence in the market. Three-dimensional trademarks cannot acquire secondary meaning (see Article 231, n°2 CPI). Classical examples of trademark registration for shapes are the Coca-Cola bottle and the Toblerone package.

Though trade dress has a large tradition in the US, applying also to the general appearance of the restaurant, in Portugal traditionally trade dress applies to the overall appearance of labels, wrapping or containers in which a producer packaged its product (see Article 233 CPI). Trade dress may include features such as size, shape, colour, textures, graphics, or even the design of the product. Trade dress has the same functions as trademarks, and it must be new, have a distinctive character and be non-functional to deserve protection. Trade dress, by its intrinsic nature, serves to identify a particular source. That makes it different from design protection.

Portuguese CPI protects trade dress in a disastrous way. If the trade dress is not registered and a third party imitates said trade dress, the previous user of the trade dress must register it to have an exclusive right over it.

If a third party comes and imitates someone's trade dress this should be considered an act of unlawful competition, an act of confusion, forbidden by Article 313 CPI. This is not a problem related to trademarks. But the Portuguese law does the opposite. It is treated as a trademark issue. The legislator claims that there is a trademark (a virtual one) consisting of the packaging and labeling of the product and demands that

problematic. Thought possible under EUTM Regulation and Portuguese CPI (Articles 208 and ff), that abolished the necessity of graphic representation, still the strict interpretation of the CJ Sieckmann Case tends to prevail. The clear and precise representation requirement is always denied in these cases. With more detail see ROCHA, "The Mondrian Cake...", cit., pp. 174-175.

the user applies for the register of a new trademark in order to protect that presentation. Article 233, n^o2 CPI determines that those interested in refusing to register the trademarks referred to in this article may only intervene in the respective proceedings after they have applied to register their trademark with the elements of the external appearance referred to in paragraph 1⁹⁶. But if the interested party can obtain the same result under Article 232, n^o1, (h) CPI, what's the interest of Article 233? The trademark ought to be refused (h) when it is recognizable that the applicant intends to compete unfairly or that unfair competition is possible regardless of the applicant's intention.^{97/98}

Trade dress, an underdeveloped area of law, with a historically generous interpretation, may be the perfect solution for the protection of culinary creations⁹⁹. "Plating" of dishes may come under one of three categories of trade dress: "plating" as product packaging, considering food as a product and the unique "plating" as its packaging (though this may imply issues when the plating itself is suitable to be eaten); "plating" as a *tertium quid*, meaning that the food presentation ought to form a part of a separate category, similar to restaurant décor, because it is part of the restaurant experience but it is not the main product or, in a strict sense, its packaging; signature dishes as service trademarks. When a dish is

⁹⁶ Article 233 (Imitation of unregistered packaging or labelling) "1 - Registration shall also be refused of trademarks which, under the terms of article 238(1)(b) and (c), constitute a reproduction or imitation of a certain external aspect, namely of packaging or labels, with the respective shape, colour and arrangement of sayings, medals, rewards and other elements, demonstrably used by others in their registered trademarks. 2 - Those interested in refusing to register the trademarks referred to in this article may only intervene in the respective proceedings after they have applied to register their trademark with the elements of the external appearance referred to in the previous paragraph".

⁹⁷ GONÇALVES, L. M. COUTO strongly criticizes the Portuguese solution, in *Manual de Direito Industrial*, cit., pp. 285-286; in the same sense, SILVA, P. SOUSA e, *Direito Industrial*, cit., pp. 289-290.

⁹⁸ Logotypes, rewards, geographical indications and designations of origin, when registered, may also play a very important role in protecting culinary creations by industrial property rights. With more detail, see ROCHA, "The Mondrian Cake..." cit., p. 177, footnote 47.

⁹⁹ In this sense, STRAUS, N., "Trade Dress Protection for Cuisine: Monetizing Creativity in low-IP Industry", *UCLA Law Review*, 60, 2012, pp.184-260, especially p. 242.

inherently distinctive and serves as a source indicator for a restaurant, as the above-mentioned Thomas Keller's Salmon Cornets do, this might fall under the category of service trademark.¹⁰⁰

Trade dress enforcement raises several problems. Proving trade dress infringement requires the plaintiff to prove that the defendant's use of his or the plaintiff's trademark causes, or may cause, confusion to customers as to the source of the product.

This may be difficult to prove for presentation of the dish, that is, food plating. Unlike the well-known Coca-Cola bottle or of Toblerone packaging, restaurants' food "plating" styles are not ubiquitously known, and customers are unlikely to believe that the copying restaurant's dish is somehow associated with the original. Nevertheless, this will depend on the circumstances of each case.¹⁰¹

The scope of protection would be very narrow if a chef sought protection only for a signature dish. Obtaining protection for each dish on a menu would be very inconvenient and not very accommodating for changing menus and dishes. Nevertheless, authors like Straus rightly point out that trademark law, trade dress (and we add unfair competition) rules) is an area with an expansionary history and may prove to the most hopeful frontier to protect signature dishes.¹⁰²

8 OTHER WAYS OF PROTECTING CULINARY CREATIONS AND THEIR PRESENTATION

Unfair competition rules, including trade secrets, non-disclosure agreements, fiduciary duties and social norms, are other ways of protecting gastronomy, including three-dimensional food presentation.¹⁰³A

¹⁰⁰ For a deeper approach see STRAUS, "Trade Dress Protection for Cuisine...", cit., p. 242.

¹⁰¹ STRAUS, N., "Trade dress...", cit., p. 242.

¹⁰² STRAUS, N., "Trade dress...", cit., pp. 248-252.

¹⁰³ With detail and examples, see ROCHA, "The Mondrian Cake...", cit., pp. 177-179.

culinary performance can also be protected by related rights.¹⁰⁴ Culinary databases may also be protected by the *sui generis* right of the manufacturer of databases related to the culinary world.¹⁰⁵ Because, in this study, we are mostly dealing with food aesthetics, we didn't mention patents or utility models. But if the culinary creation is a new solution for a technical problem, with industrial applicability, patents can be the right form of protection.¹⁰⁶ New utensils and cook robots can also be protected by patents or utility models.

Protecting food presentation by intellectual property can be a very important source of royalties and of the recognition of moral rights of chefs (and cooks).

Intellectual property rights are considered fundamental rights according to Article 17 of the Charter of Fundamental Rights of the European Union and of Protocol 1, Article 1, of the European Convention of Fundamental Rights. They are also foreseen as fundamental rights in Article 42 of the Portuguese Constitution.

Anyway, we must not forget that one must be careful, especially if we are dealing with copyrights, that last for a long time (as a rule, in the EU, patrimonial rights term is life of the author plus 70 years after the authors death. Moral rights can even have a longer term of protection, not yet harmonized), or tridimensional trademarks, that can last forever (ten years from the application, with infinite renewals of 10 years, for as long as there is serious use).

Overprotection can damage free competition and innovation. Authors like RAUSTIALA and SPRIGMAN even consider knockoffs the fuel for innovation and creativity in the food industry (like in other industries).¹⁰⁷

There is a long-standing culture of hospitality and a sharing and borrowing approach in the culinary industry. Sharing recipes and cooking

¹⁰⁴ With detail and examples, see ROCHA, "The Mondrian Cake...", cit., pp. 170-171.

¹⁰⁵ With detail and examples, see ROCHA, "The Mondrian Cake...", cit., pp. 169.

¹⁰⁶ With detail and examples, see ROCHA, "The Mondrian Cake...", cit., pp. 171-173.

¹⁰⁷ RAUSTIALA, K., SPRIGMAN, C., **The Knockoff economy, how imitation sparks innovation**, Oxford University Press, New York, 2012, pp. 57-95.

methods is common in the culinary world. The recipes, dishes and cooking skills of today are the result of generations and are often part of cultural heritage. Gastronomy is a combination of heritage and innovation. Chefs seem to endorse the idea about sharing and hospitality, which conflicts with the idea of exclusive ownership of recipes and dishes if they are given the credits and are acknowledged in some way.

Besides law-based intellectual protection, there is self-regulation created by the culinary industry on which chefs rely.¹⁰⁸ Here there are three main principles. The first one is that a chef must not copy other chefs' innovative recipes exactly. The second one is that if a chef reveals a recipe related to a colleague, that chef must not pass the information to anybody else, mainly colleagues, except if authorized to do so. The third one is that colleagues must give credits to developers of significant recipes and/or methods, and/or techniques as authors of that information. This last guideline focusses primarily on attribution to the original creator by providing words such as "adapted from" or "inspired by".

Chefs do respect these three general principles, namely punishing infringers by a refusal to provide further information and by lowered reputation in the community.

It is not common for chefs to invoke copyright protection, except in relation to cookbooks, e-cookbooks, magazines, e-magazines, photographic works or audiovisual works of all types.

Trade secrets play an important role in the protection of culinary creations. Trade secret (harmonized in the EU) is intended to protect information (including formulas, patterns, compilations, program devices, methods or processes) which grants economic value (actual or potential), from not being generally known and is subject of efforts that are reasonable to maintain secrecy (see Article 313 ff CPI). To be considered a trade secret, the subject matter, including methods, processes or formulas of

¹⁰⁸ See International Association of Culinary Professionals ethical guidelines, available at IACP CODE OF ETHICS (last access on March 9, 2025). Similarly, the Food Blog Alliance has provided guidance in the domain of social rules that apply to food bloggers. See Food Blog Alliance - Your Ultimate Food Community – Share Recipes, Get Answers & Explore Culinary Delights! (last access on March 13, 2025).

recipes, must have an independent economic value and there must be means put in place by the creator or proprietor to protect secrecy.

Many well-known food companies rely on trade secrets to protect their recipes or formulas (e.g. Coca-Cola recipe, KFC's chicken, MacDonald's Big Mac "special sauce"). But trade secret protection is also used by smaller restaurants claiming trade secret infringement by ex-chefs and employees. Reputed chefs, relying on gastronomic precedents belonging to the culinary public domain, tend to keep some ingredient or some combination of ingredients, as well as manipulation of them secret, adding their personal touch to the popular recipe or dish. That way they can maintain a culinary edge over their competitors.

Trade secret protection may be very useful for smaller-scale restaurants and for individual chefs (or cooks) because the barriers to obtaining protection are relatively low, especially as compared to obtaining patents. However, there is very limited legal protection once the secret becomes known. Secret information can be revealed through inadvertence or even independent discoveries, and improper misappropriation may be difficult to prove. That's one of the reasons why non-disclosure agreements and fiduciary duties are so important. Another problem in relation to trade secrets protection has to do with the growing potential reverse engineering of recipes, given the new advancements in technology, namely in Generative Artificial Intelligence, which may be used in deciphering the exact ingredients and proportions that were used.¹⁰⁹

Non-disclosure agreements seem to be widely used for culinary creations. These are contractual tools which ensure confidentiality of information between two or more parties. Together with fiduciary duties, they add one layer of protection of trade secrets. Many chefs mandate that employees sign non-disclosure agreements. Molecular gastronomist deceased chef Homaru Cantu, besides relying on strong intellectual property rights protection, required all employees and visitors to his kitchen to sign non-disclosure agreements before entering.

¹⁰⁹ With more detail, BONADIO, WEISSEBERGER, "Food Presentation...", cit., p. 17; ROCHA, "The Mondrian Cake...", pp. 177-178.

Non-disclosure agreements are also supported by the International Association of Culinary Professionals ethical code which states that restaurants and their chefs should provide a written contract stipulating the responsibilities of the employees upon their departure, especially regarding their use of proprietary information.

Civil law considers contract infringement, the breach of the duty of confidentiality and the use of secrets of the company by the former employees and collaborators in the post-contract phase.

The high turnover rate and the practice of partaking in frequent internships and traineeships, however, can make enforcement of non-disclosure agreements (or fiduciary duties) more difficult in practice.

Requiring all kitchen guests, whether they are visiting chefs, members of the media, or even clients, to sign non-disclosure agreements though possible, may be too much, creating a secrecy that goes against the “hospitality gene” that is part of the culinary culture.¹¹⁰

9 CONCLUSION

It is a fact that our society is obsessed with glamorous presentation of food, which led to coin the expression “food porn”, due to the millions of photos and videos of food in social media (*foodie social media culture*). We take a photo or make a video (namely reels) before we eat. This became a professional way of doing business by chefs, cooks, and other players in the market (see, as a simple example, www.casapappagalo.it).

Although cuisine and food presentation are frequently copied and imitated, intellectual property rights may give broad protection to chefs, restaurant owners and food industry companies. To the law, we must add self-regulation ethical codes and non-disclosure agreements.

The opinion of judges, culinary industry insiders, scholars and experts differs very much as to the appropriate way to ensure that chefs’

¹¹⁰ With more detail, BONADIO, WEISSENBERGER, “Food Presentation...”, cit., p.17; ROCHA, “The Mondrian Cake...”, pp. 177-178.

(and cooks') efforts are not unduly exploited. While some maintain that chefs and cooks, like any other type of creator, ought to have copyright and other types of industrial rights protection, others are hesitant in disturbing the low intellectual property equilibrium which the culinary world is believed to inhabit.

Nevertheless, a simple internet search or a look at foodie magazines reveals that the issue of whether copyright and other industrial property rights should be available for culinary creativity is a clearly increasing concern to many chefs and cooks, restaurants and Intellectual Property experts. Though the culinary history relies on the sharing and borrowing (the *hospitality gene*), as the industry develops and competitiveness between chefs, cooks and restaurants continually rises, it is understandable and inevitable that chefs, cooks, restaurants and food companies may find attractive and important to protect the culinary creations through intellectual property rights. In the coming years we will see increasingly more cases of chefs (as well as cooks, restaurant owners and food companies), claiming exclusive rights over their creations whether through copyrights or industrial property rights, or other means. This is likely to compel courts to pronounce the matter more regularly and consistently. That's why it is of paramount importance to strike an adequate balance between protection and free use. Overprotection can have a chilling effect on the culinary world creativity and innovation. In this study we aimed to establish the basis for this equilibrium regarding food presentation.

Food presentation can be protected both in its bidimensional appearance and in its three-dimensional shape. The first type of presentation doesn't cause specific problems regarding intellectual property rights. The protection of the three-dimensional shape of the food presentation, that is, the "plating" of the dish, is much more defying, namely in the EU.

As a rule, "plating" can be protected by copyright when we are before an original artistic work. Food artistic presentations are like sculptures, and their author is an artist. In haute cuisine, they even have strong originality. The chef (cook) can be protected as an author. Nevertheless,

artistic plating is a work of applied art, because besides the artistic aspects, food complies with the nutritional function.

Regarding the standards for the protection of works of applied art in the EU, though, cumulation with design protection cannot be ruled out, there have been very different approaches in EU Member States as to the level of originality required, because EU Design Regulations and Directives left much freedom for national laws and there are different traditions regarding this subject.

The leading case on this subject is the *Cofemel* Case. However, the CJ didn't solve the harmonization problem. The ruling was vague and somewhat contradictory regarding the harmonization of the protection of works of applied art and its relation to the overlapping of protections by design. Though the CJ considered that "originality" is the same for all types of works and partial cumulation ought to be adopted, it didn't leave clear guidance to solve actual cases. Though "originality" and "work" were considered by the CJ harmonized concepts of the EU, one doesn't understand why the *G-Star* designs were not considered to be "works", but mere subjective impressions. There seems to be a somehow hidden subtext in the CJ ruling that even contradicts the concept of "originality" on which the CJ relied. That's why after *Cofemel* countries in the Member States of the EU still decided according to their national tradition. That is, no harmonization was until now reached. Not even in Portugal, where the *Cofemel* Case originated.

Design protection can be very interesting for the protection of food plating, though the novelty and individual character requirements may be hard to fulfill, because cuisine is a mixture of tradition and innovation. The new Regulation on design doesn't solve the problem left by *Cofemel*. Nor does the new Directive on the subject solve the question. However, the enlargement of the concepts of "design" and "product" allow the protection of virtual food presentation and of the interior of a restaurant or a bar by way of design.

Three-dimensional trademarks, service trademarks, trade dress, rules against unfair competition, trade secrets, non-disclosure agreements

and fiduciary duties can also be interesting ways of protecting food presentation.

We must also consider the self-regulation codes of conduct, which play a very important role.

Excessive protection, given the history and tradition of gastronomy, may harm creativity, innovation, and ultimately competition. Most chefs favour a more open approach, within certain boundaries, namely the granting of the credits. But that doesn't mean that others don't have the opposite view and prefer to rely on intellectual property, or other types of exclusive protection.

The wanted type of protection required also has to do with the form of presentation to be protected (two-dimensional or three-dimensional), and to know whether the protection is required by chefs (or restaurant/bar owners) for signature dishes or by food industry companies.

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