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This thesis answers the question whether or not works of applied art that are the author's own intellectual creation and thus protected under copyright law are automatically excluded from trademark protection via application of the substantial value exception (art. 4(1)(e) Trademark Directive). The answer is that this is not so. To arrive at this answer, research was conducted into the role and interpretation of 'aesthetics' within both copyright law and trademark law.

The role of aesthetics when examining if a work of applied art is the author's own intellectual creation, was examined in light of the case law of various Member States of the European Union, namely the Netherlands, Germany, France, the Czech Republic, Portugal and Italy. These views were then seen in the light of the view of the Court of Justice of the European Union (hereinafter: CJEU), which was analysed based on various judgements of the CJEU such as *Infopaq*, *Painer* and *Cofemel*. The analysis of the case law of the aforementioned Member States shows that there are different interpretations of the case law of the CJEU. Even more interesting is that each Member State claims to be in line with the case law of the CJEU. Germany, for example, equates the requirement of artistic merit with the requirement of creativity within the requirement of the author's own intellectual creation. Art. 2 (10) Italian Copyright Act states that works of industrial design must have 'a creative character and artistic value', which imposes that artistic value is an additional requirement alongside the requirement of creativity. According to art. 2 (1) Copyright Act of the Czech Republic a work can be copyright protected when it is 'a unique outcome of the creative activity of the author'. In the Netherlands works of applied art cannot be copyright protected when it is 'too banal or too trivial', because that would not indicate that it is a result of creative labour. It is impossible for all these different interpretations to be in line with the case law of the CJEU.

An analysis of the CJEU's rulings shows that there are two cumulative requirements that have to be met in order to be protected under copyright law; (1) the author's own intellectual creation and (2) the subject matter has to be identifiable with sufficient precision and objectivity. The CJEU has stated in *Cofemel* that the requirement of the author's own intellectual creation is both necessary and sufficient. This means that there is no room for applying any additional requirement alongside the requirement of the author's own intellectual creation. Consequently, aesthetics may not be imposed as an additional requirement. However, this does not mean that aesthetic considerations cannot be considered *in* the assessment of the author's own intellectual creation. Though, aesthetic effect in itself is insufficient to constitute the author's own intellectual creation, according to the CJEU in the *Cofemel* judgement.

The substantial value exception in trademark law has primarily been examined based on the *Bang & Olufsen* judgement of the General Court and the *Hauck/Stokke* and *Gömböc* judgements of the CJEU. Analysis of the *Bang & Olufsen* and the *Hauck/Stokke* judgements has shown that aesthetic characteristics of the design were required for the substantial value exception to apply. Since *Gömböc* this has changed; there must be a form of 'attractiveness', and aesthetics is one of the ways to achieve this. This has broadened the possibilities for the application of this exception. However, attractiveness is not the only requirement that must be met. This attractiveness must 'to a very great extent' have been the reason for the consumer to purchase the product. All this must be viewed from the perspective of the competition ratio that applies to this exception; granting trademark protection of this design to one party must distort the conditions of competition on the market concerned. If this is the case, then the

application of the substantial value exception is appropriate. Considering the main question of this thesis, the foregoing shows that aesthetics are not necessary to achieve the required attractiveness and therefore cannot be regarded as a prerequisite for the application of the substantial value exception.

This research has shown that the CJEU's approach is as follows. In regard to the copyright protection, aesthetics cannot be used as an additional requirement alongside the requirement of the author's own intellectual creation. Aesthetic considerations can however be considered when assessing if the work of applied art is an author's own intellectual creation. Furthermore, the subject matter must be identifiable with sufficient precision and objectivity. In regard to the substantial value exception of trademark law, aesthetics are no longer required to declare it applicable. Even when the aesthetic effect leads to the required attractiveness, this aesthetics must - to a very great extent - be the reason the consumer purchases the product. Moreover, this exception can only be applied if the conditions of the competition on the market concerned are distorted when the protection of this design is granted to a single party.

From the findings of this research, which focused on the role and meaning of aesthetics, it follows that trademark protection is not automatically excluded via the substantial value exception when works of applied art, that are the author's own intellectual creation, are copyright protected.

Barbara Scheurwater