



Work or Design?

- overlap of European Copyright and Design Law

The Danish Perspective

GRUR Annual Conference 16 October 2025



Brief introduction to the ECJ

Composition of the European Court of Justice

27 judges



11 Advocates General



Chambers

3 judges

5 judges

15 judges

27 judges

Cases of less importance or easy to solve

More important cases (Article 60 of the Rules of Procedure)



Procedure at the Court

- Questions concerning interpretation or validity
- Translation
- Working language: French
- Written observations (parties, Member States, and EU institutions)
 - *Or briefs in a direct action or appeal cases*
- *Rapport préalable*
- *Réunion générale*
- Questions to the parties and to the Commission
- Oral hearing
- Opinion of the Advocate General
- Judgment
- National courts must apply the interpretation in the specific case

- Obligation to refer (CILFIT II (C-561/19) and case C-64/16)



The role of the European Court of Justice

Joseph H.H. Weiler's quote from Henry Schermer's preface:

- *"No court can fully escape policy-making. Constitutional Courts are more obliged than other Courts to make policy decisions, and the Court of Justice must do so on a relatively larger scale than most constitutional Courts"*

Lord Howe (in P.J.G. Kapteyn, *Law of the European Union and the European Communities*, fourth edition, 2008):

- *"The Court had no pre-existing legal system to work with. The treaty provisions it was called upon to interpret were often general in scope and silent on detail. The option of operating in a "non-activist" manner, merely interpreting the meaning of words, was simply not open to the Court of Justice"*

Opinion of an Advocate General on new questions of law (Article 20 of the Statute)

"A second opinion that comes first" (Professor Hartley)

Intro

- Protection of applied art industrial design, fashionwear, and similar areas – three possible avenues:
- **Copyright**, if the product is *original*
- **Design right**, if the product is *new* and has *individual character*
- **Protection against product imitation** under the **Marketing Practices Act**, if the product has *distinctiveness/ commercial separability/ market position*
- **Can be cumulative** – one does not exclude the other



Danish perspective – historically

- Earlier Danish case law from the 1960s to the 1990s applied a rather **high threshold** of originality for products and phenomena in the fields of applied art, industrial design, fashionwear, and similar areas.
- This regime was accompanied by what appears to have been a narrow view on the scope of protection, including a **stricter assessment of infringement**.
- This traditional approach was reaffirmed by the Danish Supreme Court in 2012 (Nørgaard), which stated:

“In light of the freedom of movement in the market and to prevent monopolisation, Danish legal tradition imposes significant requirements for originality and artistic effort before copyright protection can be granted to fashion items.”
- Following the CJEU’s Cofemel judgment, however, it is now firmly established that applied art must meet the same originality standard as other copyrightable works – that is, the work must reflect the author’s own intellectual creation based on free and creative choices.
- Nevertheless, Danish courts have **not consistently aligned** their rulings with the Cofemel standard. Recent case law indicates a lack of uniformity and a somewhat uncertain application of the harmonised EU originality test in the context of applied art.



Ilse-Jacobsen I

- A Supreme Court judgment on the protection of rubber boots, delivered one year after Cofemel, explicitly citing the Cofemel decision:
- *‘Following Cofemel, it must be assumed that clothing models, depending on the circumstances, **can and must be regarded as works of applied art** eligible for copyright protection’.*
- *‘However, as the Cofemel makes clear, it is **not sufficient** for such models to be considered works merely because, beyond their functional purpose, they produce a **distinctive and characteristic aesthetic effect - not even if they are the result of design concepts and processes recognised as innovative** within the fashion industry.’*



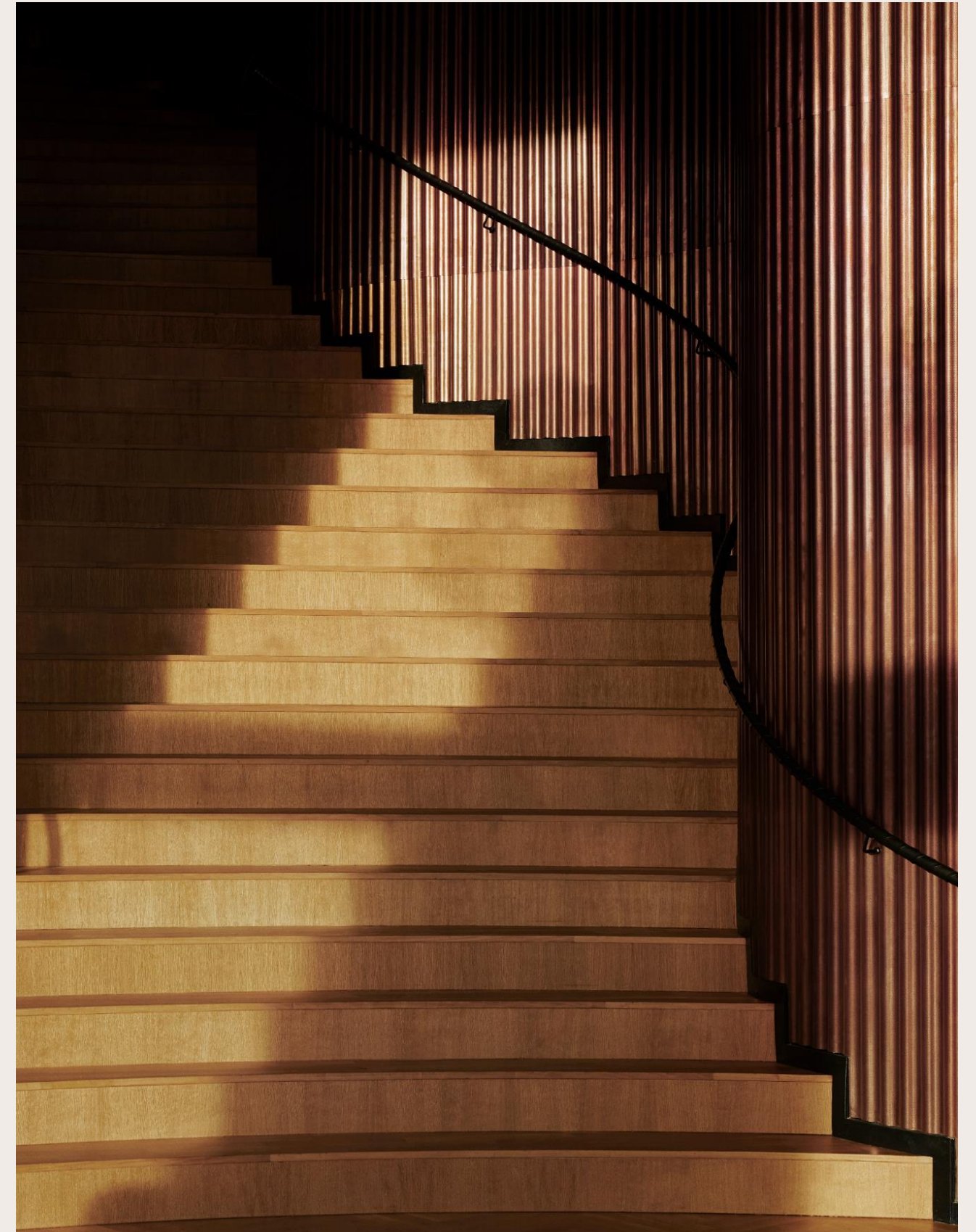
Ilse-Jacobsen II

- The Danish Supreme Court held that the principles set out in the *Cofemel* judgment regarding the copyright protection of clothing **also apply to footwear**, including rubber boots.
- On the basis of the judgment of the CJEU in the *Cofemel* case, the Supreme Court found no basis for concluding that the design innovation meets the requirement of originality, which is a condition for the RUB 1 rubber boot to qualify as a work of applied art.
- The experts' statement that the boot, as a whole, reflects creative ability based on free and creative choices, and thus constitutes an independent creative effort, was set aside.



Ilse Jacobsen III

- Instead, the Supreme Court found that the rubber boot possesses such a **degree of distinctiveness** that it is protected against imitation under the Marketing Practices Act.
- According to the experts' assessment, the sole, when assessed as a whole, must be regarded as the most characteristic design feature of the rubber boot, and is therefore of greater significance than the lacing.
- This design feature, the sole, was not replicated in the alleged copy.
- As a result, the differences between the boots was sufficient to conclude that the marketing of the copy did not constitute an infringement of rights under the Marketing Practices Act.



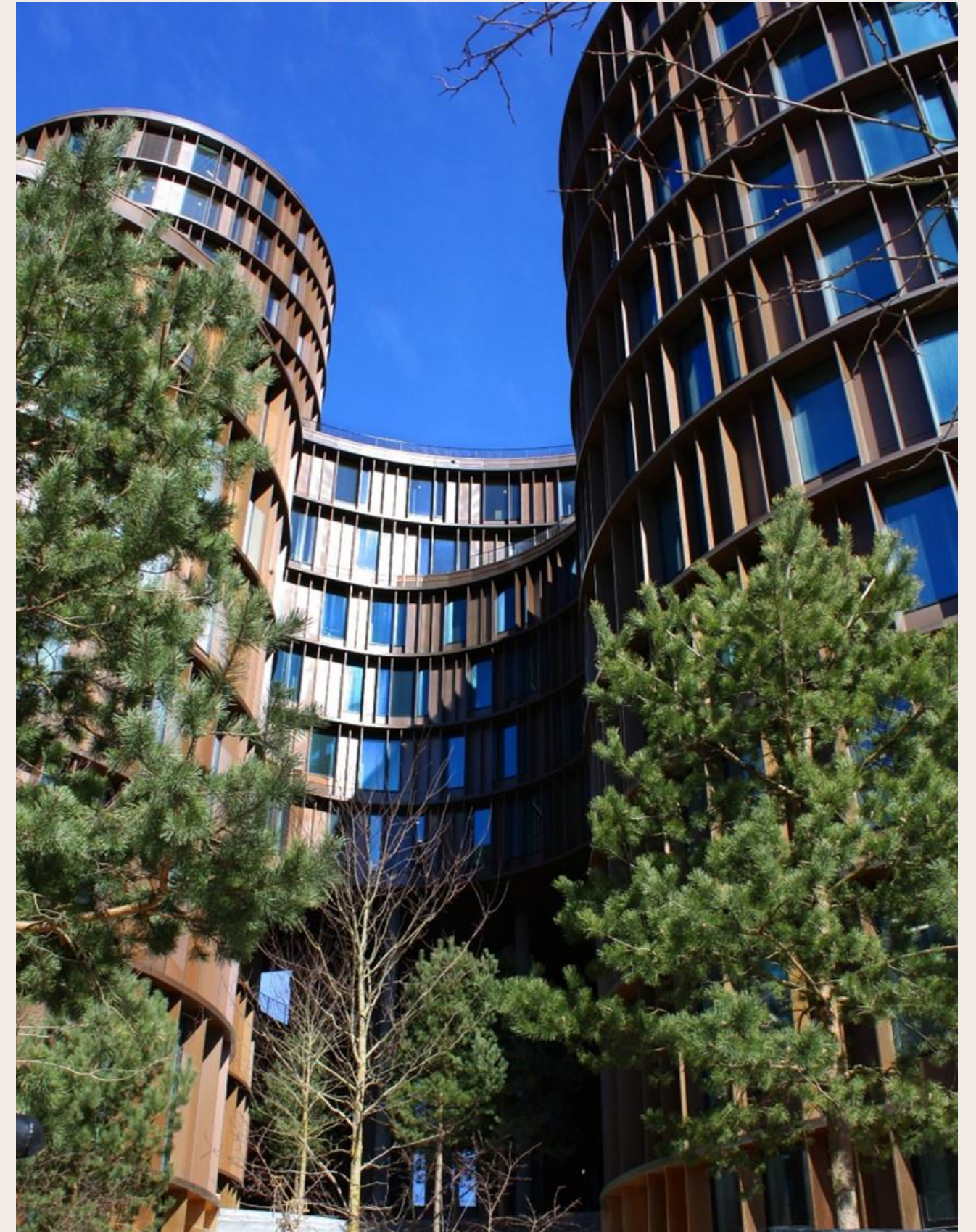
Ganni v. Steve Madden I

- Ganni v. Steve Madden - Injunction Proceedings before the Danish Maritime and Commercial High Court Concerning the Buckle Ballerina Shoe
- The court emphasized that the shoe was launched following **an extended design process.**
- According to the designer, it incorporates familiar elements from earlier GANNI designs - such as the heel, sole, buckles with studs, and pointed toe - and draws inspiration from the 1980s punk scene. While these elements are not new in themselves, **their combination** in this particular way had not been seen before and reflects **the designer's own intellectual creation.**
- The court specifically highlighted the contrast between the feminine shape and pointed toe of a traditional ballerina shoe and the raw, angular sole and heel, combined with punk-inspired straps and metal studs. This unique composition **embodies the designer's vision of "coolness."** Furthermore, the designer had **significant creative freedom in shaping** and decorating the individual components, whose proportions and combination were not solely dictated by technical function - an assessment supported by expert statements submitted by GANNI.
- The Court found, after an overall assessment of the above, that the shoe was eligible for protection as applied art under the Danish Copyright Act.



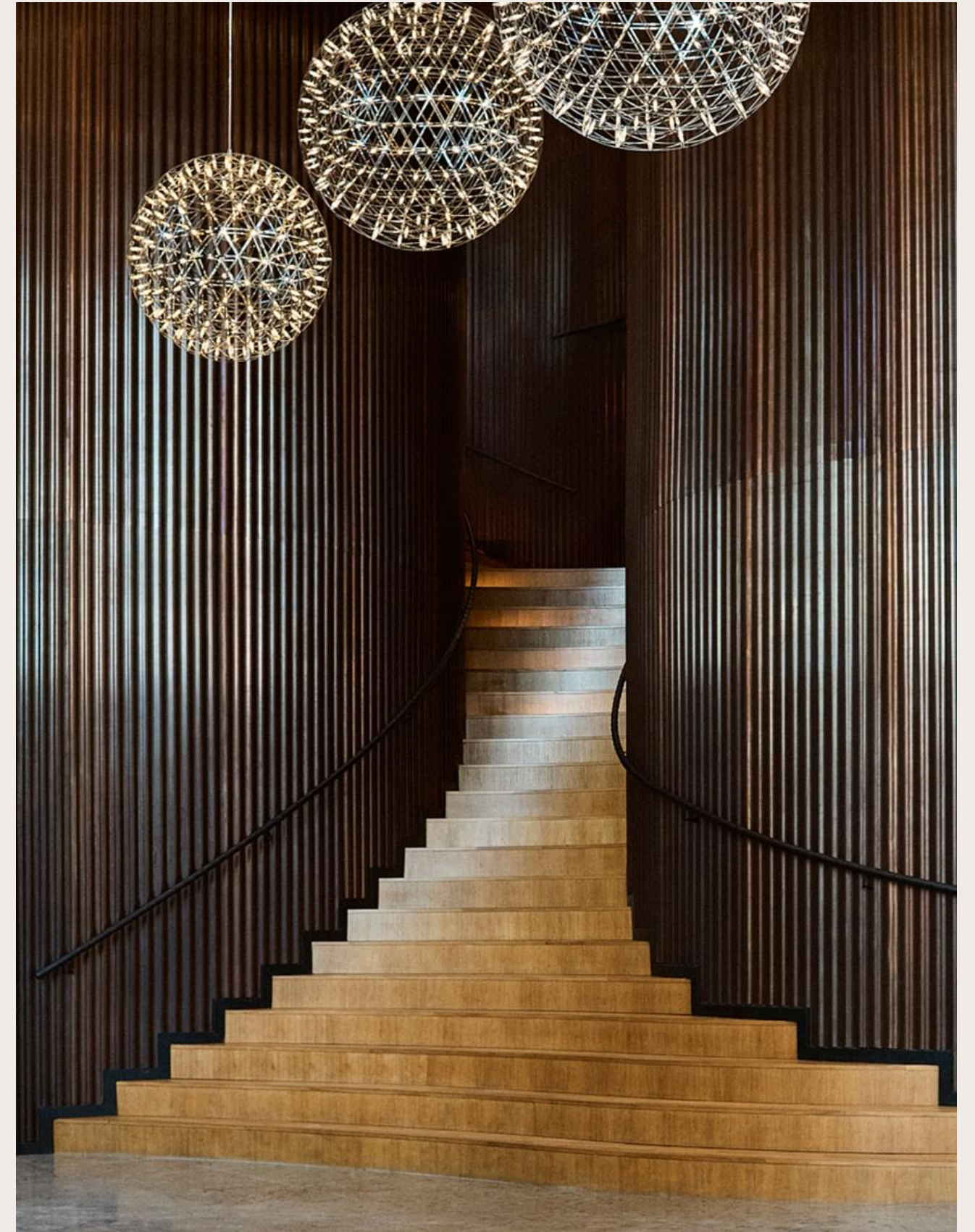
Ganni v. Steve Madden II

- The judgment was appealed to the Eastern High Court, where Steve Madden, argued that the Maritime and Commercial High Court had shown insufficient restraint in conferring copyright protection on clothing designs.
- In support of this position, Steve Madden referred to the aforementioned *Ilse Jacobsen* case, emphasizing that products whose appearance is primarily dictated by functional and market considerations are more appropriately protected under design law.
- Steve Madden further relied on the CJEU's *Cofemel* judgment and the Opinion of Advocate General Szpunar to underline the distinction between the objectives of copyright and design protection. Accordingly, it was argued that the Maritime and Commercial High Court failed to conduct its assessment in accordance with EU law, as *Cofemel* also establishes that cumulative protection under both design and copyright law may only be granted under specific circumstances.



Ganni v. Steve Madden III

- **The High Court did not accept Steve Madden's arguments** and instead upheld the Maritime and Commercial High Court's assessment.
- The High Court found that although the Buckle Ballerina incorporated several design elements from earlier works, including previous Ganni shoe designs by the same designer, this did not preclude the design from qualifying as the designer's own intellectual creation. The recognizable design elements had been combined in a sufficiently original and creative manner to meet the threshold for protection as an artistic work under Section 1(1) of the Danish Copyright Act.
- Based on the expert statements submitted in the case, the Court found that the Buckle Ballerina design, or elements thereof, were the result of the designer's free and creative choices. **This is in clear contrast to the *Ilse Jacobsen* case, where the expert opinion was disregarded and afforded no evidentiary weight.**



Key take-aways – the Danish perspective

- Continued inconsistency in national case law, despite rather clear and authoritative guidance from the CJEU.
- The narrative surrounding the design process and underlying creative effort may influence the assessment.
- Documentation of market trends or similar existing products ("prior art") can be relevant - even in the context of copyright law.
- The Marketing Practices Act's protection against product imitation remains the courts' preferred route - but even here, the case law lacks consistency.
- Overall, outcomes are difficult to predict — whether one represents the rights holder or the alleged infringer.



Birkenstock

- No copyright protection of the design of the Birkenstock sandals,
- The standards of originality as applied to *applied art* and *art that merely serves its own purpose* (to be art) are the same.
- According to the BGH, works of applied art enjoy protection if they are original in the sense that they are an author's own intellectual creation, reflecting free and creative choices.
- An 'artistic achievement' (*'künstlerische Leistung'*) is a requirement.
- A personal intellectual creation can be excluded when technical requirements do not leave room for artistic creativity.
- The display of the sandals in museums and exhibitions as well as the award of design prizes did not allow the conclusion that the sandal designs were the result of an artistic expression.

Comments:

- Has the BGH with the ruling set a high bar for copyright protection of designs in the field of applied art?
 - Copyright is reserved for works that are truly original and reflect the author's personal creative input.
 - As a consequence, design protection is more important than ever to protect works of applied art that may not qualify for copyright protection.



Mio/konektra I

Copyright and design interplay

- Szpunar interprets the Cofemel statement that cumulative protection applies “*only in certain situations*” as meaning that no stricter originality threshold may be imposed on applied art.
- This rejects the rationale - as argued by Steve Madden in the *Ganni* case - that applied art should primarily be considered a matter for design law rather than copyright.
- If the Court follows Szpunar, it would align with the approach of the Danish courts in *Ganni/Steve Madden*, which rejected limiting applied art protection to design law.

Criteria for copyright infringement

- Szpunar proposes that infringement occurs where the creative elements of a protected work are reproduced in a *recognisable manner* in the allegedly infringing work.
- However, the threshold of “recognisability” may prove too vague, leading to legal uncertainty and inconsistent application across courts.
- On the question of the impact of the display of the work in museums and exhibitions as well as the award of design prizes (cf. Birkenstock):
 - “[...] *the recognition of the subject matter by professional circles may be taken into account for the purposes of assessing the originality of the subject matter at issue. However, those circumstances are in no way decisive*[...]”

Mio/konektra II

Critical commentary (Eleonora Rosati) on the question of whether an infringement has taken place:

- Szpunar’s test is overly subjective and unclear.
- She recommends a more objective three-step framework:
 - Determine whether there has been derivation.
 - Compare the two works to establish copying of protected elements.
 - Examine whether any exceptions or defences under Article 5 InfoSoc Directive apply.

” Mio/konektra promises to be one of the most relevant CJEU copyright judgments ever issued to date. The Court has an opportunity to reflect on and put a full stop (or, at least, a semi-colon!) on an evolution, driven by the Court itself, which has been unfolding since the 2009 Infopaq judgment.

While a lot of the AG Opinion should be endorsed in the resulting ruling, the infringement test should remain one based on originality and one where derivation (whether direct or indirect) plus reproduction of an original part still equates prima facie infringement.”

Eleonora Rosati

Questions?



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