

Novelty, Idea or New Meaning as Criteria for Copyright Protection?*

Transitions in Swedish Design Law

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I. Introduction

While the CJEU has proclaimed a harmonized concept for the very object of copyright protection – an *original* work – in a fairly comprehensive bulk of decisions,¹ by mainly defining a protected work as being the result of an author's *own intellectual creation*, as expressed in three different EU directives,² some recent signs of a Swedish fall-out from that concept are in view,

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¹ The (still) most prominent case is C-5/08, ECLI:EU:C:2009:465, *Infopaq*, followed by C-393/09, ECLI:EU:C:210:816, *BSA*; joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, *Premiere League*; C-145/10, ECLI:EC:C:2013:138, *Painer*; C-406/10, ECLI:EU:C:2012:259, *SAS Institute*; C-173/11, ECLI:EU:C:2012:642, *Football Dataco*; C-355/12, ECLI:EU:C:2014:25, *Nintendo*; C-310/17, ECLI:EU:C:2018:618, *Levola Hengelo*, and others.

² References were made basically to the Software directive 2009/24/EC (uncodified version 91/250/EC), the Database Directive 96/9/EC and the Term Protection Directive 2006/116/EC, and the almost identical phrasing in those directives of the contours of an original work. The CJEU finds reason to note, that Article 1:3 of the Software Directive says: "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection." Article 3.1 of the Database Directive, as *copyright* protection for a database is concerned, says that such protection may come about if it "by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation ... No other criteria shall be applied to determine their eligibility for that protection." Article 6 of the Term Protection Directive (uncodified original version; directive 93/98/EC) says the following: "Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection."

as will be discussed in this text, concerning artistic works and applied art. It is written in the hope that Professor Annette Kur, being a long-time observer of Nordic IP Law and an esteemed link in the academic world between Nordic and Continental IP Law, may take some interest in those possible transitions in Swedish Design Law.³

As just indicated, the CJEU has basically borrowed the said terminology from the Computer Programs (Software) Directive and some other directives, but it can be traced back to the Berne Convention's article on the protection of collections, like anthologies for example, as literary works in their own right. In the eyes of the CJEU a work is an original intellectual creation of the author on condition that it is 'reflecting his personality and expressing his free and creative choices in its production'. In the landmark *Infopaq* decision, the CJEU stresses, at no. 35, that the reproduction rights, which were focused on in the case, were valid merely for a work original in the way that it is the author's own intellectual creation, thus as a result of creative choices, what has eventually become normative for all kinds of works, according to the CJEU.

What seems clear from the Court of Justice's case law is that an intellectual creation easily qualifies as original. Obviously, in many copyright laws, the work of authorship has already become a vessel that accommodates a very broad array of works of the mind, from high art to low art, from the purely aesthetic to the (almost) predominantly functional or technical. The standard for protection in many jurisdictions has evolved to the point where original and creative sometimes seem to be synonymous terms, both meaning little more than not directly copied or resulting from a modicum of freedom of choice. It is important to note, though, that the CJEU's recent case law certainly doesn't do away with the creative element of an author, absolutely being a physical person (or a group of physical persons), and the amount of his or her factually available choices facilitating the form of a work.

Hence, it is not possible among the Member States to uphold e.g. stricter originality terms for certain types of works, as some states probably have done. More doubtful have been, however, if a fully harmonized concept for originality is valid also for designs, or objects of applied art, although the CJEU may indicate a general and cohesive application within the whole

³ Professor Annette Kur was appointed honorary doctor of law at the Stockholm University in 2012.

field of copyright objects. According to the Designs Directive,⁴ Article 17, a registered design right in or in respect of a Member State in accordance with the Directive, shall also be eligible for protection under the law of *copyright* in that State. Each and every Member State thus decides ‘the extent to which, and the conditions under which, such protection is conferred, including the level of originality required’. This, probably, to match Article 2.7 of the Berne Convention, which states just about the same freedom of the Member States of the Berne Union.⁵

But new light has recently been cast on this matter by the CJEU in the *Cofemel* case.⁶ The question posed by the Portuguese Supreme Court was whether Member States have the freedom to choose the level of originality pertaining to works of applied art, industrial designs and works of design or whether they must apply the CJEU standard of “the author’s own intellectual creation”. The CJEU stated, in short, that in order to show “originality”, it is (my translation from French) ‘*both necessary and sufficient for it to reflect the personality of its author, as resulting from their free and creative choices*’. Further, the Court also noted that ‘*where the making of an object has been determined by technical considerations, by rules or by other constraints, which have not left room for the exercising of any creative freedom, then that object cannot be regarded as possessing the originality required to constitute a work*’. The CJEU also stresses that copyright protection must not be weaker for designs than for any other type of literary or artistic work.⁷

Thus, since the concept of work is an autonomous notion of EU law and the Information Society Directive has not differentiated between works, the CJEU case law on originality by now applies to all works. The thrust of the whole argument by the CJEU in the *Cofemel* case is that uniformly interpreting the notion of work, which includes the originality requirement, is paramount to harmonizing EU copyright law, as stated in the Infosoc

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

⁵ According to Article 2.7 BC, Member States are allowed to offer ‘industrial’ designs a specific, different, possibly exclusive, protection as compared to that offered to literary and artistic works embraced by the Berne Convention, and to determine the conditions for such protection.

⁶ See C-683/17, ECLI:EU:C:2019:721, *Cofemel v. G-Star Raw*. Cf. the Advocate General Szpunar’s opinion delivered on 2 May 2019. AG Szpunar chose the option that Member States must apply the CJEU standard of “the author’s own intellectual creation”, what was followed by the CJEU.

⁷ See *Cofemel* at para. 31 and para. 35.

Directive, para. 24 and restated in para. 29. Further, of particular interest here, the CJEU stated, upon a question raised by the Supreme Court of Portugal, that designs which, apart from their functional capacities, also create a ‘separate’ *visual effect* which is remarkable from an *aesthetical* view, shall *not* motivate a design to be classified as a ‘work’ in the meaning set out in Directive 2001/29.⁸

Therefore, one could not argue anymore that the substance of originality would be an internal matter for the individual Member State as designs are concerned. But one should bear in mind that the CJEU generally prefers interpretations and applications best suited for the most profound EU harmonization and integration, what drives in the direction of a harmonized originality concept also valid for designs.

This was confirmed several years ago also by the Swedish Supreme Court, concerning an internationally well-known design, that of the Mini Maglite torch. In that case, the Court set out in detail the prerequisites for copyright protection of a work of applied art well in line with what eventually was to come out of CJEU’s own judgment practice.⁹ The Supreme Court underlines that works of applied art must show the same amount of originality as other copyright works, and that there was no reason to apply a higher or specific originality request for a work of applied art, different from other copyright works, although a work of applied art may be very bound by its inherent functional elements.¹⁰ The Supreme Court proclaimed that to allow copyright protection to a design of applied art it should (i) distinctly rise above being banal, (ii) not be the result of a routinely effort and (iii) show a modicum of originality or independence to works of others of the same kind.¹¹ However, three recent decisions of Swedish courts seem not to be in line with those findings of the CJEU contoured above. Those cases form the basis for this study.

⁸ See *Cofemel* at para. 53–55.

⁹ See NJA 2009 p. 159, *Mini Maglite*. Analysis by Rosén available at www.InfoTorg.se.

¹⁰ Hereby referring to prop. 1969:168 s 124 et seq. and 135.

¹¹ Cf, the judgment of the German BGH, I ZR 143/12, 2013.11.13, *Geburtstagszug*, whereby the BGH confirmed that after the 2004 reform of the *Geschmacksmustergesetz* the traditional distinction between “works of applied art” and “works of purpose free art” has been abandoned. We may immediately note, that those quite distinctive prerequisites of the Swedish Supreme Court should, in my mind, have barred protection to the banal design⁸, or concept, of the anchor bracelet, as well as that of the Daniel Wellington clock, described under section II and III below.

We may insert here that, as of 1 September 2016, there is a new Swedish court structure specially for intellectual property and market/competition law cases, making the Stockholm district court of first instance a special court for all IP and market law cases in Sweden, called PMD,¹² and the Svea Appeal Court (also in Stockholm), the final special appeal court, now called PMÖD.¹³ Still, an appeal to the Supreme Court of Sweden will be possible, but only if the PMÖD so decides. The aim of this reform is to strengthen the knowledge and expertise of the judges handling complex intellectual property and market law phenomena and, naturally, to make the procedures before the courts more speedy than before. Thus, in IP Law, Sweden may currently be said to have two precedent courts, The Supreme Court and the PMÖD. But already the PMD, certainly meant to be a court of specialists, has produced a fairly great number of judgments by now that crave for a certain respect and attention, as decisions of a special court probably should, and falls in line with the actual aim of the IP court reform in Sweden.

All the more interesting then to check out below the PMD's 'anchor bracelet' decision¹⁴, the PMÖD's 'Clock' decision,¹⁵ as well as a fairly recent judgment of the Supreme Court on the effects of a 'new meaning' of a painting.¹⁶

II. The anchor bracelet design

A few years ago a type of decorative bracelets built on marine features became very popular on the market, and was sold in many shops, on the internet or elsewhere, at low prices. The concept for most of them, at least for those being tried by the PMD, was easy to identify: (i) a standard marine cord of polyester, to be found in any marine shop, (ii) in both ends tied in a loop by a thin winded string, as found on marine ropes or moorings, and (iii) a mini log anchor (in typical design, but with the Tom Hope TM stamped in the metal) tying the loops together, the size of it all adjusted to fit the wrist of a human being. See fig. below.

¹² Patent- och Marknadsdomstolen, PMD.

¹³ Patent- och Marknadsöverdomstolen, PMÖD.

¹⁴ PMD Mål nr PMT 1803-17, 2017.12.21, Ankararmband.

¹⁵ PMÖD Mål nr PMT 5885-18, 2019.03.22, Daniel Wellington.

¹⁶ NJA 2017 p. 75, Svenska syndabockar (Swedish Scapegoats).



Tom Hope Ltd, a Swedish entity designing and marketing low price jewelry, claimed before the PMD that they owned the design of such an anchor bracelet, it being an original work of the company's own (named) designer, and that Ur & Penn Ltd,¹⁷ by marketing a series of anchor bracelets, varied somewhat as to coloring, featuring the same or almost identical forms as those put on the market by Tom Hope. The bracelets of Ur & Penn were produced in China, upon their order, but were merely based on Ur & Penn's request to receive 'anchor bracelets', à la mode worldwide at the time.

The PMD in its judgment starts off by noting that the construction of a bracelet tied together with an anchor, in particular in the shape of a 'classical' log anchor, and otherwise consisting of marine strings, was nothing new to the world when Tom Hope introduced its product. However, an original form may come about by the combination of known/available objects, the court declares; "previously known form elements pulled together to constitute a product, doesn't prevent them from being combined in such a way so as to allow the overall expression to be afforded copyright protection" (*my translation*). Naturally, this is per se undisputable. The court, thus finding no originality as to the shape of the little anchor, the mustered marine strings or those winded string loops, continues to state that the bracelet(s) of Tom Hope, as a whole, met the demands of originality, 'though with a not so high marginal'. Further, in spite of the fact that Ur & Penn AB sold a bracelet with a slightly differently designed anchor and with somewhat different winding of the loops, hence no plain plagiarism, the PMD found its anchor bracelet to violate the author's rights of Tom Hope to its design.

This outcome of the PMD's judgment must be considered as quite remarkable, as it obviously ignores the shape of the product emanating almost directly from the basic idea of an anchor bracelet, composed by those three 'standard' elements described above, and realized basically in one and

¹⁷ AB Ur & Penn, a Swedish entity, since the early 1940ies selling clocks and cheap jewelry via its well over 100 shops throughout Sweden.

the same way. The overall impression of Tom Hope's bracelet is thus given already by the *idea* of the anchor bracelet, to make a bracelet with those standard components, particularly as it showed nothing to declare some individuality. In the individual case, the strings or the anchor could of course have been shaped differently and in a more original way, in which case they could have evoked an overall impression of an original quality – but quite obviously, in my eyes, this was not the case here.

Anyhow, those features of a protected design, as stated by the Swedish Supreme Court, noted above, are simply not met by Tom Hope's bracelet, i.e. that a design should (i) distinctly rise above being banal, (ii) not be the result of a routinely effort and should (iii) show a modicum of originality and independence to works of others of the same kind.

To conclude, Tom Hope's anchor bracelet must almost per definition be called banal, lacking any individual independency relative to works of the same kind, although probably offering a 'visual effect' from an 'aesthetic point of view'. Hence. It might have been clearly à la mode at the time and in that sense adequate on the market. But I would still claim that it stems from a distinctive and quite strict idea, making it non-eligible for copyright protection according to contemporary EU standards.¹⁸

III. The Daniel Wellington wristwatch design

In this case, see note 12 supra, Daniel Wellington AB, firstly claimed that their design of a wristwatch, the DW clock pictured below, was an artistic work, either by itself or in combination with a so called NATO textile bracelet (in various coloring combinations), with which it was put on the market. The Daniel Wellington entity was not claiming any rights to the bracelet as such, known to have been on the market by others since the 1960ies, but to the combination of it with their watch design. Secondly, Daniel Wellington claimed i.a. that the design of a wristwatch, marketed under the William

¹⁸ In "Birthday Train", see note 7 supra, the German Court of Appeal, to which the case was remanded back, also argued that the *idea* of a "birthday train" was not protected and that the train itself (without the candles and numbers which were discounted under the idea/expression dichotomy) was not sufficiently different from other toy trains. One may observe, though, that in the design world arguably the idea and expression tends to merge to a "concept"; see *Antoon Quaedvlieg*, Research Handbook on the Future of EU Copyright, ed. *Estelle Derclaye*, EE Publishing, 2009.

Gregor trademark by (again) Ur & Penn AB (the WG watch, see picture below), was using the protected design of the DW clock.

The PMÖD noted that the DW clock itself consisted of elements often used in wristwatch design since long, what did not hinder that the chosen combination of such elements may, seen as a whole, render the designer copyright protection for the DW clock. And there were indeed, the PMÖD observed, a fairly great number of watches on the market well before the DW made its commercial entry, what was shown by the defendant in the case, pretty much having the same “look” as the DW clock. However, the court especially observed (i) that the edging had the same color as the dial-plate, what made it look bigger than it actually was, and (ii) that the flat glass on the clock-face and the beveling of the edge gave a thin and flat expression to the watch, what fell in line with the intentions of the designer, as told to the court when he was heard as a witness. Hereby, the designer of the DW clock had, according to the PÖMD, executed his own free and creative choices, the design thus being his own intellectual creation. Hence, the PMÖD concluded, the DW clock itself (with or without the bracelet) was an original work, and not merely a use of elements from “the common form storage” for watches, as claimed by the defence.



As for the WG clock the PMÖD found it to be “almost identical” to the DW clock, although it noticed that the WG clock was slightly bigger than the DW clock, that the color of the WG clock-face was of a different nuance from that of the DW, and that WG had a second-pointer. Other factual differences, such as the design of the tiny horns holding the bracelet, were not observed by the court as being of any importance in this context.

Myself, I am unable to nurse some enthusiasm for the outcome of the decision by the PMÖD. Not that the design of the two compared objects would not offer the same impression – they do, of course! But this is because both resemble an ocean of identical or almost identical wrist-watches, easily found on the market for decades. As Ur & Penn had exhaustively showed in its defence, there were many more or less identical precedents to the DW clock such as, to mention just a few, the Patek Philippe model Calatrava (ref. 3537) from the 1930-ies, the Seiko Cronos model (2008), the Omega Genève model (1969) or the Certina New Art model (1970). But many others are easy to find in the repertoires of many well-known clock producers – in particular if the *overall impression* is sought for, disregarding differences in details, as the PMÖD actually did.

In my eyes, the design efforts behind the DW clock are restricted merely to the choice of an already existing model or, rather, appearance of a watch, considered to have a chance to commercial success at a particular time, i.e. to match what's in fashion by picking something out of the available common storage of wristwatch design. Such a choice can't fall in line with what the criterion of "creative choice" stands for, as stamped by the CJEU.

Quite another issue is Ur & Penn's very probable decision to follow up on the commercial success of Daniel Wellington by copying the appearance of the DW watch design. Probably, the PMÖD was very eager to attack plagiarism, generally speaking, thus to offer protection against commercial actors prone to let a Chinese factory copy and produce for them any best-selling item on the Swedish market. But in this case the delicate instrument of copyright was not at hand, I would claim, notwithstanding that e.g. trademark law or unfair competition might have been available instruments.

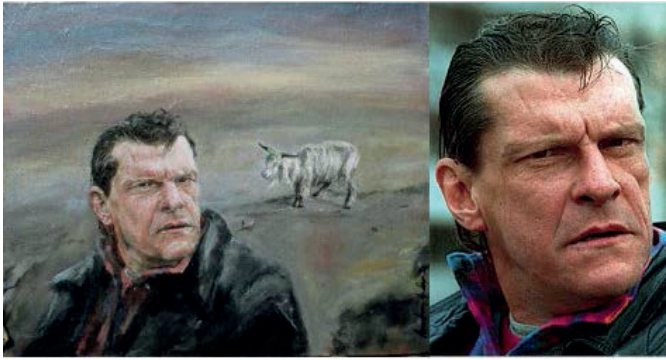
IV. "New meaning" of an artistic work

A judgment of the Swedish Supreme Court, also from 2017, being and 'old' enough case to have fallen out of the new procedural order of the PMD and PMÖD, adds to the confusion of what prerequisites may constitute a work protected within the frames of copyright law. The basic story was the following.

A photographer followed for a couple of days Christer Pettersson, once found guilty of the murder of Swedish Prime Minister Olof Palme, eventually acquitted, to take pictures of him. A close-up portrait of Mr Pettersson was, after some technical touch up, to be frequently exposed in media uses.

Without permission of the photographer, a painter, MA, a professional artist, much later used that portrait photo as a model for an oil painting on canvas called 'Scapegoats of Sweden'. The painting displays Mr Petterson, as he comes out from the photographic picture, in a deserted landscape together with a goat with a blue and yellow (the colors of the Swedish flag) ribbon around his horns; see pictures below.

The painter exhibited the painting at the Modern Arts Museum of Stockholm, exposed it on his public website and sold copies of it in the form of posters. The photographer later on claimed before the courts that MA hereby had violated his copyright in the work, by making copies of it and to communicate it to the public.



To the right Jonas Lemberg's photographic portrait of Mr Petterson, to the left Markus Anderson's painting 'Svenska syndabockar'.

All courts trying the case found the photographic portrait to be an artistic work, independently created and original enough to be afforded full protection by copyright proper, not merely being protected as any photographic picture.¹⁹ The pertinent issue of relevance in the case was, in short, how to draw the line between an adaptation, protected as such but depending on the protection of the underlying work (the photographic portrait), and a new original work, containing or using another work but not carrying its protected/original features.²⁰

¹⁹ The Swedish Copyright Act distinguishes between photographic works, being original and therefore treated just as other forms of original works being artistic, like original paintings, on the one hand, and mere photographic pictures, not showing originality, but protected like other accomplishments as neighboring or related rights, on the other.

²⁰ Cf. Article 4, paragraph 1 and 2, of the Swedish Copyright Act.

The court of first instance found that MA had not created a new work by himself but had made copies of the photographer's work, while the appeal court came to the opposite conclusion.²¹ The appeal court stressed that the painting was an original work, not an adaptation of the artistic/photographical work, but made in a free connection to a work by a reference to it.

The Supreme Court started off by pointing out what was said to be the decisive factor in this case, whether the work, being used as a model, had been changed or reshaped enough to emerge as a new and independent work by the painter or, if MA's work was an adaptation, still in dependence of the original photo.

From this position the Supreme Court first concluded that merely the portrait as such was to be seen as an adaptation of the photographer's work as it was used in the painting, although the court conceded that this was a borderline issue. Generally, by this finding of the court, the conclusion would pretty much have been a given one – the painter had used a work by someone else. This is because someone else's original work, the photographic rendition of Pettersson's face, had factually been used in the painting, thus reproduced, and copies were indeed made thereof. There were some differences between the painting and the photography, mostly of a technical nature, due to the transformation of the photography to the artistic form of the painting and because of other added items in the painting.

But the Supreme Court made a statement that must be considered as a *reduction* of the realm of a protected work, disregarding the fact that the painting contained at least a *dependent adaptation* of the photographic picture: One should not look merely at the photographic work as such, as it is actually seen in the oil painting, but take in what the whole painting is showing! The composition of the painting dominated over the photographic picture, as the former was made in aching colors, displayed a deserted landscape and, in particular, the emblematic and thus important (scape)goat.

Those features afforded the painting a totally '*different meaning*' than that of the portrayal photography, the Supreme Court concluded. Instead of a photographically strong portrait, the painting displayed an allegory suggest-

²¹ We may note here that Swedish Copyright Act, Article 4, first and second paragraph, distinguishes between an original work and an *independent adaptation* as well as *dependent adaptation* of it. An adaptation that is independent of the *original form* of the model work is rendered full protection, whereas the adaptation lacking that element of independence is also offered protection as a work, but which can't be used without acceptance from the owner of rights to the underlying original work.

ing criticism of a medial craving for scapegoats, and displaying Mr Pettersson as a scapegoat; the painting was a comment on society and the prevailing times, whereby Pettersson, as a phenomenon, not a person, together with the goat and the painted background conveyed a symbolic message, as the Supreme Court had it.

What strikes us here is the fact that the Supreme Court finds the photographic work, although said to be protected as a (dependent) adaptation when appearing in the painting, to have undergone a 'change' as used in the new context or 'totality' of the painting. The protection of the photographic (artistic) work is hereby consumed by another artist's work, letting an overall assessment lead to the painter having created a new and independent original work.

This way of reasoning seems to be meant as a fair gesture to support new thoughts and ideas of artists, even if such acts would factually be using the works of other artists in a narrow copyright sense. But this is not really in line with the traditional view in copyright law, and it might result in future challenges. Millions of works are used on a daily basis, particularly in the digital environment, and presented in very different *contexts*. Hereby, they may be part of something possibly having a 'different meaning', based upon an overall evaluation of a new context as compared to the context from which they originated; a classical issue of "transformative use". Following the decision of the Supreme Court, an original work, in full protection by its actual *form*, would easily lose that protection if a user decided to 'transform' it merely by presenting it in a way so that the 'meaning' of the original, whatever that might have been, emerge as "different" from that of the new work.

V. Some conclusions

The protection of designs generally and, not least, items of applied art have had a fairly rocky road to follow during the last 100 years before they were granted full protection within the framework of IP law. The Designs Directive is a fairly new instrument for EU-wide protection and national Member State protection has a recent, yet complex and not particularly coherent, history among those states and worldwide.²²

²² There are different legal positions on this in different countries, though; designs were only afforded protection as works of authorship at a relatively late stage, at least by some national legislators, but not true for all countries. Germany, for example, has protected works of applied art since 1907.

Maybe the same can be said about designs and applied arts protection by copyright law proper; authorial works, design creations by authors as original artistic objects, were relatively late provided with copyright protection by national legislators (e.g. about 1970 in Sweden) or by the CJEU during this century.²³

Nevertheless, how to set the contours of an original work, be it something called applied art or a phenomenon of a literary or artistic nature, has now become an issue of EU law, at least according to the CJEU, hence a fully harmonized legal figure within the EU. The CJEU has set out some often observed criteria, namely (i) originality, (ii) something being the author's own creation and (iii) no or minimal risk for independent double creation etc. We may also note the CJEU's observation (iv) that the author's own creation shall reflect his or her *personality* or *personal touch*,²⁴ or (v) that the author has expressed his or her creative capacity by factually making *creative choices*,²⁵ or (vi) that *selection* and *compilation* may be expressions for *creative freedom*,²⁶ or, lastly (vii) *creativity* and *skill* by coming to the same functions and purposes as the original specimen, but not by using the same source or object codes.²⁷

But none of those criteria are really to be found in the judgements by Swedish courts analyzed above or, rather, not reasonably applied by the courts. Much less were those Swedish courts able to digest the statements of the CJEU in the *Cofemel* case, that a *specific visual effect* which is *characteristic from an aesthetic view* does not indicate the existence of a protected work. Still, those Swedish cases cannot be observed merely as a few mishaps in the mighty stream of (adequate) IP decisions. The first two were decided by the new specialist IP court of Stockholm (PMD, in 2017) and the Appeal Court (PMÖD, in 2019) respectively, the third case by the Supreme Court of Sweden, in 2017.

Obviously, neither the Tom Hope design on the anchor bracelet or the DW wristwatch were really tested on the basis of any of those criteria now

²³ It seems proper to be careful with this particular issue; on the one hand it seems clear that works of applied art are protected under EU law (cf. the BSA case, C-393/09), what may be seen as strong evidence. On the other hand we don't know yet what the threshold of protection will be – not because works of applied art have only been added later but because the CJEU has not received a reference earlier.

²⁴ Cf. The *Painer* case in note 1 supra.

²⁵ Cf. The *Painer* and, e contrario, the *Premiere League* cases in note 1 supra.

²⁶ Cf. The *Dataco* case in note 1 supra.

²⁷ Cf. The SAS Institute case in note 1 supra.

set forth by the CJEU, though the courts made references to relevant CJEU decisions, but, even worse, protection was rather based on a typical “no no” in copyright law, namely to pay homage to the *idea* or *concept* of an object. The mere use of those three conceptual items of an anchor bracelet and, much less, picking a clean-looking clock design from the common “storage”, simply cannot demonstrate an author’s own creation, unless showing considerable individualized features and form elements adding to the used concepts.

To afford those designs, or rather concepts, copyright protection for about the next 100 years, I find grossly exaggerated; if anything (any idea) is protected, then nothing factually is! This “generosity” of the court does not really help authors, apart from the claimant in those (hopefully) isolated cases. I do not think, however, that those decisions came out of “rebellion” against the CJEU, which has – after all – created a concept of work out of quite thin air, or preoccupation by good old national traditions (certainly not!), but maybe out of sheer negligence or, more probable, eagerness to fight plagiarism and commercial rip off in the design industry and to open up for artistic freedom in the field of pure art.

As for the decision of the Supreme Court, it is dualistic in its reduction of the scope of per se undenied protection of a work, i.e. that of an original photographic portrayal of a person, on the one hand, and its “generous” protection of an author’s work which incorporates another work, because the new context gives it all a “new meaning”, on the other. The latter formula of the Supreme Court was probably construed in some haste, and it might open the door for massive (re)uses of protected objects without permission needed. Applications in the world of AI demonstrate such fears, e.g. by a production of collections of protected works resulting in new “creations” which have a “meaning” different from the individual works, which are being exploited by the running of the machine.