

C/2023/964

27.11.2023

**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**

(Case C-580/23, Mio and Others)

(C/2023/964)

Language of the case: Swedish

Referring court

Svea Hovrätt, Patent- och marknadsöverdomstolen

Parties to the main proceedings

Applicants: Mio AB, Mio e-handel AB, Mio Försäljning AB

Defendant: Galleri Mikael & Thomas Asplund Aktiebolag

Questions referred

1. In the assessment of whether a subject matter of applied art merits the far-reaching protection of copyright as a work within the meaning of Articles 2 to 4 of Directive 2001/29/EC, ⁽¹⁾ how should the examination be carried out — and which factors must or should be taken into account — in the question of whether the subject matter reflects the author's personality by giving expression to his or her free and creative choices? In that regard, the question is in particular whether the examination of originality should focus on factors surrounding the creative process and the author's explanation of the actual choices that he or she made in the creation of the subject matter or on factors relating to the subject matter itself and the end result of the creative process and whether the subject matter itself gives expression to artistic effect.
2. For the answer to Question 1 and the question of whether a subject matter of applied art reflects the author's personality by giving expression to his or her free and creative choices, what is the significance of the facts that
 - (a) the subject matter consists of elements that are found in common designs?
 - (b) the subject matter builds on and constitutes a variation of an earlier known design or an ongoing design trend?
 - (c) identical or similar subject matter has been created before or — independently and without knowing whether the subject matter of applied art for which protection as a work is claimed — after the creation of the subject matter in question?
3. How should the assessment of similarity be carried out — and what similarity is required — in the examination of whether an allegedly infringing subject matter of applied art is covered by a work's scope of protection and infringes the exclusive right to the work which, according to Articles 2 to 4 of Directive 2001/29/EC, must be conferred on the author? In that regard, the question is in particular whether the examination should focus on whether the work is recognisable in the allegedly infringing subject matter or on whether the allegedly infringing subject matter creates the same overall impression as the work, or what else the examination should focus on.
4. For the answer to Question 3 and the question of whether an allegedly infringing subject matter of applied art is covered by a work's scope of protection and infringes the exclusive right to the work, what is the significance of
 - (a) the degree of originality of the work for the scope of the work's protection?
 - (b) the fact that the work and the allegedly infringing subject matter of applied art consist of elements found in common designs or build on and constitute variations of earlier known designs or an ongoing design trend?
 - (c) the fact that other identical or similar subject matter has been created before or — independently and without knowledge of the work — after the creation of the work?

⁽¹⁾ 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 (OJ 2001 L 167, p. 10).