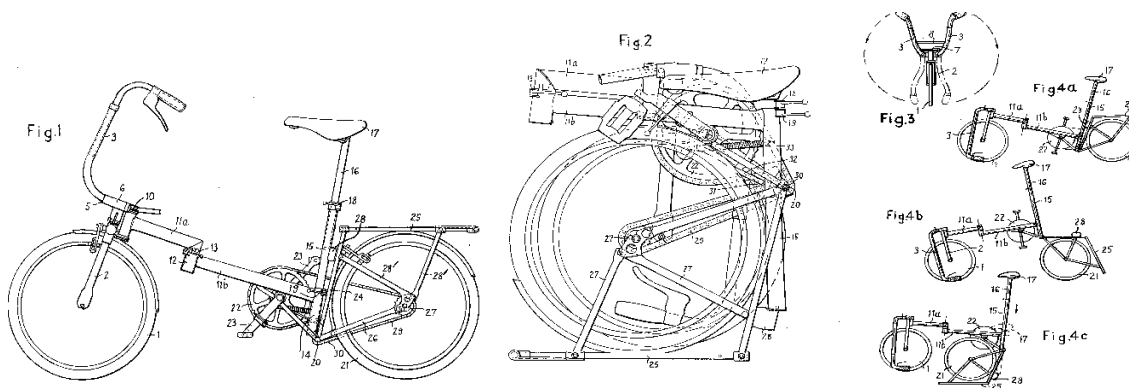


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**CJEU, C-833/18 (Brompton Bicycle): copyright may apply to shapes that are necessary to achieve a technical result**

On 11 June 2020, the CJEU ruled in a case concerning the possible copyright protection of the Brompton Bicycle, a bike - once protected by a patent, now expired - whose peculiar feature is that it can have three different positions: a folded position, an unfolded one and a stand-by position, as shown in the pictures below:



Source: EP79302096A, Brompton Bicycle Ltd, Google Patents

Answering to a referral by the Liège Tribunal de l'Entreprise (Companies Court), the Court concluded that the **copyright protection** provided for by Art. 2 to 5 of Directive 2001/29/EC (the "Infosoc Directive") **can apply to a product whose shape is at least partly necessary to obtain a technical result**, if that product is an original work resulting from intellectual creation.

The case arises from a dispute between Brompton and Get2Get, a competitor marketing a bicycle ("Chedech") looking very similar to Brompton's and folding into the same three positions. Get2Get claimed that the appearance of the bike is dictated by the technical solution sought, *i.e.* to ensure that it can fold into three positions. Hence, it could not be protected under copyright law. Instead, Brompton maintained that the three positions of the bicycle can also be reached by shapes that are different from those given to that bicycle by its creator. Thus, its shape may be protected by copyright.

The referring Court observed that, under Belgian law, any creation is protected by copyright when it is expressed in a particular shape and is original. The Court quoted the CJEU's recent design case law (C-395/16, Doceram), namely on the interpretation of Art. 8(1) of Regulation No 6/2002: to determine whether the appearance of a product is exclusively dictated by its technical function, one must establish that the technical function exclusively determined those features. The Tribunal referred the following questions to the Court of Justice:

*'(1) Must EU law, in particular Directive [2001/29], which determines, inter alia, the various exclusive rights conferred on copyright holders, in Articles 2 to 5 thereof, be interpreted as excluding from copyright protection works whose shape is necessary to achieve a technical result?*

*(2) In order to assess whether a shape is necessary to achieve a technical result, must account be taken of the following criteria:*

- *The existence of other possible shapes which allow the same technical result to be achieved?*
- *The effectiveness of the shape in achieving that result?*
- *The intention of the alleged infringer to achieve that result?*
- *The existence of an earlier, now expired, patent on the process for achieving the technical result sought?*

The CJEU considered the questions together, noting that in essence, the Belgian Court asked whether Art. 2 to 5 of Directive 2001/29 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.

According to the CJEU's case-law, **two conditions apply to the concept of "work"** (see [Cofemel, C-683/17](#)):

- 1) It entails **an original subject matter** which is the author's own intellectual creation and,
- 2) It requires **the expression of that creation**.

As far as the first condition is concerned, a subject matter is capable of being regarded as original, if it reflects the personality of its author, as an expression of his free and creative choices.

In that regard, it must be borne in mind that ***"where the realisation of a subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required for it to constitute a work and, consequently, to be eligible for the protection conferred by copyright."***

Concerning the second condition, the concept of work in Dir. 2001/29 necessarily entails the existence of a subject matter that is identifiable with sufficient precision and objectivity. It follows that ***"a subject matter satisfying the condition of originality may be eligible for copyright protection, even if its realisation has been dictated by technical considerations, provided that its being so dictated has not prevented the author from reflecting his personality in that subject matter, as an expression of free and creative choices"***.

The referral concerns the first condition. The CJEU concluded that, although the shape of the Brompton bike appears necessary to obtain a technical result (i.e. that the bicycle may be folded into three positions), it may still be considered protectable as a work, subject to the referring court's ascertainment on the work's originality.

In order to establish whether the product falls within the scope of copyright protection, the national court must determine whether, through the choice of the shape, the author has expressed his creativity in an original manner, through free and creative choices, and has designed the product in such a way that it reflects his personality.

The Court also clarified that, in that view,

- a) The existence of other possible shapes which can achieve the same technical result is not decisive in assessing the factors which influenced the choice made by the creator, and
- b) The intention of the alleged infringer is irrelevant in such an assessment. Besides,
- c) The former existence of a patent may influence that assessment only in so far as it allows to reveal the choices made on the shape of the product.