

# Functionality, Cumulation and Lessons from Trade Mark Law: the Advocate General's Opinion in *Brompton Bicycles*

Ilanah Fhima

*University College London*

On 6 February 2020, Advocate General M Campose Sanchez-Bordona delivered his opinion in *Brompton Bicycle Ltd*.<sup>1</sup> This is a copyright infringement case concerning folding bicycles. The basic design for the folding bicycle in question was created by Mr SI in 1975, with the first significant order in 1981 and more significant commercialisation in 1987. Mr SI was granted a patent for the bike's three-step folding mechanism<sup>2</sup> in 1981 (which has now long-expired), but he never sought design protection for any versions of his design. Could Mr SI, and the company he founded, Brompton Bicycles, now claim copyright in the design of the bikes to prevent the production of a bicycle of similar appearance, which incorporated the same folding mechanism?

In this important case, the referring Belgian court asked the CJEU whether, under harmonised EU copyright law, copyright protection is available to "functional" shapes, i.e. those which are necessary to achieve a technical result, absent any legislative exclusion of this sort. It further sought clarification of which factors were relevant to ascertain whether a shape was necessary to achieve a technical result. In recommending an answer for the CJEU to adopt, the Advocate General considered the fraught and long-standing issue of when cumulative intellectual property protection is permissible, particularly between copyright and patents or designs. This has been brought to particular attention in the light of *Cofemel's*<sup>3</sup> ruling that designs and works of applied art must be subject to no stricter test to qualify for protection than other copyright works. He also considered the nature of originality for the purposes of copyright law in the light of recent CJEU jurisprudence. The Advocate General sought to make a number of links to the approach to excluding functional matter under EU trade mark law, suggesting a negative convergence approach to the issue. However, the extent of his reliance upon trade mark doctrines in the different context of copyright without thoroughly exploring the implications is open to criticism.<sup>4</sup>

## **The Advocate General's preliminary observations: cumulation – the triple decker sandwich**

The Advocate General began by highlighting the problem of overlapping (cumulative) protection of copyright on the one hand and design and/or patent protection on the other.

He noted<sup>5</sup> that both patents and design protection have a number of features in common:

- Both have a practical/industrial application.
- Both involve the holder making new subject matter available to the public - via registration (patents and registered designs) or by use (unregistered designs).

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<sup>1</sup> *SI, Brompton Bicycle Ltd v Chedech/Get2Get* (C-833/18) EU:C:2020:79 ("*Brompton Bicycle*").

<sup>2</sup> EP0026800B; see also [https://www.youtube.com/watch?v=1\\_yTKvxA5oE](https://www.youtube.com/watch?v=1_yTKvxA5oE) for illustration of the folding mechanism in action.

<sup>3</sup> *Cofemel - Sociedade de Vestuario SA v G-Star Raw CV* (C-683/17) EU:C:2019:721 ("*Cofemel*").

<sup>4</sup> For further examples of transplants of trade mark concepts in to copyright see E Derclaye, 'Right and wrong analogies: the CJEU's use of trade mark concepts in copyright and design law' (2020) 42(2) EIPR 78.

<sup>5</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79, para 37.

- Both have the objective of promoting innovation. This includes promoting technology and fostering competition.

Inherent in the objective of promoting innovation by competition is a balance of public and private interests: the inventor/designer is granted a fixed term monopoly in return for disclosure.<sup>6</sup>

Copyright is different because, according to the Advocate General, it has a much longer period of protection. If designers can claim this no-cost, no-formality, long-lasting protection for industrial objects, they would have no incentive to use the patent and design systems. Legal certainty would also be compromised because without the detail of a registration, the edges of the subject-matter of copyright are fuzzy.<sup>7</sup> Moreover, as commentators have noted,<sup>8</sup> cumulative protection will arise more frequently following *Cofemel*<sup>9</sup> because the CJEU ruled that there can be no subject-matter limitation on what is protected by copyright, bringing many designs into the scope of copyright. Schovsbo argues that this runs the risk of an overextension of copyright.

If adopted by the CJEU, this approach would represent a new take on the court's cumulation thinking. This argument is familiar from trade mark law, where the problem is that *infinite* IPRs (vis, trade marks) will undercut the finite protection granted by patents in particular, and so will keep protected subject-matter out of the public domain for longer.<sup>10</sup> Copyright, on the other hand, has an end-point, albeit a very distant one. The problem that the Advocate General identifies here though is not just that subject-matter will be kept out of the public domain for longer, but also that the "industrial property system" (presumably, along with its carefully-crafted checks and balances) will fall out of favour because it is more difficult for designers to use and does not last as long. It is submitted that, this doomsday scenario seems unlikely, particularly when it comes to patent protection. What the Advocate General has omitted to mention is that while patent and design law may be shorter, the rights conferred are much more significant (e.g. patents and registered designs include a presumption of validity, and there is no need to show copying for infringement) and so these systems will remain attractive. If we look across to trade mark law, the existence of passing off, for example, does not stop business from obtaining registered trade marks. Instead, it acts as an important safety net for SMEs who are ignorant of the registration system, or cannot afford to make full use of it. As is the case with copyright, there is no registration in passing off, and yet somehow the courts manage to navigate their way through the 'legal certainty' difficulties involved and delineate the rights involved in the absence of registration.

The Advocate General states<sup>11</sup> that his arguments are "in truth, simply variations on the same theme which was previously addressed by Advocate General Szpunar in his Opinion in *Cofemel*." However, it is argued that the Advocate General in *Brompton Bicycles* has gone further than the CJEU did in

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<sup>6</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 40.

<sup>7</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 paras 41-44.

<sup>8</sup> See, e.g., J Schovsbo, 'Copyright and Design Law: What is Left After All and *Cofemel*? – or: Design Law in a 'Double Whammy'' (January 14, 2020). Available at SSRN: <https://ssrn.com/abstract=3519156> or <http://dx.doi.org/10.2139/ssrn.3519156> and A Kur, 'Unité De L'Art Is Here to Stay - Cofemel and Its Consequences' (December 9, 2019). Max Planck Institute for Innovation & Competition Research Paper No. 19-16. Available at SSRN: <https://ssrn.com/abstract=3500845> or <http://dx.doi.org/10.2139/ssrn.3500845>.

<sup>9</sup> *Cofemel* (C-683/17) EU:C:2019:721 The key question in that case was whether designs and works of applied art could be protected by copyright. The CJEU held that they must be so protected, as long as they are original, in the sense that they constitute the author's own intellectual creation, as per the general copyright standard. See further on this case A Kur, 'Unité De L'Art Is Here to Stay - Cofemel and Its Consequences' (December 9, 2019). Max Planck Institute for Innovation & Competition Research Paper No. 19-16. Available at SSRN: <https://ssrn.com/abstract=3500845> or <http://dx.doi.org/10.2139/ssrn.3500845>.

<sup>10</sup> See, e.g. *Lego Juris v OHIM* (C-48/09 P) EU:C:2010:516, para 46.

<sup>11</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 44.

*Cofemel*. The logic of his preliminary observations would appear to be a complete ban on cumulative protection as between copyright and patent or design law. While it is true that the *Cofemel* court did highlight the risks of copyright undermining design protection,<sup>12</sup> ultimately the court found designs can be ‘works’ for the purpose of copyright law<sup>13</sup> and consequently must be protected as long as they are original and confirmed that cumulative protection is possible at least in some situations.<sup>14</sup> Indeed this is ultimately acknowledged by the AG in *Brompton Bicycles* in his answer to the first referred question and would seem to be inherent in his somewhat cryptic statement that:

“a comparison of the aims and values pursued by two sets of legal provisions, namely, those governing industrial property and those governing copyright, must be conducted *proportionately* so as to prevent the excessive protection of the latter from leaving the former devoid of substance.”<sup>15</sup>

A proportionate balancing act is different from an absolute ban on cumulation. The challenge is to perform this balancing act in a coherent fashion.

### **The first question: can there be copyright protection where a work is dictated by technical requirements?**

In its first question, the referring court asked whether technical functionality could be used to withhold copyright protection from the Brompton Bicycle. EU legislation contains no functionality exclusion for copyright protection. However, the Advocate General attempted to craft one based on existing case law. Following *Cofemel*, a “work” must be protected by copyright if it is “original”.<sup>16</sup> Earlier cases had found that this is not a matter of aesthetic merit. Instead, a work will be original whenever it embodies the author’s own intellectual creation.<sup>17</sup> This cannot be the case where the subject matter is dictated by technical function because “the different methods of implementing an idea are so limited that the idea and the expression become indissociable.”<sup>18</sup> Likewise, a work will not be original where there are “technical considerations, rules or constraints which leave no room for creative freedom.”<sup>19</sup>

However, the Advocate General opined that where a design (work) “merely has a number of functional aspects” it can retain its copyright protection.<sup>20</sup> He drew inspiration from trade mark technical functionality, and in particular *Lego Juris*. There the court found that a sign would not consist “exclusively” of the shape of the goods which are necessary to achieve a technical result if there are “one or more minor arbitrary elements in a three-dimensional sign, all of whose essential characteristics are dictated by the technical solution to which that sign gives effect.”<sup>21</sup> In *Brompton Bicycles*, the Advocate General noted that the referring court seemed to suggest that the shape was “necessary” to achieve the technical result. If that was so, then it could not benefit from copyright protection.<sup>22</sup>

The Advocate General’s proposed answer to the first question represents an ambitious attempt to create a functionality exception to copyright protection where there is no explicit basis in the EU law. It also

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<sup>12</sup> *Cofemel* (C-683/17) EU:C:2019:721 para 50.

<sup>13</sup> *Cofemel* (C-683/17) EU:C:2019:721 para 48.

<sup>14</sup> *Cofemel* (C-683/17) EU:C:2019:721 para 52.

<sup>15</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 45.

<sup>16</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 at paras 57 to 65.

<sup>17</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) EU:C:2009:465, para 37.

<sup>18</sup> *Bezpečnostní softwarová asociace* (C-393/09) EU:C:2010:816 para 49.

<sup>19</sup> *Football Dataco v Yahoo!* (C-604/10) EU:C:2012:115; [2012] C.M.L.R. 703 para 39.

<sup>20</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 67.

<sup>21</sup> *Lego Juris v OHIM* (C-48/09 P) [2010] E.T.M.R. 63 paras 48 to 52.

<sup>22</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 76.

follows from *Cofemel* that some form of judicial balancing exercise will be necessary to square the idea that designs cannot be excluded from copyright *per se* with the idea that cumulation may be harmful, but will not always be so. This is what the Advocate General has attempted to formulate.

However, using the concept derived from trade mark law which requires all the “essential characteristics” to be non-functional is not without its problems. The Advocate General opines that there is little problem in applying (cautiously) a rule derived from one IPR across the whole suite of IPRs,<sup>23</sup> but it is argued that this demonstrates insufficient regard for context, and the fact that the seemingly same rule can play a different role in relation to different IPRs.

In trade mark law, focussing on the “essential characteristics” prevents the technical shape exclusion from being overly wide. It permits the registration of product shapes which indicate origin in cases where competitors “easily have access to alternative shapes with equivalent functionality.”<sup>24</sup> In trade mark law, the concern is the design freedom of *competitors*. However, in using the concept to define author’s own intellectual creation in copyright law, we are looking at the design freedom of the original designer. In the trade mark context the key concern is competition. While free competition is an important background interest in copyright law, it is not the fundamental driver of what “originality” is all about. Moreover, in trade mark law, a further competition-based interest mitigates in favour of limiting the functionality exclusion only to signs which consist exclusively of functional essential characteristics. These signs will often be functioning as distinctive trade marks, and so refusing registration has the capacity to cause consumer confusion.<sup>25</sup> Again, this is not relevant to copyright protection. While the general concept of “functionality” playing a role in balancing conflicting interests is common to both copyright and trade marks, the actual interests being balanced are not shared directly. Thus, there is a danger in directly transplanting trade mark functionality into copyright. Note also, that in trade mark law the focus on “essential characteristics” is derived from the wording of the legislation. The technical functionality exception is limited to signs “which consist *exclusively* of... the shape, or another characteristic, of goods which is necessary to obtain a technical result...[emphasis added].”<sup>26</sup> Given that there is no legislative basis for the functionality doctrine in copyright, there is obviously no such wording to justify this limitation to the exclusion in copyright.

### **The second question: factors for assessing whether a shape is necessary to achieve a technical result**

No doubt because of the nature of the referred questions from the Belgian court, the Advocate General has articulated list of factors for proving functionality (or otherwise). This is to be welcomed. While individual factors have been considered in EU trade mark law (e.g. relevant of patents in *Lego*) the CJEU has never drawn them together in a single list of factors, leaving the test for technical functionality to be pieced together from the lower courts’ and tribunals’ case law. Similarly, in *Doceram*,<sup>27</sup> the CJEU left it to national courts to decide how to approach which circumstances should be relevant to design functionality (although there too, the Advocate General had attempted to articulate a test).

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<sup>23</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 70.

<sup>24</sup> *Lego Juris v OHIM* (C-48/09 P) para 72.

<sup>25</sup> See A Kur, “Too Pretty to Protect? Trade Mark Law and the Enigma of Aesthetic Functionality” *Max Planck Institute for Intellectual Property and Competition Law Research Paper* No. 11-16 (2010) at 11.

<sup>26</sup> Art.7(1)(e)(i) of Regulation (EU) 2017/1001 on the European Union trade mark [2015] OJ L 336/ 1 (“EUTMR”) and Art.4(1)(e)(i) of Directive (EU) 2015/2436 to approximate the laws of Member States relating to trade marks (Recast) (“EUTMD”).

<sup>27</sup> *DOCERAM GmbH v CeramTec GmbH* (C-395/16) EU:C:2018:172 para 38.

## Earlier patent

The Advocate General opined that an earlier (expired) patent is relevant but not determinative.<sup>28</sup> The reason for this was two-fold: the substance of the patent will often disclose details of the technical advances of the article in question, and “the choice of a patent as the tool for protecting the activity of the person registering that patent permits the assumption that there is a close relationship between the shape patented and the result intended: to be exact, the shape is that which the inventor decided was effective to obtain the desired functionality.”<sup>29</sup> In the way this latter reason is phrased, the Advocate General seems to be saying that the decision to patent suggests that the owner thought that the product was something functional. This looks rather similar to the designer’s subjective intention, to which we return later.

This position is very similar to that taken in trade mark law. In *Lego*, the existence of an earlier patent was said to be highly suggestive but not determinative of technical functionality.<sup>30</sup> In practice though, it is hard to find a cases where there is an earlier patent but the sign it covered was not held to be technically functional.

## Availability of alternatives

Whether the existence of alternative ways of achieving the same result should remove a feature from the functionality exclusion has been at the heart of the debate concerning the scope of the trade mark functionality doctrine in both the US and the EU.<sup>31</sup> If alternatives are available, it is arguable that the interests of competitors do not require the mark to be excluded from protection because there are other ways in which competitors can compete. As against that, it can be argued that the competitive interests at stake are so fundamental that protection should never been given where the subject-matter is related to the product’s manner of operation. An argument based on channelling functional aspects into the patent system would also suggest that alternative are irrelevant because, regardless of the alternatives, it would only ever be possible for such subject-matter to be protected by the patent (or design) systems. The availability of alternatives has also been in the spotlight in relation to Art.8(1) of the Community Design Regulation,<sup>32</sup> which states that ‘A Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function’. In *DOCERAM*, the CJEU considered whether the availability of alternative designs took a design out of scope of the exclusion, holding that ‘it must be established that the technical function is the only factor which determined those features, the existence of alternative designs not being decisive in that regard’<sup>33</sup>

Following *DOCERAM*, the Advocate General in *Brompton Bicycles* took a middle ground: the availability of alternative designs is relevant, but not decisive to copyright functionality. In particular, there will be greater opportunities for creative freedom if alternatives are available and it may be possible to separate “aspects which reflect functional considerations from those which simply reflect the free (original) choices of the creator, which may be protected by copyright.”<sup>34</sup>

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<sup>28</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 79.

<sup>29</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 80.

<sup>30</sup> *Lego Juris v OHIM* (C-48/09 P) para 85.

<sup>31</sup> See, e.g. M McKenna, “(Dys)Functionality” (2011) 48(4) *Houston Law Review* 823 and Robert Bone, “Trademark Functionality Reexamined” (2015) 7(1) *Journal of Legal Analysis* 183 and *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd* (C-299/99) EU:C:2002:377, paras 81-83 and *Lego Juris v OHIM* (C-48/09 P) para 58.

<sup>32</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24.

<sup>33</sup> *DOCERAM GmbH v CeramTec GmbH* (C-395/16) EU:C:2018:172 para 32.

<sup>34</sup> *Lego Juris v OHIM* (C-48/09 P) paras 84 and 85.

The approach in EU trade mark law seems to have been stricter. From the outset, the *Philips v Remington* court held:

“As to the question whether the establishment that there are other shapes which could achieve the same technical result can overcome the ground for refusal or invalidity contained in Article 3(1)(e), second indent, there is nothing in the wording of that provision to allow such a conclusion.”<sup>35</sup>

While the wording in *Lego* is slightly less clear,<sup>36</sup> in practice, evidence pointing to the existence of alternatives has been repeatedly dismissed by EU tribunals. The one place where there has arguably been some attention paid to alternatives is in the UKIPO, where a concept of “form over function” has been utilised. In a case concerning possible exclusion of the shape of the *LANDROVER DEFENDER*, the Hearing Officer found that the vehicle shape did not fall within the exclusion because “the design and configuration of the usual features of such vehicles results in a seemingly endless variety of basically two box shapes. ...[T]here is a design element to the configuration of the elements making up the shapes at issue.” Even there though, the Hearing Officer expressly states that this is not meant to introduce an examination of alternatives.<sup>37</sup>

Should we expect trade mark functionality and copyright functionality to take the same approach on this factor? Not necessarily. Once again, the focus in trade mark law is in protecting others’ ability to compete, whereas this is only an indirect object of copyright law. Instead, the role being played by functionality in copyright is to determine whether the free, creative choices of the designer of the *original object* are evident in the resulting design, rather than the competitive impact of protection going forward. From a slightly different perspective though, if the underlying purpose is to channel technical features into the (design and) patent system, alternatives should not be relevant, because one would want *all* those functional alternatives within those systems. Here there seems to be somewhat of a tension between the role that the Advocate General sees copyright functionality as playing (preventing cumulation which will ultimately protection competition and the public domain) and the vehicle used to introduce it into copyright (originality and the author’s own intellectual creation).

### **Intention of infringer to achieve a technical result**

Somewhat oddly, the question asked by the referring court was whether the *infringer*, by using the feature in question, intended to achieve a technical result. Perhaps this is a tortuous way of focussing on whether the competitor felt obliged to use a feature which could not be designed around. The Advocate General rightly reframes this question to put the focus back on the functional aspect of the shape being tested for functionality. To that end, he opines that the intention of the designer at the point of designing the object may be relevant “in order to assess whether its author was really seeking to achieve his own intellectual creation or whether, instead, he was seeking only to protect an idea applicable to the development of an original industrial product with a view to the mass production and sale of that product on the market.”<sup>38</sup> This looks like a cumulation point: did the designer intend to make a copyright work or a something industrial, worthy of being protected by the design system?

The author would rather like to meet this designer who wakes up in the morning and thinks “what sort of IP right shall I go for today.” It is also doubtful that the dividing line is so clear. A more sensible

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<sup>35</sup> *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd* (C-299/99) para 81.

<sup>36</sup> *Lego Juris v OHIM* (C-48/09 P) para 58.

<sup>37</sup> Jaguar Land Rover’s Application (O/589/19) para 138.

<sup>38</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 93.

question would focus on whether the designer was motivated by appearance or function (or a mixture of both). More generally, the Advocate General has been criticised for identifying functionality as an objective question, but then looking to the subjective intention of the designer.<sup>39</sup> It is submitted that there is not necessarily a contradiction here. The legal test for functionality may be objective, but the evidence used to prove it will take in all sorts of information, including circumstantial evidence. If there is a “smoking gun” that suggests that the designer thought the shape was functional, it would be odd for the court to ignore it. It is well-established that technical functionality is an objective question in trade mark law, and yet tribunals will frequently look at the right-holder’s own claims (e.g. on websites and other marketing materials) which link a product’s features to enhanced performance etc.. These are essentially the IPR-holder’s subjective claims to functionality. More puzzling is the Advocate General’s dismissal of the relevance of design awards or appearance in design museums.<sup>40</sup> Depending on the criteria of the award, such recognition may reflect how well the product functions, not just its aesthetically merit.

### **Effectiveness of shape in achieving technical result**

The Advocate General appears to read the inclusion of the factor concerning the effectiveness of the shape in achieving a technical result as meaning “what if it doesn’t work?”, finding that if the shape does not work, ‘the requirement of future industrial application would not be satisfied’. This somewhat unclear wording presumably means that if it doesn’t work, not one would want to buy it. Thus, it should be presumed that it can work.<sup>41</sup> However, it is possible to read the referring court’s question differently, as calling for a factual analysis of how well the shape functions, or even a consideration of whether the shape is the optimal way of achieving the technical result. This may particularly be so since in reordering the referring court’s questions, the Advocate General moved this factor from towards the top of the list (the natural place for such a factor) to the bottom. In any event, describing how the shape works is a sensible initial step to ascertain which features are technically-necessary, and this could be evidenced in ways including expert evidence or claims on the would-be copyright-holder’s website.

### **There may be other factors...**

The Advocate General concludes by noting that as functionality is a question of fact, it would be inappropriate to offer an exhaustive or non-exhaustive list of factors.<sup>42</sup> This seems prudent as this is still very much a developing area of the law.

### **There remains a role of unfair competition...**

The Advocate General rounded off by noting that there remains a role for unfair competition in the case of “slavish or parasitic imitation” where copyright protection has been withheld.<sup>43</sup> This echoes a point made by the CJEU in *Lego*, highlighting the possibility of the protection of technical shapes excluded from trade mark law by unfair competition.<sup>44</sup> As he notes, unfair competition remains unharmonised, which raises the spectre of shapes being (indirectly) protected in some Member States but not others.

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<sup>39</sup> See, e.g. E Derclaye, AG Campos Sanchez-Bordona’s opinion in *Brompton Bicycle – The good, the bad and the contradictory* – Part II (18 February 2020) <http://copyrightblog.kluweriplaw.com/2020/02/18/ag-campos-sanchez-bordonas-opinion-in-brompton-bicycle-the-good-the-bad-and-the-contradictory-part-ii/>; E Rosati, AG Campos in *Brompton Bicycle* advises CJEU to rule that “exclusively” functional shapes do not deserve copyright protection (6 February 2020) <http://ipkitten.blogspot.com/2020/02/ag-campos-in-brompton-bicycle-advises.html>.

<sup>40</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 94.

<sup>41</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 97.

<sup>42</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 99.

<sup>43</sup> *Brompton Bicycle* (C-833/18) EU:C:2020:79 para 100.

<sup>44</sup> *Lego Juris v OHIM* (C-48/09 P) EU:C:2010:516 para 61. I am grateful to Lynne Chave for this observation.

From an internal market perspective, this may be regrettable, but it is reflective of the reality that unfair competition is not harmonised and is unlikely to be so any time soon.

## **Conclusion**

If the CJEU follow the Advocate General's approach in *Brompton Bicycles*, this will mean the recognition of a highly similar technical functionality exclusion across EU copyright, design and trade mark law. The European Copyright Society warned about the difficulties with this approach, given the different justification underlying copyright and design law prior to the issuing of the Advocate General's opinion.<sup>45</sup> Moreover, this convergence presents some difficulties given the different points in the respective systems where functionality is taken into account. While cumulation is a particular concern for the Advocate General, for reasons of competition and the maintenance of the public domain, *Cofemel* prevented him from adopting an absolute bar on cumulation, and indeed, there is no mandate in the legislation for such an approach. However, there are sound policy reasons for attempted to ensure that there is not a complete overlap between copyright and designs, which could logically be the result of *Cofemel*. The result is an approach to functionality that attempts to balance cumulation concerns with the need to retain protection as an option for certain shapes using the arguably ill-fitting "essential characteristics" doctrine drawn from trade mark law. This is itself, shoe-horned into the "originality" eligibility requirement of copyright protection. It remains to be seen whether this translates into a workable solution for designs protected by copyright and for the IP system more generally.

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<sup>45</sup> M Ricolfi and E Derclaye, 'Opinion of the European Copyright Society in relation to the pending reference before the CJEU in *Brompton Bicycle v Chedech / Get2Ge*' (12 December 2019) available from <https://europeancopyrightsocietydotorg.files.wordpress.com/2019/12/ecs-opinion-brompton-final-12-12-2019-final-3.pdf>.