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Opinion of the Advocate General of the ECJ in the Painer case (2): the notion of originality in photographs

Stef van Gompel (Institute for Information Law (IViR)) · Tuesday, May 3rd, 2011

The Advocate General's Opinion in Case C-145/10, Painer v Standard VerlagsGmbH et al., parts of which have already been discussed in an earlier blog post (here), also deals with the copyrightability of portrait photos. In this case, German and Austrian newspaper publishers had published portrait photos of Natascha Kampusch, and a photo-fit based on one of the photos, following Natascha's escape from her abductor in 2006. The portrait photos were produced by Eva-Maria Painer. Since she had not consented to publication, she brought an action against the newspaper publishers for copyright infringement.

Because the referring court (the Handelsgericht Wien) was uncertain about whether the publication of the photo-fit should be regarded as a reproduction of the photographic template used for its production, it submitted a request for a preliminary ruling on this question to the ECJ.

In her opinion, the AG first considers under what conditions portrait photos can be afforded copyright protection. To this end, she interprets the harmonized notion of originality in photographs of Article 6 of the Term Directive. Pursuant to this provision, a photograph is original if it is the photographer's own intellectual creation (reflecting his personality). According to the AG, the crucial factor in establishing originality is 'that a photographer "leaves his mark" on a photo' by using the available formative freedom. In the case of a portrait photo, she regards it as immaterial that the essential object of such a photo is already established in the person of the figure portrayed. She reasons that the photographer still enjoys sufficient formative freedom in determining 'the angle, the position and the facial expression of the person portrayed, the background, the sharpness, and the light/lighting' (para. 124).

The AG thus entertains a fairly low standard of originality. In particular, she does not explicitly state that a certain degree of creativity is required in making 'formative' choices. Moreover, in line with the second sentence of Article 6 of the Term Directive, which provides that no other criteria may be applied to determine the eligibility of protection of photographs, she argues that the degree of artistic quality, novelty, purpose of creation and expenditure and costs of producing photographs are irrelevant (para. 123).

Although the AG's interpretation of the notion of originality may not be very surprising, given that the standard of originality in copyright law is often considered to be low, it is rather disappointing that in her opinion she decides to not further discuss the criterion of 'Schöpfungshöhe', the degree of creativity, of works. As the availability of 'formative freedom' is not very high in the case of

portrait photos, especially traditional school portraits, there is little room for making individual, subjective choices and the degree of creativity of the work is correspondingly low. In various countries, a relatively narrow scope of protection is conferred on works with a low degree of creativity. By not discussing the degree of creativity of works, the AG seemingly fails to recognize this.

To a greater or lesser extent, however, the AG touches upon the relationship between the level of originality and the scope of copyright protection when it comes to the question of derivative works. She argues that the publication of a photo-fit is a reproduction of the portrait photo used as a template for its production 'only if the personal intellectual creation which justifies the copyright protection of the photographic template is still embodied in the photo-fit' (para. 129). Thus, 'the further removed from the template the photo-fit is, the more readily it can be accepted that the elements comprising the personal intellectual creation of the template are repressed in the photo-fit to an extent that they are no longer significant and are thus no longer worthy of consideration' (para. 130).

In this latter statement, the AG suggests that only 'the elements comprising the personal intellectual creation of the template' are decisive factors in assessing whether a photo-fit constitutes a reproduction of the photo on which it is based. However, it is uncertain what importance she attaches to the overall impression of the photographic template, including the object of the portrait photo (the image of the portrayed person), in respect of which the photographer enjoys little formative freedom, because it 'is already established in the person of the figure portrayed' (para. 124). On the one hand, she states that reproduction can be assumed 'in a case where the photo-fit was based on a scan of the photographic template'. On the one hand, she explicitly states that there is no infringement 'if, for example, the portrait photo is only used to record a person's biometric characteristics, and if a photo-fit is then produced on the basis of those characteristics' (para. 129).

It remains to be seen how the ECJ will eventually decide in this matter and to what extent it will follow the AG's opinion. Given that the standard of originality is already low in most countries, it is to be hoped that the ECJ will not strip this notion down to the bone. Copyright law simply has nothing to gain from a concept of originality that has little significance.

This entry was posted on Tuesday, May 3rd, 2011 at 12:33 pm and is filed under Case Law, European Union, Originality, Reproduction (right of), Subject matter (copyrightable)
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