Kluwer Copyright Blog

Another piece of the puzzle, or is it? CJEU on photographs as copyright works

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Of the many questions addressed by the Court in its Painer judgment (Case C-145/10) the most impact will probably be on the construction of an EU wide originality criterion for copyright works.

Infopaq, BSA and Murphy went before, seemingly extending the originality standard implicit in the Software Directive and the Database Directive to all works of authorship. Now the standard of art. 6 Term Directive, morphed to a 'personal touch stamp' seems the latest generic test. Which is odd, considering that art. 6 Term Directive's primary function is to set a harmonized term of copyright protection for works of photography, distinguishing it from the (unharmonized) term for additional related rights that some EU Member States recognize for photographic images. What is more, the referring court did not even ask about standards for subsistence. It asked about the scope of copyright protection, especially in the light of limitations of the Information Society Directive.

There is something distasteful about this whole affair: the newspapers and a freelance photographer still hashing it out over the use of photos, in what was a horror cover story throughout Europe in the summer of 2006. The person portrayed – a girl photographed at a nursery by a free-lance photographer- was abducted at age 10, horribly abused for eight years before she managed to escape. The photographer gave prints of the portrait photos to the parents and police. Some of them were subsequently released by Austrian authorities at the time of her abduction in the context of the search. Two years later a journalist was given these photos. With the father he asked a studio to create a photo-fit of what the then 12 year old presumably would look like. After her escape, lacking any current photos, the photo-fit was among the ones newspapers published. The photographer of the portrait photos was not asked for permission, nor credited. She initiated actions on the merits and for injunctive relief against the graphic designer

who made the photo-fit and a number of Austrian and German newspapers.

Questions rephrased

The Austrian court asked if '…Article 1(1) of Directive 2001/29 in conjunction with Article 5(5) thereof and Article 12 of the Berne Convention, particularly [in the light of the fundamental right to respect for property] to be interpreted as meaning that photographic works and/or photographs, particularly portrait photos, are afforded 'weaker' copyright protection or no copyright protection at all against adaptations [my italics] because, in view of their 'realistic image', the degree of formative freedom is too minor?

Probably not the most aptly phrased question. It arose in connection with the photo-fit, really. In an earlier action for injunctive relief brought against the graphic designer, the Austrian Supreme Court had judged that the photo-fit was not an adaptation of the source photo but a new, independent work ('Freie benützung'). The end result was too far removed from the portrait photo. The source portrait does meet the modest originality criterion required for copyright protection under Austrian law. But considering the limited creative possibilities when making a portrait photo, the resulting protection is narrow: 'the stronger the individuality of the source work, the more removed must be the creation it inspired for it not to be regarded as an unauthorized adaptation, and vice versa' (case 4Ob170/07i). What the Austrian Supreme Court says here seems to me to be in line with the CJEU's reasoning in Infopaq on reproduction in part: only if the part reproduced expresses the author's own intellectual creation does the reproduction right come into play. Unauthorized copying is about copying what is original.

But in the proceedings on the merits the parties disagreed fiercely on the OGH's reading, so much that the Landgericht Wien thought it wise to make a preliminary reference. The CJEU then rephrases the question completely: does art. 6 Term Directive mean that a portrait photograph can, under that provision, be protected by copyright and, if so, is that protection inferior (particularly as regards the reproduction right of art. 2 Information Society Directive), because of the allegedly too minor degree of creative freedom such photographs can offer?

So not surprisingly: yes, concludes the CJEU, portrait photographs can be subject-matter 'which is original in the sense that it is its author's own intellectual creation' (Infopaq I). And: 'an intellectual creation is an author's own if it reflects the author's personality' (mentioned in recital 17 of the Term Directive, on art.6). And: 'if the author was able to express his creative abilities in the production of the work by making free and creative choices' (Football Association v Murphy). And: 'By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'. If then, a portrait photograph shows the personal touch stamp, it is protected as a copyright work.

Personal touch

Is the 'personal touch stamp' now the new norm? More importantly, is it a mere synonym, or different from the originality standard implicit in the Computer Programs Directive and the Database Directive? Those two were the result of compromise between diverse national standards. With regard to photographs also, national standards differed substantially. German and Austrian law for example required a markedly higher than normal originality for photographs to be protected as artistic works. But this was (and is) coupled with similar though shorter protection for other photographs. And even if for arguments' sake one accepts that software, databases and

photographs are subject to the same harmonized standard, how can the Court jump to one uniform standard for all conceivable categories of works? If anything, legislative history shows there was an awareness of different domestic standards, and an intention to bring these together for select types of works only. This is borne out by copyright for designs: as recent as 2002 the community legislator expressly provided that the standard of originality remains a matter for Member States to determine (Community Design Regulation art. 96; similar in art. 17 Design Directive). The judgment in Flos (case C-168/09) has unfortunately muddled matters further.

Thin protection

The Court then answers the second leg of the question: No, the protection of the reproduction right for portrait photos is not inferior compared to that for other types of photographs and works that pass the originality threshold. Not 'inferior' for a category or genre as such no, but that is hardly the point I would argue. The point is that in an infringement analysis in cases which involve works like these, it is less likely there will be a reproduction because there is little originality to copy. Unless that is, the Court means to overturn its own Infopaq qualitative criterion, and regard any type or amount of copying as an unauthorized reproduction.

Limitations

The second and third question concern the interpretation of the limitations in the Information Society Directive on quotes (art. 5(3)) and Article 5(3)(e) of Directive 2001/29 on public safety. On the former, nothing earth-shaking: the right to quote exists also to the benefit of persons who do not use the quote in their own copyrighted work.
On the public safety exemption of art 5(3)(e), the Court essentially says that in the interest of legal certainty, authors should not have to contend with media making their own decisions on whether publishing copyrighted material is in the interest of public safety. Only when the authorities take the initiative and coordinate press action can the media rely on the exemption. There's a vote of confidence in the press, in ECHR speak a 'vital public watchdog' of society. The Court is quick to assume that copyright must trump freedom of the press in the interest of a 'high level of protection' and 'legal certainty' for the copyright owner. It would be interesting to see how the European Court of Human Rights balances such conflicts between exclusive rights in information and freedom of expression. The Austrian Supreme Court had in the Painer summary proceedings taken the position that it suffices if the authorities have images available for publication, and these images are published in the context of reporting on on-going criminal investigations aimed at solving a crime (case 4Ob170/07i). That sounds less strict more balanced than the CJEU.

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