# Kluwer Copyright Blog

## A Story to be Told. The fine line between plagiarism and story-(re)telling

Giorgio Spedicato (Monducci Perri Spedicato & Partners) · Thursday, November 15th, 2012

*"What seems to lack in the decision of the Court, at the end of the day, is a clear test of what constitutes a structural element in the 'embryonic stage'.*

Last 19 October 2012, the Italian Supreme Court published a decision on a case of plagiarism related to a literary work which told the true story of a II World War hero. The facts, in brief: the plaintiff wrote a book about the story of an officer of the Italian navy and a pioneer of scuba diving, Luigi Ferraro, based on a number of talks and interviews that the two had had. The book was mostly biographic, but it also mixed the story of Luigi Ferraro with the war experiences of the author, who was in the Italian army in the same period. Before publishing the book, the author asked the defendant, a journalist with an expertise in scuba diving, to read the manuscript. The story captured the imagination of the journalist, and in a month or so he wrote and immediately published his own book on the story of Luigi Ferraro. When the publisher of the plaintiff learned that another book on the same story was just published by a competitor, he refused to publish the book of the plaintiff. A lawsuit was the inevitable consequence.

The Supreme Court, confirming the decision of the Court of first instance and the Court of Appeal, ruled against the defendant on the following grounds:

– on the one hand, it was proven that the defendant had had access to the unpublished work of the plaintiff; and
– on the other hand, according to the judges, the comparison of the two works showed a 'clear similarity of content, as well as lexical, formal and stylistic affinities'.

It is a fundamental principle that copyright law does not protect content, and that it does not protect style and lexicon either. The circumstance that the judges were sure that the defendant had had access to the unpublished work seems therefore to have played a crucial role in the decision. But what if the judges hadn't had the evidence of the previous knowledge of the unpublished work by the defendant? Would they have said, in spite of this, that it was a clear-cut case of plagiarism,

based on the similarity of content, lexicon and style of the two works, being absent any reproduction of the expression?

Ultimately, the decision of the Supreme Court deals with the unsolved (and maybe unsolvable, at least in the abstract) problem of the limits of protection of the *innere* (as opposed to the *äußere*) Form of non-fictional works, such as biographies, where a minimum degree of creativity is normally involved in the selection and arrangement of the contents.

To this regard, the Supreme Court, though recognising the plagiarism, laconically reminded that copyright does not protect structural elements of the work in their 'embryonic stage', that is elements requiring further elaboration, integration and development to give rise to a copyrightable subject matter. But since every structural element (even the ones which may be definitely deemed to be protected by copyright) is susceptible to be further developed, the question is: how much 'further' is enough to exclude the appropriation of a protected element

What seems to lack in the decision of the Court, at the end of the day, is a clear test of what constitutes a structural element in the 'embryonic stage'. A proposal could be the following: if a structural element is susceptible to be further developed in a number of expressions which are not substantially similar (meaning that the expression 'A' would not infringe, in the abstract, the copyright on the expression 'B'), this structural element is likely outside the scope of copyright protection, as it is still in the 'embryonic stage'.

As far as I know, such a test was never proposed by Italian courts. I acknowledge that it may sound somehow tautological. But in the uncertain domain of the legal protection of the *innere* Form, even tautology may help, as long as it makes things clearer.

GS

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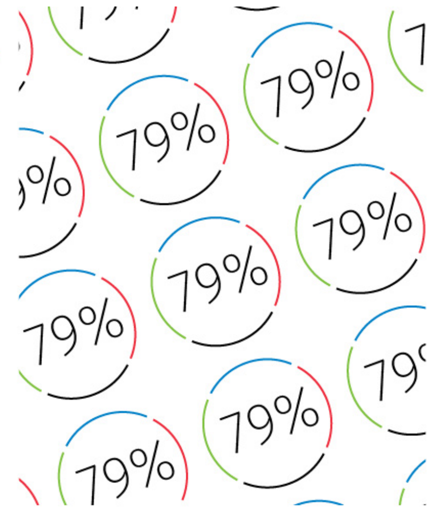


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