Kluwer Copyright Blog

Copyright case law of the German Bundesgerichtshof 2015 – 2019 – Part 3 of 4: Related rights and exceptions and limitations

Jan Bernd Nordemann (NORDEMANN) · Tuesday, November 23rd, 2021

Parts 1 and 2 of this post (originally published in "Auteurs & Media") summarising case law of the German Bundesgerichtshof from 2015 to 2019 are available here and here, and part 4 will be published on the blog shortly.

IV. Related rights

In addition to rights of the author, German copyright law also recognises related rights. These include rights afforded to creators and organisations whose activities do not lead to a "work" within the meaning of Section 2 UrhG but nevertheless is similar to the creative process of an author or is closely connected to the principle of protection that underpins copyright. This protection includes, among other things, simple photographs as per Section 72 UrhG that do not fulfil the condition for protection as a work.

In an important judgment concerning photographs, the BGH confirmed its case law that in order to achieve protection under Section 72 UrhG, a photograph must always exhibit a minimum level of personal intellectual creation. This personal intellectual creation is lacking if the photographs in question are "mere reproductions of other photographs" in which an original has been merely reproduced (copied) as closely as possible. Rather, it is necessary for the photograph to have been created "as an original in itself, meaning initially as an image" ("Urbild").

V. Special provisions for computer programs (Sections 69a et seqq. UrhG)

Following on from the CJEU decision in *UsedSoft I* and the BGH decision in *UsedSoft II*, the BGH further outlined the issue of exhaustion of copies of works transmitted online in the 2014 *UsedSoft III* case. The exhaustion of copyright in computer programs, which is harmonised under European law in Article 4(2) of the Computer Programs Directive (2009/24), was transposed into law in Germany in Section 69c No. 3, second sentence UrhG. If a copy of a computer program is published in the territory of the EU/EEA with the consent of the rightholder, Section 69 No. 3, second sentence UrhG stipulates that the right of distribution in relation to that copy has been exhausted (with the exception of the right of rental).

The BGH ruled that the right of distribution is not only exhausted with regard to the individually downloaded copy but also with regard to copies of the computer program yet to be made. According to the BGH, the exhaustion occurs irrespective of whether the sale is of a physical copy of the program or not. The exhaustion of the right of distribution is also not precluded by the fact that the consent given in the scope of the original granting of rights was dependent on the programs only being used for a specific purpose.

In another decision in 2015, the BGH further specified the provisions of the *UsedSoft* case law. According to this, a limited-term licence leads to exhaustion if the software is deactivated at the end of the term. Exhaustion should not depend on whether the reseller originally received the "exhausted" copy of the computer program from the seller through the provision of a data carrier or through disclosure of the product key.

In a decision back in 2016, the BGH had been called upon to rule on the question of whether the use of the client software of an online game is covered by the exception provision in Section 69d(3) UrhG if the purpose of use of the program was for the user to develop their own automation software (so-called bot software). Section 69d(3) UrhG grants the person entitled to use a program copy the right to observe, examine or test the functioning of that program even without the rightholder's authorisation, in order to determine the ideas and principles underlying the program element (German transposition of Article 5 of the Computer Programs Directive, 2009/24).

In that case, the defendant had downloaded the plaintiff's client software and used it for the commercial – and contractually prohibited – purpose of developing its own automation software intended to simplify the gaming experience. The defendant also analysed, using the downloaded client software, the software of the online game itself, in order to develop its bots. The plaintiff asserted an infringement of the exclusive right of reproduction.

The BGH affirmed a violation of the right of reproduction. Contrary to the prior instances, however, it ruled that the analysis of the client software and the actual software of the online game itself was covered by the exception provided for in Section 69d(3) UrhG. According to the BGH, Section 69d(3) UrhG covered all forms of analysis of programs that do not involve interfering in the program code itself. According to the BGH, the right to observe the program elements of the reproduced client software was not exceeded by the defendant's observing not only the functioning of the program elements of the client software but also the functioning of the game software stored on the server. In conclusion, however, the BGH affirmed a copyright infringement on the grounds that under Section 69d(3) UrhG only the reproduction of the computer program is permitted and not the reproduction of the audiovisual game data of the game client (such a reproduction had taken place in the course of the defendant's use).

In a criminal decision, the BGH ruled that the defendant, who had offered product keys and links

to download computer programs online, was, in the absence of the rightholder's consent and other entitlement under Section 106(1) UrhG, liable to criminal prosecution. An exhaustion of the right of distribution under Section 69c No. 3 second sentence UrhG was not a possibility in light of the product key originating from illegal Chinese sources.

VI. Exception provisions

The exception provisions harmonised in Article 5 of the InfoSoc Directive (2001/29) are regulated in Germany in Sections 44a – 63 UrhG.

1. **Reporting on current events (Section 50 UrhG) and right of quotation (Section 51 UrhG)**

The exceptions for reporting on current events and for quotations, as stipulated in European law under Article 5(2)(c) in conjunction with (4) and Article 5(3)(d) in conjunction with (4) of the InfoSoc Directive (2001/29) are found in German law under Sections 50, 51 UrhG.

In a case involving the appropriation of an interview, the BGH rejected the application of Section 50 UrhG because the provision distinguished between current events and copyright protected works which became perceivable in the course of such events, and the visual material appropriated was not a copyright protected work which had become perceivable in the course of a current event which was being reported on. With regard to Section 51 UrhG, the BGH ruled that the right of quotation does not require that the person using the quote critically examines the appropriated work to a significant extent.

2. **Incidental works (§ 57 UrhG)**

The incidental inclusion of a work, regulated in European law under Article 5(3)(i) in conjunction with (4) of the InfoSoc Directive (2001/29), is regulated under German law as the use of a so-called incidental work in Section 57 UrhG.

In a 2014 decision, the creator of a painting had made his work available to a manufacturer of office furniture for displaying in salesrooms. Upon return of the paintings, the plaintiff noticed that a photograph had been published in the defendant's catalogue and brought a claim for copyright infringement against the defendant. The defendant invoked the defence of the limitation provision in Section 57 UrhG.

The BGH firstly recognised that, when assessing the question of whether the plaintiff's painting in the defendant's catalogue and on the defendant's website should be regarded as an "incidental work" within the meaning of Section 57 UrhG, the defendant's entire catalogue or entire website should not be used as the object of reproduction within the meaning of Section 57 UrhG. The actual object of the reproduction is limited to the specific photograph and the individual image on the website. Section 57 UrhG requires that the work is insignificant in relation to the main subject matter of the communication. The BGH applied a strict and rightholder-friendly test. The court stated that insignificance in this manner was to be assumed if the work could have been left out or replaced without this being noticed to the average observer. Generally, such a lower degree of significance could no longer be attributed to the additionally utilised work if it "recognisably determines the style or tone" or was included to "underline a certain effect or statement" in the actual subject matter of the exploitation, if it fulfilled "a dramaturgical purpose" or was "otherwise

characteristic". Provided the incidental work is perceived by observers as belonging to the overall concept, the aspect of the "aesthetic or stylistic" interchangeability of a copyright protected work with another work was no longer relevant.

3. **Freedom of panorama (Section 59 UrhG)**

The freedom of panorama, regulated in European law under Article 5(3)(h) in conjunction with (4) of the InfoSoc Directive (2001/29) is found in German law under Section 59 UrhG.

The BGH issued a decision on this point in 2017. A cruise operator pursued a copyright infringement claim against a land tour operator because the defendant had displayed photographs of the cruise ship, AIDA, on its website, on which the copyrighted "AIDA kiss mouth" motif was painted.

The BGH reasoned that the "AIDA kiss mouth" reproduced in the photograph could also be found "on public highways, streets or squares" within the meaning of Section 59(1) UrhG. The decisive factor for the "public" aspect was the free availability to everyone. The fact that the work in dispute was found on a moving ship did not, in the view of the BGH, change the applicability of the limitation provision. The "permanent" criterion in Section 59(1) was met because the work was "located permanently and not only temporarily in public spaces". "Permanent" did not mean at a fixed location but on a persistent basis. The decisive factor was that the "AIDA kiss mouth", with the cruise ship, was located in (various) public places for a long period of time, as was intended.

In another decision on the freedom of panorama, the BGH had to decide whether attaching a photograph of a work to a three-dimensional architecture model, of which a photograph had been made available on the internet, was covered by the exception in Section 59(1) UrhG. The plaintiff was the creator of a painting, which consists of 16 so-called heads, displayed on a remaining section of the Berlin Wall (the so-called "East Side Gallery"). The defendant, that was marketing a residential building called "Living Levels" located behind the "East Side Gallery", advertised the real estate project on its website using an architecture model that included a part of the "East Side Gallery" containing the "heads". The BGH decided that the use was covered by Section 59 UrhG.

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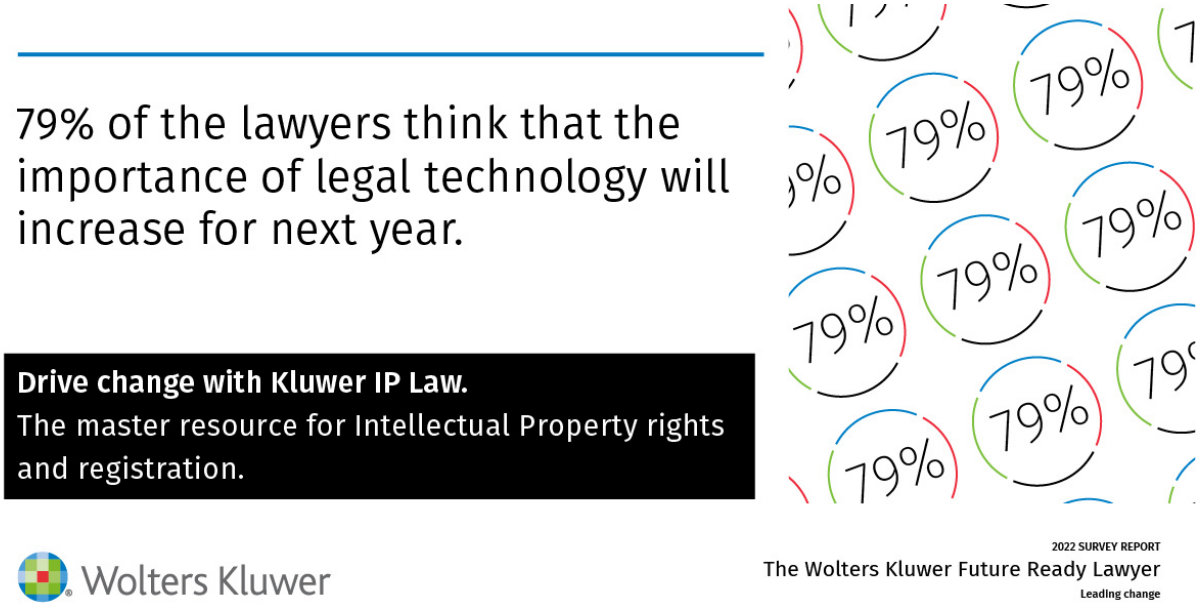

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