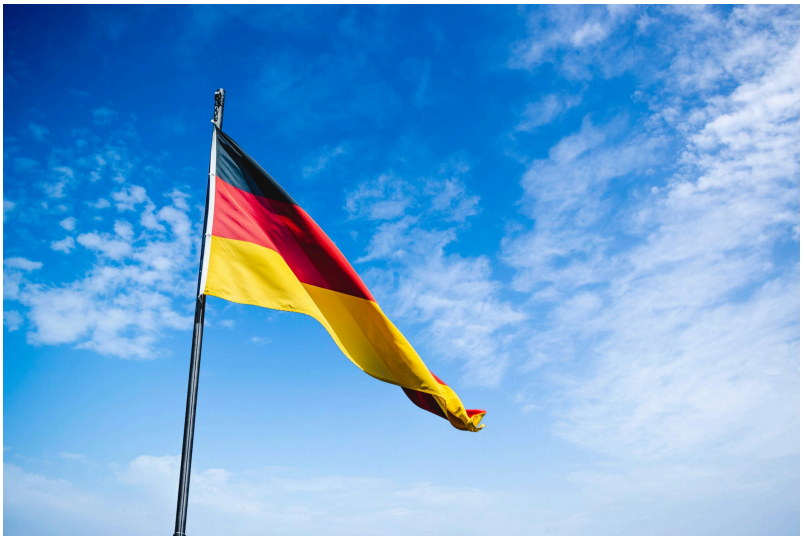
Kluwer Copyright Blog

German Federal Court of Justice: Copyright Case Law of 2021 – Part I

Jan Bernd Nordemann, Julian Waiblinger (NORDEMANN) · Wednesday, February 22nd, 2023



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The implementation transposition of the Copyright Directive 2019/790 (DSMD) in the summer of 2021 represented probably the greatest reform in German copyright law since the German Copyright Act (UrhG) came into force. Germany's implementation of Art. 17 DSMD was discussed in an earlier blog post by Julian Waiblinger and Jonathan Pukas. The other changes to German copyright law have also been covered in two previous blog posts (see here and here).

That said, 2021 also saw a very active German Bundesgerichtshof ("BGH" – Federal Court of Justice) in the area of copyright law. This article covers the most relevant copyright law decisions of the BGH from that year. Part I addresses decisions in the areas of scope of protection, exploitation rights, exceptions and limitations, and copyright contract law. Part II will cover claims under copyright law and copyright collection societies.

I. Scope of protection (copyrighted works)

1. Definition of Work and Work Quality (Section 2(2) UrhG)

In order for a work of applied art to exceed the threshold for protection set out in the UrhG it suffices if it achieves a threshold of originality which would justify people interested in and sufficiently familiar with conceptions of art describing it as an "artistic" creation. Following the 2013 BGH decision *Geburtstagszug*, several lower courts afforded copyright protection in the area of applied art despite only a minor degree of individual character. In its recent decision

Zugangsrecht des Architekten, the BGH stressed once more that "the threshold of originality required for copyright protection may not be set too low". For example, for buildings to meet the threshold of originality, the building plans or the building itself must stand out from the mass of everyday building work and not merely be presented as average architecture. Moreover, the BGH stated that the criterion of "artistic creation" did not differ from the requirements set out in the CJEU case law in "Cofemel" (C-683/17) or "Brompton" (C-683/18).

2. Official works (Section 5 UrhG)

New BGH case law was also produced in the area of official works under Section 5 UrhG. Official works are acts of creation such as legislative texts or official notices. Due to the public interest in their being widely disseminated, they are excluded from copyright protection. The background of the relevant decision, *Kastellaun*, was a collective municipality (in German, a "Verbandsgemeinde") named Kastellaun that posted to its website a report produced by a private planning consultancy for a party seeking planning permission for the purposes of that planning procedure. One of the key issues in contention was whether the publication of a section of a map contained in the report was permitted under copyright law. The BGH decided that neither the section of the map in the report nor the report itself should be classified as official works under Section 5 UrhG. Even though the work was part of an official procedure, it was not produced by officials in public service themselves or by private persons that had themselves applied to the official body.

3. Authorship of works (Sections 7-10 UrhG)

As far as questions of authorship or co-authorship are concerned, the most recent decision of the BGH on the 1980s German classic film "Das Boot" ("The Boat") contains points worthy of mention. In that case, which has been ongoing for many years and across numerous judicial instances, the head cameraman for that film, Jost Vacano, is asserting claims for additional remuneration under Section 32a UrhG, due to the extraordinary success of the film. However, the BGH has repeatedly focussed on a variety of peripheral issues. This is again the case for its decision *Das Boot III*, which concerns the presumption of authorship set out in Section 10(1) UrhG. Under Section 10(1) UrhG, whoever is designated as author on copies of a published work or on the original of the work of visual art in the customary manner is regarded as the author of the work, unless proven otherwise. The presumption of authorship under Section 10 also applies to film works, as well as now, according to this decision of the BGH, between co-authors. Thus, if more than one person is designated as author on the copy of a work in the customary manner, these persons are accordingly – also in relation to one another – regarded as co-authors of the work until proven otherwise.

II. Exploitation rights

All new developments in the case law of the BGH on copyright exploitation rights (Sections 15 et seqq. UrhG) are related to the right of communication of a work to the public on the internet, as established in Section 15(2) UrhG. This provision implements, in particular, Article 3(1) of the

InfoSoc Directive on communication to the public to persons not present at the place where the communication originates.

In *VG Bild-Kunst/SPK*, the CJEU ruled that the use of framing technologies only addresses a new public and therefore is only deemed a communication to the public under Article 3(1) of the InfoSoc Directive if technical protection measures are circumvented when linking to the work that has been legally made available to the public. In that context, the CJEU stated that circumvention shall be deemed to have occurred not only where paywalls or similar have been circumvented, but also where effective protection measures, within the meaning of Article 6 of the InfoSoc Directive, are circumvented whose sole purpose is to prevent framing technology, thus leaving the content itself legally freely available on the internet. The BGH has now applied that ruling to a specific case, in its decision *Deutsche Digitale Bibliothek II*. After reciting the CJEU judgment, it referred the case back to the appeal court.

The BGH *Lautsprecherfoto* case concerned a product photograph that had initially been made available to the public on an e-commerce platform in violation of copyright (Section 15(2), Section 19a UrhG). After the listing had been deleted, the product photograph only remained available to those who entered a 70-digit URL into their browser, for example if they had made a note of the URL or bookmarked it. The BGH decided there was no public aspect to the communication because the criteria of “a fairly large number of people” was, under any realistic assessment, not met. It was, however, not possible on procedural grounds to address how that ruling would have been affected if the listing – and thus the product photograph – had remained accessible via search engines.

III. Exceptions & limitations (Sections 44a et seqq UrhG)

2021 saw the BGH once more issue judgments concerning exceptions and limitations to copyright. These exceptions and limitations are harmonised in Article 5 of the InfoSoc Directive as well as in other provisions of EU law. In the German UrhG, they are set out in Sections 44a-63.

In its decision *Kastellaun*, already mentioned above in the section on “Official Works”, the BGH also expressed its position on the scope of the copyright exception provisions set out in Section 45 UrhG (implementation of Article 5(3)(e) of the InfoSoc Directive). That provision allows individual copies of works to be made and communicated to the public for use in proceedings before an official body, a court or an arbitration board. The BGH made it clear that Section 45 UrhG also covers the making available to the public of a statement made in the course of an official planning application under the German Federal Building Act. However, whether the provisions of the German Federal Building Code were actually relevant, which is necessary, is a matter for the appeal court. The BGH also emphasised the need for a factual and temporal connection to the official proceedings. According to the BGH, once the official proceedings have ended, the act of use covered by Section 45 UrhG is no longer permitted. Finally, the BGH instructed the appeal court to assess whether the requirements of the three-step-test under Article 5(5) of the InfoSoc Directive were met. According to the BGH, the requirements would usually be met in cases like the one at hand. However, after the case was referred back, the prior instance court, the Appeal Court of Zweibrücken, saw the matter differently. That court therefore rejected the application of Section 45 UrhG.

IV. Copyright contract law

German copyright law stipulates that authors are entitled to appropriate remuneration for every use of their work (Section 32 UrhG). In the event of an unexpected success of a work, its author can even become entitled to a retroactive claim for additional remuneration (Section 32a UrhG; now the implementation of Article 20 of the DSMD). Section 32a UrhG is also known in Germany as the "bestseller paragraph".

In its decision *Das Boot III*, the BGH used the opportunity to present the full process for applying the series of tests for authors' claims for additional retroactive remuneration under the bestseller paragraph (Section 32a UrhG) textbook-like.

In order to determine whether additional remuneration does have to be paid to the author in question, the level of remuneration considered hypothetically appropriate when viewed in hindsight is compared to the remuneration that was actually paid. If the conclusion drawn from this comparison is that the remuneration was not appropriate, this entitles the author, according to the newest developments in German case law, to bring an action directly for payment of appropriate consideration. The key factor for determining the hypothetically appropriate level of remuneration is the revenues and benefits earned by the author's contracting partner through their exploitation of the work. In its decision, the BGH restated the importance of these criteria. In the opinion of the court, the appeal court that heard the case in the prior instance made an error in law when assessing whether a disproportionate difference existed, the error being that the appeal court took as the basis for its assessment the full amount of the remuneration actually paid. The BGH reasoned that if the contracting party – as in the case at issue – has granted a variety of exploitation rights to a number of third parties, any assessment as to whether a conspicuous disproportion exists must only take into account that part of the actually paid remuneration which is attributable to the rights exploited by the respective third-party contracting party. Only that part of the remuneration can then be put up against the notional appropriate remuneration, calculated based on the revenues and benefits which the respective contracting partner has earned through its use of the work. Therefore, one can only count in favour of, for example, a contractual partner within the licensing chain that has acquired the television rights, that part of the remuneration paid which was explicitly paid for the television rights in the work. Various approaches can be used to determine what part of the remuneration is attributable in this way.

The BGH also stated that when assessing the extent of any conspicuous disproportion, one may look at the entire relationship of the author to the exploiter. As such, any costs which reduce the profit of the exploiter can also be taken into account. Finally, it is worth mentioning that when answering the question as to what is the level of appropriate remuneration, one can take as an indicative reference point collective remuneration rules, even if they do not directly apply to the case at issue. Collective remuneration rules are contractual agreements between associations of users and associations of authors which set the level of appropriate remuneration for authors within the relationship between the parties. The use, as a point of reference, of collective remuneration rules, which are, strictly speaking, not actually applicable, is now settled case law of the BGH.

Part II of this post will summarise decisions relating to claims under copyright law and collecting

societies.

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