Kluwer Copyright Blog

The case law of the German Federal Court of Justice (Bundesgerichtshof) and selected other German courts in 2022 – Part I

Jan Bernd Nordemann (NORDEMANN) · Thursday, March 14th, 2024

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This article continues the tradition of reporting on the copyright case law of the German Bundesgerichtshof, the highest German civil court for copyright matters (Federal Court of Justice – "BGH"). This article summarises the most important BGH copyright decisions in 2022 as well as selected lower-court case law. Readers may find it useful to consult an English translation of the provisions of the German Copyright Act (Urheberrechtsgesetz – UrhG); an official translation may be found here.

This article is divided into two parts. Part I covers decisions in the areas of copyright protection and exploitation rights, as well as exceptions and limitations. Part II will focus on copyright contract law and claims under copyright law.

I. Copyright protection

1. Copyrighted subject matter

German copyright law grants copyright protection to all works which are sufficiently original. Usually, German courts will look at the principles developed by CJEU case law to answer the question of whether a work enjoys copyright protection. As stated in its decision in *FIFA World*

Cup by the District Court Hamburg (Landgericht – LG Hamburg), the basic feed for broadcasts of the men's football World Cup (2018) and the women's football World Cup (2019) is copyright protected as a cinematographic work (Section 2(1) No. 6 UrhG). The choice of camera angles and the composition of the sequence of images as well as normal speed and slow-motion replays constitute a considerable creative input on the part of the director and thus justify classification as a cinematographic work.

In its decision in *World Feed*, the Appeal Court of Frankfurt am Main (Oberlandesgericht – OLG Frankfurt a.M.) came to a similar conclusion regarding the basic feed of the UEFA Champions League.

In *Forschernetzwerk*, the District Court Munich I (Landgericht – LG München I) had to look at the eligibility for protection of legal texts. It affirmed the protectability of specialist academic articles and associated abstracts. As copyright law does not grant protection for ideas, the ideas embedded in academic works cannot be protected. Nevertheless the specific linguistic wording can be chosen individually and represent an individual creation of the author(s), which is eligible for protection.

2. Authorship

The *ITPUse* decision of the OLG Hamburg contains remarks on the authorship of computer programs. The court stated that the author of software can only be the person who actually creates the computer program. In contrast, the person who assigns the task to create the program and possibly also specifies detailed requirements which the program must meet is not also an author of the program. Therefore, no one can be even a co-author of a computer program if they have not personally specified any of the command structure.

3. Protection of older works

The BGH decision in *Porsche 911* concerned, among other things, the protectability of the older car model Porsche 356, the predecessor model of the Porsche 911, as a work of applied art. The iconic car was created before the UrhG came into force (1965). The question therefore arose as to whether the Porsche 356 was eligible for protection as a work of applied art under the German Art Copyright Act (Kunsturheberrechtsgesetz – KUG) that was in force at the time. The BGH ruled that there were "generally" no differences between the current UrhG and the earlier KUG. Hence copyright protection had to be assessed in the same way for both laws.

Furthermore, the BGH repeated that to be eligible for copyright protection as a work of applied art the Porsche 356 needed to be a creation of individual character whose aesthetic content has reached such a degree that, in the opinion of circles receptive to art and reasonably familiar with art appreciation, it can be considered an "artistic" achievement ("künstlerische Leistiung"). The BGH also stated that these requirements were materially ("in der Sache") the same as the requirements of the CJEU (see paras. 28-29). However, in the aftermath of the 2023 Swedish CJEU referral in *MIO* (C-580/23), the BGH has now decided that this may not be so obvious. In a case which involves the question of copyright protection of the *USM Haller* furniture design the BGH referred several questions to the CJEU in December 2023 to clarify the requirements for protection of applied art under EU law.

II. Exploitation (exclusive) rights

Germany has implemented the EU provisions governing exploitation (exclusive) rights, as harmonised under Union law in Articles 2 to 4 of the InfoSoc Directive 2001/29, in Sections 15 to 22 UrhG.

1. Right of reproduction (Section 16 UrhG)

The right of reproduction, as set out in EU law in Article 2 of the InfoSoc Directive, can be found in Germany in Section 16 UrhG.

The BGH ruled in *Elektronischer Pressespiegel II* that the initial storage (digitisation) as well as the transfer of digital data from one storage device to another (e.g., uploading to a server for publication on the internet) constituted a relevant reproduction.

2. Communication to the public (Section 15(2), Sections 19 et seqq. UrhG)

The right of communication to the public, as set out in Article 3(1) of the InfoSoc Directive, can be found in German law in Section 15(2) and Sections 19-22 UrhG. As Article 3 of the InfoSoc Directive harmonises the right in the Member States, German courts are heavily guided by the existing CJEU case law.

The OLG Frankfurt a. M. affirmed in its decision in *World Feed* that the definition of public, in the context of the showing of copyright-protected content in a restaurant or bar by means of a screen, was met where ten guests were present in the establishment at the time of the showing and no notices for a closed or private event had been posted, such that no restrictions on access of any kind were apparent.

The subject matter of the BGH decision in *Der Idiot*, is the performing right under Section 19(2) UrhG. This exploitation right is part of the right of communication to the public in German law. However, it has not been harmonised by Article 3 of the InfoSoc Directive as it concerns a communication to a public physically present. There are two variants of the performing right in German law, namely the right to perform a musical work in public through personal presentation (variant 1) and the right of stage/theatrical presentation of a work (variant 2). This distinction is relevant because the performing right for musical works under variant 1 is a so-called “small right”, so it can be acquired from the German collective management organisation, GEMA, whereas the rights under variant 2 are so-called “grand rights”, meaning that individual licensing is required, carried out by the author or his/her publisher. The BGH considers a use of music to involve “grand rights” (to be individually licensed) if the music is an integral, organic component of the dramatic plot and is not merely used for background, accompaniment purposes. According to the BGH, a use does not necessarily involve “grand rights” even if it was specially tailored to the specific staging of the piece by the director and was written exclusively for that staging. It may still be possible that the music doesn’t advance the action and is merely used in the background.

3. Dependent adaptation and free use

The 2021 German copyright reform introduced a number of changes to the German adaptation right. The "free use" Section 24 UrhG (old version) was removed. However, the exceptions previously covered by Section 24 UrhG (old version) for caricature and parody are now expressly regulated in Section 51a UrhG, implementing Article 5(3)(k) of the InfoSoc Directive. Alongside these, an exception for pastiche has been newly incorporated into German copyright law in 2021, making use of the option contained in Article 5(3)(k) of the InfoSoc Directive.

Moreover, the first sentence of Section 23(1) UrhG now indicates the threshold between legal and illegal adaptations: that provision specifies that adaptations and transformations may be created freely without authorisation provided they have "a sufficient degree of difference to the work used". Previously, under the old Section 24 UrhG, the answer to this question was found in the BGH's "fading away theory" (Blässetheorie). According to that theory, a use could only be considered free use if the older work "faded away" in the newer work. In this respect, the question also arises under EU law as to whether this "fading away theory" must be compatible with the CJEU criterion of recognisability. The CJEU relied on recognisability to answer the question of whether there was still a relevant act of reproduction under Article 2 of the InfoSoc Directive in its *Pelham* judgment. As EU copyright law and more specifically the InfoSoc Directive does not mention adaptation or transformation as a separate exploitation (exclusive) right, it seems appropriate to use "recognisability" to determine the scope of the German adaptation right.

The BGH has now clarified this question in its decision in *Porsche 911*. The fading away criterion developed under the old law in Section 24 UrhG still applies to distinguish free use from uses which need to be authorised. But the criterion of "fading away" has to be understood in line with EU law as meaning a lack of recognisability of the unique, creative elements that gave rise to copyright protection of the original work. When comparing the overall impression of the two works, what is now important is whether the features which gave rise to the copyright protection of the original work are recognisable in the newly created work.

III. Exceptions and Limitations

The exceptions harmonised in Article 5 of the InfoSoc Directive are implemented in Germany in Sections 44a-63 UrhG.

According to Section 45(1) and (3) UrhG, the creation and communication to the public of individual copies of works to be used in proceedings before official bodies are permitted. This implements Article 5(3)(e) of the InfoSoc Directive. The making available of an expert opinion that had to be produced according to the provisions of the German Federal Building Code (Baugesetzbuch – BauGB) takes place, according to the BGH, in the course of proceedings before a public authority as per Section 45 UrhG and is thus exempted from copyright.

The first court decisions concerning the new pastiche exception in Section 51a UrhG have now been issued. As of 7 June 2021, Germany has implemented Article 5(3)(k) of the InfoSoc

Directive. The OLG Hamburg affirmed, in its decision in *Metall auf Metall III*, the existence of a pastiche through means of music sampling. This music sampling case had already made it all the way to the CJEU once in the *Pelham* judgment. However, at the time of the CJEU judgment in 2019, Germany did not yet have a pastiche exception, so the question of using pastiche to justify the sampling has only now been raised. According to the OLG Hamburg, what is required for a pastiche is a recognisable adoption of creative features of the original as well as an intellectual examination of the pre-existing work or other object of use. Moreover, the interests involved need to be weighed against one another and the 3-step test (Art. 5(5) of the InfoSoc Directive) has to be applied in order to strike a fair balance between the interests of users and rightholders. According to the OLG Hamburg, these requirements were met by the sampled two-second rhythm sequence which served as a continuous underlay in the newer music track “Nur mir”. In 2023, on the next court level, the BGH decided to refer several questions regarding the pastiche exception to the CJEU in its ruling *Metall auf Metall V*.

The LG Berlin affirmed the existence of an allowed pastiche in the case of the adoption of essential visual elements from a digital graphic into an oil painting because the oil painting contained a new artistic statement. This follows from the LG’s Berlin decision in *The Unknowable*.

Part II of this post will focus on copyright contract law and claims under copyright law.

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