CO-REACH INTELLECTUAL PROPERTY RIGHTS IN THE NEW MEDIA

Hong Kong Workshop, 20th October 2011

The Threshold of Originality under EU Copyright Law

Dr. Roman Heidinger, M.A.

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN

Overview

- Originality requirement in Austria and Germany
- European harmonization
- Development of the case law
- Recent case law of the ECJ (and national courts)
- Conclusions

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN

Originality Requirement in Austria and Germany

- Austrian Copyright Act, Article 1 (1) :
  Works within the meaning of this Law shall be original intellectual productions in the fields of literature, music, art and cinematography.
- German Copyright Act, § 2 (2):
  Personal intellectual creations alone shall constitute works within the meaning of this Law.
  - *„Werke im Sinne dieses Gesetzes sind nur persönliche geistige Schöpfungen.“*
  - Slightly different wording for computer programs (Article 69a):
    “author's own intellectual creation”

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN

European Harmonization

- Directive on the legal protection of computer programs (2009/24/EC):
  Article 1 (3): A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.
  - In respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied (Recital 8).
- Similar provisions for Databases and Photographs. The European law provides no general codified harmonization of the originality requirement.

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN

Influence of the Harmonization on the Protection of Computer Programs (German Case Law)

- Before harmonization:
  - Test: Creative latitude to carry out programming task
  - First step: comparison of the work with preexisting creations to identify individual elements of the program
  - Second step: these elements must considerably exceed the average, common creative working/programming of the average programmer

    (Supreme Court, 9th May 1985, I ZR 52/83 – *Inkasso-Programm*)
- After harmonization:
  - Excluded are only simple routine programming services that any programmer would provide the same way
  - Presumption for the protection of complex programs

    (Supreme Court, 3rd May 2005, I ZR 111/02 – *Fash2000*)

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN

Influence of the Harmonization on the Protection of Photographs (Austrian Case Law)

- Before harmonization:
  - Copyright only subsists if the work is substantially different from preexisting photographs. This requires that the personality of the photographer is visible in the composition of the photograph.
  - A “common” photograph of a landscape with bikers is not protected.
    - Supreme Court 12th October 1993, 4 Ob 121/93 – *Landschaft mit Radfahrern*
- After harmonization:
  - Copyright protection as work does not require a certain level of originality or even a high level of artistic skills. Also average (“amateur”) photographs of common scenes can be protected. Required is only some formative freedom that makes the photograph distinguishable from other photographs.
  - Simple pictures of different grape varieties are protected.
    - Supreme Court, 16th December 2003, 4 Ob 221/03h – *Weinatlas*

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN

ECJ, C-145/10 – *Eva-Maria Painer*
Opinion of AG Trstrenjak, 12th April 2011

- A portrait photo is afforded copyright protection if it is an original intellectual creation of the photographer, which requires the photographer to have left his mark by using the available formative freedom.
- The photographer can determine, among other things, the angle, the position and the facial expression of the person portrayed, the background, the sharpness, and the light/lighting. To put it vividly, the crucial factor is that a photographer 'leaves his mark' on a photo.

ECJ 16th July 2009, C-5/08 - *Infopaq*

- Infopaq operated an electronic media monitoring service.
- The service amounted to the storage (and printing) of fragments of texts from newspaper articles consisting of the search term along with the five preceding and the five subsequent words.
- Sample Phrase: ***"a forthcoming sale of the telecommunications group TDC which is expected to be bought"***.
- Does this partial reproduction of a work constitute a reproduction (a copyright infringement) within the meaning of the Information Society Directive (2001/29)?

ECJ 16th July 2009, C-5/08 - *Infopaq*

- The copyright protection of "works" is harmonized by the Information Society Directive. Copyright is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.
- Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them.
- It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.

(Paragraph 45 of the judgment)

ECJ 16th July 2009, C-5/08 - *Infopaq*

- The possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in a newspaper article, may be suitable for conveying to the reader the originality of the publication, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article.
- The national courts must make the determination.

NLA v Meltwater, 27th July 2011 (Court of Appeal/England)

- Facts: Meltwater operated an internet news monitoring service. The end user receives the headline of the article and the "hit-sentence".
- Headlines are capable of benefitting from copyright protection. Originality only requires that the work originates from the author.
- *"Although the court [ECJ] refers to an 'intellectual creation' it does so in the context … which clearly relates such creation to the question of origin not novelty or merit. Accordingly, I do not understand the decision of the European Court of Justice in Infopaq to have qualified the long standing test established by the authorities ".*

Conclusion / Consequences

- Lowering the threshold for originality means that copyright protection of works is getting more into line with ancillary copyright (e.g. sound recordings).
- Lowering the standard increases the possibility of identical/similar independent works.
  - Example: Similar photographies of the same object
- Although priority is not a criterion for copyright protection the courts have been reluctant to recognize independent works (Priority is a prima facie evidence that the second work is a copy). Is there a need to reconsider this?
- It appears that the findings of the ECJ are not precise enough to truly harmonize the originality requirement within the entire European Union (see Meltwater decision).

Thank you for your attention!

Contact:
Dr. Roman Heidinger, M.A.

University of Göttingen
Chair for Civil Law and Intellectual Property Law
Platz der Göttinger Sieben 6
37073 Göttingen
Germany
Email: roman.heidinger@jura.uni-goettingen.de

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN