



BARDEHLE
PAGENBERG

Work or design – overlaps in European copyright and design law? The German perspective

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Starting point

- **Court of Justice of the EU (12/9/2019; C-683/17) – ‘Cofemel’**
 - (...) purpose of the protection of designs is to protect subject matter which, while being new and distinctive, is functional and liable to be mass-produced (para 50)
 - (...) ensure a return on the investment necessary for the creation and production of that subject matter (para 50)



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1962 FERRARI 330 LM / 250 GTO BY SCAGLIETTI - CHASSIS NO. 3765

One Lifetime. One Car. One Chance. | 13 NOVEMBER 2023



- **Cologne Appeal Court (26/1/2024; 6 U 86/23) – Birkenstock**
 - Copyright law (...) is based on the fact that works of art often must find their own market first *[and]* artists often wait a lifetime for success
 - This is the price for the author being allowed and expected to create completely free of any specific purpose
 - *[for]* design objects to be protected *[under copyright law]* their design *[must]* based on an artistic achievement

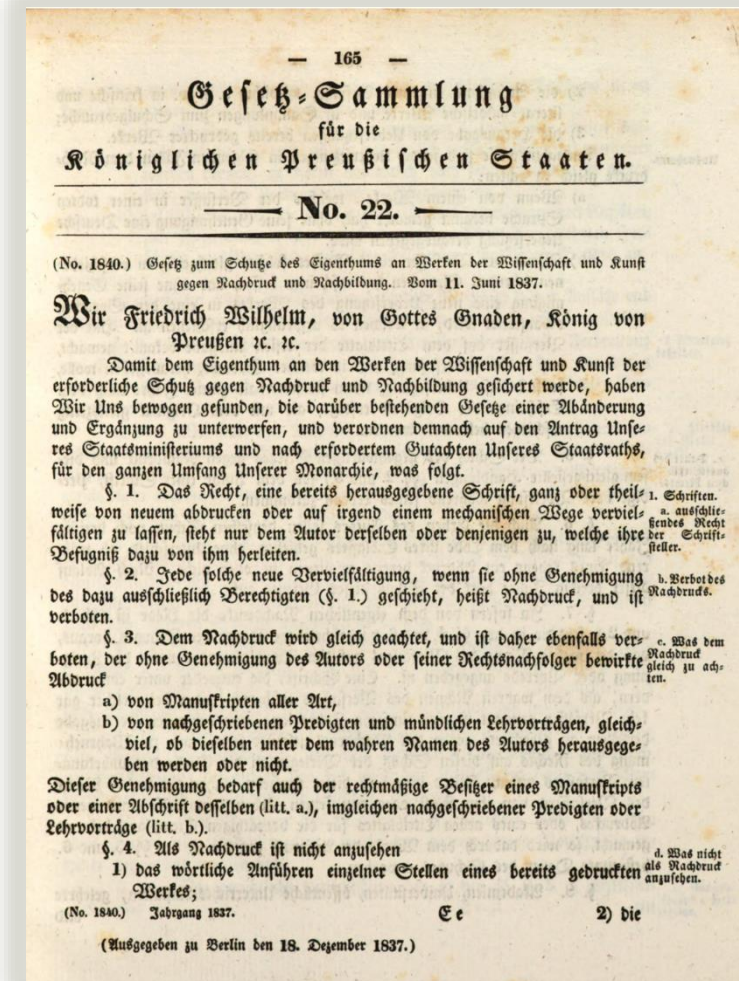
- **German Federal Supreme Court (20/2/2025; I ZR 16/24) – Birkenstock**
 - According to the case law of the German Federal Supreme Court, a personal intellectual creation is a creation of individual character, the aesthetic content of which has reached such a level that, in the opinion of circles receptive to art and reasonably familiar with art views, one can speak of an artistic achievement (established case law, referring, inter alia, to Reichsgericht, 10/6/1911 – I 133/1910 – School Fracture and Reichsgericht, 14/1/1933 – I 149/1932 – Gropius Door Handle)

Past – ‘In the beginning, the earth was without form and void’

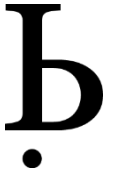
Past – ‘..., the earth was without form and void’



- In 1837, the Prussian Parliament, under the Prussian King Friedrich Wilhelm, said: Let there be copyright law: and there was **protection of works of science and art** (*‘Gesetz zum Schutze des Eigenthums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung’*)
- GS. S. 165

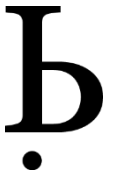


Past – ‘..., the earth was without form and void’

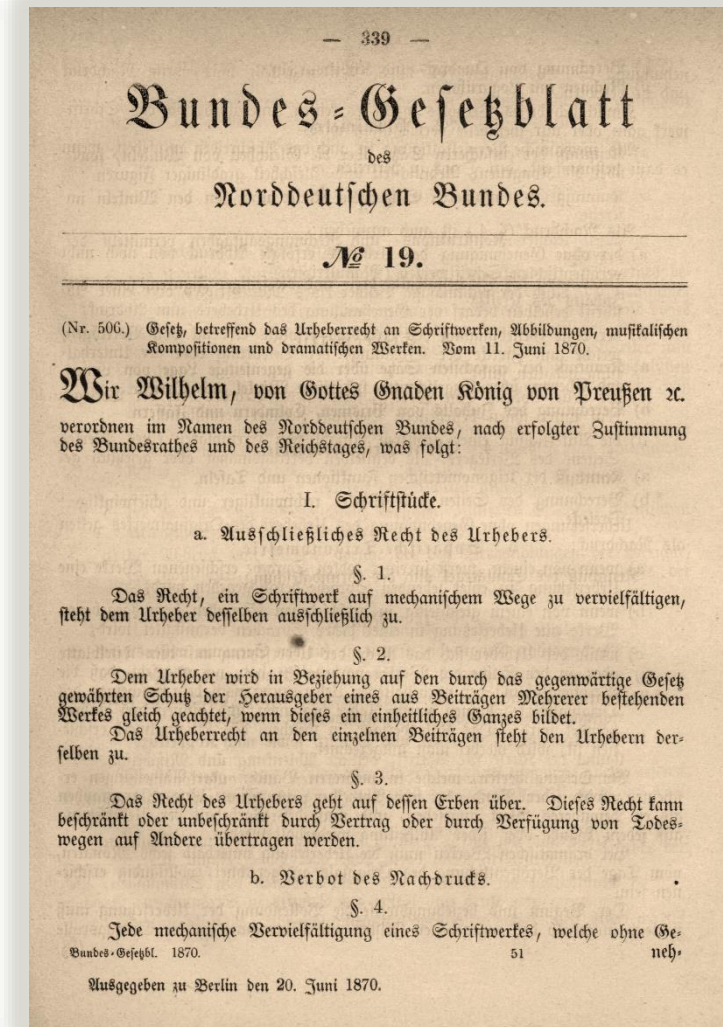


- The use of works of art as models for the products of manufactories, factories and crafts is permitted. (§ 25)
- The author of a work of art and his heirs enjoy the exclusive rights guaranteed to them (...) as long as the original remains in their property. (§ 26)
- No protection for works of applied art!

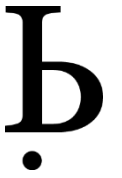
Past – ‘..., the earth was without form and void’



- In 1870, the German Parliament, under the Prussian King Wilhelm, said: Let there be copyright law: and there was protection of writings, illustrations, musical compositions, and dramatic works (*‘Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken’*)
- NBGBI. 11.6.1870, S. 339



Past – ‘..., the earth was without form and void’

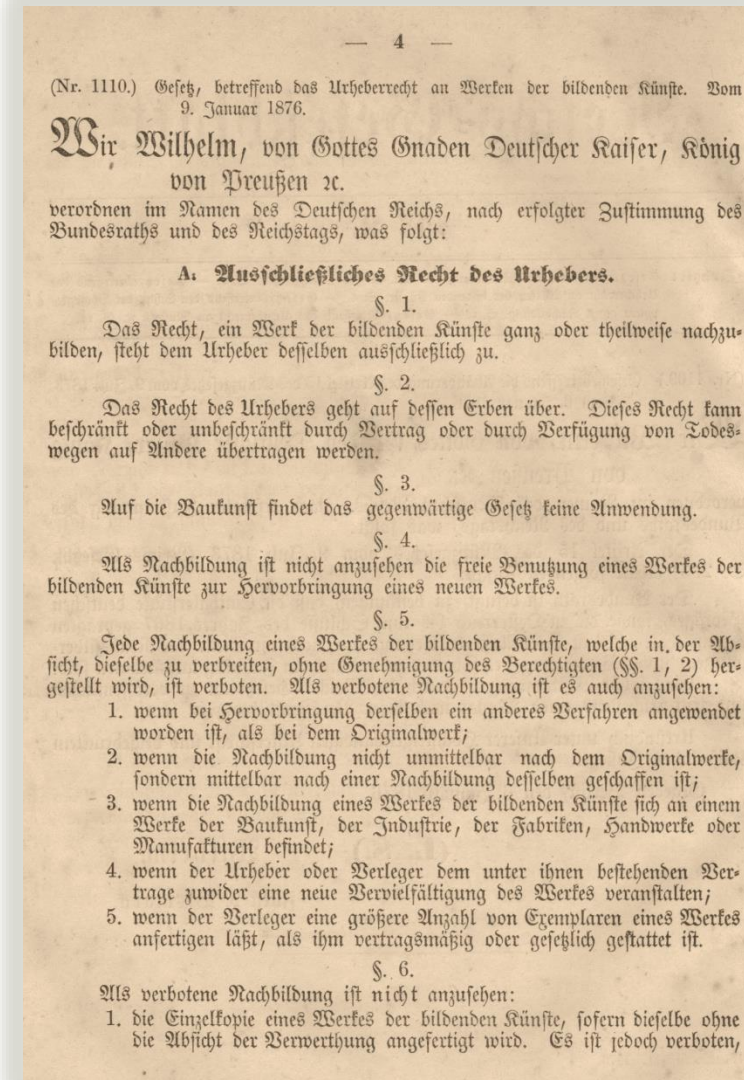


- The provisions in § § 1 – 42 shall also apply to geographical, topographical, scientific, architectural, technical and similar drawings and illustrations which, according to their main purpose, are not to be regarded as works of art. (§ 43)
- No protection for works of applied art!

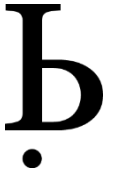
Past – ‘..., the earth was without form and void’



- In 1876, the German Parliament, under the German Emperor Wilhelm I, again said: Let there be copyright law: and there was protection of fine arts (*‘Gesetz betreffend das Urheberrecht an Werken der bildenden Künste’*)
- RGBI. 9.1.1876, S. 4

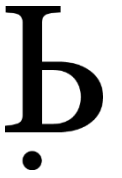


Past – ‘..., the earth was without form and void’

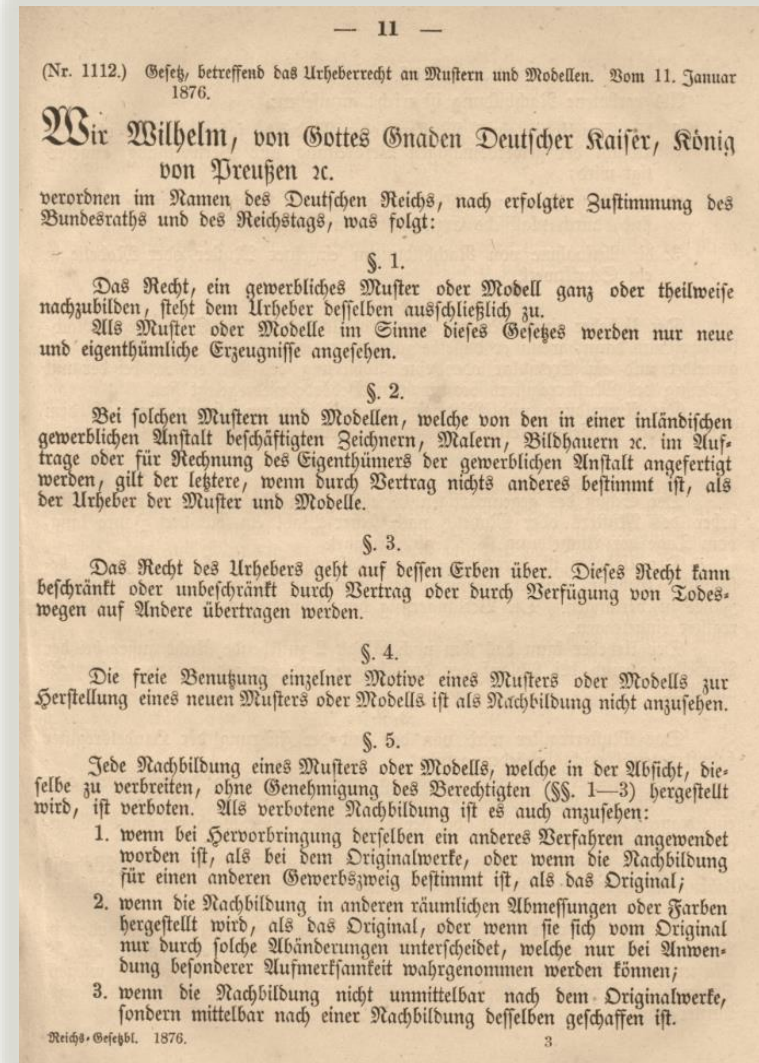


- If the author of a work of fine arts permits the same to be copied on a work of industry, factories, crafts or manufactures, he shall enjoy protection against further reproductions of works of industry, etc., not in accordance with the present law, but only in accordance with the law concerning copyright in designs and models. (§ 14)
- No protection for works of applied art under copyright law!

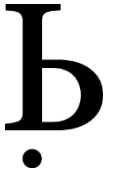
Past – ‘..., the earth was without form and void’



- In 1876, the German Parliament, under the German Emperor Wilhelm I, also said: Let there be design law: and there was protection of designs and models (*‘Gesetz, betreffend das Urheberrecht an Mustern und Modellen’*)
- RGBI. 11.1.1876, S. 11

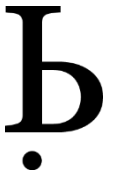


Past – ‘..., the earth was without form and void’

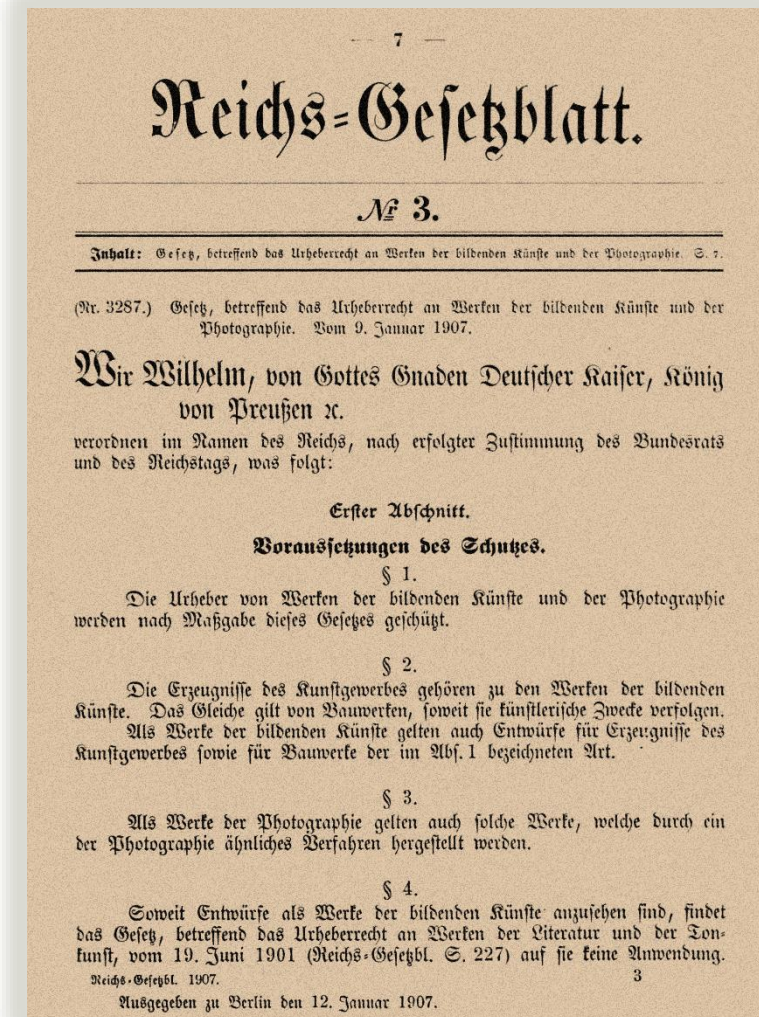


- The right to reproduce a commercial design or model in whole or in part belongs exclusively to the author of the same.
- For the purposes of this Act, only new and individual products shall be regarded as designs or models. (§ 1)

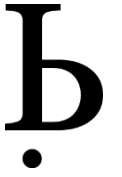
Past – ‘..., the earth was without form and void’



- In 1907, the German Parliament, under the German Emperor Wilhelm II, once again said: Let there be copyright law: and there was protection of works of fine arts and photography (*‘Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie’*)
- RGBI. 9.1.1907, S. 7

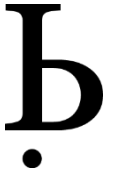


Past – ‘..., the earth was without form and void’



- The products of applied arts belong to the works of the fine arts. The same applies to buildings insofar as they pursue artistic purposes. Works of fine arts shall also include drafts for arts and crafts products and for buildings of the type referred to in subsection (1). (§ 2)

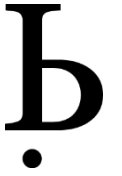
Past – ‘..., the earth was without form and void’



- The free use of a work is permissible if it produces an original creation. (§ 16)
- The protection of copyright in a work of fine art shall cease when thirty years have elapsed since the death of the author. (§ 25)
- Protection for works of applied art under copyright and design law!

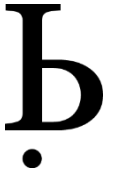
**Finding subsistence of copyright/
validity of a design**

Finding subsistence of copyright/validity (relationship)



- **German Federal Supreme Court (30/5/1958; I ZR 21/57) – Candida font**
 - In comparison with a design, which (...) likewise requires novelty and originality, qualifying an article of use as a work of art requires a creative achievement of such rank that one can still speak of art according to the prevailing view in life of the educated circles of the people who are to some extent familiar with artistic views and are receptive to artistic things.

Finding subsistence of copyright/validity (copyright law)

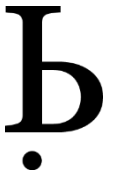


- **German Federal Supreme Court (30/5/1958; I ZR 21/57) – Candida font**
 - It is (...) not legally objectionable that the Court of Appeal, in determining the aesthetic content of the “Candida” typeface significant under copyright law, compared it with the abundance of previously known Antiqua typefaces and based it only on the deviations that distinguish the “Candida” typeface, in its overall effect, from the fonts already known at the time of its creation

- **German Federal Supreme Court (9/5/1985; I ZR 52/83) – Debt Collection Program**
 - If, therefore, the eligibility of computer programs for copyright protection is to be affirmed in principle, it must be examined in each individual case whether the program and its precursors achieve a sufficient degree of creative originality. The question must be answered according to the principles developed by the case law so far. According to this, the question of the degree of originality is measured by the overall intellectual and creative impression of the specific design, and indeed in an overall comparison with pre-existing designs

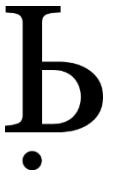
- **German Federal Supreme Court (8/7/2004; I ZR 25/02) – Dog Figure**
 - The creative individual character of the sculptural dog figure *Bill*, which is quite different from the comic figure, was insufficiently examined by the Court of Appeal; in particular, the examination of the degree of originality – which must be carried out based on a comparison with the previously known designs – was omitted. There would have been reason to explain in more detail to what extent the special features of the sculptural figure are common individual elements

Finding subsistence of copyright/validity (design law)



- **Reichsgericht (6/5/1941; I 4/1940) – Pencil Sharpener**
 - What is new does not have to be individual. The new seems individual when it displays an independent creative achievement. Whether this is the case can only be determined by comparison with the previously known and measured according to degree. (...) Novelty could not be doubtful since the protected model differs from both the briquette and the lyra model. (...) Of course, the achievement of the author of a design must be measured based on all the preparatory work carried out in the field in question

Finding subsistence of copyright/validity (design law)



- **German Federal Supreme Court (18/12/1959; I ZR 27/58) – Chérie**
 - In order to be individual, the product must present itself as the result of personal, form-creative activity. (...) In each individual case, this depends on the overall effect achieved. This effect is not to be determined, as in the case when assessing novelty, by separate comparison of the design with each of the individual pieces that may be compared, but the preparatory work carried out in the field in question must be assessed in its entirety and in conjunction with the free forms available

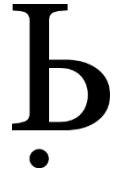
Finding subsistence of copyright/validity (design law)



- **German Federal Supreme Court (18/4/1996; I ZR 160/94) –
Wooden Chairs**
 - Novelty and individuality of a design must be examined separately and, in principle, independently of each other. The examination of the individuality and its degree – unlike the examination of novelty – is not to be carried out by an individual comparison of the design in suit with earlier designs, but by an overall comparison with the previously known designs

- **German Federal Supreme Court (28/1/2016; I ZR 40/14) – Wristwatch**
 - The examination of the individuality and its degree – unlike the examination of novelty – is not to be carried out by an individual comparison of the design in suit with earlier designs, but by an overall comparison with the designs previously known in the field in question. The overall impression must be based on the determination of the overall impression of the design and the features of appearance on which that overall impression is based

Finding subsistence of copyright/validity (relationship)



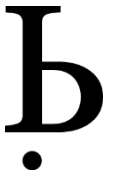
German Federal Supreme Court (8/7/2004; I ZR 25/02)

- **Copyright law:** In examining whether there has been an adaptation, it must be found in detail which objective features determine the creative individuality of the original. The decisive factor for this is an **overall comparison with the previously known designs, which must be based on the overall impression of the original and the features of appearance on which it is based.**

German Federal Supreme Court (28/1/2016; I ZR 40/14)

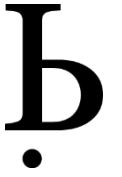
- **Design law:** The examination of the individuality and its degree must be carried out by an overall comparison with the designs previously known in the field in question. **The overall impression must be based on the determination of the overall impression of the design and the features of appearance on which that overall impression is based.**

Finding subsistence of copyright/validity (relationship)



- **Demarcation/overlap (1876 – 2004)**
 - Design law: Presence of novelty ([individual comparison](#))
 - Design law: Assessing degree of individuality ([overall comparison](#))
 - Copyright law: Assessing degree of originality ([overall comparison](#))

Finding subsistence of copyright/validity (relationship)



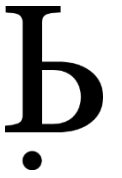
- **Demarcation/overlap (since 2004)**
 - Design law: Presence of novelty ([individual comparison](#))
 - Design law: Presence of individual character ([individual comparison](#))
 - Copyright law: Assessing degree of originality ([overall comparison](#))

Assessing scope of protection

- **German Federal Supreme Court (28/2/1991; I ZR 88/89) – Exploded views (copyright law)**
 - It is sufficient that an individual mental activity – which stands out from everyday work in the field of technical drawings – is expressed (...), even if the degree of originality (...) is small.
However, a low degree of originality also results in a correspondingly narrow scope of protection for the work in question

- **German Federal Supreme Court (13/11/2013; I ZR 143/12) – Birthday Train**
 - In addition, it should be noted that a low level of originality that nevertheless establishes copyright protection leads to a correspondingly narrow scope of protection of the work in question (cf. German Federal Supreme Court, 28/2/1991 – I ZR 88/89 – Explodes Views, with further references) (para 41)

Assessing scope of protection (design law)



- **German Federal Supreme Court (12/7/2012; I ZR 102/11) – Pram II**
 - (...) a small freedom of the designer will lead to a narrow scope of protection of the design [*while*] a great freedom of the designer will lead to a broad scope of protection of the design (para 31)
 - The scope of protection of the claimed design is also determined by its departure from the previously known forms. The greater the departure (...) the greater the scope of protection (...) (para 32)

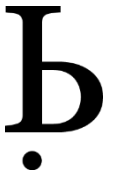
Assessing scope of protection (relationship)



- **AG Szpunar (8/5/2025; C-580/23 and C-795/23) – Mio/USM Haller**
 - Copyright law: As regards the taking into account of the 'degree of originality' as a determining factor of the scope of protection, that solution seems to me to be modelled on the logic of design law (para 68)
 - Design law: (...) level of individuality determines scope of protection (para 68)

Finding infringement

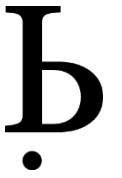
Finding infringement (design law)



- **German Federal Supreme Court (12/7/2012; I ZR 102/11) – Pram II**
 - (...) *[in case of]* a broad scope of protection of the design
 - (...) even major differences in appearance may not produce a different overall impression on the informed user (para 31)

- **German Federal Supreme Court (28/1/2016; I ZR 40/14) – Wristwatch**
 - In this context, similarities and differences between the individual characteristics must be weighed according to whether they are of primary importance for the overall impression (...) or whether they take a backseat (para 35)

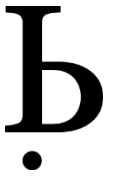
Finding infringement (copyright law)



- **German Federal Supreme Court (15/12/2022; I ZR 173/21) – Showcase Light**
 - What are the objective characteristics determining the creative originality of the work?
 - Have original creative features of the work been copied by the later design and/or to what extent?
 - Comparison of the respective overall impression of the designs, taking into account all copied creative characteristics (para 29)

Future – Seven steps to objectivity

Future – Seven steps to objectivity (copyright law)



- **Step 1 – Autonomous concept of work under EU law**

- As regards the concept of work protected by copyright law contained in the provisions of Article 2 lit a, Article 3 (1) and Article 4 (1)

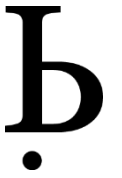
Directive 2001/29/EC, this is an [autonomous concept of EU law](#)

which must be interpreted and applied uniformly throughout the

European Union (German Federal Supreme Court, 20/2/2025 – I

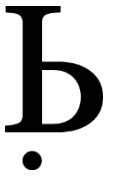
ZR 16/24 – Birkenstock, para 15, citing Cofemel, para 29)

Future – Seven steps to objectivity (copyright law)



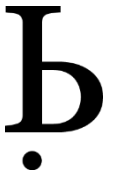
- **Step 2 – Determining the subject matter of copyright protection**
 - In copyright infringement proceedings, the plaintiff bears the burden of proving the existence of a personal intellectual creation. It must, therefore, not only submit the work in question, but also, in principle, demonstrate the specific design elements from which copyright protection is to result (Birkenstock, para 30)

Future – Seven steps to objectivity (copyright law)



- **Step 3 – Separating aesthetic from technical characteristics**
 - Characteristics solely dictated by function, *i.e.*, ‘realisation of subject matter dictated by technical considerations, rules or other constraints, which have left no room for creative freedom’ (Cofemel, para 31)?
 - Room for creative freedom means room for aesthetic creative freedom (not: room for technical creative freedom)!

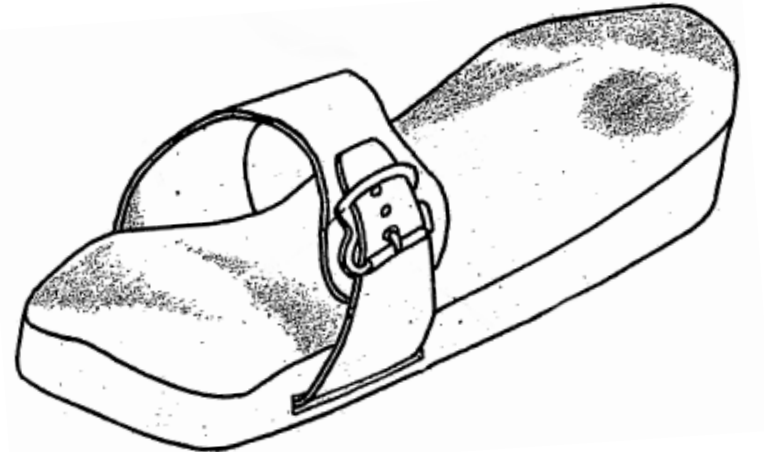
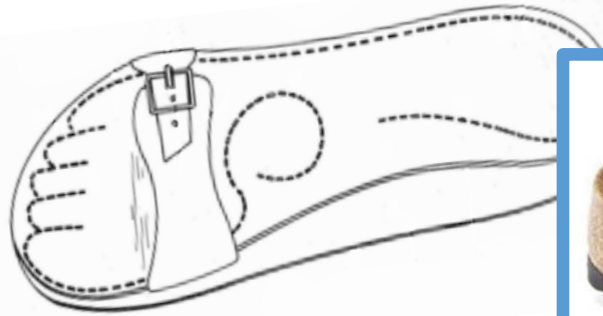
Future – Seven steps to objectivity (copyright law)



- **Step 4 – Determining room for aesthetic creative freedom**
 - (...) if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices (Cofemel, para 30)
 - Establishing the existing degree of freedom of the author!

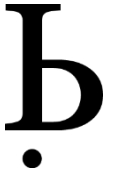
- **Step 5 – Sufficient use of creative freedom (overall comparison)**
 - [According to the Cologne Appeal Court] it is true that none of the features of the characteristics of the footbed and the fastening system considered by the District Court to be characteristic could only be designed that way in a technically compulsory manner, and the parties ultimately agreed that different configurations were possible in all areas. However, it could not be established that the existing degree of freedom of the designer had been creatively used to an extent that went sufficiently clearly beyond the everyday. It was not ascertainable that the plaintiff's sandals stood out creatively from usual configurations of health sandals already known at that time (Birkenstock, para 31)

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- **Step 6 – Ignoring intentions of the author**
 - In the Senate's opinion, (...) the examination of originality for all types of works must be carried out objectively and uniformly, based on the specific work presented. The author's subjective view in terms of creative intent or awareness of free creative decisions should not be relevant (German Federal Supreme Court, 21/12/2023 – I ZR 96/22 para 27 – USM Haller)

Future – Seven steps to objectivity (copyright law)



- **Step 7 – Ignoring reception of the work after creation**

- Apart from the fact that it has not yet been conclusively clarified under EU law whether circumstances that arose after the time of the creation of the design, which is decisive for the assessment of originality, can be used at all for assessing originality, such as the presentation of the design in art exhibitions or museums or its recognition in professional circles, the Court of Appeal dealt with this aspect but could not draw any conclusions about an artistic achievement in the sense of expressing a free creative decision on the part of its creator from the exhibition of Birkenstock classics exclusively in design museums and design exhibitions, as well as from the awarding of design prizes (Birkenstock, para 32)



Thank you for your attention!

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