

Individualität or Originality –Core Concepts in German Copyright Law

Prof. Dr. Karl-Nikolaus PEIFER



INSTITUT FÜR MEDIENRECHT UND KOMMUNIKATIONSRECHT
der Universität zu Köln
Prof. Dr. Karl-Nikolaus Peifer

I. Introduction: European and German Work Notion – Which Concept?

- European Definition
 - **author's own intellectual creation**
- German Definition in Section 2 (1) and (2) Copyright Act 1965 :
 - **Personal intellectual creations.**
- Features
 - Open clause (not restricted to specific work categories, therefore including “multimedia work”, “happening” in contemporary art);
 - “Personal” # “own”?



Originality Concepts – Copyright vs. Droit d'Auteur

- Originality not defined in national laws but left to courts
- UK-Concept: closed list; originality = 2 elements:
 - not copied = origin in the author as a person (# entrepreneurial works);
 - expenditure of a substantial amount of the author's own skill, knowledge, mental labour, taste or judgement (Laddie/Prescott/Vitoria), but no personal imprint required
- French Concept: originalité:
 - „l’empreinte de la personnalité de l’auteur”
- German Concept: „personal“ = individual = individual expression of the author as a person



Court of Justice of the European Union (CJEU)

- CJEU - Painer-decision (145/10), at 88: “an intellectual creation is an author’s own if it reflects the author’s personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices”, at 92: By making ... choices, the author of a portrait photograph can stamp the work created with his ‘personal touch’.
- Prepared by GA Mengozzi, Case 604/10 – Football Dataco - at 37: the Common Law test of “labour, skill, effort” lacks the continental European creativity test alluding to an expression of personality in the work while the European standard even in the database directive “echoes a formula which is typical of the continental copyright tradition”.
- Going back to Recital 16 of the Protection Term Directive: A photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account.



II. Individuality Test Applied – Examples from German Copyright Jurisprudence

- Five-step-test: Fixation (expression) - intellectual – creation – personal (individual) – level of creativity
- **Fixation:** Hamburg District Court (Landgericht), artists as art?



Eva & Adele (German performance artists: „Wherever we are is Museum“,

No Copyright protection because artists and work are identical. There is no fixation which can be separated from the person of the author. There is no property right in the person (# right of publicity).



II. Individuality Test Applied

- Five-step-test: Fixation (expression) - intellectuality – creation – personal (individual) – level of creativity
- (Human) **Intellectuality** = not being of technical or functional origin; serving a communicative purpose; expression of ideas and intellect



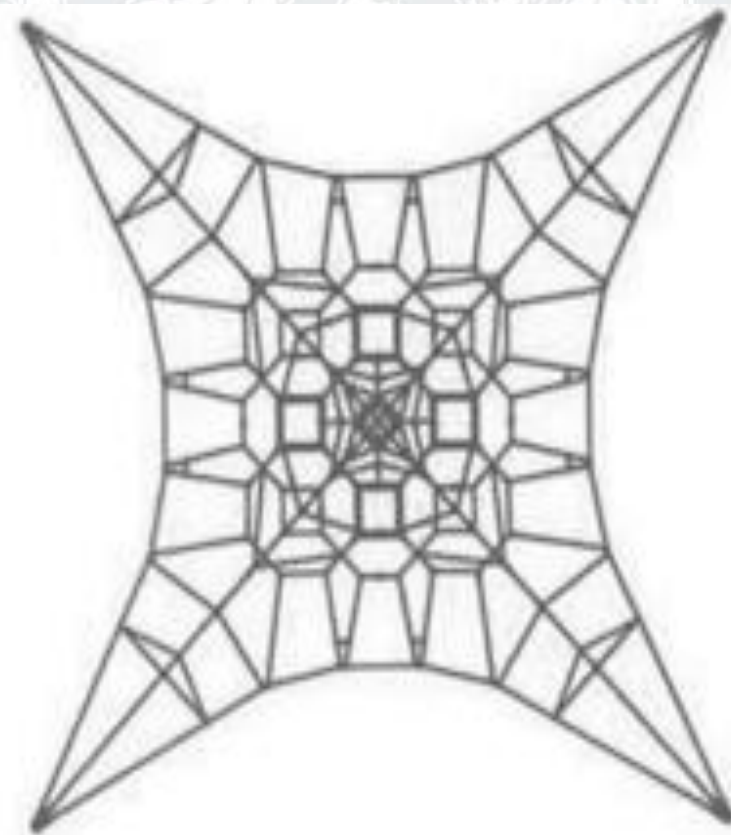
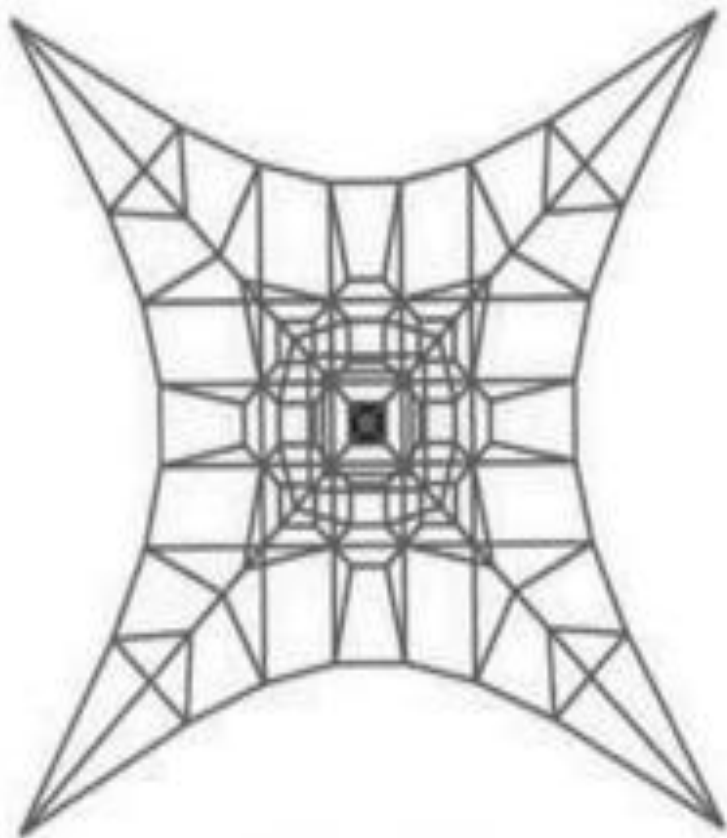
Source: GRUR 2012, 58

BGH: Copyright protection is granted for a creative (intellectual) arrangement and does not extend to functional aspects.

CJEU (C-393/09 – BSA/Culture Commission): “where the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable”.



BGH GRUR 2012, 58



II. Individuality Test Applied

- Five-step-test: Fixation (expression) - intellectuality – creation – personal (individual) – level of creativity
- **Creation** = not pre-existing in nature, more than a mere idea, rule of operation or calculation (see Article 9(2) TRIPS agreement)

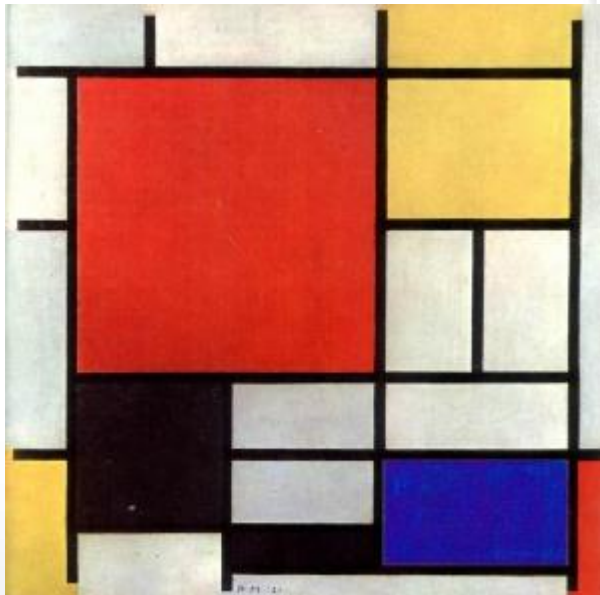


Marcel Duchamps, “Fountain” 1917, replica 1964, foto: Micha L. Rieser (Wikimedia, Musée Maillol, Paris)

„objet trouvé“ has not been created but just found and presented. It can be an object of art but it is not copyright-protected.

II. Individuality Test Applied

- Five-step-test: Fixation (expression) - intellectuality – creation – personal (individual) – level of creativity
- **Personal/individuality** = individual to this author, not to every other author or to ordinary craftsmanship



We know a Mondrian when we see one.

Generally: Double creation test:
Would every creator achieve this result if he worked independently (without knowing the original work)?

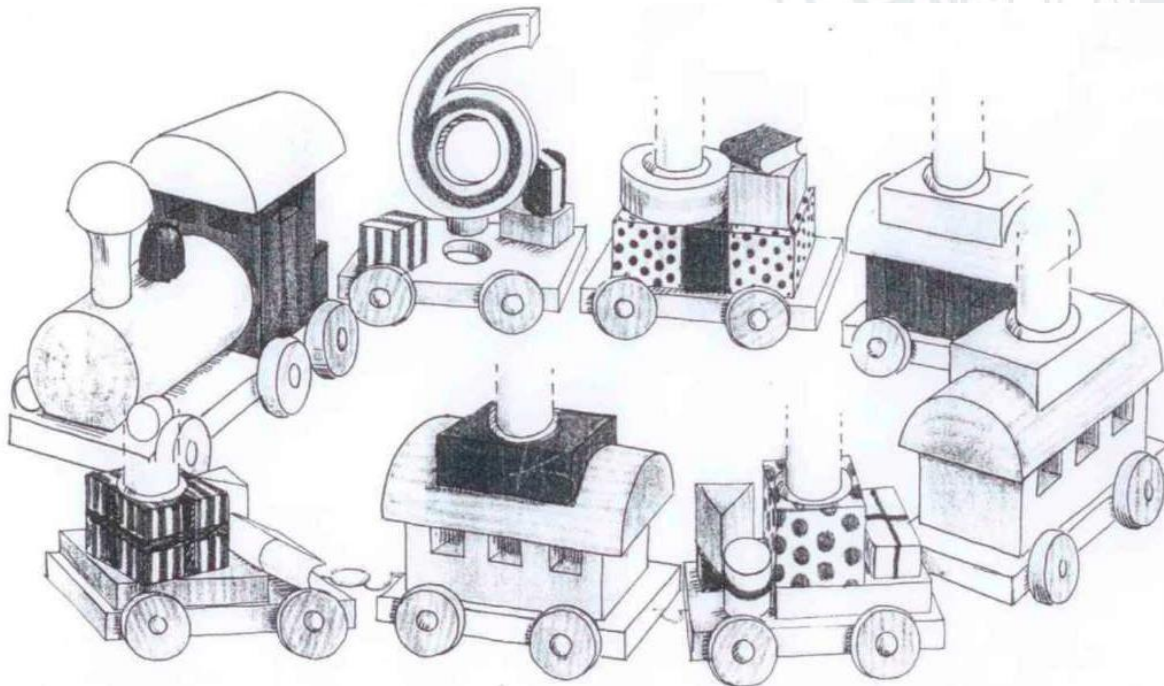
CJEU (Painer-case), para 92: „By making ... choices, the author of a portrait photograph can stamp the work created with his ‘personal touch’”.



II. Individuality Test Applied

- Five-step-test: Fixation (expression) - intellectuality – creation – personal (individual) – level of creativity
- **Level of creativity** – until recently: artistic value of certain creations, especially those of applied art. Recently abandoned in:

BGH GRUR 2014, p. 175 – Birthday Train



RBC: no judgment on the quality or merit of the creation, but:

- some minimal degree of creativity (Feist)
- „sufficient skill, labour or judgment (Cornish/ Llewellyn 10-05);
- Germany (until recently: artistic quality for applied art required)

Results

- The European standard „own intellectual creation“ fits with the German standard, although one might still argue that conceptually „personal“ is more than „own“. However, the Painer case shows that the European work notion is in line with the individuality test.
- The European work notion is a general test. It does no longer allow to have separate standards for separate work categories; it does not give room to a closed catalogue of work categories.
- The European criteria may be put in harmony with the German concept:
 - Intellectuality - more than functional, creative choice
 - Creation - more than idea or objet trouvé
 - Personal (individual)- own = „personal stamp“.
 - Fixation (expression) object of IP-rights
 - Level of creativity - own = individual

