Exam „European Copyright Law“ – Winter Semester 2023/2024, 13 Punkte

Paula Sophie Rathe (Studentin LL.B. IT-/IP-Recht)

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Information on your Exam (gekürzt):

Please presuppose that European Law is applicable and that the member states in question have implemented all facultative provisions.
National law must be taken into account.

1. How do we respect international treaties when applying EU legislation? Which problems occur when creating or amending international treaties?

2. A S.p.A. (società per azioni, an Italian stock corporation, “A”) is a clothing company in the high-price range registered in Milano, Italy. A is famous for its jeans designs worn by many celebrities around the globe. A’s jeans are characterised by the unusually low placement of the pockets, several eye-catching stitching across the jeans as well as ragged and open knees. The stitching also forms a heart on the backside of the jeans.

B B.V. (besloten vennootschap met beperkte aansprakelijkheid, a Dutch limited liability company, “B”) is a clothing company in the low-price segment based in Amsterdam, the Netherlands. B is a subsidiary of C K.K. (kabushiki-gaisha, a Japanese stock corporation, “C”), a clothing company based in Tokyo, Japan that globally sells affordable clothing.

The managing director of B (“MD”) is interested in clothing and admirers the achievements of A’s designers. Therefore, he envisages to sell an affordable version of A’s designs. He expects that this gives B an edge in the tough low-price clothing business.As a plain copy is too obvious, MD orders B’s designers to only take a part of the jeans design and tailor a prototype. This prototype only borrows the shape of the jeans, the stitching (also the heart shape on its back) and the ragged and open knees. The pockets are at the “usual” height.

MD then visits C’s headquarters in Tokyo to present his new ideas and to obtain funding for production. C’s board of directors is very pleased with MD’s presentation and consequently willing to provide funding as long as C receives a part of the profits.

B’s products are then sold in several stores in several European countries and online. Moreover, B also pays several influencers to present the jeans.

As A becomes aware of B’s marketing, A is infuriated and visits its lawyer. A’s lawyer instantly issues a cease-and-desist letter and sends it to both B and C.

B is of the opinion that there cannot be copyright protection for fashion. Fashion shall be protected by design law and the jeans of A are not registered as a design, which is true. Moreover, creation has always relied on what

has been there before, and certain designs are so famous that they become a "public good".

C holds the opinion that the actions of its European subsidiary are none of its business.

Do B and C infringe A's rights under copyright law?

3. Bonus question: Imagine you are A's lawyer: Which practical issues arise, and which tactical considerations do you need to do in case A intends to sue B and C?

Good Luck!

Question 1

There are different aspects when it comes to respecting international treaties. For one, the EU itself can be part of international treaties as the EU, according to EU legislation, has a legal personality and therefore legal capacity. But there is the requirement that it has to fall into the scope of competencies conferred to it by the member states. For Intellectual Property Rights this conferral is written in Article 118 TFEU.

To ensure consistent legislation concerning international treaties and EU legislation, international legislation and treaties are used to interpret EU law. An example of this is the three-step-test which was originally a part of the Berne Convention for the Protection of Literary and Artistic Works (from now on referred to as "Berne Convention"), in Article 13, and is now also a requirement in Article 5 (5) of Directive 2001/29/EC (from now on referred to as "InfoSoc Directive").

Additionally, EU legislation does sometimes not harmonize certain cases. International legislation can then provide a source of information in regards to how a certain case should be treated or what rights are provided. One example is the lacking harmonization of moral and adaptation rights in EU directives. Here the Berne Convention provides information on these subject matters.

As international legislation is only directly applicable if it has a precise and clear obligation, which is rarely the case, many treaties give the task of implementation directly to its member states.

There are various problems that can occur when creating and amending international treaties. These problems are nothing new as they also occurred when creating the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (from here on referred to as "TRIPS Agreement"). The original aim was to provide a harmonized approach to Copyright but also to Intellectual Property Rights in general. However, consensus building can be a big problem when it comes to creating general legislation, as every country wants its interests to be considered. When creating TRIPS, for example, there were many new countries that may have had different interests than bigger industrial countries like the USA.

This problem still prevails as can be seen regarding TRIPS. There has been no significant revision and it still does not include the incorporeal distribution of goods. There have been some new treaties by the WIPO that include digital rights management and communication via the Internet, but countries still rely on additional trade agreements to supplement TRIPS as it does not include modern ways of distribution.

Another problem is the enforcement of the treaties, as the provisions are sometimes not mandatory.

This point plays into the next problem: As mentioned before, international treaties aim to create a harmonized approach to a subject matter. But when every country has its own ideas on what should be regulated in which way, it gets really hard to find common ground. This not only leads to there being no amendments or revisions of a treaty but also to a harmonization of the bare minimum when first creating new treaties. This is also caused by the member states not wanting to give up too much control and wanting to keep their independence.

Another problem, especially for treaties with a subject matter that is of a digital manner, is that technological advancements are so fast, that it is hard to keep up with the amending of the treaties.

All in all, there are many different problems when it comes to creating and amending international treaties. Some specific to those with a technological subject matter but also general ones.

Question 2

Firstly, the question of whether fashion can be protected by copyright law, as B claims that fashion is only protected by design law.

The requirements for protection of work under EU law are not harmonized and even the question of whether the definition of the term 'work' is harmonized is disputed. In general, copyright is the incorporated product of creative human activity, which does not directly preclude the protection of fashion and its design from its definition. Even art and books are protected under copyright.

For a work to be protected, it has to be original in the sense that it is the author's intellectual creation that reflects his personality and shows his creative abilities in the sense that during the production of the work he had the opportunity to make free and creative choices. The second requirement is that it has to be the author's own intellectual creation in the sense that the subject matter can be identified with sufficient precision and objectivity. The design of the jeans is A's own creation and reflects a certain originality. It can be assumed that A had the opportunity to make free and creative choices and as the design is so unique and recognizable, the subject matter (the jeans design) can also be identified with sufficient precision and objectivity.

As the definition of a work in the scope of copyright is fulfilled, there seems to be no reason why fashion can't be protected by copyright. The jeans present an original work of A that can thus be protected by copyright.

It can also be concluded that A is the owner of the copyright as, while the ownership of copyright is not harmonized in EU legislation, the printed case description does not say differently. While one could argue that the case seems to be more about the protection of economic interests which could lead to protection via related rights and not copyright, A is neither a performer, nor a phonogram producer, a producer of the first fixations of films, a broadcasting organization, nor is the case about a database, it can be concluded that A should be treated as an author and is thus protected by copyright. As the actual designer, meaning the person, is not clear it can just be assumed that A as a corporation can be an author, as there are different understandings of the term.

As it is now clear that fashion can be protected by copyright law, the next question is which of A's rights have been infringed by B partly copying their design and selling the resulting jeans for profit. There seem to be no specific directives regarding the subject matter. Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art as, while there can be an argument about whether the jeans distributed by A are works of art, there is definitely no resale but rather a copying of design in the case in question. Consequently, one has to look at the InfoSoc Directive as it is a 'catch-all' for all subject matters related to copyright.

There is a variety of rights that B could have infringed by selling the jeans.

One of them is the reproduction right regulated in Article 2 (a) of the InfoSoc Directive. This right is a preventative right which also includes reproduction in part, as long as it is a part of the originality of the work. B did not copy the whole design of the jeans, but rather the shape and the stitching, which includes the heart shape on its back, as well as the ragged and open knees. The only part of the design that he did not copy is the height of the pockets. When looking at the elements that make A's jeans design unique, it can only be concluded that by just leaving away the low pockets the design of B's design still reminds of the original which was also B's intention when copying the design. The copied elements form a huge part of the originality and creativeness of the design so it can only be concluded that the copying of the elements by B is a reproduction in part which in return is protected by Article 2 (a) of the infoSoc

Directive. This gives A the right to authorize or prohibit direct or indirect, temporary or permanent reproductions of his work, the jeans, by any means and in any form, in whole or in part. The case description indicates that A was in no way okay with the reproduction of his design, as indicated by the cease-and-desist letter sent by them. This means that B infringed A's reproduction right as regulated in Article 2 of the InfoSoc Directive. There is also no apparent exception to this exclusive right in Article 5 of the InfoSoc Directive. It is not just a temporary reproduction as regulated in Article 5 (1), nor is the reproduction just for private use as regulated in Article 5 (2), glazing over the 'technological measures' mentioned in the exception. The design is also not meant as a caricature or parody as regulated in Article 5 (3) k), nor does it seem right to categorize it as a pastiche as the copying of the design was merely for reasons of profit and not primarily because it had really anything to do with the design itself.

Another one is the right of communication to the public regulated in Article 3 Nr. 1 of the InfoSoc Directive. This article provides A with the right to control how his work is communicated to the public, including making it available to the public, which entails a transfer of ownership. As seen in judgements of the CIEU, knock-offs, and copies of works are included in this exclusive right. There also needs to be a targeting of consumers in the member states. By selling copies of A's work in the EU and marketing the goods to consumers in the member states via influencers, B infringed on this right as B can no longer control how his work is communicated and may thus also affect the reputation of the design and company negatively. Consequently, there is an infringement of A's right of communication to the public.

There could also be an infringement of the distribution right regulated in Article 4 Nr. 1 of the InfoSoc Directive. B's design is clearly a copy of A's design, although only in part but still a copy of a substantial part of the subject matter. The mentioned article gives A the right to authorize and prohibit the distribution of the copies to the public by sale. B did not have A's authorization to sell copies of his jeans or the design which means that B infringed on A's distribution right regulated in Article 4 (1) of the InfoSoc Directive. It can only be concluded that the distribution right also covers copies in part as argued above. Article 4 (2) is not relevant in this case, as it is about the first sale or exhaustion in general.

Another one could be A's moral rights, which are not harmonized in the EU. Only the Berne Convention gives some insights into moral rights in Article 6bis thereof. According to Article 6bis (1), the author can object to any distortion, mutilation, or other modification of his work that would be prejudicial to his honor or reputation. It can be concluded, that a cheap knock-off of a designer's work can hurt their reputation by distorting the work and thus sending the wrong signals about the designer's intentions or the quality of the work. But as moral rights are not harmonized, the protection can vary between member states.

A last one could be the adaptation right, which is one harmonized in some cases but not this one. Like above, only the Berne Convention gives some insights about the protection of adaptation rights in Articles 8 and 12 thereof. While adaptation rights are not harmonized, adaptations of a work can be protected via the reproduction right if the work was changed and thus constitutes a reproduction. As mentioned above, A's work is protected via the reproduction right.

It can be concluded that by copying A's design and selling the resulting jeans, B infringed on the reproduction and distribution rights, as well as the right of communication to the public of A. There is also a possibility of an infringement of A's moral rights.

As to the question of whether C infringes the rights of A: C claims that the actions of its European subsidiary are none of its business. And one could think that, because technically B produced and sold the jeans, that C does not infringe on any rights. However, the actions of a third party can be attributed to someone else. In this case, B visited the headquarters of C in Tokyo and presented his new idea of the jeans to procure funding for the production. C's board of directors loved the presentation and was willing to provide funding as long as they received a part of the profit. So it can be concluded that C not only knew of B's ideas and intentions but also provided the necessary funding which B could not have realized his idea. Moreover, C even wanted a part of the profits in return and as a clothing company that globally sells affordable clothing, it can be expected

of C to know that the design of the jeans might infringe rights. Especially because A is famous for its jeans designs which are worn by many celebrities around the globe and therefore constantly in the spotlight. And it should also be taken into consideration that B is a subsidiary of C which makes an attribution of the actions of a subsidiary to the "mother company" all the more plausible. So all in all it can be concluded that, because C knew about the jeans and even made the production and sale possible, B's actions can be attributed to C which means that C also infringed A's rights by proxy.

Question 3

It should firstly be taken into account, that C is based in Japan and not in the EU and whether EU law is applicable. This should not be a problem as seen in the Blomqvist case where there was also the question of applicability if the company is not from the EU.

Furthermore, the question of the infringement of moral rights should be pursued in more detail as well as the jurisdiction.

Overall result of the exam

An above-average exam that covers most issues of the exam. There are only minor issues: Inter alia, not all arguments of the parties are covered, and some arguments can be worded more precisely (in particular regarding the question of an exclusivity of design protection). The exam is answered in comprehensible English.

Overall, 13 Points