

Max Mustermann

Sartoriusstraße 12

97072 Würzburg

[Matrikelnr.]

[e-mail address]

[semester]

**On the distinction between reproduction, adaptation and free use
in copyright law**

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List of abbreviations

ao	and others
Art.....	Article
cf.....	confer
eg.....	for example (exempli gratia)
esp.	especially
et al.	and others (et alii)
et seq.	and the following (et sequentes)
EU.....	European Union
ie.....	that is (id est)
UrhG.....	Urheberrechtsgesetz
WCT.....	WIPO Copyright Trea

A. Introduction

The term plagiarism is not found in copyright law. It generally refers to the theft of intellectual property, i.e. the deliberate appropriation of another person's intellectual property and the claiming of authorship of another person's work.¹ In contrast, the Copyright Act speaks of copyright infringement.

The term parody is also not found in copyright law. The two terms are located in the area of conflict between reproduction, adaptation and free use. The allocation to one of these three types of use can be of decisive importance for the legal status of the author of a work and the user of the work. The distinction between these individual types of use will be explained below. To this end, the basics of the delimitation are first outlined and the terms reproduction, adaptation and use are characterised. Subsequently, the concrete delimitation will be analysed and the special feature of parody will be discussed in particular.

B. Principles of demarcation

I. Categorisation of the rights of use

Pursuant to Section 11 sentence 1 UrhG, copyright consists of moral rights on the one hand and exploitation rights on the other. The term exploitation rights describes the author's authorisations with regard to the material side of copyright.

On the one hand, the exploitation rights give the author a positive right of use, meaning that only the author is authorised to exploit the work. On the other hand, the author can prohibit others from exploiting the work. He therefore also has a prohibition right.²

The exploitation rights primarily serve the financial interests of the author. At the same time, however, they also serve his idealistic interests by allowing him

¹ *Dreier/Schulze*, UrhG, § 23 Rn. 27.

² *Lettl*, UrhR, § 4 Rn. 30.

to decide whether and in what way his work should be utilised.³

The owner of the exploitation rights is the author. Although copyright is inheritable pursuant to Section 28 (1) UrhG, the author himself cannot transfer either the moral right or the exploitation rights pursuant to Section 29 (1) UrhG. They are inextricably linked and provide uniform protection for the author (monistic theory).⁴

The provision of Section 15 UrhG lists a number of exploitation rights. It explicitly mentions reproduction pursuant to Sections 15 (1) No. 1, 16 UrhG. Not mentioned are adaptation and free use pursuant to Sections 23 and 24 UrhG. Whether the adaptation also constitutes an exploitation right within the meaning of

§ 15 UrhG is controversial. The list in Section 15 (1) UrhG is in any case not exhaustive, as the wording ‘in particular’ indicates.

However, the question of whether the adaptation also constitutes an exploitation right within the meaning of Section 15 UrhG is not of decisive importance for the delimitation and should therefore be left open here.

II. General protection requirements

The assertion of exploitation rights generally requires that a copyrightable work within the meaning of Sections 1, 2 UrhG exists, i.e. a protectable work of literature, science or art. Section 2 (1) UrhG contains a non-exhaustive list of examples of works.⁵ According to Section 2 (2) UrhG, only personal intellectual creations, i.e. products that represent something new and unique through their content, form or the combination of content and form, are protected works.⁶

Excessive demands are not placed on originality. It therefore does not have to be a ‘masterpiece’.⁷

³ *Loewenheim*, UrhR, § 19 Rn. 1.

⁴ *Lettl*, UrhR, § 4 Rn. 2; *Wandtke/Bullinger/Bullinger*, UrhG § 11 Rn. 1.

⁵ So auch: Gesetzesbegründung, BT-Drucks. IV/270, p. 37.

⁶ Gesetzesbegründung, BT-Drucks. IV/270, S. 38.

⁷ *Lettl*, UrhR, § 2 Rn. 25.

The degree of uniqueness required for the necessary level of design can generally still be present in a simple creation, without the artistic value being important, the so-called small coin.⁸

In any case, the uniqueness must lie above the mechanical-technical or routine design, the craftsmanship or the commonplace.⁹ Otherwise, the necessary level of creativity is not achieved. However, there is still protection as a related right pursuant to Sections 70 et seq. §§ 70 ff. UrhG can still be considered.

Copyright protection arises with the creation of the work and expires seventy years after the death of the author in accordance with Section 64 UrhG. After that, a work is considered to be in the public domain, meaning that it is no longer protected by copyright. Anyone is then free to reproduce, adapt or otherwise use the work.

Pursuant to Section 3 sentence 1 UrhG, the adaptation of a work can also obtain copyright protection, provided that the adaptation constitutes a personal intellectual creation of the adapter within the meaning of Section 2 (2) UrhG. § Section 3 UrhG regulates under which conditions a copyright of the adapter arises through the adaptation, but not whether an adaptation and its utilisation are also permissible. This is regulated by § 23 UrhG.¹⁰ The question of whether an adaptation copyright arises must therefore be separated from the question of whether the adaptation may also be utilised or, in the case of Section 23 sentence 2 UrhG, whether the production of the adaptation is already permissible.

⁸ BGHZ 181, 260 Rn. 27 = GRUR 2010, 193 – *Sommer unseres Lebens*; BGH, GRUR 1981, 267 (268) – *Dirlada*; Möhring/Nicolini/Ahlberg, § 2 Rn. 78.

⁹ Möhring/Nicolini/Ahlberg, § 2 Rn. 77.

¹⁰ Chakraborty, S. 30.

Final declaration

I declare that I have written this thesis myself and without the help of others and that the text has not been prepared with the aid of sources and aids other than those specified and that no artificial intelligence has been used.

Würzburg, 12.06.2024

Max Mustermann

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