



Comment on the the Court of Appeal of Antwerp’s Decision in “*Photos of Shower Drains*”

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1 Decision Summary

The claimant, a professional photographer, took photographs of a shower drain inside a shower, which appeared in numerous product brochures, websites, etc. He gave an exclusive licence of his copyright in his photos to the claimant company. The defendant company, a competitor of the claimant, reproduced and communicated to the public those photographs without permission in its own product brochure. The interest of this decision lies mainly in the judge’s very detailed analysis of the originality of photographs. After having reminded of the Court of Justice of the European Union’s (CJEU) case law on the topic, the judge took great care when analysing such originality. He also reminded that the burden of proving originality is on the claimant. The judge considered the elements given by the claimant carefully and recalled the *Painer* decision in which the CJEU distinguished three phases: the preparation phase, the phase of taking the photo, and the development phase.

While discussing the photos’ originality, he clearly stated that “the nature of the photo (product photo) ‘in itself’ does not mean that it is devoid of an original character (copyright protection)” and that when “an author produces a work in the context of his professional activities and displays the necessary professional expertise, it does not prevent the work as such from being original”. As the judge explained:

For a translation of the Court of Appeal of Antwerp’s decision in “*Photos of Shower Drains*” into English see this issue of IIC at <https://doi.org/10.1007/s40319-024-01542-9>.

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In order for such a work to be subject to copyright protection (e.g. created in the context of the professional performance of his assignment), the (product) photographer must in one (or more) of the phases (preparatory phase, actual photo phase and/or development/editing phase) transcend the narrow purpose of the (product) photos by “emphasizing his personality” (externalized in the free and creative choices). This can be expressed by deviating from the (functionally) designated standards (in one or more of the indicated phases). In other words, the “personal note” of the product photographer should be able to be found from the product photo.

The judge then endorsed the first judge's reliance on the CJEU's ruling in *Cofemel* (para. 50) that copyright protection is reserved for objects that deserve to be classified as works. He also endorsed the first judge's analysis of the three phases for the claimant's two photos and concluded that all the choices made during staging, exposure and angle were either non-existent, fully dictated by constraints or are not proven to be free and creative (paras. 18–20). However, at para. 21, relying on the CJEU's ruling in *BSA* he held that because the ideas and expressions merge, the photos do not enjoy copyright protection.

That said, the claimant still won but on grounds of unfair competition, namely Art. VI.104 of the Belgian Code of Economic Law which states: “Any act contrary to honest market practices by which a company harms or may harm the professional interests of one or more other companies is prohibited”. Whereas the first judge had stated that simply copying a work was not an act of unfair competition, the second judge seemed to disagree because he found that the defendant breached the law by having engaged in parasitic competition (para. 26). The court of appeal reversed the first instance judge's decision on this point. According to the court of appeal judge, the defendant's editing of the photos is minimal, the parasitism is not systematic as only two photos were copied and there is no likelihood of confusion. As the claimant does not prove its damage by way of presenting as evidence the payment of the claimant company to the claimant photographer, the court of appeal sets the amount of the damage for parasitic competition *ex aequo et bono* at EUR 500.00.

2 Comment

This decision is interesting on several fronts. As stated above, the court of appeal took great care in determining whether the photos were original. In so doing, the court applied the CJEU's precedents well. The decision shows that if the claimants do not discharge their burden of proof regarding the work's originality, they will not win. A similar trend is taking place in France where the courts have for over a decade taken a very strict stance in the proof of originality.¹ So much so that in December 2020 the Superior Council of Literary and Artistic Property (CSPLA)

¹ See e.g. A. E. Kahn, (2023) “Un an de droit de la mode” 9 CCE, p. 17; A. E. Kahn (2012) “Un an de droit de la mode” 9 CCE, p. 20; P. de Candé (2022) *Propriétés Intellectuelles*, pp. 58–59, comment on Court of Appeal of Paris, pole 5-2, 15 April 2022, RG No. 20/07813, *SAS Made in design & Koziol v. Tarrerrias Bonjean*.

issued a report asking the legislature to provide for a presumption of originality or for the parties to share the burden of proof. Indeed, perhaps the pendulum has swung too far the other way.² Nevertheless, in cases of so-called “low-originality” works such as some photographs but also some works of applied art, the CJEU’s case law points to a stricter verification of originality. The Court of Appeal of Antwerp relies on the correct points from the correct CJEU decisions. The line must be drawn somewhere and with a detailed step-by-step check of the three “photographic phases” as detailed in the CJEU’s *Painer* decision, courts can take the most informed decision in every case. In this, the decision can be applauded.

One criticism we can make of the decision is that the ending of the discussion on originality amalgamates the originality requirement with the merger doctrine according to which if there are only a handful of ways to expression an idea, the former merges with the latter. In addition, the judge’s statement is a bit contradictory with his statement at para. 15 where he said that there was no issue with the first requirement as there was expression in the photos. However, we can fault the judge only a little as the CJEU has itself perpetuated this amalgamation in many of its judgments including in the latest on this point, namely *Brompton*. In paras. 27 and 31, the Court of Justice conflates idea/expression and originality.³ The amalgamation shows that it is difficult to differentiate between idea and expression and expression and originality. Indeed, one can say that they are on a continuum as was hinted at by the House of Lords in 2001 in a defining English case.⁴ Nevertheless, the two requirements need to be distinguished as an original idea can never be protected by copyright. The CJEU has the opportunity to clarify its case law on this point in the twin pending cases *MIO* and *konektra*⁵ and it would be well-advised to do so.

Another criticism of the decision is to follow Belgian precedent, which states that the prior art must be taken into account when assessing originality (para. 13). However, the prior art has no place as such in the appreciation of originality. The prior art is only relevant in patent and design law. In these fields of law, copying is

² Available at https://www.culture.gouv.fr/fr/content/download/281377/file/CSPLA%20-%20Rapport%20Preuve%20de%20l%27originalite%CC%81_d%C3%A9cembre%202020.pdf?inLanguage=fre-FR.

³ *SI, Brompton Bicycle Ltd v. Chedech/Get2Get*, Case C-833/18, 11 June 2020, ECLI:EU:C:2020:461: “27 In that regard, it should be noted that the criterion of originality cannot be met by the components of a subject matter which are differentiated only by their technical function. It follows in particular from Article 2 of the WIPO Copyright Treaty that copyright protection does not extend to ideas. Protecting ideas by copyright would amount to making it possible to monopolise ideas, to the detriment, in particular, of technical progress and industrial development (see, to that effect, judgment of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259, paragraphs 33 and 40). Where the expression of those components is dictated by their technical function, the different methods of implementing an idea are so limited that the idea and the expression become indissociable (see, to that effect, judgment of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraphs 48 and 49).

31 In that regard, as recalled in paragraph 24, 26 and 27 of the present judgment, that cannot be the case where the realisation of a subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom or room so limited that the idea and its expression become indissociable.”

⁴ *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416.

⁵ Cases C-580/23 and C-795/23.

irrelevant, i.e. a design or invention will not be new if it is in the prior art; whether the applicant was unaware of it and thus did not copy it is irrelevant. In copyright law, independent creation can lead to protection even if a similar work already exists. So long as the creator did not copy a previous work, the work will be copyright-protected. Therefore, “prior works” are only to be taken into account to determine originality if they are copied by the creator. If the creator *copies* from the prior art, there is no originality (unless the combination of different pieces of prior art is original). However, taking into account standards (as the judge does at para. 18), and for that matter current trends or public domain elements to oust originality is correct. Again, these are questions that the CJEU will have to answer in *MIO* and *konektra*.

Lastly, the decision is interesting on the point of unfair competition law. The Belgian Code of Economic Law (which simply restates Art. 10^{bis}(2) of the Paris Convention) is conducive to different interpretations concerning acts of unfair competition, as can be seen in the different rulings by the two courts in this case.

The court of appeal's judgment shows that even if the claimant loses on copyright, unfair competition law can come to the rescue. This can be criticised because simply copying something unprotected by an intellectual property right should be allowed. It is obvious that by doing so the defendant will obtain an advantage because he will not have to fork out the cost of the work (here photographs) but this is what free competition looks like. Only if competitors do something other than copying, such as denigrating the competitor or trying to cause consumer confusion, should the law punish them. Otherwise, parasitism cuts across intellectual property rights and competition is no longer free. We will not repeat this age-old debate.⁶ Perhaps, it is time for the EU legislature to act bravely and harmonise this part of unfair competition law. Despite supposed irreconcilable differences between Member States, it is long overdue and can cause single market distortions as some Member States (and as we can see within Member States too) punish parasitism (e.g. at least some courts in Belgium, Italy, France) and others do not (e.g. Germany).

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⁶ For a discussion, see e.g. E. Derlaye (2008) *The Legal Protection of Databases, A Comparative Analysis*, Elgar, chapter 3 and the references cited there.