

WIPO-CNEL Conference, 11 December 2009

Non Traditional Copyright Subject Matter

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The following presentation addresses the international norms governing the subject matter of copyright (originality; non protection of ideas or processes; special rules for applied art) and then offers two examples of non traditional subject matter: a wheel of Grana carved to resemble the Colosseum, and a website featuring handbags designed by an individual craftswoman.

I. Subject matter of copyright in general

A. Subject matter within the protection of international copyright norms:

The Berne Convention, art. 2(1) covers a very broad swath of subject matter: “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression . . .” There follows an extremely long list of examples, including “works of applied art.” Berne art. 2(5) includes “collections of literary or artistic works such as encyclopaedias and anthologies” subject to the condition that “by reason of the selection and arrangement of their contents” these collections “constitute intellectual creations.” The concept of “intellectual creation” in fact informs all Berne-protected subject matter; thus a “literary and artistic work” must evidence some creativity.

Berne does not further specify how much creativity an “intellectual creation” entails, but the “originality” threshold in national law is low. The US requires a “modicum of creativity”; the emerging standard in the European Union is the author’s “own intellectual creation.”

B. Exclusions from the subject matter of copyright:

The Berne Convention implicitly, and the TRIPs Accord explicitly exclude copyright coverage of ideas: “Copyright Protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such,” TRIPs art. 9(2). Thus, for example, while “every production in the scientific domain” comes within the subject matter of copyright under Berne, the ideas and information disclosed in such “productions” remain outside the scope of copyright.

C. Borderline subject matter

1. Computer programs and databases

These works are now clearly included within the subject matter of copyright, see TRIPs art. 10. Nonetheless the requirements of “intellectual creation” and non protection of methods of operation will often lead to a limited scope of protection. TRIPs makes this explicit in connection with databases: “Compilations of data or other material which by reason of the selection and arrangement of their contents constitute intellectual creations” are covered, but protection “shall not extend to the data or material itself.”

2. Works of applied art

Although these appear on the list of “literary and artistic works,” and may manifest considerable intellectual creativity, they are not automatically protected in all member States: according to Berne art. 2(7), “it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art . . . as well as the conditions under which such works . . . shall be protected . . .” Thus, member States may through laws on industrial models and designs impose higher thresholds of creativity on works of applied art and may subject them to formalities such as registration requirements which may not be imposed on other kinds of “literary and artistic works.” The Berne Convention does not, however, define what constitutes

“applied art.” Each member State would draw its own line between art and industrial design. Nonetheless, the category would generally cover the utilitarian shape of useful articles.

II. Examples of Non Traditional Copyright Subject Matter

A. Food Sculptures: the Coliseum carved from a wheel of *Grana Padana*



The cheese is not within the subject matter of copyright (though “Grana Padana” may be a protected geographical indication). But the carving of the cheese into a representation of the Coliseum in Rome would be a protectable artistic work, notwithstanding its somewhat ephemeral medium of fixation. Under the principles outlined above, however, the scope of the protection is narrow. First, the sculptor (or caterer) may not claim the idea of carving the wheel of cheese into the shape of the coliseum. Second, and relatedly, if a second sculptor carves a wheel of Grana (or Reggiano or Gouda . . .) to look like the coliseum, similarities between the two carvings that are attributable to their common

representation of the Flavian amphitheater give rise to no claim on the part of the first sculptor. Only those representational details that are original to the first sculptor are protectable. Moreover, to the extent that these details may have been dictated by the peculiarities of the cheese medium, rather than by the autonomous authorial choices of the sculptor, other carvers are free to copy them.

B. Website of hand-crafted knit handbags



1. Website design

The website would be protectable under Berne-TRIPs norms as a collection of works (photographs and descriptive text) or a compilation of material creatively selected and arranged. The visual presentation of the photographic and text elements would meet the generous standard of originality implicit in Berne and prevalent in national laws. That the presentation facilitates the useful purpose of enabling online shopping does not disqualify it from protection. While utility may be a bar to the protection of artistically designed functional *objects* (see 2. infra), it does not preclude copyright for descriptions, representations or explanations of how to perform a useful function.

2. The handbags

By contrast, international norms would not require copyright coverage for the handbags. These are utilitarian articles, however attractively designed. Moreover, the knitting motifs are standard patterns and probably would not be analogized to protectable fabric designs. (An original stitching pattern, however, might qualify with respect to the design of the pattern in the wool, but would not extend to the shape of the handbag.) Berne does not require member States to protect products of this kind by copyright notwithstanding their creativity. Some member States may, as a matter of their domestic law, nonetheless bring industrial design within the scope of copyright, under the theory of “unity of art” which does not discriminate between Art and Utility. But the Berne Convention does not require those States to protect applied art from member States that do so discriminate. On the contrary, under art. 2(7) if the work of applied art is protectable in its country of origin only under a design patents or industrial designs and models regime, then other member States would protect the work under their design protection laws rather than their copyright laws. The country of origin of these handbags is the US, whose copyright law would deem them unprotectable useful articles. Their protection, both in the US and under Berne, therefore would turn on whether the handbags met the standard of creativity required under local designs and models or design patent laws.