

**COPYRIGHT**

**Television**

**"The Tunnel"**

District Court of Munich

ZUM-RO 2001/23

The Munich court was concerned with two questions. First, it had to decide on the question of the original authorship in an exposé and script/treatment of a tv-film. The second issue was whether a company, a manager of which was a joint author of the script, could sell the rights in the work and transfer the copyright in it.

**Joint authors and initial ownership of copyright in script/treatment**

On January 8, 2001 the defendant company concluded a contract of sale of the copyright of a script and treatment for the tv-film *The Tunnel* with the plaintiff. Clause 1 of the contract stated that the manager of the defendant was the joint author of the script and treatment and jointly owned the copyright in the script and treatment of the tv-film. According to clause 2 the defendant company sold these rights to the plaintiff.

Who owned the initial copyright in the exposé written by the manager of the defendant with the help of two assistants? All essential features of the exposé originated from the manager. Only the transformation, in particular the wording and the dramatisation of the treatment were made with the help of two assistants. According to the German copyright law only natural persons can be initial owners of the copyright. The law does not recognise a copyright in mere ideas or in a concept which has not been reduced to a material form. An idea as such is not protectable by copyright. The quality of a work which is a condition for protection comes about only if there is a reduction of the idea to a material form, such as constituting a literary work of the mind, which has the necessary level of originality. If there are two or more persons involved in this process, the contributions of which are not separable, there is a typical case of a joint authorship (in the sense of Article 8 of the German Copyright Act). Typically, there will be a case of a joint authorship if the contributions cannot be differentiated, in particular, if several authors have jointly formulated a text. The test is: would it be possible to exploit the contributions to the work independently of each other. If not, there is a work of joint authorship the copyright of which arises jointly in the co-authors, see Article 8(1) of the German Copyright Act. As a consequence, the ownership is held jointly by the co-owners. The joint property can only be transferred collectively.

Thus unlike many other national copyright laws, according to German copyright law the authors of a script for a tv-film do not become joint authors of the tv-film—they are, just like the composer of the film music, authors of pre-existing works which are independent of the film work. Again, unlike U.S. law, German law does not know the work for hire doctrine according to which the initial ownership in the copyright of an audiovisual work may arise in the (legal) person who employed the persons who created the work. The copyright arises always in the individual person(s) who created the work.

**German law does not permit the sale or transfer of copyright**

Concerning the validity of the contract of sale the Court found that the German Copyright Act does not permit the transfer of the copyright as such—the rightholder may transfer only the exploitation rights. Only within the scope of Article 29 sentence 1 of the German Copyright Act (thus within the fulfilment of a disposition operative on death or of an obligation arising from the dissolution of a plurality of heirs) a transfer of the copyright may occur. In all other cases the copyright cannot be transferred according to sentence 2 of this provision. Accordingly a joint author may not dispose of his creative contribution with regard to the joint work. The Court therefore held that the contract on the sale of the copyright was invalid and without effect, since it constituted a violation of Article 29 of the German Copyright Act.

However, it often occurs that the parties to copyright contracts who do not know that the copyright itself cannot be transferred unless it is within the limits of Article 29 of the German Copyright Act, "agree" on a transfer of the copyright. German legal practice solves this problem by resorting to an interpretation of the contract which transforms the transfer of the copyright to a licence for the exploitation of the work (Gerhard Schricker, "Urheberrecht" (2nd ed., C.H. Beck, Munich 1999), No. 9 to Article 29):

"The contract is interpreted in such a manner that the content is directed towards the only possible transaction of the grant of the right of use."

Yet it seems that in this case the Court saw no possibility of curing the unlawful intention of the parties by interpreting their transaction in such a manner that it would result in a legally permissible

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transaction that is to say the grant of a licence for the exploitation of the copyright. The Court did not even discuss this possibility. Taking into account that by reason of the state of protection principle German law is applicable to international contracts with regard to the issue of the transferability of the copyright in Germany, the relevance of this decision becomes evident. But it cannot be expected that German courts will consider that international copyright contracts which assert the transfer of the copyright including Germany will be without effect insofar as Germany is concerned. Thus for practical reasons it is very likely that the German jurisprudence will continue to treat copyright contracts which assert a transfer of the copyright as licence contracts which grant a comprehensive exploitation right.

## Hungary

**TRADE AND SERVICE MARKS**  
Pepsi Co. Inc. v. Summit-Agro  
Hungaria kft.  
Metropolitan Court  
3.Pk.22 864/1999/10

**Reasoning:** On April 30, 1993 the respondent applied for the registration of the coloured device mark SA at the Hungarian Patent Office for goods and services (hereinafter goods) listed in Classes 1, 30, 31, 35 and 42. The mark shows a red circle in a beige-coloured field which is cut in two symmetrical parts (upper and lower parts) by a wavy line in the middle. In this line the graphically stylised letters S and A are shown, between the two letters there is some distance. This mark has been registered under Reg. No. 141 283.

The applicant is the owner of the coloured device mark Reg. No. 125 989 enjoying priority as of May 19, 1986. Protection covers mineral water, carbonated waters and other soft drinks, as well as concentrates and other basic materials for beverages. The trade mark consists of a white ground of five red horizontal lines being parallel to each other and underneath five blue lines arranged likewise. The lines are thicker in the middle so that the lines follow tightly on each other to form the shape of a circle and between the red upper parts and the blue under parts there is a wavy stripe/line.

On October 20, 1997 the applicant claimed on grounds of Article 4(1)(c) of the Law XI of 1997 on Trademarks, cancellation of the trade mark SA in respect of all goods figuring in the lists of goods. He argued that his own trade mark is well-known, it enjoys a good reputation and the trade mark in respect of which cancellation is sought is identical to it; the letters SA shown in the inner part of the wavy line do not change this situation.

The respondent argued that the claim for cancellation should be rejected. He stated that the total impression created by the two trade marks on consumers is quite different. The horizontal stripes of the earlier trade mark show broken lines like rolling shutters, while his own trade mark has no similar features; the letters SA are the elements which are dominant on it.

The Hungarian Patent Office rejected the claim for cancellation. The Office stated that there could be no confusion between the two trade marks. The different impression they create on the consumers is based on the difference of the colours, the different appearance of the circle-forms, the opposite direction of the wavy lines, and the letters SA figuring in the trade mark in respect of which cancellation was claimed.

The appellant applied to the court for the decision of the Office to be set aside and that the trade mark SA be cancelled. He argued that consumers might confuse the trade mark because of the circle form, the wavy line in the middle and the red-blue colour which were characteristic of his trade mark.

The respondent proposed in his motion that the decision of the Office be approved. He maintained his earlier arguments and made reference to the fact that the goods marked by the two trade marks are quite different, in the trade mark SA there is no blue colour. Thus with regard to the inscription SA the two trade marks were not confusing.

The Appeal was rejected.

According to (1)(a) of Article 33 of the Law No. XI of 1997 on the Protection of Trademarks and Geographical Indications "the mark shall be cancelled if the subject matter of the trademark protection does