

German Federal Court of Justice dismisses copyright protection of specific Birkenstock sandals

Utility objects require proof of creative freedom

By Dr. Ricardo Vocke-Kerkhof

On 20 February 2025, the German Federal Court of Justice (BGH) announced its ruling in the copyright case of Birkenstock. In the course of three revisions of appeal rulings by the Higher Regional Court of Cologne, the BGH ruled that the well-known Birkenstock models

“Arizona”, “Madrid”, “Boston” and “Gizeh” do not enjoy copyright protection. These models do not constitute works of applied art pursuant to § 2 (1) No. 4 (2) of the German Act on Copyright and Related Rights (UrhG), as Birkenstock was unable to demonstrate that the design of



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The Federal Court's ruling affirmed that the design of Birkenstock sandals is largely determined by functional requirements and therefore does not exhibit artistic freedom in the sense of copyright law.

the sandal models utilized existing creative leeway in an artistic manner. This ruling is in line with the BGH's previous case law, according to which everyday objects can enjoy copyright protection even if the level of design is low. However, an individual intellectual creation must still be proven, which the court stated did not apply in the Birkenstock case.

Background to the verdict

The plaintiff Birkenstock Group distributes the world-famous Birkenstock sandals.

In 2023, Birkenstock filed a lawsuit against three companies before the Regional Court of Cologne. The defendant companies sold sandal models that were very similar to those of the plaintiff. The Regional Court upheld these actions and ruled that the plaintiff's sandal models in dispute were protected by copyrights, which had been infringed by the defendant's imitations.

The defendants appealed against these verdicts to the Higher Regional Court of Cologne. In response to these appeals, the Higher Regional Court dismissed Birkenstock's claims on the grounds that Birkenstock's sandals do not enjoy copyright protection. The court concluded that the sandals in question are not to be regarded as "protected works" within the meaning of copyright law, as the plaintiff had not proven that the design of the sandals utilized creative freedom in an artistic manner. In the case of utility objects like the Birkenstock sandals, it is necessary to distinguish between protection under copyright law

and protection under design law. The purpose of protection under design law is determined by the fact that a certain form follows a function. Objects that are protected by copyright law on the other hand, are personal individual creations that do not have to follow any functional requirements and can stand on their own without a purpose. Although the BGH and the European Court of Justice have recognized that designs and copyrights may overlap, according to the Higher Regional Court of Cologne, this only occurs in exceptional circumstances.

When determining copyright protection, it is relevant whether the object of use is the result of free artistic activity and whether this artistic freedom can be recognized in the object. Mere aesthetics alone are not a criterion for the assumption of copyright protection, as art does not have to be aesthetic in itself in order to be successful. In the opinion of the Higher Regional Court, the Birkenstock sandals did not meet these requirements for copyright protection, as the shape of the sandals is largely dictated by their function. In addition, the sandals did not stand out sufficiently from previous known designs. In the eyes of the court, the sandals remained within the realm of craftsmanship and did not reach the realm of art.

Contents of the verdict of the BGH

The BGH has confirmed the opinion of the Higher Regional Court of Cologne.

The BGH initially stated that the Higher Regional Court was right to assume that copyright protection requires

(1) that there is creative freedom and (2) that this freedom has also been utilized in an artistic manner. Free and creative work is excluded if technical requirements, rules or other constraints determine the design.

In addition, the BGH stated that the Higher Regional Court dealt with all relevant design features of the sandals and concluded without error of law that the Birkenstock sandal models did not make full artistic use of the existing creative scope.

Significance for future cases

Due to the long term of protection (70 years after the death of the originator), a copyright is a far-reaching protective right that excludes imitations for a long time. However, since a copyright in Germany cannot be registered, there is a considerable degree of uncertainty regarding the existence of such a right. This uncertainty applies both to the originator and to any competitor, and will ultimately only be clarified if the copyright is successfully (or not) enforced in court.

With this new verdict, the BGH has now substantiated its previous case law and emphasized that when enforcing copyright protection of utility objects in court, it is important to demonstrate in detail whether there was creative freedom in the design of the utility object and that this freedom of design was utilized in an artistic (and not merely aesthetic) manner. The burden of proof lies with the party invoking the copyright.

It is therefore advisable for creators to record their intentions and thoughts on the design of the work during the creative process. Otherwise, due to the long period of copyright protection, there may be a risk that the creator's intentions can no longer be proven at a later date.

In addition, other intellectual property rights (design and trademarks) can be used to ensure accompanying protection for these products. The advantage of this is that these rights are included in a register and there is more certainty about their existence as a result. However, it has to be noted that such an approach is not an option for every utility product and that a registration could even have an adverse effect on copyright protection, as the Higher Regional Court of Cologne considered the coincidence of design and copyright to be an exception rather than the rule. Therefore, it should be considered on a case-by-case basis whether accompanying protection through other IP is possible and sensible. ←

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