Art. 2 CopA: Definition of Works

Function and structure of the provision

Art. 2 CopA defines what copyright protects. Paragraph 1 gives the general definition: works are literary and artistic intellectual creations with individual character, irrespective of their value or purpose **Art. 2 CopA**. Paragraph 2 lists categories "in particular". The list illustrates the definition and does not replace it, so every listed category must still satisfy paragraph 1 **Art. 2 CopA**. The Federal Supreme Court applies it this way. Applied art, for example, is a category that can be protected in principle, but a given object is protected only if it shows individual character **4A_78/2011**.

Paragraphs 3, 3bis and 4 do different jobs:

- Paragraph 3 confirms that computer programs are works. A program is still protected only if it has individual character **BGE 125 III 263**.
- Paragraph 3bis genuinely extends protection: certain photographic depictions count as works even without individual character **Art. 2 CopA**.
- Paragraph 4 covers drafts, titles and parts of works, but only insofar as they themselves meet the requirements of paragraph 1 **Art. 2 CopA**.

The only amendment to Art. 2 is paragraph 3bis. It was inserted by the Federal Act of 27 September 2019 and has been in force since 1 April 2020 **Art. 2 CopA**. Its temporal effect is discussed in the section on paragraph 3bis.

Several Federal Supreme Court decisions cited below were decided under the former Copyright Act. They are flagged where their vocabulary differs from current law, in particular "originality" in the sense of the author's personal imprint.

Work status is the gateway to the whole Act. Protection arises when the work is created (see the section on perceptible form). In principle it lasts until 70 years after the author's death, or 50 years for computer programs **Art. 29 CopA**. The Federal Supreme Court treats this long term as a reason not to set the individuality requirement too low for any category of work **BGE 148 III 305**.

Intellectual creation: a human act in perceptible form

Human creation

Copyright arises in the person of the human creator. Under Art. 6 CopA, the author is the natural person who has created the work **Art. 6 CopA**. Creating a work is a factual act (Realakt), not a legal transaction. It requires neither legal capacity nor an intention to acquire copyright **BGE 116 II 351**.

What the Act requires is a creative act that expresses the human mind in the work. In the trance-speech case, the Federal Supreme Court held that it does not matter whether the idea made perceptible rests on reflection or on inspiration. Even claimed inspirations from the beyond "are legally attributable without restriction to their human recipient" ("Jenseitige Inspirationen sind daher rechtlich uneingeschränkt ihrem menschlichen Empfänger zuzuordnen") **BGE 116 II 351**.

That case was decided under the former Act. Under current law the Court has held that a work must rest on human will and express a thought ("Als geistige Schöpfung muss das Werk auf menschlichem Willen beruhen; es muss Ausdruck einer Gedankenäusserung sein") **BGE 130 III 168**.

The Federal Council's dispatch on paragraph 3bis applies the same premise to photographs. A creation is intellectual only if human action underlies it. Automatically produced images, such as radar photographs, surveillance-camera footage and camera-trap pictures, are therefore outside protection **BBl 2018 591**.

The human-creator principle also governs authorship disputes:

- A legal entity cannot be an author, and who created the work is a question of fact **CCIV cm17-018623-402017phc/2017**.
- A co-author must make a creative contribution. Someone who merely carries out another person's instructions, with no room for their own creativity, is an auxiliary and not a co-author **BGE 136 III 225**.

None of the Federal Supreme Court decisions discussed here addresses whether output generated by artificial intelligence can be a work. Current parliamentary work concerns a different question, namely AI providers' use of protected works:

- The Council of States adopted Motion 24.4596 with the Federal Council's support **AB 2025 S 347**.
- The National Council committee report records that copyright protects form, not information or content as such **Kommission für Wissenschaft, Bildung und Kultur Nationalrat: Bericht** .

On the authorities above, the deciding question for generated output is whether a natural person's creative decisions are expressed in the result. The mere operation of a technical process is not enough **BGE 130 III 168 BBl 2018 591**.

Perceptible form, without fixation

Protection follows the form, not the idea. An idea is protected only once it is clothed in perceptible form, and an unformed thought does not meet the definition of a work **BGE 116 II 351**. Fixation is not required: under Art. 29(1) CopA, a work is protected from the moment it is created **Art. 29 CopA**.

Where a photograph's individuality arises when it is taken, the Zurich Commercial Court treated the image on the negative as the work and the prints as mere copies. The print is itself a work only where individuality is created by special processing of the negative or by particular development steps **HG210019**.

Form versus idea, method, content and style

Copyright protects only the concrete expression of a thought. In the notation-system case, the Federal Supreme Court held that a system for writing music down is a mere idea, not a work. It can no more be protected than "a new style, a verse form or a shorthand system" ("ein neuer Stil, eine Versform oder ein Stenographie-System") **BGE 70 II 57**. A piece of music or a textbook written in the system can be protected, but only as one possible expression of it **BGE 70 II 57**.

For scientific works, what a scientist says about facts becomes free in its content once published, even if it conveys new insights reached

with effort **BGE 113 II 306**. Protection can attach to the concrete presentation and to the planning, selection, arrangement and structure of the material. Where the scientific content leaves no room for individual expression, protection falls away **BGE 113 II 306**.

Current-law decisions apply the same line in several settings:

- Course concepts. The Aargau Commercial Court held the "concept" behind workshop materials unprotected and limited protection to their concrete presentation **HSU.2022.32**.
- Software. The algorithms and logic of a computer program are excluded **CCIV cm17-018623-402017phc/2017**.
- Engineering. The technical content of engineering drawings and static calculations is excluded. That is a matter for technical property rights, not copyright **LK020010**.

The boundary is not mechanical. The Geneva Court of Justice held that generic legal terms such as "retrait du permis" (licence withdrawal) remain free. But a competitor who paraphrased entire paragraphs of a legal-information website, adopting its specific advice and original ideas as formulated, infringed the protected texts **ACJC/283/2022**. What matters is whether the taking concerns the individual wording, selection or arrangement, or only information and abstract ideas.

Individual character

Individuality of the work, not of the author

The decisive criterion is individuality, and it must be expressed in the work itself. Under the revised Act, originality in the sense of the author's personal imprint is no longer required. In the Court's words, "what counts is the individuality of the work, not of the author" ("Massgebend ist die Werk-Individualität und nicht die Urheber-Individualität") **BGE 148 III 305**. The Court has described this as a development of the case law under the new Act **4A_78/2011**, and the French-language decisions say the same **BGE 136 III 225**.

Individuality is set against banality and routine work. It results from the variety of decisions the author takes and from surprising and unusual combinations **BGE 136 III 225**.

Lower courts often add the formula of statistical uniqueness: it must appear excluded that a third party facing the same task would have created an identical work **ACJC/667/2015**. The Federal Supreme Court uses the concept for photography, but what must be unique is the image composition, not the event or object depicted **BGE 130 III 168 BGE 130 III 714**.

Statistical uniqueness is therefore an aid to the analysis, not a sufficient condition. A statistically unique text can still be denied protection if it appears banal, routine or dictated by the logic of its subject **HSU.2022.32**.

Creative latitude and the uniform standard

The individuality required depends on the room available for individual design: the smaller that room, the more readily individuality is to be found **BGE 148 III 305**. Where the subject leaves little room, as in a scientific work, protection is granted even for a low degree of creative activity **BGE 136 III 225**. At the other end, where the purpose dictates the design through known forms so that practically no room is left for individual features, the object is a purely craft product outside copyright **BGE 148 III 305**.

How this sliding scale relates to thresholds for particular categories is the main tension in the case law:

- Older line. Earlier decisions said the requirements are "not always equally high" **4C.120/2002**. For applied art, the Court long applied "relatively high requirements", with a rule that in case of doubt a purely craft product is to be assumed **BGE 143 III 373**.
- Doubt rule survives the revision. In 4A_78/2011 the Court rejected the argument that the revised Act had superseded this doubt rule **4A_78/2011**.
- Uniform formulation. In BGE 148 III 305 (2022), the Court held that "the requirements of individuality are the same for all kinds of works" ("Die Anforderungen an die Individualität sind vielmehr für alle Arten von Werken dieselben") **BGE 148 III 305**.

The Court reconciled the two lines in that same decision. The higher requirements for applied art, and with them the doubt rule, rest on the practical insight that individuality is harder to achieve when the purpose of use determines the normal form ("auf der praktischen Erkenntnis, dass Individualität schwieriger zu erfüllen ist, wenn der Gebrauchszweck die normale Form bestimmt") **BGE 148 III 305**. For utility objects, the individual artistic design must therefore come from the part that is not already dictated by function **BGE 148 III 305**.

The legal criterion is thus uniform. What differs is the room for design against which a work is measured. In litigation the outcome turns less on the label of the category than on a concrete account of which design options were open and how the author used them.

Value, purpose and effort are irrelevant

Under paragraph 1, value and purpose do not matter **Art. 2 CopA**. Courts must refrain from judging artistic merit, but they must make a value judgment on whether the work is individual **4C.120/2002**.

A utilitarian purpose therefore does not exclude protection. A manual on hazardous substances for fire services **BGE 136 III 225** and a marketing text describing software **ACJC/667/2015** were both protected. Purpose matters only indirectly, by narrowing the room for design.

Effort is equally irrelevant. Individuality is assessed independently of how the work came about, including the material or intellectual effort invested **BGE 130 III 714**. A Geneva provisional-measures decision inferred sufficient individuality of software partly from its costly development and from its role as the basis of the applicant's business **ACJC/148/2022**. That reasoning is hard to reconcile with BGE 130 III 714. It is best read as a plausibility finding on a record where work status was largely uncontested, not as a test. Protecting investment is the function of Art. 5 lit. c UWG, not of Art. 2 CopA (see the section on neighbouring regimes).

Photographs: individual character under paragraph 2 lit. g and the special rule of paragraph 3bis

Photographs with individual character

Photographic works fall under paragraph 2 lit. g and need individual character. What counts is the result achieved. The photograph must, on its own, express a thought with individual character **BGE 130 III 168**. Two errors are excluded:

- Using a particular technique does not automatically lead to protection **BGE 130 III 168**.
- A photograph may not be denied protection merely because no special photographic means were used. A snapshot can be protected **BGE 130 III 168**.

In the Bob Marley case, the concert photograph was protected. Its individual character lay in the choice of framing and the moment of release during a particular movement of the singer, together with the lighting, shadows and pose **BGE 130 III 168**. The Court also corrected the lower court, which had wrongly demanded special planning **BGE 130 III 168**.

The Meili decision marks the limit. The photograph showed the former security guard Christoph Meili holding two folios, framed frontally so that the titles were legible. The Court denied protection. The photographer had used the available room for design neither technically nor conceptually, so the image did not stand out from what is usual **BGE 130 III 714**. A unique subject does not make a photograph unique. Even a photograph of the last specimen of a dying

bird species is not protected eo ipso. Protection depends on whether the choice of subject is used as a design element that gives the image individual character **BGE 130 III 714**. Being in the right place at the right time, and the effort it took, do not count **BGE 130 III 714**.

Paragraph 3bis: photographs without individual character

Paragraph 3bis was the legislature's answer to the gap shown by Meili. The dispatch cites the denial in BGE 130 III 714. It states that the Meili photograph, which lacked individual character according to that decision, is now protected against unauthorised use **BBl 2018 591**. It also states that the new protection is, in substance, an extension of copyright and not a new related right **BBl 2018 591**.

The National Council chose this approach deliberately. The committee majority had proposed placing protection for non-individual photographs (Lichtbildschutz) in Arts. 29 and 34 instead of Art. 2. Opponents objected that the committee version would protect every photograph, whereas the Federal Council draft protected only photographs of three-dimensional objects. The Merlini proposal to follow the Federal Council draft prevailed by 110 votes to 61 **AB 2018 N 2191**. The Council of States later agreed **AB 2019 S 258**.

The scope is narrower than the English text may suggest. The German enacted text reads: "Fotografische Wiedergaben und mit einem der Fotografie ähnlichen Verfahren hergestellte Wiedergaben dreidimensionaler Objekte gelten als Werke, auch wenn sie keinen individuellen Charakter haben." **BBl 2019 6585**. The English version could be read as listing two separate categories. The dispatch, however, makes protection of photographs too conditional on the photograph depicting a three-dimensional object **BBl 2018 591**.

The dispatch sets out the following requirements and exclusions:

- Three-dimensional subject. Photocopies and other reproductions of texts, plans, graphic representations, other photographs and other two-dimensional originals cannot be protected under paragraph 3bis **BBl 2018 591**.
- Human action. Automatically produced images remain excluded (see the section on human creation) **BBl 2018 591**.
- Any photographer. Photographs by professionals and by amateurs are protected alike **BBl 2018 591**.

Protection under paragraph 3bis is weaker in time. It expires 50 years after the depiction was produced, and Arts. 30 and 31 CopA do not apply to such depictions **Art. 29 CopA**.

For acts after 1 April 2020, the Bern Commercial Court protected an aerial photograph "regardless of its individual character" ("ungeachtet ihres individuellen Charakters") **HG 2022 35**. On appeal, the Federal Supreme Court noted that the protection finding had not been challenged before it. It upheld the award of only CHF 55 on enrichment grounds **4A_168/2023**. In that decision, therefore, the Court did not rule on the merits of paragraph 3bis. The decision also shows a practical point: protection under paragraph 3bis says nothing about the size of the monetary award.

On transitional law, the dispatch explains that, in combination with Art. 80(1) CopA, the extension also covers photographs created before the amendment entered into force. It does not apply to acts completed under the former law that were lawful at the time **BBl 2018 591**. Whether an image has individual character therefore still matters, for three reasons:

- It decides whether the 50-year term or the term based on the author's death applies **Art. 29 CopA**.
- It decides whether two-dimensional reproductions can be protected at all.
- It decides how the image is treated for uses before 1 April 2020.

Utility objects: applied art and architecture

Applied art and design

For works of applied art under paragraph 2 lit. f, the test is the artistic overall impression of the form. That impression arises from the design, the lines and the interplay of all the elements, so a mosaic-style comparison of individual features is the wrong method **BGE 143 III 373**. That individual elements were already known is not decisive. Nor need the object found or significantly shape a new style **BGE 143 III 373**.

The Court also links copyright to design law. A protected work of applied art can exist only where the artistic design at least reaches the distinctiveness (Eigenart) required by Art. 2(1) of the Design Act, and does so "unbestreitbar klar und deutlich" (indisputably clearly and distinctly) **BGE 143 III 373**.

The leading applications show which facts decide the outcome:

- HfG bar stool: protected. Seating furniture allows a great many possible forms. The minimalist design of the necessary elements and their matched proportions created an overall impression that clearly set the stool apart from earlier models. That impression was not dictated by function **BGE 143 III 373**.
- Fire-ring grill: protected. The ordinary observer first sees an artistic object and only on closer inspection recognises a grill **4A_472/2021**.
- Le Corbusier LC 1 chair: not protected. Two similar earlier models existed, Breuer's Wassily chair and the Colonial Chair. Measured against them the chair lacked sufficient individuality, and nothing had changed since BGE 113 II 190 **4A_78/2011**.
- Watch (old law): not protected. The central strap attachment had long been known, and case and dial differed little from common models. The design was a mere variation of an existing form **BGE 105 II 297**.
- Construction toy (Vaud): not protected. Relying on a court expert, the court found that cube-based construction toys had existed for decades and that comparable connector systems worked on similar principles. The toy did not stand out clearly from products already on the market **CCIV co05-036600-1782011dca/2011**.
- Watches (Geneva, superprovisional measures): individuality not made plausible. The court held that watch design offers considerable creative freedom. Even with unusual combinations, it could not be ruled out that the defendant had created an identical design independently **ACJC/1689/2018**.

The Geneva watch decision shows the other side of the latitude principle. Where the room for design is wide, coincidental similarity is more plausible, and the claimant must show more.

Architecture and plans

Works of architecture fall under paragraph 2 lit. e. Their room for design is limited by practical use and technical constraints, and limited even more than for other utility objects **BGE 148 III 305**. A reduced degree of independent activity can therefore suffice. The architect need not create something absolutely new; a creation that is only relatively and partially new may be enough **BGE 142 III 387**. There is no protection, however, where the architect merely contributes craft skill by combining and modifying known forms and lines, or has no creative freedom at all in the circumstances **BGE 142 III 387**.

In BGE 142 III 387, a custom-designed villa with a specific arrangement of elements and a distinctive roof was protected. The architect had taken various decisions that were not dictated by routine **BGE 142 III 387**. The architect's injunction against the owners' planned alteration nonetheless failed. Under Art. 12(3) CopA, the owner may modify a completed building, subject only to an alteration that harms the architect's personality under Art. 11(2). The lower the degree of individuality, the more readily alterations are allowed **BGE 142 III 387**. Individuality therefore decides not only whether the work is protected but also how far that protection reaches.

Plans and models that express a protected architectural work are protected whether or not the building has been built **BGE 125 III 328**. In the same decision, a later project was a free use. It shared only the general layout of three groups of flat-roofed villas, while it changed the

loggias into gardens, made the roofs inaccessible and gravel-covered, and altered the façades **BGE 125 III 328**.

The Ticino courts show how the requirements apply in practice:

- Modular house: no work. The plans were based on a third party's modular system with fixed 62.5 cm elements and on the client's instructions. The choices the claimants pointed to were dictated by planning rules, the terrain and the client's wishes, and an architect cannot base originality on elements imposed from outside **10.2009.15**. The claimants had failed to explain which features distinguished their plans from comparable buildings **10.2009.15**.
- Plans versus site billboard. In provisional proceedings, the plans were prima facie a work, but the billboard on the building site was not, because its function was purely informational **10.2006.16**.

Scientific and technical representations, texts and software

Maps, plans and technical drawings

Paragraph 2 lit. d protects the form of representation, not the technical or geographical content. The Zurich High Court held that the object of protection is the external form of communicating a scientific statement, or the selection or systematic arrangement of the material, and that the content of what is depicted is irrelevant to the creative achievement **LK020010**. It therefore denied protection to the idea of an undrained tunnel and to static calculations **LK020010**.

Older Federal Supreme Court decisions on maps follow the same line. In BGE 103 Ib 324 (old law), the rock depictions in the national 1:50,000 map were protected. They did not merely convey geographical facts but depended on the cartographer's aesthetic design choices, which leave considerable artistic freedom **BGE 103 Ib 324**. A mere copy remains unprotected **BGE 59 II 401**. The very low threshold stated in BGE 59 II 401 should not be carried over to current law without regard to the later case law on individuality.

Linguistic works and functional texts

Linguistic works are protected only if their wording has individual character. A text whose linguistic form does not depart from what is generally usual does not reach the required individuality **BGE 134 III 166**.

For the texts of the Swiss medicines compendium, detailed legal rules on content and structure, the texts' purpose, ordinary medical language and the logic of the subject left so little room that protection was denied "even with low requirements as to individuality" ("selbst bei niedrigen Anforderungen an die Individualität") **4A_404/2007**. The Thurgau High Court reached a similar result for ordinary legal pleadings, because their room for design was too constrained **RBOG 2015 Nr. 08**.

Functional texts are not excluded as such, however:

- Software description. Geneva protected a technical marketing text describing software. The room for design was small, but the terms and phrasing used made it appear excluded that a third party would have written an identical text **ACJC/667/2015**.
- Legal-information website. The texts were protected as the result of the author's editorial choices **ACJC/283/2022**.

The decisive difference from the medicines-compendium case is how far regulation and the logic of the subject actually fixed the wording.

Computer programs

Paragraph 3 confirms that computer programs are works, but the Federal Supreme Court requires individual character under paragraph 1 **BGE 125 III 263**. In that case the Court did not decide on protectability because the facts found were insufficient **BGE 125 III 263**. The working test comes from cantonal decisions:

- Low threshold. Because developers usually have limited formal room for design, the requirements are not set high. A program must go beyond an entirely banal programming effort and must not merely copy other software **HSU.2023.24**.
- Non-banality. A program is protectable if, from the viewpoint of professionals, it cannot be called banal **CCIV cm17-018623-402017phc/2017**.
- Structure, not logic. Individuality is to be sought in the program's structure. Algorithms and program logic are not protected, and a common purpose, a similar programming style or comparable functionality are not decisive **CCIV cm17-018623-402017phc/2017**.
- Source and object code. Protection covers both **ACJC/148/2022**.
- Updates and releases. Programs changed more than insignificantly can be derivative works under Art. 3 **BK 2016 484**.

Outcomes turn on how the claim is presented:

- The Aargau Commercial Court refused provisional measures because the applicant had not even outlined the specifications of the tuning software or filed code, so the software could not be identified **HSU.2023.24**.
- Geneva granted an injunction where the defendants had only asserted, without evidence, that the software was "not unique". The court held that uniqueness is not required and some individuality suffices **ACJC/148/2022**. Its additional reliance on development costs is discussed in the section on value, purpose and effort.

Other categories: film, choreography, music, graphic works and compilations

Few decisions address film, choreography or music directly:

- Film. The Chaplin decision (old law) protected The Gold Rush because the author had given it a personal character through the plan of the staging and the combination of the events depicted **BGE 96 II 409**. Under current law, this "personal character" vocabulary must be read in the light of the work-individuality test.
- Choreography. In the Basel Tattoo case, the Federal Supreme Court accepted that individual numbers may be protected as choreographic works under paragraph 2 lit. h if they meet the statutory requirements **4A_482/2013**. Linking the numbers together did not make the overall production a stage work. The production was also not a collection under Art. 4, because the claimant did not show what more it represented than the sum of the individual works **4A_482/2013**.
- Music. BGE 33 II 433 was decided under the Act of 1883. It held that a new composition, even one based on a known melody, is protected if it results from creative imagination and is not a mere transcription such as an arrangement **BGE 33 II 433**. Under that law, quoting music was lawful only where the earlier work was presented as such and remained clearly distinguishable. Incorporating it without mention was reproduction **BGE 33 II 433**. The decision illustrates the history of the rule and is not authority on paragraph 2 lit. b.

Graphic works and everyday compilations are often denied protection:

- Logo. A cow logo was not protected. The animal did not differ in colour, shape or posture from any other drawing of a cow, and mixing features of different breeds was not perceptible as original **4C.86/2000**.
- Calendars. Darkening a base colour, choosing new fonts and adding pictograms were craft work only **4C.120/2002**.
- Driving-school logos (Geneva). The shared features, a white L on blue required by road-traffic law plus letters in magenta, did not reach the threshold of Art. 2. The court nonetheless granted relief under unfair competition law **ACJC/694/2018**.
- Exam questions (Bern Commercial Court). Questions derived from legal rules and everyday situations did not stand out from what is logical or usual. The material, kept as an Excel list and separate folders, was not a collection either, because no

individual selection or arrangement was shown **HG 2015 39**.
- Website (Geneva). A site's texts, the names of its sections and sub-sections, their tree structure and its graphic design were protected where they reflected creative choices **ACJC/283/2022**.

Drafts, titles and parts of works (paragraph 4)

Paragraph 4 does not create a separate standard. Drafts, titles and parts are protected only insofar as they are themselves intellectual creations with individual character **Art. 2 CopA**.

Drafts. For architecture, plans are protected whether or not the building is realised **BGE 125 III 328**. Under Art. 29(1), protection does not depend on any work being completed or fixed **Art. 29 CopA**.

Titles. A title is protected only if, taken on its own, it has the character of a work, meaning an independent and distinctive intellectual content **BGE 77 II 377**. The name "Mickey Mouse" failed this test. Naming a mouse Mickey was too obvious and ordinary, and the name drew its meaning only from the protected drawing **BGE 77 II 377**. Under current law, the Aargau Commercial Court denied protection to the title and description of a workshop because they were neither unusual nor original **HSU.2022.32**. That decision also refers to the proposition that titles are protectable if they are original or have become established in the market **HSU.2022.32**. The second alternative points to protection against confusion rather than to work status.

Parts. A part of a work is protected if the part itself meets the requirements of protection **BGE 113 II 306**. Taking unprotected details, such as data, evidence or examples, does not infringe copyright "however numerous they may be" ("mögen sie auch zahlreich sein") **BGE 113 II 306**. The Zurich Commercial Court rejected the defence that the copied passages were short word sequences torn from their context, and granted a provisional injunction. It expressly left open the case of very few or entirely banal passages **HE140296**. In the Aargau case, the workshop folder as a whole was protected for its selection, arrangement and presentation, but the specific parts taken did not reach the threshold **HSU.2022.32**. What is taken must therefore be analysed on its own, not by reference to the protection of the whole.

Proof, review and the scope of protection

Allegation and burden of proof

The party claiming protection must allege and prove the facts that give the work its individual character. In the modular-house case, the Ticino court held that the claimants had to explain and prove which features showed creative activity distinguishing their plans from comparable buildings. A bare assertion of originality failed **10.2009.15** . In provisional proceedings, the applicant must make the protectability plausible, and does not succeed if it cannot even identify the protected object **HSU.2023.24** **CCIV cm17-018623-402017phc/2017**.

Conversely, where detailed allegations on individual character go uncontested, the court may treat them as established. The Zurich Commercial Court did so for each disputed photo print **HG210019**.

The defendant bears the burden on facts that block protection. In the fire-ring case, the Federal Supreme Court held that if technical requirements under the claimant's own patent left no room for design, it was for the defendants to allege those facts as facts preventing the right from arising ("als rechtshindernde Tatsachen von den Beklagten darzulegen") **4A_472/2021**. Earlier forms are typically proved by filing the earlier models, as in the LC 1 and HfG cases **4A_78/2011** **BGE 143 III 373**, or through a court expert **CCIV co05-036600-1782011dca/2011**.

Question of law and standard of review

Whether an object is a work is a question of law ("Savoir si l'on est en présence d'une oeuvre artistique relève du droit") **4C.86/2000**. The Federal Supreme Court therefore reviews the application of the individuality standard itself, and corrected the lower courts in the Bob Marley and HfG cases **BGE 130 III 168 BGE 143 III 373**.

The facts on which that assessment rests bind the Court unless they are manifestly incorrect, that is, arbitrary **4A_404/2007**. Examples are the existing forms, the constraints and how the work came about. The appeal is therefore won or lost on the factual record built at first instance.

Individuality and the scope of protection

The degree of individuality also defines how far protection extends. For a utility object, the scope of protection is narrower the less pronounced the individual character conferred by using the room for design **4A_472/2021**. Even within a narrow scope, the fire-ring imitations infringed, because their overall impression did not differ from the original and minor deviations made no difference **4A_472/2021**.

The same link appears in architecture. A later project was a free use because the elements borrowed had passed entirely into the background **BGE 125 III 328**, and an owner may alter a building more freely where its individuality is low (see the section on architecture and plans) **BGE 142 III 387**.

Neighbouring regimes

Unfair competition. Denying work status does not decide claims under the Unfair Competition Act (UWG), which are examined separately.

- Market-ready work result (Art. 5 lit. c UWG). In the medicines-compendium case, the texts were not works, but they were a market-ready work result that had been technically reproduced. The claim under Art. 5 lit. c UWG still failed because the first competitor had already amortised its costs, so there was no clear disproportion between its effort and the copier's **BGE 134 III 166**. The Bern Commercial Court likewise rejected an Art. 5 lit. c claim for exam material. The material was not a finished product, and the defendant had invested its own effort **HG 2015 39**.
- Risk of confusion (Art. 3(1) lit. d UWG). Geneva refused copyright protection for driving-school logos but granted relief for risk of confusion, applying prior use in the same canton **ACJC/694/2018**. In the LC 1 case, the claim based on risk of confusion failed as well, because the defendants' advertising did not trade on Le Corbusier's name **4A_78/2011**.

Design law. Copyright protects the individual achievement and design law the distinctive one. A copyright work of applied art requires at least clearly reached design-law distinctiveness (Eigenart) **BGE 143 III 373**. Before the current Act, the Court had already held that novelty, the requirement for a registered design, does not suffice for a work of art **BGE 105 II 297**.

Technical property rights. The creativity of a construction idea is a question for technical property rights, not for copyright **LK020010**.

Collections (Art. 4) and derivative works (Art. 3). Where the individual elements are unprotected, individuality may lie in their selection or arrangement. A website can also be protected as a collection, with its individuality resulting from how its database is arranged **ACJC/283/2022**. The limits of collection protection (Basel Tattoo, exam questions) and the treatment of software updates as derivative works are discussed in the sections on other categories and on computer programs **4A_482/2013 HG 2015 39 BK 2016 484**.

Practical implications

- Claimants should describe the work concretely: which elements, which design options were available, and which choices were made. For software, this means filing the code or at least its

essential specifications **HSU.2023.24**. For buildings and plans, it means identifying the features that were not imposed by the client, the site or planning law **10.2009.15**. Relying on effort, cost or commercial importance alone is risky **BGE 130 III 714**.

- Defendants should file the existing forms and plead technical or functional constraints as facts that block protection, since the burden of those facts lies on them **4A_472/2021**. Where individuality is low, they should argue for a narrow scope of protection and for differences in overall impression **4A_472/2021**.
- Photographs. First check whether individual character can be shown under paragraph 2 lit. g. If not, check whether paragraph 3bis applies: it requires a three-dimensional subject and human action, gives only a 50-year term, and does not cover acts completed lawfully before 1 April 2020 **BBl 2018 591**
  Art. 29 CopA.
- Parallel claims. Claims under the Unfair Competition Act and design law should be pleaded in parallel wherever work status is doubtful, because their requirements are independent
  BGE 134 III 166 ACJC/694/2018.