

Kluwer Copyright Blog

The Single Market and copyright protection of formats

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“Does the European Single Market provide the right legal framework for the unhindered exchange of formats between the Member States?”

Formats, especially television formats, have proven their commercial value, but the question whether copyright protection also applies to these products of the mind, which they undoubtedly are, cannot be answered easily and there are valid arguments for and against (copyright) protection.

Pursuant to the European Court of Justice’s definition of a copyright protected ‘work’, formats can theoretically be protected by copyright. The creators have to prove that they made free and creative choices during the process of creation by selecting, combining, arranging and/or configuring the decisive format’s elements. The investment of mere skills and labour cannot justify copyright protection.

No legal certainty for formats circulating on the Single Market

In daily practice, the question is answered differently in different EU Member States. While, for instance, the Dutch Supreme Court considered in the case ‘Survive! vs. Big Brother’ that the format of Survive! is protected by copyright but was not infringed upon by the format of Big Brother, the German Federal Court of Justice decided in the case ‘Kinderquatsch mit Michael’ that formats are per se not copyright protected. The format was just an instruction book explaining how to form or to express the idea. That means it is not the result of a creation process and therefore, even if it is original, not copyright protected.

The different levels of copyright protection of formats which circulate on the single market results from the lack of European harmonization. As long as no common definition of the copyright protected work is provided for by European copyright law or by its interpretation by the ECJ, commercial companies principally have to deal with the copyright laws of 28 Member States. End-users participating in shows based on formats have to trust that the producer of the show they

watch, post or interact with, cleared the necessary rights. If not, the owner of the format's copyright that is infringed by these acts of usage cannot only pursue, pursuant to the law of the corresponding Member State(s), the infringement of the commercial producer or distributor of the show but also the participating end-users.

From the perspective of the single market, the uncertainty about the legal status of formats is unwanted as it hinders the free flow of formats within the EU. Harmonization with regard to the definition of the copyright protected 'work' as well as of the adaptation right could mitigate the negative effects of this legal uncertainty with regard to formats. Pursuant to the European Court of Justice's definition of a copyright protected 'work', formats can theoretically be protected by copyright. The creators have to prove that they made free and creative choices during the process of creation by selecting, combining, arranging and/or configuring the decisive format's elements. The investment of mere skills and labour cannot justify copyright protection.

However, a survey under stakeholders, be it creators, producers, distributors, users or re-producers, about the uncertainty that follows from the legal differences within the EU shows that the stakeholders are certainly not univocal in their views about copyright protection.

Balance of interests by copyright law

Pursuant to individualistic copyright theories in continental Europe, copyright law protects the author of the work as an artist. While this one-dimensional purpose corresponded to the situation in the 18th century, in the so called digital age copyright concerns not only single artists but whole cultural industries and, increasingly, users participating in the so called participatory or remix culture. This cultural development changes the perception of copyright from an instrument for the protection for artists to an instrument to balance the interests of all participants involved. In contrast to individualistic theories, Anglo-Saxon utilitarian copyright theories are more suitable to explain the balancing of these interests taking not only the artist but the society as a whole into account. Given their focus on the effects that copyright law has on society as whole, utilitarian theories allow to feedback their corresponding theoretical assumptions. Thereby, the definition of the copyright protected work serves as a first entry point for the balance of interests that might be re-balanced in a later step: A broad definition of the protected work may require to lower the bar of copyright by such means as a fair use clause or exceptions. Important questions in this respect are: what is the balance between copyright protection and innovation? Which criteria do stakeholders consider to be relevant for the protection of formats?

The survey

Related to the HIIG research project 'Circulation of cultural Goods» of the research area «Internet Policy and Governance', participants of format markets, such as for television and advertising, but also of the open source movement, were surveyed with respect to the necessity and the effects of copyright protection for formats.

The results are, from a legal point of view, interesting. Copyright protection is considered less or equally important to grant licenses for the usage of intellectual creations/works than or as informal norms and lack of practical Know-How. There seem to be many other factors, beside the exclusivity of copyright, enabling the creator and/or producer to exclude others from the use of his intellectual creation. Furthermore, there seem to be many other business models, beside those based on copyright, which enable the creators and/or producers to monetize their format. Copyright

protection is more an instrument serving specific purposes of the participants.

Especially format creators and producers realise that copyright does not only protect their own formats but also those of others and that it could also hinder them in creating formats that (e.g.) meet the demands of popular trends.

The results show a trend towards a very broad definition of the copyright protected ‘work’ but to a narrow adaptation right in favour of subsequent re-creators. That means that right owners could forbid the slavish copy of their format but that re-creators may be principally free in re-combining the elements of existing formats.

The solution for the right balance between a low level of originality and the possibility to freely adapt formats might be a narrow adaptation right or, how the Dutch court did it, a precise definition which elements combined meet the required originality and which elements are adapted.

Conclusion

Two aspects cast doubts whether European copyright and its interpretation by the ECJ can result in acquiring a fair balance between the interest all markets participants: Firstly, the recitals of the relevant directives presume that only a high level of protection is appropriate to foster creativity in general. This tendency makes it difficult to re-balance the broad definition of the copyright protected work in later steps, e.g. with narrow adaptation right or a wide fair-use-clause.

Secondly, the ECJ does not use the purposes of copyright provided for by the recitals to balance the interest of all participants involved. The court does not examine whether or how copyright protection actually fosters creativity and innovation in a specific case. Instead, the Court focuses on the interests of the author.

The ECJ did not yet decide on adaptations of copyright protected work and until now no preliminary questions were asked about format protection, but when that time comes, the Court will hopefully consider that there is a plentitude of valuable interests.

MvG

The author’s thesis “*Copyright Protection of Formats in the European Single Market*”, including the results of the discussed survey can be downloaded [here](#).

The author is also the founder of a start up that develops ‘non-linear’ formats. On the website of the Mauerschau-project (an augmented reality app about the Berlin Wall), the author blogs about his findings of the last years of research, development and production and about how far the existent regulatory framework fits to the media industry evolving from the old to the new economy. The website and the blog can be found here: [Mauerschau.com](https://mauerschau.com)

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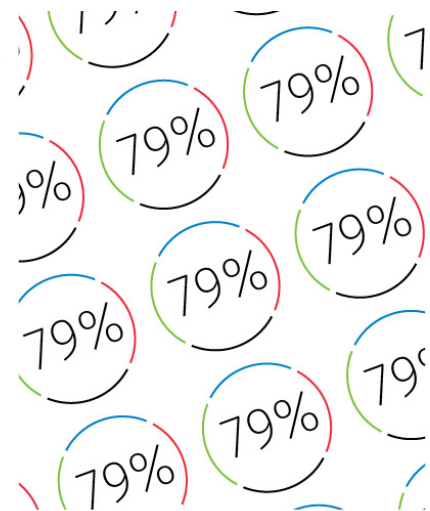
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