The Court of Justice, the Commission, and the case for consolidation of EU Copyright Law

Kluwer Copyright Blog
December 7, 2015

Ana Ramalho (Maastricht University)

Please refer to this post as: Ana Ramalho, 'The Court of Justice, the Commission, and the case for consolidation of EU Copyright Law', Kluwer Copyright Blog, December 7 2015, http://copyrightblog.kluweriplaw.com/2015/12/07/the-court-of-justice-the-commission-and-the-case-for-consolidation-of-eu-copyright-law/

Readers of this blog are familiar (or should I say fed up?) with the piecemeal legal framework of EU copyright. With nine directives in the field of copyright alone (plus one on enforcement), the legal patchwork is evident. One of the problems with this scenario is the interplay of the different directives with one another. And specifically when it comes to the InfoSoc Directive, this blogger has asserted elsewhere that uncertainty regarding its place in the wider legal framework is a gap worthy of the legislator's attention.

On the other hand, and perhaps unsurprisingly (given this legislative patchwork in general and the InfoSoc Directive in particular), the number of preliminary references to the CJEU in the field of copyright has been on the rise for a few years now. As posts on this and other blogs show, one major concern of commentators is whether the CJEU has got each case right – there being many voices that often disagreed with the Court's rulings. In defence of the CJEU, it does not have an easy task, seeing as the EU copyright framework is quite the maze. And some of its case law, even though criticised to exhaustion (think of *Infopaq*) did attempt to generalise uniform standards (think of originality), presumably to the benefit of integration and the internal market. A recent study has even suggested that the Court's case law might be more coherent than it would seem at first sight.

There is, however, another aspect of the CJEU case law that should be looked at: its contribution to the consolidation of EU copyright law. Each ruling of the CJEU may or may not be criticised on its own merits, and it is possible to look at the coherence (or lack thereof) of CJEU case law as a whole, but one question that has been bothering this blogger is how the CJEU case law interacts with the existing directives for the purposes of consolidation of EU copyright law. **Has the CJEU added (very much needed) consistency to the fragmented body of EU copyright law? Has the CJEU managed to carry out a de facto consolidation of the EU framework?** That doesn't seem to be the case.

While the CJEU has in fact put forth some harmonised standards and notions, its rulings are confined to particular features of EU copyright (such as a given exclusive right or the criteria for protection). Consolidation as a broader picture is not touched upon. Or is it? In some cases, the Court's rulings do seem to work towards a judicial consolidation of the legislative patchwork. It is, again, the case of harmonisation of the originality standard carried out by the Court: by deeming the originality standard found in the Software, Database and Term of Protection Directives applicable to subject-matter covered by the InfoSoc Directive, the Court has in effect "sewn" the directives together. It could of course be argued that it is not the Court's task to consolidate the *acquis*, as it does not have jurisdiction to rule on questions that have not been referred to it (as per, inter alia, the Advocate General's opinion in case 22/79, *Greenwich Film v. SACEM*, at pp. 3295-3296). However, the Court has at times considered that it is not strictly bound by the questions posed to it, and as a consequence it has either rephrased the question (this happened for instance in case C-393/09, *BSA*), or it has addressed legal arguments falling outside the scope of the questions referred (see e.g., case 78/70, *Deutsche Grammophon v. Metro*, a case on competition law where the Court also addressed intellectual property considerations). In other words, even though it is not a primary task of the CJEU to consolidate the *acquis* beyond the specific questions posed to it, the scope of action of the Court is more extensive than it looks. This could give the CJEU some leeway (or responsibility?) to consolidate the *acquis*.

Unfortunately, this leeway hasn't always been used in the best way. For example, the CJEU has stated that the Software Directive is a *lex specialis* vis-à-vis the InfoSoc Directive (see cases C-128/11, *UsedSoft* and C-355/12, *Nintendo*), which would justify a different legal treatment of software when compared to other subject-matter. But if it is the case that the Software Directive is a *lex specialis*, how can it then be explained that the Court extended the criterion of originality found in "specialised" directives (such as the Software Directive) to every type of subject matter covered by the "generalist" InfoSoc Directive (as per the *Infopaq* decision)?

The patchwork of directives, the uncertainty regarding the connection between them, and the inability or unwillingness of the CJEU to deal with that conundrum should be a strong enough sign for the EU legislator to step in. In May 2015, the EU Commission communicated its intention to make legislative proposals aimed at a "modern, more European copyright framework". But a closer look reveals that these **proposals are targeted at specific aspects of copyright law and/or deeper harmonisation of certain issues, rather than a consolidation of the existing *acquis***. Such consolidation is also largely absent from the roadmap that outlines the next steps to be taken by the Commission. This seems to hint that the next proposals from the Commission will not prioritise consolidation of the *acquis*. We will know more this Wednesday (9 December), when the Commission makes public the first proposals for the modernisation of EU copyright, so – stay tuned!