Kluwer Copyright Blog

The Renckhoff judgment: The CJEU swivels the faces of the Copyright Rubik's Cube (Part I)

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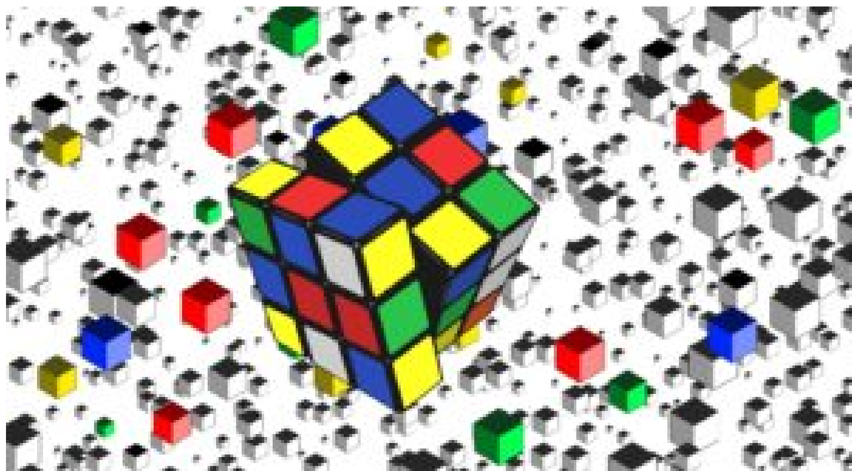

The delimitation of the proper boundaries of lawful use of copyright-protected works on the Internet has always been puzzling for courts, which in some instances have creatively interpreted the copyright acquis in order to take account of the particularities of the digital ecosystem. In this context, the CJEU in Usedsoft (C-128/11) adopted for the first time the concept of *lex specialis* in copyright law, in relation to the question of digital exhaustion of downloaded copies of computer programs. Subsequent judgments, such as those in Svensson (C-466/12), BestWater (C-348/13), GS Media (C-160/15), ACI Adam (C-435/12), Ulmer (C-117/13), and VOB (C-174/15) have clearly demonstrated that the CJEU, between reason and sensitivity, opted for workable and "fair" solutions which were tailor-made for the particular circumstances of specific digital uses of copyright-protected works.

The evaluation of lawfulness and fairness is a delicate legal exercise which presupposes by definition a non-formalistic approach. The Renckhoff case (C-161/17, Judgment of 7 August 2018) is an ideal demonstration of the current controversies and the lacunae of EU copyright law. It is also highly representative of the deepening divide between conflicting copyright visions.

The facts of the case do not involve any technological complexity. A pupil downloaded and used for a written school assignment a photograph of the city of Cordoba. The photograph was uploaded and made accessible, without any technical restrictive measures, on an online travel website with the consent of the photographer. The assignment was then uploaded to the school's website. The author of the photograph brought the proceedings before the German courts claiming copyright infringement. The referring Court (the German Federal Court of Justice) asked the CJEU whether

the uploading of the photograph without the consent of the photographer on the school's website qualifies as communication to the public.

Six main legal issues are relevant for the evaluation of the lawfulness of the pupil's and the school's acts – the first three are discussed below, and the remaining three in Part II of this blogpost. It is noteworthy that the Opinion of the Advocate General Campos Sanchez-Bordona and that of the CJEU were significantly divergent in relation to those questions.

1. Lack of originality: the "original sin" of the case?

One of the issues raised by the Advocate General was the originality of the photograph (Opinion, par. 53-59). For the Advocate General, even if the contested photograph could be protected under German law as a simple photograph (and, therefore, not as a "photographic work" subject to the criterion of originality), it would potentially lack the required level of originality under EU copyright law. Indeed, as the CJEU recalls, a photograph may be protected by copyright provided that it is the intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph (par. 14). Even though it is clear that the European standard of originality is higher than the UK "sweat of the brow" standard (see Football Dataco, C-604/10), it could not be considered as a highly subjective one. In this context, the free choices and the personal touch of the photographer may be expressed in several ways and at various points in its production. In Painer (C-145/10), the CJEU found that those choices may be expressed in a portrait photograph. It could be assumed that a variety of creative choices may also be expressed in a landscape photograph, such as the one that has been used by the pupil. This could be rather easily evidenced in relation to a photograph that has been taken by a professional, such as in the present case. Would it be the same for a photograph taken by a tourist? For copyright law, all authors are equal. However, the nature of photographic works and the advanced technological tools which are available today to every mobile phone holder might, in practice, render the criterion of originality meaningless. Nonetheless, the issue of the originality of the contested photograph has not been further discussed by the CJEU, since it has not been referred by the German Federal Court of Justice.

2. "Merge" of the economic rights

The assignment was uploaded to the school's website and also made available to the public. Nonetheless, the question referred to the CJEU does not address the act of reproduction of the photograph. The school's acts have been analyzed only under the light of the right of communication to the public. For the Advocate General, this holistic evaluation of the user's behaviour shall be praised (Opinion, par. 51).

It is noteworthy that this is not the first time that the CJEU appears to favour such a comprehensive approach, which, instead of analysing formalistically each separate act of the user, focuses on the final and most significant use. In this context, the CJEU held that publicly accessible libraries have an ancillary right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals on the

grounds of the exception of Article 5(3)(n) of Directive 2001/29 (Ulmer, C-117/13). This teleological approach is reasonable, and could evolve in an emerging interpretative tendency which emphasizes the highly relevant right, instead of the accumulation of several rights.

3. “New public”, role and intention of the user

The essence of the dispute undoubtedly lies in the assessment of the users’ behaviour as communication to the public. In a hotly debated Opinion, the Advocate General elaborated a subversive argumentation and denied the application of the right of “communication to the public”, by emphasizing, inter alia, (a) that the photo had a secondary character in the pupil’s assignment; (b) that the photograph was accessible on the online travel platform without any technical restrictions (and therefore did not address a “new public” since the photograph was easily and lawfully available with the copyright holder’s consent to all Internet users); and (c) that the pupil did not have a profit making intention. The analysis of the Advocate General, which is inspired by the CJEU’s reasoning in *GS Media*, favours the assessment of copyright infringements under a fault-based approach. This methodology has the advantage of flexibility, but makes the copyright enforcement even more complex, since it is based on the synthesis of various piecemeal criteria in relation to the behaviour of the user and its impact and the intention of the user.

Nonetheless, the CJEU adopts a completely different line of reasoning. The objective to establish a high level of protection for authors does not permit a liberal interpretation of the rights of the author in a way that the non-profit motive or the negligence of the users is taken into account in order to generally deny users’ liability. First, the CJEU reiterates the fundamental copyright dogma that copyright protection has a preventive and *erga omnes* character. Then, the Court is cautious to distinguish the public of the users of the travel website on which the photograph was originally published from the “new” public of the users of the school’s website. The Court emphasises that the photographer gave his consent only for the publication on the first site and that to hold that the posting on one website of a work previously communicated on another website with the consent of the copyright holder does not constitute making available to a new public would amount to applying an exhaustion rule to the right of communication.

Irrespective of the specific circumstances of the case, which could justify a more tolerant evaluation of the users’ acts, this is an important reminder that works found freely and without technical restrictions on various Internet sources are still protected by copyright, contrary to what a vast number of Internet users might think.

In Part II of this blogpost, the three remaining significant findings of the Renckhoff judgment will be analysed: the distinction of the Renckhoff case from the CJEU’s precedents in the hyperlinking cases; the CJEU’s approach in relation to the subversive Advocate General argumentation in favour of the recognition of a standard of behaviour of a diligent author; and the breadth of the application of the educational use exception of the Information Society Directive.

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