Kluwer Copyright Blog

Reflections on the CJEU's judgment in Spiegel online: is there a golden intersection between freedom of expression and EU copyright law? Part I

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On 29 July 2019, the CJEU delivered its hotly awaited decision in the case *Spiegel Online GmbH v Volker Beck* (C 516/17). The decision is part of a trilogy of preliminary references raised by the German courts focusing on copyright exceptions and the interaction of copyright law with fundamental rights (*Pelham*, C?476/17 and *Funke Medien* C-469/17). The CJEU has privileged a mainstream approach and followed several arguments of the Advocate General (AG) in his Opinion on the case (see our comments: *Mirror, mirror, tell me, is the Copyright law fair and balanced? Reflection on AG's conclusions on the Spiegel Online cas*e (Part I) and (Part II)). However, the Court's findings depart from the AG's conclusions on other equally significant points.

Mr. Beck, a German politician, wrote a contentious article which was published in a collection of articles after being subject to certain modifications by the publisher without the author's consent. Since then, the author has totally distanced himself from the content of this article. In 2013, the manuscript of the article was discovered and presented to Mr. Beck, who made the document available to various newspaper editors as evidence that his manuscript had been modified in the article published in the collection. While the author did not consent to the publication of the text by the media, he, however, published both versions of the manuscript on his own website. The Internet portal Spiegel Online published an article in which it was stated that the defendant had deceived the public, because the essential content in the manuscript had not been altered. In

addition, the two versions of the manuscript were made available for download in full text, through hypertext links. Mr. Beck considered that the availability of the full texts of his article on Spiegel Online constituted copyright infringement.

Part I of this blogpost is dedicated to the general framework of analysis which has been developed by the Court on the fundamental question of balancing copyright protection with freedom of expression, both by national courts and the legislation of the Member States (MS). Part II analyses the interpretation and the conditions of application of specific copyright exceptions which are based on freedom of information and freedom of expression, namely the news reporting and quotation exceptions.

1) The degree of freedom of Member States in relation to copyright exceptions

One of the central questions of the dispute concerns the delineation of the degree of latitude afforded to the MS in transposing the exceptions provided for in Directive 2001/29 (InfoSoc Directive). For the CJEU, there is no uniform answer to this question, but it is necessary to examine whether the specific exception shall be interpreted as constituting a measure of full harmonisation or not. In this context, the scope of the MS' discretion in the transposition into national law of a particular exception must be determined on a case-by-case basis, according to the wording of that provision. In the present case, as the CJEU stresses, it is clear from the content of the news reporting and quotation exceptions in the InfoSoc Directive that they do not constitute full harmonisation. The MS enjoy a certain freedom to perceive this exception in light of their national constitutional standards of protection of fundamental rights, but their discretion is circumscribed in several regards, namely: the limits imposed by EU law (which means that the MS are not in every case free to determine, in an un-harmonised manner, the parameters governing those exceptions), the general principles of EU law (including the principle of proportionality), the objectives of the InfoSoc Directive (to establish a high level of protection for authors and to ensure the proper functioning of the internal market) and the three step test. Furthermore, it is also for the MS to safeguard a fair balance of rights and interests between the different categories of rightholders, as well as between the rightholders and users, and also to ensure an interpretation which allows a fair balance to be struck between the various fundamental rights protected by the EU Charter of Fundamental Rights. It is not, however, clear whether the degree of latitude of MS is also limited in the opposite way, in the sense that failing to provide for certain exceptions in domestic law could be incompatible with the Charter, as was advanced by the AG in his Opinion in Pelham (Opinion of AG in *Pelham*, par. 77). For example, would it be compatible with the Charter if a MS does not provide for the parody exception, as is the case in certain MS, where use of a work for satire or parody are directly founded in the freedom of expression as the latter is enshrined in their Constitution? This question is crucial since the Court has closed the door on the application of fundamental rights as an external limitation to copyright.

2) Fundamental rights as external limits to copyright protection

Indeed, one of the fundamental propositions of the Opinion of the AG in the present case has been that MS cannot rely on fundamental rights, like freedom of expression, in order to go beyond the exhaustive catalogue of exceptions in Article 5 of Directive 2001/29, since it is the competence of the legislator to strike the fair balance between copyright and other fundamental rights. The CJEU affirms this position and firmly denies the application of fundamental rights as external limits to copyright protection on several grounds. First, the CJEU recalls the exhaustive character of the list of exceptions and limitations contained in Article 5 of the InfoSoc Directive. In the CJEU's line of

reasoning, the possible destabilising impact of a fundamental rights' analysis for the harmonisation of copyright law prevails. For the CJEU, to allow each MS to derogate from an author's exclusive rights, beyond the exceptions and limitations set out in Article 5 of that directive, would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, the objective of legal certainty, and the requirement of consistency in the implementation of those exceptions and limitations.

The CJEU is far more austere and restrictive than the AG on this point, since it appears to establish in an absolute way the impossibility of justifying a derogation from the author's exclusive rights on the grounds of freedom of information and freedom of the press. It is important to recall on this point that the AG had left the door open for a possible limitation of copyright directly on the grounds of freedom of expression in certain specific circumstances. In the AG's view, the courts' interventions in this field should only be exceptional (when the "essence of a fundamental right" is at stake). In such cases, the core of freedom of expression would be safeguarded only via a limitation of the author's right, regardless of whether a limitation is prescribed with precision in a specific copyright exception. The Court, however, does not mention the possibility to further limit copyright in such exceptional circumstances. In this context, it appears that freedom of expression can be safeguarded only via the specific exceptions which have been established in the domestic jurisdiction of the MS provided that those exceptions are included in the exhaustive list of Article 5 of the InfoSoc Directive. While the national courts are encouraged to opt for an interpretation of the existing exceptions which safeguards their effectiveness and the balancing of fundamental rights at stake, no further limitation is possible on the basis of freedom of expression. This would mean that in practice it will not be possible to justify a satirical use or a parody of a work unless there is a specific copyright exception in the domestic legislation which expressly enables such a use. This is an excessive approach which could be counterbalanced only if the parody exception is established as mandatory in European copyright law. However, this is not the case today. It is not clear, however, whether this is a result that was anticipated and appraised by the CJEU when establishing the principle that fundamental rights cannot act as external limitations to copyright law.

3) The reinforced position of copyright exceptions and limitations as users' rights

While the CJEU rejected the opportunity to justify further limitation of copyright on the basis of freedom of expression, it did, however, affirm that the exceptions and limitations of Article 5 of the InfoSoc Directive shall be adequately safeguarded because they confer rights on the users of works (see par. 54 of the judgment). This is not the first time that the CJEU has referred to copyright exceptions as "users' rights" (See, for instance: Case C-117/13, Technische Universität Darmstadt v Eugen Ulmer KG ('Ulmer'), par. 43, Case C-201/13, Deckmyn, par. 26, Case C-314/12, UPC Telekabel). By doing so, the Court clearly departs from the archetypal approach which considers exceptions and limitations as simple liberties or "privileges" recognised by the legislation in favour of users. This is an important reminder that the user of copyright-protected works has emerged as a new norm in the CJEU's case law.

Indeed, up until now, the recognition of certain exceptions as rights of lawful users was inconsistent and only in relation to computer programs and databases. The approach of the CJEU in the present case is broader, however. The recognition of copyright exceptions and limitations as users' rights has some important ramifications. Specifically, it requires that, in striking the balance between the exclusive rights of the author and the rights of users, a national court shall not give priority to the rights of the author, but shall promote an interpretation of those provisions that fully

adheres to the fundamental rights enshrined in the Charter. Consequently, a national court may depart from a restrictive interpretation of copyright exceptions and limitations in favour of an interpretation which takes full account of the need to respect freedom of expression and freedom of information, enshrined in Article 11 of the Charter. While the CJEU advances an approach in favour of a flexible interpretation of copyright exceptions by national courts, it is not clear whether the "upgrading" of exceptions to the legal category of rights has further implications on the way those "user rights" can be claimed and protected. Legislative intervention will probably be needed in order to safeguard copyright exceptions as real "users' rights", in the sense that they are *jus cogens* that cannot be overridden by technological protection measures (TPMs) or by contracts. This change must be accompanied by the introduction of procedural mechanisms, such as the establishment of *locus standi* of lawful users to bring a claim before a court against the neutralisation or restriction of copyright exceptions, and the establishment of out-of-court redress mechanisms for the settlement of these disputes.

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