Kluwer Copyright Blog

Introducing control © – Strategic Litigation for Free Communication

Felix Reda (GFF (Society for Civil Rights)) · Monday, April 13th, 2020

A year after the adoption of Directive 2019/790 on copyright and related rights in the Digital Single Market, many questions about its compatibility with fundamental rights remain unanswered. Germany, the epicenter of public protests against the directive's most controversial provisions, is also the origin of frequent fundamental rights-related requests for preliminary rulings on EU copyright law. Most recently, the CJEU ruled on three such cases in July 2019. As digitization accelerates, the friction between copyright law and the communication freedoms enshrined in Article 5 of the German Basic Law (freedom of expression, freedom of the press, ban on censorship, freedom of information, education, the arts and the sciences), as well as in the EU Charter of Fundamental Rights, is likely to grow. control ©, a new project launched by former Member of the European Parliament Felix Reda (the author of this post) and German fundamental rights litigation NGO Gesellschaft für Freiheitsrechte (GFF) aims at defending those freedoms in court.

Strategic litigation as a means of defending fundamental rights has a long history, for example in the US, where it has been an important tool of the civil rights movement. Organizations such as the Electronic Frontier Foundation and Public Resource have applied this approach to copyright-related questions surrounding US fair use or the public domain status of annotated legal texts. Europe has less of a tradition of this form of strategic litigation, but activists such as Max Schrems and organizations like epicenter.works have shown the promise of this approach in the European context, especially as regards the right to data protection. The young German organization Gesellschaft für Freiheitsrechte (GFF), founded in 2015, has brought strategic fundamental rights litigation to Germany, supporting individuals and organizations in court proceedings on diverse issues ranging from state surveillance to anti-discrimination, freedom of assembly and the right to asylum. In its new project, **control ©**, GFF is partnering up with copyright reform activist and former MEP Felix Reda to ensure that freedom of communication is protected in the application of copyright law.

One year ago, on 17 April 2019, the European Union adopted its Directive on Copyright in the Digital Single Market (DSM Directive). Even by copyright standards, the debate surrounding the

reform was heated, with over 100,000 people taking to the streets in protest, most of them in Germany. 5 million signed a petition against its most controversial provisions, Article 15 on the neighbouring right for press publishers and Article 17 on liability of online content sharing service providers. Since the adoption of the DSM Directive, Poland has brought an action against Article 17 in front of the CJEU, while the UK has recently announced that it will not implement the directive at all following Brexit. Numerous academics have weighed in with their proposals for a best-case implementation, while remaining sceptical regarding Article 17's compatibility with the acquis. Some law professors, like Gerald Spindler, consider that the provision constitutes a general monitoring obligation, concluding that it is fundamentally incompatible with the Charter of Fundamental Rights.

Can Article 17 be brought in line with the Charter?

With the deadline for national implementation looming in June 2021 and the stakeholder dialogues aimed at developing guidance on the functioning of Article 17 having stalled without any consensus emerging, the question of how the DSM Directive can be reconciled with fundamental rights is more pressing than ever. The German government, under intense public pressure, has promised to avoid the introduction of mandatory upload filters, but to date has failed to produce a proposal for national implementation. Meanwhile, the question to what extent an approach based on compulsory licenses as a potential alternative to upload filters is possible under EU and international law, is subject to academic debate.

Whichever approach the German government – and legislators in other member states – end up choosing, the inherent contradictions enshrined in Article 17 will have to be reconciled in court. One main goal of the new litigation project **control ©** is to ensure that fundamental rights considerations will be at the forefront of those court cases, in Germany and eventually at a European level.

Learning from past mistakes

Too often, balancing elements introduced into copyright law with the aim of safeguarding communication freedoms that may be impacted by rightsholders' interests end up being under-utilized in practice. One such cautionary tale is Directive 2012/28/EU on certain permitted uses of orphan works. Legal uncertainty surrounding the interpretation of its strict conditions, such as the requirement to conduct a "diligent search" for the rightsholder, has crushed its lofty goals of unlocking vast collections of our European cultural heritage that may still be in copyright, but whose authors are unknown. To date, eight years after the adoption of the Orphan Works Directive, just over 6,000 works have been registered as orphan works, most of them literary works. By comparison, in the US, the Internet Archive alone is in the process of digitizing over 100,000 historic music records to make them available for online streaming, based on flexibilities in the US copyright system. The DSM Directive's new out-of-commerce works provisions could lead to a similar breakthrough in Europe, but cultural heritage institutions may once again be deterred from using the new opportunities for fear of costly litigation. In situations like these, GFF plans to step in and offer institutional users the necessary protection through **control ©**.

Likewise, balancing elements included in Article 17, such as the provision that legal content must not be deleted as a consequence of the cooperation between platforms and rightsholders, are likely to be ignored if nobody fights for them in court. Independent authors whose careers can suffer tremendously from wrongful automated removals of their works may not have the resources to

defend themselves without the support of GFF. Alternatively, national legislators may consider the user rights enshrined in Article 17 to be little more than non-binding aspirational statements.

This risk is evident from the national implementation proposal of France, one of the staunchest supporters of the DSM Directive during Council negotiations. Its draft law on "audiovisual communication and cultural sovereignty in the digital age", which includes the national transposition of Article 17, but not of other parts of the DSM Directive, simply fails to implement most of the users' rights provisions of Article 17. In response to a written question posed by Pirate Party MEP Marcel Kolaja, the European Commission indicates that the French implementation is at odds with the requirements of the DSM Directive, yet there is reason for doubt as to whether the Commission would go so far as starting infringement proceedings in such cases, if no powerful economic interests were at stake. Should Germany take a similar approach to France, GFF plans to challenge the implementation in court, as part of its **control ©** project.

Copyright in times of Corona

Even though the implementation deadline for the DSM Directive is still a year away, the launch of **control ©** is timely, as the frequent German referrals to the CJEU of copyright cases with a fundamental rights dimension show. The current copyright law raises plenty of fundamental rights questions, many of them thrown into sharp relief by the current public health crisis.

Roughly 80 percent of academic studies about respirators are behind a paywall, as a quick search on EuropePMC demonstrates. Libraries that have had to close their doors to patrons face difficulties moving their public interest services – such as story time for children – online, as EU copyright law expects libraries to limit their communication of copyrighted works to dedicated terminals on their premises. Teachers in border regions whose students live in different EU member states find that some of their students can't access online material used in class due to geoblocking. While some rightsholders have taken laudable steps to extend existing licensing or remuneration agreements to temporarily cover additional uses, and pledges have emerged that encourage a pragmatic approach to IP during the ongoing crisis, fundamental rights questions cannot always be resolved through the goodwill of all involved parties.

control © wants to be copied

While GFF's activities through **control ©** will be limited to court cases originating in Germany, the author hopes that civil society in other member states will follow this example and fight for our freedom of communication in court. The high level of attention to the copyright reform amongst the German public, as well as the frequent referrals to the CJEU by its courts make Germany an ideal starting point for this initiative. Yet, its national copyright law also poses particular challenges, tilting strongly towards the interests of rightsholders. After all, Germany is completely lacking some of the essential copyright exceptions aimed at protecting freedom of expression, such as the parody exception (demonstrating the Germans' proverbial lack of a sense of humour). Thankfully, this and other essential exceptions are made mandatory by the DSM Directive.

Other European countries have much more progressive copyright systems that strike a better balance between exclusive rights and fundamental freedoms. As implementation of the new copyright rules progresses, GFF is looking forward to consulting with potential partners across the EU to advance the cause of freedom of communication through strategic litigation.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Monday, April 13th, 2020 at 10:10 am and is filed under CDSM Directive, Digital Single Market, European Union, Germany
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.