

Kluwer Copyright Blog

EU copyright law round up - third trimester of 2021

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Welcome to the third trimester of 2021 round up of EU copyright law!

In this series we update readers every three months on developments in EU copyright law. This includes Court of Justice (CJEU) and General Court judgments, Advocate Generals' (AG) opinions, and important policy developments. You can read the first and second trimester round ups [here](#) and [here](#). Since the second trimester roundup came a bit late and included some third trimester updates, we are repeating those here.



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CJEU judgments and AG Opinions

Poland v Parliament and Council, AG Øe, C-401/19

This eagerly awaited AG Opinion was published on 15 July 2021. AG Saugmandsgaard Øe suggests that Art. 17 is in principle compatible with the freedom of expression and information guaranteed in Art. 11 of the [Charter of Fundamental Rights of the European Union](#). Nonetheless, the most important element of the Opinion is that such compatibility is only possible subject to a specific reading of the provision and implementation of its safeguards. A comment on the most important aspects of the Opinion can be found [here](#), while an analysis of how the Opinion can assist Member States in implementing the CDSM Directive is accessible [here](#). A more extensive

analysis of the Opinion, together with the Commission's Guidance on Art. 17 and the *YouTube v Cyando* case, can be found in this [paper](#).

Stichting Brein v News-Service Europe BV, Court of Justice, C-442/19 and Puls 4 TV, Court of Justice, C-500/19 [Withdrawn]

Following the CJEU's judgment in *YouTube v Cyando* (C-682/18 and C-683/18; discussed [here](#), [here](#), [here](#) and [here](#)), these two cases took an interesting turn and were withdrawn. The *Stichting Brein* preliminary reference related to the liability of an operator of a platform for Usenet services for communication to the public, while the *Puls 4 TV* reference concerned the application of the hosting safe harbour to online video platforms.

Austro-Mechana, AG Hogan, C-433/20

On 23 September 2021, AG Hogan delivered his Opinion in the *Austro-Mechana* case which tackles the private copying exception and the compensation for the reproduction and storage of copyright material in the cloud. The AG suggests that the private copyright exception applies in the cloud, but a separate levy may not be payable. A comment on the Opinion is coming soon on the blog, so watch this space.

General Court

Resource.Org, General Court, T-185/19

In this case, Public.Resource.Org, Inc. and Right to Know CLG challenged a decision by the European Commission to not grant (free and public) access to harmonised standards adopted by the European Committee for Standardisation (CEN). One of the Commissions' arguments to justify its refusal (under art. 4(2) of [Regulation \(EC\) No 1049/2001](#)) was that doing so would undermine the copyright protection of the standards at issue. This begs the question of whether standards can be subject to copyright protection.

The General Court's reasoning in answering this question is not particularly convincing. The Court accepted the Commission's finding on the existence of copyright protection for the requested harmonised standards, since the Commission had based its reasoning on objective and consistent evidence to support the existence of the copyright claimed by CEN for the standards. Besides, the Court held that considering the case law on copyright originality, the Commission was entitled to find that the necessary threshold of originality for the harmonised standards had been met. Finally, the applicants did not show in the present case how the restrictions on creativity that result from the standardisation legislation prevent the harmonised standards from reaching the EU originality threshold. For a critical analysis of this judgment, see this [post](#) on the IPKat.

CDSM Directive implementation

7 June 2021 marked the deadline to implement the **CDSM Directive**. Since most Member States missed the deadline, the Commission started infringement procedures by sending letters of formal notice (see [here](#)). Countries usually have **two months to respond to and comply with the letter of formal notice**. This seems to have pushed some EU Member States towards compliance, as at the end of September Portugal became the latest country to publish a national **transposition proposal** for the Directive.

If you are interested in tracking the implementation process, we recommend you check **CREATe's resource page** (in partnership with the **reCreating Europe** project), as well as the **COMMUNIA tracker**.

Policy

UKIPO, Music creators' earnings in the digital era

On 23 September 2021, the UKIPO published a report looking into how creators earn in the digital era and, more specifically, through streaming. The report highlights, among other things, that there are still many misunderstandings of the system by which musicians make a living from royalties for copyrighted works (see [here](#) for an interesting piece in The Guardian about this report).

EU Parliament, Draft report on IP Action Plan

On 30 September 2021, the EU Parliament adopted a draft report that welcomes the EU Commission's aims set out in its **EU IP Action Plan**. The central message of the report is that stronger IPRs will help in the process of social and economic recovery from the COVID-19 and other global crisis.

In relation to copyright, other than mentioning efforts to ensure the transposition of the **CDSM Directive** and **Directive (EU) 2019/789** laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, the Plan focuses on facilitating licensing of copyright via enhanced transparency. In this context, other than the obligatory vague mention of the use of blockchain technologies, reference is made to the publication (later in 2021) of an ongoing study on copyright and new technologies, which will focus on copyright data management and artificial intelligence. It is also noted that the Commission will "work with relevant stakeholders to promote the quality of copyright data and achieve a well-functioning "copyright infrastructure" (e.g. improve authoritative and updated information on right holders, terms and conditions and licensing opportunities).

At the WIPO level, the focus of the Commission's work will be twofold: to reach an agreement on a new treaty ensuring international protection for broadcasting organisations and "work towards securing the EU's ratification of the WIPO Beijing Treaty (signed by the EU in 2013), which grants international protection to audio-visual performances".

Coming soon and latest referrals

Some interesting preliminary references to the CJEU to look out for include: *RTL Television* (**Case C-716/20**) regarding 'cable retransmission' in hotel rooms and *AKM* (**C-290/21**) on communication to the public by satellite broadcasting.

On the copyright/trade mark front, a case on the registrability of the marks '**ANIMAL FARM**' and '**1984**' is still pending before the EUIPO's Grand Board of Appeal. The copyright in these two titles expired at the beginning of 2021.

Stay tuned!

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