Kluwer Copyright Blog

EU: Playing Sherlock, or spotting copyright consequences in patent cases

Ana Ramalho (Maastricht University) · Thursday, May 2nd, 2013

"The most obvious one is the fact that, if enhanced cooperation is permitted in the area of creation of unitary titles, then a similar solution could be envisaged for copyright."

Last month, the CJEU came to a decision in joined cases C-274/11 and C-295/11, where the claims of Spain and Italy against enhanced cooperation for the creation of a unitary patent were dismissed. Did this blogger just take the wrong exit on the IP interstate and arrived in patent city? Not really. While this is a patent decision, some of its splinters might indeed land in copyright town.

In a nutshell, 25 Member States of the EU decided to establish enhanced cooperation between them in the context of creating a unitary patent, following Article 20 of the Treaty on European Union (TEU) and Articles 326-334 of the Treaty on the Functioning of the European Union (TFEU). The creation of the unitary patent would take place under Article 118 TFEU, which grants the EU competence to create European intellectual property rights.

Spain and Italy, however, threw their toys out of the pram and didn't tag along, filing the cases mentioned above. One of the arguments used against enhanced cooperation in the proceedings is that Article 118 TFEU falls within the exclusive competence of the Union. If that would be the case, establishing enhanced cooperation would not be possible, since this mechanism can only be used in relation to shared competences of the EU. The CJEU ruled that Article 118 TFEU is a shared competence (i.e., one where both the EU and its Member States are competent to take action). The Court also stated that the competence of Article 118 TFEU was "attached" to the objective of building an internal market – much like, e.g., Article 114 TFEU, which has been used so far to harmonize national copyright laws (see paragraph 21 of the decision).

So, what does this all mean for us copyright addicts? Well, in this blogger's opinion, there are a couple of relevant points here. The most obvious one is the fact that, if enhanced cooperation is permitted in the area of creation of unitary titles, then a similar solution could be envisaged for copyright, provided that other requirements are met and should there be the political will to do so (after all, only 9 out of the 27 Member States need to be on board to establish enhanced

cooperation, according to Article 328 TFEU). Enhanced cooperation has its quirks, and going deep into that is not an exercise for a blog post. Suffice it to say that, although the Lisbon Treaty has watered down the requirements for using enhanced cooperation, the latter still implies an *apartheid* between Member States that adhere to it and the ones that do not. How rigid this divide might be, especially in the case of a unregistered unitary title, is somewhat an open question. As it is whether such solution actually promotes integration – one of the goals of enhanced cooperation – or whether it just adds an extra layer of legal uncertainty that might actually contradict that goal.

Another consequence for copyright is the express attachment of the use of Article 118 TFEU to the objective of building an internal market. Does this mean that Article 118 TFEU cannot be used as a self-standing competence to create just any kind of IP title, including copyright? In this blogger's opinion, the answer is yes, that is exactly what it means. If Article 118 is linked to the establishment and functioning of the internal market as an objective, then we must recall all the CJEU case law that interprets that concept. Again, this is not the place to do so, but in short , according to the CJEU, there must be a genuine link between the aim and content of a measure , on the one hand, and the establishment of an internal market, on the other. In the Court's view, the internal market must be a genuine goal of the legislative measure, which will be the case if obstacles to cross-border trade exist and the measure in question is designed to prevent them (see among others case C-376/98 – *Tobacco Advertising I* and case C-380/03 – *Tobacco Advertising II*).

Translated into copyrightese: the creation of a pan-European copyright title should be aimed at doing away with obstacles to cross-border trade in copyright goods and services. Sure, despite the fact that we have eight copyright directives (not counting the enforcement one) and one more one the way, some unharmonized aspects and inconsistencies subsist that do not foster the internal market. On the other hand, however, the directives did achieve some level of harmonization that facilitated cross-border trade. An eventual copyright regulation would have to prove its worth in that sense, even though the CJEU also allows for consideration of goals other than the internal market, so long as they are ancillary (case C-376/98 – *Tobacco Advertising I* and joined cases C-465/00, C-138/01 and 139/01 – *Österreichischer Rundfunk*).

So yes – copyright town does have something to chew on, if the creation of an European copyright title is a foreseeable and/or desired option.

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