

Kluwer Copyright Blog

Recently added copyright cases

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The KluwerCopyrightBlog is part of Kluwer's [IP Kluwer IP Law](#) portfolio. Whereas the blog serves as a platform where scholars and practitioners can share their informed opinions on specific aspects of IP law and jurisprudence, the related Kluwer Copyright Cases Database aims to accumulate important case law in the field of copyright in one database.

The KluwerCopyrightBlog already reported incidentally about individual cases that were added to the database, for instance [here](#), [here](#) and [here](#), but to satisfy the increasing curiosity about what is happening in the copyright courts of other EU member states, we thought that it might also be a good idea to publish a periodic overview of interesting cases that were added recently to the database.

The selection of this month includes recently submitted cases from France, Germany, Poland, Hungary, Estonia, Italy, the Netherlands and the UK:

France: Supreme Court, 11 December 2013 (Sony Music). The Supreme Court agreed the Court of Appeal Paris that a victim may bring an infringement action on the grounds of the infringement of his moral rights in a work of collaboration. However, the Supreme Court quashed the decision of the Court of Appeal in that it ruled that the author could not bring an action on his own on the grounds of his economic rights.

The Supreme Court ruled that under Article L. 113-3 of the Intellectual Property Code, the admissibility of the action of an the author of the first work, exclusively directed against the entity that exploits the allegedly infringing work of collaboration is not subject to bringing the case against all the co-authors that allegedly infringing work. (*Case submitted by Brad Spitz, YS Avocats, Paris*).

France: Supreme Court, 10 December 2013 (No protection for perfume). In this ruling, the French Supreme Court confirms that perfume is not protected by copyright, as it is not in a tangible form sufficiently identifiable. The Supreme Court maintains yet again its position in a case concerning a Lancôme perfume, stating that 'copyright only protects creations in their tangible form, so far as this form is identifiable with sufficient precision to permit its communication.

Whereas the fragrance of a perfume, which, outside its process of development, which is not itself

a work of the mind, is not a form that has this characteristic, and can not therefore be protected by copyright'. (*Case submitted by Brad Spitz, YS Avocats, Paris*).

USA: United States Court of Appeals, 26 February 2014 (Garcia v. Google, Inc.). The federal district court in Los Angeles abused its discretion by not granting an actress's request for a preliminary order forcing Google to takedown the controversial anti-Islamic "Innocence of Muslims" video from its YouTube platform, the U.S. Court of Appeals in San Francisco has ruled (*Garcia v. Google, Inc., February 26, 2014, Kozinski, A.*).

The actress established that she was likely to succeed on the merits of her copyright infringement claim and that, absent removal of the video, she would continue to be subject to threats and possible physical harm, according to the court. Circuit Judge N. Randy Smith filed a dissenting opinion. (*Case submitted by Cheryl Beise, CCH*).

Estonia: Harju County Court, 28 June 2013 (EAÜ v. EH). The Estonian Authors' Society (EAÜ) sued EH for its refusal to pay for the public performance of works in EH's restaurant. The main arguments of EH were that EAÜ should prove that it rightfully represented the right holders and that the works that were performed were part of EAÜ's repertoire.

The court pointed out that the use of the copyrighted works is allowed only with permission from the author or the collecting society and that when EH signed the license agreement with EAÜ, it clearly recognized that EAÜ had all the necessary mandates to represent the right holders and that it couldn't refuse to follow the obligations deriving from that agreement. In addition, the court stated that the defendant had to prove that the rights vested in works performed in its restaurant were not collectively managed by EAÜ. (*Case submitted by Elise Vasamäe, Aavik & Partners Law Office, Tallinn*).

Switzerland: Federal Supreme Court, 23 April 2013 (Reportages SSR). Does an oral agreement, which does not deal with the issue of copyright, provide an assignment of copyrights and, if yes, to what extent? The scope of assignment of copyrights is determined on the basis of general rules of contract law respectively on the basis of real wishes of the parties (subjective interpretation) or, if the latter cannot be determined, on the basis of what parties would have agreed in good faith and based on the specific circumstances (objective interpretation).

If the objective interpretation is uncertain, the scope of assignment of copyrights is determined on the basis of specific rules of copyright respectively on the basis of the so-called *théorie de la finalité* (*Zweckübertragungstheorie*) (Article 16 Copyright Act), under which the assignment covers the sole copyrights needed for the purpose of the contract. (*Case submitted by Yaniv Benhamou, Troller Hitz Troller, Lausanne*).

UK: High Court of England and Wales, 14 November 2013 (Redcrier v. Redrup). The Court ordered the defendants, who admitted copyright infringement (use of a photograph by a competitor), to make an interim payment for the loss caused to the claimants. The application for the interim payment was granted. It was found that the photograph that was used in the present case was a fairly trivial one and that it was likely that a willing buyer would not have paid a large licensing fee.

It did however represent a significant part of the claimant's goodwill, of which the claimants must have wanted to take benefit. Even though the claimant would not have granted a license on the use of this photograph, the Court had to proceed on the hypothetical basis that the parties would be

willing to negotiate a license. (*Case submitted by Stavroula Karapapa, University of Reading; Maurizio Borghi, University of Bournemouth*).

UK: Court of Appeal of England and Wales, 16 October 2013 (Performing Right Society v. B4U Network). The claimant appealed the decision of the Chancery Division to grant summary judgement for the defendant's copyright infringement claim. Dismissing the appeal, the Court of Appeals determined that — on the true construction of the agreement between the claimant and the composers for the future copyrights of the composers — the music had been assigned to the claimant once it had been created.

The question posed by the agreement with the collecting society was not whether the composers became owners, but whether, at the time the agreement was made, they could have done so. The assignment was not found to transfer rights of which the composers subsequently became owners, but rights which the composers may own. (*Case submitted by Stavroula Karapapa, University of Reading; Maurizio Borghi, University of Bournemouth*).

High Court of England and Wales, 13 November 2013 (Paramount Home Entertainment v. British Sky Broadcasting). The claimant film studios were entitled to injunctions under the s 97A of the CDPA1988 to request the defendant retail internet service providers to block access to websites providing downloads of, and hyperlinks to, copies of films and television programmes to which they held copyright.

Even though the mere provision of a hyperlink did not clearly fall under the scope of “communication to the public” within the meaning of art 3(1) of Directive 2001/29, the combined effect of uploading content to a host site and providing a link did amount to such communication (*Case submitted by Stavroula Karapapa, University of Reading & Maurizio Borghi, University of Bournemouth*).

Amsterdam Court of Appeal, 9 November 2013 (GeenStijl / Sanoma). According to the court, the publication of an hyperlink to copyrighted material must, in principle, not be regarded as an autonomous communication to the public, unless the material is unfindable and unreachable for the public and the publication of the link constitutes a new access channel. The court suggests that anyone who puts something on the internet is not directly communicating it to the public, if the location is kept private and the material is unfindable for e.g. search-engines, even if what is put on the internet is, in principle, accessible for everyone who knows the exact location.

But when he himself or someone else discloses the access link or the digital key to the material to a broader public, the material can be considered to be communicated to the public. In this case the publication of the link doesn't constitute copyright infringement, but the court does consider the publication to be an unlawful act, as it had a highly facilitating character and therewith violates the carefulness which is required in public life.

Hungary: Supreme Court, 31 October 2012 (Creations of science). A patented invention cannot be exploited freely, but that does not prevent anybody from writing a scientific literary work about the invention. The technical method in a patent application is not a literary, scientific work and therefore it is not protected by copyright. A copyright claim cannot be enforced for the same technical method because of the lapse of (provisional) patent protection.

A technical feature may be protected as know-how when it has not yet become part of the public domain. In the present case the publication of the patent application results in that the technological

feature has become part of the public domain. (*Case submitted by Eszter Kabai, Head of Legal Department at Artisjus*).

Supreme Court of Poland, 15 November 2012 (Protection of technical works in copyright law). Technical solutions are not covered by copyright protection. The technical documentation may however be the subject of protection. A bus can only act as a material carrier of an intangible work (*corpus mechanicum*).

The judgment concerns two issues. The first is the separation of a work under the meaning of copyright law (intangible) from the material carrier (*corpus mechanicum*). The court ruled that the plaintiff improperly demanded the protection for the bus as an object (*corpus mechanicum*) instead of the technical documentation on the basis of which it was built. (*Case submitted by Marcin Balicki, Jagiellonian University*).

Germany: Federal Court of Justice, 15 August 2013 (File Hosting Services). If the business model of a file-hosting-service is not per se designed to foster copyright infringements and other illegal activities, the fact that the service provider encourages the infringing use of the service through actions of his own will have to be taken into account when determining the extent of the service provider's duties to monitor.

A file hosting service provider, who by way of his business model, encourages the use of his services for copyright infringements may be obliged to regularly monitor link-collections encompassing hyperlinks that direct to his services. The resulting obligation (of the interferer (*Störer*)) to monitor, apply in relation to every copyright protected work of which he received a clear notification that it was being violated. The obligation to monitor are not reduced because the service provider was notified of a large number of violations – 4800 songs in the case at hand. (*Case submitted by Benjamin Schuetze, Leibnitz Universität, Hannover*).

Germany: Short annotation by Federal Court of Justice of Germany, 12 July 2012 (Alone in the Dark). “Alone in the Dark” provides some guidance, as to what legal obligations host providers have to comply with. The question is, how a reasonable balance between economic interests of file hosting providers on the one side and copyright holders on the other side, can be achieved. (...).

Before “Alone in the Dark” one of the arguments of those who wanted to limit obligations for hosting services under secondary liability (*Störerhaftung*) argued that it was an unreasonable burden to require a file hoster to monitor its platforms not only by the use of automated tools such as wordfilters but if circumstances required also manually. Although this argument was not entirely dismissed by the Court, it was at least modified to the extent that in cases, where it cannot be ensured that monitoring software (wordfilter) is accurate enough a manual re-check (to have a look at a “small number of link collections”) may be necessary. (*Case Benjamin Schuetze, Leibnitz Universität, Hannover*).

Italy: Constitutional Court, 24 October 2013 (C.E. vs RAI/Gay Pride). The public displaying of the portrait of a person without his/her consent is not an infringement of the rights of such person under Article 96 of the Italian Copyright Act when it is associated with facts or events which are of public interest and/or which have taken place in public. However, the portrait may not be displayed when this would prejudice the honour, reputation or dignity of the person portrayed. No prejudice occurs if the person portrayed is shown for a very short time in the midst of an

anonymous crowd of passengers about to join the Gay Pride parade. (*Case submitted by Giorgio Spedicato, Monducci Perri Spedicato & Partners*).

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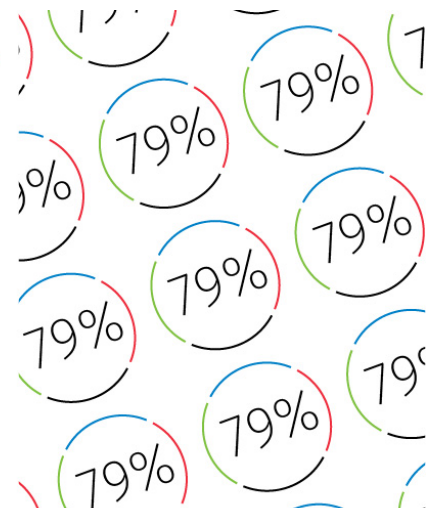
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