

# Kluwer Copyright Blog

## Felix Reda MEP discusses the harmonisation of copyright law, IP enforcement and Brexit

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Here at the Kluwer Copyright Blog we are thrilled to have had the opportunity to ask [Felix Reda MEP](#) a few questions on some very topical copyright law issues. We are very grateful to Felix for sparing time in his busy schedule to do the interview, and here's what he had to say:



***1. In your speech at the Commission's recent IPR Enforcement Conference, you emphasised that the enforcement of IP law must go hand in hand with solid and predictable substantive law. In your opinion, which areas of copyright law should be priorities for harmonisation?***

The harmonisation of copyright exceptions and limitations is overdue. There is a trend towards voluntary agreements of online intermediaries to take automated measures to screen for and take down infringing content. As online intermediaries often operate EU-wide and their agreements rarely include any commitment to keeping legal content online, national exceptions and limitations are systematically undermined. It is a daunting task to try to keep an overview of all the different exceptions and limitations that may or may not apply from country to country, hence content that is legal under a national copyright exception is routinely taken down by intermediaries who can't or won't pay attention to these exceptions. One prominent example is a popular mashup created by German artist Kurt Prödel using scenes from penalty kicks in the UEFA EURO 2016 football championship that was taken down by UEFA. Taking into account the recent German Constitutional Court ruling in the 'Metall auf Metall' case, the video may very well constitute free use in Germany, but in the absence of clear harmonised exceptions at EU level, online intermediaries faced with a takedown request will err on the side of the complainant. The best approach would be to turn the optional list of exception and limitations from the InfoSoc directive

into a mandatory one and to properly follow the ECJ rulings (most notably Deckmyn) that have established that the concepts laid down in the exceptions and limitations, insofar as they don't make reference to national laws, are autonomous concepts of EU law that need to be uniformly implemented throughout the EU. The list of exceptions could use some updating, for example by including an exception for text & data mining or clearer provisions on remix and mashup, but the same goal could also be achieved by extending the scope of existing exceptions. Finally, the introduction of an open norm would help keep the exceptions and limitations up to date with technological development, given that the legislative process on a European level is notoriously slow.

***2. The Commission is proposing a 'follow the money' approach to IP enforcement, focusing on commercial-scale infringements. What are your views on this approach?***

A focus on commercial-scale infringements depends entirely on the definition of commercial scale. Unfortunately, the Commission has left this old and central question unanswered. If the purpose of the 'follow the money' approach is to disregard the minor everyday infringements that are largely a consequence of the outdated substantive copyright law, that is a reasonable approach. Almost anyone who uses the Internet regularly, from individuals to companies to public institutions, comes into conflict with copyright law on a regular basis. Strict enforcement would bring the digital economy and interpersonal communication on the Internet to a screeching halt. So the 'follow the money' approach seems like a good way of prioritising enforcement action on the cases where it matters. It's important to make sure though that the definition of 'commercial scale' is not cast so wide as to include cases that lack profit motive or any money actually changing hands. In the past, cases of individual file-sharing have sometimes been classified as 'commercial-scale infringement' based purely on the number of works uploaded or downloaded. Estimates of damages have been based on the erroneous assumption that every download from an illegal source constitutes a lost sale, even if those damages would exceed the entire economic activity on Earth when applied to all file-sharing activity taking place. It is therefore essential to base the 'follow the money' approach on independent academic evidence.

***3. What difficulties do you foresee in implementing such a system?***

Measures against counterfeiting that mostly aim at the transparency of supply chains, including 'know your customer' provisions, should be easily implementable if the signatories are committed to them. What is more problematic from a fundamental rights perspective is when private companies are put in a position to make judgements about the limits of free speech, for example when trademarks are used in the context of satire. Algorithms are not capable of evaluating the scope of fundamental rights. This becomes especially relevant when payment providers are included in the voluntary agreements, that may provide the only feasible means of payment in a given market. The Commission must make sure that none of the Memoranda of Understanding that they initiate with industry can substitute for legal recourse in controversial cases, or shut legitimate businesses out of payment services. The danger is that 'follow the money' could lead to a privatisation of law enforcement, precisely the kinds of concerns that led to the widespread protests against the Anti-Counterfeiting Trade Agreement several years ago.

On the positive side, it is evident that the European Commission has learned a lesson from the defeat of ACTA about the need for transparency. Civil society groups have been involved in the discussions on the Memoranda of Understanding from an early stage, although they have remained critical of the instrument. Public concerns such as those about wrongful takedowns have also made

it into the MoU on the online sale of counterfeit goods, which includes a commitment from rights holders to use takedown notices only in cases in which they hold the relevant rights and to avoid erroneous or abusive notifications. Whether these measures will lead to a decrease in wrongful takedowns of legal content remains to be seen. Cases like takedowns of critical customer reviews show the large potential for abuse of the notice and takedown instrument if there is a lack of safeguards that protect free speech.

#### ***4. What other aspects of IP enforcement do you feel that the Commission should focus on?***

I think the ‘follow the money’ approach needs to be evaluated before any new steps in the area of IP enforcement are taken. Historically, IP enforcement has suffered from a lack of evidence, which has led to ultimately futile crusades in the cultural sector, when it turns out that the surge in copyright infringement online was caused by a lack of legal offers and no crackdown on filesharers could have an effect comparable to the development of legal, easy-to-use and fairly priced download and online streaming services. Overall, developments of IP enforcement should focus on those areas of IP that are already harmonised at EU level and functioning reasonably well. Copyright reform is so dearly needed that any intensified enforcement would just end up enforcing a fundamentally broken system and have disastrous effects on access to knowledge.

#### ***5. What impact do you think Brexit will have on the future development of European Copyright law?***

Whatever the impact of Brexit on copyright law, the implications on almost every other aspect of living and working in the European Union will be severely affected. Following the confusion about the UK government’s resistance to immediately invoke Article 50 TEU, there are a number of important questions to be resolved before any impact on copyright law can be envisioned. So far, European copyright legislation has been developed on the legal basis of the internal market. If the UK indeed leaves the EU but remains part of the single market, it will have to implement all copyright legislation without getting a vote on it. In that case, an important voice in copyright legislation, one that has emphasized the importance of independent academic evidence and technological neutrality, will be missed.

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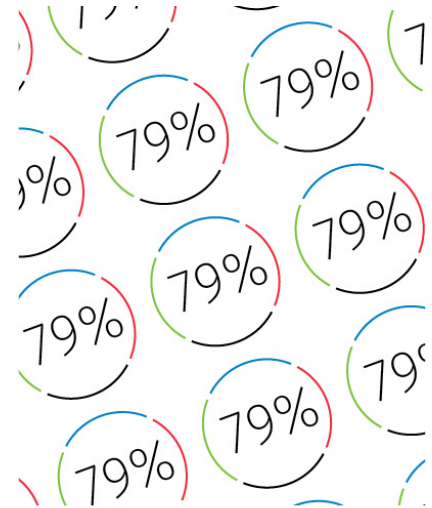
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