Kluwer Copyright Blog

Copyright 4.0 : a global perspective (and many takeaways) IP Conference held at the University of Geneva on February 22, 2017 – Part 2

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Last week we published the first part of a two-part article summarising the essence of the presentations at the annual IP conference organised by the University of Geneva on February 22, 2017 (programme available here). This is the second part of the article, discussing the remaining presentations.

4. Scope of copyright: hyperlinking and framing as main issues.

- **Hyperlinking:** hyperlinking, which can be defined as the creation of a reference to data that the reader can directly follow by clicking, is one of the key architectural elements of the internet. In *GS Media*, the ECJ addressed the legality of hyperlinking based notably on the debatable "for profit" concept. More specifically, the ECJ held that "*the posting of a hyperlink on a website to works protected by copyright and published without the author's consent on another website does not constitute a 'communication to the public' when the person who posts that link does not seek financial gain and acts without knowledge that those works have been published illegally. In contrast, if those hyperlinks are provided for profit, knowledge of the illegality of the publication on the other website must be presumed*" (Press release available here). With respect to Switzerland, most commentators support the view that hyperlinking does not violate copyright law, unless the link allows the final user to download content unlawfully.

- **Framing:** Framing, which enables the display of any information available on the internet directly on a person's own page, has become a major trend in particular in social media. According to some scholars, in Swiss law, framing is likely to fall under the right to make available to the public and would thus infringe on the rights of the copyright holder.

5. Limitations and exceptions to copyright: towards more freedom for users?

- There is a trend in WIPO Treaties toward a more user-friendly interpretation of limitations and exceptions to copyright.

- **Usedsoft confirmed.** The ECJ confirmed its ruling in Usedsoft and held that the "*initial acquirer of a copy of a computer program, accompanied by an unlimited user licence, may resell that copy and his licence to a new acquirer. However, where the original material medium of the copy that was initially delivered has been damaged, destroyed or lost, that acquirer may not provide his back-up copy of that program to that new acquirer without the authorisation of the*

rightholder." Note that this question remains open with respect to other works such as music or ebooks.

- **In the field of science, new exceptions for text and data mining.** Article 3 of the Proposal for a Directive provides for a new exception to copyright aimed at allowing researchers to benefit from a clearer legal space to use innovative text and data mining research tools, teachers and students to be able to take full advantage of digital technologies at all levels of education and cultural heritage institutions (i.e. publicly accessible libraries or museums, archives or film or audio heritage institutions) to be supported in their efforts to preserve the cultural heritage, to the ultimate advantage of EU citizens.

- **Is the fair use exception being introduced in Europe?** Continental jurisdictions have always been reluctant about introducing a fair use defence such as that in US law. Now, the question can legitimately be raised as to whether there is a shift in thinking, in light of the solution adopted in the *GS Media* case addressed above. In this respect, one can emphasise in particular the following statement made by the ECJ: "*the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information*" (para. 45).

- **Exceptions for user-generated content and other practices by users in North America.** As indicated above, Canadian law has recently been modernised. The new law, which sets out quite a complex mechanism, leans towards more freedom for users (see Sections 29.21 et seq. of the Copyright Modernisation Act relating to non-commercial user-generated content, reproduction for private purposes, backup copies and reproduction for later listening or viewing).[1]

6. Infringement: green light to punitive damages.

According to the ECJ, the Enforcement Directive, which lays down the minimum standard protection that EU Member States have to implement in their national legislation, does not prevent said Member States from introducing punitive damages in case of copyright infringement (see in particular par 33). This may lead to major developments in the field of copyright enforcement in the EU.

7. Intermediary liability.

- **Internet Service Providers (ISPs).** Music piracy remains a major issue for content owners, and direct legal action is increasingly difficult. Website blocking, meaning measures implemented by ISPs blocking their subscribers' access to infringing websites, is an efficient tool to fight piracy. This tool raises legal issues, however, such as the types of legal basis available for injunctions where no liability of ISPs exists. It should be noted that the solutions adopted vary quite significantly across jurisdictions. In this connection, the *Equustek* case (soon to be addressed by the Canadian Supreme Court) is worth mentioning on the question of whether a world-wide injunction can be issued against Google, enjoining it from displaying hyperlinks to website of third parties who were prohibited from carrying on business over the internet because of infringement of Equustek rights.

- **Internet Access Providers (IAPs).** Generally speaking, less attention has been paid to IAPs' obligations and liability. In this connection, it is worth mentioning that the draft Bill currently under discussion in Switzerland provides for an obligation on IAPs to block access to websites in

cases of clear infringing content. In addition, IAPs would have to implement a graduated-response system.

- **Creation and technology are converging.** The conference held in Geneva showed that creation and technology are, now more than ever, converging and that these areas need to be addressed as a whole. In addition, developments in various jurisdictions are influencing each other; hence the need for a truly global perspective.

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[1] See also the following cases of the Canadia Supreme Court: CCH Canadian Ltd. v. Law Society of Upper Canada (2004), Alberta (Education) v. Access Copyright (2012) and SOCAN v. Bell Canada (2012).

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