Kluwer Copyright Blog

The Renckhoff judgment: The CJEU swivels the faces of the Copyright Rubik's Cube (Part II)

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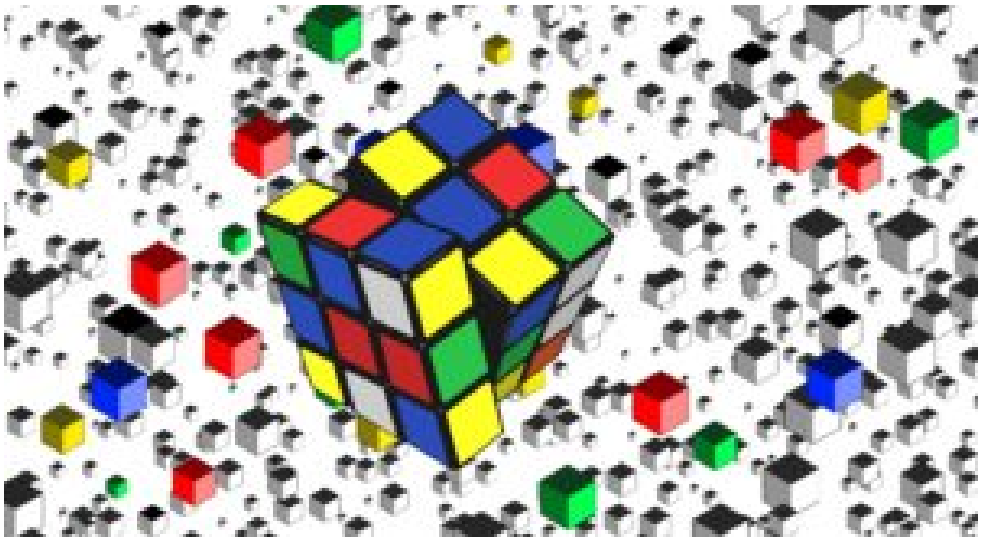

As discussed in Part I of this blogpost, the CJEU in Renckhoff was called, once again, to analyse the application of copyright in relation to the use of copyright-protected works on the Internet. The Renckhoff judgment is, therefore, another addition to the complex European copyright case law construction. To date, the often tailor-made jurisprudential solutions adopted by the CJEU incarnate an activist and pragmatic, but also piecemeal approach.

The CJEU's interpretative dynamism is justified by the inaptness of the EU legislation to catch the dynamic pulse of technological developments and to reflect the multidimensional substance of modern copyright law regulation. Nonetheless, the current copyright law landscape could only by euphemism be described as a harmonious one, even though the ultimate will of this EU judge-made law is to gradually bring some coherence to an anarchic body of copyright law sources by constructing the copyright *lex generalis*, either by contradiction to the *lex specialis* or by extracting a general rule from the juxtaposition of similar cases.

In this context, as will be shown, the CJEU in Renckhoff is very vigilant to stress that its previous case law in relation to hyperlinks and its implications for the criterion of the new public is a *lex specialis* which cannot find an application in the present case (1). Similarly thoughtful is the CJEU's stance in relation to the subversive Advocate General's argumentation in favour of the recognition of a standard of behaviour of a diligent author (2); and in relation to the breadth of the educational use exception of the Information Society Directive (3).

1. The *lex specialis* of hyperlinks

For the Court, the application of the line of reasoning in the linking cases (Svensson, BestWater and GS Media, as well as "Filmspeler" (C-527/15) and Pirate bay (C-610/15), since the Court has interpreted the concept of hyperlinks in a technologically neutral way) shall be seen as a particularity (a *lex specialis*) which is justified by the indispensable role of hyperlinks in the sound operation of the Internet by enabling the dissemination of information in that network characterised by the availability of immense amounts of information (par. 40 of the judgment). On the other hand, posting a work on another website without the authorisation of the copyright holder does not contribute, to the same extent, to that objective and, as a result, a similar multifactor fundamental rights analysis cannot be justified in the present case. The approach of the CJEU at this point is interesting, since, even though this is not expressly stated, it is based on the prevalence of the right of the public to receive and communicate information on the Internet specifically via linking. Even though it is rather straightforward that freedom of expression on the Internet could not properly operate without linking, the distinction of the present case from the linking precedents could be more robustly based on the fact that the users' acts in the present case were not just pointing and recommunicating an existing communication, but were the primary acts of an independent new communication of the work.

It is also regretful that that CJEU did not take the opportunity to develop further its reasoning as regards the concept of "restrictions" of access to copyright-protected works on the Internet, which first appeared in Svensson. Indeed, the CJEU affirms in the present case that the lack of warnings, disclaimers (and presumably other non-technical restrictions of access, such as contractual ones) does not have any legal impact on the application of the right of communication to the public. This is relevant both for professionals and for normal, nonprofessional users without any profit-making intention who make primary communications of copyright-protected works to the public. But what if such contractual restrictions are present? In Svensson, it was not clear whether the CJEU's reference to "restrictions" of access covered only technical restrictions or more broadly every kind of restriction. Does a nonprofessional linker without any profit-making intention have to diligently search for the existence of such contractual restrictions before linking? Even if it could be risky to arrive at general conclusions, the significant importance that the CJEU attached to hyperlinking for the proper functioning of the Internet and the exercise of online freedom of expression could militate against such an approach.

2. The prototype of the "diligent copyright holder" and the question of formalities

The CJEU deconstructs the argument that has been advanced by the Advocate General in relation to the standard of responsible behaviour that shall be expected by a professional author (Opinion, par. 75, 78, 82, 85 and 104 to 106).

For the Advocate General, the absence of a mention of the name of the author of the photograph on the specific page in the travel magazine on which the photo appeared, and the free accessibility of the photograph without any restrictions or warnings, demonstrate a lack of diligence by the copyright holder. The argument seems to imply the recognition of a contributory negligence mechanism in copyright law. This failure of the copyright holder to take reasonable care in relation to the safeguard of his copyright shall be taken into account especially in relation to the use of information which is provided in huge quantities by the Internet, since otherwise the freedoms of expression and of information would be restricted.

The CJEU affirms that the enjoyment and the exercise of copyright may not be subject to any formality. In this context, it would be inconsistent to impose on the right holder an obligation to reserve his copyright, to mention his name as the author, or to warn the public that use of the work is prohibited. This line of reasoning has also been firmly criticized by ALAI in its Opinion in relation to the case.

The rejection of the standard of a diligent copyright holder necessarily results in the denial of the prototype of "innocent" copyright infringers. The idea is that the lack of reasonable precautionary measures on the part of the right holder would have encouraged the user (in the present case, the pupil and the teacher) to legitimately assume, without any need for further enquiries, that the photograph was freely available to the public.

This marks a clear step backwards from the first "hyperlinking" case, Svensson. In Svensson, the Court implicitly developed the reasoning that if a work is openly available on the Internet, then it is presumably addressed to all Internet users. In this way, the application of the right of communication to the public was neutralized due to the lack of a new public. A body of evidence had to exist in order to show that objectively the purpose was not to communicate the work to all the public. In the GS Media judgment, the CJEU further built on this, explaining that, when the work was unlawfully first communicated to the public, a professional user should be in position to determine the unlawful nature of the first communication. An *a contrario* analysis would conclude that any non-professional user would be free to reuse any freely available online content. This is this idea that the Court intended to denounce with force in the present case. In this context, Renkhoff does not constitute a reversal of jurisprudence, since the Svensson/GS Media principles continue to apply to hyperlinks. However, the CJEU reiterates that this approach cannot be interpreted in a way that completely neutralizes the economic rights of the author.

3. Educational uses and the three-step test

Finally, the user's acts took place in an educational context. For the Advocate General, a flexible interpretation of the educational exception of Article 5(3) of Directive 2001/29, that gives greater weight to the right to education, would enable -even urge- students to use images for learning purposes (Opinion, par. 115). The non-profit educational nature of the pupil's acts would also be a conclusive element for the fulfillment of the criteria of the three-step test (Opinion, par. 122 to 128), since by posting the photograph on the school's site, neither the pupil nor the school is undermining the possible financial benefits to be gained from the presence of the photograph on the Internet (no conflict with a normal exploitation of the works and no unreasonable prejudice to the legitimate interests of the right holder). It is noteworthy that the argument has also been discussed in the ALAI Opinion, where, with reference to the relevant Article 10(2) of the Berne Convention, it has been advanced that communication on a school's website with more restricted access might prove to be perfectly compatible with the Convention's norms. The CJEU, however, somehow briefly skips this argumentation, by emphasizing that it is decisive that the school website made the photograph accessible to all the visitors to that website (par. 42).

Conclusion

In conclusion, the CJEU in Renckhoff, contrary to the Advocate General's alternative reading of copyright rules, has clearly affirmed a mainstream interpretation of the basic copyright principles and denied the lawfulness of the pupil's and the school's acts. Unsurprisingly, the non-profit, incidental, and educational character of the users' activity did not count in favour of a more

equitable approach, since it is not in the judge's competence to redesign the internal structure of the copyright regulation. In this context, the Advocate General's Opinion could be seen as a heartfelt call for flexibility, especially in cases where a *dura lex sed lex* approach might appear unfair.

Like Rubik's cube, the Renckhoff case is an insightful representation of the multiple dimensions of modern copyright regulation and enforcement. Rubik's structure was designed to allow the individual colourful pieces to move without the whole structure falling apart. Even if the multicoloured and chaotic aspect of the cube may be frustrating, it hides a – complex, but real – solution. In the same way, modern copyright law needs to be able to allow a reasonable dose of flexibility in the assessment of the lawfulness of end users' activities without misplacing its fundamental aim: the effective and adequate protection of the creator in a technologically neutral way. Even if Renckhoff seems to adopt a very different philosophy from the Svensson/GS Media principles, it is necessary to look at the complexity of each case in order to acknowledge its specificity and understand the Court's pragmatism in Copyright law.

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