Kluwer Copyright Blog

A matter of perspective – AG Szpunar suggests Member States are ineligible for copyright protection in confidential military reports

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The relation between freedom of expression and copyright in the EU is one of imprecision and uncertainty. In *Funke Medien* (Case C-469/17) the German Federal Supreme Court (BGH) asks whether fundamental rights should permit the unauthorized use of military reports in the absence of an applicable copyright exception. In his Opinion, Advocate General (AG) Szpunar approaches the question from a different perspective and asks instead whether a Member State can invoke copyright to keep military information confidential.

Facts

The Federal Republic of Germany regularly publishes status reports on its military mission in Afghanistan. These are distributed to selected members of the Parliament and other Federal institutions as 'classified documents'. Redacted summaries thereof are also released to the public. The German newspaper Westdeutsche Allgemeine Zeitung, owned by the Funke Medien, after having applied unsuccessfully for the release of the classified reports, obtained and published them online as the "*Afghanistan-Papiere*" (Afghanistan Papers). The German Government claimed infringement of its copyright in the reports and succeeded at first instance. On appeal, the BGH referred three preliminary questions to the Court of Justice of the European Union (CJEU).

The questions refer to the latitude of Member States in implementing exclusive rights and exceptions, the impact of fundamental rights in interpreting the same, and whether freedom of expression and freedom of the media justify exceptions and limitations outside Article 5 InfoSoc Directive.

The Opinion of the Advocate General

AG Szpunar delivers a remarkable opinion, however only after suggesting declaring the request inadmissible. He argues that because the referring court itself doubts that the military reports are protected by copyright the questions are of a hypothetical nature. Based on the reports available he questions whether they are more than purely informative documents and therefore not original pursuant to Infopaq I. This is because such reports leave their authors relatively little room for creativity, as their form and expression are dictated by their function, With remaining doubts as to whether the classified military reports constitute works protected by copyright the AG suggests declaring the case inadmissible.

Despite this, AG Szpunar nevertheless provides us with an answer, albeit not to the questions submitted by the BGH. As he remarks, similar questions have also been asked in two other proceedings (Pelham, Spiegel Online). However, these cases can be distinguished on their facts. Interestingly, though, AG Szpunar points out that "[*t]here are probably an infinite number of other possible factual and legal configurations in which the same general questions could be submitted concerning the relationship between copyright and fundamental rights.*"

He continues by warning against an overly general assessment of the question on the relation between copyright and fundamental rights which would either provide too little or too much flexibility, depriving any copyright system of "*all legal certainty*". It is, therefore, appropriate to highlight the special features of the case: (1) the subject matter is purely informational documents, which (2) are owned by the state as the guarantor of fundamental rights (and not a beneficiary), and (3) copyright is used here to ensure the confidentiality of the documents. Against this background, AG Szpunar changes the perspective of the inquiry and asks instead whether a Member State can invoke copyright in order to limit the right to freedom of expression (FoE) under Article 11 EU Charter.

The application of copyright rules, including exceptions, requires respect for fundamental rights, but some "*systematic shortcomings*" might call the legality of copyright as a normative system into question, or at least suggest legislative amendments. These might be the absence of an exception for a particular use, which might render the exercise of FoE impossible. In what AG Szpunar calls "*exceptional cases*" copyright might, therefore, have to yield to overriding public interests. In such cases (see e.g. the ECtHR cases in *Ashby Donald* and *The Pirate Bay*) fundamental rights can constitute external limits to copyright.

AG Szpunar further proceeds in three steps. The starting point is that the rights to FoE under Articles 10 ECHR and 11 EU Charter are not absolute. They are subject to limitations contained in both instruments. Amongst others, the right can be limited to prevent the disclosure of confidential information and for the purposes of national security. Similar restrictions are contained in the EU Treaties as part of the "*objectives of general interest recognised by the Union"* (Article 52(1) EU Charter). Notably, the German government does not invoke these justifications for limiting the right to FoE of *Funke Medien*, but only to protect its (alleged) copyright in the military reports. It had particularly argued that the threat to security posed by the unauthorized publication of the classified reports was not such as to justify a direct interference with FoE.

This raises the question whether an interference with FoE is justified by the interest of a state in protecting its copyright in military reports. Although the protection of copyright can justify a limitation of FoE as a 'right of others' under Article 10(2) EU Charter, in cases where these two

rights compete courts are required to strike a fair balance between them. AG Szpunar is not convinced that such reasoning can be applied here. Fundamental rights are rights of the citizen against a state, and states, such as the Member States of the EU and the signatory states to the ECHR, cannot be beneficiaries of such rights. As a result, a state cannot rely on copyright as a fundamental right to restrict the rights of others. Any other limitations to the right to FoE by the state, other than based on the public interest, would question, and ultimately destroy fundamental rights. As a result, and in the absence of a justification for the interference with FoE based on public interest, a Member State cannot invoke its copyright to keep information confidential.

Finally, and in the alternative, AG Szpunar argues that the interference with FoE is not necessary to protect the copyright in military reports. Copyright pursues two objectives: to protect the personal relationship between the author and the work, and to guarantee the author a reasonable economic exploitation of his work. Military reports are drafted anonymously by a number of public servants or military personnel, often under supervision, which makes it difficult to identify the author. It is therefore difficult, if not impossible, to create a genuine link between the author(s) and the works in question. Moreover, the purpose of invoking the property right in the documents is not to prevent the economic exploitation by a third party, but the publication of confidential information. As neither is the purpose of copyright, the protection of copyright in the military reports is not necessary in a democratic society. Instead, the confidentiality of information should be protected under laws and procedures created for that purpose.

Interestingly, AG Szpunar seems to harbour some sympathies for the suggestion made by the BGH that there exist copyright exceptions beyond the list of Article 5 InfoSoc Directive. But he does not consider the case to be the appropriate setting to discuss them. Fortunately, two other cases are pending before the CJEU which address this question in particular (Pelham, Spiegel Online).

Comment

The exact line of demarcation between the right to FoE and the right to (intellectual) property is difficult to determine, and it requires extreme cases, such as this one, to approximate its precise location; if that is at all possible. But this is what the BGH in essence had asked the Court to rule upon. Instead, AG Szpunar seeks the outer limits of copyright protection and explores when copyright, as a matter of policy, should not apply. This is so if one were to follow the argument of the AG, when the enforcement of copyright is used to mask, in legal terms, other intentions. Indeed, as the German government openly admits, copyright is employed here to avoid the publication of confidential information, in a situation where a direct balancing of the public interest and the right to FoE would most likely favour the latter. Without much overstatement, one could call what the German Government is attempting a form of censorship, but this is not a purpose which copyright law should serve. AG Szpunar has recognized this and suggests protecting copyright, but also fundamental rights in general, from being undermined by an abuse of an individual right by an entity which should guarantee this right. His line of argument is convincing and helps to maintain the integrity and legitimacy of copyright as a normative system. And in order to protect this system it is sometimes better to disregard it. It will be interesting to see whether the CJEU has the courage to adopt AG Szpunar’s change of perspective or whether it will tackle the questions as asked by the BGH.

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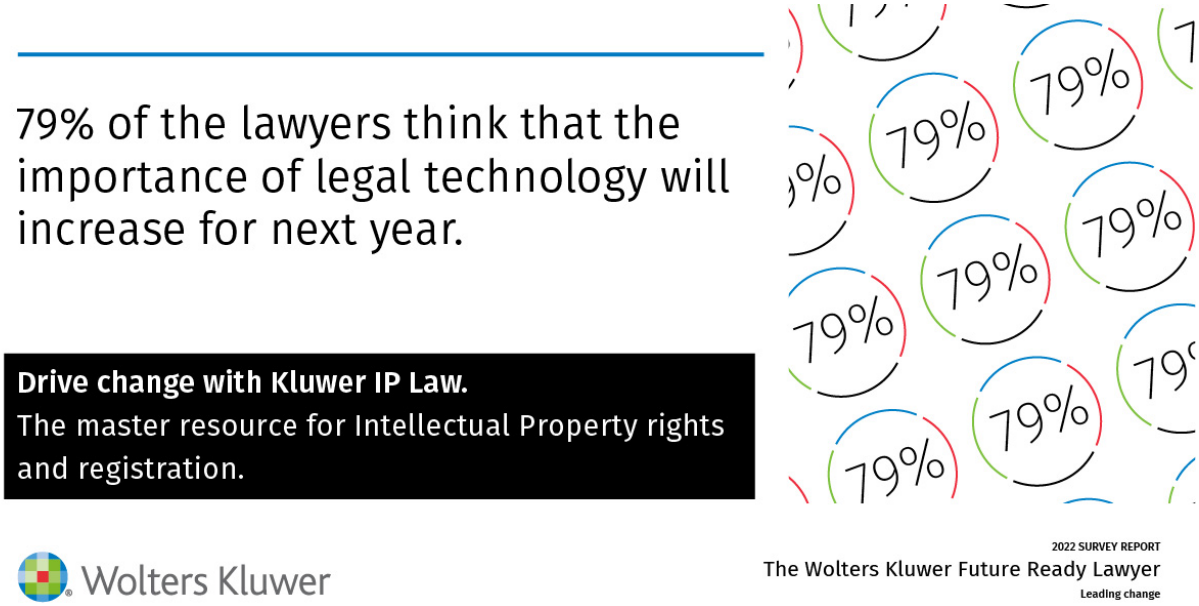

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