Kluwer Copyright Blog

Top 10 posts on the Kluwer Copyright Blog in 2018

Kluwer Copyright Blogger · Tuesday, January 8th, 2019

As we enter a new year, we would like to take this opportunity to pass on our best wishes for 2019 to all of our readers, as well as reflect on developments in copyright over the past year. Last year was a busy one in the copyright world, with a number of landmark CJEU decisions, proposals for European copyright reform and significant developments in a number of jurisdictions.

Here is a quick look back at our 10 most read posts last year:

1. Felix Reda discusses the current Proposal for a Directive on copyright in the Digital Single Market

Here at the Kluwer Copyright Blog we were thrilled to have the opportunity to ask Felix Reda MEP a few questions on the controversial Proposal for a Directive on copyright in the Digital Single Market (DSM Directive). Although the proposed DSM Directive has many controversial topics, we decided to focus the interview on perhaps the two most controversial: the press publishers' right (Article 11) and the so-called "value gap" or "transfer of value" proposal (Article 13).

2. Axel Voss's JURI Report on Article 13 Would Violate Internet Users' Fundamental Rights

In June, the Legal Affairs (JURI) Committee of the European Parliament voted in favour of Rapporteur MEP Axel Voss's proposal on Article 13 of the draft Directive on Copyright in the Digital Single Market. The saga surrounding this infamous text was however far from over. In this post, Christina Angelopoulos explained why Article 13 should be amended, highlighting its incompatibility with existing EU law and the Charter of Fundamental Rights.

3. Should taste be subject to copyright protection? Heksenkaas will tell us.

Whether taste constitutes protectable subject-matter under EU copyright law is one of the questions which the CJEU had to answer in 2018. Eugenie Coche explained the background to the case, in which the Dutch Court of Appeals of Arnhem-Leeuwarden, in the course of an appeal procedure, turned to the CJEU for a preliminary ruling on the scope and extent of EU copyright law, more precisely on whether the taste of a food product falls within its ambit. Having regard to the vague nature of the Infopaq criterion, which was further developed in the Painer case and which requires that, for copyright protection, subject-matter shall be

original in the sense that it is its author's own intellectual criterion, ambiguous cases flowing therefrom were foreseeable.

4. Copyright reform: a new right for press publishers – to have or not to have?

On 14 September 2016, a proposal for a Directive on Copyright in the Digital Single Market saw the light of day. The proposal is part of the EU copyright reform package, which has as its objective to modernise EU Copyright rules for the digital age, thereby attaining the objectives set out earlier in the Digital Single Market Strategy. Notwithstanding the Commission's quest to strike a fair balance with policy interests such as innovation, education and research, this new framework also seeks to ensure the continuity of a high level of protection for right holders. In this context, the proposed Directive provides for a new category of right holders, namely press publishers. This post discusses the advantages and disadvantages of the proposed press publishers' right, and what it could mean in practice.

5. The EU's Controversial Digital Single Market Directive – Part I: Why the Proposed Internet Content Filtering Mandate Was So Controversial

The stated goals of the EU's proposed Digital Single Market (DSM) Directive are laudable: Who could object to modernizing the EU's digital copyright rules, facilitating cross-border uses of in-copyright materials, promoting growth of the internal market of the EU, and clarifying and harmonizing copyright rules for digital networked environments? The devil, as always, is in the details. The most controversial DSM proposal was its Article 13, which would require online content sharing services to use "effective and proportionate" measures to ensure that user uploads to their sites are non-infringing. Their failure to achieve this objective would result in their being direct liable for any infringements. In this post, Professor Pamela Samuelson explains the rationales for this new measure, specific terms of concern, and why critics have argued for changes to make the rules more balanced.

6. Before the Singularity: Copyright and the Challenges of Artificial Intelligence

In May, the ECS held their annual summit in Brussels, under the title "EU copyright, quo vadis? From the EU copyright package to the challenges of Artificial Intelligence." The summit covered many of the hot topics on today's copyright agenda, including the proposed directive on Copyright in the Digital Single Market. This post, however, focused on the afternoon session, dedicated to the challenges posed to copyright law by artificial intelligence (AI), especially in the EU.

7. The Art of Sampling in the Metall auf Metall case: a new form of artistic expression or mere infringement of copyright and related rights?

In Germany, the tension between copyright and artistic interests arising out of the ambiguous legal position of sampling has played out for almost twenty years in the Metall auf Metall case, subsequently referred to the Court of Justice of the European Union (the CJEU). As Paulina Julia Perkal explains, the dispute has its roots in the copyright claim of the members of Kraftwerk, electronic music pioneers, against Moses Pelham, a music producer, over a two-second sample

dated from 1977. The main subject of the three legal proceedings concerned the extraction of a two-second sequence of rhythms from the composition 'Metall auf Metall' by Kraftwerk and the inclusion of the rhythm in the song 'Nur Mir' (written by Moses and performed by Sabrina Serlur). Kraftwerk claimed that using their sample in a loop and including it in a song constitutes an infringement of their producers' rights and therefore asked for an injunction against further distribution of the song.

8. HEKS'NKAAS at the CJEU: the end of a cheese-war or the beginning of a new copyright era?

On 4 June 2018, one of the core concepts of copyright – the copyright work – was disputed at the Court of Justice of the European Union (CJEU). The "cheese battle", which started in 2015 at the Court of First Instance in Gelderland (the Netherlands) between HEKS'NKAAS (applicant) and 'Witte Wievenkaas' (defendant), resulted in a copyright war at EU level. Not only did the issue lead to unprecedented events, such as the cheese-tasting by judges in a parallel dispute between Heks'nkaas and Magic cheese, but also to unforeseen implications: defining or refining the scope of copyright law. This post discusses the arguments put forward by the parties at the CJEU hearing.

9. How much do we know about notice-and-takedown? New study tracks YouTube removals

The European Union is working on a dramatic change to the regime that governs the liability of online intermediaries established with the E-Commerce Directive (Directive 2000/31/EC). Given the virulence of debate, and the huge economic and cultural impacts of the regulatory approach adopted, it is surprising how little is known about the functioning of the regime as it currently operates. After nearly two decades of "notice-and-takedown" it should be possible to rely on a body of empirical research for policy making. Using data collected from user-generated music parodies on YouTube, Martin Kretschmer and Kristofer Erickson explain how they studied the pattern of takedowns over a five-year period, because there was very little known about why rightsholders act to request removal of content. They also wanted to know if rightsholders were actually as sensitive as they claimed over a proposed exception for purposes of parody, introduced in the UK in 2014. The data consisted of 1,834 parody videos, based on 343 commercially successful pop songs that charted in the UK for at least 1 month in 2011. This technique allowed them to study features of the original music track as well as its parody off-shoots, to see whether any had a significant effect.

10. The EU's Controversial Digital Single Market Directive – Part II: Why the Proposed Mandatory Text- and Data-Mining Exception Is Too Restrictive

The proposed European Digital Single Market (DSM) Directive would mandate a new copyright exception to enable nonprofit research and cultural heritage institutions to engage in text- and data-mining (TDM). The European Commission and the Council recognize that digital technologies have opened up significant opportunities for using TDM techniques to make new discoveries by computational analysis of large data sets. These discoveries can advance

not only natural but also human sciences in ways that will benefit the information society. In the second part of her article, Professor Pamela Samuelson discussed why the proposed exception is too restrictive and could make it hard for EU-based entities to compete with American and Japanese firms whose laws provide them with much greater freedom to engage in TDM analyses.

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organisations.”>CJEU, Digital Single Market, Enforcement, European Union, Exceptions and Limitations, Germany, Infringement, Legislative process, Liability, Netherlands, Originality, Press Publishers ’ Right, Text and Data Mining (TDM)

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