Kluwer Copyright Blog

Mirror, mirror, tell me, is the Copyright law fair and balanced? Reflection on AG's conclusions on the Spiegel Online case (Part I)

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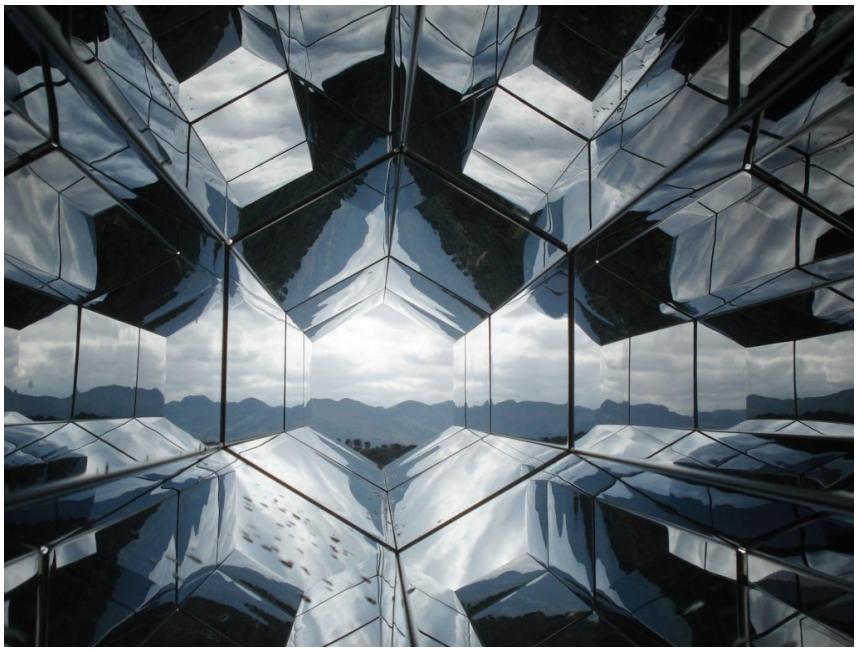

On 10 January 2019, the Advocate General (AG) Szpunar delivered his opinion in the case *Spiegel Online GmbH v Volker Beck (C 516/17)*. The case is part of a trilogy of preliminary references raised by the German courts focusing on copyright exceptions and the interaction of copyright law with fundamental rights (*Pelham, C?476/17* and *Funke Medien C-469/17*).

The facts of the case are interesting. Mr. Beck, a German politician, wrote a contentious article, which was published in a collection of articles after being subject to certain modifications by the publisher without the author's consent. Since then, the author has totally distanced himself from the content of this article. In 2013, the manuscript of the article was discovered and presented to Mr. Beck, who made the document available to various newspaper editors as evidence that his manuscript had been modified in the article published in the collection. While the author did not consent to the publication of the text by the media, he, however, published both versions of the manuscript on his own website. The Internet portal Spiegel Online published an article in which it was stated that the defendant had deceived the public, because the essential content in the manuscript had not been altered. In addition, the two versions of the manuscript were made available for download in full text, through hypertext links. Mr. Beck considered that the availability of the full texts of his article on Spiegel Online constituted copyright infringement.

The questions referred to the CJEU by the German court (BGH) point to the controversial issue of the balancing of copyright exceptions with fundamental rights and the scope of copyright exceptions in the digital era. Equally thought provoking are the answers of the AG. The first part

of this blogpost focuses on the stance of the AG in relation to the latitude left to Member states (MS) in relation to copyright exceptions, and the scope of the exception for news reporting of Article 5(3)(c) of Directive 2001/29.

1) The degree of freedom of Member States in relation to copyright exceptions

One of the central questions of the dispute concerns the delineation of the degree of latitude afforded to the MS in transposing the exceptions provided for in Directive 2001/29. Can the MS consider the list of exceptions of Article 5 as a starting point in order to shape their corresponding national exceptions more broadly or more restrictively on the basis of their own legal culture or do they have to closely follow the balancing of rights which was established by the EU legislator for each of the exceptions of Article 5?

For the AG, who refers on this point to his Opinion in the Pelham case, the latitude of the MS is restricted in several ways (Opinion of AG in *Spiegel Online*, par. 62, referring to paras. 71-79 of his Opinion on the *Pelham* case C-476/17, delivered on 12 December 2018. For further analysis of *Pelham*, see here or here). For the AG, while MS have some freedom in the choice and wording of the exceptions they consider appropriate to transpose into their national legislation, they may not introduce exceptions not provided for in the exhaustive list of Article 5 or extend the scope of the existing exceptions. This might appear restrictive, if it is not combined with another finding of the AG in his Opinion in the "neighboring" *Pelham* case, where the AG mentioned that the degree of latitude of MS is also limited in the opposite way by the Charter of Fundamental Rights of the EU, in the sense that failing to provide for certain exceptions in domestic law could be incompatible with the Charter (Opinion of AG in *Pelham*, par. 77). This is very interesting, because it implies that certain exceptions of Article 5 might be considered as mandatory thanks to the Charter, even if this has not been expressly stated in Directive 2001/29. It goes beyond the scope of this post to analyse which of the exceptions of Article 5 might fall within this category. Preliminarily, this could be the case for exceptions with a strong foundation on freedom of expression, such as quotation (mandatory under 10 (1) of the Berne Convention) and, probably, parody which has often been recognized as a limitation to copyright by national courts, even in the absence of a specific corresponding copyright exception.

The AG concludes with the sibylline finding that MS are free as to the choice of form and methods they consider appropriate to implement in order to comply with the obligation to protect the exclusive rights of the author provided in Directive 2001/29, in so far as those rights can be limited only in the application of the exceptions and limitations listed exhaustively in Article 5 of that directive. Having in mind that exceptions are also autonomous concepts of EU copyright law, the exact scope of each of the exceptions of Article 5 is expected to be clarified by the CJEU, as has already been done for parody (see: Deckmyn, Case C?201/13).

2) The specific conditions for the exercise of news reporting exceptions in domestic copyright laws

The present case also raises the question of the compatibility of a national copyright exception with Directive 2001/29 from a different angle. Can the MS implement a copyright exception, whose justification basis is the right to information, by adding more rigorous conditions for its exercise?

In the present case, users can invoke the German news reporting exception which corresponds to Article 5(3)(c) of Directive 2001/29 only in cases in which it would be unreasonable to seek the

authorization of the author. For the AG, this additional requirement of the domestic law is justifiable. Germany implemented the second alternative of Article 5(3)(c) of Directive 2001/29 which refers to the use of works in connection with the reporting of current events. Despite its broad formulation in Article 5(3)(c), the AG stresses that this exception shall be interpreted in light of the corresponding exception of Article 10bis (2) of the Berne Convention, which is much more specific in relation to the means of the reporting and the works used, since it refers to "*reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event*". For the AG, the use made by Spiegel Online goes beyond the scope of the news reporting exception of Article 5(3)(c), since the article was not seen or heard in the course of a current event (such as a book or painting which could be seen when the media report on a book or art exhibition), but was made available in full text via hyperlinks in order to be read (not simply "seen") by the public.

While it is understandable why the narrowly constructed news reporting exception cannot apply in the present case, the AG's assessment on the additional restriction posed by the German law (application only in cases in which it would be unreasonable to seek the authorization of the author) shall be discussed. When a work is lawfully published it shall be subject to public debate and scrutiny without imposing an obligation on the press to first seek the authorization of the author before reporting on it. It is noteworthy that the AG is cautious to mention that the author could, in the exercise of his exclusive right, refuse to grant his authorization, which would call into question the right of the public to be informed about the event in question (Opinion, par. 28). It would be inconsistent with the protection of freedom of information if authors, by invoking their copyright, could discriminate amongst the media as to who can report to the public on their public exhibitions or public presentations of their works. In this context, the reasonableness of the requirement to seek the author's authorization necessarily acts as a balancing factor, which should, however, not be interpreted in a way that limits the application of the exception only to cases where there is no sufficient time to seek this authorization.

The second part of this blogpost will deal with three other highly significant issues raised by the AG's Opinion: the concept of quotation in EU copyright law, the possibility of using fundamental rights as external limits to copyright protection, and the AG Opinion's thought-provoking stance in relation to copyright misuse and the protection of moral rights in EU copyright law.

This entry was posted on Friday, February 15th, 2019 at 3:14 pm and is filed under AG Opinion, Case Law, inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, European Union, Exceptions and Limitations, Germany, Infringement
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