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 II)

Tatiana Synodinou (University of Cyprus) · Thursday, February 21st, 2019

On 10 January 2019, the Advocate General (AG) Szpunar delivered his opinion in the case *Spiegel Online GmbH v Volker Beck (C 516/17)*. Part I of this blogpost explored the AG's stance in relation to the degree of latitude left to Member States when implementing copyright exceptions and the ambit of the news reporting exception of Article 5(3)(c) of Directive 2001/29. Part II focuses on three other challenging legal 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's interesting thoughts in relation to copyright misuse and the protection of moral rights in EU copyright law.

1) The concept of quotation

For the AG, the non-application of the German news reporting exception does not necessarily render the making available of the manuscripts unlawful, since it would be possible to ground this use on the quotation exception of Article 5 (3)(d) of Directive 2001/29.

In this context, the meaning and scope of "quotation" under EU copyright law are analyzed. This question was also raised in Painer (Case C?145/10), where the CJEU sketchily delineated the concept of quotation by clarifying that the only quotations permissible are quotations from a work which has already been lawfully made available to the public (par. 127) and that there is no requirement that the quoting work is itself a work protected by copyright (par. 183-189).

The AG advances some very insightful propositions on the concept of quotation. First, he embraces a broad, technologically neutral understanding of this concept, by stating that the quotation exception might not apply only to literary works (par. 42), but also to other categories of works (cinematographic, artistic, music) and that it is possible to quote a work as a whole, if this is necessary (par. 45). Nonetheless, even if the exception for quotation is capable of justifying uses of works through different technical modes (including, possibly, hyperlinking under specific circumstances (par. 43, 48)), for the AG it goes beyond the concept of this exception to make a work available on a website, in its entirety, as an accessible and downloadable file in an autonomous manner (par. 48). This is because this use substitutes the need to access the original work by exempting the reader from having recourse to the original work and, thus, exceeds the limits of this exception, without the need to analyze the actual risk of this use to the exploitation of the work (par. 49).

In the AG's conceptual construction of quotation, the application of the exception is a careful balancing exercise and a matter of proportionality. Certain questions appear crucial for the assessment of the application of the exception in the present case. Was it necessary to offer the work as a whole for autonomous downloading or would it have been sufficient to point to the parts of the work, before and after the modifications? Was there a sufficient link between the article commenting on the politician's change of attitude in relation to his manuscript and the work which was quoted as a whole? Should the two texts be perceived as a whole or are they simply two "autonomous" units without a sufficiently strong link (conceptual, structural, technical) between them?

2) Fundamental rights as external limits to copyright protection

One of the fundamental propositions of the Opinion is that MS cannot rely on fundamental rights, like freedom of expression in the present case, in order to go beyond the exhaustive catalogue of exceptions in Article 5 of Directive 2001/29. In the view of the AG, the balancing of copyright protection with other fundamental rights belongs to the competence of the legislator and not the courts, which might be required to intervene only exceptionally in the case of violation of the core of a fundamental right. This balancing has already been done by the EU legislator when establishing the list of exceptions in Article 5. For the AG, enabling MS to use fundamental rights in order to limit further the exclusive rights of the author would neutralize the harmonization effect of Article 5. For the AG, such a possibility would result in the introduction through the back door of a general matrix for the establishment of new exceptions similar to the "fair use" clause, because in practice every use of copyright protected works could be based on freedom of expression. The underlying idea is that, due to an inherent profound antagonism between copyright protection and freedom of expression, freedom of expression could in practice act as a justification for every use of copyright protected works.

What, however, is more decisive is the possible impact of such an amorphous justification basis for copyright exceptions on the whole construction of harmonized EU copyright law. If new exceptions could variably be introduced by MS on the basis of their domestic perception of freedom of expression, the painfully established EU copyright acquis would collapse. This line of reasoning is understandable. Furthermore, its application in the present case appears justifiable, since the online platform could have chosen other, more proportionate means in order to satisfy the legitimate interest of the public in reading the two versions of the article, such as by including a hyperlink to the website of Mr. Beck, where the two versions had been published. The assessment, however, might have been different if the author had dissimulated the articles, altered their content

or presented the versions in such a way that it was not possible for the reader to objectively compare the articles and form her own judgement of their content (in the view of the AG those circumstances were not met in the present case, see: par. 73, 74).

Indeed, there will be cases where the core of freedom of expression would be safeguarded only via a limitation of the author's right, regardless of whether a limitation is prescribed with precision in a specific copyright exception. It is notable that the AG advances that it is possible in such specific circumstances to limit copyright directly on the grounds of freedom of expression.

In this context, EU copyright law appears to struggle in the face of classic legal dilemmas: flexibility or legal certainty? diversity or uniformity? In the AG's view, the courts' interventions in this field shall only be exceptional (when the "essence of a fundamental right" is at stake), since it is the competence of the legislator to strike the fair balance between copyright and other fundamental rights. This finding shall not only be seen as a restriction, but as a hint that it is within the competence of the EU legislator to shape the general perimeter of flexible and fundamental rights' "sensitive" copyright norms.

As paradoxical as it might seem, the EU legislator has already spread the germ for the elaboration of a different norm in relation to copyright exceptions when it introduced the concepts of lawful user and lawful use in the European acquis. To date, the concept of lawful use has been given multiform and rather amorphous expressions by the EU legislator (lawful acquirer, lawful user, lawful use, lawful access) and has been interpreted rather restrictively. This concept could evolve into a dynamic copyright norm which combines flexibility with responsibility through the legislative establishment of a taxonomy of lawful use in European copyright law.

3) Moral rights, an unseen force in European copyright law?

Lastly, the publisher advanced that the author misused his copyright, because he claimed the application of his economic rights in order to protect his personality. It is noteworthy that similar arguments are sometimes advanced in national copyright laws in the inverse situation – when an author invokes his moral rights while his real aim is to protect his economic interests. An analogous consideration is also present in the AG's reasoning in the Afghanistan papers case, where the State misused copyright in order to block the dissemination of confidential information (Opinion, *Funke Medien*, par. 61). However, contrary to his Opinion in *Funke Medien*, the AG rejects this argument in the present case. For the AG, even if moral rights are not harmonized by the Directive 2001/29, they have to be taken into account when interpreting the Directive's provisions because of the unavoidable interaction between EU copyright norms and the protection of moral rights in domestic copyright laws. Par consequent, the interpretation of a copyright exception in relation to an economic right of the author cannot disregard his moral rights by enabling free use of the work simply because the author in question does not envisage any economic exploitation of the work. In the view of the AG, this finding shall apply in the present case. This is because the controlled publication of Mr. Beck's manuscript with a note declaring his distance from his previous views falls within the exercise of his freedom of expression, which also includes the freedom to change views (par. 79). In this context, the freedom of expression of the author is safeguarded by the legal monopoly offered by copyright.

It is not the first time that protection of the non-harmonized moral interests of authors have been taken into account in cases brought before the CJEU. In Deckmyn (C?201/13), the CJEU recognized the legitimate interest of authors in ensuring that their works are not associated with a

racist and discriminatory message (par. 31). Nonetheless, in his Opinion in the present case, the AG advances a thought provoking justification for the exclusive control of the author over his work which is offered by copyright, by stating that this exclusivity is based both on the protection of the personality (moral right) and the freedom of expression of the author (copyright as a means of safeguarding freedom of expression and of opinion). This enhanced focus on the fundamental rights basis of copyright when it comes to the protection of moral interests of the author has the potential to assert moral right as a powerful limitation to the dissemination of copyright protected works on the grounds of copyright exceptions in European copyright law.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Thursday, February 21st, 2019 at 2:33 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, Moral rights

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.