Kluwer Copyright Blog

# Reflections on the CJEU's judgment in Spiegel online: is there a golden intersection between freedom of expression and EU copyright law? Part II

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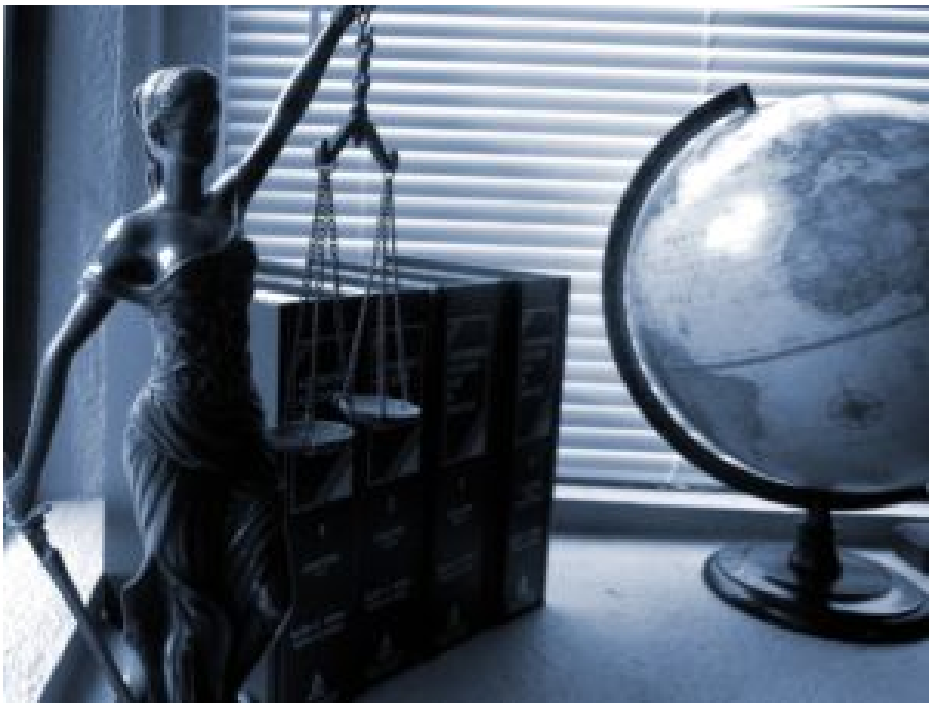

The turbulent relationship between copyright law and the freedoms of information and expression lies at the heart of the recent decision of the Court of Justice of the European Union (CJEU) in the case *Spiegel Online GmbH v Volker Beck* (C 516/17). Part I of this blogpost critically overviewed the CJEU's main principles of analysis of the balancing of copyright protection with freedom of expression and the discretion of the MS and national courts on this issue. Part II analyses the specific core of the EU news reporting and quotation exceptions and the CJEU's insightful reflections on certain conditions of their application.

**1) Prior consent as a specific condition for the exercise of the news reporting exception**

One of the intriguing aspects of the case has been whether a national copyright law rule which restricts the application of the exception provided for the use of a protected work for the purposes of reporting current events in cases where it is not reasonably possible to make a prior request for authorisation is compatible with EU copyright law.

In order to give an answer, the CJEU analyses the scope and conditions of application of the relevant provision of Article 5(3)(c), second case of the InfoSoc Directive. For the CJEU, the concept of "reporting" must be understood as providing information on a current event. In this

context, merely announcing that such an event has occurred does not amount to reporting it. However, "reporting" does not require that the user analyses the current event in detail. Furthermore, the Court interprets the concept of "current event" in a flexible way, by denying a purely chronological evaluation of the "current" character of the event. Accordingly, a current event is an event that, at the time at which it is reported, is of informatory interest to the public and not necessarily a recent event. However, what is important is that the information relating to a current event is diffused rapidly. This is difficult to reconcile with a requirement for the author's prior consent, which would be likely to make it excessively difficult for relevant information to be provided to the public in a timely fashion, and might even prevent it altogether. Furthermore, the wording of the InfoSoc Directive could not support the requirement for the right holder's "prior consent", since Article 5(3)(c) does not establish such a requirement. In light of the above, the CJEU concludes that the InfoSoc Directive precludes a national rule restricting the application of the news reporting exception in cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events. By affirming so, the CJEU departs from the restrictive interpretation of the AG, who advanced in his Opinion that the additional requirement of "prior consent" of the domestic law is justifiable. The Court's stance is understandable and it is welcomed, since it would be inconsistent with the protection of freedom of information if authors, by invoking their copyright, could in practice apply censorship by refusing to grant an authorisation to inform the public about their works, by setting conditions on how to report or by discriminating amongst the media as to who can report on their works.

**2) The EU concept of quotation and its application to hyperlinking**

Finally, the CJEU was called upon to answer whether the concept of 'quotation' can also cover a reference made by means of a hyperlink to a file which can be downloaded independently. The CJEU promotes a broad and technologically neutral interpretation of the concept of quotation.

First, as noted by the CJEU, an essential characteristic of quotation is the use of a work or an extract of a work for the purposes of illustrating an assertion, defending an opinion or allowing an intellectual comparison between that work and the assertions of the user. For the CJEU, what is important is that the user shall establish a direct and close link between the quoted work and his own reflections, thereby allowing for an intellectual comparison to be made with the work of another. Consequently, it appears that the substantial requirement for the enjoyment of the exception for quotation is the intellectual link between the quoted work and the user's work or reflections (since it is not necessary that the quoted work is inserted in an original work of the user). Furthermore, from the wording used by the Court (the use of a work or, more generally, of an extract of the work, see par. 78 of the judgment) it is assumed that, subject to the three step test (see par. 79 of the judgment) it is also possible to quote a work as a whole and not necessarily a part or extract of it (see also par. 89 of the judgment). In this light, the concept of quotation is multiform in the sense that it is not necessary that the quoted work be inextricably integrated, by way of insertion or reproduction in footnotes, into the subject matter citing it, but every type of quotation shall be accepted on the condition that it is in accordance with fair practice, and to the extent required by the specific purpose of the quotation (criticism, review, informatory purpose or other). In the present case, the use of Mr Beck's manuscript and article for the purposes of quotation must not be extended beyond the confines of what is necessary to achieve the informatory purpose of that particular quotation. As long as this essential condition is met, nothing precludes the quotation from being made by means of a hyperlink to a file which can be downloaded independently (par. 84 of the judgment).

The CJEU follows the AG's line of reasoning that the exception for quotation is capable of justifying uses of works through different technical modes including, possibly, hyperlinking (see par. 43, 48 of the Opinion of the AG), but it does not adhere to the AG's absolute finding that it goes beyond the concept of the quotation exception to make a work available on a website, in its entirety, as an accessible and downloadable file in an autonomous manner (see par. 48 of the Opinion of the AG). Furthermore, the CJEU reaffirms its previous case law (GS Media, C- 160/15, par. 45 and Renckhoff, C- 161/17, par. 40) in relation to the special position of hyperlinks in European copyright law. In this context, it recalled the significance of hyperlinks as unique forms of expression which contribute to the sound operation of the internet, which is of particular importance to freedom of expression and information as well as to the exchange of opinions and information in that network characterised by the availability of incalculable amounts of information (par. 81 of the judgment).

Finally, the CJEU recalls its previous findings in the Painer case (C?145/10, par. 127) that the only quotations permissible are quotations from a work which has already been lawfully made available to the public. The CJEU then further analyses this condition and concludes that a work, or a part of a work, has already been lawfully made available to the public if it has been made available to the public with the authorisation of the copyright holder or in accordance with a non-contractual licence or statutory authorisation (par. 89 of the judgment).

In the present case the particularity is that at the time of the publication of Mr Beck's manuscript in 1988 as an article in a book the publisher had made minor changes to the manuscript prior to this publication, without Mr Beck's express consent for those modifications. Is this first publication a way of lawfully making available to the public the manuscript? Furthermore, was the manuscript made lawfully available to the public when Mr Beck published the documents on his own website accompanied by his statements of dissociation? According to the CJEU, it is for the national court to decide whether a work has been lawfully made available to the public, in the light of the particular case before it and by taking into account all the circumstances of the case (par. 91 of the judgment). In the present case, the referring court has to ascertain whether, at the time of Mr Beck's initial publication of the manuscript as an article in a book, the publisher had the right, whether contractually or otherwise, to undertake the editorial amendments in question. If not, it would need to be held that, in the absence of the right holder's consent, the work, in the form in which it was published in that book, was not made lawfully available to the public (par. 92 of the judgment).

This is a pragmatic approach which takes into account the lack of EU harmonisation of moral rights and of copyright contract law. Indeed, the lawfulness of a first publication of a copyright protected work is covered by the protection of the moral right (right of integrity and right of divulgation, "droit de divulgation" in the MS where the latter is established and the possibility to contractually agree to the limitation of the moral right), by contract law, and also possibly by the protection of the personality right (such as where the editorial change is harmful for the author's honour or reputation). The consent of the author in relation to the final form of her/his manuscript and the author's ideas and the reflections expressed by the latter has a specific significance, since, for the CJEU, the justifying foundation of the quotation exception is the intellectual comparison and juxtaposition of ideas and opinions as a means of freedom of expression. This foundation would collapse in the case of false or misleading information, such as when the modified manuscript no longer reflects the thoughts and opinions of the author.

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