Kluwer Copyright Blog

Copyright as a “censorship right”?! A critical evaluation of two current preliminary ruling proceedings of the CJEU

Christian Czychowski (NORDEMANN) and Viktoria Kraetzig (University of Frankfurt) · Monday, October 14th, 2019

European Court of Justice decisions of July 29, 2019 (C-469/17 and C-516/17)

The abuse of copyright as a “legal weapon” to suppress press reports is not a new development – for decades authors and rightholders have used their exclusive rights to prevent the publication of unpleasant information.

The situation in practice

The situation is always the same: a press company publishes an article that contains copyrighted content. The author is upset by the reporting, but deliberately avoids the obvious option of seeking injunctive relief under press law. Such a claim for injunctive relief would be accompanied by a balancing of interests between the right of personality of the person concerned and the conflicting fundamental right of freedom of information of the general public. Especially where the reporting contains information relevant to democracy, the civil courts will often give priority to freedom of information according to established constitutional jurisprudence, taking into account its “absolutely constituent significance” for a free democratic state. On the other hand, according to the *Gies-Adler* decision (file no. I ZR 117/00) of the German Federal Supreme Court (“BGH”), there is no balancing of interests in copyright law beyond the codified exceptions and limitations.

The person concerned will therefore assert a right to an injunction under copyright law. To exaggerate: he relies on copyright law in order to achieve a goal rooted in a complaint relevant to press law, so as to avoid the balancing of interests in press law. If none of the exceptions and limitations of copyright applies, his injunctive relief will be granted, even if there is a particularly urgent need for information on the part of the public regarding the information to be suppressed.

BGH: Reference for a preliminary ruling from the European Court of Justice (CJEU)

Against this background, German courts have tried in various ways to prevent the use of copyright law for the enforcement of press law objectives. However, they have not yet found a doctrinally "clean" solution for this purpose. It was therefore all the more pleasing that the BGH, in two cases known as "*Afghanistan Papiere*" and "*Reformistischer Aufbruch*", referred two requests to the CJEU for preliminary rulings on whether the right to freedom of information of the general public could justify a restriction of copyright beyond the codified copyright exceptions and limitations.

Facts of the cases

The starting point in the "*Afghanistan Papiere*" case was the publication of military status reports of the Federal Republic of Germany by the newspaper "Westdeutsche Allgemeine Zeitung" (WAZ). The Ministry of Defence prepares weekly status reports for selected members of parliament and federal ministries, which are classified as 'Classified Documents — Restricted', the lowest of the four levels of confidentiality laid down under German law. The WAZ editors obtained the reports in an unknown way and published some of them on their website under the name "Afghanistan Papiere". The Federal Republic of Germany subsequently sought injunctive relief claiming that its copyright had been infringed by the publication. This was granted by the District Court and the Regional Court, before the BGH suspended the appeal proceedings in order to apply to the CJEU for a preliminary ruling.

The "*Reformistischer Aufbruch*" procedure was based on the following facts: A former member of the German Parliament wrote a manuscript in which he opposed demands for the complete abolition of sexual criminal law. In 1988, this was published as a contribution in a collection of essays, but the editor of the volume changed the title and shortened the text by one sentence. The politician asked the editor to mark the changes with a note, but without success. In the following years, he explicitly distanced himself from the content of the article. A few days before the parliamentary elections in Germany in 2013, in which the politician ran for election, the manuscript was rediscovered and presented to the politician. He decided to make the document available to various press companies as proof of the editor's changes, but expressly rejected publication of the manuscript in the media. He also published the original and modified versions of the texts on his website with a notice of dissociation. The news magazine "Spiegel Online" thereupon asserted in an article that the essential content of the manuscript had not been falsified at all. As evidence, Spiegel Online made available for download via a hyperlink the original version of the manuscript and the modified version. The politician started proceedings against the magazine for an injunction for infringement of his copyright. After defeats in the lower courts, the magazine appealed to the BGH, which stayed the proceedings and referred the matter to the CJEU.

Decision of the CJEU

The CJEU held in its judgments that freedom of the press and freedom of information should not be taken into account beyond the codified exceptions and limitations. In its decisions, the CJEU

states that a balancing of interests would jeopardise the harmonisation effect of Directive 2001/29/EC and the objective of legal certainty which it is pursuing. The exceptions and limitations should also be implemented consistently by the Member States. If an "unwritten" exception were allowed in the sense of freedom of press and freedom of information, this could no longer be guaranteed. There is therefore no room for a judicial balancing of interests apart from the balancing carried out by the legislature.

Comment and outlook

The CJEU does not seem to see that this opens the door to the abuse of copyright as a method of censorship. It is indeed the case that the Court decided in both proceedings that the codified exceptions and limitations are to be interpreted in accordance with the fundamental right of freedom of information. However, these exceptions and limitations reach their limits too quickly to adequately reflect their importance in cases of abuse. For example, leaked information, in which the public may have a particularly high interest, cannot, from the outset, fall under the quotation exception in copyright law due to the lack of prior first publication. If the content is not published in connection with "reporting on current events", the use will not be covered by the reporting of current events exception either and can therefore be prevented by copyright. In particular, the disclosure of "suppressed" information can be of crucial importance for the political decision-making process of the public, especially during election campaigns.

There is also another aspect that should not be overlooked: the copyright restrictions are optional, but exhaustively listed in Article 5 of the InfoSoc Directive. It is therefore quite possible that a Member State will not have implemented exceptions and limitations relevant to protecting freedom of information. Does the CJEU not see a problem with the fact that in such countries the fundamental rights of freedom of press and freedom of information are not taken into account at all in cases of abuse? In cases where the author deliberately abuses his exclusive right to suppress information, his copyright must in any case be weighed against conflicting rights of communication, taking into account the specific circumstances of the individual case. In such cases of abuse, freedom of information ought to be given priority due to its fundamental significance for a free democratic state. Consideration of the interests of the author also supports this result, as his exclusive economic rights are obviously not affected at all in such cases of abuse. Just think of the two underlying proceedings: neither the Federal Republic of Germany nor the politician will have had an economic interest in the exploitation of their works.

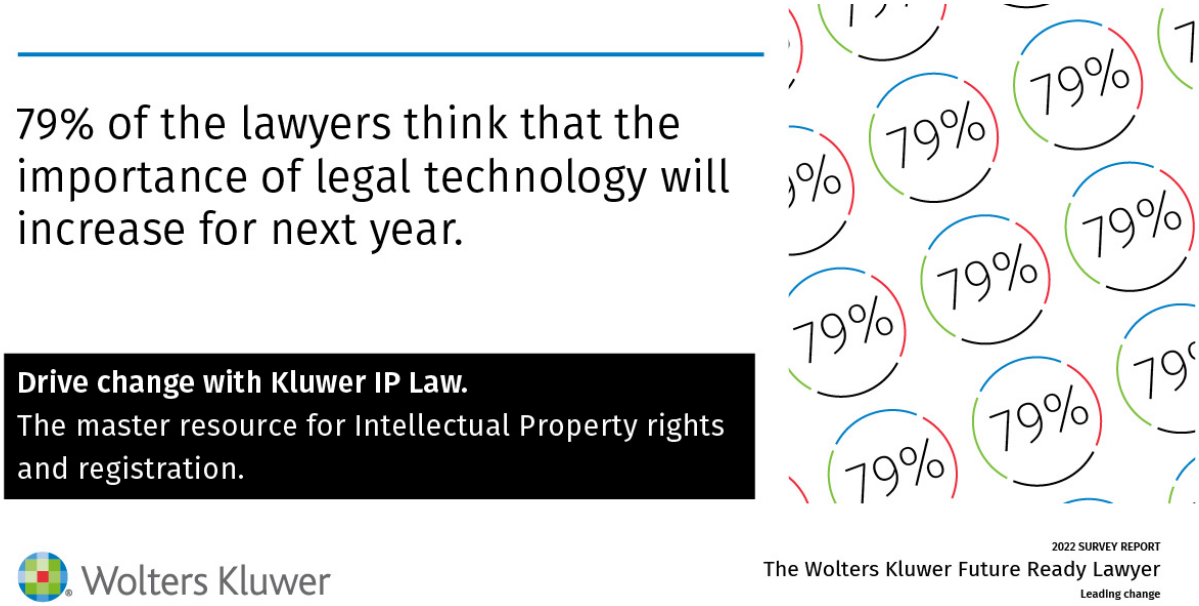
These recent rulings of the CJEU open the door to the use of copyright as a "censorship right" – a tendency which no parties would wish for in times when intellectual property rights are increasingly under observation. But the final word on this matter has not yet been spoken. As mentioned above, although the exceptions and limitations are optional under the InfoSoc Directive, they are exhaustively listed in Article 5. Copyright law, however, is only partially harmonised. Consequently, even following the CJEU decisions, the national courts still have the opportunity to take into account in their rulings the fundamental rights of freedom of the press and freedom of information, beyond the codified exceptions and limitations. If, however, the German courts should find themselves prevented from doing so by the CJEU decisions, the effectiveness of Germany's fundamental rights is up for discussion. That would be a situation that would call for the Federal Constitutional Court of Germany: the court would have to decide whether the national courts still have to respect the primacy of Union law if this infringes fundamental national rights.

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

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Monday, October 14th, 2019 at 10:31 pm and is filed under 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, Germany, Limitations
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.