Kluwer Copyright Blog

Top 10 Posts on the Kluwer Copyright Blog in 2019

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As we enter a new year, we would like to take this opportunity to pass on our best wishes for 2020 to all of our readers, as well as reflect on developments in copyright over the past year. Last year was another busy one in the copyright world, with a number of landmark CJEU decisions, ongoing 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. The New Copyright Directive: A tour d'horizon – Part I by João Pedro Quintais

This was the first post of a series on the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market.

On 17 May 2019 the official version of the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market was published in the Official Journal of the EU. This marked the end of a controversial legislative process at EU level. It also marked the beginning of what will surely be a contentious process of national implementation. Part I of this post briefly discusses the legislative process and surveys Titles I through III of the Directive. Over the following months other contributions on the blog dug deeper into the specific rules.

2. The New Copyright Directive: A tour d'horizon – Part II (of press publishers, upload filters and the real value gap) by João Pedro Quintais

Continuing the series on the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, Part II gave an overview of the remainder of the Directive, namely its measures to achieve a well-functioning marketplace for copyright (Title IV) and final provisions (Title V).

If any conclusion can be drawn from this tour d'horizon of the CDSM Directive, it is that national legislators have their work cut out during national implementations. For an instrument aimed at further harmonisation and promotion of legal certainty, the Directive leaves a significant margin of discretion to national lawmakers, either as a matter of design or as a result of ambiguous wording. Naturally, as we have seen in the past, some legislators may choose to implement a quasi-verbatim copy of the directive. Whichever the approach, it is likely that many of the issues raised in this and the previous post will ultimately make their way to the CJEU. It may take some years, but preliminary references are coming.

3. The New Copyright Directive: Text and Data Mining (Articles 3 and 4) by Bernt Hugenholtz

With the increasing powers of computer processing and the omnipresence of vast amounts of minable text and data on the Internet, TDM has become a hugely important research tool in science and many other domains. In the industrial and commercial realm TDM has become even more pervasive. Text and data mining is nowadays standard practice in pharmaceutical research, journalism, information retrieval, search, and consumer information – to name just a few areas.

In conclusion, the TDM provisions of the DSM Directive secure considerably less freedom to text and data mine than they initially appear to do. The opt-out clause of Art. 4, in particular, leaves for-profit miners in the EU at the mercy of the content owners. This puts AI developers, journalists, commercial research labs, and other innovators at a competitive disadvantage in comparison with the United States, where text and data mining is deemed fair use, even if it is done for profit. One may wonder if innovation in Europe would not have been better served without any of the TDM exceptions in the new Directive.

4. The science of piracy, the piracy of science. Who are the science pirates and where do they come from: Part 1 by Balázs Bodó

In 2016, Science published a short report on the usage of SciHub, a piratical scholarly journal article distribution service. Set up by Alexandra Elbakyan, a kazakhstani scientist, SciHub allows users to bypass journal publishers' paywalls, so everyone can have access to journal articles for free. The report, based on a dataset provided by Elbakyan, offered a stunning insight into the underground circulation of scholarly knowledge. The colourful maps made it clear that it is not just developing countries that seem to struggle with access issues: high income European and North American countries are also eager pirates of scholarly articles.

The topic of this post is a closely related phenomenon: the underground circulation of scholarly books. Using a dataset provided to us by one of the administrators of a prominent shadow library, we mapped both the supply of and the demand for academic monographs, textbooks and other learning materials via piratical shadow libraries. Our primary findings suggest that scholarly book piracy is a ubiquitous global phenomenon, with no apparent end in sight. If that is indeed true, what might the consequences be for the status quo in scholarly publishing?

Part 2 is available here.

5. Article 17 of the New Copyright Directive: A French mission on content recognition technologies by Brad Spitz

In a letter dated 29 March 2019, the President of the CSPLA ('Conseil supérieur de la propriété littéraire et artistique'), an independent body in charge of advising the French Minister of Culture on copyright law, has appointed three public institutions to submit a report on the use of recognition tools for copyright-protected content on online sharing platforms. The three institutions are the CSPLA, the HADOPI (the High Authority for the distribution of Works and the Protection of Rights on the Internet) and the CNC (the 'Centre National du Cinéma et de l'image animée' is a public administrative organisation that is a regulatory body for the film, broadcasting, video, multimedia and technical industries).

6. German BGH – Does YouTube Perform Acts of Communication to the Public? by Jurriaan van Mil

On 13 September 2018, the Bundesgerichtshof (Federal Court of Justice, "BGH") referred six questions to the Court (C-682/18). Most notably, with its first question, the BGH asks, in essence, whether an online video sharing platform, such as YouTube, performs an act of communication to the public within the meaning of Article 3 Information Society Directive when its users upload copyright infringing content to its platform. Consequently, the Court finds itself in a position to settle the negotiations regarding Article 13 DSMD before the EU's co-legislator does, or to declare the final version of Article 13 DSMD invalid. Moreover, the Court has the opportunity to illustrate how its case-law regarding the right of communication to the public should be applied to online video sharing platforms.

7. Member States can no longer require a higher level of originality for works of applied art/designs, says AG Szpunar in Cofemel by Estelle Derclaye

On 2 May 2019, Advocate General Szpunar delivered his opinion in Case C-683/17, Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV (not yet available in English). The case concerned designs for t-shirts and jeans made by G-Star Raw. In essence, the question posed by the Portuguese Supreme Court is whether Member States have the freedom to choose the level of originality pertaining to works of applied art, industrial designs and works of design or whether they must apply the CJEU standard of "the author's own intellectual creation" (AOIC) to such works. AG Szpunar chose the latter option.

8. Waiting for Tom Kabinet, a.k.a. why EU copyright needs digital exhaustion, and how the CJEU can help with this – Part 1 by Caterina Sganga

After years of contradictory decisions and obiter dicta, on April 2, 2019 the CJEU held the first hearing in Tom Kabinet (C-263/18), a Dutch referral that promises to solve once and for good the question of admissibility of digital exhaustion under Art. 4(2) InfoSoc. Against the legislative silence, Tom Kabinet puts the Court at a crossroads – literal interpretation and dogmatic respect of traditional concepts versus teleological update of existing norms – and pledges to carry, in the event of a positive response, epochal consequences for the economics and balance of EU copyright law.

Part 2 is available here.

9. European Copyright Roundtables: Implementing the Digital Single Market Directive by Martin Husovec and Martin Kretschmer

The Digital Single Market is a widely shared aspiration. The recently adopted copyright reform is one of the EU's central interventions to re-arrange online creative markets. The expectation is that the newly created rules will facilitate fairer attribution of value where it is due. Since the narrative behind the legislation was dramatic, the expectations are high.

However, due to political turbulences in the legislative process, the resulting text of the Directive is extremely complex. There is now a serious risk that the Member States will spend another decade debating what exactly they agreed upon in spring 2019.

The European Copyright Roundtable is an event conceived in the hope that these risks can be minimized through an open, fair and respectful debate. Organised by academics, without any industry funding, the ECR creates a European forum, which brings academics and stakeholders into a conversation about important questions of the implementation stage.

10. Before the CJEU soon: the question of digital exhaustion by Saba Sluiter

One of the main limitations to the right of distribution in European copyright law is the principle or rule of exhaustion. This rule, known as the first sale doctrine in US law, means that the right of distribution is exhausted by the first sale or other transfer of ownership of a copy of the work made by the rightholder or with his consent (Article 4(2) InfoSoc Directive). This rule has mostly been of straightforward application to physical copies of works, but can it be applied to digital copies of works too? That is the question in the case of Tom Kabinet in a nutshell.

Tom Kabinet is a Dutch company that aims to create a second-hand marketplace for e-books. It operates a website where you can upload used e-books and buy used copies of e-books. It started its business in 2015. Soon after, two organizations of publishers filed for a preliminary injunction to stop Tom Kabinet from selling used e-books. Tom Kabinet, however, believes it can rely on the CJEU's ruling in UsedSoft and claims that there is digital exhaustion under EU law.

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