

Kluwer Copyright Blog

EU copyright law round up – first trimester of 2021

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In this new series we will be updating readers every three months on developments in EU copyright law. This will include Court of Justice (CJEU) and General Court judgments, Advocate Generals' (AG) opinions, and important policy developments.



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The end of 2020

Since this is the first issue of our round up, we have also included one AG Opinion from December 2020 not previously covered on the blog.

Mircom, AG Szpunar, Case C-597/19

In *Mircom*, AG Szpunar tackled interesting questions on the making available right, “copyright trolls” and enforcement, among others. *Mircom* has a peculiar business model. It had concluded contracts with several erotic film producers, so it held licences for the communication to the public of these films on filesharing networks. Therefore, in its own name, the company was pursuing legal actions against the perpetrators of those infringements, with the aim of obtaining compensation, 50% of which was passed on to the producers.

Many questions were on the table before AG Szpunar, but the first two are directly tied to copyright law. First, in AG Szpunar’s opinion unsurprisingly the making available for download of *pieces of a file* containing a protected work within the context of a peer-to-peer (P2P) network falls within the scope of the making available right, even before the user concerned has himself downloaded that file in its entirety. Furthermore, that user’s full knowledge of the facts is not decisive.

Next, and more interestingly, the Opinion turned to the so-called “copyright trolls” issue – a

concept unknown in EU law (para 76). Following the general legal principle that EU law cannot be relied on for abusive or fraudulent ends (para 77), the AG states that Mircom does not in fact exploit those licences, but merely seeks compensation from individuals who infringe the copyright and related rights in the content at issue by making them available to the public on P2P networks. Therefore, Article 4(b) of the [Enforcement Directive](#) should be interpreted as meaning that a body which, although having acquired certain rights over protected works, does not exploit them and merely claims damages from individuals who infringe those rights cannot benefit from the measures, procedures and remedies of the [Enforcement Directive](#). However, the Directive neither requires nor precludes domestic legislation from extending the benefit of such measures to an assignee of claims relating to infringements of intellectual property rights.

2021: first trimester

CJEU judgments and AG Opinions

1. CV-Online Latvia, AG Szpunar, Court of Justice, Case C-762/19

On 14 January 2021, AG Szpunar delivered his Opinion in *CV-Online Latvia*. This case relates to the *sui generis* database right and its application to the activity of search engines. You can read the detailed comment on the opinion [here](#).

2. VG Bild-Kunst, Court of Justice, Case C-392/19

On 9 March 2021, the Court of Justice delivered its judgment in *VG Bild-Kunst*. Discussing the lawfulness of framing and linking, the CJEU held that where a copyright holder has adopted or imposed measures to restrict framing, the embedding of a work in the website of a third party by means of that technique constitutes making available of that work to a new public. Consequently, that communication to the public must be authorised by the copyright holder. You can read a comment [here](#).

3. Top System SA, AG Szpunar, Court of Justice, Case C-13/20

On 10 March 2021, AG Szpunar delivered his Opinion in *Top System SA*, which examined the thorny question of computer program decompilation as per the [Software Directive](#). The AG suggests that a legitimate purchaser of a computer program can legitimately decompile this program when this is necessary in order to correct errors affecting its operation (interpretation of Article 5(1) of the Software Directive). Furthermore, when decompilation is for the purpose of correcting errors, it is not subject to the specific requirements of Article 6 of the [Software Directive](#). However, this specific act of decompilation can only be carried out to the extent necessary for the error correction and within the limits of the contractual obligations.

General Court

Hana Jareš Procházková & Antonín Jareš v EUIPO, General Court, Case T-656/18

This case concerns an interesting intersection between copyright and trademark law. On 20 January 2021, the General Court was faced with the issue of revocation of a trademark on the basis of an earlier Czech copyright claim. The key point was the need to prove the existence and authorship of copyright in the word ‘PRIM’. This was not successfully proven.

CDSM Directive implementation

For those interested in tracking the implementation process of the [CDSM Directive](#), we recommend you check [CREATE’s resource page](#) (in partnership with the [reCreating Europe](#) project) as well as the [COMMUNIA tracker](#).

As you will notice, although the deadline for implementation is June 2021, most Member States are yet to implement the directive. This is probably due to challenges associated with implementing Article 17. On that front, Member States are likely waiting for the publication of the much anticipated European Commission Guidelines following the Stakeholders’ Dialogue (for the preliminary version in the form of a Targeted Consultation, see [here](#)), as well as the upcoming AG Opinion (due 22 April) and judgment on Case [C-401/19](#) (more details below).

Policy alert

UKIPO consultation outcome, [Artificial intelligence and intellectual property](#)

Towards the end of 2020, the UKIPO launched a consultation on AI and IP. On 23 March 2021, the results were published. The call for views was responded to by 92 stakeholders – owners and users of IP rights, including those producing and using AI technology, right holders whose rights may be infringed, as well as academics and interested members of the public. The consultation covered both copyright and patents and its outcomes can be read in full [here](#). (For previous analysis of the topic of AI and copyright on this blog, see [here](#).)

Coming soon

In the next few months, there are several developments to keep an eye on.

In addition to the Commission Stakeholder guidance mentioned above, everyone is eagerly awaiting the Opinion of AG Saugmandsgaard Øe in the Polish challenge to Article 17 of the CDSM Directive which is due on 22 April 2021 (see [here](#)).

Another significant judgment expected this year is *Peterson v YouTube* (joined cases [C-682/18](#) and [683/18](#)), for which there has been an AG Opinion (discussed [here](#)) but no date has yet been fixed for the judgment.

Other interesting pending cases include *Public.Resource.Org and Right to Know v Commission* (Case [T-185/19](#)) on the copyright protectability of harmonised standards, *RTL Television* (Case [C-716/20](#)) on the evergreen topic of ‘cable retransmission’ in hotel rooms, and on the copyright/trademark front, a case on the registrability of the marks ‘ANIMAL FARM’ and ‘1984’

currently pending before the EUIPO's Grand Board of Appeal (the copyright in these two titles expired at the beginning of 2021).

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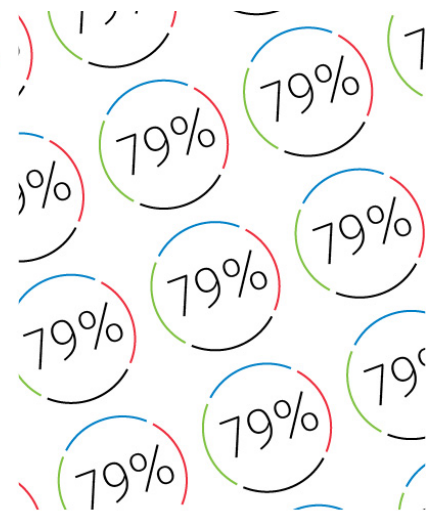
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