# Kluwer Copyright Blog

## EU copyright law round up – second trimester of 2021

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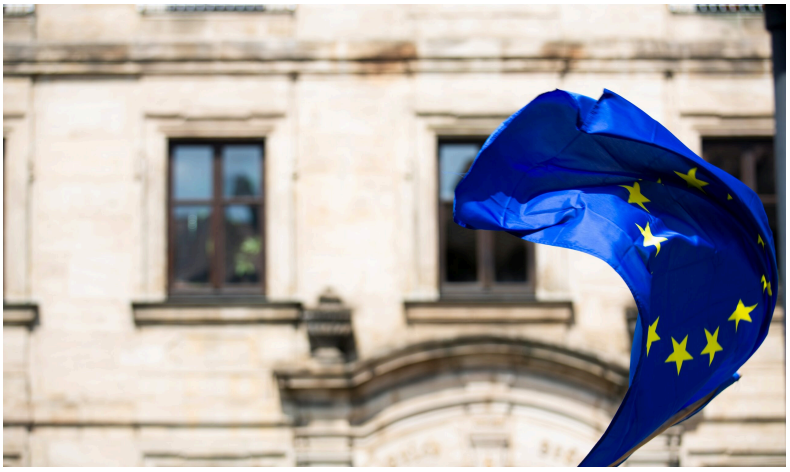

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Welcome to the second trimester of 2021 round up of EU copyright law! Apologies to readers that this one comes a bit late. In this series, we update readers every three months on developments in EU copyright law. This includes Court of Justice (CJEU) and General Court judgments, Advocate Generals' (AG) opinions, and important policy developments. You can read the first trimester round up here.

**CJEU judgments and AG Opinions**

*CV-Online Latvia, Court of Justice, Case C?762/19*

On 3 June 2021, the CJEU delivered its judgment 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 a comment on the case here.

*Mircom, Court of Justice, Case C-597/19*

On 17 June 2021, the CJEU delivered its judgment in *Mircom*, tackling many interesting points regarding communication to the public and file sharing. In particular, the Court has clarified the legal status of uploading in the context of a p2p network using the BitTorrent protocol, especially as regards the act of the uploading user. In essence, the CJEU states that if it is established (as a factual matter) by the national court that the user is aware of how the software works (i.e. that it automatically uploads pieces of files that have been downloaded by the user), and if the user has not actively turned off the "automatically upload" feature, then that user's conduct is capable of constituting an act of making available.

An important aspect here is that the Court requires a mental element when assessing the conduct of the user (s/he acts “in full knowledge of the consequences of what he or she is doing”). The Court further concludes that uploading to a p2p network reaches a “public”, which is to be qualified as a “new public”, even if the work was already available for download elsewhere with the consent of the rightsholder.

On the interface between copyright enforcement and data protection, the Court established that, *under certain conditions*, the systematic registration of IP addresses of users and the communication of their names and postal addresses to the holder of intellectual property rights or to a third party to enable an action for damages to be brought is permissible. Importantly, the initiatives and requests to that effect must be justified, proportionate and not abusive and have their legal basis in a national legislative measure. We will have a detailed analysis of this case on the blog soon.

*YouTube v Cyando, Court of Justice, C?682/18 and C?683/18*

June was a particularly eventful month for the communication to the public right and platform liability. On 22 June 2021, the CJEU held in *YouTube v Cyando* that under current EU law provisions online platforms do not, in principle, make a communication to the public of copyright-protected content illegally posted online by users of those platforms. Nonetheless, those platforms do make such a communication in breach of copyright where they contribute, beyond merely making those platforms available, to giving access to such content to the public. You can read comments on this rich judgment here, here, here and here.

**CDSM Directive implementation**

The deadline to implement the CDSM Directive passed on 7 June 2021. Most Member States have missed the deadline, which has led the Commission to launch infringement proceedings against these Member States (see here). This is somewhat surprising, since the Commission itself was remarkably late in issuing its Guidance on art. 17 CDSM Directive (see below), which many Member States were waiting on before carrying out their implementation.

If you are interested in tracking the implementation process, we recommend you check CREATe’s resource page (in partnership with the reCreating Europe project), as well as the COMMUNIA tracker.

**Policy alert**

*European Parliament Resolution, Challenges of sports events organisers in the digital environment*

Following a report by the Legal Affairs Committee, on 19 May 2021 the European Parliament adopted a Resolution on the challenges of sports events organisers in the digital environment (discussed on the blog here).

*European Commission, Public consultation on the Data Act & amended rules on the legal protection of databases*

On 3 June 2021, the European Commission launched another public consultation, which, among

other things, seeks input on the review of the Database Directive. The consultation is open for submissions until 3 September 2021.

*European Commission, Guidance on the application of Article 17 CDSM Directive*

On 4 June 2021, just three days before the implementation deadline for the CDSM Directive, the European Commission issued its guidance on the application of art. 17 of the Directive – undoubtedly one of its most controversial provisions. The guidance has been discussed in several posts on our blog (here, here and here).

*UKIPO, UK's future exhaustion of intellectual property rights regime*

The UKIPO is currently seeking views on the UK's future regime for the exhaustion of intellectual property rights which will underpin the UK's system of parallel trade. The consultation closes on 31 August 2021.

**A sneak peek into the third trimester**

Because this round-up comes late, here are some important developments that took place in July.

*Resource.Org, T-185/19, EU General Court*

This judgment refers to a challenge brought by Public.Resource.Org, Inc. and Right to Know CLG against a decision by the European Commission to not grant (free and public) access to harmonised standards adopted by the European Committee for Standardisation (CEN). Among the arguments used by the Commission to refuse access (under art. 4(2) of **Regulation (EC) No 1049/2001**) was that doing so would undermine the copyright protection of the standards at issue. This leads naturally to the important question of whether standards can be subject to copyright protection.

The General Court's reasoning is rather superficial and at points circular. For our purposes, the main points can be summarized as follows. First, the Court states that the Commission based its finding on the existence of copyright protection for the requested harmonised standards on objective and consistent evidence such as to support the existence of the copyright claimed by CEN for the standards. Furthermore, in light of existing case law on copyright originality, the Commission was entitled to find that the necessary threshold of originality for the harmonised standards had been met. Finally, the applicants did not show in the present case how the restrictions on creativity that result from the standardisation legislation prevent the harmonised standards from reaching the threshold of originality required at EU level. For a critical analysis of this judgment, see this post on the IPKat.

*Poland v Parliament and Council, C?401/19*

The long-awaited Opinion of AG Saugmandsgaard Øe on the action by Poland to annul certain aspects of art. 17 CDSM Directive was delivered on 15 July 2021. The AG suggests that art. 17 is in principle compatible with the freedom of expression and information guaranteed in art. 11 of the Charter. But that compatibility is only possible subject to a specific reading of the provision and implementation of its safeguards. You can read a comment on the most important aspects of the Opinion here, and an analysis of how the Opinion can assist Member States in implementing the

CDSM Directive here. There is also a lengthier analysis of the Opinion in combination with the Commission's Guidance on art. 17 and the *YouTube v Cyando* case in this recent paper.

**Coming soon and latest referrals**

Some interesting preliminary references to the CJEU to look out for include: *Stichting Brein* (C-442/19) on the liability of an operator of a platform for Usenet services for communication to the public; *Puls 4 TV* (C-500/19), on the application of the hosting safe harbor to online video platforms; *Austro-Mechana* (C-433/20) on private copying and the cloud; *RTL Television* (Case C-716/20) regarding 'cable retransmission' in hotel rooms; and *AKM* (C-290/21) on communication to the public by satellite broadcasting. With respect to the copyright/trade mark overlap, a case on the registrability of the marks 'ANIMAL FARM' and '1984' is still pending before the EUIPO's Grand Board of Appeal. The copyright in these two titles expired at the beginning of 2021.

Stay tuned!

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This entry was posted on Monday, August 16th, 2021 at 11:31 am and is filed under AG Opinion, Case Law, CDSM Directive, 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, Digital Single Market, European Union, Legislative process, Round-up
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