Kluwer Copyright Blog

Top 10 Posts on the Kluwer Copyright Blog in 2022

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As we enter a new year, we would like to take this opportunity to pass on our best wishes for 2023 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 ongoing European copyright reform, a number of landmark CJEU decisions and notable developments in a number of jurisdictions.

Here is a quick look back at our 10 most-read posts last year:

1. Andy Warhol Foundation v. Goldsmith: The Supreme Court Revisits Transformative Fair Uses by Pamela Samuelson

In its landmark 1994 decision Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), the U.S. Supreme Court ruled that Campbell's creation of a rap parody version of a popular Roy Orbison song could be fair use because it transformed the original song by adding something new, with a different purpose, or a new meaning or message. Since then, courts in the U.S. have grappled with how broadly or narrowly to interpret the concept of transformativeness when assessing fair use defenses to charges of copyright infringement… In seeking Supreme Court review, the [Andy Warhol] Foundation argued that the Goldsmith decision was inconsistent with the Court's teachings in Campbell and Google.

2. Article 17 survives, but freedom of expression safeguards are key: C-401/19 – Poland v Parliament and Council by João Pedro Quintais

[T]he CJEU delivered its much awaited judgment in Case C-401/19 – Poland v Parliament and Council. In simple terms, the main issue before the Court was the validity of the preventive measures required by Article 17(4) (b) and (c) in fine in light of the right to freedom of expression and information recognized in Article 11 of the Charter; in the alternative, should these provisions not be severable from Article 17 as a whole, the Republic of Poland asked the Court to annul Article 17 in its entirety.

This post provides a refresher on the contents of Article 17, followed by a brief highlight of the

main takeaways to kick-off the discussion.

3. YouTube's first Copyright Transparency Report 2021 – A step towards "factfulness" by Jan Bernd Nordemann

At the end of 2021, YouTube's first Copyright Transparency Report 2021 ("Report") was published. It is interesting to look at this Report against the background of the 2019 EU rules for the liability of platforms like YouTube through the famous Art. 17 DSM Directive 2019/790 ("DSMD").

In any case, this first YouTube Report is indeed a promising start (Paul Keller, op cit.), as it provides a first set of facts to "undramatize" copyright actions via YouTube and the like and start to look at this from a position of "factfulness". To quote Hans Rosling once again: "I have found it useful and meaningful to learn about the world as it really is." (Factfulness, p. 254). Following the Report this means: Copyright infringement needs to be addressed; unjustified requests have to be taken seriously, but seem to be an exceptional scenario in particular by qualified rightholders; and there is no real alternative to automation on larger platforms.

4. A vanishing right? The Sui Generis Database Right and the proposed Data Act by Paul Keller

[T]he European Commission published its proposal for a Data Act. The proposal is the second major element of the European Data Strategy presented in 2020 and complements the Data Governance Act that is expected to be formally adopted this spring.

As expected, the proposed Data Act introduces rules strengthening user access and portability to data generated by connected devices (ranging from industrial appliances to personal virtual assistants), rules related to the interoperability of data spaces and cloud services, and new requirements for businesses to share data with the public sector bodies. But for anyone who had expected the Data Act to include a revision of the Database Directive — an ambition that the Commission had signalled in both the 2020 Data Strategy and the 2020 Intellectual Property Action Plan — the final proposal will be a major disappointment.

5. The Contested Meaning of Web3 & Why it Matters for (IP) Lawyers by Mark Fenwick and Paulius Jurcys

The week before Christmas was disrupted by a controversy in Silicon Valley over the future of the internet. Prominent tech founders and venture capitalists (VCs) argued about the meaning and implications of web3, a vague concept hinting at a possible utopian vision of a decentralized internet and the new opportunities that might be created around emerging technologies such as blockchain.

So, is web3 "somewhere between a and z"? What is web3, anyway? And why do definitions matter anyway (especially for lawyers)?

6. AI Music Outputs: Challenges to the Copyright Legal Framework – Part I by Oleksandr Bulayenko, João Pedro Quintais, Joost Poort and Daniel Gervais

The creation and development of copyright law are closely connected to technological and associated business transformations … It is therefore not surprising that progress in AI technologies and their deployment in the creative sector creates new opportunities and challenges for the law, creators (authors and performers), and rightsholders. What is perhaps different with AI technologies is the magnitude of the potential impact, brought about by the unprecedented scale of automation that increases productivity and access to creativity. Yet, the very same automation poses challenges for the application of copyright law, increasing legal uncertainty, as demonstrated in this report vis-à-vis AI music outputs. This begs the question of how EU law can and should meet this challenge.

Part II is available here.

7. CJEU upholds Article 17, but not in the form (most) Member States imagined by Felix Reda and Paul Keller

Article 17 is here to stay, but most national implementations fail to meet the fundamental rights standards developed by the Court in its judgment. [The] long-awaited ruling in Case C-401/19 finally brings some clarity to the almost three-year-long discussion about the implementation of Article 17 of the Copyright in the Digital Single Market Directive (DSM Directive) … In [the] judgment the Court rejected the argument brought forward by Poland and concluded that the design of Article 17 includes sufficient safeguards protecting the right to freedom of expression and information of the users.

8. Copyright law and football matches: impossible to match? (Part I) by Tatiana Synodinou

The economic value of football broadcasting has reached impressive levels that appeared unthinkable decades ago. While the COVID-19 pandemic has affected the revenues of European football clubs, audiovisual rights still have a crucial role in securing the financing of sports events in the European Union.

At the same time, a global paradigm of online piracy enabling the retransmission of sports events on a worldwide basis has dynamically emerged. In this context, an important question is whether the classic copyright and related rights protection offers a solid legal basis for combatting online piracy, specifically regarding the broadcasting of live sports events, or whether the sports industry should be granted additional exclusivity through the establishment at EU level of specific protection, as is the case in certain Member States (currently Bulgaria, France, Greece, Hungary, Italy, Romania, Slovakia and Spain provide specific audiovisual rights).

Part II is available here.

9. Article 17: (Mis)understanding the intent of the legislator by Paul Keller

[T]he French Government presents the second report on content recognition tools on digital sharing platforms commissioned by the Conseil Supérieur de la Propriété Littéraire et Artistique (High Council for literary and artistic property – CSPLA). The new CSPLA report, authored by Jean-Philippe Mochon (who had also authored the previous report on content recognition tools), focuses on "proposals for the implementation of Article 17 of the EU copyright directive" and marks an important and timely contribution to the discussion about the implementation of Article 17. It provides further insights into the positions taken by France throughout the discussion.

10. DJs are Phonogram Producers, says Dutch Supreme Court by P. Bernt Hugenholtz

On December 17, 2021, in a big win for electronic dance music (EDM) artists, the Dutch Supreme Court held that DJs own phonographic rights (neighbouring rights) in their home-produced recordings – not the record labels that commercially release them. The decision comes in a long-running dispute between world-famous Dutch DJ and EDM artist Martin Garrix and his former record label, Spinnin' Records. Garrix had entered into a record production contract with the label at a very young age. Having become a successful DJ and finding the terms of the contract unfair, Garrix sought annulment for a variety of legal reasons. He also claimed that the phonographic rights that according to the language of the contract belonged to the label, were actually his own.

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