

# Kluwer Copyright Blog

## EU copyright law round up – first trimester of 2023

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Welcome to the first trimester of the 2023 round up of EU copyright law! In this edition, we report on an AG Opinion that came out late in 2022 and update you on what has happened in the first trimester of 2023 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 previous round-ups [here](#).



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### CJEU judgments and AG Opinions

#### *Ocilion*, AG Opinion, [C-426/21](#)

This is yet another preliminary reference on the private copying exception in Article 5(2)(b) InfoSoc Directive coming from the Austrian courts. For a comment on the most recent Court judgment on private copying and the cloud (Case C-433/20), also coming from Austria, see [here](#). On 15 December 2022, AG Szpunar delivered his opinion which sought to clarify the exception's application to the rights of reproduction and communication to the public respectively. With respect to reproduction, the case mostly deals with the legal status of an online service for the retransmission of television services that enables users to access copies of the programs at a later stage through a "replay" function. Examining the particular functionalities of the service at issue, the AG concludes that the copies made in this context are not covered by the private copying exception. In particular, this conclusion applies to a service that offers the following functionalities for the additional recording of TV programs: (1) a service where independent copies of the programs are not created with each recording made by a user, but initially made by another user who recorded it for the first time and accessed subsequently by the subsequent user through a referencing system; and (2) a service providing a replay function, in which the television program of all selected channels is fully recorded 24 hours a day, allowing the user to watch this program

on a deferred basis for seven days, as long as the user makes the selection on each of the channels by clicking on a box. With respect to the the right of communication to the public in Article 3(1) InfoSoc Directive, the AG states that it is not a communication to the public if a supplier offers hardware and software, as well as technical assistance, to broadcast television programs on the Internet to end users. Equally, it is not a communication to the public if they offer a service for recording and replaying these programs (IPTV solution), which makes this hardware and software available to its customers who operate them themselves.

### **CDSM Directive implementation**

The **CDSM Directive** implementation is still far from over. As readers know, many Member States missed the deadline, so in February 2023 the **Commission referred 11 of them to the CJEU for failure to fully transpose the Directive**. Currently, about six Member States have still not implemented the Directive into their national laws.

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 DSM Implementation Portal**.

### **Policy**

*Max Planck Institute for Innovation and Competition, **Position Statement on the 'Design Package' (Amendment of the Design Regulation and Recast of the Design Directive)***

In January 2023, the Max Planck Institute for Innovation and Competition issued its position statement on the Amendment of the Design Regulation and Recast of the Design Directive. The copyright aspects of their position statement focus on the cumulative protection of design and copyright. Stay tuned in the next weeks for a post looking at these issues in detail.

### *UKIPO, **Rights reversion and contract adjustment***

The UK has been firm on not implementing the CDSM Directive, which also included an important chapter on exploitation contracts of authors and performers. This UKIPO report, issued in February 2023, investigates two proposals that have been made to protect the contractual interests of UK music creators by making changes to UK copyright law. One focusses on the reversion right, which would provide a means by which the transfer of copyright returns to the music creator at an agreed time-period after the contract with a rights holder has been signed. The other is to introduce a contract adjustment right, which would enable music creators to address

disproportionate revenues resulting from contractual terms.

*UK Department of Science, Innovation and Technology, **A pro-innovation approach to AI regulation***

In March 2023, a new white paper was published detailing how the UK government aims develop a innovation friendly approach to the regulation of AI. As part of its pro-innovation framework, the UK government intends to take forward the recommendations of the [Vallance Report](#) relating to intellectual property and generative AI (p.20). This report recommended that the UK Government should announce a clear policy position on the relationship between

intellectual property law and generative AI to provide confidence to innovators and

investors. In the [HM Government Response](#) to this report (also dated March 2023) it is noted that the IPO “will produce a code of practice by the summer which will provide guidance to support AI firms to access copyrighted work as an input to their models, whilst ensuring there are protections (e.g. labelling) on generated output to support right holders of copyrighted work”. The code of practice is to be informed by consultations with “a group of AI firms and rights holders to identify barriers faced by users of data mining techniques when accessing copyright materials.” As an incentive, AI firms that commit “to the code of practice can expect to be able to have a reasonable licence offered by a rights holder in return.” It is also noted that if the code of practice “is not adopted or agreement is not reached”, then this initiative “may be followed up with legislation” (p.5).

*European Commission, **Commission Recommendation on a Code of Practice on the management of intellectual assets for knowledge valorisation in the European Research Area***

In March 2023, the European Commission issued a recommendation encouraging the efficient intellectual asset management for both individuals and organisations. Among others, the recommendation highlights that understanding the role of copyright in the context of teaching for professors, researchers, and students is essential.

### **Coming soon and latest referrals**

2023 promises a lot with several pending cases before the CJEU: *AKM (C-290/21)* on communication to the public by satellite broadcasting, *Ocilion (C-426/21)* on communication to the public and the private copying exception, *Castorama Polska (C-628/21)* on copyright enforcement, *Blue Air Aviation (C-775/21)* on communication to the public on airplanes, *Citadines (C-723/22)* on communication to the public in hotel rooms and fitness rooms, *HADOPI (C-470/21)* on the French HADOPI law, *Mylan (C-473/22)* concerning enforcement and compensation, *Telia*

*Finland (C-201/22)* on CMOs and standing, as well as the latest German referral on *Cheat-Software* and game consoles.

On the copyright/trade mark front at the EUIPO, 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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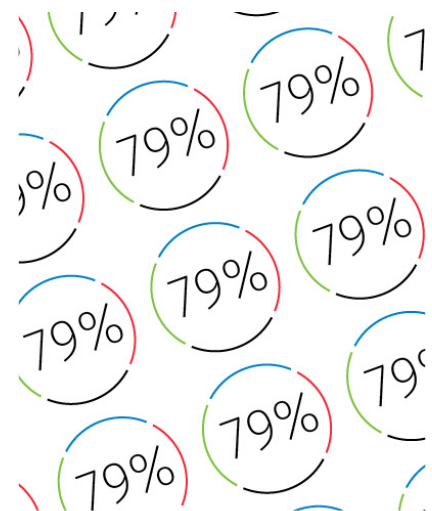
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national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.”>CJEU, Communication (right of), Contract, European Union, Exceptions and Limitations, Legislative process, Private copying, Reproduction (right of)

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