Kluwer Copyright Blog

Everything is harmonized. The CJEU's decision in Kwantum v. Vitra

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Just seven weeks after the release of the AG's Opinion the Kwantum v. Vitra case was decided by the European Court. For Dutch background and early criticism, see my earlier blog. The main question asked to the Court was whether a Member State may unilaterally apply the Berne Convention's rule of material reciprocity (Article 2(7) BC) to non-EU works. According to this provision, Berne states are not obliged to grant copyright protection to works that originate from a country that does not itself provide for copyright protection of industrial designs. One of such countries is the United States, the country of origin of the Eames chair in the case at hand.

Given the short time frame between opinion and decision, the Court's answer does not surprise. It is for the EU legislature, not the individual Member States, to restrict the scope of application of harmonized EU copyright law. Since the acquis does not provide for material reciprocity, works of applied art are unconditionally protected in the EU.

The Court's reasoning relies heavily on the AG's Opinion and the Court's earlier decision in RAAP. In that case the CJEU had decided that Member States may not unilaterally invoke material reciprocity regarding the remuneration right accorded to phonogram producers and performing artists under Article 8(2) of Directive 2006/115/EC. Like the AG, the Court emphasizes that the Information Society Directive, which harmonizes the main rights of exploitation, does not comprise a rule of material reciprocity – in contrast to the Term Directive and the Artist's Resale Right Directive that do. Allowing individual Member States to individually apply Article 2(7) BC would undermine the InfoSoc Directive's aim of reducing fragmentation of the internal market.

As in the RAAP decision, the Court finds additional arguments in the EU Charter. The Court conceives material reciprocity as a limitation to copyright which, according to Articles 17(2) and 52(1) of the Charter, must be provided for by law. And because, as the CJEU has established in previous case law, copyright protection of works is fully harmonized, the competence to legislate on this matter is with the EU, not the Member States.

Although this outcome was to be expected, the Kwantum ruling leaves me deeply dissatisfied, as did the RAAP decision that preceded it. The Court's decision hinges on two main arguments, both of which I find entirely unconvincing. The first is the absence of rules of international application in the InfoSoc Directive, which the Court – advised by the AG – interprets as a legislative choice to unequivocally extend copyright protection to all works originating from outside the EU. What the Court seems to forget is that the InfoSoc Directive was never meant to harmonize the notion of the work of authorship. Therefore, issues of international application did not arise. It was eventually the CJEU itself that – with a wave of its magic wand – turned the work into a harmonized concept. Moreover, the CJEU doesn't even mention that the Design Directive and the Design Regulation expressly allow the Member States to determine "the extent to which, and the conditions under which" copyright protection is accorded to works of applied art (Art. 17 Design Directive, Art. 96(2) Design Regulation).

The second argument is equally questionable. Because the TRIPs Agreement and the WCT, international treaties that bind the EU, prescribe national treatment as the default rule, a rule of reciprocity amounts to a limitation of the fundamental right to intellectual property enshrined in Article 17(2) EU Charter – says the CJEU. But these conventions incorporate Berne Convention minimum standards and therefore exclude works of applied art from national treatment. So how can applying an internationally agreed standard amount to a "limitation" of the fundamental right of IP?

In my opinion, a less activist Court could have – and should have – chosen another path. Leaving aside the alternative readings suggested by the European Copyright Society, the CJEU could have simply answered that in respect of works of authorship rules of international application are not (yet) fully harmonized, so it is for the Member States to apply Article 2(7) BC. Of course this would preserve some market fragmentation, but that's what you get with step-by-step harmonization. In any case, the negative impact on the internal market would be negligible, since most Member States apply Article 2(7), or a transposition thereof, in the same way as the Netherlands.

But telling a referring court that an issue is *not* harmonized is something the CJEU no longer seems capable of doing. As I recall, the last time this happened was in the Circul Globus decision of 2011, where the Court held that the right of communication to the public does not encompass a right of public performance.

Following Kwantum it is not hard to forecast the Court's next trophy in its hunt for complete harmonization. Two of the main remaining matters of unharmonized copyright are the notions of authorship and copyright ownership. But the InfoSoc Directive mentions "authors" and "rightholders" everywhere, so it is easy to imagine the Court will one day waive its magic wand again and construe these notions as fully harmonized. AG Szpunar's recent opinion in the ONB case already points in that direction.

Although I'm all for a strong European Union (even more so in these troubling times), the Court's judicial activism is becoming a liability for the EU and its Member States. The Court's "everything is harmonized" approach disrupts the EU's legislative agenda and exposes Member States to massive Francovich liabilities. It also undermines the EU's international trade policies. With RAAP and Kwantum the EU has thrown away precious bargaining chips in its trade negotiations with the US and other third countries. Moreover, a literal reading of the Court's judgment implies that authors of all countries in the world can now rely on copyright protection in the EU – an

unexpected gift to countries like Iran that remain outside the international copyright framework.

To avoid further disruption and embarrassment, the EU legislature should reclaim the initiative immediately. After RAAP and Kwantum a directive or regulation on rules of international application should be a priority. In addition, the EU should complete its copyright harmonization agenda as soon as possible. At the same time, the EU should finally start work on copyright unification.

In sum, there's a lot of copyright work to do for the new Commission.

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