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Session 10: Copyright Law

A. Developments in EU Copyright Law

The ECJ Infopaq-decision

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1. The importance of this decision

This decision is especially important because it is the first decision by the ECJ – certainly as far as I am aware – on the meaning of the concept of *work* or, as the case may be, the originality test in Community copyright law. In my opinion it can be seriously questioned whether the Court had the necessary competence under European law to adopt the approach which it took.

The definition of *work* and *originality* comes to the fore within the framework of an answer to the question of what is to be understood by *the partial reproduction of a work* in the sense of Art. 2(a) of the Copyright Directive.[1] According to the Court it must first be determined whether the journalistic products in question are in fact *works* as required under Art. 2 of the Directive. The products amounted to the storage and the subsequent printing of fragments of text from a newspaper article consisting of a search term therefrom along with the five preceding and the five subsequent words.

I will first report on the way in which the Court dealt with this matter (2), then I will discuss the Court's competence (3), before evaluating certain aspects (4).

2. The judgment by the Court

In its judgment the Court considered the following question: as the concept of *partial reproduction* is not defined in the Copyright Directive, whether, for the definition thereof, consideration should not consequently be given to the wording, the context and the objective of the Directive and the international law on this issue (ground 32). This issue was previously dealt with in the SGAE/Rafael Hotels decision in 2006.[2]

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1 Directive 2001/29/EC.

2 ECJ 6 december 2006, Case C-306/05 (SGAE v. Rafael Hoteles) on Art. 3 Directive 2001/29/EC.

From the fact that the concept of *partial reproduction* in Art. 2(a) of the Copyright Directive is related to *works,* the Court apparently deduced that (in conformity with the wording and the context of the provision,FWG?) before coming to such a definition, it must first be determined what, exactly, is a *work* under the Directive and/or whether there is a question thereof in this case (ground 33). The Court therefore determined in grounds 35-38 that from points 4, 9-11 and 20 of the Preamble to the Copyright Directive it would appear that, on the basis of the Software Directive, the Copyright Duration Directive and the Databanks Directive (which are linked with Art. 2(5) and (8) of the Berne Convention), copyright in the sense of Art. 2(a) is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation (ground 37).[3]

Following on from this, it was decided that parts of a *work* are not to be treated any differently to a work in its entirety. Dixit the Court (a)*s a consequence, the copyright therein is protected as long as the entire work is original* (ground 38). According to the Court that is the case *subject to the condition that these (*therefore those parts*,* FWG*) contain certain elements which are the expression of the author's own intellectual creation* (ground 39).
I understand this to mean that *parts of a work* (ground 38) *could* (my emphasis) be protected by copyright law when the work in its entirety is identifiable. I come to this understanding based on the Court's opinion concerning the copyright status of parts of press articles. These press articles – dixit the Court - *consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation* (ground 45). *Words as such do not, therefore, constitute elements covered by the protection* (ground 46).

What does this mean for the eleven-word fragments? According to the Court *(it cannot be excluded that) certain individual sentences, or even phrases from the text in question, can convey the originality of a publication, such as a press article, to the reader by means of communicating an element which, as such, expresses the author's own intellectual creation* (ground 48). The applicable national court will have to make this determination.

[3] Directives 91/250/EC, 96/9/EC, and 2006/116/EC.

3. The competence of the Court

One thing is certain: the Court is only competent to define the concept of a *work*, or respectively the originality test, in a EU law perspective whenever this concerns a harmonized understanding of the concept. But is this the case here? That is an intriguing question to which an answer cannot be easily found.

Van Eechoud has argued, amongst other things, that the Acquis Communautaire has a rather modest scope where it concerns copyright protection.[4] *In the field of copyright* – she writes - *the lack of a harmonized originality test for all works is most conspicuous. The laws of the Member States do have an implicit or explicit form of such a test. In the acquis there are only scattered provisions.* In the Infopaq decision the Court also referred to the tests in certain provisions of the Software Directive, the Copyright Duration Directive and the Databanks Directive and stated that they all three, although they are conceptually different, are increasingly attaining a comparable result in practice. However, Van Eechoud doubts whether a uniform definition of original works will prevent different outcomes from continuing to occur as long as the national copyright law of the Member States continues to protect achievements which do not comply with the uniform definition. Not to mention the fact that *a more detailed harmonization of the concept of work (…) is difficult to propose without also regulating the question of which party will have to apply it.* According to Van Eechoud, the concept of a *work* is consequently not harmonized, which is also the case for incidental definitions in a few Directives.

Another interpretation is provided by Handig.[5] With a visionary glimpse, announcing that (*s)ome aspects of the term "work" will probably be clarified by the ECJ in the pending case Infopaq etc.,* he gives his opinion that despite the lack of harmonization at an international level, within the EU we can speak of a certain degree of harmonization.[6] Referring once again to the Directives in question, Handig determines, on the one hand, that although the minor differences in the definition of the concept of a *work* do indeed result in a difference in meaning, we do not have to depart therefrom especially considering the terminology used by the EU legislator which is generally lacking in accuracy. Moreover, according to Handig, the more or less identical definitions of the concept of a *work* in the Directives and the lack of a definition in

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4 Mireille van Eechoud, Het Communautair Acquis voor au- teursrecht en naburige rechten: zeven zonden of zestien gelukkige jaren? AMI/Informatierecht 2007/4, p. 109-117.

5 Christian Handig, The Copyright Term 'Work'- European Harmonisation at an Unknown Level, IIC 2009/6, p. 665-685.

6 Handig, p. 666, note 3.

other subsequent Directives leads him to deduce that *it is likely that more identical definitions in later directives were simply deemed to be superfluous*. Furthermore, in line with what the ECJ decided earlier on this point: an autonomous and uniform interpretation must normally be given to terms in EU legislation, Handig reaches the now acknowledged conclusion that *it is very likely that the ECJ would interpret it* (i.e. the term "work", FWG) *as being harmonized.*[7]

I can only repeat the question: was the Court competent to provide a uniform Community copyright law interpretation of the concept of a *work*?

4. Evaluation

Crucial in this case is, of course, the answer to the question whether the Court, before giving its opinion on the reproduction right, first had to determine whether the eleven-word fragment did in fact amount to a *work* in the sense of Community copyright law. As I read it in the AG's Conclusion, it was not necessary – in order to answer the question of the content and the scope of *reproduction* and *reproduction right* – to first consider whether the produced journalistic products in question were in fact *works* in the sense of Community copyright law. Implicit in the AG's opinion, the concept of a *work* is evidently not harmonized from a European law point of view and a case dealing with, in this instance, the applicable national law as well as the Copyright Directive, do not point to the law of the Member States to discern the content of the *work* concept. Apparently, according to the AG, this implicit conclusion is sufficient. I am inclined to agree with her and with Van Eechoud on this point.

But this is different as far as the Court is concerned with which Handig concurs. Evidently the Court considers the definition of the *work* concept in the three Directives, following on from the description in the Berne Convention, to provide sufficient meaning so as to include this definition in the *Acquis Communautaire.* This notwithstanding the fact that – and the Court itself specifically points to this – the work is not defined in the Copyright Directive which is generally considered to be a pre-eminent harmonization instrument.

I have difficulty with this. In the first place from the point of view of the technical aspects of legislation: even if it would have been obvious that the concept of a *work* had been harmonized in earlier EU legislation, then this should not have gone unmentioned in the

[7] Handig, p. 671, referring to the SGAE v. Rafael Hoteles decision.

Copyright Directive when dealing with such a central notion of copyright. Secondly, I do not consider the evidence claimed in grounds 9-11 of the decision, with the possible exception of ground 21, to be convincing. These grounds are concerned with, in general terms, an enumeration of the objectives of Community copyright law and certainly not with framing the concept of a *work.*

If my objections are indeed correct, then the Court was not competent to embark on its harmonization exercise. Can something then be done about this? I must admit that my knowledge of Community law is not sufficient to allow me to determine with authority when a part of Community law can be said to belong to the *Acquis Communautaire* and/or when the Court has exceeded its authority on this point.

What can be said, for that matter, about the definition of the *work* which the Court came up with? That is indeed the familiar formulation from the earlier Directives which sticks to the middle ground between the civil law and the common law traditions. It is a formulation which takes as its implicit point of departure the debatable assumption that a uniform notion of *work* is applicable within the national copyright laws of the Member States. A *work* concept which does not therefore distinguish various categories of works as is at issue here.
I consider this assumption to be incorrect and it leads to an unworkable approach as far as the *work* concept is concerned. On the contrary, for a EU-wide uniform *work* concept I propagate to follow a tailor-made approach whereby due consideration can be given to various categories of *works.*

In should further be observed that it is unclear whether with respect to protected elements or also parts of (complete) *works* which, according to the Court, should be protected by Community copyright law, these must be the author's own independent intellectual creations. That will apply, for example, to a quotation or a salient expression, but will it also apply to words put together out of choice or classification or a combination? Consequently, the single message "*The Pope is dead"*, apart from a relevant obituary, cannot be protected by copyright law, but with Horace's *Seize the day (carpe diem)* from his *Odes and Epodes* the situation is different, although it regards a combination of merely single words.