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**JOB OFFERS AND ADVERTISEMENTS****MONTHLY CASE LAW OVERVIEW****Copyright**

*Freedom of information and freedom of the press are not capable of justifying exceptions or limitations to the copyright not provided for in the directive*

**IPPT20190729, CJEU, Funke Medien v Duitsland**

**Copyright.** Military status reports constituting purely informative documents, the content of which is essentially determined by the information which they contain and that those reports are thus entirely characterised by their technical function, are not protected by copyright: creativity has not been expressed in an original manner and there is no own intellectual creation. Article 5(3)(c) Copyright Directive does not constitute measures of full harmonisation of the scope of the relevant exceptions or limitations. Discretion in the implementation is circumscribed in several regards: discretion must be exercised within the limits imposed by EU law, discretion cannot be used so as to compromise the objectives of that directive, discretion also circumscribed by Article 5(5) of the directive, lastly, it is for the Member States to ensure a fair balance is struck between the various fundamental rights protected by the European Union legal order. Freedom of information and freedom of the press, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, are not capable of justifying exceptions or limitations to the copyright not provided

for in the Directive. In striking the balance between the exclusive rights of the author and the rights of the users of protected subject matter, the latter of which derogate from the former, a national court must rely on an interpretation of those provisions which fully adheres to the fundamental rights enshrined in the Charter. Publication of military status reports may amount to 'use of works ... in connection with ... reporting' within Article 5(3)(c), second case, of Directive 2001/29: reports are presented in a structured form in conjunction with an introductory note, further links and a space for comments.

**IP 10216. Preliminary question on the application of the VAT directive on collective management organisations**

**Case C-501/19:** UCMR – ADA Asociația pentru Drepturi de Autor a Compozitorilor - Pro Management Insolv IPURL.

Preliminary reference on the interpretation of Council Directive 2006/112/EC

**Preliminary questions:**

"1. Do the holders of rights in musical works supply services within the meaning of Articles 24(1) and 25(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive) to performance organisers from which collective management organisations, on the basis of an authorisation – a non-exclusive licence – receive remuneration, in their own name but on behalf of those right holders, for the public performance of musical works?

2. If the first question is answered in the affirmative, do collective management organisations, when receiving remuneration from performance organisers for the right to perform musical works for a public audience, act as a taxable person within the meaning of Article 28 of the VAT Directive, and are they required to issue invoices including VAT to the respective performance organisers, and, when remuneration is paid to authors and other holders of copyright in musical works, are the latter, in turn, required to issue invoices including VAT to the collective management organisation?"

**IP 10217. Preliminary questions about liability of hosting providers when providing certain services**

**Copyright. Preliminary questions.** "1. Is Article 14(1) of Directive 2000/31/EC to be interpreted as meaning that the operator of an online video platform, as a host service provider, plays an active role, leading to a loss of the liability privilege, as a result of providing or offering to the user the following accompanying activities in addition to the provision of storage space for third-party content:

- suggesting videos according to subject areas;
- facilitating visitors to search by title or content information by means of an electronic directory of content, with the user being able to specify the title or content information;

- providing online tips in relation to the use of the service ('Help');
- with the user's consent, linking the videos uploaded by the user with advertisements (but not any selfpromotion by the platform operator) according to the selection of the target group by the user?

2. Is a national legal position whereby the cease-and-desist obligation of a host service provider (intermediary service provider) in an active role as accessory in respect of infringements by its users exists only on the condition that the accessory has knowingly encouraged the user's infringement consistent with the first sentence of Article 11 of Directive 2004/48/EC, or is this provision to be interpreted as meaning that the Member States must not make claims for a prohibitory injunction made by right holders against accessories dependent on knowing encouragement of the user's infringement?

1. Are the provisions in Articles 12 to 14 of Directive 2000/31/EC on the liability of intermediary service providers to be considered to be horizontal limitations of liability that benefit any intermediary service provider in a neutral role, even where its activity is to be qualified under copyright law as communication to the public that it has committed itself?

2. Are Article 14(3) (and also Article 12(3) and Article 13(2)) of Directive 2000/31/EC, Article 8(3) of Directive 2001/29/EC and the third sentence of Article 11 of Directive 2004/48/EC to be interpreted as meaning that the liability privilege in accordance with Article 14(1) of Directive 2000/31/EC is available to a host service provider (intermediary service provider) in a neutral role even in the event of a claim for a prohibitory injunction being brought against it and that therefore even an injunction order by the courts with respect to such an intermediary service provider is admissible only if that intermediary service provider has actual knowledge of the illegal activity or information, or is such an injunction order by the courts admissible only if the host service provider does not expeditiously remove or disable the content objected to as infringing after a specific warning and confirms the infringement in judicial proceedings?"

**CJEU: Phonogram producer can prevent "sampling" of his work**

[IPPT20190729, CJEU, Pelham](#)

*Related rights. Copyright.* Phonogram producer can prevent under Article 2(c) Copyright Directive another person from taking a sound sample, even if very short ("sampling"), of his or her work for another phonogram, unless that sample is included in the phonogram in a modified form unrecognisable to the ear. Concept of 'copy' (Article 9(1)(b) Rental Directive) must, according to its preamble, be interpreted consistently with the same concept as it is used in the Geneva Convention. Reproduction of all or a substantial part of a phonogram constitutes a 'copy'.

Member State cannot, in its national law, lay down an exception or limitation, other than those provided for in Article 5, to the phonogram producer's right provided for in Article 2(c) of that directive. Use of a sound sample taken from a phonogram (sampling) may amount to a "quotation", on the basis of Article 5(3)(d) Copyright Directive, provided that that use has the intention of entering into dialogue with the work from which the sample was taken. Concept of 'quotations' (Article 5(3)(d) Copyright Directive) does not apply when it is not possible to identify the work concerned by the quotation in question. Article 2(c) Copyright Directive constitutes full harmonisation.

***Author's consent not required when using work for the purposes of reporting current events***

[IPPT20190729, CJEU, Spiegel Online v Volker Beck](#)

*Copyright.* Copyright directive does not fully harmonise the exceptions or limitations. European fundamental rights are not capable of justifying exceptions or limitations not provided for in the directive. In striking the balance between the rights of the author and the rights which derogate from the former, there must be fully adhered to the fundamental rights enshrined in the Charter: there is nothing whatsoever in the wording of the Charter or in the Court's case-law to suggest that an IP-right is inviolable and must for that reason be protected as an absolute right. Article 5(3)(c) of Directive 2001/29 precludes a national rule restricting the application of the exception or limitation provided for in that provision in cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events. Reference made by means of a hyperlink to a file which can be downloaded independently, is covered by quotation exception. A work has "already been lawfully made available to the public" within the meaning of the quotation exception where that work, in its specific form, was previously made available to the public with the rightholder's authorisation or in accordance with a non-contractual licence or statutory authorisation.

#### Trade mark law

***Justified declaration that Red Bull trade marks consisting of a combination of the colours blue and silver per se are invalid***

[IPPT20190729, CJEU, Red Bull v EUIPO](#)

*Trade mark law.* Justified declaration that Red Bull trade marks consisting of a combination of the colours blue and silver per se are invalid: General Court correctly applied the principles stemming from the Heidelberger Bauchemie judgement (IPPT20040624), considering that the mark was not systematically arranged in such a way that the colours concerned are associated in a predetermined and uniform way.

***IP10208. AG: EUIPO's decision rejecting the registration of the trade mark 'Fack Ju Göhte' should be annulled***

Court of Justice of the European Union Press Release: "[...] As regards the concepts of 'public policy' and 'accepted principles of morality' to which the Regulation refers, while acknowledging a certain overlap, the Advocate General distinguishes between them and suggests that different elements have to be taken into account for their assessment. When EUIPO wishes to rely, specifically, on the absolute ground for refusal of accepted principles of morality, which was the case in the present proceedings, it must establish why it believes that a given sign would offend those principles. Importantly, that assessment must be grounded in a specific social context, and it cannot ignore factual evidence that either confirms or possibly casts doubt on EUIPO's own views on what does or does not conform to accepted principles of morality within a given society at a given time. In other words, that assessment cannot be carried out having regard solely to the word sign, in isolation from the broader societal perception and context. As regards the present case, the Advocate General concluded that the EUIPO assessment, endorsed by the General Court, failed to meet those standards. In this respect, the Advocate General discusses the evaluation conducted by EUIPO and by the General Court of certain factors put forward by Constantin Film, such as the success of the film 'Fack Ju Göhte'; the absence of controversy as to its title; the fact that the film title was duly authorized and released for screening to younger audiences; and that it has been incorporated into the learning programme of the Goethe-Institut. While none of those factors is conclusive for the assessment under the Regulation, they constitute strong evidence about the social perception of morality by the relevant public. Thus, much more convincing arguments should have been provided by EUIPO and the General Court to conclude that the eponymous trade mark still cannot be registered on account of it being an affront to accepted principles of morality caused to exactly the same public."

***IP 10214. Preliminary questions about distinctive character***

*Trade mark law.* Case C-456/19: Aktiebolaget Östgötatrafiken. Prejudiciële Svea Hovrätt - Sweden.

Trade Mark Law. Preliminary reference on the interpretation of Article 4(1)(b) of Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015

Preliminary questions:

"1. Must Article 4(1)(b) of the Trade Marks Directive be interpreted as meaning that, in the case of an application for registration of a trade mark which designates services and where the application relates to a sign, placed in a particular position, which covers large areas of the physical objects used to perform the

services, it must be assessed whether the mark is not independent of the appearance of the objects concerned? [...]"

***CJEU on protection of a trade mark consisting of a quality label******IPPT20190411, CJEU, ÖKO-Test Verlag v Dr. Rudolf Liebe***

*Trade mark law.* Proprietor of a 'quality label' trade mark (for consumer information and –advice) is not entitled by Article 9(1)(a) and (b) (former) CTMR and Article 5(1)(a) and (b) of Directive 2008/95 to oppose the affixing, by a third party, of a sign identical with, or similar to, that mark to products that are not similar to, the registered goods or services. For a trade mark to have a "reputation" it is required that a significant part of the relevant public knows that sign: not required that the public must be aware that the quality label has been registered as a trade mark. Proprietor of an 'quality label' trade mark (for consumer information and –advice) with a reputation is entitled by Article 9(1)(c) and (b) (former) CTMR and Article 5(2) of Directive 2008/95 to oppose the affixing by a third party of an identical sign to non-similar products, if it takes unfair advantage of the mark concerned, or causes detriment to that distinctive character or reputation when there is no existence of a 'due cause', in support of such affixing.

***Complaints directed against grounds of the judgment under appeal purely for the sake of completeness cannot in any event lead to the judgement's being set aside******IPPT20190704, CJEU, FTI Touristik v EUIPO***

*Trade mark law.* Name in normal script of figurative mark in the European Union Trade Marks Bulletin irrelevant for the purpose of determining the phonetic perception of the signs which should not be confused with their name in the Bulletin. Complaints directed against grounds of the judgment under appeal purely for the sake of completeness cannot in any event lead to the judgement's being set aside.

**ITEMS****Articles and opinions*****IP 10215. ECJ Kraftwerk: "What we're gonna do right here is go back. Way back!"***

*Daniel Haije (Hoogenraad & Haak)*

"The Grand Chamber of the European Court of Justice (15 judges) decided yesterday in its infinite wisdom that use of a recognizable music sample (however short) is not permitted without authorization from the phonogram producer (ie. the owner of the recording). The judgment reminds me of a famous sample from a track by Jimmy Castor and the Funky Bunch: "What we're gonna do right here is go back. Way back. Back

into time!” (see <https://lnkd.in/e-vHvBw>) The Court effectively sacrifices standing sample practice in favor of the earning power of owners of old recordings (who arguably have already earned their fair share). The Court does attempt to strike a balance between the freedom of the arts (of the sample user) and the exclusive rights of the phonogram producer, but IMHO fails miserably. According to the judgment, use of a sound sample “in a modified form unrecognisable to the ear” is not a reproduction, and therefore falls outside the scope of protection of the phonogram producer. Beautiful thought, but the whole idea behind 99.9% of samples is to use a recognizable sound snippet.”

***IP 10212. Dijkman, commentary on HP/Digital Revolution (Dutch Supreme Court), 19 April 2019***

*L.E. Dijkman, European University Institute, commentary on HP/Digital Revolution 19 April 2019 (Dutch Supreme Court, HP/Digital Revolution); published in Journal of Intellectual Property Law & Practice, July 2019.*

“In its ruling in HP/Digital Revolution, the Dutch Supreme Court held that the sale of a printer may imply a license to use third-party cartridges, barring claims for indirect infringement. [...] The Supreme Court’s decisions on novelty of the patent and the clarity requirement are relevant for practice but hardly surprising. After all, the Supreme Court explicitly aligns with EPO practice and other European jurisdictions. This makes the decision a good example of judicial dialogue, which many scholars believe is the most promising way to achieve harmonization of substantive European patent law so long as the Unified Patent Court is not functional. An interesting question that remains unanswered is whether a court may raise a clarity objection against an auxiliary request ex officio. [...]”

## News

***IP 10213. Marvel’s Iron Man 3 poster does not infringe copyrights Horizon Comics***

*Thewrap.com:* “Marvel Entertainment won a copyright infringement lawsuit on Monday that had claimed the company copied the design of their movie poster for “Iron Man 3” from another comic. Horizon Comics Productions sued Marvel in April 2016 saying the image of Robert Downey Jr. kneeling in his Iron Man suit was copied from an image of their character Caliban, also in a crouched, kneeling position for their comic book series “Radix.”

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