

New Developments in the World of Standards:  
Law, Private Governance, and the Reconfiguration  
of Transnational Markets

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Copyright issues?

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# Why copyright (as per the Infosoc-Directive)?

- (4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will **foster substantial investment in creativity and innovation**, including network infrastructure, **and lead in turn to growth and increased competitiveness of European industry** ...
- (9) Any harmonisation of copyright and related rights must take as a basis **a high level of protection, since such rights are crucial to intellectual creation**. Their protection helps to ensure the maintenance and development of **creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large**. Intellectual property has therefore been recognised as an integral part of property.
- (10) If **authors or performers** are to continue their creative and artistic work, they have to receive an **appropriate reward** for the use of their work, **as must producers** in order to be able to finance this work.
- (11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of **ensuring that European cultural creativity and production** receive the necessary resources and of **safeguarding the independence and dignity of artistic creators and performers**.

# Copyright in standards?

- The question is this:
  - Are standards protected under EU copyright law and may right holders rely on copyright to prevent the reproduction, communication to the public and distribution to the public of their standards (or parts thereof) without their authorization?
- The answer is this:
  - It depends on the **originality** of the standard, whether national law has **exempted** standards from protection and whether the standard is being used in a way which falls inside of copyright's **exclusivity**

# Originality

- Originality is a harmonised EU-concept which rests upon international conventions (Berne Convention (BC), WIPO Copyright Treaty (WCT) and TRIPS)
- **No copyright in ideas, procedures, methods of operation, mathematical concepts, rules, news, data, information** etc. as such
  - C-310/17 Levola Hengola
    - **Two cumulative conditions** must be satisfied for subject matter to be classified as a 'work': **First**, the subject matter concerned must be original in the sense that it is the **author's own intellectual creation**. **Secondly**, only something which is the expression of the author's own intellectual creation may be classified as a 'work'.
  - C-833/18 (Brompton)
    - 27 ... the criterion of originality cannot be met by the components of a subject matter which are differentiated only by their technical function ... **Protecting ideas by copyright would amount to making it possible to monopolise ideas, to the detriment, in particular, of technical progress and industrial development**

# Originality may reside in the creative combination of un-protected elements

No copyright in ideas, procedures, methods of operation, mathematical concepts, rules, news, data, information etc. as such

However, **the combination** thereof may be original if "creative":

- C-5/08 (Infopaq): (45) Regarding the elements of [newspapers], it should be observed that they 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.
- C-469/17 (Funke Medien): (23) ... **the mere intellectual effort and skill** of creating those reports **are not relevant in that regard**.
- C-604/10 (Football Dataco): (39) **No originality when** the setting up of the database is **dictated by technical considerations, rules or constraints** which leave no room for creative freedom
- C-833/18 (Brompton): (27) ... [no originality] **Where** the expression of those components is dictated by their technical function, the different methods of implementing an idea are so limited that **the idea and the expression become indissociable**

# Exemption for “official texts of a legislative, administrative and legal nature”

- **Berne Convention Art. 2(4)**
  - “It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts”
- **DKCA § 9: “Acts, administrative orders, legal decisions and similar official documents are not subject to copyright”**
  - No EU-harmonization
  - Similar in other countries
    - German CA Sect 5 (1) Acts, statutory instruments, official decrees and official notices, as well as decisions and official head notes of decisions do not enjoy copyright protection.
    - Sec 5(3) “Copyright in respect of private normative works is not affected by subsections (1) and (2) if acts, statutory instruments, decrees or official notices refer to such works without reproducing their wording.

# Exclusivity

- authors are protected against the reproduction, communication to the public and distribution to the public of their original works or (original parts thereof) without their authorisation.
- Exclusivity is limited by **exceptions and limitations** e.g.
  - (d) quotations ...
  - (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.
- Exclusivity does not extend to e.g.
  - **The use of non-original parts**
    - E.g. ideas, procedures, methods of operation, mathematical concepts, rules, news, **data, information** as such
  - Summaries

## Public.Resource.Org. C-588/21

- The right to refusal to grant access to a document whose disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property does not include Harmonised standards adopted by the European Committee for Standardisation (CEN)
- Unlike the Commission and General Court and despite the invitation of the AG, **the CJEU did not address copyright directly**
- However, the way Court framed some of the issues have implications for copyright:
  - (70) **a harmonised standard**, adopted on the basis of a directive and the references to which have been published in the *Official Journal of the European Union*, **forms part of EU law owing to its legal effects**
  - (74) although .. compliance with harmonised standards is not compulsory .. [the] legal effect ... makes them **an essential tool for economic operators**, for the purposes of exercising the right to free movement of goods or services on the EU market.
  - (75) .. **it may prove difficult, or even impossible, for economic operators to have recourse to a procedure other than that of compliance with such standards**, such as an individual expert report, in the light of the administrative difficulties and additional costs arising therefrom ...
  - (82) Accordingly, by the effects conferred on it by EU legislation, a harmonised standard may specify the rights conferred on individuals as well as their obligations and those specifications **may be necessary for them to verify whether a given product or service actually complies with the requirements of such legislation.**



# Standards in copyright/copyright in standards after Public.Resource.Org

- For the DKCA the exemption for “official texts of a legislative, administrative and legal nature” no doubt includes harmonized standards
  - (70) a harmonised standard, adopted on the basis of a directive and the references to which have been published in the *Official Journal of the European Union*, forms part of EU law owing to its legal effects
    - Already generally assumed, e.g. *Peter Schønning*, p. 279: “Officielle normer og standarder må anses for omfattet af § 9” (with ref. to T-185/19)
- Following the CJEU, copyright in “remaining” standards might turn out to be shaky (originality) and protection slim (exclusivity):
  - (74) essential tool for economic operators ...
  - (75) .. it may prove difficult, or even impossible, for economic operators to have recourse to a procedure other than that of compliance with such standards
  - (82) necessary for them to verify whether a given product or service actually complies with the requirements of such legislation.

# Summing up

- There can be two reasons for standards not to be protected by copyright:
  - 1) They are exempted as “official texts”
    - “Harmonized standards” in the meaning of the CJEU are not protected under DK CA
  - 2) They are not original
    - Requires a creative element and dissociability btw expression and “ideas”, “rules”, “data” or “information”
- Even if standards are copyrighted right holders cannot prevent
  - the use of non-original parts of standards
    - i.e. “ideas”, “rules”, “data” or “information” can be used freely and by all
  - quotations or summaries

Thank you for your attention

- Questions and comments are welcome to [Jens.schovsbo@jur.ku.dk](mailto:Jens.schovsbo@jur.ku.dk)