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EDITORIAL

Why Harmonised Standards Should Be Open

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The recent opinion delivered by AG Medina in C-588/21 has reopened the discussion about the question of access to European harmonised standards.[1] The case refers to the appeal against *Public.Resource.Org and Right to Know v. Commission* (T-185/19). In brief, two non-governmental organisations (NGOs) requested that the Commission allow access to four harmonised technical standards in accordance with Regulation (EC) 1049/2001 (which sets the conditions for obtaining access to EU documents whether drafted by EU institutions or received from third parties). The Commission refused their request based on an exception established in the same Regulation, namely if the disclosure would jeopardise the "commercial interests of a natural or legal person, including intellectual property […] unless there is an overriding public interest in disclosure" (Art. 4(2) Regulation (EC) No. 1049/2001). In particular, the Commission claimed that harmonised standards are protected by copyright, their disclosure would economically impact on the standardisation body that issued them, and that no overriding public interest was proven. The NGOs contested this decision before the General Court, which ultimately confirmed the Commission's evaluation, dismissing the claim.

This outcome was challenged before the Grand Chamber, and, on this occasion, AG Medina contended that harmonised standards shall be considered as "acts of the

[1] Case C-588/21 P *Public.Resource.Org and Right to Know v. Commission and Others* [2023] ECLI:EU:C:2023:509, Opinion of AG Medina.

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institutions, bodies, offices or agencies of the European Union", and that the rule of law and the principle of legal certainty impose making EU law freely accessible to anyone. If harmonised standards were classified otherwise, AG Medina casts serious doubts as to whether the contested standards would be protected by copyright at all.

This case might have some interesting copyright ramifications even beyond the question of IP protection of harmonised standards, hence a premise on the functioning of the EU standard-setting system is due.

The role of technical standards has become increasingly important since the so-called "New approach", inaugurated in 1985 to resolve the fragmentation of technical specifications of products among Member States and to favour the free movement of goods within the EU. In brief, the European legislation establishes the essential requirements that the manufacturers shall guarantee before offering certain products or services on the market. Such requirements are translated into technical specifications by the competent European Standardisation Organisations or "ESOs" (namely, the Comité européen de normalisation "CEN", the Comité européen de normalisation électrotechnique "CENELEC", and the European Telecommunications Standards Institute "ETSI"), which are entrusted by the Commission to develop harmonised standards. Manufacturers can decide how to implement the essential requirements, but "given the cost and time involved in this approach, manufacturers often prefer the harmonized standards"[2]. Indeed, if they comply with a harmonised standard, they benefit from a presumption of conformity with the requirements established in the secondary legislation. We can see this regulatory approach in many relevant areas, from digital accessibility to high-risk AI systems.[3]

Harmonised standards are a specific type of standard: they are not created *motu proprio* and in an independent manner by the ESOs. On the contrary, they are "commissioned" by the Commission. Moreover, the latter exercises a certain level of control and supervision during the planning and drafting process, and, ultimately, it must ensure that the standards reflect the legal requirements. Once these conditions have been satisfied, a reference to the standard is published in the series L of the Official Journal of the EU.

While the Commission does not intend to delegate political powers to the ESOs,[4] it nevertheless tasks them with preparing the technical rules that will complement EU law – and technical decisions are *neither good nor bad nor neutral*. For this and other reasons (notably, the obstacles to ensuring civil society participation during the standard-setting process), this system has often been criticised with regard to the risk of leaving important matters to private ordering[5] – a situation that can be

[2] Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk (2011) *Administrative Law and Policy of the European Union* (Oxford), p. 593.

[3] As proposed in the Draft AI Act.

[4] As expressed in Commission Staff Working Document, "Vademecum on European Standardisation in support of Union Legislation and policies" – Part I, SWD(2015) 205 final, p. 9.

[5] Michael Veale and Frederik Zuiderveen Borgesius (2021) "Demystifying the Draft EU Artificial Intelligence Act" Vol. 22(4) Computer Law Review International, p. 97.

exacerbated in some contexts, such as the upcoming AI Act where the technical standards are expected to "incorporate core EU democratic values and interests".[6]

However, it is undeniable that harmonised standards have been used as a regulatory tool, integrating secondary legislation in practice. They create legal effects for the parties implementing them, notably ensuring the presumption of conformity. Hence, given this "juridification"[7] (in *James Elliott Construction*, the CJEU affirmed that harmonised standards are "part of EU law"), it appears contradictory with the traditional approach in EU Member States, which excludes those texts from copyright protection, and considers it unjustified to hold most of these documents behind a paywall.

AG Medina argues that harmonised standards should be classified as EU legal acts, given the role and control exercised by the Commission in their path of approval and considering that such standards are *de facto* (and in some cases even *de iure*) mandatory. At the same time, their copyrightability creates a barrier to their access, making it harder to properly assess the eventual alternatives to that standard or (for any interested party) to rebut the presumption of conformity. In light of this premise, Medina concludes that such standards should be freely accessible.

Here, the AG opens up an interesting point concerning the copyrightability of EU law more generally. As is well known, the matter of whether "official texts of a legislative, administrative or judicial nature" should benefit from copyright protection is left by Art. 2(4) of the Berne Convention to the discretion of the signatory countries (but it can be noticed that almost all EU Member States have decided not to apply copyright to official texts). As recalled by the same AG, the EU is not part of the Berne Convention, but by virtue of Art. 1(4) of the WIPO Copyright Treaty it is bound to Arts. 1–21 of the Convention. However, EU law has not specifically addressed the copyrightability of official texts produced by European institutions. According to the AG, Art. 297 of the Treaty on the Functioning of the European Union, which prescribes the publication of texts in the Official Journal of the EU, should be seen as an indication that these documents do not benefit from any exclusive right.

However, even assuming for the sake of argument that EU official texts are subject to copyright, the EU has made them accessible and reusable ("the Commission has set an example to public administrations in making statistics, publications and the *full corpus of Union law* freely available online"[8]). For instance, the documents held by the Commission and the Publications Office of the

[6] Communication from the Commission, "An EU Strategy on Standardisation – Setting global standards in support of a resilient, green and digital EU single market", COM/2022/31 final, 2 February 2022, p. 4. For this reason, digital rights advocates and scholars are calling for the recognition of a greater engagement of civil society in the design of the standards for AI systems (Ada Lovelace Institute, "Inclusive AI governance: civil society participation in standards development" (2023) https://www.adalovelaceinstitute.org/report/inclusive-ai-governance).

[7] Harm Schepel (2013) "The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law" Vol. 20(4) Maastricht Journal of European and Comparative Law, p. 521 (where the author recognised this turn, although was critical of it).

[8] Recital 7, Commission Decision 2011/833/EU of 12 December 2011 on the reuse of Commission documents [2011] OJ L330/39. Emphasis added.

EU are subject to the open reuse policy outlined in Directive 2011/83/EU on consumer rights, and, as one can read in the copyright notice of the EUR-Lex website "Unless otherwise specified, *you can re-use the legal documents published in EUR-Lex for commercial or non-commercial purposes*".[9] In light of this, if harmonised standards were to be recognised as official EU acts and published in the Official Journal, the operational result would be their open access.

A second interesting copyright issue raised in the opinion involves the originality of harmonised standards *tout court*. The AG, in particular, criticises the lack of in-depth assessment in T-185/19 as to whether the threshold of originality was met. The standard for originality in EU copyright law is considered quite low, but it still requires the author's "personal touch",[10] which can be expressed "by making free and creative choices".[11] In this respect, one can legitimately wonder about the strength of the "size matters"-like argument which was used by the Commission when affirming that "the length of the texts *implies* that the authors had to make a number of choices (including in the structuring of the document)".[12] Indeed, the AG specifically calls into question the effective creative freedom of authors of harmonised standards given the technical content of these documents, the requirements established in the secondary legislation, and the control exercised by the Commission during the preparation of the standard. For instance, CJEU case law has established that when an output is merely "dictated by technical considerations, rules or other constraints"[13] without leaving any room for free creative choices, that subject matter cannot be considered an original work. Hence, it should be necessary to distinguish within the standard which parts are based on free and creative choices and which are predetermined by technique to the point that the idea and expression overlap[14] – a task that is not always easy. The decision in C-588/21 could then be a good opportunity for the Court to provide additional guidance on this assessment. Its significance will be particularly relevant even beyond the issue of harmonised standards, considering the heated discussions on the

[9] EU, Copyright notice https://eur-lex.europa.eu/content/legal-notice/legal-notice.html#2.%20droits. Emphasis added. The phrase "unless otherwise specified" refers, for example, to the international accounting standards that, according to EU law, shall be followed by companies which securities are traded on regulated markets. These standards are developed by the IASB (International Accounting Standards Boards) and published in the Official Journal, but subject to special conditions mentioned in the act itself. For instance, Commission Regulation (EC) 1126/2008 states that "Reproduction allowed within the European Economic Area. All existing rights reserved outside the EEA, with the exception of the right to reproduce for the purposes of personal use or other fair dealing".

[10] C-145/10 at 92; C-604/10 at 32.

[11] C-145/10 at 89; C-604/10 at 38; C-469/17 at 19; C-683/17 at 30; C-833/18 at 23.

[12] *Public.Resource.Org and Right to Know v. Commission* at 48. Emphasis added.

[13] C-604/10 at 39; C-683/17 at 31; C-833/18 at 31. *See also*, C-393/09 at 48–49; C-403/08 and C-429/08 at 98; C-406/10 at 39.

[14] On the "dissection" between creative and non-creative choices in a work, *see also* Eleonora Rosati (2023) "Copyright at the CJEU: Back to the Start (of Copyright Protection)" in Hayleigh Bosher, and Eleonora Rosati (eds), *Developments and Directions in Intellectual Property Law: 20 Years of The IPKat* (Oxford), p. 222.

concept of originality and the level of human creative freedom in large language models outputs.[15]

All in all, it is a principle of legal culture to provide access to the rules applicable in a given society, not only to ensure that the people who should implement them do so appropriately but also to guarantee that those rules and behaviours can be scrutinised and, eventually, contested. Access to the information contained in the standard can indeed respond to the public interest of protecting consumers, by allowing them or their representative bodies to effectively assess the safety of a product.[16] It can favour competition too.[17] The Commission expressly acknowledged the role of standards in helping access to the internal market during the COVID-19 pandemic, when the copyright on certain standards covering selected medical devices and equipment was waived precisely to facilitate the production and distribution of safe devices from as many companies as possible.[18] It ought to be desirable to pursue such goals beyond the contingency of an emergency.

More trivially, it should be noticed that the sale of harmonised standards does not seem to constitute a vital requirement for the functioning of ESOs (which are, it is useful to recall, nonprofit organisations). In the case of CEN, such revenues correspond only to 4.6% of its budget, and the organisation is consistently funded by the Commission.[19] ETSI, for instance, is already making its harmonised standards available for access on their website.[20] Hence, it is quite surprising that in T-185/19 the ESOs' commercial interests were not more carefully assessed and balanced with the interests of consumers and manufacturers in accessing the information.

In light of these economic considerations, even if the Court would not decide in favour of access, it seems reasonably possible to find a compromise to make such documents available. Indeed, in the upcoming standardisation strategy, the Commission is ready to engage with ESOs to make their standards freely accessible, and "if insufficient progress is made, the Commission will consider proposing a revision of Regulation (EU) No 1025/2012, as necessary".[21] Given the prominent legal role that harmonised standards are playing, it is certainly time to review the standard-setting world through a more democratic and participatory lens. Indeed, if we want to avoid Kafkaesque nightmares, more should be done to make the law – in all forms – open and understandable to all.

[15] For a lucid analysis of this issue, *see* P Berndt Hugenholtz and João Pedro Quintais (2021) "Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?" Vol. 52(9) IIC, p. 1190, https://doi.org/10.1007/s40319-021-01115-0.

[16] Opinion of AG Medina (*supra* note 1), para. 108.

[17] Rob van Gestel and Hans-Wolfgang Micklitz (2013) "European Integration through Standardization: How Judicial Review Is Breaking Down the Club House of Private Standardization Bodies" Vol. 50(1) Common Market Law Review, p. 145. Public interest considerations can play an important role in the copyright balancing exercise against competition principles, as shown in *Magill* and *IMS Health*.

[18] EU Press release "Coronavirus: European standards for medical supplies made freely available to facilitate increase of production" (20 March 2020) https://ec.europa.eu/commission/presscorner/detail/%5Beuropa_tokens:europa_interface_language%5D/ip_20_502.

[19] Opinion of AG Medina (*supra* note 1), para. 99.

[20] Although, as noticed by the AG, the reproduction needs to be authorised by ETSI. *Ibid*.

[21] EU Commission (*supra* note 6), p. 4.