

**MORRISON
FOERSTER**

COPYRIGHT AND HARMONIZED STANDARDS

**Public.Resource.Org, Inc. and Right to Know CLG
vs. the EU Commission (T-185/19, now C-588/21)**

Dr. Jens Hackl

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Parties and subject-matter

Applicants:

- Public.Resource.Org (U.S.) and Right to Know CLG (Ireland)
- Non-profit NGOs focused on transparency and access-to-information advocacy
- Free access to the law for all citizens

Subject-matter of the claim:

- Access to four harmonized standards adopted by the European Committee for Standardisation (CEN) relating to the safety of toys and to the registration, evaluation, authorization and restriction of chemicals (REACH)
- Access request is based on Regulation 1049/2001 and 1367/2006

Course of the proceedings

**25 September
2018**

Request for access
rejected by the EU
Commission

**14 July
2021**

Claim
rejected by
the GC

**22 January
2019**

Appeal ultimately
rejected by the EU
Commission

**23 September
2021**

Appealed to the
ECJ

Harmonized standards (1)

- Used since 1985 when the EU introduced the so-called “New Approach” in order to facilitate the completion of the internal market.
 - Legal basis: Regulation (EU) 1025/2012 and Directive (EU) 2015/1535
- Under the New Approach, EU legislation lays down – in a very general way – the minimum (essential) requirements applicable to certain products in order to enable the free movement of goods in the internal market.
 - Excerpt of the Directive 2009/48/EC: *„Toys and their parts and, in the case of fixed toys, their anchorages, must have the requisite mechanical strength and, where appropriate, stability to withstand the stresses to which they are subjected during use without breaking or becoming liable to distortion at the risk of causing physical injury.”*

Harmonized standards (2)

- The EU legislation then entrusts standardization organizations (like CEN) with the drafting of standards that include the technical specifications necessary to ensure compliance with the basic requirements of the respective EU legislation.
- EU Commission significantly controls drafting of harmonized standards
 - Detailed mandate including timeline
 - Supervision of drafting including detailed review (also by other EU institutions)
 - Funding (up to 35% of CEN's budget)
 - Reference is published in Official Journal
 - EU Member States have to adopt each harmonized standard – unchanged – as a national standard within six months, and must not impose additional requirements

Harmonized standards (3)

- Products manufactured in compliance with harmonized standards are then presumed to satisfy the essential requirements in the respective EU legislation resulting in the free marketability within the internal market
 - Excerpt of the Directive 2009/48/EC: *“Toys which are in conformity with harmonised standards or parts thereof [...] shall be presumed to be in conformity [with the essential requirements laid down in this directive]”*.
- ECJ in James Elliot (C-613/14): Harmonized standards are part of EU law
- But: no free access to harmonized standards
 - Only available against payment of a fee
 - 877.27 EUR in the UK for the four requested harmonized standards
 - Partly 8.13 EUR per page

Refusal to access

- Access to requested harmonized standards denied by EU Commission and confirmed by GC under the exemptions in Regulation 1049/2001
 - *“The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property [...] unless there is an overriding public interest in disclosure.”*
- EU Commission and GC’s main reasons:
 - Harmonized standards are protected by copyright
 - EU legislation on harmonized standards (Regulation (EU) 1025/2012 and Directive (EU) 2015/1535) does not require free access (and not challenged by applicants)
 - Free access would undermine the “New Approach”

Rule of law requires free access (1)

- Harmonized standards are part of EU law (ECJ in James Elliot, C-613/14)
 - EU Commission significantly controls drafting of harmonized standards
 - Harmonized standards are *de-facto compulsory* as they are the only accepted method in the market for proving compliance with the respective EU regulations and directives
- The EU is “founded” on the rule of law, which is also a “common value” to all EU Member States (cf. Art. 2 TEU).
 - EU Commission: the “*rule of law is the backbone of any modern constitutional democracy*”
 - The rule of law requires that everyone is bound by the law.
- The rule of law constitutes EU primary law and thus takes precedence over any EU secondary law (directives or regulations)
 - All EU secondary law must be interpreted and comply with EU primary law

Rule of law requires free access (2)

- Rule of law requires free access to the EU law for all EU citizens
 - Since the rule of law requires that everyone is bound by the law, everyone must have the possibility to know the law
 - ECJ (C-161/06): “*[I]n accordance with the principle of legal certainty, community rules must enable the persons concerned to identify precisely the scope of the obligations which they are subject to, **which can only be guaranteed by the proper publication of those rules in the official language of the addressee.***”
 - ECJ (C-108/01): “*The principle of legal certainty required that the condition in question be brought to the knowledge of third parties by adequate publicity in Community legislation.*”
- Further case-law of ECHR (*Sunday Times*) and national courts exists which stipulates the same principle

No copyright protection of the law

- EU Commission: “*EU legislation is considered as public domain*” and “*is free from copyright and can be reused without restriction, subject only to the obligation to acknowledge the source*”
- U.S. Supreme Court (Georgia et. al vs. Public.Resource.Org, Inc., decision of 27 April 2020, 590 U.S. (2020):
 - Non-binding annotations to the law drafted by a private organization under the supervision and with financial support of the legislator, which provided commentary relevant to understanding the laws.
 - The court concluded that since “*every citizens is presumed to know the law, [...] all should have free access [...] and [the law] must be free for publication to all.*”
 - Or to put it differently: “*no one can own the law*” so that the annotations “*are ineligible for copyright protection*”
- Consequence: exemptions in Regulation 1049/2001 do not apply
 - In the alternative: free access to the EU law must have priority over copyright protection

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