COURT OF JUSTICE
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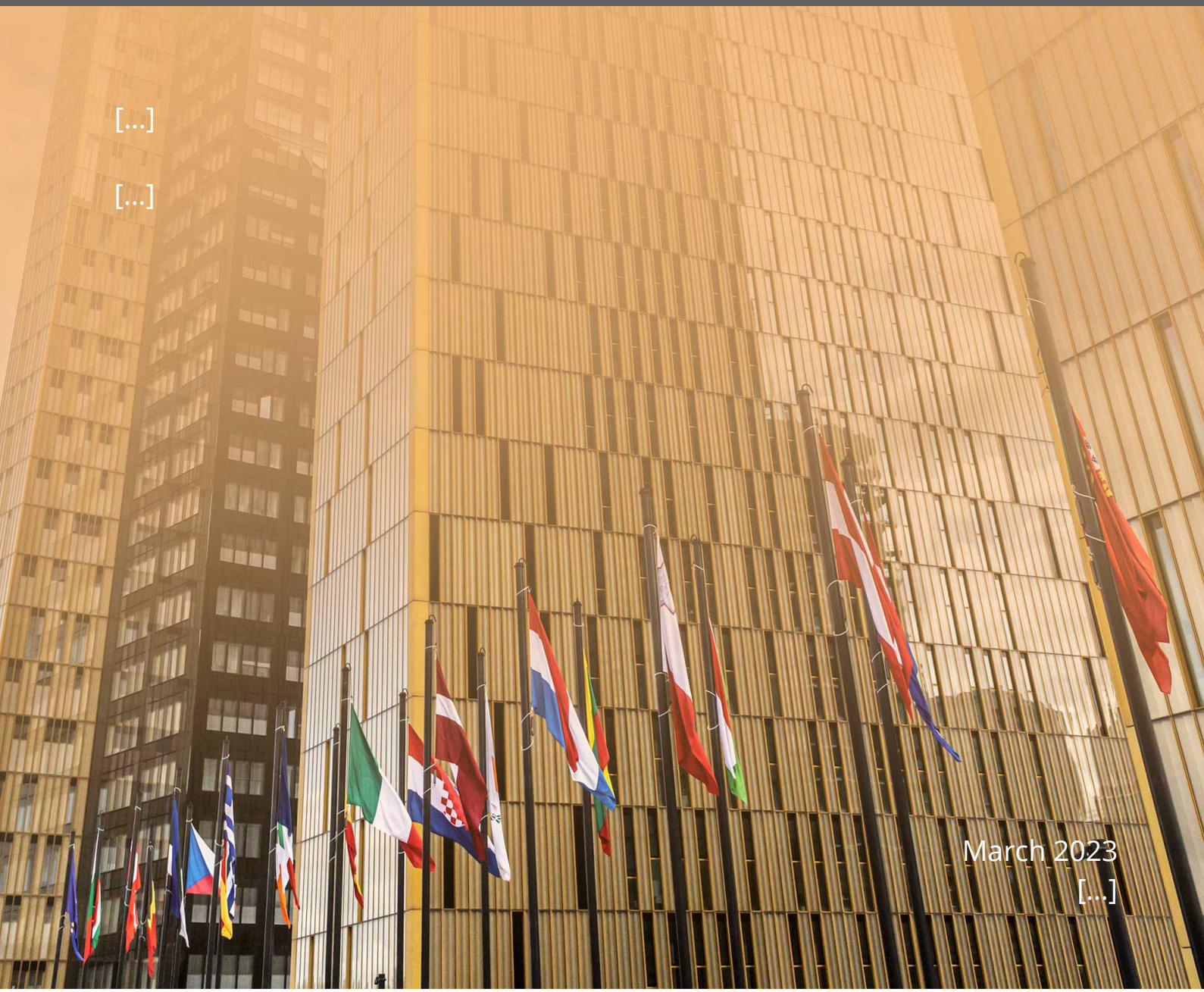
EN

RESEARCH NOTE

FROM THE RESEARCH AND DOCUMENTATION DIRECTORATE

Protection, through copyright, of official texts and technical standards



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SUMMARY

INTRODUCTION

1. The Research and Documentation Directorate (DRD) received a request for [a] research note [...] on the protection, through copyright, of harmonised standards approved by the European Committee for Standardization (CEN). This research note examines, first, whether official texts benefit from copyright protection, secondly, whether that protection also applies to technical standards and, lastly, if and to what extent such protection may limit open and free access to those texts. It also looks at the language arrangements for access to technical standards.

2. This research note covers the rules in **sixteen** States: **Belgium**, the **Czech Republic**, **France**, **Germany**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, the **Netherlands**, **Poland**, **Romania**, **Slovakia**, **Spain**, **Sweden** and the **United Kingdom**.

3. To understand the rules of protection applicable to technical standards in the legal systems analysed, it will first be examined whether official texts are subject to protection under copyright law (**I.**) [1]. Secondly, the extent to which technical standards can be protected by copyright will be clarified (**II.**). Thirdly and finally, the methods of access to those standards will be reviewed, including the language arrangements for such access (**III.**).

I. OFFICIAL TEXTS AND COPYRIGHT

4. Under Article 2(4) of the Berne Convention for the Protection of Literary and Artistic Works: [2] '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'.

5. From the outset, it should be noted that all the legal systems examined provide for an exception to copyright protection for official texts, whether that be an exclusion from protection [3] or the existence of a copyright specific to that type of text. [4] After presenting those different exceptions (A.), their scope will be analysed in order to determine the texts to which they may be applicable (B.).

A. EXCEPTION TO COPYRIGHT PROTECTION FOR OFFICIAL TEXTS

6. This study shows that there is a majority trend to exclude official texts from copyright protection. Indeed, such exclusion is provided for in all the States examined (1.), with the exception of those belonging to the common law tradition, namely **Ireland** and the **United Kingdom** (2.).

1 [...]

2 The 9 September 1886 Convention, in the version resulting from the Paris Act of 24 July 1971, as amended on 28 September 1979.

3 For **Belgium**, the **Czech Republic**, **France**, **Germany**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, the **Netherlands**, **Poland**, **Romania**, **Slovakia**, **Spain** and **Sweden**.

4 For **Ireland** and the **United Kingdom**.

1. CIVIL LAW TRADITION: EXCLUSION OF OFFICIAL TEXTS FROM COPYRIGHT PROTECTION

7. Amongst the **fourteen States with a civil law tradition** that exclude official texts from copyright protection, it should be noted that, for **thirteen of them**, [5] the exception is explicitly provided for under copyright law. Only **French copyright law** does not provide for an exclusion for official texts. Such an exclusion however results from established case-law. [6]

8. Although all the States with a civil law tradition provide for the exclusion of official texts from copyright protection, that exclusion is justified by different principles.

9. First, in **almost all of the States**, it is not disputed that an official text meets the *criterion of originality*, a *sine qua non* condition for protection under copyright law. Only the **Belgian** legislator considers that official texts cannot be protected in the same way as literary works, due to the absence of creative activity.

10. The exclusion of official texts from copyright protection is justified by the States' recognition that there is a public interest in those texts being accessible to the public. Such an exclusion is then based, depending on the State, either on a general principle of the right to information [7] or transparency, [8] or on the adage that 'ignorance of the law is no defence'. [9] Under that adage, litigants must be able, freely and free of charge, to access certain texts for those texts to be enforceable against them.

11. It follows from the above that, in the legal systems with a civil law tradition, official texts do not benefit from protection under copyright law and therefore belong to the public domain. They are, therefore, in principle, freely accessible, free of charge.

2. COMMON LAW TRADITION: SPECIFIC PROTECTION PROVIDED FOR OFFICIAL TEXTS

12. The legal systems of the States belonging to the common law tradition have a notable specific feature with regards to the protection of official texts. In **Ireland** and in the **United Kingdom**, those texts are protected by copyright.

13. In **Ireland**, the Copyright and Related Rights Act 2000 provides that works made by the Government [10] and Parliament [11] are protected by copyright for a period of 50 years from their creation. That protection applies to texts adopted by the Irish Government and its officers or employees and to texts adopted by both Houses of the Irish legislature. Court decisions are protected by copyright. The courts, taken as a whole, are the owners of court decisions.

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5 **Belgium**, the **Czech Republic**, **Germany**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, the **Netherlands**, **Poland**, **Romania**, **Slovakia**, **Spain** and **Sweden**.

6 See paragraph 6 of the French contribution.

7 That is the case in the **Czech Republic**, **Germany**, **Poland** and **Slovakia**.

8 In **Sweden**, access to public documents stems from the principle of transparency.

9 That is the case for **France**, **Italy** and **Spain**.

10 Section 191(4) of the Copyright and Related Rights Act 2000.

11 Section 192(2) of the Copyright and Related Rights Act 2000.

14. The same system of legal protection exists in the **United Kingdom**, where official texts are protected by Crown copyright or Parliamentary copyright. Crown copyright protects any work made by His Majesty or by an officer or servant of the Crown in the performance of his or her duties for a period of 125 years from the creation of the work. [12] It is intended to protect, in particular, works produced by ministries and state agencies, including court decisions. [13] Parliamentary copyright protects any work made by, or under the direction or control of, the House of Commons and/or the House of Lords for a period of 50 years after its creation. [14]

15. The existence of copyright over official texts is justified, in the **United Kingdom**, by the objective of preserving the integrity and official character of those texts, thus making it possible to certify their quality and reliability.

16. However, it should be noted that the existence of copyright over official texts in **Ireland** and the **United Kingdom** does not preclude them from being freely accessible, free of charge. Indeed, in **Ireland**, the Copyright and Related Rights Act 2000 provides that works protected by copyright specific to official texts are freely accessible to any person. That right of access also includes the right to reproduce the texts. [15] The Courts Service makes all court judgments available online and declares on its website that it adheres to the Regulation on the re-use of public sector information. [16] Therefore, all judgments are freely available free of charge for reproduction.

17. The Government of the **United Kingdom** has chosen to adopt open licences, [17] developed with a view to facilitating access to and re-use of public sector information. Under those licences, most works protected under Crown and Parliamentary copyright are freely available, free of charge. They may be copied, published, distributed, transmitted, adapted or exploited in a commercial or non-commercial manner, provided that the source of the information is acknowledged. [18]

18. The systems for the protection of official texts adopted by States belonging to the common law tradition are of particular interest, in that they highlight the possibility of combining copyright protection and public accessibility. Thus, the existence of copyright over a text does not necessarily prevent it from being freely accessible, free of charge. Where there is an overriding interest in certain works being available to the public, it is open to the legislature to provide for an exception to the author's monopoly, as in **Ireland**. The copyright owner can also waive part of its monopoly, through the adoption of open licences.

12 Section 163 of the Copyright, Designs and Patents Act 1988.

13 See paragraph 8 of the United Kingdom contribution.

14 Section 165(1) and (3) of the Copyright, Designs and Patents Act 1988. Bills put before the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales are also protected by copyright, under sections 166A, 166B and 166D of the Copyright, Designs and Patents Act 1988.

15 Section 194(1) of the Copyright and Related Rights Act, 2000.

16 Regulatory Act No 279 of 2005.

17 The Open Government Licence for Crown copyright and the Open Parliament Licence for Parliament copyright.

18 See http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/.

B. SCOPE OF THE APPLICATION OF THE EXCEPTION FOR OFFICIAL TEXTS

19. All of the legal systems examined provide for an exception to copyright protection for official texts. The scope of that exception differs from State to State. Various criteria emerge from an analysis of the copyright laws that provide for this exception.

20. First, the *nature of the issuing entity* of the text may play a role in determining the scope of the exception for official texts. This is the key criterion in **Ireland** and in the **United Kingdom**, where a special regime applies to works made by the Government, the Parliament and, in the case of the **United Kingdom**, the King**.** In **Germany**, a work may be considered official if the text emanates from an office or is attributable to an office, namely an institution exercising public power.

21. Secondly, the classification of an official text may also have its origin in the *mandatory nature* of that text. That is the case, in particular, in **Hungarian law**, which excludes from copyright protection the legal rules and the internal regulations of public law bodies, judicial or administrative decisions, administrative or official communications, and other similar provisions. [19]

22. The *mandatory nature* and the *nature of the issuing entity* may also be taken into account together for the purposes of classifying an official text. In **Italy**, official texts – understood as mandatory texts that are known to all – emanating from the State and public administrations, both Italian and foreign, are excluded from copyright protection. [20]

23. Thirdly, a significant proportion of the States examined provide, within their copyright law, a *list that is in principle exhaustive* of texts that can be classified as official texts. In **Spain**, this applies to 'legal or regulatory provisions and their drafts, court decisions and the instruments, agreements, deliberations and opinions of public bodies, and the official translations of all the previous texts'. [21] In **Latvia**, copyright law does not protect legislative or administrative instruments, other documents from national and local authorities or court decisions (laws, court decisions and other official documents), nor the official translations or consolidated versions of those texts. [22] In **Poland,** copyright law provides for an exclusion from protection for legislative instruments and their official drafts; official documents, materials, signs and symbols; published patent descriptions; and simple press releases. [23] **Slovak law** refers to legislative texts, administrative and judicial decisions, technical standards, and the preparatory documentation created in connection with those documents and their translations. [24]

19 Article 1(4) of the 1999. évi LXXVI. törvény a szerzői jogról (Law No LXXVI of 1999 on copyright).

20 Article 5, Chapter 1, Title 1, of Legge 22 aprile 1941, No 633, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Law on copyright).

21 Article 13 of the Ley de propiedad intelectual, as amended by Real Decreto legislativo 1/1996, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia (Royal Legislative Decree 1/1996 approving the consolidated text of the Law on intellectual property), of 12 April 1996 (BOE No 97 of 22 April 1996, p. 14369).

22 Article 6(1) of the Autortiesību likums (Law on copyright), of 6 April 2000.

23 Article 4 of l'Ustawa o prawie autorskim i prawach pokrewnych (Law on copyright and related rights), of 4 February 1994, Dz. U. 2022, pos. 2509, consolidated text.

24 See paragraph 2 of the Slovak contribution.

24. Fourthly, the *nature* of the text is frequently taken into account for the purposes of classifying a text as an official text. In **Lithuania**, in **Romania** and in **Sweden**, official texts of a legislative, administrative and legal nature and the official translations of such texts are excluded from copyright protection. Those exceptions reflect the wording of Article 2(4) of the Berne Convention.

25. Lastly, in **France,** where the specific arrangements for official texts are the result of an exception created through jurisprudence, case-law has established the principle that the official texts which must be excluded from copyright protection are texts that, *by their nature and purpose*, must be freely available to all. This applies to laws, regulations and court decisions, but also to the text of a patent for invention after its publication or that is the subject of an examination.

26. It can be seen from the foregoing that all of the legal systems examined in this research note provide for an exception to copyright for official texts, the scope of which varies from State to State. It was also observed that open and free access to official texts is guaranteed in all of the States examined, regardless of whether such texts are subject to copyright protection.

II. TECHNICAL STANDARDS AND COPYRIGHT

A. INTRODUCTORY STATEMENTS

27. It is important, first of all, to define the concept of 'technical standard'. Article 2(1) of Regulation 1025/2012 [25] contains a definition of the concept of 'standard' [26] and its different categories. According to that provision, a standard is 'a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory'.

28. Standardisation processes can be undertaken for public or private activities at a national, regional or international level, in principle by national and international standardisation bodies. At the international level, the most important player is the International Organization for Standardization (ISO), whose 167 members are the national standardisation bodies. In Europe, the bodies recognised by the European Union are CEN, the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI).

25 (EU) Regulation No 1025/2012 of the European Parliament and of the Council of 25 October 2012, on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council Text with EEA relevance (OJ 2012 L 316, p. 12).

26 For the purposes of this research note, the term 'technical standard' has been used over the term 'standard' in order to avoid confusion with 'standards' in the sense of 'legal rules'. However, Regulation No 1025/2012 only defines and uses the term 'standard'.

29. The ISO is the copyright owner of the documents it produces. [27] On the ISO website, it is possible to purchase the technical standards it develops and to consult its information section. [28] Those standards are available in English and French, and sometimes also in Spanish. [29]

30. CEN, CENELEC and ETSI are the respective copyright owners of the documents that they produce, [30] which are available in English, French and German. Technical standards developed by ETSI can be consulted, printed and downloaded free of charge from its website, although their reproduction must be authorised by ETSI. [31]

31. On the other hand, neither CEN nor CENELEC distribute or sell technical standards. [32] Both bodies confer on their members (namely, national standardisation bodies and, where appropriate, electrotechnical committees) the right to exploit standards through bilateral operating agreements. Thus, each member has, within its own territory, the absolute right to distribute, sub-distribute, adjust, translate, rent, lend, derive revenue from duplication and loan, communicate to the public in total or in part, in summary or with comments, transfer all exploitation licences and authorise all sub-licences and otherwise exploit CEN and CENELEC publications [33] and their national implementations. [34]

32. At the national level, each State has entrusted the task of standardisation to one [35] or more [36] standardisation bodies. Those bodies are sometimes semi-public bodies and more generally are associations or legal persons under private law, which are non-profit and entrusted with a public service mission; a significant part of their revenues come from the sale of technical standards to

27 See https://www.iso.org/declaration-for-participants-in-iso-activities.html. ISO publications are subject to Swiss copyright regulations.

28 ISO member bodies also have, under the terms of member right 2, the right to sell ISO standards and publications, and to use copyright, and the ISO name and logo (https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100399.pdf).

29 Since 2019, there have been Spanish Translation Working Groups (STTFs) within ISO, formed by representatives of the national bodies (https://www.une.org/la-asociacion/sala-de-informacion-une/noticias/iso-en-espanol).

30 CEN and CENELEC publications are regarded as individual and original works and, therefore, are subject to Belgian copyright law, Belgium being the State territory within which the works were created. For more detail, see *CEN-CENELEC Guide 10, Policy on dissemination sales and copyright of CEN-CENELEC Publication*, available at: https://www.cencenelec.eu/media/Guides/CEN-CLC/cenclcguide10.pdf, point 4.2 'Copyright ownership'.

31 See https://www.etsi.org/intellectual-property-rights. For that reason, ETSI is not the subject of this research note.

32 Obtaining European Standards – CEN-CENELEC (cencenelec.eu).

33 See *CEN-CENELEC Guide 10, Policy on the distribution, sale and copyright of CEN and CENELEC Content*, available at: https://www.cencenelec.eu/media/Guides/CEN-CLC/cenclcguide10.pdf point 4.3 'Exploitation rights'. However, CEN and CENELEC may decide to make their standards accessible free of charge, as was the case in the context of COVID-19, where the standards for the medical equipment required to deal with COVID-19 were made available free of charge. See, in that regard, https://www.cencenelec.eu/news-and-events/news/2020/pressrelease/2020-03-20-cen-and-cenelec-make-european-standards-available-to-help-prevent-the-covid-19-contagion/.

34 The standards of those bodies, identifiable by the prefix EN, must be implemented by the members as identical national standards. See page 8 of CEN-CENELEC, Internal Regulations Part 2, available at: https://boss.cen.eu/media/BOSS%20CEN/ref/ir2_e.pdf.

35 The **Czech Republic**, **France**, **Hungary**, **Ireland**, **Latvia**, **Lithuania**, **Poland**, **Romania**, **Slovakia**, **Spain** and the **United Kingdom**.

36 **Belgium**, **Germany**, **Italy**, the **Netherlands** and **Sweden**.

natural or legal persons. [37]

33. Those national bodies develop their own or 'national' technical standards (identified by the code of the country or the body: NF – for French standards, BSI – for those of the United Kingdom, UNE – for Spanish standards, DIN – for German standards, and so forth) and also include harmonised standards as national standards (identified by the previous code and the prefix EN); in the case of ISO standards, where they have been adopted as harmonised standards, the previous rule applies (identified by the national code and EN ISO codes), but the adoption of non-harmonised ISO standards as national standards remains voluntary (these are NF-ISO, BS-ISO, UNE-ISO and DIN-ISO standards (and so forth)).

B. COPYRIGHT PROTECTION FOR TECHNICAL STANDARDS

34. Our study shows that, **in fifteen of the sixteen States** examined for the purposes of this research note, technical standards are works protected by copyright.

35. **Slovakia** is the only State [38] where technical standards are not protected by copyright law. [39] That law includes all technical standards in the list of official texts excluded from protection under copyright. However, technical standards in **Slovakia** are protected by the Law on technical standardisation, which lays down rules on the distribution and the reproduction of Slovak technical standards. [40] It is apparent from the explanatory statement to the Law on technical standardisation that the purpose of protection for technical standards is to limit the distribution of amended or obsolete standards and to protect standards users and consumers. However, the Law on technical standardisation is intended to ensure the protection of the rights of the authors of those standards, which cannot, in principle, be freely accessible, free of charge. [41] Therefore, although standards are excluded from copyright protection, the protection regime provided by the Law on technical standardisation is comparable, in its effects, to copyright protection.

36. The fact that technical standards are protected by copyright stems, in most cases, from their classification as protected works, [42] and from the absence of a reference to those standards in

37 See Commission Staff Working Document, *Analysis of the implementation of the Regulation (EU) No 1025/2012 from 2013 to 2015 and factsheets accompanying the document 'Report from the Commission to the European Parliament and the Council on the implementation of the Regulation (EU) No 1025/2012 from 2013 to 2015'*, COM(2016) 212 final, p. 11.

38 It should be noted, however, that under **Czech law**, the protection of technical standards also appears to benefit from a specific protection regime, provided for by the Zákon č. 22/1997 Sb., o technických požadavcích na výrobky a o změně a doplnění některých zákonů, of 24 January 1997 (Law on technical product specifications). However, unlike Slovak law, technical standards are not explicitly excluded from copyright protection under Czech law. See paragraph 7 of the Czech contribution.

39 Zákon č. 185/2015 Z. z. autorský zákon (Law on copyright) of 1 July 2015 (čiastka 57/2015). Under Article 5(b) of the Law on copyright, legislative texts, administrative or judicial decisions, technical standards, and preparatory documentation created in connection with them and their translations do not fall within the scope of that law, even if they satisfy the conditions for classification as a work. See paragraph 2 of the Slovak contribution.

40 Article 14 of Zákon č. 60/2018 Z. z. o technickej normalizácii (Law on technical standardisation) of 6 February 2018 (čiastka 29/2018).

41 See the explanatory statement to Article 14 of the Law on technical standardisation (ASPI) and https://www.normoff.gov.sk/?faq. See paragraph 5 of the Slovak contribution.

42 It should be emphasised that Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) does not define the concept of 'protected work' so it is for the Member States to establish their own definitions.

the list of exceptions to the protection of works under copyright, which is, in principle, exhaustive. [43] A technical standard is supposed to fulfil the criterion of originality and is considered, through its development process, to be a *collective work*. As a result of that classification, standardisation bodies automatically own the copyright over technical standards. [44] However, there is no automatic ownership in **Sweden**, where it is necessary for the participants in the standard development process to waive their rights explicitly in favour of the standardisation body. [45]

III. ACCESS TO TECHNICAL STANDARDS

37. Once it has been established that copyright applies to technical standards, the question arises as to how those standards can be accessed. With regard to access to technical standards, first the limitations on open and free access to such standards will be analysed (A.) and secondly, the language arrangements that govern access (B.).

A. LIMITATIONS TO OPEN AND FREE ACCESS TO TECHNICAL STANDARDS

1. INTRODUCTORY STATEMENTS

38. In the legal systems examined, in principle, copyright grants its owner the possibility of subjecting access to technical standards to the payment of a sum of money, as that possibility has been implemented by the standardisation bodies of the various States.

39. That being said, it should be noted at the outset that some standardisation bodies allow consultation of standards *in situ* free-of-charge. [46] In the **United Kingdom**, some categories of standards may also be freely available, namely certain publicly available specifications (PASs) in the field of innovation and government-funded projects. Further, it is also possible to consult standards through entities such as libraries or information points, [47] but it should be highlighted that the interested parties can only consult the texts and not download or print them.

40. In addition, professional associations with a subscription to a standardisation body offer their members the possibility to consult standards related to their profession: the licensing agreement may include the printing or downloading of standards.

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43 That is the case for **Belgium**, **France**, **Italy**, **Latvia**, the **Netherlands**, **Romania, Spain** and **Sweden**.

44 That principle applies to national technical standards because, as stated in paragraphs 29 and 30 of the Summary, ISO, CEN and CENELEC are the copyright owners of their own standards.

45 https://www.sis.se/en/standards/generaltermsandconditions/verltelseavupphovsrtt/.

https://www.sis.se/en/standards/generaltermsandconditions/copyright/.

46 That is the case namely in **Belgium**, **France**, **Germany**, **Hungary, Latvia, Lithuania**, the **Netherlands**, **Poland**, **Slovakia**, **Spain** and the **United Kingdom**, where standards can be consulted at the premises of the Deutsches Institut für Normung (DIN) within the Normen-Infopoint, the Bureau de Normalisation (NBN), the Asociación Española de Normalización (UNE), the Asociación española de normalización (AENOR), the Association Française de Normalisation (AFNOR), the Magyar Szabványügyi Testület, the Latvijas standards (LVS), the Lietuvos standartizacijos departamentas (Lithuanian Department of Standardisation), the Stichting Koninlijk Nederlands Normalisatie Instituut (NEN), the Polski Komitet Normalizacyjny (PKN), the Úrad pre normalizáciu, metrológiu a skúšobníctvo Slovenskej republiky or the British Standards Institution (BSI).

47 That is the case in **Belgium**, the **Czech Republic**, **Germany**, **Latvia**, **Lithuania**, **Poland**, **Slovakia**, **Spain**, **Sweden** and the **United Kingdom**. It should be noted that, in **Germany,** technical standards are also archived by the Deutsches Patent- und Markenamt (Patent and Trademark Office).

41. In **Sweden**, in order to make technical standards more accessible, some bodies have made agreements with the Svenska Institutet för stadarder (Swedish Standards Institute) (SIS), under which standards relating to the respective activities of those bodies are available free of charge on their websites. [48]

42. Some of the States examined (**Hungary**, **Italy, Spain**) provide for a mechanism to facilitate access to technical standards for small- and medium-sized enterprises (SMEs). [49] In **Spain**, the UNE has committed to offering special prices to facilitate access to technical standards, especially collections of standards complementing relevant regulations, for SMEs and equivalent groups. [50] In **Italy,** an annual economic contribution to the financing of standardisation bodies was introduced in 2017, in order to limit the cost of purchasing technical standards for the benefit of SMEs, artisans, organisations and professional associations. Provision is also made for the possibility that the competent minister can determine whether standards of particular public interest are published free of charge. [51] A similar system, aimed at reducing access costs for SMEs to the most commonly used technical standards also exists in **Hungary**. In recent years, public subsidies have been allocated to enable some users to obtain a subscription allowing them to access technical standards online at a reduced price. [52]

43. The legal systems of **two** of the States examined (the **Netherlands**, **Spain**), have special features relating to access to technical standards by public authorities. In **Spain**, legislation imposes an obligation on the standardisation body to provide public administrations, at their request, with the standards that contain references which are included in the regulations they develop. [53] In the **Netherlands**, the central government has purchased the rights to a considerable number of technical standards so that public officials can consult them free of charge for the purpose of carrying out their duties. [54]

44. In the **United Kingdom**, there is a non-legally binding Memorandum of Understanding between the national standardisation body and the government, which states that the national standardisation body will provide standards to the government if it needs them for the purposes of preparing legislation or public procurement, but this does not include public authorities. Generally speaking, UK public authorities have a subscription to the standardisation body's database. [55]

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48 For example, the Lantmäteriet (Swedish Mapping Authority and Land Registry) announced in 2017 that around fifty technical standards would be accessible free of charge from 1 February 2017 thanks to a collaboration between that authority and the SIS.

49 For the sake of completeness, it should be noted that Article 6(f) of Regulation No 1025/2012 imposes on standardisation bodies the duty to encourage and facilitate the access of SMEs to standards, in particular by applying special rates for the provision of standards and by providing bundles of standards at a reduced price.

50 In 2018, a non-legislative proposal inviting the government to make access to UNE standards free of charge, in particular for SMEs and self-employed workers, was approved, but no regulatory changes have occurred. See paragraphs 19 and 21 of the Spanish contribution.

51 See paragraph 14 of the Italian contribution.

52 See paragraph 15 of the Hungarian contribution.

53 Article 11(o) of Real Decreto 2200/1995, por el que se aprueba el Reglamento de la Infraestructura para la Calidad y la Seguridad Industrial (Royal Decree 2200/1995 approving the Regulation on infrastructure for industrial quality and safety) of 28 December 1995 (BOE No 32 of 6 February 1996, p. 3929). See, also, paragraphs 15 and 20 of the Spanish contribution.

54 See paragraph 16 of the Dutch contribution.

55 See paragraph 16 of the UK contribution.

45. That said, the question remains whether it is possible to provide for limits to the restriction of access to standards, depending on whether the technical standards concerned are voluntary or mandatory.

46. Indeed, technical standards are intended to be voluntary, but become, in some cases, mandatory. That mandatory nature may be formally conferred by a legal rule, by reproducing the content of the text of the technical standard or, which is much more common, – by referring to it (reference made either to a specific version of the technical standard or to the one in force at the time of its application). It may also be conferred informally, through practice, where there is only one technical standard that can be used to comply with a particular standard. [56]

47. As for **voluntary technical standards**, [57] which constitute almost all technical standards, [58] the legal systems of the States examined are unanimous: they **remain protected by copyright and access to them may, therefore, be subject to a fee**. [59]

48. With regard to access to mandatory technical standards, two approaches have emerged from our study. There is a first group of States, the majority (**Germany**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, **Poland**, **Romania**, **Spain**, **Sweden** and the **United Kingdom**), where only the technical standards with content that is included in an official text are accessible free of charge, while access to technical standards to which national regulations refer remains subject to a fee. [60]

49. For a second, minority, group (**Belgium**, the **Czech Republic**, **France**, the **Netherlands** and **Slovakia**), mandatory technical standards must be freely accessible, free of charge, even when the national provision that renders them mandatory only makes reference to them.

2. LIMITED, PAID ACCESS TO ALL TECHNICAL STANDARDS

(a) THE RULES

50. For the **first group** of States, **access to all technical standards**, whether voluntary or mandatory, **requires a fee**. A simple reference to a standard made in a legislative or regulatory text does not allow open and free access to standards. It is only in cases where the content of a

56 That is the case, for example, with standards that are so well known and applied that they become the only standard on the subject, such as ISO 9000 (Quality Management Systems), adopted by the ISO.

57 It should be noted that, amongst the States examined, **Hungary** is unique in the sense that national legislation, as recently amended, refers only to voluntary technical standards. See, in that regard, paragraphs 9 to 11 of the Hungarian contribution.

58 For example, according to AFNOR, only 1% of technical standards are mandatory, a percentage that rises to 12% of Spanish technical standards, according to AENOR.

59 The subject of the determination of the price of technical standards is not the subject of this research note, but it may be noted that there are different systems: for example, in **Germany**, the concept of reasonable remuneration is used to consider that public interest is satisfied and the prices and conditions of distribution are established by committees with the participation of the representatives of standards users (see paragraph 9 of the German contribution); in **Spain**, the price of technical standards is the subject of an agreement with the State (see paragraph 15 of the Spanish contribution).

60 However, it would appear that, in reality, in the majority of the States in the first group, the practice of incorporating the content of technical standards into a legislative text is not widespread or even assumed.

standard is included in an official text that the said content becomes freely accessible, because official texts belong to the public domain.

51. It should be noted that restriction of access to technical standards has been introduced in various forms. In some countries, the laws on standardisation establish protection (**Lithuania**, [61] **Poland** [62]); sometimes protection is considered an exception to the laws on access to information (**Ireland** [63]). In the case of **Germany**, Article 5(3) of the Law on copyright, [64] included following a development in case-law, provides that copyright is not excluded for private standardisation works, where the laws, decrees, orders or official notices refer to them without reproducing their wording. In that case, the author (or, where applicable, the third-party holder of an exclusive right of reproduction and distribution) is obliged to grant a right of reproduction and distribution to any publisher in order to ensure the distribution of the standards, under reasonable conditions, including, inter alia, adequate remuneration to ensure the financing of the standardisation system (compulsory licence). However, the entire above-mentioned provision seeks to ensure the self-financing of the standardisation bodies.

52. In **Romania**, the relationship between copyright and the right of access to information has been defined by case-law. The Curtea Constituțională (Constitutional Court) ruled, in a 2017 decision, [65] that the protection afforded by copyright to national, European and international technical standards [66] is not contrary to the constitutional right of access to information of public interest. [67]

(b) CRITICISMS AND NUANCES ARISING FROM CASE-LAW AND DOCTRINE

53. The fact that access to mandatory standards is restricted is not without nuance, however, and has been the subject of criticism in case-law and legal literature.

54. In **Italy,** there is a line of case-law that has excluded from copyright protection compilations or collections of technical rules or standards referred to in national legislation and adopted by a standardisation body to which the legislature has delegated that task. [68]

55. In **Spain**, a minority part of legal literature also considers that reference made by an official text declaring a technical standard to be mandatory means the loss of economic and moral rights derived from intellectual property. It has also been argued that protection under intellectual property law is not acceptable when technical standards establish the presumption of conformity

61 See paragraph 16 of the Lithuanian contribution.

62 In combination with copyright regulations. See paragraph 2 of the Polish contribution.

63 See paragraph 8 of the Irish contribution.

64 Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (Law on copyright) of 9 September 1965 (BGBl. I S. 1273).

65 Decision of 30 May 2017, No 365, available at https://www.asro.ro/wp-content/uploads/2017/09/Decizie-nr.-365-din-2017.pdf. See paragraphs 16 to 19 of the Romanian contribution.

66 Established by Article 8(1) and (2) of Lege nr. 163/2015 privind standardizarea naţională (Law on standardisation), of 24 June 2015 (*Monitorul Oficial al României* No 470 of 30 June 2015).

67 Provided for under Article 31 of the Romanian Constitution.

68 See paragraphs 15 to 20 of the Italian contribution.

or complete the text of a provision where the government has waived the right to do so itself. [69]

56. In **Romania**, the fact that documentation for the award of a public contract refers to mandatory technical standards, access to which is subject to a fee, in contradiction with the principle of transparency for the award of public contracts, has been criticised in legal literature, which proposes that those standards should be readily accessible to potential tenderers.

57. Lastly, the specific issue of criminal offences related to the failure to comply with technical standards should be examined. In **Sweden**, the Högsta Domstolen (Supreme Court) held in two cases that the principle of the legality of penalties conflicted with the reference to a technical standard in a law providing for a criminal penalty. In the first case, the Högsta Domstolen (Supreme Court) based its decision on the fact that access to the technical standard in question was subject to a fee. [70] In the second case, involving the same standard, the accused was acquitted because, even though that standard was available free of charge, it was only available in a language other than Swedish – English, in that case. [71]

3. OPEN AND FREE ACCESS TO MANDATORY TECHNICAL STANDARDS

58. With regards to the **second group of States**, where **access to mandatory technical standards must be unobstructed and free of charge**, even where the national provision that renders them mandatory merely refers to them, such an exception is based on different rules.

59. In **France**, open and free access to mandatory technical standards was introduced via a statutory text, having notably been applied by the Conseil d'État (Council of State). [72] In the **Netherlands**, the government has agreed a scheme for open and free access to the technical standards referred to in state legislation with the Dutch standardisation body (NEN), for which NEN receives annual compensation. [73]

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69 See paragraphs 25 to 27 of the Spanish contribution. In response to the objections of the majority part of legal literature, which asserts, in particular, that standardisation bodies depend on the revenues derived from the sale of technical standards, it has been proposed, in the context of harmonised standards, given that the development of such standards is a public task, that standardisation bodies should be compensated, like the Spanish regime for private sectoral bodies carrying out public tasks.

70 See NJA 2017, p. 157.

71 See NJA 2019, p. 577. See also paragraphs 31 to 35 of the Swedish contribution.

72 Conseil d'État (Council of State) (France), Judgment of 28 July 2017 (ECLI:FR:CECHS:2017:402752.20170728). See paragraph 19 of the French contribution.

73 See paragraph 14 of the Dutch contribution.

60. Case-law seems to have given impetus to the recent change that has taken place in the **Czech Republic**. The Nejvyšší správní soud (Supreme Administrative Court) observed, in a 2015 judgment, [74] that it followed from EU law, in the light of Regulation No 1025/2012, that access to mandatory technical standards in the field of construction should be open and free and not burdensome. In that context, amendments to the Czech law on technical product specifications, which came into force in 2021, introduced remote sponsored access to mandatory technical standards. [75] Under that system, the fee is paid by the relevant ministry or central authority and access to those standards is therefore free of charge for end-users.

61. In **Belgium**, the failure to publish technical standards that have become mandatory and the fact that access to those standards requires payment have been criticised on several occasions by the Conseil d'État (Council of State). According to the latter, the fact that the standards referred to in regulatory instruments are not published in full in *Moniteur belge* (the Belgian Official Gazette), and that they can be acquired only in return for payment and that they are not all available in the official languages of the country, means that they are not published in accordance with the Belgian Constitution and that, consequently, they would not be enforceable against third parties. Following an intervention by the national legislator in 2022, in the specific case of Belgian standards that have become mandatory, those standards are now accessible on the website of the Belgian standardisation body, while the other mandatory standards are made available free of charge by the author of the regulatory instrument concerned, while respecting copyright. [76]

62. In **Slovakia**, the standardisation body must be informed before a reference to a technical standard is included in a regulation of general application, and the authority responsible for the preparation of the draft regulation of general application (or the author of the draft regulation of general application) must cover the access costs for interested parties to the technical standard concerned. [77]

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74 Nejvyšší správní soud (Supreme Administrative Court) of 28 May 2015, No 1 As 162/2014-63. See paragraphs 15 and 16 of the Czech contribution.

75 Amendments introduced by the Zákon č. 526/2020 Sb., kterým se mění zákon č. 22/1997 Sb., o technických požadavcích na výrobky a o změně a doplnění některých zákonů, ve znění pozdějších předpisů, a zákon č. 90/2016 Sb., o posuzování shody stanovených výrobků při jejich dodávání na trh, ve znění pozdějších předpisů, of 12 November 2020 (Částka 218/2020). The explanatory statement to those amendments states that, in order to ensure conformity with the Constitution, mandatory technical standards must be freely accessible, free of charge.

76 See paragraphs 12 and 14 of the Belgian contribution.

77 See paragraphs 12 and 13 of the Slovak contribution. A reference to a technical standard must be contained in the actual text of the regulation and not simply in footnotes, which do not constitute legislative text.

63. Nevertheless, it should be specified that it is difficult to apply those regimes that provide for open and free access to mandatory technical standards to *European or international technical standards*. Indeed, as mentioned above, ISO, CEN and CENELEC remain the copyright owners of the standards they develop. Thus, agreements made in the **Netherlands** and **Slovakia** with national bodies allow open and free access only to the standards for which those bodies are the copyright owners, namely, as a rule, national standards.

64. In **France**, legislation and case-law impose open and free access to all mandatory standards, including European and international standards. However, in practice, that access is only possible for national standards. [78] Indeed, the French standardisation body does not give open and free access to European standards for which it is not the copyright owner.

65. In addition, it would appear that, in the majority of the States in the second group, the balance between the protection of mandatory technical standards by copyright and their open and free access is ensured by the provision of a compensation mechanism, established between public authorities and the national standardisation bodies.

66. It follows from the foregoing that, in the **vast majority** of the legal systems examined, **access to technical standards is only possible in return for a fee**. In the few legal systems where open and free access is provided, it is limited to mandatory national standards.

B. LANGUAGE ARRANGEMENTS FOR ACCESS TO TECHNICAL STANDARDS

67. With regards to the language arrangements for access to technical standards, it should be noted at the outset that, in all of the States studied, the arrangements are not strictly defined. Various situations can be observed depending on the type of standards in question.

68. As for national standards in the strict sense (those that do not implement CEN, CENELEC or ISO standards at national level), they are usually always drafted, and are accessible, in the official language of the country (except in **Ireland**, where they are rarely available in Irish). This is mainly because those standards are 'local'. They also constitute a very small part of technical standards.

69. For the remainder of the standards, the situation differs depending on the State examined, but the general rule is that the technical standards which are not purely national standards are available, at least partially, in the official languages of those States.

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78 Even though the Conseil d'État (France) (Council of State) held in its judgment of 28 July 2017 (ECLI:FR:CECHS:2017:402752.20170728), that the fact that CEN holds intellectual property rights over standards which have become mandatory cannot pose an impediment to the obligation to ensure that those standards are accessible free of charge, in practice, only mandatory French technical standards can be consulted and downloaded free of charge. See paragraphs 21 and 22 of the French contribution.

70. In that context, it should be noted that it is possible to identify a group of States where the national languages of which, or at least one of the national languages of which, correspond to the official languages in which international and/or European technical standards are developed. Indeed, as mentioned above, ISO standards are published in English and French while CEN and CENELEC standards are published in English, French and German. Consequently, States with English or French as official languages have access, without any linguistic constraints, to all those standards, and those States with German as an official language have access to the CEN and CENELEC standards. [79]

71. Access to standards in languages other than English, French or German differs depending on the States examined. [80] It is worth mentioning that the legislation of some of those States explicitly provides that mandatory standards must be available in the national language (**Latvia**, **Lithuania**). In some cases, that is imposed as a result of case-law or through practice (the **Czech Republic**, **Sweden**). In **Poland**, legislation seems to be even stricter on this matter, as it provides that the national standard (in the broad sense) can only be mentioned in a legal provision after it has been published in Polish. However, national legislation sometimes makes abstract references to language access arrangements, without providing details (**Romania**, **Slovakia**).

72. In the other legal systems that have been the subject of this research note, there is no legislative provision devoted to language arrangements (**Germany**, **Hungary**, **Italy**, the **Netherlands**, **Spain**). [81]

79 That is the case for **Belgium**, **France**, **Ireland** and the **United Kingdom** for ISO, CEN and CENELEC, and **Germany** for the latter two bodies.

80 In any event, it should be highlighted that standardisation bodies do not provide, on their websites, detailed and precise information on the availability of standards in different languages.

81 Some data can be highlighted in the case of **Hungary** and **Spain**: for Hungary, 24% of non-national standards are available in Hungarian, and, for Spain, 60% of EN standards and 25% of ISO standards are available in Spanish (from the AENOR database).

CONCLUSION

73. In the sixteen legal systems examined, **official texts** are either excluded from copyright protection (States with a civil law tradition) or subject to a specific type of copyright protection (States with a common law tradition) allowing open and free access to official texts, by way of derogation or waiver by the public authority of its prerogatives in relation to copyright. In both cases, the legal systems guarantee **open and free access** to those texts.

74. By contrast, for **technical standards**, the situation is much more nuanced. They are **protected by copyright**, which therefore limits open and free access to their content, although that limitation of access is sometimes tempered by the possibility of free consultation *in situ*. Nevertheless, in the majority of the legal systems examined, a distinction exists between voluntary and mandatory technical standards. Copyright protection limits open and free access to **voluntary technical standards in all of the States**, meaning it is **subject to a fee**. In the case of **mandatory technical standards**, on the other hand, there are **two different regimes**. [82] In **five** of the legal systems examined, access to those standards must be **unobstructed and free of charge**, regardless of whether the standards are protected by copyright or not. In **ten of the legal systems examined**, access to standards remains **subject to a fee**, and their content is only freely accessible, free of charge, when it is included in an official text, which, in practice, is rare.

75. The language arrangements for access to technical standards are not strictly defined in any of the Member States examined. While national standards in the strict sense are, in principle, accessible in the respective national languages of the countries concerned, that is not necessarily the case for international and European standards adopted as national standards. Indeed, in only **five** legal systems is there a system that aims to ensure the availability of mandatory technical standards in the respective national languages.

[…]

82 It should be recalled that Hungary is not included in that classification (see footnote 57).

83 […]