Luxembourg, we have a problem: where have the Advocates General gone?

Here's the August 2014 JIPLP editorial, "Luxembourg, we have a problem: where have the Advocates General gone?", penned by Deputy Editor Eleonora Rosati (e-LAWnora)

What is the story with the Court of Justice of the European Union (CJEU), its references for a preliminary ruling, and what looks like a sentiment of increasing uneasiness of the court towards its Advocates General, at least in the area of copyright?

Over the past few months the CJEU has ruled on key copyright issues, that spanned from the scope of exclusive rights (Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB*, 13 February 2014; Case C-351/12*Ochranný svaz autorský pro práva k dílům hudebním os (OSA) v Léčebné lázně Mariánské Lázně as*, 27 February 2014) and related exceptions and limitations (Case C-435/12 *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding*, 10 April 2014; Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others,* 5 June 2014) to enforcement (Case C-170/12 *Peter Pinckney v KDG Mediatech AG*, 3 October 2013; Case C-387/12 *Hi Hotel HCF SARL v Uwe Spoering*, 3 April 2014; Case C-314/12 UPC *Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproducktionsgesellschaft mbH,* 27 March 2014), and everything in between, including the evergreen (because still highly unclear) database right (Case C-202/12*Innoweb BV v Wegener ICT Media BV and Wegener Mediaventions BV,*19 December 2013).

What most of these cases had in common was the role or, more appropriately, the absence thereof, of any input from the Advocate General. The CJEU either departed significantly from their Opinions or ruled without seeking one in the first place. The former is possible because Opinions of Advocates General are not binding on the CJEU. The court made this eloquently clear in recent references that required consideration of controversial issues, such as the criteria for determining jurisdiction in case of alleged online infringements (*Pinckney*) or the requirements of blocking injunctions (*UPC Telekabel*). The latter is expressly allowed by Article 20 of the court's Statute in those instances that raise “no new point of law”. This was the case, for instance, of *Svensson, Public Relations Consultants Association, Hi Hotel,*and *Innoweb.* In general terms, the CJEU has increasingly reverted to this possibility, as the 2013 Annual CJEU Report made clear together with the fact that in that year the number of references for a preliminary ruling was 33% higher than 2009.

By not seeking the Opinion of an Advocate General, the CJEU implied that there was no need for a detailed analysis of the legal aspects of the case at hand. By departing from the Opinion sought, the CJEU showed that it did not share the legal analysis conducted by the designated Advocate General. Either way, the CJEU appeared to suggest that it knew better than its Advocates General.

What appears like an emerging trend may thus prompt a specific question: Have Advocates General and their Opinions become a waste of time and resources in this area of the law?

It is unlikely that this was because copyright is an “easy” area of the law or the issues it has been presenting recently do not require much thought. Was it straightforward to say that hyperlinking falls outside the scope of copyright protection tout court? Was it easy to determine that the courts of a given Member State have jurisdiction to hear cases of alleged online copyright infringements just because the website where allegedly infringing content is available can be accessed from that particular territory? Was it so clear that the database right might come into question when operating a meta search engine?

One may wonder whether all this, instead, may be a consequence of the fact that, similarly to the judges of the court, Advocates General are not IP and copyright specialists. Would the statistics on Advocates General and their Opinions change at all if there were (more) subject specialists among them and – possibly – among the judges of the court too? What if, elaborating upon Article 252 of the Treaty on the Functioning of the European Union, the duty of Advocates General, acting with complete impartiality and independence, was to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the court, require not just their involvement, but also their specific competence?

Opinions of Advocates General are usually more thoughtful than subsequent judgments, especially where the court agrees with the Opinion. But when it comes to copyright, what is and – most importantly – what should be the role of Advocates General? Is #saveourAGs the answer (and relevant hashtag of course)? If so, how can this be done?