11 February 2022

Registry of the European Court of Justice of the European Union
Rue du Fort Niedergrünewald
L-2925 Luxembourg
LUXEMBOURG

**C-588/21 P**

**Public.Resource.Org Inc and Right to Know CLG**

Appellants

**European Commission**

Defendant

**European Committee for Standardisation (CEN) and others**

Interveners at first instance

**Application for permission to file a reply to the response by the European Commission and the Interveners**

Submitted pursuant to Article 175 of the Rules of Procedure of the Court of Justice by the Appellants, Public.Resource.Org Inc and Right to Know CLG, represented by Dr Fred Logue, Solicitor, and by Dr Jens Hackl, Rechtsanwalt and Christophe Nüßing, Rechtsanwalt, with a postal address for service at 8/10 Coke Lane, Smithfield, Dublin D07EN2Y, Ireland who consent to service by e-Curia,

In the name and on behalf of the Appellants, we respectfully request that the President grants the Appellants the right to submit a reply to the response by the European Commission (the "**EC**") and the Interveners under Article 175 of the Rules of Procedure of the Court of Justice and para. 29 of the Practice Direction.

1 The Appellants make this request to the President for permission to supplement the appeal with a reply, in particular to enable the Appellants to present their views on several pleas of inadmissibility and on new matters relied on in the EC's and the Interveners' response.

2 Both the EC and the Interveners contest the admissibility of the appeal in whole and in part and additionally make several new arguments for the first time in their responses. These aspects are as follows:

a. Inadmissibility of the Application and the Appeal in their entirety because the Appellants lack an interest in the proceedings and the General Court ("**GC**") erred in finding that the Appellants had such an interest (Interveners' response, para. 2 and paras. 6 to 14);

b. Inadmissibility of the first line of argument of the first limb of the first ground of the Appeal *obscuri libelli* because the Appellants failed to provide the paragraphs of the GC's judgement that are being contested (EC's response, paras. 13 to 17) and because it is an indirect challenge of the legality of Regulation No 1025/2021 which is not pleaded (EC's response, paras. 18 to 20 and Interveners' response, paras. 19 to 21);

c. Inadmissibility of the second line of argument in the first ground of the Appeal when the Appellants contend that the GC and EC only relied on general allegations and assumptions when assessing copyright protection of the harmonized standards (EC's response, para. 50);

d. Inadmissibility of the Appellants' argument in relation to the originality assessment in conjunction with the copyright protection of the harmonized standards ("**HS**") since this is a request to re-examine a factual finding of the GC (Interveners' response, paras. 3 and 60);

e. Inadmissibility of the Appellants' reliefs sought to ask the Court to grant access to the requested HS (Interveners' response, para. 4);

f. Inadmissibility as regards references to national case law as new evidence (Interveners' response, para. 5);

g. Inadmissibility of the Appellants' argumentation regarding the general presumption for HS under Regulation No 1049/2001 because this was not argued before the GC (despite the fact that the GC made a specific finding on this point (para. 103 of the GC's judgement) (Interveners response, para. 63);

h. Inadmissibility of grounds of appeal which challenge the GC's judgment regarding the overriding public interest under Regulation No 1049/2001 because the GC's considerations are framed as being included "for the sake of completeness" (Interveners' response, para. 79), including the argumentation with respect to the vagueness of the Appellants' argumentation in conjunction with the overriding public interest (EC's response, para. 83);

i. Presentation of new arguments and facts relating to the interpretation of Regulation No 1025/2012, particularly its relationship to Regulation No 1049/2001

(EC's response, para. 18, and Interveners' response, paras. 19 and 23), and that it is the basis for the existence of copyright in the requested HS and that it mandates charging for HS (EC's response, para. 51; Interveners' response, paras. 23 to 31 and 72), and the risk of decoupling the system of European HS from the international system (Interveners response, para. 33) including the risks arising from fees for HS (Interveners' response, para. 27);

j. Stating that the Appellants did not show in their first line of argumentation regarding copyright protection of HS how the GC erred in law (EC's response, paras 38 to 42);

k. Presentation of new arguments regarding the principle of legal certainty, particularly that this only requires "appropriate publicity" (Interveners response, paras. 43 to 47);

l. Ineffectiveness of the Appellants' argumentation concerning the commercial interests if the Court acknowledged copyright protection because the EC based the access refusal on two different lines of reasons, namely the copyright protection and the risk of a very large fall in the fees collected by CEN (EC's response, para. 59).

3 The Appellants should have a right to be heard on the extensive pleas of inadmissibility and the new arguments/facts submitted by the EC and the Interveners in their respective responses.

4 Under the Practice Direction (para. 29), "*the response may be supplemented by a reply […], in particular in order to allow the parties to adopt a position on a plea of inadmissibility or new matters raised in the response.*" This is the case here with respect to the aspects mentioned above in para. 2, lit. a to l because these concern either pleas of inadmissibility or new matters raised in the response.

5 The plea by the Interveners that the Appellants lack an interest in bringing the Appeal is inadmissible in itself, particularly as the Appellants limited their appeal against the GC's judgments on the merits and as the Interveners' argument could be considered an impermissible cross-appeal. Further, the Interveners' argumentation is also flawed. The Appellants need to demonstrate this.

6 In terms of the plea of inadmissibility *obscuri libelli*, the Appellants should be permitted to argue by reference to their Appeal as a whole that they have presented a coherent and properly argued appeal and that they have in fact identified which aspects of the contested judgment are incorrect. The Appellants also need to clarify that the rules of Regulation No 1025/2012 are irrelevant for the assessment (contrary to what the GC did), particularly as Regulation No 1025/2012 cannot serve as an exemption to access under Regulation No 1049/2001. In the absence of a reply, the Appellants are concerned that the Court will be asked to rule on admissibility by reference to selected extracts from the Appeal which are presented out of context.

7 The pleas of inadmissibility relating to whether the requested HS meet the test of originality including the argumentation around the general presumption for HS as well as the overriding public interest in disclosure again go to central issues in the Appeal and mischaracterise the arguments actually made by the Appellants. Moreover, whether or not a work is original is not only a matter of fact as asserted by the Interveners. The Appellants should thus be granted the opportunity to reply to these pleas of inadmissibility.

8 The plea by the Interveners that the reliefs sought and the reference to national case law would be inadmissible are wrong and must be clarified by the Appellants. The Appellants should thus be granted the opportunity to reply to these pleas of inadmissibility.

9 The substantive pleas in conjunction with the interpretation of Regulation No 1025/2012 including the relationship to Regulation No 1049/2001 and the consequences following from Regulation No 1025/2012 go to the essence of the grounds of Appeal. These aspects thus need to be addressed by the Appellants, particularly the relationship between Regulation No 1025/2012 and Regulation No 1049/2001, and whether Regulation No 1025/2012 can be interpreted as conferring *sui generis* copyright on HS, and whether charging for access to HS is mandatory under that Regulation rather than simply permissible in principle.

10 Further, there is new evidence and argumentation in relation to the functioning of the European Standardisation System and its relationship with international standardisation organisations. This has not been presented either before the EC when it made the contested decision or before the GC and thereby invites the Court to itself rule de-novo and on the merits of matters which have not been at issue heretofore.

11 In relation to the concept of "appropriate publicity", the Appellants need to comment on this argument as this is a misunderstanding of the case law, which deals with how public notice is given to the fact that a measure has been adopted. There is no dispute in this case over how notice of the adoption of HS is given, rather the dispute is over access to the content of the HS and the required free access to the law under the rule of law.

12 In terms of the argumentation around the ineffectiveness of the Appellants' argumentation concerning the commercial interests if the Court acknowledged copyright protection because the EC based the access refusal on two different lines of reasons, the Appellants want to demonstrate that the alleged two different lines of reasons are inextricably linked so that there is no ineffectiveness.

13 For the reasons set out above, the Appellants respectfully ask the President to exercise the power under Article 175 of the Rules of Procedure and to authorise the filing of a reply to the EC's and Interveners' responses and for a time limit to be set for the said filing.

Dr. Fred Logue Dr. Jens Hackl Christoph Nüßing