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Vereniging Openbare Bibliotheken v. Stichting Leenrecht

Court of Justice of the European Union, Case C-174/15, 10 November 2016

In a case brought by the Association of Dutch Public Libraries, the Court clarified its position on the lending of electronic books ('eBooks') under the Rental and Lending Rights Directive in light of the lack of specific reference to digital copies.

Background

In 1992, the European Community enacted a Directive conferring on authors and performers a right to control rental or lending of copies of their works (Directive 92/100/EEC of 19 November 1992 on rental right and lending right, 'the Rental and Lending Rights Directive'). Member States have the option to introduce an exception to copyright for this purpose, provided that the rightsholders are fairly compensated. The Directive made no mention of works in electronic form. This is hardly surprising: although the first eBooks, such as Project Gutenberg's copy of the American Declaration of Independence, had already been created, in 1993 the internet was still the domain of computer scientists. Barely 100 texts were available for download and commercial publishing, let alone lending, in electronic form was unknown.

In 2001, the EU introduced the Directive on Copyright in the Information Society (Directive 2001/29/EC, 'the InfoSoc Directive'), specifically to deal with the questions then arising from the distribution of copyright works electronically. It addressed the possibility of infringing by communicating a copy of a work electronically over a communications network; but by Article 1(2)(b), it expressly excluded any effect on the existing Rental and Lending Rights Directive.

The Rental and Lending Rights Directive was codified in 2006 (Directive 2006/115, 'the 2006 Directive') but other than being updated to refer to the relatively new right of communication to the public, was essentially unchanged. No reference was made to eBooks. Recital (4) did state that 'copyright and related rights protection must adapt to new economic developments such as new forms of exploitation,' but this wording had already appeared in the 1992 version and so cannot necessarily be read as a reference to eBooks.

The European legislators responsible for re-framing the Rental and Lending Rights laws evidently did not foresee the launch in 2007, and almost instantaneous success, of Amazon's original Kindle. The Kindle revolutionised both reading and publishing, sweeping away the need for significant investment to produce a book and, consequently, the need for substantial pre-selection of books to publish.

Nevertheless, it took some time for libraries to begin lending eBooks. As of November 2010, only 8% of 204 UK libraries surveyed offered some form of eBook lending service; by September 2011 this had reached 38%. The need to do so, however, becomes increasingly apparent as the proportion of publications that are available only in electronic form continues to rise.

In this context, the applicability of laws on rental and lending rights to eBooks started to become significant.

The Dutch dispute

In the Netherlands, Article 15c(1) of the Copyright Law permits lending of published copyright works without the author's permission, provided that a fair remuneration is paid to the copyright holder. Accordingly, Dutch libraries pay to the Lending Collecting Society a lump sum in respect of their loans of hard copy works, and the Society distributes those payments to rightsholders. The amount of the payment is set by a Government-designated agency. However, after internal discussion, this agency concluded that the lending of eBooks did not fall within the scope of Article 15c(1), and so lending of eBooks by the public libraries of the Netherlands amounts to copyright infringement.

In response, the Dutch Government drafted new legislation to establish a national digital library, but the public libraries' association (Vereniging Openbare Bibliotheken) challenged the proposed draft by bringing an action seeking a declaration that Article 15c(1) does, in fact, cover lending of eBooks. In considering that request, the Dutch court referred to the CJEU the question whether or not 'lending' in the 2006 Directive also includes

The CJEU asks whether, in light of the lack of direction in the legislation, there are grounds to justify the total exclusion from the 2006 Directive of all digital copies.

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the non-commercial making of a digital copy available for temporary download by a single user at a time.

The Dutch Court also asked whether the InfoSoc Directive limits Member States' right to introduce a partial exemption, such as Article 15c(1), to the lending right only to the situation where the copies were first put into circulation in the EU by or with the consent of the rightsholder and, if it does, whether making a digital copy available for remote download constitutes such an act.

The Advocate General's approach

Advocate General Szpunar gave his Opinion in June. He expressly acknowledged that the EU legislature had not contemplated including the lending of electronic books within the Rental and Lending Rights Directive because the technology relating to commercially viable electronic books was only in its infancy. Under English principles of statutory construction, this would have been the end of the question: eBooks were not included. But the Advocate General nevertheless proposed that an axiological, 'follow the value' approach to interpretation should be applied. Since lending eBooks is the modern equivalent of the lending of printed books, the Directive should be interpreted to include it, to ensure the effectiveness of the legislation in a sector experiencing rapid technological and economic development.

His Opinion also points out that literary creation is as much a cultural as an economic activity: the importance of books for the preservation of and access to culture and scientific knowledge has always prevailed over mere economic considerations.

Finally, AG Szpunar noted that the main purpose of copyright is to protect the interests of authors. Prior to this dispute, Dutch libraries did lend eBooks but could only do so under individual licensing agreements with publishers, which principally benefit publishers or other intermediaries without necessarily passing adequate remuneration to authors. It also enables publishers to determine which eBooks will be made available, at what price and on what conditions. If, instead, digital lending of all eBooks falls within the Directive, authors would receive fair remuneration in addition to that generated by the sale of books.

The CJEU's approach

The CJEU decision skirts the question of what the legislature might have intended to include. Instead, it asks whether, in light of the lack of direction in the legislation, there are grounds to justify the total exclusion from the 2006 Directive of all digital copies. Noting that the 1996 WIPO Copyright Treaty introducing rental rights expressly refers only to hard copies, the Court concluded that the rental right part of the Directive must also be read restrictively to cover hard copies only. But the same limitation need not be read into the separately-defined lending right.

The Court also found nothing in the preparatory work behind the drafting of the original Rental and Lending Right Directive which required exclusion of lending digital copies. A note from the Commission proposing the exclusion of electronic copies was specific to films and in any case did not find its way into the final text.

Recital 4, encouraging copyright to adapt to new economic developments, supports the Court's view of digital lending as a form of exploitation which the legislature would have expected copyright to adapt to. Recital 9 of the InfoSoc Directive requires a high level of protection to be provided for authors.

The Court therefore concluded that the lending of eBooks is not excluded. Having reached that view, it was clear that the partial exception to the lending right (provided that fair compensation is paid) applies equally to eBooks as to hard copies since this interpretation enables the exception to function effectively. In particular, the value of the exception for cultural promotion is best served by treating the lending of eBooks and hard copies alike.

As to whether the lending right exception can be applied only where a digital copy has not first been put on the market in the EU by, or with the licence of, the rightsholder, this received short shrift. The public lending right would clearly be wholly ineffectual if it could be exhausted by exhaustion of the distribution right, since libraries would be free to avoid the lending right by buying only second-hand copies of books. However, a national law provision which requires libraries only to buy books, including eBooks, which have been put into circulation by a first sale in the European Union, is acceptable since it reduces the risk of prejudice to authors' rights through the imposition of a lending right exception.

Comments and conclusions

While a remuneration scheme as now approved in this judgment is likely to satisfy the authors' collecting societies, publishers are in a more tenuous position, particularly following the Court's decision in *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, Case C-572/13. There, the Court found that publishers were not rightsholders under EU copyright law and therefore cannot benefit from the private copy levy scheme which benefits authors. It may be that publishers will be reluctant to 'sell' eBooks to libraries knowing that they will be automatically entered into e-lending schemes. But unlimited lending of eBooks may equally lead to distortion of the eBooks market. The various stakeholders may now face a further round of negotiation, in order to come up with a model that fairly benefits all parties.