Kluwer Copyright Blog

Belgium: the problem child of the lending right?

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On 19 November 1992, the European Council adopted the Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (now replaced by Directive 2006/115/EC), which provides an exclusive right to authorize or prohibit the rental and lending of originals and copies of copyrighted works. The Directive also provides that Member States may derogate from the exclusive right in respect of public lending, provided that at least authors obtain a remuneration for such lending, and that Member States shall be free to determine this remuneration taking account of their cultural promotion objectives. The Directive had to be transposed not later than 1 July 1994.

On 30 June 1994, Belgium adopted the law on copyright and related rights. This law transposed the directive 92/100/EEC by providing the exclusive lending right, a limitation for public lending organized by recognized or official institutions for an educational and cultural purpose, and a right to remuneration in cases where the limitation applies. The King was supposed to determine the amount of the remuneration by way of a Royal Decree after consulting the relevant institutions and collecting societies.

In 2001, noting that none of the implementing measures relating to the remunerations provided for in the Belgian copyright Act had been adopted, the European Commission started sending notice letters to the Belgian authorities. The latter explained that the problem was at the level of the Belgian federated entities (the "communautés"/"gemeenschappen") which are competent in matters of culture. These federated entities were opposed to the introduction of a lending right and wanted to exempt the lending institutions from the payment of any remuneration for lending copyrighted works. They therefore blocked the legislative mechanism.

On 16 October 2003, the European Court of Justice declared that, by failing to apply the provisions on the public lending right provided for in Directive 92/100/EEC the Kingdom of Belgium had failed to fulfil its obligations under Articles 1 and 5 of that Directive (case C-433/02).

Fearing a possible penalty, the King quickly adopted on 25 April 2004 a royal decree transposing article 5 of the Directive 92/100/EEC and finally providing for a calculation method. The amount of the remuneration was fixed on a yearly flat-rate

basis at 1 EUR per adult and 0,5 EUR per minor, on the condition that the borrower has borrowed at least once during the reference period. The remuneration is paid only once no matter how many lending institutions the borrower is registered with.

VEWA (a Belgian collecting society representing authors from the educational and scientific fields) was not happy with the royal decree and sought its annulations by bringing the matter before the state council ("conseil d'état"/"Raad van staat"). According to VEWA, this remuneration was far from being "equitable". The state council noted that article 5(1) of the Directive simply provides for a "remuneration" contrary to its article 4(1) or 8(2), which provide for an "equitable remuneration". Anyhow, it decided to stay the proceeding and referred a question to the Court of Justice of the European Union for a preliminary ruling.

In its judgement of 30 June 2011 (Case C-271/10) the Court of Justice acknowledges that there is a distinction to be made between the "equitable remuneration" provided in article 4(1) and 8(2) of the Directive, and the "remuneration" provided in article 5(1). The Court reminds that lending does not have a direct or indirect economic or commercial character: "In those circumstances, the use of a protected work in the event of public lending cannot be assessed in the light of its value in trade. Consequently, the amount of the remuneration will necessarily be less than that which corresponds to equitable remuneration or may even be fixed on a flat-rate basis in order to compensate for the act of making available all the protected works concerned". The Court also states that even though it belongs to the Member States alone to determine what are the most relevant criteria for ensuring compliance with that Community concept and that the wording of Article 5(1) of Directive 92/100 reserves them a wide margin of discretion, the amount of the remuneration cannot be purely symbolic and should not be dissociated from the harm for which it constitutes consideration, namely the making available of protected works by establishments accessible to the public. Therefore and accordingly, the amount of the remuneration due should take account of the extent to which those works are made available: "the higher the number of protected works made available by a public lending establishment, the greater will be the prejudice to copyright". The Court therefore criticized the royal decree as it does not take that criterion into account. The Court also agrees that the amount of remuneration to be paid to authors should also be determined by taking into account the number of borrowers registered with a lending establishment, but also criticizes the fact that the royal decree organises a de facto quasi-exemption of many establishments because of its "one registration per person per year" system. The Court therefore rules that article 5(1) of the Directive precludes legislations such as the royal decree.

With such clear answer to its question, the State Council will not have any choice but to annul the royal decree, and in the meantime Belgian Courts or Tribunals should not apply it anymore as it is contradictory to EU law. Belgium will therefore have to implement a new royal decree which takes into account the minimal criteria as set forth in the decision of the Court of Justice. Meanwhile, authors are still waiting for their proper remuneration…

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