Kluwer Copyright Blog

AG Spuznar's Opinion in the VOB case: A big dose of technological neutrality, but also a hint for a more author protective EU copyright law?

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On June 16, Advocate General (AG) Spuznar delivered his opinion in Case C-174/15 Vereniging Openbare Bibliotheken v Stichting Leenrecht. The case emerged from a dispute between VOB, the association of Dutch public libraries, and a foundation entrusted with collecting the remuneration for lending which is due to authors. In VOB's view, the lending of electronic books under the 'one copy one user' model (1 copy accessible exclusively by 1 user/borrower at a time) shall be subject to the Rental and Lending Directive's regime.

The case is of great importance, since the questions referred to the Court touch on two of the most controversial key issues related to EU digital copyright law: e-lending and exhaustion of the distribution right in the digital environment. Furthermore, the Court has been asked to clarify whether the derogation from the public lending right which is established in Article 6 (1) of the Rental and Lending Directive is subject to certain requirements in order to apply, such as the requirement that the copy made available for lending be obtained from a lawful source. According to Article 6 (1), Member States may derogate from the exclusive right provided in respect of public lending, provided that authors at least obtain remuneration for such lending.

AG Spuznar, in his Opinion, has clearly opted for a teleological, rather than a historical or literary, interpretation of the concept of lending and has reached some conclusions which embrace a flexible and technologically neutral standpoint. It is also noteworthy that, quite remarkably, he correlated his legal analysis with the historic functional role of libraries as crucial vectors of the public interest task of cultural dissemination. Indeed,

as he emphasises in his introduction, *"[i]f libraries are unable to adapt to this trend they risk marginalisation and may no longer be able to fulfil the task of cultural dissemination which they have performed for thousands of years. The institution of a regulatory framework to accommodate the modernisation of the way in which libraries operate has, for some time, been a subject of intense debate, both among stakeholders and in legal theory. The question of whether — and if so on what legal basis — libraries may lend electronic books is at the heart of this debate. The present case will enable the Court to provide a judicial answer to that question"*.

Libraries have always been a laborious testing ground for copyright regulation in times of ground-breaking technological and social and economic changes. The reconciliation of copyright protection with the interests of preservation and dissemination of culture and science has proven a delicate task each time new reproduction and dissemination techniques for copyright protected works emerge. The diverging positions on key issues such as public lending, photocopying in libraries and, in particular, copyright exceptions in favour of libraries, have often been described in terms of a battle pitting the copyright holders against the libraries. The digital revolution has undoubtedly further perplexed this tumultuous relationship, since the ideal of libraries as the guardians of a digital knowledge ark often collides with the technologically non-neutral character of copyright rules. So, while this case focuses on specific aspects of this controversy, the stance of the CJEU will potentially have a significant symbolic nature as regards copyright law's adaptation to the modern role and function of libraries.

As regards the first question, the AG opined in a way that favours the inclusion of e-lending within the scope of application of the Rental and Lending Directive. His main line of argument lies in the functional equivalence between the traditional borrowing of a book and of e-lending (para. 31) and on the need to enable libraries to continue to fulfil the task of cultural preservation and dissemination that they have performed for hundreds of years while books existed only in paper format (para. 38). Furthermore, interpreting the concept of "lending" in such a flexible way is the only option for the true protection of the creators' interests, because, thanks to the application of the derogation of Article 6 para. 1, it will enable authors to receive remuneration for the e-lending, in addition to that generated by the sale of books and independently of agreements concluded with publishers. Otherwise, the lending of electronic books will continue to be arranged under licensing agreements concluded between libraries and publishers in a way which is principally of benefit to publishers or other intermediaries in the electronic book trade, instead of the authors (par. 34).

Certainly, the inclusion of e-lending in the scope of application of the Rental and Lending Directive is not unequivocal. Indeed, the Directive, which was promulgated on the analogue world's terms, does not expressly include electronic rental or lending, even if the Commission, in its 1995 Green Paper on the information society, expressed the opinion that the Directive should also cover these acts. Finally, the making available right which was established in the WIPO Copyright Treaty (WCT), the WPPT and Directive 2001/29 appears to broadly cover all forms of electronic dissemination of works, including e-lending. As a result, due to absence of public lending schemes for e-books, libraries have to negotiate with right holders the specific terms governing the making available of e-books to the public, since the derogation of Article 6 (1) of

the Directive does not apply. In the view of the AG, this is a perplexing situation since libraries do not always have the financial means to procure electronic books, with lending rights, at the high prices demanded by publishers; while publishers and intermediaries in the electronic book trade are often reticent to conclude agreements with libraries to enable them to lend electronic books.

As regards the critical question of digital exhaustion, the AG does not expressly deal with it, since he considers it to be irrelevant to the lending right. As he pinpoints, the acquisition of the right to lend or rent a work is in no way dependent on the exhaustion of the distribution right. His stance is plainly understandable, since the referring court appears to have entered the digital exhaustion question into the debate through the back door, when discussing the possible introduction of requirements in relation to the way the copies which are destined to be lent have been put in circulation and their origin in the context of the derogation for public lending in Article 6 (1).

At the same time, however, the AG appears to favour a technologically consistent interpretation of the concept of "copy" which also includes digital copies (par. 52). Since the UsedSoft decision, legal commentators have debated intensively both for and against such an extension, while the CJEU's position, which focused its reasoning on the *lex specialis* of the Software Directive further clouded the enigma of digital exhaustion. It will be interesting to see whether the CJEU will deal with this question or choose to refrain from giving a clear cut answer.

Furthermore, the AG elaborates more on the question of the requirements for the application of the derogation of Article 6 (1) in the context of e-lending. In his opinion, the copy of the e-book which is destined to be lent shall have been put in circulation with the author's consent and must have been obtained from a lawful source. With the exception of AG Wathelet's opinion in GS Media (C-160/15), this is the third case, after ACI Adam (C-435/12) and Svensson (C-466/12), that has favoured a requirement for the author's consent and the neighbouring concept of the lawfulness of the source of a copy of a copyright protected work which was put in circulation or was made available. In the present case, it is notable that the AG constructs the concept of the author's consent on the grounds of the non-economic interest of the author in deciding whether and how the work will be published. By doing so, he is giving a knowing wink to the moral right of publication (the French "*droit de divulgation*"). The latter, -which is not part of the minimalist moral right protection of Article 6*bis* of the Berne Convention, but is generally recognised in continental law copyright jurisdictions-, is infringed every time the divulgation of a work takes place without the author's consent. So, the AG seems to embrace an "EU specific subject matter" basis for copyright law which, aside from the economic copyright, also encompasses the non-economic interest of the author in controlling the publication of the work. In the AG's view, this essential copyright core shall not be subject to exhaustion either in its "official" and orthodox form or in its unconventional Svensson version. If this stance is followed by the CJEU, it will be the second precedent after the Deckmyn case (C-201/13) where EU copyright law appears to also encompass the non-economic (moral) interests of the author.

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