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CJEU: the Luksan case and the protection of film directors

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On 9 February 2012, the Court of Justice of the European Union issued its judgment in the case Martin Luksan v. Petrus van der Let (Case C-277/10) opposing a film director to a film producer on the exploitation rights of the film "Fotos von der Front". The case was brought by the Wien Handelgericht (Commercial Court of Vienna) for a preliminary ruling on the issues of exploitation rights vested in film producers and right to fair compensation.

At national level, Mr. Luksan and Mr. van der Let had signed an agreement through which Mr. Luksan agreed to write a script and direct a film documentary on German photography war during WWII and Mr. van der Let to produce and exploit the film. The contract assigned to the film producer all the copyright and related rights in the movie, with the exception of certain methods of exploitation (such as the making available to the public on digital networks and the broadcasting by closed circuit TV and pay TV), which were subject to a separate payment. The contract did not contain any provision on the statutory right to remuneration.

The dispute arose when the film director discovered that the producer had made the movie available online and assigned the rights to an online video platform. The film director considered that this method of exploitation was reserved to him in the contract and initiated proceedings against the producer for having breached the contract and his copyright. For his defence, the producer claimed that the Austrian Copyright Law (Para. 38 (1) of Urheberrechtsgesetz) exclusively granted exploitation rights in the film to the producer and that any contract stating the contrary was void. In addition, he considered that he was entitled to all statutory right to remuneration.

The national court feared that national law providing for the 'original and direct allocation of the exploitation of rights' to the film producer as well as for the possibility to grant by contract all statutory rights to remuneration to the film producer was incompatible with EU law and referred a series of preliminary questions to the CJEU. (For a more detailed presentation of the case, see the blog written by Francisco Cabrera on the Opinion of the Advocate General).

Concerning the exploitation rights in the cinematographic work, the CJEU had to determine whether under EU law, national legislations would be allowed to provide for an exclusive grant of exploitation rights to the film producer. To answer the question, the Court first assessed the status and position of the film director, whether he had to be considered as the author of the

cinematographic work and originally benefitted from exploitation rights. The applicable EU Directives (namely the Satellite and Cable Directive, Rental Directive and Term of Protection Directive) do not provide for a complete harmonisation of the notion of authorship but as a compromise designate the (principal) film director as the author or one of the authors of the cinematographic work.

The Court acknowledged that status and held that the (principal) film director could not be denied exploitation rights because "[he] (had to) be regarded as having lawfully acquired, under European Union law, the right to own the intellectual property in that work". As a consequence, national laws providing for a legal assignment (cessio legis) such as the Austrian Copyright law or for another type of irrebutable presumption of transfer of exploitation rights to the film producer should be precluded. It should be noted that the Court rejected the application of Article 14bis (2)(b) and (3) of the Berne Convention invoked by the Asutrian Government to justify its national law. This article provides for a presumption of assignment of rights in favour of the film producer.

The CJEU acknowledged that the application of this article would allow a "national legislation to deny the principal director certain rights to exploit a cinematographic work". However the Court rejected the argument since Member States "are no longer competent to adopt provisions [in the field of intellectual property] comprising th(e) European Union legislation". Although the goal pursued by the Court is understandable, this statement contradicts the terms of the EU Directives. Recital 5 of the Term of Protection Directive states that its provisions "should not affect the application by the Member States of the provisions of Article 14bis (2)(b),(c) and (d) and (3) of the Berne Convention". Recital 7 of the Rental Directive provides that "the legislation of the Member States should be approximated in such a way as not to conflict with the international conventions" in the field of copyright and related rights. In addition Article 351 TFEU makes clear that the Treaty does not affect rights and obligations arising from (international) agreements signed by the Member States before the entry into force of the Treaty.

The second issue brought to the CJEU concerned the application of the right to fair compensation to the film director. The national law permitted to depart from that principle and grant full statutory right to compensation to the film producer. The CJEU only analysed the issue in relation to Article 5(2) of the Information Society Directive, which provides for the compensation of a rightholder for the use of his work under the private copying exception.

The Court established that the (principal) film director in his capacity as author (and thus rightholder) had to be granted by law the right to fair compensation. The Court ruled that such a right could not be "waivable" as the goal of fair compensation is "to compensate rightholders for the prejudice sustained", which is " conceptually irreconcilable with the possibility for a rightholder to waive that fair compensation".

With this ruling, the CJEU clearly establishes that a presumption of assignment of exploitation rights in favour of the film producer is always possible under the conditions that agreements to the contrary are possible and that the presumption is rebuttable. The Court also ensures that the film director will always benefit from a fair compensation for the use (under the private copying exception) of his work and that he will not be deprived of his right by the film producer. The Court seems to protect the film director maybe because he is supposed to be the weakest party in the negotiations with the film producer. However, one can regret that the decision of the CJEU neither refers to nor discusses the role and position of the film producer who is also considered under some national laws as a co-author of the cinematographic work.

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