Kluwer Copyright Blog

The ECJ condemns the French Act on digital exploitation of out-of-print books

Brad Spitz (REALEX) · Thursday, January 12th, 2017

The French Act No. 2012-287 of 1 March 2012 'on the digital exploitation of unavailable books of the twentieth century' created a specific compulsory collective management system for out-of-commerce books, in Articles L.134-1 to L.134-9 French intellectual property Code ('IPC').

These new provisions were intended to allow the digitisation and reissuing of books that are still protected by copyright, but no longer exploited ('out-of-print' books). These provisions also allow digitisation by libraries and thus were intended to encourage public access to knowledge and culture. The new system, which was the first of its kind in a copyright system, has been analysed as being the French legislator's way of allowing French libraries and publishers to compete with Google's digitisation crusade.

However, the ECJ, in its judgment of 16 November 2016 (Case C?301/15), ruled that Articles 2(a) and 3(1) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as precluding such national legislation.

The French legislation

General rules

Article L.122-1 IPC provides that 'The right of exploitation belonging to the author shall comprise the right of performance and the right of reproduction.'

In French law, an exception to a principle is to be interpreted restrictively: *exceptio est strictissimae interpretationis*. That is to say that the exceptions to copyright and neighbouring rights have to be construed in favour of the monopoly granted to the rightholders. Article L.122-5 IPC, which provides for copyright exceptions, and Articles L.211-3 and L.214-1 IPC, which provide for neighbouring rights exceptions, set out a limited list of exceptions. The courts may neither create nor accept any exceptions other than those expressly provided for by the law.

The French Act on the digital exploitation of unavailable books

The system created by the 2012 Act applies to 'unavailable books' defined as books published in France before 1 January 2001 that are no longer distributed by a publisher and are no longer published either in printed or digital form.

The 2012 Act created a freely accessible online public database, which is held by the Bibliothèque Nationale de France (BNF), with a list of the unavailable books. Anyone can ask the BNF to register a book in the database. The database contains a list of thousands of unavailable books.

Under this legislation, once a book is registered in the database for more than six months, the right to authorise its reproduction and communication to the public in digital form is exercised by a collecting society approved by the Minister of Culture. The collecting society grants authorisation for remuneration on a non-exclusive basis for a renewable five-year period. The collecting society must take efficient measures to identify and locate the rightholders in order to redistribute the royalties.

The French legislation provides an opt-out system whereby the author or the publisher of a book may refuse collective management of the work by writing to the BNF within six months from the registration of the work in the database. A publisher that notifies their opposition within the six-month period mentioned above must exploit the unavailable work within two years from notification; otherwise the book may be exploited via the collective management system. After this opt-out period, an author and a publisher who have not notified their opposition within the 6 month period are granted a right of preference and a right to withdraw from the system (see Brad Spitz, Guide to Copyright in France, Kluwer Law International 2015, pp. 49 – 52).

This complicated system is supposed to strike a balance between the public interest and the interests of the authors and publishers. The Constitutional Court ruled that this Act complies with the French Constitution, stating that it is possible to undermine the right to property if it is justified by reasons of public interest and proportionate to the objective pursued (28 February 2014, No. 2013-370 QPC). But the ECJ ruled otherwise.

The judgment of the ECJ

A request for a preliminary ruling was made by two French authors, Marc Soulier (known under the name Ayerdhal, who died recently) and Sara Doke, concerning the legality of a decree of 27 February 2013 for the application of Articles L.134-1 to L.134-9 IPC. They argued that the French legislation creates a copyright exemption that is not provided for in the directive.

The French Conseil d'État (Council of State) referred the following question to the Court of Justice for a preliminary ruling:

'Do [Articles 2 and 5] of Directive 2001/29 preclude legislation, such as that [established in Articles L. 134-1 to L. 134-9 of the Intellectual Property Code], that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of "out-of-print books", while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down?'

In its judgment, the ECJ states that under Articles 2 and 3 of Directive 2001/29, Member States shall provide authors with the exclusive reproduction right and the exclusive right of

communication to the public (para. 29). Therefore, ‘subject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work’ (para. 34).

The Court adds that the circumstances in which implicit consent can be admitted must be strictly defined by the legislation so as not to deprive of effect the very principle of the author’s prior consent (para. 37). Therefore, authors must actually be informed of the future use of their work by a third party, and of the means at their disposal to prohibit it if they should so wish (para. 38).

The Court considers that the French legislation does not offer a mechanism to ensure that authors are actually and individually informed, and a ‘mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use’ (para. 44).

The Court therefore ruled that Articles 2(a) and 3(1) of Directive 2001/29/EC must be interpreted as precluding national legislation that gives a collecting society the right to authorise the reproduction and communication to the public in digital form of ‘out-of-print’ books which are no longer commercially distributed, and which are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice.

The French legislation must therefore be corrected so that each author is actually informed beforehand and can oppose the digital exploitation of his work without further formalities.

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