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The Ruling of the Court of Justice in Soulier Revisited

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Following an interlocutory question from the French Council of State, in a dispute concerning the legality of the decree of 27 February 2013 on the application of the law of 1 March 2012 on the digitisation of out-of-print books of the 20th century, the Court of Justice of the European Union (Case C-301-15) rightfully stated that this regulation did not comply with the law of the European Union:

"Article 2(a) and Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of 'out-of-print' books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and 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, on the conditions that that legislation lays down."

The interlocutory petition concerned the interpretation of Articles 2 and 5 of Directive 2001/29. Two authors, Mr Soulier and Ms Doke, joined by the *Syndicat des Écrivains de Langue Française* (SELF – trade union of writers of the French language), argued that the French ruling, by entrusting the right to authorise the reproduction of books in a digital form to a copyright collective society, instituted a limitation not provided for by Article 5.

The French state, like Sofia (*Société Française des Intérêts des Auteurs de l'écrit* – French society for the interests of authors of the written word) contested this position, specifying that the extended or compulsory mechanism of collective management, organised by law, did not harm the very existence of the law since the author could withdraw at any time. This argument relies on the distinction between the existence and exercise of the law, which determines the division of competency between Member States and the European Union.

I – The Extension of the Control of the CJEU on the Terms for Exercising Authors' Exploitation Rights

It seemed apparent that Directive 2001/29 did not concern the exercise of rights and no longer defined the notion of exclusive rights or its content or the terms of a prior authorisation. Now, as the comment by Professor Valérie Laure Benabou *[1]* highlights, "this decision, given in a context

of intense but not exhaustive standardisation, shows that the Court can equally control the obedience of the States as to the definition of the rights retained by the directives as check the conformity of the terms of exercise that accompany it".

As a preliminary observation, the Court points out that the French regulation refers not only to the right of reproduction (Art. 2(a)) for digitisation but also "the right of communication to the public" (Art. 3(1)). Nonetheless, the exploitation of out-of-print books "does not fall within the field of any exceptions or limitations". In paragraph 27, the Court declares: "It therefore follows that Article 5 of Directive 2001/29 appears to be irrelevant for the purposes of the main proceedings."

Unusually[2], the Court relies on the WIPO treaty and more particularly Article 5, paragraph 2, of the Berne Convention to justify extending its control to the conditions of exercising rights. It surmises the principle of the author's prior consent to reproduce or communicate his/her work to the public in the absence of exceptions or limitations. It declares, in fact, that "Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly." (paragraph 35).

The Court consequently limits the State's ability to introduce extended collective management methods, despite this possibility being left to the Member States in preamble no. 18 of Directive 2001/29[3].

II – The Prerequisites of the Author's Implicit Consent

Mindful of protecting the author, the Court points out preamble 9 of Directive 2001/29, fixing "the objective of increased protection of authors"; it intends to supervise the strict conditions of this implicit consent in order "not to deprive of effect the very principle of the author's prior consent".

In paragraph (38), it specifies the conditions of this: "In particular, every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes".

Although French regulations organise information campaigns in the press and on websites in connection with collective management organisations in direct contact with authors of the written word, in their opinion these provisions were insufficient. The aim of these publicity measures was the announcement, each spring, that a new list of out-of-print book titles was likely to be digitised. The author or his/her beneficiary was, thus, invited to consult the Relire register https://relire.bnf.fr/ (a legal database administered by the National library) to exercise their right to oppose the title from entering the collective management regime. This prerogative applied for six months, although the author can "*opt out* or *opt in*" of the digitisation or exploitation process at any time.

"*It does not follow from the decision to refer that that legislation offers a mechanism ensuring authors are actually and individually informed. Therefore, it is not inconceivable that some of the authors concerned are not, in reality, even aware of the envisaged use of their works and, therefore, that they are not able to adopt a position, one way or the other, on it. In those circumstances, a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use.*" (paragraph 43).

Furthermore, it continues, we cannot reasonably presume from lack of objection by the authors, that all the authors of these “forgotten” books are favourable to their “resurrection” in a digital form and for a commercial use (paragraph 44).

Subject to these conditions, it declares in paragraph (45) that Directive 2001/29 does not object to a national law pursuing “an objective such as the digital exploitation of out-of-print books in the cultural interest of consumers and of society as a whole”, but that it could not justify a dispensation not provided for by the legislator of the Union for the guaranteed protection of the authors by this Directive.

To respond to the question of whether the collective management can be “extended” or “made compulsory” *[4]*, the Court replies that it would only be compatible with the right of the Union in two cases, namely when:

- The absence of prior authorisation is provided for by an exception or a limitation. This involves, for example, systems of compensation for private copy use, the right of reprography, the lending right or neighbouring rights;
- Conditions for exercising the right, entrusted to the extended or compulsory collective management, ensure the protection of authors, by guaranteeing that they are informed effectively and in an individualised way about the use of their works.

The question will undoubtedly be asked in these terms in relation to the new French legislation in respect of services such as “Google Image”, anticipating a compulsory collective management implementation system for visual works of art published on a website for the purposes of managing the image referencing automated services (Art. L.136-2 of the Intellectual Property Code).

III – The Conditions for Leaving the Extended Collective Management System

French law is also criticised for having insisted that the author provide proof that he/she is the only holder of the digital right or that he/she acts jointly with his/her editor to be able to remove his/her book from the scope of the licences allocated by the certified copyright collective society (L.134-6 of the Intellectual Property Code).

Claiming in defence the consequences of the HP/Reprobel ruling (12 Nov. 2015, C-572/13) and the Luksan ruling (9 Feb. 2012, C-277/10), which fix the principle of ownership originating from the rights of reproduction and communication of authors, the Court points out the superiority of the right of the author over that of the editor. Thus, the right to withdraw must be able to be exercised by the author, without having to depend on the wish or agreement of his/her editor who moreover only holds the printed rights.

The Court finally recalls that the enjoyment and exercise of the rights cannot be subject to any formality (Article 5.2 of the Berne Convention). Consequently, a ruling consisting of subjecting the author to prior formalities, like proving that other persons are not holders of the digital rights on his/her work, is not permissible.

The CJEU concludes therefore that the French ruling, by entrusting to a certified society the right to authorise the reproduction, communication to the public and digital exploitation of out-of-print books, even if it allows authors or their beneficiaries to object to or end this exercise, is not compatible with Articles 2(a) and 3(1) of Directive 2001/29.

Following this ruling, the Council of State, in its decision of 7 June 2017, decided on a partial quashing of the provisions relating to the terms of withdrawal and objection (Articles R.134-4 to 10 of the Intellectual Property Code). It specified that the retroactive disappearance of these provisions is not "of a kind to challenge the validity of contracts signed under its influence" (§ 7

Council of State, no. 368208, Section of disputes, 10th and 9th divisions reunited). So the Council of State, broadly speaking, upheld the ruling, preserving the public Register of out-of-print books held by the BnF and the digital exploitation of the books by Sofia.

To conclude, having taken this legal action, the authors have obtained a limited quashing of the regulatory ruling associated with this law. But, beyond the particular context of the French law, the ruling of the CJEU reveals that amongst the roles of the European judiciary is guardian of the conditions for exercising the exclusive right. This thereby intends to ensure a high level of protection for authors by allowing them to know the use that shall be made of their works, by "informing them effectively and in an individualised way", even though the difficulty of a massive digitisation collides with the search for beneficiaries at high processing costs.*[5]* This difficulty inherent to a massive digitisation can therefore not be served by a compulsory or extended collective management.

This is unless Directive 2001/29, in the process of being revised, introduces the conditions for a presumed collective management such that a part of the French literary corpus of the 20th century is no longer protected only by oblivion until it falls in the public domain.

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[1] "Why the Soulier and Doke ruling exceeds the Relire case: the control by the CJEU of the author's prior authorisation conditions", CJEU 16 November 2016, Valérie-Laure Benabou, Dalloz IP/IT no. 3 – February 2017, p. 108.

[2] In HP v. Reprobel, 12 November 2015, C-572/13, the CJEU refrained however from invoking the conventional definition of the ownership of the rights defined by the WIPO and WTO treaties recognising the transferee of the rights as holder.

[3] Preamble no. 18 specifies that "this directive does not harm the terms that exist in the Member States concerning the Management of rights, such as extended collective licences". Furthermore, it is Directive 2014/26/EU of 26 February 2014 that in principle standardises the rules applicable to collective management.

[4] Cf., The collective management of the copyrights and the neighbouring rights at a crossroads: must it remain voluntary, can it be extended or made compulsory, Mihaly Ficsor, e bulletin of copyrights, October 1993.

[5] Les paroles s'envolent, les écrits restent (the words fly away, the written word remains), 3 questions to Vincent Montagne, President of the Syndicat National de l'Édition (national publishing trade union), which highlights that this decision of the Council of State puts a huge dampener on the digitisation programme. "What a waste! It however met a need, and Diderot the first to highlight from 1767 in his letter on trade and industry the importance of making books

available that no longer are, but observed the material and financial impossibility of such a project: this is now possible" Electronic communication– monthly review Lexisnexis Jurisclasseur – July – August 2017.

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