

European Copyright Society

Opinion on

**The Reference to the
CJEU in Case C-572/13**

Hewlett-Packard

Belgium SPRL v.

Reprobel SCRL

5 September 2015

ECS position paper on the Opinion of the Advocate General in the case *HP Belgium v Reprobel* pending before the Court of Justice of the EU
(Hewlett-Packard Belgium SPRL v. Reprobel SCRL, C-572/13)

On June 11, 2015, the Advocate-General Pedro Cruz Villalón delivered his Opinion in the *HP Belgium v. Reprobel* case now pending before the Court of Justice of the EU (CJEU, case C-572/13). This Opinion and the underlying case raise one important issue: *Is it permissible for a national copyright law to allocate a portion of the fair compensation for reproductions exempted under Article 5(2)(a) and (b) of the 2001/29 Infosoc Directive directly to publishers, although they are not listed among the initial holders of the reproduction right under Article 2 of the Infosoc Directive?*

As a group of academics concerned about the copyright reforms envisaged in the European Union as well as by the interpretation and development of the law by the CJEU, the European Copyright Society (ECS)¹ takes this opportunity to share its view on this matter of principle.

Copyright law² is linked to the freedom of the authors to create and should remunerate the creative authors in first instance. Therefore copyright law should not grant rights ab initio to persons other than the individual creators. This principle (the “author principle”) applies to the exclusive rights within the copyright bundle. It also applies to any right to remuneration provided by law to compensate for the exempted uses of copyright-protected works. We believe copyright is not the correct instrument by which to confer rights on legal entities to protect their investments. There are many instances where publishers or producers deserve to get an adequate protection, but their protection should derive either from the contracts concluded with the individual creators or by way of a related right granted by law. The ECS believes the Court of Justice of the EU should clearly reaffirm the important principle of initial authorship for creators.³

With respect to the question of the allocation of the right to fair remuneration raised in the HP Belgium v. Reprobel case, the response that the Advocate-General proposes largely

¹ The ECS was founded in January 2012 with the aim of creating a platform for independent and critical scholarly thinking on European copyright law. Members include leading European scholars and academics seeking to promote their views of the overall public interest. The Society is not funded, nor is it instructed, by any particular stakeholders.

² Unless indicated otherwise, ‘copyright’ refers to copyright law in the strict sense (“droit d’auteur” or “authors’ rights”), excluding the system of neighboring or related rights. Copyright includes exclusive rights and remuneration rights.

³ The principle of initial authorship of rights belonging to copyright is compatible with a presumption of transfer of the exclusive rights. Indeed, in some situations, the transfer of the exclusive exploitation rights in favor of a producer can be provided by law, rather than by contracts. For instance this is the case for audiovisual works. Under this approach, the initial grant of exclusive rights benefits the numerous co-authors and the presumption of transfer facilitates the concentration of the rights and the exploitation by the producer.

acknowledges the author principle and, to that extent, the Opinion is welcome. However, by leaving too much leeway to the Member States, some aspects of the Opinion (§132 to 143) might create uncertainty. In particular, the ECS does not think Member States should be free to grant publishers a remuneration right as a related right. This would seriously reduce the harmonizing effect of the 2001/29 Infosoc Directive. In the ECS's opinion, the 2001/29 Infosoc Directive prohibits a system which automatically allocates a part of the fair remuneration for the reprographic or private copies of copyright works to persons other than the authors.

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1. The question of principle addressed to the Court of Justice of the EU in *HP Belgium v. Reprobel*.

This case raises several questions about the way the levy system for reprographic (and private) copies is designed in Belgium. More precisely, the request for a preliminary ruling addressed by the Brussels Court of appeal⁴ includes four questions on the “fair compensation” (or levies) that the Member States are obliged to put in place to compensate for the uses falling under the exception of Article 5(2)(a) (the ‘reprography exception’) and 5(2)(b) (the ‘private copying exception’) of the 2001/29 Infosoc Directive, if a more than *de minimis* prejudice exists. Although several other questions addressed to the Court of Justice in *HP Belgium v. Reprobel* may have important effects in practice, the present opinion only focuses on the third question formulated as follows:

“Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to allocate half of the fair compensation due to rightholders to the publishers of works created by authors, the publishers being under no obligation whatsoever to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived?”

2. The Belgian law and the relevance of the question in other Member States, e.g. Germany.

Belgian copyright law provides that half of the remuneration for reprographic uses is to be distributed to the publishers (the “publishers’ envelope”), while the other half is reserved for the authors (the “authors’ envelope”). There is no mechanism in the law to ensure that the authors benefit in any way from the amounts collected under the publishers’ half. Therefore the Belgian collecting society for reprographic uses (Reprobel), which jointly represents, and acts for, authors and publishers, is under no obligation to transfer any of the money comprised in the publishers’ envelope to the authors. On the contrary, publishers claim that, by signing publishing contracts, the individual authors commonly assign their own right to fair compensation for reprographic and private copying, which in turn increases the part of the remuneration that should benefit the publishers⁵.

⁴ Brussels Court of appeal, 23 Oct. 2013, *Auteurs & Media*, 2015/1, p. 67.

⁵ Belgian law has in the meantime been amended so as to provide for the non-assignable character of the part of the fair compensation due to authors, and the publishers therefore cannot rely anymore on the individual publishing contracts to claim a part of the fair compensation collected by Reprobel (see Article XI.239, 7th

The question raised by *HP Belgium v. Reprobel* is also relevant in Germany, where the allocation rule between authors and publishers is not enshrined in the law, but in the statute of the relevant collecting society (VG Wort). In a case now pending before the Federal Supreme Court (*Bundesgerichtshof*), one individual author has challenged the lawfulness of the practice of VG Wort of allocating a portion of the monies for reprographic uses to the publishers, in particular when the author has first mandated VG Wort to collect the money for reprography before signing individual publishing contracts. On December 14, 2014, the *Bundesgerichtshof* decided to stay the proceedings until the CJEU delivers its judgment in the *HP Belgium v. Reprobel* case⁶.

The decision in *HP Belgium v. Reprobel* might affect the law and practices in other Member States.

3. Under copyright law, there is no legal basis nor justification for allocating an exclusive right or a right of remuneration to a person other than the individual creator.

Rights comprised within copyright should first belong to the individual creators. This principle applies to the exclusive economic rights.⁷ This is confirmed by the wording of Articles 2 to 4 of the Infosoc Directive which grant the main economic rights to “authors.”⁸ Hence the Infosoc Directive embraces the principle that the initial persons vested with the exclusive rights are the authors, in the sense of individual creators. This is in line with a standard justification for copyright which is to reward the individual creators and/or incentivize those individuals to exercise their freedom to create.

It is true that the provisions of Article 5(2)(a) and (b) of the Infosoc Directive that allow Member States to provide, under certain conditions, for a reprography or private copying exception do not explicitly refer to the authors as the beneficiaries of the associated fair compensation. Rather, those provisions allow for the introduction of such exceptions “provided that the *rightholders* receive fair compensation”. The notion of “rightholder” (“titulaire de droits” in French, etc.) is not as such defined under EU copyright law, neither is there a definition of “author.” In line with the basic “author principle” discussed in the previous paragraph it is, however, legitimate to consider that the primary beneficiaries should be the authors as individual creators. Other “rightholders” may include the holders of related rights as defined in Articles 2 and 3 of the Infosoc Directive, i.e. performers, producers and/or broadcasting organisations.

indent of the Economic Law Code). The ECS thinks such approach should be followed by the Member States as long as the assignability of rights is not dealt with at EU level.

⁶ See A. Lucas-Schloetter, *Les éditeurs peuvent-ils percevoir la rémunération pour copie privée ?*, RIDA, janvier 2015, Nr 243, p. 3-99. In the pending German proceeding, the Munich Regional Court (case 6 U 2492/12, 17.10.2013, *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)* 2014, p. 272) held that publishers are not entitled to claim a fifty percent share of the monies collected by VG Wort, relying inter alia on Case C-277/10 *Luksan* ECLI:EU:C:2012:65, paras. 100 et seq.

⁷ The principle also applies to the moral rights which have not been harmonized in the EU.

⁸ Articles 2 (reproduction right), 3 (communication to the public right) and 4 (distribution right) of the Infosoc Directive impose on the Member States the obligation to provide authors with those rights. For instance, Article 2 states that “Member States shall provide for the exclusive right to authorize or prohibit (...) reproduction (...): (a) for authors, on their works”.

The notion of ‘rightholder’ in Article 5(2)(a) and (b) should thus be interpreted as prohibiting a Member State from vesting in publishers the right to receive a share of the fair compensation.

4. The first part of the reasoning of the Advocate-General on the third question (paras. 123 to 131 of the Opinion) is correct and should be confirmed by the Court of Justice.

In his Opinion, the Advocate-General first gives a clear – and we believe correct – interpretation of Article 5(2) of the Infosoc Directive. In the first part of the reasoning (paras. 123 to 131), the Advocate-General supports the view that Article 5(2)(a) of the Infosoc Directive does not allow Member States to allocate a portion of the fair compensation to the publishers if there is no obligation for the publishers to ensure that they pass on this part, directly or indirectly, to the authors (para. 131). To support his reasoning, the Advocate-General relies on the case C-521/11 *Amazon*, where the CJEU ruled that “the fact that a part of the revenue intended for fair compensation under Article 5(2)(b) of Directive 2001/29 is intended for social and cultural establishments set up for the benefit of those entitled to such compensation is not in itself contrary to the objective of that compensation, provided that those social and cultural establishments *actually benefit those entitled*.”⁹ According to the Advocate-General, publishers cannot in any way be assimilated to such social and cultural establishments, neither has it been demonstrated that the remuneration paid to the publishers will actually benefit the authors. On this issue we fully agree with the Advocate-General’s Opinion and we recommend the CJEU to follow the advice of the Advocate-General.

5. The second part of the Advocate-General’s Opinion on the third question (paras. 132 to 143) leaves some ambiguity as to the possibility of Member States creating additional exceptions.

According to the Belgian State, the remuneration paid to the publishers in accordance with Belgian copyright rules has to be qualified as a *sui generis* compensation, that is adopted outside the scope of the Infosoc Directive and pursues an objective relating to cultural policy. The present opinion does not intend to discuss this view here except to question its legal basis, as no reference to an objective of cultural policy can be found in the text of the relevant Belgian provisions nor in the *travaux préparatoires*; in addition, it seems to conflict with the division of competence organized within the Belgian federal State.¹⁰

The Advocate-General considers that the Infosoc Directive does not preclude Member States from establishing a right to specific remuneration in favor of the publishers to compensate them for harm resulting from the marketing and use of reprographic devices. According to the Advocate-General, this specific remuneration could exist “*on the fringes*” of the requirements of the Infosoc Directive (“*en marge de ses prescriptions*”; see para. 138 of the

⁹ CJEU, C-521/11 (*Amazon*), § 53.

¹⁰ The central State which adopted the Belgian copyright law (now included in the Economic Law Code) has no general power for defining a cultural policy, only the federalized entities have this power.

Opinion), provided that it does not negatively affect the fair compensation due to authors in accordance with Article 5(2)(a) and (b) (para. 143 of the Opinion).

We share the above view in so far as it is interpreted in a restrictive way, namely that Member States remain free to put in place special compensation mechanisms *outside copyright law* only (e.g. as a cultural supporting measure for the publishers in the book chain), and only provided that it does not negatively impact the authors' fair compensation.

In addition, in the current state of EU law, recital 19, Article 5, and Art 11(1) of the Term Directive allow Member States to maintain or introduce related rights for publishers. However, in the long term, such optional related rights are undesirable in so far as they create divisions within the internal market and render the law excessively complex. Another argument against such a nationally granted related right for publishers would be that such related right for publishers may negatively affect what authors can obtain as the fair compensation is arguably capped by the level of harm resulting from the exempted copies.

In the ECS opinion, the second part of the Advocate-General's answer to the third question leads to ambiguity regarding the principle that Member States may set up a compensation system for publishers within copyright. On this, the answer of the Advocate-General could be interpreted as favoring the creation of additional related rights which will have undesirable results and are likely to further fragment the internal market.

6. The ECS invites the Court of Justice to rely on its *Luksan* decision and to thus solely confirm the first part of the Advocate-General Opinion (§123 to 131) and to reject the possibility of creating a related right for publishers.

In case C-277/10, *Luksan*, the CJEU has given an interpretation of Article 5(2)(b) of the Infosoc Directive that is consistent with our opinion.

For the Court, the principal director of a film, "in his capacity of *author* of a cinematographic work", is one of the "rightholders" under Article 5(2)(b) and "*must, consequently, be regarded as a person entitled by operation of law, directly and originally, to fair compensation payable under the private copying exception*" (*Luksan*, para. 94). A similar reasoning is made in respect of film producers. Such a producer, i.e. "the person responsible for the investment necessary for the production of the work", must be regarded as a "*holder, by operation of the law, of the reproduction right*" under Article 2 (d) (para. 92). From this, the court subsequently concludes that the producer can be considered a "rightholder" of the fair compensation.

Hence, the Court thus suggests that (any other) rightholder of the fair compensation should belong to the list of the initial beneficiaries of the reproduction right under Article 2 of the Infosoc Directive. Entities which are not "holders by operation of law" of a reproduction right arguably cannot be the initial beneficiaries of the fair compensation.

The Court adds that in the Member States which have decided to establish the private copying exception, "*the rightholders concerned must, in return, receive payment of fair compensation. It is clear from such wording that the European Union legislature did not wish to allow the persons concerned to be able to waive payment of that compensation to them*"

(paras. 100 and 105). For the Court, the principle of effectiveness (“effet utile”) and the obligation for the law to achieve a certain result require that the fair compensation for the rightholders is “*actually recovered*” (para. 106). Therefore a system providing that half of the remuneration for reprographic uses is automatically allocated to the publishers, which do not belong to the “*holders, by operation of law*” of a reproduction right under Article 2 of the Infosoc Directive, is not compatible with EU law. The claim of publishers to get half of the collected amounts could neither be founded on a presumed or actual transfer of the right to fair compensation from authors as the Court of Justice, in the *Luksan* decision, makes a clear case in favour of a non-transferable right to fair compensation (para. 109). Nothing suggests that the reasoning of the court, made under Article 5(2)(b) of the Infosoc Directive (for private copying) in *Luksan* could not be transposed to Article 5(2)(a) of the Directive (for reprography) in *Reprobel*.

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On behalf of the European Copyright Society:

Prof. Lionel Bently
Director, Centre of Intellectual Property and Information Law (CIPIL), University of
Cambridge, United Kingdom

Robert Clark,
Emeritus Professor, University College, Dublin

Prof. Estelle Derclaye
Professor of Intellectual Property Law, University of Nottingham, United Kingdom

Prof. Séverine Dusollier
Professor, Sciences-Po, Paris, France

Prof. Christophe Geiger
Director, Centre d'Etudes Internationales de la Propriété Intellectuelle (CEIPI), University of
Strasbourg, France

Jonathan Griffiths
School of Law, Queen Mary University of London, United Kingdom

Prof. M-C. Janssens
Professor Intellectual Property Law, University Leuven (KU Leuven), Belgium

Prof. Axel Metzger
Humboldt-Universität, Berlin, Germany

Prof. Dr. Alexander Peukert
Goethe-Universität Frankfurt am Main, Germany

Prof. Marco Ricolfi
Chair of Intellectual Property, Turin Law School, Italy

Prof. Ole-Andreas Rognstad
Professor of Law, University of Oslo, Norway

Prof. Martin Senftleben
Professor of Intellectual Property, VU University Amsterdam, Netherlands

Prof. Alain Strowel,
Professor, Faculties of Law of the University Saint-Louis in Brussels and of the Catholic
University of Louvain, Belgium

Prof. Michel Vivant
Head of the "Innovation Law" Speciality, Sciences Po Law School, Paris, France

Prof. Raquel Xalabarder
Chair on Intellectual Property, Universitat Oberta de Catalunya, Barcelona, Spain.