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Jurius

Copyright Directive Precludes National Legislation

ECJ – The copyright directive precludes national legislation authorising the digital reproduction of out-of-print books in breach of the exclusive rights of authors. National legislation must guarantee the protection accorded to authors by the directive and ensure, in particular, that they are actually informed of the envisaged digital exploitation of their work, while being able to put an end to it without formalities. (Judgement C-301/15)

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[Rz 1] In France, out-of-print books' are defined as books published before 1 January 2001 which are no longer commercially distributed or published in print or in a digital format. According to the French legislation, an approved collecting society, the SOFIA, is responsible for authorising the reproduction and communication, in digital form, of out-of-print books, it being understood that the authors of those books or their successors in title may oppose or put an end to the exercise of those rights under certain conditions.

[Rz 2] Two French authors (Marc Soulier, who is better known as Ayerdhal and has since died, and Sara Doke) requested the annulment of a decree specifying certain aspects of the French legislation, claiming that that decree is not compatible with the copyright directive.[1] In particular, those authors submit that the French legislation establishes an exception or limitation, not provided for in the directive, to the exclusive rights guaranteed to authors by the directive. The Conseil d'État français (French Council of State), before which the case has been brought, has referred a question to the Court of Justice on this subject.

[Rz 3] In its judgment, the Court of Justice notes that, subject to the exceptions and limitations expressly provided for in the directive, authors have the exclusive right to authorise or prohibit the reproduction and communication to the public of their works.

[Rz 4] However, it holds that the prior consent of an author to the use of one of his works can, under certain conditions, be expressed implicitly. For the existence of such consent to be accepted, the Court considers, in particular, that every author must be informed of the future use of his work by a third party and of the means at his disposal to prevent it if he so wishes.

[Rz 5] The French legislation, as it currently stands, provides that the right to authorise the digital exploitation of out-of-print books is transferred to the SOFIA when the authors do not oppose it within a period of six months after the registration of their books in a database established to that effect. The Court states that the Conseil d'État has not shown that this legislation included a mechanism ensuring authors are actually and individually informed. It is not therefore inconceivable, according to the Court, that some of the authors concerned are not aware of the envisaged use of their works and, consequently, are not able to adopt a position on it. In those circumstances, a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to the use of their works, especially since it cannot reasonably be presumed that, without opposition on their part, every author of forgotten' books is in favour of the resurrection' of those works, in view of their commercial use in a digital format. The Court adds that the pursuit of the objective enabling the digital exploitation of out-of-print books in the cultural interest of consumers and of society, while compatible with the directive as such, cannot justify a derogation not provided for by the EU legislature from the protection that authors are ensured by the directive.

[Rz 6] Furthermore, the Court states that the French legislation enables authors to put an end to the commercial exploitation of their works in digital format either by mutual agreement with the publishers of those works in printed format or alone, on condition that they provide evidence that they alone hold the rights in their works. The Court declares, in this respect, that the right of the author to put an end to the future exploitation of his work in a digital format must be capable of being exercised without having to depend on the concurrent agreement of persons

1 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 (OJ 2001 L 167, p. 10).

other than those to whom the author had given prior authorisation to proceed with such a digital exploitation and, thus, on the agreement of the publisher holding only the rights of exploitation of that work in a printed format. Moreover, the author of a work must be able to put an end to the exercise of rights of exploitation of that work in digital format without having to submit beforehand to any additional formalities.

Judgement of the ECJ C-301/15 of 16 November 2016 in case Marc Soulier and Sara Doke v. Premier ministre and Ministre de la Culture et de la Communication

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