Court of Justice of the European Union: Hewlett-Packard Belgium v. Reprobel

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Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

On 12 November 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in Hewlett-Packard Belgium v. Reprobel, which was a preliminary ruling on the interpretation of "fair compensation" under Articles 5(2)(a) and 5(2)(b) of Directive 2001/29/EU (the "InfoSoc Directive"). The case arose in Belgium, when a collective rights management organisation, Reprobel, requested that Hewlett-Packard pay a EUR 49.20 levy for every "multifunction printer" it sold. The dispute reached the Brussels Court of Appeal (Cour d'appel de Bruxelles), which referred a number of question to the CJEU.

Article 5(2)(a) provides that member states may provide for exceptions to the reproduction right "in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation". Article 5(2)(b) provides for another exception "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation".

The first question was whether, when interpreting the term "fair compensation" in Article 5(2)(a) and Article 5(2)(b), it is necessary to draw a distinction between (a) the making of reproductions by natural persons for private use and for ends that are neither directly nor indirectly commercial and (b) the making of reproductions by natural persons but for a use other than private use or for ends that are directly or indirectly commercial or the making of reproductions by other categories of users. The Court ruled that "since the harm suffered by the rightholders in each of those situations is not, as a general rule, identical", it followed that such a distinction should be drawn.

The second question answered concerned whether the above articles precluded national legislation, such as the Belgian legislation, which authorises a member state to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, with the publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived. The Court first noted that publishers are not among the reproduction rightholders listed in Article 2 of the

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Directive. Moreover, “publishers do not suffer any harm” for the purposes of the reprography exception and the private copying exception. It followed, according to the Court, that publishers cannot receive compensation under those exceptions when such receipt would have the result of depriving reproduction rightholders of all or part of the fair compensation to which they are entitled under those exceptions.

Finally, the Court ruled on whether Article 5(2)(a) and Article 5(2)(b) preclude legislation which combines, in order to finance the fair compensation granted to rightholders, two forms of remuneration: first, lump-sum remuneration paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, the amount of which is calculated solely by reference to the speed at which such devices are capable of producing copies; and second, proportional remuneration, recovered after the reproduction operation, determined solely by means of a unit price multiplied by the number of copies produced, which also varies depending on whether or not the person liable for payment has cooperated in the recovery of that payment, which, in principle, is to be made by natural or legal persons who make copies of works. The Court held that “a combined system of remuneration of that kind must include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum in respect of different categories of users”.

Judgment of the Court (Fourth Chamber) in Case C-572/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL, 12 November 2015

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