Court of Justice of the European Union: Soulier and Doke v. Premier ministre

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On 16 November 2016, the Court of Justice of the European Union (CJEU) delivered a judgment concerning compliance of French legislation with the Copyright Directive (Directive 2001/29/EC), namely the right of reproduction under Article 2 and the communication to the public under Article 3(1) in the case of "out-of-print books". The CJEU examined whether the consent to authorise acts regulated in Article 2 and 3(1) of the Copyright Directive can be expressed not only by author but also by approved Collective Management Organisations (CMOs) with regard to commercial exploitation of books that are not published anymore. The case was initiated by writers Ms Doke and Mr Soulier and, later on, several institutions and other 35 natural persons intervened in the proceeding.

According to the Intellectual Property Code (the Code) an "out-of-print book" is a book published in France before 1 January 2001, which is no longer commercially distributed or published in print or digital format. The Code provisions established the legal framework for digital and commercial exploitation of those books that are laid down in the Decree No. 2013-182. Provisions of the Decree allowed approved CMOs to give an authorisation for reproduction and digital exploitation after a period of six months of registration in the database of "out-of-print books". The author or publisher of such a book may oppose in advance the authorisation given by CMOs within a period of six months after the date of registration. Following the expiration of that period, the author's written work will be available in a digital format for commercial exploitation. All incomes collected in this manner will be used to support cultural and creative initiatives in accordance with the Decree. The applicants claimed that the Decree should be annulled because it is not in accordance with the Copyright Directive.

After the national court dismissed all pleas that were not related with Articles 2, 3, and 5 (exceptions and limitations), the Court concluded that examination of the case depends on the interpretation of those articles. Therefore, the Court requested a preliminary ruling on whether a Member State is precluded from establishing a system which gives approved CMOs the right to authorise reproduction or communication to the public of the "out-of-print books" while allowing authors or successors to oppose such a practice.

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The CJEU firstly stated that current case does not fall within the scope of any of exceptions and limitations since the list of exceptions in the Copyright Directive is exhaustive in nature. Thereby, the CJEU stated, Member States may not adopt additional exceptions other than those listed in the Article 5.

The CJEU noted that in principle the rights of reproduction and communication to the public are exclusive rights, preventive in their nature in the sense that prior consent of the author is required for any use of his or her work, within the meaning of Article 2 and 3(1). These rights are not only limited to enjoyment but also extend to the exercise and should be broadly interpreted. The Copyright Directive does not prohibit granting certain rights and benefits to third parties, such as publishers, on the condition that this does not cause harm to authors' exclusive rights.

In the view of the CJEU, consent can be given either explicitly or implicitly, since the Copyright Directive does not specify the way in which consent should be expressed. The implicit consent must be defined narrowly in order "not to deprive of effect the very principle of author's prior consent". Additionally, every author must be informed of the usage of his work and means to prohibit it. A mechanism of informing authors does not follow from the French legislation in question and "a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use". Having regard to the principles, the CJEU concluded that national legislation is precluded from conferring a right to approved CMOs to authorise reproduction and communication to the public of the "forgotten" books, while allowing authors to oppose such a practice. This particular context precludes Member States from presuming that lack of opposition is a mark in "favour of the resurrection" of works in terms of their commercial use in digital format.

Judgment of the Court (Third Chamber) in Case C-301/15 Marc Soulier and Sara Doke v Premier Ministre, Ministre de la Culture et de la Communication, 16 November 2016

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