Max Planck Institute
for Innovation and Competition

Copyright exceptions and limitations in the digital age – e-lending after the Stichting leenrecht case of the CJEU

Copyright in the Digital Age
WIPO and HIPO
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Overview

1. Background of the case and preliminary questions to the CJEU
2. Development of arguments by the CJEU
3. Evaluation of judgment
4. Consequences for national law?

1. Background of the case and preliminary questions

- Dutch draft law on creation of national digital library for digital lending of e-books, based on premise that e-lending not covered by lending exception under Dutch copyright law

- Dutch Public Libraries' Association seeks court declaration that e-lending is covered under that exception

- District Court, The Hague, refers four questions to the CJEU, in particular, whether lending provisions of Directive 2006/115 (including possibility of exception to exclusive right) cover e-lending **under specific conditions** (comparable to analog lending) (constructed case; suggestive question – what, if question put differently?!)

2. Development of arguments by the CJEU

- Art. 1(1) “does not specify whether ... concept of copies … also covers copies which are not fixed in a physical medium, such as digital copies” [but: traditional understanding/terminology!]

- International law: Art 7 WCT, Agreed Statement: rental [and distribution] right only apply to tangible objects (recital 35!)
- But it does not necessarily follow that EU legislature wanted to give same meaning to ‘copies’, ‘objects’ when applying to rental or lending (?!)

- WCT does not preclude applying lending right to be applied to e-lending

2. Development of arguments by the CJEU

- Commission's preparatory work : does not support conclusion that digital lending should be excluded in all cases from Directive 20016/115
- Although: Commission explicitly mentions desire to exclude e-lending – but (CJEU): Commission only mentions films – not necessarily valid for books (recital 42) (counter arguments!)
- Objective (recital 4 of Directive – understood differently)
- Recital 46 – contradictory (Art. 3 InfoSoc!)
- "No decisive ground allowing for exclusion" of e-lending from Directive 2006/115 [means: possible, but not necessary to interpret as included?]

2. Development of arguments by the CJEU

- Exception/Derogation under Art. 6 Directive 2006/115

  - To be interpreted strictly
  - “Cannot be ruled out” that it “may apply” where e-lending has essentially similar characteristics to lending of printed works (as in case before court)
  - Result (recital 54 - answer to precise question, not general statement)

3. Evaluation of judgment

- Does judgment mean that, if “e-lending” does not have essentially similar characteristics to lending of printed works, it is not lending?

- Systematically correct interpretation would be:
  - activity described in preliminary question is “making available” (Art. 3 InfoSoc Directive) (exploitation in non-tangible form:
  - Legislature has to decide, whether to provide and exception/limitation and under what conditions (possible addition to Art. 5 InfoSoc)

- What would be result if preliminary question asked: whether activity is covered by Art. 3 InfoSoc?
- At least: chance that CJEU will respect WCT (no “e-rental”/ “e-sale”)

4. Consequences for national law?

- Possible to classify “e-lending” as making available under national law
- According to Court: possible to apply derogation from exclusive right, if at least authors are granted right to remuneration, under the specific conditions of the case
- Accordingly: national law may
  - keep exclusive right, as done so far in EU MS (understanding, that it is making available) (Art. 1 Directive 2006/115)
  - or choose to apply a derogation under conditions of Art 6 Directive 2006/115
- Question: how to tackle case of circumvention of TPM that make “e-lending” different from lending of printed books? (eg. Enabling ever-lasting copy)?

Thank you for your attention!

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