

IFRRO Comments regarding the European Copyright Society’s Opinion on Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*

On June 11, 2015, the Advocate-General (AG) *Pedro Cruz Villalón* delivered his Opinion in Case C-572/13, *Hewlett-Packard Belgium v. Reprobel* ([here](#)). The case, which is still pending before the EU Court of Justice (CJEU), raises, *inter alia*, an important issue, namely: “*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 Information Society Directive directly to publishers, although they are not listed among the initial holders of the reproduction right under Article 2 of the Information Society Directive?*” While the Opinion of the AG is non-binding, the CJEU is expected to publish its decision by the end of 2015.

The International Federation of Reproduction Rights Organisations (IFRRO, www.ifro.org) has noted the opinion of the European Copyright Society regarding the reference to the CJEU in Case C-572/13, *Hewlett-Packard Belgium v. Reprobel* (available [here](#)). Although we would have liked to comment on several points raised in that document, we shall limit our observations here to the right of publishers to receive a share of the collected remuneration / compensation for the use of text- and image-based (TI) works.

We hold that the opinion expressed by the European Copyright Society regarding the publishers’ share is unsubstantiated, without any form of, or references to, legal analysis. We are also of the opinion that it conflicts with the international legal framework (including the Berne Convention, and especially the three-step-test laid down therein), and breaches longstanding legal and contractual arrangements between authors and publishers. Moreover, it is contrary to arrangements and traditions established and practised since the first establishment of collective rights management in the TI sector – the Reproduction Rights Organisations (RROs) – more than 40 years ago, regardless of the system under which they operate. The fundamental basis of collective rights management in the TI sector is that both authors and publishers are entitled to receive a portion of the remuneration / compensation. This is also consistent with the IFRRO Statutes, which require that RRO members represent both authors and publishers, and that these grant both categories of rightholders adequate representation on their governing bodies. In this vein, numerous IFRRO submissions to the European Commission on draft legislation, which led to the adoption of the EU Information Society Directive 2001/29 (“Infosoc Directive”) in 2001, uncontestedly, referred to ‘rightholder’ as a generic term for authors and publishers, who should both be entitled to a part of the remuneration / compensation when copies are made from an already published work.

Publishers are “rightholders”, in accordance with EU and international law

The European Copyright Society states that: “(...) *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. 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.*” And: “*The notion of “rightholder” (...) is not as such defined under EU copyright law, neither is there a definition of “author. (...) 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.*”

IFRRO believes that publishers are to be considered as “rightholders” according to Art. 5(2)(a) and (b) of the Infosoc Directive. Art. 2 of the Infosoc Directive harmonises the reproduction right for authors, artists, producers and broadcasting companies, ensuring the legal protection of the creative authors’ process and his / her financial investments (*cf.* Recital 19). Recital 30 also stresses that the right can be assigned. EU Member States have a wide margin of discretion; they are free to maintain or establish supplementary remuneration systems (*cf.* Recitals 35, 36). Member States are also allowed to go beyond the minimum harmonisation of the Infosoc Directive.

The Infosoc Directive confines the reproduction right to the author (Art. 2) and indicates in Art. 5(2), as in Recital 35, that rightholders should receive fair compensation. IFRRO does not see this as a contradiction, but rather as a clarification, permitted by the terminology: using two different terms, the Directive embodies the idea that the author *and* the publisher may receive appropriate remuneration / compensation for the reproduction of their works.

Remarkably, in Art. 5(2)(a), (b) and (e) of the Infosoc Directive, in contrast to Art. 2, the EU legislator therefore used the term “rightholder” for all possible beneficiaries – as a deliberately neutral, generic term. There is a reason why Art. 2-4 use the term “author”, whilst Art. 5(2)(a) and 5(2)(b) refer to the “rightholder”. Also the European Copyright Society seems to accept that the notion “rightholder”, as used in 5(2)(a) of the Infosoc Directive, goes beyond the notion of author as the original creator of the work (in Art. 2 of the Infosoc Directive).

A broader understanding of the term “rightholder”, i.e. including other beneficiaries than authors, can also be derived from Recitals 37 and 38 of the Infosoc Directive; the legislator explicitly recognised the national rules of reprographic remuneration and distribution as already in existence in 2001. At the time of the approval of the Directive, the concept of remuneration / compensation of both authors and publishers already existed. It was a long-established practice and a fundamental basis for the work of RROs that remuneration / compensation for reprographic reproduction of fragments of already established works authorised under licensing or remuneration schemes administered by RROs, including for private use, could be shared between authors and publishers. Recital 37 of the Infosoc Directive found the existing reprographic remuneration systems as being in compliance with Internal Market rules.

Furthermore, upon approval of the Infosoc Directive, several countries had already set the revenue split between the author and the publisher in their legislation. Never has any EU institution alleged that the legislation of the countries concerned did not comply with the Directive or any other Community legislation. Nor were any objections raised when the author-publishers split was established and fixed in the Statutes of several RROs operating in the EU.

The European legislator thus did not object to rules remunerating publishers as well. Indeed, excluding publishers from the compensation / remuneration scheme would lack objective reasons and would be discriminatory, thereby infringing Art. 20 of the EU Charter of Fundamental Rights. Granting, to the publisher, the right to receive compensation for the uses covered by Art. 5(2)(a) and 5(2)(b) of the Infosoc Directive, is also in harmony with the Berne Convention and TRIPS, to which Recital 44 of the Infosoc Directive refers (*i.e.*, to treat publishers as “rightholders”). The Berne Convention (in Art. 2(4)) and TRIPS (in Art. 9) protect authors, legal successors and also “other rightholders of exclusive rights”.

Undoubtedly, the “three-step” test, as enshrined in international law and in Art. 5(5) of the Infosoc Directive, is also applicable to publishers.

In the recent EU Collective Rights Management Directive 2014/26 (adopted on 4 February 2014), the term “rightholder” explicitly includes publishers, and is defined, in Art. 3 c), as “any person or entity, other than a collective management organization, which holds a copyright or a related right or rights which an operating agreement or the law confers a share of revenues from rights”. The broad interpretation of the term “rightholder” is also highlighted in Recitals 2 and 5 of the same Directive.

Against this background, the notion of “rightholder”, as used also in Directive 2014/26, should have the same transversal meaning – for reasons of consistency and legal certainty –, contrary to the European Copyright Society’s argument that the notion of “rightholder” is not defined under EU law.

Publishers are entitled to a share of the TI remuneration

The European Copyright Society further continues 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.” It refers to case C-277/10, *Luksan*, where the CJEU has given an interpretation of Article 5(2)(b) of the Infosoc Directive that: “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 (...).”

This conclusion, as expressed by the European Copyright Society, is, in our view, not accurate. In *Luksan*, the CJEU ruled that European law must not conflict with the Berne Convention. In particular in the TI sector, any exception or limitation is economically harmful to both authors and publishers.

Also, the understanding that remuneration rights could not be transferred, would infringe Art. 20 of the EU Charter of Fundamental Rights. In line with Dr. *Nikolaus Kraft* (see: [IFRRO synopsis](#) and [Dr. Kraft's article](#)), IFRRO would like to recall that there is a difference between “inalienability” and “non-transferability” of rights. The *Luksan*-ruling also makes a distinction between both terms: although a “*cessio legis*” on behalf of the producer would be in opposition to the Infosoc Directive, a legal assumption would not be so. Authors shall be protected from waiving claims without monetary compensation. In the same vein, the AG, in *Hewlett-Packard Belgium v. Reprobel*, does not preclude legal successors from the claim to receive fair remuneration.

When creating the Infosoc Directive, the European legislator recognised the different legal situations, practices and traditions in the European Member States. Even when it is argued that publishers are not “rightholders” on the basis of Art. 5(2)(a) Infosoc Directive, EU Member States are not obliged to provide for a prohibition of transfer of rights under the law of obligations. Member States are even allowed to go beyond the provisions foreseen in Art. 5(2) Infosoc Directive, and to legally establish remuneration rights for publishers. In any

case, publishers must be entitled to a share of the TI remuneration based on the distribution rules of the local RRO. This was also acknowledged in the AG's Opinion in *Hewlett-Packard Belgium v. Reprobel*.

Publishers receiving a share of reprography collection is common practice throughout the EU

It should also be emphasised that, with respect to TI works, both authors and publishers are crucial with respect to their creation and publication. In terms of exceptions and limitations to the exclusive right, both suffer equally from an economic disadvantage. They should both be compensated or remunerated in this regard.

All over Europe, it is common practice that publishers receive a share of reprography proceeds as a remuneration or compensation for their own harm, either on the basis of law / regulation, contractually and / or on the basis of the RRO's statutes or distribution rules. When copies are made from an already published work, both the author and publisher of the work suffer a loss. Also, the additional income publishers derive from compensation or remuneration for the reproduction of their works, is economically important, allows for investments (including in digital content and exploitation), and sustains and fosters cultural diversity in the EU, since said income is particularly important for works with limited readership (*e.g.* academic works; *see*: PwC study, March 2012, [here](#)).

In this vein, both authors and publishers are interested in the collective management organisation's distribution rules being a mirror of the reality. Distributing a share to publishers via collective management is, since several years, common practice in many EU Member States. Belgium, Bulgaria, Spain, Estonia, Greece, Hungary, Lithuania, Poland, Portugal, Czech Republic, Romania and Slovenia have even provided for a publishers' share by law. Most of these provisions were in existence a long time before the Information Society Directive 2001/29/EC entered into force.

In conclusion

The purpose of the provisions and the terminology of the *acquis* in Directives 2006/115, 2001/29 and 2001/84, in addition to the recent Directive 2014/26, indicate that publishers are "rightholders", entitled to a share of remuneration / compensation. Any other view would conflict with both EU law and the binding rules of international law.

If, nonetheless, publishers were no longer entitled to a share of reprography revenue (either on the basis of the law / a regulation, on the basis of contractual arrangements, or the RRO's statutes and rules of distribution), this would endanger the whole collective management system and the long-standing arrangements in the TI sector. It would jeopardise the solidarity between authors and publishers, at the heart of the publishing sector.

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