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**GLOSS TO THE JUDGMENT OF THE COURT OF JUSTICE OF THE
EUROPEAN UNION OF 16.11.2016 IN CASE C-301/15²³**

SUMMARY:

The gloss concerns the judgment of the Court of Justice of the European Union of 16.11.16 2016 in case C-301/15, which ruled that Articles 2(a) and 3(1) of 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 must be interpreted as precluding national legislation which entrust an organisation authorised to collect and distribute copyright revenue with the exercise of the right to authorise the reproduction and public digitalisation of 'out-of-commerce' books which are no longer commercially distributed or published in printed or digital form, even though it also allows the authors of or rightholders to those books to object to the said exercise.

KEYWORDS:

copyright and related rights; information society; unavailable books; reproduction; communication to the public; digital form

1. THESIS OF THE DECISION

Articles 2(a) and 3(1) of 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

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² www.curia.europa.eu, accessed on 20.1.2017.

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information society must be interpreted as precluding national legislation which entrust an organisation authorised to collect and distribute copyright revenue with the exercise of the right to authorise the reproduction and public digitalisation of 'out-of-commerce' books which are no longer commercially distributed or published in printed or digital form, even though it also allows the authors of or rightholders to those books to object to the said exercise.

2. FACTS OF THE DECISION

The glossed judgement was given in response to the question referred for a preliminary ruling from the Conseil d'État (Council of State, France) in the proceedings between Marc Soulier, Sara Doke and Prime Minister, Ministre de la Culture et de la Communication, on the interpretation of Articles 4 and 5 of 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 society⁴ (hereinafter 'the Directive') in view of the validity of Decree No 2013-182 of 27 February 2013 on the application of Article L.134-1-L.134-9 of the French Intellectual Property Code concerning the digital use of books not available from the 20th century⁵ (hereinafter referred to as the Decree).

In the main proceedings, the Applicants brought an action for annulment of the Decree on the ground of misuse of powers. In their view, the French Intellectual Property Code was incompatible with the cases listed in the Directive, which allowed limitations and exceptions to the right to authorise the reproduction of a work protected by copyright. Articles from L. 134–1 to L.134–9 of the Intellectual Property Code established a legal framework to make books defined as 'not accessible' available again by arranging for their commercial use in digital form. On the other hand, Decree No. 2013–182- specified the detailed rules for the application of these provisions. The applicants submitted that, in particular, Articles L. 134–1 to Article L. 134–9 of the Intellectual- Property Code provides for an exception or limitation to the exclusive reproduction right stipulated in Article 2(a) of Directive 2001/29, which is not among the exceptions or limitations listed exhaustively in Article 5 thereof.

The referring court rejected all the applicants' pleas in law in the main proceedings, but those under Articles 2 and 5 of the Directive. With regard to the latter, it states that the ruling must be preceded by a determination as to whether the Directive precludes national legislation from allowing organisations authorised to collect and distribute fees to exercise the right to authorise the reproduction and digital presentation of 'out-of-commerce books', while preserving the rights of the authors of or

⁴ OJ C 2001, L 167, p. 10

⁵ Journal officiel de la République française of 1 March 2013, p. 3835.

rightholders to those books to object to such exercise or to prevent it under the conditions laid down therein.

3. OPINION OF THE ADVOCATE GENERAL

In his opinion of 7 July 2016, the Advocate General stated that he did not deny the legitimate objective of bringing forgotten books to life, if necessary via new technologies⁶. However, he suggested that when deciding on the case, the Court should bear in mind the objectives of the Directive and consider that Articles 2(a) and 3(1) of the Directive preclude rules such as those laid down in Articles L. 134–1 to L. 134–9 of the Intellectual Property Code, from entrusting accepted organisations authorised to collect and distribute copyright revenue with the exercise of the right to authorise the reproduction and digitalisation of 'out-of-commerce books', even though it allows the authors or rightholders to those books to object to that exercise or to prevent it under the conditions laid down therein.

In support of his stance, the Advocate General emphasised that the use of a digital version of a book in such a way that it is accessible to all requires making it available to the public and constitutes communication to the public within the meaning of Article 3(1) of the Directive. Consequently, the digital use of books protected by copyright constitutes "reproduction" and "communication to the public" of a work which require separate and individual authorisation from the author, unless those activities fall within the scope of the exception or limitation provided for in Article 5 of the Directive⁷.

The Advocate pointed out that the system of exceptions and limitations is strictly governed by Article 5(5) of the Directive, which provides for the possibility to "apply such exceptions and limitations only in certain specific cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder"⁸ and cannot be interpreted broadly in the legislation of the Member States.

In the view of the Advocate General, Articles 2(a) and 3(1) of the Directive require the 'express and prior' consent of the author to 'any reproduction or communication to the public' of his work, including in digital form. The author's prior express consent to the reproduction or communication to the public of his work may not be revoked, implied or limited by replacing it by tacit consent or a

⁶ www.curia.europa.eu, accessed on 20.1.2017.

⁷ Similarly, CJEU judgment of 27.2.2014, OSA (C351/12-, EU:C:2014:110, para. 36).

⁸ CJEU judgment of 12.9.2006, Laserdisken (C–479/04, EU:C:2006:549, para. 79).

presumption of transfer of rights, which he must oppose within a specified period and under the conditions provided for by national law, unless authorised by Community law.

4. JUDGMENT OF THE COURT OF JUSTICE

The Court of Justice (hereinafter the CJEU) shared the view of the applicants and the Advocate General that Articles 2(a) and 3(1) of the Directive preclude national legislation from entrusting an organisation authorised to collect and distribute copyright levies to exercise the right to authorise the reproduction and digital communication to the public of 'out-of-commerce' books which are no longer commercially distributed or published in printed or digital form, even though it also allows the authors of or rightholders to those books to object to such reproduction.

In the grounds for its judgment, the CJ stated that Articles 2(a) and 3(1) of the Directive provide respectively that Member States shall grant authors the exclusive right to authorise or prohibit direct or indirect reproduction of their works by any means or in any form, and the exclusive right to authorise or prohibit communication to the public of their works. The protection afforded to authors by these provisions must be broad in scope. That protection must be interpreted in particular as meaning that it is not limited to the possession of the rights guaranteed by Articles 2(a) and 3(1) of the Directive, but also extends to the exercise of those rights. This stance is in line with the Berne Convention and its implementation is the objective of the Directive.

Subject to the exceptions and limitations exhaustively provided for in Article 5 of the Directive, any use of a work by a third party without such prior consent must be regarded as an infringement of the copyright in that work⁹. The objective of high level of protection referred to in recital 9 of the Directive requires that the conditions under which implied consent may be allowed be strictly defined so as not to render meaningless the very principle of prior author's consent. In particular, each author must be effectively informed of the intended use of his work by a third party and of the means available to him to oppose it if he so wishes. In the absence of prior effective communication of such intended use, the author is not in a position to take a stance on that use and, consequently, to prohibit such use if necessary, so that the mere existence of his implied consent in that regard remains purely hypothetical. Consequently, in the absence of guarantees to ensure that authors are effectively informed of the intended use of their works and of the means available to them to prohibit such use, they cannot indeed take a stance on such use at all.

⁹ Similarly, the CJEU judgment of 27.3.2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, paras. 24, 25.

According to the Court, it is not apparent from the provisions of the French Intellectual Property Code concerning the digital exploitation of books out-of-commerce in the 20th century that a mechanism to guarantee effective and personalised information for authors has been set up. It is therefore not excluded that in fact some of the authors concerned are not even aware of the intended use of their works and are therefore not in a position to take any stance on this issue, either in favour of or against such use. In these circumstances, the mere absence of opposition on their part cannot be considered as implicit consent to such use.

The Court points out that the Directive does not preclude national legislation, such as that at issue in the main proceedings, from pursuing, in the cultural interests of consumers and society in general, an objective such as the digital exploitation of out-of-commerce books. However, the attainment of those objectives and interests cannot explain an departure unforeseen by the European Union legislature from the protection afforded to authors by that directive. Although the Directive does not prevent Member States from granting certain additional rights or specific advantages to third parties such as publishers, this can be done on condition that such rights and advantages do not infringe the exclusive rights which the Directive confers on authors¹⁰.

The author of a work must be able to put an end to the exercise by a third party of his rights in that work to digital exploitation and thus prohibit that third party from making any future use of that work in that form, without having to carry out, in certain predefined cases, the formalities of demonstrating that others are not the holders of other rights in that work, such as rights relating to its use in a printed-out form.

5. COMMENTS

The challenge to ensure the protection of authors' rights is nothing new. Still, amidst widespread digitisation, intensified efforts are necessary to effectively protect copyright. In the European Union, author's rights are classified as a fundamental right, a type of property right which may be limited solely in exceptional circumstances. This is confirmed by the interpretative views expressed in the case law of the Court of Justice of the European Union under Article 17(1) of the Charter of Fundamental Rights of the European Union¹¹ and in the judgments of the European Court

¹⁰ Similarly, CJEU judgment of 12.11.2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paragraphs 47–49.

¹¹ OJ C 326 of 26.10.2012, para. 391, as amended.

of Human Rights interpreting Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms¹².

The glossed ruling of the European Court of Justice works in favour of the authors, rightly restricting the right of Member States to interfere in the copyright of authors. It prevents rules which would allow the use of a work without the consent of the author from being transposed into national legislation, the author represented by the collecting society, by allowing him to object post factum.

Accorded to authors by the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24.7.1971), as amended on 28.9.1979. (hereinafter "the Berne Convention")¹³, the exclusive right to authorise the reproduction of works, in whatever manner and in whatever form, has been reiterated in the Directive. Restrictions on this right may only apply in specific cases and must be allowed under Community law. Otherwise, the use of the work shall require the express prior consent of the author for any reproduction or for any communication to the public of his work, including in digital form.

It should be noted that the legislation of the European Union and the Member States is increasingly introducing new regulations establishing exceptions for the use of works, though protected by copyright. Libraries, universities, schools may use some of the works. Other people's works may be used for parody, caricature, scientific research without the need to obtain the author's consent.

These restrictions are clearly specified in the legislation, including the Directive, and cannot be interpreted broadly. Such an approach would unduly interfere with the rights of authors, stripping them not only of their right to remuneration but also of the right to decide whether to make their work available to the public.

6. EVALUATION OF POLISH PROVISION IN THE CONTEXT OF THE RULING

The ruling also has an impact on the Polish legal system. Similarly to the French legal system, Polish law introduced the possibility of using works which are not commercially available without the authors' prior, explicit consent.

¹² Journal of Laws of 1995 no. 36 item 175/1. Cf. CJEU judgment of 9.2.2012 in case C-277/10 Luksan, judgment of the Great Chamber of the European Court of Human Rights of 1.1.2007 in case *Anheuser-Busch Inc. v. Portugal*.

¹³ Journal of Laws of 1994, No. 104, item 506.

The Act of 11 November 2015 amending the Copyright and Copyright Act and the Gambling Act¹⁴ to the Copyright and Related Rights Act¹⁵ (hereinafter referred to as "Copyright Act") introduced Section 6 "Certain uses of works not available in trade".

The amendment to Article 35¹⁰ (1) of the Copyright Act defined a work which is not available in trade (the so-called *out-of-commerce*). These include 'works published in books, journals, periodicals or other forms of printed publications if such works are not available to the public in circulation with the permission of the holders of copyrights in such works within the fields of exploitation listed in Article 35¹⁰ (2), or in the form of copies marketed in a number meeting the reasonable needs of the public, or by way of making them available to the public in such a way that everyone may access them at a place and in time selected thereby. In determining the availability of works, the circulation of copies of works which have been subject to the exhaustion of the right referred to in Article 51(3) shall not be taken into account.

The archives, educational institutions, higher education institutions, research units within the meaning of the Act of 30 April 2010 on the principles of financing science and cultural institutions, referred to in Article 35¹⁰ (2) of the Copyright Act, may, as agreed with a collecting societies designated by the Minister in attendance of Culture and National Heritage, reproduce out-of-commerce works in their collections, first published in the Republic of Poland before 24 April 1994, in particular to digitise them, and 'make them available to the public in such a way that everyone can access them at a place and in time selected thereby', inter alia, on websites. Article 35⁵(3) shall apply *mutatis mutandis*.

A collecting society shall be deemed authorised to administer rights of the rightholders referred to in Article 35⁵(1) which have not been so authorised by the collecting society if the work is included in a list of works not marketed and the rightholders have not objected in writing to the administration of their rights by the collecting society within 90 days of the date of such disclosure (Article 35¹⁰(3) of the Copyright Act). Once the period laid down in that provision expires, the beneficiaries referred to in Article 35¹⁰(1) who have not objected in as per Article 35¹⁰(3) may give up, in respect of certain works, the intermediation of the collecting society referred to in Article 35¹⁰(2) by a written declaration to the collecting society that the authorisation referred to in Article 35¹⁰(3) has ceased, with three months' notice effective at the end of the calendar year. This organisation shall forthwith notify in writing the Minister in attendance of Culture and National Heritage of such a declaration and the

¹⁴ Journal of Laws, item 1639.

¹⁵ Consolidated text, Journal of Laws, item 666.

entities referred to in Article 35¹⁰(2) with whom it has concluded agreements covering such works (Article 35¹⁰(4) of the Copyright Act).

As per the said regulation, the entities referred to in Article 35¹⁰(2) of the Copyright Act may use out-of-commerce works solely for non-commercial purposes, for the performance of their statutory tasks serving the public interest, while the revenues generated may be used only to cover direct costs of digitisation and making works available to the public (*argument* from Article 35⁵(3) of the Copyright Act).

This structure is similar to the permitted use of orphan works (Article 35⁵ et seq. of the Copyright Act). Similarly as in the case of the latter, Article 35¹⁰(2) of the Copyright Act admits the publication of these works without the author's consent. The difference is that the rightholders to out-of-commerce works are known, which hold the author's economic rights to these works (if not, they are orphan works within the meaning of Article 35(1) of the Copyright Act). Nonetheless, the provision imposes no conditions on the making works available to the public. However, works may be made available to the public only if rightholders have given their consent or if it can be reasonably assumed that they would not object to their use (*argument* in Article 1(3) of Directive 2012/28/EU).

Both the limits of permitted use of orphan works and non-commercial works should be determined in view of Article 35 of the Copyright Act, which prohibits undermining the legitimate interests of the author. However, the Act does not provide for mechanisms that can respect the author's economic rights and protect his works from mass and commercial use. The action of a collecting society which, in the present case, is authorised to administer authors' rights under Article 35¹⁰(3) of the Copyright Act cannot be regarded as such. Whilst application of Article 35¹⁰ et seq. to mass digitations of works for commercial use by private entities is rightly rejected¹⁶, the Act does not prevent such a practice. In particular, the entities referred to in Article 35¹⁰(2), do not have to limit the availability of works to members of libraries, archives, students of higher education institutions, etc. On the contrary, the law expressly permits the work to be made available to 'anyone'. Collecting societies shall be authorised to administer the rights of the beneficiaries if the latter do not object in writing to the registration of the work. The Act commits the author to monitor the content of the list, instead of obligating organizations to diligently, in good faith, attempt to arrange for the consent of the author or his legal successors to include the work in the list (similarly to the procedure provided for in Article 35⁶ of the Copyright Act). Moreover, the author must make a statement in writing, whereas this could be any form from which the author's stance can be deduced. The term for the author

¹⁶ K. Gienas [in:] E. Ferenc-Szydełko (ed.), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Ed. 3, Warsaw 2016 - *komentarz do art. 355*, Legalis

to object to the entry of a work in the register is very short, especially in view of how long the works have been "out-of-commerce". Afterwards, the author may not cause the work to be removed from the list and prohibit its distribution to the public. Accordingly, provisions concerning "inaccessible" works in an unauthorised manner require action to be taken by the author with a view to protecting the rights accorded to him by the Act. However, the procedure should be "reverse", that is the entities which use or want to use the work should demonstrate an appropriate right.

According to the Explanatory Memorandum to the amendment "the regulation of the status of out-of-commerce works - with full respect for the rightholders's entitlements - would facilitate access by citizens to books and periodicals of often significant historical, artistic and informational value, the exploitation of which, on the one hand, is not currently of interest to market operators and, on the other hand, does not raise objections from rightholders"¹⁷.

In principle, one should agree with the idea set out in the Explanatory Memorandum to the 2015 amendment, whereby the introduced rules would result in easier access to works of significant value. It is also true that the shape of the regulation introduced to the Copyright Act will not "raise rightholders' objections"¹⁸ which, however, stems not from a deliberate procedure ensuring 'respect for the rightholders' rights', but rather from their omission.

It is worth noting that the amendment was not intended to "make possible" access to works, but to "facilitate access". In other words, out-of-commerce works, referred to in the Act, are available in libraries, archives or other collections. However, for various reasons, their authors do not pursue measures to make them available again. These authors are known, however, and solely do not seek redistribution of their work since the so-called "orphan works" referred to in Section 5 of the Authors' Rights Act have been handled separately.

Since out-of-commerce works are not orphan works at the same time, there can be no statutory exception limiting the authors' right to decide how to use the work if it is contrary to Article 5 of the Directive, and to the relevant case law of the CJEU, in which it is stated that the use of a work by a third party without the prior consent of the author should be considered as an infringement of copyright¹⁹.

Article 17 of the Copyright Act "constructs a synthetic definition of Copyright Act, referring explicitly to the ownership concept of the Civil Code. Just like the owner of an item, the author may,

¹⁷ Explanatory Memorandum to the Act, Druk Sejmowy Issue 3449 www.sejm.gov.pl, accessed on 20.1.2017.

¹⁸ Ibid.

¹⁹ Cf. CJEU judgment of 27.3.2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, paras. 24, 25).

to the exclusion of other persons, use the work, authorize other persons to such use and dispose of the right to use the work"²⁰, the content of this right is an "effective *erga omnes* right to decide on any form of use of the work"²¹.

Regardless of whether the view of the legislator is shared and the assumption of a proprietary approach to copyright adopted by the legislator²², limitations of copyright introduced for legitimate public or social interest (Articles 23-35, Articles 35⁵-35⁹ of the Copyright Act) may be applied only in specific cases which do not violate the normal use of a work or other protected item of or cause illegitimate damage to the rightholder's legitimate interests (Article 5(5) of the Directive).

If the rules allowing someone else's right, that is copyright, to be exercised, are special provisions, in cases which do not constitute exceptions it depends on the author, how, when and where his work can be made available. The author enjoys full right and freedom to make decisions concerning his work. Subject to reasonable exceptions and with due respect for the copyright, solely his decision should make it possible for his work to be used and re-used.

7. SUMMARY

Due to divergences of interpretation concerning Article 5 of the Directive, *inter alia* with respect to the introduced provisions in French²³, German²⁴ or Polish law, or as highlighted above, a preliminary ruling by the CJEU in case C-301/15 was necessary. This judgment clearly implies the primacy of the protection of the subjective copyright over the right to use the work by non-authors. The Court entirely accepts the use of works for public purposes, but makes such use contingent on the author's consent. This consent must not be implied, tacit, or follow-up. It is not the author who is supposed to seek protection with reference to the use of his work, but the subject who intends to make such a work available must endeavour to reach the author and be issued with his consent to distribute the work and make it available. It was against the shifting of the burden of action to the author that the Court opposed in its judgment. The issue of the burden of action is vital here, because it determines

²⁰ E. Traple, *Komentarz do art. 17 ustawy o prawach autorskich i prawach pokrewnych*, [in:] *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Ed. V, J. Barta (Ed.), M. Czajkowska-Dąbrowska, Z. Cwiąkański, K. Felchner, E. Traple, LEX 2011, LEX.

²¹ E. Traple [in:] *System prawa prywatnego, vol. 13, Prawo autorskie*, ed. J. BARTA, Warsaw 2007, p. 122.

²² Cf. judgment of the Constitutional Tribunal of 23.6.2015. (SK 32/14, Journal of Laws of 2015, item 932); judgment of Administrative Court in Katowice of 14.3.2008. I ACA 102/08, OSA/Kat. 2008, Issue 3, item 8, Legalis. Alternatively J. Barta, R. Markiewicz, *Prawo autorskie*. WK 2016, LEX..

²³ Act No 2012-287 of 1.3.2012 on digital exploitation of out-of-commerce books from the 20th century.

²⁴ Act of 1.10.2013 on the use of orphan and out-of-commerce works and other amendments to the Copyright Acts.

whether copyright has been infringed. The operation of a collecting society does not replace the author's consent, which the CJEU emphasized in its ruling.

The CJEU judgment in case C-301/15 makes it necessary to adapt the Copyright Act to the 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. Amendments to the Copyright Act in this respect require the introduction of a prior author's consent for the use of his work in lieu of implicit consent and the possibility for the author to object to the use of his work. The author must be aware of the interest in reuse of his work, must be able to decide whether it gives it consent and to which use he agrees.