THE PUBLISHERS ASSOCIATION

Dr Ros Lynch
Director of Copyright and Enforcement
Intellectual Property Office
4 Abbey Orchard Street
London SW1P 2HT

8 June 2015

Vereniging Openbare Bibliotheken v Stichting Leenrecht, Case C-174/15

Dear Ros

The Court of Justice of the European Union (CJEU) has issued a call for observations from member states' governments with respect of the above case. (This is further to my letter of 8 April 2015 when this case was first referred to the CJEU by the Dutch court.) This reference touches upon two significant areas of European law for the publishing community, namely remote lending of e-books and generally digital exhaustion. We urge the UK Government to intervene in this case and submit observations to the CJEU in support of the UK publishing and wider creative industries.

The Publishers Association (The PA) is the leading representative voice for books, journal, audio and electronic publishers in the UK. We have over 100 companies in membership who publish academic journals, text books for higher, secondary and primary education, fiction, non-fiction, children's and learning resources. The combined revenues of our membership are £4.3 billion, 35% of which are earned through digital products and services.

From a UK legal and political perspective:

- Under the UK implementation of the Rental and Lending Directive (Directive 2006/115/EC) lending does not include the acts described in Question 1; the answer to this question is accordingly "No";

- Digital exhaustion is not triggered by the making available of a download, as raised in Question 4; the answer to this question is accordingly also "No".

We note that the question of Public Lending Right under UK law based on the derogation in Article 6 of the Rental and Lending Directive is only secondary to the question of the definition of "lending" – as only if there is electronic lending does the question of public lending right remuneration arise.

THE PUBLISHERS ASSOCIATION

Question 1:

Are Articles 1(1), 2(1)(b) and 6(1) of Directive 2006/115 to be construed as meaning that 'lending' as referred to in those provisions also means making copyright-protected novels, collections of short stories, biographies, travelogues, children's books and youth literature available for use, not for direct or indirect economic or commercial advantage, via a publicly accessible establishment:

- *by placing a digital copy (reproduction A) on the server of the establishment and enabling a user to reproduce that copy by downloading it on to his/her own computer (reproduction B), – in such a way that the copy made by the user when downloading (reproduction B) is no longer usable after a limited period, and*
- *in such a way that other users cannot download the copy (reproduction A) on to their computers during that period?*

1. **No**, under the UK legal framework the Articles 1(1), 2(1(b) and 6 (1) of the Rental and Lending Directive cannot be construed that way. The pertinent UK law expressly provides that lending does not include acts of communication to the public as described in this Question 1:

Section 18 A (3) CDPA 1988 (as amended):

"The expressions "rental" and "lending" **do not include**--
(a) making available for the purpose of public performance, playing or showing in public or **communication to the public**;"

Section 40 A (1a) CDPA 1988 (as amended):

(d) "lending" is to be read in accordance with the definition of "lent out" in section 5 of that Act (and section 18A of this Act does not apply). (N.b. both definitions of lending either within or outwith the Public Lending Rights system exclude communication to the public.)

Clause 43 (2) Digital Economy Act 2010:

""lent out"—
means made available to a member of the public for use away from library premises for a limited time, but **does not include being communicated by means of electronic transmission to a place other than library premises**, and "loan" and "borrowed" are to be read accordingly;"

2. We also note that as regards e-lending the mere reliance on the Rental and Lending Directive is not sufficient; the Directive expressly leaves intact and in no way affects the protection by copyright (as provided in the Information Society Directive); c.f. Article 12 Rental and Lending Directive. The Rental and Lending Directive is lex specialis in the areas it covers but outside its application normal copyright rules continue to apply.

This position has been iterated by the current Minister of State for the Creative Industries and Digital Economy, Ed Vaizey MP, who in response to a Parliamentary Question in April 2015 said that that any extension of the PLR scheme to include remotely downloaded e-books would require an amendment to the Information Society Directive.

Articles 2 and 3 Information Society Directive cover the exclusive right of reproduction and communication to the public respectively; these rights have to be considered separately and each require the permission from the right holder.

- All operations of e-lending at some stage involve the act of reproduction at the server of the establishment; such reproduction is neither temporary nor incidental.
- The activity outlined in Question 1 constitutes a communication to the public which is "understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting." (Recital 23 Information Society Directive). Such communication requires a licence by the right holder.

3. No exception provided in the Information Society Directive applies; moreover, any future exception which would exempt the acts described in Question 1 (i.e. offering e – Books) would render libraries into commercial operators interfering with the market. Not only is this not compatible with the role and function of libraries; it would also conflict with all three steps of the Berne Three Step Test, Art. 5 (5) Information Society Directive.

4. In case the question of interlibrary loans arises we note that Recital 10 Rental and Lending Directive clarifies that lending within the meaning of this Directive should not include making available between establishments which are accessible to the public.

Additionally, under European and international law fundamentals, the Rental and Lending Directive should not extend to e-lending. Article 1 of the Rental and Lending Directive states that it covers the authorisation or prohibition of the rental and lending of "originals and copies of copyright works". Such originals and copies of copyright works are to be understood as "tangible objects" according to the internationally agreed statement concerning Articles 6 (distribution) and 7 (rental) of the WIPO World Copyright Treaty 1996: "the expressions "copies" and "original and copies" being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects". "

Questions 2 - 4

Given that from a UK perspective Question 1 has to be answered in the negative, answering Questions 2 to 4 is unnecessary. It seems that all questions relate to a

specific situation under Dutch copyright law; any decision of the CJEU needs to take into account the situation in other member states which we hope the UK Government will submit for the UK. However, we would like to comment in particular on these questions in particular as they relate to digital exhaustion.

Question 2: *If Question 1 is to be answered in the affirmative: does Article 6 of Directive 2006/115 and/or any other provision of EU law preclude Member States from imposing on the application of the restriction on the lending right included in Article 6 of Directive 2006/115 a condition that the copy of the work made available by the establishment (reproduction A) must have been brought into circulation by an initial sale or other transfer of ownership of that copy within the European Union by the rightsholder or with his consent within the meaning of Article 4(2) of Directive 2001/29?*

In as far as the derogation in Article 6 Rental and Lending Directive relates to the lending right we note Article 1(2) Rental and Lending Directive: "The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 3(1)."

As far as other rights are concerned, normal exhaustion rules apply (see below).

Question 3: *If Question 2 is to be answered in the negative: does Article 6 of Directive 2006/115 lay down other requirements for the source of the copy (reproduction A) provided by the establishment, for instance the requirement that the copy was obtained from a lawful source?*

This question basically asks whether the copy of the work used by the library has to be obtained legally as a pre condition for the application of the derogation to the lending right; the obvious answer is that any copy which is being lent out has to be obtained legally by the library; in fact we expect that all copies used by libraries for their activities are obtained legally (applying provisions of the general EU Copyright framework, in particular the Information Society Directive).

Question 4: *If Question 2 is to be answered in the affirmative: is Article 4(2) of Directive 2001/29 to be construed as meaning that the initial sale or other transfer of ownership of material as referred to in that provision also means making available remotely by downloading, for use for an unlimited period, a digital copy of copyright-protected novels, collections of short stories, biographies, travelogues, children's books and youth literature?*

This question basically asks whether making available by download triggers exhaustion. This is not the case.

1. The European Copyright framework expressly states that there is no digital exhaustion:

- Recital 29 Information Society Directive: “The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the right holder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.”
- Article 3 (3) Information Society Directive: “The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”

2. The decision in UsedSoft GmbH v Oracle International (Case C-128/11) does not change this. The Software Directive (and in particular Article 4 (2) thereof) is *lex specialis* to the Information Society Directive as the CJEU has expressly stated in the UsedSoft (Para 51) and in other decisions such as Nintendo and Others v PC Box Srl and Others (Case C 355/12) (Para 23). The exhaustion found in the UsedSoft decision is based on Article 4 (2) Software Directive and does not apply in areas covered by other Directives such as the Information Society Directive

3. Art & Allposters International BV v Stichting Pictoright (Case C-419/13) also stated in January 2015 that exhaustion is restricted to physical (tangible) items.

4. Also relevant here is Article 1 (2) of the Rental and Lending Directive; this clearly states that the rental and lending of originals and copies of copyright works, is not exhausted by any sale or other act of distribution of originals and copies of copyright works.

5. Various decisions in Germany have also held that there is no digital exhaustion and that the Software Directive is *lex specialis*, e.g. LG Berlin Az 16O 7313 (keyselling) and OLG (Court of Appeals) Hamm Az 22 U 60/13 (e- and audio Books) and most recently on 24 March 2015 OLG (Court of Appeals) Hamburg Az. 10 U 5/11 (e- and audio Books).

6. In addition to these legal observations we also stress the economic reality. The digital and physical markets have very different properties requiring different treatments as regards exhaustion. In the digital world the second-hand market is largely indistinguishable from the first-hand market as digital copies are identical clones of the original work; they can be reproduced indefinitely without any loss of quality and circulated widely without control. In our view, protection by DRM (e.g. via by offering a “forward and delete” function) represents no effective remedy given the ease with which such measure can be circumvented. The existence of a market for second hand digital copies will destroy the primary market for authors and publishers.

THE PUBLISHERS ASSOCIATION

We hope that you find this submission useful and that you will be able to develop these arguments in the UK Government's submission to the CJEU. If you would like to discuss any aspect of this in further detail please do get in touch and I and colleagues would be delighted to meet with you.

Yours sincerely

Richard Mollet
Chief Executive