

By Alain Strowel, 6 September 2015

An Opinion on the right allocation of the fair remuneration for reprography



On June 11, 2015, the Advocate-General Pedro Cruz Villalón delivered his Opinion in the *HP Belgium v. Reprobel* case now pending before the Court of Justice of the EU (CJEU, case C-572/13). The Advocate-General Opinion and the underlying case raise one important issue: *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 Infosoc Directive directly to publishers, although they are not listed among the initial holders of the reproduction right under Article 2 of the Infosoc Directive?*

In less legalese terms, this pending case is about whether the levies on reprographic devices – which are quite common in Continental Europe – can initially be divided between authors and publishers or whether authors should be entitled to the whole amount of collected levies.

As a group of academics concerned about the copyright reforms envisaged in the European Union as well as by the interpretation and development of the law by the CJEU, the European Copyright Society (ECS) [1] of which I am a member takes this opportunity to share its view on this matter of principle.

The full Opinion of the ECS can be accessed [here](#). Please find hereafter the executive summary:

Copyright law [2] is linked to the freedom of the authors to create and should remunerate the creative authors in first instance. Therefore copyright law should not grant rights ab initio to persons other than the individual creators. This principle (the “author principle”) applies to the exclusive rights within the copyright bundle. It also applies to any right to remuneration provided by law to compensate for the exempted uses of copyrighted works. We believe copyright is not the correct instrument by which to confer rights on legal entities to protect their investments. There are many instances where publishers or producers deserve to get an adequate protection, but their protection should derive either from the contracts concluded with the individual creators or by way of a related right granted by law. The ECS believes the Court of Justice of the EU should clearly reaffirm the important principle of initial authorship for creators.[3]

With respect to the question of the allocation of the right to fair remuneration raised in

the HP Belgium v. Reprobel case, the response that the Advocate-General proposes largely acknowledges the author principle and, to that extent, the Opinion is welcome. However, by leaving too much leeway to the Member States, some aspects of the Opinion (§132 to 143) might create uncertainty. In particular, the ECS does not think Member States should be free to grant publishers a remuneration right as a related right. This would seriously reduce the harmonizing effect of the 2001/29 Infosoc Directive.

In the ECS's opinion, 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.

[1] The ECS was founded in January 2012 with the aim of creating a platform for independent and critical scholarly thinking on European copyright law. Members include leading European scholars and academics seeking to promote their views of the overall public interest. The Society is not funded, nor is it instructed, by any particular stakeholders.

[2] Unless indicated otherwise, 'copyright' refers to copyright law in the strict sense ("droit d'auteur" or "authors' rights"), excluding the system of neighboring or related rights. Copyright includes exclusive rights and remuneration rights.

[3] The principle of initial authorship of rights belonging to copyright is compatible with a presumption of transfer of the exclusive rights. Indeed, in some situations, the transfer of the exclusive exploitation rights in favor of a producer can be provided by law, rather than by contracts. For instance this is the case for audiovisual works. Under this approach, the initial grant of exclusive rights benefits the numerous co-authors and the presumption of transfer facilitates the concentration of the rights and the exploitation by the producer.