

Online and Its Effect on the “Goods” Versus “Services” Distinction

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Traditionally, the effect of digital networking technologies on copyright is seen in the loss of control rightholders have suffered over the production and dissemination of their copyrighted works, since digital technology facilitates the making of copies at almost no marginal cost. Also, networking technology, including peer-to-peer file sharing, deprives rightholders of control as regards the distribution of copyrighted works to users. Later on it became apparent that the democratisation of reproduction and dissemination tools extended the application of copyright – which initially governed the relationships between authors and commercial users, i.e. publishers, film producers and broadcasting organisations – to acts undertaken by end users. Finally, automatisisation of the data reproduction and dissemination process mainly by internet service providers raised the difficult issue whether, and if so to what extent, the need to automate new information disseminating systems may justify – as “collateral damage” – some infringements of individual copyrights. Over the last several years copyright law has adapted to these challenges, perhaps not in all respects but at least to a certain extent.

However, recent case law of the Court of Justice of the European Union – mainly *UsedSoft* (C-128/11) but to a certain extent also *Football Association Premier League* (*Murphy*; C-403/08 and C-428/08) – signals yet another major challenge for two legal concepts which up until now seemed to be well established: the notion of “goods” on the one hand, and the notion of “services” on the other hand. Indeed, each of these two decisions has attracted considerable attention due to their somewhat surprising outcome and the numerous additional questions raised by each of them. In *UsedSoft*, quite surprisingly the CJEU decided for the exhaustion of the

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distribution right where the rightholder had not handed over to the first acquirer a physical program copy but instead had made the data set of the program available for online download, and this even if the second acquirer – instead of receiving the data set from the first acquirer – downloaded a new data set directly from the rightholder's website. In *Murphy*, the CJEU banned national legislation prohibiting the importation, sale and use of foreign decoding devices that provide access to an encrypted satellite broadcasting service from another Member State, and thereby raised the important issue to what extent this decision also might affect territorially split licensing of copyright within the EU. These issues are certainly of great practical importance, and they certainly are worth discussing, even if, or precisely because, at the moment they are far from being resolved.

But the point which tends to be overlooked – because the CJEU did not explicitly address it in these two cases – and which shall be highlighted in this editorial, is the question *why* the CJEU argued on the basis of freedom of movement of goods in *UsedSoft* whereas it based its argument on the freedom of movement of services in *Murphy*. After all, in *UsedSoft* where no physical copy of the protected computer program had changed hands, at first glance the legal qualification of the offering of the program online as a service rather than as a sale of goods would have appeared more obvious. Mirror image, *Murphy* was about the sale and subsequent use of a physical good (the decoder), which at first glance might have suggested solving the case on the basis of the freedom of movement of goods, rather than on the basis of the freedom of services.

A possible answer which can be inferred from the language used by the CJEU in *UsedSoft* is that the Court wanted to enable the acquirer, of not only a physical but also of a virtual program copy, to transfer the use rights in that particular copy to subsequent acquirers without further control by the initial rightholder (provided the acquirer was entitled to use the program for an unlimited time and he had paid a remuneration equivalent to the use value of the program). However, this result could only be achieved on the basis of exhaustion, i.e. only on the basis of freedom of movement of goods. Therefore, the CJEU had to qualify the facts of the case as a “sale”, even at the price of rather surprising conclusions such as that “the act of communication to the public [is changed] ... into an act of distribution” (*UsedSoft*, para. 52). Without going into detail, a similar outcome-oriented line of argumentation can be observed in *Murphy*, where the CJEU tried to overcome all potentially opposing legal hurdles – rules on conditional access, opposing copyrights – in order to enforce the freedom of movement of services as regards encrypted satellite signals within the EU.

The question – unanswered so far – is when and according to what criteria the CJEU will give preference to the EU freedoms over rightholders' exclusive rights, and when it will not? Anyhow, in times of offering copyrighted works in digital form, it is of secondary importance whether the offering is conducted offline or online. Hence, the distinction between “goods” on the one hand and “services” on the other loses much if not all of its meaning. At best it is no longer technology-neutral. Moreover, due to increasing bandwidth, in the future most copyrighted works will be transmitted *online* anyway. If this is the case, then either all offerings of copyrighted material online will have to be considered as services. Or, if the

distinction between freedom of movement of goods and services is to be maintained, the criteria for distinguishing between the two – and with it between “goods” and “services” – are to be found elsewhere. However, in this respect, the decisions handed down by the CJEU so far have not yet provided much guidance. What is needed is an appropriate definition of these meta-criteria, i.e. a coherent theory of when to treat online offerings of copyrighted works as “services” and when to still treat them as “goods”, in spite of their intangible and immaterial nature.