



12.3.2024

NOTICE TO MEMBERS

Subject: Petition No 0944/2023 by Francesco Cossu (Italian) on digital property rights for consumers

1. Summary of petition

The petitioner explains that various pieces of EU legislation address the risks that piracy and Artificial Intelligence pose to digital and intellectual properties for producers while consumers' rights regarding digital goods are increasingly compressed, mostly caused by the rapid disappearance of physical supports for movies, games, music, and software, and their replacement with digital-only versions. According to him, licenses of usage are mostly unilaterally decided by the provider without the same guardrails that exist in other areas to protect consumers. In particular, when selling a digital product, he explains that there is no obligation to grant the customer the right of lending, reselling, or inherit the purchased good, which on the other hand exist for physical goods. In his opinion, this imbalance is driving more and more producers to push digital goods as a way to twist ownership into a personal, non-transferable license of usage, which he believes is not good for consumers and should not be allowed. He therefore calls on the EU to act to protect digital consumer's rights.

2. Admissibility

Declared admissible on 20 December 2023. Information requested from Commission under Rule 227(6).

3. Commission reply, received on 12 March 2024

Commission's observations

The petition essentially refers to the consumers' rights attached to the purchase of digital goods, in particular digital content (movies, games, music and software). More specifically, the petitioner points out that, by contrast with tangible goods, providers of digital goods do not

necessarily allow consumers to lend or resell the purchased content. In this context, there are both EU consumer protection and EU copyright law aspects to be taken into account.

1. As far as EU consumer protection is concerned, EU general consumer protection legislation aims at guaranteeing that consumers are well informed in their purchasing decisions. In particular, the Consumer Rights Directive 2011/83/EU requires the traders to provide the consumers with information about the main characteristics of the product, including digital services and digital content, before the conclusion of the contract. The Unfair Commercial Practices Directive 2005/29/EC prohibits traders' commercial practices that mislead consumers in relation to the main characteristics of the products and it requires traders to provide consumers with the information that they need to make informed purchasing decisions.

The Digital Content Directive 2019/770/EU lays down rules on the conformity of digital content or a digital service with the contract, providing consumers with remedies in the event of a lack of such conformity or a failure to supply, and the modalities for the exercise of those remedies. Specifically, the consumer is entitled to have the digital content or digital service brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in Article 14 of the Directive.

2. As far as EU copyright law is concerned, creative content incorporated in digital goods is protected by copyright and subject to EU copyright law. Under EU copyright law, authors, performers, phonogram and film producers, broadcasting organisations have exclusive rights over the reproduction, making available and distribution of their works and subject matter; authors in addition also have exclusive rights on the communication to the public of their works.

The right of distribution provides these rightholders with the exclusive right to authorise or prohibit any form of distribution to the public, by sale or otherwise, of the original of their works or of copies thereof. This right, in relation to the petition, is regulated in EU law in several directives: in Article 4 of Directive 2001/29/EC ('the InfoSoc Directive')¹, in Article 9 of Directive 2006/115/EC ('Rental and Lending Right Directive')² in Article 4 of Directive 2009/24/EU ('Computer Programs Directive').³

This exclusive right of distribution is limited by the principle of exhaustion which means that after tangible goods such as a book or a CD are sold for the first time by, or with the authorisation of the rightholder, subsequent owners of these goods can give or sell them to someone else without requiring the rightholder's authorisation. Therefore, after the first lawful sale of a work protected by copyright, or of computer programme, rightholders cannot control anymore the resale⁴ in the EU of such works and subject matter in tangible (i.e. physical) formats.

Conclusions

EU copyright law is clear, on the one hand, that such exhaustion after the first sale only applies to physical formats and not to digital ones⁵, and on the other, that exhaustion does not arise in

¹ 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

² DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

³ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer program

⁴ This does not apply to the rental and lending rights contained in the Rental and Lending Rights Directive (see Recital 28 of the InfoSoc Directive)

⁵ See Tom Kabinet C-263-18, 58 et seq. We note that according to the UsedSoft judgement of the CJEU (C-

the case of exclusive rights applicable to the online access to protected content, namely the right of communication to the public and the right of making available⁶. The European Court of justice also confirmed that the exhaustion only applies to the tangible product incorporating the protected content⁷. This means that, for content accessed through online content services, rightholders continue to enjoy exclusive rights on the use of their works. In this case, the relationships between service providers and consumers are regulated by the terms and conditions of a licence agreement, which determine under which conditions such content may be used.

Digital copies, which are not contained in a tangible medium, do not deteriorate with use, therefore making any used copy a perfect substitute for a new one. If the principle of exhaustion applied to purely digital content, it would affect the interests of the copyright holders differently than for second-hand sale of works incorporated in a tangible medium.

Therefore, in the light of the above, the Commission considers that the currently applicable rules at EU level provide the right balance of rights and interests both for content creators and consumers.

128/11), under certain conditions that make it analogical to physical sale, the right of distribution can be exhausted for computer programs even if the distribution was done electronically.

⁶ Article 3(3) of the InfoSoc Directive and recital (29)

⁷ UsedSoft C-419/13, paras 39-40