

The Court of Justice of the European Union holds that Spain's scheme for fair compensation for private copying is inconsistent with EU law

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The hot-off-the-press judgment of the CJEU of 9 June 2016 concludes that the scheme for fair compensation for private copying adopted by Spain, funded from the national government budget, is contrary to EU law inasmuch as not capable of guaranteeing that the cost of fair compensation is borne by the users of private copies.

1. Art. 5(2)(b) 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, states that Member States may provide for exceptions or limitations to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned".

The introduction of a limit to intellectual property rights is thus allowed with so-called 'private copying'. And since such limitation means a loss of revenue for intellectual property rightholders, when a Member State decides to implement the private copying exception provided for under that provision in its national law, it is required to provide for the payment of 'fair compensation' to such rightholders.

In Spain, this compensation was initially governed by art. 25 of the Recast Text of the Intellectual Property Act (abbrev. TRLPI). This article introduced a highly controversial digital levy scheme under which the purchasers of

media or devices that could be used for private copying paid said compensation.

Following intense social debates, this scheme was abolished under the tenth additional provision of Royal Decree-Act 20/2011 of 30 December 2011 concerning urgent budgetary, taxation and financial measures for correcting the public deficit, replacing it with a procedure for payment to the recipients of fair compensation for private copying charged to the national government budget (regulated by Royal Decree 1657/2012 of 7 December). Subsequently, Act 21/2014 amended the TRLPI in respect of the regulation of compensation, providing that such would be paid by collecting societies, in accordance with regulatory provisions, out of the national government budget.

2. In respect of Royal Decree 1657/2012, of 7 December, regulating the procedure for payment of fair compensation for private copying charged to the national government budget, the Spanish Supreme Court referred two questions for preliminary ruling from the CJEU (case C-470/14, *EGEDA, DAMA and VEGAP v Administración del Estado*), as follows: (i) "is a scheme for fair compensation for private copying compatible with Article 5(2)(b) of Directive 2001/29 where the scheme, while

taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, it thus not being possible to ensure that the cost of that compensation is borne by the users of private copies?"; and (ii) "[i]f the first question is answered in the affirmative, is the scheme compatible with Article 5(2)(b) of Directive 2001/29 where the total amount allocated by the General State Budget to fair compensation for private copying, although it is calculated on the basis of the harm actually caused, has to be set within the budgetary limits established for each financial year?".

These questions have now been answered by the CJEU in its judgment of 9 June 2016.

3. The CJEU had already addressed several issues relating to the payment of compensation by individuals performing copies (the levy system) and, in this regard, it should be recalled that according to established case law of the Court [judgments of 21 October 2010 in *Padawan*, C-467/08; of 16 June 2011 in *Stichting de Thuiskopie*, C 462/09; of 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11; and of 5 March 2015 in *Copydan Båndkopi*, C-463/12]:

1st) It is incumbent on EU Member States when they decide to implement in their national law the private copying exception to provide for the payment of 'fair compensation' to rightholders.

2nd) The Directive imposes on the States an obligation to achieve a certain result, in the sense that they they must guarantee, within the framework of their powers, the actual recovery of the fair compensation intended to compensate the rightholders.

3rd) Member States have broad discretion in determining the persons who have to pay that fair compensation and to determine the form, detailed arrangements and level thereof, in compliance with Directive 2001/29 and, more generally, with EU law. And in this regard, the application of a private copying levy runs counter to the Directive, in particular in relation to digital reproduction equipment, devices and media which are acquired by persons other than natural persons for

purposes clearly unrelated to such private copying. However, nothing prevents legal persons from being, where appropriate, under an obligation for the financing of the fair compensation intended for rightholders as compensation for that private copying, passing on the private copying levy by including it in the price charged for making the reproduction equipment, devices and media available or in the price for the copying service supplied. In those circumstances, the private user for whom the reproduction equipment, devices or media are made available or who benefits from a copying service must be regarded as being, in reality, the 'person indirectly liable to pay' fair compensation, that is to say the person actually liable for payment.

4. On the basis of this case law, the judgment here discussed concludes that Article 5(2)(b) of Directive 2001/29 cannot be regarded as precluding, in principle, Member States which have decided to introduce the private copying exception from choosing to establish, in that context, a fair compensation scheme financed not by such a levy, but by their national government budget; provided, however, that such an alternative scheme guarantees the payment of fair compensation to rightholders on the one hand, and that its detailed arrangements guarantee actual recovery on the other.

Moreover, and this is particularly relevant, such a scheme must guarantee that the cost of fair compensation is ultimately borne solely by the users of private copies. Because of this, the CJEU believes that a scheme such as Spain's - where there is no definite allocation of revenue (such as revenue from a specific levy) to particular expenditure and the budgetary item intended for the payment of fair compensation is financed from all the budget resources of the 'General State Budget' - is inconsistent with the Directive. Such a scheme means that fair compensation is similarly paid by all taxpayers, including legal persons, without there being any measure allowing legal persons, which do not in any event fall within Article 5(2) (b) of Directive 2001/29, to request to be exempted from contributing to the financing of that compensation or, at least, to seek reimbursement.

5. After this important decision from the CJEU, the Supreme Court must rule on the action for annulment of Royal Decree 1657/2012, with the Spanish legislature being compelled to introduce the

appropriate legislative changes (excluding a return to an indiscriminate levy scheme) since, as has been stated, fair compensation for private copying must be paid by natural persons only. Let us wait and see.

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