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Copyright Levies' War Rages in Spain

Francisco Javier Cabrera Blázquez (European Audiovisual Observatory) · Thursday, March 24th, 2011

On 2 March 2011 the *Audiencia Provincial de Barcelona* took note of the judgment of the Court of Justice of the EU (CJEU) in the case Padawan v SGAE (C-467/08) and decided that the indiscriminate obligation of paying private copying levies as provided for in Art. 25 of the Spanish *Ley de Propiedad Intelectual* (Intellectual Property Act), in particular with respect to digital reproduction equipment, devices and media acquired by companies, professionals and public bodies, cannot be considered fair.

Article 25 LPI regulates fair compensation for acts of "[R]eproduction exclusively for private use, by means of non-typographical devices or technical instruments, of works circulated in the form of books or publications, deemed by regulation to be equivalent, and phonograms, videograms and other sound, visual or audiovisual media". These acts of reproduction shall give rise to fair compensation paid at a flat rate (private copying levy) for each of the said methods of reproduction. Collective management of this compensation is mandatory. Debtors of this compensation are those manufacturers established in Spain that operate as commercial distributors, as well as persons who acquire outside Spanish territory, the equipment, devices and media referred to with a view to their commercial distribution or use there.

Parties to this case were a Spanish collecting society, the *Sociedad General de Autores y Editores* (SGAE), and Padawan, a Spanish company that sells CD-Rs, CD-RWs, DVD-Rs and MP3 players. SGAE claimed from Padawan payment of the private copying levy for the years 2002 to 2004. Padawan refused to oblige on the ground that the indiscriminate application of a levy to digital media, regardless of the purpose for which they were intended (private use or other professional or commercial activities), was incompatible with the Directive 2001/29/EC (the InfoSoc Directive). On 14 June 2007, the *Juzgado de lo Mercantil No 4 de Barcelona* upheld SGAE's claim in its entirety and Padawan was ordered to pay EUR 16,759.25 plus interests. Padawan appealed the judgment to the *Audiencia Provincial de Barcelona*. On 15 September 2008 this court decided to refer the case to the CJEU for a preliminary ruling under Article 234 EC.

In itspreliminary ruling of 21 October 2010, the CJEU came to the conclusion that the obligation to pay a private copying levy for digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than

private copying, is incompatible with the Article 5(2)(b) of the the InfoSoc Directive.

Despite having clarified the scope of Article 5(2)(b) InfoSoc, the CJEU judgment raised important practical questions that had to be solved by the referring court. The Audiencia Provincial de Barcelona had to decide whether or not the defendant was obliged to pay the amounts due for private copying levy for the years 2002 to 2004. The court, unable to determine which equipment and devices were sold to companies and which were sold to individuals, upheld the defendant's appeal and decided that the defendant would not have to pay the private copying levies claimed by SGAE.

Surprisingly, the *Audiencia Provincial de Barcelona* did not ask Padawan to prove to which extent the digital products at stake were sold for purposes other than for making private copies. So did, however, another Spanish court in a similar case. On 28 February 2011, the *Juzgado de lo Mercantil número 6 bis de Madrid* decided that a Spanish company selling digital reproduction equipment, devices and media was obliged to provide information to the creditor (in this case EGEDA, a Spanish collecing society for producers of audiovisual works) as to the number of digital reproduction equipment, devices and media sold by the debtor because this would enable the creditor to calculate the fair compensation due to him.

Following the publication of the CJEU judgment, the Spanish government announced that it will introduce changes to the current legislation in order to make it conform with EU law. In the meantime, the real thorny issue here is the fate of those amounts already collected by rightsholders' societies applying the Spanish legislation though in infringement of EU law. If collecting societies were unduly cashing on private copying levies from companies, professionals and public bodies, do they have to give that money back? The collecting societies have already declared that they will not pay back these amounts since they consider that the Padawan decision does not apply retroactively. However, some public bodies have already announced that they will demand the refund of the private copying levies unduly paid over the past years.

Adding insult to injury for the government, on 22 March 2011 the Spanish *Audiencia Nacional* (High Court) annulled for formal reasons the ordinance that set the digital reproduction equipment, devices and media that are subject to the private copying levies.

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