

The neverending story. Spanish private copying levy.

Kluwer Copyright Blog
July 1, 2011

Pedro Letai (IE University (Segovia, Spain))

Please refer to this post as: Pedro Letai, 'The neverending story. Spanish private copying levy.', *Kluwer Copyright Blog*, July 1, 2011, <http://copyrightblog.kluweriplaw.com/2011/07/01/the-neverending-story-spanish-private-copying-levy/>

On 21 October 2010, the European Court of Justice rendered its judgement in case C-467/08 Padawan v SGAE, calling the current application of Spanish private copying levy into question. The judgement maintained that the Spanish private copying levy is abusive and that it does not meet with what Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society, establishes. The Court ruled that the levy should be charged only on certain equipments and devices and on individuals, but not legal entities, companies or national authorities, which should be exempted.

Firstly it should be clarified, as opposed to what has been implied in the media, that the ruling of the European Court of Justice does not prohibit the existence of a private copying levy in Spain, as the application of a fee to compensate the right-holders for private copying is recognised under Directive 2001/29/EC.

What the ruling of the European Court of Justice prohibits is the indiscriminate application of the private copying levy to each and every one of the equipment and devices that can store works protected under copyright, regardless of the intended use that such equipment or devices would eventually receive.

The purpose or ratio essendi of the levy is to compensate right-holders for damage suffered by the private copying of protected works. The indiscriminate application of a levy on all types of equipment and devices, including those that will be used for purposes clearly unrelated to private copying (e.g. when acquired by a company, a professional or a public administration that will not use them for private copying purposes), does not respect the need for a direct correspondence between the fair compensation of right-holders and the limitation in favour of private copying.

The ruling has not meant the elimination of the levy in Spain. In fact, it has confirmed the validity of systems of private copy compensation, including the system under Spanish law, but will probably lead, in the short term, to a modification of the Spanish legislation to the effect of excluding that the private copying levy be interpreted and applied indiscriminately to all equipment and devices regardless of the purpose for which they will be used. It is therefore the enforcement of the Spanish Copyright Law that seems to be immediately affected by this new decision, which should move the Government to revise it.

On the other hand, although we would have to wait and see how events develop in practice, the decision opened the door as well to possible claims for repayment of the amounts paid to the collecting societies in monthly fees paid in connection with equipment or devices not used for private copying.

Furthermore, on last March, the Spanish private copying levy has received another serious judicial setback, as the National Court (Audiencia Nacional) ruled the nullity of the 2008 Order which set the fees, the devices and the equipments subject to payment for fair compensation along the lines of private copying.

The Court understood that the regulating order requires specific approval procedures, as an explanatory report on economic and the opinion of the State Council, which were not made. The Court analyzed the administrative or regulatory Order that set the fees in 2008 and said it would be incomprehensible that while the standard fixed fee for analogue devices were considered an Order, with the prescribed procedures that this entails, the standard set by the digital levy has been considered as a simple administrative act, which does not need to comply with the same procedural requirements.

The levy itself remains in force but the Order which regulated its application becomes null, as the Court concludes that is a mandatory provision which has been developed and launched without meeting several requirements, especially the compulsory report from the State Council (Consejo de Estado) and the financial report. The fees that will be applicable from now on would be those from 2006, which did not address specifically some new devices such as MP3's, MP4's or certain mobile phones with multimedia faculties. Devices and equipments as CD recorders, DVD, CD-R, CD-RW, DVD-R, DVD-RW, multifunction printers and multifunction inkjet and laser scanners remain taxed by the private copying levy, but with old-fashioned fees.

Regarding the amounts already collected by the collecting entities, the decision did not contain any provision about an automatic refund to the plaintiffs, although individuals have already started claiming on courts for the money paid on equipments or devices not regulated under the 2006 fees.

Meanwhile, the Spanish Government is forced to proceed for the adoption of a new regulatory framework regarding the private copying levy after the above mentioned decision of the ECJ, considering the levy may not be applied indiscriminately, and that it should only be applied in the case where the device is clearly intended for private copying.

This legal figure is poised to become one of the biggest headaches for the Spanish government. Legislators hope that, as in the song, 'there upon the rainbow is the answer to a never ending story'.