This blog post discusses the recent Advocate General's Opinion in Case C-435/12 – AciAdam and Others, delivered on February 27, 2014. The case involves the interpretation of Article 5(5) of the Copyright Directive (2001/29/EC), which addresses the application of the three-step test (Art. 5(5)) in the context of private copying.

In his Opinion, Advocate General Villalon considered whether reproductions from unlawful sources fall within the private copying exception of Art. 5(2)(b) of the Copyright Directive (2001/29/EC) and, as such, whether it is in line with the directive to calculate the private copying levy on reproductions from both lawful and unlawful sources. He ruled that private copying levies must be calculated on all private copies, whether from lawful or unlawful sources.

The Advocate General’s Opinion has significant implications for the interpretation and enforcement of the Copyright Directive. It clarifies the application of the three-step test and provides guidance on the scope of the private copying exception. The Opinion is a landmark decision in EU copyright law and has implications for the enforcement of copyright rules across the EU.

In order to understand the implications of the Opinion, it is important to review the relevant legal provisions and the factual context of the case. The following summary provides an overview of the key issues addressed in the Advocate General’s Opinion and highlights its broader implications for EU copyright law.

**Relevant legal provisions**

- Art. 5(2)(b) of the Copyright Directive (2001/29/EC)
- Art. 5(5) of the Copyright Directive (2001/29/EC)

**Facts and questions referred**

- The questions referred also relate to the effect of the application of the three-step test (art. 5(5)) on the scope of the private copying exception.
- The case is a key test case for the application of the three-step test in the context of private copying.

**Conclusion of the Advocate General**

The Advocate General’s Opinion provides a detailed analysis of the application of the three-step test in the context of private copying. The Opinion clarifies the scope of the private copying exception and provides guidance on the implications of the three-step test for the enforcement of copyright law in the EU.

The Advocate General concludes that reproductions from unlawful sources fall within the private copying exception when the work has become available without infringement.

**Relevant links and references**

- European Commission: “Copyright reform: Connecting Europe” (2014)
- Advocate General’s Opinion in Case C-435/12 – AciAdam and Others (2014)
- Court of Justice of the European Union: “Decision in Case C-435/12 – AciAdam and Others” (2014)

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cases from unlawful sources, mainly because such undertaken would conflict with the normal exploitation of the work, hence violating the first subparagraph of Article 11(1) of the Berne Convention.

In their oral observations, the almonds Stichting Toonhuizen, as well as the Dutch and Austrian Governments, agreed that it is important to understand and comprehend the complex relationship between the different aspects regarding the application of the exception to private copying from unlawful sources. That is to say, because these aspects are interrelated, it is necessary to ensure that the measures taken are effective and proportionate, and that they are also consistent with the principles of the Berne Convention.

In this regard, the Advocate General stated that Dutch legislation tolerates downloading of protected works from unlawful sources, and prohibits the uploading of such works. To do so, it indirectly makes the downloading of protected works through unlawful sources, from a legal perspective, a non-derogable exception. Therefore, the Advocate General concluded that the CJEU should consider that there is no conflict between the right to private copying and the copyright in the work.

In a less clear section of the Opinion, the Advocate General questions whether levies can adequately compensate copyright holders for mass unauthorized acts of reproduction, communication to the public and destruction. That question has been prompted by the considerable photocopying of Dutch law (including acts of uploading), and leads to the consideration that mass unauthorized acts of reproduction and communication to the public are “incompatible with the second subparagraph of Article 11(1) of the Berne Convention”.

The Advocate General pointed out that Dutch legislation tolerates downloading of protected works from unlawful sources, mainly because such understanding would lead to double payment, as digital rights management and innovative pricing schemes are to prevent unauthorized access and reproduction. That would be so despite the level of quality and variety of content available to the public, and the fact that the harms caused to normal exploitation of works online; in order to ensure payment of fair compensation (indirectly enabling acts of uploading), and leads to the consideration that levies could hardly compensate for the harms caused to normal exploitation of works online due to the lack of evidence and evidence provided by the Advocate General.

Conclusion of the Advocate General

In this regard, the Advocate General concluded that the private copying levy cannot cover acts of reproduction of works made from unlawful sources. Consequently, private copying can only be calculated on the basis of reproductions made from lawful sources. If Member States were allowed to calculate levies on the basis of works made from unlawful sources, that would be equivalent to a sui generis compensation system, contrary to the autonomous and uniform concept of “fair compensation” and to the conclusion of the Advocate General.

A particular important aspect on which guidance would be welcome is the consideration that levies could hardly compensate for the harms caused to normal exploitation of works online. It can be said that the Advocate General’s conclusions lack backing by evidence.

There is some criticism to be made here, but that would go beyond the scope of this blog post. The Advocate General’s comments lack backing by evidence.

Whether the CJEU will to follow the Advocate General’s Opinion, where would this lead?

Copyright levies are intended to compensate rightholders for the harms caused by acts of private copying. There are several reasons for the legal and economic perspective that the utility consumers derive from the exception. If the Advocate General’s comments lack backing by evidence, it could lead to a reduction of the overall amount of levies and, in turn, to a reduction of the overall amount of levies and, in turn, to a reduction of the overall amount of levies.

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If the CJEU is to follow the Advocate General’s Opinion, where would this lead?