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France: Courts must assess the remuneration for private copying

Brad Spitz (REALEX) · Thursday, June 16th, 2016

In a [judgment of 17 March 2016](#), the *Cour de cassation*, the French Supreme Court, ruled that the judicial courts are required to assess and award compensation for private copying in situations where a decision of the Commission in charge of setting the fair compensation has been annulled. This judgment seems to mean that the courts may also be required to award fair compensation where there has been no decision of the Commission setting compensation, e.g. for new forms of copying devices or media.

The French Commission for private copying and its decisions

Article 5.2(b) [Directive 2001/29/EC](#) 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 [...].’

In France, [Articles L.311-1 to L.311-8 of the French Intellectual Property Code](#) (‘IPC’) set out the remuneration system that must ensure that the rightholders will receive fair compensation for the French exception for private copying. Article [L.311-5 IPC](#) establishes the Commission in charge of setting the compensation for each type of media subject to payment, and the amount and conditions of payment. The applicable tariffs set by the Commission for each medium are published in the Official Journal of the French Republic, and are presented on the [website of the Ministry of Culture](#) (CD-R, non-dedicated USB flash drives, memory cards, hard drives, etc.). The remuneration is collected by collecting societies and distributed to the beneficiaries. Today, [Copie France](#) is the collecting society in charge.

The decisions of the Commission for the remuneration for private copying are often challenged before the administrative Supreme Court (‘*Conseil d’Etat*’) and some of its decisions have been annulled. In certain situations the remuneration set by the Commission was without doubt not due (e.g. [Conseil d’Etat, 25 June 2014, No 347914](#): annulment of a decision which set an amount to be paid by professional users on memory cards, USB keys and external hard drives, in breach of [Directive 2001/29](#) – see [Case C-467/08 \(2010\), Padawan SL v. SGAE](#)). But in other cases, the decisions are

annulled for reasons that do not change the fact that remuneration remains due as a matter of principle. In such situations, the *Conseil d'Etat* often puts a time limit on the effect of the annulment. It will decide that the annulment will only take effect from a certain date, subject to contentious actions undertaken at the date of the judgment against acts adopted on the basis of the annulled provisions. This means that the collecting societies will not be obliged to reimburse the large sums paid by users, subject however to judicial actions that were started before the judgment. Therefore, in the case of a successful and timely judicial action from users in order to obtain the reimbursement of the sums paid under an annulled decision of Commission, the rightholders will not receive fair compensation for the making of copies, unless the judicial judge rules otherwise. This was precisely the question in dispute before the *Cour de cassation*.

The facts of the case

The facts of the case presented to the *Cour de cassation*, the judicial Supreme Court, were the following:

Sony Mobile Communications AB (previously Sony Ericsson Mobile Communications) had paid fees to the relevant collecting societies for the distribution of non-dedicated memory cards and multimedia mobile phones from May to December 2008, on the basis of two decisions of 2007 and 2008 of the Commission for the remuneration for private copying. However, Sony had brought a case before the *Conseil d'Etat* to ask for the annulment of these decisions. Their action was successful: the *Conseil d'Etat* annulled the decisions and ruled that the annulment would only take effect from 1 January 2009, subject to the contentious actions undertaken at the date of the judgment against acts adopted on the basis of the annulled provisions (*Conseil d'Etat*, 17 Dec. 2010, No 310195 and 17 Dec. 2010, No 315832).

Sony had brought such a contentious action before that date. The Court of Appeal of Paris (7 Oct. 2014, No 12/10702) found that because of the annulment by the *Conseil d'Etat* of the Commission's decisions, the invoices for May to December 2008 had no legal basis and ordered the collecting society (*Copie France*) to reimburse the amount paid by Sony (EUR 319,669.48). This part of the ruling was accepted by both parties and was therefore not in dispute before the Supreme Court. However, the collecting society successfully presented a counterclaim asking for fair compensation to be awarded by the court, and the Court of Appeal ruled that Sony had to pay an amount of EUR 290,000 for the period from May to December 2008. This sum was payable concurrently with the sum to be reimbursed pursuant to the annulment of the decisions, resulting in the collecting society only having to reimburse the sum of EUR 29,669.48.

The judgment of the *Cour de cassation*

Sony lodged an appeal before the Supreme Court, claiming that [Article L.311-5 IPC](#) grants the Commission for the remuneration for private copying exclusive jurisdiction to set the compensation for each type of media subject to payment, and the amount of payment, and that the Court of Appeal therefore breached [Article L.311-5 IPC](#) and the principle of the separation of powers (Act of 16-24 August 1790).

In its judgment of 17 March 2016 (No 15-10895), the Supreme Court upheld the judgment of the Court of Appeal, ruling that under Article 311-1 IPC, which has to be interpreted in the light of Directive 2001/29/EC, the rightholders have to receive fair remuneration to compensate them adequately for the uses made under the exemption for private copying. The Supreme Court added that the European Court of Justice has ruled that a Member State which has introduced an exception for private copying has the obligation to ensure that the rightholders actually receive fair remuneration intended to compensate them for that harm, and that this is an obligation to achieve such a result (Case C-462/09 (2011), *Stichting de ThuisKopie*, para. 34 and Case C-521/11 (2013), *Amazon.com International Sales e.a.*, para. 57).

The Supreme Court therefore found that the Court of Appeal rightly ruled that the annulment of the decisions of the Commission for the remuneration for private copying must not deprive the rightholders of fair compensation due in respect of copies made from the cards and phones distributed by Sony. Indeed, in such a situation the judicial judge has to assess and award fair compensation.

The impact of the *Cour de cassation*'s judgment

The Supreme Court has clearly affirmed that the exception for private copying cannot exist without fair compensation, which means that in the absence of a decision by the Commission for remuneration for private copying, the courts have the obligation to assess the remuneration to be paid to the rightholders. This judgment could therefore have a very significant impact, as it seems that rightholders may, where no decision of the Commission has set a sum for new forms of copying devices or media (i.e. even in the absence of a decision that has been annulled), claim compensation directly before the courts.

To be continued...

A full summary of this case has been published on [Kluwer IP Law](#)

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