

Spanish Supreme Court ratifies the European Court decision on private copying. Same story all over again?

Kluwer Copyright Blog
December 12, 2016

Patricia Mariscal (Elizaburu)

Please refer to this post as: Patricia Mariscal, "Spanish Supreme Court ratifies the European Court decision on private copying. Same story all over again?", Kluwer Copyright Blog, December 12 2016, <http://copyrightblog.kluweriplaw.com/2016/12/12/spanish-supreme-court-ratifies-european-court-decision-private-copying-story/>

The Spanish Supreme Court has annulled some of the rules regulating the system of financing fair compensation for private copying through the General State Budget on the grounds that they are incompatible with EU law. The system that had been in place up until now was analysed by the CJEU through a number of questions referred by the Supreme Court for a preliminary ruling, which arrived on 9 June 2016. The Supreme Court's judgment has left a legal vacuum that will have to be filled by the Spanish Government in the coming months and will likely involve a return to the former levy system.

Directive 2001/29/EC lays down an obligation whereby States whose laws contain a private copying exception must provide for a system of compensation for rightholders affected by that limitation. In Spain, which has such a limitation, there was a system in force between 1987 and 2012 under which a levy was placed on equipment, devices and recording media that could be used to make private copies. Although the payment onus was on the manufacturers, distributors and importers of said equipment, devices and media, the indirect debtors who actually ended up paying the compensation were the end users, since the levy was applied to the products that they acquired. This system was on the receiving end of a strong social smear campaign, particularly following the famous 'Padawan' case, in which the Barcelona Court of Appeal ended up exonerating an IT company that sold recording media from payment of a large sum of money as fair compensation that the Sociedad General de Autores y Editores (SGAE) had been claiming from it for years. In that case, the CJEU intervened at the Appeal Court's request, and established, *inter alia*, that in a system such as the one in place in Spain, there must be a link between application of the levy and use of the equipment, devices and media for making private copies. This implied that the "levy" could not be placed on equipment, devices or media that were not explicitly intended for making private copies. In the main proceedings, it was considered that Padawan's products were intended for professional use and not for making private copies.

The Padawan case was the foundation for the reform that took place in 2012 through Royal Decree 1657/2012, of 7 December, that basically established that the amount allocated to fair compensation would be fixed on an annual basis by means of a ministerial order, within the budgetary limits established for each financial year.

Two months later, in February 2013, this Royal Decree was challenged by all the Spanish copyright collecting societies in the Contentious-Administrative Chamber of the Supreme Court. The appeal sought the annulment of the law based on two kinds of ground - procedural and substantive. On the one hand, they argued that the appropriate legal instruments had not been used in order to regulate the new system, and on the other, that the system was contrary to the provisions of Article 5.2(b) of Directive 2001/29/EC. As regards this second issue, the claimants argued that the principle established in CJEU case-law, whereby fair compensation should ultimately be defrayed by the persons who make private copies, is not respected in a system such as the Spanish scheme, under which the compensation is paid by all taxpayers without drawing any distinction. They also argued that financing the compensation through the General State Budget did not ensure that it was fair.

On 9 June 2016, the CJEU rendered a judgment which, replying only to the first of the questions referred, established that the Spanish system was not compatible with EU law.

The judgment can be considered as the culmination of a whole series of warnings and findings that, even before it came about, presaged the incompatibility of the Spanish scheme for financing the compensation through the General State Budget with Directive 2001/29/EC. One of the principal findings of the CJEU in *Padawan* was precisely that fair compensation had to be borne by the natural persons making the private copies, notwithstanding the fact that in order to be able to collect the monies, payment could be demanded from manufacturers, importers and distributors, who would subsequently pass on the cost of the levy in the final price of the product. It is surprising that in that case the CJEU's judgment was used to brand a scheme that, in principle, indiscriminately applied the levy to all devices and media capable of being used to make copies without taking account of the private or professional use of same as arbitrary and unfair, and that one year later, the Spanish Government adopted another scheme in which not only are professionals and legal persons who sell devices and recording media not intended for private copying not exonerated from payment of the compensation, but the cost is borne directly by all taxpayers.

Now that the Royal Decree has been annulled, and the rules governing fair compensation for private copying financed through the General State Budget have been declared inapplicable... what system do we have now? This question is inevitable, since the repeal of the current system does not imply the "resurrection" of the rules that had governed the previous system. There is currently a legal void which must be filled within a short space of time by the Spanish Government, likely by bringing the Spanish system in line with the systems in place in the other Member States.