Private copying levy in Italy: potential impact of the CJEU ruling in case C110/15 and Italian State Council of State decisions

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1. Introduction

As reported previously on the Kluwer Copyright Blog, on 22 September 2016 the Court of Justice of the European Union (CJEU) delivered its judgment in the Padawan case (C-110/15).[1] The judgment clarifies whether and when the private copying exemption in Article 5.2 of Directive 2001/29 (the "Directive") applies.

The issues of state were referred to the CJEU by the Italian State Council of State in the context of a lawsuit brought against the Minister of Culture and Sports (MIBACT) of Italy by a group of claimants. The suit was brought in relation to the Declaration of 18 December 2009 (the "Decree") by the MIBACT, which declared the existence of a "multifunctional" private copying levy and fixed the amounts applicable to a group of products and services.

The CJEU confirmed the judgment of the Italian State Council of State, stating that the private copying levy must be abolished. The CJEU also referred the case to the CJEU for a second judgment. The Council of State also referred questions to the CJEU in relation to whether the following provisions are consistent with European laws (namely Article 5.2 of Directive 2001/29).

2. The legitimacy of the procedure for adoption of the Decree of 30 December 2009

The Italian State Council of State found the Decree to be lawful and effective, thereby lifting the ban on enforcement of the Decree by the same State Council. Regarding the first of these factors, the Council stated that the private copying levy, even if based on the transposition of the Directive, is subject to the right to the free circulation of goods. According to Article 52 of the Italian Constitution, the free circulation of goods is a fundamental right enjoyed by all citizens.

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3. The illegitimacy of the levy on private copying

The Council of State judgment referred to the CJEU the appropriateness of the measures taken by the MIBACT to ensure that the levy system was consistent with European laws (namely Article 5.2 of Directive 2001/29). The Council of State also referred questions to the CJEU in relation to whether the following provisions are consistent with European laws (namely Article 5.2 of Directive 2001/29).

4. The impact of the prohibition of the levy

The Italian State Council of State also clarified that the attribution to SIAE of a monopoly in the collection of private copying was in accordance with national law. The Council of State also referred questions to the CJEU in relation to whether the following provisions are consistent with European laws (namely Article 5.2 of Directive 2001/29).
On the basis of a combined reading of CJEU case C-110/15 and the interim decision of the Italian Council of State of 18 February 2015, we can conclude that the private copying levy system in Italy will remain substantially safe even if it will require some adjustments in order to meet the requisites of the exclusions for professional use and there will likely be a reduction in the room for contractual autonomy that the Decree has granted to date in Italy, in accordance with the principle of equal treatment invoked by the CJEU. We should consider whether such adjustments could impact and question those agreements already stipulated by SIAE that could result in them not being aligned with the new set of requisites established for the exclusions from private copying levy. This, together with the introduction of an ex post procedure for reimbursement dedicated to professional users according to the CJEU ruling, could also be managed via a review of the Decree and its implementation procedure by MIBACT and SIAE, also taking into consideration what the Italian Council of State has pointed out on the general administrative nature of measures of the Decree (which supports, in the Council’s opinion, retroactive application of possible amendments).

Save for these procedural aspects, it is not likely that following the CJEU ruling in case C-110/15, major adjustments will be introduced into a Decree, either through a final ruling of the Italian Council of State or via a review of the Decree adopted by MIBACT in any case. It does not seem likely that such an adjustment could impact the substantive provisions of the Decree, especially the core provisions on the type of devices and media subject to the private copying levy.

We should also consider whether there will be some impact on this “state of the art” resulting from the introduction of new technologies for making copies via cloud services. The Italian Council of State has pointed out, inter alia, that the completion of the General Margin Framework on private copying levy for this case should be also considered in the light of recent developments recently referred to the CJEU (case C-265/16, VCast Vs RTI). Some questions regarding the lawfulness of cloud computing services for the remote storage and reproduction of private copies without authorisation of the right-holders. It cannot be ruled out that a higher level of harmonisation at EU level in the area of private copying levy could be promoted by new CJEU rulings.

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