

Kluwer Copyright Blog

Return to the Levy

Patricia Mariscal (Elzaburu) · Tuesday, July 25th, 2017

Back in December last year, we reported [-on this blog-](#) on the legal vacuum left in the wake of the Spanish Supreme Court's judgment declaring the system for financing private copying null and void.



As you will recall, from 2012 to 2016 fair compensation for private copying was financed in Spain from the General State Budget. Unlike in the vast majority of European Union countries, where the user's option of making copies of the works and other copyright-protected subject matter that they acquire is financed through a levy system imposed on equipment and media capable of being used to make copies, in Spain we temporarily adopted a system whereby that exception to copyright was covered by all taxpayers, without distinction.

Unsurprisingly, the days of the Spanish legislature's solution were numbered. In June 2016, the CJEU categorically ruled (*Case C-470/14-EGEDA and Others*) that fair compensation for private copying must be borne by the users -natural persons- who ultimately benefit from the exception; this excludes legal persons who, by definition, do not make private copies.

Although neither the CJEU judgment nor the one subsequently passed by the Spanish Supreme Court established the new system to be implemented, it was taken for granted that Spain would essentially return to the levy system that had been in place prior to 2012. However, there was some uncertainty -principally regarding the way in which the exception system would be regulated-, which has been cleared up in [Royal Decree 12/2017](#) amending the consolidated wording of the Spanish Copyright Act, published on 3 July 2017, with respect to the system of fair compensation for private copying.

The "new" digital levy works in much the same way as the one that was eradicated in

2012. However, the main difference lies in the establishment of a dual system of “ex ante” and “ex post” exceptions, which prevent the levy from being imposed indiscriminately. It should not be forgotten that the repeal of the “old” levy system was hurried along by a judgment from the CJEU (*Padawan*, 20 October 2010), which considered a levy that was indiscriminately applied to end consumers and legal persons, irrespective of the purpose of the copies (which, in the case of legal persons, was not private use), to be contrary to EU law. The new system establishes a list of parties exonerated from payment, including (i) public sector entities; (ii) legal persons acting as end consumers, who demonstrate the exclusively professional use of the equipment and media; and (iii) persons who have obtained the mandatory authorisation of the holders. Furthermore, the new regulation provides for a reimbursement system for end consumers who, falling within the obligation to pay, are able to prove the exclusively professional purpose of the equipment or its intra-Community exportation or supply.

Beyond that, the system continues to consider manufacturers and importers as debtors of the compensation, together with the distributors who successively acquire the devices, apparatus and media. In any event, the system is designed so that debtors may pass the price of the levy onto the final user, who is the one who will be carrying out the private copying, as the case may be.

As regards prices and the list of products subject to the levy, a transitional system has been put in place, under which the prices run from 0.24 Euros for a pen drive up to 6.45 Euros for multimedia external hard drives. This is certainly a considerably lower range than those of other EU countries. For example, under this transitional legislation, smartphones are subject to a levy of 1.10 Euros, whilst in France, for instance, the surcharge applied to the same products is in the region of 8 Euros.

The return to the levy will entail a considerable increase in the sums received by the collecting societies in relation to the private copying exception in recent years (which, under the recently abolished system, amounted to 5 million Euros per year). However, everything points to the fact that we will fall far short of the 100 million Euros collected in 2009.

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