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ECJ: Private copying levies II-the Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH case

Tatiana Synodinou (University of Cyprus) · Sunday, June 26th, 2011

On 16 June 2011 the Court of Justice of the European Union gave judgment in Case C-462/09, *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH, Mijndert van der Lee and Hananja van der Lee* (case C 462/09), a reference for a preliminary ruling from the Hoge Raad der Nederlanden (the Dutch Supreme Court). As in the *Padawan* case, to which the ECJ decision made a lot of references, the preliminary questions concerned the payment of fair compensation due for the application of the private copying exception and especially the modalities of payment of the private copy levies.

The Netherlands have introduced a scheme of private copying levies which have to be paid either by the manufacturer of the importer of blank media. Opus, a Germany based company, sells via Dutch web sites blank media to Dutch customers. Opus does not include to the price of the media any fee for the payment of fair compensation for the private copying exception and does not pay private copying levy as regards the media delivered to its Dutch customers in the Netherlands or in Germany.

Stichting de Thuiskopie argued that Opus must be considered as ‘importer’ of the media and thus pay the relevant levy. Opus, on the contrary, argued that the importers are its Dutch customers, the final users who take profit of the private copying exception, and denied payment. The Hoge Raad referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, provide any assistance in determining who should be regarded under national law as owing the “fair compensation” referred to in Article 5(2)(b)? If so, what assistance does it provide?’

(2) In a case of distance selling in which the buyer is established in a different Member State to that of the seller, does Article 5(5) of Directive 2001/29 require national law to be interpreted so broadly that a person owing the “fair compensation” referred to in Article 5(2)(b) of the directive who is acting on a commercial basis owes such compensation in at least one of the Member States involved in the distance selling?

In the Court’s logic, the *Infosoc* Directive must be flexibly interpreted in a way which ensures that the harm caused by the massive private copying is really recovered. The concept of “harm” and the ultimate goal of the effective enforcement of compensatory means underlie the ruling.

According to the Court, the Directive imposes that a fair compensation must be provided for the harm caused for the application of the private copying exception. As regards the definition of the person who has to compensate for this harm, the Court confirmed the *Padawan*’s ruling that since the person who has caused the harm to the holder of the exclusive reproduction right is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that

rightholder, it is, in principle, for that person to make good the harm related to that copying by financing the compensation which will be paid to that rightholder. However, Member states have a broad discretion to organize the private copying levies scheme in a way which makes a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to that final user, since they are able to pass on the amount of that levy in the price paid to the final user for that service. In other words, even if the harm is caused directly by the end users of the blank media, it is possible in order to ensure the recovery of the compensation to charge commercial sellers of the media and in that case, thus the entities who provide the means to the users to cause the “harm”.

As regards the second question, the Court imposed a duty of efficient enforcement of private copying levies schemes to Member states in order to guarantee that the reward of the right holders will effectively take place. As the Court stressed, the Infosoc Directive does not include any specific statement as to allow a particular interpretation with regard to the person to be regarded as responsible for paying the fair compensation owed to the authors on the basis of the private copying exception in the context of a distance selling arrangement. Therefore, any Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of blank media and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, has to ensure that those authors actually receive the fair compensation intended to compensate them for that harm. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

It is doubtless that searching the recovery of the compensation from every single user which proceeds to private copying would have definitely imperiled private copying levies schemes. The solution of the liability of a seller which is based in another member state as regards the payment of the levies is consistent with the construction of a paneuropean market of intangible goods. Nevertheless, this duty of interpretation, application and enforcement of private copying levies in a way that fully guarantees the recovery of the fair compensation might be proved a difficult task too. Apart from the problems of identification of the distant on line seller which is based in another Member state, courts will have to accommodate the question of the proper enforcement of the payment by an entity which is based in another Member state.

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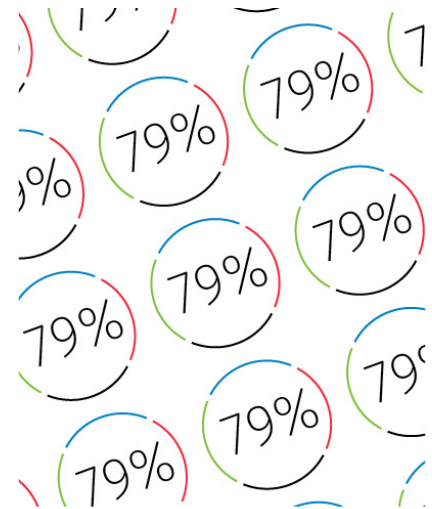
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