Kluwer Copyright Blog

Hasty legislative amendment to correct French private copying levy

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France is currently modifying, in emergency, its legislation on private copying levy and more generally on private copying after the ECJ decisions Padawan and ThuisKopie. The reason for this urgency is twofold: substantial and procedural. The French Council of State (Conseil d'Etat) has held in a decision rendered the 17th of June 2011 that the French system was not complying with the Padawan requirements as regards the scope of the copying levy, and consequently declared void the decision of the commission fixing the tariffs without considering any exemptions for the professionals. But the judgment of the Council of State, which bore in mind the necessity of avoiding global refunds for all the past remuneration paid by professionals, had decided to postpone the effects of the annulment of the commission's decision until December the 22nd, allowing the government to amend the legislation in the interval. This is why the French Bill is being discussed at such short notice; the first version of the law (petite loi) has been voted by the French Assembly on the 29th of November and will be discussed before the Senate the 19th of December. According to the procedure, if the Senate does not amend the submitted text, it will be adopted as such at this date, that is to say, in time to avoid claims for refunds by the professionals.

Consequently, the first purpose of the proposition is to maintain the system of private copying levy while exempting the professionals from the liability of fair compensation, but such only for the future. Article 4 of the Bill states that the fair compensation (rémuneration pour copie privée) shall not be paid for recording devices notably purchased for uses for professional purposes, which precludes any presumption that a use is for private copying.

The Council of State has decided that the French system, which already encompassed mechanisms of reimbursement for some professionals on the one hand and, on the other hand, allowed discounts on the tariffs applied to particular devices purchased by professionals, was not consistent with the Padawan decision. This is highly debatable as Padawan's conclusions were not that far-reaching. They only left the Member States the responsibility to implement a system that did not place the final burden of the fair compensation on the professionals who do not, per se, make private copies. The mechanism could be either an exemption ex ante or a refund ex post. But so said the Council of State: a mere discount on the tariffs is not sufficient to comply with the ECJ requirements… Hence, the actual Bill extends the scope of the exemptions by way of agreements to be concluded with the collecting society in charge of the copy levy (future art. L. 311-8 III) and it also organizes the conditions for the reimbursement of the professionals not included in such

agreements.

In order to avoid the refund of the copy levy already paid by professionals according to the void decision n° 11 of the Commission, (i.e. an average amount of 58 millions Euro on a total of 310 millions Euro collected from the 1st of January 2009 through the summer 2011), article 6 of the Bill limits the claim for refund by the newly exempted professionals to the sole devices purchased after the law will have entered into force. Quite strangely, article 5 of the Bill also "covers", that is to say declares legal, the levies collected before the Council of State's decision of annulment, even if they were disputed, as long as no binding decision had been rendered at the date of the annulment. The system clearly aims at limiting as much as possible the retroactive effects of the decision of annulment.

As regards the levy for private copying, the Bill also introduces two core modifications. The first reflects the ECJ decisions establishing a link between the devices subject to the levy and the use thereof for purposes of private copying. Article 2 of the future law states that the amount of the levy also depends on the "use" of the device according to surveys. It means that a system, which would only take into account the storage capacity of the device, without considering the actual use thereof for private copying would not comply with the law. There again, the French Assembly limits the levy base in a very strict way, whereas the Court seemed to consider that the fair compensation should be calculated in light of the mere "possibility of causing harm to the author of the protected work". This possibility "depends on the fulfillment of the necessary pre-condition that equipment or devices which allow copying have been made available to natural persons, which need not necessarily to be followed by the actual production of private copies" (paragraf 57 of the Padawan decision).

Article 3 of the Bill also provides a new obligation, which does not derive from the ECJ case-law, to mention the amount of the fair compensation paid by the purchaser on the device. A notice has to be joined, eventually in a digital form, describing the purpose of the levy and the ability to conclude exemption agreements or to ask for a reimbursement. This "transparency" obligation can be read as a counterpart of maintaining the private copying levy system, which the consumers association accuse of unduly raising the price of devices compared to other countries of the Union.

Last but not least, (in fact first in the Bill), the law would change the very definition of the private copy exception itself. Article 1 of the Bill adds a new condition to article L. 122-5, namely that in order to benefit from the exception the copy must be made from a legal source. This condition had been previously highlighted by a Council of State decision of 11 July 2008 that rendered void a former decision of the Commission applying tariffs on devices notwithstanding the fact that their storage capacity were used to record counterfeiting works. Still, the mention of a legal source was at that time a mere element required for calculating the fair compensation and not a condition for the benefit of the exception itself. The law seems to make no difference and inserts the legal source as a new condition to the exception of private copying, like the Finnish law, which stipulates that the private copy must be made from a legally obtained copy, whereas in Germany the source should not be manifestly illegal. Yet, the vagueness of the criterion is blatant: how can one know that the source was "legal"? Having this knowledge is a huge difficulty for the user. But even more fundamentally, what is a legal source of the copy? Does it mean that only the purchaser of a copy of a work can make a new copy of it? Will any copy made from an access to the work through public or private lending be legal according to this condition? What about the "legal" download of a work? Should any subsequent copy be authorized? Is the source legal only when the user is authorized to copy? But then, the exception would lose all meaning…. And without exception: no

more levy! What if the new law spawned the exact opposite result of its ambition?

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