

Kluwer Copyright Blog

Private copy levies on multipurpose electronic devices?

Francesco Spreafico · Tuesday, May 1st, 2012

An Italian administrative court says yes.



Directive 29/2001/EC on copyright and related rights in the information society introduced the principle that EU Member States may authorize individuals to make copies of copyrighted audio, visual and audio-visual works, for private use, without the need to request authorization to right holders, subject to the general condition that right holders receive a “fair compensation” for such use of their works.

Indeed, making a copy of protected works without the authorisation of the authors, although for private and not for commercial use, is considered an act of interference with the exclusive reproduction right of the right holder, which triggers the latter’s entitlement to an appropriate remuneration for the harm suffered.

Legislative Decree n. 68/2003 has implemented in Italy Directive 29/2001/EC through the introduction in the Italian Copyright Law of arts. 71-*sexies* et seqq. The provisions allow individuals to copy protected phonograms and videograms, for personal use and without an intent to make profit or for indirect commercial purpose, on any device or media, provided that right holders receive a compensation, through the imposition of certain levies on the price of equipments used for the reproduction, to be determined by a Ministerial Decree.

On December 30, 2009 the Ministry of Cultural Heritage and Activities has fixed the amount of the private copying levies and established that it applies on all devices that are suitable to make copies of phonograms and videograms for personal use, even when the reproduction function is not the sole or main function of the device, thus including many multipurpose electronic devices such as smart phones, tablets or personal computers.

The decision to extend the private copying levy to multipurpose devices has been widely criticized by the consumer electronics industry and, in 2010, Samsung Italia (supported by some consumer

associations) challenged the decree before the Administrative Court for Lazio Region, mainly complaining that the imposition of the levy was unlawful and not consistent with the scope of arts. 71-sexies, 71-septies, and 71-octies of the Italian Copyright Law and the scope of Directive 29/2001/EC and requesting to quash the act.

The administrative court issued its decision in March 2012, rejecting Samsung Italia's claim on all grounds.

The court considered that the payment of a fair compensation for private copying – although having a clear compensatory function for the use, at least potential, of copyrighted works – should be considered as an imposed performance, since there is no chance or alternative for the obliged parties to avoid the payment. It also recalled the 2010 CJEU judgment in the Padawan v. SGAE case (C-467/08), where the European court examined how to maintain the 'fair balance' between right holders and users of protected works. Following this judgment, the administrative court clarified that while fair compensation is linked to the typical actual use of digital reproduction devices for the purposes of private copying, and there must be a sufficiently close link between the relevant levy and the use of such devices for reproduction purposes, the requirement does not prevent EU Member States from introducing a system based on practical considerations, which is not found on the actual extent of private copying but on the presumed use for private copying by the users of the devices and the consequent calculation of the fair compensation on this estimate.

In the wake of the CJEU's judgment, the administrative court has also confirmed that, in order to determine the level of the fair compensation, the possible harm suffered by the author as a result of the reproduction must be taken into account, meaning that a minor prejudice does not give rise to a payment obligation. Given the practical difficulties in identifying the actual private users, who should be the persons in charge of the fair compensation's payment, the obligation is passed on to the purchaser of the reproduction device or storage medium, via the purchase price.

According to the court the fair compensation system is simply structured on the assumption that devices and storage media are suitable for private copy, even if in practice they are not used for these purposes. Therefore, it is not necessary to check whether the individual has actually made copies and causes damages to the authors of the protected works, but it is sufficient the potential reproduction of the copyrighted works in order to justify the application of a levy for private copying.

Based on this reasoning, to the extent that multipurpose electronic devices allow the reproduction of music, videos or other audiovisual materials, are subject to the application of the levy.

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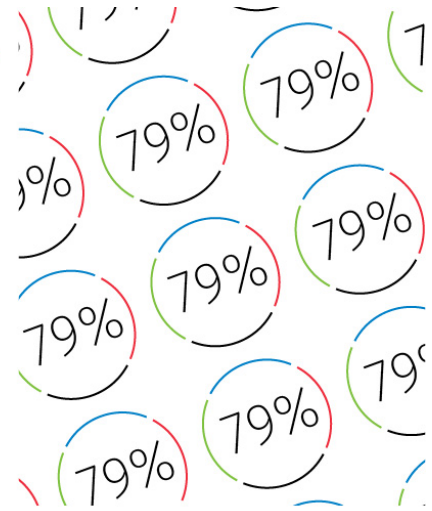
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