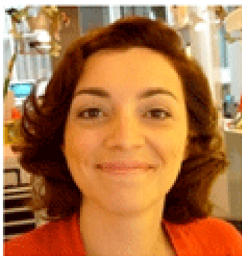
Kluwer Copyright Blog

France: Part of law on private copying levy is unconstitutional

Catherine Jasserand (Institute for Information Law (IViR)) · Monday, January 28th, 2013



On 15 January 2013, the French Constitutional Council declared unconstitutional Article 6, paragraph II, of the law on private copying levy (Law No. 2011-1898).

This provision retroactively validated private copying levies that had been paid or claimed based on rates annulled by the French Council of State. To fully understand the ruling of the Constitutional Council, it is necessary to explain the background of this provision.

Back in 2008, the Private Copying Commission (*Commission pour la rémunération de la copie privée*) set new levy rates in its Decision No. 11. On 17 June 2011, the Council of State annulled that decision on the grounds that products acquired by professionals for a purpose other than private copying should have been excluded from the scope of private copying levies.

The Council of State applied the ruling of the European Court of Justice (ECJ) in the Padawan v. SGAE case (Case C-467/08). The ECJ prohibits an indiscriminate application of private copy levy on all type of equipment, devices and media, regardless of their intended purpose of use. As a consequence private copying levy should only apply to sales of devices to individuals using them for private copying. However to avoid massive refunds of undue levies, the Council of State suspended the effects of its decision of annulment for 6 months (i.e. until 22 December 2011), to the exception of pending lawsuits. The objective was to leave enough time for the Private Copying Commission to determine new rates in compliance with the Council of State's decision.

However, by the end of December 2011, the Commission had not set new rates but instead Parliament, under pressure, adopted a new law on private copying levy (Law No. 2011-1898).

One of the particularities of the law was to provide a transitional period under Article 6. The first paragraph of Article 6 maintained for a maximum of 12 months the annulled rates (i.e. until December 2012). The second paragraph of Article 6 validated payments and claims that had been challenged before Courts (before the Council of State's decision) but had not been settled yet. This only concerned remuneration paid or claimed on products other than the ones bought for professional purposes for which conditions of use did not allow to presume a private copying use.

Although Article 6, paragraph II, is not clearly written, the intent of the legislator was to retroactively validate these payments or claims. In its report to the French National Assembly (second chamber of the French Parliament), the Committee in charge of cultural affairs explained the reasons of such "legalization". Before 22 December 2011 (effective date of the Council of State's decision), Decision No. 11 of the Private Copying Commission was not considered illegal, except in the case of legal proceedings against decisions made on the basis of the annulled rates. Parties challenging before a district court (*Tribunal de Grande Instance*) orders to pay private copying levies on the ground of the quashed decision were entitled to consider that it had never existed, even if the decision was only annulled because it did not make any distinction between professional uses and private uses. The rates applicable to private copying use were not challenged before the Council of State but were part of the annulled decision.

As a consequence, the report notes that many parties stopped or suspended their payments before the decision of the Council of State was officially known. And they either sued the collecting entity (Copie France) to contest payment orders or were sued by the collecting entity to make their payments. In any case, the report assessed that if all the refund requests would have been through, the collecting entity would have had to pay back € 58 million. A part of that amount had already been re-used. Parliament considered there was "imperative need" to validate these remunerations through the law.

The French telecoms operators, SFR, was among the parties which challenged the validity of the invoices it received from the collecting entity. The telecoms operator argued that Article 6 of the law on private copying levy undermined the principle of separation of powers and its right to effective judicial review under Article 16 of the Declaration of the Rights of Man and the Citizen (which states that "any society in which the guarantee of rights is not secured, nor the separation of powers determined, does not have any Constitution"). On 17 October 2012, the Court of Cassation (Supreme Court) referred paragraph II of Article 6 to the Constitutional Council for constitutional review. The Court of Cassation refused to refer the first paragraph of the same article as the Constitutional Council had already declared it conform to the Constitution in its decision of 20 July 2012 (Decision 2012-263 QPC).

In its decision of 15 January 2013 (Decision 2012-287 QPC), the Constitutional Council ruled on the constitutionality of Article 6, paragraph II. The Council acknowledged that the legislator could retroactively validate payments or claims that were subject matter of pending legal proceedings but only for reasons of general interest (public interest). However the Council considered that the financial reasons invoked by the legislator related to an undetermined amount of money and were therefore not sufficient to justify a violation of persons' rights who had initiated legal proceedings before the Council of State's decision. The Constitutional Council strictly scrutinizes justifications of laws legalizing existing practices ("lois de validation"). This is even more true when the general interest at stake is exclusively financial. In addition, laws legalizing practices are generally trying to avoid the effects of the annulment of an administrative act and are strictly framed as they can potentially affect the separation of powers between the executive, legislative and judicial branches. But this is a different issue.

As a consequence of the Constitutional Council's decision, the fate of the parties having challenged before 17 June 2011 the validity of their invoices for the payment of private copying levies (based on the annulled rates) is left in the judges' hands.

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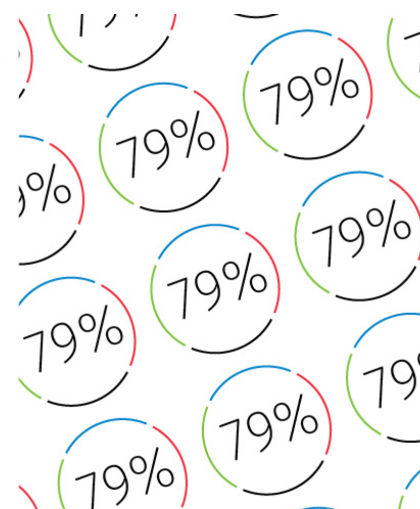

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