Kluwer Copyright Blog

EU: Private Copying Recommendations fall in January

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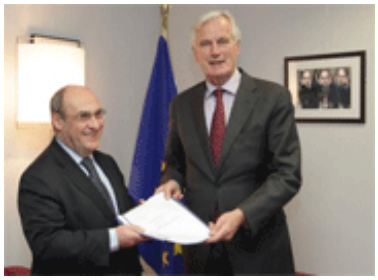

Private copying (**PC**) levies have for long been one of the most hotly debated topics in EU copyright law and policy. It is a common area for discussion between rightholders, collective rights management organizations (**CMOs**), the Consumer Electronics/ICT industries and even consumer representative associations. At the EU level, PC levies have been on the harmonization agenda since the 1988 Green Paper on Copyright and the Challenge of Technology and, following stakeholder consultations (in 2006 and 2008) and the 2011 IPR Strategy, remain an "on-going initiative" of D.G. MARKT. The latest instalment in this saga was the appointment of Mr. António Vitorino (picture, left, with EU Commissioner Barnier) as mediator in November 23, 2011 to lead a stakeholder dialogue in this field. The economic significance of PC levies is highlighted by the fact that, in 2010 alone, the overall amount collected in the EU was above € 600 million.

On January 31, 2013, the report of Mr. António Vitorino (**AV**, not to be confused with AVB) on the results from such mediation was finally delivered and published under the format of a recommendations document ("Recommendations"; see also the Press Release). AV had initially promised this document for autumn 2012, but as this blogger is well aware, the Portuguese fall is an expansive concept, thus making this a timely publication.

The body of the document contains recommendations covering new business models, licensed services and the PC exception (Part I), as well as levy systems in the internal market (Part II). Appendix I lists the stakeholders involved in the mediation process, while Appendix II and III contain copies of statements concerning the process.

The Recommendations address both PC and reprography levies, focusing on the problems caused by divergent national levy systems (well exemplified by figures provided in the Press Release) to the internal market. After demonstrating its political skill by lauding all stakeholder's "constructive" contributions to the mediation process, AV reminds us of the importance of existing CJEU case law on the topic – i.e. *Padawan vs SGAE* and Stichting de Thuiskopie vs Opus – for resolving issues brought up during the mediation process. Importantly, reference is made to the multitude of current CJEU referrals awaiting decision, namely *Joined Cases VG Wort vs Kyocera Mita* (already with a "concise" Opinion by A.G. Sharpston), *Austro Mechana vs Amazon*, *Constantin Filmverleih vs UPC Telekabel*, Copydan Båndkopi vs Nokia (a.k.a. absolutely-all-you've-ever-wanted-to-know-about-PC-but-were-too-afraid-to-ask) and *ACI Adam et al. vs*

Stichting de Thuiskopie.

In fact, it is quite likely that the decisions on the above cases clarify most of the (many) questionable issues surrounding PC in the EU. Maybe for that reason, the Recommendations shy away from some of the important issues raised in the mentioned referrals, such as the (il)legal nature of the source of the copy (an issue dealt in detail in ACI *Adam*, *Constantin Filmverleih*, *Copydan Båndkopi*, and only indirectly mentioned in the Recommendations) or even the full impact of TPM use in the assessment of fair compensation (see, e.g., A.G. Sharpston's Opinion in *VG Wort*, paras. 94-104).

In order to understand the Recommendations, it is important to look first at some of AV's introductory remarks, as these clarify his basic understanding on some key aspects. First, AV believes that none of the currently proposed alternatives justifies the "phasing out" of hardware-based levies. Second, the link between the PC beneficiaries causing the "harm" and those liable for financing fair compensation *"should not be severed"* (implicitly, AV seems to be challenging the validity of the recently enacted Spanish legislation on PC). Third, online business models are shifting from ownership to access based models, leading to a future decrease in the level of PC levies collected. In fact, where rightholders are remunerated via licensing agreements for uses through (typically DRM-ed) "online services" covering reproduction of their works, imposition of levies would configure a double payment. As such, the focus of the Recommendations is squarely placed on the *"consistency, effectiveness and legitimacy"* of current levy systems.

Having set the stage, the remainder of this blog post will address each recommendation in turn, following the structure of the commented document.

ON NEW BUSINESS MODELS, LICENSED SERVICES AND THE PRIVATE COPYING EXCEPTION

Recommendation 1 (on the development of new and innovative duly authorized business models in the digital single market):

– *"Clarifying that copies that are made by end users for private purposes in the context of a service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies."*

Although the current business market for online services is dynamic and evolving, AV identifies a tendency for comprehensive offers to consumers, comprising multiple features (device portability, synchronization, cloud "storage & matching", playlist sharing, etc.), for the most part falling outside the scope of the PC exception. As such, the lawful operation of these complex access based services requires licensing agreements. Conversely, this blogger argues, legal uncertainty and fear of litigation can be the reason why many of these services "over-license", meaning that the problem could be tackled by better defining the scope of PC and not restricting or quasi-eliminating it…

Naturally, AV's interpretation is posited on an (extremely) restrictive view of the scope of the PC exception, which he perceives (historically and normatively) as insusceptible of facilitating third parties' commercial activities. If some operators were able to avoid the licensing requirement based on the exception, this would in fact lead to more and higher levies. Therefore, AV expresses "no doubt" that such services must be licensed. This blogger, being younger and far less knowledgeable, has at least "some doubts" that this is true for all services and even for non-

negligible parts of many services' operations; let's therefore agree to disagree on this one (and wait for the CJEU's guidance, especially in *ACI Adam*…).

If AV is right, the question becomes how to qualify the end-users copies made for private purposes under these services. Such qualification depends whether the rightholder's consent for acts of private copying is valid. This is because, if the consent is deemed invalid, the use falls under the PC exception and (unless *de minimis*) gives rise to payment of fair compensation. AV deems such consent valid on the basis of the following neat legal distinction: a rightholder's authorization for private use does not equate to the contractual overridability of the exception; it is instead a contractual disposition of an already exempted act. Therefore, the rightholder is entitled to grant such authorization for PC against whichever counter performance she deems adequate. PC acts so authorized will therefore cause no "harm" and give rise to no claim for fair compensation. Readers should note that in her Opinion in *VG Wort*, A.G. Sharpston deals with this precise issue (paras. 105-121), following a different reasoning than AV but reaching a similar conclusion, by accepting national laws that allow rightholders to either "*renounce any claim to fair compensation* [and not to exercise control over the copying] *or make their works available for copying subject to contractual arrangements"*, thus enabling them to receive fair compensation in advance for future acts of PC; in either case, such rightholders would have no claim for fair compensation, which should be deemed *"exhausted"* (paras. 120-121, and 137, fourth indent).

AV's interpretation results from his belief on online service providers' ability to cater to market needs via direct licensing. It is recognized that a CMO-enabled private ordering regime may hinder authors and performers, due to their lack of bargaining power in negotiations with corporate rightholders, which often leads to the latter acquiring all the economic rights on works and thus benefiting from direct licensing practices. Notwithstanding, AV notes these issues are better addressed in the context of contract and labour law (and of collective rights management), not of PC levies.

In sum, licensed copies should not give rise to PC levies, as that would lead to double payment. This solution is supported by Recitals 35 and 45 of the Information Society Directive (opening the door for contractual stipulation in this field) and by *Padawan* and *Stichting de Thuiskopie*, which link fair compensation to "harm" caused by unauthorized reproduction; a contrario, authorized uses cause no harm requiring compensation. This issue should be settled in *VG Wort*.

ON LEVY SYSTEMS IN THE INTERNAL MARKET

AV's departure point is that, following Padawan, the sole condition for the "leviability" of products is their technical capability to make copies. Beyond said condition, Member States (and not the EU legislator) should decide which products to levy, according to their specificities. Notwithstanding, and with respect for the principles of subsidiarity and proportionality, levy systems should be reconciled with internal market objectives. Five sets of recommendations are advanced in this context, aimed at providing specific solutions to existing "cross-border issues" connected with the divergent application of the PC regimes.

Recommendation 2:

– *"Levies should be collected in cross-border transactions in the Member State in which the final customer resides."*

AV recommends the application of the country of destination principle in cross-border

transactions, as outlined in Stichting de Thuiskopie, on the grounds that the PC harm is caused in the country of residence of the final users, as the country where the reproduction likely takes place. This interpretation, which will be addressed in Austro Mechana, implies that PC levies cannot be collected in the country of origin (i.e. of import or manufacture), thus preventing "levy-forum shopping " by manufacturers and importers.

Recommendation 3 addresses double payments in cross-border sales and payment liability. It is presented as an alternative proposition:

Either,
– **(a)** – "The liability for paying levies should be shifted from the manufacturer's or importer's level to the retailer's level while simplifying the levy tariff system and obliging manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy." (**Recommendation 3.a**)

Or **alternatively**
– **(b)** – "clear and predictable ex ante exemption schemes should be established." (**Recommendation 3.b**).

The clear purpose of **Recommendation 3.a** is that levies for a product are paid only once, in the country of destination. This means to counteract current practices, where imposition of levies on importers causes multiple payments resulting from the product crossing borders, a situation not adequately mitigated by existing reimbursement systems, especially when products' sales-chain involves unrelated entities. A shift of liability to the retailer level is viewed as the most conducive (and CJEU compliant) approach to making effective the country of destination principle and preventing the risk of double payments. Accompanying measures are proposed to reduce the administrative burden at retailer level, namely the imposition of: (i) an obligation on importers and manufacturers to provide information on levy-product transactions to CMOs (e.g. via periodic reporting obligations); and (ii) liability for payment of the levy on importers and manufacturers who fail to comply with information obligations. This shift to the retailer level must be accompanied by the simplification of national levy tariff systems (e.g. fewer tariff classes, better definition of harm, etc.).

Recognizing the difficulties in applying the above recommendation, and alternative is proposed (**Recommendation 3.b**). Such an alternative tries to address the legal challenges raised by existing reimbursement systems and their ability to distinguish between private/professional use , as demanded by Padawan and currently under consideration in Austro Mechana. Recognizing the great difficulty for manufacturers/importers to distinguish between equipment sold for professional or personal use, it is advanced that this task is more adequately performed by final retailers. As such, AV argues that ex-ante exemptions from payment by manufacturers/importers could provide a suitable alternative system design to that of directly imposing liability on final retailers. Such alternative is likewise preferable to current ex-post reimbursements systems – where sales for professional uses are actually levied.

This option could be implemented via standardised exemptions for cross border sales of goods by manufacturers/importers not acting simultaneously as retailers for private end-users, subject to specific qualifying rules and procedures. The potential problem with this alternative, as AV duly notes, is that it might only benefit manufacturers/importers and not necessarily professional users.

The issues addressed in these recommendations should, in principle, be greatly clarified in *Copydan Båndkopi* (questions 6(a) through 6(c)).

Recommendation 4 is specific to the field of reprography, and merely states that:

– "*more emphasis should be placed on operator levies than on hardware based levies.*"

The reprography exception is different from its PC counterpart insofar as it's not only *medium* (paper) and *method* (photographic technique) *specific*, but also has a *wider scope*, covering reproductions made for purposes beyond private use. That being said, similar cross-border double payment problems occur in this field. For that reason, and because it would be dysfunctional to have different regimes for PC and reprography, it is recommended to shift liability to the retailer level also for reprography levies. In addition, express reference is made to "operator levies", in opposition to hardware based-levies. The first refer to those collected on the base of framework agreements between CMOs and entities ("operators") engaged in activities of mass copying (e.g. copy shops). Because operator levies raise no Internal Market issues, they should gradually be promoted as the reprography levy system of choice over their hardware-based counterparts.

Recommendation 5:

– "*Levies should be made visible for the final customer.*"

Padawan allows direct debtors to pass on the PC levy on the price to consumers. This is not always feasible for manufacturers/importers, which thus absorb said levy in some instances. AV believes it will be easier for retailers to pass on the levy, subject to the condition that the same are made visible to consumers. This would not only increase transparency, but also prevent evasion and facilitate CMO collection efforts. In the context of the adoption of the alternative identified in recommendation 3.b., a parallel solution would be imposing this transparency obligation throughout the sales-chain. Increased visibility could also facilitate competition at retailer level, by enhancing consumer pre-purchase information and pressuring retailers to exclude levies from the final price.

Finally, **Recommendation 6** states that:

– "*More coherence with regard to the process of setting levies should be ensured by:*

(a) *Defining 'harm' uniformly across the EU as the value consumers attach to the additional copies in question (lost profit)*; and
(b) *Providing a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits.*"

This recommendation is aimed at increasing legal certainty in setting the level of fair compensation. To do so, both a common definition of "harm" and common procedural rules for levy setting are required.

a) Harm as lost profit

The notion of "harm" caused to authors for PC/reprography purposes is subject to different interpretations. "Harm" is both a valuable (Recital 35 of the Information Society Directive) and necessary (Padawan) criterion for calculating fair compensation. AV believes this concept requires

uniform interpretation, providing a clear link to the amounts levied.

AV proceeds to interpret harm in a way similar to that used for civil liability in typical European Civil Law countries. The following steps summarize his approach.

1) Identify the hypothetical situation absent the exception.
2) Identify the **actual (and not the hypothetical)** value consumers would be willing to pay in that situation for the additional private copies if these where lawfully acquired.
3) This value corresponds to rightholders' lost licensing opportunities for the additional private copies (i.e. their "economic harm").
4) This "economic harm" is lower than the market value of the initial copy but not de minimis, i.e. it is still sufficient to merit payment.
5) If the additional private copies reach a de minimis level no economic harm occurs, as there would be no actual licensing opportunity for such uses. The calculation must therefore consider consumer's willingness to pay, to be valued differently in the analogue and digital world.
6) A lower willingness is expected for digital copies, leading to a lower level of fair compensation for additional digital copies. 7) However, in an interesting reading of Padawan, the harm to be compensated relates not to isolated but to aggregate ("taken together") consumer copying acts.

In this blogger's view, some serious criticism can be made to AV's reasoning on this point. It goes beyond the scope of this blog post to explore such criticism in detail, but here is some food for thought for interested readers: – Is the hypothetical scenario applicable to harm typical of non-punitive damage systems adequate for a "compensation" right? (I'm purposefully distinguishing compensation from remuneration rights, following the CJEU's case law). – Is this not how harm is analysed for infringement of copyright exclusive rights in the same countries? If so, do we really want to establish an identical baseline for conceptually distinct rights? – If the economic harm reflects lost licensing opportunities for hypothetical legally acquired subsequent copies, are we to assume that where such licensing opportunities do not exist (i.e. online mass uses not covered by licensing agreements due to lack of offers or unwillingness to pay), no harm and thus no fair compensation is due? If so, it seems only PC acts from a "legal source" are covered and that matter is settled (unless of course the CJEU decides otherwise and then AV's calculation method implodes and we can scratch this part of the Recommendations…) – Is an act of digital private copying really a dynamic concept covering aggregate acts? If so, where should the line be drawn? Should we consider only the aggregate uses of a consumer regarding a specific work, by a specific rightholder, or all works of the same rightholder? During what period of time? And if we adopt a broad interpretation on these points in order to make the levy system operational, do any *de minimis* uses remain? (On a related note, readers should note that guidance on the *de minimis* qualification of the prejudice is forthcoming in *Copydan Båndkopi).*

b) Level of Tariffs

In this context, after describing the hectic state of the existing systems for setting levies and its negative impact on rightholders and other stakeholders, it is noted that such problems would persist even with a shift of liability to the retailer level. As such, it is recommended that the tariff setting process is improved and made transparent, that equal representation of all stakeholders is implemented, and that the process is subject to supervision by national authorities (at interim and/or final level). Assuming the "equal representation" requirement includes consumer representatives and does not mirror the list in Appendix I, this recommendation alone (if implemented) should provide for significant structural changes in current Member State practices.

Levy setting decisions should be subject to judicial review, preferably under specific procedural rules, ensuring fast decisions and clearly defining the effective date of application of the rate.

AV goes one step further and recommends the following minimum standards for the tariff setting process:

– Decisions on the application of a levy to a product taken within 1 month post-market introduction;
– Provisional/transitional tariff level within 3 month post-market introduction;
– Definitive tariff level within 6 month post-market introduction;
– In principle, the definitive level should be equal or inferior to te provisional level. If superior, the payment of the difference should be gradual.

Overall, the Recommendations provide an independent, pragmatic and solid suggestion on several contentious aspects of the PC/reprography levy systems. Even where legal reasoning is debatable, the document has the merit of not shying away from assuming clear positions in a concise and articulate way, which is laudable. The question now is whether these Recommendations will gather digital dust in Mr. Barnier 's locker waiting for all those CJEU decisions or whether his promise to take the Recommendations "*into account in any further steps to be taken regarding private copying and reprography levies, and in particular in the on-going review of the EU copyright framework*" means a different course of action.

JPQ

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