

On copyright levies, printers, plotters and personal computers (VG Wort v Kyocera and others)

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On June 27, 2013, the CJEU delivered its judgement in Joined Cases C-457/11 to C-460/11, *VG Wort v Kyocera* and others (VG Wort v Kyocera; see also the [press release](#)). This judgement was preceded by an Opinion by A.G. Sharpston (delivered on January 24, 2013) and comes in a particularly busy period for private copying and reprography levies, which has seen not only the publication of a set of [Recommendations](#) by Mediator António Vitorino, but also a bevy of requests for preliminary references by the CJEU: [Austro Mechana v Amazon](#) (with an Opinion by A.G. Mengozzi), [Constantin Filmverleih v UPC Telekabel](#), [Copydan Båndkopi v Nokia](#) and [ACL Adam and Others v Stichting de ThuisKopie](#).

The Commission has made clear that reform in this field is necessary from the single market perspective, with Internal Market Commissioner Barnier presenting the Vitorino Recommendations as "non-binding provisions". However, despite the Recommendations having been discussed in the latest "[competitiveness meeting](#)" of the Council of the EU, there is no indication of legislative action in this field for 2013, as previously promised for 2012 in the [IPR Strategy](#) (of 2011).

VG Wort v Kyocera deals with the interpretation of several provisions in the [Copyright Directive](#) (all legal provisions cited hereinafter refer to this legal instrument, unless otherwise stated). It looks in particular at the right of reproduction (art. 2) and its articulation with the exceptions and limitations in art. 5 - namely concerning private copying, reprographic reproductions and the concept of fair compensation -, as well as with the provisions on technical protection measures (TPMs) in art. 6. The judgement also deals with a question on the temporal applicability of the Directive (arts. 10 and 13(1)).

Facts and dispute

This judgement results from references for a preliminary ruling from the Bundesgerichtshof (Germany), made in the context of proceedings between a German collecting society (VG Wort) and several intermediary suppliers (Kyocera, Epson, Xerox, Fujitsu and Hewlett Packard) concerning the compensation to be paid to the first by the latter as a consequence of the placement on the market of devices capable of copying (e.g. printers, plotters and personal computers).

VG Wort is the sole representative of authors and publishers of literary works in Germany for the purposes of collecting this compensation from device suppliers, having acted in the disputes giving rise to this judgement on behalf of VG Bild-Kunst, a different collecting society representing rights holders in graphic works. In essence, the disputes in the underlying cases relate to both collecting societies' intent to have the aforementioned intermediary suppliers pay levies on computers, printers and or plotters marketed in Germany. The suppliers, for their part, argued that some of the devices in question (namely printers and plotters) are incapable of autonomous copying, being able to do so only when linked to a device that uses a photographic technique or process for that effect; as such, only the latter device should be levied.

After an eventful journey through the national judicial system that saw one of the cases go as far as the German Federal Constitutional Court, the similar nature of the multiple references made in cases C-457/11 to C-460/11 lead to these being joined for the judgement in *VG Wort v Kyocera*.

Judgement

Following the structure of the judgement, the following paragraphs provide a synthesis of the Court's main arguments and findings.

Applicability of the Copyright Directive *ratione temporis*

The question of the temporal applicability of the Copyright Directive is dealt briefly by the Court, which states the general principle that this legal instrument has no retroactive effect, meaning that it does not apply to acts of exploitation of works prior to its date of transposition into national law (December 22, 2002).

The effect of explicit or implicit authorization in the right to fair compensation

The Court then addresses the question of the effect of explicit or implicit authorization in the right to fair compensation. As a preliminary point, readers should recall that, where Member States chose to implement the optional exceptions or limitations in arts. 5(2)-5(4), certain provisions are conditional upon the grant of fair compensation - art. 5(2) (a), (b) and (e) - while others do not come with such condition, being however possible that national law provides for such compensation (cf. recital 36).

The Court's reasoning in answering this question is formalistic and lacks clarity. Notwithstanding, this blogger would summarize the argumentation as follows. First, Member States can implement art. 5(2) and (3) either via the legal mechanisms of exceptions (a broader exclusion of exclusive rights) or limitations (a more restricted casuistic exclusion of certain acts from the scope of exclusive rights). In both instances, either the Directive requires that some exception/limitations are accompanied by fair compensation or Member States opt to do so. Where fair compensation is provided, it must be based on the harm caused to rights holders by unauthorized reproductions. When particular reproduction acts fall within the scope of a compensated exception/limitation, such uses are possible despite authorization by rights holders. Consequently, any such authorization by rights holders does not produce legal effects and cannot impact the harm caused by the reproduction. This in turn means that these authorizations cannot be taken into consideration when calculating the level of fair compensation. This understanding, it should be emphasized, represents a significant departure from the status quo in many Member States' levy systems.

On this point, the Court strays from AG Sharpston's Opinion. Although the Opinion shares the same basic understanding, the AG qualifies her position in light of the interpretation that "the legislature clearly intended there to be some possibility for contractual arrangements to coexist with such exceptions and limitations". The Directive not being clear, Member States should enjoy a level of discretion, which includes the possibility of rights holders either renouncing the claim for fair compensation or making their works available through contractual arrangements that price such fair compensation for future copying into the transaction; in either case, no fair compensation from private copying levies is due for these acts (as the same would be, quite curiously, "exhausted") (See AG Opinion, paras 119-121 and 137, fourth indent).

A similar outcome (although following a somewhat different logic) results from the Vitorino Recommendation that copies made by "end users for private purposes in the context of a service that has been licensed by rightsholders do not cause any harm that would require additional remuneration in the form of private copying levies".

The effect of TPM application in the condition of fair compensation

According to art. 5(2)(b) (on private copying), fair compensation must take account of the application or non-application of TPMs to the copied works.

The Court notes that TPMs are meant to allow rights holders to restrict the practice of unauthorized acts by end-users, whilst the private copying exception/limitation is designed as a legislative permission for unauthorized reproduction acts. It is for the Member States to define the proper scope of this exception/limitation, which should be done also through by the encouragement and regulation of the application of voluntary TPMs by rights holders. In other words, the application of TPMs helps delimiting the scope of private copying. It is that delimited scope that forms the basis for the calculation of fair compensation. In this light and due to the voluntary nature of TPMs, even where these are available but not applied, the condition of fair compensation remains applicable. Member States may nonetheless adjust the level of fair compensation in light of the application of TPMs, thus encouraging its voluntary adoption and better application of the exception/limitation.

Here too the Court seems to diverge from AG Sharpston's Opinion, which qualifies this as a matter of policy not clarified by the Directive, thus being up to Member States to decide whether and to what extent fair compensation should be provided for where TPMs are available to but not applied by rights holders (AG Opinion, para. 104).

The scope of the concept of reprographic reproductions

This question is aimed at discerning whether the concept of reprographic reproductions (art. 5(2)(a)) encompasses acts "effected using a printer or a personal computer, essentially where the two are linked together, and, in such a case, which person must be considered as owing the fair compensation under that provision".

The Court notes first that art. 5(2)(a) applies to acts of reproduction using a particular medium - a material element consisting of paper or similar - thus excluding all non-analogue mediums, especially those of a digital kind. Second, it covers different means of reproduction: photographic of other processes having similar effect. The crux of the provision is in the medium comprising the result of the reproduction act, meaning that it allows for a plethora of operations leading to such act, on condition that these are non-autonomous and integrated in a single process, under the control of the same person and aimed at reproducing the work in an analogue medium. Under this configuration, the Court considers that art. 5(2)(a) can encompass reproduction processes including multiple devices, even if with a digital function (thus allowing methods comprising an intermediate digital stage).

Furthermore, and applying by analogy the Court's case law on the private copying exception (read: [Padawan](#) and [Stichting de ThuisKopie](#)) in articulation with art. 20 of the [Charter of Fundamental Rights of the EU](#) (on "Equality before the law"), the person considered as owing the fair compensation is the end-user making the unauthorized copy; however, due to the practical difficulties in charging end-users, Member States are authorized to implement reprography levy systems that qualify intermediaries in the possession of the relevant equipment as the debtors. For (single process) reprographic reproductions using a chain of devices, Member States can identify as debtors any like intermediaries within such non-autonomous chain. In both cases, two conditions must be fulfilled. First, the intermediaries in question must be given (in law or in fact) the possibility to pass on the levy to end-users. Second, the overall amount owed as fair compensation for the harm cannot be "substantially different from the amount fixed for a reproduction obtained by means of a single device". These conditions are aimed at securing the respect for the right of equal treatment of the parties involved.

Concluding Remarks

The Court's judgement in *VG Wort v Kyocera* raises several concerns, a detailed analysis of which would go beyond the scope of a blog post. In broad strokes, the most criticisable parts of the judgement are those relating to the effect of a rights holder authorization and of TPM application in the condition of fair compensation. On the first, the Court's ruling will likely lead to double payment by end-users, which will not

only continue paying for a licensed use (that already prices subsequent digital copying into the purchase), but also a levy, which must be calculated as if no digital copying is priced into the purchase of a work. On the second (and related), by deciding that the application of TPMs can only impact the calculation of the level of fair compensation, the Court not only ignores economic arguments for the application of no levies under these circumstances, but also (quite remarkably) art. 6(4), fourth subparagraph of the Copyright Directive. The latter provision allows for the contractual overridability of the PC exception for works made available online, with copy control TPMs and subject to a licensing agreement (think: downloads from Apple iTunes). It remains to be seen whether and how forthcoming judgments of the Court will address these issues.

JPO