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## Private copying levy: The aftershocks of Padawan

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*“”The difficulty also lies in the fact that (to our knowledge) no levy system within the EU provided before Padawan for such a distinction and that the structure of the payment system did/does not lend itself easily to making such a distinction.”*

There’s nothing wrong with a private copying levy, the CJEU decided in SGAE/Padawan, but “the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including cases in which such equipment is acquired by persons other than natural persons for purposes clearly unrelated to private copying, is incompatible with the directive.”

An interesting refinement of a controversial legal doctrine. And an interesting financial refinement for the relevant industry. The decision essentially meant two things: 1) where the law or the mutually agreed tariffs for private copying in the Member States made no distinction between private and professional users of recording media, collective rights management societies collected excessive sums of money for years, e.g. the unwarranted part of the professional users; and 2) tariffs establishing the level of the private copying levy must now be revised in most (if not all) Member States to reflect the distinction between private and professional users of media. The aftershocks of Padawan can therefore be felt on either front, although greater shocks should be expected in the future throughout the EU.

*Reimbursement of moneys*

In the Netherlands, the aftershock was initiated on the first point by the Dutch branch of Imation, an American company specialized in data storage. Imation stated that the Dutch collecting society for private copying levies (Stichting De Thuiskopie, literally ‘The Homecopy foundation’) should reimburse the levies that Imation paid after 1 July 2006 with regard to the sale of blank data carriers to professional users. The district court of The Hague ruled in February of this year that Imation should not have been charged for the sale of blank data carriers to professional users. It stated that the ECJ clearly ruled that undifferentiated levies are not allowed under any circumstances and therefore that levy systems like that of the Dutch Thuiskopie, in which the extent of professional use was inter alia discounted in the height of the levies, are incompatible with Directive 2001/29. The district court also ruled that the amount of unduly paid levies was as yet unclear and should be further investigated.

On 12 August 2013, Imation filed a writ asking the district court Amsterdam to grant an order for the seizure of sums held by Thuiskopie, the ING Bank (Thuiskopie's bank), and sixteen importers and manufactures of blank data carriers that are under the obligation to pay levies to Thuiskopie. By doing so, Imation wanted to obtain security for a claim of € 7.651.268,90, the amount that Imation estimated to represent unduly paid levies. The court rejected the action, among other reasons because a seizure would hinder Thuiskopie in realizing its main objective of distributing the collected levies to copyright holders: a euphemism to say that an award of damages of this magnitude would severely compromise the continued existence of Thuiskopie.

The two decisions from the district courts of The Hague and Amsterdam illustrate how difficult it is to apply the Padawan findings to past occurrences: national courts can very well reiterate the principle set by the CJEU according to which moneys should not have been collected indiscriminately, but it is another challenge to determine what proportion of the moneys collected represent the unwarranted 'professionals' share that would need to be reimbursed today.

*Recalculation of tariffs*

More importantly from a forward-looking perspective, Padawan requires that the level of the private copying levy be revised to reflect the distinction between private and professional users of media. This is also no easy task! One would say that determining the level of the private copying levy is already complicated enough without having to adapt the system to make differentiated collections. The difficulty also lies in the fact that (to our knowledge) no levy system within the EU provided before Padawan for such a distinction and that the structure of the payment system did/does not lend itself easily to making such a distinction: manufacturers and importers of media are not in a position to know whether the recording media purchased lower down in the chain are meant for private or professional uses. Moreover, collecting societies had (to our knowledge) not established any system to facilitate this requirement.

Among the solutions put forward to solve the problem is the suggestion made in the report of mediator Vitorino, last January, to transfer the liability for paying levies 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. Or alternatively, to establish clear and predictable ex ante exemption schemes. To date the transfer of liability option does not seem to have generated much enthusiasm among stakeholders or lawmakers outside of the manufacturing/importing sector, although in theory, it might provide the solution to the problem of the indiscriminate collection of moneys.

In contrast, the creation of an exemption to the benefit of professionals has been put in place at least in one Member State: France. Essentially the French Code of Intellectual Property, together with a Decree of application, exempts certain categories of professionals from the payment of the levy. Article L. 311-8 in the Code of Intellectual Property reads:

*I.-The remuneration for private copying is not due when the recording medium is acquired for their own use or production:*
*1- The audiovisual communication companies;*
*2- Producers of phonograms or video recordings and those who provide, on behalf of producers of phonograms or video recordings, reproduction thereof;*
*2bis- of published works on digital media publishers;*
*3- The legal persons or organizations, including the list is determined by the minister of culture,*

*using the recording media for the purpose of assisting persons with visual or hearing disabilities. II.-The remuneration for private copying is not due either to the recording media especially acquired for business purposes whose conditions do not allow to assume a use for the purposes of private copying.*

France appears, so far, to be one of the few (if not the only) Member States that addressed the problem of the indiscriminate application of levies on blank media purchased by professionals.

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