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Why the reform of the Spanish law has been contested in the Spanish Constitutional Court

Pablo Hernández · Thursday, February 19th, 2015

The latest large-scale reform of the Spanish Copyright Act was published on 5 November 2014. The key aspects of the reform are discussed here. The bulk of the opposition to the reform contends that two provisions of the Act, namely, the new regulation for private copying and the imposition of a "one-stop shop" system, breach the Spanish Constitution.

The current Spanish governing party decided as soon as they came to power, at the end of 2011, to abolish private copy payments by consumers in Spain in order to fulfil a campaign pledge to voters. Since no one wanted to make private copying into an illegal practice, the solution was to keep the copyright limit and to add the cost to the State Budget. The decision was considered at that time to be temporary, anticipating a European Harmonisation that never materialised. The decision was incorporated in the Spanish Copyright Act last November and was challenged on February, 4th by the major opposition party (PSOE) before the Constitutional Court.

The appellant claims that the new private copying regulation damages private property rights and is detrimental to the duty to make a fair contribution to public expenditure. It also holds that the legislature harms reproduction rights by making a rule that precludes fair compensation.

According to the new Act, compensation to copyright-holders will be calculated according to a specific administrative procedure to determine the damage caused by the private copies and the State will pay the figure according to an annual assignment fixed in the Government budget.

The regulation is considered by the opposition ex-proprietary, preventing the compensation from fully making up for the loss of the right of reproduction. In that regard, the appellant argues that the fact that compensation has gone from being payable by the individual copiers to being payable out of the State's coffers means that the compensation cannot cover the damage that has actually been sustained. It is true that the impoverished Spanish public budget will bear the burden of that outcome, but this would not seem to be an easy conclusion to arrive at automatically, and there is no doubt that rightholders will be able to appeal the allocation granted to them if they consider that it fails to cover the damage that has been sustained.

As regards the duty to contribute fairly to sustaining public expenditure, the appellant indicates that the requirements of justice and financial capacity to which all public expenditure must be linked are not satisfied. The appellant claims that the State payment of compensation means that all tax-paying citizens will be contributing to an expense without having made copies. In that regard, it is difficult to accept the reasoning of the appeal insofar as it is clear that the contested legislation establishes that it is the State that will be responsible for paying the compensation, but it has not created any new tax connected with the same. It is therefore not simple to see how the constitutional requirements which must be met in the design of each tax contribution and in the overall planning of the tax system have been breached. Using the same argument put forward in the appeal, any compensatory payment made by the State could be classed as unconstitutional, since individuals who have nothing to do with the cause of the payment will have contributed.

The disassociation between the beneficiary of the private copying (the individual copier) and the paying party (the State) raises doubts concerning the new regulation's conformity with the InfoSoc Directive and how the latter has been interpreted by the Court of Justice of the European Union. A forthcoming decision (based on a referral for a preliminary ruling made by the Spanish Supreme Court) will determine whether or not the power granted to the Member States to establish how the compensation will be financed (*Padawan*) will be broad enough to enable the State to bear the onus of paying compensation for the damage caused by private copying. Nevertheless, it would not seem that this uncertainty can be converted into a breach of the State's constitutional duties when designing taxation.

As indicated above, the appellant also objects to the obligation imposed by the reform on collective management societies to jointly create a one-stop shop in order to centralise billing and payment transactions. This provision has been included in the Act under the illustrative title: "Measures for reducing transactional costs" and, according to the draft bill, the idea is for users of musical content to be able to settle all their duties vis-à-vis the numerous collective management societies that can claim from them, in a single transaction.

The appellant believes that this provision excessively restricts the right to freedom of association. It also specifically criticises the fact that the rule sets a mandatory deadline for complying with the obligation, imposes the duty of financing the one-stop shop and prevents any of the current collecting societies from controlling it.

In regulated sectors, there are a considerable number of cases where operators are forced to adhere to an organisation whose activity lies in the general interest. In Spain this occurs in the case of banks, which are forced to belong to the Deposit Guarantee Fund (Art. 5 of Decree-Law 16/2011) and to contribute towards guaranteeing the money that individuals have deposited with them.

Spanish Collecting Societies are legally-configured entities which the legislature has subjected to a special regulatory system as a condition for operating in the realm of collective rights management and being vested with a number of important privileges. This system, which restricts free competition, has not been called into question until now, and operators who wish to carry out collective management activities must respect the conditions established to that end, which extend to many aspects of their internal affairs. To the existing duties, the reform has now added the obligation to act alongside the other societies for billing and collection purposes via a body which will have to be created by all of them.

It would not seem easy to deduce infringement of the right to freedom of association from a greater

demarcation of the activities of collecting societies. However, there is also no doubt that the restrictions established against the freedom to operate and free enterprise need to be justified in order to observe the general interest at play. The Spanish law was drafted under the precedent of the one-stop shop for collecting copyright and related rights (VID) established by the anti-paperwork Decree-Law approved in 2012 by the Colombian Government.

This law limited Societies' obligation to act together to public establishments (in the case of Spain, there are no restrictions), and it was declared in conformity with law in judgment C784-12 handed down by the Colombian Constitutional Court. The Spanish Constitutional Court has been keenly following German constitutional case-law, but given that the legislature currently seems to be seeking inspiration from other models, it would do no harm to also bear in mind the problems deriving from these decisions.

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