

# Kluwer Copyright Blog

## Everything you always wanted to know about private copying but were afraid to ask (Case C-463/12 Copydan Båndkopi v Nokia Danmark A/S)

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On March 5, 2015 the Court of Justice of the European Union (the ‘**Court**’ or ‘**CJEU**’) ruled on [Case C-463/12 Copydan Båndkopi v Nokia Danmark A/S](#) (‘*Copydan*’). The case marks the seventh occasion on which the Court has ruled on the issue of the private copying limitation under art. 5(2)(b) Directive 2001/29/EC (the ‘**Directive**’), following [Padawan](#), [Stichting de Thuiskopie](#), [Luksan](#), [VG Wort](#), [Amazon.com](#) and, most recently, [ACI Adam](#). Currently, at least two more cases are pending: [C-572/13 Hewlett-Packard](#) and [C-470/14 Egeda](#).

This blog post is structured as follows. Section 1 briefly discusses *Copydan*’s background and facts, while clarifying the issues examined by the Advocate General (‘**AG**’) and the Court. Due to the length of the Opinion and the judgment, section 2 follows the Court’s approach to those issues and contrasts it with the [opinion of AG Cruz Villalón](#). Section 3 offers concluding remarks. The judgment in particular is at some points unclear (if not contradictory), and at other points just poorly written. What follows is a first attempt to understand the Court and reconcile *Copydan* with the Directive and previous cases on private copying. As the text is quite long, readers familiar with the case should feel free to jump to the topics of their interest and conclusions.[1]

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### 1. Background, facts and questions

On 16 October 2012 the Østre Landsret (Denmark) lodged a reference for a preliminary ruling with the CJEU in a case between the applicant, Copydan Båndkopi, and the defendant, Nokia Danmark A/S. The applicant is a collective rights management organisation ('CMO') authorised in Denmark to collect, manage and distribute the private copying levy. The defendant is a manufacturer and provider in Denmark of mobile phones, which it markets to professionals and individuals. Some of these phones include detachable memory cards (different from the incorporated or internal memory) that store files containing copies of protected works downloaded from external sources. Taking the view that said cards should be subject to a levy, the applicant brought a suit against the defendant for payment thereof, with reference to the 2004–2009 period. Nokia appealed on multiple grounds and, as a result, the Østre Landsret submitted this reference for a preliminary ruling.[2]

The reference contains a long and complex list of questions that read like a treatise on the private copying limitation. The topics include the admissibility of levies on multifunctional media and on media components, the detailed arrangements for the charging of the levy, the concept of *de minimis* harm, the impact of rights holders' authorisation on the limitation, the impact of technical protection measures ('TPMs'), the un/lawful nature of the source of the copy, and the impact of the use of third party devices for private copying.

This was followed by the Opinion of AG Villalón in mid-2014 and, this March, the Court's decision. Following common practice in copyright cases, the Court rearranged the long list of questions referred by the Østre Landsret. The following table provides an overview of the issues tackled by the Court in relation to the questions submitted and the AG's analysis. These issues are then addressed in that order in section 2.

Issue	CJEU	AG	Østre Landsret
Levies on multifunctional media	18–29	22–39	Question 4
Levies on media and components	30–41	22–53	Question 5
Detailed arrangements for the charging of the levy	42–55	102–112	Question 6
<i>De minimis</i> harm	56–62	97–101	Question 3
Rights holders' authorisation, accompanied or not by remuneration	63–67	57–68	Question 1 a) and b)

Issue	CJEU	AG	Østre Landsret
Impact of TPMs	68–73	69–80	Question 1 c) and d) and question 2)
Unlawful source (work made available without consent)	74–79	81–85	Question 1 f)
Third party device used for copying	80 – 91	86 – 96	Question 1 e)
Unlawful source (work made available ‘by any other means’) – inadmissible question	92 – 95	83 – 85	Question 1 g)

## 2. Analysis

Both the AG and the Court examine the questions and issues above with reference to the private copying limitation and the objectives of the Directive, even where the Østre Landsret does not expressly refer to it. The Court, in particular, defines those objectives as emanating from recitals 9, 10, 31, 32, 35, 38 and 39 in the preamble to the Directive.

### 2.1 Levies on multifunctional media

The question relates to the admissibility of levying multifunctional media and the extent to which its principle function is relevant. Both the AG and the Court restated the existing case-law on the principles applicable to the limitation.

In the AG’s view, those principles meant that the mere capacity for media to be used for private copying suffices for it to be a legitimate levy target, irrespective of its principal function. Thus, a levy on mobile phone memory cards secures a fair balance of interests, provided the limitation’s requirements are met.[3]

The Court followed the AG, considering it to be enough that one of the functions of the media – even if ‘ancillary’ – is to make private copies, as there is a presumption that users ‘take full advantage of all the functions provided by the medium’. However, the function should play a role in the determination of the amount of compensation, as this is to be calculated with ‘reference to the relative importance of the medium’s capacity to reproduce works for private use’. Furthermore, where that determination leads to the conclusion that the medium allows only for negligible copying, the prejudice may be *de minimis* and, pursuant to recital 35, not give rise to fair compensation.[4]

### 2.2 Levies on media and components

The question here is whether it is admissible to levy only certain detachable memory cards and not internal memory components of other devices (e.g. MP3 players), where both are used for private copying.

The AG tackles the question through the lens of a national system’s coherent application of limitations, which is instrumental to ensuring a functioning internal market[5]. After highlighting

member states' broad margin of discretion, which extends to the selection of levy targets, he notes that the same is limited by the Directive's objectives, the limitation's requirements, and the obligation imposed on states to provide fair compensation. In that light *and failing an objective justification for the exclusion of non-removable reproduction media*, the selection of levy targets based on the detachable nature of the media is incompatible with the Directive. However, he concludes, 'it is for the referring court to assess any objective justification for such exclusion and draw the appropriate conclusions'.[6]

The Court reaches a similar conclusion but adds relevant nuance. It emphasises the need to interpret limitations in light of the principle of equal treatment (art. 20 of the [Charter](#)) and notes that the different treatment of *comparable* levy targets under the requirements for fair compensation must be objectively justified. It is for the national court to analyse the different media and their effects vis-à-vis the making of copies, conclude on their comparability and assess potential justifications (e.g. the fact that non-detachable components are integrated in already levied devices). In summary, to be compatible with EU law, a national system cannot treat differently comparable categories of media and components; if it does so, it must present objective justifications for that treatment. In any case, these are matters for the national court to determine.[7]

This may be easier said than done. Law or statute, enacted by the national legislator, not courts, determines the list of levied devices/media. Unless the court considering the matter is competent to assess the validity of that law (which most national courts are not), it will be difficult to make the determinations required by the CJEU.

### 2.3 Detailed arrangements for the charging of the levy

The Danish system imposes the levy on producers and importers of mobile phone cards to business customers, who resell them to final purchasers that in turn can use them for professional or personal purposes.

In examining this issue, the AG notes that fair compensation is only due for media used for private (and not professional) purposes. However, practical difficulties may justify the imposition of the levy on producers and importers, provided these have the possibility of passing it on to end-users and, for professional-use media, of reimbursement. In any case, it is for the national court to determine whether the law secures these features.[8]

The Court generally follows the same approach, with additional detail. It states that the Danish configuration of a levy system is compatible with EU law if the ensuing conditions (in line with *Padawan* and *Amazon.com*) are met, which are for the national court to determine.[9]

1. The configuration must be justified by practical difficulties.
2. The exemption is available only to producers/importers if these are able to establish that the media were sold to 'persons other than natural persons' [sic] and for purposes unrelated to private copying. Here, the Court posits, the exemption cannot be limited to sales to entities (business customers) that have previously registered with the competent CMO, as that would violate the principle of equal treatment.
3. It provides an effective right to reimbursement, which is not excessively cumbersome, and benefits solely the final purchaser of the memory card that submits an appropriate application with the CMO. (The fact that the reimbursement right lies with the final purchaser respects the

‘fair balance’ aim expressed in recital 32 insofar as the system allows the levy to be passed on to them on the sale of mobile phones).

#### 2.4 *De minimis* harm

On the issue of what constitutes *de minimis* harm for which ‘no obligation for payment may arise’ (recital 35), the AG notes that member states have a wide margin of discretion in this respect; hence, the choice to charge compensation for these uses instead of exempting them is compatible with EU law.[10]

The Court essentially agrees. It recognises that member states have a margin of discretion in setting the threshold for when the prejudice caused to rights holders is to be considered minimal. However, it adds, the definition of that threshold must be consistent with, ‘inter alia’, the principle of equal treatment enshrined in art. 20 of the Charter.[11]

#### 2.5 Rights holders’ authorisation, accompanied or not by remuneration

The impact of rights holders’ authorisation, accompanied or not by remuneration, has been previously addressed in *VG Wort*. [12] The Court stated that, if an end-user act is covered by the limitation, any authorisation by rights holders is irrelevant for the purposes of fair compensation, as those uses are permissible regardless of authorisation. Any authorisation, therefore, would be ‘devoid of legal effects’.[13]

In its Opinion, the AG somewhat departed from *VG Wort* and considered that the Court left open the question of whether levies are due if rights holders have made available a work online subject to payment that includes fair compensation (e.g. a licence fee for the download of a song from a lawful platform). In light of the principle of fair compensation and the Directive’s objective of fair balance, he posits that no levy should be due where the authorised content has been subject to ‘a payment or other form of fair compensation’, as that would lead to an unjustified double payment by users.

That conclusion expressly echoes the [recommendations of Mediator Vitorino](#) on the topic.[14] It also opened the door for what Professor Peukert called a two-tier system, where levies would be charged mostly for works lawfully made available online for no fee and unrestricted by TPMs; interestingly, this would mean a significant change of direction for CMOs in the field, who would now be responsible for fostering a ‘sharing culture’.[15]

The Court disagreed with the AG and re-stated the *VG Wort* doctrine, clarifying that it also applies where a work is made available subject to payment.[16] However, it adds, because the authorisation in question is devoid of legal effects, the rights holder should not be entitled to any additional remuneration for that act:

*Since, in circumstances such as those set out in paragraph 65 above, such authorisation is devoid of legal effects, it cannot, of itself, give rise to an obligation to pay remuneration of any kind in respect of the reproduction, for private use, by the user of the files concerned to the rightholder who authorised such use.*

In my view, the circumstances ‘set out in paragraph 65 above’ are the following:

*where a Member State has decided, pursuant to Article 5(2) of Directive 2001/29, to exclude, from the material scope of that provision, any right for rightholders to authorise reproduction of their works for private use*

To be clear, the reference here is to art. 5(2), which states:

*Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases*

Therefore, the circumstances relate to the ‘optional’ nature of the limitation, meaning the choice by Member States whether or not to implement the limitation.

What to make of this? At this stage, I see two possible interpretations. The first and most straightforward is the following. If member states choose to implement the optional limitation they exclude from its material scope any authorisation from rights holders for acts of private copying. No ‘two-tier system’ is possible. Both Mr Vitorino and the AG’s positions are thus fully rejected. Also, one might add, the possibility of contractually overriding the exception outside the cases expressly allowed in the Directive becomes difficult to accept. This seems to be the Court’s method of theoretically avoiding the problem of double payments.

However, as I’ve argued [before](#), because rights holders will price into the purchase the possibility of private copies, consumers will quite likely continue to pay twice for private copies. This is contradictory to the principle of *de minimis* harm. If rights holders have already received payment for private copies they suffer no further (or negligible) harm; therefore, member states should be free to exempt these uses from levies.

The second and less obvious interpretation could be along these lines. Even where member states implement the limitation, it is up to national law (or case-law) to exclude from its material scope any authorisation from rights holders for those acts. Where they do, the first interpretation applies. Where they don’t, the authorisation is not devoid of legal effects and it is possible to set aside fair compensation, triggering a two-tier system in said countries.

I posit that the first interpretation is more consistent with the *Copydan* judgment, as well as with the objectives of the Directive regarding harmonisation of limitations and the achievement of a smooth and functioning Internal Market. However, I’m open to be persuaded otherwise, especially as one could argue that the problem of double payment will subsist. If it does, then it is difficult to locate the harm for which compensation is due and, arguably, the ‘fair balance’ of competing rights and interests that the Directive aims to achieve is negatively affected.

From a different perspective, the second interpretation would be a ‘workaround’ to the problem of double payment in a manner consistent with *Copydan*. Another admissible workaround would be to consider that, because rights holders price private copying acts into the purchase of content, member states could consider paid authorised uses as causing only *de minimis* harm, and therefore not charge fair compensation. If properly defined, this solution would be within their margin of discretion and respect the principle of equal treatment, while achieving a fair balance between the interests of rights holders and users.

## 2.6 Impact of TPMs

This question relates to the impact that TPMs on devices (e.g. DVDs, CDs, MP3 players or

computers) might have on the condition of fair compensation vis-à-vis private copies made on the same. Both the AG and the Court follow *VG Wort* and *ACI Adam*.<sup>[17]</sup>

TPMs allow rights holders to restrict unauthorised acts and help define the scope of the limitation. However, the latter is a legislative permission from member states, who must therefore ensure its proper application, including preventing acts that rights holders do not authorise. Because TPMs are voluntary, even where they are available but not applied, the condition of fair compensation remains applicable. However, member states may decide that TPM application has an impact on the *level* (i.e. calculation and amount) of fair compensation so that ‘rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception’.<sup>[18]</sup> In this respect, the Court has stated in *Nintendo* that legal protection of TPMs must respect the principle of proportionality: its application by rights holders should be suitable to achieve the goal of preventing unauthorised acts and not go beyond what is required for that purpose.<sup>[19]</sup>

The emphasis on fair compensation as a means to *encourage* voluntary adoption of TPMs and proper delimitation of the limitation opens the possibility that TPM-ed works are subject to higher levies than unrestricted works! This is an odd outcome, which seems prejudicial to end-users and to the Directive’s fair balancing aim. Also, insofar as the two-tier system described above is based on the non-applicability of TPMs, *Copydan* pre-empts its application by mandating payment in those scenarios.

Instead, it would be logical that application of these measures results in lower or no levies. This is because the possibilities to engage in private copying are reduced, making the prejudice to end-users minimal. Here, again, application of the *de minimis* provision may provide an escape valve to prevent unwarranted payments by consumers.

## 2.7 Unlawful source (work made available without consent)

The present question relates to the scope of the limitation and in particular to whether it covers copies made from unlawful sources. The Court understands unlawful sources as referring to *works made available to the public without consent of the rights holder (Question 1 f)* and not unlawful sources ‘by some other means’ (*Question 1 g*). Regarding the latter, the Court finds the Østre Landsret reference inadmissible, as it ‘failed to provide sufficient information relating to the nature of the reproductions to which the question submitted relates’, therefore preventing the Court from giving a useful answer. <sup>[20]</sup>

The issue of unlawful sources has been recently addressed in *ACI Adam*, which the AG and the Court strictly adhere to. The conclusion is that the limitation does not cover copies made from unlawful sources, understood here as those made available to the public absent authorisation; consequently, the national levy system must make a distinction between lawful and unlawful sources of reproduction for private use.<sup>[21]</sup> I’ve previously been critical of the Court’s judgement in *ACI Adam* and believe the same criticism applies to *Copydan* (see [here](#)).

## 2.8 Third party device used for copying

The final admissible question is the following: is a national law that levies copies made by an individual ‘by or with the aid of a device belonging to a third party’ (**‘third party device’**) compatible with the Directive?

The examples provided by the Østre Landsret are copies made by an individual from a third party's DVD, CD, MP3 player, computer or other device. In theory, this third party can be a friend, acquaintance, or colleague, as well as a service provider (e.g. DVD rental shop or similar). Moreover, the content in question can be acquired with the authorisation of the rights holder – i.e. lawfully – or without it.

In answering the question, the AG described multiple fact patterns arising from a third party device scenario (e.g. loan of a DVD among small circle of family/friends, or cases where the content in the device originates from an unlawful source). He concluded that a unitary response covering all potential sources of reproductions and/or situations in which they are made is not possible. However, he read the Danish legislation as containing several rules addressing some of the challenging cases. In that light, he concluded that it is up to the national court to interpret Danish law and its specific concepts, in light of the Directive and applicable CJEU judgements.[22]

The Court's approach to this issue is somewhat confusing, so reader caution is advised. After providing a basic definition of the limitation's scope, it notes that art. 5(2)(b) makes no reference to 'the legal nature of the connection, such as the right to property' between the individual that benefits from it and the device used to make copies.[23] In other words, nothing is said about use of third party devices to make copies.

In that light, following the *principle of strict interpretation* and taking into account that the Directive aims at *partial harmonisation*, the use of third party devices for private copying is outside the scope of the provision.[24] One could legitimately ask: is it strict interpretation when you allow third party devices for private copying, therefore extending the possibilities available to make copies?

The response is that the Court argues for a different meaning for strict interpretation, interpreting *ACI Adam* and [Case C-228/11 Melzer](#) (a non-copyright case) *by analogy*, and stating that a limitation 'cannot give rise to an interpretation going beyond the cases expressly envisaged'.[25] Why the same understanding was not applied to the un/lawful nature of the source remains unclear.

Consequently, 'in those circumstances', says the Court, art. 5(2)(b) should not be read in light of art. 5(5), containing the Directive's three-step test. The Court complicates matters by stating that the test is discarded because

*... contrary to what is claimed by the European Commission... [it] is not intended either to affect the substantive content of provisions falling within the scope of Article 5(2) of that directive or, inter alia, to extend the scope of the different exceptions and limitations provided for therein (see judgment in ACI Adam and Others, EU:C:2014:254, paragraph 26).[26]*

It should be noted that the reference to *ACI Adam* is removed from its original context: there, it was meant to clarify the role of the test when a limitation is in place[27]; here, it is apparently used to justify why the test does not apply to the scenario of third party devices. In a vacuum, this makes little sense. One can speculate that this paragraph is merely an unclear response to the observations submitted by the Commission to the Court, which are not public record. If that is the case, a cautious reading would be to consider that the test does not apply to use of third party devices because that topic is outside the harmonised scope of the limitation, and it is in relation to this scope that the test operates.

The net result is that national legislation imposing a levy on third party devices used for private



copying is compatible with the Directive.[28] This is because the choice to levy these devices is outside the scope of the Directive and thus within the margin of discretion of member states.

If a levy is applied, the use of such devices cannot be qualified as copyright infringement. This has some interesting consequences. If I copy songs from a friend's laptop but those songs were downloaded from *The Pirate Bay*, the copies come from an unlawful source and are not covered by the limitation. However, the device is subject to a levy and my copies may be exempted, which seems incongruous. It is up to national laws to regulate this intersection between unlawful source and copying from third party devices. In doing so, however, it is difficult to imagine that end-users will not end up paying levies for copies made from unlawful sources, i.e. for private copies they are not allowed to make...

Also, *Copydan* is bound to have an effect on intermediary or secondary liability for the provision of such devices or related services.[29] If I set up a service for 'do-it-yourself' copies I'm providing a third party device for the user to make private copies. Unless national law prohibits it, such service should not give rise to liability. However, it is easy to imagine that member states will envisage different solutions to this problem, with potential negative effects on the Internal Market for the provision of these services.

The issue is of particular complexity in what concerns 'do-it-yourself' copies in the digital environment, namely cloud services that provide technical means for users to make or request their own copies, such as virtual storage spaces and online 'personal video recorders' ('PVRs') for audiovisual works. Member states' laws already qualify copies made by third parties differently; furthermore, the identification of the copier in the context of PVR services has been subject to contrasting decisions in France and Germany.[30] In this respect, *Copydan* leaves the status quo untouched, with the abovementioned negative effects. The possibility of levying Cloud services was broached in a [Resolution of European Parliament from last year](#) and is sure to become more pressing in the future. Given the national landscape in the EU, it is perhaps a matter of time until the issue comes up expressly before the Court.

### 3. Conclusions

The Court's judgment in *Copydan* is relevant for a wide range of issues in the field of private copying and levies. To a significant extent it reaffirms and follows on previous decisions in the field, especially *VG Wort* and *ACI Adam*. However, it also advances it in some respects. We now know that the function of a device matters only to determine the level of compensation (and not to eliminate it), that exclusion of levies for comparable devices/media must be objectively justified, the conditions under which certain detailed arrangements for charging levies are admissible, that the concept of *de minimis* harm should be read in light of the principle of equal treatment, that fair compensation applies even for authorised content subject to payment (with a high risk of double payments for users), that the availability and application of TPMs give rise to levies (possibly higher than for unrestricted works), that unlawful sources refer at least to works made available without consent of rights holders (a distinction incumbent upon national systems), and that the use of third party devices for copying is outside the scope of the Directive and within member states' margin of discretion. On the latter issue, the Court's different approach to 'strict interpretation' and unclear analysis of the three-step test are noteworthy, as are the possible implications for third party liability, including (potentially) for Cloud services.

On balance, despite narrowing the scope of levies by excluding unlawful sources (in line with *ACI Adam*), the Court keeps that scope relevant by allowing levies to co-exist with authorised paid uses and TPMs, while permitting (in principle) the recourse to third party devices. In doing so, it arguably places individual users in the difficult position of having to pay twice for content, and for works where copying is restricted by technical measures. In this light, the *de minimis* concept may play an important role as a safeguard to protect user interests. Subject to the principle of equal treatment, it can – and perhaps should – be used to control excessive levies on multifunctional devices, in situations where rights holders have charged for content and/or use restrictive copy control TPMs.

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[1] I would like to thank Professor Séverine Dusollier and dr. Joost Poort for valuable comments to earlier versions of this post. All errors are, of course, my sole responsibility.

[2] *Copydan*, 11–16 (questions reproduced at 16).

[3] *Opinion AG in Copydan*, 33–39.

[4] *Copydan*, 18–19. On *de minimis*, see also 2.4 infra.

[5] *Opinion AG in Copydan*, 32, 40–41, citing recitals 31 and 32.

[6] *Opinion AG in Copydan*, 40–53.

[7] *Copydan*, 30–41.

[8] *Opinion AG in Copydan*, 102–112.

[9] *Copydan*, 42–55. On previous case-law describing these conditions, see *Padawan*, 52; *Amazon.com*, 28, 31, 34–36.

[10] *Opinion AG in Copydan*, 97–101

[11] *Copydan*, 56–62.

[12] *VG Wort*, 48–58.

[13] *VG Wort*, 34–40.

[14] *Opinion AG in Copydan*, 57–68.

[15] I describe this position [here](#) and [here](#); see also the discussion of [Bischoff and Wagner](#).

[16] *Copydan*, 65 citing *VG Wort*, 37.

[17] *VG Wort*, 52–57; *ACI Adam*, 43–44.

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- [18] *Opinion AG in Copydan*, 69–80; *Copydan*, 68–73.
- [19] See Case C-355/12 *Nintendo and Others*, 29–31.
- [20] *Copydan*, 92–95.
- [21] *Opinion AG in Copydan*, 81–85. In addition, he seemingly advances (at 84–85) that unless it is established that the source of the copy is lawful, it cannot be concluded that fair compensation is due. (In others words, where the source is legally uncertain, no compensation is due).
- [22] *Opinion AG in Copydan*, 86–96.
- [23] *Copydan*, 80–86.
- [24] *Copydan*, 87–88.
- [25] *Copydan*, 87. N.B. that *Melzer* relates to judicial cooperation in civil matters and already applies this reading by analogy to [Case C-189/08 Zuid-Chemie](#).
- [26] *Copydan*, 90.
- [27] See *ACI Adam*, 25–26.
- [28] *Copydan*, 91.
- [29] There are also potential overlaps with the reprography levy.
- [30] See Sari Depreeuw and Jean-Benoît Hubin, “Study on the Making Available Right and Its Relationship with the Reproduction Right in Cross-Border Digital Transmissions” (2014) 53–54.

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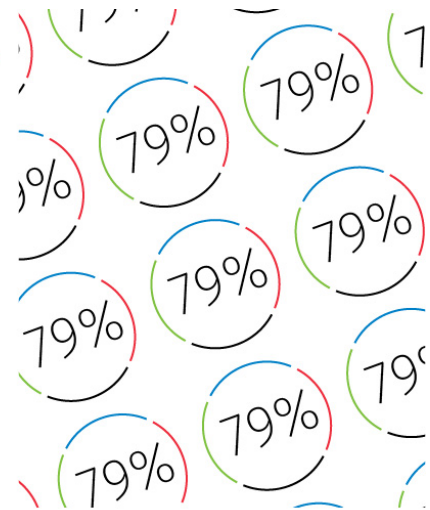
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