# Kluwer Copyright Blog

## Belgian levies regime condemned by the CJEU

Philippe Laurent (Marx, Van Ranst, Vermeersch & Partners) · Tuesday, February 23rd, 2016

*Case C?572/13, HP v. Reprobel, 12 November 2015*

*By Philippe Laurent and Céline Wulleman, Marx Van Ranst Vermeersch & Partners*

As we know, Member States may adopt exceptions to the reproduction right of authors in the cases and under the conditions listed in Article 5 of Directive 2001/29. Some of those exceptions may be transposed into national law provided that a "fair compensation" is paid to copyright holders: this is the case for the reprography exception (Article 5.2.a) and the private copying exception (Article 5.2.b). These two exceptions have been transposed into Belgian copyright law (article XI.190 of the recent Code of Economic Law) in the form of "legal licences". The fair compensation calculation method for the reprography exception is fixed in advance by the Royal Decree of 30 October 1997.

The dispute that gave rise to the preliminary question is between HP and Reprobel. HP imports computers and reprographic devices into Belgium for private and professional use. Reprobel is the Belgian collective management company entrusted with collecting and distributing sums corresponding to fair compensation under the reprography exception. HP challenged the amount of fair compensation for reprography claimed by Reprobel on some "multifunction" printers that it sold in Belgium, i.e. a total sum of 186.484.741 EUR (based on a levy of 49,20 EUR per printer), thereby underlining the incompatibility between the Belgian regime of fair compensation and EU law.

By judgment of 23 October 2013, the Brussels Appeal Court (Cour d'appel de Bruxelles) decided to refer some questions to the Court of Justice for a preliminary ruling.

In its judgment of 12 November 2015, the Court of Justice first provided an interpretation of the concept of "fair compensation" in the context of the reprography exception. By referring to its judgment in the *Padawan case* concerning the private copying exception, the Court points out that fair compensation is intended to compensate for the harm caused to authors resulting from the reproduction of their work without their authorisation and must therefore be calculated proportionately to that harm. As a result, "*it is appropriate, when applying the reprography exception, to draw a distinction, as regards fair compensation, between reproductions made for private use and for ends that are neither directly nor indirectly commercial by natural persons and those made by other users and/or for other ends*" because the harm resulting from those different kinds of reproduction is not equal. The Belgian system should therefore be adapted to reflect this distinction.

The Court then addressed the question of the compatibility with EU law of a national system such as that in Belgium, which allocates half of the fair compensation collected to the publishers, without an obligation for them to ensure that the authors benefit from it. Since articles 5.2.a and 5.2.b of the directive provide for exceptions to the reproduction right of authors and require compensation for the resulting harm caused to the authors, the system is aimed exclusively at indemnifying the reproduction rights holders. Additionally, the CJEU observes that Article 2 of Directive 2001/29 does not list publishers among the copyright holders. Therefore, the Belgian system is contrary to EU law in that regard as well.

Thirdly, the Court ruled that reproductions of sheet music and counterfeit reproductions made from an unlawful source cannot be taken into account in the calculation of the fair compensation for reprography. Indeed, Article 5.2.a expressly excludes sheet music from the scope of the reprography exception. In addition, the Court further explained that sheet music must also be excluded from the scope of the private copying exception to prevent inconsistencies, since there is some overlap between the scopes of those exceptions (indeed, as explained by the Court, "*reproductions made by natural persons for private use and for ends that are neither directly or indirectly commercial may come within the scope of the reprography exception and the private copying exception*"). The Court infers from this common exclusion the existence of a special regime prohibiting reproduction of sheet music without the consent of rightholders. Similarly, the Court already ruled in its judgment in *ACI Adam and Others* that private copies made from an unlawful source are not covered by the private copying exception. For the same reasons of consistency as above, the Court came to the same conclusion regarding reproductions made from an unlawful source in the context of the reprography exception. In other words, the Court set the record straight recalling that only the reproduction acts that enter into the scope of the exception may be taken into consideration when establishing the corresponding fair compensation. Should it be otherwise, rightholders could receive double remuneration for the same use: once on the basis of a voluntary licence and the other through the regime of the "legal licence". Such double remuneration would be contrary to the requirement of a fair balance between rightholders and users of protected works (See recital 31 of the preamble to Directive 2001/29).

Finally, the Court examined the functioning of the regime of fair compensation. In Belgium, two kinds of payments are collected as "fair compensation": first, a lump-sum remuneration paid by importers per reprographic device put on the Belgian market (the amount is variable depending on the copy speed) and, secondly, a proportional remuneration paid by the users of reprographic devices (based on the estimated number of copies). The amount of the proportional remuneration also varies depending on whether or not the end user cooperated in the recovery of the remuneration by Reprobel.

In relation to the remuneration fixed in advance (lump-sum), the Court judged the criterion of the copy speed contrary to EU law: it does not sufficiently take into account the harm suffered by the copyright holders, since the degree of harm will vary depending on the user (legal or natural person), the context (private or professional use) and the purpose of the reproduction (for commercial ends or not). Concerning the proportional remuneration fixed after the fact, the difference in rates according to the end user's cooperation or not in the recovery is contrary to EU law since the harm suffered by the copyright holder remains the same in both cases.

Last but not least, the Court accepted the principle of a combined system of remuneration, having regard to the possibility for Member States to determine the arrangements for financing and recovering fair compensation and the level of the compensation. However, given the fact that fair

compensation must be calculated on the basis of the actual harm caused to authors resulting from the reproduction of their works without their consent, a system of combined remuneration which includes a lump-sum remuneration fixed in advance "*must contain mechanisms, in particular for reimbursement, which are designed to correct any situation where "overcompensation" occurs to the detriment of particular categories of users*".

This judgment mainly supports HP's position, which consisted of opposing Reprobel's claims by raising the incompatibility of the provisions of the Belgian law with those of Directive 2001/29. The referring Court, the Brussels Appeal Court, should therefore refuse to apply the current Belgian regime for fair compensation, which will need to be reviewed by the national legislator in order to comply with the European framework.

---

*To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.*

This entry was posted on Tuesday, February 23rd, 2016 at 11:08 am and is filed under Belgium, Case Law, inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, Collective management, European Union, Legislative process, Remuneration (equitable), Reproduction (right of)
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.