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FAIR COMPENSATION AND PRIVATE COPYING LEVY: WHICH BALANCE BETWEEN CONFLICTING RIGHTS?

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The European Court of Justice (ECJ) recently delivered an important judgement on the private copying levy (see *Padawan SL v Sociedad General de Autores y Editores (SGAE)* (Case C-467/08), ruling of 21 October 2010).

It was the first time the ECJ dealt with this issue. It did so when interpreting certain provisions of the Info-Society Directive (2001/29) which cover the exception to the reproduction right (one of the exclusive rights offered to copyright owners) for private uses and non commercial purposes. One of the provisions interpreted by the ECJ was Article 5(2)(b) of the above directive. It states this exception may be introduced by EU Member States provided that a fair compensation is paid to right holders. Almost all EU countries compensate the copyright owner by imposing a private copying levy on the sellers of copying equipment - *i.e.* products capable of being used for making copies, such as MP3 players, DVDs, CDs, etc. - and by channelling the relevant proceeds to the former.

The case originated from Spanish proceedings instituted by SGAE, the national collecting society, against Padawan, a distributor of copying devices. The latter had refused to pay the former the private copying levy,

arguing that the way the levy was applied was discriminatory: indeed, the levy indiscriminately applied to both private persons and companies/professionals who purchased the equipment in question.

Four main conclusions can be drawn by examining ECJ' reasoning in *Padawan v SGAE*.

(i) The fair compensation envisaged by Article 5(2)(b) Info-Society Directive should aim to compensate copyright owners "adequately". Its quantification should take into consideration the harm suffered by right holders as a consequence of the unauthorized reproduction of their works by users.

(ii) Private copying levies are compliant with the Info-Society Directive. On the one hand, there is no doubt the levy directly applies to the distributor of copying devices and not to the user of such devices. Yet on the other hand, the ECJ stressed, the former can pass on to the latter the levy paid by augmenting the price charged to him. Therefore the user will be – ultimately and indirectly - the person liable to pay the fair compensation. This is in line with Recital 31 Info-Society Directive according to which a fair balance between the rights of copyright owners and the interests of users should be struck.

(iii) The Court also dealt with the issue of "objective suitability" of equipment for private copying. In a nutshell, it was held that for the levy to apply it is not necessary to show that the individual has effectively made a copy of the copyrighted work; in this regard, a presumption that the purchaser of the equipment will use it for making copies applies.

(iv) Finally - and this is the most relevant issue of the ruling - the ECJ found that the levy should apply exclusively to sales of copying devices to individuals who use them for making private copies, and not to equipment sold to companies and professionals (that undoubtedly purchase them for purposes different from private copying).

This ruling will have an impact on those countries which have introduced private copying levies and have not provided any exemptions in relation to sales of copying devices to companies and professionals (e.g. Italy had

already introduced such exemptions). Such states will therefore have to modify the relevant legislation by following the guidelines given by the ECJ in *Padawan v SGAE*.