Society of Audiovisual Authors
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STATE BUDGET PRIVATE COPYING COMPENSATION COMPATIBLE WITH EU LAW AS LONG AS IT TAKES INTO ACCOUNT THE ESTIMATED HARM SUFFERED BY RIGHTHOLDERS

Summary of the Advocate General opinion in the EGEDA, DAMA and VEGAP case C-470/14

On 19 January 2016, Advocate General (AG) Maciej Szpunar delivered his opinion (unavailable in English) in case C-470/14 (link to the French version) *EGEDA, DAMA, VEGAP v. the Spanish State* following a reference to the CJEU by the Spanish Supreme Court. The opinion sought to verify the compatibility with EU law of the Spanish private copying compensation system where the compensation is borne by the general State budget.

Facts

The claimants, CMOs EGEDA (audiovisual producers), VEGAP (visual artists) and our member DAMA (audiovisual authors), brought proceedings against the Spanish State (supported by AMETIC, an association representing companies in the electronic, ICT, telecom and digital content sectors), challenging the compatibility with EU law of the Spanish system of private copying compensation based on a State budget in place since 2012 (Royal Decree 1657/2012). The claimants argued that it was incompatible with Art 5(2)(b) of the 2001/29 Copyright Directive in two respects: (1) the private copying compensation should be paid by those who caused the harm resulting from this exception to rightholders' exclusive right of reproduction and (2) the fairness character of the compensation is not guaranteed by the Spanish legislation since according to Art 3 of the Royal Decree in question the annual budget is fixed ex ante, whereas the actual harm can only be determined ex post. The Spanish court decided to stay the proceedings and send a request for a preliminary ruling to the CJEU. In this case, all intervening parties as well as the European Commission, Greece, Finland and Norway also submitted written observations. France was also present at the hearing on 1 October 2015. The CJEU's ruling is awaited.

Opinion

Note that before answering the questions per se, the AG interestingly recalled the place which the private copying exception holds in the copyright system, by referring to its value-based (axiological) justification – i.e. users' possibility to make (legal) private copies as part of the general public interest of access to culture - and practical justification – i.e. the impossibility to control uses of works by users as it would constitute an unacceptable interference with the private sphere which is protected as a fundamental right (para 15). He also traced back the origins of the private copying exception, which originally was not accompanied by any compensation. Compensation mechanisms were first introduced by certain Member States recognising the emergence of new technical means for copying (cheaply and massively) and their effect on the exploitation of works (para 16). Only then did the problem of the harm caused to rightholders emerge (para 34).

Firstly, the AG concluded that Art 5(2)(b) of the Copyright Directive does not preclude a system where the private copying compensation is paid out of the general State budget. The AG disagreed with the claimants based on the provisions of the Copyright Directive, the CJEU's case law and practical reasons regarding the functioning of the system in the current technological context (para 20). The claimants, supported by the French and Greek governments, to the contrary, believe that pursuant to the CJEU's case law the users

making or able to make private copies, as debtors, must finance the fair compensation (para 19).

- **On the interpretation of the Copyright Directive,** the AG showed that there is no binding norm in the Directive according to which users should finance the fair compensation. The Directive does not provide any guidance on the form, calculation method and financing of the compensation, nor on who should be responsible for paying the compensation – it only designates the beneficiaries (para 22). Recital 35 gives guidance on the level of compensation by referring to the potential harm to rightholders (para 23) and Recital 31 notes the need for a fair balance between the interests of rightholders and users (para 25). As such, Member States are free to introduce a private copying exception (being one of the optional copyright exceptions) and are therefore, all the more so, free to regulate the more detailed and technical question of how the private copying compensation should be financed. The AG also noted that the only obligation in the Directive is that the private copying exception be accompanied by compensation for rightholders in line with the fair balance mentioned in Recital 31(para 26).
- **On the CJEU's case law,** the AG explained that a general principle, according to which private copying compensation must necessarily be financed by the users who benefit from the exception, meaning that in practice the only possible system of private copying compensation is that of levies charged on electronic equipment, cannot be inferred from the CJEU's case law on private copying. Moreover, the AG does not think that making the levies' system the only possible private copying compensation system is desirable for practical reasons linked to technological developments (para 41). The AG based his reasoning on the *Padawan*, *Stichting de Thuiskopie* and *Copydan* rulings which focused on problems linked to the functioning of the private copying levies' system (para 30). The "user-payer" (of the compensation) principle only applies to the system of private copying levies and not to any possible system of compensation, since it cannot be applied strictly (para 35), is only a theoretical principle (paras 36-39) and so does not have "legal force" (para 40).
- **On the functioning and the challenge to the levies' system in the digital environment,** the AG demonstrated that the emergence of digital technology means that the principle according to which private copying compensation should be paid by those who benefit from the exception is challenged, as users of electronic equipment do not necessarily make use of all its functionalities, including to make copies of copyright-protected works (paras 42-44). In his view, it is impossible to anticipate the effective use one will make of a certain equipment and the compensation system based on levies seems to be closer to a "pooling system" ("mutualisation" in French), where all buyers finance the compensation for the harm caused by certain buyers and where the total revenue generated from private copies levies is centralised within CMOs and distributed between all rightholders according to criteria defined by the CMOs (or by the law in certain Member States) (para 45). According to the AG, "the system of levies no longer provides perfect coherence in the Internal Market" (para 46); it is facing new challenges and the reflection to find alternative solutions cannot be blocked by the "user-payer" principle which is a "legal fiction" in the current technological context (para 47).
- **On the fact that the compensation is paid out of the State budget,** the AG pointed out that such a system also exists in Estonia, Finland and Norway (para 48). In his view, this system is based on a "different logic" (para 52) which is not contrary to the Copyright Directive, which does not impose a particular compensation system but only requires the compensation to be fair.

Secondly, the AG concluded that Art 5(2)(b) of the Copyright Directive precludes that the State budget set aside for private copying compensation purposes be established ex ante each year, without taking into consideration the estimated amount of harm suffered by rightholders. Note that the AG shared the Commission's doubt regarding

whether this question is relevant to resolve the dispute (para 55) and revealed that the State budget set aside amounted to 8,6 million EUR in 2013 and 5 million EUR in 2014, whereas the total harm to rightholders was estimated at respectively 18,7 million EUR and 15,2 million EUR (para 56). Regarding whether the State budget could or not limit the level of compensation in this way, the AG underlined the need to "effectively" compensate the full extent of the potential harm suffered by rightholders, which cannot therefore be capped at a lower level (para 62). Indeed, according to the CJEU's case law on the effect of compensation, the AG recalled (i) that the notion of fair compensation is an "autonomous concept of EU law" (*Padawan*) which requires a coherent interpretation in all Member States (para 59), (ii) that the fair compensation must be seen as the counterpart for the harm suffered by rightholders and be calculated according to this harm (*Padawan*, para 60) and (iii) that the obligation to compensate for the harm caused by the private copying exception is a performance obligation ("obligation de résultat" in French) to be respected by Member States which have introduced such an exception (*Stichting de Thuiskopie*, para 61). Finally, in paras 63-69, the AG rejected the Spanish government's arguments justifying the very low budget it set aside for private copying compensation and denounced the fact that the budget is fixed (without referring to precise reliable data) ex ante (para 67) and at a level far too low to take into account the harm suffered by rightholders as estimated according to the Member State's internal rules (para 69).