

Private copying and fair compensation

Alain Strowel

Professor, UCLouvain, Université Saint-Louis, Brussels, KULeuven, Munich IP Law Center, Avocat at the Brussels bar

alain.strowel@uclouvain.be

Copyright Exceptions and Limitations within the
Scope of the Review of the EU Copyright Framework
Conference – March 26-27, 2015 - Riga

Outline

- The copyright levies conundrum
- The principles defined by the CJEU: *Padawan* (C-467/08)
- The assessment of levies under the CJEU case law
 - Criterion of harm; who pays?, etc.
- Pending cases and open issues
- A future European initiative on levies?

Copyright levies conundrum

- The InfoSoc Directive (Art. 5(2)(b)) allows for an exception in case of:
 - **Private copying:** « *reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial* »
 - If **fair compensation** is provided: « *on the condition that the rightholders receive fair compensation* »
 - Taking into account **DRMs:** « *the application or non-application of technological measures ... to the work* »

The principles defined by the CJEU: *Padawan*

Padawan (C-467/08)

- Facts: Padawan markets blank media (CD-Rs, DVD-Rs, MP3 devices...). SGAE claims levies. Padawan refuses because the levies apply indiscriminately whether the use is private or professional
- Five questions asked by the Barcelona Court:
 - Is there an harmonised notion of fair compensation?
 - Must a « fair balance » exist between rightholders and those liable to pay?
 - Must the levy be « linked to the presumed use of the equipment or media », thus requiring that the equipment/media « are to be used for private copying »?
 - Is an indiscriminate application to professional users compatible with the notion of « fair compensation »?
 - Questions 3 and 4 are examined together by the CJEU
 - Is the Spanish system compatible with the InfoSoc Directive?
 - Question excluded by the CJEU

Padawan: operative part (1)

- The concept of 'fair compensation' is an « *autonomous concept of EU law which must be interpreted uniformly* »
 - With reference to the recitals of the InfoSoc Directive
- But: power of MS:
 - To introduce or not a private copying exception
 - To determine:
 - *the form*
 - *the detailed arrangements for financing and collection, and*
 - *the level of the fair compensation*
- But: « *within the limits imposed by EU law in particular by the InfoSoc Directive* »
 - Thus bearing of rules on freedom of goods/services, principles of non-discrimination and proportionality, etc.

Padawan: operative part (2)

- Fairness for the calculation of levies: « *fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception* »
- Fairness as to the liable persons: « *persons who have digital reproduction equipment, devices and media and who on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation* »
 - But: « *inasmuch as they are able to pass on to private users the actual burden of financing it* »
 - Thus the private parties are in principle the ones that should finance the fair compensation, but « *given the practical difficulties* », « *those having that equipment* » (§46) can be made liable to pay.

Padawan: operative part (3)

- The link between the levied item and its use for private copying:
 - « *a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying* »
- Thus no indiscriminate application of levies:
 - « *the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible* » with Art. 5(2)(b) of the InfoSoc Directive
 - Thus: equipment acquired by undertakings for purposes clearly unrelated to private copying (e.g. professional use) should not be levied

The assessment of levies under the CJEU case law

CJEU case law since 2010

- Decided:

- *Padawan*, 21 Oct. 2010 (C-467/08)
- *Thuiskopie/Opus*, 16 June 2011 (C-462/09)
- *VG Wort*, 27 June 2013 (C-457/11 to C-460/11)
- *Amazon*, 11 July 2013 (C-521/11)
- *ACI Adam*, 10 April 2014 (C-435/12)
- *Copydan*, 5 March 2015 (C-463/12)

- Pending:

- *Reprobel* (C-572/13)
- *EGEDA* (C-470/14)

Assessment of levies

- Main issues:
 - Calculation of levies with regard to the harm
 - *Padawan* and more recent decisions
 - The levies cannot compensate for illicit copies
 - *ACI Adam, Copydan*
 - Who should pay the levies if cross-border sale?
 - *Opus*
 - Effective right of reimbursement and possibility of indirect remuneration (social/cultural funds)
 - *Amazon, Copydan*
 - Levies when there is a chain of devices
 - *VG Wort*
 - Multifunctional medium and minimal harm
 - *Copydan*

How to calculate levies? Notion of harm under *Padawan*

- Recital 35 and Padawan (§39 and ff):
 - « *account must be taken [...] of the 'possible harm' suffered by the author* »
- Levies = « recompense for the harm » « caused [...] by the introduction of the private copying exception » (§ 42)
- But when the prejudice is 'minimal', no obligation to pay (§39 and 46): *de minimis* rule
- No need to prove actual harm to the author (§54)
 - Sufficient if equipment is « able to make copies »
- Levies are not there to compensate for authorised copies: compensation of authors only if copies made
12 « *without their authorisation* » (§39, 40 and §45)

No levies for unlawful copies:

ACI Adam (C-434/12)

- Facts: ACI Adam and other parties = importers and/or manufacturers of blank data media (CDs and CD-Rs). Required to pay levies in the NL.
 - Claim the amount incorrectly takes into account the harm as a result of copies made from unlawful sources.
- Finding of CJEU: Art. 5(2)(b) and 5(5) preclude a national law which does not distinguish when the source of the private copy is lawful or not
- Grounds:
 - Strict interpretation of Art. 5(2)(b) (exception to a right)
 - Nothing in InfoSoc Dir. allowing Member States to extend the scope of the exceptions (§27)
 - If option to extend, risk for functioning of internal market
 - Support for the dissemination of culture must not be achieved by sacrificing strict protection

No levies for unlawful copies

- Levies are not there to compensate for illicit copies: opinion of AG Trstenjak (11 May 2010) in *Padawan*:
 - “*‘Fair compensation’ within the meaning of Article 5(2)(b) of Directive 2001/29 is not aimed at compensating the rightholder for illegal actions in connection with the unauthorised reproduction of works and other subject-matter. There is only a claim to compensation in connection with private copying, provided that such copying is permitted according to the copyright laws of the Member States. The fact that – for instance on the internet via so-called ‘P2P’ (peer-to-peer) file sharing – widespread infringement of the essentially comprehensive reproduction rights of the author may be observed is not relevant in connection with that provision of the directive, and neither can it be regarded as a factor for the purpose of ensuring a balance between the interests of the rightholder and of the user.*”

Who has to pay the levy?

ThuisKopie/Opus (C-462/09)

- Facts: Opus (Germany) sells blank media online, including via Dutch website (targeting NL). Prices do not include levies. Goods delivered by post. No payment to the collecting society in NL (ThuisKopie), neither in Germany
 - Action by ThuisKopie. Questions by Supreme Court
- Findings of the CJEU:
 - Art. 5(2)(b) and (5) means the final user who makes the private copies is responsible for paying the “fair compensation”. But: chargeable to those “who make reproduction equipment, devices and media available to that final user”
 - Why? Because possibility “to pass on” the levy amount
 - Member States having a levy system must ensure, on the territory where the harm occurs, that authors actually receive the fair compensation.
 - If it is impossible to recover from the final user as importer of the blank media, the national authorities must find a solution allowing a certain result and ensuring the recovery of the compensation from the seller who contributed to the importation

Cross-border difficulties remain

Every time a copying device is sold across an intra-community border from country A to country B, the manufacturer has to:

- Classify the product based on the levies tariffication of country A;
- Make a declaration to the Collecting Society of country A;
- Execute payment to the Collecting Society in country A;
- When the product is exported to country B, the manufacturer has to classify the product based on the tariffication schemes of country B;
- Make a declaration to the Collecting Society of country B;
- Execute payment to the Collecting Society in country B;
- Go back to the Collecting society of country A with proof of export and payment in country B when refund mechanisms are available;
- Request for a refund of the levy paid in country A.

Effective right of reimbursement

Amazon (C-521/11)

- Facts: Amazon placed recording media in Austria. Austro-Mechana claims the payment of levies.
 - Action in Austria. Questions by Supreme Court.
- Findings and reasoning of the CJEU:
 - It is, in principle, for the person who makes the private copy « to make good the harm related to that copying by financing the compensation » (§23 referring to *Padawan*, §45 and *Opus*, §26)
 - Need of a link with private copying
 - Thus a system providing levies when media are acquired by persons other than natural persons is not compliant: no fair balance, unless practical difficulties
 - A reimbursement system allows the restoration of the fair balance if it is effective and if it is not excessively difficult to repay the levy paid
 - For the national authorities to verify 1) if practical difficulties to distinguish between the buyers and 2) the scope, effectiveness, availability, publicisation and simplicity of use of the reimbursement system

Possibility of social and cultural funds *Amazon* (C-521/11)

- Findings and reasoning of the CJEU:
 - Possibility of indirect compensation “through the intermediary of social and cultural establishments set up for their benefit” (§50)
 - Provided that the arrangements for the operation of those establishments are not discriminatory
 - Need to ensure that “European cultural creativity and production receive the necessary resources to continue their creative and artistic work and to safeguard the independence and dignity of artistic creators and performers” (§52)

Private copying/reprography exception

- In the digital world:
 - EU Directives: private copying exception not recognized for computer programs (1991) and databases (1996)
- In the analog and digital worlds:
 - InfoSoc Directive (Art. 5(2)(b)): « *reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on the condition that the right-holders receive fair compensation which takes into account of the application or non-application of technological measures ... to the work* »
- In the analog-out world:
 - Reprography exception of InfoSoc Directive (Art. 5(2)(a)): « *reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation* »

Private copying v. reprography

Art. 5(2) (b) v. Art. 5(2) (a)

- Reproductions
- *on any medium*
- *by a natural person*
- *for private use and for ends that are neither directly nor indirectly commercial*
- *on the condition that the right-holders receive fair compensation which takes into account of the application or non-application of technological measures ... to the work*

- Reproductions
- *on paper or any similar medium*
- *by the use of any kind of photographic technique or by some other process having similar effects*
- *provided that the rightholders receive fair compensation*

Reprography levy and chain of devices: *VG Wort* (C-457 to 460/11)

- Facts: VG Wort brought actions in Germany regarding reprography levies against several manufacturers of PCs and printers. Questions from Federal Supreme Court
- Findings of the CJEU:
 - Does art. 5(2)(a) include copies made by a printer and a PC? Yes, a chain of devices leading to copies made on paper or another analogue medium are covered.
 - Condition: the copies are part of a “single process” under the control of the same person. Possibility to have levies on one device
 - What if the copies were explicitly or implicitly permitted? No bearing on the fair compensation. Seems contradictory with *Padawan* : levies when copies made without authorisation
 - Obscure distinction between an exception (no exclusive right) and a limitation (exclusive right is preserved)
 - Does the possibility to use DRMs (TPMs) affect the levy obligation? The non-application of DRMs does not mean that no levy is due. But Member States can make the level of compensation dependent on whether DRMs are available.

Multifunctional medium, *de minimis* harm, reimbursement, etc.: Copydan (C-463/12)

- Six detailed questions from Danish Court in a case involving collecting society Copydan and Nokia including:
 - In case of a multifunctional medium (not primarily used for copying), is there a situation « where the prejudice to the rightholder would be minimal » (rec. 35)?
 - Is it compliant with InfoSoc Dir. to have levies for copies made from (paid or free) online licensed content?
 - Is it possible to have a levy on memory cards in mobile phones whose primary/most important function is not private copying and when no remuneration applies to internal memory (iPods) designed and primarily used for storing private copies?
 - How to take into account DRMs?

Copydan (C-463/12)

- Q4: multifunctional medium “deemed” to be used for copying, but “amount of fair compensation”:
 - “in principle, by reference to the relative importance of the medium’s capacity to reproduce” (§27);
 - if rarely used, minimal prejudice and “the making available of (the copying) function many not give rise to an obligation to pay” (§28)
- Q5: discrimination (in case levy on detachable media, but not on embedded component =internal memories) is to be assessed by national court
 - facts: detachable → “facilitate further copies”
 - difference justified if “another form” of compensation (§38-40)
- Q6: possible to apply levies to producers selling cards to business customers (if do not know whether final purchasers are individuals) on condition:
 - (i) “practical difficulties”
 - (ii) burden of proof for producers that cards sold to non natural persons
 - (iii) effective reimbursement system

Copydan (C-463/12)

- Q3: possible to define a “threshold below which” minimal prejudice (without obligation to compensate) (§61)
 - Discretion of Member States but principle of equal treatment
- Q1(a,b): effect of authorisation to copy given by rightholder: “devoid of legal effect”, “no effect on the harm caused”, no “bearing on the fair compensation owed” (§65-66)
 - Difficult to understand end of §66 (if authorisation: no obligation to pay; but the issue = whether a levy can apply)
- Q1(c,d) and 2: TPM “can have no effect on the fair compensation payable” but freedom of M. States to make the “level” of levies dependent on (non)application of TPM
- Q1(f): no levy for copies “made using unlawful sources” (if made available without authorisation) (§75-79)
- Q1(e): need of (i) protected work (><counterfeited or pirated work); (ii) natural person; (ii) reproduction on any medium, but no indication as to the devices used for copying, thus it could belong to third party
 - No interpretation at light of art. 5(5) >< Commission IPdigit - IP & IT AT YOUR FINGERTIPS



Pending cases and issues

Delineation of reprography levy: *Reprobel* (C-572/13)

- Facts: litigation between HP and Reprobel about reprography levy based on speed capacity of device
 - Normal (by default) speed or maximal speed
 - Questions by Brussels Court of appeal:
 - Whether fair compensation of Art. 5(2)(a) and (b) should be interpreted differently if the copies are made by a natural person (for private/non-commercial use) or by another user (for commercial purpose)
 - Can the fair compensation include a) a lump-sum payment (by manufacturers) based on speed (number of copies per minute) + b) a proportionate remuneration paid by end-users based on the number of copies?
 - Can half of the fair compensation be allocated to publishers if no obligation for publishers to ensure authors benefit?
- 26 – Can the levies cover copies of sheet music?

How to distinguish a levy from a subsidy: *Egeda* (C-470/14)

- Facts: Spain replaced its levy system by a subsidy scheme financed by the general State budget. Challenge by collecting societies (*Egeda*, etc.)
- Two questions by Spanish Supreme Court:
 - Is a scheme for fair compensation for private copying compatible with Article 5(2)(b) where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, it thus not being possible to ensure that the cost of that compensation is borne by the users of private copies?
 - is the scheme compatible with Article 5(2)(b) where the total amount allocated by the General State Budget to fair compensation for private copying has to be set within the budgetary limits established for each financial year?



A future European initiative on private copies & levies?

Harmonisation requirement

- Warning of the CJEU in *Padawan*:
 - “An interpretation [of the InfoSoc Directive] according to which Member States which have introduced an identical exception [for private copying], provided for by European Union law and including, ... the concept of ‘fair compensation’ as an essential element, are free to determine the limits in an inconsistent and un-harmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive” (§36)

High level of protection but appropriate remuneration

- Recital 9 and 10:
 - “Any harmonisation of copyright and related rights must take as a basis a high level of protection”
 - >< the highest level
 - “If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work”
 - >< maximum remuneration: *Premier League*

Private copying, levies, and DRMs: how to reconcile the positions?

- Consumers:
 - For private copying, against levies, against DRMs
- Music/content industry:
 - For qualified private copying, for levies as second-best, for DRMs
- Collecting societies:
 - For private copying, for levies, against DRMs
- Technology/consumer electronics industry:
 - For private copying, against new levies, for/and against DRMs

Focus of Commission's attention

- Levy issues with a cross-border dimension:
 - Case of sale of media/equipment across borders (who pays? How to organise the payment?)
 - To rely on *Opus*
 - Reimbursement schemes as burdensome
 - To rely on *Amazon, Copydan*



Thanks for your attention

Alain Strowel

alain.strowel@uclouvain.be