



# PRIVATE COPYING UPDATE

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### PRIVATE COPYING

The Private Copying Forum, chaired by David El Sayegh (SACEM), has not been held this year 2019/2020. While BIEM, CISAC and Stichting de ThuisKopie are working to finalise the joint study, the working group members have provided information on the developments that have taken place in their respective countries since the last business affairs report:

#### Judicial decisions and new regulatory requirements

- Legal action has been taken in the **Netherlands** by importers (Dell / HP) concerning cloud copying and offline streaming. On September 18, 2019, the court in The Hague confirmed that offline copying, cloud copying and the Dutch cloud copying collection system were covered by the private copying exemption.
- Moreover, the European Court of Justice (CJEU) has considered, with the judgments in Copydan and VG Wort, that each country was free: 1- to define fair compensation by means of an exemption to the reproduction right, concerning the reproduction of protected works; 2- to take into account the different stages corresponding to the chain of devices involved before the copy itself. Thus, like the Netherlands, the Member States are free to impose the private copying levy for copies on the devices with which the private copies are made before they are actually stored in the cloud.
- In **France**, in the case between the collective management society Copie France and a Luxembourg e-commerce platform, Only Keys, concerning the online sale of products covered by the private copying exception. The Court of Cassation decided last February in agreement with the 2011 CJEU ruling in the OPUS case (C462 / 09), namely that the online sale platform was liable in France for remuneration for private copying for products shipped from Luxembourg.
- In **Belgium**, legislative proposals have been adopted, which, on the one hand, aim at harmonizing Belgian law with the formulation of the exception for private copying provided for by the European directive and, on the other hand, aim at reinstating the publishers as royalty recipients (via a sui generis right).

#### Proceedings/Lobbying/ Actions underway

- In **Austria**, several lawsuits against mobile phone exporters are in progress concerning the fee reimbursement. If the latter can be reimbursed by Austro-Mechana (AUME), when the exporter justifies the export and fee payment, the Austrian society does not consider admissible any reimbursement request covering the period from 2012 to October 2015, when no fee was paid for mobile phones, nor passed on by operators to exporters. Samsung joined the proceedings along with AUME. A main statement in the lower court is awaited to establish if the legal argument presented by AUME is valid, or whether it is necessary to initiate the proceeding and examine the actual amounts and the supporting documentation concerning the exported mobile phones.
- In **Germany**, legal proceedings are still underway to establish whether, in all circumstances, a lump sum contract implies that the remuneration is adequate, in particular in cases where the arbitration board judges that the appropriate amount is lower to the one agreed in the mentioned contracts. Several of these cases, in different ways, are currently before the Superior Regional Court and the first decisions are expected to be delivered in the first half of 2020. However, they should continue before the Federal Court of Justice.



- In **Japan**, the private copying remuneration system has existed since 1992; however, the agency that collect remuneration for videos, which has received nothing since 2013, has finally been dissolved. As for those collected by the society in charge for audio collections are very low, at issue:
  - The scope of the private copying remuneration remains limited: the inclusion of any new audio or video equipment to be served by Cabinet decree implies the agreement of several ministries. Thus, high-capacity equipment such as external hard drives or mobile phones produced and sold in large quantities, completely fall outside the scope of the private copying exemption.
  - Manufacturers of certain recording equipment, who must cooperate to charge and collect remuneration, are not obliged to pay it.

At the CISAC General Assembly held in Tokyo in May 2019, a resolution was adopted to revive private copying remuneration in Japan, which is expressly addressed to the Japanese authorities that should set up a modern and operational remuneration system, like other developed markets, which regularly update their system to adapt to consumer behaviour. The resolution was presented to the Director General of the governmental Agency of Cultural Affairs.

Private copying remuneration is on the agenda of the government subcommittee for “adequate protection and exploitation of copyright”. In 2019, this subcommittee investigated on the equipment used for audio and video private copying and its results are currently being analysed.

### Developments regarding levies and covered products

- In **the Netherlands**, since 2018, the private copying levies applicable to PCs, tablets and smartphones used to make copies in the cloud have been increased. Thus, a “cloud” component was added to the previously existing levies for these devices. Market research has shown that a third of computer, tablet and smartphone owners use cloud services and a quarter automatically synchronize contents there. Studies have also shown that copied works are increasingly being stored in the cloud, in personal folders and used interchangeably from the computer, tablet and smartphone. Negotiations meant to extend the scope of the levy to copies of VOD, catch-up TV and licensed downloads from legal streaming sites are underway. The new rates will be *effective on January 1, 2021*.
- In **Canada**, the rates for 2020 and 2021, confirmed by the Copyright Board on December 13, 2019, remain unchanged at 29 Canadian cents per unit. Despite this, revenues go on declining, as the equipment covered by private copying has been limited since 2011 to audio recording media such as CD-R, CD-RW, CD-R audio and CD-RW. The review of the Federal Copyright Act, started in December 2017, was reported to the government in June 2019. Despite broad support for remuneration for technologically neutral private copying, the rapporteur proposed to first verify if it was advisable to extend the private copying regime to digital devices and then study the impact on the retail price of the devices concerned. No official response was given before the October federal election. Finally, the outgoing party won the last elections but without a majority, it must now lean on the support of at least one other party to govern. The party supporting the CPCC’s view is now in a position of strength. However, the government might not consider the copyright reform to be a priority issue. Until the Copyright Act is revised, the CPCC<sup>1</sup> continues to advocate the establishment of an annual compensation fund on a transitional basis. To date, it has still not been taken into account.

1) Canadian private copying collective (CPCC).



- In **Italy**, there is no development to be reported, which was expected last year, concerning the new ministerial decree on the principle of ex ante exemption and reimbursement for professional use. Tariff setting is currently underway within the Ministry of Cultural Heritage.
- In **Germany**, for the first time, new contracts were signed for consumer electronics products, USB keys, memory cards and smart watches. Thus, for the first time, the German tariff system is largely covered by global contracts.
- In **Switzerland**, the renegotiation of the main private copying tariff (concerning digital storage in mp3 players, TV receivers and others, smartphones and tablets) has led to the royalty to decrease, which will be in force by July 2020. However, the upward trend in storage should help offset this fall.

In addition, the VPR<sup>2</sup> and catch-up TV tariff is currently being revised. SUISSIMAGE, which manages this tariff for all the Swiss collective management societies, should probably submit its application for approval to the Arbitration Commission by the end of May to obtain it at the end of the year.

- In **Greece**, the developments and changes in the Greek Copyright Act on the private copying exemption have been significant since July 20, 2017. These several legislative changes have led the collective management societies, representing the rights holders, to sign provisional agreements to collect royalties. The two provisional agreements provided for a new rate of 2% applicable to computers, tablets and smartphones (the 25 June 2018 agreement) and a rate of 6% on digital storage media and devices (the 9 January 2019 agreement).

In November 2019, an addendum to the provisional agreements on the distribution of the sums collected between July 20, 2017 and December 31, 2019, set the share to be distributed among all collective management societies at 90% of the collections for private copying, the remaining 10% would go to the three societies (one for each category of rights holders), which manage collections for private copying.

The final agreement on the distribution rates between the societies should take place during the first half of 2020.

- In **Spain**, since the private copying system has been re-established when the Royal Decree 12/2017 entered into force, negotiations are still ongoing between the private copying collection organization, representing all collective management societies (Ventanilla Unica Digital – VUD), and industry (manufacturers and commercial distributors) to set the equipment covered by the applicable remuneration and tariffs. At the same time, collective management societies are consulting with the Ministry of Culture on reducing the gap between Spanish tariffs and the average tariffs in force in the EU countries.
- In **France**, a definitive scale for the nPVR (network personal video recorder) was adopted on July 3, 2018 (Decision No. 17) and Copie France, the management society dedicated to private copying remuneration, is working on the adoption of fixed rates applicable to hard drives computers that were to be implemented in 2021. In the meantime, a process to update the tariffs applicable to mobile phones, external hard drives, tablets, USB keys and memory cards has been launched and should take two years to be completed. It should be noted that as it represents 65% of all the collections, the smartphone is the main source of private copying remuneration.

2) Personal Video Recorder



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