



PRIVATE COPYING FORUM

(WebMeeting, 20 March 2018)

The Private Copying Forum, chaired by David El Sayegh (SACEM), met on 20 March 2018 in the form of a virtual meeting. It was attended by 14 representatives of BIEM member societies and non-member societies, including the Dutch society (Stichting de Thuiskopie), the Belgian society (AUVIBEL) and the German society (ZPÜ). This year, CISAC was also invited to present the conclusions of its Private Copying Global Study published in October 2017.¹

Two years after its last meeting, this forum provided an opportunity to run through the decisions handed down by the Court of Justice of the European Union (CJEU) since 2016 and to take stock of the lessons to be learned from them and, where applicable, the steps taken at national level in response to these decisions....:

- The decision of 21 April 2016, in the case between Austro-Mechana and Amazon (C-521/11), confirmed that the Austrian society was entitled to sue Amazon in an Austrian court, even though the company was not domiciled in Austria. Therefore, the national courts are competent when a company does not pay the private copying levy in the country in which the recording medium is made available. In this context, the levies in force in their country apply.
- The decision of 9 June 2016 in the EGEDA case stresses that when a Member State decides to introduce a private copying exception in its legislation, it must also provide for payment of fair compensation for the benefit of rightholders. This compensation may take the form of a levy or it may be financed from the State budget. But, whatever the case, the compensation must ultimately be borne by the users of private copies.

Following this decision, the Spanish Supreme Court declared that the Spanish private copying compensation system was incompatible with European law and annulled the remuneration mechanism based on the State budget. In July 2017, a royal decree restored to a large extent the traditional remuneration system, as well as the ex-ante exemptions and the reimbursement mechanism for users able to substantiate professional use. In September 2017, the Spanish collective management societies created a digital one-stop shop for the private copying levy, “Ventanilla Unica Digital” (VU). In spite of these positive developments, some negative aspects remain core concerns, including the low level of the provisional levy rate, the existence of exemptions in favour of numerous public administration bodies and the need to extend the scope of the levy.

- The decision of 22 September 2016 in case C-110/15 – Microsoft (formerly Nokia Italia SpA) and others v SIAE, on whether the Italian system of exemption from payment of the private copying levy was compatible with the InfoSoc directive (on the harmonisation of certain aspects of copyright and related rights in the information society). The European Court of Justice held that the Italian law concerning the ex-ante exemption principle and the reimbursement scheme for professional use was contrary to European Union law. Subsequently, the Italian Council of State annulled the application of article 4 of the ministerial decree of 30 December 2009, concerning the reimbursement protocols called into question by the decision, but confirmed the legality of the decree and rejected the plaintiffs’ claims for damages.

¹ All the presentations given at the Forum are available on the BIEM website, together with the latest version of the Stichting de Thuiskopie and WIPO survey, which provides information on private copying law and practice around the world (under ISSUES/Private Copying).



- The decision of 18 January 2017 in the case between the Ministry of Finance and the collective management society SAWP confirming that the royalties paid to rightholders, including those concerning the private copying exception, are not subject to VAT. On the other hand, VAT continues to apply to equipment subject to the private copying levy.

...and particularly the decision in the VCAST Limited v RTI SpA case concerning the lawfulness of the making available to VCAST's customers of a video recording system in the cloud to record television programmes broadcast, inter alia, by RTI. The CJEU's decision of 29 November 2017 establishes that an individual making copies for his/her personal use does not necessarily have to possess the reproduction equipment, devices or other media; the provision of copying services by a third party could be covered by the private copying exception if:

- access to the copied protected content is authorised by the rightholders concerned with regard to the right of communication to the public;
- the copies made in this way are exclusively for the private use of the customer of the online service.

This decision can be compared to the new *French* Intellectual Property law of 7 July 2016 which has extended the scope of the private copying exception to recording in the cloud – nPVR.² Accordingly, services recording remote audio or video streams are subject to the private copying levy if the recording is requested by a natural person, on a linear service, before the programme is broadcast or while it is being broadcast; those concerned are television and radio distributors and services, as well as cloud hosting services, which enable users to obtain a copy of a programme.

In this regard, a provisional tariff was published in the Official Journal on 9 July 2017 and the final amount of the compensation should be known before 31 July 2018.

In several countries, like the *Netherlands* and *Austria*, discussions are in progress concerning, in the former, the nature of the royalty (exclusive right or compensation) and, in the latter, the inclusion of cloud services and nPVR within the scope of the private copying exception.

The participants were also briefed on ongoing developments in *Canada*. On 1 December 2017, the Copyright Board of Canada published the private copying levy rate applicable in 2018 and 2019, which remains unchanged from 2017 at 29 Canadian cents per unit. Although the levy is maintained, revenues are declining rapidly, at little more than CAD 2 million in 2017, as the equipment covered by the private copying system has continued to be limited to audio recording devices of the CD-R and CD-RW kind since 2011.

Only a legislative amendment would enable the application of the levy to be extended. This is the position that has been adopted by CPCC³ in the long process of revising the law which finally started in mid-December. The political context is more favourable to authors' rights and culture but the federal elections due in October 2019 could stall the process.

² Network Personal Video Recorder

³ The Canadian Private Copying Collective (CPCC) is an umbrella organization whose member collectives represent songwriters, recording artists, music publishers and record companies. The CPCC is the non-profit organization responsible for collecting and distributing private copying levies on behalf of its member collectives.

The ruling party has suggested setting up an annual compensation fund amounting to CAD 35 million. Pending the revision of the law, CPCC is advocating its introduction as a transitional solution.

In the Netherlands, a new rate schedule came into force on 1 January 2018 for two years. It is the outcome of negotiations between the stakeholders and takes account of new technological developments and changes in consumer behaviour. The new rate schedule, as adjusted, excludes CD-Rs and DVD-Rs, the use of which is in decline, whereas portable storage equipment and USB sticks, which are mainly used to copy music files, have been included in the schedule:

Equipments	2015-2017	2018 - 2020
CD-R and DVD-R	€ 0.02	
Computer/laptop/server/media center	€ 3.50	€ 2.60
Tablet	€ 3.50	€ 2.60
Smartphone/telephone with an MP function	€ 3.50	€ 4.70
Portable audio/video player	€ 1.40	€ 1.20
Set-top box with hard disk / HDD Recorder	€ 3.50	€ 3.80
Electronic reader	€ 0.70	€ 0.80
External HDD/SSD	€ 0.70	€ 0.60
USB stick		€ 0.60
Wearable with storage capacity		€ 1.20

Source: *Stichting de Thuiskopie*

In conjunction with the meeting, a summary of the media covered by the private copying exception systems was updated – see [Annex](#).

Private Copying Levies | Devices covered

# of devices submitted	Country	Analogic carriers	CD	DVD	MP3/MP4 walkman	Decoder/VCR/Set top box	Memory card	USB key	External HDD	Multimedia External HDD	Smart phones	PC	Tablets	Embedded GPS with hard disk	Cloud services	E-reader and wearables (smartwatch)
13	Austria	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes		
13	Croatia	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes		
13	France	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes		yes	yes	only nPVR	
12	Czech Rep	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes		
12	Germany	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			
12	Italy	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			
12	Portugal	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			
12	Slovakia	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			
12	Spain	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			
11	Belgium	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes		yes			
11	Hungary	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes		yes			
11	Lithuania		yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			
11	Sweden	yes	yes	yes	yes	yes		yes	yes	yes	yes	yes	yes			
10	Greece*	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			
10	Netherlands				yes	yes		yes	yes	yes	yes	yes	yes		yes	yes
10	Romania	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes					
9	Bulgaria**	yes	yes	yes	yes	yes	yes	yes	yes	yes						
9	Poland	yes	yes	yes	yes	yes	yes	yes	yes	yes						
7	Slovenia	yes	yes	yes	yes	yes	yes	yes								
8	Switzerland***	yes	yes	yes	yes	yes					yes		yes		only nPVR	
5	Denmark	yes	yes	yes			yes	yes								
5	Latvia*	yes	yes	yes	yes	yes										
3	Japan*	yes	yes	yes												
2	USA*		yes											yes		
1	Canada		yes													
0	UK															
0	Finland															
0	Norway															
State funding																
State funding																

* 2015 data not updated in 2018

** no collections

*** only storage media (whether embedded or not) and not the devices