



The lessons of the latest decisions of the CJEU as regards private copying exception

Major decisions since 2016

Judgment of 21 April 2016 : Austro-Mechana v/ Amazon

Judgment of 9 June 2016 : EGEDA v/ Administración del Estado

Judgment of 22 September 2016 : Microsoft v/ SIAE

Judgment of 18 January 2017: Minister Finansow v/ SAWP

Judgment of 29 November 2017 : Vcast Limited v/ RTI SpA

1. Austro-Mechana v/ Amazon



Issue : Is Article 5(3) of Council Regulation n° 44/2001 on jurisdiction in civil and commercial matters applicable to legal proceedings brought by Austro-Mechana against Amazon for the payment of the private copying remuneration?



Positive answer from the Court :

- ➔ Article 5(3) of Council Regulation n° 44/2001 lays down a specific rule under which, in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued before the courts of another Member State, that where the harmful event occurred
- ➔ Since the claim is not related to a contractual matter but to a harmful event based on an infringement of the Austrian law, such claim falls within Article 5(3) of Council Regulation n°44/2001



CONSEQUENCES

- Austro-Mechana was entitled to sue Amazon in Austria despite the fact that this company was domiciled in Germany and Luxembourg
- National courts have jurisdiction when a company fails to pay private copying remuneration in the country where the recording media are made available
- Within this context, the national courts will apply the levies adopted in the country where the recording media are made available

2. EGEDA v/ Administración del Estado



Question : Is the private copying remuneration financed by the General Spanish State Budget compliant with Article 5 (2) (b) of the Infosoc Directive ?



The Court's answer is twofold :

- ☞ Since Members States enjoy broad discretion regarding the parameters of the compensation in return of the private copying exception, Article 5(2)(b) does not preclude, in principle, from choosing a scheme financed by the General State Budget
- ☞ However, since it is not guaranteed that the cost of the private copying compensation is actually borne by natural persons who make private copies, the Spanish scheme is not compliant with European rules



CONSEQUENCES

- When Members States decide to implement the private copying exception into their national law, they are required to provide for the payment of fair compensation to right holders
- Such compensation scheme could be a levy but could also be financed by the General State Budget
- However, any compensation scheme adopted by Members States should by borne ultimately by the natural persons who make private copies

3. Microsoft v/ SIAE



Issue : Is the Italian system that exempts, from payment of the private copying levy, the distribution of devices and media acquired for purposes unrelated to private copying compliant with the Infosoc Directive ?



Negative answer from the Court :

- ☞ The Italian law does not contain any generally applicable provision exempting from the payment of the private copying levy importers who prove that the devices are acquired for purposes clearly unrelated to private copying levies (lack of objective criteria)
- ☞ Consequently, the legislation at issue does not ensure an equal treatment between importers required to pay the private copying levy



CONSEQUENCES

- When Members States decide to implement the private copying exception into their national law, they are required to implement a reimbursement scheme when the devices are clearly unrelated to the private copying exception
- Such reimbursement scheme should be based on legal objective and transparent criteria which guarantee an equal treatment between entities required to pay the private copying levy
- Such reimbursement scheme should be effective and should not make it excessively difficult to obtain repayment of levies unduly paid

4. Minister Finansow v/ SAWP



Issue : Should private copying levies be subject to value added tax according to Directive 2006/112 on the common system of value added tax ?



Negative answer from the Court :

- ☞ Article 2 (1) (c) of the VAT Directive is only applicable to the provision of services for consideration, which implies a legal relationship between the provider of the service and the recipient and a reciprocal performance
- ☞ The private copying levy does not constitute a direct consideration for any supply of services because it is linked to the harm resulting from the reproduction of protected works without the rightholders' consent



CONSEQUENCES

- Rightholders do not provide services, within the meaning of the VAT Directive, when their CMOs collect private copying levies
- VAT is not supposed to be paid, on this legal ground, on the fees collected by CMOs with regard to private copying
- VAT is still applicable on the media and/or the devices subject to private copying levies

5. Vcast Limited v/ RTI SpA



Issue : Does the cloud video recording system for broadcast television programmes provided by Vcast fall under the scope of the private copying exception ?



Negative answer from the Court that holds that :

- ☞ the functionality provided by Vcast is dual : it gives access to protected content broadcast by third parties and it enables users to make copies of such content
- ☞ the first functionality entails a communication to the public right which prevents Vcast from claiming that its service falls under the scope of the private copying exception



CONSEQUENCES

- The CJEU's decision does not require that the natural person who makes copies for his private use should own reproduction equipment, devices or media
- Copying services provided by a third party could fall under the scope of the private copying exception provided that :
 - *the access of protected copied content is licensed by rightholders concerned with regard to their communication to the public right*
 - *Such copied content is exclusively made for the private use of the natural person who is the customer of such online service*



The Law of 7 July 2016 “on freedom of creation, architecture and heritage”

NPVR provision

- The private copying remuneration shall be paid by the radio or television services, or their distributor, (Article L.311-4) which, by means of remote access, provide a natural person with the reproduction of works, for their private use
- The remuneration must take into account the number of users of the storage service in question and the storage capacity made available to them



5. The Law of 7 July 2016 “on freedom of creation, architecture and heritage”

NPVR provision

- This new provision is based on the view that there is no difference between an individual making a copy himself by means of a “box” supplied by a TV distributor and an individual obtaining such a copy through an online service providing a NPVR
- However, the copy must concern a “linearly transmitted” radio or television program and must be requested “before the transmission of the program or during it for the remaining part”



5. The Law of 7 July 2016 “on freedom of creation, architecture and heritage”

NPVR provision

- Firstly, the private copying exception is restricted to services set up by radio or television services or their distributor
- Secondly, the distributor who makes available a NPVR service is required to conclude an agreement with the radio or television broadcasters “setting out beforehand the functionalities of that storage service”
- The main purpose of these agreements will be to define the copying capacity of the NPVR services and specify the conditions for ensuring the security of the copied content



5. The Law of 7 July 2016 “on freedom of creation, architecture and heritage”

Extension of the scope of Article L.324-17

- CMOs are already required to use 25% of the revenues from the private copying remuneration for activities that support creation, live performances and training for performing artists (cultural activities)
- The new law extends the sphere of use of the 25% to “the development of artistic and cultural education”



5. The Law of 7 July 2016 “on freedom of creation, architecture and heritage”

The Reimbursement Procedure for Exported Media

- Recording media exported from the French territory are not subject to the payment of the remuneration for private copying in force in France (CJEU judgment of 11 July 2013 in the Amazon case)
- New reimbursement schemes should be implemented when exported media are not distributed on the French market (ex-ante and/or ex-post reimbursements are available)

THANK YOU!

