Private Copying Forum
(WebMeeting, 13 June 2013)

Notes

Participants

Christine Mergoupi	AEPI
David Kitzinger	ARTISJUS
François Stroobant	AUVIBEL
Burak Ozgen	GESAC
Katarina Matanovac	HDS
Hugo Cox	PRS for Music
Serge Vloeberghs	SABAM
Martine Loos	SABAM
Charle-Henri Lonjon	Sorecop/Copie France
Roberta Luise	SIAE

and for BIEM
Ronald Mooij
Laure Margerard

Apologies for absence was received from Thierry Desurmont (SACEM/SDRM)

¤¤¤¤¤¤

Main topics to be discussed during the meeting:

- Recent court decisions
- Impact of the Padawan and Opus decisions on local situation
- New development in European and UK legislations

Hungary

➔ Nokia case: after 6 year proceeding, a decision was issued by the High Court in favor of ARTISJUS, asking Nokia to pay the private copying levy on mobile phones and memory cards, for the year 2002- 2007. ARTISJUS started talks with Nokia to settle demand for the remaining period.

➔ The written decision haven't yet been received, ARTISJUS will circulate a legal summary once received (see attached).

➔ No problem has been identified so far with foreign exporters to Hungary following the Opus decision.

20-26 Boulevard du Parc – F- 92200 Neuilly-sur-Seine
Tel: 00 33 1 55620840 - Fax: 00 33 1 55620841 - e-mail:info@biem.org

Belgium

➔ The Opus case confirmed a previous decision of the Belgium court. No problems in general with importers have been faced except with Amazon, a case has been introduced to the court and is pending.

Croatia

➔ No question has been received from abroad following the OPUS case in Croatia. HDS has signed an agreement with the importers. They are negotiating tariffs for tablets, PC and for Smart phones (a tariff for Mobile phone has already been applied since 2007).

➔ Regarding professional uses: an appeal is pending, HDS expects to have it taken good steps during this year

France

➔ An important case was won against Apple on tablets, waiting for the legal decision. The judge considered that notwithstanding the absence of an applicable tariff scheme, RO are entitled to receive remuneration because of the prejudice caused. An intermediate remuneration of EUR 5 million was granted as a provision to right owners.

➔ Last year, during similar proceedings against Sony, Nokia, Acer and Motorola, the judge already argued that RO should receive remuneration even in absence of tariff scheme and granted an amount equivalent to 85% of what RO were claiming.

➔ Implementation of the Opus case: 2 test cases were launched against websites abroad: Nierle (Germany) and MMD (Luxembourg) selling to French consumers from abroad. The decisions, in first level of jurisdiction, were in favor of right holders and, notwithstanding the fact that NIERLE and MMD have made an appeal of these decisions, on the basis of these decisions, negotiations have been started with other importers.

Greece:

➔ Right owners' CMOs (creators and producers) are actually pursuing importers of Mobile phones. Joint extra-judicial letters have already been sent to importers and some have already replied (also extra-judicially) denying that mobile phones are subjected to private copying remuneration, due to the fact that allegedly they can be considered as PCs and as PCs are excluded from the levy, thus mobile phones (smart phones) are also not subject to the levy.

➔ As regards the Court case instituted by the creators' CMOs against SONY claiming declaration of imports (and payment of PC remuneration) for video cameras, the decision was not favorable for the CMOs; AEPI are currently in the process of taking the next legal step to fight back.

Italy

➔ Nokia pays copy levy for Mobile phones.

➔ Case against Imation is in the appeal court: the Company put into question the system following the Padawan case asking to withdraw the professional use of blank media from the scope of application of the levy system. Imation argues that the Padawan decision should be put into application as at the enforcement of the Directive; and then ask for the reimbursement of levy paid as of beginning of 2003.

United Kingdom

➔ The UK government has been intending to introduce a private copying exemption without compensation, arguing that compensation is included in the purchase price of the original content.

➔ The week before the meeting, the government published draft legislation with a 6 week technical consultation period which is not open to challenging the basic principle of the text.

➔ Actors in the Music sector are considering the way to challenge the text on a legal basis either through a judicial review or a complaint at the European level.

Update at the European level

➔ After the publication of recommendations of Mr Vitorino at the end of January, RO organisations gave a strong negative reaction on the possible consequences of those recommendations for them and future of the creation in Europe.

➔ End of May, Mr Vitorino presented and defended its conclusions in front of the Parliament, the Legal Affairs Committee and the Competitiveness Council. There were mixed feeling about the recommendations.

➔ At the Parliament, MP F. Castex is preparing a report covering private copying. The report will be completed by October in the meantime Mrs Castex will organise hearing in September.

➔ Remains important to provide policy makers at the national level with information, particularly analytic data, to show the value of private copying.

➔ The Commission continues to work on this issue in order to determine its future policy relating private copying. No action is expected before the end of 2013 and in any case the nature of a possible action to take place on this issue has not been decided.

¤¤¤¤¤¤¤¤¤¤¤¤¤

Summary of Artisjus on the Nokia case

[The Nokia case and the former Samsung case were summarized by Artisjus for the CISAC Legal Committee in more annual national reports of Artisjus].

Since the sending over of the last 2012 report, the Nokia case was decided by a final decision of the Supreme Court.

The case number was Pfv. IV. 21272/2012/7. (The decision is not yet available on the official website of the courts.)

Artisjus as plaintiff sued (…) Nokia, as an importer of mobile phones for provision of data and private copy (blank media) remuneration with regards to memory cards packaged to the mobile phones as well as the integrated memories of mobile phones sold in Hungary. Nokia refused to pay remuneration and to provide data as it is provided for in §§ 20 and 22 of the Copyright Act stating that the legal ground for the collection of private remuneration with regards to integrated memories of mobile phones and memory cards is missing.

The second instance Court (Győr Court of Appeal) ordered the defendant to provide data and pay remuneration on memory cards packaged to the mobile phones. The court held that the legal basis for the collection of remuneration is valid, refused all defences of the defendant with regards to the legal ground, however gave way to the discrimination /unfairness defence. The court was of the view (like the first instance court) that the fact that the integrated memories of mobile phones were not specified in former tariff charts (until 2009) but were regarded as "MP 3 players, and similar multifunctional devices" shall be regarded as unfair general terms, since they are too broad and open the way for more interpretations. As a result if the said contract terms are corrected and the unfairness is eliminated (the mobile phones are indicated in the tariff charts as of 2010) the collection of remuneration is lawful.

The decision was open for extraordinary review by the Supreme Court (the Curia of Hungary). The defendant filed a pile of documents and requests to review all parts of the decision that establishes the payment obligation and refuses the defendants' arguments. Artisjus requested to reverse that part of the second instance decision that establishes that the former tariffs that did not indicate mobile phones only MP3 players may not be applied to mobile phones are unfair contract terms.

The Supreme Court reversed that part of the second instance decision that qualified the former tariff provisions as unfair. In any other respects it upheld the former decision. As a result the private copy remuneration can be enforced with regards to the integrated memories of mobile phones also under tariff charts that did not specify the integrated memories of mobile phones only listed MP3 players and other multifunctional devices as carriers subject to the remuneration.

The panel stressed that

- it has never been disputed by the defendant that the questionable tariff provisions should cover mobile phones as well. This fact could be supported by the parties' correspondence,

- general terms that provide for the service and the consideration (the price) may never be qualified as unfair (this is a provision of the Civil Code that was interpreted by the Supreme Court) if they are clear,

- the reference to the exception for professional use is also unfounded, since it may not be excluded that a mobile phone comes into the possession of a private person and it is eligible for making private copies.

It is worth adding that all courts rejected the motion for preliminary ruling, although the defendant made a reference to the Copydan case as well. The courts held that the Padawan ruling is sufficient to cover all devices/media that are eligible for private copying.

Moreover the first instance court sought the statement of the Competition Office on the request of the defendant. The Competition Office did not initiate a procedure against Artisjus and stated that hypothetically an abuse with dominant position may be established if the pricing cannot be objectively justified. Artisjus could prove that the tariffs are based on objective criteria, the storage capacity of the various media, the market circumstances of the sale of various media, surveys on the usages of copying ordered and done annually and comparisons with similar tariffs.

(End of summary)