Private Copying Forum
(Webmeeting, 15 January 2014)

Notes

Participants:

Christine Mergoupi	AEPI
Paul Fischer	AKM
François Stroobant	AUVIBEL
Michael de Vries	BUMA/STEMRA
Anna Bucci	CPCC
Hugo Cox	PRS for Music
Serge Vloeberghs	SABAM
Martine Loos	SABAM
David El Sayegh	SACEM/SDRM – Chairman
Carlos Casado	SGAE
Cristina Perpina-Robert	SGAE
Roberta Luise	SIAE
Charles-Henri Lonjon	SORECOP/Copie France
Anke Link	SUISA

And for BIEM:

Mitko Chatalbashev BIEM/CISAC Director of European Affairs
Laure Margérard
Marie-Claude Rasmussen

Apologies for absence:

David Kitzinger	ARTISJUS
Katarina Matanovac Feric	HDS
Darko Stanicic	HDS
Satoshi Watanabe	JASRAC
Till Zimmer	ZPÜ

The meeting was chaired by David El Sayegh, the new General Secretary of SACEM.

He presented his report on the lessons of the 2 latest rulings of the ECJ: the WG Wort case in June and AMAZON case in July – **Annex 1**.

1. Contractual authorization, online service and private copying (VG WORT Case)

Issue: Does the fact that a right holder has expressly or implicitly authorized the reproduction of his (her) protected work mean that the private copying exception does not apply and that the fair compensation associated with such exception is not due?

This is a key question especially regarding new online services such as cloud computing.

The negative answer from the court is very good since the European Court has decided that where a Member State has introduced the private copying exception in its national law, the authorization granted by right holders to allow the making of private copies is devoid of any legal effect. That implies that if there is some act of reproduction which falls within the scope of the private copying exception, no contractual authorization should be issued by the right holder.

This is one of the most important claims raised by manufacturers who have said they are not going to pay twice as the right holders have already been remunerated under the full licence scheme.

In some cases there is an act of exploitation which comes within the scope of an exclusive right and both rights should be granted by a licence. In the case of a download store (ITunes), the act of downloading falls within the scope of the exclusive right but private copying comes within the scope of the private copying exception. There is a legal ground for asking "Apple" for a private copying remuneration in order to compensate for such exception and such reproduction right.

The second point is that contractual remuneration should not jeopardize the private copying remuneration if there is a private copying remuneration in the country in question. The private copying remuneration scheme is protected through this ruling.

Consequence of this ruling:

It is not possible to subject compensation remuneration to a contract when such compensation constitutes the compensation for the private copying exception. It would be very easy for certain categories of rights holders to conclude any kind of licence with manufacturers of any device related to the private copying remuneration so they can make any contract, but the contract should only license acts of reproduction which come within the scope of the exclusive right and may not jeopardize in any way acts of exploitation which fall within the scope of the private copying exception and the remuneration linked to the private copying exception.

2. Remuneration for private copying and use of recording media (Amazon case)

First issue: *Is the indiscriminate application to any purchase, whether by a legal or a natural person, of the private copying levy, associated with a reimbursement scheme, compatible with the fair balance to be struck between the interests of right holders and those of the users of blank media?*

The Court's answer is yes subject to compliance with two cumulative conditions: the existence of sufficient practical difficulties to determine the purpose of the use of the purchased medium, and the need to set up an effective scheme for the reimbursement of the private copying remuneration when such medium is not used for private copying.

It is a very balanced way to make private copying remuneration applicable as it is very difficult sometimes to determine beforehand what will be the use of any kind of device. It makes it possible to apply a presumption of private copying remuneration when it is difficult for right holders to determine the use.

However in cases where the entity liable for payment of the private copying remuneration is capable of demonstrating that the medium was not purchased for the purpose of private copying, a reimbursement scheme can be set up under the French law. The ruling is compatible with the French scheme which provides for exemption agreements or even reimbursement when the conditions of use rule out a presumption of use for private copying.

The fact that the purchaser is a natural or a legal person is not a ground per se for obtaining an exemption or a reimbursement of the private copying remuneration. The key point is to determine the use of the medium and the fact that a presumption of private copying use is acceptable according to this ruling.

In response to a question from A. Link as to who is to define the use of the medium, in the case where a legal entity buys 100 mp3 players for its employees, they are still within the scope of the private copying reimbursement, C-H Lonjon explained that if the French law states that there is a presumption of private use, it falls within the scope of the collection. Thus Copie France, as the body responsible for collecting the remuneration and refunding, has to determine whether mp3 players are used for professional or private use in the workplace by the employees. The law states that we have to collect any evidence in order to demonstrate that the use of the device is intended only for professional purposes. Companies can impose internal regulations on their employees that they only use the device for professional use. And the device must remain on the premises during the night. We can presume that, if there is no restriction and they are permitted to take the device home, it is for private copying use.

D. El Sayegh stressed that when there are practical difficulties to determine the use, a refutable presumption of private copying use can be set up.
If it had been otherwise, it would have been very difficult for right holders to demonstrate beforehand that any purchase was intended for private copying. This is the burden of proof.

C-H Lonjon explained that liable companies consider that the system in France does not work because of a lack of publicity, an overly cumbersome process and the difficulties of fulfilling the requirements imposed by the law.

Second issue: *is a presumption of private copying use, enabling the application of the remuneration for private copying, justified when the media are purchased by private persons?*

The Court's answer is yes subject to compliance with two cumulative conditions: the existence of sufficient practical difficulties to determine the purpose of the use of the purchased media, and the rebuttable nature of this presumption, in order to avoid imposing remuneration outside a situation of private copying.

It is important to highlight that, in the end, the most relevant criterion is the use made by the final user who purchased the medium. However there might be practical difficulties in order to determine this use. So national law could provide for a scheme where there is payment first of the private copying remuneration and then, according to a rebuttable presumption or a reimbursement scheme, the user could be refunded only if the end user has succeeded in demonstrating that when the medium was purchased it was not for the purpose of making private copies. It means that the burden of proof is borne by the purchaser and not the right holder.

P. Fischer stressed the problem they are facing at national level when the Supreme Court said that the legal person would be exempted automatically from the private copying levy. It does not necessarily apply.
In Austria, there are a lot of associations which are legal persons by law. If an association just buys a lot of smartphones and then sells them to its members, they are all exempt from the private copying levy.

D. El Sayegh underlined that the national Supreme Court stated that legal persons would be automatically exempted from the private copying remuneration. This is a serious problem they are facing now because it is not true as there are instances where there is private copying even for legal entities.

It may be possible for you to demonstrate, if your company provides you with a smartphone for work, that you could also use it to make private copies of protected content.

It is important to keep in mind that, ultimately, what is the medium to be used for? Thus the rebuttable presumption system, where you pay first and you have to be reimbursed after, is a way to make things easier for rights owners. But in the end the relevant criterion, even with legal emphasis, is the use of the purchased medium. There are many disputes in France in which manufacturers ask to be refunded. One such example is the case of YouTube where they stopped paying and now want to be refunded for payments they've previously made in the past. In that case, we will use the Amazon case, and say that according to the ECJ ruling we can set up a scheme, when we face practical difficulties to determine the use of media, which enable the right owners to collect first and then (with regard to the balance which has to be struck between the right holders and users' interests) refund certain amounts previously collected only if the purchaser has demonstrated that the purchased media was not purchased for private copying use.

In response to a participant's question about the criteria used to effect the refunds, C-H Lonjon indicated that the French regulations list the elements related to the criteria. First, an invoice of the purchase of the media must be provided, showing that the remuneration has been paid. However the system is not fully operational as the retail channels are not yet organized to issue invoices which show the amount of remuneration.
New regulations should be ready as of April 1st in order to fulfil the obligation to show the amount of remuneration. Once Copie France has the evidence that the remuneration has been paid by the consumer it will examine whether the media has been used solely for professional purposes or not. Another practical element is an official declaration on the part of the requesting party stating that the usage is to be non-private in nature.

3. Remuneration for private copying and schemes to help social and cultural actions

Issue: Is private copying remuneration, which is intended to compensate for the harm suffered by right holders by reason of the introduction of a private copying exception, compatible with the fact that part of such remuneration is not paid directly to the right holders but to social and cultural establishments set up for their benefit?

This scheme represents 50 % of the remuneration in Austria and 25 % in France.
There are other countries which have set up similar schemes.

The directive does not impose on member states the obligation to ensure that all of the private copying remuneration goes to the right holder.

Member states enjoy wide discretion to determine how and how much of this 'indirect' compensation will be allocated to funding social and cultural establishments.

The only condition in order to validate this measure is to ensure that the compensation will actually benefit the right holder and that it shouldn't be discriminatory based on nationality within the EU.

In France, this legal issue has been raised in pending litigation. It was one of the most important points raised by the manufacturers saying that "It's completely illegal because 25% of the private copying remuneration isn't going directly to the right holders, but could be funding cultural establishments".

Indeed, the use of the sum must effectively benefit the right holders (which is the case in France) because according to the French law indirect compensation is purely and strictly controlled by national rules.

Another very complex question concerns whether the collective management society of the country of destination of a carrier may request private copying remuneration in that country when remuneration for private copying has already been paid in other member states of the European Union. The court very clearly stated that member states that have introduced private copying remuneration have an obligation to achieve certain results in the sense that they must guarantee to rights holders actual payment of fair compensation.

However, the Amazon case has brought up yet another new point. When the place of a transfer of a first purchase of media and the place where reproduction of works on such media occurs is not the same, the latter point should prevail.

Thus, it enables private copying remuneration to be collected for any device bought by an end user situated in France. From a practical standpoint, it is a message sent by the ECJ. Even though private copying remuneration has previously been paid by the entity which is supposed to pay Copie France. Any possibility of forum shopping is prohibited by the court with this rule. Of course, no double payment should occur. But in this context the manufacturers or the importers should request reimbursement of the private copying remuneration previously paid in the country of origin.

The practical consequences of such a system if it were authorized would be very dangerous. For instance, an importer could import through the UK, where no remuneration has to be paid, and then transfer the media to a French end consumer in France. So then the person would be able to avoid paying any remuneration by pointing out that the first country of introduction of media into the EU is a member state where no remuneration has been established. So there is a very practical linkup here: the remuneration has to be paid where the *harm* to the right holder has been done. That is, where the copy has been made. If there has been previous payment in other member

states, where the *carrier* has been in transit, then there will be a refund system for the re-exports.

It implies that if someone claims to have already paid remuneration in Germany but the harm is located in France, then the French pricing should be applicable. The solution is very different regarding devices which incorporate protected content.

5. Exception for private copying and technological measures (VG Wort case)

Issue: Does the possibility of applying technological measures (ie DRMs) render the private copying remuneration inapplicable?

The answer was very positive. Technological measures are not intended to eliminate the possibility for end users to make private copies. So the private copying exception, especially in countries where the national law has granted remuneration for private copying, should be applicable. However, the court mentioned that the level of fair compensation could vary depending on, of course, the application of technological measures. So it implies that there is room for technological measures but also room for private copying remuneration. Especially, when technological measures do not prevent end users from making private copies. Of course, regarding the musical field, the situation is better than it used to be because DRM has been withdrawn from digital platforms (ITunes...).

However, with regard to the principle, it is important to state, as the Court did, that the private copying remuneration and exception are still valid despite the fact that there are sometimes technological measures. Technological measures do not render the private copying remuneration inapplicable. Only the level of remuneration can vary depending on the application of technological measures.

In conclusion, the rulings reinforce the remuneration for private copying. First, contractual authorization for online services does not preclude the private copying exception nor jeopardize the private copying remuneration. It is not because something has been paid on a full contractual basis to the right holder that the private copying remuneration is not applicable. The uses made by the purchasers are the relevant criteria. When right holders face practical difficulties to determine a use, a system to be set up in which one would pay first and reimburse afterwards is admissible according to the Court. Part of the private copying remuneration could help cultural and social action. Cross border trade of media in countries which have adopted the principle of remuneration does not prevent the country where the harm is localized from collecting the private copying remuneration, even though private copying remuneration has previously been paid in the country of origin. It will be up to the manufacturer or importer to claim reimbursement in the country of origin.

However the fight against private copying remuneration is not over. There are other pending cases and an important issue has been raised through the preliminary questions especially regarding the legality of the source of the copy.

Recently in the ACI Adam BV v. Stichtung de Thuiskopie case there is also a question regarding the notion of 'harm' and the application of contractual remuneration.

6. Developments at national level

D. El Sayegh stressed that they are waiting for an important ruling. There has not yet been any relevant ruling issued by a national court but he said that "we will use the Amazon and WG Wort rulings in our fight to demonstrate the legitimacy of the private copying remuneration scheme".

CH. Lonjon underlined that they have started some legal proceedings against different websites located mainly in Luxembourg and Germany which are still going on and that they would be interested in sharing information with other countries where such proceedings have been started.

P. Fischer indicated that they won such a case some years ago.

F. Stroobant indicated that they won a case against Amazon very recently and are now facing the problem of the execution of the decision of the court. Amazon has been ordered by the court to pay 10,000 euros per day of delay for declaring the sales in Belgium. So probably the decision of the court will be difficult to be exercised He also referred to other cases with very heavy sentences from the Belgian courts against a site located in Luxembourg. The natural persons who were implicated in those direct sales were sentenced in Belgium to confiscation of their goods, prohibition of any professional activities for 10 years and immediate imprisonment. This is just to show that the courts are taking the problem very seriously and the message to all who would circumvent the system is: "Don't do it or you will pay the price for it".

P. Fischer asked if all the countries have legal exemptions for exports in their national laws and suggested an exchange of each country's export information.

CH. Lonjon indicated that this had already been put into practice with neighbouring countries such as Belgium because of the number of flows between France and Belgium. So they try in a practical but discreet way to exchange information between the two countries in order to cross-check the quantities declared as exported and which should be declared as imported in the other country.

F. Stroobant confirmed that they exchange information which is allowed expressly by the Belgian laws. If somebody is asking Belgium for reimbursement of exports to France, he will warn Copie France and the latter should normally get a declaration for the quantities exported to France from Belgium. This is a very good system. If somebody asks for a reimbursement for professional use, this also means that any copy of protected material will fall within the scope of the exclusive rights with the application of the tariffs of the exclusive rights and not the very low private copying tariff.

In Canada, A. Bucci indicated that the situation is not good at all. They can only collect on the sale of blank CDRs. So as the use of CDRs declines, so does the revenue. Any attempts that they have made to extend the private copying levy to mp3 players or electronic memory cards have been thwarted by the government. So at this point all they can do is collect as much revenue as they can and hope that at some point, when there's a change in government, they make some changes to the current legislation.

M. Chatalbashev stated that, in the last few years, Russia had started to effectively implement the private copying scheme. There have been many cases against big names like Nokia and Samsung for millions of euros, and most of these cases here have been won. Now, RAO is the main stakeholder together with the record companies and audiovisual producers and the right holders.

annex 1

THE LESSONS OF THE LATEST RULINGS OF THE ECJ

AS REGARDS PRIVATE COPYING

Pour que vive la musique
Long live music

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Two major rulings

➔ **Judgment of 27 June 2013 : VG Wort v/ Kyocera and others case**

➔ **Judgment of 11 July 2013 : Amazon v/ Austro-Mechana case**

1. Contractual authorization, online service and private copying (VG Wort case)

Issue : Does the fact that a right holder has expressly or implicitly authorized the reproduction of his (her) protected work mean that the private copying exception does not apply and that the fair compensation associated with such exception is not due?

Negative answer from the Court :

- ☞ Where a Member State has decided to introduce in its national law the private copying exception, the authorization granted by the right holders to allow the making of private copies is devoid of any legal effect.
- ☞ Insofar as a contractual authorization to allow the making of private copies has no legal object, it cannot jeopardize the fair compensation granted for private copying.

CONSEQUENCE

- Precludes any possibility to subject compensatory remuneration to a contract when such compensation constitutes the recompense of a private copying exception.

2. Remuneration for private copying and use of recording media (Amazon case)

First question : is the indiscriminate application to any purchaser, whether a legal or a natural person, of the private copying levy, associated with a reimbursement scheme, compatible with the fair balance to be struck between the interests of the right holders and those of the users of blank media ?

The Court's answer is yes subject to compliance with two cumulative conditions:

- ☞ the existence of sufficient practical difficulties to determine the purpose of the use of the purchased medium;

- ☞ the need to set up an effective reimbursement scheme of the private copying remuneration when the use of such medium is not for private copying.

CONSEQUENCES

- Validity of the French scheme (Article L.311-8 of the French Intellectual Property Code) which provides for an exemption agreement, and even reimbursement, when the conditions of use do not allow to presume a private copying use;

- The fact that the purchaser is a legal person is not *per se* a ground for exemption and/or reimbursement of the private copying remuneration.

Second question : is a presumption of private copying use, enabling the application of the remuneration for private copying, justified when the media are purchased by private persons ?

The Court's answer is yes subject to compliance with two cumulative conditions :

- ☞ the existence of sufficient practical difficulties to determine the purpose of the use of the media purchased ;
- ☞ the rebuttable nature of this presumption, in order to avoid imposing a remuneration outside of a situation of private copying.

CONSEQUENCE

- It is the use by the final user which constitutes the key criterion for the application of the private copying remuneration even if a Member State has the possibility to implement a rebuttable presumption.

3. Remuneration for private copying and schemes to help social and cultural actions (Amazon case)

Issue : is a private copying remuneration, intended to compensate the harm suffered by the right holders by reason of the introduction of a private copying exception, compatible with the fact that part of such remuneration is not paid directly to the right holders but to social and cultural establishments set up for their benefit?

Positive answer from the Court that recalls that:

- ☞ Directive 2001/29 does not impose on Member States the obligation to ensure to right holders the cash payment of all of the private copying remuneration,
- ☞ Member States enjoy a wide discretion and can therefore provide that part of that compensation is to be provided in the form of indirect compensation,
- ☞ Such a scheme must actually benefit the right holders and must not be discriminatory.

CONSEQUENCES

- The 25 % of Article L.321-9 of the French Intellectual Property Code complies with European law insofar as it is used to help creation, live performances and the training of artists ;

- The use of the sums must benefit all right holders, nationals of the European Union;

- The use of the sums must effectively benefit right holders.

4. Remuneration for private copying and cross-border trade of recording media (Amazon case)

Issue : could the collective management society of the country of destination of the media request the private copying remuneration applicable in such country when a remuneration for private copying has already been paid in another Member State of the Union ?

The Court recalls that :

- The Member States which introduced the private copying exception have an obligation to achieve a certain result in the sense that they must guarantee to the right holders the actual payment of a fair compensation to compensate the harm arisen on their territory ;
- When the place of transfer of the media and the place where the reproduction on such media occurs are not the same, it is the latter point of contact which must prevail.

CONSEQUENCES

- Each time a medium is intended for a consumer located in France, Copie France is the entity in charge of collections according to the French rates;

- In case of double payment, the payor may request a reimbursement of the payment made in the country of origin but shall pay Copie France ;

- Any possibility of « forum shopping » is prohibited by the Court if the media have as a destination France.

5. Exception for private copying and technological measures (VG Wort case)

Issue : does the possibility of applying technological measures (ie DRMs) render the private copying remuneration inapplicable ?

Negative answer from the Court that holds that :

- ☞ The existence of a technological measure is not intended to eliminate the exception for private copying when the national law of the concerned Member State recognizes such exception.
- ☞ Only the level of the fair compensation can vary depending on the application of a technological measure.

CONSEQUENCES

- The application of a technological measure does not render the private copying remuneration inapplicable ;

- The application of a technological measure must safeguard the private copying exception and its remuneration when a Member State has introduced such exception in its national law ;

- The level of the private copying remuneration can vary depending on the application of a technological measure.

CONCLUSION

These two rulings reinforce the private copying remuneration scheme on such essential questions as :

- ✓ Contractual authorizations for online services
- ✓ The uses and the purchasers of the media (natural v legal person)
- ✓ The schemes to help cultural and social actions
- ✓ The cross-border trade of media in countries which have adopted the principle of a remuneration
- ✓ The articulation with technological measures

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There are however other pending cases (COPYDAN v/ Nokia case ; ACI Adam BV v./Stichting de Thuiskopie case) concerning :

- The legality of the source of the copy
- The notion of harm
- The application of the technological measures
- The application of the contractual remuneration

THANK YOU