



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

Major decisions since 2013

Judgment of 27 June 2013 : VG Wort v/ Kyocera and other case

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

Judgment of 10 April 2014 : ACI ADAM BV ea v/ Stichting de ThuisKopie

Judgment of 5 March 2015: COPYDAN BANDKOPI v/ Nokia Danmark

Judgment of 12 November 2015 : Hewlett-Packard Belgium v/ Reprobel

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



Issue : Does the existence of an express or implicit authorization to reproduce protected works 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 have any bearing on the fair compensation which constitutes its recompense.



CONSEQUENCES

- Weakens the recommendations of the Vitorino report that wished to make the contractual authorizations for online services prevail to the detriment of the private copying exception ;
- Precludes any possibility to subject compensatory remuneration to a contract when it constitutes the recompense of a legal exception.

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

 First question : Is the indiscriminate application to any purchaser, whether a legal or a natural person, of the private copying remuneration, on the placing on the market, of recording media, associated with a reimbursement scheme (in the situation where the final use of the media is not one of private copying), compatible with the fair balance to be struck between the interests of the right holders and those of the users of such 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.



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.

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,
- The fact that the fair compensation must be regarded as a recompense for the harm suffered by right holders is not incompatible with the principle of an indirect compensation,
- Such a scheme is compatible with the objectives of Directive 2001/29 which are to ensure that creators and performers receive the necessary resources to continue their creative and artistic work and to safeguard their independence and dignity,
- Such a scheme must actually benefit the right holders and must not be discriminatory.

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 ;
- Such harm materializes not at the level of the transfer of the recording media but with the reproduction carried out on such media by a person for a private use ;
- 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.

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



Issue : Does the possibility of applying technological measures, designed to prevent or restrict acts, in respect of copyright protected works or other subject matter, which are not authorized by the right holder (“technological measures”), 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.

6. Exception for private copying and legality / illegality of the source (ACI ADAM and Copydan cases)



Issue : Can the remuneration for private copying take into account the private copies made from an illegal source ?



Negative answer from the Court that holds that :

- ➔ Admitting that private copies can be made from an illegal source would encourage the circulation of counterfeited or pirated works, to the detriment of sales or of other lawful transactions relating to the protected works;
- ➔ The Member States that allow reproductions for private use must limit unauthorized acts.

7. Minimal prejudice (Copydan case)



Issue : Who decides, and under what conditions, that exemption from payment of fair compensation is possible when private copies are made of protected works, ie that the prejudice caused to the right holders is minimal ?



Answer from the Court :

- ☞ It is within the discretion of the Member States to set the threshold for such prejudice;
- ☞ Such threshold must be applied in a manner consistent with the principle of equal treatment.

8. Private copying and devices belonging to a third party (Copydan case)



Issue : Can there be private copying when a reproduction is made by a natural person by or with the aid of a device belonging to a third party?



Positive answer from the Court that holds that :

- ☞ The Infosoc Directive did not mention, and did therefore not consider, the characteristics of the devices thanks to which copies are made for a private use relevant;
- ☞ Consequently, it is up to Member States to decide on the question whether a device used by a private individual to make copies for private use must belong to that person or whether it may belong to a third party.

9. Possibility for creators to share the fair compensation with their publishers (Reprobel case)



Issue : Can a Member State allocate a share of the fair compensation to the publishers of the protected works ?



Negative answer from the Court that holds that :

- ➡ Publishers are not exclusive reproduction right holders pursuant to Article 2 of the Infosoc Directive and do not suffer any harm for the purposes of such exception;
- ➡ Publishers cannot therefore receive compensation when such receipt would have the result of depriving reproduction right holders of all or part of the fair compensation to which they are entitled under such exception.



CONSEQUENCES

- The CJEU's decision has no effect on systems, such as the one set up by Sacem, which apply the terms and conditions of the contracts entered into between creators and their publishers, providing to the benefit of the latter a share of the fair compensation

CONCLUSION

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

- ✓ Contractual authorizations for online services
- ✓ 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
- ✓ The legality, or illegality, of the source

THANK YOU!

