

The Supreme Court revokes the Royal Decree governing compensation for private copying financed by the General State Budget

On 10 November 2016, upholding the appeal filed by various collecting societies, the Supreme Court (Contentious-Administrative Chamber) issued a judgment declaring the nullity of Royal Decree 1657/2012, which governed the procedure for the payment of fair compensation for private copying, financed by the General State Budget

I. Broader context of the Supreme Court judgment of 10 November 2016

Despite the praise attributed to it by some and the criticism it has drawn from others, what is clear at this stage is that the system of fair compensation for private copying has been a continuous source of legal conflict and social tension between holders of intellectual property rights and users. Amid the ongoing controversy raised by the legal concept of fair compensation for private copying -popularly known as the "private copying levy"- the Court of Justice of the European Union ("**CJEU**"), far from standing on the sidelines, has played not only a significant role, but also a decisive one, alongside that of the Spanish Courts.

The first blow to Spain's former system of fair compensation for private copying set forth in Article 25 of the Spanish Copyright Act¹ was dealt by the CJEU, in what came to be known as the "Padawan case" (case C-467/08). At that time, the Barcelona Court of Appeal (Section 15) was hearing the proceedings involving the Society of Spanish Writers and Editors ("**SGAE**") and a small limited liability company called Padawan, S.L. regarding its failure to pay the private copying levy corresponding to CDRs, CDRWs, DVDRs and MP3. The Court decided to refer several questions to the CJEU² for a preliminary ruling as to whether the Spanish system of fair compensation for private copying, which was being applied indiscriminately to all digital reproduction equipment and materials without making any distinction between the different uses of said items by companies and professionals and individuals, was in line with Article 5.2 b) of Directive 2001/29/EC³.

By means of its judgment of 21 October 2010 (case C-467/08), the CJEU replied to the questions raised by the Barcelona Court of Appeal (Section 15) as follows:

1. The concept of 'fair compensation', within the meaning of Article 5.2(b) of Directive 2001/29/EC "[...], is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on the Member States to determine, within the limits imposed by European Union law in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation".
2. Article 5.2(b) of Directive 2001/29 must be interpreted as meaning that "the 'fair balance' between the persons concerned means that fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception. It is consistent with the

¹ Royal Legislative Decree 1/1996, of 12 April, which approves the revised text of the Spanish Copyright Act, standardising, clarifying and harmonising the legal provisions currently in force on the subject (Official State Gazette of 22 April 1996).

² Ruling of the Barcelona Court of Appeal (Section 15) of 15 September 2008 (Appeal no. 822/2007; Judge *Rapporteur* Mr Ignacio Sancho Gargallo).

³ Directive 2001/29/EC of the European Parliament and of the Council, of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (Official Journal of the European Communities of 22 June 2001, B 167/10).

requirements of that fair balance to provide that persons who have digital reproduction equipment, devices and media and who on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it."

3. Article 5.2(b) of Directive 2001/29 must be interpreted as meaning that "a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying".

On this basis, the CJEU concluded that "the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29". Ultimately, the CJEU concluded that a "one size fits all" system –such as the one that has been applied to date, which only took into account equipment, devices and/or material, without considering the effective use made thereof, and irrespective of whether or not the user (copyist) was a private individual (the only party able to make reproductions subject to the private copying exception)– was not in accordance with EU law. The Barcelona Court of Appeal (Section 15) supported the CJEU's decision in its judgment of 2 March 2011⁴.

Against this background, and after the Spanish National Court⁵ declared the nullity of the Ministerial Order⁶ establishing the list of which equipment, devices and articles were subject to the payment of the private copying levy and indicating the amount applicable to each, in December 2011, Royal Decree-Law 20/2011⁷ was approved, bringing with it some radical changes to the fair compensation system in place at the time. Its Tenth Additional Provision:

1. Removed the fair compensation for private copying established in Article 25 of the Spanish Copyright Act, with the limits established in Article 31.2 thereof;
2. Stated that the payment of such fair compensation for private copying must be made from the General State Budget; and
3. Authorised Spain's Government to establish regulations on the procedure for paying the parties receiving the private copying levy to be financed by the General State Budget. Said levy would be determined "on the basis of the estimate of the harm caused".

This was how, using the prerogative contained in Additional Provision 10 of Royal Decree-Law 20/2011, Royal Decree 1647/2012⁸ was enacted, governing the process and objective criteria for determining the annual amount of the fair compensation for private copying, as well as the process for the liquidation and payment thereof from the General State Budget.

However, far from resolving the problems arising as a result of the private copying levy under the traditional system set out in Article 25 of the Spanish Copyright Act, Royal Decree 1647/2012 caused a new clash with collecting societies which, as with the "Padawan case", has been resolved by the CJEU and, ultimately, by the Supreme Court's Contentious-Administrative Chamber in its Judgment of 10 November 2016, which we discuss here and which has declared the nullity of Royal Decree 1657/2012.

II. By means of its Judgment of 10 November 2016, the Supreme Court has declared the nullity of Royal Decree 1657/2012 governing the system of fair compensation for private copying financed by the General State Budget

In early 2013, several collecting societies lodged a contentious-administrative appeal (*recurso contencioso-administrativo*) against Royal Decree 1657/2012, which was given leave to proceed by the Third Chamber of the Supreme Court.

⁴ Judgment no. 89/2011, of 9 March 2011 (Appeal no. 822/2007; Judge *Rapporteur* Mr Ignacio Sancho Gargallo). The Barcelona Court of Appeal judgment was followed by the CJEU judgment of 16 June 2011 (*Stichting case*; C-462/09).

⁵ Judgment of the Spanish National Court (Section 3) of 22 March 2011.

⁶ Ministerial Order PRE/1743/2008, of 18 June (Official State Gazette of 19 June 2008).

⁷ Decree-Law 20/2011, of 30 December, on urgent budgetary, tax and financial measures to remedy the public deficit (Official State Gazette of 31 December 2011).

⁸ Royal Decree 1657/2012, of 7 December, governing the procedure for the payment of fair compensation for private copying financed by the State Budget (Official State Gazette of 8 December 2012).

In said appeal, the appellant societies argued that Additional Provision 10 of Royal Decree-Law 20/2011 and Royal Decree 1657/2012, by establishing the fair compensation for private copying financed by the General State Budget, were contrary to Article 5.2 b) of Directive 2001/29/EC, "*in the interpretation made thereof by the judgments of the Court of Justice dated 21 October 2010 [Padawan case] and 16 June 2011 [Stichting case]*", which require that it be only the user of private copying who effectively pays for the cost of the fair compensation.

The Padawan case: the CJEU comes into the picture again

Since resolving the dispute involved interpreting Article 5.2(b) of Directive 2001/29/EC, as we already saw in the *Padawan* case, in its ruling of 10 September 2014 the Spanish Supreme Court (Third Chamber) agreed to refer the following two questions to the CJEU for a preliminary ruling:

"(1) *Is a scheme for fair compensation for private copying compatible with Article 5(2)(b) of Directive 2001/29 where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, it thus not being possible to ensure that the cost of that compensation is borne by the users of private copies?*

"(2) *If the first question is answered in the affirmative, is the scheme compatible with Article 5(2)(b) of Directive 2001/29 where the total amount allocated by the General State Budget to fair compensation for private copying, although it is calculated on the basis of the harm actually caused, has to be set within the budgetary limits established for each financial year?"*

These two questions were answered in the judgment of 9 June 2016 (C-470/14), in which the CJEU, dealing the second blow to the Spanish system of fair compensation for private copying, stated as follows:

"Article 5(2)(b) of Directive 2001/29/EC [...] must be interpreted as precluding a scheme for fair compensation for private copying which, like the one at issue in the main proceedings, is financed from the General State Budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies."

In light of the negative reply to the first of the questions referred by the Supreme Court, the CJEU considered, once it had established that the system on fair compensation for private copying resulting from Spanish legislation is not compatible with Directive 2001/29/EC, that it was not necessary to provide a reply to the second question referred to it.

Approval, pending the proceedings, of Spanish Act 21/2014, amending the Spanish Copyright Act

It just so happens that, after the Spanish Supreme Court handed down its ruling of 10 September 2014 agreeing to refer the abovementioned questions to the CJEU for a preliminary ruling, the Spanish legislator decided to pass Act 21/2014, of 4 November, amending the Spanish Copyright Act⁹.

For what concerns us here, Article 1 of Act 21/2014 led to the redrafting of Article 25 of the Spanish Copyright Act, making mention, in its current section 1, second paragraph, to the payment of the fair compensation financed by the General State Budget:

"1. *The reproduction of divulged works in the form of books or publications which, for these purposes, are legally assimilated, as well as phonograms, videograms or other sound, visual or audiovisual mediums, made using technical, non-typographical apparatus or instruments, exclusively for private use, but not professional or business use, for purposes which are neither directly nor indirectly commercial, pursuant to sections 2 and 3 of Article 31, will entail unique and fair compensation for each of the three types of reproduction mentioned.*

Said compensation, financed by Spain's General State Budget, will be allocated to compensating the intellectual property rights which would no longer be received as a result of the private copying legal limit. [...]"

However, the Supreme Court considered that the new wording of Article 25 of the Spanish Copyright Act in no way affected the CJEU's pronouncement, since Act 21/2014 does not change the regulatory framework examined in the CJEU's judgment of 9 June 2016, which is based on a fair compensation system financed by the General State Budget

⁹ Act 21/2014, of 4 November, amending the revised text of the Spanish Copyright Act, approved by Royal Legislative Decree 1/1996, of 12 April, and Act 1/2000, of 7 January, on Civil Procedure (Official State Gazette of 5 November 2014).

that Act 21/2014 simply confirms.

Meanwhile, let us not forget that the current wording of Article 25 of the Spanish Copyright Act has been the subject of a constitutional challenge which is currently pending a decision.

The Supreme Court (Third Chamber) recognises the primacy of EU law over national law

Once it became known that the CJEU considered the new Spanish system of fair compensation for private copying financed by the General State Budget contrary to EU law due to the failure to establish a measure to ensure that the cost of said compensation is borne exclusively by the users of private copying, the Third Chamber of the Supreme Court, in orthodox observance of the principle of primacy of EU law, concluded that:

- a. In accordance with the above principle of primacy, as consistently affirmed since the *Simmenthal* Judgment of 9 March 1978 (C-106/77), national judicial bodies are bound to not apply any national legal provisions that are contrary to the law of the European Union; and
- b. Therefore, if a national legal provision is contrary to EU law (in this case, Directive 2001/29/EC), it must not be applied in accordance with said principle of primacy, apart from the fact that it may also be unconstitutional¹⁰.

Based on the above two premises, the Supreme Court reached the following conclusions:

1. In view of the incompatibility of national law (Additional Provision 10 of Decree-Law 20/2011 and section two of Article 1 of Act 21/2014) with EU law (Article 5.2(b) of Directive 2001/29/EC), in accordance with the principle of primacy of EU law, "*the above-mentioned [national] legal provisions must be deemed inapplicable in this case*".
2. Royal Decree 1657/2012, as an executive regulation whose purpose is to implement the above provisions in relation to the procedure for paying the fair compensation for private copying financed by the General State Budget, lacks an effective legal basis and, as a result, must be considered null and void.

III. Conclusion

Despite the tortuous legal journey travelled thus far, the outlook for the current system on fair compensation for private copying set forth in Act 21/2014 and developed in the currently revoked Royal Decree 1657/2012 does not seem very promising. The CJEU's judgment of 9 June 2016 and the judgment of the Supreme Court (Third Chamber) of 10 November 2016 have in fact blocked the change of system entailed by abandoning the traditional fair compensation system in order to move to the new system financed by the General State Budget.

If the new compensation system financed by the General State Budget seems hardly viable –and it is yet to be seen how Spain's Constitutional Court will decide the pending constitutional challenge–, simply going back to using the old fair compensation system does not appear to be the solution either. It should be noted that the traditional system, as designed, did not pass the "Padawan" legal doctrine test either.

All in all, once again, the legislator has a difficult challenge before it, which it may well decide to tackle as part of the essential reform it announced in Final Provision 4 of Act 21/2014. We hope this happens sooner rather than later.

¹⁰ This latter reference should be put in perspective with, as mentioned earlier, the constitutional challenge brought by the PSOE, Spain's Socialist Workers' Party, against Article 1 of Act 21/2014 for breaching Articles 31 and 33 of the Spanish Constitution. Although the Supreme Court judgment analysed here only mentions section 2 of Article 1 of Act 21/2014, said constitutional challenge is also brought against the text appearing near the end of section 3 thereof: "[...] and will have an annual amount consigned thereto in the General State Budgets Act".

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