

CJ asked if private copy from illegal source is legal

On 21 September 2012, the Dutch Supreme Court submitted pre-judicial questions to the EU Court of Justice ("CJ") in *ACI v. Stichting De Thuiskopie*. For copyright holders, this means a new phase in the struggle for compensation for private copying from illegal sources. The Supreme Court has asked the CJ among other things to clarify whether the private copying exemption includes copies derived from illegal sources and, if not, whether Member States nevertheless may take copies from illegal sources into account for determining a fair compensation for copyright holders.

Background

According to Article 5(2)(b) of the EU Copyright Directive^[1] (the "**Directive**"), copyright owners are entitled to a fair compensation if private copying is exempt from copyright protection by national law. In the Netherlands, copyright holders are compensated by a system in which manufacturers of carriers are required to impose levies on their products. The revenues of these levies are paid to Stichting De Thuiskopie ("**De Thuiskopie**"), which divides the revenues among all copyright holders as compensation.

The dispute between ACI and other manufacturers of carriers, and De Thuiskopie concentrates on the question whether the private copying exemption in the Dutch Copyright Act includes copies from illegal sources and whether the Dutch Copyright Act intends to compensate copyright holders for such copies. Both the Dutch Court of Appeal and the Advocate General (at the Dutch Supreme Court) defended the opinion that the Dutch Copyright Act does not differentiate between sources and thus also applies to copies from illegal sources.

The Supreme Court decision

The Supreme Court, however, now ruled that the interpretation of the Directive is decisive. Therefore, it referred questions to the CJ to clarify whether the private copying exemption includes copies from illegal sources. If the CJ's answer is in the negative, the Supreme Court would like to know whether Member States are nevertheless permitted to compensate copyright holders for private copying from illegal sources. The Supreme Court also enquired if the fact that technical facilities to counter unauthorised private copies are not (yet) available needs to be taken into consideration.

Legal costs of the Enforcement Directive

Furthermore, this judgment of the CJ could clarify the scope of Article 14 of the Enforcement Directive^[ii] regarding legal costs. The Supreme Court asked the CJ to clarify whether Article 14 is applicable in a case like this where the claims do not stem from, but might be a form of, enforcement of intellectual property infringement.

Practical Relevance

A judgment of the CJ in this case could be highly important for the fair compensation of all copyright holders in the EU, all the more considering the scale of private copying from illegal sources nowadays. For IP litigation practice, it would be useful if the CJ sheds some light on the scope of Article 14 of the Enforcement Directive as currently the interpretation of this article differs among Member States. It will take at least a year for the CJ to render its judgment.

We would be more than pleased to discuss any questions you may have regarding the above. Tobias Cohen Jehoram and Vivien Rörsch of De Brauw represent De ThuisKopie before the Supreme Court.

^[i] 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

^[ii] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

Contact

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