



Press and Information

Court of Justice of the European Union

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Judgment in Case C-462/09

Stichting de ThuisKopie v Opus Supplies Deutschland GmbH, M van der Lee, H van der Lee

Member States who have introduced an exception for private copying are obliged to ensure effective recovery of the fair compensation intended to compensate the authors

That obligation to achieve a certain result exists even if the commercial seller of the reproduction media is established in another Member State

According to the Directive on copyright and related rights in the information society¹, the exclusive right to reproduce audio, visual and audio-visual material is granted to authors, performers and producers. Nonetheless, exceptionally, Member States may authorise the making of private copies on condition that the copyright holders receive 'fair compensation'. The purpose of that compensation is to contribute towards ensuring that rightholders receive appropriate remuneration for the use of their works or other subject-matter.

Netherlands legislation provides for such an exception for copying for private use. It is for the manufacturer or importer of the reproduction media to pay the private copying levy. The Stichting de ThuisKopie is the Netherlands body responsible for recovering the private copying levy. Opus is a company based in Germany which sells, via the internet, blank media. Its operations are focused in particular on the Netherlands by means of Dutch-language websites which target Netherlands consumers.

The contract of sale established by Opus provides that, where a Netherlands consumer makes an order online, that order is processed in Germany and the goods are delivered from Germany to the Netherlands, on behalf of and in the name of the customer. Opus does not pay a private copying levy in respect of the media delivered to its customers in the Netherlands, either in that Member State or in Germany.

Arguing that Opus had to be regarded as the 'importer' and, consequently, responsible for paying the private copying levy, the Stichting brought an action against Opus before the Netherlands courts. Opus, on the other hand, argues that it is the Netherlands purchasers who must be classified as importers.

That argument relied upon by Opus in its defence was accepted by the Netherlands courts at first instance and then on appeal, which dismissed the Stichting's action for payment. The Stichting then pursued an appeal in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) which made a reference for a preliminary ruling to the Court of Justice.

The Hoge Raad notes that, to regard the purchaser, that it the individual consumer, as the importer and, therefore, responsible for paying the private copying fee, is tantamount to admitting that such a fee cannot in fact be recovered, since the individual purchaser cannot in practice easily be identified.

As a preliminary point, the Court finds that the Directive on copyright does not expressly address the issue of who must be regarded as responsible for paying the fair compensation. However, the

¹ 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 (OJ 2001 L 167, p. 10).

Court notes that it has already held that the fair compensation must be regarded as recompense for the harm suffered by the author².

Since the person who has caused the harm to the holder of the exclusive reproduction right is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, it is, in principle, for that person to make good the harm, by financing the compensation which will be paid to that rightholder.

The Court has however admitted that given the practical difficulties in identifying private users and obliging them to compensate rightholders, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have the digital reproduction equipment, devices and media and who make that equipment available to private users or who provide copying services for them.

With regard to the question of determining the person who is to be regarded as responsible for paying the fair compensation in relation to a distance selling arrangement such as that at issue, the Court notes that the European Union legislature expressed its desire for a high level of protection to be guaranteed for copyright and related rights, since they are crucial to intellectual creation. The introduction of the private copying exception may therefore not unreasonably prejudice the legitimate interests of the copyright holder.

It follows that, unless they are to be deprived of all practical effect, the provisions of the Directive on copyright impose on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, meaning that it must guarantee, within the framework of its competences, the effective recovery of the fair compensation intended to compensate the authors harmed by the prejudice sustained, in particular if that harm arose on the territory of that Member State.

In the present case, it is agreed that the harm suffered by the authors arose on the territory of the Netherlands, since the purchasers as final users, on a private basis, of the protected works reside there.

In relation to contracts such as those at issue, it appears to be impossible, in practice, to recover such compensation from the final users as importers of those media in the Netherlands. If that is the case, and in the light of the fact that the system of recovery chosen by the Member State concerned cannot relieve that Member State of the obligation to achieve the certain result of ensuring that the authors who have suffered harm actually receive payment of fair compensation for the prejudice which arose on its territory, it is for the authorities, in particular the courts, of that Member State to seek an interpretation of national law which is consistent with that obligation to achieve a certain result and guarantees the recovery of that compensation from the seller who contributed to the importation of those media by making them available to the final users.

In that regard, it is of no bearing on that obligation that, in the case of distance selling arrangements, the commercial seller who makes available reproduction equipment, devices and media to purchasers residing on the territory of that Member State, as final users, is established in another Member State.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

² Case [C-467/08 Padawan](#) see also Press Release [106/10](#)

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