Court of Justice of the European Union: Preliminary Ruling in Dutch 'Thuiskopie'-Case

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On 16 June 2011, the European Court of Justice delivered its preliminary ruling concerning the interpretation of Art. 5(2)(b) and Art. 5(5) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. Art. 5(2)(b) allows a private copy exception on the reproduction right of copyright owners, provided that the rightholders receive a fair compensation. According to Art. 5(5), such an exception may not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightholder.

Questions arose in the case of Stichting de Thuiskopie ('the Stichting') versus Opus Supplies Deutschland GmbH ('Opus') and were referred to the European Court by the Hoge Raad (Dutch Supreme Court) on 20 November 2009. The Stichting is responsible for collecting private copying levies from importers and distributing these to rightholder organisations. In the Netherlands, such levies are based on Article 16c of the Auteurswet (law on copyright) and they are intended to finance the fair compensation paid to copyright holders on the basis of the exception for copying for private use. Opus is a Germany-based company that sells blank media via the internet. While its business focuses on the Netherlands, it does not pay private copying levies. Therefore, the Stichting brought an action against Opus before Dutch courts. Opus argued that it is not an importer; rather, that individual consumers must be classified as such since the goods are delivered from Germany on behalf of and in the name of the customer. This defence was accepted by the Dutch courts at first instance and on appeal. Thereupon, the Stichting lodged an appeal with the Hoge Raad (the Dutch Supreme Court).

The Hoge Raad questioned whether the abovementioned construction could be regarded as compatible with Directive 2001/29, as it has the effect that the levy cannot in fact be recovered. After all, in practice it is difficult to identify the individual purchaser. The first question in this regard was whether Art. 5(2)(b) and Art. 5(5) of the Directive provide any assistance in determining who owes the fair compensation under national law. The European Court notes that the provisions of the Directive do not expressly address the issue of who is to pay that compensation, leaving the Member State with broad discretionary powers. Finally, the European Court concluded that it is in principle the private user that has

caused the harm to the rightholder and should therefore compensate this. However, given the practical difficulties in identifying the user, Member States may establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to the final user. The amount of that levy can consequently be passed on to the final user in the price paid for that service.

The second question concerned the issue of distance selling in which the buyer and the seller are established in different Member States. The Hoge Raad asked whether in such a case national law should be interpreted in such a way that fair compensation can be recovered from the person responsible for payment who is acting on a commercial basis. The European Court stated that Member States that have introduced a private copying exception must guarantee the effective recovery of the fair compensation for the harm suffered by the rightsholders in the territory of that State. The fact that the seller is established in another Member State does not affect the obligation to achieve this result. Consequently, when the fair compensation cannot be collected from the final user, the national court may interpret national law in a way that allows for recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

Judgment of the Court (Third Chamber), 16 June 2011

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