[FR] Article 6-II of Act of 20 December 2011 on Private Copying Found Unconstitutional

IRIS 2013-2:1/21

Amélie Blocman
Légipresse

On 17 June 2011, the Conseil d'Etat, acknowledging the CJEU's "Padawan" judgment (see IRIS 2010-10/7), cancelled Decision 11 of the "private copy" committee responsible for determining the types of media, the rates of remuneration, and the method of paying the remuneration for making a private copy provided for in favour of rightsholders in application of Articles 311-1 et seq. of the French intellectual property code (Code de la Propriété Intellectuelle - CPI) (see IRIS 2011-7/20). The justification for the cancellation was that all the media were subject to the remuneration, without any possibility of exonerating those acquired, particularly for professional purposes, "where the conditions for their use did not allow the presumption that the media would be used for the purpose of making private copies". Acknowledging this decision, and to bring French legislation into line with European requirements, the Government voted on a new Act on 20 December 2011, "on the remuneration for making private copies" (see IRIS 2012-1/26). The Constitutional Council has already pronounced on the first paragraph of Article 6 of the Act of 20 December 2011 (see IRIS 2012-8/22).

Operating a "legislative validation", Article 6-II of the Act has validated the remunerations received or claimed in application of the "private copy" committee's Decision 11 for media other than those acquired for professional purposes, which had been the subject of proceedings instigated before 18 June 2011 but for which the judgment had not reached the status of res judicata by the time the new law was promulgated.

A telecom operator who, under these provisions, had received a demand from the collecting body for payment of the remuneration for making a private copy in respect of its Internet boxes contested the compliance of this Article with the constitutional principles of the separation of powers and the right to effective legal redress by lodging a priority question of constitutionality. The Constitutional Council examined the question, and in its decision of 15 January 2013 recalls its constant jurisprudence on legislative validations: if they are able to alter retroactively a rule of law or validate an administrative or private-law act, they must pursue a purpose of sufficient general interest and respect both the court judgments with the status of res judicata and the principle of the non-retroactive application of penalties and sanctions. In the case at issue, the Constitutional Court found that the legislator, by this validation, was attempting, for the cases

pending, to limit the scope of the cancellation pronounced by the Conseil d'Etat in order to avoid the cancellation depriving the holders of copyright and neighbouring rights of the compensation allocated for media other than those acquired for professional purposes and for which the conditions for use did not allow a presumption of use for private copying. The Council found that the financial reasons invoked, in some cases involving unspecified sums of money, could not be regarded as sufficient to justify such an infringement of the rights of the persons who had instigated proceedings before the date of the Conseil d'Etat's decision. It therefore found paragraph II of Article 6 of Act No. 2011-1898 of 20 December 2011 on remuneration for making a private copy contrary to the Constitution.

This decision will have no effect on the actual remuneration for making a private copy, for which new scales came into force recently, despite much criticism and renewed appeals, particularly from those in the industry, to "thoroughly reform the system" for this remuneration.

Conseil constitutionnel, 15 janvier 2013, Société française du radiotéléphone - SFR (décision n° 2012-287 QPC)

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