Advocate General: No Private Copying Levy for Downloading from an Illegal Source

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In his opinion of 9 January 2014, the Advocate General of the Court of Justice of the European Union (CJEU), in Case C-435/12, considered whether reproductions from unlawful sources fall within the private copying exception of Directive 2001/29/EC (Copyright Directive). A related question considered by the Advocate General, is whether it is in line with the Copyright Directive to calculate the private copying levy based on reproductions from both lawful as well as unlawful sources.

According to Article 5(2) subsection (b) of the Copyright Directive, member states can exclude private copying for non-commercial purposes by natural persons from copyright infringement. The application of this exception must not, however, be in conflict with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the rightsholder. In light of this exception, the private copying levy was introduced. The goal of this levy is to ensure that rightsholders receive fair compensation for private copying of their works.

The Copyright Directive does not make an explicit distinction between works originating from a lawful or an unlawful source. This gave rise to the question of whether, in short, Article 5 of the Copyright Directive covers the reproduction of works that originate from an unlawful source. A Dutch Court of Appeals referred this matter to the CJEU for a preliminary ruling. In the Advocate General's opinion, the fact that there is no explicit distinction between lawful and unlawful sources in the Copyright Directive cannot imply that the European legislator intended to extend the fair compensation to works obtained from unlawful sources. The reasoning behind this, is that such an interpretation would be incompatible with Article 5(5) of the Copyright Directive, i.e. that the exceptions provided for in this Article "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work".

Stichting Thuiskopie, the defendant in this case, argued that the private copying levy is the only instrument that effectively deals with the publication and distribution of copyrighted works through unlawful sources. It was therefore argued that the levy on works originating from unlawful sources actually contributes to the normal exploitation, as opposed to a rule that prohibits every reproduction from unlawful sources. In this regard, the Advocate General pointed

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out that Dutch legislation tolerates downloading protected works from unlawful sources, and only prohibits the uploading of such materials. The Advocate General believes this to be an indirect stimulation for the mass distribution of protected works through unlawful sources. According to the Advocate General, it would be better to prohibit the downloading of protected works, as this would take away the need for fair compensation in the first place.

The Advocate General's conclusion was that the private copying levy cannot cover the reproduction of protected works through unlawful sources. If it would fall within the scope of the private copying exception, the levy would rise disproportionately, which would bring about the risk of imbalanced rights between rightsholders and users of protected materials. According to the Advocate General's opinion a private copying levy can thus only be calculated based on reproductions from lawful sources.

Opinion of Advocate General Pedro Cruz Villalón, 9 January 2014

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