Court of Justice of the European Union: No Private Copying Levy for Downloading from an Illegal Source

IRIS 2014-6:1/4

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On 10 April 2014, the Court of Justice of the European Union (CJEU) delivered its opinion in Case C-435/12 (ACI Adam/Stichting de Thuiskopie). The Court considered whether reproductions from unlawful sources fall within the private copying exemption of Directive 2001/29/EC (Copyright Directive). Advocate General (AG) Villalón was of the opinion that reproductions from unlawful sources fall outside the scope of private copying (IRIS 2014-3/3). The CJEU followed the AG's opinion and stated that the private copying exception cannot cover reproductions made from unlawful sources, and that accordingly, the levy cannot be calculated on the basis of such unlawful reproductions.

The Court's reasoning is, for the most part, in line with the AG's opinion. However, a notable difference is that the CJEU put more emphasis on the fact that that the internal market can be negatively influenced if member states are allowed to include reproductions made from unlawful sources under the private copying exemption. Other than that, the CJEU also based its decision on the principle of strict interpretation and the application of the three-step-test as formulated in the Copyright Directive. The outcome of the case is identical to that which the AG concluded.

For the Netherlands, the country in which this case originates, the decision has two main implications in practice: individuals who download from unlawful sources are now copyright infringers, and the calculation method of the private copying levy must be changed. With regard to the first issue, the Dutch government stated that it will not criminally prosecute individual users. Also, Stichting Brein, a Dutch Anti-Piracy Organization, mentioned on its website that it will not change its enforcement policy to include enforcement against individual users. However, rightsholders can still initiate proceedings against individual downloaders.

According to the Dutch government, there is no need to amend the Dutch Copyright Act, as the wording of the relevant Article is quite broad and allows for the interpretation given by the CJEU. The Dutch government has stated that the CJEU decision will come into effect immediately. However, *Stichting Onderhandelingen Thuiskopievergoeding*, the organisation that determines the private copying levy in the Netherlands, has to develop a new calculation method. Until then, the old calculation method will be used, which means that for the time

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being, the private copying levy still takes into consideration reproductions made from unlawful sources. The new calculation method is due to be introduced in summer 2014.

Judgment of the Court (Fourth Chamber), ACI Adam and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding, Case C-435/12, 10 April 2014

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