Validation of the remuneration scale for private copying by users of remote personal recording services

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Molotov TV is a television distribution platform that provides an OTT service enabling users to copy programmes and store them in their personal 'cloud'. Article L. 311-4 of the Intellectual Property Code, in the version adopted under the Act of 7 July 2016, states that remuneration for private copying is "paid by the broadcaster or distributor of a radio or television service [...] that provides a physical person, through remote access, with a reproduction, for private use, of works based on a programme that forms part of a linear broadcast by the broadcaster or distributor concerned, provided such reproduction is requested by the physical person before the programme is broadcast or during the broadcast for the remainder of the programme." The French legislator mentioned more specifically the possibility of privately copying television programmes on digital media such as Molotov. Article L 331-9 of the Intellectual Property Code, in the version adopted under Act No. 2009-669 of 12 June 2009, stipulates that "broadcasters and distributors of television services may not use technical measures that would prevent the public from benefitting from the private copying exemption, including on digital media and in a digital format, under the conditions mentioned in paragraph 2 of Article L 122-5 and paragraph 2 of Article L 211-3." On 3 July 2018, the so-called 'private copying commission' adopted the definitive scales of remuneration for online services that, like Molotov TV, enable individual users, through remote access, to reproduce, for private use, works based on a programme that forms part of a linear broadcast. The new scales replace those adopted in June 2017 which, in the absence of any ad hoc studies of the use of such copying methods, were based on the scale applicable to boxes provided by Internet access providers.

Molotov asked the *Conseil d'Etat* to annul the commission's decision of 3 July 2018 on the grounds that the commission had exceeded its powers.

Discussion particularly focused on the consideration given to technical protection measures when determining the disputed scale of remuneration. Article L. 311-4 of the Intellectual Property Code states that the level of remuneration should take into account the degree to which the technical measures defined in Article L. 331-5 of the same code are used, and their impact on people's use of the private copying exemption. In this case, the Molotov company claimed that technical protection measures, which it thought were imposed contrary to Article L. 331-5

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by certain television channels, restricted the possibility for users of its remote personal recording service to make private copies. However, in the opinion of the *Conseil d'État*, the case file did not show that the effect of these measures had not been taken into account by the usage survey that had been carried out in order to evaluate the actual use of the private copying facility offered by the remote personal recording service. Furthermore, the 'private copying commission' was not responsible for deciding whether such protection measures were lawful.

The *Conseil d'État* also noted that the level of remuneration for private copying depended, for each type of media, on how much it was used for private copying, measured on the basis of surveys. The case file showed that remote personal recording services were used for private copying to a much greater extent than recording devices integrated into television sets, video recorders or decoders, in view of their unique technical features. Molotov had no grounds to claim that the commission had infringed the equality principle and taken its decision on the basis of a clear misjudgement by adopting a scale of remuneration for private copying that was twice as high, with the equivalent storage capacity, for remote personal recording services. The application was therefore rejected.

CE, 10e et 9e ch. réunies, 27 novembre 2019, n° 424398, Molotov

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000039426787&fastReqId=872771996&fastPos=19

Conseil d'Etat, 10th and 9th chambers combined, 27 November 2019, no. 424398, Molotov

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