

Relevant decisions of the CJEU regarding exclusive rights in the framework of copyright and related rights

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The International Link and Global Network

RROs:

**Mandate to license reproduction,
making available and distribution**

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Represent publishers *and* creators, e.g. AGE COP

Creators and Publishers associations

- International

- IPA, STM, EWC, IFJ, ENPA, ICOGRADA

- National

- E.g. SPA (Sociedade Portuguesa de Autores)



Sessions I and II: IFRRO Presentation

I – Reproduction and public lending

**II – Quotations, using excerpts or parts of
works**

Session I:

Reproduction and public lending

- 1) CJEU, *Padawan* case (C-467/08)
- 2) CJEU, *Luksan* case (C-277/10)
- 3) CJEU, *Stichting Thuis kopie* (C-462/09)
- 4) AG Opinion, *Austro-Mechana v. Amazon* (C-521/11)
- 5) AG Opinion, *VG Wort v. KYOCERA et al.*, Joined Cases C-457-460/11
- 6) CJEU, *VEWA v. Belgium* (C-271/10)

1.) *Padawan* decision (C-467/08)

- Facts: Padawan markets blank media (CD-Rs, DVD-Rs, MP3 devices...). SGAE claims levies. Padawan refuses, stating that levies apply indiscriminately and regardless of the purpose (private or professional).

Padawan decision: operative part

- The „**autonomous**“ concept of „fair compensation“ in Directive 2001/29/EC must be interpreted „**uniformly**“ across the EU (see, by analogy, the concept of „equitable remuneration“ in Article 8.2 of Directive 92/100/EEC).
- If devices are **able to make copies**: sufficient to justify the application of levy (cf. Recital 35: „harm“, „possible harm“).
- Exception needs to „compensate for the **prejudice to rightholders**“.

Padawan decision: conclusions

- Private copying v. reprography: Art. 5.2.b v. Art. 5.2.a of Directive 2001/29/EC
- The findings of the CJEU concerning “professional use” in the *Padawan* case – a case concerning private copying levies only – **should not be applicable to reprographic levies.**

Art. 5.2.a and 5.2.b Directive 2001/29

- Levies in the text- and image-based works sector are based on Article 5.2.a and encompass levying under Article 5.2.b of Directive 2001/29/EC.
- Copying under Article 5.2.b must be effected by a natural person for private use and non-commercial ends, regardless of the medium or the location where the copying takes place.
- Copying under 5.2.a is copying for any purpose by either natural or legal persons, as long as the output has the potential of being represented on a graphic surface, i.e. paper or similar medium (reprography).

Cf. Vitorino Report

- The **scope of reprographic levies is different** than audio/audio-visual private copying levies. (Levies in relation to text- and image-based works include private, professional, educational and other uses.)
- Levies should be collected in cross-border transactions in the **country of destination**.
- In principle, **all equipment and devices with a copying capability** could be subject to the levy. EU Member States can decide which products should be included in the levy.
- There should be an **increased visibility** for the levy charges.

2.) *Luksan v. van der Let* (C-277/10)

- Facts: Film director v. film producer on exploitation rights of film and “fair compensation”.
- CJEU: Right for fair compensation **not** “**waivable**”, as the goal of fair compensation is “to compensate rightholders for the prejudice sustained”, which is “conceptually irreconcilable with the possibility for a rightholder to waive that fair compensation”.

3.) Stichting de Thuiskopie (C-462/09)

- Facts: Opus (Germany) offered for sale blank media including via Dutch-language website (targeting NL). Prices did not include levies. Goods delivered by post. No payment to the CMO in NL (Thuiskopie) or in Germany.
- CJEU: In principle, final user = responsible for paying the levy re: Art. 5.2.b; however, **EU MS can establish that manufacturers/importers pay levy and pass on amount to final user of device.**

Stichting de Thuiskopie (C-462/09)

- **CJEU: It is for the EU Member State to ensure that authors actually receive fair compensation intended to compensate them for the harm occurred.** The mere fact that the commercial seller of reproduction equipment, devices and media is established in a MS other than in which the purchasers reside, has no bearing on that obligation of the MS to ensure that rightholders get paid.

4.) AG Opinion, *Austro-Mechana v. Amazon* (C-521/11)

- Facts: Austro-Mechana is an Austrian collective management organisation, in charge of obtaining “fair compensation” for rightholders, following the sale of blank supports. Amazon has engaged, inter alia, in the online sale of recording media. Austro-Mechana sued Amazon before Austrian courts, seeking payment following the goods sold over its platform.

AG Opinion, *Austro-Mechana v. Amazon* (C-521/11)

- AG Mengozzi: **It does not follow** from Directive 2001/29 **that there is no right to fair compensation** if domestic legislation provides that all the funds received are distributed to authors - half of them through **direct compensation** and the other half through **indirect compensation**.

5.) AG Opinion, *VG Wort v KYOCERA et al.*, Cases C-457-460/11

- Facts: In Germany, fair compensation is achieved on the basis of a levy from those who manufacture, import or sell devices capable of making reproductions. The *Bundesgerichtshof* has to decide whether a levy is due on printers or PCs able to make reproductions only when linked to one or more other devices, such as scanners, which may themselves be subject to the same levy.

AG Opinion, *VG Wort v KYOCERA et al.*, Cases C-457-460/11

- Question 1, concerning Art. 5.2.a of Directive 2001/29: Does reproduction by “any kind of photographic technique or by some other process having similar effects” include copying with a printer or PC?

AG Opinion, *VG Wort v KYOCERA et al.*, Cases C-457-460/11

AG Opinion: This refers only to reproduction of **analogue originals** of which an image is captured by **optical means**; it encompasses reproduction by processes which involve as an intermediary stage **storage on digital device** (computer / memory device), provided that the process is carried out by **single person** and/or as **single operation**.

AG Opinion, *VG Wort v KYOCERA et al.*, Cases C-457-460/11

- Question 4, concerning Art. 5.2.a, 5.2.b and Recital 36 of Directive 2001/29:
Does the requirement and possibility of fair compensation cease to apply if the rightholder has expressly or implicitly **consented to the copying** of his/her work?

AG Opinion, Cases C-457-460/11

AG Opinion: If exception exists in the MS, rightholder has no choice to grant or refuse authorisation of copying. If compensation scheme exists, MS may allow rightsholders:

- to renounce fair compensation;
- to make work available under the condition that compensation is paid:
- entitlement to fair compensation exhausted; should not be taken into account when calculating the financing of any general scheme of fair compensation.

6.) *VEWA v. Belgium* (C-271/10)

- Facts: According to VEWA, by fixing a flat rate of remuneration of 1 EUR per adult per year and 0.50 EUR per child per year (i.e. calculated exclusively in accordance with numbers of borrowers registered with public establishments, on the basis of a flat-rate sum, per borrower per year), the Belgian Royal Decree infringed Directive 92/100/EEC (requirement to pay “equitable remuneration”).

VEWA v. Belgium (C-271/10)

- CJEU: The “remuneration” (cf. “compensation” in Directive 2001/29) “**must enable authors to receive an adequate income**”; “**its amount cannot be purely symbolic**”. (Art. 5.1 of Directive 92/100 refers to “remuneration”, whereas Art. 4.1, relating to rental, refers to “equitable remuneration”. CJEU: The concepts need to be interpreted differently.)
- Amount of remuneration: needs to be assessed in the light of the **value of the use of a protected work in trade** (case C-245/00, *SENA*).

VEWA v. Belgium (C-271/10)

- CJEU: A public lending establishment should take account of the **number of protected works made available**. Larger public lending establishments should pay a greater level of remuneration. Also, account should be taken of the **number of persons having access** to the protected works, i.e. the borrowers registered with an establishment.
- Harm suffered by authors – authors must receive **remuneration equivalent to an adequate income** (cf. Recital 7 of Directive 92/100).

VEWA v. Belgium (C-271/10)

- CJEU: Belgian system de facto exempts many establishments from obligation to pay remuneration (cf. Art. 5.3 Directive 92/100; case C-36/05, *Commission v. Spain*).
- CJEU: Belgian law does not comply with Art. 5.1 of Directive 92/100/EEC, as it does not take into account (i) **the number of a copyright owner's works made available by a lending establishment**, and (ii) **the number of establishments lending a particular work**.

Session II:

Quotations, using excerpts or parts of works

- 1) CJEU, *Eva Maria Painer* (C-145/10)
- 2) CJEU, *Infopaq* (C-5/08)

1.) *Eva Maria Painer* (C-145/10)

➤ Facts:

- Photographic portrait of a child
- Photograph used by security authorities in search appeal – and as template for photo-fit
- Following escape of subject: media defendants in Austria and Germany reproducing photograph and photo-fit.

Eva-Maria Painer (C-145/10)

- CJEU: Exception for purposes of public security (Art. 5.3.e of Directive 2001/29)
 - Exception only applicable where reproduction **objectively capable of pursuing public security**
 - Media not entitled to rely directly on Art. 5.3.e

Eva-Maria Painer (C-145/10)

- CJEU: Conditions for application of the exception for quotations for purposes such as criticism or review (Art. 5.3.d):
 - Where **source not indicated**, reliance on exception precluded
 - Quotation requiring material **reference** back to the quoted work
 - **Full quotation possible in case of photos**
- Art. 5.3.d must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.

2) *Infopaq* (C-5/08)

- Facts: Infopaq, a Danish press monitoring agency, was scanning newspaper articles for commercial purposes without the permission from rightholders.
- CJEU: Reproduction +, if elements reproduced are **„expression of the intellectual creation of their author“**
- CJEU: The act of printing an **extract of 11 words**, during such a data capture process, is **not „transient“ or „incidental“** – rightholders' **consent required**.

Infopaq (C-5/08)

- CJEU: An act can only be „transient“ within the second condition laid down in Art. 5.1 of Directive 2001/29 if its **duration is limited to what is necessary** for the proper completion of the technological process in question; i.e. the **process must be automated** so that it deletes that act automatically, **without human intervention**. – Legal certainty for rightholders.
- (Cf. Recital 33 of Directive 2001/29: Acts that are, by definition, created and deleted automatically and without human intervention.)



Thank you for your attention