



Update

Momentum

Intellectual Property and IT

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PORTUGUESE COPYRIGHT LAW - AMENDMENTS TO THE PRIVATE COPYING SCHEME

The Information Society Directive (Directive 2001/29) allows Member States to lay down an exception to the exclusive reproduction right of holders of copyright and related rights so that private copies may be made - the so called «private copying exception».

As permitted by the Information Society Directive, the Portuguese Copyright Law enables private copying, that is, acts of digital or analogue reproduction carried out by an individual for private, non-commercial purposes.

Crucially, though, the Portuguese Copyright Law does not require reproductions for private use to be made from lawful sources, that is, it does not distinguish between private copies made from lawful sources and those made from pirated sources – unlike the Italian Copyright Code, for example, which makes that distinction. This legitimizes, for example, downloads from P2P platforms.

This feature of the Portuguese Law cannot be tolerated, according to a recent judgement the Court of Justice of the European Union (Case C-435/12 *ACI Adam BV and Others v Stichting de ThuisKopie, Stichting Onderhandeligen ThuisKopie vergoeding*).

National legislations which do not distinguish between lawful and unlawful private reproductions, said the court, are not capable of ensuring a proper application of the private copying exception. And that, the court pointed out, encourages the circulation of pirated works, inevitably reducing the volume of



sales or of lawful transactions relating to the protected works and consequently having an adverse effect on the normal exploitation of those works.

In light of this judgement, which has clarified the private copying provision of the Information Society Directive, one can conclude that the Portuguese Copyright Law needs to be amended. It can no longer sacrifice strict protection of copyright or tolerate illegal forms of distribution of pirated works.

Given the emergence of guidance from the Court of Justice of the European Union, it became obvious that the Portuguese Copyright Law had to ensure the proper application of the private copying exception and thus restrict illegal acts.

Instead, though, a lot of political energy has only gone into the private copying compensation scheme. The compensation scheme is obviously fundamental – something the British Government seems to have forgotten in its recent copyright legislation amendment work – but is not all.

The Portuguese Compensation scheme did require amendment. Bizarrely it only covered analogue media not digital, therefore not reflecting the new digital reality. The amendment that is currently being discussed in Parliament aims to extend the scope of the levy scheme to mobile phones, computers, tablets, cameras, USB, memory sticks and hard disks.

The goal is to get up to speed with the technological evolution without which the private copying scheme is left devoid of practical meaning and impact. But the levy system must ensure that a fair balance is maintained between the rights and interests of authors (as the recipients of the fair compensation) and those of users of protected subject matter.

And a private copying system which does not consider the lawful or unlawful nature of the source from which a private reproduction has been made may not respect that fair balance. So, it seems that a lot remains to be done to ensure compliance with EU requirements and to guarantee that the Portuguese Government does not incur in civil liability arising from non-compliance with EU law.



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