

## **Dutch Supreme Court: Private Copying scheme 2013-2017 legally binding**

The Supreme Court of the Netherlands delivered final judgment on 7 December 2018 in proceedings concerning the validity of the Dutch private copying regulation as laid down in a number of successive Administrative Orders (AO's) during the period 2013-2017. These AO's designated for which storage media and devices a private copying levy was due in the period 2013-2017 and the tariffs of these levies.

### **Background**

As from 2013, the Dutch system of private copying levies, that was until that time limited to CD-r and DVD-r, was extended to a much broader range of devices and carriers, such as mp3 players, smartphones, tablets, pc's, laptops and hard drives. Immediate reason for this update of the Dutch system was a verdict in proceedings between the Dutch neighboring rights organization NORMA and the Dutch State, ruling that the Dutch State had acted wrongfully against rights holders by restricting the levies to certain categories of blank media, while private copying was shifting to other media.

According to the court of appeals in The Hague, the Dutch State was liable for the damages suffered by right owners in this respect. Consequently, Thuiskopie reached a settlement with the Dutch State, receiving an amount of € 33,5 million in damages, aside from a settlement of € 10 million that NORMA for its specific group of rights owners.

In April 2014 the European Court of Justice ruled in the ACI- Thuiskopie case that copies from illegal sources are not covered by the Private Copying exception and no remuneration is due for such copies in the context of the exception.

### **Legal proceedings regarding validity of the updated Private Copying system**

Following the issuing of the AO's as from 2013 adding new devices for which levies are due, several industry parties (a.o. HP, DELL, ACER, Imation) initiated proceedings against the Dutch State and Stichting de Thuiskopie. These manufacturers and importers of devices subject to levies challenged the validity of the subsequent Administrative Orders on a number of grounds which, in their view, would be contrary to European law.

The court of appeal in The Hague ruled in its verdict of 23 May 2017 that the AO's were lawful and binding. In cassation, the Supreme Court rejects the complaints submitted by the plaintiffs against this judgment and thus ratifies the judgment of the court of appeal. By doing so, the Supreme Court follows the advice of its Advocate General, who concluded on 5 October 2018 that the cassation appeal filed should be rejected. The Advocate General also concluded that it would not be necessary to request a preliminary ruling from the European Court of Justice, as suggested by plaintiffs.

### **Copies from illegal sources**

The plaintiffs complained, inter alia, that the levies were set too high because, in determining the level of that levy, the disadvantage suffered by rightsholders from copies from illegal sources should not have been taken into account. Referring to the broad margin of appreciation granted by the EU Court of Justice to Member States when determining the levies and the obligation of an interpretation of national legislation in accordance with the directive, the court of appeal rejected

this argument; even without taking illegal copies into account, the AO's can be considered to provide equitable compensation for the entitled rightsowners.

#### **Calculation of damages suffered by rightsholders**

In addition, the plaintiffs stated that a 'substitution model' should be applied when determining the private copying levies. Such a model implies looking at the number of original copies of works that consumers would have purchased if they would not have the possibility to make private copies. The court of appeal, however, agreed with the Dutch State and Stichting de Thuiskopie that when calculating the level of the private copying remuneration, a so-called 'license model' should be applied, whereby each copy made represents a certain value, irrespective of whether the consumer would have purchased an original.

#### **Exemption for professional uses**

Plaintiffs further argued that the system of upfront exemption and refund applied by Stichting de Thuiskopie in case of professional use of objects subject to PC levies would not be in line with European law, since this system was not laid down in the relevant legislation and regulations. The Hague Court of Appeal ruled that this is not necessary: it is sufficient that there is an effective refund system.

#### **In summary:**

The judgment of the Supreme Court definitively established that the Administrative Orders setting the private copying levies in the period 2013-2017 were lawful and binding and that Stichting de Thuiskopie could collect those levies on behalf of the rightsowners.

The Supreme court has confirmed the main criteria set by the various ECJ cases and thus confirmed the Dutch system fully compliant with these criteria and the Directive:

- Member States have broad margin of appreciation when setting the parameters of the private copying system and determining the applicable levies,
- The levy must be *related to* – and not necessarily correspond with - the damages suffered by the right owners,
- The levies may be collected with manufacturers and importers of devices and/or blank media