

Private copying and e-commerce: consumer information as a bulwark against distortions of competition and loss of revenue resulting from the non-payment of private copying levies?

The surge in the purchases of blank recording media (phones, external or multimedia hard drives, CD-Rs, DVD-Rs, USB devices, memory cards, GPSs, tablets, etc.) by French consumers has recently revealed the profound inadequacy of the French legislation on private copying remuneration.

The French distributors of such media as well as the company responsible for collecting private copying levies on behalf of authors, performing artists and producers (i.e. the company COPIE FRANCE) are the first victims of this situation.

Pursuant to the French Intellectual Property Code ("FIPC"), a consumer is entitled to make a private copy of a work (in particular sound and audiovisual materials) insofar as a remuneration is paid to compensate the loss suffered by the author of such work or its assignees as a result of this right of reproduction. Pursuant to Article L.311-4 of the FIPC, this remuneration of a compensatory nature must be paid *"by the manufacturer, the importer or the person who makes intra-Community acquisitions"*.

To meet this payment obligation, the remuneration takes the form of a private copying levy imposed directly on French manufacturers or distributors that, in turn, pass on this so-called "Sacem" levy in the prices of the products (the private copying levy applied in France is one of the highest in Europe⁽¹⁾).

On the other hand, foreign distributors, that do not consider themselves as liable for the payment of a private copying levy, offer via the Internet blank recording media at an unbeatable price (e.g. 15 Euros for 100 blank CDs, as opposed to 60 Euros in France), it being specified in addition that the French consumer is not informed that, as a *"person who makes intra-Community acquisitions"*, he/she becomes liable for the payment

of such remuneration, failing which he/she may face three years of imprisonment and a fine of 300,000 Euros per acquired bank recording medium (Article L.335-4 of the FIPC).

This circumvention of applicable legal provisions has a direct impact on the French manufacturers and distributors that are *de facto* compelled to apply higher prices to take into account the so-called “Sacem” levy and that are therefore, unable to compete with foreign distributors. Societies of authors and right-holders, materially unable to control the effective payment of the private copying levy by each French Internet purchasers, also suffer considerable revenue losses. Further, it is difficult to blame French consumers for not paying the private copying levy as most of them are not even aware of this obligation. The economic loss resulting from this situation is huge^[2].

- **The obligation to inform consumers: a remedy for distortions of competition?**

After several years of a fierce legal battle, the *Fédération française du e-commerce et de la vente à distance* (French Federation of e-commerce and distance selling, hereinafter “FEVAD”) has finally succeeded in imposing its views through one of its most active members, the company RUEDUCOMMERCE SA, that has obtained the conviction of several foreign companies for unfair competition practices and distortions of competition, on the ground that such companies had deliberately omitted to mention in their on-line price lists intended for French consumers the existence of the private copying levy^[3].

Similarly, the remanding Court, in a judgment dated November 17, 2010^[4] awarded to RUEDUCOMMERCE SA the sum of 100,000 Euros in damages in compensation for the commercial loss it had suffered. Specifically, the Court held that e-sellers, even based outside France, may neither escape French consumer law nor ignore the existence of the private copying levy^[5].

Even more remarkable: in 2011^[6], the Nanterre First Instance Court ordered the collecting bodies COPIE FRANCE and SORECOP (now merged into COPIE FRANCE) to pay to RUEDUCOMMERCE SA the sum of one million Euros in damages. The two collecting bodies were found guilty of “*gross negligence on two counts*”, i.e. (i) failure to perform “*their obligation to collect the remuneration for private copying due by consumers who get their supplies from foreign e-sellers*”, and (ii) failure to “*take any measure to harmonize the amount of the private copying levy with the other European legislations in order to fight against distortions of competitions generated by the existence of the grey market*”. At that time, COPIE FRANCE declared that it would lodge an appeal. Law n °2011-1898 of 20 December 2011 concerning private copying levy has finally enshrined the obligation to inform the consumer and has introduced a new Article in the FIPC, i.e. Article L.311-4-1, according to which “*the amount of the remuneration provided for under Article L. 311-3, specific to each type of medium, is brought to the attention of the purchaser when the recording media mentioned in Article L.311-4 are put on sale. A note explaining this remuneration and its purpose is also brought to the consumer’s attention, either on paper or integrated into the medium.*”

The conditions in which these provisions are to be implemented (amount of remuneration per type of medium and content of the explanatory note) will be set forth in a forthcoming Decree of the Council of State, based on a draft text prepared by the *Direction Générale de la Concurrence, Consommation et de la Répression des Fraudes* (General Directorate for Competition Policy, Consumer Affairs and Fraud Control, hereinafter “DGCCRF”). This Decree should be adopted in the second half of 2013. The DGCCRF is currently conducting interviews to refine its draft text.

As such, it is reasonable to expect that consumers duly informed of the amount of the private copying levy that they will have to pay separately to COPIE FRANCE – and that comes in addition to the price –, could finally change their mind and decide not to buy the product from foreign web sites. Consumers, worried by the steps that they will have to take personally with collecting bodies, may prefer a withholding tax, more simple to implement, automatically levied when purchasing products from a French distributor. This could contribute to partially remedying distortions of competition.

- **Will the information provided to consumers be enough to compensate the loss of revenue resulting from the non-payment of private copying levies?**

It is not certain that a French consumer, even fully informed of the above situation when purchasing a product from a foreign e-seller, will systematically pay the relevant private copying levy.

In the aforementioned judgment of December 2, 2011, the Nanterre First Instance Court considered that a system of “*pre-payment by the distributors*” should be preferred to a tax levied directly at the level of the consumer, which is materially impossible to implement. Yet, at present, the French legislator is not considering imposing the private copying levy directly on foreign e-sellers.

Whatever the French legislator may think, a judgment handed down by the Court of Justice of the European Union⁷¹ should encourage French courts to force e-sellers that sell blank recording media to French consumers, to pay the so-called “Sacem” levy.

Indeed, pursuant to this judgment, “*It is for the Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of media for reproduction of protected works (...) to ensure that those authors actually receive the fair compensation intended to compensate them for that harm. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis*”.

There are many other challenges that need to be taken up with respect to private copying: because at least 20% of revenue have been lost due to the fact that blank recording media used for professional purposes are exempt from a levy, the attractiveness of private copying is seriously jeopardized by the emergence of cloud computing... The possibility to make the major cloud companies liable for the private copying levy seems now

to be under consideration...

[1] The French private copying levy rate on blank CDs and blank DVDs is respectively 12 times and 6 times higher than in Germany. For both types of media, the French rate is two times higher than in Belgium or Spain; for CDs and DVDs, it is respectively 2.5 times and 2 times higher than in the Netherlands.

[2] By making a comparison between what has been collected by French societies of authors and right-holders and what could have been collected on the basis of the sales achieved in the relevant country, the loss figures speak for themselves: 25% for CDs, 40% for MP3 players, or 57 % for DVDs. In practice, this means that 40% of the MP3 players sold in France are purchased aboard or via “parallel channels” where no private copying levy is applied. Consequently, 40% of these levies have not been collected on these players in France, i.e. 14.2 million Euros that are lost to SACEM and others.

[3] Second Civil Chamber of the *Cour de Cassation*, November 27, 2008.

[4] 5th Pole, Fourth Chamber of the Paris Court of Appeals, November 17, 2010.

[5] Extracts of the judgment issued by the Paris Court of Appeals on November 17, 2010: *“whereas, on the merits of the case and regarding the obligation to inform consumers in the general terms of sale, companies based outside the French territory are subject, when they carry on commercial activities for the French public, to the obligations imposed by French consumer law, in particular Articles L.111-1 and L.121-18 of the French Consumer Code, and the ministerial order dated December 3, 1987 according to which the information on the price of the products or services must mention, whatever the medium used, the total amount, inclusive of any and all applicable taxes, that must be paid by the consumer; whereas the private copying levy, commonly referred to as the “Sagem” levy, is an element of the price insofar as the consumer has the obligation to pay it (...), the breach of a legal obligation that has an impact on competition constitutes an act of unfair competition; in the present matter, the concerned companies could not, and in any event should not, ignore French consumer law and the existence of the private copying levy(...).”*

[9] 6th Chamber of the Nanterre First Instance Court, December 2, 2011.

[7] *CJEU*, C-462-09 of June 16, 2011 “Opus Supplies”.

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