

Examining fair compensation

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IP & IT analysis: How does the ruling in *Hewlett-Packard v Reprobel* affect publishers in the UK? Laurence Kaye, partner at Shoosmiths, explores the decisions made by the Court of Justice of the European Union (CJEU) and applies that to the UK's position.

Original news

C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] All ER (D) 174 (Nov)

CJEU gave a preliminary ruling concerning the interpretation of articles 5(2)(a) and (b) of Directive 2001/29/EC (the Copyright Directive). The request had been made in proceedings between Hewlett-Packard Belgium SPRL (Hewlett-Packard) and Reprobel SCRL (Reprobel) concerning the recovery by Reprobel from Hewlett-Packard of sums corresponding to the fair compensation owed under exceptions to the reproduction right.

Briefly explain the background of this case?

At first glance, the CJEU's decision in *Hewlett-Packard Belgium vs Reprobel* has little immediate impact in the UK. However, in a world of global publishing and porous national legal boundaries, a decision affecting a single Member State has significance across all Member States and beyond.

Reprobel is a Belgian Collective Society that collects and manages the 'fair compensation' that arises from the reprographic exception. In Reprobel's case, it collects 'one off' levies from the manufacturer, importer or distributor of photocopying equipment in Belgium and volume-based fees from those carrying out copying activities.

The *Reprobel* decision deals with how 'fair compensation' should be applied by Member States where they implement the copyright exceptions to the exclusive right of reproduction for reprographic copying and also private copying allowed under the Copyright Directive, arts 5(2)(a) and (b). A recurring theme in the judgment is the statement in the recitals to the Copyright Directive that when determining the nature and level of fair compensation, a 'valuable criterion' is the harm which is suffered by the right holder by the copying in question.

The UK has not implemented either form of exception. Reprographic copying (eg photocopying of works or its digital equivalent) is dealt with by collective licensing and not by exception. As regards private copying, the government abandoned its attempt to introduce an exception after the High Court ruled that the government's exception introduced in 2014 was unlawful. This followed a challenge by the music industry and others by judicial review suggesting the government had no evidence to support the introduction of a private copying exception with zero compensation, based on the assumption would not result in any harm to rights holders.

What did the CJEU decide regarding the four questions referred on fair compensation?

Who's the user? It matters

The first ruling dealt with the distinction in the Copyright Directive between the reprographic exception in art 5(2)(a) and the private copying exception in art 5(2)(b). The court noted that there was an overlap between the two in that the reprographic exception can be relied upon by any user--whether a private individual, company or otherwise--whereas the private copying exception only applied to a natural person. As a result, the term 'fair compensation' has to be interpreted differently. In practice, as reprographic copying can be done at scale by companies, it may justify higher levies.

Publishers lose out

The second ruling is the one that is of real concern to publishers in the UK as well as Europe. Under Belgian law, levies and fees received from administering the two copyright exceptions are split between authors and publishers. The CJEU decided that publishers are not entitled to receive its distributions. The court held that arts 5(2)(a) and (b) preclude national legislation--such as current Belgian law--from authorising part of the 'fair compensation' (ie levies plus volume

based copying fees) to be paid to publishers of works created by authors where those publishers have no obligation to pay part of their receipts to the authors.

The basis for this determination was the court's finding that publishers are not included in the Copyright Directive as holders of the exclusive reproduction right, which applies only to authors, performers, phonogram producers, film producers and broadcasters--not publishers. As such, publishers do not suffer harm by the copying and are not entitled, therefore, to receive any 'fair remuneration'.

The third ruling concerned the copying of sheet music

The court held that as the copying of sheet music falls outside the exceptions in arts 5(2)(a) and (b), national legislation is precluded from introducing an undifferentiated system for recovering fair compensation which also covers the copying of sheet music. The court also decided that as these copyright exceptions do not authorise the making of counterfeit copies, an undifferentiated system cannot also cover counterfeit copies made from unlawful sources.

The fourth ruling examined the legitimacy of the combined remuneration system operated by Repobel

It consisted of the levy on copying equipment and the volume-based system centered on actual copying, bearing in mind that the function of fair remuneration is to compensate rights holders for harm caused by the copying in question. As regards the levy, Repobel fixed that based on the speed at which the device in question could copy. The court held that this was too crude and did not take account of the fact that different devices may be used for different purposes, including those where the copying might be made legitimately for private vs. commercial purposes. The court also criticised Repobel's tariff for volume-based copying. While the court decided that national legislation can allow a system combining up front levies with volume-based fees centered on copying, the combined system must build in flexibility, such as a provision for reimbursement to payees in appropriate cases.

What messages can lawyers draw from this decision?

The CJEU has clarified the scope of the reprographic and private copying exceptions in arts 52(a) and (b) and the relationship between them. It also confirmed previous case law that 'fair remuneration' in any form cannot be used to sanction copyright piracy.

For lawyers advising publishers, the *Reprobel* decision poses a threat because the CJEU held that publishers are not holders of exclusive rights under the Copyright Directive--publishers would dispute that, arguing that they are beneficiaries of the right of reproduction by virtue of contractual arrangements with authors. Also, in certain Member States publishers are expressly included as rights holders. In the UK, publishers are beneficiaries of the exclusive right in typographical arrangements of published editions.

Given the forthcoming review of copyright in Europe, publishers' lawyers will want to think long and hard about what needs to be done to protect publishers from a copyright perspective. Publishers' lawyers will also want to think about what is required to ensure that publishers are protected for the investment and creative endeavors they make in respect of their publications in both online and offline formats.

What will it mean for the UK's quashing of the private copying exception that fair compensation must be calculated on the basis of 'actual harm'?

- o the government has already made it clear that its current focus is on the forthcoming review of copyright by the European Commission, so the re-introduction of a private copying exception into UK law has moved down its agenda
- o for the time being, licensing solutions for both reprographic and private copying remain the way forward in the UK
- o in the event that the government decides to revive the private copying exception, *Reprobel* contains clear guidance about how to deal with the issue of 'fair compensation' under any such exception

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Allocating fair compensation to publishers--not a fair levy system

Fair play--the notion of fair compensation for private copying

Copyright--permitted acts and defences

Interviewed by Ioan Marc Jones.

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