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Implementation of the InfoSoc Copyright Directive in Spain.

SPAIN has not implemented the European **Directive 2001/29/EC**, of 22 May 2001 [2001 O.J. (L 167/10) of 22.06.2001], on the harmonization of certain aspects of copyright and related rights in the information society [hereinafter, the Directive], yet.

The European Court of Justice already ruled against Spain (and Finland and France) for failing to implement within the required deadline (December 2002). The last news is that following the infringement proceedings the European Commission has sent a reasoned opinion to Spain².

In November 2002, a first bill was presented by the former Government to implement the Directive. It was a very ambitious bill, since it not only implemented the Directive but was also amending some other parts of the current copyright law that needed reform (among them, the regime and control of collecting societies). The bill was rejected by collecting societies and authors (while consumer and users' groups and the technological industry were in general in favor of it) and brought an open battle. Finally, the Government dropped the bill, waiting for things to calm down and until the new legislative term.

The 2004 elections brought a new socialist Government to Spain. We had to wait until August 2005, for the new government to introduce another bill in the Parliament³. The current bill has been passed by the lower chamber (Congress), and is now pending to be passed by the Senate⁴; it will then go back to Congress for final approval (expected along this 2006 year).

The current bill is far less ambitious than its predecessor. It could be said that it is a "minimal" implementation. Collecting societies and authors were quite satisfied with it, while consumer groups and the technology industry are not. Consumers and distributors of digital supports have been campaigning against the payment of the private copy levy. However, these past weeks, SGAE (*Sociedad General de Autores y Editores*⁵, the Spanish collecting society for music authors and publishers) –which had been giving clear support to the government's bill and ironically was the one who forced the payment of the levy, back in 2002 - has quite unexpectedly attacked it⁶.

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² Press release available at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/503&format=HTML&aged=0&language=EN&guiLanguage=en>

³ *Proyecto de Ley 121/000044, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril* (introduced by the Government on August 26th 2005)

⁴ The bill sent to the Senate (March 29, 2006) is available here (in Spanish): http://www.congreso.es/public_oficiales/L8/SEN/BOCG/II/II0053A.PDF

⁵ See <http://www.sgae.org>

⁶ After stating its "absolute opposition" to the proposed bill, the SGAE press release refers to two specific articles: art.90.4 (the SGAE claims that, for the authors of audiovisual works, the law should establish a remuneration right in addition to the exclusive right of making available to the public that the bill introduces for all authors); and art.31.2 (private copy exception) –which will be considered later. <http://www.sgae.es/contenido/cont.inm?instanceId=1451&tipoId=38&selectedMenu=29>

The current implementation bill adopts several provisions on all 3 accounts envisioned in the Directive:

1. Rights: Harmonization of the rights of reproduction (art.2), communication to the public (art.3), and distribution (art.4);
2. Exceptions: The list of exceptions to these rights, permitted in national laws (art.5).
3. TPMs and DRMs: Protection of access-control and anti-copying devices (so called “technological protection measures” TPM) (art.6) and rights-management systems (so called “Digital Rights Management” DRM) (art.7), that were included in Directive following the WIPO Internet Treaties of 1996.

1.- RIGHTS.-

New definitions of the rights of **reproduction, distribution and communication to the public** are introduced, following the exact terms of the Directive’s definitions. Although the very wide terms of the existing law made such amendments unnecessary to meet the Directive’s harmonized level –except for the right of making available- the government thinks safer to get the language closer to the EU one.

The only issue worth mentioning is the introduction of an exclusive “***right of making available***”, as part of the communication to the public, to cover any kind of exploitation on-line (be it on demand, upload, streaming, etc), not only for authors but also –as required by the Directive- for ALL neighboring rights’ owners (artists, music and film producers and broadcasters).

Interestingly, after acknowledging this exclusive right of making available, both the authors of audiovisual works as well as the artists (musicians and actors) pushed the government **to get them a “remuneration” (for the acts of making available done by the producer, once that right has been transferred to him)**; a remuneration right that will be **non-transferable and managed by collecting societies**. It is a way to “protect” the authors’ and artists’ exclusive right of making available, in front of the bargaining power of producers (they all know they are going to grant this right to the producer, so at least they get an extra “insurance”). It is not without significance that the authors and artists feel more secure with a “simple” remuneration right than with an exclusive right (it seems to prove that “more is *not always* better”). In addition, one may argue that an exclusive right should preempt the existence of a remuneration right: it should be either one or the other! But this is not new under Spanish law, where some other remuneration rights are built upon the existence of an exclusive right (*for instance, authors of audiovisual works are granted a remuneration on box-office in exchange for the licensing of their communication to the public right and their rental right, musicians, actors and phonogram producers are granted a remuneration for the communication to the public of their recordings*).

2.- EXCEPTIONS.-

A.- Technical Copies Exception (*Ephemeral copy exception*)

The technical copies exception is the only mandatory exception in the Directive, which tries to compensate for the broad definition of the exclusive right of reproduction (art.2). The exception is introduced into Spanish law closely following the language of art.5(1) of the Directive. The Spanish bill introduces this mandatory exception “as is” (under art.31 of the proposed bill), and adds an **explanation of “lawful use”** as an act authorized either by the owner or the law (thus, implementing into the law the explanation made under recital 33 of the Directive). In my opinion,

it is a good choice to implement the exact language of the Directive (recital 33 included), since this will enhance the harmonizing effect when it is interpreted by the ECJ.

As far as the rest of non-mandatory and exhaustive list of exceptions in art.5(2) and (3) of the Directive, the Spanish bill only introduces amendments related to 3 of them:

B.- Private Copy Exception

As far as the reproduction right, the Directive distinguishes between an exception for **reprography**⁷ (photocopies made for any purposes, by any person) and another one for **private uses** (any copies –in any formats- made by a natural person for private use), both of them subject to **fair compensation**.

The Spanish Copyright Law does not make such a distinction. It provides for **only one exception to the reproduction right for private uses**, in general (which includes photocopies as well as any other copies, in any other supports and media). Which means, on the other hand, that photocopies made for non-private-uses require the author's consent. The proposed bill introduces some amendments to this exception, but maintains both under one exception.

Despite not having a statutory exception for reprography, CEDRO (the Spanish collecting society for reprography) designed already in 1987 (the year when the Spanish Copyright Law was passed) a **“public copying” license** to cover copies done by means of photocopiers which (because of their size or because of the place they were located) could not qualify –in their opinion- under the private copying exception⁸. In practice, since it is impossible to separate *a priori* what will be the final location (or use) of each equipment and since the statutory levy for private copying applies to all equipment “intended” for private copying, some photocopying machines are subject to a dual payment: the levy for private copying set on the equipment (paid by the manufacturer or importer) and the “public copying” license paid by libraries and copy-shops, etc. Altogether, the “public copying” license functions as if there was a statutory exception for reprography. This is probably the reason why **the bill does NOT care to introduce a new exception for reprography (as it could be done under art.5(2)(a) of the Directive)**.

SCOPE of the EXCEPTION:

The definition of private copy is currently set in art.31 of the Copyright law: *“Works already disclosed may be reproduced ... for the private use of the copier, ... provided that the copy is not used for either collective or gainful purposes”*.

Following the Directive's language, the new language proposed in the bill refers to **“made by a natural person for private use”**. We should remember that that particular piece of language gave the EU Parliament and the Commission a headache⁹. It is easy to foresee that this language will **be a source of trouble**. For instance, in France there has been a long-going debate as to whether

⁷ The exception for **reprography** affects only analog media: reproductions on paper (or similar medium) by photocopying (or similar means), provided that the right-holders receive fair compensation.

⁸ This system finally found legal approval through a Decree 1434/1992 Royal Decree 1434/1992, of 27 November, elaborating on Articles 24, 25 and 140 of Law 22/1987 of 11 November, on Intellectual Property, as modified by Law 20/1992, of 7 July, which regulated the system of levies set for private copying, by stating that *“The Government shall specify by regulation the types of reproduction that should not be regarded as for private use for the purposes of the provisions of this Article, the equipment, apparatus and material exempted from the payment of remuneration owing to the specific nature of the use or exploitation for which they are intended, ... and the distribution of remuneration in each of the fields of activity ...”*

the “copier” must be the person who is going to use them for private purposes or not; and in Spain, it has been usually accepted that the private copy must not necessarily be made by the user himself. It is foreseeable that despite of the new language, Spanish courts will retain the same interpretation (regardless of the change in the legal language).

When further compared with the language of the Directive, the Spanish private copying exception under the pending bill, has two basic differences: it is limited to **copies made from a lawfully acquired copy** (language newly introduced in the bill) and it requires that the private copy is **not subject to subsequent collective or commercial use** (already required in the current Copyright law). The later already exists under the current exception, and keeping it does not seem to “hurt” nor worry anybody. The former requirement, though, which draws inspiration from the German implementation law, is generating some turmoil. It is clearly envisioned to exclude P2P downloading from the coverage of the private copying exception. However, the SGAE is opposing it because by requiring that a private copy is made from a legally acquired “copy” (*ejemplar* –which by definition means a tangible copy), a legal vacuum will exist concerning “private” copies made from non-tangible sources, such as TV and radio broadcasts or digital files (be it lawfully or unlawfully acquired), which will continue to be made and would –therefore- not be remunerated (by means of the private copying levy). Several amendments to this language have already been introduced to be discussed in the Senate.

REMUNERATION:

The private copy exception is subject to **fair compensation** of the right-holders. Article 25 of the current Spanish Copyright Law subjects the making of private copies under the exception (defined as “*reproduction carried out exclusively for private use*”) to the payment of a levy and identifies the specific equipment and supports that are subject to payment of such levy. The levy system envisioned in art.25 for private copying only refers expressly to **photocopies, phonograms and videograms equipment and supports**. **No levy is expressly established for digital equipment and supports.**

ANALOG V. DIGITAL COPY:

A few years ago, SGAE, the Spanish collecting society for music authors and publishers, **seek to interpret that art.25 of the Copyright Law already included (implicitly) a levy for private copying in digital supports**. Instead of lobbying (the government and/or the legislator) to modify the language of that provision¹⁰, the SGAE preferred to go to court, and (quite unexpectedly – since the language of art.25 is very clear) obtained judgments in its favor¹¹, which forced

⁹The Council Common Position read “*made for the private use of a natural person*” (which –as explained by the Council itself- was intended to cover not only reproductions made by a natural person but also reproductions made on behalf of such person). Instead, the finally adopted text (introduced by a Parliament amendment, which is the same as used in both of the Commission Proposals) reads “*made by a natural person for private use*” Although the Commission did not want to admit that the Council’s intention was forsaken and preferred to explain that either language means the same: “*As with the previous formulation in the text of the Common Position, the Commission is of the view that the word ‘by’ would also allow a copy to be made for and on behalf of a natural person for private use. This would include providing the means, technical or otherwise, for the making of such copies.*”

¹⁰ The political party in power at that time was the Partido Popular (it is no secret that SGAE had always feel more comfortable with the PSOE) –which may account for the at least peculiar way that SGAE used to obtain a levy for digital supports.

¹¹ See Juzgado de Primera Instancia n.22 de Barcelona, Sentencia de 2 Enero 2002 (*SGAE v. Traxdata*) and Juzgado de Primera Instancia e Instrucción n.2 de Espulgues de Llobregat, Sentencia de 13 Marzo 2002 (*SGAE v. Verbatim*).

ASIMELEC (the Spanish Association of manufacturers of digital supports) to negotiate a levy for floppy disks, CD-Roms and recordable DVDs.

Since the Directive contains no definition of what is “fair compensation”¹², Member States are given a **large degree of flexibility to interpret it**. Beyond taking into account the “*differences between digital and analogue private copying*” (as instructed by recital 38), the exact **form (and amount) of such compensation** (i.e., levies on copy shops, sales of blank tapes and equipment, as exists in most Member States) **is to be decided by each Member State**, in accordance with their own legal traditions and practices. They may even decide that where prejudice to the right-holder is minimal (or where he has already been compensated), no obligation for payment (or further payment) arises.

The current proposed bill to implement the Directive refers to “*any form of supports and equipment*” and establishes **separate fees for digital and analog supports and equipment**:

- the fees for analog supports and equipment are: from 15 to 200 euros for photocopiers, from 60 cents to more than 6 euros for recorders, and from 18 cents to 30 cents per hour for supports;
- the fees for digital supports and equipment are: from 9 to 200 euros for scanners, from 60 cents to more than 6 euros for digital recorders, 70 cents per hour for video digital supports, and from 16 to 30 cents per hour for audio digital supports;
- will be established and updated every two years by the Government (by Regulation). PC hard disks are expressly excluded from paying such levy, but other disks (floppy, CD-Rom, DVD, USB, iPod, etc) will be subject to the levy. In fact, SGAE has already sued Apple for the amounts retroactively due since its arrival into the Spanish market!

The **manufacturers (or importers)** of these equipment and supports are the ones who must pay for the levy, but they always “charge” it to the final consumer (included in the final price).

Consumers’ groups and manufacturers (of equipment and support) are opposing the bill for several reasons:

- The levy system does not allow to distinguish between the use of somebody else’s works covered by the private copying exception and the use of one’s own works or material which does not qualify as a work, which does not to be covered by the exception. They all pay for it. But this is already true for analog copies (and nobody ever complained about it!).
- Although in theory the levy system will take into account the existence and efficiency of TPM (access control and anti-copy measures) which prevent private copying, consumers’ complain that in practice, it is impossible to distinguish the use of the support or equipment *a priori*. Collecting societies defend the levy, as long as, TPMs are not effectively and widely implemented.

¹² There is some guidance in Recital 35: “*In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.*”

On the other hand, **copyright owners** (IFPI, International Federation of Phonogram and Videogram Producers) also oppose it because, according to them, the levy “promotes” digital piracy: once the user has paid for it, you cannot stop him from making illegal copies.

The payment of this levy is currently the heart of a strong opposition against the bill, led by distributors and retailers of digital supports. The reason, however, must be found outside the language of the bill: collecting societies have been suing all retailers (even small family business) for non-payment of the digital copying levy. They claim payment of this levy “retroactively” (since they started to sell digital supports) and directly to the retailers (explaining that manufacturers and importers of the supports sold had not paid for it). This harsh exercise of rights is –let’s say it- not only abusive but even illegal, mainly for two reasons: on the one hand, payment of a levy for digital copies is not expressly envisioned in the current law and it simply stems from a lower court judicial decision (interpreting the law), which could have well been reversed in appeal (that was never attempted); second, because the levy is due by manufacturers and importers, not by retailers (the idea of holding them responsible for the manufacturers failure to pay, is not grounded in copyright law, but only –if so- on a loose interpretation of the civil law doctrine of “subsidiary liability” (*responsabilidad civil subsidiaria*). Interestingly, with abusive actions of this kind, collecting societies may well be jeopardizing the chances of a digital private copying levy being lawfully implemented in the Spanish law. For more information on this issue, visit: <http://www.todoscontraelcanon.es/>

C.- Library Exceptions

Library privileges are enlarged with two new additions: reproduction for **conservation purposes** (in addition to the currently existing, research purposes) and reproduction and communication to the public for research purposes “**by dedicated terminals on the premises**” of such establishments.

The exceptions are **not expressly limited to analog reproductions**, digital copies are also allowed, provided that they are not done for commercial advantage. However, **libraries cannot post the digital copies or transmit them to their patrons beyond the library premises**. This exception is not **subject to fair compensation** by the Directive, but the Spanish bill requires it¹³.

D.- Quotation + Teaching & Research Exceptions

Under the current Spanish law, research and teaching exceptions are limited to quotations (and quotations are limited to teaching and research purposes). The proposed bill separates both exceptions: quotations would be finally “unrestricted” (for any purposes) and a new exception to the reproduction and communication to the public rights is introduced for teaching and research purposes (beyond quotation), subject to fair compensation (despite not being required by the Directive)¹⁴.

The problem with this new exception is the language used by the Spanish government: Instead of transposing the exact terms of art.5(3)(a) of the Directive “*use for the sole purpose of illustration for teaching or scientific research*”, the Spanish text refers to “*the teachers of official educational programs*” and “*in the classrooms*”, which may narrow down its scope and jeopardize its

¹³ See Recital 36: “*The Member States may provide for fair compensation for right-holders also when applying the optional provisions on exceptions or limitations which do not require such compensation.*”

¹⁴ See Recital 36: “*The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.*”

application to digital environments and distance learning education, as clearly intended by the Directive¹⁵.

As it stands now in the Senate, an amendment has been proposed twice (through Amendments #5 and #46) to delete both references, so as to allow its application to on-line teaching. Now we must wait for the Senate to decide upon these amendments.

E.- Public Lending Exception

The public lending exception already exists in the current Spanish copyright law, but it is not listed as an exception in the Directive. It seems it can be maintained in the Spanish national law by means of the general “grand father” clause of art.5(3)(o) of the Directive, which allows

*“use in certain other cases of minor importance where exceptions or limitations **already exist** under national law, provided that they **only concern analogue uses** and do not affect the free circulation of goods and services within the Community,”*

provided the three-step-test is respected. The Spanish public lending exception is not subject to any remuneration to the author (as it is obliged by art.5(1) of the Directive 92/100/EC on rental and lending rights). The Spanish government has already been sued by the European Commission for failing to comply with that requirement; therefore I envisage this issue will continue to be controversial since the proposed bill does not even address it.

3.- TPMS AND DRMS:

The proposed bill introduces two new articles (160 and 161) in the Spanish Copyright Law to implement the protection of TPM and DRMs, closely following the language of the Directive.

TPMs envisioned in the bill include both **access-control** devices, as well as **anti-copying** (or rather, anti-infringing) devices, prohibiting two sets of acts:

- **willful acts of circumvention** of such technological measures;
- any other activity related to these acts of circumvention (**preparatory acts**): *“manufacture, import, distribution, sale, rental, advertisement or possession for commercial purposes”* of *“devices, products or components or the provision of services”* used to circumvent these technological measures. Notice that for these preparatory acts, **knowledge is not a requirement** (as it is for the acts of circumvention).

Nothing prohibits the use of TPMs to control access and use of non-copyrighted works, however, its circumvention will not constitute an infringement. Instead, the same does not apply **as far as preparatory acts**: they will **always constitute an infringement** (regardless of whether they result in an unlawful or lawful access and/or use of works or non-protected works).

Once the protection of TPMs is set, the problem is **how to ensure their pacific co-existence with the exceptions**. How to ensure that an exception (e.g., a reproduction for teaching purposes) can be effectively exercised where the copyright owner has in place an anti-copying or an access-control device?

The **specific choice made by the Spanish government** when implementing the (in)famous art.6(4) of the Directive:

¹⁵ See Recital 42: *“When applying the exception or limitation for non-commercial educational and scientific research purposes, **including distance learning**, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.”*

- The Spanish bill **includes private copying within the first group**¹⁶! But it also allows copyright owners to establish a specific maximum number of copies to be made under the private copying exception and to enforce that number by means of TPMs (the initial bill of August'05 established a number of 3 copies; the current text leaves it open). In that case, if TPMs are set by the copyright owner, they cannot be lawfully eluded; thus, the private copy exception practically disappears.
- It establishes the following system to address possible conflicts between TPMs and exceptions:
 - First, of course, it relies on the **voluntary measures** adopted by the copyright-holders;
 - In the absence of these measures, the beneficiaries of the exceptions can sue the copyright-holders (in front of the **civil courts**). In my opinion, this system amounts to completely forsaking the effectiveness of the private copy exception in digital formats.

The protection of DRMs is specially important not only in view of the possibility of **licensing works over the Net**, but also of the possibility of implementing **compensation schemes for the use of works through the Internet** (DRMs would allow to allocate these uses and later distribute the compensation among the respective authors).

Sanctions for circumventing TPMs and DRMs are already envisioned in the Criminal Code (art.270).

¹⁶ This may have been inspired by the French bill –yet, this text establishes a mediation body (so that the protection of the private copying exception in front of TPMs is more real than the Spanish solution of going to court!).