

2-2017 • JULY 4, 2017

## BACK TO THE PAST FOR THE PRIVATE COPYING LEVY

On July 3, 2017 the Council of Ministers passed Royal Decree no. 12/2017, amending the limitation on private copying and regulating fair compensation for such limitation - the “private copying levy”. Compensation paid out of the general state budget was rendered null and void by the courts and the new regulation has now gone back to the system that was in force until 2011. Under the former system it was the manufacturers, distributors and importers of the equipment, devices and media capable of making private copies of protected works that had to pay the levy.

So-called “private copying” is a legal limitation on the exclusive right of authors (or other copyright holders) to authorize or prohibit the reproduction of their works or other subject-matter. This limitation is regulated in Directive 2001/29/EC and in the Spanish Copyright Law (article 31.2) and enables individuals to make copies of works they have gained access to lawfully for personal use without the rightholder’s authorization. In return for such limitation, the law envisages fair compensation (article 25), aimed at offsetting the economic damage that private copying causes to rightholders.

The legislative vagaries on the subject reveal that the regulation of fair compensation has not gone smoothly: the cancellation of the system that had been in force until now (pursuant to which compensation was paid out of the general state budget) has been imposed following judgments by the CJEU of June 9, 2016<sup>1</sup> and the Supreme Court of November 10, 2016<sup>2</sup>.

With a view to addressing the existing uncertainty, the Government has chosen to amend the Spanish Copyright Law with a Decree (the only requirement for it to be converted into a law is a vote on the entire text by the lower house of the Spanish parliament), establishing the bases for the new compensation system, as a single non-waivable charge on devices capable of reproducing protected works:

- **When does it come into force?** The Decree will come into force on August 1, 2017 and establishes a transitional regime applicable until a regulation is issued (within a maximum term of one year) that offers a complete regulation of fair compensation.
- **Who are the beneficiaries of the compensation?** Authors, artists and performers, editors and publishers of books and similar publications<sup>3</sup>, phonograms, videograms and other sound, visual or audiovisual media.
- **Who is obliged to pay the compensation?**
  - Manufacturers in Spain who act as commercial distributors, and also importers in Spain of the devices defined in the Decree, from the time of the sale/import of the media.
  - Wholesalers and retailers who successively acquire the equipment, devices and media are also jointly and severally liable with respect to the manufacturers/importers that supplied those goods, unless they can evidence that they have paid the compensation. That is, payment of the compensation may be transferred through a chain effect to distributors.
  - As far as collection is concerned, those who are obliged to pay must send every three months, a list of the media sold/imported in the preceding quarter (deducting the media that are exempt from payment) to the “joint collection body”, which will handle, together with the collecting societies, the issue of the corresponding invoices.

<sup>1</sup>CJEU judgment of June 9, 2016 in case C-470/14, EGEDA and others v. Administración del Estado and others, (ECLI:EU:C:2016:418).

<sup>2</sup>Supreme Court judgment number 2394/2016, of November 10, 2016, (ES:TS:2016:4832).

<sup>3</sup>Similar publications are deemed to be, on a transitional basis, any serial or data publication, published under the same title at least once a month and up to no more than every six months, which has at least 48 pages per copy (for example, cultural, scientific or technical magazines).

- **What entities are exempt from payment of the levy?** (i) Public sector entities, which must submit a certificate; (ii) companies and professionals—for example self-employed workers—who make an exclusively professional use of the media or do not make them available to individuals to make copies, provided that they submit a certificate issued by the joint collection body; (iii) those who have an authorization from the rightholders to reproduce the works in the pursuit of their activities, provided that they submit a certificate issued by the joint collection body; (iv) individuals travelling in Spain.
- **Who can ask for a refund for the compensation paid?** (i) Companies and individuals who act as final consumers, justifying the professional use made of the equipment; (ii) whoever has acquired the equipment for export.
- **Creation of the joint collection body:** the CMOs that receive the compensation must set up within three months from the entry into force of the Decree (November 1, 2017), a legal entity in charge of managing exceptions and refunds, and of receiving and managing the quarterly lists of media provided by creditors.
- **What equipment, media and devices are liable—on a transitional basis—for the levy?**

Type of equipment, media or device	Amount of the compensation (€/item)
Multifunction inkjet or laser printers that copy, print or scan.	5,25
Monofunction printers that copy, print or scan up to 39 copies per minute.	4,50
Specific compact disc recorders.	0,33
Mixed mode compact disc recorders.	0,33
Specific versatile disc recorders.	1,86
Mixed mode versatile disc recorders or versatile compact disc recorders.	1,86
Read only compact discs.	0,08
Re-recordable compact discs.	0,10
Versatile read only discs.	0,21
Versatile re-recordable discs.	0,28
USB memory cards and other memory cards not integrated in other devices.	0,24
Non-integrated discs suitable for reproducing videograms, texts and phonograms or other sound, visual or audiovisual content.	6,45
Discs integrated in a device suitable for reproducing, videograms, texts and phonograms or other sound, visual or audiovisual content.	5,45
[*Except for discs integrated in video game consoles that do not allow reproductions to be made that are covered by the private copying limitation and in digital TV set top boxes].	
Portable devices for reproducing phonograms, videograms, texts or other sound, visual or audiovisual content in compressed format and electronic and portable electronic, touchscreen devices.	3,15
Mobile phones with the ability to reproduce phonograms, videograms and texts or other sound, visual or audiovisual content.	1,10

- **Indication of the amount to be paid in the invoice:** those liable for the levy must set out separately on their invoices or receipts that they provide to customers, the amount of the fair compensation and a text stating that customers are entitled to a refund.

In short, the Royal Decree establishes a system similar to the one that was in force in Spain until 2011. However, we will have to wait for the implementing regulations to know the definitive scope of the so-called “private copying levy” although it must be based on the criteria set forth by CMOs in their rates (including intensity of use of the equipment, storage capacity, impact of the time limit or amount of the compensation in other EU Member States). In the meantime, the transitional regime will apply.

Follow us:



**[www.garrigues.com](http://www.garrigues.com)**

This publication contains general information and does not constitute professional opinion or legal advice.  
© Garrigues, all rights reserved. Exploitation, reproduction, distribution, public communication and transformation, total and partial, of this work, without written permission from Garrigues  
Hermosilla 3 - 28001 Madrid - T +34 91 514 52 00