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PRIVATE COPYING EXCEPTION IN LITHUANIAN COPYRIGHT LAW: COMPATIBILITY WITH THE EUROPEAN UNION LAW AFTER PRELIMINARY RULING IN *PADAWAN* CASE

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Abstract. *Private copying exception is an exception to copyright which is present both in Lithuanian national law and law of the European Union. Recent jurisprudence of Court of Justice of the European Union interpreted legal regulation of private copying exception in the laws of the European Union. The mentioned jurisprudence raised concern whether Lithuanian copyright laws on private copying exception and their interpretation in case law of Supreme Court of Lithuania are compatible with the European Union law. This paper analyses the nature and intention of private copying exception, its reflection in Lithuanian and European copyright law and evaluates Lithuanian laws and case law in the light of recent jurisprudence of the Court of Justice of the European Union. The authors conclude that recent jurisprudence of the Court of Justice of the European Union on private copying exception shall not lead to any dramatic or substantial changes of Lithuanian national copyright laws.*

Keywords: *copyright law, private copying, compensation, Padawan case.*

Introduction

Copyright law sets certain exceptions to exclusive rights. One of the exceptions which is present both in Lithuanian and the European Union copyright law – private copying, i.e. reproduction for personal use. Legal regulation of private copying exception in Lithuanian law has been addressed and interpreted by the Supreme Court of Lithuania in its jurisprudence. Recently Court of Justice of the European Union adopted preliminary ruling in so called "*Padawan* case" in which rules of the European Union law on private copying exception were interpreted. Ruling of the Court of Justice of the European Union instantly was followed by different interpretations published in mass media, including opinion that mentioned preliminary ruling revealed that Lithuanian copyright laws are incompatible with the European Union law and Supreme Court of Lithuania formed inappropriate jurisprudence on private copying exception. It seems that mentioned preliminary ruling might be revolutionary and thus might have a dramatic impact on Lithuanian copyright law. Due to these reasons subject of this article is topical and significant.

As ruling of the Court of Justice of the European Union in *Padawan* case was adopted recently no scientific researches on the subject of this article have been concluded so far. Private copying exception in Lithuanian copyright law was analysed by V. Mizaras, R. Birštonas, J. Usonienė, however all researches were concluded before appearance of jurisprudence of the Court of Justice of the European Union on the issue concerned. Therefore it can be concluded that topic of this article is new and not analysed.

Purpose of the article is to reveal the nature and intention of private copying exception, analyse its reflection in Lithuanian and European copyright law and evaluate Lithuanian laws on private copying in the light of recent jurisprudence of the Court of Justice of the European Union.

Object of the research – rules on private copying exception in Lithuanian laws and the EU law, jurisprudence of the Supreme Court of Lithuania and Court of Justice of the European Union on private copying exception.

Methods used by the authors: analysis, summary, comparative.

1. Legal Nature of Private Copying Exception

Function of copyright law is not only recognition and protection of rights of authors, performers and other subjects of copyright and related rights. The function of copyright law is to achieve this aim by proportional means which do not unreasonably restrict the rights and legitimate interests of other persons. In other words, the function of copyright is to reconcile a lot of different interests and achieve appropriate balance between them[1]. It is stated in the Preamble of World Intellectual Property Organization

1 Burrel, R.; Coleman, A. *Copyright Exceptions: The Digital Impact*. United Kingdom: Cambridge University Press, 2005, p. 187−188.

Copyright Treaty[2] (hereinafter – WIPO Copyright Treaty) that contracting parties recognize "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention".

The major interest groups acting at issue are copyright holders and copyright users. Group of copyright holders consists of creators, who create intellectual works, and producers, who invest and organize the production of works. Group of copyright users consists of commercial users and private users (consumers). Some scholars call those groups as creators and owners on one hand, and users and public on the other[3]. Although it is true that the position of these players may vary, there can be no doubt about the need to strike a fair balance between the various claims[4].

On human rights level copyright law has to set a balance between exclusive rights of creators to protect and exploit their works and society's right to information. Right to freedom of expression is a fundamental right, which is recognized both on international and national level. This right is included in The Universal Declaration of Human Rights[5], International Covenant on Civil and Political Rights[6], European Convention on Human Rights[7].

In its active sense freedom of expression grants to public a right to disseminate information and in its passive sense – to receive information. Copyright law provides authors with exclusive rights to exploit their works as a reward for creativity and as an incentive for creation in the future. Due to this reason "there is a potential conflict between the right to freedom of expression and copyright"[8]. International Covenant on Economic, Social and Cultural Rights[9] recognizes everyone's right to take part in cultural life and to enjoy the benefits of scientific progress and its applications (Article 15 a) and b)) on the one hand as well as everyone's right to enjoy the benefits of scientific progress and its applications on the other (Article 15 c)).

Copyright law constantly seeks to balance interests of different groups and this is evidenced by copyright laws in force. Aside from author's and performer's rights (both economic and moral), which give satisfaction and incentive to create, related rights are granted to producers of audiovisual works and phonograms with an aim to promote in-

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2 World Intellectual Property Organization Copyright Treaty [interactive]. Geneva, 1996 [accessed 26-01-2011]. <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189>.

3 Geist, M. *In the Public Interest. The Future of Canadian Copyright Law*. Toronto: Irwin Law, 2005, p. 51.

4 Geiger, C. The Future of Copyright in Europe: Striking a Fair Balance Between the Protection and Access to Information. *Intellectual Property Quarterly*. 2010, 1: 1−14, p. 2.

5 The Universal Declaration of Human Rights [interactive]. 1948 [accessed 26-01-2011]. <http://www.un.org/en/documents/udhr/index.shtml>.

6 International Covenant on Civil and Political Rights [interactive]. 1966 [accessed 26-01-2011]. <http://www2.ohchr.org/english/law/ccpr.htm>.

7 European Convention on Human Rights [interactive]. 1950 [accessed 26-01-2011]. <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf>.

8 Akester, P. The Impact of Digital Rights Management on Freedom of Expression – The First Empirical Assessment. *International Review of Intellectual Property and Competition Law*. 2010, 41(1): 31−58, p. 32.

9 International Covenant on Economic, Social and Cultural Rights [interactive]. 1976 [accessed 26-01-2011]. <http://www2.ohchr.org/english/law/cescr.htm>.

vestments into creative sector. Copyright law also seeks to maintain equilibrium and not unreasonably restrict society's right to information which is integral part of freedom of expression. This aim is achieved through the following means:

1. Balance flows from the fundamental principles and norms of copyright law. For example, idea is separated from its expression, i.e. copyright law does not protect idea, however only its expression[10]. Works claiming protection under copyright law must fulfil the standard of originality which inter alia requires some degree of creation to be invested into the work. Finally, authors' rights and related rights traditionally are protected by law for a fixed-term.

2. Balance is achieved through restrictions of authors' rights and related rights. Copyright laws set certain exceptions to exclusive rights. Example of such restriction is found in Article 9(2) of Berne Convention for the Protection of Literary and Artistic Works[11] (hereinafter – Berne Convention) which provides contracting states with a right to permit the reproduction of works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The mentioned article of Berne Convention "introduced what is known as the "three step" test, that is three conditions which must be observed in the introduction of any limitations on or exceptions to the reproduction right"[12]: (1) the limitation or exception can only apply in certain special cases; (2) the limitation or exception must not conflict with a normal exploitation of the work; and (3) the limitation or exception must not unreasonably prejudice the legitimate interests of the author. Although introduced just for right of reproduction "three step" test later was applied for limitations of all exclusive rights and became "the centrepiece of the exceptions regimes"[13] that have been incorporated in the Agreement on Trade-Related Aspects of Intellectual Property Rights[14] (Article 13), WIPO Copyright Treaty (Article 10) and World Intellectual Property Organization Performances and Phonograms Treaty (Article 16).

In the European Union (hereinafter – the EU) aspect of copyright exceptions and limitations is harmonized by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[15] (hereinafter – InfoSoc Directive). Article 5 of InfoSoc Directive enacts an exhaustive list of exceptions and limitations which Member States

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10 Cottier T., *et al*. *Concise International and IP Law*. TRIPS, Paris Convention, European Enforcement and Transfer of Technology. The Netherlands: Kluwer Law International, 2008, p. 38.

11 Berne Convention for the Protection of Literary and Artistic Works [interactive] 1886 [accessed 26-01-2011]. <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>.

12 Sterling, J. A. L. *World Copyright Law. Second edition*. London: Sweet & Maxwell, 2003, p. 439.

13 Ricketson, S.; Ginsburg, J. C. *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*. Volume I. New York: Oxford University Press, 2006, p. 759.

14 Agreement on Trade-Related Aspects of Intellectual Property Rights [interactive] 1994 [accessed 26-01-2011]. <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm>.

15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [interactive] 2001 [accessed 26-01-2011]. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>.

must or may provide in their national copyright laws. The only mandatory limitation that Article 5 introduces is a limitation to the right of reproduction in Article 5(1). All other 20 limitations are optional. It is to be mentioned that in addition to fulfilling the specific requirements set by Article 5(1)-(4), all copyright limitations implemented by Member States must pass the "three-step" test[16], which is set in Article 5(5).

Article 5(2)(b) provides Member States with optional limitation "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned".

The purpose of this exception is to maintain balance between exclusive copyrights and society's interest to have access to cultural values, to take part in cultural life and to enjoy the benefits of cultural and scientific progress and its applications. The mentioned right of private individuals was recognised since very roots of copyright law as historically copyright law was aimed to control relations between professionals or fight with professional pirates[17]. Starting from the very first exclusive rights, which granted monopoly to publish books just for certain persons[18], the copyrights recognised and protected by law later on were basically aimed at professional or semi-professional uses: public performance, broadcasting, retransmission, etc. Formerly it was accepted that copying of works by hand for the private use of an individual not seriously affect the interests of the author. However with the advent of the photocopying machine, tape duplication and, more recently, digital reproduction processes and the Internet, the validity of the argument that private copying does not seriously affect the interests of the author or the owner of related rights has been and is still being debated[19]. Therefore private copying exception of Article 5(2)(b) of InfoSoc Directive allowing reproductions only subject to specific conditions specified therein (requirement of fair compensation and other) reflects a reasonable consensus between competing interests. Condition of fair compensation is of particular importance in the digital environment, because private copying phenomenon is rapidly growing and results in growing negative impact on economic interests of right holders[20].

Private copying exception is also justified by impossibility to control the persons, who carry out private copying actions[21]. Private copying actions can be performed in any place, they are basically unknown and cannot be predicted by right holders in advance.

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16 Dreier, T.; Hugenholtz, P. B. Concise European Copyright Law. The Netherlands: Kluwer Law International, 2006, p. 369.

17 Geist, M., *supra* note 3, p. 523.

18 Cornish, W.; Llewelyn, D. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*. London: Sweet & Maxwell, 2003, p. 345.

19 Sterling, J. A. L., *supra* note 12, p. 435.

20 Birštonas R., *et al*. *Intelektinės nuosavybės teisė* [Intellectual Property Law]. Vilnius: Registrų centras, 2010, p. 159.

21 Mizaras, V. *Autorių teisė.* T. 1 [Copyright Law. I Volume]. Vilnius: Justitia, 2008, p. 518.

Due to these reasons control of such actions would be economically impossible[22] or at least unreasonable.

2. Private Copying Exception in Lithuanian Law

Lithuanian law provides private copying exception in line with Article 5(2)(b) of InfoSoc Directive. It is provided in Article 20 "Reproduction of Works for Personal Use" of Law on Copyright and Related Rights[23] (hereinafter – Lithuanian Law on Copyright). Article 23 of Lithuanian Law on Copyright provides for the exception for reprographic reproduction of works.

Paragraph 1 of Article 20 of Lithuanian Law on Copyright provides that "It shall be permitted for a natural person, without the authorisation of the author or any other owner of copyright, to reproduce, exclusively for his individual use, not for direct or indirect commercial advantage, in a single copy a work published or communicated to the public in any other mode, where the reproduction is a single-action. When works are for the private use reproduced on paper by means of reprography (affected by the use of any kind of photographic technique or some other process having similar effects), the provisions of Article 23 of this Law shall apply.

Paragraph 3 provides that "When reproducing an audiovisual work or a work recorded in a phonogram, the author of the work or his successor in title, together with the performers and the producers of the audiovisual works and phonograms or their successors in title, shall have the right to receive fair compensation established as a percentage of the wholesale price for blank audio or audiovisual recording media intended for personal reproduction (other than the media intended for export, professional needs and the needs of persons with hearing or visual impairment)".

Paragraph 4 sets the subjects who shall pay compensation: "The compensation referred to in paragraph 3 of this Article must be paid by producers and importers of audio or audiovisual analogue/digital recording media intended for personal reproduction, except in the cases where such blank media are brought into the country exclusively for the private use (in the luggage of a passenger)."

Paragraph 5 establishes right and duty of Government to establish detailed regulation of compensation procedure: "Taking into consideration the application or non-application of technological measures determined in paragraphs 1 and 2 of Article 74, the amount of compensation referred to in paragraph 3 of this Article, the conditions of distribution and payment thereof shall be established by the Government, after consultation with associations representing producers and importers of the said media and associations of collective administration of copyright and related rights. The compensation must not exceed 6 per cent of the wholesale price of a blank audio or audiovisual medium. The compensation to owners of the rights specified in paragraph 3 of this Article shall be distributed and paid by associations of collective administration of copyright and related

22 Mizaras, V. *Autorių teisė.* T. 1 [Copyright Law. I Volume]. Vilnius: Justitia, 2008, p. 518.

23 Republic of Lithuania Law on Copyright and Related Rights. *Official Gazette*. 1999, No. 50-1598.

rights, approved by the institution authorised by the Government. Not more than 25 per cent of this compensation may, in the manner prescribed by law, be used for programmes for the support of creative activities".

Paragraph 6 sets a moment when compensation is to be paid: "The compensation referred to in paragraph 3 of this Article the importers must pay to the account of the association of collective administration of copyright or related rights, approved by the institution authorised by the Government, at the time of customs clearance before the goods are placed in free circulation, unless otherwise provided for in an agreement between the importer and this association of collective administration".

As it is established in Paragraph 5 of Article 20 of Lithuanian Law on Copyright Governmental Resolution No. 1106 of August 29, 2003[24] (hereinafter – Governmental Resolution) was adopted. Governmental Resolution establishes detailed procedure of payment, collection and distribution of compensation for private copying exception. It should be mentioned that Section III of Governmental Resolution provides procedures under which the compensation is paid back to exporters of media, persons who use media for professional needs and persons who use media to fulfil the needs of persons with hearing or visual impairment.

Legal regulation of private copying exception has been analysed by The Supreme Court of Lithuania (hereinafter – Supreme Court) in the civil case *Lietuvos autorių teisių gynimo asociacijos agentūra v. UAB „Trajektorija*"[25] (hereinafter – *Trajektorija* case). In the light of the topic of this article two questions addressed by the Supreme Court are of particular importance: first, subjects who have a duty to pay the compensation for private copying; second, definition of media intended for personal reproduction (private copying).

In response to the first question Supreme Court analysed the definition of the "importer" provided in Lithuanian Law on Copyright. The Supreme Court emphasised that this is specific question of copyright law which cannot be answered through application of tax laws. As definition of the "importer" is not provided in Lithuanian Law on Copyright in the opinion of Supreme Court the meaning of this notion shall be revealed in the light of InfoSoc Directive. It was stressed that compensation is not tax or duty in its nature, but compensation for the authors. In the view of Supreme Court if the law was interpreted in a way that subjects who bring media into Lithuania from other EU states are not subject to pay compensation for private copying the main aim established in InfoSoc Directive would not be achieved – fairly compensate right holders for exploitation of their works without permission for personal reproduction. The Supreme Court finally arrived to the conclusion that "importer" shall be deemed every person who bring

24 Resolution of the Seimas of the Republic of Lithuania No. 1106 of August 29, 2003 "On the Approval of Compensation for Reproduction of Audiovisual Works or Phonograms for Personal Purposes Distribution and Settlement". *Official Gazette*. 2003, No. 84-3847.

25 The Supreme Court of Lithuania College of Judges of Chamber of Civil Cases ruling 3 March, 2008 in the civil case *Lietuvos autorių teisių gynimo asociacijos agentūra v. UAB „Trajektorija"* (case No. 3K-3-4/2008).

into the territory of Lithuania media intended for personal reproduction, both from third states and EU Member States.

In response to the second question Supreme Court analysed the notion of media intended for personal reproduction (private copying). The Court noted that remuneration is paid by the importers and producers of the blank audio and audiovisual recording media. Under the laws in force the importers must pay remuneration at the time of customs clearance before the goods are placed in free circulation, unless otherwise provided for in an agreement between the importer and the association of collective administration. The producers must pay remuneration till goods are brought out of manufacturing premises before their first sale or other transfer to other persons. Due to such legal regulation Supreme Court concluded that intent of the blank audio and audiovisual recording media – for private use is presumed by law, because remuneration is to be paid before any actual act of personal reproduction. In the view of Supreme Court such regulation is in conformity with InfoSoc Directive and its aims included therein. The Supreme Court further emphasised that laws provide with special cases when actually paid private copying remuneration is paid back. Question whether blank audio and audiovisual recording media were actually used for personal (private) purposes is answered only after actual payment of remuneration. The Court stated that right to get back this remuneration is enjoyed not by importers or producers, but by exporters, persons using recording media for professional needs and entities, established by people with hearing or visual impairment, or entities representing them. Due to these reasons Supreme Court found entity, which actually sold blank media to professionals or used blank media for societal goals, an appropriate subject to pay private copying remuneration under Lithuanian laws.

3. *Padawan* Case and its Implications on Lithuanian Law

Court of Justice of the European Union (hereinafter – CJEU) on 21 October, 2010 adopted a preliminary ruling in the case *Padawan SL v. Sociedad General de Autores y Editores de España* (SGAE)[26] (hereinafter – *Padawan* case). In this case CJEU has addressed interpretation of InfoSoc Directive, in particular private copying exception included therein (Article 5(2)(b)). Instantly after adoption of the ruling a discussion has started in Lithuania about its possible implications on Lithuanian law. The major cause of large public debate was press release prepared by one law firm, which inter alia quoted the opinion of the scholar prof. M. Kiskis. Press release has been widely published in mass media[27] and its content can be summed up by the following statements, which are seen as an impact (result) of *Padawan* case:

26 Case C 467/08, *Padawan SL v. Sociedad General de Autores y Editores de España* (SGAE) [2010] ECR 00000.

27 Lawyers: Court of Justice of the European Union ruling in *„Padawan*" case – turning-point concerning media copyright levy [interactive]. Vilnius, 2010 [accessed 26-01-2011]. <http://www.15min.lt/naujiena/pinigai/itkodas/teisininkai-estt-sprendimas-padawan-byloje-luzis-del-laikmenu-apmokestinimo-autoriniais-mokesciais-51-121318>; Court of Justice of the European Union ruling in *„Padawan*" case – turning-point

1. Private copying levies (tax base) must be harmonized on the EU level;
2. The tariffs of private copying levies must be based on particular calculation of harm, i.e. must be based on specific and calculated actual harm suffered by the authors due to private copying;
3. Private copying levies must be paid by retailers but not by wholesalers (in contradiction to current practice in Lithuania). In the opinion of prof. M. Kiskis, persons who do not sell blank media directly to private persons (consumers) can stop their payments of private copying levy because it is in contradiction with the EU law;
4. In the opinion of prof. M.Kiskis, ruling in *Padawan* case changes the Supreme Court's conclusions in *Trajektorija* case in which it was concluded that blank media is charged with private copying levies irrespective of type of future usage (whether it will used for personal or professional needs). It is obvious from CJEU ruling in *Padawan* case that Supreme Court was wrong in interpretation of Lithuanian Law on Copyright and InfoSoc Directive. Therefore Lithuanian laws shall be changed immediately.
5. Finally, in the light of the abovementioned reasons prof. M.Kiskis finds it necessary to rethink whether private copying levy is necessary in Lithuania at all, because right to private copy (granted under laws) is basically not used by Lithuanian consumers.

It seems after reading previously mentioned arguments that CJEU ruling in Padawan case shall lead to dramatic and significant changes in Lithuanian copyright laws. Furthermore it seems that Supreme Court misinterpreted the very essence and nature of private copying exception provided in InfoSoc Directive. In order to examine the correctness of the arguments listed previously we shall analyse the CJEU ruling.

CJEU in its ruling in *Padawan* case firstly addressed the concept of "fair compensation". It noted that "although it is open to the Member States, pursuant to Article 5(2)(b) of Directive 2001/29, to introduce a private copying exception to the author's exclusive reproduction right laid down in European Union law, those Member States which make use of that option must provide for the payment of fair compensation to authors affected by the application of that exception. An interpretation according to which Member States which have introduced an identical exception of that kind, provided for by European Union law and including, as set out in recitals 35 and 38 in the preamble thereto the concept of 'fair compensation' as an essential element, are free to determine the limits in an inconsistent and un-harmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive, as set out in the

concerning media copyright levy [interactive]. Vilnius, 2010-10-22 [accessed 26-01-2011]. <http://www.elektronika.lt/news/business/25797/>; Court of Justice of the European Union ruling in *„Padawan*" case - turning-point concerning media copyright levy [interactive]. Vilnius, 2010-10-22 [accessed 26-01-2011]. <http://investar.lt/ekonomika/44/2525-padawan-byloje-luzis-del-laikmenu-apmokestinimo-autoriniais-mokesciais>; Court of Justice of the European Union ruling in *„Padawan*" case - turning-point concerning media copyright levy [interactive]. Vilnius, 2010-10-22 [accessed 26-01-2011]. <http://www.teisingumas.lt/naujienos/aktualijos/estt-sprendimas-201epadawan201c-byloje-2013-luzis-del-laikmenu-apmokestinimo-autoriniais-mokesciais>; Court of Justice of the European Union ruling in *„Padawan*" case - turning-point concerning media copyright levy [interactive]. Vilnius, 2010-10-22 [accessed 26-01-2011]. <http://www.litas.lt/estt-sprendimas-padawan-byloje-luzis-del-laikmenu-apmokestinimo-autoriniais-mokesciais/>.

preceding paragraph"[28]. "Having regard to the foregoing considerations, the answer to the first question is that the concept of 'fair compensation', within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on them to determine, within the limits imposed by European Union law and in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation"[29].

It follows from the conclusion of CJEU that fair compensation is an essential and obligatory element of private copying exception under the InfoSoc Directive. It was also concluded that concept of fair compensation is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception. In our opinion CJEU clearly indicated that very concept of fair compensation shall be interpreted uniformly, i.e. it shall not be treated by Member States as a tax rather than compensation, it shall not be treated as compensation for any other purposes except of private copying exception, etc. In this light it should be noted that exactly this concept of fair compensation was ascertained and applied by Supreme Court in *Trajektorija* case. However wording of CJEU cannot be read as requiring any further harmonisation of fair compensation in the laws of Member States. As indicated above, CJEU specifically noted that power to determine the form, detailed arrangements for financing and collection, and even the level of that fair compensation is conferred on Member States.

Thus it can be concluded that CJEU ruling in *Padawan* case does not require total harmonisation of private copying levies all across the EU. What it does require is just uniform concept of fair compensation. Furthermore it is clear that fair compensation must be present in all Member States which have introduced private copying exception in national laws. Therefore the question of lifting private copying levies in Lithuania cannot be discussed apart from the question of elimination of private copying exception in national laws.

CJEU in its ruling in *Padawan* case also answered the questions how fair compensation is to be calculated and who are the persons concerned between whom a "fair balance" must be established. What concerns the first question CJEU reaffirmed the notion of compensation and its aim under InfoSoc Directive. The Court stated, that "it is clear from those provisions that the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by the author"[30]. Due to that CJEU arrived to the conclusion that "fair compensation must necessarily be calculated on the basis of

28 *Padawan* case, *supra* note 26, para. 36.

29 *Ibid*., para. 37.

30 *Ibid*., para. 40.

the criterion of the harm caused to authors of protected works by the introduction of the private copying exception"[31].

As regards the question of the persons concerned by the "fair balance", CJEU was clear that "copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned. It follows that the person who has caused harm to the holder of the exclusive reproduction right is the person who, for his own private use, reproduces a protected work without seeking prior authorisation from the rightholder. Therefore, in principle, it is for that person to make good the harm related to that copying by financing the compensation which will be paid to the rightholder"[32]. However it is very important, that CJEU ruled that private copying levy can be charged no to the consumers concerned, but to those who make that equipment available to private users. The exact reasoning of the Court was as follows: "given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment, as stated in the last sentence of recital 35 in the preamble to Directive 2001/29, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy"[33]. It was admitted in the *Padawan* case, that "in such a system it is not the users of the protected subject-matter who are the persons liable to finance fair compensation, contrary to what recital 31 in the preamble to the directive appears to require. However, it should be observed, first, that the activity of the persons liable to finance the fair compensation, namely the making available to private users of reproduction equipment, devices and media, or their supply of copying services, is the factual precondition for natural persons to obtain private copies. Second, nothing prevents those liable to pay the compensation from passing on the private copying levy in the price charged for making the reproduction equipment, devices and media available or in the price for the copying service supplied. Thus, the burden of the levy will ultimately be born by the private user who pays that price. In those circumstances, the private user for whom the reproduction equipment, devices or media are made available or who benefit from a copying service must be regarded in fact as the person indirectly liable to pay fair compensation"[34]. Finally it was concluded that "since that system enables the persons liable to pay compensation to pass on the cost of the levy to private users and that, therefore, the latter assume the burden of the

31 *Padawan* case, *supra* note 26, para. 42.

32 *Ibid*., paras. 44, 45.

33 *Ibid*., para. 46.

34 *Ibid*., paras. 47, 48.

private copying levy, it must be regarded as consistent with a 'fair balance' between the interests of authors and those of the users of the protected subject-matter"[35].

In our opinion, it follows from the abovementioned that CJEU interpreted following key points of the EU law: (i) private copying levy can be charged not to the private persons who perform actual private copying activities, but to those who have the reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them; (ii) such a system is consistent with the EU law as long as it enables the persons liable to pay compensation to pass on the cost of the levy to private users and that, therefore, the latter assume the burden of the private copying levy.

Particular attention should be paid to the meaning of the phrase "who make in law or in fact that equipment available to private users". In our opinion it shall not be understood merely as direct sale to private users. Term used by CJEU "making available in law or in fact to private users" shall be read systematically with the reasoning of Padawan judgement and thus understood as persons who are able to pass on the cost of the levy to private users. The emphasis shall not be put on the fact whether those persons sell equipment directly to private users or sell equipment to retailers. It therefore should be noted in this regard that importers and producers of blank media can be presumed as the persons, who make available in law or in fact this media to private users. These subjects are the ones who are responsible for media appearing on the market of the country. Advocate General Trstenjak in his opinion addressed this issue stating, that "as provided for in the Spanish legal system – those who are directly liable to pay such fair compensation, that is the dealers and importers <…>, that levy is normally passed on to the customer and therefore ultimately to the user via the purchase price. Therefore, as the German Government correctly observes, the effect of that provision on the dealers and importers proves to be neutral. Whilst they have to pay the lump-sum compensation to the authors, they do not suffer any prejudice as a result because they are reimbursed for the compensation by the user via the purchase price"[36].

Thus a conclusion can be drawn that importers and producers of blank media can be charged with private copying levy under the EU law. This was also concluded by the Supreme Court in *Trajektorija* case.

Finally, CJEU in its ruling in *Padawan* case analysed the issue of necessary link between private copying levy and actual use of equipment or media for private copying. CJEU confirmed that "there is a necessary link between the application of the private copying levy to the digital reproduction equipment, devices and media and their use for private copying"[37]. The Court further delivered that "consequently, the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including in the case expressly mentioned by the national court in which they are acquired by persons other than natural persons for purposes clearly unre-

35 *Padawan* case, *supra* note 26, para. 49.

36 Opinion of Advocate General Trstenjak delivered on 11 May 2010 in Case C 467/08, *Padawan SL v. Sociedad General de Autores y Editores de España* (SGAE) [2010] ECR 00000, para. 76.

37 *Padawan* case, *supra* note 26, para. 52.

lated to private copying, does not comply with Article 5(2)(b) of Directive 2001/29"[38]. However CJEU stressed that "where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work"[39]. In the view of the Court, "it follows that the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users"[40].

It flows from the CJEU ruling in *Padawan* case, that private copying levy can be applied only to reproduction equipment, devices and media which are acquired by natural persons for purposes related to private copying. What concerns the proof, mere fact that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy and proof that factual private copies were made is not necessary, provided that the equipment or devices have been made available to natural persons as private users.

In the light of this, in our opinion, Lithuanian laws comply with the EU law. It was already mentioned that Lithuanian laws provide a right and mechanism under which the private copying levy is paid back to exporters of media and persons who use media for professional needs. As it was stated before, CJEU confirmed that the system of collecting private copying levy shall enable the ones liable to pay compensation to pass on the cost of the levy to private users and that, therefore, the latter assume the burden of the private copying levy. Due to this reason in any case only the end-user pays the private copying levy via the purchase price. In this connection as long as legal mechanism provides a possibility for end-users, who do not use media for purposes related to private copying, to get back private copying levy, such mechanism in our view complies with the EU law. As indicated before, CJEU specifically noted that power to determine the form, detailed arrangements for financing and collection, and the level of fair compensation is conferred on Member States.

Conclusions

1. Copyright law constantly seeks to balance interests of different groups and this is achieved through the following means: balance flows from the fundamental principles and norms of copyright law; balance is achieved through restrictions of authors' rights and related rights.

2. The purpose of private copying exception is to maintain balance between exclusive copyrights and society's interest to have access to cultural values, to take part in cultural life and to enjoy the benefits of cultural and scientific progress and its applica-

38 *Padawan* case, *supra* note 26, para. 53.

39 *Ibid*., para. 54.

40 *Ibid*., para. 56.

tions. Private copying exception is also justified by impossibility to control the persons, who carry out private copying actions

3. CJEU findings in *Padawan* case shall not lead to dramatic changes in Lithuanian copyright law. Preliminary ruling of CJEU has not revealed any significant inconsistencies of Lithuanian laws with the EU law:

i. CJEU indicated that concept of fair compensation shall be interpreted uniformly: it shall not be treated as a tax rather than compensation, it shall not be treated as compensation for any other purposes except of private copying exception, etc. Exactly this concept of fair compensation was ascertained and applied by Supreme Court in *Trajektorija* case. Ruling in *Padawan* case cannot be read as requiring any further harmonisation as it was specifically noted that power to determine the form, detailed arrangements for financing and collection, and even the level of that fair compensation is conferred on Member States.

ii. CJEU affirmed that fair balance by copyright rules must be achieved between rightholders and persons who perform actions of private copying. In spite of that private copying levy can be charged to the persons who have the reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Phrase "who make in law or in fact that equipment available to private users" shall not be understood merely as direct sale to private users however shall be understood as persons who are able to pass on the cost of the levy to private users. Thus a conclusion can be drawn that importers and producers of blank media can be charged with private copying levy under the EU law. This is the system which is present in Lithuanian laws. This was confirmed by the Supreme Court in *Trajektorija* case as well.

iii. It flows from the CJEU ruling in *Padawan* case, that private copying levy can be applied only to reproduction equipment, devices and media which are acquired by natural persons for purposes related to private copying. Mere fact that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy and proof that factual private copies were made is not necessary, provided that the equipment or devices have been made available to natural persons as private users. As long as Lithuanian laws provide a possibility for end-users, who do not use media for purposes related to private copying, to get back private copying levy, such mechanism complies with the EU law.

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ATGAMINIMO ASMENINIAIS TIKSLAIS IŠIMTIS LIETUVOS AUTORIŲ TEISĖJE: TEISINIO REGULIAVIMO SUDERINAMUMAS SU EUROPOS SĄJUNGOS TEISE PO PRELIMINARAUS SPRENDIMO *PADAWAN* BYLOJE

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Santrauka. *Autorių teisė nuolat siekia suderinti įvairių interesų grupių svarbius, rūpimus dalykus. Šio tikslo siekiama įvairiais būdais: interesų balansas išplaukia iš fundamentalių autorių teisės principų; interesų balanso siekiama nustatant išimtinių teisių ribojimus. Atgaminimo asmeniniais tikslais išimties tikslas yra pasiekti pusiausvyrą tarp išimtinių teisių į intelektinės veiklos rezultatus ir visuomenės intereso naudotis kultūros vertybėmis, dalyvauti kultūriniame gyvenime bei tobulėti, naudojantis kultūros ir mokslo pažangos rezultatais. Nagrinėjama išimtis taip pat pateisinama negalėjimu kontroliuoti asmenų, kurie atlieka atgaminimo veiksmus.*

Europos Sąjungos Teisingumo Teismas (toliau – ESTT) priėmė sprendimą vadinamojoje „Padawan" byloje (toliau – Padawan byla), kuriuo atskleidė svarbius asmeninio atgaminimo išimties, įtvirtintos Europos Sąjungos (toliau – ES) teisėje, interpretavimo aspektus. ESTT sprendimas Padawan byloje neturėtų būti traktuojamas, kaip atskleidžiantis Lietuvos nacionalinės teisės bei jos interpretavimo teismų praktikoje neatitikimą arba prieštaravimą ES teisei. ESTT atskleidė, kad teisingos kompensacijos samprata turėtų būti aiškinama vienodai visose valstybėse narėse: kompensacija neturėtų būti aiškinama kaip valstybės nustatytas mokestis, kaip kompensavimas, nustatytas kitu tikslu nei atlyginti išimtinių teisių turėtojams už jiems daromą žalą atgaminimu asmeniniais tikslais ir t. t. Tokios nuostatos

yra laikomasi ir Lietuvos nacionalinėje teisėje bei teismų praktikoje. Sprendimas Padawan byloje nereikalauja detalesnio harmonizavimo. Priešingai, ESTT aiškiai pažymėjo, kad valstybės narės turi teisę nustatyti kompensacijos formą, finansavimo ir surinkimo sistemą (mechanizmą) bei kompensacijos dydžius.

ESTT patvirtino, jog teisiniu reguliavimu turi būti pasiekta pusiausvyra (balansas) tarp teisių subjektų ir asmenų, kurie atlieka atgaminimo asmeniniais tikslais veiksmus. Nepaisant to, ESTT pažymėjo, jog pareiga mokėti „asmeninio atgaminimo rinkliavą" gali būti nustatoma asmenims, kurie turi atgaminimo įrangą, prietaisus bei laikmenas, ir kurie faktiškai arba pagal teisės aktus padaro šiuos įrenginius prieinamus vartotojams, arba kurie teikia jiems atgaminimo (kopijavimo) paslaugas. Sąvoka „asmenys, kurie faktiškai arba pagal teisės aktus padaro šiuos įrenginius prieinamus vartotojams", neturėtų būti suprantama siaurai, kaip apimanti tik asmenis, kurie vykdo tiesioginius pardavimus vartotojams. Ji turėtų būti aiškinama, kaip apimanti asmenis, kurie gali perkelti asmeninio atgaminimo rinkliavos kaštus galutiniams vartotojams. Dėl šios priežasties, pavyzdžiui, tuščių laikmenų importuotojams ir gamintojams gali būti nustatyta pareiga mokėti asmeninio atgaminimo rinkliavą pagal ES teisę, kaip tai yra nustatyta ir Lietuvos nacionaliniais teisės aktais. Sprendime Padawan byloje taip pat konstatuota, jog asmeninio atgaminimo rinkliava gali būti nustatyta tik atgaminimo įrangai, prietaisams bei laikmenoms, kuriuos įsigyja fiziniai asmenys, t. y. tikslams, susijusiems su atgaminimu asmeniniais tikslais. Anot ESTT, vien faktas, kad įranga ar prietaisai gali pagaminti kopijas, yra pakankamas pagrindas taikyti asmeninio atgaminimo rinkliavą ir nereikalingi įrodymai, jog tokios kopijos buvo faktiškai pagamintos. Lietuvos nacionaliniai teisės aktai yra atitinkantys ES teisę, nes nustato galimybę bei mechanizmą gauti kompensaciją galutiniams naudotojams, kurie naudoja įrenginius arba laikmenas tikslams, nesusijusiems su atgaminimu asmeniniais tikslais. Taigi faktinė rinkliavos našta yra perkeliama tik vartotojams, kurie įsigyja įrangą arba laikmenas atgaminti asmeniniais tikslais, kaip to reikalaujama pagal ES teisę.

Reikšminiai žodžiai: *autorių teisė, atgaminimas asmeniniais tikslai, kompensacija, Padawan byla.*

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