

THE SUPREME COURT DECLARES NULL AND VOID THE DISTRIBUTION OF REMUNERATION FOR PRIVATE COPYING IN RELATION TO PHONOGRAMS AND OTHER SOUND MEDIA

In its recent Judgment no. 1227/2020, dated 30 September, the Spanish Supreme Court (Third Chamber) declared null and void the distribution of equitable remuneration for private copying among authors (40%), performers (30%) and producers (30%), respectively, established in Article 4.1.a) of Royal Decree 1398/2018, dated 23 November, which develops Article 25 of the Spanish Copyright Act (*Ley de Propiedad Intelectual*) with regard to the equitable remuneration system for private copying ("**RD 1398/2018**" and the "**LPI**", respectively).

SETTING THE CONTEXT FOR THE SUPREME COURT DECISION OF 30 SEPTEMBER 2020

If, in the context of the Spanish Copyright Act (LPI), one had to choose the topic that has caused the Spanish legislator the most headaches for decades now, then regulating the private copying limitation (Article 31.2 LPI) and the equitable remuneration related to it in favour of the copyrights holders (Article 25 LPI) would very likely, by far, top the list.

Equitable remuneration for private copying has followed a rocky road all these years, no thanks to ongoing regulatory reviews¹ and to the decisions of the different Courts, both national² and of the European Union (Padawan and

Key issues:

- The distribution of remuneration for private copying in relation to phonograms and other sound media among authors, performers and producers (40%-30%-30%) established in RD 1398/2018 is declared null and void.
- This annulment is for formal reasons: infringement of the rules on how legislation is to be drafted.
- As a result of the annulment, the 50%-25%-25% distribution established in the previously applicable regulation now applies again.
- There is no formal impediment to the Government once again approving a 40%-30%-30% distribution, without retroactive effects.
- We will have to wait and see if, with regard to collecting societies, a mechanism is established to facilitate the recalculation of the excess amounts potentially received or any shortfalls, when applying the percentages declared null and void.
- Any groups facing a loss due to the potential recalculation of amounts will have one year in which to claim financial liability against Spain's General Administration.

¹ Just to give some examples, we can mention Ministerial Order PRE/1743/2008, of 18 June 2008 and Royal Decree-Law 20/2011, of 30 December.

² This would be the case, for example, of the Spanish National Court (*Audiencia Nacional*) Judgments dated 22 March 2011 or of Judgment no. 89/2011 of the Barcelona Court of Appeal (Section 15), dated 2 March 2011 (Padawan).

Egeda cases³), in which the remuneration was even at one time funded from Spain's General State Budgets⁴.

In this context of ongoing regulatory reviews, equitable remuneration for private copying is an old familiar friend to the Supreme Court's Third Chamber. Not surprisingly, prior to the recent Judgment of 30 September 2020, the Third Chamber had the occasion to declare Royal Decree 1657/2012, which regulated the procedure for the payment of the equitable remuneration for private copying from Spain's General State Budgets, null and void, as a result of the "Padawan" doctrine established by the CJEU⁵.

Following that first chapter, the Supreme Court's Third Chamber and equitable remuneration for private copying have now, four years later, run into each another again. This time the Third Chamber, through its recent Judgment of 30 September 2020, has declared null and void the 40%-30%-30% distribution of equitable remuneration for private copying among authors, performers and producers, respectively, in relation to phonograms (sound recordings) and other sound media.

But this is not the end of the story for remuneration for private copying before the Supreme Court's Third Chamber, just yet. Appeals lodged by AMETIC (the Spanish Association of Electronics, Information and Communications Technologies, Telecommunications and Digital Content Companies) and other collecting societies against RD 1398/2018 are currently underway. Thus, we can expect to see new episodes of the "unfortunate" story of equitable remuneration for private copying in Spain, in the relatively near future.

THE SUPREME COURT'S GROUNDS FOR ANNULMENT: A "LAST MINUTE" CHANGE OF CRITERIA WITHOUT ASKING THE OPINION OF THE LEGAL ENTITIES PREVIOUSLY CONSULTED

Initial version of the draft regulation set the distribution percentages at 50%-25%-25%

The initial version of the draft regulation on equitable remuneration for private copying which culminated in RD 1398/2018 set the distribution percentages of remuneration for private copying in relation to phonograms and other sound media among authors, performers and producers at 50%-25%-25%, respectively⁶.

This initial version was subject to public information stage, in which several legal entities made allegations. It also obtained a favourable report from Spain's consumers and users association (*Consejo de Consumidores y*

³ Judgments of the Court of Justice of the European Union ("CJEU") dated 21 October 2010 (C-467/08) and 9 June 2016 (C-470/14), respectively.

⁴ See the 10th Additional Provision of Royal Decree-Law 20/2011, dated 30 December, on urgent budgetary, tax and financial measures to remedy the public deficit.

⁵ See Judgment no. 2394/2016 of the Supreme Court (Third Chamber), dated 10 November, which (partly) upheld the appeals for judicial review lodged by the collecting society for audiovisual producers *Entidad de Gestión de Derechos de los Productores Audiovisuales* (EGEDA), the copyright association for audiovisual media *Derechos de Autor de Medios Audiovisuales* (DAMA) and the collecting society for visual artists *Visual Entidad de Gestión de Artistas Plásticos* (VEGAP).

⁶ The percentages cited coincide with those set out in the preceding regulations: Royal Decree 1434/1992, dated 27 November and Royal Decree 1657/2012, dated 7 December.

Usuarios) and from the First Section of the Spanish Copyright Commission (*Comisión de Propiedad Intelectual*). In this second case, the report was of a mandatory nature, as established in Article 25.4 LPI.

The 40%-30%-30% distribution percentages were introduced upon completion of the procedural stages of the draft regulation

Following the public information stage and the issuance of the mandatory report by the First Section of the Spanish Copyright Commission, Spain's General Administration (*Administración General del Estado* (AGE)) decided to modify the distribution percentages of remuneration for private copying in relation to phonograms and other sound media, changing them from the original 50%-25%-25% to 40%-30%-30%.

This latest distribution had not been proposed by any of the legal entities making allegations during the public information stage. In fact, those legal entities that expressed their disagreement with the percentages 50%-25%-25% proposed an equal distribution of one third each among authors, performers and producers.

But despite that, the new text of the draft regulation on equitable remuneration for private copying was not subject again to the public information stage, nor to the issuance of reports by Spain's consumers and users association and the First Section of the Spanish Copyright Commission. This new text was only subject to the issuance of reports by various Ministries and by the Spanish Council of State, following which its approval was published in the form of a Royal Decree.

Case law of the Supreme Court does not require that legislation drafting procedures recommence each time a law's wording changes, unless the change is substantial

In its Judgment of 30 September 2020, the Supreme Court restated its case law, whereby: "*the general rule is that it is not necessary to recommence, time and time again, the public information and reporting stages as the draft regulation being conceived in that drafting process [of a law] evolves*".

However, that general rule has one exception, namely: those cases in which "*substantial changes are made to a new version of the draft regulation, which affect the key aspects of what was intended*"⁷.

The modification of the distribution percentages of remuneration for private copying is a substantial change

In the Supreme Court's opinion, the modification of the distribution percentages of remuneration for private copying constitutes precisely a substantial change in the wording of the draft regulation, on which none of the legal entities taking part in the public information stage were able to make allegations, since the modification occurred subsequent to their involvement.

In the Supreme Court's view, the issuance of a mandatory report by the First Section of the Spanish Copyright Commission is particularly relevant. According to Article 25.4.2 LPI, its involvement in relation to the proposed text

⁷ See in this regard the Judgments of the Supreme Court's Third Chamber dated 23 January 2013 (appeal no. 589/2011), 21 February 2014 (appeal no. 954/2012), 19 May 2015 (appeals nos. 534/2012 and 626/2012) and 17 July 2018 (appeal no. 400/2017).

of the law should occur "*prior to its approval*", from which it can be inferred that its report should refer to "*the final version of the text*".

Outcome of failing to subject the new wording of the draft regulation to the mandatory procedures

The Supreme Court concludes that the change of the distribution percentages of equitable remuneration for private copying to 40%-30%-30% should have been made subject, once again, to the public information stage and to the issuance of a mandatory report by the First Section of the Spanish Copyright Commission, in order to know the opinion of the various legal entities that had previously made allegations or reported on the original version of the legal text.

As this was not done, the procedural rules applicable to the drafting of legislation were infringed, which constitutes grounds for its being declared null and void, leading to the annulment of Article 4.1.a) of RD 1398/2018.

WHAT IS NEXT?

Percentages currently applicable to the distribution of remuneration for private copying

The invalidation of the percentages set in Article 4.1.a) of RD 1398/2018 entails the application of the percentages that were previously in force, established in Article 36.a) of Royal Decree 1434/1992, dated 27 November: 50%-25%-25%⁸.

Potential future modification of the distribution percentages, without retroactive effects

As has been said, the invalidation of the percentages set in Article 4.1.a) of RD 1398/2018 is due to purely formal reasons.

Thus, nothing prevents the Spanish General Administration from making a new proposal for a regulation which, following all mandatory procedural stages, ultimately re-approves the percentages 40%-30%-30% that were recently invalidated.

In any event, any regulation potentially approved in the future would not have retroactive effects, since that would infringe the principle of legal certainty, in the terms developed by the consolidated case law of Spain's Constitutional Court⁹.

Potential recalculation of amounts distributed while Article 4.1.a) of RD 1398/2018 was in force

Although the Supreme Court has not pronounced in this regard (as the appellant has not requested this), the annulment of Article 4.1.a) of RD 1398/2018 may give rise to the potential recalculation of any excess amounts

⁸ Note that Royal Decree 1434/1992, dated 27 November, came back into force following the annulment, by means of the Judgment of the Supreme Court (Third Chamber) dated 10 November 2016, of Royal Decree 1657/2012, dated 7 December, which had repealed it.

⁹ See classic Constitutional Court Judgment no. 126/1987, dated 16 July, whose doctrine has been reiterated in many successive judgments, some prominent ones being: Judgments nos. 116/2009, dated 18 May; 176/2011, dated 8 November; and 121/2016, dated 23 June.

received or any shortfalls, when applying the percentages 40%-30%-30% established in the regulation declared null and void.

We will have to wait and see if, in relation to the collecting societies, any mechanism is established to facilitate this recalculation, which should occur within the five-year limitation period.

Potential liability claim against Spain's General Administration for loss and damage suffered due to the declaration of distribution percentages as null and void

The potential recalculation of any excess amounts received or any shortfalls, in application of Article 4.1.a) of RD 1398/2018, could lead to considerable tension among the various groups affected. Some would be entitled to claim for any amounts not received, while others could be required to refund the excess amounts they have unduly received.

In these circumstances, those groups negatively affected by the application of the regulation declared null and void will have to consider the possibility of bringing financial liability actions against Spain's General Administration.

In this case, the legal right to claim will expire in one year.

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