The private copying exception and jurisdictional issues

17/05/2016

This article was first published on LexisPSL IP & IT analysis, May 2016

IP & IT analysis: Discussing the judgment in Austro-Mechana v Amazon, Tom Ohta, an associate solicitor at Bristows LLP, points out that the private copying exception has had a somewhat rocky journey in the UK.

Original news

C-572/14: Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon

Briefly, what is the background to this referral to the Court of Justice of the European Union (CJEU) by the Austrian Supreme Court?

This referral looks at jurisdictional issues in the context of the private copying exception, specifically, whether a claim for non-payment of a private copying levy constitutes a ‘tort, delict or quasi-delict’ under article 5(3) of the Brussels Regulation (EC) 44/2001 (now article 7(2) of the Recast Brussels Regulation (EU) 1214/2012).

By way of background:

- The private copying exception permits end users to make private copies of copyright work for non-commercial use without the right holder’s authorisation. However, because this would infringe the right holder’s exclusive right of reproduction, it is conditional on right holders receiving ‘fair compensation’ as recompense for the harm suffered to them. The legislative basis behind the private copying exception is found in article 5(2)(b) of the Information Society Directive 2001/29/EC (the InfoSoc Directive) (see further Copyright—permitted acts and defences).
- Many Member States have chosen to implement the private copying exception and to provide the fair compensation through a system of levies (a private copying levy). The Austrian implementation requires anyone who sells recording material or equipment in Austria to pay a private copying levy that is collected by the Austrian copyright-collecting society, Austro-Mechana, on behalf of individual copyright owners.
- Five subsidiaries of Amazon, established in Luxembourg and Germany, sold recording media in Austria that was either pre-installed in mobile phones or used to expand their memory capacity.
- Austro-Mechana brought a claim before the Austrian courts against Amazon for non-payment of the private copying levy in respect of the recording media sold in Austria since October 2010.
- Under the Brussels Regulation (EC) 44/2001 (for cases commenced prior to 10 January 2015) and the Recast Brussels Regulation (EU) 1214/2012 (for cases commenced after that date), the basic principle is that a defendant should be sued in his country of domicile (the so-called ‘domicile rule’).
- However, this is subject to certain exceptions and special jurisdiction rules. In matters relating to ‘tort, delict or quasi-delict’, the defendant can be sued in the courts for the place ‘where the harmful event occurred or may occur’ rather than in their place of domicile.
- Because Amazon was not being sued in its place of domicile, it challenged whether the Austrian courts had jurisdiction to hear the claim on the basis that the obligation to pay the private copying levy did not constitute a ‘tort, delict or quasi-delict’ for the purposes of the Brussels Regulation, art 5(3).
- Amazon was initially successful before the lower courts, but the Austrian Supreme Court was unclear on the correct interpretation of the Brussels Regulation and asked the CJEU for guidance on this issue.

In dealing with the private copying levy claim, how did the court approach the special jurisdiction rules?

The CJEU drew on previous case law to apply a two-stage test when establishing whether a matter fell within the scope of the Brussels Regulation, art 5(3), namely:

- the action must not concern ‘matters relating to a contract’ (one of the other special jurisdiction rules found under the Brussels Regulation, art 5(1)(a))

- the action must seek to establish the liability of the defendant

Matters relating to a contract

In order for a matter to constitute a ‘tort, delict or quasi-delict’, it must not concern ‘matters relating to a contract’, which is one of the other special jurisdiction rules under the Brussels Regulation, art 5(1)(a) (the Recast Brussels Regulation, art 7(1)).

In order to fall within art 5(1)(a), although there is no requirement for there to be a concluded contract, the claim must be based on the establishment of a legal obligation between the parties that was freely consented to.

In this case, the disputed obligation to pay the private copying levy was imposed by Austrian law, and as such, the CJEU considered that it was not freely consented to by Amazon. Austro-Mechana’s claim for payment of the private copying levy therefore did not concern a ‘matter relating to contract’ (ie it satisfies the first limb of the two-stage test).

Liability

The CJEU considered that liability in tort, delict or quasi-delict requires a causal connection to be established between the harmful event and the damage caused to the claimant. In this case therefore, there must be an event attributed to Amazon (as the supplier of recording media) which is alleged to cause damage to the copyright-collecting society, Austro-Mechana.

This raises two inter-related issues:

- Is it relevant that the damage caused to the copyright-collecting society is not (directly) caused by the supplier of the recording media, but by the end-user who uses that recording media to make the private copies?
- Is it relevant that the private copying levy is payable to the copyright-collecting society, rather than to the copyright holder?
While the CJEU’s reasoning is not overtly clear from its judgment, its view was that neither of these two issues are relevant. This is tolerably clear from the following:

- The CJEU recognised that the harm to the right holder is caused by the end user who makes the private copies for non-commercial purposes without their authorisation. Therefore, in principle, it should be the end user who should make good the harm by paying the fair compensation.

- However, drawing on previous case law, the CJEU recognised the practical difficulties in identifying such private users and requiring them to compensate the right holders. This is why Member States are able to establish a private copying levy to finance the fair compensation which is chargeable not to the end users making the private copies but to those parties that make digital reproduction equipment, devices and media available to those private users (or who provide private copying services for them).

- Parties paying the private copying levy are permitted to pass on that cost in the price charged for reproduction equipment, devices and media, and as such, the end users indirectly finance the levy when they purchase such recording media. In the CJEU's view, this system struck a 'fair balance' between the competing interests of right holders and end users.

- Under Austrian law, only the copyright-collecting society could rely on the right to fair remuneration provided for under the private copying exception.

Having considered these points, the CJEU’s view was that Austro-Mechana’s claim does seek to establish the liability of the defendant because there was a causal link between the harmful event (Austro-Mechana’s failure to collect the private copying levy from Amazon as a result of the latter’s refusal to pay that levy) and the damage sustained.

**What is the situation with regard to the private copying exemption in the UK?**

The private copying exception has had a somewhat rocky journey in the UK.

The UK government sought to implement art 5(2)(b) of the InfoSoc Directive by introducing regulations (the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations) in August 2014 which inserted a new provision (s 28B) into the Copyright, Designs and Patents Act 1988. However, the UK government chose not to introduce a compensation scheme, as found in many other Member States, on the basis that there was only de minimis harm caused to right holders as a result of the introduction of the exception.

The absence of a compensation scheme led to judicial review proceedings being successfully brought to challenge the legality of the implementing regulations (R on the application of British Academy of Songwriters Composers and Authors and others) v. Secretary of State for Business Innovation and Skills (The Incorporated Society of Musicians Intervening) [2015] EWHC 2041 (Admin), [2015] All ER (D) 183 (Jul)). As a result, the Personal Copies for Private Use Regulations were quashed with prospective effect and therefore, at present, there is no private copying exception in England and Wales. Although the government has expressed an intention to introduce a private copying exception in the future, the timing of this remains unclear (see furtherQuashed—what’s next for private copying in the UK?).

**What do you think will happen in the future, if anything?**

There have been a flurry of cases in recent times from the CJEU [for example see news analysis: The EGEDA opinion on fair compensation. Allocating fair compensation to publishers—not a fair levy system and Examining fair compensation] on the private copying exception with more to follow.

In the context of this case however, it now remains for the national court in Austria to determine whether a harmful event has occurred or may occur in that Member State for the purposes of art 5(3).

**Does this decision impact UK businesses? What should lawyers advise their clients?**

The judgment indicates that a claim based on a failure to comply with a statutory obligation in a Member State to pay a private copying levy may, in principle, be considered a tort, delict or quasi-delict for the purposes of art 5(3). The judgment indicates that a claim based on a failure to comply with a statutory obligation in a Member State to pay a private copying levy may, in principle, be considered a tort, delict or quasi-delict for the purposes of the special jurisdiction rules under the Brussels Regulation and may result in that Member State having jurisdiction to hear the claim, even where the defendant is domiciled in a different Member State.

Companies will therefore need to carefully consider their statutory obligations relating to private copying levies in each of the Member States in which they place recording equipment, media and devices on the market to assess the potential risk profile in that jurisdiction. The optional nature of the private copying exception and the lack of harmonisation across Member States means companies will need to be aware of the nuances of the legal framework in each jurisdiction and local law advice may need to be sought in appropriate cases.