

France

## “Remuneration Scheme for Private Copying”

**Intellectual Property Code, Sec. L.311-5, L.311-8; Act on Private Copying No. 2011-1898 of 20 December 2011 – *Canal* + *Distribution et al.*, SIMAVELEC; SIMAVELEC**

**Council of State (Conseil d’État) ·  
Constitutional Court (Conseil constitutionnel) ·  
17 June 2011 – Case No. 324816 ·  
20 July 2012 – Case No. 2012-263**

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**In accordance with the ruling of the CJEU in case C-467/08, the French legislature is obliged to provide for a regime of private copying levies differentiating between private and professional use.**

In a decision rendered in 2010, the CJEU ruled that a system of levies for private copying applied to digital reproduction equipment, devices and media that makes no distinction between private and professional use does not comply with the 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 (InfoSoc Directive) (CJEU, Case No. C-467/0821, October 2010—*Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*).

Before this decision was rendered, a couple of representatives of blank media manufacturers and vendors (SIMAVELEC) brought an action before the Council of State asking for the annulment of a decision rendered in 2008 by the “National Commission responsible for the private copying remuneration of rights holders and for deciding on the conditions of payment of private copying levies” (“*Commission rémunération pour copie privée*”; Sec. L.311-5 Intellectual Property Code). This Commission—consisting of representatives of right holders, copying equipment manufacturers and sellers, and consumers—meets regularly to adapt the amount of the levies according to the development and technical capacities of devices and the way such devices are used. In its 2008 decision (Decision No. 11 of 17 December 2008, published in the Official Journal of 21 December 2008), the Commission ordered levies to be paid for several sorts of devices. The appellants (SIMAVELEC) contested the payment of levies on equipment purchased by professionals for purposes other than private copying. This litigation was still ongoing while the French legislature had introduced new legal provisions related to private copying, thereby

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amending national copyright law. Before the law was modified in December 2011, the Intellectual Property Code (Sec. L.311-8) already limited private copying levies to a closed list of purchasers of devices (among them phonogram or videogram producers and editors of works published on digital media) used for purposes other than private copying. While some equipment is obviously intended for professional use only and has been duly excluded from the scope of the private copying levy, most copying devices have no such clear-cut intended use and can therefore be used both by professionals and private consumers. On the basis of the European *Padawan* case law, the Council of State (17 June 2011, *Canal + Distribution et al.*) ruled that by applying private copying levies to all equipment regardless of private or professional use, and without providing for the reimbursement of levies to purchasers legally entitled to exemption, national copyright law and European copyright law as interpreted by the CJEU had been breached. According to the Council, a general system providing for a lump-sum reimbursement was not enough to comply and implement a system that exempted professional users.

However, aware of the consequences of setting aside the decision of the National Commission with immediate effect, the Council of State decided to postpone the effects of its ruling by six months in order to avoid causing a surge of requests for reimbursement and to give sufficient time for the Commission to decide on new rates and conditions of private copying levies. In the meantime, the French government passed an Act relating to Private Copying Remuneration (Act No. 2011-1898 of 20 December 2011). Although the Act expressly provided for an exemption for blank media purchased for professional purposes (new Art. L.311-8), it was based on the same 2008 conditions abolished by the decision of the Council of State. The national trade union representing the digital media industry (SIMAVELEC) challenged the constitutionality of the Act in asking a “*question prioritaire de constitutionnalité*” (QPC) to the Council of State, arguing that the legislation was in conflict with its own jurisprudence. The Council of State then seized the Constitutional Court having jurisdiction over constitutional matters. According to the Constitutional Court, the legislature followed the Council of State and modified the legal provisions relating to the exemption of private copying levies for equipment purchased for professional use, while leaving the decision on the new rates and conditions of levies to the competent body (which has to take a decision within the 12 months following the adoption of the Act, i.e. by the end of 2012). The 2008 measures were thus only confirmed by the law in their temporary state. Therefore, the Act’s constitutionality was confirmed (Constitutional Court, Decision No. 2012-263, 20 July 2012).

The purpose and actual use of copying equipment subject to private copying levies has been a critical issue in many EU Member States. The *Padawan* decision was the first EU decision to clearly state that non-private copying use—notably professional—in accordance with EU copyright rules had to be exempted from levies. This jurisprudence was promptly confirmed by the French highest legal authorities, thus resolving pending disputes raised by some professional users and clarifying further the mission of the national body for private copying remuneration in finding the right balance between all stakeholders concerned.