

Message 304

Communication from the Commission - TRIS/(2013) 02067
 Directive 98/34/EC
 Translation of the message 303
 Notification: 2013/0244/E

Observations from the Commission (article 8, paragraph 2, of Directive 98/34/EC). These observations do not have the effect of extending the standstill period.

ОГРАНИЧЕН - OMEZENÝ PŘÍSTUP - BEGRÆNSET - ZUGANGSBESCHRÄNKT - ΕΣΩΤΕΡΙΚΗ ΧΡΗΣΗ - LIMITED - LIMITADO - PIIRATUD - RAJOITETTU - LIMITÉ - KORLÁTOZOTT HOZZÁFÉRÉS - RISERVATO - RIBOTO NAUDOJIMO DOKUMENTAS - IEROBEŽOTAS PIEĒJAMĪBAS DOKUMENTS - RISTRETT - RESTRITO - LIMITAT - OBMEDZENÝ - OMEJENO - BEGRÄNSAT

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1. MSG 304 IND 2013 0244 E EN 12-08-2013 08-08-2013 COM 8.2 12-08-2013

2. Commission

3. DG ENTR/C/3 - BREY 08/94

4. 2013/0244/E - SERV60

5. article 8, paragraph 2, of Directive 98/34/EC

6. Within the framework of the notification procedure laid down by Directive 98/34/EC, the Spanish authorities notified to the Commission on 10 May 2013 the draft Bill amending the Recast Text of the Act on Intellectual Property, approved by Royal Legislative Decree 1/1996, of 12 April, and Law 1/2000, of 7 January, on Civil Procedure.

The notified draft amends the regulation of some of the limits or exceptions to copyright currently established by Spanish legislation on intellectual property and the regulation of intellectual property rights management societies. It also establishes specific measures with a view to continuing to strengthen instruments used in response to non-compliance with these rights. Lastly, the notified draft aims to transpose into Spanish law Directive 2011/77/EU of the European Parliament and of the Council, of 27 September 2011, amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

Examination of the draft has prompted the Commission to deliver the following comments pursuant to Article 8(2) of Directive 98/34/EC.

1. Cessation of rights to the producer of phonograms

Articles 110a and 112(2) of the Act on Intellectual Property as amended by the draft Bill provide for a "Use it or lose it clause" for music performers. They provide that the contract transferring the rights of the music performer could be terminated by the performer unless "a sufficient number of copies are put on sale or made available to the public". The Commission would like to invite the Spanish authorities to define the terms "sufficient number of copies" more precisely.

2. Private copying exception and fair compensation

The Commission would like to draw the attention of the Spanish authorities to Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10, the "Information Society Directive"). In particular, Article 5(2) of the said directive states that Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 under

specific conditions. If a Member State decides to introduce the private copying exception envisaged by Article 5(2)(b), it has to ensure that the rightholders receive fair compensation.

Paragraphs 1 and 3 of Article 25 of the Act on Intellectual Property as amended by the notified draft provide that the compensation for acts of private copying will be paid from the general state budget. The European Commission is already discussing this issue with the Spanish authorities in the context of a dialogue started before the notification of the draft law at stake.

Therefore, the Commission would like to invite the Spanish authorities to explain how the requirement that the actual burden of financing the fair compensation should fall on those responsible for the harm, as put forward by the CJEU (See in particular the Judgment of the CJEU of 21 October 2010 in Case C-467/08 SGAE vs. Padawan), will be satisfied in a system in which the fair compensation is financed from the general state budget.

Article 25, paragraph 5 of the Act on Intellectual Property as amended by the notified draft enumerates two cases in which the harm caused by acts of reproduction carried by natural persons for private use by virtue of the exception would be minimal and therefore would not give rise to payment obligation. This paragraph also provides for a legal basis for the adoption of further regulations determining other situations in which the harm caused to the rightholder by private copying would be minimal and would not require compensation.

The Commission notes that this provision could lead to a potentially undetermined number of situations in which acts of private copying will not give rise to any compensation being paid to rightholders. Moreover, the Commission would like to underline the lack of clarity as to the criteria used to determine the cases in which the harm caused to the rightholder by private copying is minimal and does not require compensation.

The Commission recalls that the Court of Justice has found that the principles encompassed under the right to good administration, including the right to be heard and the right of defence (as also codified in article 41 of the Charter of Fundamental Rights of the European Union, 2010/C 83/02, OJ C 83, 30.3.2010, p. 389), would constitute fundamental principles of law applicable to Member States when they implement EU law. Furthermore, in accordance with its Article 51(1) when implementing European Union law, Member States are bound by the Charter, including its Article 47 which provides for the right to an effective remedy. The functioning Intellectual Property Commission set up under Article 158b must thus fully respect these rights and principles.

In this connection, the Commission services would like to invite the Spanish authorities to:

- Clarify what are the criteria on the basis of which it is assumed that situations described in points a) and b) of paragraph 5 of Article 25 of the Act on Intellectual Property as amended by the draft Bill cause minimal harm and hence, do not give rise to payment obligation;
- Further explain on the basis of what criterion it is considered in point a) of paragraph 5 of Article 25 that only "individual and temporary reproduction" of works broadcast by public broadcasting organisations (as opposed to works broadcast by all broadcasting organisations) cause minimal harm and hence, do not give rise to any payment obligation;
- Explain in more detail at which stage the regulations determining the situations in which the damage caused to the rightholder is minimal and does not require compensation (as prescribed by paragraph 5 of Article 25 of the Act on Intellectual Property as amended by the draft Bill) are going to be adopted and how the Spanish authorities intend to guarantee that their adoption will not affect the system of calculation and distribution of fair compensation, as prescribed in the Royal Decree 1657/2012;
- Clarify, possibly by giving examples, what acts of reproductions made by natural persons for private purposes (i.e. acts of private copying) by virtue of the private copying exception – as amended by the proposed legislation – would give rise to the payment of fair compensation.

The Commission would like to invite the Spanish authorities, in view of the identified existing interpretative doubts, to clarify the aforementioned provision by referring to the applicable provisions of the Information Society Directive, as interpreted by the CJEU, in view of ensuring full compliance with the applicable EU law.

3. Collective rights management

According to Article 147 of the Act on Intellectual Property as amended by the draft Bill, entities established in Spain managing rights collectively have to receive a prior authorisation from the Ministry competent for intellectual property.

The Commission would like to ask the Spanish authorities to clarify whether this requirement for authorisation will also be applicable to entities established outside of Spain, which manage rights in Spain. If such is the case, the Commission would like to know how the Spanish authorities would justify the establishment requirement, which is de facto introduced by this provision, in view of the rules of the Directive 2006/123/EC of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36), notably Article 16 thereof.

4. Enforcement of intellectual property rights

Title IVa of the Act on Intellectual Property as amended by the draft Bill (Articles 158, 158a and 158b) lays down the powers and competences of the Intellectual Property Commission. According to Article 158b(1) of the Act on Intellectual Property as amended by the draft Bill: "The Second Section of the Intellectual Property Commission will exercise the functions of safeguarding the intellectual property rights against their infringement by the parties responsible for the information society services through a procedure whose object will be the re-establishment of legality."

The Commission would like to invite the Spanish authorities to provide clarifications on the following points:

- How does the draft law relate to the Spanish data protection legislation implementing Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31), what safeguards are envisaged for the processing of personal data under Article 158b as well as under the proposed Articles 256(1) and 259(4) of the Spanish Civil Procedure Act and possibly under other Articles proposed in the draft measure and has the Agencia Española de Protección de Datos (AEPD) been consulted on this draft?

- What is meant by the notion "information society services providers that directly infringe intellectual property rights" in Article 158b(2)(a)?"

- What is meant by the notion "sufficient ties to Spain" and how would these be identified by the Intellectual Property Commission? Furthermore, could the Spanish authorities clarify whether the supervisory treatment and obligations imposed are applied in a non-discriminatory manner to all intermediary information society services providers or whether the draft Bill provides for a differentiation in the treatment (e.g. scope of illicit activities covered)?

- Do the five conditions laid down in Article 158b(2)(b) mean that only the intermediary information society services provider who acts beyond mere technical, neutral and passive nature of its activity will be held responsible for the infringement in a specific case? Specifically, do the five conditions laid down in Article 158b(2)(b) mean that "the procedure for re-establishment of legality" can be directed against internet access providers providing services in Spain?

In this context the Commission would like to reiterate that only in cases where the conditions laid down in Section IV of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1, the E-Commerce Directive) are not met can the intermediary service provider be held liable for the activity or information it transmits, provides access to or stores.

- In view of the above points could the Spanish authorities also clarify what is the relationship between Article 158b of the Act on Intellectual Property as amended by the draft Bill and Law 34/2002 on services of the information society and electronic commerce, which implements the E-commerce Directive, including provisions concerning the liability of intermediary information society service providers?

- In the context of the previous question, could the Spanish authorities clarify how the Intellectual Property Commission would determine "significant participation in the infringement" as laid down in the first condition of Article 158b(2)(b)?

- The Commission would like to know what is meant by the notion of "specific and massive facilitation of localisation of works and other subject matter that are shown to be offered without authorisation" as laid down in second condition of Article 158b(2)(b). For example, would the hosting service provider that merely provides technical means for using localization tools, but does not itself manage them be covered by this condition? Additionally, how would an intermediary information society service provider identify whether a specific "intellectual property right-protected" item is offered without authorization?

- Does the draft Bill only cover "facilitation" of the intellectual property rights infringements? In the case of a negative answer, the Commission would like to receive explanations as to which provisions apply to the actual infringer and what is the reason for the draft Bill to include these.

- Article 158b(4) of the Act on Intellectual Property as amended by the draft Bill contains the following provision: "[...] the provider of information society services must be required to proceed within a period no greater than 48 hours with the voluntary removal of the content declared to be offending, or if applicable, to make the allegations and propose the tests that it deems opportune for the authorisation of the use or applicability of a limit to the intellectual property right [...]". Does this provision apply exclusively to the providers of information society services that directly infringe intellectual property rights? Or, on the contrary, do they mean that an intermediary service provider, like internet access provider or hosting service provider, have to offer their assessment of the legality of particular content?

In the particular case of user-generated content platforms allowing end-users to upload their content, does the draft Bill provide for a possibility for such end-users to express their views on the alleged illegality of content uploaded by them?

- Can the draft Bill (notably Article 158b(5)) be understood as meaning that the Intellectual Property Commission would have the possibility to require that the internet access provider terminate the user's access to the internet? In case of a positive answer, the Commission would like to invite the Spanish authorities to explain why this measure is necessary and proportionate in view of possible less restrictive measures (e.g. removal of the content at its source).

- With regard to Article 158b(6) of the Act on Intellectual Property as amended by the draft Bill, the Commission would like to understand how the Intellectual Property Commission would determine whether a specific service coming from outside the EEA is "specifically directed to Spanish territory".

- With regard to Article 158b(6) of the Act on Intellectual Property as amended by the draft Bill, the Commission would like to invite the Spanish authorities to clarify the reasons for setting the minimum level of a fine at EUR 30.000.

- The Commission would like to invite the Spanish authorities to clarify whether the Intellectual Property Commission will be able to require the information society services provider to end an infringement or remove the illicit content without any prior court decision, except in cases where the information in question was not removed voluntarily and the participation of the intermediary information society services provider is needed.

In addition, does the Spanish Bill provide for a possibility of a full review (as opposed to the procedural review) of the resolution of the Intellectual Property Commission pertaining to illegality of content (resolution envisaged by Article 158b(4) of the Act on Intellectual Property as amended by the draft Bill)?

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