

Message 202

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Forwarding of the response of the Member State notifying a draft (Spain) to comments (8.2) of Commission.

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4. 2013/0244/E - SERV60

5. -

6. Regarding the observations submitted by the European Commission pursuant to Article 8(2) of Directive 98/34/EC on the draft bill amending the revised text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of 12 April, and of Law 1/2000, of 7 January, on Civil Procedure, we wish it to be known that the Council of Ministers, having carried out the mandatory procedures, at its session held on 14 February 2014, submitted the text to the Spanish Parliament, as the Bill amending the Revised Text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of 12 April, and Law 1/2000, of 7 January, of Civil Procedure (Official Gazette of the Spanish Parliament of 21 February 2014), which is currently under discussion by the parliamentary groups of the Spanish Lower House.

With regard to the observations issued by the European Commission, the Spanish authorities would like to submit the following considerations:

1.- Transfer of rights to the audio recording producer.

Firstly, the observations of the European Commission seek to clarify the concept of a "sufficient number of copies", which figures in the first paragraph of Article 110 bis, section 1 of the Revised Text of the Law on Intellectual

Property, approved by Royal Legislative Decree 1/1996, of 12 April (hereafter: TRLPI) in the version proposed by the Draft Bill.

Although it should be noted that none of the parties interested in the Draft Bill have requested the revision of the concept of a "sufficient number of copies" during the public information procedure to which the text was submitted between 22 March and 17 April 2013, following the observation of the European Commission, the draft has been amended to read as follows:

"1. If, fifty years from the date of the lawful publication of the audio recording or, where no publication has taken place, fifty years from the date of its lawful communication to the public, the audio recording producer does not offer enough copies for sale to reasonably meet estimated public demand in accordance with the nature and purpose of the audio recording, or if the audio recording is not made available to the public in the manner established in Article 20.2.(i), the performer may terminate the contract which transferred the rights to the recording of his or her interpretation or performance to the audio recording producer."

This aims to establish criteria to determine whether a sufficient number of copies have been physically put up for sale, which is important in order to verify whether the unilateral termination of the contract by the performer is lawful.

Accordingly, the criterion has been chosen in accordance with the criterion under Article 4 TRLPI regarding the number of copies considered sufficient to determine whether a work has been published. In this context, "publication constitutes the dissemination by making available to the public a number of copies of the work which reasonably meets the estimated public demand in accordance with its nature and purpose". This wording comes from Article 3.3 of the Berne Convention, which establishes that "[T]he expression 'published works' means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work".

2.- Private copying exception and fair compensation:

Before answering the request for clarification and explanation regarding the various limits of the future regulation on fair compensation for private copying in the Bill amending the Revised Text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of 12 April, and of Law 1/2000, of 7 January, of Civil Procedure, (hereafter: "the Bill"), it should be noted that the text that was analysed by the services of the European Commission has undergone amendments to its contents following the observations made by the Commission and various national advisory bodies. Although the new wording resolves - partly in some cases - some of the concerns raised by the questions submitted and the text, as previously mentioned, is currently the subject of negotiations between parliamentary groups in the Spanish Lower House, Article 25 of that text is reproduced below, in the version of the Bill which was submitted to the highest national consultative body, the Council of State, for its due consideration.

"Article 25. Fair compensation for private copying.

1. The reproduction of works distributed as books or publications which are for these purposes assimilated in regulation, and of audio recordings, video recordings or other audio, visual or audio-visual copies made using non-typographical technical devices or instruments, exclusively for their private use, not for professional or business use, and for ends that are neither directly nor indirectly commercial, in accordance with Article 31, sections 2 and 3, shall incur a single, fair compensation for each of the three types of copy mentioned above. Such compensation, in line with the General State Budget, is intended to compensate the intellectual property rights forgone under the legal private copying limitation.

2. Compensation shall be paid to the authors of the works indicated in the previous section, which are publicly exploited using one of the methods mentioned in that section, and, in relevant cases and types of reproduction, to the editors, audio recording and video recording producers and performers whose performances were recorded on those audio recordings and video recordings. This right cannot be waived by authors, performing artists or performers.

3. The procedure to determine the amount of this compensation, which is calculated on the basis of the prejudice caused to the beneficiaries listed in section 2, in accordance with the private copying limitation established in Article 31, sections 2 and 3, and which will be included in the General State Budget on an annual basis, as well as the procedure for the payment of such compensation, which will be effected through management entities, shall comply with the regulations.

4. In order to establish the amount of fair compensation, the following shall not be considered copies for private use:

- a) copies recorded using digital copying equipment, devices or media acquired by legal persons, that have not been made available, in law or in fact, to private users and that are clearly reserved for uses other than private copying;
- b) copies recorded by persons with prior authorisation to carry out the corresponding reproduction of the protected works and performances in the exercise of their activities, under the terms of said authorisation;
- c) copies obtained of works or performances which are distributed through effective technological measures which prevent or limit the recording of private copies, where the copyright holder has not authorised the copy.

5. No obligation for compensation may arise from regulated situations in which prejudice to the rightholder is minimal. In no event may an obligation for compensation arise from the single and temporary recording by individuals for their personal use of works to which they have obtained access through lawful means of image, sound or audio-visual broadcasting, thereby enabling them to watch or listen to them at a more convenient time.

6. In determining the amount due in fair compensation, consideration may be given, in accordance with the regulations, to whether the rightholders have used effective technological measures to prevent or limit private copying, or to limit the number of private copies.”

In addition, and having taken the observations made by the Council of State into consideration, the version of the text in the Bill, which is currently under examination by the Lower House of the Spanish Parliament and is the subject of negotiations between the Parliamentary Groups, is reproduced below:

“Article 25. Fair compensation for private copying.

1. The reproduction of works distributed as books or publications which are for these purposes assimilated in regulation, and of audio recordings, video recordings or other sound, visual or audio-visual copies made using non-typographical technical devices or instruments, exclusively for their private use, not for professional or commercial use, and for ends that are neither directly nor indirectly commercial, in accordance with Article 31, sections 2 and 3, shall incur a single, fair compensation for each of the three types of copy mentioned above. Such compensation, in line with the General State Budget, is intended to compensate the intellectual property rights forgone under the legal private copying limitation.

2. Compensation shall be paid to the authors of the works indicated in the previous section, which are publicly exploited using one of the methods mentioned in that section, and, in relevant cases and types of reproduction, to the editors, audio recording and video recording producers and performers whose performances have been recorded on those audio recordings and video recordings. This right cannot be waived by authors, performing artists or performers.

3. The procedure to determine the amount of this compensation, which is calculated on the basis of the prejudice caused to the beneficiaries listed in section 2, in accordance with the private copying limitation established in Article 31, sections 2 and 3, and which will be included in the General State Budget on an annual basis, as well as the procedure for the payment of such compensation, which will be effected through management entities, shall comply with the regulations.

4. In order to establish the amount of fair compensation, the following shall not be considered copies for private use:

- a) copies recorded using digital copying equipment, devices or media, acquired by legal persons, that have not been made available, in law or in fact, to private users and that are clearly reserved for uses other than private copying;
- b) copies recorded by persons with prior authorisation to carry out the corresponding reproduction of the protected works and performances in the exercise of their activities, under the terms of said authorisation.

5. No obligation of compensation may arise from regulated situations in which prejudice to the rightholder is minimal. In no event may an obligation for compensation arise from the single and temporary recording by individuals for their personal use of works to which they have obtained access through lawful means of image, sound or audio-visual broadcasting, thereby enabling them to watch or listen to them at a more convenient time.

6. In determining the amount due in fair compensation, consideration may be given, in accordance with the regulations, to whether the rightholders have used effective technological measures to prevent or limit private copying, or to limit the number of private copies.”

In accordance with this version, the various questions submitted by the European Commission regarding this article in its current version in the Bill are addressed below:

- Regarding the criteria which determine that the situations described in Article 25, section 5 of the Law on Intellectual Property, in the version proposed by the Bill, are considered to cause minimal damage and do not give rise to an obligation of payment:

The Bill refers to a further regulatory provision (Article 25.5 TRLPI in the wording proposed in the Bill), although it goes on to outline a situation which, in any event, causes minimal prejudice and therefore does not give rise to an obligation of fair compensation. This situation is the single and temporary reproduction by individuals for their personal use of works to which they have obtained access through lawful means of image, sound or audio-visual broadcasting enabling them to watch or listen to these at a more convenient time. Private copying is not subject to fair compensation where it is understood that it does not have any real capacity to substitute the legal acquisition of the protected works or performances that are copied and, therefore, either do not cause prejudice, or if they do, it is of such little consequence as to be considered minimal. This situation is conditional on the functional nature of such an action. Watching or listening to works or performances after they have been broadcast is only permitted for the user's enjoyment at a more convenient time or using a more convenient device.

In order to achieve greater clarity and legal certainty, the aforementioned Bill seeks to determine the meaning of lawful access to the work for its reproduction (Article 31.2.b TRLPI in the wording proposed by the Bill), in such a way as to define the cases of lawful access and establish those situations which, falling within the scope of lawful access, cause no or cause minimal prejudice. With regard to this last aspect, it must be concluded that in the situation referred to in the aforementioned Article 25.5, it is understood that the copy does not prejudice the rightholder given that no profits are lost, since neither the fact of watching or listening to the work after the broadcast substitute a new licence agreement.

- Regarding the criteria which determine, in Article 25, section 5, that only “the single and temporary reproduction of works broadcast by public broadcasting organisations (as opposed to works broadcast by all broadcasting organisations) causes minimal damage and, therefore, does not give rise to any obligation of payment:

As already indicated above, the new version of Article 25, section 5 TRLPI in the Bill replaces “works broadcast by public radio-broadcasting organisations” with “works to which they have obtained access through lawful means of image, sound or audio-visual broadcasting” thereby removing any reference to the nature of the body which broadcasts the work subject to private copying, whereby it is understood that it is no longer necessary to provide an explanation regarding a version that has been amended in accordance with the Commission’s observations.

- Regarding the date of the adoption of the regulations to determine situations in which prejudice to the rightholder is minimal and how the Spanish authorities intend to guarantee that its adoption will not affect the system for the calculation and payment of fair compensation in accordance with Royal Decree 1657/2012, of 7 December:

The Bill (in the proposed version of Article 25.5 TRLPI) does not only recognise cases of minimal damage, as established under preambular paragraph 35 of Directive 2001/29/EC (“in certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise”), but it goes further and establishes a legal provision under the umbrella concept of minimal prejudice, to contribute to defining the concept.

However, the Bill provides for further regulation (abovementioned Article 25.5) to address situations in which prejudice to the rightholder is minimal and does not give rise to an obligation of compensation. This refers to a future regulation, which would provide for the possibility of defining the legal concept, either by describing the situations established in the law, or by regulating other situations that fall under the concept of minimal prejudice, which will not be possible until the current Bill has been approved by the Spanish Parliament.

Regarding the timeline for this regulatory development, it is not possible to provide an exact date since the text is still at the preparatory stage, as indicated above. Until Parliament approves the current Bill, the provision in question cannot be developed.

Lastly, we consider that it is necessary to convey the idea that the approval of the current Bill, and the future Law amending the revised text of the Law on Intellectual Property and the Law of Civil Procedure, will transfer in total security the amendment both in law and through regulation of certain provisions of the abovementioned Royal Decree 1657/2012, of 7 December, as a natural consequence of the provisions relating to private copying as regards the requirements for legal access and the considerations regarding the calculation of fair compensation.

- With regard to reproduction by individuals for private purposes (in other words, acts of private copying) under the private copying exception (according to the proposed legislation) which would give rise to fair compensation:

In the current wording of the Bill, acts of private copying are regulated as a limitation to the right to reproduction and are therefore protected through the provision of fair compensation, as established in Article 5(2)(b) of the abovementioned Directive 2001/29/EC.

In concrete terms, acts of private copying which fall within the scope of the private copying exception could include situations in which a private copy is made of a work that has been accessed lawfully, such as a work contained on a purchased storage device; copies of works containing technological measures limiting the number of copies that can be made, provided that the copies are included in the number of copies permitted; or the reproduction of works that incorporate measures that prevent their reproduction, where these have been lifted under Article 161.1(a) and 4 of the Revised Text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of 12 April, and copies made through lawful acts of public communication which imply the broadcasting of images, sounds or the simultaneous broadcasting of both.

3.- The collective management of rights.

Regarding collective management of rights, the question is whether the authorisation requirement will also apply to institutions established outside Spain which manage rights in Spain, and if this is the case, the European Commission wishes to know how the Spanish authorities will justify the requirement of incorporation, which would be introduced de facto in the draft Bill, taking into consideration the provisions of Directive 2006/123/EC, of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36), and in particular its Article 16.

In this regard, it should be noted that the current wording of Article 147 TRLPI is a result of the amendment under

Law 25/2009, of 22 December, amending various laws for their adjustment to the Law on free access to service activities and their exercise, which was the last regulation which partially incorporated the aforementioned Directive 2006/123/EC into Spanish law.

This amendment of the article removed the obligation on entities without an establishment in Spain to obtain an appropriate authorisation from the then Ministry of Culture to “manage exploitation rights or other intellectual property rights in their own name or for third parties, for and in the interest of various authors or other intellectual property rightholders”, while it maintained the obligation of obtaining an authorisation for the collective management of intellectual property rights, for entities with a permanent establishment, whether they performed “obligatory” or “voluntary” collective management services.

,The contents of Article 147 in the draft Bill submitted to the European Commission, which now appears as Article 148, has undergone changes, but of a different nature to the interpretation made by the Commission. The change differs in that it makes the requirement of an administrative authorisation apply only to legally established entities with an establishment in Spain, when they intend to manage rights subject to “obligatory” collective management.

The intention of this amendment was to make the voluntary collective management of intellectual property rights more flexible, even though Article 17(11) of Directive 2006/123/EC, made it possible to maintain the requirement for entities that had an establishment in Spain of obtaining the corresponding authorisation for the voluntary collective management of rights, a decision was taken to withdraw this requirement in the future. Removing this authorisation, on the other hand, resulted in the general declaration of the voluntary provision of collective management services for intellectual property rights, contained in the version of Article 147 TRLPI proposed by the draft Bill. However, as indicated, the current text of the Bill which is currently before Parliament, has removed the possibility of amending Articles 147 and 148 TRLPI, whereby these would, for the time being, remain as they currently stand, following the amendment of the TRLPI under the abovementioned Law 25/2009, of 22 December:

“Article 147 Requirements

Legally constituted entities which have an establishment in Spain and which intend to provide, in their own name or on behalf of a third party, management services for exploitation rights or other intellectual property rights, for and in the interest of various authors or other intellectual property rightholders, must obtain the appropriate authorisation from the Ministry of Culture, with a view to guaranteeing an adequate level of protection of intellectual property. This authorisation must be published in the ‘Official State Gazette’.

These entities, in order to guarantee the protection of intellectual property, must be not for profit and, pursuant to the authorisation, may exercise the intellectual property rights entrusted to their management and will have the rights and obligations established in this Title.”

“Article 148 Authorisation conditions

A. The authorisation outlined in the previous article shall only be granted if the corresponding application is accompanied with documentation which provides evidence that the entity meets the following conditions:

- a) That the statutes of the applicant meet the requirements established in this Title.
- b) That the information provided indicates that the applicant meet the conditions required to guarantee the effective administration of the rights which are going to be entrusted to its management throughout the territory of Spain.
- c) That the authorisation promotes the general interests of the protection of intellectual property.

B. In order to evaluate whether the conditions set out in paragraphs (b) and (c) of the preceding paragraphs are met, the following criteria will be taken into particular consideration: the applicant’s capacity to provide a viable management of the rights entrusted; whether its statutes and material resources are suitable for providing this service, the potential effectiveness of its management abroad, with particular attention to the overriding reasons of public interest which the protection of intellectual property serves.

C. The authorisation shall be understood to have been granted if no notification is made to the contrary, within a period of three months following the presentation of the application.”

4.- Enforcement of intellectual property rights.

The various questions submitted by the European Commission are answered and commented on below:

- Regarding the regulatory framework on data protection: Organic Law 15/1999, of 13 December on Data Protection (LOPD), applies to any data processing carried out by the second section of the Intellectual Property Commission (CPI). The safeguards are the general safeguards established in the LOPD and the implementing regulations, except for cases in which a legal authorisation is required to obtain personal data, where provisions are made for prior judicial supervision. The Spanish Data Protection Agency (AEPD) was consulted during the preparation of the Bill and due consideration was given to its observations. An additional section 9 has been included in Article 158 ter TRLPI in the version proposed as the Bill, clarifying that all the activities of the Second Section of the CPI are subject to the LOPD.

- Notion of “providers of information society services that directly violate intellectual property rights”. This notion refers to those providers of information society services, defined under Directive 2000/31/EC and Law 34/2002, of 11 July, which usurp any of the exclusive rights reserved to rightholders under the Law on Intellectual Property. The qualifier “directly” (Article 158 TRLPI in the version proposed by the Bill) has been deleted, considering it to be redundant.

- The notion of “sufficient links to Spain”. This is a concept that already appears in the relevant regulations in force regarding the allocation of domain names under “.es” and it refers to the existence of links or relations with Spain and in particular with the Spanish market. However, in the final version (Article 158 ter TRLPI, in the wording proposed by the Bill) this has been deleted. Regarding the possible obligations arising from the provision of an intermediation service to guarantee the effectiveness of the measure to bring the situation into line with the law, the regulations in force in Spain require that such measures be objective, proportionate and non-discriminatory (Article 11 of Law 34/2002, of 11 July, on information society and e-commerce services).

- Enforcement of section 2, letter (B), of Article 158 ter. The conditions required to establish the liability of a sophisticated content localisation service ensure that no intermediation service that limits itself to providing a technical, neutral or passive service may be considered “responsible” for infringing the safeguards of intellectual property rights in a digital environment. Therefore, it is highly improbable that an Internet service provider may be considered responsible of the violation of section 2 letter (B) of Article 158 TRLPI in the wording proposed by the Bill, because in general it shall not meet any of the conditions established under said provision.

- Relation to Law 34/2002, of 11 July. The Bill strictly complies with the liability limitation regime established in the aforementioned Law 34/2002, of 11 July, and therefore, with the regime provided under Directive 2000/31/EC. In this regard, the aforementioned conditions, established in proposed Article 158, section 2, letter (B) TRLPI, are in line with the jurisprudence of the Court of Justice of the European Union on the interpretation of Articles 12 to 15 of said Directive. Indeed, section V of the Preamble of the Bill expressly indicates that it does not affect the limitations of liability established in Articles 14 to 17 of Law 34/2002, of 11 July.

- Determination of “significant participation”. Although this requirement, contained in the Bill, eliminates the term “participation”, it intends to exclude from the scope of the procedure one-off or negligible actions which, nevertheless, may on occasion contribute or participate in an infringement committed by a third party. The Bill (proposed Article 158 ter TRLPI) mentions the following factors for the consideration of significance: the Spanish audience ratings of the service which participates in the infringement or the volume of protected works or performances that such participation facilitates the infringement of. The current wording of the Bill simplifies and improves the text.

- The notion of “facilitating, specifically and on mass, the localisation of works and performances which are thereby made available without authorisation”. The current wording of the Bill simplifies and improves the text, ensuring that prosecuted conducts are significant, active, are not neutral and do not include cases of simple technical intermediation. The required knowledge factor must be evaluated in accordance with existing jurisprudence, especially that of the Court of Justice of the European Union on the interpretation of Articles 12 and 15 of Directive 2000/31/EC. Therefore, a technical host which merely offers the technical means to use localisation tools would, in principle, not meet this condition.

- Article 158 ter TRLPI, in the wording proposed by the Bill applies, as explained above, both to those who infringe intellectual property rights by usurping said rights as well as to providers that localise qualified contents meeting the conditions established in section 2, letter (B) of said Article 158 ter.

- Section 4 of Article 158 ter TRLPI in the wording proposed by the Bill applies to those considered “liable” for an infringement of this procedure in agreement with the provisions in section 2 of Article 158 ter, in other words, it applies both to those who infringe intellectual property rights and to providers who localize qualified contents which meet the conditions established in section 2, letter (B) of Article 158 ter. As indicated above, an intermediation service which is limited to a technical, neutral and passive service may not be considered “liable”. Regarding platforms containing user-generated contents, the Bill does not make any specific provisions as to whether these meet the conditions established in section 2, letter (B), of Article 158 ter, a question which must be considered on a case-by-case basis.

- Article 158 does not provide for the possibility of interrupting the final user’s access to the Internet. The Bill only provides for the possibility of collaboration with the Internet service providers to block access to specific contents or internet pages if the persons responsible for them have not removed offending contents once the CPI has requested them to do so. The Bill expressly indicates (proposed section 5 of Article 158 TRLPI) that specific justification must be provided for this measure, with due consideration of the effectiveness of other measures available to the CPI.

- Reference to “specifically directed at the territory of Spain”. This notion, contained in Article 4 of Law 34/2002, of 11 July, shall be interpreted in accordance with the jurisprudence of the Court of Justice of the European Union in similar situations (among others C-585/08 and C-144/09).

- The amount of the fine established in Article 158, section 6 TRLPI in the version of the Bill. The amount is

equivalent to the amount established for similar violations in cases where there is a failure to cooperate with the authorities, as for example in Article 38.3(g) of Law 34/2002, of 11 July, in connection with Article 39.1(b) of said Law. It should be recalled that Article 158, section 6 TRLPI, in the version proposed by the Bill, sanctions the reiterated failure to cooperate with the CPI by persons responsible for the violation of rights, manifested by the failure to comply with the requirement to withdraw offending contents on two or more occasions.

- Competence of the CPI to require the withdrawal of contents made available unlawfully. The Bill, maintaining the current regulations of Law 2/2011, of 4 March, on the Sustainable Economy, in this regard, establishes that the CPI may itself require, without a legal authorisation, the withdrawal of contents which, according to the relevant administrative adversarial procedure, are considered to have been made available unlawfully. In the event of failure to remove these voluntarily, the CPI must obtain the prior judicial authorisation foreseen for the restoration of legality through the collaboration of the providers of intermediation, electronic payment and publicity services.
- Review of the decisions of the CPI. All the decisions of the CPI, as administrative acts, may be reviewed by the courts, through administrative proceedings. Therefore, the rulings issued under Article 158, section 4 TRLPI may be reviewed in their entirety before said judicial bodies.

European Commission

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