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The Reform of the Spanish Intellectual Property Law

By Ainhoa Veiga

On November 4th, 2014, the Spanish Parliament passed Law 21/2014, amending the 1996 Consolidated Restated Text of the Spanish Intellectual Property Law (the "IP Reform").1 The IP Reform implements Directive 2011/77/EU, of 27 September 2011, which extends the term of the protection of phonograms, and Directive 2012/28/EU, of 25 October 2013, allowing libraries, museums and public archives to digitise and upload orphan works in their collections.

While the implementation of these directives do not raise any particular comments (it is no more than a verbatim transposition), the IP Reform has also introduced important changes, some of them controversial: namely, the unofficially named "Google tax" to be applied primarily to news aggregators such as "Google news", additional limitations on private copying and the compensation for private copies payable on the state budget.

The IP Reform comes with a short-term vision of immediately accommodating urgent demands from particular sectors (e.g., the Spanish news publishing industry), and of immediately addressing the need to strengthen the existing instruments for the protection of works in the information society (in particular, by enacting more effective measures and fines against the linking to allegedly infringing content). Further, Additional Provision Fourth of the IP Reform mandates the Government to undertake preliminary works, within a year from its entry into force, aimed at preparing an integral reform of the Intellectual Property Law so that it is entirely adapted to the needs and opportunities of the information and knowledge society. With some exceptions, the IP Reform shall enter into force on 1 January 2015.

Below, we just address two of the main, and likely most controversial, amendments introduced by the IP Reform: (i) the new features of the private copying exception and compensation; and (ii) the "Google Tax" on online aggregators of fragments of information, opinion and entertainment published by online newspapers and other websites periodically updated.

1. Limitations to the private copying exception and compensation on the State budget.

Like in most member states of the EU, Spanish law has long provided for an exception for private copying (e.g., reproduction made for private uses) and for a compensation to rightsholders under the assumption that private copying implies a loss of revenues for them.2

Until 2012, under the Spanish Intellectual Property Law, this compensation consisted of a levy charged on the purchase of blank media and equipment,3 but with the digital innovation, the levies policies were put into question. Thus, at the end of 2011, the Government decided to replace the existing levies system and made them payable to the rightsholders, through the corresponding collective management entities, on the State budget.4

Before the final approval of the IP Reform by Parliament, in September 2014, the Supreme Court (Administrative Chamber) has put into question this system by seeking from the European Court of Justice a preliminary ruling on the compatibility of the compensation through the State budget with Directive 2001/29/EC.5 Notwithstanding, the IP Reform has upheld this compensation system by which the total amount of the compensation is to be decided each year by the government after a calculation procedure based on the harm actually caused to rightsholders as a result of reproduction by individuals from published works made from a legal source.

In order to fine tune this compensation procedure from a legal perspective and, implicitly, to justify a dramatic cut in the amount of private copying levies, the IP Reform has restricted the scope of the exception for private copying as follows:

– A private copy will only be legal provided (i) the copy is made by

an individual for his/her own private use, expressly excluding copies made for professional purposes; (ii) the copy is made from works legitimately acquired6 by virtue of a legal sale or public communication, excluding rented and second hand copies; (iii) the copy obtained cannot be given a collective or lucrative use.

– Data bases and computer software are expressly excluded as well as works which have been made available to the public so that any person may access them from a place and at a time individually chosen.

2. The "Google Tax" to news aggregators.

Providers of electronic services which make available to the public non-significant fragments of "*information, opinion or entertainment*" published in "*periodical publications*" (e.g., newspapers, magazines) or in "*websites periodically updated*" (potentially very broad) will not need the rightsholders' authorisation but will have to pay a fair compensation to the publishers and any other righstholders. The fair compensation, which cannot be waived by the rightsholders, is to be collected by the corresponding collective management entities for which the relevant stakeholders will have to reach an agreement on the amount of the compensation and its calculation. If they don't reach an agreement within eight months the relevant amounts will be fixed by an administrative body.

It is to be noted that this legal authorisation to aggregate fragments does not extend to images or photographs for which the rightsholders' authorization will be required.

The creation of this "tax" leaves a number of issues unclear: particularly the length required for the relevant fragments to be considered "*non-significant*"; or whether the content first published under "creative commons" licenses shall be subjected to the "non-waivable" fair compensation right.

On the other hand, search engines without a specific commercial purpose that provide results to searched terms included in the "*information, opinion or entertainment*" content and that provide the links to the relevant sources are excluded from the obligation to pay the fair compensation.

This new "tax" will mainly affect aggregators that undertake the indexing of relevant content in order to facilitate access to it by driving the users to the source of the content.

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Ainhoa has also extensive experience in mergers and acquisitions, unfair competition and on intellectual property matters.

1 Following the continental European tradition, intellectual property comprises the legal rights resulting from intellectual activity in the literary, artistic and scientific fields. Intellectual property in the strict sense excludes patents and trademarks which are referred to under the heading of "industrial property". Thus, the object of Intellectual Property are the original works in the literary, artistic and scientific field such as: literary works, musical composition, audiovisual works, theatrical works, plastic works (e.g., sculptures, paintings, graphics, etc.), architecture works, maps, photographs and computer software.
2 Article 5.2.b) of Directive 2001/29/CE 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.
3 The levies were charged by the collective management entities to manufacturers and importers of copying devices. These levies were ultimately passed on to the end-users.
4 Additional Provision Tenth of Royal Decree-Law 20/2011, followed up by Royal Decree 1657/2012 implementing the new compensation system for acts of private copying aimed at complying with the regulatory framework and case-law of the European Union after the ruling of the CJEU in the *Pawadan* case (Judgment of 21 October 2010, Case C- 467/08).
5 Case 34/2013 filed by collecting societies "Entidad de Gestión de Derechos de los Productores Audiovisuales", "Derechos de Autor de Medios Audiovisuales" y "Entidad de Gestión de Artistas Plásticos" against Royal Decree 1657/2012.
6 In line with recent case-law from the European Court of Justice in Case C-435/12, *ACI Adam*.