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Your ref. 11.05.2015 No 4-3-86-15

Our ref. 05.06.2015 No 9-2/150689/1502561

Opinion in Constitutional Review Case No 3-4-1-22-15 initiated at the request of Tallinn Circuit Court

Dear Chief Justice of the Supreme Court,

You requested the opinion of the Chancellor of Justice about the constitutionality of subsection 3 (1) of Government of the Republic Regulation No 14 of 17 January 2006 'Procedure for Payment of a Charge as Compensation for Use for Private Purposes of Audiovisual Works and Sound Recordings of Works, List of Recording Devices and Storage Media and Procedure for Application for Remuneration for Development of Music and Film Culture and Financing Training and Research Programmes or Use for Other Analogous Principles' (hereafter Regulation No 14). With its interlocutory judgment in Administrative Case No 3-13-366, Tallinn Circuit Court decided not to apply subsection 3 (1) of Regulation No 14 in the part in which it does not guarantee that the equitable remuneration stipulated in subsection 26 (1) of the [Copyright Act](#) is obtained, due to its incompatibility with constitutionality.

Having analysed this issue, the Chancellor of Justice found that:

Subsection 3 (1) of Government of the Republic Regulation No 14 of 17 January 2006 is not contrary to the Constitution.

The reasons for the opinion of the Chancellor of Justice are given below. The Chancellor of Justice does not request the resolution of the case in oral procedure.

1. The contested issue is not about contradiction with European Union law, but possible incompatibility with the [Constitution](#). The principle of fair compensation set forth in Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive) is included in subsection 26 (1) of the Copyright Act. Article 5(2)(b) of the Information Society Directive leaves Member States that have provided for exceptions or limitations to reproduction for private use a broad margin of discretion in the determination of the format of fair compensation and the methods for its calculation.

2. Therefore, it is necessary to assess in this case whether Regulation No 14 violates the right to fair compensation set forth in subsection 26 (1) of the Copyright Act and is therefore incompatible with the Constitution. If Regulation No 14 is not incompatible with the Copyright Act, it is

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necessary to assess additionally whether the regulation could be unconstitutional due to its incompatibility with § 32 of the Constitution.

3. Protection of the personal and proprietary rights of authors is stipulated in § 39 of the Constitution, which also extends to phonogram producers and performers of works (hereinafter referred to as performer) via international treaties binding on Estonia.¹ The author, phonogram producer and performer have the exclusive right to use their works in any manner whatsoever and to decide on whether to permit or prohibit its use. Considering the international treaties binding on Estonia, any limitations of the proprietary rights of authors, phonogram producers and performers must correspond to the three-step test. According to this test, states may establish limitations or make exceptions only in certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.² Compliance with the conditions of the three-step test does not necessarily presume that compensation is paid in order to permit the reproduction of audiovisual works or sound recordings of works for private use.³ However, payment of compensation may help to guarantee that the given exception to the exclusive right of reproduction does not unreasonably prejudice the interests of the rights holders.

4. § 32 of the Constitution does not stipulate either that authors, phonogram producers and performers have to be paid for the private use of audiovisual works or sound recordings of works. Since permitting the reproduction of works and sound recordings for private use limits the proprietary rights of authors, phonogram producers or performers, more specifically the exclusive right to decide on the reproduction of the works or recordings, this activity may be considered a limitation of ownership for the purposes of subsection 32 (2) of the Constitution, whereby the Constitution does not expressly require the payment of compensation.

5. Irrespective of the fact that the Constitution does not directly stipulate the obligation to pay compensation to the author, phonogram producer and performer if the exception of reproduction for private use is established, the legislator may still decide to demand payment of such compensation. Thus, the legislator has prescribed in subsection 26 (1) of the Copyright Act the possibility to reproduce audiovisual works or sound recordings for private use without the authorisation of the author, and stipulated the right of the author, phonogram producer and performer to receive fair remuneration or compensation for such activity.

6. Although damage due to private use is caused to an author, phonogram producer and performer by an individual who copies a work or a sound recording of the work, it is impossible to measure the extent of the damages caused in each single case and collect remuneration for it, which is why money for payment of fair remuneration is collected on recording devices and storage media. For this purpose, the legislator authorises the Government of the Republic to establish a list of recording devices and storage media in clause 27 (14) 1) of the Copyright Act. Although a certain amount of recording devices and storage media are listed in subsection 3 (1) of Regulation No 14, there is no disputing the fact that this list does not cover all modern devices with which reproduction is technically possible.

¹ [World Intellectual Property Organization Performances and Phonograms Treaty](#).

² Article 9(2) of the [Berne Convention for the Protection of Literary and Artistic Works](#); Article 13 of the [Agreement on Trade-Related Aspects of Intellectual Property Rights](#); Article 10 of the [World Intellectual Property Organization Copyright Treaty](#), Article 16 of the World Intellectual Property Organization Performances and Phonograms Treaty.

³ Specialist literature explains that the purpose of the three-step test is to provide the option of limitation of exclusive rights without the relevant compensation. – S. Karapapa. Private copying: the scope of user freedom in EU digital copyright. London; New York, 2012, pp 115-116.

7. Regulation No 14 would be incompatible with law if we interpreted the authorisation given to the issuer of the regulation in such a manner that the list must cover all of the recording devices and storage media accessible to individuals with which audiovisual works and sound recordings of works can be reproduced. In the case of such an interpretation, it would be presumed that the sale of each recording device or storage medium would inevitably lead to the use of the works, i.e. the purchase of any recording devices would be made equal to the use of the author's works. It should also be presumed in such a case that the regulation becomes incompatible with law as soon as a new type of recording device appears on the market. As already said, the sales volumes of recording devices and storage media are used to indirectly measure the infringement of the rights of authors, phonogram producers and performers. It is up to the legislator to decide exactly how to measure the use of the works of authors, provided that the remuneration paid to the author generally corresponds to actual use. The interpretation that regards the purchase of recording devices as use, not as a way of measuring use, fails to take account of the objective named by the legislator in subsection 26 (1) and clause 27 (14) 1) of the Copyright Act – to guarantee fair remuneration in order to compensate for the private use of works and sound recordings of works by collecting 3% of the value of goods for recording devices and 8% for each storage medium.⁴

8. The legislator has permitted the private use of audiovisual works and sound recordings of works since the adoption of the Copyright Act (11 November 1992), and stipulated the obligation to pay fair remuneration for such use. However, the legislator has been bound by European Union law in this issue since 1 May 2004. Article 5(2)(b) of the Information Society Directive requires states which have decided in favour of the exception of private use to pay fair compensation to the rights holders. However, the directive leaves it up to the legislator of each Member State to decide on the mechanism it uses to collect money for payment of fair compensation and how this is divided by the rights holders.

9. The Information Society Directive and the case law of the European Court of Justice that furnishes the directive give rise to the important principle according to which fair compensation is closely connected to the possible damage caused to the rights holders by the reproduction of protected works and sound recordings of works for private use.⁵ The directive also stipulates that in certain cases, the damage caused by reproduction for private use may be minimal and the obligation to pay compensation may not even arise in such cases.⁶

10. If the limit for fair compensation is the damage that authors, phonogram producers and performers suffer due to the exception of private reproduction, then private reproduction itself borders on reproduction for private use from an illegal source⁷ and reproduction for private use on the basis of a licence.⁸ In other words, the exception of reproduction for private use only covers such reproduction of works or sound recordings of works that an individual has done for their

⁴ The 8% remuneration rate applied in Estonia is the highest among the 32 countries in the world where remuneration is collected as a certain percentage of the sales or import price of a device. – [Stichting de Thuiskopie and World Intellectual Property Organization, International Survey on Private Copying, Law & Practice 2013](#), Table 2.

⁵ Recitals of the [Information Society Directive](#), points 35 and 38; [Judgment of the European Court of Justice in Case No C-467/08](#), paragraphs 39-42.

⁶ Recitals of the Information Society Directive, point 35; [Judgment of the European Court of Justice in Case No C-463/12](#), paragraph 59. As the concept of damage is of fundamental significance in calculating the amount of fair compensation, it is also possible that adding devices to the list whose main function is not reproduction for private use will lead to a situation where the compensation cannot be considered fair, as the users of said devices have not caused damage to rights holders or have only done so minimally (see [Judgment of the European Court of Justice in Case No C-467/08](#), p 53 and [Judgment of the European Court of Justice in Case No C-463/12](#), p 28).

⁷ [Judgment of the European Court of Justice in Case No C-435/12](#), p 56.

⁸ Recitals of the Information Society Directive, p 35.

private use and from a legal source, and which remains outside the licence system.⁹ Defining the scope of application of reproduction for private purposes is important, because the damage caused to authors, phonogram producers and performances and thereby also the size of fair compensation depends on the extent and intensity of such activity.

11. The fairness of the compensation is influenced by whether reproduction for private use today takes place largely with the recording devices and storage media that are not listed in subsection 3 of Government of the Republic Regulation No 14, as well as whether private copying of phonograms has decreased as a whole, e.g. for the reason that works are consumed in different ways. Since there are no studies to demonstrate one or the other, then the Chancellor of Justice is of the opinion that it is impossible to conclude that the only or main cause of the decrease in the compensation paid to authors, phonogram producers and performers is the incompatibility of the list of recording devices and storage media set forth in subsection 3 of Regulation No 14 with modern technology. On the one hand, the scope of application of private copying has not remained untouched by the development of technology, as various possibilities to consume audiovisual works in ways other than copying them for oneself have appeared (incl. streaming channels and saving on a cloud server). On the other hand, it is possible that some authors have also adapted to the information society and started using modern solutions which allow them to control the use and dissemination of their works better. Although technology has developed considerably in the last ten years, this fact alone does not make it possible to conclude that the list of recording devices and storage media in Regulation No 14, which has remained unchanged since 2006, definitely leads to payment of unfair compensation and incompatibility with law and the Constitution.

12. It is a duty of the state to guarantee copyright protection, incl. against the creation of pirate copies and other unlawful use. However, this issue, which is important from the standpoint of fundamental rights, cannot be resolved with the exception of reproduction for private use and the remuneration prescribed for it. The reason for this is that the exception in question applies to the use of works only to an extremely limited extent. If the remuneration was extended to all devices that can be used today for the reproduction of audiovisual works and sound recordings of works, the price of any storage media (memory cards, memory sticks, portable hard drives, etc.) and recording and reproduction devices with built-in storage media (photo and video cameras, computers, smart phones, etc.) would increase as a result (presumably by the rate stipulated in subsection 27 (7) of the Copyright Act, irrespective of the actual use of such devices). At the same time, the implementation of the exception of reproduction for private use and the damage caused by this to authors may have not increased, but instead decreased over the years as a result of changed consumption habits.

13. When compensation loses its connection to the damage caused to rights holders due to this exception, it is no longer compensation for damage, but basically a tax whose collection is not limited to the payment of fair compensation. The legislator has the right to establish taxes pursuant to § 113 of the Constitution. The legislator may establish taxes on products and services. Of course, an analysis must be carried out before a tax is established to avoid non-proportional infringement of fundamental rights. The legislator may also stipulate a scheme on the basis of which the state compensates authors, performers and phonogram producers for any possible damage caused to them as a result of unauthorised reproduction of audiovisual works and the sound recordings of works, incl. downloading from illegal sources. However, the remuneration set forth in subsection 27 (7) of the Copyright Act cannot be interpreted in such a broad manner, as the legislator has stipulated the payment of compensation only within the scope of the exception stipulated in

⁹ It is thereby questionable whether any damage can even emerge as a result of a person making a backup copy of a CD they purchased or transferring the files from the CD to mp3 format.

subsection 26 (1) of the Copyright Act (such a definition also arises from the Information Society Directive). Considering the fact that it's unclear whether the exception in question and the compensation paid for it are still relevant and adequate in the changed environment, it is the legislator that should take steps to explain the possible alternatives and guarantee their applicability in accordance with European Union law and the international treaties that are binding on Estonia.

14. What must be kept in mind here is that due to practical reasons as well as those that arise from the protection of privacy, it is impossible to ascertain the exact extent to which audiovisual works and sound recordings of works are reproduced for private use and how great the damage caused by this to authors, phonogram producers and performers is. There is certainly no way to claim that an author, phonogram producer or manufacturer would have received economic benefits via the exercise of their proprietary rights without the existence of the possibility of private copying. It is therefore inevitable that fair compensation does not fully cover the damage caused to authors, phonogram producers and performers. However, said persons should receive compensation due to private copying to an extent that is not clearly insufficient and therefore unfair. Considering the above, however, it is at present impossible to draw the conclusion that the list of recording devices and storage media established by the Government of the Republic does not guarantee the fair compensation required in subsection 26 (1) of the Copyright Act.

15. The above therefore indicates that Government of the Republic Regulation No 14, section 3 (1) of which lists the recording devices and storage media on which a fee must be paid for private use of audiovisual works and sound recordings of works, is not incompatible with subsection 26 (1) of the Copyright Act in the part in which it guarantees the right to fair compensation for authors, phonogram producers and performers.

16. Having ascertained that Regulation No 14 does now violate the right to fair compensation set forth in subsection 26 (1) of the Copyright Act and is therefore not formally incompatible with the Constitution, it is also necessary to answer the question whether Regulation No 14 could be incompatible with the Constitution. The main question that arises is whether Regulation No 14 violates the fundamental right to property set forth in § 32 of the Constitution. What must be taken into account is that § 32 of the Constitution protects a legal position that already exists, i.e. the precondition for an infringement of § 32 is the existence of a legal position that can be measured in proprietary terms. However, there is no such legal position to be protected in this Case because, as previously mentioned, the Constitution does not place the sale of recording devices in the area of copyright protection. The sales volume of recording devices is rather one possible way of measuring the use of works (which is protected by § 39 of the Constitution). In other words, not listing recording devices and storage media in Regulation No 14 does not constitute an infringement of § 39 of the Constitution, as reproduction must be regarded as the infringement, not the sale of recording devices. This is why the question of the regulation's material incompatibility with the Constitution is irrelevant due to the lack of an infringement.

Yours sincerely,

/digitally signed/

Ülle Madise