

IT LAW NEWSLETTER

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The following document is a summary of the latest news regarding Copyright legislation in Spain.

INTRODUCTION

The development of the new technologies and the incorporation in the so-called Information Society are having an important influence on the configuration of the Spanish Copyright legislation.

One of the main characteristics of the Information Society is ease of public access to more and better information.

There is a potential confrontation between this general access and copyrights as the holders of these rights will not allow for their creations to be included in the national or international information structures unless they are guaranteed that their rights and interests will be protected.

It is in this new environment that the amendment of the Spanish Copyright Act has been approved, not without controversy. We cannot forget that nowadays the IT industry reports enormous benefits and all its players want to protect their share of profits.

ACT 23/2006, OF 7TH OF JULY, MODIFYING THE SPANISH COPYRIGHT ACT, APPROVED BY ROYAL LEGISLATIVE DECREE 1/1996, OF 12TH OF APRIL

This act incorporates into the Spanish legislation 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. The Directive deals with three main areas: reproduction rights, the right of communication and distribution rights. The modifications introduced by the Spanish amendment in relation to these rights are addressed to mention specifically or clarify what was already implied by the Spanish Copyright Act of 1996.

1) Reproduction Rights

The reproduction right, without altering itself in its concept, is clarified by adding all those forms in which it can be shown, thereby avoiding possible doubts about the inclusion of the reproductions made by digital systems.

2) Distribution Right

Likewise the distribution right description is improved and clarified, by means of the express reference to the fact that the holders have recognized this circumscribed distribution right to the exploitation of the work/creation incorporated in a tangible support. Consequently the scope of the right is delimited and thus the confusion that is sometimes created in the network exploitation is avoided.

The new regulation also clarifies that the first sale or another transmission of the ownership of the material support does not imply the extinction of the distribution right, but only the loss of the faculty to authorize or to prevent later sales or transmissions of the ownership of the material support, solely within the territory of the European Union.

3) The right of communication

The most remarkable novelty in the catalogue of rights is represented by the explicit recognition in this law of the interactive availability right, by virtue of which any person can accede to works from the place and at the moment that they chose. It constitutes a modality of the present right of public communication that, considering the ample terms in which the law of 1996 was defined, was already understood to be included in its definition. However, for the sake of clarity and of a greater legal security what it had been established in the European Directive is specifically included: the mere availability of the material facilities necessary to carry out a communication is not equivalent in itself to a communication in the sense of this law. According to it, it is attributed specifically to the authors, to the artists interpreters or executants, the broadcasting organizations and to the producers (of phonograms or audio-visual recordings) an exclusive right on this modality of public communication.

The amendment, therefore, does not alter the traditional concept of the reproduction, distribution and public communication rights, but introduces the new aspects derived from the new context in which the works and the benefits are created.

4) Limitations: Private Copy

The European Directive establishes a list of limits to the above mentioned rights, of which only one is obligatory. Nevertheless, the Directive allows that other limits not included in it could be observed by the different countries.

The Spanish amendment introduces the obligatory limit established in the Directive: exemption of certain provisional reproductions of technical character. This limit is a consequence of the way that the systems of transmission of networks work because in order for the works and creations to be used by the user it is necessary to make a series of provisional *fixings* of technical character. These reproductions are part by itself of the functioning of the network and, therefore, they remain configured as an exception to the reproduction right.

The amendment also improves the way that other limits were defined in the previous Spanish Act. In this sense article 31.2 is especially important; according to it the reproduction can be done without the author's authorisation when it is carried out by a natural person for his/her private use. It must also be a copy of works or creations to which the natural person has legal access and obtained for a non lucrative or collective use.

This authorisation exemption does not apply to electronic data base and software.

5) Digital Canon - Royalty

One of the most important new features is the new regulation of the private use regime. The new regulation maintains the same principles already laid down in the legislation currently in force. These principles refer to the compensation that the manufacturers and importers of equipment, devices and suitable material supports to reproduce protected works must pay to the authors and other copyright holders.

This compensation is known as "canon" and it is a fixed amount that the entities that administer copyrights charge as a compensation for the private use that the consumer is authorised to make of the materials subject to copyrights.

This new regulation responds to the necessity to harmonize the interests of the copyright holders affected by the private use limitation established in article 31,2 of the law, as well as the interests of the distributors of equipment, devices and material supports subjects to the payment of the compensation by private use, and tries to

establish a balanced frame that constitutes a regime to the benefit of all the agents affected and that is adapted to the new social and technological realities of the information society.

The reform of the private copy regime introduces the due differences between the analogical context and the digital one, since the digital private copy can propagate much more and has greater economic impact. Thus, a legal regime is established with enough flexibility to be able to adapt properly to the technological reality that is in constant evolution. For that reason, from the implementation of this law, section 5 of the current article 25 of the Spanish Copyright Act will only be of application to the analogical equipment, devices and material supports.

A new listing of other equipment, digital devices and material supports is added. It establishes the compensation that the subjects are forced to pay, defined in the section 4.a) of mentioned article 25, to the creditors. The computer hard disks are excluded specifically, without necessitating the exclusion of ADSL connections, since these are not, by their nature, equipment, devices, or material supports susceptible to reproduction. They are mere connections, which is the reason why in no case could they be subject to any payment at all.

As a result of this new regulation the price of these products (i.e. CD, DVD, MP3 players, mobile telephones, memory sticks, etc.) will be increased. The technological industry and consumers have protested against the canon, and they state that it is an "indiscriminate fee". The amount of the canon must be negotiated between the industry and the entities that administer copyrights but it will always need the government's approval.

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