

CHAPTER 3

The current Spanish intellectual property regime: The missing government syndrome?*

Carlos Padrós-Reig

Universitat Autònoma de Barcelona, Spain.

carlos.padros@uab.cat

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A b s t r a c t

This chapter explores how several issues relating to the digital copying of artistic works have been delineated by recent court judgments in Spain that declare both the automatic calculation of levies and presumptions regarding the use of electronic devices to be unlawful. The Spanish context has also been one of minimal government involvement in defending the public interest. In 2014 the Intellectual Property Commission (CPI) was modified to ensure that the public interest would be better taken into account in determining economic compensation of collective rights. Furthermore, the private method of fee collection has been eliminated, with compensation for public use of artistic works now included as an item in the General State Budget.

This legislative evolution, in a civil law system based on the calculation of damages and on compensation exclusively for right holders, has arrived to the point of distinguishing between private copying and public reproduction. What is evident is the need to take into account the public interest in meeting the challenge of legally adapting to new societal and consumption patterns.

Keywords

Intellectual property, collective rights, Spanish IP law.

1. Context¹

Conventional wisdom describes the “missing mother syndrome” as a pathology caused by early childhood abandonment or rejection by one’s mother. Growing up without the secure presence of a loving, supportive mother is a devastating experience since the mother is the first and basic caretaker. This metaphor can be applied to the malfunctioning Spanish intellectual property (IP) legal regime, given that the public administration (as represented by the Ministry of Culture) — and government in general — has shown a lack of interest in protecting and defending the public interest in terms of accessing culture and remunerating creators.

In our changing world, the digital consumption of culture raises the matter of public use of songs, audiovisual material and other artistic content. It is not merely a question of prosecuting illegal practices but also one of meeting the challenge of legally adapting to new societal and consumption patterns. Of course we are not so naïve as to think that all digital consumption of culture is well meaning. But the fact that the digital revolution has changed the way we access music, literature and films should be accompanied by a deeper reflection on government’s role in defending the public interest.

Contemporary transformations in how culture is consumed affect not only production and distribution models but also legal institutions and regulations. It would seem logical that regulations governing IP and private copying should be different in the analogue and digital worlds. In other words, any transformation in how culture is accessed and consumed should be reflected in an updated IP regime.

This article explores the legal nature of private copying and the position of the Spanish public administration regarding this matter. It is evident is that not only has the legislation been poorly adapted to the new technologies, but also that the public administration has largely remained on the sidelines. If fair compensation for private copying responds to a public interest (collective remuneration of authors), then the administration needs to play a greater role

1 All translations of excerpts from Spanish regulations, case law and institutional texts and of citations from untranslated works are by Ailish Maher.

in determining both the amount of compensation and how this is collected. In Spain, both efforts to adapt the legislation and the little involvement government regarding IP leave a great deal to be desired.

Generally speaking, legal IP regimes in the 21st century need to deal with two phenomena regarding cultural creation: dematerialization and disintermediation. People can nowadays access artistic works without necessarily using any kind of physical support during consumption and the separation and the steps between production, distribution and consumption of artistic works have all but vanished. What shape should an IP regime adopt in this new context?

Any legal ownership regime governing intellectual and material property is greatly determined by the circumstances of each time and place. It is therefore quite wrong to fossilize the concept of ownership according to standards that no longer exist. In Roman civil law, property was the right to use and abuse what was one's own; in contrast, in the social-democratic state, property is subject to the public interest, which means that antisocial use is prohibited. Since the right to property is a variable and non-absolute social construct, IP should logically be properly adapted to our new technological paradigm.

The same is true of the dividing line between private property and public domain. The subjective constitutional right of access to culture as part of the integral development of persons is considered worthy of protection against the exclusivity of certain forms of trade in culture (e.g., traditional music). Contemplating a painting in a museum cannot be regarded as a taxable act of cultural consumption but as the collective enjoyment of an artistic creation. Similarly, certain types of musical and audiovisual reproduction should also belong to the public cultural domain.

Such notions are contrary to the traditional system for remunerating creators, whose economic rights are traditionally divided into those of an individual nature (contractual) and those of a collective nature (reproduction) acknowledging the creator's rights to fair compensation for private copying. Individual economic rights are easily quantifiable since they are based on a

percentage of sales (royalties). Collective economic rights are calculated — on the basis of an estimate of how many copies may be made (e.g., of a book or CD) — by collecting societies as fees raised through a levy applied to devices that could potentially be used to copy and store protected content. Such a levy, which acts in defence of the public interest, goes beyond any strictly private relationship between creator and consumer. Thus, while individual economic rights are agreed privately, compensation for private copying is a public matter.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society² — along with six other directives — establishes the legal basis for copyright in the European Union (EU). This Directive represents the response of the EU legislator to information technology advances that offer right holders new production and exploitation possibilities while creating new challenges for IP protection, given the risk of unauthorized reproduction, imitation or counterfeiting of protected works and content. The Directive also aims to satisfy a legitimate public interest in terms of accessing protected works and content. It is consequently the outcome of the efforts of the EU legislator to reconcile the interests of right holders and the public interest.

Although Article 5.2.b) of this Directive refers only very briefly to private non-commercial copying, Recital 38 states, in greater detail, that the exception for private copying:

... may include the introduction or continuation of remuneration schemes to compensate for the prejudice to right holders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue

2 Available at: <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:32001L0029&from=EN>

private copying and a distinction should be made in certain respects between them.

Moreover, according to Recital 45, exceptions and limitations regulated by the member states in accordance with this directive:

...should not (...) prevent the definition of contractual relations designed to ensure fair compensation for the right holders insofar as permitted by national law.

But beyond such general statements of the Preamble, Article 5.2 provides that:

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned.

Given the rejection of a proposed draft directive on private copying presented in 1992, EU harmonization has largely been limited to permitting member states to provide for private copying exceptions. Directive 2001/29/EC, however, effectively prevents member states from allowing any private copying exceptions in their legislation unless some form of remuneration is established. This provision particularly affects countries ruled by the Anglo-Saxon tradition of “fair use” or “fair dealing”, which, in specific circumstances, allows private copying with no requirement for remuneration.

Directive 2001/29/EC gives full freedom to member states to determine which devices will be levied (recording equipment, support media or both) and to what extent (according to storage capacity or according to ease of reproduction) and also to determine how to share revenues raised from fees between beneficiaries. There is little EU clarity regarding the issue, however. To cite one of Spain's top legal experts (Garrote, 2007):

Therefore, for example, perfectly consistent with the Directive is a system of fair compensation (such as the French system) that only considers recording media, but not recording equipment. Also possible is the adoption of a system of legal licensing, such that, for each reproduction for private use, a certain sum is paid to the right holders (as happens in Holland with reprographic copying). It is even possible, when a member state recognizes certain marginal cases of private copying (as in the UK and Ireland with broadcast recordings), that, rather than establish a remuneration scheme, maximum limits be set based on an open system of fair use or fair dealing. The only provision member state legislators cannot overrule is Article 5.5 of Directive 2001/29/EC, which definitively binds them. This flexibility in the system established by the Directive also affects the question of who should be the creditors and debtors of fair compensation and whether there should be mandatory collective rights management. Each state itself must identify, in accordance with its national legislation, the right holders who must be compensated for private copying and to what extent. Finally, flexibility also extends to the method of setting fair compensation. This can be done directly by law (as has been done in Germany, Italy and Portugal) or according to general legal guidelines and a specialized administrative body entrusted with the tasks of fixing the fees payable by creditors and deciding the supports and/or recording equipment subject to compensation (as in France). The matter could also be delegated to an arbitration committee of independent experts or could simply be left to specific agreements between societies representing debtors and creditors. Finally, also possible is a mix of all

these procedures, distinguishing between analogue and digital environments, as has been done in Spain.

While acknowledging that recitals are not the core part of a legal text, there is little doubt regarding their interpretative value in Directive 2001/29/EC, in that they shed more light on the matter in hand. For instance, Recital 35 states:

In certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the right holders resulting from the law in question. In cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this directive. In certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.

Against this background of EU regulation, the Spanish system of IP protection is in a state of constant flux as it seeks, in a new technological context, to strike a social and economic balance that takes into account both the rights of creators to remuneration for their work and the rights of individuals to access culture.

This present article, which highlights recent developments in the evolution of the Spanish legal framework, is particularly critical of the lack of involvement of the public administration in matters affecting the public interest. As commented earlier, the cultural consumer's payment of compensation does not represent a private exploitation agreement (license)

but a form of tax on a collective good — hence the greater need for a public body to manage this aspect of IP.³

2. Legal and Jurisprudential Delimitation of the IP Concept

2.1. High Court Ruling of 22 March 2011: Appeal 704/2008⁴

In 2008 the digital copying levy was normatively implemented by Order PRE/1743/2008 of 18 June. In several simultaneous lawsuits, the High Court considered whether this regulation was lawful. The specific issue in question was the lack of economic dossiers (which must accompany any administrative regulation) detailing how the actual amounts to be levied were to be calculated. This was a purely procedural claim.

Law 23/2006 of 7 July, amending the Consolidated Text of the Intellectual Property Law, approved by Royal Legislative Decree No. 1/1996 of April 12, 1996 (hereafter the LPI) provides some general guidelines. Garrote (2006) analyses in great detail the seven criteria used for drawing up the list of recording equipment and media devices established under Law 23/2006 (Article 25.6 (4)).

The first of these criteria is the harm actually caused to right holders by private copying. This law adds something that is already contained in Recital 35 of Directive 2001/29/EC, namely that “in certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise”.

This “minimum prejudice rule” can be used to exclude several digital devices and support media which do not, in fact, prejudice right holders because they are not used to make copies for private use. The practical problem is, however, that along with the reproduction function, some digital

3 See the World Intellectual Property Organization (WIPO) for a list of Spanish laws and regulations governing IP: <http://www.wipo.int/wipolex/en/profile.jsp?code=es#a7>.

4 Available from the CENDOJ database: CENDOJ ID 28079230032011100206.

storage space is almost always included in such devices. Hence, several such devices may not be considered as “recording equipment” given that their use for private copying causes minimal prejudice. On the other hand, given that they have a digital memory, they are strong candidates to be included in the list of digital “support media”. Garrote (2006) continues as follows:

The second relevant criterion is the degree of use of equipment or support media for private copying purposes — an attempt to combine the criterion of idoneity with the criterion of “actual use” of the specific equipment or support medium, much discussed during the parliamentary debate (...). Like the previous criterion, this serves to either exclude specific devices or support media from the list or to reduce the amount payable if these are not extensively used in practice to make private copies — as was the case with Spanish Royal Decree 1434/1992 of 27 November, Article 15.2a), whereby aircraft black boxes and answering machines were not considered to be “sound reproduction equipment” for payment purposes.

The third criterion is the storage capacity of equipment and support media, measured in computer storage units (megabyte, gigabyte, terabyte, etc). However, it is not mandatory to establish a recording capacity-to-hours conversion formula, which (...) is extremely important in practice. The only obligation according to this criterion is that a support medium of 1 gigabyte (for instance) should not be liable for more compensation than a support medium of just 500 MB.

The fourth criterion concerns the quality of the copies. Since it is impossible to know copy quality in advance, the regulation must logically consider the equipment. Thus, for example, a DVD recorder capable of making high-definition copies would be liable to pay greater compensation than a lower-end DVD recorder. This is, in short, a matter of higher levies on higher-end products.

The fifth criterion is that the availability, level of application and effectiveness of technological measures must be taken into account, in

line with Articles 31.2 and 161. This requires taking into account the degree of market penetration of such technological measures (mainly anti-copying devices). If technological protection is very robust and there are few private copies in the market (possibly measured by statistical indices), the amount of compensation would have to be significantly reduced. It may even happen that a device or support medium (e.g., a new generation console) incorporates an anti-copying system so effective that private copying or storage in its digital memory would be virtually impossible. Such devices or support media should surely not be obliged to pay compensation.

The sixth criterion is the shelf life of the reproductions, a criterion that logically applies to support media. It seems that this could only be relevant to support media that include some kind of “auto-delete” or “self-destruct” mechanism for stored copies, given that actual conservation of copies depends on environmental conditions and so cannot be taken into account in legislation.

The final criterion is that the amount of compensation applicable to recording equipment and support media should be proportional to the final average retail price — a vague and difficult-to-interpret criterion that was the subject of much discussion during the parliamentary debate. It seems to mean that there should not be excessive disproportion between the final price and the amount of compensation. In practice this will simply serve as a cap or ceiling on the amount of compensation, in that this may not equal or exceed the cost of manufacture.

The list of criteria does not resolve the question of what happens when a digital reproduction device is also a material storage medium (e.g., a DVD recorder with hard-drive storage). It would seem that this kind of equipment should pay compensation both in respect of the device itself (per recording unit) and in respect of its storage capacity (per byte).

Nonetheless, meeting the above criteria was not sufficient to ensure the legality of Order PRE/1743/2008. The High Court Ruling of 22 March 2011 (Appeal 704/2008) found as follows:

In the case under consideration, the required dossiers are missing and, in their absence, the explanatory note of the draft order in the administrative file cannot be considered a valid replacement. Said note does not effectively meet the requirements regarding dossiers, neither in terms of content nor in the period for which it was produced (after the first negotiation phase for drawing up the Order ended without consensus and before submission to the Council of Consumers and Users [Consejo de Consumidores y Usuarios]).

A corollary to the foregoing is that the omission of the mandatory State Council Opinion and of the mandatory dossiers constitutes a fundamental defect that affects Order PRE/1743/2008 in its entirety, thereby rendering it null and void by law ex article 62.2 of Law 30/1992. Hence, in the case under consideration, it is not incumbent on us to study the grounds, as outlined in the lawsuit, that question the specific regulations described in the Order, whose analysis, furthermore, is not necessary to justify the declaration of nullity that has been anticipated above. Consequently, the fact that the substantive issue remains on the margins of this ruling is sufficient justification for refusing to discuss the question of unconstitutionality raised by the claimant, who failed, in any case, to sufficiently justify his proposal.

We consequently uphold the appeal, but only partially, bearing in mind that this chamber has no knowledge of the aims of the claimant in relation to the retroactive scope of the nullity of the repealed Order regarding the collection of abusive fees and the cessation of indiscriminate charging of fair compensation. This is for the simple reason that fair compensation is a private legal matter and the above petition is consequently outside the jurisdiction of this court. For this

reason, our ruling is limited to declaring the Order under appeal to be null and void.

2.2. Supreme Court Ruling of 13 December 2010: Appeal 1699/2006⁵

This ruling included a discussion of the need for fair compensation to be based on equitable criteria rather than on the automatic application of a percentage of revenues. The first argument of importance was an analysis of the public administration's stance in relation to collecting societies:

The position adopted in the sentence under appeal is not acceptable, in the sense of being obliged to use the general fees notified by collecting societies to the Ministry of Culture in accordance with Article 159.3 of the LPI (...), given that the public administration has not objected for the reason that the LPI has not awarded it fee approval powers but merely the authority to receive notification of these fees (Article 159.3 of the LPI) and, broadly (Article 159.1 of the LPI), a generic oversight role in ensuring compliance with obligations and other requirements established by law. This implies a very minor degree of control that is insufficient to consider that powers to review the fairness of fees correspond exclusively to the public administration and the contentious-administrative jurisdiction.

Moreover, the existence of a prior negotiation process does not guarantee that the general fees meet with the requirements for fairness implied in the very concept of equitable remuneration, as expressed, in relation to the case under consideration, in Article 108.3 of the LPI (now Article 108.5).

Otherwise, the impossibility of reaching agreement in the negotiation phase would automatically entail the possibility, contrary to the law, that collecting societies could unilaterally set general fees, even if said fees were not fair.

5 Available from the CENDOJ database: CENDOJ ID 28079110012010100854.

The second argument of relevance is an analysis of the specific criteria for calculating fees (quantification of fair compensation):

The appellant posits, in an allegation that is not rejected by the appellee, that the general fees are set exclusively according to the claimant company's turnover. This cannot be accepted in absolute terms. As was made clear in the Supreme Court Ruling of 21 January 2009 it is clear that the criterion of actual use of the repertoire — insofar as this can be applied — is fairer than the criterion of availability or of quantification according to company turnover.

Another criterion that must be taken into account, as expressly stated by the appellant, is that of a comparison with agreements between collecting societies and other production companies, given that fairness is closely related to the requirement that fees for different production companies be similar. This is not to say that they must be identical, rather that there should be no excessive disproportion that cannot be justified for management or other reasons.

In the Supreme Court Ruling of 22 December 2008, this court declared null and void any agreement with a production company based on an unjustified lack of proportion regarding fees subsequently approved in an agreement with another association.

The appellee seems to justify charging what appear to be more onerous fees for the defendant than for other production companies, based on the fact of the defendant having rejected the other fees offered during the negotiation phase. It is clear, however, that not having reached agreement during a negotiation process is not in itself a justification for the imposition of more onerous fees than objectively respond to fairness criteria weighted in terms of fees applied to other bodies in the corresponding agreements. This would place one negotiating party in a position of superiority and in a position to impose his will on the other party, thereby ensuring that agreement content would be as dictated by him.

It must also be borne in mind that the LPI relates the obligation of companies to set general fees to the use of a repertoire (Article 152.1b). What this means is that, in setting fees, consideration must be given to criteria associated with the extent of the repertoires (of collecting societies in comparison with each other) and with right holders due fair compensation. These right holders are not just those who have entered into management agreements with collecting societies, but also others outside the compensation distribution mechanisms operated by one or all of the collecting societies.

The Supreme Court finally arrived at a doctrinal conclusion:

In relation to author rights arising from public communication of audiovisual works, the jurisprudence of this chamber has already implicitly stated that, irrespective of the circumstances of the negotiation, fair compensation cannot be established in an unconditional fashion according to general fees established unilaterally by collecting societies, not even when these fees may have been approved by the public administration. Rather, various criteria have been considered that align fair compensation with actual use principles that themselves guarantee fairness. Indeed, the Supreme Court Ruling of 20 September 2007 states that “it is not disputed that the claimant has applied the established fees and that these fees have been set in accordance with a legal rule; this does not preclude their being called into question, however, even though in this case there has been no disagreement or record of conflict in regard to abusive or unfair charges.”

Supreme Court Ruling of 15 January 2008, in referring to fair compensation for producers of audiovisual works for public TV broadcasts in hotels, declares that “the appropriate price for public communication already considered as such must be determined according to two criteria: the management body agreement, in this case with the respondent hotel or, as more usually occurs, with a hotel association; or, in the absence of an agreement of this type, the price

ostensibly established by the fee structure notified by the collecting society to the Ministry of Culture (...). This is not to say that said fees must prevail in the face of any opposition from those obliged to pay, as the law requires that fees must be subject to the criterion of fairness. Fairness as outlined in Article 3.2 of the Civil Code requires prudent and restrictive consideration (Supreme Court Ruling of 8 February 1996).”

As stated in the Ruling of 15 July 1985, while Article 3.2 of the Civil Code prohibits the exclusive use of fairness as grounds for rulings unless clearly authorized, it does not prohibit fair weighting in regard to application of rules, which is the case that concerns us here (Supreme Court Ruling of 15 March 1995). The rulings of 12 June 1990, 11 October 1988 and 3 November 1987 are based on the same reasoning. And, in regard to the case under consideration, the ruling adds that “the application of the established fees cannot reasonably be deemed abusive, in the absence of any agreement, when applied to a real use of public communication, that is, in ‘occupied’ rooms and apartments. A different view would be taken of a claim for indemnification that was based on a calculation of the total ‘available’ rooms or apartments.”

The plea is consequently upheld, since the requirement for fairness in setting fair compensation based on collecting societies fees must be subject to oversight by the courts, and therefore — following the doctrine established in the Supreme Court Ruling of 7 April 2009, which resolved an appeal very similar to this one — the appellant’s petition must be partially admitted. It is hereby declared, in enforcement of the ruling, that fair compensation must be determined, according to the general fees notified by the AIE [Spanish Society of Artistic Performers] to the public administration, by fairly weighting the fees resulting from the defendant’s income and taking into account, among other factors indicative of the extent of the repertoire, actual use, financial volume of operations and the existence of agreements with other companies involved in public communication activities.

2.3. Supreme Court Ruling of 6 June 2011 (CEDRO Case): Appeal 837/2007⁶

In what became known as the CEDRO case — referring to the Spanish Reprographic Rights Centre (Centro Español de Derechos Reprográficos, CEDRO) — the claimant had made photocopies in an establishment open to the public without prior authorization by the copyright holder. An appeal in cassation was upheld and the original judgment reversed (the claimant was ordered to pay ten times the full amount of the fees he would have had to pay had he obtained authorization).

The contested sentence was declared to contravene legal doctrine established regarding the setting of compensation according to Article 140 of the LPI. Had reproduction been authorized, compensation would have amounted to the general fees established for authorized copying of 10% of a work, multiplied by five. Specifically, the ruling stated as follows:

1. We declare that there are grounds for the appeal in cassation (...) against the ruling issued on appeal — Proceedings 18/2007 — by the Provincial Court of Valencia, Section 9, on 22 February 2007, which stated as follows:

“While upholding, in part, the appeal submitted by CEDRO’s legal representative against the ruling of 26 October 2006 of Mercantile Court 2 of Valencia (...), we hereby partially revoke said ruling, and, for the reasons outlined above, the defendant is ordered, in the terms outlined in the first-instance ruling, to apply the fees, multiplied by ten, that would have applied had the requisite authorization been obtained in the period in question and bearing in mind the revoked ruling. The remaining pleas of the judgment under appeal are upheld, including the non-imposition of costs for the proceedings at first instance, due to the underlying legal doubts. There will be no award of costs regarding this appeal.”

2. We annul the ruling, which we hereby declare to be null and void.

6 Available from the CENDOJ database: CENDOJ ID 28079110012011100432.

3. Instead, while partially upholding the appeal submitted by CEDRO's legal representative against the ruling of 26 October 2006 of Mercantile Court 2 of Valencia (...), we hereby partially revoke said ruling, and, for the reasons outlined above, the defendant is ordered, in the terms outlined in the first-instance ruling, to apply the fees, multiplied by five, that would have applied had the requisite authorization been obtained in the period in question and bearing in mind the revoked ruling. The remaining pleas of the judgment under appeal are upheld, with non-imposition of costs for the proceedings at first instance.

4. The following legal doctrine is reiterated: the compensation required under Article 140 of the LPI for unauthorized photocopying in establishments open to the public — in accordance with the general fee schedule for the claimant CEDRO and the compensation that would have been received had the required authorization been obtained — must be calculated as the amount of the general fee for authorized copies of 10% of a work, multiplied by five. If it can be adequately proven that the average percentage of photocopies of the work was less or more than 50%, the fee may be multiplied by a higher or lower coefficient, to a maximum of ten times the amount.

The CEDRO case thus resulted in legal doctrine that disallows the presumption that copying was authorized. Furthermore, the Supreme Court had declared a year earlier that fair compensation needed to be based on equitable criteria and not on the automatic application of a percentage of revenues. Finally, the declaration of invalidity of Order PRE/1743/2008 launched a debate regarding how to calculate fair compensation for private copying in Spain — a debate which also had the outcome of leading to a questioning of IP regulation in more general terms. It was becoming clear that fair compensation could not be established in an unconditional manner according to general fees established unilaterally by collecting societies, even when these fees had been approved by the public administration.

To sum up, these three cases of court judgments invalidating the IP system led to a general questioning regarding the calculation and levying of copying fees and a broad consensus that legal reforms were critical.

3. The Intellectual Property Commission (CPI)

A public administrative structure with regulatory and oversight powers must obviously play a key role in IP matters. Establishing, collecting and managing a private copying levy is, much like a duty or tax, a matter of public interest. Regulation of the Intellectual Property Commission (Comisión de la Propiedad Intelectual, CPI, formerly called the Intellectual Property Mediation and Arbitration Commission) and of the powers of the Ministry of Culture was originally addressed in Articles 158 and 159 of the LPI, as follows:

Article 158. Intellectual Property Mediation and Arbitration Commission

An Intellectual Property Mediation and Arbitration Commission is hereby created, as a national collegiate body, in the Ministry of Culture, with the functions of mediation and arbitration as attributed to it under this law.

1. The Commission will perform its mediation functions by doing the following:

a) Participating in negotiations between parties, provided they have granted their consent, in the event of failure to agree regarding the authorization of cable distribution of television broadcasts in the absence of agreement between intellectual property right holders and cable distribution companies.

b) Where required, making proposals to the parties.

It will be considered that all parties accept the Commission's proposals as outlined in the previous paragraph if they do not expressly state their

opposition within three months, in which case, the decision of the Commission will produce the effects outlined in Law 36/1988 of 5 December governing arbitration, with an option for review by the civil courts.

The parties will be informed of the proposal and of any opposition to the same in accordance with Articles 58 and 59 of Law 30/1992 of 26 November governing the legal regime of public administrations and common administrative procedure.

The mediation procedure and the composition of the Commission for the purposes of said mediation will be determined in the regulations. Two representatives from the collecting society representing the intellectual property rights subject to negotiation and two representatives from the cable broadcasting company shall be entitled to participate in the Commission regarding any matter that affects them.

2. The Commission will perform its arbitration functions by doing the following:

a) Resolving, provided the parties have granted their consent, conflicts which, in application of Point 1 of the above article, may arise between collecting societies and associations of users or broadcasters of collecting society repertoires. Submission to the authority of the Commission is voluntary and must be expressed in writing.

b) Setting substitutory amounts for the general fees, for the purpose indicated in Point 2 of the above article, at the request of an association of users or a broadcaster, provided these agree to submit to the authority of the Commission for the purpose outlined in a) above.

3. The procedure and composition of the Commission for the purposes of arbitration shall be established by legislation. Two representatives from the collecting society and two representatives from the association of users or from the broadcasting company shall be entitled to participate in the Commission regarding any matter that affects them.

The decisions of the Commission shall be binding and enforceable.

The contents of this article are without prejudice to any legal action that may be brought in the relevant jurisdiction. However, submission of a conflict to arbitration by the Commission will prevent judges and courts from addressing the matter until the decision of the Commission has been issued and provided that the party invokes the same by way of derogation.

Article 159. Powers of the Ministry of Culture

1. In addition to the power to grant or revoke authorizations as described in Articles 148 and 149, the Ministry of Culture shall have oversight powers regarding compliance with the obligations and requirements described in this law.

[Article 159.1. Paragraph 2. Declared unconstitutional by Constitutional Court Ruling 196/1997 of 13 November].

2. Without prejudice to provisions in other relevant legislation, modifications to the statutes of the collecting societies, once approved by the general assembly of members, must be submitted to the Ministry of Culture for approval, and shall, moreover, be considered as approved if no decision declaring otherwise is notified within three months of submission.

[Article 159.3. Declared unconstitutional by Constitutional Court Ruling 196/1997 of 13 November].

Leaving aside the lack of an implementing regulation regarding the CPI, its ineffectiveness was a clear obstacle to the proper functioning of the IP system. By virtue of Additional Provision 2 of Law 23/2006, the CPI should be a key administrative intervention element regarding IP protection in Spain, most especially in regard to setting fees. Two basic kinds of models were possible:

1. The first option would be for unilaterally set fees, considered as inherent to the public interest, to be managed by collecting societies

authorized by the Ministry of Culture. The collecting societies would be established as corporate administrative bodies — like associations of liberal professionals or sports federations. There should be an absolute and rigorous requirement to defer to the CPI — as happens, for instance, in German law — in matters of economically despotic behaviour.

2. The second option would be to consider collecting societies as subject to market competition rules as apply in any other economic sector. Negotiations with users or with an arbitration commission would be unnecessary, given that competition between collecting societies would establish equitable prices.

According to Delgado-Porrás (1995), the first option would constitute an internal contradiction regarding the system established by the legislator to ensure fairness —which is no other than the application of economic competition rules by the courts or by the corresponding administrative bodies.

Nonetheless, there was no evident interaction between the CPI and the aforementioned competition authorities — mainly due to the poor view held of the CPI, there being a clear preference for disputes with collecting societies to be aired in lengthy lawsuits or in administrative (competition law) procedures.

The problem in Spain lay precisely in the mixing of two systems: fees were unilaterally set in a *de facto* monopoly whose logic was based on collecting societies defending the public interest, yet there was no public control over the setting of these fees.⁷ Thus, the legislation regulating IP management encouraged the existence of a quasi-legal monopoly, yet antitrust rules were applied to what was not really a market.

⁷ It is interesting to contrast this fee system with the system established, for instance, for industrial control and inspection tasks implemented by bodies attached to the public administration. In this case, the fee schedule of amounts to be charged in the future must be filed along with the documentation required for accreditation. In other words, for industrial inspection bodies, fees, although private, are subject to certain administrative controls at the time of initial accreditation of the inspection body.

In its Decision of 27 July 2000 regarding Case 465/99, the Spanish Competition Tribunal (Tribunal de Defensa de la Competencia) touched the heart of the matter when it stated as follows (Fact 10):

The current LPI in practice creates a frustrating vacuum when parties fail to reach agreement regarding what constitutes a fair once-off payment, as it has been considered sufficient to create a commission with powers of voluntary arbitration and mediation. Most likely it was imagined that the seeds of competition would germinate and bloom in the field of intellectual property rights management. However, precisely the opposite has come to pass, namely, the proliferation of monopolies that individually manage multiple recognized rights.⁸

The above declaration made patent the fact that pathways were open in all directions. Either we take compensation fees to be remuneration regarding a matter of public interest overseen by the public administration, or we accept that collecting societies should be deprived of all their prerogatives — used, it may be said in passing, with poor judgement. Perez de Ontiveros-Baquero (1993) has warned that overzealousness in protecting IP rights may even restrict the dissemination of creations, thereby upsetting the balance between IP protection and access to culture:

... a single communicative act may require multiple authorizations and may even require the payment of several levies — circumstances that would create such a burden that the economic advantage of using an intellectual creation may be perceived as not worth the disbursement to be made (...) The social vocation of intellectual creations can only be enforced through adequately scaled fees and corrective interpretation of the regulations.

8 Available at <http://www.cnmc.es/es-es/competencia/buscadorde/resoluciones.aspx>.

The failure of the Ministry of Culture to exercise its control functions regarding the collecting societies and the setting of compensation fees could only be decried as negligent. Rodríguez-Tapia (2007) upbraided the government as follows:

What is more serious, however, is that neither the government nor the courts have seen fit to materially or substantially remodel the CPI, which, despite good intentions, has proved ineffective, bound hand and foot as it is in terms of playing its true and desirable role of supervising collective management of IP rights. Authors like Rodrigo Bercovitz and Casas Valles have, for years, been calling for reform. This reform cannot wait. Yet Law 23/2006 of 7 July has postponed for another day the reforms it mentions, as its Additional Provision 2 merely authorizes the government to implement regulatory reforms in the future.

The CPI was described by Spanish IP legislation as a collegiate body of national scope with arbitration functions regarding parties and substitutory functions regarding the setting of general fees. With the approval of Law 2/2011 of 4 March on the sustainable economy (LES), the CPI was empowered with the additional function of adopting measures to suspend information society services (i.e., the Internet). The main innovations of the 2011 reforms were as follows:

- CPI division into two sections: Section I, mediation and arbitration, and Section II, safeguarding of IP rights.
- Conferral of powers on Section I to set substitutory fees in the absence of agreement between parties.
- Conferral of powers on Section II to punish infringement of IP rights.
- Conferral of powers on the contentious-administrative courts to authorize suspension of information society services in the event of infringement.

The CPI was thus composed as follows:

Section I	President appointed by the government 3 members — persons of recognized expertise in the IP field — nominated by the Ministries of the Economy, Culture and Justice Term of 3 years, renewable once
Section II	Presidency held by the Sub-Secretary of State for Culture 4 members nominated by the Ministries of Culture, the Economy, Industry, Tourism and Trade and the Presidency

The LES, in its Final Provision 43 (popularly called the Sinde Law after the Minister of Culture of the day), described Section II in the following terms:

Section II, which shall act in accordance with the principles of objectivity and proportionality, will be responsible for exercising the functions provided for in Articles 8 and related articles of Law 34/2002, aimed at safeguarding intellectual property rights against infringement by providers of information society services. The Section may adopt measures to suspend the provision of an information society service that infringes intellectual property rights and to remove content that infringes these rights, provided that the provider, directly or indirectly, acts with a profit motive or has caused or is likely to harm ownership rights. Prior to the adoption of these measures, the information society service provider shall be issued with a formal request to proceed, within a period not exceeding 48 hours, with the voluntary removal of the infringing content or, if applicable, to make claims and provide suitable evidence concerning authorized use or the applicability of a limit to the intellectual property right. Once the above deadline has passed, where necessary, evidence will be examined within two days and will be forwarded to interested parties for conclusions within five days. The Commission shall then issue a decision within a maximum of three days. Voluntary withdrawal of the infringing content shall halt the proceedings. Implementation of the measure, in the event of non-compliance with the formal request, shall require prior judicial

authorization, in accordance with the procedure described in Article 122 bis, Point 2, of the law governing the contentious-administrative jurisdiction.

3.1. Development of New Legislation

The legal configuration of the new CPI was normatively implemented by Royal Decree 1889/2011 of 30 December governing the functioning of the CPI. The draft submitted for consultation to the General Council of the Judiciary (Consejo General del Poder Judicial, CGPJ)⁹ merited an Opinion¹⁰ that is of undoubted interest here:

ONE. With regard to the composition and legal system governing CPI Sections I and II:

- In appointing members of Section I, the principle of regulatory hierarchy is possibly contravened by Article 3.1 of the draft, in terms of the inclusion of the evaluation of certain requirements of experience and knowledge not provided for in the LPI.
- Note that the appointment of the President of Section I must be by joint Ministerial Order, and not by means of a “joint proposal” of the Ministry of Culture and the Ministry of the Economy (Article 158.3.4 of the LPI).
- Note, regarding substitution of the President of Section I, a possible contradiction between Article 3.2 “in fine” and Article 3.4 of the draft.
- It is recommended that the assignation to the secretary of the oversight role regarding the independence, neutrality and impartiality of Section I be revised.

9 Procedural rules for the approval of Royal Decrees make it compulsory to consult the CGPJ whose opinion is non-binding but is usually taken into account since it may prevent future litigation.

10 Available at <http://www.poderjudicial.es/stfls/cgpj/COMISI%C3%93N%20DE%20ESTUDIOS%20E%20INFORMES/INFORMES%20DE%20LEY/DOCUMENTOSCGPJ/021%2011.pdf>.

- It is recommended that further thought be given to the asymmetry regarding eligibility requirements for members of the two Sections.
- Various observations are made regarding the description of the legal regime applicable to Section II.

TWO. In relation to mediation procedures before CPI Section I.

- A possible contradiction is observed between the possibility of one party requesting mediation and the legal requirement that the CPI acts as a mediator “provided both parties have granted their consent”.
- It is recommended to add the qualification “where required” in the passage referring to the CPI’s formulation of a proposed solution to a conflict in Article 6.3 of the draft.
- The solution proposed by the Commission should not have the requirement to be motivated, whereas there should be a requirement for motivation when the CPI decides to put an end to the proceedings on considering agreement between the parties to be impossible. Likewise, motivation should be a requirement for parties refusing to accept the solution proposed by the Commission.
- It is recommended, in the interest of legal certainty and to avoid abuse, to set a maximum period for the mediation proceedings after which there can be no more attempts to reach agreement.
- It would be appropriate for the draft to include a statement regarding legal or extra-judicial actions while the mediation process is under way.

THREE. With regard to potential compatibility between mediation and arbitration proceedings before CPI Section I:

- It is suggested that some mechanism be set up to establish precedence for proceedings, in the event that these are requested at the same time by the parties in conflict.

– In order to avoid disparate outcomes, a system needs to be established to channel issues through a single procedure to avoid different parties on the same side of a conflict submitting simultaneous requests for mediation or arbitration to the CPI.

FOUR. In relation to arbitration proceedings before CPI Section I:

– So as not to pervert the essentially voluntary nature of arbitration and so possibly undermine the right to effective legal protection, it is recommended that Article 2.3 of the draft or its first subsection be removed. At the very least, we suggest that the term “unjustified” be removed.

– Note that supplementary application of the Arbitration Law will affect the regime governing the adoption of agreements and the Presidential planning, processing and promotion functions, as the draft regulation may unintentionally force these to be processed in other terms.

– It is recommended, to avoid any possible delays, that a maximum time frame for the proceedings be established that is more in keeping with Article 37.2 of the Arbitration Law. It is also suggested that arbitrators be permitted to resolve disputes by declaring one or more arbitral awards.¹¹

Even though the CGPJ pointed out several technical errors in the wording of the CPI regulation, Royal Decree 1889/2011 of 30 December largely met with approval. Its main content is described in the following paragraphs.

Royal Decree 1889/2011 regulates the functioning of the CPI as a national collegiate body attached to the Ministry of Culture and regulated by the LPI. As we have noted, the LES (Final Provision 43, i.e., the Sinde Act) profoundly changed the CPI in that its functions of mediation and arbitration were broadened and actions aimed at safeguarding IP rights were added, thus conferring the body with more peremptory powers.

11 Text available at <http://www.poderjudicial.es/stfls/cgpj/COMISI%C3%93N%20DE%20ESTUDIOS%20E%20INFORMES/INFORMES%20DE%20LEY/DOCUMENTOSCGPJ/021%2011.pdf>.

The CPI continues to be divided into two sections. Section I, responsible for mediation and arbitration, has had its material scope greatly broadened. This reinforcement of its role makes it the ideal instrument for settling disputes in the current IP system. Section II, meanwhile, exercises the new function of safeguarding IP rights against infringement by providers of information society services. A mixed administrative and judicial procedure has been established to safeguard fundamental rights that requires the intervention of the Central Contentious-Administrative Court.

Regarding Section I, mediation powers extend to all matters directly related to the collective management of IP rights, whereas arbitration powers extend to conflicts between collecting societies, between right holders and collecting societies and between broadcasters and collecting societies. Also important is its arbitration function and its powers to set substitutory fees. Section I is thus converted, in the existing IP system, into the ideal instrument for non-judicial conflict resolution, provided that the parties voluntarily agreed to submit to its decisions.

As for Section II, its main function is to safeguard IP rights against infringement by Internet service providers. The procedures described in the legal text are thus not directed against users, but against service providers infringing IP rights by offering or intermediating in illegal content. A core requirement is that, directly or indirectly, a profit motive exists or financial loss or harm is caused — or likely to be caused — to the right holder. The goal is to remove any obstacle to the full exercise of IP rights and to restore legality when rights have been infringed, for which purpose, a service may be suspended or infringing content may be removed.

Royal Decree 1889/2011 of 30 December regulates administrative procedures but also provides for Central Contentious-Administrative Court intervention, at the behest of the CPI, in two specific circumstances:

- When holders of infringed rights who have initiated proceedings cannot identify those responsible for the infringement, they may request the Central Contentious-Administrative Court to issue a formal request, to the provider of intermediation services, regarding the data necessary to

identify and locate the infringers. Under this procedure, the right of access to this information enables civil and criminal actions to be pursued if necessary.

- When the existence of an infringement of IP rights has been proven and content removal or service interruption has been ordered, if those responsible do not willingly comply within 24 hours, the Central Contentious-Administrative Court may be requested to force compliance within three days of enforcement of the order.

These mechanisms enable rapid decisions in resolving rights infringements. Deadlines for both the administrative and judicial phases are very short and the administrative procedure allows for the use of electronic communications.

The regulatory implementation of the CPI was published in the Official State Gazette (Boletín Oficial del Estado, BOE) of 31 December 2011, simultaneously with Royal Decree Law 20/2011 of 30 December (governing urgent budgetary, tax and financial measures for the correction of the public deficit), which has an Additional Provision worded as follows:

Additional Provision 10. Modification of the fair compensation regime for private copying.

1. Hereby abolished is fair compensation for private copying as provided for in Article 25 of the Consolidated Text of the Intellectual Property Law, approved by Royal Decree 1/1996 of 12 April, with limits as established in Article 31.2 of the same law.
2. The government shall establish by law the procedure for payment of fair compensation for private copying from the General State Budget.
3. The amount of compensation to be paid will be decided based on an estimate of the harm caused.

The digital copying levy was thus abolished, leaving fair compensation for private copying to be charged to the General State Budget. The regulatory mechanism implemented is based on compensation (calculated on the basis of the harm caused to creators) for the fact that private copying remains fully

legal. The amount is determined by the public administration following dialogue with the sectors concerned, in full compliance with the regulatory and jurisprudential framework of the EU. In an article published in *El País*, Seisdedos and Fraguas (2011) commented as follows:

Vice-President Soraya Saenz de Santamaría (...) has announced the replacement of the digital copying levy (...) by a universal tax. So, we will all pay, whether or not we make private copies. According to ministry sources, the compensation, to be agreed with the collecting societies, will be drawn from an item in the General State Budget and will amount to between 37 and 42 million [euros], a figure arrived at by multiplying the Spanish population by 0.8 or 0.9 euros per head. Less than half the amount raised in 2010 from the previous system.

Paradoxically therefore, as soon as the administrative structure designed to regulate the calculation of fees was reformed, the very fee itself was abolished, thereby rendering the whole discussion pointless.

Finally, we conclude this section by referring to Supreme Court Ruling of 31 May 2013 (Appeal 48/2012).¹² Several collecting societies challenged Royal Decree 1889/2011 (Rodríguez-Portugués, 2013), arguing that a purely administrative body had been conferred with powers that restrict fundamental rights. The Court rejected the claim, reasoning as follows (Point of Law 8):

It is indeed true that fundamental rights are at stake, as indicated by the appellant on citing, essentially, freedom of expression and freedom of information. Nonetheless, the importance of these rights, their nature as necessary elements of a free and pluralistic public opinion and their expression on the Internet — an extraordinary stimulant for culture, leisure, communications and trade — does not preclude administrative intervention in this area, already a tradition in the telecommunications and audiovisual sectors. These fundamental rights, which are not unlimited, do not preclude the creation of an administrative body, the design of an administrative procedure and the adoption of a series of

¹² Available from the CENDOJ database: CENDOJ ID 28079130042013100154.

measures aimed at restoring online legality, provided that constitutional and legally established safeguards are respected, and especially bearing in mind that administrative action is subject to review by judges and courts in fulfilment of the oversight role conferred on them by the Spanish Constitution regarding the legality of administrative acts and provisions, ex Article 106.1 of the Spanish Constitution (...). In other words, in many other areas of administrative activity fundamental rights are also at stake to varying degrees. Yet this does not mean that it must be judges who directly implement measures to restore legality. These measures may be implemented by an administrative body like CPI Section II acting in accordance with the principles of objectivity and proportionality (Article 158.4 of the LPI), provided that constitutional and legally established guarantees are respected. Therefore, to suspend an information society service that infringes IP rights or to remove infringing content, an administrative decision is sufficient, provided that it is subject to appropriate procedures that allow a hearing of the affected party, without prejudice to the fact that the implementation of these measures requires judicial authorization, as stated in Articles 9 and 122 bis of the LJCA [Law 29/1998 of 13 July governing the contentious-administrative jurisdiction] as amended by Law 2/2011 of 4 March on the sustainable economy (...). Judicial bodies will rule on the legality of the procedure after the fact, should the proceedings of Section II of the Commission be disputed. Note, finally, that the contested Royal Decree, as also Article 158 of the LPI, indicate that it is the Central Contentious-Administrative Court which must enforce the measure in the event of non-compliance with the formal request, in accordance with the procedure described in the cited Article 122 bis and also included as Final Provision 43.7 of Law 2/2011 of 4 March on the sustainable economy.

In the same Ruling, the option of a strictly judicial regulation was stated to be just one of several possibilities (Point of Law 9):

The general idea of the appellant association is that, to safeguard intellectual property, a different system should have been established in which judicial bodies would be directly responsible for monitoring legality online in the interest of protecting intellectual property, since, in the opinion of the appellant, this system would offer better guarantees. The non-involvement of the public administration in this area is defended, and future intellectual property infringements should be dealt with by the courts. This is one opinion of many legitimate others, although not relevant to the case concerning us here, as that debate, being beyond the scope of this case, cannot be brought into the appeal, and has, indeed, already been resolved in the courts following a different format to that proposed by the appellant. And so, it is not only appropriate but also mandatory that this should — and indeed must — be implemented by law in accordance with the challenged Royal Decree, by virtue of the principle of normative hierarchy, there being no other option (Article 9.3 of the Spanish Constitution). The confluence, essentially, of rights to freedom of expression (Article 20.1.a) of the Spanish Constitution) and of information (Article 20.1.d) of the Spanish Constitution) and, specifically, the right to literary, artistic, scientific and technical production (Article 20.1.b) of the Spanish Constitution), as well as other rights — such as the right to personal and familial privacy (Article 18.4 of the Spanish Constitution) and access to culture, among others — and the limited nature of said rights, all determine the need to take measures that limit their respective scopes and balance them in terms of connections. However, this regulatory configuration should not be disproportionate, nor should it involve any undue restriction on the rights of citizens, nor should the legal regulations as provided for in Article 158 of the LPI raise doubts regarding their constitutionality, as we have already mentioned. Bear in mind that Section II of the Commission exercises, according to Article 158.4 of the LPI, the functions outlined in Article 8 and concurrent articles of Law 34/2002 of 11 July on information society services and electronic commerce, which outline the “measures necessary to suspend provision

or remove infringing information”, followed by a list of the principles that may be violated by information society services. These include safeguarding public order, investigating crime, ensuring public safety and national defence (part a); protection of public health (part b); respect for personal dignity and the principle of non-discrimination (part c); protection of youth and children (part d); and, of concern to us here, the safeguarding of intellectual property rights (part c).”

3.2. Law 21/2014 of 4 November Amending the LPI

More recent reform of the LPI — popularly called the Lassalle Law after the Secretary of State for Culture of the day — represents a strengthening of ministerial administrative powers regarding enforcement of this legislation (e.g., the new Article 159, covering public administration powers). Although a thorough analysis of the scope of this reform is not possible here, certain references to the CPI are worthy of comment.

In general terms, the concept of fair compensation for private copying has been modified in that the number of cases eligible for compensation is reduced. Also, as mentioned, fair compensation as referred to in Article 31.2 is to be charged annually to the General State Budget, with the procedures for setting and paying compensation fees being those established by law. Furthermore, payment will be made through the collecting societies; this has led to Article 25 of the LPI, referring to fair compensation for private copying, being modified.¹³

Also modified is the article regulating CPI Section I, which has the effect of broadening its powers to include a fee-setting function and strengthening

¹³ This regulation has been approved — despite the Supreme Court Ruling of 10 September 2014 suspending the contentious-administrative appeal against Royal Decree 1657/2012 of 7 December governing the procedure for payment of compensation for private copying from the General State Budget. The Supreme Court ruling posed two questions concerning interpretation of Directive 2001/29 Article 5.2.b): first, whether compensation via the General State Budget ensures that the cost is borne by actual users of copies; and, second, whether such compensation may be affected by budgetary limits set annually, thereby creating an imbalance between the interests of the right holders and those of the users of the private copies.

its oversight role in ensuring that fees are fair and non-discriminatory. To this end, Article 158 has been amended as follows:

Article 158. Intellectual Property Commission: composition and functions

1. The Intellectual Property Commission (CPI) is hereby created as a collegiate body with national scope affiliated to the Ministry of Culture. It will carry out the functions of mediation, arbitration, fee-setting and oversight in the cases provided for in the present Title, and will safeguard intellectual property rights in accordance with this law. The CPI will also exercise an advisory function with respect to all matters within its scope and regarding which it may be consulted by the Ministry of Culture.

2. The CPI will be formed of two Sections: a) Section I shall exercise all functions of mediation, arbitration, fee-setting and oversight in the cases provided for in the present Title.

b) Section II shall oversee, within the scope marked by the powers of the Ministry of Culture, the safeguarding of intellectual property rights from infringement by information society services, in the terms outlined in Article 8 and related articles of Law 34/2002 of 11 July governing information society services and electronic commerce.

3. Section I shall be formed of four members who may delegate their functions to their respective deputies. All members will be recognized experts in the intellectual property and competition field. The Ministry of Culture shall appoint a president who will hold the casting vote. The members of Section I shall be appointed by government royal decree on the basis of nominations by the Ministers of Culture, the Economy, Justice and Industry, Energy and Tourism. Terms shall run for five years and may be renewed once. The government may legally modify the composition of Section I.

4. The president of Section II shall be the Secretary of State for Culture or a person delegated by him/her. Section II shall be formed of two members from the Ministry of Culture, one from the Ministry of Industry, Energy and Tourism, one from the Ministry of Justice, one from the Ministry of the Economy and one from the Ministry of the Presidency. The members shall be nominated by their respective departments from among public administration staff groups or categories with advanced qualifications and accredited expertise in intellectual property matters. (...) Section II functioning and the procedure for exercising its functions shall be determined by law.

The new CPI is now composed as follows:

Section I	President appointed by the government 3 members — persons of recognized expertise in the IP field — nominated by the Ministries of Culture, the Economy, Justice and Industry, Energy and Tourism Term of 5 years, renewable once
Section II	Presidency held by the Secretary of State for Culture 6 members nominated by the Ministries of Culture, the Economy, Justice, Industry, Energy and Tourism and the Presidency

The mandate of CPI Section I members has been lengthened from three to five years and CPI Section II members now number seven, all appointed by the government,

As regards functions, the amended Article 158 bis (Paragraphs 3, 4 and 5) reinforces the mechanisms for establishing fair and non-discriminatory fees and also provides for the National Markets and Competition Commission (Comisión Nacional de los Mercados y la Competencia, CNMC) to be notified in the event of non-compliance so that it can act accordingly.

Finally, a new Article 158 ter has been added that very wordily details (Paragraphs 3, 4, 5 and 6) the procedures and conditions under which CPI Section II may proceed to suspend information society services that

infringe IP rights, with fines of up to €600,000 for failure to remove infringing content.

The quasi-judicial role of the CPI was addressed in State Council Opinion 1064/2013 of 28 November 2013¹⁴ which, in analysing the draft version of Law 21/2014 (see Section 3.2), mainly relied on Supreme Court Ruling of 31 May 2013 (see end of Section 3.1). The State Council Opinion points to the different configurations of a similar body to the CPI in the European setting (Section 7.5.6):

The continuity of the draft law at this point is in direct contrast with the experience of neighbouring countries where the usual procedure is the creation of ad hoc entities, such as the French HADOPI (...) whose composition involves the highest authorities in the country, ensuring independence and autonomy in the exercise of its functions. This is even more notable when, as is the case here, the draft law amends the functions of the CPI in number and in importance in terms that merely translate into the anticipation of a possible increase in the number of members of Section I. If it is intended, with the attribution of new functions to the CPI, to improve public vigilance of the market for IP rights, then Sections I and II must be provided with the necessary material and human means, it being necessary to determine, with greater precision in the legislation, the subjective requisites for membership of the Sections by persons who must be able exercise the public tasks entrusted to them with suitable knowledge and efficiency.

The above confirms a poorly functioning system of appointments and emphasizes that the important function entrusted to the CPI requires suitable allocation of human and financial resources — for which there is no provision in the legislation. This lack of means may well compromise the future activities of the CPI.

14 Available at <https://www.boe.es/buscar/doc.php?id=CE-D-2013-1064>.

4. Conclusions

The consumption of culture is experiencing a profound paradigmatic shift, due to the new technologies and the emergence of new forms of access to creations and new consumer habits. The legal regime, always reactive to change, finds it difficult to accommodate the new digital scenario.

In 2006, the Consolidated Text of the LPI was reformed with the inclusion of a newly worded Article 25 on fair compensation for private copying, governed by principles of balance, fairness and proportionality. The CPI was also reformed in two ways: it was strengthened in terms of arbitration functions and powers to set substitutory fees and it was empowered to control illegal Internet downloads.

These changes were made in a hasty and non-reflective manner that merely served to highlight the great gap existing between social realities and legislation. Also evident was the government's general indifference to the conflict between public and private interests. Several court judgments and some regulatory reform efforts gradually rectified certain basic aspects of the legal regime, summarized below:

1. Fair compensation for private copying may not be applied indiscriminately without taking into account the use made of the supporting device. If it can be proved that the device for which the levy is paid is not used to copy protected works, then the collection of a fee is not justified. In other words, the indiscriminate application of a private copying levy, in particular, on recording equipment, digital devices and support media clearly reserved for uses other than private copying, is a contravention of Directive 2001/29/EC. Automatically assuming that devices and support media will be used for private copying — an issue which is particularly important in the case of large institutional consumers — is therefore not justified.
2. The Supreme Court has established case law in relation to the calculation of fair compensation for private copying and has imposed a veto on automatic calculations based on turnover. Fair compensation

should be determined on the basis of general fees, as notified by collecting societies to the public administration, and their fair weighting according to the income of the user, taking into account actual use, financial volume of operations and the existence of agreements with other companies performing similar activities.

3. The compensation as established by Article 140 of the LPI for unauthorized photocopying in establishments open to the public — in accordance with the general fees of CEDRO (as the claimant) and the remuneration that would have been received had the photocopying been authorized — is the amount of the general fee for authorized photocopying of 10% of the work, multiplied by five. If evidence clearly indicates that the average percentage photocopied is less or more than 50% of the work, the rate may be multiplied by a higher or lower coefficient, to a maximum of ten times the amount.
4. The amount and method of collection of the digital copying levy, as normatively established by Order PRE/1743/2008, were declared in contravention of the law given that essential requirements regarding approval were not fulfilled, namely, inclusion of the State Council Opinion and the economic dossiers. Its abrogation means that, although amounts paid between 2008 and 2011 cannot be recovered, any collection of the levy was impossible until some similar provision was approved. The reform undertaken by Royal Decree Law 20/2011 cancelled the digital copying levy in favour of publicly funded compensation via a budgetary allocation from the General State Budget. This change is an implicit recognition of the public nature of fair compensation.
5. The CPI was adapted to the new provisions of the LES (Final Provision 43. i.e., the Sinde Law), with resulting changes in its role, in fee-setting (Section I) and in procedures for safeguarding IP rights (Section II). The CPI, further strengthened by Law 21/2104, may now act on its own initiative regarding possible infringements and may

formally request Internet service suspension, the withdrawal of advertising from websites and the blocking of electronic payments.

6. The CPI is no longer merely an arbitrator but an administrative body with powers to set fees. Consequently, its fee-setting and fair compensation functions are recognized as matters of public interest. The choice of an administrative and not a judicial body is legitimate as long as the possibility of court review of the corresponding decisions is guaranteed. The scope of administrative measures for service suspension and content removal, however, may overlap with protective measures in civil law (injunctions).
7. The CPI needs to be provided with the human and financial means necessary for it to exercise the key role it is designed to play in the IP system. It also requires a system of appointments that guarantees both professionalism and independence. Otherwise, despite progress in terms of recognition of the public nature of fair compensation and the greater implication of government, it will be impossible for the CPI to ensure compliance with regulations and to implement the oversight functions entrusted to it.

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