



Refurbished phones and tablets now subject to French private copying levy?

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Manufacturers and “importers” into France of refurbished/reconditioned cell phones as well as tablets are now liable for the French private copying levy, although such liability is being contested judicially.

• WHAT IS THE PRIVATE COPYING LEVY?

The private copying exception to authors’ intellectual property rights allows copying protected content (e.g., film, music, images, books, etc.) in exchange of a private copy levy paid by manufacturers and “importers” of storage devices to authors, artists, publishers and producers of works duplicated on such media.

Such private copying exception was created in Germany in 1966 and now exists in various forms in many countries, including France since 1985.

• ARE YOU CONCERNED IN FRANCE?

The private copy levy is due in France when storage device products subject to it (notably cell phones and tablets) are put into circulation in France by either their manufacturer or “importer”.

• BROAD LEGAL INTERPRETATION OF “IMPORTER” IN FRANCE

French Law takes a broad definition of “importer” for private copying levy purposes, covering:

- Under Art. L 311-4 of the French Intellectual Property Code, persons who realize intra-EU acquisitions of goods into France from other EU countries within the meaning of the VAT definition and,
- Under the European and French cases, respectively ECJ, C-462/09, 16 June 2011,

Opus and French Supreme Judicial Court, n° 18-23.752, 5 February 2020, Only Keys, persons “contributing” to the importation of the goods into France from outside the EU making them available to end-users in France, irrespective of the VAT and Customs definitions of “importer”.

• BROAD SCOPE RECENTLY EXTENDED TO RECONDITIONED DEVICES

A 1 June 2021 Decision n° 22 rendered by the French Private Copying Levy Commission, effective 1 July 2021, extended the scope of the French private copying levy to now include not only new devices, but also refurbished/reconditioned cell phones and tablets, albeit subject to reduced rates.

Specifically, the levy now also applies to second-hand devices that are put back into circulation after having undergone functionality tests to establish that they meet the safety and use obligations that the consumer can legitimately expect, as well as, if necessary, one or more interventions to restore their functionalities.

In parallel, a law aimed at reducing the environmental impact of information technology in France has been enacted, codifying in French Law the extension of the French private copying levy to refurbished/reconditioned storage devices at specific differentiated rates compared to new devices, but with certain exceptions concerning the refurbisher.

• PENDING COURT CASES

Given the significant impact of the extension of the private copying levy to refurbished/reconditioned storage devices driving up costs of such devices for consumers and undercutting the competitiveness of businesses in the sector, various industry actors, including the union for reconditioning IT and electronic devices and a French consumer's group, filed cases, currently pending before France's Supreme Administrative Court to suspend the Private Copying Levy Commission's Decision n° 22 enlarging the levy's scope.

Additionally, since 2018 refurbished device operators in France with factories and offices in France have received information requests from Copie France, entity in charge of collecting the French Private Copying Levy.

The legal proceedings resulting therefrom are still pending.

Very recently Copie France also started issuing information requests to refurbished device sellers not established in France whose names had been found on backmarket.com.

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• PRACTICAL IMPLICATIONS?

Since Copie France is now addressing an increased number of information requests, particularly to foreign actors across the refurbished/reconditioned cell phones and tablets sector who sell to French customers via online platforms, it is important to understand this complicated levy and the recent developments to respond appropriately.

Likewise, even in the absence of an information request, it is important to analyze the legal position and determine the appropriate course of action.

Grant Thornton Société d'Avocats will keep you updated on the status of the pending high court decisions and, in the meantime, can help analyzing your situation and with your relations with Copie France.

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