

# Private copying levies on technically independent devices

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## Introduction

The Supreme Court has rendered its judgment (T3973-15) in a long-running dispute concerning private copying levies on mobile phones with an external memory device. The court found that the right to collect private copying levies extends to devices which consist of two technically independent devices – in this case, a mobile phone and an external memory device – even if the independent devices were not "especially suited for the production of copies of works for private use" and would thus not be subject to private copying levies if sold individually.

## Background

Copyswede is a Swedish umbrella collecting society for private copying levies. Sony Mobile Communications AB imported and sold the W715 Walkman, a multifunctional mobile phone. The W715 Walkman had an internal memory with an 80 megabyte capacity and was sold together with an external memory device with an 8 gigabyte capacity. Copyswede initiated legal proceedings against Sony and claimed that Sony was liable to pay private copying levies for the import of approximately 74,050 mobile phones. The first-instance and appellate courts both found that Sony Mobile was indeed liable to pay private copying levies for the import. The case brought a number of interesting issues before the Supreme Court.

## Decision

The Supreme Court found that two technically independent devices, such as a multifunctional mobile phone and an external memory device, may be subject to private copy levies even if only one, or neither, of the devices are suited for private copying when assessed independently. The court underlined that the provision regarding private copying levies is intended to be neutral from a technological standpoint and that the application of private copying levies should not be easy to circumvent.

The court further specified that the assessment should be based on whether the devices synergise so that they may be interpreted as a single device. The court found that the same assessment should be made for products with integrated components as for products with external components, especially if the devices are made available to function as a single device. In this case, the external memory device was sold together with the mobile phone. The court thus found that the devices should be regarded as one single device, which in this case was a mobile phone.

The court referred to its previous ruling regarding iPhones, which were found to be "especially suited for the production of copies of works for private use" and thus subject to private copying levies. Regarding whether the W715 Walkman was also especially suited for private copying, the court underlined that for this requirement it is irrelevant whether the device has other functions than

## AUTHORS

[Henrik Wistam](#)



[Gustav Kyringer](#)



those intended to enable production of private copies. Such functions may instead be considered when determining the level of compensation. Referencing the iPhone judgment, the court found that the technical capacity and user-friendliness of the device should be considered. The court also pointed out that the threshold for the requirement is set at a low level; if the device is expected to be used for private copying to a non-negligible extent, the device should be considered to be suited for private copying.

The court found the W715 Walkman to be comparable to the iPhone and underlined that comparable devices should, as a rule, be treated equally. Copying levies should therefore apply to multifunction mobile phones with external memory devices, such as the W715 Walkman.

Regarding the level of compensation, the court stated that private copying levies are calculated based on the total memory capacity, but that the compensation may be reduced if it can be assumed that the device is used for purposes other than private copying. Such other purposes include uses of the device that do not make use of the memory capacity, owing to the fact that it must be assumed that there are consumers or buyers that are not interested in the functions that makes the device suitable for private copying. The court concluded that a 25% reduction of the statutory rate of Skr4 per gigabyte was reasonable, considering that the mobile phones were multifunctional. This resulted in a significantly higher levy than set by the lower-instance courts, which established the private copying levies at only one-eighth of the statutory rate.

The Supreme Court clarified that copying levies should be applied from the day of the import or manufacture of the product.

### **Comment**

Although the judgment may seem to be of small practical significance, since mobile phones today are rarely sold with external memory devices, it broadens the applicability of private copying levies to encompass technologically independent devices sold together. More devices may therefore be subject to private copying levies following the Supreme Court's assessment.

It is uncertain to what extent this broadening of the application of private copying will be applied in practice, as device suitability is assessed from case to case. Nevertheless, the decision must be viewed as a success for Copyswede.

*For further information on this topic please contact [Henrik Wistam](#) or [Gustav Kyringer](#) at Advokatfirman Lindahl by telephone (+46 8 670 58 00) or email ([henrik.wistam@lindahl.se](mailto:henrik.wistam@lindahl.se) or [gustav.kyringer@lindahl.se](mailto:gustav.kyringer@lindahl.se)). The Advokatfirman Lindahl KB website can be accessed at [www.lindahl.se](http://www.lindahl.se).*

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