The Position of the United Kingdom

GILLIAN DAVIES[1]
Barrister, Lincoln's Inn
London, United Kingdom

The background prior to the 1988 Act

It may seem anachronistic to have someone from the United Kingdom speaking on the subject of existing levy systems. It is well known that the UK Parliament has to date set its face against the introduction of a levy system for private copying. There is also no sign in the Consultation Paper on Implementation of the EC Information Society Directive in the United Kingdom, published in August last year by the Patent Office[2], that the present government intends to change its position. Moreover, there does not appear to be any widespread support for the introduction of a levy system at this stage among the UK interested circles.

Nevertheless, I have been asked to briefly review the UK's traditional resistance to the levy and to describe the present legal situation as regards sound and audiovisual private copying.

Whether or not to introduce a levy system was hotly debated from the late 1970s until the adoption of the Copyright Act 1988 (the 1988 Act). In those days, the interested circles were strongly advocating the introduction of a levy scheme and continued to fight for it during the parliamentary debates leading to the 1988 Act. Throughout this period the UK Government kept changing its mind on the subject[3].

The first stage of the campaign was the recommendation of the Whitford Committee that a levy on recording equipment, similar to that which was operating at the time in Germany, should be implemented[4]. However, in 1981, the government in a green paper concluded that:

[1] Ph.D, Barrister, Lincoln's Inn, London. Chairman, Technical Board of Appeal and Member of the Enlarged Board, European Patent Office. Formerly Associate Director General and Chief Legal Adviser, IFPI.

[2] Consultation Paper on Implementation of the Directive in the United Kingdom, 7 August 2002.

[3] For comparative studies of the situation in EC countries and elsewhere in the early 1980s and 1990s, see G. Davies, *Private Copying of Sound and Audiovisual Recordings,* ESC Publishing, Oxford, for the EC Commission, 1984; and G. Davies and M. Hung, *Music and Video Private Copying, An International Survey of the Problem and the Law,* Sweet and Maxwell, London, 1993.

[4] *Copyright and Designs Law, Report of the Committee to consider the Law on Copyright and Designs,* Chairman, The Hon. Mr. Justice Whitford, Cmnd 6732, 1977.

The government has still not received convincing evidence that the introduction of a levy on audio and video equipment or blank tape would provide an acceptable solution to the problems or potential problems described; at the end of the day it may have to be accepted that there is in fact no acceptable solution.[5]

Public debate, however, continued and in 1986 the government published a White Paper in which it stated clearly that it had decided to introduce a levy on blank audio tapes. With regard to audiovisual media, it said that the case had not been made out.[6]

This undertaking, which was reiterated in the Queen's speech setting out the government's legislative programme for the forthcoming year, had been dropped by the time the draft 1988 Act was introduced in Parliament[7].

Ministers rejected the levy basically for political reasons. The proposal had attracted much negative press coverage and the government of the day was persuaded it would be a very unpopular measure with the general public. More serious objections included a public policy reluctance on the part of the government to enforce exclusive rights in the private sphere. It was also argued that the cost of administering any levy scheme would be so high that the benefits to right holders would be hardly worthwhile. Finally, what tipped the balance of opinion among the politicians against the levy was that organisations representing the visually handicapped joined with the tape manufacturers in a strong and well-organised anti-levy campaign.

Private copying under the 1988 Act

Thus, today, the legal situation under the 1988 Act, as amended, is that there is no private copying privilege of general application. Copyright owners enjoy exclusive rights and copying of sound and audiovisual recordings for private use remains, in principle, an infringing act.

The Copyright Act 1988, of course, does permit certain acts which would otherwise amount to copyright infringement. These permitted acts are designed to balance the interests of copyright owners with the public interest but the list of permitted acts does not extend to home taping, as such.

The general exception of fair dealing, which permits copying of certain works for the purpose of research or private study, does not apply to the private copying of films or sound recordings.

[5] Reform of the Law Relating to Copyright Designs and Performers' Protection, A Consultative Document, Cmnd 8302, July 1981, Ch. 3, para. 23.

[6] *Intellectual Property and Innovation,* presented to Parliament by the Secretary of State for Trade and Industry by Command of her Majesty, Cmnd 9712, April 1986.

[7] Queen's Speech, 25 June 1987. The Copyright Bill was introduced in October 1987.

However, the 1988 Act is not as categorical as the old 1956 Act and there are a small number of permitted acts which relate to the use of a copyright work for private and domestic purposes. For example, there is a general time-shifting exemption which applies to broadcast or cable programmes, which applies to both audio and video recordings (s. 70).

Other permitted acts include allowing photographs to be taken of part of a TV broadcast or cable programme (s. 71). Similarly, in relation to rights in performances, there is an exception allowing a live recording of a performance to be made where this is for the private and domestic use of the person making the recording (s. 182(2))[8].

However, subject to these fairly narrow exceptions the act of home taping of sound and audio-visual recordings remains an infringing Act.

It was logical, therefore, for the UK Government to include in the 1988 Act protection for technological measures designed to prevent or limit copying. While not convinced of the benefits of a levy system, the government considered it reasonable that right owners should be able to use technical means to protect their exclusive rights. The technological protection measures of the 1988 Act (s. 296) apply where copies of a copyright work are issued to the public by or with the licence of the copyright owner in an electronic form which is copy-protected. References to copy-protection include "any device or means intended to prevent or restrict copying of a work or to impair the quality of copies made". Those who are targeted are those who manufacture and deal with devices designed to circumvent copy-protection devices.

This legislation predated the equivalent provisions of the WCT and WPPT by eight years and the Information Society Directive by thirteen and in this aspect the 1988 Act was ahead of its time.

Implementation of the Information Society Directive

Meanwhile, the UK is late in implementing the Information Society Directive and it is not known for certain whether the current situation will change.

At present, the draft Regulations to implement the Information Society Directive and to amend the 1988 Act have not yet been published; as already mentioned, a Consultation Paper was circulated in August 2002 and the UK Patent Office has intimated that the Regulations will be published in October 2003.

[8] The Consultation Paper, cf. n. 2, above, states that this exception is to be deleted; see Annex A, para. 4.9.1.

From the Consultation Paper, however, it would appear that the United Kingdom does not intend to radically amend the 1988 Act as regards the private copying issue.

The Directive does not mandate the introduction of a private use exception or the introduction of levy schemes. It only gives Member States the option to provide for a private use exception to the reproduction right (the wording is "Member States may...") but, if they do, then it is a condition that right holders receive fair compensation.

The UK Government's basic approach is to maintain existing UK exceptions as far as possible and to amend only insofar as necessary to comply with the Directive, and, since the interested parties in the United Kingdom are not seeking the introduction of a levy system, any drastic change of approach in the draft Regulations is unlikely.

On technical measures, on the other hand, the Consultation Paper promised amendments to the 1988 Act to bring the present protection of copy-protection systems into conformity with the Directive and also to provide legal protection for electronic rights management information, as required by the Directive; this latter protection is a new area for the UK copyright law.

A private copying exception is not justified in the digital environment

With hindsight, I believe the United Kingdom's reluctance to introduce a private use exception for sound and audiovisual recordings, compensated for by levies, has turned out to be an extremely wise move (or one might say a blessing in disguise).

In the digital environment, it may be questioned whether private copying exceptions are any longer valid. In my personal view, there is no longer any justification for them.

In the analog world, levies were seen as the only feasible and equitable solution to private copying. Since the practice could not be controlled, the rough justice argument prevailed and had its logic. But now, as we heard yesterday, the technical means exist and will soon be in place to enable right owners to control access to and copying of their works in the digital environment. I believe it would be a very serious mistake for right owners to accept the extension of levy schemes to digital copying and to give up the aim of maintaining exclusive rights. Where exclusive rights exist as in the United Kingdom, they should be hung on to and every effort should be made to regain them in the digital area elsewhere (where they have been limited in exchange for levy schemes).

No levy system, however sophisticated, and even assuming such a system were universally in place, could remunerate right owners adequately for digital copying in the world of digital broadcasting and the Internet.

A return to the principle of the exclusive reproduction right is therefore justified. There is no inherent and inalienable right of the public to make perfect digital copies for private use; in any case, there is nothing to stop them making themselves good quality, analogue copies.

Logically, if and when technical measures are widely used and effective, the existing remuneration schemes will become redundant and should be phased out. I was glad to hear the opinion voiced yesterday by Professor Hugenholtz that such an outcome is indeed envisaged by the Information Society Directive. I sincerely hope that that is the intention.

To sum up: everything should be done to stop levies being extended into the digital domain and to prevent any further erosion of the exercise of exclusive rights, backed up by technical copy-protection measures and digital rights management systems.