General Report – Part D
Legislative Activity Concerning Private Copying
(Translation)

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Note: "MPT", in French, or "TPM" in English, stands for "technological protection measures", that is to say all of the technical aids that are created to prevent access to or use of protected objects without authorization and which are not otherwise authorized by the law.

"GDN", in French, or "DRM" in English, stands for digital rights management and is commonly defined as the use of digital technology in order to activate the rights of the protected objects, especially by means of MPT, permitting the differentiation of products and preventing consumers from bypassing access technology and the restrictions of uses.

This summary was written based on responses given by 15 groups: Australia, Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Spain, Sweden, Switzerland and the USA.

(1) Does your national law include provisions specific to private copying?

In general, we can observe one thing: The majority of the responses to the questionnaire do not point out significant modification of the law regarding private digital copying. There are rare exceptions, like the USA, where the legislation has principally extended the basis, but also, possibly the beneficiaries of the compensation/remuneration for private coping. This observation applies in particular for the countries that have not yet transposed the European Directive of 2001 called "the Information Society Directive", such as France or Belgium.

In fact, the majority of systems do not formally distinguish private digital copying from private analogue copying. This is the result of a broad formulation of the legal provisions, as it is indicated, in particular, by the Hungarian, Swiss, Spanish, German, and French reports. We can observe a quite broadly shared principle of technological neutrality of the definition of private copying**.** It is thus particularly important to point out below those national provisions which depart from this principle.

One also observes that the countries whose legislation already conforms to the WIPO treaties (either directly or by means of the Information Society Directive) are largely content to impose the TMP and the DRM as does, for example, the Digital Agenda Act, 2000, in force in Australia since March 2001, or the DMCA in the USA.

As we will detail below, the most radical provisions may be found within the European Union, the members of which prohibit private copying of software and electronic databases.

(2) If yes, have the changes followed a

(2.1) Comprehensive approach (i.e., did they regulate all aspects of digital copying and making available)? Please describe.

Taking into account the previous remarks, private copying has not given rise to a global legal approach, except very rarely. This observation is equally valid both for the systems preferring a synthetic approach to the exceptions to exclusive rights and for the systems which adopt an analytical method.

Two exceptions deserve our attention, nevertheless: The Danish Law on Copyright of 1995 prohibits the digital copying of a work which is itself already made available in digital form. This well-intentioned exception is primarily based on an analysis of benefits obtained by the consumer. Denmark has at the same time followed another course: the prohibition of certain uses of private copying. Since December 2002, "collective" digital copies have been limited to non-commercial uses. In Switzerland, a draft law adopts the same logic, proposing a more strict definition of private and personal use. It goes without saying that this development has not been met with unanimous acceptance, especially among consumers.

The restriction of private copying can also take place indirectly through an increase in the application of TPM, thus allowing copyright holders to make their works unsuitable for private copying with no possible exception. This is underlined by the US report concerning the application of the Digital Millennium Copyright Act (DCMA). This solution, also contested by consumers, will be detailed in 2.5.

(2.2) Or have the changes been only partial in nature?

(2.2.1) What partial changes have been made (private copying in general, or only certain scenarios of private copying)?

As mentioned before, the most frequent treatment of private digital copying aims to enlarge the basis of compensation/remuneration and/or the beneficiaries of these. Precise information on the application of this solution is given in the summary in Part C.

The majority of national laws have, by different means, extended the scope of the law to include recording carriers and/or digital recording equipment. As a result of the multiple functions of the majority of digital equipment and carriers, the imposing and the calculation of the amount of the levy are often the object of controversy. This is the case, for example, in Spain, where the legal condition of "suitableness" gives rise to multiple interpretations.

The solution of imposing a levy on carriers has been nearly unanimously adopted. Firstly, those that are detachable were targeted, especially blank optical discs. But, more and more, countries impose or have drafts to impose (Switzerland, Spain) a levy on integrated carriers such as hard discs.

In the USA, the Audio Home Recording Act of 1994 (AHRA) establishes a right to private digital copying, limited to phonograms, but without making a distinction whether or not the person who makes the copy is the owner of the original copy. On the other hand, it establishes a right to remuneration for digital, and only digital, copying. In order to limit the negative effects on copyright holders, the law prescribes that the copying be restricted to one generation either by means of the equipment or by using SCMS or an equivalent code.

We can observe that some legal systems define a base capacity for imposing the levy: 100 Mo for all supports in Greece, or 32 Mo for memory cards in Hungary, for example.

Finally, we can note that some countries, like Hungary, which have chosen to distinguish between the technical purpose of the carrier (audio CD-R, or data CD-R) encounter difficulties of application owing to the convergence of these media.

Some countries, like Germany, Spain, Belgium, and Italy, have chosen to impose a levy on certain equipment in addition to carriers. On the other hand, Greece and the USA limit themselves to levies on equipment.

The imposition of levies on certain types of equipment does not pose any difficulties in terms of their use in the reproduction of protected works (CD and MP3 writers). Other kinds of equipment may be treated differently country by country; for example, a levy imposed on scanners in Greece, but not in Spain.

On the other hand, for the time being, no system imposes a levy on printers, but it is envisaged sometimes as a solution. More generally, the question is raised for computers. In this matter, the Greek provision, which excludes the imposition of a levy on peripheral devices as soon as they can be integrated into the central unit, is remarkable. An equivalent to this is found in the USA, where equipment with software installed into it is exempt.

The broadening of the scope of beneficiaries is less frequent. In this respect, we can observe the French Law of 17 July, 2001, which provides for a right to remuneration to all categories of authors and publishers for private copying on digital recording carriers. Thus, copyright holders have become beneficiaries also in the domain of literary and graphic works.

(2.2.2) Have existing private copying limitations been narrowed or broadened?

Some countries have left the conditions for private copying unchanged in the digital universe. Those that have modified the conditions have naturally and fortunately worked toward the restriction of private digital copying.

These developments can take two forms: restrictions in certain situations and/or the prohibition of some categories of creations.

Tightening up of conditions

Besides the afore-mentioned Danish solutions and the Swiss draft law, which seek to circumscribe private copying, the provision adopted in the Irish Law on Copyright (Section 86) is particularly interesting. It states that private digital copying is expressly authorized if it is not prohibited by the copyright holders. One can therefore think quite legitimately that this restriction will not only be influenced by the presence of TPM but also by conventional means.

In Finland, private copying can only take place if the work is legally owned. Even if it does not limit itself to the digital universe, this solution permits the limiting of private digital copying, especially from networks. The Hungarian law, excluding digital access from private copying in the event of third-party copying, shares a similar concern, to restrict digital copying.

In Germany, the law transposing the Information Society Directive also adds the condition that the copy be free of charge if it is made by a third party. This general provision is applied to digital reproduction, but not to reprography or similar technology.

The exclusion of certain creations

All the members of the European Union have legislation which conforms to the directives of 1991, on computer programs, and of 1996, on databases. These texts, dealing with digital creations excellently, exclude or considerably limit the possibility of them being copied.

The practical reach of these restrictions is not negligible. In reality, the majority of multi-media creations contain software elements, and the concept of databases is sufficiently wide for it to be applied to a number of digital creations.

What is more, the right to a backup copy of software is strictly defined in order not to cause damage to the copyright holders.

The reaction of some countries in the face of their restrictions has been contradictory. For example, Sweden excludes the private copying of databases expanding this to all digital reproduction of any compilation held in digital form. On the other hand, Article 22*bis* 3º of the Belgian law of June, 30, 1994, authorizes the reproduction of databases held on digital carriers when this reproduction

takes place for reasons of illustration for education or for scientific research, and when it can be shown that these are not-for-profit activities and do not conflict with normal exploitation of the works.

(2.3) Are there any TPM-related legal provisions (EU-Members please see also part E of this questionnaire)?

As the question stipulates, we refer to part E of the report. In fact, certain EU members studied have not transposed yet the Information Society Directive. This is notably the case concerning Belgium, Germany, Spain, and France. In spite of the absence of transposition, we can note that the French and Spanish laws already protect, in a certain way, the technology associated with software.

As regards these countries, the draft laws are very faithful to the text of the Directive, as in the case of the Hungarian law and the Swiss draft.

The same observation is applicable for the national laws having implemented the Directive (Italy, the Netherlands, Greece, Denmark): they prohibit both the acts of infringement and the preparatory acts, sometimes going as far as their mere publicity (such as the Danish law of December 2002).

Even if it seems to only target services with conditional access, the Italian law of April 2003 (new Article 171 of Copyright Law) is remarkable since it mentions expressly the absence of distinction between private and public use of the creation in respect of which the protection measure has been circumvented. What is more, the penal sanctions to be applied are extremely significant. Regarding penal sanctions, they are either assimilated to those to be applied in case of piracy, and punished by the same penalties, or are subject to specific penal provisions.

As regards other countries, we can observe that the USA, by means of the DMCA, and Australia, foresee sanctions against preparatory acts heavily but do not apply them against the acts of circumvention themselves, or at least limit their application to the circumvention of access control.

The notion of TPM has been strictly interpreted in Australia (no application for the systems of territorial zones for video games by the Federal Court 55 IPR 497) and the distribution of circumventing devices can be legitimized by a written declaration justifying “authorized practice”.

Nevertheless, the Australian group emphasizes that the absence of a sanction against the circumvention of a TPM is not a real problem in so far as access to circumventing equipment is difficult and “authorized practice” does not apply to private copying.

The DMCA, on the other hand, limits sanctions to situations in which the function of circumvention is proven. Furthermore, this norm is applied more broadly than the provisions of the Information Society Directive insofar as it is applied

to analog equipment as well, which must contain some copy-control mechanism in the cases of distribution on demand or pay-per-view channels, and it foresees sanctions against the interception of services of conditional access.

(2.4) Are there DRM-related legal provisions?

The observations made in point 2.3 above are largely applicable also concerning DRM.

As consensus is easier to reach on this subject, the rules adopted, or under discussion, outside or inside the European Union, are relatively homogeneous: they foresee sanctions both the acts of removal or alteration of DRM and the subsequent use of material from which DRM has been removed or in which it has been altered. The application of sanctions is made subject to the presence of intent, especially in Ireland and the USA.

Regarding differences in approach, we can observe these:

The definition of DRM

Germany, applying the principle of technological neutrality, deliberately ignores the distinction between TPM and DRM, foreseeing uniform approach to prohibited acts. At the same time, the other members of the EU have maintained, to a lesser or greater degree, the distinction formulated in the directive.

In contrast with this, the DMCA seems to use many nuances (see above, for the distinction of devices for access control) to such an extent that there is no sanction against the circumvention of a right control device.

The definition of the purposes of the devices or the services of which the distribution is prohibited

The choices concerning this issue are various. For example, the concept is strictly interpreted in Australia, while Italy foresees heavy penal sanctions (Article 102) even in the case of the simple possibility of circumvention (Article 171).

Sanction of subsequent acts

The DMCA extends, very logically, its sanctions against the distribution of works in the case which DRM has been removed or altered (17 USC § 1202).

(2.5) What is the effect of the TPM/DRM-related rules on previously existing private copying exceptions?

The majority of the reports emphasize *a fortiori* that, in the present state of existing legislation, the rules, new or under consideration, concerning TPM/DRM

have still no effect on private copying. Nevertheless, one can make some observations by considering prospective legislation.

Two major effects may be envisaged: the maintenance of private copying, despite the presence of TPM/DRM, and the taking into account of technological measures in the perception and the distribution of remuneration.

Concerning the compatibility of systems, the complexity and stakes of the problem have resulted in different solutions, notably in Germany and Spain.

The Italian law (Article 71) seems to adopt a special position: a TPM can prohibit absolutely private copying but not the reproduction for the request of public authorities or for security reasons. And, if the copyright holders have to permit at least one copy, this copy can be analog and not required in the event of online communication or when it is contractually excluded.

In the same way, the US group believes that the AHRA does not appear to confer a right on the consumer but simply limits the power of the copyright holder: thus the TPMs do not need to be compatible.

As regards, the High Council of Literary and Artistic Property, a French consultative organ, noted in its report No. 2002–3 on professional uses and the remuneration for private copying that these should not be taken into account in the management of private copying system.

In the absence of a solution accepted by the main players, some legislation would refer these issues to *ad hoc* commissions (Spain) or to the courts (Greece).

Concerning the adaptation of mechanisms of compensation/remuneration, the solutions are more consensual. Also, all this is expressly foreseen in the Information Society Directive. The principle is thus largely recognized (Germany Spain France …). The Spanish group, nevertheless points, to a major obstacle: should one take into account possibility of protection or rather its presence?

(3) If no legislative action with regard to digital copying has been taken:

If we take into account the preceding developments, it is not surprising that the majority of national groups answered this question in the negative: legislative activity, even fragmentary or in the course of being adopted, is observable in all of the countries studied.

(3.1) Has any legislative action been considered but rejected?

The US report describes an interesting attempt to abandon the clause "no mandate". In fact, the impossibility of going against the industry has weakened significantly the effect of TPM/DRM.

Fritz Hollings' bill in the Senate aimed to unite the representatives of all the main players, industries and consumers, in order to define standards of techno-

logical protection, which could then be made compulsory. This initiative did not result in success.

Still in the USA, proposals are being examined concerning the application of the exhaustion theory in the case of digital distribution, the creation of an exception for technical copies in networks, and backup copies. Such provisions would permit, to a greater or lesser degree, an approximation to the solutions in force within the EU.

In another field, the Spanish project to amend the copyright law envisages, as a last resort, the entrusting of decisions concerning compensation/remuneration, and especially the appraisal of the concept of "suitability" (see above 2.2.1) to the Council of Ministers. This solution is contested by the organizations representing the copyright holders.

(3.2) Are there any legislative or administrative reports that bare on this issue and might be preliminary to taking legislative action?

The majority of national groups mention the existence of draft laws or preliminary reports. What are involved are essentially texts aiming for conformity with the WIPO treaties or the Information Society Directive.

The content of these has already been presented in the preceding sections and/or will be presented, for the EU, in part E.

(3.3) What digital copying acts are generally considered as being covered by the analogue exception on private copying (i.e., an exception crafted in view of analog private copying)?

This question, in general, has not been dealt with, since as explained above in point 1, the countries studied apply the principal of technological neutrality which extends to "fair use" as it is applied in the USA. As the French report emphasizes: "*ubi lex non distinguit* …" Regarding its general application, this principle is nevertheless tempered by the considerations listed in point 2.

(3.4) How are existing limitations concerning private copying being interpreted with regard to digital private copying by case law?

As a general rule, the reports do not include case law concerning digital copies.

Nevertheless, and in an indirect manner, the courts have dealt with this question in France, Spain and the USA, essentially in connection with the Internet. These judicial efforts should not overshadow those mentioned previously, notably in Australia.

The French judiciary stated in 1996 that communication through a web-site is covered by an exclusive right because the server cannot be associated with a "virtual domicile" thus allowing the operation to be considered as private copying.

In the USA, case law relating to Napster points out that the sharing of MP3 files could not be considered as a case of fair use, independently of the private nature of downloading. The intermediary who, knowingly, leaves infringing reproductions on their system can be punished as he is participating directly in the infringement.

The other contentious issue concerns the scope of application and the amount of the compensation/remuneration.

In France, administrative judges have clarified the interpretation of texts concerning private copying in order to adapt them to digital private copying. The *Conseil d'Etat* has applied the solutions mentioned previously, confirming the broadening of rightsholders who are beneficiaries of compensation/payment while excluding the area of multimedia (where the presence of a software element excludes private copying). Furthermore, corroborating the interpretation of the ad hoc commission, the judge legitimized the imposing of levies on carriers in function of "the rate of copying" of works but also in function of the level of compression of the data affected (non-published opinion the substance of which is integrated in the above-mentioned decision of the Commission of June 2003).

In respect of Spain, the report mentions two decisions relating to blank digital carriers. At the end of the Traxdata Affair (Tribunal of the 1st Instance, No. 22, Barcelona, January 2, 2002) and Verbatim Affair (Tribunal of the 1st Instance, Esplugues de Llobregat, No. 2, March 13, 2002), it was decided that blank carriers should be levied even if they could be used for purposes other than private copying. The CD-Rs are considered as "suitable" carriers under the law (see above).

(4) Other issues concerning digital private copying:

(4.1) To what degree does the law authorize acts of public communication and/or the communication/making available to the public of digital material?

This question was approached in different ways in the national reports.

The majority of national reports note in this connection that digital communication of a work is dealt with by the application of an exclusive right and should be expressly authorized by the copyright holder.

In certain legal systems, this solution also is covered by the principle of technical neutrality. In Germany, as well as in France, for example, the right of communication to the public includes implicitly digital dissemination.

In other countries, a specific right has been recognized applying both to copyright and neighboring rights. This is the case in Italy (Article 16 of the Law on Copyright) and in Ireland whose law (Section 40 (1) (a)) mentions expressly communication in digital networks.

Other reports have treated digital communication while dealing with other exceptions. For the sake of coherence, we will deal with this question in the next point.

(4.2) Did the national legislature change such existing limitations in view of communication/making available digital works?

We have noted, several times, above the principle of technological neutrality in legislation. It seems to be generally accepted, and it is applied to the definition of the prerogatives of rightsholders, to the exception for private copying and, in general, also to other exceptions.

Thus, France has not modified the existing limitations while the Spanish report specifies that the exceptions to the right of public communication apply also to digital communication. It is the case for press reviews, reports on current events, judicial documents, databases used for education or research, and parodies.

Certain reports underline the taking into account of the digital character of the communication in the application of the exceptions. These adaptations concern primarily education and research.

In Belgium, for example, in 1998, by modifying the Copyright Law of 1994, education and research benefit partially from exceptions permitting digital copying of extracts of literary and plastic works and the public communication of works on digital carriers. In the same spirit, the Swiss draft law authorizes the communication of works, in classes, even from digital material (Article 19, paragraph 1). But, the same draft law goes even further in permitting the communication of works as electronic files available on an internal network within a company or an administration.

In Australia, since a law passed in 2000, the exception for libraries and educational institutions has been extended to the digital environment. Germany has also dealt with these limitations not foreseen in the Information Society Directive: Article 52A of the Copyright Law authorizes the making works available to the public in certain precisely determined cases, such in respect of extracts of a work for the purposes of education or research. This exception is nevertheless subject to equitable remuneration.

In the USA, a specific legal mechanism has been adopted for this issue: the Teach Act (USC section 110(2) and 112). It facilitates digital transmission of extracts of works (with the exception of dramatic and musical works) solely for students involved in educational programs. However, in order to reduce damage caused to copyright holders, the educational establishment must use techniques of distribution which prevent the reuse of works.

(4.3) What role does the three-step test have in determining the scope of analog/digital private copying exceptions (both with regard to lawmaking activity and to case law)?

The role of the three-step test is considered by all the reports as important and crucial. However, this is obvious, since it is a condition explicitly foreseen by Article 9(2) of the Berne Convention, and for the EU countries, in Article 5.5 of the Information Society Directive.

The difference between the various legal systems appears, in this area, not in terms of the principle itself, but regarding its formal presence in or absence from the legislation. Several countries, including France and Finland, do not mention the three-step test explicitly. On the other hand, they often confirm the attention devoted to the test by the legislature (for example, by the consideration of the test during parliamentary discussions) or by the courts, attention facilitated, it is true, by the application of the principle of strict interpretation of exceptions. The German report justifies this absence by saying that it limits the judicial insecurity regarding the assessment of exceptions foreseen in a limitative manner. In the USA, the conditions of application of fair use are generally admitted as being equivalent to the conditions for the application of the three-step test.

Nevertheless, the situation is evolving: the Greek and Hungarian laws impose the test while the Swiss and French draft laws transpose the Information Society Directive, having recourse to its formal integration.

More surprisingly, the Belgian legislation only refers to it partially concerning the exceptions for education and research, applied since 1994 and already mentioned. In a similar manner, Article 40*bis* of the Spanish Copyright Law leaves out the first condition of the test, considering that the limitation to certain special cases is already covered by the existence of an exhaustive list of exceptions.

As the Australian report observes, the test serves as an argument for certain pressure groups, and especially for the representatives of the rightsholders, in order to contest the application of exceptions, either recognized or under consideration, in insisting that those exceptions are not in accordance with the test. The Spanish report mentions, for example, regarding this issue that when compensation/remuneration is not applied uniformly to all the cases of an exception, especially regarding private copy, this discrimination could be interpreted as contrary to the application of the test.