The Future of Copyright Levies in the Digital Environment

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The subject of my talk is the future of copyright levies in the digital environment. As Professor Cornish already told you, this is going to be a short summary of the rather lengthy report that our Institute produced a couple of months ago. It is available on our web-site (www.ivir.nl); you can download it from there for free.

I will take you through the highlights of the report. It begins as it should with the beginning: what are copyright levies? This may be an offensive question to a knowledgeable audience as you are, but I think it is worth reconsidering what levies really are before we enter into a debate. Of course, we all know what they are; they are payments on blank media or recording equipment that are usually collected and distributed by collecting societies. Their rates are set either by law, or by a government authority or through a complex process of negotiations between collecting societies and producers or manufacturers of blank media or equipment. And here comes the important thing that we sometimes tend to forget; the levies are an integral part of a statutory licensing system. Certain exclusive rights are replaced by rights to remuneration, in particular in respect of private copying but also in the broader field of reprography. So what you see here is a right to remuneration that replaces an exclusive right.

The point I want to make here is that the statutory exemption defines the scope of the levy. What this means is that no levies are due for illegal copies. This is a very important point. Surprisingly, however, when I was at a meeting at the European Commission in Brussels last week on this very subject, I heard a representative of a collecting society say that this principle no longer applies; that now levies may, and even should, be paid for acts of illegal copying; in other words, that there should be a right to remuneration that takes into account peer-to-peer file sharing.

That is quite a step forward – or backward – in the debate and it raises an enormous number of important issues. Just one of the many questions that this triggers: is that really a levy that we are talking about? If we are going to pay levies for acts of piracy, is that not really a tax? If it is a tax, does the principle of national treatment apply?

There are a lot of other questions, of course. Whatever the answers are, I am from the old school and I still believe that levies should not be applied to acts of illegal copying.

Let me take you through the history of the levy system, very quickly. The history begins in Germany with Josef Kohler, one of the godfathers of intellectual property law, who, in 1907, declared that copyright does not extend to the private sphere, as a matter of principle. That was a tenable position for many years and, in fact, many people still endorse that view. However, it gradually became less tenable politically and economically as home-recording equipment became amply available in the 1950s and 1960s. The losses suffered by right-holders simply became too large and led to a reconsideration of private copying exemptions that were, and still are, widely available in most countries.

Then, in the 1950s and 1960s, the German Federal Supreme Court decided in a series of landmark cases on home taping. These cases were brought before the Court by GEMA against manufacturers and retailers of home-taping equipment. What the German Supreme Court said – based on a literal interpretation of the then current German copyright law – was that home taping was indeed copyright infringement that the legislators could not have foreseen. Accordingly, because the equipment was primarily aimed at – or at least very much suitable for – facilitating such infringing copying, the equipment manufacturers were held liable for contributory infringement. A very different result emerged in the later and much more famous Betamax decision by the US Supreme Court, I might add.

As to enforcement – and this is equally interesting to note in retrospect – the German Supreme Court in 1964 judged that the monitoring and enforcement of this exclusive right of private copying, however, was impossible because it would encroach upon the private sphere which was protected – and still is protected – by the German Constitution. In fact, GEMA required the manufacturers of recording equipment to submit information on the names and the addresses of purchasers of such equipment, so that it could monitor future use. This was squarely in conflict with the constitutional right of privacy. So, it became an unenforceable right of private copying. What the Supreme Court suggested was a levy as a compromise between an exclusive right, on the one hand, and the right to privacy, on the other. That is how the levy system came into being in Europe. From Germany, it has spread all over Europe and also to several countries outside Europe.

What we see today is lots of levies. Levies that differ from one country to another. There was an attempt at harmonization in the mid-1990's, but it failed. There is no harmonization, and there are no uniform tariffs. In fact, there are no levies at all in some important countries in Europe, like the United Kingdom and Ireland.

What kind of levies do we see today? There are levies on analog and digital recording equipment, levies on analog and digital photocopying machines, faxes, audio-recorders and VCRs, levies on scanners, MP3 devices, CD-writers and – big question mark here – perhaps also levies on PCs. In some countries, this list

is much longer than in others. And, of course, there are levies on blank media, on audio tapes, audiovisual tapes, and also on all sorts of digital media, including recordable DVDs. Lots of levies. Which, of course, raises the question: is this expansion of levies into the digital environment really a good idea?

There are arguments in favor of such an expansion; and they are valid. One argument is obviously the ease and perfection of digital private copying which is of a much higher degree than in analog days. In fact, individual users can make near perfect private copies that are infinitely reproducible at nearly zero cost.

Another argument, also in favor of such an expansion, is the inevitable convergence of analog and digital equipment. In fact, it is very difficult nowadays to make a distinction between analog and digital media and equipment. Look at supposedly analog machines in your living room, and you will find that they are also well equipped with chips, and that they are becoming digital machines. Conversely, your PC can and will emulate just about any recording or home-copying device that you can imagine.

However, that is also – paradoxically – a very good argument for not extending levies into the digital environment. There are indeed a good number of arguments *contra* such an expansion. The first one is that a PC is a universal machine. It has no primary purpose or function such as a tape-recorder, the primary purpose of which is to record copyright-protected works. The PC is not a dedicated machine, it is a "turing machine" that you can program into just about any machine you want, including very harmless devices from a copyright perspective. Therefore, the primary- purpose rule that underlies the levy system is a very strong argument against the expansion of levies into the digital environment.

And there are other arguments. There is, admittedly, a lot of digital private copying going on out there, but many of those digital uses are actually permitted, and should therefore fall outside the scope of any levy scheme. Look at the public domain works that we are all copying on a daily basis from the Internet. There is a lot of back-up copying going on, that is allowed by the EC Software Directive. There are all sorts of educational uses that are permitted by law. And finally, there is a lot of copying of copyright-protected works that is made available over the web under implied licenses. We all have our web-sites these days, we all love everyone to privately copy from it, but we do not expect a levy in return.

Then of course – and this brings me back to the argument I made at the start – levies should not, at least under current legal doctrine, serve as compensation for illegal uses. What you see in all discussions about expanding levies into the digital environment is the peer-to-peer debate immediately surfacing. Peer-to-peer …. big-big problem, big losses for content-owners. But we are talking here about illegal acts. These acts cannot serve as an argument for expanding levies onto digital equipment. Unless, of course, we want to legalize such peer-to-peer uses

and to integrate them into the levy system. What this would mean, of course, is a colossal expansion of the scope of the statutory licenses. And the question is: is that really a good idea? Well, probably not. This kind of expansion of the levy systems would seriously undermine the exclusive rights that are at the core of the copyright system as we know it.

Another argument against expanding the levy system to illegal copying is that it would simply legitimize such copying. Pierre Sirinelli has made a very good point out of that. If you have users pay levies for peer-to-peer type activities, they expect that what they are doing is allowed.

Then, finally, there is the DRM argument. Recall why levies were invented by the German Supreme Court in the first place. Because individual rights management was not considered possible and legal. Because individual rights management would encroach upon the private sphere. Well, at least in theory, digital rights management systems do allow just that! They cure the market failure which is behind much of the levy system that we know today. This is the essence of Article 5.2(b) of the EC InfoSoc Directive. It is a very complex provision which tries to reconcile digital rights management and levies. The InfoSoc Directive, on the one hand, promotes and protects digital rights management very clearly under its Articles 6 and 7, and, at the same time, it mandates levies not only for analog but also for digital private copying. It does not say "levies" but it says "fair compensation" based on possible harm, but we all know what that means: levies.

The level of "fair compensation" however – and here comes the difficult and controversial part – should take account of the application or non-application of technological measures. A logical thing if you think of the *raison d'être* of any levy system. If a levy system can effectively be replaced by individual rights management, there is no need and no rationale for such a system to survive. In fact, what the European Commission, who drafted this language, wants – it becomes clear of the drafting history of the Directive – is to avoid double payment by consumers. Consumers pay once through the levy system indirectly to the right holders and another time directly to content owners under a digital rights management system. What this all adds up to is a gradual phasing out of levies.

The question however is – and that is the difficult part – what are the trigger points? How to implement such a phasing out? Article 5.2(b) of the InfoSoc Directive provides that Member States may apply private copying exceptions "on the condition that the right holders receive fair compensation which takes account of the application or non-application of technical measures". That is the rule that we are trying to interpret.

There are two ways to look at the "application or non-application of technical measures:" a "static" interpretation and a "dynamic" interpretation. The static in-

terpretation is based on a literal reading of Recital 35 which refers to the degree of actual use of technological protection measures. So, the idea here is that the phasing out will be proportional to the actual application of such technological measures in the market place. In other words, if content owners decide not to use technical protection measures for whatever reason, then levies will continue to live on forever. There are a number of problems with this interpretation. First of all, that it is very unclear what the base-line would be of such a degree of actual use test. A 100% level of application of technical protection measures, of course, will never exist. Open distribution models will always survive; there will always be sponsored services, free web-services, etc., that are not protected by technological measures. Another problem is that some sectors of the cultural and information industries are simply not suitable for the application of technological measures.

Still another problem is that – if you really think about it – there is no linear relationship between the use of a technological measure and the media that is used for copying. The same media may be used to copy very different types of contents. Let us imagine that the music industry, from next year, applies 30% copy-protection to its music CDs. Should this mean a 30% decrease of levies? Of course, not, because CDs are also used for all sorts of other contents. This is a very difficult calculation problem that will be impossible to solve.

Then, possibly the most convincing argument against this interpretation is that it really puts a premium on not applying digital rights management; in fact to keep the good old rough justice system of copyright levies intact.

The dynamic interpretation that we favor in our report does not suffer from that principal objection. We base our interpretation on Recital 39 of the Directive which refers to the availability, not the actual application of technological measures. What that means is that regulators, authorities or whoever who set the tariffs are not bound to measure what you cannot measure, but they are rather invited to initiate – and this is not an easy task either, but it is a more forward-looking exercise – a process of technology assessment where the real question is are technological measures economically available in the market. "Economically," in a very broad sense; in the sense that the technology must be there and must be workable. In an economic sense in that the cost of applying such DRM should not be burdensome; the cost to the consumers should be acceptable; in a way that the consumers also accept and be able to work with the digital rights management systems. So, the consumer side of the coin is also integrated into this equation. Finally – and this brings me back to he German Supreme Court's decision of 1964 – digital rights management systems respect individual users' privacy rights. If and when these conditions are met, sooner or later, the reasons underlying the current system of levies will finally cease to exist.