

General Report – Part C

Summary of the National Reports on the Questions Concerning the Regime of Private Copying in the Analog Domain

(Translation)

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The private copying regime in the analog field

1. Is there a private copying exception in your national copyright law?

The majority of provisions in national legislation studied relate to the regime of private copying. In addition to the countries whose national groups have prepared reports on this issue, we have to note that the issue of private copying have attracted recently the attention of legislative bodies in several other countries, such as Algeria, Austria, Belarus, Bulgaria, Cameroon, Congo, Czech Republic, Equator, Estonia, Gabon, Iceland, Israel, Japan, Kazakhstan, Kenya, Latvia, Mauritius, Moldavia and Nigeria.⁷²

2. The scope of the exception for private copying in national law

2.1. Are all protected works treated alike, or is the exception limited to a particular class, or particular classes, of protected works?

The field of application of private copying regimes differs in a significant manner from one country to other. The various variants are illustrated in the following chart:

⁷² Australian Copyright Council, Remuneration for private copying in Australia: A Discussion Paper, September 2001, p. 9.

Countries	Works covered	Exceptions
Belgium	Aural and audiovisual works	N/a
Canada	Musical works, performances of musical works, sound recordings of musical works	N/a
Denmark	All works	Works of architecture; the reproduction of a work of art by mould, printing, on the basis of an original negative or in any other manner giving the impression that the copy may be regarded as an original; software; digital reproduction of works made in digital format
Finland	All works	Software and databases
France	All works	Works of art intended to be used for the same purposes as those for which their originals were created; software and electronic databases
Germany	All works	Reproduction in a way other than by hand writing (it being clarified that the use of computer is authorized) of the notes of musical works, of entire books and of reviews; databases; software; reproduction of the public performance or recitation of a work on visual or aural carrier
Greece	All works	Works of architecture; certain artistic works; sheet music; databases
Hungary	All works*	N/a*
Ireland	All works	Electronic databases
Italy	Works contained in phonograms and videograms	N/a
Netherlands	Literary and artistic works	Works of architecture

* The editor's remark: This information indicated by the author concerning Hungary is incorrect. For the correct information, see the answer of the Hungarian ALAI group to the questionnaire.

Countries	Works covered	Exceptions
Spain	All works	Software and databases
Sweden	All works	Works of architecture; software; electronic databases
Switzerland	All works	Software
United States	Sound recording of musical works	N/a

2.2. Which acts are exactly covered by the private copying exception?

Although the terminology tends to differ from one national law to the other, it may, nevertheless, be concluded that the regime relates essentially to the concept of reproduction. Certain texts exclude all other forms of private use. In this respect, we may refer in particular to Article 53(6) of the German law which explicitly excludes communication to the public from the private copying regime. In contrast, other laws apply the private copying regime in a much broader field. This is particularly the case as regards Article 19(1) of the Swiss law which prefers the concept of the use of works for private purposes to that of private copying.

The distinction between manual and mechanical reproduction seems to be obsolete. Nevertheless it is still applied in the German law which provides that the reproduction of notes of a musical work or of an entire work or newspaper is only covered by the private copying exception if it is made manually, which, at the same time also includes computer storage.

2.3. Does the law distinguish between making an extra copy or copies of a work of which one already owns a copy on the one hand, and making a copy of a work one doesn't have, instead of acquiring a licensed copy of it on the other hand?

The purchase of a primary copy of the work, in general, does not constitute a prerequisite for the application of the private copying exception. This condition was rejected by the German Supreme Court in 1997.⁷³ Otherwise, private copying is regarded a kind of replacement of buying a copy of a work. A certain Spanish doctrinal current, however, is of the view that Article 31(1)2 of the *Law*, which provides that “the copy shall be intended for collective purposes for profit-making purposes,” does not permit to the copyist to take the advantage of not buying a copy, since such an advantage should be assimilated to profit making.

⁷³ *German report*, p. 9, note 23.

2.4. Who are the persons who benefit from the private copying exception (including third parties who make copies for persons who are privileged by the private copying exception)?

From this viewpoint, the national laws under study may be divided into three categories. The first category includes those laws which expressly exclude from benefiting from the private copying exception the acts performed by third persons; this is the case in particular as regards the Spanish and Swedish laws. The second category consists of those laws which expressly admit the possibility that the acts covered by the exception may be performed by third parties. The Danish, Finnish, German, Hungarian, and Swiss may be found in this category. Finally, the third category is composed of those laws which are silent on this issue. In certain cases, the jurisprudence fills in this legislative lacuna. This is the case, in particular, in the French law; in two famous decisions rendered in the *C.N.R.S.*⁷⁴ and *Rannou-Graphie*⁷⁵ cases, it was found that the private copying exception does not extend to third-party copyists. The Canadian courts seem to have adopted the contrary position: in a recent decision, the Federal Appellate Court concluded that the reproduction of a work for private study or research may be performed by a third person for the researcher without infringing Article 29 of the *Law*.⁷⁶

2.5. What is the legal construction of the private copying exception: is there a “right” of the end-user? A “privilege”? A “limitation” or an “exception” (does this distinction play a role at all/is it considered under national law doctrine to be of importance)?

This question raises a problem of definition. For the discussion, we borrow the following formulation from Professor Sirinelli: “It would be the best to speak, as Ricketson noted, of ‘limitations’ we are faced with a right to remuneration, and of ‘exceptions’ where there is no right anymore”⁷⁷ After having settled this semantic question, we have to qualify now the private copying regime.

⁷⁴ D. 1974. 337, note Desbois, JCP G 1975, II, 18 163.

⁷⁵ *Rannou-Graphie* case, Civ. 1ere, March 7, 1984, RIDA July 1984, p. 151, rejecting the appeal against CA Paris, October 8, 1982, RIDA January 1983, p. 138.

⁷⁶ *C.C.H. Canadienne Ltée v. Le Barreau du Haut-Canada*, [2002] 4 C.F. 213, 285. See also Barry Torno, *Fair Dealing: The Need for Conceptual Clarity on the Road to Copyright Revision*, Ottawa: Consommation et Affaires commerciales Canada, 1981, p. 45.

⁷⁷ Pierre Sirinelli, “Rapport de synthèse”, in *Journées d’Étude de l’ALAI – Les Frontières du droit d’auteur*, Sidney, Australian Copyright Council, 1999, p. 135.

First of all we have to note that this question has not emerged with real passion in the doctrine and in the jurisprudence. This may be explained if we place this regime into a historical perspective. Originally, there was nothing else but the tolerance of a marginal phenomenon without any major impact on the economic exploitation of works. As the Spanish report underlines, this tolerance later became a kind of resignation in the face of the impossibility of the authors to control the private use of works under the conditions of constant technological developments. Nobody was able to try to justify a right of users in the name of the protection of their privacy. The reports of the French and Spanish groups mention this.

As regards the distinction between “exceptions” and “limitations,” it seems to prevail in the Hungarian, Italian, Spanish and Swiss doctrine, but rejected by the German and Swedish doctrine. Otherwise, the US and Canadian laws foresee the private copying regime as a basis for immunity of users against infringement claims. The most original approach may be found in the German doctrine which considers the rights to remuneration as a third type of rights in addition to moral rights and exclusive rights.⁷⁸

In fact, it would seem more exact to qualify the private copying regime as a statutory license subjected to a right to remuneration.

3. On what legal ground is the remuneration of the authors/rightsholders, if any, based?

3.1. On exclusive right? If so, how is the exclusive right exercised (individually/collectively)?

On this point, the national reports are unanimous: the remuneration for private copying is not based on an exclusive right.

3.2. A levy? If yes,

3.2.1. Which devices/activities give rise to the levy? (e.g., copying devices/blank material/copying activities/importing activities/other: specify); how are these devices/activities defined?

It may be stated in general that the basis of the levy is defined in a broad a technologically broad manner. As an illustration, Article L.311.4 of the French Code de la propriété intellectuelle may be mentioned under which the levy must be

⁷⁸ *Schricker-Melichar*, §§ 45 et s. note 18. *German report*, p. 13.

paid for “recording carriers that may be used for private reproduction of works”. The Canadian law provides that only carriers “usually used” by consumers for such reproduction are subject to the payment of levies.

The obligation to pay levies applies, in general, for blank carriers, but certain countries (Belgium, Germany, Greece, Italy) extend it also to recording equipment.

The chart included under point 1.3.2.3, below, indicates the carriers and equipment for which levies are to be paid. They are fixed by the law (Greece, Spain, United States), by a tribunal or a commission (Canada, France), or by a collective management organization (Hungary).

It should be added that the laws of some countries also prescribe the obligation of paying levies for photocopying machines (Germany, Greece, Hungary, and Spain), and also for telefax machines (Germany and Spain), for scanners (Germany, Greece and Spain), for printers (Germany and Spain) and for the paper to be used for these (Greece).

3.2.2. How is levy amount fixed: (by law; negotiations of the parties; state intervention/mediation/litigation)?

In Denmark, Greece, Spain, and the United States, the amount of the levy is fixed by the law. This involves the major inconvenience that any adaptation to the technological developments needs a legislative amendment. Certain national laws foresee the intervention of a ministry or another governmental authority: this is the case, for example in Finland (with the intervention of the Ministry of Education). In other cases, the determination of the amount of the levy is the result of negotiations between collective management organizations, on the one hand, and the producers of carriers and equipment. In Italy, in the absence of agreement between these parties, the amount is fixed by the President of the Council of Ministers, after a hearing with the participation of the interested parties. The German and Swiss laws provide that, if the interested parties are unable to reach agreement, the dispute is submitted to an arbitration board, against the decisions of which any party may appeal to the ordinary courts. The Hungarian law foresees that the amount of the levy is determined by the collective management organizations representing the owners of rights after consultation with the interested parties. Finally, the Canadian and French laws leaves the determination of the amount of the levy to a quasi-judiciary body, namely, in France, to the commission created by Article L.311-5 of the *Code de la propriété intellectuelle*, and in Canada, to the Copyright Board.

3.2.3. What is the amount of levy (specify how much is due on/for what)?
Please also indicate the criteria according to which such payment is being fixed in practice, in particular, how it relates to the marketing of primary analog and digital products

Any attempt to offer an exhaustive synthesis of criteria for the determination of the amount of the levies seems to be condemned to a failure. The amounts applicable in 2002 are presented in the following chart.

Countries	Basis of the levies	Recording capacity	Amount of the levy
Belgium	Equipment suitable for the reproduction of protected works		3% of the sale price
	Analog sound carriers	60 minutes	0.1 euros
	Digital audio carriers		0.23 euros
	Recordable or re-recordable compact disc	700 Mg	0.12 euros
	Analog audiovisual carriers	60 minutes	0.1 euros
Canada ⁷⁹	Audio carriers	40 minutes and more	0.19 euros
	Audio CD-R, audio CD-RW and minidisc		0.51 euros
	CD-R and CD-RW		0.51 euros
Denmark	CD	4 minutes	0.56 euros
	DVD	120 minutes	1.27 euros
Finland	Analog audio carriers		0.0076 euros per minute
	Analog video carriers		0.005 euros per minute
	CD-R and RW		0.005 euros per minute
	Minidisc		0.005 euros per minute

⁷⁹ The amounts expressed in Canadian dollars have been converted at the rate of 1 \$ CA = 0,66874 euros.

Countries	Basis of the levies	Recording capacity	Amount of the levy
	Video DVD-R/RW, DVD-RAM, DVD+RW		0.0076 euros per minute
	Data CD-R and RW		0.0025 euros per minute
	Data DVD-R/RW, DVD-RAM, DVD+RW		0.0013 euros per minute for the audio aspect 0,0019 euros per minute for the visual aspect
	MP-3		0.005 euros per minute
France	Analog audio carriers	100 hours	28.51 euros
	Analog video carriers	100 hours	42.84 euros
	Minidisc	100 hours	45.73 euros
	Audio CD-R and RW	100 hours	45.73 euros
	Video CD-R and RW	100 hours	125.77 euros
	Data DVD-RAM and RW	100 000 Mb	50.43 euros
	DVD-RAM, DVDR and RW	100 Gb	33.82 euros
	DVHS	100 hours	125.77 euros
	Removable audio memory	100 Mb	1.05 euros
	Digital recording carrier integrated in a walkman, recoder in MP-3 format	100 Mb	1.05 euros
	Hard disc integrated into a television set, video-recorder or decoder	40 Gb and less 40 Gb to 80 Gb	10 euros 15 euros
	Hard disc integrated into a walkman or a normal player dedicated for playing recordings of works fixed on phonograms	5 Gb 5 Gb to 10 Gb 10 Gb to 15 Gb 20 Gb to 40 Gb	8 euros 10 euros 12 euros 20 euros

Countries	Basis of the levies	Recording capacity	Amount of the levy
Germany	Audio equipment		1.28 euros
	Video equipment		9.21 euros
	Audio carriers	60 minutes	0.0614 euros
	Video carriers	60 minutes	0.087 euros
	CD “burners”		7.50 euros
	CD	60 minutes	0.072 euros
	DVD-R/RW, DVD+R/RW, DVD-ROM		0.174 euros
Greece	Audio and video equipment		6% of the sale price
Hungary ⁸⁰	Audio carriers	60 minutes	0.0816 euros
		60 to 90 minutes	0,0979 euros
		90 minutes and more	0.0118 euros
	Video carriers	120 minutes	0.2 euros
		120 to 180 minutes	0.25 euros
		180 to 195 minutes	0.27 euros
		195 minutes and more	0.34 euros
Raw material import for audio carriers	1000 meters	0.82 euros	
Raw material import For video carriers	1000 meters	0.99 euros	
Audio CD-R and CD-RW		0.23 euros per piece	
Data CD-R and CD-RW		0.15 euros per piece	
Minidisc		0.24 euros per piece	

⁸⁰ The amounts expressed in Hungarian forints have been converted at the rate of 1 euro = 254 H forints.

Countries	Basis of the levies	Recording capacity	Amount of the levy
	DVD-R and DVD-RW		1.01 euros per piece
	DVD+RW		1.01 euros per piece
	Memory cards - MP-3	32 MB	4.08 euros
Italy	Audio and video equipment		3% of the catalogue price
	Carriers		?
Netherlands	Audio carriers	60 minutes	0.23 euros
	Video carriers	60 minutes	0.33 euros
Spain	Equipment suitable to reproduce phonograms		0.6 euros per equipment
	Equipment suitable to reproduce videograms		6.61 euros per equipment
	Audio carriers	60 minutes	0.18 euros
	Audiovisual carriers	60 minutes	0.3 euros
Sweden ⁸¹	Data CD-R/RW	80 minutes 74 minutes	0.11 euros 0.10 euros
	Carriers	60 minutes	0.13 euros
Switzerland ⁸²	Audio carriers	60 minutes	0.21 euros
	Video supports	60 minutes	0.3 euros
United States			2% of the transfer price (minimum 1 \$ and maximum 8 \$)
			3% of the transfer price

⁸¹ The amounts expressed in Swedish crowns have been converted at the rate of 1 S crown = 0.11 euros.

⁸² The amounts expressed in Swiss francs have been converted at the rate of 1 Swiss francs = 0.65 euros.

3.2.4. *Who has to pay the levy?*

In general, the collection of the remuneration is ensured at the source; namely at the manufacturers and importers. This leads to a major inconvenience, because there are many ephemeral importers who neglect their obligation to pay the remuneration. In order to fight against such kind of fraudulent behavior, the Spanish law (article 25(4)) establishes joint responsibility for the payment of the levy of the manufactures and importers, on the one hand, and the distributors, on the other hand.

Countries	Those who must pay the levy	Exceptions
Belgium	Manufacturers, importers and intra-community distributors	Producers of phonograms and audiovisual works. Broadcasting organizations. Audiovisual archives recognized by public authorities. Blind, deaf and similar handicapped people and their associations. Educational institutions recognized by public authorities
Canada	Manufacturers, importers and sellers	Exportations. Societies, associations and other similar organizations representing handicapped people
Denmark		Commercial exportation of audio or video tapes. Use for professional, including educational, purposes of audio or video tapes. Use of audio or video tapes for recordings for handicapped people. Other cases exempted from the payment of remuneration by the Ministry of Culture
Finland	Manufacturers and importers	Exportations. Producers of phonograms and videograms. Making recordings for use by handicapped people. Other persons exempted by the Ministry of Education

Countries	Those who must pay the levy	Exceptions
France	Manufacturers and importers	Companies dealing with audiovisual communication. Producers of phonograms and videograms. Persons who make reproductions on behalf of producers of phonograms and videograms. The publishers of works published on digital carriers. Organizations using recording carriers for handicapped people the list of which is established by the Ministry of Culture
Germany	Manufacturers and importers. Distributors if within six months they buy visual or audio carriers of more than 6000 hours combined duration and more than 100 pieces of equipment	
Greece	Importers, manufacturers and distributors	N/A
Hungary	Manufacturers and importers	Exportations. Carrier not destined for private copying
Italy	Manufacturers and importers. Joint responsibility of distributors	
Spain	Manufacturers and importers	Producers of phonograms and videograms. Broadcasting organizations. Physical persons purchasing equipment and recording carriers outside Spanish territory
Sweden	Manufacturers and importers	A 37.5% reduction has been negotiated in order to take into account the carriers not used for private copying
Switzerland	Manufacturers and importers	N/A
United States	Importers, manufacturers and distributors	N/A

3.2.5. *Who collects the levy?*

With the exception of the United States, where the remuneration must be paid to the Copyright Office, the other laws under study foresee a system of collective management. The collecting societies are designated by the owners of rights (as in France) or by a tribunal (as in Canada) or by a governmental authority (such as the Ministry of Culture in Denmark and the Ministry of Education in Finland).

3.2.6. *What is the total amount of levies collected?*

The amounts are presented in the following chart:

Countries	2000	2001	2002
Belgium		7,085,654.03 euros	5,057,907.60 euros
Canada	4,854,150 euros	16,252,860 euros	18,613,940 euros
Denmark		4.9 millions euros	8.3 millions euros
Finland		9,125,000 euros	10,095,000 euros
France	82,170,000 euros	95,316,000 euros	
Germany	70,737,739 euros	95,316,000 euros	
Hungary	2,372,739 euros	3,009,429 euros	
Italy		7.8 millions euros	7.8 millions euros
Sweden		7,900,000 euros	
Switzerland	6,281,408 euros	6,434,098 euros	
United States		1,914,268 euros	

3.2.7 *How are levies being distributed?*

The keys of distribution of the remuneration between the various groups of owners of rights differ to a surprising extent from country to country. It may also be noted that the laws of an important number of countries provide that a part of the remuneration is to be used for the national promotion of certain cultural activities.

Countries	Distribution keys	Distribution method	Existence of cultural or other funds
Belgium	33 % for the authors, 33 for the performers, 33 % for the producers		
Canada	66 % for the authors, 18.9 % for the performers, 15.1 % for the producers	Samples and statistical studies	No
Denmark	2/3 for owners of rights, 1/3 to a cultural fund	Statistical studies	Yes
Finland	<i>Phonograms</i> 65 % for the authors 35 % to a cultural fund		
	<i>Videograms</i> 50 % for the authors 50% to a cultural fund		
France	<i>Phonograms</i> 50 % for the authors 25 % for the performers 25 % for the producers	Samples and statistical studies	Yes. 25 % must be dedicated for the support of creativity, live programs and the formation of artists
	<i>Videograms</i> 1/3 for the authors 1/3 for the performers 1/3 for the producers	Samples and statistical studies	Yes. 25 % must be dedicated for the support of creativity, live programs and the training of artists
Germany	<i>Audio</i> GEMA 21 % GVL 21 % VG Wort 8%	Statistical studies	
	<i>Video</i> film producers 8.33 %, visual arts 3.675 %, foreign films 21.56 %, German films 14.21 %, documentary films 1.225 %	Statistical studies	

Countries	Distribution keys	Distribution method	Existence of cultural or other funds
Greece	authors 55 %, performers 25 %, producers 20 %		No
Hungary	<i>Phonograms</i> Authors 50 %, Performers 30 %, Producers 20 %		No
	<i>Videograms</i> Producers 13 %, authors of cinematographic works 22 %, scenario writers 25 %, composers 20 %, performers 25 %, creators of works of art and photographic works 4 %		No
Italy	<i>Phonograms</i> 50 % for the authors, 50 % for the producers (the latter must transmit 50 % of what they receive to the performers embodied in their phonograms)		
	<i>Videograms</i> authors 30 %, producers 70 %		
Spain	<i>Phonograms</i> 50 % for the authors, 25 % for the performers, 25 % for the producers	The evaluation of private copying take place, for example, on the basis of the sale success of a phonogram considering that private copying must be proportional to it	Yes. 20 % of the amount received must be used, in equal proportions, for assistance granted to the members of the societies, and for the training, of the authors and the performers

Countries	Distribution keys	Distribution method	Existence of cultural or other funds
	<i>Videograms</i> 1/3 for the authors, 1/3 for the performers, 1/3 for the producers	The evaluation of private copying take place, for example, on the basis of the sale success of recording considering that private copying must be proportional to it	Yes. 20 % of the amount received must be used, in equal proportions, for assistance granted to the members of the societies, and for the training of the authors and the performers
United States	The funds of musical works receive 1/3 of the remuneration, and it must be distributed among the authors and owners of rights		
	The funds of sound recordings receive 2/3 of the remuneration, and it must be distributed among performers	Distribution in proportion of the sale in the given year	

3.2.8 *Are the levies to be paid by intermediaries passed on to the end-user?*

Although the texts of the reports are silent on this question, it seems to be obvious, however, that the levy is included in the price of the equipment and carriers, and that, therefore, it is the end-user who, in fact, pays it.