Existing Levy Systems – Germany

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1. The New Law

As already mentioned several times during our Congress, the German Parliament (*Bundestag* and *Bundesrat*, i.e., the Federal Chamber and the States Chamber) has finally implemented the EU Information Society Directive (Directive 2001/29/EC of 22 May 2001) by the "Law to Regulate Copyright in the Information Society" (*Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft*), dated 10 September 2003 (published in *Bundesgesetzblatt*, Part I No. 46 of 12 September 2003 p. 1774, in force on 13 September 2003). In accordance with the relevant provisions in Article 5 of that Directive, that new German Law, in addition to other items, had to fine-tune the already existing provisions on copyright exceptions and limitations. One of the most important questions highly disputed until the last phase of the legislative process, concerned the new version of the provisions on reproduction for private and other personal uses in Section 53 Copyright Law; as a last-minute solution, the condition was added here that the reproduction is not allowed if the original material used for the reproduction has obviously been made illegally. By the way, Section 53 covers both cases, private copying in the sense of Article 5(2)(b) as well as reprography in the sense of Article 5(2)(a) of the Directive. The German term of private copying in the sense of reproduction for personal and other private use is thus a comprehensive one.

2. Levy system almost unaffected by the reform

In spite of the fine-tuning of the provisions on private copying and reprography in Section 53, the levy regime proper as provided in Section 54 as well as in Sections 54a through 54h of the Copyright Law remained unaffected by the reform. That is already an important result in itself, since it demonstrates that the German legislators wanted the existing levy scheme to be continued also in the digital field. Apart from a specific amendment of the Copyright Administration Law of September 9, 1965, (with further amendments), according to which collecting societies, when establishing their tariffs on the basis of Sections 54 and 54a, shall take into consideration in how far technical protection measures are applied in the relevant field of use of works or other protected matter, the exist-

ing German levy or remuneration scheme is thus maintained. As most of you already may know, the German scheme is based on a combination of equipment and carrier (recording media) remuneration in the field of private copying and as a combination of equipment and operators' remuneration in the field of reprography, to be paid by producers and importers (in subsidiary manner, also by retailers) of such equipment and media and, respectively, by specific operators of photocopying machines (such as schools, universities, research institutions, public libraries and copy shops).

The inclusion of the digital field into the levy scheme, at the same time, confirms preceding case law according to which equipment such as reader printers, laser printers, CD-burners, scanners and fax machines were already covered by the levy scheme until now (see references by Rehbinder, *Urheberrecht*, 12th ed. 2002 p. 209). In addition to that, according to a GEMA press release dated January 9, 2003, the relevant German collecting agency, the Central Office for Private Recording Rights (ZPÜ = *Zentralstelle für private Überspielungsrechte*) has reached an agreement with the relevant industry concerning the inclusion of certain variants of blank DVD-carriers into the levy scheme (see *Multimedia und Recht* 2003 No. 3 p. X). In July 2002 a corresponding agreement had already been reached concerning CD-burners (see Becker, *GEMA-Nachrichten*, Issue 167, June 2003 p. 90/91). Finally, as requested by the German Collecting Society Word (*VG-Wort*), the Arbitration Board, as established under the Copyright Administration Law, on February 2, 2003, set up a settlement proposal according to which personal computers (PCs) shall also be included in the levy scheme. Consequently, a sum of 12 euros (net) would have to be paid under the scheme by producers and importers (or retailers) for every PC sold in Germany. However, that keen and far-reaching proposal was immediately rejected by the computer industry, claiming that computers are no copying machines at all. Consequently, we shall have to wait for another court decision here, as we had for example in the case of CD-burners (see *Multimedia und Recht, loc.cit*. p. IX).

However, as a consequence of the adoption of the implementation law, the argument can at least no longer be put forward that the remuneration scheme as admittedly originally conceived for analog uses (there were no other uses at the time of original adoption of the Copyright Law in 1965) cannot be applied to the digital field. On the contrary, there are now strong additional arguments in favor of that application.

3. Reasons for the continuation of the levy system in the digital era

In spite of some critical remarks stemming from the States Chamber (*Bundesrat*) and concerning the necessity of a differentiation between analog and digital uses, the Federal Government in its reply to those remarks (see *BT-*

Drucksache 15/38, p. 41) had given a number of reasons why private copying and the remuneration scheme related to it should continue to apply also to the digital field, at least for some years to come. Some of these reasons are presented here:

> "According to the view of the Federal Government only the practically proved lump sum remuneration scheme can at the moment broadly guarantee an adequate compensation for digital reproduction for private use.
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> The Federal Government recognizes certain advantages and chances in the perspective of individual licensing. E.g., individual licensing can allow that remuneration for the production of copies can be based on actual use and can be collected directly from the user. Those who, like the producers of equipment and the producers of blank carriers, only provide the means for the reproduction, would not be charged. The basic principle of copyright law as also expressed in Secs. 53 and 54 of the Copyright Act, namely that authors and performing artists should adequately share in the economic profits of their work, would be taken into consideration.
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> The requests for the legislator to replace the system of lump-sum remunerations in the digital field, however, cannot be fulfilled from one day to the other. For an individual collection of remuneration for digital copies there momentarily does not exist a fully functioning and generally accepted system, which in accordance with the position of all parties interested, would correspond to the security standards required and could also be based on the necessary organisational infrastructure. The development of technical protection mechanisms in the online as well as the offline field so far neither has been completed nor is sufficiently ripe for use. According to press reports, as far as copy protection mechanisms have already been put to use with phonograms, the systems used partly did not only hinder or restrict copying of phonograms but also their playing altogether. For the rest, the *Bundesrat* in its own position taking also admits that in the field of "digital rights management" there is still a need for development.
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> The Federal Government, together with the interested parties, thinks, however, that new and practically usable systems of a secure individual accounting should be created in the near future. Incidentally, the development in the online and in particular in the offline field, where – though with modest success – increasingly copy protection systems are being used, shows that technical advancement is factually progressing.

Moreover – and all interested parties are also aware of this – one hundred percent security cannot be reached in the field of individual accounting; equally, a remaining part of lump-sum remunerations will have to be continued with also after the establishment of individual accounting systems, for example, for remunerations of such content material which is no longer protected by copy protection systems, but also for the protection of copyrights of such exploiters who cannot protect their rights by technical measures nor even want to do it."

Let me only add, as far as the latter argument is concerned, that German public broadcasters have already declared that – in view of certain media law obligations – there will be a whole range of digital programs also broadcast in the future without any technical protection. That means that there will also be a perhaps not insignificant amount of freely accessible digital material in the years to come, the home copying of which, consequently, should continue to be compensated by a remuneration scheme.

4. Obligatory administration of the scheme by collecting societies

From the beginning (see originally Sec. 53(5)(4), now Sec. 54h) the German Copyright Law had rendered the administration of the remuneration claims under the levy scheme by collecting societies obligatory (in the field of the reprographic remuneration right that solution was introduced only in 1985, whereas the whole system was rearranged in Sections 54 to 54h in 1995). That obligation to administer the scheme through collecting societies had a number of important consequences, in particular also as far as the distribution of collected sums of money was concerned. In spite of all newer tendencies to ameliorate the situation, we all know the deficiencies of the contractual regime in the field of rights management by individual contracts, in particular also in view of many unclarified questions in case of transborder use and conflict of laws. Whether and how far authors and performers (and other neighboring rights owners) can share in income from exploitation of works or performances or other protected matter, is often a question of bargaining power or often its lack. When such administration of rights (be it legal remuneration rights) is entrusted to collecting societies, there is at least a certain probability, backed by traditional distribution rules or, partly, also by legal provisions, that authors and performers get an adequate share.

In that context we cannot but quote a recent decision of the German Supreme Court (*Bundesgerichtshof*) in the electronic press digest (*Elektronischer Pressespiegel*) case (decision of 11 July 2002, GRUR 2002, 963). Against the lower court, the Supreme Court decided that certain cases of electronic press digests are also covered by the legal license provisions (legal remuneration right) concerning traditional printed (analog) forms of press digests (Sec. 49 Copyright

Law); here certain forms of press digests are allowed on the condition that a right of remuneration to be obligatorily administered by a collecting society (concretely the collecting society Word) is paid. On that background the Supreme Court, explaining why in certain situations provisions on copyright limitations must not necessarily be interpreted in a restrictive way, made, amongst others, the following rather important statements:

> "In this regard, other criteria could apply to an exception which permits free use, than in the case of a legal license, under which the exclusive right of copyright is merely converted into a claim of remuneration. It is also relevant … if the application of the exception places the author in a more favorable position than the application of an exclusive right …
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> The regulation in Sec. 49(1) of the Copyright Law has the effect that in any case a substantial proportion of the remuneration for the use of protected works in a press digest goes to the journalists themselves. If, on the other hand, it was subject to the exclusive right, that would not lead to a better position for the authors. For as is also shown in this case, in which the plaintiff refers to its contracts with its employed or freelance journalists, usually the author transfers all his exploitation rights to the newspaper publisher …" (English text quoted from Melichar, Literature and Authors' Rights: At the Mercy of a Free Market Economy?, in "European Writers' Congress" (Ed.) Forum Europa III (Budapest 2002), Munich 2003, p. 31 et seq.).

In other words, from the point of view of the authors' (or performers') share, administration by collecting societies goes far beyond the mere technical aspects of rights managements and money collection, aspects which are so often exclusively at the centre of international debate of the analogue/digital dichotomy. Many arguments continue to be valid also in the digital field; consequently, we should not too easily throw over board traditionally tested and proven ways of collective administration (see generally Dietz, Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe, Journal of the Copyright Society of the USA, Vol. 49 No. 4 (Summer 2002), p. 897 et seq.).

5. Some figures

As a matter of fact, and on the background of the obligatory collective administration rule, the two cases of remuneration rights covered by Sec. 53, namely reprography and private copying, are administered separately. In the first case, namely reprography, the remuneration right is administered by the collecting

society Word (*VG-Wor*t), which has to share the money collected to a certain percentage with other societies, in particular the collecting society Image/Art (*VG-Bildkunst*), which represents "picture" artists. In the second case, namely private copying, the remuneration right is administered, as already mentioned, by a special agency in which the interested collecting societies are grouped together, namely the Central Office for Private Recording Rights (*Zentralstelle für private Überspielungsrechte*; ZPÜ). That agency, which itself concretely is managed by GEMA, collects the money which, according to a certain key, established by agreement between the societies concerned, is paid out to the different collecting societies (such as GEMA, society Word, society Image/Art as well as a whole group of collecting societies in the film sector; for details see Kreile, *Einnahme und Verteilung der gesetzlichen Geräte- und Leerkassettenvergütung für private Vervielfältigung in Deutschland. Ein System hat sich bewährt*, in: *GEMA-Jahrbuch* 2001/2002, S. 94 et seq.).

According to Section 54d, coupled to a corresponding annex, specific rates of remuneration per equipment and per recording medium in the case of private copying as well as per photocopying machine in the case of reprography and, in addition to that, rates to be paid by specific operators of photocopying machines in certain sectors (schools, universities, research institutions, public libraries, and copy shops) are provided. These rates are deemed to be equitable in the sense of "equitable remuneration", but they still apply only if there is no other agreement. In practice, such agreements as concluded between the collecting bodies and user associations do exist, indeed. On their basis, taking specific years as an example, the following overall sums were collected from producers and importers of recording equipment and blank media in the field of private copying and, respectively, from producers and importers of photocopying machines and from specific operators of such devices:

a) Private copying remuneration

For the year 2000, according to Kreile (*loc.cit.* p. 111) approximately 70 m Euro (precisely: DM 138.350.662,05) were collected, of which approximately 20 m Euro (DM 38.834.775,69) stemmed from the audio recording sector, distributed correspondingly to the societies concerned (in particular the musical society GEMA) and approximately 50 m Euro (DM 99.515.886,36) stemmed from the video sector and was distributed correspondingly to the societies concerned (for details of these rather complicated distribution patterns see Kreile (*loc.cit*. p. 122 f.). In addition to that, Kreile mentions a growing amount of money collected under the title of digital equipment and media which, for 1999, already amounted to approximately 3,5 m Euro (more than DM 7 m). Levy collecting in the digital field, therefore, is already beginning to be financially relevant.

b) Reprographic remuneration

According to the business report for 2002 of the society *Wort*, approximately 30 m were allocated to *VG-Wort*, whereby the largest part (25,92 m Euro) stemmed from producers and importers of copying machines and the smaller part (4,26 m Euro) stemmed from operators of such machines. The overall sum represents almost 40% of the total income from the administration of rights by that society (altogether: 79 m Euro). This demonstrates how relatively important that special legal remuneration right must be considered today (the above figures do not cover smaller parts attributed to other collecting societies in the field of reprography).

6. Final distribution

It is simply not possible to present even a short summary of the very complicated manner in which the individual collecting societies distribute the money stemming from the levy scheme. It needs mentioning, however, that according to Kreile (*loc.cit*. p. 125) within GEMA the relevant sums of money are redistributed as a percentage to the sums paid out to authors and music publishers under the rubrics of "mechanical right" (25%) and "broadcasting right" (75%) as far as the audio sector is concerned, and, respectively, 5% and 95% as far as the video sector is concerned. Such a "rough justice" is based partly on experimentally proven statistics, according to which private copying takes as a source material either phonograms available on the market or broadcasting programs. Whether such statistically based expectations are tenable also in a digital future is to be doubted, but the collecting societies concerned will certainly find – if necessary – a more adequate key. What is important here is that "rough justice" is better than no justice, and, I think, this will be true for yet a long time.

7. Deduction for general purposes

As far as the specific field of remunerations for private and personal uses is concerned, there are no direct provisions in German law which would allow or prescribe certain deductions for cultural, social or other general purposes. However, in a general way, such deductions are not only allowed, but strongly recommended to collecting societies on the basis of Article 8 of the German Copyright Administration Law, according to which the collecting societies shall set up welfare and assistance schemes for the holders of the rights and claims that they administer. Since income from the levy schemes is administered, as mentioned, together with other rights, where more concrete relations between rights and uses can be established, in the final result such deductions also include income from the levy scheme.