Observations to the Summary
(Translation)

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This is a new kind of exercise for which there does not seem to be an example in the history of ALAI congresses and study days, since we are supposed to intervene after that a summary has been offered. Shall we make a summary of the summary? Certainly, not. Our task – as I understand the intentions of the organizers – is rather to complete the summary by some additional observations, which may be quite subjective. This means that we can select from the numerous topics discussed and to choose some on which we wish to make some complementary comments. This is what I am going to do now.

Obviously, the most interesting aspect is to look into the future. However, in order that we may do so appropriately we have to clarify certain things before. The first one is that we are not in a legal vacuum. Those who said and still keep repeating that, in the digital environment, it is inevitable that certain zones appear beyond any possible legal control were wrong and continue being wrong. It is, in fact, not a legal vacuum of which we should be afraid, but rather of a rich choice of legal means. We have an exclusive right which may be strengthened by the application of technological protection measures and supported by digital rights management, and we also have a remuneration system for private copying about which we do not know how to develop it in the future. This finding that, thus, there is no legal vacuum is promising. However, at the same time it is also disturbing, since we are faced with a situation where we have to choose from between the various solutions.

This is not easy because – and this is the second remark I would like to make – the issues involved are very complex. This has become quite clear during the congress on the basis of the various presentations. And then we have not yet taken into account another dimension of complexity, which is quite normal; namely the existence of differing national solutions. This is true for the very concept of private copying. The reports presented yesterday revealed how big differences there are from one country to the other. There are countries where a restrictive concept of private copying is applied on the basis of which only the person making a copy, and nobody else, may benefit from any exception, while in other countries, the only condition is that the copy serve private use, even if that it is the private use of somebody else.

This is not the same thing. On the basis of the first restrictive concept of private copying, any transfer of a work included in a file attached to an e-mail involves the making of a copy that is not covered by the exception for private copying since it will not be used by the person who has made it, or, in any case, who is at the origin of its making. This makes a big difference!

In many countries, private copying is defined without reference to the origin of the copy. Yesterday we heard that under the new German law, there is a provision under which the exception for private copying does not apply where the source of a copy is obviously illegal. It will be interesting to see how the German courts will apply this concept, and under what circumstances it will be possible to state that the source of a copy is obviously illegal. Then there are countries where there is no specific provision on for private copying but a more general exception applies. This is the case, for example, as regards the U.S system of "fair use", a very complex system, where the judges have to take into account four factors and to take a decision on the basis of their combination. The specialists in the United States themselves say that it is difficult for them to apply these rules. This offers a chance for attorneys and law professors, but it is difficult to foresee how it works, so much that the "fair use" for the lawyers in Continental Europe is as much mysterious as the English plum pudding.

All this creates a lot of uncertainty. But there is still worse a thing. We are not in agreement even about the legal nature of exceptions. There are countries where the word "exception" is understood literally, in the sense that the exceptions are simply tolerated and they can never serve as a basis for some rights of the users. In contrast, there are also countries where there is a trend to consider that any exception is the origin of a real right of users. It seems that this is the case in the United States concerning the "fair use". This question emerges in Belgium where a recent law has given an imperative character to all the exceptions; we do not know what the origin of this legislative innovation is and we cannot foresee its possible impact. Finally, there are countries where distinctions are made between the various exceptions, as it was explained to us, for example, by Mister Yamamoto. Distinctions may be made according to the foundation of exceptions, and one could write a lot of studies about this, since the justifications of the exceptions are very much complex and varied. This is particularly true in the case of private copying.

I was surprised for example by the case mentioned by Alberto Bercovitz yesterday where in Spain where it was demanded from the authorities to oblige the owners of rights to retire from the market a CD protected by an anti-copy system. I am not a specialist of Spanish law, but still I am very curious to know on which provision of the 1996 Spanish law such a measure could be based.

If the public boycotts such a product is one thing. However, it would be a completely different thing to allege that the technological protection system might be

illicit, since it would very difficult to reconcile such a position with the 1996 Treaties of WIPO and with community directive of May 22, 2001.

Today, a speaker has said that private copying may become such a right that it will be necessary to add to the slogan of the French Republic "libérté, égalité, fraternité" a fourth element: "gratuité de la copie privée". We are not there yet. However, what is happening in Spain is also taking place elsewhere, and in particular also in my country: there is a very-very strong pressure to transform the exception for private copying into a real right.

This is what we should see and take into account.

For what perspectives should we work? I think that this involves two questions: first, where we would like to go, and, second, how we would like to go there. If we want to decide where to go, we should know that in the dialectical relationship of an exclusive right supported by technological protection measures and digital rights management information, on the one hand, and remuneration for private copying, on the other hand, it is necessary to give preference to one of these two alternatives. And in that respect, the copyright specialists in general are of the view that it is the exclusive right strengthened by technological measures that should be preferred. It is true that a right to remuneration for private copying is part of copyright, as Mrs. Ameida-Rocha pointed out this morning. Nevertheless, we have to recognize that such a system does not create such a satisfying situation in which the author or other owner of copyright can exercise his exclusive rights as an important basis in negotiations. Everybody recognizes that the most appropriate solution is granting an exclusive right.

I should add that the system of remuneration for private copying has perverse effects. It would be difficult to enumerate all these effects but there is one among them which has been mentioned during the debates several time and which is impressing. And it is the idea that this system of remuneration for private copying should not remunerate the illegal uses and copies. This was explained in a very much persuasive way by Bernt Hugenholtz. In legal terms, his argumentation is impeccable. The admission that the remuneration for private copying may serve to remunerate illegal copying would undermine the very principle of exclusive rights. I do agree with him on this.

However, we should see that this may lead to completely inequitable results, since the author, who of course is ready to fight certain acts of piracy, would receive a worse treatment in the face of a clearly illegal act than in the face of reproduction tolerated by the law.

I have to add that it is not easy to distinguish between the two. The border between legal and illegal is very porous. Let us take one example. In many countries a coy ceases to be covered by the exception for private copying if it is used for collective purposes. This means that in the case of somebody who makes a copy for private purposes – this is thus a private copy – but who then communi-

cate this copy, the exception does not apply anymore. Considering this, how can we draw the border, how can we decide, from the viewpoint of the remuneration for private copying, what is legal what is illegal? And I could still mention numerous examples.

The last question: if we prefer exclusive rights combined with technological protection – and I think this is very general opinion – still we should know at what speed we proceed and what we are doing in the immediate future. There will be a transitional period which certainly will be quite long. Perhaps, longer than many people think or hope. In this field, the technicians always sound very much confident and positive, and say that all the problems will be solved tomorrow. The lawyers know, however, that these lyric forecasts frequently are far away from reality. Therefore, I think that we should wait that these systems function appropriately. I have heard from several speakers that this is not the case yet.

Thus, we have to handle the transitional period. We have to note that the European directive does say about this issue too much. It is satisfied to offer, in its Article 6(4) a general framework, saying that when the remuneration is fixed for private copying, the application or non-application of technological protection measures must be taken into account. This leaves open many possibilities. I had not had a real idea about the number of such possibilities until yesterday I read the very good report prepared by the Amsterdam Institute for Information Law under the direction of Bernt Hugenholtz, which presents the entire palette of possibilities at our disposal. I am not going to present a summary of that report, I leave it to you to read it, but I would like to say that it proves that there is still enough food for our debates.

These have been the brief observations I wanted to make. I thank you for your attention.