The situation in Portugal
(Translation)

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First of all, I would like to thank the Hungarian group and Mihály Ficsor for having invited me to participate in this congress as a speaker. It is a great honor for us to be here and to speak about the situation in our country. And that is quite an interesting situation. I am going to tell you the story.

The 1985 Portuguese Code on copyright and related rights includes several specific provisions on the exceptions to copyright. These are the free uses regulated by Articles 75 to 82. Among the free uses, we can find the case of reproduction in full or partly by a public library and a non-commercial documentation center and the case of partial reproduction by educational establishment.

These kinds of uses may be found at the border between public use and private use. If we consider that a private use is supposed to take place in a family circle, even if in a larger sense also including friends, these uses would have to be regarded as public uses. However, this qualification is without importance for the determination of the possibility of foreseeing limitations of the right of reproduction.

When we speak about reprography in libraries, educational institutions, etc., we are in the domain of private copying in a larger sense – reproduction for personal and other private uses, to lend the terminology of our German friends.

However, in our law, it is not among the provisions on exceptions that the exception for private copying is expressly foreseen but rather in a provision instituting a completely specific case. It is Article 81(a) which authorizes the making of "one single copy, for exclusively scientific or humanitarian purposes, of works not available yet in the trade which would be impossible to obtain within a time necessary for their use."

The same article, in its paragraph (b), authorizes the reproduction of works for exclusively private purposes provided that it does not conflict with a normal exploitation of the works concerned and does not unreasonably prejudice the legitimate interest of the authors.

The analysis of Article 81 reveals that the exception for private copying is totally linked to the three-step test. We can find the specific character of the exception in paragraph (a) to which paragraph (b) adds the two other conditions foreseen in Article 9(2) of the Berne Convention which must be fulfilled in order

that private copying might be considered licit. Article 81(b) also adds that it is not allowed to use such copies for certain purposes, including communication to the public or commercial distribution. The same considerations apply for the exceptions already mentioned for public libraries, non-commercial documentation centers and educational establishment.

Finally, Article 82 on the compensation for private copying provides that in the sale price of any mechanical, chemical, electric, electronic or other equipment suitable for the fixation and reproduction of works as well as any material on which works may be fixed or reproduced in any of these ways, a sum shall be included to be transferred to the authors, performing artists, publishers and to producers of phonograms and videograms.

This is the main provision of the law. What does it mean? First of all, it may be deduced from it that the remuneration is to serve the compensation for the prejudice suffered by the private reproduction and use of works; the law makes this clear.

Second, the provision reflects the recognition by the legislator that, as a result of development of reproduction and dissemination technologies, widespread private copying of works has become possible, and that it cannot be ignored anymore that, due to this, a new important form of exploitation emerges completely escaping any control by the authors. Consequently, the economic value of the works thus reproduced significantly decreases, and the legitimate interests of the owners of rights are unreasonably prejudiced.

Third, it is clear that the exception covers acts of reproduction themselves resulting in copies that may replace those authorized by the right holders. The act of reproduction and the communication of the copy obtained should not be mixed up. The former may be exempted from the right of reproduction if the conditions in Article 81(B) are fulfilled, while the latter is always prohibited if the copy has been obtained on the basis of an exception.

The Portuguese legislators finally found that it was necessary to foresee a system permitting for the rightsholders to obtain remuneration for an exploitation that they cannot prevent. What is involved is the principle instituted by Article 81 of the code whose implementation through detailed regulation took only place 13 years later by the law 62–98 of September 1. This law containing the regulation concerning Article 81 of the code – whose title is "Compensation for reproduction of fixations of works" – does not use the term "levy", which may be regarded as a synonym of "tax," to qualify the sum to be paid as a compensation for private copying. It rather use – and I think quite well – the term "remuneration". This underlines that the sum to be paid is not simply a compensation for the harm suffered, but a real copyright remuneration.

The system established by the law offers the practical conditions for the collection of the remuneration for domestic – and therefore uncontrollable – repro-

duction, and for also other forms of reproduction, such as reprographic reproduction, that are more controllable.

In order to make the system operational, the Association for the management of private copying (AGECOP) has been established, a not-for-profit organization the purpose of which is to collect and administer the sums foreseen in the code for which the law I have mentioned has introduced the necessary regulation.

The AGECOP has been established by the already existing organizations representing the authors, the performers, the publishers and the producers of phonograms and videograms. In order to guarantee the respect for the principles of equality, representativity, freedom, pluralism and participation, the AGECOP is organized and is supposed to function in integrating all the possible future organizations the objective of which is the representation of the economic interests of the authors, performers, publishers and the producers of phonograms and videograms who wish to accede to it.

The management of the remuneration by the AGECOP, of course, includes its distribution to the member organizations and to those who have otherwise mandated it with such management of rights. It may also conclude contracts with the similar organizations in other countries. In order to defend the interests of its members, the AGECOP should also prepare legal, economic and technical studies and opinions concerning reprographic reproduction and private copying, in particular as regards the sum of the remuneration to be included into the price of the carriers used for the fixation and reproduction of works and objects of neighboring rights.

The AGECOP has two autonomous departments for the collection and administration of remunerations. One for the reprographic sector and another for private copying. All the associations representing the beneficiaries are integrated in both departments. This structure reflects the recognition of the important differences between the collection and management of remuneration due for reprographic reproduction, on the one hand, and private copying, on the other hand.

From the sum collected, 20% is deducted for the promotion of cultural activity and research and of the dissemination of works and objects of neighboring rights, and of course for covering the management costs of the Association. What remains is distributed among the member associations in the following way: department of reprography: 50% for the authors, 50% for the publishers; department of private copying: 40% for the authors, 30% for the performers, 30% for the producers.

If there are more than one organizations representing a category of beneficiaries, the distribution between them takes place on the basis of how representative they are, which is measures according to certain determined criteria. The beneficiaries who are not members of associations are to enjoy the same treatment as the members of the associations representing the same categories

of beneficiaries. They do not have right to receive more than the members of the associations.

Finally, some words on the current legislative initiatives concerning private copying. A draft law for the implementation of the Information Society Directive has been presented and discussed, bit it has not been adopted yet. This draft law foresees the following modifications: the extension of the rules concerning private copying also to the digital environment, inclusion of provisions on technological protection measures and rights management information in accordance with the Directive. The fixation of the amount of the remuneration, the application or non-application of technological measures would have to be taken into account. In certain cases, there would be some limitations of the protection to be granted for technological measures. Reprographic reproduction would be allowed since – as the notes added to the draft law indicate – "since it is a social reality accepted, the impact of which is decreasing with the broadening of the application of digital technology and the prejudicial effect of which is diminished by the measures adopted in respect of private copying." This modification has created a lot of discussions.

Finally, I would like to underline, that – as what I have said also confirms this – the system of remuneration should be maintained in the digital environment. It functions and it only requires some minor modifications. There is no reason to try to find some other solutions.