

General Report – Parts E/F/G*

Implementation of the EU Directive. Factual Background. Existing Studies

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(1) – Scope. The following Report covers **Parts E** – *Special questions for EU-Member States, regarding the implementation of the EU-Directive 2001/29/EC on Copyright in the Information Society* and **Part F**: *Questions regarding the factual background of the ALAI Questionnaire on Digital Private Copying*, and it also contains a short list and description of the studies reported in answer to **Part G**.

(2) – **National Reports**. This preliminary draft version is based on the information obtained by national responses to the Questionnaire received from the following 15 countries: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Spain, Switzerland, Sweden, and the USA.⁸³

Report Part E

(3) – **Reason for including questions on EU law**. Although the questions of Part E of the Questionnaire are only of relevance to the EU-Member States and, therefore, not to all national groups of ALAI, they have nevertheless been included in this Questionnaire. The thought that has motivated the inclusion of these questions in the Questionnaire is that the EU Directive on Copyright in the Information Society contains a harmonised legal framework which – *inter alia* – deals with the issue of private digital copying, and which will have to be implemented in the now 15 (and starting in 2004: 25) EU-Member States. Although by now, not all EU-Member States have duly implemented the Directive (so far, implementing legislation has been enacted in Austria, Denmark, Greece, Germany, and Italy⁸⁴), it is interesting to see in what ways the Member States have used the freedom of decision left to them by the EU Directive in several

* This report has been prepared on the basis of the reports of national ALAI groups presented before the Congress.

⁸³ This enumeration may not contain all reports delivered.

⁸⁴ It may well be that after the delivery of the national reports, some other Member States may by now have enacted implementing legislation.

respects. These national choices may well serve as models for further legislative solutions to be adopted at both national, regional and even international level.

(4) – EU-Directive 29/2001/EC and digital private copying. In short, the EU legislative model regarding digital copying may be summarized as follows. There are three main issues which are addressed in the Directive with regard to digital private copying. First, the possibility of an exception regarding digital private copying (see 5); second, the possible effect of the availability and/or existence of technical protection measures (TPM) on both the scope of the private copying exception (see 6) and, third, on the amount to be paid under a levy system (see 7).

(5) – Digital private copying (Art. 5(2)(b)). As regards the exception for digital private copying, the EU-Directive **Art. 5(2)(b)** allows Member States “in respect of reproductions on any medium” (which includes digital) “made by a natural person for private use and for ends that are neither directly nor indirectly commercial.” The only condition is that the rightholders receive fair compensation.⁸⁵ This exception comes in addition to the one for analog copying in Art. 5(2)(a) which is much broader since it allows Member States to “make an exception from the exclusive reproduction right in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music.” Hence, under EU-law, analog copying exceptions are not limited to private copying. However, quite like in the case of digital private copying, any national exception to the exclusive reproduction right has to assure that the rightholders receive fair compensation. According to Recital 35, the fair compensation to be received by the rightholders should “compensate them adequately for the use made of their protected works or other subject-matter.” In evaluating of what compensation would be “fair”, “a valuable criterion would be the possible harm to the rightholders resulting from the act in question”. Once more, it should be noted that neither the exception for analog copying nor the one for digital copying is mandatory. Member States are therefore free to adopt them in their respective national law. It should also be noted that as regards digital private copying, Recital 39 of the EU-Directive advises Member States adopting an exception for private digital copying “should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.”

⁸⁵ For the link of the amount of the compensation to the fact whether or not TPMs are applied to the work or subject, see below (7).

(6) – TPM and the scope of digital private copying exceptions (Art. 6(1)–(4)). As regards the possible effect of the availability and/or existence of technical protection measures (TPM) on the scope of the private copying exception, Art. 6(1)–(3) of the EU-Directive – in line with Art. 11 WCT and 18 WPPT – first of all provides for mandatory legal protection of effective TPM against their unauthorised circumvention. However, in order to accommodate the conflict between statutory limitations to the exclusive rights⁸⁶ adopted by a particular Member State on the one hand, and the factual exclusivity created by private TPM, and secured by the mandatory anti-circumvention legislation just mentioned, Art. 6 (4) (1) puts an obligation on Member States to take appropriate measures in order to ensure that rightholders make available to the beneficiaries of an *analog* copying exception in accordance with Article 5(2)(a) the means necessary for the beneficiaries to benefit from that exception in cases where beneficiaries have legal access to the protected work or subject-matter concerned. This obligation exists as long as there are no voluntary measures taken by rightholders and no agreements between rightholders and other parties concerned. However, regarding acts of copying in accordance with an exception pursuant to Article 5 (2) (b) – that is, including *digital* private copying – Article 6 (4) (2) makes it optional for Member States to take such measures in respect of a beneficiary of the said exception. This option is again restricted to cases where reproduction for private use has not already been made possible by rightholders to the extent necessary to benefit from the exception, and it does not prevent rightholders from adopting adequate measures regarding the number of reproductions to be made. It should be noted that according to Art. 6 (4) of the EU-Directive, none of these rules apply to works or other subject-matter which are made available to the public online on agreed contractual terms.

(7) – TPM and the amount of compensation for acts of digital private copying (Art. 5 (2) (b)). Finally, as regards the effect of the availability and/or existence of technical protection measures (TPM) on the amount to be paid under a remuneration system, Art. 5 (2) of the EU-Directive makes the amount of ~e fair compensation to be paid to the rightholders dependent from “the application or non-application” of effective technological measures to the work or subject-matter concerned. However, the Directive is not quite clear as to the conditions under which TPM should be taken into account. Whereas Art. 5 (2) (b) speaks of

⁸⁶ According to Art. 5 (4), where Member States may provide for an exception or limitation to the right of reproduction, they may provide similarly for an exception to the right of distribution to the extent justified by the purpose of the authorised act of reproduction.

the “the application or non-application” of TPM, Recital 35 refers to the “degree of use”, and Recital 39 to the “availability” of TPM.

(8) – Scope of analysis. For the time being – and in view of the uncertainties related to the process of national implementation – the analysis only is based on those countries which have already transposed EU-Directive 2001/28/EC into their domestic legislation.⁸⁷ Of course, in the view of the limited number of countries which have implemented the Directive by now, the following statements can hardly be taken as representative, but they might still be indicative of future trends.

(9) – Implementation regarding Digital private copying (Art. 5 (2) (b)). This first survey of national implementing legislation shows that some Member States do in fact limit their existing exceptions regarding analog private copying when it comes to digital private copying, whereas other Member States apparently do not.⁸⁸ Thus, on the one hand, in Germany, the exception for private copying has been maintained for digital copying. However, it has been limited in one respect: as regards digital private copying, the person privileged by the private copying exception may still have the copies made by another person, but only if no payment is received therefor. So far, in German law, this restriction has also applied to the transfer of works to video or audio recording mediums and to the reproduction of works of fine art, but not to analog private copying of other copyrighted works. Moreover, in a rather complicated rule-and-exception scheme, the existing additional exceptions regarding copying for building up a personal archive, for personal information concerning current events in the case of a broadcast work, and for other personal uses, have been limited to some extent with regard to digital activities (i.e., one of the following three conditions has to be fulfilled: the reproduction must be on paper, or use must only be in the analog form, or the archive does not have a direct or indirect commercial aim).⁸⁹ In Denmark, single copies in digital form are only allowed exclusively for the personal use of the copying person himself or his household. On the other hand, no such restrictions with regard to digital private copying seem to have been adopted in Greece and in Italy.

⁸⁷ With the exception of Austria.

⁸⁸ It should be noted that additional restrictions regarding digital private copying apply in all Member States in view of private copies of computer programs and on databases (as regulated by EU-Directives 91/250/EEC and 96/9/EC).

⁸⁹ Only criteria one and two apply in the case of the exceptions for personal information concerning current events in the case of a broadcast work, and of the exception for other personal uses.

(10) – Implementation regarding TPM and the scope of digital private copying exceptions (Art. 6 (1) – (4)). A similar divergence of national implementations may be observed as regards the overlap of TPM and statutory private copying exceptions. Whereas neither Germany nor Denmark made use of the possibility offered by **Art. 6 (4) (2)** of the EU-Directive and they do not oblige rightholders to provide measures that beneficiaries of the private copying exception in the digital field can truly benefit from it, Greece and Italy have taken advantage of Art. 6 (4) (2) of Directive 2001 /29/EC, albeit in a different manner. Greece has apparently implemented a scheme according to which, absent voluntary measures by rightholders, including agreements with beneficiaries of limitations, both rightholders and beneficiaries of limitations may ask for the intervention of mediators. If the parties do oppose the finding of the mediators, then the matter can be taken to the courts. In Italy, the private copying exception is submitted to the exception of rightholders to allow at least one copy that can also be an analog one.

(11) – Implementation regarding TPM and the amount of compensation for acts of digital private copying (Art. 5 (2) (b)). Also, as regards the overlap of the amount of remuneration due under a private digital copying regime and TPM available and/or effectively applied, Member States' implementing legislation does not follow the same route. Whereas neither Germany nor Greece contain any statutory rules to this effect (so that, as a matter of fact, the question is left to private parties, i.e., to negotiations of users with the collecting societies), it is reported from both Denmark and Italy that the application or non-application of TPM is, or has to be taken into account when assessing the need and possible size of a remuneration scheme. However, it seems that the legislative texts do not contain any further criteria which might clarify the relationship between the amount of levies due and existing TPM.

Report Part F

(12) – Questions. Questions in Part F related to information and statistical data available regarding the effects of digital private copying on the exploitation of analog and of digital material; the application and types of TPM to copyrighted subject matter, including pricing information, user-acceptance and cost-benefit relationship of applying TPM; and the state of implementation of DRM-systems, including the technology used.

(13) – Availability of statistical data. It appears from the national reports that the availability of statistical data in this area is still rather limited. In essence, apart from data published by collecting societies in many countries, such mate-

rial seems only available in countries where specially targeted official studies⁹⁰ or studies by private interest groups have been undertaken.⁹¹ However, it should be noted that these countries do not represent the majority of those countries from which answers to the Questionnaire have been received. Most of these studies focus on particular effects and data, such as the amount of CD-Rs used for copying copyrighted material. It has likewise been mentioned that without such studies, the collection of relevant data in this domain would be extremely difficult, if not impossible for a private organisation such as ALAI, since the data needed for such a survey were largely business secrets. Having this in mind, the following statements should be met with great caution.⁹²

(14) – Effects of digital copying on the analog exploitation of copyrighted subject matter.

As regards the effects of digital private copying on the analog exploitation of copyrighted subject matter, it is sometimes noted that the amount of the levies collected for private copying decreases because of the sale and use of CD-R and related types of re-writable supports.⁹³ At the same time, there seems to be conflicting evidence regarding the effects of levies on the market of blank media and regarding the influence of private copying activities on the sale of commercial phonograms. For example, in Canada, some studies apparently have come to the conclusion that levies have hardly any influence on the market of blank media, and that private copying activities have no measurable influence on the sale of commercial phonograms, whereas industry studies conclude to a considerable negative impact on the market for blank media and phonograms. It seems that the effect of digital copying via file-sharing systems, such as Napster, Grockster, KazaA etc., has been examined mostly in the U.S.A. Here, the national report states not only that “digital private copying has taken place on a wide scale”, but also that “over the time period in which downloading and ‘sharing’ of digital music files has increased, CD sales have dropped significantly.” But it is also noted that it is unclear whether there is a causal relationship between the fall in CD sales and digital private copying, but that the Napster court had before it several reports which indicated that Napster use harmed the market for copyrighted musical compositions and sound recordings and raised barriers to copyright own-

⁹⁰ For a preliminary list of official studies or studies commissioned by official bodies, see Report on Part G, below.

⁹¹ Such as, e.g., in Australia, Canada, Germany, and the U.S.

⁹² A more thorough review and evaluation of the data contained in the studies will be reserved for the final study.

⁹³ See, e.g., the Belgian report.

ers' entry into the market for digital downloading of music. One report stated that on a macroeconomic level, the amount collected by levies is minimal with regard to the GDP.

(15) – Some trends. As regards the type of TPM applied to copyrighted subject matter, the technique mostly applied at present seems to be copy-protection or protection which makes it difficult or impossible to read a particular type of CD on different machines. Moreover, so far, the application of TPM even to phonograms (audio-CDs and DVDs) seems just to have been started, since TPM are still in their infancy. Consequently, in some reports, this development hasn't been given particular attention. Apparently, in some countries more audio-CDs are protected by TPM than in others (even the U.S.-report states that "at present most CDs are not copy-protected", whereas in many cases DVDs are apparently containing CSS-protection. Although information on existing DRM is scarce, it seems that information regarding access and use of copyrighted material is stored with the user and not transmitted to the rightholder yet. In addition, it should be noted that in some countries such as Germany, the introduction of DRM/TPM-mechanisms have met with resistance from the part of the end-users, insofar as users had not been able to play audio CDs on their PC, or that due to TPM-technology, audio CDs had not been properly running on all types of audio CD-players.

Report Part G

(16) – Question. In Part G, the question was whether there are any official or unofficial studies regarding the effect which existing or newly introduced private copying exceptions had for analog copying and in the digital environment, and regarding the functioning, implementation and effects of TPM and/or DRM.

(17) – Existing studies on digital private copying. Apart from quite a number of studies undertaken over the last years at the national level on analog copying and on the amounts paid and received under the different remuneration schemes, the following studies which explicitly focus on digital private copying exceptions should be mentioned:

- *Australian Copyright Council* Remuneration for private copying in Australia – A Discussion Paper, September 2001 (available at www.copyright.org.au)
- *Canadian Government* Document de consultation sur les questions de droit d'auteur à l'ère numérique, 2001 (available at <http://strategis.ic.gc.ca>)
- *Chantepi* La lutte contre la contrefaçon, Rapport au ministère de la culture, 2002
- *Chantepi* Les mesures techniques, Rapport au ministère de la culture, 2003

- *Conseil supérieur de la Propriété Littéraire et Artistique* Rapport portant sur la rémunération pour copie privée (available at <http://www.culture.fr/culture>)
- *Hugenholtz/Guibault/van Greffen* The Future of Levies in a Digital Environment, Institute for Information Law, March 2003 (also available on the IVIR-website, at www.ivir.nl)
- *Malmberg* Digital Private Copying in Finland
– Interview Logit Oy, February 2002
- *Ricketson* WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, Doc. SCCR/9/7, April 2003 (available at the WIPO website, at www.wipo.int)
- *US Copyright Office* DMCA Section 104 Report, August 2001 (available at the Copyright Offices website, at www.copyright.gov)
- *US. Register of Copyrights* Joint Study of Section 1201(g) of the DCMA (together with the Assistant Secretary for Communications and Information in the Dept. of Commerce, also available at www.copyright.gov).