

# General Report – Part B

## The Definition of Private Copying

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An analysis of the national reports reveals that what is understood as private copying differs from country to country. Though the substance of most countries' laws share similar elements, the form in which each country sets forth its understanding of private copying varies. Nevertheless, common themes run throughout each country's scheme of allowing or, alternatively, prohibiting certain types of copying. Many countries' laws<sup>11</sup> in this area address three elements: (1) the person making or requesting the copy should be a human being (not a business entity), (2) the scope of the use of the copy should not go beyond a set circle of friends and family<sup>12</sup> and (3) the recipient of the copy must not use it for commercial purposes, directly or indirectly. Two primary concerns appear to drive the various provisions: (1) the preservation of individual autonomy/privacy of the user/copier and (2) the protection of the market for the original work. While structured differently, each country's laws address some if not all of the following questions: Who may copy? By what means? Who, other than the copier, may receive copies? What may be copied? How much may be copied? For what purpose and use may one copy?

### Who may copy?

While most reporting countries specify that the beneficiary of a private copying exception or limitation (whether general or specific), must be a physical individual<sup>13</sup>, the seemingly simple question of "Who may copy?" under the various private copying schemes becomes more complex when the question is rephrased as "Who may *make* the copy?" This question becomes particularly important when a third party, for example an employee of a copy shop or a library, makes the

<sup>11</sup> See, for example, the Hungarian and Italian national reports.

<sup>12</sup> But see discussion of Swedish law *infra* which extends reproduction for private use to a few copies for work colleagues.

<sup>13</sup> Nearly all countries reporting specify that the copier must be a private individual, a human being (as opposed to an entity). See, for example, Italy's law, specifying that the copier be a "natural person."

copy. In cases where an individual commissions a copy shop to make a copy which he/she intends to use for personal, non-commercial use only, does the person who actually makes the copy (e.g., the employee of the copy shop) benefit from a private copying exception, or could he/she be held liable for copyright infringement? A related question inquires whether it makes a difference if the recipient of the copy makes it herself, but uses outside facilities (e.g. equipment of copy centers or libraries).<sup>14</sup> For those countries which classify copies resulting from third party equipment or personnel, it is the ultimate private purpose and use of the copy that governs, rather than the venue in which the copy is made, or whether a third party receives compensation for making such a /copy.

By contrast, other countries specifically exclude from their private copying exceptions, copying made using equipment located in copy shops or other venues which make such equipment available to the public. For example, in Spain, use of libraries, reproduction services, or copying equipment made publicly available in commercial or non profit venues disqualifies the resulting copy from the “private copying” exception’s coverage.<sup>15</sup> As copying in a public venue could increase the risk of copying and distribution on a larger scale, this type of provision appears aimed at protecting the interest of the copyright holder and the market for the original work.

Several other countries report that their laws specifically address whether and under what circumstances an individual may engage a third party to make the “private copy.” Finland permits a person to engage a third party to make the allowable single copy for private purposes. That third party may not, however, copy musical works, cinematographic works, utilitarian articles or sculptures, or copy another work of art by artistic reproduction. Germany permits a third party helper in a narrower fashion, by confining the types of copying permitted and by not permitting the amanuensis to be paid. Hungary prohibits a work from being copied by another person onto a computer, or onto “an electronic data carrier” even if is done for a private purpose. Sweden prohibits the engagement of a third

<sup>14</sup> Swiss law, for example, allows a person to reproduce copies of a work “for private use” and have a third party make the copy used; the Swiss law specifically includes libraries with photocopy machines available to their users as permissible third parties in the copying for private use context. Similarly (for works other than music, cinematography, utilitarian articles, sculptures, or other works of art reproduced artistically), Finnish law allows one to use outside services or engage a third party to make reproductions for the “private use” of the person commissioning the copy.

<sup>15</sup> Spain’s law specifies that, in order to qualify as private copying or copying “for private use,” copies may not be made using equipment or materials placed at the public’s disposal or at “establishments engaged in reproductions for the public or ... for distribution at a charge.”

party to reproduce musical or cinematographic works, and like Finland, prohibits the “artistic reproduction” of another author’s artistic work. One can speculate that some of these restrictions are designed to prevent niche industries from forming around a default right to a private copy.

A number of questions remain, as to the liability of copy shops and other third parties who copy a work for someone who uses the work for personal/private, non-commercial ends. Several possible interpretations/outcomes exist:

1. The copy center or library could be viewed as the agent of the copier and may have no liability for the unauthorized copying. In this case, the copy would still be “private” and exempt.
2. Alternatively, the third party could be viewed as a distinct entity from the person who requested the copy, and be fully liable for the unauthorized copying. Here, the copy would no longer be “private,” and would accordingly come within the scope of the author’s exclusive rights.
3. Or, the copy may be subject to a remuneration right; the individual receiving the copy is not liable, but the third party entity making the copy is required to pay the statutory fee.

### **Who may receive copies?**

In addition to specifying who may make “private copies,” many countries’ laws and judiciaries have limited the scope of those persons with whom one may “share” a work copied for private or personal use. In considering the number of people who may enjoy the copy, two questions arise: (1) Are more people allowed to use the same copy or (2) Are more copies allowed to be made for more people? The national reports are not always clear as to whether a larger scope of recipients implies a larger number of copies. The question of who may receive copies under a country’s private copying provision becomes increasingly important as digital technology and e-mail vastly facilitate circulation of copies to friends, family and beyond.

Most of the reporting countries indicate that their private copying provisions limit the scope of who may receive/use the copies. The radius of people to whom the copier or person commissioning the copy may distribute or with whom he/she may share the copy varies from country to country.

Several countries limit the recipient of the copy to the copier himself/herself. French law generally provides that once a work is published, the author may not prohibit copies strictly reserved for “the private use of the copyist and not intended for collective use.” Similarly, the Netherlands provides a general private copying exception, allowing on “to reproduce a work in a limited number of copies for the sole purpose of private practice, study or use of *the person who makes the copies or orders the copies to be made exclusively for himself*”

(emphasis supplied). These countries' private copying exceptions appear to place a greater emphasis on limiting the scope of the recipient/user for the work, than on the type of work copied.<sup>16</sup>

Other countries with specific copying exceptions for particular subject matter limit these provisions to the copier himself/herself. For example, Canada's specific private copying exception for the reproduction of sound recordings applies only to the "sole private use" of the copier.<sup>17</sup> Canada and Italy and the US in case of Audio Home Recording Act provide the narrowest scope of recipient/users of copies for specific types of works (in the case of Italy, "audiograms" and "videograms").

The majority of reporting countries limit the scope of recipients in their private copying/use provisions to a circle of family and friends of the copier. How does one interpret "family and friends" in this context? The determining factor under Danish law is "whether personal ties exist" between the person who makes the copy and the person or people to whom the copy is given.<sup>18</sup> Similarly, German case law and legal literature interpret "private use" as "use in the private sphere in order to satisfy personal needs for oneself or *for persons to which a relationship by private ties exist.*"<sup>19</sup> Of course, this begs the question, what constitutes personal or private ties? Certainly, immediate family and close friends would seem to qualify.<sup>20</sup> The question remains, how far can one extend the notion of family and friends or "family circle," for purposes of a private copying exception or provision? It remains to be seen just how distant a relative might benefit from this exception. Does the exception apply to blood relatives only, or also to

<sup>16</sup> The Netherlands' provision excludes architecture and computer programs from its private use provision. See the Netherlands national report.

<sup>17</sup> See also Italian and Netherlands national reports, containing similarly narrow private copying provisions.

<sup>18</sup> See the Danish national report. Denmark provides a more limited private copying exception for digital copying (see Section D of the national report).

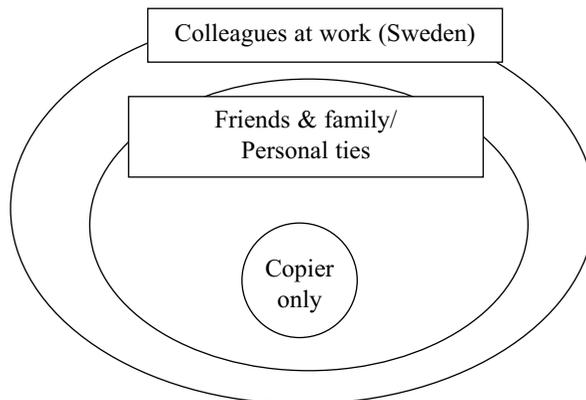
<sup>19</sup> It should be noted that the German national report specifies that private copying does not cover professional use.

<sup>20</sup> Belgium's specific exception for the reproduction of sound and audio-visual works provides for those reproductions "carried out in the family circle" and limited to the family circle. See also, the Swiss national report. Swiss copyright law, which provides one of the broader provisions (with regard to whom one may share copies with), allows for copying of a work for private use, defined in part, to include personal use or use "in a circle of closely linked people, such as relatives or friends". In addition, the Swiss "private use" provision allows "all use of works by a teacher and her students for pedagogical purposes," as well as a provision allowing administrative, institutional use of internal documents for documentation and internal information purposes, both of which seem analytically separate from the present discussion of "private copying."

relatives by marriage? Blood can stretch pretty thin. Is it a question of degrees of relationship: nuclear family, grandparents, uncles, aunts, first cousins, but not beyond? And, with regard to “friends” certainly a broad spectrum of friendship is possible, ranging from intimate friends to acquaintances. None of the responses to Part B directly address whether a newfound “friend” on the chatroom of a peer to peer network would or should come within the “circle of friends.” One might argue that a chatroom open to the public would not qualify as private. Nevertheless, the possibility to meet and form relationships with individuals via the Internet exists. E-mail and instant messaging technology enable direct communication between two people who may never meet in person, but who may nevertheless feel a strong bond with one another based on that communication. The responses do not indicate whether a private copying exception would or should cover such a virtual friend.

Sweden provides one of the broadest scopes within which one may receive a copy made for private use. Unlike other countries which draw the boundary at the friends and family level, Sweden allows reproduction for “private use” to extend to a “few copies for colleagues at a working site.”

The diagram below indicates the range in scope of who may receive copies under the various countries’ understandings of private copying:



### What may be copied?

Each country’s understanding of private copying varies with regard to what types of works may be copied and, equally important, what works may not be copied. Some countries’ laws provide a general copying exception but specifically exclude certain types of works from the private copying exception. Alternatively, some countries have specific private copying exceptions which relate to specific

media.<sup>21</sup> Still other countries provide for general fair use and fair dealing provisions, applicable to all types of works. See General Report of Parts A and C for charts describing the various countries' private copying provisions' application to or exclusion of particular types of works.

Most countries prohibit from this general copying privilege specific categories of works. The most common restrictions are on electronic databases. Other categories include works of art, software (other than back-up copies or copies for system interoperability), and architectural works.

With respect to specific subject matter exclusions, Switzerland and France both designate software and works of art. EU countries exclude software, other than a backup copy, and electronic databases from their "private copying" schemes and Switzerland excludes software from its copying "for private use" provisions. The Swiss law provides that outside of a close circle of friends, one is not allowed to reproduce "all or the essential portion of copies of works available in the market place," works of fine art, musical scores (compositions), or record "interpretations, representations or executions of a work on phonograms, videograms or other fixed medium." Several countries exclude architectural works from their private copying provisions, protecting against the reproduction of these works which are unique. A number of countries limit their private copying provisions to published works.<sup>22</sup> Some countries accord greater rights of private copying where a specific market is not being served.<sup>23</sup> In Germany, a complete reproduction of a book for private use may be permitted if the work has been out of print for more than two years.

While the above-named countries specify works *excluded* from the scope of a general private copying exception, other countries specify the kinds of works that are *included* within a narrower exception. For example, Canadian copyright law includes a specific private copying exception for the reproduction of sound recordings for private use only. Similarly, Belgium's private copying exception goes to audio and audiovisual works copied in the "family circle and reserved"

<sup>21</sup> See also the Italian national report. Italian law provides for "limitations on the reproduction right" which allow "private reproduction of phonograms and videograms upon any kind of media" provided that: (1) the copy is made by a "natural person", (2) with "the sole purpose of personal use" and (3) the copying does not have commercial purposes, either directly or indirectly. In addition to its provision with regard to "private copying" of phonograms and "videograms" onto blank media, the Italian Copyright Law sets forth another limitation of the reproduction right for reprography – copies of magazines and books made on paper by any form of "photographic technique."

<sup>22</sup> See for example, Denmark, Finland and France's national reports.

<sup>23</sup> For example, Canada permits copying of a work into a version appropriate for the handicapped, as long as there is no version of the work directed at that market.

for that family circle (but its provisions for remuneration extend to those copies as well<sup>24</sup>). The United States' Audio Home Recording Act applies only to recording made using digital and analog audio home recording devices.

The more general provisions relating to fair use and fair dealing contained in some countries' laws do not explicitly limit the availability of the exceptions to particular media. In the U.S., for example, "fair use" is a fact-specific analysis in which courts consider four primary factors, among others, in their determination of whether a particular unauthorized copy or use is to be ruled non-infringing. The fair use analysis is not dependent on the type of work copied, but the subject matter of the copied work could affect the analysis under factor 2 (the nature of the copyrighted work), and the medium of copying might affect the analysis, under factor 4, of the economic harm caused by the copying. In any event there is no absolute right or guarantee *ex ante* that a use will be determined fair.<sup>25</sup> Similarly, Australia's fair dealing provision could be applied to any medium.

### **How much may be copied? Limits on portion/amount that can be copied and Limits on number of copies**

In addition to limiting the types of works that may be the object of a private copying provision (and/or the types of works which are excluded from such a provision), a number of countries' laws place limits on how much of a work may be copied. Some countries limit the portion or amount of a particular work that may be copied,<sup>26</sup> some limit the number of copies that may be made, and some limit both the portion and the number of copies made.

Several countries limit the number of copies that are permitted under a "private copying" or similar provision. For example, German law defines private copying as "making *single* copies of a work for private use" (emphasis supplied).

<sup>24</sup> See Belgium national report.

<sup>25</sup> While the fair use analysis could apply to any type of media, the U.S. does have specific legislation with regard to audio home recording devices. This legislation takes the form of a levy on particular recording media. For more discussion of the AHRA, see Section C of the General report.

<sup>26</sup> See for example, the Australian national report, which limits copying for research or study, up to 10% of the number of pages of a chapter from editions of 10 pages or more; an article from a periodical publication; 10% of the number of words from a document in electronic form. Italian law also sets limits on the amount of a periodical which may be copied for personal use employing photocopying equipment. For example, under Italian law, one may photocopy for personal use, up to but not more than 15% of each volume or issue of a periodical, excluding advertising.

Similarly, Finland allows one to make single copies of disseminated works for one's private use. Sweden's Copyright Act allows for a single copy of a literary or artistic work, or a photograph, to be made for private use only. Copying for private use in this context is understood under Swedish law to mean "reproduction for one's own needs as well as for the closest circle of family and friends," but, unlike other countries which draw the boundary at the friends and family level, Sweden allows reproduction for "private use" to extend to a "few copies for colleagues at a working site." While "a few copies" may appear undefined, the Swedish Court of Appeals has held that 30 copies made to distribute to administrations in a municipality was "excessive."<sup>27</sup>

The "single" copy limitation included in several countries' private copying exceptions poses interpretative challenges when combined with the "friends and family" recipient provisions. Must one share the same single copy with each friend and family member or may one make a single copy for each friend and family member? As discussed below, the notion of a single copy becomes more complex when applied to the digital realm in which one copy may be "forwarded" to a friend, while another copy of the file remains on the hard drive or e-mail account of the initial sender.

While several countries constrain "private" copies to a "single" copy, it is not always clear, in the digital environment, what constitutes a "single" copy. For example, how do or should private copying exceptions reflect the challenge of RAM copying, the transient or incidental copying technically required to permit the listening to or viewing of a work via computer? Regardless of the user's intent, multiple transient copies may be generated, possibly placing the user in a perpetual state of copyright infringement. Consistent with art. 5.1 of the EU Information Society Directive, Ireland's Copyright Act provides that this type of transient or incidental copying is non-infringing. Limits on the numbers of copies made when applied to digital technology pose other challenges as well. How does one treat the scanning of a text or an image, or the saving of different versions of a text, or the e-mailing of a single document to one friend, who e-mails that single copy to another friend, and so on? Must one, in order to satisfy the "single" copy requirement, delete one's copy of a work after sending it via e-mail? As digital technology continues to break down the barriers between public and private, it becomes more challenging to preserve the boundaries of private copying. For further discussion of different approaches to the digital challenge in the realm of private copying, see Part D of the General Report.

<sup>27</sup> See the Swedish national report. Sweden's provision allowing a few copies for colleagues at a working site appears inconsistent with its "single copy" of an artistic or literary work for private use.

### **For what purpose and use may one copy?**

Nearly every reporting country's understanding of private copying limits the purpose and use of the copy. Accordingly, the majority of the reporting countries' laws provide that the purpose of the private copy must be personal/private and non-commercial in nature.

### **Privacy concerns**

Most countries' provisions limit the purpose and use of the copy to personal or private use.<sup>28</sup> Whether defined as "domestic and private use" (as in the Australian exception for exempt recordings),<sup>29</sup> as use of the work for private ends (as in Switzerland), or as reproduction for the "sole purpose of personal use" (Italy's exception for phonograms and videograms), many countries specifically limit the purpose of and actual use of the exempted copy to the "private sphere."<sup>30</sup> Finland's exception for "private use" encompasses "studying, private research, hobbies (without a commercial purpose) and pure aesthetic needs/enjoyment." In addition to limiting the use of the copy to personal, non-commercial ends, the majority of the countries report that their laws limit to physical persons (as opposed to an entity or a business) the category of those who may copy; these countries also restrict to a personally linked group those who may receive copies. Whether positively or negatively articulated, this emphasis on using the work for private purposes and within a personal circle of family and friends indicates a desire to protect an element of personal autonomy of the individual consumer.

By specifying a provision that protects an individual's personal freedom and privacy, and enables her to make personal or private use of limited copies, these laws also seek to reconcile the personal autonomy interests of users with the economic interest of authors.<sup>31</sup> It should also be noted, however, that the personal

<sup>28</sup> See for example the national reports of Denmark, France, Germany, Greece, and Hungary.

<sup>29</sup> Similarly, Australian legislation specifically allows the recording of a broadcast for the "private and domestic use of the person who made it." The law shapes the understanding of what constitutes "private and domestic use for the person who made it" by excluding from this definition/category, any film or sound recording copied from a broadcast for any of a number of purposes which encompass making the copy public, or copying or distributing the copy for any commercial purpose, either directly or indirectly.

<sup>30</sup> See the German national report.

<sup>31</sup> Ireland's more general fair dealing provision clearly emphasizes the goal of protecting the copyright owner's interest; its definition of fair dealing includes use of a copyrighted work "for a purpose and to the extent which will not unreasonably prejudice the interests of the owner of a copyright."

and private copying and use of a work present serious challenges to enforcement. Thus, one could also interpret the allowances for personal and private use as a collective (no pun intended) decision to avoid policing the areas most difficult to enforce. These concerns provide additional context to the information contained in several national reports that their private copying provisions prohibit collective use of the work copied, or exclude any public distribution, communication, or performance of a work,<sup>32</sup> for one may surmise that once the copies are more widely distributed they will more easily come to the attention of the copyright owner.

### **Non-commercial use/purpose – economic harm concerns**

The second primary concern addressed in nearly every country's understanding of private copying is that of potential economic harm. Most countries' laws in this area specify that the "private copy" may not be used for any commercial purpose, whether directly or indirectly.<sup>33</sup> This condition that a private copy be non-commercial in nature, purpose and use indicates a concern for the marketplace.<sup>34</sup> If commercial unauthorized copies were allowed, the copyright holder's interest could be jeopardized. Similarly, if no limits were set on the amount of a work that could be copied or the numbers of copies made (without equitable remuneration), the proliferation of the work without compensation to the copyright holder could seriously harm or replace the market for the original work. In light of the popularity of peer to peer file sharing, this possibility is of grave concern today, particularly for the music industry, but remains an equal threat for other media.

Conclusion: Is "private" copying an imprecise proxy for "economically harmless" (or at least "relatively unharmed") copying?

Whether national laws limit who may make copies, who may receive copies, what one may copy, or for what purpose one may copy, concern for economic

<sup>32</sup> See the French national report. See also the Australian provision which excludes selling, distribution or making a sound recording or film public, from its definition of "private or domestic use" contained in its "exempt recording" provision.

<sup>33</sup> Spain's law, for example, does not require the author's permission when a reproduction "is made by a private individual for private use for no direct or indirect commercial end and the copy obtained is not put to collective use."

<sup>34</sup> Some countries with more general fair use and fair dealing provisions strongly favor non-commercial uses over commercial uses, though they do not specifically exclude the possibility that a use could be fair and commercial in nature. For example, the U.S. and Australia consider the effect on the potential market for a work and U.S. courts consider whether the use is commercial or non-commercial.

harm underlies the majority of private copying exceptions reported. These provisions attempt to delineate areas where the perceived risk to the market for the original work appears the greatest. In those instances, no privilege will attach, even though the user's privacy interests may be present. The Spanish disqualification of copies made using equipment that is publicly available in shops or libraries illustrates the primacy of economic concerns: even though the user may be making the copy for her personal enjoyment alone, the relative ease and efficiency of making the copy under these circumstances threatens the market for the work, particularly as the number of users accumulates.

Consistent with the concerns we discern in the Spanish law, some prohibitions inject a kind of transaction cost into permitted copying. For example, Hungary and Germany permit essentially complete copies of certain literary works if the copyist reproduces the work by "handwriting" or "manually." Similarly, Italy distinguishes between (1) reprographic works copied by hand or "by a means of reproduction unsuitable for circulating or disseminating to the public" which are free and (2) reproduction for personal use of by means of photocopying "or like means" for which remuneration to authors and publishers is expected.<sup>35</sup> The understanding seems to be that a manual copy would be less likely to impair the market for the work. Creating "friction" by limiting permissible copying to cumbersome techniques underscores the assumptions embedded in many regimes – that "private" copying is labor intensive, and therefore not economically threatening to the market for the work. Now that digital technologies have dramatically reduced the transaction costs of reproduction, particularly in certain categories of works, these assumptions may need to be exposed and challenged. Section D considers the issue of digital copying in more depth.

While each country sets forth limits to minimize the impairment of the author's interest, some also endeavor to reconcile protection for the market for the work with protection of user privacy and/or autonomy, as well as to respond effectively to the enforcement problems that a prohibition on private copying would present. Thus, many countries specifically set forth levy and remuneration schemes, in order to compensate the author for the private copier's reproduction and use of the work. Some countries, such as Hungary, specify a general right to remuneration that may be separate from or incorporated into a levy system. A right of remuneration grants rights holders the ability to seek money for, but not to prevent, private copying, while a general default right of private copying may not necessarily compensate authors. A right of remuneration may

<sup>35</sup> See discussion of Italian remuneration provision below. The Italian law allows a complete copy of a work if manually copied but sets limits on the amount that may be copied if photocopying equipment is used.

also provide opportunities for private ordering, such as licensing organizations, to police that right.

Some regimes explicitly regulate conditions for this type of private ordering. For example, museums, libraries, archives and teaching establishments in Canada may use the photocopiers installed on their premises if they have signed an agreement with a “management organization” authorized by the copyright holder to grant licenses. In Italy, copy shops or other public premises of reproduction, even if for free, must pay remuneration to authors and publishers based on number of copies made. In addition, Italian libraries must pay a lump sum annually for copying activity occurring on their premises. In Canada and the United States, libraries are shielded from liability (or obligation to pay) for improper copying occurring on their premises, provided legal warnings are posted. For a further discussion of the remuneration schemes related to private copying, see Section C of the General Report.

In reviewing national law definitions of private copying, this Report comes to the tentative conclusion that as a term of art meaning “non-infringing” copying, “private” copying may be a misnomer. The principal rationales underlying private copying exceptions, or limitations offset by a remuneration right, address economic and enforcement concerns rather than individual autonomy. It is unclear that a privacy interest, standing alone, would trump economic rights. As the Internet increasingly blurs line between private and public, the primacy of the economic concerns is likely to become all the more pronounced.