Private Copying Remuneration in Spain

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ALAI's Spanish section sent its report, giving response to the excellent and comprehensive questionnaire prepared by Professors Dreier, Ginsburg, Sirinelli, Spoor and Mr. Landry. It would not make any sense to repeat it here ... and (fortunately) time would not be enough for doing so. Rather, it will be more useful to present an overview of the Spanish levy system. As you will see, in general terms, Spanish law meets the requirements of what anyone could expect from a levy system. With its advantages and problems.

I. A brief but eventful and troubled history: 1987, 1992, 1994

1. We will probably have to start with a historic journey (brief, do not panic!) to illustrate the difficulties faced to achieve a system which could finally work. Sometimes one learns more from mistakes (... better if they are not one's own) than from good moves. And in Spain, one must admit it, we made several mistakes (that at the time did not look so) before we came up with the solution. So, I believe, we are in a position to provide some useful experience; even though it is always difficult to extrapolate because every country has its own idiosyncrasy ... and its own bad habits. The truth is that, during some years the levy system existed only on paper. It was needed – and achieved – a purposeful political will, able to pull itself together after repeated failures, to finally implement it. As you may have already guessed, such failures had a lot to do with the issues of which goods must be subject to a levy and who (and how) fixes its rate.

2. The levy system was introduced by the Intellectual Property Act of November 1987, as a way to compensate the *objective damages* derived from the exemption for private copying. The copying of all kind of works "*for private use of the copies"* was permitted, with the exception of computer programs (Sec. 99.2 LPI/1987). But, at the same time, it provided for the right to a "*compensatory remuneration"* (sec. 25.1 LP111987) subject to compulsory collective management and a levy on the equipment and materials used for the making of private copies. In spite of certain initial doubts and the obligation of using part of the money collected for social goals, it was an intellectual property right, not a tax. Apart from that, the Law left it to a Decree "*to determine the equipment and*

materials subject to levies, the rate, the collection system and the distribution of remuneration".

The Decree was passed relatively quickly (March 1989, Decree 287/1989). At least apparently, its design was good and it should have been made effective immediately. However, it had an *Achilles heel.* The Decree entrusted a *Joint Committee* to establish the list of equipment and materials subject to levy, its rate, the remuneration due and the collecting procedure. The Committee was formed by three designated members of the Ministry of Culture plus an even number of members designated by the interested parties; 10 for the right holders and 10 for those subject to payment (sec. 2 and 3 of Decree 287/1989). Agreements and decisions had to be published in the Official Gazette of the Spanish State (BOE) (thus providing a general reach) and were effective for a term of three years, with a tacit extension unless otherwise decided by the Committee. There would have been no problem... had it not been because the validity of the Joint Committee's agreements and decisions required the presence of a minimum number of each party's representatives (sec. 9.2 Decree RD 287/1989). In practice, this allowed any of them to block its operation. And that is what happened.

3. Maybe it would have been enough to amend the Decree, but the experience of the Joint Committee had been calamitous and, perhaps for this reason, it was preferred to modify the law. The amendment was carried out in July 1992 (Law 20/1992 and Decree approved by RD 1434/1992) and it was the first one that affected the Intellectual Property Act of 1987. Meaningfully, the Preamble of the Law put the blame on itself for having trusted so much *("completely")* in the "*principle of self-administration of the social agents involved",* that is to say, in the capacity of the interested parties to reach agreements. It was good to leave room for self-regulation, but it had been naive to forget about the 'subsidiary instruments ... not to mention the fact that the matter in discussion directly affects people who are not present in the negotiations, not even indirectly (as it happens with consumers, who finally "pay for" the levy).

The amended system had, again, a very reasonable look. New section 25 LPI was longer and seemed to provide adequate response to the old law's mistakes. Firstly, it attempted to be more precise about the equipment and materials subject to the levy; in that sense, instead of talking about "*equipment and materials […] that allow the reproduction of works [exclusively for personal use]"* (sec. 25.2 and 1 LPI/1987), it referred to "*equipment, devices and materials 'suitable' to produce [reproductions for private use according to what was authorized in subsection 2 of sec. 31 of this Law]"* (sec. 25.1 LPI/1992)[17]. Secondly, there were also improve-

[17] Sec. 15.1 RD 1434/1992 even provided a definition of "equipment or devices" *("The set, interconnected and articulated, of physical elements that allow reproduction")* and of "materials" *("The physical elements that may be used as global support of the relevant reproduction").*

ments in the determination of the economic content of the right. The levies to be charged to each equipment or device and material were established directly by Law (sec. 25.4 LPI/1992). On that basis, the annual fixation of the "*compensatory remuneration"* referred to the agreements between the interested parties, that is to say, the debtors (individually or collectively) and the collecting societies (sec. 25.5a) LPI/1992). The *Agreement over the compensatory remuneration* (Convenio sobre la remuneración compensatoria) was intended to serve for the "*global determination and individual allocation among the debtors of the amount of compensatory remuneration obtained in the course of the preceding calendar year"* (sec. 21.1 RD 1434/1992). Nevertheless, if no agreement was reached within the first two months of the year, remuneration would be "*fixed through the mediation and resolution of a third party, which will be binding for debtors and creditors"*(sec. 25.4,b) LPI/1992). That was the big novelty. The *mediator* was a person designated by the Ministry of Culture (subject to a formal hearing with debtors and creditors) and had to "*dictate resolution within two months from his/her designation, which could be extended one more month"* (sec. 25.6 LPI/1992). Such resolution was binding "*for all the creditors and debtors of the compensatory remuneration known at the time it was produced"* (sec. 36.6 RD 1434/1992; *cfr.* sec. 25.5b) LPI/1992).

The system did not work this time either. Why? It is easy to explain it from today's perspective. The term "*suitable"* (instead of "*that allow")* was not helpful to identify the equipment, etc; although this was a minor problem because sec. 25.10 LP111992 – unlike what happens in the legislation today in force- entrusted the Government with the fixation – by regulation – of the "*equipment, devices and materials subject to levies"* (sec. 25.10 LPI/1 992). Over all, as I'm sure you have already suspected, the failure of the 1992 system lied, once more, in the procedure to fix the remuneration rate. It was wise not to trust 100% in the goodness of the market. But the force of the body in charge to decide in the absence of an agreement was miscalculated. It was naive to believe that one "*mediator"* could fix the remunerations in such a short time of two/three months. As it was feared, the "*mediator"* (who turned out to be – if memory serves me right – a Professor of Constitutional Law, probably with other duties) was overwhelmed with the situation. Still today, in the premises of the General Sub-Department of Intellectual Property at the Ministry of Culture and Sport, one can see the never-ending rows of boxes full of documents for the mediator to *process.*

The enormous task of the "*mediator",* undoubtedly meritorious, was not enough. All his resolutions were contested and, once again, the system was blocked. In fact, by anticipating the required intervention of a mediator, any direct resource to a civil judicial proceeding to claim the payment of remuneration was (or appeared to be) excluded.

4. The third and finally successful try took place in December 1994, taking advantage (...a usual practice in Spain) of the implementation of the Rental and

Lending Directive (92/100/EEC). Almost at the final stages of the parliamentary proceedings of its implementation Law (Law 43/1994) an Additional Provision was introduced, which gave sec. 25 its present lengthy wording (no less than 23 sub-sections; almost a *small law* in itself, within the general Intellectual Property Law). At the same time, a considerable part of the Decree (RD 1434/1992) was deleted, since it was useless with the new system. This reform had the virtue of putting an end to the long *vacatio legis,* or better, *vacatio ius* that had lasted seven years (either due to blocking or to lack of success).

I will now present the current Spanish system. It is worth to advance here the reason for its success. It is very simple: the regulation contains all necessary details for the debtor to know how much to pay and how to do so, and – when payment has not been fulfilled – it allows the creditor to bring an economic claim to courts (for a specific amount, or an amount to be determined in the course of the process).

II. General view of syytem in force

This is the (most) boring part. But, after all, I have been requested to explain the Spanish system. I will try to do so in a concise and schematic way, describing: (1) The right and its essential characteristics; (2) The relation between remuneration and private copying; (3) The equipment or devices and materials subject to a levy; (4) The subjects of the right (rightholders/creditors, debtors and other liable parties); (5) Economic content of the right (rate of levies); (6) Rules of the obligation *(modus operandi* and guarantees of effectiveness); and (7) Matters referred to further development by Government regulation.

1. **The right and its essential characteristics**. – As we know, from 1987 the exemption for private copying is accompanied by a right of remuneration. Its aim[1] clearly expressed by Law (sec. 25.1 LPI), is "to *compensate the intellectual property rights not received"* for the private copies produced "*exclusively for private use, according* to *that authorized in sub-section 2 of sec.31 [...] by means of non-typographical devices or technical instruments".* The right has the typical or usual characteristics of the so called "simple remuneration" rights:

> ***"Unwaiveable".*** The remuneration right cannot be waived by authors and performing artists (sec. 25.1 LPI). Instead, the remaining right holders (publishers, phonograms' producers and audiovisual recordings producers) are allowed to waive it. It is not clear whether the inalienability nature extends also to *inter-vivos* transfers, although this is the most reasonable conclusion (non-transferability). Of course, the right may be transferred *mortis causa* and has the duration of the intellectual property in general.

Compulsory collective management. The right is made effective through collecting societies (sec. 25.7 LPI). There is no room for direct claims from right holders. Collecting societies act on behalf of its members, as well as on behalf of non member right holders. In principle, societies can act independently. But when they converge in the same "modality of remuneration", they are allowed to act jointly or even to constitute an *ad hoc* legal entity (sec. 25.8 LPI). However this is only a possibility. In practice, it causes some troubles.

Equitable economic content, that may be fixed externally. Right holders cannot fix a *price* freely. Remuneration must be "*equitable"* The "*equitable"* nature can result from the agreement, but it can also be a decision taken by a third party, be it legal, judicial or administrative. Today, the fixation has been set by law.

These two characteristics may be added to the above:

***Remuneration is unique for several groups of subjects*.** Spanish law establishes three *types of reproduction or remuneration* corresponding to: books and the like publications; phonograms and sound media in general; and videograms and visual and audiovisual media in general. The subjects whose works and services are being exploited in any of these forms or types, are entitled to a "*unique"* remuneration that has to be shared among them (within each group). Therefore: authors and publishers (in the cases of books and the like publications); and authors, artists and producers (in the case of phonograms and videograms).

Part of the moneys collected must be destined to social purposes (activities or services of social security to the advantage of members and for training and promotion of authors and artists, *cfr.* sec. 155.2 LPI). The percentage is determined by regulation. Currently it is 20% (sec. 39.2 RD *1434/1992).* These expenses are subject to control from the Ministry of Education, Culture and Sport (sec. 25.10, II LPI).

2. **Relation between remuneration and private copying**. The right of remuneration compensates for private copies, but not for all of them. There are some exclusions, depending on:

***The means used for the reproduction*:** copies made "*by means of […] typographical technical devices or instruments"* are excluded (cfr. sec. 25.1 LPI). For instance, copies made by means of a typewriter are, therefore, not subject to levy.

The nature of the work involved. There is no room for private copying of computer programs and electronic databases; therefore, there is no remuneration either (cfr. sec. 31 LPI).

The form of exploitation of works and services subject of private copying: this is an aspect worth to be highlighted and that, maybe, should be subject to review.

Remuneration only applies when works or services are "*disclosed"* (rather, it should say "*exploited") "in the form of books or publications assimilated thereto by regulation for those purposes, and also in the form of phonograms, videograms or other sound, visual or audiovisual media"* (sec. 25.1 LPI). The law is not very clear[1] but it seems that by "*forms of reproduction"* or "*forms of remuneration",* it refers to the *form of exploitation of the works subject to private copying.* Apart from that, the Decree assimilates certain cultural scientific publications, to books. As I have said, some, not all of them. For instance, magazines published less than monthly or more than biannually are excluded. And so are daily newspapers.

3. **Equipment or devices and materials subject to levy.** With the exceptions mentioned, any equipment or device and material "*required for"* or "*suitable for"* the making of private copies is subject to a levy (sec. 25.1 LPI). The ambiguous sense of this expression has already been notice. Some (the debtors) hold that the "*nature of being suitable"* to make private copies was a requirement more precise than the simple "*possibility",* so only the equipment, etc. effectively devoted to such activity and with a special repercussion over the exploitation of the works would be subject to levy. On the contrary, in Spanish language it is very easy to understand that "*suitable"* is what simply "*serves for*" and, in fact, sec. 25.4,a) LPI itself refers to equipment, etc. "*that allow"* the making of private copies. This discussion has grown in importance regarding some digital equipment, etc. And it is good to remember that now the Government has no power (as it previously did) to establish by regulation "*the equipment, devices and materials subject [to levy]*" (sec. 25.10 LPI/1992).

4. **Subjects of the right (right holders/creditors, debtors and other responsible parties).** The right holders and creditors of the remuneration are authors, performing artists, publishers and producers of phonograms and audiovisual recordings. However, as already said, only the relevant collecting society can contact the debtors. Regarding debtors, they are not those who copy, but "*manufacturers in Spain, and also the acquirers outside Spanish territory for commercial distribution or use therein, of equipment, devices and material that permits any of the forms of reproduction provided for in" the Law.* Therefore, manufac-

turers and importers, whether for commercial distribution or for their own use. The Law also provides for the joint liability *(in solidum)* of "*distributors, wholesale and retail traders, successive purchasers [of equipment and materials]",* unless they "*show they have satisfied the remuneration [to the debtors]"* (sec. 25.4,a), II LPI]. The final purchasers or users remain outside the system, although it is assumed that the rate of the levy will be applied to them.

Nevertheless, the Law (sec. 25.6) provides for some subjective exemptions. The following subjects "*are exempted from the payment of the remuneration":*

"Producers of phonograms and video grams and broadcasting organizations, for the equipment, devices or materials devoted to the operation of its activity*",* provided that they have the "*mandatory authorization" to* reproduce. It is logical that those who will not make copies for their private use do not pay a levy. However, there is no general exemption in that sense. Therefore – and this would be another aspect to be reviewed – the levy applies to many consumers of equipment and materials which are not used for the making of private copies (for instance, the Office of Justice[18]; or the reprography companies).

Travelers *("Natural persons who purchase outside the Spanish territory the [relevant] equipment [etc] as travelers and in an amount that allows to assume reasonably that they will be for private use in the mentioned territory",* cfr. sec 13.2 RD 143411992). It is a clear case of private copying upon which no levy applies; probably due to the difficulty of taking it to practice.

5. **Economic content of the right (rate of levies).** The remuneration is, as already said, equitable. The exact levy is fixed by the Law itself (sec. 25.5 LPI):

In the case of books and similar publications, the levy affects only equipment or devices (not supports or other materials**).** It is a fixed price according to the copying capacity of the equipment/device**.** For instance, 7.500 ptas (45,08 euro) up to 9 copies/minute. Law also anticipates levies for high copying capacity machines (i.e. over 50 per minute, 37.000 ptas or 222,37 euro). Those machines are clearly destined to professionals or companies. Yet, the Law considers that they can also be used for private copying.

[18] Although this could seek the protection of the exemption on judicial proceedings, where no remuneration is due.

In the case of phonograms and audiovisual recordings, the levy applies to equipment and devices (a fixed price for each one, regardless of their copying capacity: 100 ptas/0,60 euro for sound supports, and 1.100 ptas/6,61 euro for image supports), ***but also to media and other materials*** *(in this case, according to the storage capacity; 30 ptas* or 0,18 euro/hour for audio-related and 50 ptas or 0,30 euro for image-related supports).

The Law attributes to a combination of three Ministries (Culture, Industry and Trade) the faculty to "adjust" – every two years – the amount of rates **to "***prevailing market conditions, technological development and the official consumer price index"* or *Retail Price Index* (Additional Provision 3 LPI).

6. **Rules of the obligation (modus operandi and guarantees of effectiveness)**. The Law accurately establishes all aspects needed to guarantee its effective fulfilment and imposes detailed procedure and record-keeping obligations to debtors. At the same time, it foresees specific judicial measures and grants collecting societies important powers to control the debtors' activity. More specifically, the Law:

Provides the moment when the payment obligation originates. In order to do that, it distinguishes between manufacturers and importers for commercial distribution, on the one hand, and importers for use, on the other (sec. 25.11 LPI)[19].

Obliges debtors (manufacturers and importers) to present on a regular basis[20] a pay-out statement to collecting societies, stating which are the equipment or devices and materials (together with their technical features) that have been manufactured or imported for distribution or utilization. The statement will not include the equipment, etc. for export as well as those intended for producers and broadcasting organizations, which are exempted according to sec. 25.6 LPI (sec. 25.12 LPI). Any distributor who sub-acquires the equipment/device/material from a debtor, has the same obligation when debtors "*have not applied to them the relevant remuneration and stated it in the invoice"* (Sec. 25.13 LPI).

[19] For the first two, the obligation originates in the moment in which they transmit the property or transfer the use. For the latter, from the very moment of purchase.

[20] Quarterly for manufacturers and importers for commercial distribution. Within the following five days after the purchase for the importers for use (sec. 25.12 LPI)

Fixes the moment of fulfilment of payment. Manufacturers and importers to distribute must pay within the same period established to submit the mentioned pay-out statement. Importers to use and, if appropriate, wholesale and retail distributors will pay at the time of presenting the pay-out statement (sec. 25.14 LPI).

Considers "debtors and. if appropriate, those jointly liable as trustees of the remuneration obtained" until the payment is fulfilled (sec. 25.15 LPI).

For control purposes, it imposes manufacturers and importers for commercial distribution the duty of stating – in the invoices they give to their customers – the rate of the remuneration. as well as the duty of applying it to them and keeping it for its subsequent submission (sec. 25.16 LPI). Same obligations are imposed to wholesale and retail distributors who in turn acquire from a debtor (sec. 25.17). In addition, they are not allowed to accept from their suppliers any equipment, etc., subject to levy which have not been duly invoiced (sec. 25.1 18 LPI). "*When the rate of remuneration is not stated in the invoice, it will be assumed, unless when proved otherwise, that [.. .] it has not been fulfilled"* (sec. 25.19 LPI).

As already said, the effectiveness of the right of remuneration is completed with judicial measures and important control powers granted to collecting societies over the commercial activity of debtors.

Regarding the first matter, in addition to any civil and criminal claims and measures applicable due to failure to pay, the Law provides for the ***adoption of preliminary injunctions*** and "specifically, *the seizure of the equipment, devices and materials concerned".* These seized goods "*will remain subject to the payment of the remuneration claimed"* (sec. 25.20 LPI).

Regarding the second matter, debtors and those jointly liable must ***allow the collecting societies to monitor the operations subject to remuneration*** *and those affected by the obligations established in subsections 12 to 20".* In order to achieve that, "*they will provide the necessary data and documents to verify the effective fulfillment of such obligations and, especially, the accuracy of the pay-out statements submitted"* (sec. 25.21 LPI). The powers of the collecting societies are so incisive that the Law reminds them the duty of "*respecting the principles of confidentiality and trade privacy regarding any in formation they held in exercising them"* (art. 25.22).

7. **Matters referred to further development by Government's regulation.** As we have seen, the system provided for by the Law is complete and capable to

operate. Nevertheless, some issues are trusted to the Government's regulation. According to sec. 25.23 LPI, the following issues will be subject to regulation:

The types of reproduction that should not be regarded as for "private use" for the purposes of the remuneration right. Under this authorization, sec. 10.1 RD 1434/1992 provides that will not be deemed reproductions for private use: "*a) those made in premises destined for the making of reproductions to the public or that have at the public's disposal the equipment, devices and materials for their making; [and] b) those which are subject of collective use or distribution for a price".* All of them require the owner's authorization (sec.10.2 RD 1434/1992)[21].

„The equipment, devices and material exempted from the payment of remuneration owing to the specific nature of the use or exploitation for which they are intended, such requirements as may derive from the development of technology and of the market sector concerned". The Law determines which are the equipment, etc. subject to levy (those "required" or "suitable" to make the copies). But the Government is allowed to exclude some of them. And so it did in Sec. 15 RD 1434/1992. For instance, "*microcassettes for dictating machines and answering machines"* are exempted, as well as some supports for only or preferably professional use (such as the old "*((Compact cassettes)) with a duration inferior to 45 minutes for use in computers").* Undoubtedly, this power of exclusion, although regulated, gives the Government some important room for maneuver and it could be used to approach some of the problems of digital technology**.**

And ***the distribution of remuneration in each of the fields of activity among the different categories*** *of creditors, so that they in turn distribute them among themselves, due regard of the provisions of Article 154 of [the] Law.* Sec. 36 RD makes the following distribution: phonograms (50% authors, 25% performing artists and 25% producers); videograms (1/3 authors, 1/3 performing artists and 1/3 producers); books (55% authors and 45% publishers). On the basis of these allocations, remunerations are then distributed among the different collecting societies and, later on, among right holders (after having

[21] Although the criteria may be reasonable, it is not appropriate that the reach of the private copying exception (defined in sec. 31 LPI) is left to be defined by a regulation. Especially, when the power granted to the Government is limited to the right of remuneration ("for the purposes of this article"), not to the extent of the exception. From this point of view, sec. 10 RD 1434/1992 could even be used by some as one more argument against the payment of the levy.

deducted administration fees and 20% for social purposes). According to sec. 37 RD 1434/1992, the distribution among collecting societies will be "*proportional to the reproduction for private use of their respective repertoires of works, performances and productions of the relevant year."* Distribution among the rightholders is left to be done by each collecting society, "*equitably among the owners of the works or productions used, according to* a *system laid down in the statutes which rules out any arbitrary action";* proportionality between remuneration and use of works or other subject-matter must be respected (sec. 25.23 *in fine* and 154 LPI)

III. Evaluation of the system in force; some problems

1. The current system is good and it works. We could follow the advice of computer experts: *If it works... don't touch it!* However, we cannot deny that it has some problems which, to some extent – and paradoxically –, are aggravated by one of its main aspects: the highest normative instance – the Law – guarantees some short term calm, but it makes changes more difficult. Some of the mentioned problems relate to technology developments. Others, on the contrary, do not, although they have been stressed by them. Not meaning to be exhaustive (and warning that my point of view might not be shared by all), it is worth noting the following problems: the concurrence of collecting societies; the *de facto freezing* of the levy rate; and the difficulties of adapting to the digital world

1) **The concurrence of collecting societies.** The fact that collecting societies act or can act independently may generate independent and successive claims to one debtor. This may pose important practical problems, more so when collecting societies not only coincide in the *form of remuneration,* but also in the management of rights of the same category of right holders (i.e., both SGAE and DAMA manage the rights of filmmakers). The possibility of a joint action (or even to set up an association or an *ad hoc* legal entity) could solve such problems. But not always do collecting societies act jointly. The problems have become more serious because in the case of most digital equipment and media, concurrence is absolute: they are used to reproduce all kind of works (literary, musical, audiovisual...; as well as non-protected material or computer programs, for which backup copies are permitted without remuneration). For instance, when one collecting society sues a manufacturer of digital supports, should it ask for the whole levy? Or only for the part it is entitled to? And which is that part?

2) **Freezing of levies.** As already said, a group of three Ministries has the faculty to "*adjust"* the amount of rates every two years to "*prevailing market conditions, technological development and the official consumer price index"* (Additional Provision 3 LPI). Collecting societies have insisted in "*updating"* (increasing) the levies. But that is conceived as a simple discretional possibility

that has never been used. Maybe it should be conformed as a duty. Apart form that, there is no doubt that the "*adjustment"* of levies – on a regular basis – according to the mentioned criteria could be an important instrument in the hands of the Administration to address some of the problems deriving from digital technology. In a wide interpretation (rejected by many), it could even be considered the possibility of fixing levies *ad hoc* for digital equipment and media.

3) **The difficulties of adapting to the digital world**. In principle, the system – and that is traditional in Spanish legislation – is *technologically* neutral. The exemption for private copying as well as the right of remuneration are formulated in neutral terms, regardless of the nature of the means of reproduction used. Both analog and digital copies are admitted. And, theoretically, in both cases there must be a remuneration. However, it's not easy to apply the current levy system to digital equipment and media. Or at least, this is what practice shows. It will be enough to point out three or four points subject to current debate:

Equipment or devices and materials subject to levies. As already mentioned, any equipment/device/material "suitable" for making private copies (of any of the three types of works provided for by the Law) is subject to a levy. But manufacturers and importers reject a mechanical application of the "suitable" concept. According to them, "suitable" are only the equipment/devices/materials really used for that, with a real practical effect. There is no agreement, for instance, about "*scanners"* or printers; let alone for computer *hard drives.* On the paper, a broad interpretation of the term "suitable" would result in the application of levies to photographic cameras.

Disagreement is aggravated because they are usually multifunction or multipurpose equipment/devices/materials not always used in relation with protected works and other subject-matter. It is the case of the so-called *computer CD-Rs.* Moreover, multipurpose equipment and supports/media don't fit well with the present organization of the remuneration system and its three rigid categories of works (books$_1$ phonograms, and videograms).

The rates of the levy. The Law, as we know, fixes the rates of the levy. But, contrary to the assumed technological neutrality, they do not seem to have been conceived for digital equipment and supports. In some cases, the levy would be very low (i.e., 60 cents of E in equipment for reproduction of phonograms). In some others, very high… or too low considering the compression systems (i.e., 18 cents of euro for an hour of sound recording). All this has been alleged by debtors in order to refuse the automatic application of the current levy system to the digital environment.

The eventual use of technological measures. Manufacturers and importers of digital supports and equipment believe that the *possibility* of using effective preventive measures against copying should suffice to exclude the levy, which in turn would reduce the global amount. Instead, creditors believe that the mere *possibility* is not enough and that it is necessary to *actually* use such measures.

IV. The Directive on the Information Society and its repercussions on the Spanish system; the draft bill of the Ministry of Education, Culture and Sport

1. The approval of the Directive on the Information Society has created a new scenario, although it does not seem to impose great changes in the Spanish law. The Directive has not been implemented yet. To date, there is only one Draft by the relevant Ministry, with two versions (BALPI November 2002 and January 2003). The draft provides for the exemption for private copying, its regulation already complying with the Directive's requirements. Both analog and digital private copies are accepted. As to the latter, however, no State intervention is foreseen when right holders employ technological measures to prevent it. Thus, the exception for private copy could eventually disappear or find its field of application greatly reduced, with the logically ensuing consequences as regards remuneration.

2. The Ministry's Draft is basically in line with the current regulation for the right of remuneration. But with some very relevant differences. The following can be outlined:

1) The Government would directly set (and update every two years) the list of equipments and materials subject to levies *(taking into consideration its objective suitability and its effective impact in the carrying out [of private copies];* sec. 25.5,a) BALPI, 2nd version). The Government would also fix the amount of levies ("*considering among other criteria, the modality or modalities involved, the copying and storage capacity and quality [...] and its incidence in the making of private copies and their effect on the market of works and services involved. Likewise, [...] it will consider whether [effective] technological measures [...] are used or not [...]* **;** sec. 25.5,b) BALPI , 2nd version. In both cases, the starting point would be a ministerial proposal, crafted with the professional advice of a new *Commission on Intellectual Property*.

2) The collecting societies concurring for each type or modality must act jointly to exercise the right of remuneration (sec. 25.6 BALPI 2nd version).

3) Provisions envisioned in the Law are substantially reduced the system being broadly referred to regulations (Decrees) (sec. 25.7 BALPI 2nd version).

3. The Draft explains that it does not want a substantial modification of the current system. The idea would be to maintain it as it is, only tempering its rigidity to make it easier to solve the problems posed, particularly in the digital environment. However, collecting societies do not share this view. In their opinion, the change is radical and it entails a move backwards which endangers the viability of the levy. Apparently, the Draft is currently blocked. Maybe even abandoned. Possibly there will be no further movement until the next general election. And that could mean a wait of over a year.

4. Meanwhile, interested parties make efforts to reach agreements; that could give place to a different scenario. One such effort is the *General Agreement* signed last 30th July by some collecting societies and ASIMELEC (Communications and Electronics Companies Trade Association or *Asociación Multisectorial de Empresas de Electrónica y Comunicaciones),* that came into force on September 1. Such *Agreement* refers only to specific digital media: sound and video or multipurpose (audio CD-R/RW, data CD-R/RW, video DVD-R/RW and data DVD-R/RW). The *General Agreement* includes a *Standard Agreement* to be signed with the debtors. Levies have been fixed by especially taking into account "*the recording habits [...], the impact of those habits in the professional and domestic market [..] life span of materials and supports [...] and the special incidence that data compression systems have on recording capacity [...]*" have been especially taken into account. Levies are as follows:

Specific materials or media:

– Sound reproduction (audio CD-RRW audio, *minidisc* or the like); 35 euro cents per recording hour.

– Visual or audiovisual reproduction (DVD-RIRW, video or the like): 70 euro cents per recording hour. For the first two years, it has been accepted that a 4.7 Gb support has a videogram reproduction capacity of 120 minutes. For the third year, technical reviews will be done (otherwise, the previous criterion would be applied).

Multipurpose materials or media:

– Data CD-RIRW or the like; 13 euro cents per recording hours (for years 2003 and 2004). Of which, 11.38 euro cents correspond to audio and 1.63

euro cents to video. The levy for 2005 will be 16 euro cents per recording hour (pending determination of the relevant distribution).

– Data DVD-RIRW; 30 euro cents per recording hour (1.03 euro cents for audio and 28.97 euro cents for video). As in the case of specific supports, it is assumed that a 4.7 Gb carrier has a reproduction capacity of a 120-minute videogram.

5. The agreement has raised opposition by consumers; especially, those who allegedly don't use the material to copy music or movies. They may even try to have the Agreement invalidated by the Administration, the Competition Tribunal or the Courts.

Apparently, the agreement has also been challenged by a collecting society (CEDRO), feeling it has been excluded from it. The Agreement is open to all the collecting societies that represent right holders whose works and other subject-matters are exploited by means of phonograms (and the like) and videograms (and the like). This would leave out of the Agreement right holders whose works are exploited in the form of books and similar (as stated above, in this case, levies affect equipment, not materials). lf this interpretation prevails, the Agreement would be flawed, and the debtors may risk being sued by CEDRO (or any other excluded collecting society). A second – and important – weak point of the Agreement is that current Law does not allow the levies to be fixed by the interested parties Maybe that explains why, with the upcoming legal changes looming in the horizon, the parties commit to "*request the Administration […] to take [the Agreement] as a reference with respect to the possible amendments that could be established over the criteria agreed by the parties for the determination of remuneration as well as for other integrant elements"*.

The Agreement is supposedly being examined by the Administration. Perhaps it will be welcomed by the Ministry of Education, Culture and Sport (satisfied that the parties have reached an agreement), but it's not sure. Other Ministries (Economy, Health and Consume, Science and Technology) probably will not even try to save the Agreement, arguing that levies are fixed by Law and that, in any case, the "*adjustment"* of the amounts depends on a decision by the three ministries.