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## **HØRINGSUTTALELSE FRA BSA - ENDRINGER I ÅNDSVERKLOVEN M.M. SOM FØLGE AV EUROPAPARLAMENTS- OG RÅDS DIREKTIV 2001/29/EF**

Vi viser til Kultur- og kirkedepartementets høringsnotat om endringer i åndsverkloven m.m., med høringsfrist 25.06.03. På vegne av Business Software Alliance (BSA) vil vi med dette komme med noen synspunkter og kommentarer i tilknytning til forslaget. Som anmodet er dette brev med vedlegg også sendt pr. epost.

### **1 Om BSA**

BSA er en verdensomspennende organisasjon som arbeider for å hindre bruk av ulisensiert programvare i næringslivet, hos myndigheter og organisasjoner. BSA ble etablert i 1988 og er i dag representert i 65 land. BSAs medlemmer er ledende utviklere av programvare og elektronisk handel. Pr. i dag er følgende selskaper medlemmer i BSA: Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cisco Systems, CNC Software/Mastercam, Entrust, HP, IBM, Intel, Internet Security Systems, Intuit, Mamut Macromedia, Microsoft, Network Associates, Novell, PeopleSoft, SeeBeyond Technology, Sybase and Symantec,Visma og WRQ.

Hvert år taper programvareindustrien betydelige beløp som følge av utbredt ulovlig kopiering. Som representant for programvareindustrien ser BSA det derfor som viktig å samarbeide med de enkelte lands myndigheter for å tilrettelegge den opphavsrettslige lovgivningen for programvare.

På denne bakgrunn ønsker BSA å inngi høringsuttalelse i forhold til de punkter i Europaparlaments- og Rådsdirektiv 2001/29/EF (direktivet) som er av betydning for BSAs medlemmer.

## **2 Konsumsjonsregelen - direktivets artikkel 4 nr. 2 / åndsverkloven §§ 19 og 20**

Det følger av direktivets artikkel 4 nr. 2 at spredningsretten ikke skal konsumeres innen Fellesskapet når det gjelder originaleksemplaret eller annet eksemplar av verket, unntatt når *”det første salget eller annen overdragelse av eiendomsretten til eksemplaret i Fellesskapet foretas av rettighetshaveren eller med dennes samtykke.”* I fortalens punkt 28 fremheves det videre uttrykkelig at retten ikke bør *”konsumeres ved salg av originalen eller av eksemplar av denne utenfor Fellesskapet”*.

BSA registrerer at Kultur- og kirkedepartementet foreslår å videreføre prinsippet om internasjonal/global konsumpsjon i åndsverkloven §§ 19 og 20 til tross for at direktivet fastsetter regional konsumpsjon. Etter BSAs vurdering ville det være en fordel å innføre regional konsumpsjon som de øvrige landene i EU.

Dette er dessuten også ordningen i den nye designloven, jf. § 12. Ved å ha samme ordning i åndsverkloven og designloven, vil en unngå uheldige situasjoner der verk både er vernet som opphavsrettbeskyttet og registrert som design.

## **3 Kompensasjonsordning for privat kopiering - direktivets artikkel 5 nr. 2 / åndsverkloven §§ 12a - 12c**

Kultur- og kirkedepartementet foreslår å videreføre en adgang til kopiering til privat bruk, kombinert med en kompensasjonsordning til rettighetshaverne. Ordningen foreslås enten finansiert gjennom en privat vederlagsordning eller over statsbudsjettet, jf. forslag til ny §§ 12a-12c.

BSA er av den oppfatning at en privat vederlagsordning på lagringsmedia vil ha flere negative konsekvenser for IT industrien, for brukerne og for samfunnsøkonomien. BSA vil således fraråde innføringen av en slik ordning.

Kultur- og kirkedepartementet har foreløpig ikke tatt stilling til hvilke lagringsmedia vederlaget skal knyttes til. I høringsutkastet drøftes flere aktuelle problemstillinger i forhold til hvilke lagringsmedia som er egnet, og det uttales i denne sammenheng at det på grunn av den teknologiske utvikling vil være vanskelig å skille mellom lagringsmedia som i hovedsak brukes til lagring av åndsverk og lagringsmedia som i hovedsak benyttes til annet.

BSA ønsker først og fremst å fremheve det klare skillet mellom PCer og annen IT-utstyr på den ene siden og tomme kassetter, CDer ol på den andre siden. PCer og annet IT-utstyr er ikke produsert med sikte på bruk til kopiering, og det benyttes i all hovedsak heller ikke til kopiering av opphavsrettslig vernet materiale. Tomme kassetter og CDer er derimot produsert med sikte på kopiering, og kan dermed i prinsippet være egnet til å pålegges en avgift. Heller ikke alle CDer benyttes imidlertid til denne type kopiering.

Å pålegge PCer og annet IT-utstyr vederlag vil medføre at en gruppe brukere, som med stor sannsynlighet aldri noensinne vil anvende dette til kopiering, er med på å finansiere

den relativt begrensede gruppe som faktisk benytter dette til slik kopiering. Dette er ikke ønskelig.

En innføring av en vederlagsordning vil dessuten for alle typer lagringsmedia medføre at brukerne kan måtte komme til å betale to ganger for retten til å kopiere – en gang ved å betale vederlaget og en gang til ved å betale opphavsmannen. Brukerne vil dessuten også kunne komme til å måtte betale vederlag for verk som ikke kan kopieres, for eksempel for DVD-filmer med kopibeskyttelse. Dette viser at det ikke er en entydig sammenheng mellom salget av lagringsmedia og hva som lagres/kopieres av opphavsrettslig vernet materiale, og at en innføring av en generell vederlagsordning ikke vil være rimelig.

BSA vil videre påpeke at den tradisjonelle begrunnelsen for å innføre vederlagsordninger om at opphavsmannen ikke selv kan kontrollere den private kopiering av sitt verk og at det derfor er ønskelig å gi opphavsmannen en kompensasjon for kopieringen, ikke lenger er treffende i dag. Etter utviklingen av ny teknologi kan opphavsmannen ved hjelp av tekniske beskyttelsessystemer og bruk av elektronisk rettighetsinformasjon begrense og kontrollere bruken og kopieringen av opphavsrettslig vernet materiale. At kopiering på denne måte kan forhindres, eller i alle fall begrenses, medfører at behovet for en kompensasjonsordning ikke er til stede i like stor grad som tidligere.

En vederlagsordning vil videre ha betydning for produsenter/importører av lagringsmedia fordi dette antagelig vil medføre redusert salg som følge av at prisene må økes.

BSA frykter også at innføringen av en vederlagsordning for lagringsmedia tilsynelatende vil kunne forsvare og sogar kanskje oppmuntre til ulovlig og uautorisert kopiering av opphavsrettsbeskyttede verk fordi brukerne kan få den feilaktige oppfatning at de ved å betale vederlaget samtidig har fått en rett til å kopiere alle typer opphavsrettslige vernede verk.

I mars 2003 utarbeidet Institute for Information Law i Amsterdam, på oppdrag av en gruppe IT-selskaper representert av BSA, rapporten "The Future of Levies in a Digital Environment". Rapporten behandler de eksisterende avgiftssystemer i EU sett i lys av den teknologiske utvikling vedrørende tekniske beskyttelsessystemer og elektronisk rettighetsinformasjon. Vi har tillatt oss å vedlegge rapporten denne høringsuttalelse, idet vi håper rapporten kan belyse dette problemområdet ytterligere. Vi vil spesielt henvise til rapportens innledende "summary", samt til "introduction" på s. 1 og 2 og Conclusions and recommendations" på s. 46 og 47.

Som det fremgår ovenfor fraråder BSA at det innføres en vederlagsordning for privat kopiering som foreslått. For det tilfellet at Kultur- og kirkedepartementet skulle finne at en kompensasjonsordning bør innføres, anbefales det at denne finansieres over statsbudsjettet i overensstemmelse med høringsnotatets forslag B. Særlig som en midlertidig ordning inntil bruken av kopisperrer er avklart, kan dette - som Kultur- og kirkedepartementet ha fremhevet - være egnet.

Skulle Kultur- og kirkedepartementet velge å foreslå en vederlagsordning med avgift på lagringsmedia, ber BSA om at vederlaget i alle tilfelle ikke knyttes til PCer og annet IT-utstyr men kun til CDer, kassetter ol.

#### 4 Effektiv erstatning - direktivets artikkel 8 / åndsverkloven § 55

Av direktivets artikkel 8 nr. 1 og 2 fremgår det at medlemsstatene skal fastsette hensiktsmessige sanksjoner og sikre at rettighetshaverne kan gå til erstatningssøksmål med hensyn til overtredelser av rettighetene og forpliktelsene fastsatt i dette direktiv, samt at sanksjonene skal være virkningsfulle, stå i forhold til overtredelsen og virke avskrekkende.

Etter BSAs oppfatning er dagens situasjon med hensyn til erstatningsutmåling på opphavsrettens område utilfredsstillende, og implementeringen av Direktivet bør foranledige en klargjøring i opphavsrettsinnehavers favør. I dom av 09.02.99 fant Kongsberg byrett (sak nr. 98-00296 A: Microsoft Corp - Kongsberg kommune) at opphavsrettsinnehaver ikke hadde blitt påført et større økonomisk tap enn tapte renteinntekter ved at kommunen hadde ervervet lisenser på et senere tidspunkt enn de ble tatt i bruk. Microsoft Corp. ble således kun tilkjent renter med kr 2.100 og ikke lisensverdien av de ulovlig kopierte/installerte programmer (domssluttningspunkt 2). Etter BSAs vurdering kan det ikke være riktig å ta i betraktning den etterfølgende handling at kommunen ervervet lisenser etter henvendelse fra opphavsrettsinnehaver. Dersom den som krenker opphavsrettigheter skal kunne unngå erstatningsansvar ved å betale for seg dersom han blir oppdaget, og ellers ikke, undergraver dette rettighetshavernes intellektuelle vern. En kopi av dommen følger vedlagt.

I denne sammenheng finner vi også grunn til å vise til at varemerkeloven § 38 pålegger den som forsettlig eller uaktsomt har brukt varekjennetegn i strid med denne lov å betale *et vederlag svarende til en rimelig lisensavgift for bruken, foruten erstatning for ytterligere skade som bruken måtte ha medført*. Tilsvarende pålegger designloven § 40 den som forsettlig eller uaktsomt utnytter en design i strid med loven å gi den forurettede *et vederlag som svarer til en rimelig lisensavgift for utnyttelsen, samt erstatning for ytterligere skade som utnyttelsen måtte ha medført*.

Etter BSAs vurdering vil en slik bestemmelse om "rimelig lisensvederlag" e.l. være å foretrekke fremfor den rene henvisning til *alminnelige erstatningsregler* i åndsverkloven § 55. Dette vil ikke bare være en bedre regel for de situasjoner der krenkeren, etter at den ulovlige handling er blitt avdekket, kan erverve lovlig lisens eller bruksrett, men også generelt på opphavsrettens område der opphavsmannens økonomiske tap ofte er vanskelig å konkretisere. I tillegg vil en slik regel også harmonisere bedre med foreliggende rettspraksis som synes å vektlegge et visst pønalt preg ved erstatningsutmålingen.

Vi fremhever også i denne sammenheng at de danske og svenske erstatningsreglene for opphavsrettskrenkelser har vederlagsbetraktninger. Kopi av de aktuelle bestemmelser følger vedlagt, jf. svensk lovs § 54 og dansk lovs § 83.

## **5 Direktivets artikkel 8.3 / åndsverklovens § 2, jf. § 54**

Direktivets artikkel 8.3 pålegger medlemsstatene å påse at rettighetshaverne kan kreve at det blir nedlagt forbud med hensyn til mellommenn hvis tjenester brukes av en tredjemann til å overtre en opphavsrett eller beslektet rettighet.

Kultur- og kirkedepartementet foreslår ikke å implementere en slik bestemmelse direkte.

BSA antar at situasjonen der tredjemann benytter seg av en mellommanns tjenester omfattes av åndsverklovens § 2, jf. § 54, slik at mellommannen kan holdes ansvarlig som medvirker til bruddet og at handlingen kan kreves stanset ved henvendelse til denne.

Det er imidlertid BSAs oppfatning at en slik regel bør fremgå klart av loven. Det foreslås således å innføre en regel som uttrykkelig fastslår at en rettighetshaver kan kreve at det blir nedlagt forbud overfor en mellommann der tredjemann benytter mellommannens tjenester til å overtre en opphavsrett eller beslektet rettighet. Uansett bør dette forhold presiseres i forarbeidene.

Med vennlig hilsen  
ARNTZEN de BESCHE

Grete Funderud Stillum  
advokat

### **Vedlegg**

The Future of Levies in a Digital Environment - Institute for Information Law i Amsterdam, Amsterdam mars 2003

Dom fra Kongsberg byrett av 09.02.99 i sak nr. 98-00296 A: Microsoft Corp - Kongsberg kommune

Den svenske og danske erstatningsregel for opphavsrettskrenkelser (svensk lovs § 54 og dansk lovs § 83)



## “The Future of Levies in a Digital Environment”

### Final Report

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## Summary

Copyright levy systems have been premised on the assumption that private copying of protected works cannot be controlled and exploited individually. With the advent of digital rights management (DRM), this assumption must be re-examined. In the digital environment, technical protection measures and DRM systems make it increasingly possible to control how individuals use copyrighted works. Rights holders are now in a position to apply such systems to identify content and authors, set forth permissible uses, establish prices according to the market valuation of a particular work, and grant licenses directly and automatically to individual users. Unlike levies, DRM makes it possible to compensate right holders directly for the particular uses made of a work. Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems.

Where levies coexist with such technical measures, consumers may end up paying twice for the right to make a private copy of a work – once by paying the levy, and once again by paying the right holder for the right to copy the work. Or consumers may end up paying a levy for a work that cannot be copied, for example, a motion picture on a copy-protected DVD. The EC Copyright Directive, which was adopted in May 2001, takes an ambivalent approach towards this issue. Art. 5.2(b) of the Directive attempts to reconcile the existing system of private copying levies with a future of individual digital rights management, by prescribing that in calculating the amount of ‘fair compensation’ for acts of private copying the ‘application or non-application of technological measures’ be taken into account. This provision suggests a gradual phasing-out of levies on digital media or equipment, as digital rights management systems enable content owners to control private copying, and set conditions of private use, at their discretion.

This study examines existing levy systems in the European Union in the light of the advent of digital rights management systems. The study’s principal aim is to interpret the Directive’s ‘phase-out’ provision of Art. 5.2(b), and to suggest possible ways of implementing it in the national laws of the Member States.

The study begins (Chapter 2) with an overview of existing and emerging DRM-based content distribution models and formats, which illustrates that the technology that allows content owners to apply DRM has become increasingly available for a wide array of content types, media formats and platforms. Chapter 3 paints a history of the system of private copying levies, as it has emerged first in Germany, and then spread to other Member States. As history reveals, the introduction of private copying levies is rooted in a finding, in a series of cases decided by the German Supreme Court in the 1950’s and 1960’s, of contributory liability on the part of the manufacturers and distributors of recording equipment. Also, the need to protect the users of such equipment against an invasion of their private sphere, which the monitoring and enforcement of rights in respect of private copying would inevitably entail, has played an important role in the introduction of the levy system.

Chapter 4 then provides an overview of existing levy schemes in selected Member States. As this chapter demonstrates, even though the scope of such systems may vary from one Member State to the next, levies have gradually proliferated. Limited initially to distinct analogue equipment (tape recorders and photocopying equipment), levies have spread to analogue media (audio and video tape), and, more recently to digital media (CD-R, CD-RW, et cetera) and even digital equipment (e.g. CD writers and hard disks).

Chapter 5 focuses on the key notions of ‘private copying’ and ‘fair compensation’, as applied in the Directive. Private copies allowed under the Directive must be ‘made by a natural person for private use and for ends that are neither directly nor indirectly commercial’. This excludes any form of commercial or institutional copying, be it for legitimate business-related or illegal purposes. The scope of any exemption permitted by Art. 5.2(b) is therefore fairly limited, as must be any system of private copying levies directly associated with it. Levies, as a form of ‘fair compensation’ prescribed

by Art. 5.2(b), therefore cannot serve to compensate right holders for losses incurred by acts not exempted pursuant to this provision, such as intra-company uses, ‘private’ uses that exceed the scope of the exemption (e.g. peer-to-peer ‘file sharing’) or other illegal acts. Levies are not intended, as sometimes mistakenly believed, to compensate right holders for acts of illegal copying (piracy). ‘Fair compensation’ is due only in cases of legitimate private copying.

The notion of ‘fair compensation’ is a novelty in EC copyright law, and to be distinguished from the notion of ‘equitable remuneration’ found in the EC Rental Rights Directive. Whereas ‘equitable remuneration’ may be due in situations where right holders suffer no harm at all, Recital 35 preceding the Directive clarifies that ‘fair compensation’ is required only when and if right holders are (actually or potentially) harmed by acts of private copying. Consequently, one might argue that Member States are under an obligation to provide for compensation only if the likelihood of such harm can be reasonably established.

Recital 35 also establishes a *de minimis* rule, by stating that ‘in certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.’ Examples of such *de minimis* use are ‘time shifting’ (the recording of broadcasts for later perusal) and ‘porting’ (copying legally acquired content to other platforms, such as PC’s, car stereo’s or portable media). Of course, no ‘fair compensation’ is due at all for the vast quantities of internet-(web-)based content which are downloaded with the implied or express consent of the content providers, and therefore fall outside the scope of any private copying regime in the first place. Recital 35 confirms that the framers of the Directive have attempted to avoid double payment by consumers. No compensation is required ‘in cases where right holders have already received payment in some other form, for instance as part of a licence fee’. Therefore, no levy is due for files copied by users of proprietary online services or (other) digital rights management systems. Also, insofar as a work or phonogram is distributed in copy-protected form, and the accompanying end-user license allows for private copying, no compensation is in order. In sum, most copies that end users of copyrighted works produce in practice, either on digital media or digital equipment, are likely either not to cause more than minimal harm to the right holders, or to fall outside the scope of Art. 5.2(b) of the Directive altogether. Seen in this light, legislatures and courts in Member States should think twice before ‘automatically’ expanding existing analogue levies to digital media or equipment.

Finally, Chapter 6 of the study examines the ‘phase-out’ provision of Art. 5.2 (b) of the Copyright Directive. It is underscored that existing levy schemes are rooted in notions of contributory liability of equipment manufacturers and traders. For this reason, most levy schemes are limited to equipment or media the primary use of which is to reproduce copyrighted works. How then to deal with multipurpose technology, such as personal computers and other digital equipment? In practice, PC’s are used for a wide variety of purposes, many of which are irrelevant from a copyright perspective, such as word processing. Even if computers and their peripherals are used by many consumers for private copying of protected content, it is clear that this is not their primary use. Indeed, the *raison d’être* of the computer lies in its being a ‘Turing machine’, a universal apparatus that can be programmed to perform just about any task imaginable.

Applying levies to such general purpose machines would, in our opinion, be unjustified and might have unwanted economic and social consequences. Levies on PC’s or hard disks would no longer reflect the contributory liability rationale on which the levy system is based. It would also inevitably lead to further expansion of levies onto other memory-equipped hardware, such as radio and television sets, digital cameras, mobile telephones, digital watches, et cetera. In the end, an increasingly large number of users would end up paying a ‘copyright tax’ without actually using copyrighted content. Large numbers of consumers would be cross-subsidising a relatively limited group of ‘private copiers.’ Moreover, such an all-encompassing levy scheme would be perceived by many users as an ‘unlimited license to copy’. We predict that such an expansion would eventually undermine the copyright system as a whole. Following a near-total ‘levitation’ of the copyright system, exclusive rights would effectively cease to exist. Right holders would instead become totally dependent on remuneration rights collected by collecting societies.



How then should we take ‘account of the application or non-application of technological measures’? Since the language of Article 5.2(b) and its corresponding recitals offer little guidance in establishing the true meaning of the phase-out provision, we have attempted to come up with a sensible and practicable interpretation, which might be suitable for implementation by the Member States. What we propose is not to engage in any attempts to measure the *actual* ‘application or non-application of technological measures’ or ‘degree of use’ of such measures. We believe that such an undertaking will prove to be a fruitless and frustrating exercise, in view of the non-linear relationship between content, technical protection measure, media, equipment and levy, and absent any baseline to measure the ‘degree of use’ against it. Instead, we recommend a more sensible and workable interpretation, which is inspired by economical and practical considerations, and which is supported by the recitals preceding the Directive. In our proposal, levies are to be phased out not in function of actual use, but of *availability* of technical measures on the market place. The phasing-out of levies should be a decision based on technology assessment.

In our interpretation, technological protection measures are ‘available’ if and to the extent that they can be realistically, and legally, applied in the market place. Factors to be assessed might include: upfront costs to producers and intermediaries; incremental costs or savings for consumers; consumer friendliness and acceptance, as reflected e.g. in market share; incorporation of PET’s in DRM systems; accessibility of DRM protected content by disabled users and users with special needs; et cetera. We propose that Member States vest the authority to set rates and designate media and equipment in a public body, which is competent to evaluate and adjust levy schemes and rates on a regular (e.g., annual or bi-annual) basis. Indeed, in several Member States such flexible mechanisms already exist or are in the making. A decision to phase-out levies for certain media or equipment would, most likely, be taken step-by-step.

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## List of abbreviations

ADAMI	Société civile pour l'administration des droits des artistes et musiciens interprètes
AISGE	Artistas Intérpretes Sociedad de Gestión
AIE	Sociedad de Artistas Intérpretes o Ejecutantes de España
AMI	Informatierecht, tijdschrift voor auteurs-, media- en informatierecht
ALCS	Author's Licensing and Collecting Society (UK)
AUVIBEL	Belgian Collecting Rights Society for Private Copying of Audiovisual Works
Beeldrecht	Authors' organization for visual artists (Netherlands)
BGH	Deutsches Bundesgerichtshof
Burafo	Authors' organization for photographers (Netherlands)
BUMA	Vereniging 'Het Bureau voor Muziekauteursrecht BUMA'
CEDRO	Centro Español de Derechos Reprográficos
CFC	Centre Français d'exploitation du droit de Copie
Copie France	Société française de perception de la rémunération pour la copie privée audiovisuelle
CPI	Code de la Propriété Intellectuelle (France)
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR, Int.	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil
GVL	Gesellschaft zur Verwertung von Leistungsschutzrechten
GWFF	Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten
GÜFA	Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten
IIC	International Intellectual Property and Copyright Law Review
IMAIE	Istituto per la Tutela dei Diritti degli Artisti Interpreti Esecutori
Irda	Stichting International Rights Collecting and Distribution Agency (Netherlands)
Lira	Stichting Literaire Rechten Auteurs (Netherlands)
MICROCAM	Société de gestion collective pour les artistes interprètes
NORMA	Stichting Naburige Rechten Organisatie Uitvoerende Kunstenaars
NVPI	Nederlandse Vereniging van Producenten en Importeurs van beeld- en geluidsdragers
OMPI	Organisation Mondiale de la Propriété Intellectuelle
REPROBEL	Belgian Collecting Society for Reprographic Rights
Reprorecht	Stichting Reprorecht (Netherlands)
SABAM	Belgian Society of Authors, Composers and Publishers

SEKAM	Stichting tot Exploitatie van Kabeltelevisierechten op Audiovisueel Materiaal
SGAE	Sociedad General de Autores y Editores (Spain)
SIAE	Società Italiana degli Autori ed Editori (Italy)
SPEDIDAM	Société de Perception et de Distribution des Droits des Artistes-Interprètes de la Musique et de la Danse (France)
SIMIM	Société de l' Industrie Musicale (Belgium)
SOFIA	Société française des intérêts des auteurs de l' écrit
SORECOP	Société de perception de la rémunération pour la copie privée sonore (France)
Stemra	Stichting tot exploitatie van mechanische reproductierechten der auteurs
ThuisKopie	Stichting de ThuisKopie (Nederland)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
URADEx	Association pour les Droits des Exécutants (Belgium)
VEVAM	Vereniging tot Exploitatie van Vertoningsrechten op Audiovisueel Materiaal
VFF	Verwertungsgesellschaft der Film- und Fernsehproduzenten
VG Bild-Kunst	Verwertungsgesellschaft Bild-Kunst
VGf	Verwertungsgesellschaft für Nutzungsrechte an Filmwerken
VG WORT	Verwertungsgesellschaft Wort
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
ZPÜ	Zentralstelle für Private Überspielungsrechte
ZUM	Zeitschrift für Urheber- und Medienrecht

## 1. Introduction

Historically, copyright levy systems have been premised on the assumption that certain uses, especially private copying, of protected works cannot be controlled and exploited individually. With the advent of digital rights management (DRM) this assumption must be re-examined. In the digital environment, technical protection measures and digital rights management systems make it increasingly possible to control how individuals use copyrighted works. Rights holders and media distributors are now in a position to apply, and are increasingly using, such systems to identify content and authors, set forth permissible uses, establish prices according to the market valuation of a particular work, and grant licenses directly and automatically to individual users. Unlike levies, electronic copyright management systems make it possible to compensate right holders directly for the particular uses made of a work. Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems.

Where levies coexist with such technical measures, consumers may end up paying twice for the right to make a private copy of a work – once by paying the levy, and once again by paying the right holder for the right to copy the work. Or consumers may end up paying a levy for a work that cannot be copied, for example, a motion picture on a copy-protected DVD. The EC Copyright Directive, which was adopted in May 2001 and required implementation by December 2002, takes an ambivalent approach towards this issue. On the one hand, the Directive permits an extension of private copying exceptions into the digital environment, subject to payment of ‘fair compensation’ (Art. 5.2 b). On the other hand, the Directive endorses a future of digital rights management by rigorously protecting so-called ‘technical protection measures’ (Art. 6) and rights management information (Art. 7). Art. 5.2(b) of the Directive attempts to reconcile the existing system of private copying levies with a future of individual digital rights management, by prescribing that in calculating the amount of ‘fair compensation’ for acts of private copying the ‘application or non-application of technological measures’ be taken into account. The language of this provision suggests a gradual phasing-out of levies on digital media or equipment, as digital rights management systems enable content owners to control private copying, and set conditions of private use, at their discretion.

This study examines existing levy systems in the European Union in the light of the advent of digital rights management systems. The study’s principal aim is to interpret the Directive’s ‘phase-out’ provision of Art. 5.2(b), and to suggest possible ways of implementing it in the national laws of the Member States. It does not touch upon other DRM-related legal issues, such as the scope of protection of technological measures against circumvention or the way such protection may affect user freedoms – issues treated in Article 6 of the Directive. It takes the European legal framework established by the Directive as a given, and therefore refrains from examining in more general terms the social and economic advantages and disadvantages of a future information society governed by private ordering systems, such as DRM, rather than by instruments of law.

Chapter 2 of the study will describe existing and emerging DRM-based content distribution models and formats. Chapter 3 will paint a history of the system of private copying levies, as it has emerged in Germany, and describe its proliferation into other Member States. Chapter 4, then, will present an overview of existing current levy schemes in selected Member States. Next, Chapter 5 will focus on the key notions of ‘private copying’ and ‘fair compensation’, as applied in the Directive. Subsequently, in Chapter 6 an attempt will be made to interpret the ‘phase-out’ provision of Art. 5.2 (b) of the Copyright Directive. How should account be taken of ‘the application or non-application of technological measures’ when calculating the amount of ‘fair compensation’ for acts of digital private copying? Finally, Chapter 7 will summarize the main conclusions of this study, and offer a set of recommendations.

This study was produced by the Institute for Information Law on commission of a group of IT companies represented by the Business Software Alliance. It was authored by Sjoerd van Geffen (Chapter 2), Dr. Lucie Guibault (Chapter 3 and 4) and Prof. P. Bernt Hugenholtz (Chapters 1, 5, 6 and 7), who also supervised the study. Mark Palmer, a post-graduate student at the University of Leuven, contributed Annex 2. Although commissioned, this study was researched and written in complete independence from its sponsors.

## 2. Technical measures as applied today and in the near future

This Chapter will describe existing and emerging content distribution models and formats that are based on technical measures.<sup>1</sup> To begin with, two key terms used abundantly in this study – ‘Technical Protection Measures’ (‘TPMs’) and ‘Digital Rights Management’ (‘DRM’) – will be explained.

### 2.1 Key concepts

#### 2.1.1 Technical Protection Measures (TPM)

The term Technical Protection Measure often refers to technical measures that protect against unauthorized access to data. An important example of such a technical measure is encryption (‘locking up’) of data, which can then only be accessed in combination with a decryption ‘key’. This offers some protection, since even if one is able to copy an encrypted file, it is useless when it can not be opened. However, such TPMs have only a limited functionality in enabling commercial distribution of digital information goods, since the information has to be ‘unlocked’ (decrypted) at one point or another to be used, and once the information is unlocked, the user can access the information, and can thus typically copy it as well.

In relation to copyright-protected works the term Technical Protection Measure often denotes a measure primarily aimed at preventing or restricting the reproduction of the protected content (*copy protection*). For this purpose files are marked in one way or another with data instructing the equipment that it is not allowed to copy the file (‘flagging’, ‘tagging’, ‘watermarking’). Whereas access protection systems make *all* possible uses – including copying – impossible for unauthorized users, copy protection measures merely prevent copying.<sup>2</sup>

#### 2.1.2 Digital Rights Management (DRM)

The terms Technical Protection Measure and Digital Rights Management (DRM) are often used rather indiscriminately. However, these terms should indeed be distinguished. DRM systems are typically able to offer broader functionality than simply protect content against unauthorized access or copying. As the words ‘digital rights management’ suggest, DRM systems are based on digital technologies that describe and *identify* content, and *enforce* rules set by right holders or prescribed by law for the distribution and use of content.<sup>3</sup>

Thus, the fundamental difference is that TPMs generally are designed to *impede* access or copying, while DRM systems do *not* impede access or copying *per se*, but rather create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the right holders. Therefore, they usually do not *deny* access but rather *manage* access to content by combining technical measures with a payment mechanism. DRM-based business models ensure that consumers pay for actual use of content, and that the content is protected and cannot be accessed by unauthorized users.

#### 2.1.3 Watermarking and fingerprinting

Marking content can be achieved in a transparent manner, but can also be hidden from the user by ‘water marking’, *i.e.* embedding information in a way that is (nearly) imperceptible to the user, but

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<sup>1</sup> The names of products and services mentioned in this study may be trademarked; any reference to products or services is for illustrative purposes only and does not constitute any endorsement, express or implied.

<sup>2</sup> Koelman 2003, §2.2.2.

<sup>3</sup> In the context of ‘digital rights management’, the term ‘digital’ can refer to various aspects: (1) automated management (by digital means) of (2) rights which are specified by digital means with regard to the use of (3) digitally stored content. These aspects are typically – but not necessarily – all present in a single technical measure for a given platform. However, for the purposes of this study it is not necessary to strictly limit the scope of the DRM concept.



recognizable by the playback device.<sup>4</sup> With such methods, identification of the work,<sup>5</sup> right holder(s), and licensee, license conditions etc. can be written into the file itself. With ‘strong’ watermarks, the identifying information embedded in files remains recognizable by equipment after (analogue) copying or tampering with a file. The ‘strong’ watermarking approach is therefore often complementary to access protection.

Various methods and technologies are used to identify a copyrighted work as such. Even if files are not marked at all, or if such marks have been removed or tampered with, the content may still be recognizable as a particular copyrighted work, much like humans can recognize a particular musical piece or movie just by hearing or seeing it. This technology is called ‘finger printing’. Confusingly, the term ‘finger printing’ is also used to denote a very different DRM-related technology. In some DRM systems the identity of an authorised user of a copy is embedded in that copy, thus facilitating detection of the source of any illegal copying.

### **Watermarking: Pit Signal Processing (PSP)**

Philips and Sony have developed a new watermarking technology (‘Pit Signal Processing’ or PSP) for the Super Audio CD (SACD) format that is intended to be the follow-up to the highly popular CD format for (offline, digital) audio content. This actually comprises both an invisible and a visible watermark. “The copyright protection information is encoded in an invisible manner by modulating the power of the laser when recording data onto the glass master at the pressing plant. The size of the focus beam increases with the laser power, such that the width of the resulting mark on the disc varies.” The required copyright data is stored as a modulation of the width of the injection moulded ‘pits’ on the disc substrate itself. As a result, copyright data can not be replicated without the glass mastering equipment used to make the original disc stampers, which has been specifically designed and carefully licensed. Furthermore, the modulation of the pit’s width can be synchronised on consecutive turns of the disc in order to form visible patterns on the disc itself, such that faint text or graphics can appear on the recorded side of the disc.



(source: Digital Audio Industrial Supply (DAISy) website: <http://www.daisy-laser.com/tech31.htm>)

## **2.2 Existing and emerging content distribution models based on technical measures**

Some distribution models using technical protection measures based on access protection somewhat resemble traditional distribution models, whereby works are made public in an environment that is

<sup>4</sup> Cox 2001, p. 3: “Watermarking is the practice of imperceptibly altering a work to embed a message about that work.”

<sup>5</sup> Examples include the Digital Object Identifier (DOI); the Universal Product Code (UPC), which currently identifies all audio CDs; the International Standard Recording Code (ISRC); and the Global Release Identifier (GRid), which was recently introduced by IFPI / RIAA, see <http://www.ifpi.org/site-content/press/20030210.html>.

under physical control of the content distributor (*e.g.* concert hall, movie theatre, video arcade). Here, the content owner has near-perfect control over who is allowed access when and where. Typically, a playback device is needed, which often uses proprietary technology. A well-known example is pay television by means of set-top boxes (decoders). More sophisticated distribution models using technical measures combine elements of different types of traditional distribution models. Technical measures applied to physical copies make it possible to escape the ‘all or nothing’ character of the traditional ‘physical copy’ business model by restricting access to a specific (set of) user(s), within a certain time(frame), to a certain number of uses, to certain types of use (*e.g.* only playing / reading, or also printing, burning on CD, etc.), to use with specific complements (such as a specific type of hardware / software, or even only on a single machine), and to a specific location (*e.g.* only at home). By varying the licensing terms in different ways along these different dimensions, content producers are able to choose from a broad range of possible distribution models. For example, varying the number of uses of a file enables ‘pay per view’ (listen, read, etc.) distribution models and promotional offers. Granting rights of use to a specific user enables a subscription model when the time period thereof is limited and periodically extended upon payment. By tying rights of use to a specific machine or location, a ‘site license’ or ‘machine license’ can be offered. Rights of use can be granted without regard to a specific location or machine for a ‘roaming’ license.

The essential difference with traditional distribution models is that DRM systems enable content distributors to finely discriminate between different uses of a work on a micro-level and price each use accordingly. In turn, this enables a high degree of price discrimination, and quality discrimination (‘versioning’) as well.<sup>6</sup>

### 2.2.1 Overview of existing systems and platforms

This section provides an overview of existing systems and platforms and expected future developments. Because of the speed and complexity of developments in this area, this overview can offer no more than a ‘snapshot’ of current developments. It is primarily intended to illustrate the actual or potential overlap of technical measures and levy systems, not to provide an exhaustive overview of available technologies.<sup>7</sup> The focus is on consumer equipment, even though it is increasingly difficult to distinguish this from (semi-)professional production equipment.

Platforms and related technical measures can be categorised according to many different aspects (product dimensions) in which they differ. In this overview they will be treated primarily by the content type involved, *i.e.* text and/or pictures (publishing), audio, video, and complex services data / multi-media. When appropriate, further distinctions will be made within these categories with regard to online versus offline content, analogue versus digital content, and playback versus recording (*e.g.* copying) equipment.

#### 2.2.1.1 General purpose technologies (data, multimedia)

Many DRM systems are neutral with regard to the content type to be protected and managed, *i.e.* any type of content can be protected and managed by such systems. Examples are:

- ContentGuard’s *eXtensible rights Markup Language* (XrML) technology;
- InterTrust Technologies (which was recently acquired by Philips and Sony) markets a product called *Rights!System*;
- Microsoft’s *Windows Media Rights Manager* product focuses on audio and video content, and can be used both on- and offline;
- Digital World Services (DWS) has a product named *Ado<sup>2</sup>Ra*, mostly used for publishing and audio;

<sup>6</sup> Shapiro & Varian 1998, 1999.

<sup>7</sup> For a more comprehensive overview of current DRM technology see: Business Software Alliance (BSA), *The DRM Landscape – Report*, appended to this study. Many examples included in our overview are taken from the BSA report. See also Lyon 2002 for a useful overview of organisations and technologies involved with DRM.

- IBM offers a product called Electronic Media Management System (EMMS, 'Madison'); this technology is used as well for advanced wireless telecommunication applications (iMode, in Japan).
- RealNetworks offers a range of DRM products.

#### 2.2.1.2 Text and/or pictures (publishing)

Some DRM systems have also been designed and/or marketed mainly or specifically for the purpose of publishing text and/or pictures. Examples are:

- Adobe's *Adobe content server* (ACS)
- Info2Clear's *Get-a-copy* is a DRM product which allows website visitors to request permission to reproduce a newspaper article, pay for the permission with a credit card, and receive the article.

#### 2.2.1.3 Audio

Various technical measures are currently available for copy protection of audio content (which is mainly music in practice), for both online and offline platforms.

##### *Offline audio formats*

Some older digital audio recording devices (DAT, MD, DCC) still use the antiquated Serial Copy Management System (SCMS). Information regarding the 'copy protection status' is included in the data stream, and can be set to prevent consumers from making more than one digital copy. The most widely used format for audio on physical carriers, however, is the Compact Disc (CD). The original CD format did not use any technical protection measures. Nowadays, however, CD's can be copy-protected in a number of different ways. A problem that is vexing consumers is that CD's protected by technical measures cannot be played on all existing types of CD players. For example, Sony's copy protected CDs cannot be read on portable CD readers, car stereos, or computers. Bertelsmann Music Group (BMG) has released a copy protected CD (Natalie Imbruglia, *White Lillies Island*) using Midbar's *Cactus Data Shield* copy protection technology, which is designed to prevent MP3-ripping by encoding content so that it won't play on a PC. Epic/Sony have released a CD (Celine Dion, *A New Day Has Come*) using copy protection technology from Key2Audio.

Other technical measures claim not to have this property. For example, Microsoft's *Windows Media Data Session Toolkit*, developed jointly with SunnComm and the French company MPO International, enables songs to be written onto a copy-controlled CD in multiple layers, one that would permit normal playback on a stereo and a PC. The PC layer can be modified so that, e.g., burning songs onto another CD can be prevented.

For other (newer) offline audio formats, similar copy protection measures are available. The DVD-Audio format used the Content Scrambling System (CSS) II system until it was cracked; it now uses the Content Protection for Pre-recorded Media (CPPM) technology which has been developed by 4C (comprising IBM, Intel, MEI and Toshiba), and the Cryptomeria Cipher (C2) for content encryption.<sup>8</sup> Pre-recorded discs in the Super Audio CD (SACD) format use digital watermarking for copy protection, and conditional access for additional multi-media content such as pictures, lyrics, etc.). Recording devices for Direct Stream Digital (DSD), using the SACD format, write identification codes are unique for each device in each recording, and register the number of discs recorded with the device and total recording time.<sup>9</sup> The Secure Digital Music Initiative (SDMI) includes a portable

<sup>8</sup> See: <http://www.4centity.com/tech/cprm/>;  
[http://www.disctronics.co.uk/technology/dvdaudio/dvdaud\\_copyprot.htm](http://www.disctronics.co.uk/technology/dvdaudio/dvdaud_copyprot.htm).

<sup>9</sup> The copyright information for content on SACD discs is present on every digital audio signal, and is transmitted through any digital output, which conforms to the Active Copyright Management System (ACMS) and ISRC (ISO3901) standards. Pre-recorded discs include SID and ISD codes which identify copyrights. See <http://www.daisy-laser.com/tech3a.htm>;  
[http://www.wired4music.com/SACD\\_FAQ.htm](http://www.wired4music.com/SACD_FAQ.htm).

device specification and watermark; DMAT (Digital Music Access Technology) is the trademark for products that are compliant with SDMI specifications.<sup>10</sup>

#### *On-line audio distribution*

For online audio, various DRM systems are currently available on the market.<sup>11</sup>

- On-Demand Distribution (OD2) manages repertoire from several record labels, and has developed an online distribution system and associated software for the music industry to sell and promote music via on-line retailers.
- Liquid Audio offers DRM products for the creation and distribution of music and for clearinghouse services.

Some paid music download services do without copy protection on downloaded files, such as Emusic (<http://www.emusic.com>), which is backed by e.g. Vivendi. Other services do use DRM technology, such as Pressplay (<http://www.pressplay.com>), which is backed by Sony/Universal and uses Microsoft's Windows Media Player 7/9 format for access and copy protection. The MusicNet service (<http://www.musicnet.com>), which is backed by BMG, EMI, and Warner, offers music in Real Player format.

#### 2.2.1.4 Video

For video content (mainly movies) various technical measures are currently available, both for online and offline platforms.

#### *Offline video formats*

For video in analogue format (VHS), Macrovision offers a copy protection technology called Analogue Protection System (APS), which exploits the Automatic Gain Control function that is common in VHS VCRs. This technology is used on pre-recorded videotapes, and also on set top boxes to protect out-coming signals against copying.

Some digital formats for video, such as Video CD, Video CD v 2.0 (using MPEG-1), and Super Video CD (SVCD, using MPEG-2), apparently do not use any copy protection technology. Other formats, most importantly the widely used DVD format, do. The DVD Copy Control Association (CCA) has developed the well-known Content Scramble System (CSS), which is at the heart for several pending 'circumvention' cases.

#### *Online video formats*

For pay television by means of set top boxes (decoders), various proprietary technologies are used to implement conditional access. For digital broadcasting, in the U.S. the Federal Communications Commission (FCC) is currently considering the adoption of a mandatory technical measure for broadcasters and equipment manufacturers called 'Broadcast Flag'. This is a technology that enables broadcast content to be marked, which would automatically prevent consumers to be able to make digital copies.

The Motion Picture Experts Group (MPEG)'s MPEG-21 standard for a 'Multimedia Framework' includes close integration of identification and description and a rights expression language (XrML) with the physical standard for encoding and transmission of content. This would allow content to be viewed in any type of viewer.<sup>12</sup>

For secure online distribution of audiovisual works (movies etc.) over the internet to PCs, various schemes are in existence, most of which are currently only available in the United States; many of these only run on the (latest version of) the Microsoft Windows operating system (e.g. only Windows

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<sup>10</sup> See <http://www.sdmi.org/>.

<sup>11</sup> Kwok 2002, p. 18, §2.

<sup>12</sup> See <http://www.stm-assoc.org/annualreport/00drm.html>.

2000 and XP).. Microsoft's Windows Media Video 8 is a video format with integrated digital rights management (DRM) technology that can be used both for online (including streaming) and offline distribution. For example, the Movielink service (<http://www.movielink.com/>), available only in the United States, offers movies from all major studios, but only works with Windows in combination with Internet Explorer. The same goes for CinemaNow, a pay-per-view service with a choice between a 48 hour time window or a monthly subscription. Apart from movies, more specialised services are also available. For example, Internet portal Yahoo offers a music video service called Launch.com (<http://launch.yahoo.com/>).

### 2.2.2 Current developments

Some important developments related to TPM / DRM systems include:

- The definition of a *rights language* in which licensing conditions can be described is of fundamental importance for DRM systems. Examples of current efforts to achieve standards for rights languages are XrML and XMCL.
- Another important issue is building up *trust* in DRM systems, i.e. getting both producers of information products and consumers thereof to gain confidence in DRM systems.
- The *identification* of works (watermarking, tagging, etc.), consumers (by means of trusted third parties and technologies like biometry) and / or equipment is also of crucial importance.
- Effective methods for *micropayment* (e.g. payment of very small amounts of money) must be generally and easily available to the consumer. The average consumer usually pays less than a dollar cent for the current ability to listen to (and make a private copy of) a song on the radio with very acceptable quality – especially when the signal is transmitted digitally.
- DRM systems software is becoming *widely available* for small-scale content owners and distributors; sometimes even in the form of 'free software'.

#### 2.2.2.1 Making platforms compliant with technical measures

Needless to say, the effectiveness of technical measures critically depends on the presence of a 'protected environment'. Systems based on technical measures will only function within the context of a platform which complies with that technology. Playback and recording devices should be 'smart' enough to 'know' whether a particular use is permitted or not. From the perspective of the content owners, technical measures should ideally be ubiquitously available across all possible platforms. For this reason, various industry initiatives have been launched to foster such an environment. For example, Microsoft has started a long term initiative called 'Palladium' (recently renamed into 'Next Generation Secure Computing Base') which is mainly aimed at PCs, with the object of storing (public key encryption) keys in hardware (e.g. in the CPU or motherboard) rather than software, thereby making it much harder to crack technical protective measures.<sup>13</sup> While this initiative should not be seen as a DRM system by itself, it is potentially an important DRM-enabling technology.

As an alternative and/or complement to market developments, some legislative efforts focus on technical measures. For example, in the United States legislation has been recently proposed which requires that copy control systems be built into equipment,<sup>14</sup> notwithstanding the current provisions to the contrary.<sup>15</sup> In Europe, the legal status quo is clearly stated in the 'no mandate' language of Recital 48 of the EC Copyright Directive:

<sup>13</sup> See <http://www.microsoft.com/presspass/features/2002/jul02/07-01palladium.asp>.

<sup>14</sup> The Consumer Broadband and Digital Television Promotion Act ('CBDTPA'), Bill S.2048, Congressional Record, March 21, 2002.

<sup>15</sup> Cf. the 'no mandate' language in §1201(c)(3) of the [Digital Millennium Copyright Act \(DMCA\)](#), and the exception in §1201(k) for analogue videocassette recorders, which must conform to Macrovision's technologies for preventing unauthorized copying of analogue videocassettes and certain analogue signals. The provision also prohibits right holders from applying these specified technologies to free television and basic and extended basic tier cable broadcasts.

‘Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6.’

#### 2.2.2.2 Standardisation and interoperability

There is general consensus that some measure of standardisation of DRM systems is necessary.<sup>16</sup> Interconnection and interoperability of DRM systems are important to achieve the critical mass necessary to win over consumers and create economies of scale. On the other hand, especially in the early stages of this emerging industry, proprietary platforms may be needed to enable innovators to recoup their investments. Competition between incompatible systems may also prove useful to improve quality (i.e. stimulate innovation) and lower the price of DRM systems.

### 2.3 Conclusion

As this chapter has demonstrated, and Table 1 of Annex 1 of this study further illustrates, DRM systems are available, and in many cases operational, today for a variety of content types and media. Prime examples include DVDs/CD audio, pay television, online video, and on-line music distribution. Table 1 lists devices (platforms) and complementary carrier media that can deliver DRM-protected content (e.g. consumer terminal equipment, mobile phones, PDAs, digital TV receivers, PCs, MP3 players, memory sticks, copy-protected CDs). The table also indicates when and how levies on these products will cause consumers to pay multiple times for the right to copy DRM-protected works.

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<sup>16</sup> See e.g. EC Copyright Directive, Recital 48.

### 3. Private copying levies: a brief history

#### 3.1 History and rationale of private copying exemptions

Traditionally, copyright owners have never held absolute control over the use of their works. Everyone is therefore free to read, listen to or view a work for his or her own learning or enjoyment. In theory, copyright never protected against acts of consumption or reception of information by individuals.<sup>17</sup> The view that copyright protection does not extend to the private sphere of the individual was well accepted by most early continental European copyright scholars. The private or otherwise personal use of copyrighted works without the prior authorisation of the rights owner was seen as enabling individuals to participate actively in the public debate and to develop their own personality to its fullest.<sup>18</sup>

In fact, some early commentators believed that legal provisions confirming that private use was outside of the right holders' exploitation monopoly was pointless, since private use was the indispensable corollary to the bequest of the work to the public through publication. Eventually however, the common view evolved, to hold that the regulation of private use inside the copyright act had become necessary because changes in society had blurred the line between public acts and private acts. Early 1900 versions of the Dutch and German copyright statutes did include exemptions for the reproduction of a work in a limited number of copies for the sole purpose of private practice, study or use of the person making the copies, whereas a specific provision regarding private use was introduced in French law only in the Act of 1957. It was always understood however that these 'private' reproductions must be neither put into circulation nor reach the public in any way.

#### 3.2 Rise of photocopying and analogue recording equipment

The first sound recording equipments made their appearance on the mass market in the early 1950's. It is safe to say that the advent of the sound and video recording equipment had in those days the same impact on the protection of copyrighted works as the advent of the Internet today. For the first time, these new reproduction devices and supports allowed anyone, both professionals and non-professionals alike, to make relatively easy and cheap copies of protected works. In just a few years time, the use of these devices and supports became widespread among the population. In view of the sheer volume of works reproduced, the scope of the rights holders' exclusive rights and of the limitation for private use became one of the most difficult and economically significant issues of the time, not only from the perspective of the rights holders themselves, but also from the perspective of the individual users and of the manufacturers and retailers of recording equipment.<sup>19</sup>

In view of the impact of home recording activities on the rights holders' interests, many commentators tried to distinguish the new circumstances from early forms of private uses. They insisted that legislatures could never have foreseen such development of technology. In their opinion, limitations for private use were originally intended to permit the hand copying or typewriting of a manuscript, which had no or minimal effect on the rights holders' interests. This was clearly no longer the case with home-taping technology.<sup>20</sup> Since limitations on copyright had to be interpreted restrictively – or so they argued – then, the traditional limitation allowing private use could not be extended to cover the making of copies of works through home-recording techniques. Following the logic of these commentators, private individuals who made reproductions of sound or audiovisual works for private use were infringing the owner's copyright in his work, as were probably also the manufacturers and retailers of recording equipment necessary for doing so.<sup>21</sup>

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<sup>17</sup> Guibault 2002, p. 48; Hugenholtz 1996, p. 94; and Spoor 1976, p. 113.

<sup>18</sup> Kohler 1907, p. 178; Lepaulle 1927, p. 7; and Leinemann 1998, p. 112.

<sup>19</sup> See: Runge 1951, p. 234; Gentz 1952, p. 495; and Krüger-Nieland 1957, p. 535.

<sup>20</sup> Wistrand 1968, p. 318; Spoor 1976, p. 113.

<sup>21</sup> Gentz 1952, p. 500.

### 3.3 Introduction of levies in Germany

From these early discussions eventually emerged the system of copyright levies that was ‘invented’ in Germany in the 1960’s. The German levy system eventually became a model for legislators elsewhere in continental Europe. Its introduction was triggered by two seminal decisions of the German Federal Supreme Court, rendered in 1955 and 1964 respectively.<sup>22</sup> In the *Grundig Reporter* case<sup>23</sup>, the German collecting society GEMA brought action against a producer of tape recorders on two grounds: (1) to enjoin the producer of tape recorders from selling recorders, unless they made customers aware of their obligations under copyright law and; (2) to obtain damages for past infringement. The Court considered that, given the fact that the legislator could not have foreseen the problem of home taping in its 1901 Copyright Act it was entitled to develop the law by interpretation. Accordingly, it held that in case of a conflict between the interest of the user of a work and those of a creator, the latter had to be favoured. The Court declared that ‘there is no general principle in copyright law that maintains that the claims of the copyright holder should stop short of the private sphere of the individual’. It thereby recognised the authors’ exclusive right to prohibit such private recordings, stating that the unenforceability of the rights was irrelevant to their legal recognition. Moreover, in the opinion of the Court, authors had a right to remuneration for the exploitation of their works even if that particular exploitation did not show any direct economic profit<sup>24</sup>. The German Supreme Court ordered the producers of recording equipment to refrain from selling such equipment without making reference to possible infringements of copyright, but denied GEMA’s claim for damages.

In the *Personalausweise* case,<sup>25</sup> the GEMA asked the Supreme Court to order that producers of recording equipment be obligated, upon delivery of such recording equipment to wholesalers or retailers, to request from the latter that they communicate the identity of the purchasers to the GEMA. First, the Supreme Court considered the question of whether the producers and retailers of recording equipment could also be held liable for copyright infringement, even if they did not realise the reproductions themselves, but only provided individuals the necessary means for doing so. The Court answered this question in the affirmative, pointing out that producers of recording equipment took express advantage of the popularity of private home taping. It decided however that the GEMA could not force vendors of home-taping equipment to oblige their customers to reveal their identity so as to enable the society to verify whether these customers engaged in lawful activities. In the opinion of the Court, although home taping constituted an infringement of copyright such measures of control would have undeniably conflicted with each individual’s right to the inviolability of his home, as guaranteed by Article 13 of the *Grundgesetz*.

The introduction of a levy on the sale of sound and video recording equipment in the Copyright Act of 1965 was a direct consequence of these two decisions. It appears from the report of the German Parliament’s Judiciary Committee that this solution had been chosen because, among other reasons, the Committee considered individual claims against private home taping not to be enforceable. From the very beginning, it was understood that the producers of recording equipment would pass the charge on to the consumers by means of the price of the tape recorders. The Committee stressed that systems of remuneration with a pass-on possibility was not uncommon. Moreover, the fact that the levy would be imposed on tape recorders which in the end might *not* be used to copy protected works – but rather, e.g., for dictating – was not considered as an obstacle by the Committee. According to the Committee, it was rather unlikely ‘that recording equipment suitable for private taping would never be used in that capacity during its whole lifetime’. To be sure, the Committee at that time expressly refused to introduce an additional levy to be paid by the producers of blank tapes on the ground that in the case of blank tapes it

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<sup>22</sup> Note that the German Federal Supreme Court had examined the question of the reproduction of sound recordings in an earlier case, but not in the context of a private use, see: BGH, decision of 21 November 1952 – Aktz.: I ZR 56/52 (*Überspielen von Schallplatten auf Magnettonbänder*) in *GRUR* 03/1953, at p. 140.

<sup>23</sup> BGH, decision of 24 June 1955 – Aktz.: I ZR 88/54 (*Mikrokopien*) in *GRUR* 11/1955, at p. 546.

<sup>24</sup> Visser 1996, p. 49; Wistrand 1968, p. 368.

<sup>25</sup> BGH, 29 May 1964 – Aktz.: Ib ZR 4/63 (*Personalausweise*), in *GRUR* 02/1965, p. 104; see: Bygrave and Koelman 2000, p. 101; and Visser 1996, p. 50. For further discussion see § 5.1 and § 6.1 (below).



could not be distinguished ‘whether they would serve just dictation purposes or rather the recording of protected works’.<sup>26</sup>

In 1985, the German Copyright Act was modified in two important respects: 1) concerning sound and audiovisual recordings, a levy was introduced on blank tapes, in addition to the long-standing levy on the sale of recording equipment; and 2) concerning reprographic copies, a levy on photocopying equipment was introduced in connection with a statutory remuneration for every page copied for personal or other private purpose from a work protected by copyright. The latter modification ended the regime that had applied until then, according to which it was permissible to make individual copies of a work for personal and, under certain circumstances, for other private purposes, without payment of remuneration. Before the coming into force of the modifications of 1985, the payment of remuneration for reprographic activities was due only in the case of copies made for commercial purposes.<sup>27</sup> At the time of the adoption of the Copyright Act of 1965, no general levy had been raised on the manufacture and sale of reprographic equipment mainly because the copyright reform had taken place before photocopying *en masse* had become economically feasible. There was no need for a remuneration right to compensate authors and editors for the revenue losses incurred due to reprographic activities. By 1983 however, users were making 25,5 billion photocopies per year on 920,000 photocopy machines in the Federal Republic of Germany alone.<sup>28</sup>

The main argument for the introduction of a levy on blank tapes in 1985 was that the remuneration collected on the sale of recording equipment no longer equalled the dimensions assumed by the legislator when the provision was enacted in 1965. The decrease in remuneration obtained from the sale of recording equipment could be explained by the fact that the average factory price in 1985 was far lower than in 1965. The collecting societies had stressed that, at the same time, this decrease of remuneration collected per unit contrasted sharply with the rapid increase of private home taping.<sup>29</sup> Contrary to the position that had prevailed until then, the legislator agreed with the collecting societies that some legal responsibility for infringement of copyright by private home taping could be assumed not just by the producers of recording equipment but also by the producers of blank tapes and cassettes. The argument put forward in 1965, according to which it would be unjust to put a levy on blank material because no distinction can be made between blank material used for purposes affecting copyright and those used for other purposes, was simply put aside in 1985.

### 3.4 Proliferation of levy systems in other countries

Today, most continental European countries have followed the German model and have granted authors, publishers, performers, and phonogram and video producers a remuneration right for the private use of their works, either under the home taping regime or the reprography regime.<sup>30</sup> The twelve EU Member States that have put in place a levy system to compensate authors for reprographic and home-taping activities are in chronological order since 1965: Germany (1965), Austria (1980), Finland (1984), France (1985), Netherlands (1990), Spain (1992), Denmark (1992), Italy (1992), Belgium (1994), Greece (1994), Portugal (1998), and Sweden (1999).<sup>31</sup> Only three EU Member States have not implemented a levy system for reprographic reproduction and home taping: Ireland, Luxembourg, and the United Kingdom. The United Kingdom has not introduced a private copying scheme, despite recommendations to the Government in favour of such a scheme. The imposition of a blank tape levy on audio and video tapes was recommended in a consultative document on copyright for audio-visual material presented to the British Parliament by the Secretary of State for Trade and Industry in 1985,<sup>32</sup> and in the Government’s 1986 White Paper on Intellectual Property and

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<sup>26</sup> Reinbothe 1981, p. 40.

<sup>27</sup> Burger 1988, p. 320.

<sup>28</sup> Melichar 1987, p. 54.

<sup>29</sup> Collova 1994, p. 86.

<sup>30</sup> Möller 1987, p. 146.

<sup>31</sup> Collova 1994, p. 53.

<sup>32</sup> The Recording and Rental of Audio and Video Copyright Material: A Consultative Document, HMSO, London, 1985.

Innovation. These recommendations were not followed as a result of pressure from tape manufactures and consumer groups.<sup>33</sup>

It is important to emphasise that private copying levies are essentially meant to cover acts conducted in the private sphere, whereas levies for reprographic activities are in most countries directed towards acts accomplished in an institutional setting, e.g. by libraries, government institutions and businesses. In most countries, individuals are indeed free to make photocopies of works for private purposes without being subject to a levy. Nevertheless, it is also evident that the borderline between reprographic and home-taping activities has become increasingly blurry, given the convergence of digital reproduction techniques and the use of all-purpose digital storage media. Moreover, where nowadays most books, magazines and other graphic works are created and disclosed *ab initio* on digital media, and then printed on paper, does the distinction between a reprographic reproduction and reproduction on a digital medium still make sense?<sup>34</sup> Recent modifications to article L. 311-1(2) of the French *Code de la Propriété Intellectuelle* illustrate this. Not only has the home-taping levy been extended to all categories of works reproduced on a digital medium, where only sound and audiovisual works were previously concerned, but publishers have also been added to the list of beneficiaries of the remuneration, along with authors, performing artists, and producers.<sup>35</sup> Although not all Member States have modified their laws in this way, we believe that a study on the future of levies in a digital environment must take both, increasingly converging levy systems into consideration.

At the international level, continental Europe's position with respect to a remuneration scheme for private copying is not widespread, but is also not unique. According to a report published in September 2001 by the Australian Copyright Council, there are at least 42 countries in the world, which have a remuneration scheme for private copying. Among these 42 countries are of course twelve of the fifteen Member States of the European Union, as well as fifteen countries from Central and East Europe,<sup>36</sup> seven African countries,<sup>37</sup> Ecuador, Paraguay, Iceland, Israel, and Switzerland. Remuneration schemes of a more limited scope have been introduced in Canada, the United States, and Japan. The Canadian private copying provisions came into force in 1997. The Canadian regime only applies to blank recording media, and not to recording devices, and only to audio recording media and not to audiovisual recording media. In the United States, remunerated private copying is allowed in some circumstances under the *US Digital Home Recording Act*, which requires payment only in relation to *digital* recording devices and media. In Japan, a remuneration scheme for digital copying for private purposes was introduced in 1992. The levies are payable on digital audio tape recorders (DAT), digital compact cassettes (DCC) and mini discs. The levy on DAT recorders is 2% of the retail price with a ceiling of 1000 yen. The levy on digital recording media is 3% (to be reviewed after 3 years). The levy on specified digital video recording devices and on specified digital video recording media is 1% of the standard price. From July 1999, a 1% levy has been payable on digital image recording devices (devices that use digital video cassette recorder (DVCR) and data video home system (D-VHS) formats).

#### 4. Current levy schemes in Europe

Having drawn a brief history of the adoption of the different levy systems in the previous section, we describe in this section the workings of these schemes as they are currently applied in Belgium, France, Germany, Italy, the Netherlands, and Spain. In the first subsection, we study the following elements of the two levy schemes: the actual basis for remuneration, the debtor of the obligation to pay the levy, the schedule of distribution of the sums collected, as well as possible exemptions from

<sup>33</sup> 'UK Government locks European levy' (1992) 2 *Music & Copyright* (September 29) at 5

<sup>34</sup> Young and Roosen 1998, p. 94, footnote 5.

<sup>35</sup> Loi No 2001-624 du 17 juillet 2001 portant diverses dispositions d'ordre social, éducatif et culturel (1), NOR : MESX0100056L, JORF/LD <http://admi.net/jo/2001/11496.html> page 11496, art. 15.

<sup>36</sup> Belarus, Bulgaria, Czech Republic, Estonia, Hungary, Kazakhstan, Latvia, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, Ukraine and Uzbekistan.

<sup>37</sup> Algeria, Cameroon, Congo, Gabon, Kenya, Mauritius, and Nigeria.

payment. In the second subsection, we will examine whether levies have been extended to digital recording equipment and/or digital storage device. Note that the reader will find most elements discussed in this section in the form of comparative tables, presented in Annex 1 to this study.

## 4.1 Workings of the current levy schemes

### 4.1.1 *Levies on reproduction devices and storage media*

The actual basis for the payment of remuneration for home taping and reprographic activities varies from one EU Member State to another. First, continental European countries have imposed levies following either one of three ways: 1) on the sale of reproduction equipment, such as photocopy machines, facsimile machines, audio, and video recording devices; 2) on the sale of blank audio or video recording media or proportional to the amount of copies realised, in the case of reprography; and 3) or on the sale of both reproduction devices and storage media or proportional to the amount of copies made, in the case of reprography. Second, the mode of calculation of levies imposed on reproduction devices and media also differs from one country to another. In some countries, the remuneration on equipment is calculated in proportion of the sales price of such equipment, while in other countries, the remuneration on equipment is paid in the form of a lump sum. The amount of the levies imposed on storage media, like audio and videocassettes, varies per country, and usually depends on the recording length of each medium, calculated on an hourly basis. Third, a number of EU Member States may have expressly excluded certain types of equipment and storage media from the levy regime on the ground that they are not primarily used for copyright relevant reproductions. Fourth, the mode of fixation of the levy varies from one Member State to the other. In the Nordic countries for example, the amount of remuneration is established through negotiation between the collecting society and the users. Most continental European countries have introduced a statutory licence, the tariff of which is determined by regulatory instrument.<sup>38</sup>

#### 4.1.1.1 Remuneration on reprographic equipment

Under the Royal Decree of 1997 concerning the remuneration due for reprographic activities, **Belgium** requires that a lump sum remuneration be paid on reprographic equipment. Such equipment includes black & white photocopiers, colour photocopiers, fax machines, duplicators, offset machines, scanners,<sup>39</sup> and multifunctional integrated equipment that allow the making of reproductions. The amount of the levy on photocopying equipment has been revised recently and is determined according to the equipment's reproduction capacity following a gradual scale of prices, ranging from • 3,39 for photocopiers capable of realising less than 6 copies per minute to • 1464,13 for photocopiers capable of realising more than 89 copies per minute. The levy imposed on fax machines is calculated on the same basis as the remuneration due for photocopiers. Duplicators and offset machines have a fixed tariff of • 258,22 and • 645,55 respectively.<sup>40</sup> Excluded from the scope of the levy scheme are devices that, in view of their objective technical characteristics, can only be used for publishing protected works, such as flat presses, rotary printing presses, plan printers with roller and offset machines the format of which is superior to A3.

Article 13 of the **German** Administration of Copyright and Neighbouring Rights Act provides that collecting societies shall draw up tariffs in respect of the remuneration they demand for the rights and claims they administer. Where inclusive contracts have been concluded, the rates of remuneration agreed upon in such contracts shall constitute the tariffs, which must be published in the official gazette. The basis for calculating the tariffs shall normally be the monetary advantages obtained from exploitation. The tariffs may also be computed on other bases where these result in adequate criteria for the proceeds of exploitation, that may be assessed with reasonable economic outlay. When

<sup>38</sup> Young and Roosen 1998, p. 93.

<sup>39</sup> See section 4.2 below.

<sup>40</sup> Arrêté royal du 13 décembre 2002 portant modification de l' arrêté royal du 30 octobre 1997 relatif à la rémunération des auteurs et des éditeurs pour la copie dans un but privé ou didactique des oeuvres fixées sur un support graphique ou analogue, Moniteur Belge, 14 January 2003, p. 1120.

establishing tariffs, the proportion of the utilization of a work in the total exploitation shall be taken into appropriate account. The amount of the levies for the reproduction of texts and other graphic works and the reprographic equipment that is subject to the payment of levies are determined by the collecting society VG WORT. According to the fee schedule appearing in Annex to the Copyright Act, a lump sum remuneration is to be paid on reprographic equipment. Such equipment includes black & white photocopiers, colour photocopiers, fax machines,<sup>41</sup> and scanners. The amount of the levy imposed on photocopying equipment has been revised recently and is determined according to its reproduction capacity following a gradual scale of prices, ranging from •38,35 for photocopiers capable of realising less than 12 copies per minute to •306,78 for photocopiers capable of realising more than 70 copies per minute. The fees are doubled for colour photocopiers.

With respect to reprographic activities, **Spain** only imposes levies on the sale of reproduction equipment and does not require the payment of a proportional remuneration per page copied. The levy on reprographic equipment is fixed at article 25(5) of the Spanish Copyright Code and varies according to the capacity of the equipment, ranging from •45 (7,500 pts) for photocopiers capable of realising less than 9 copies per minute to •222,38 (37,000 pts) for photocopiers capable of realising 50 copies per minute or more.

#### 4.1.1.2 Remuneration on recording equipment

In **Belgium**, the Royal Decree of 1996 concerning the remuneration due for private copying of sound and audiovisual works imposes a levy of 3 % of the sales price of recording equipment. The annex to the Report to the King, published together with the Royal Decree of 1996, contains an exhaustive list of recording equipment, sound, and audiovisual storage media, for which no levy is imposed, because their primary use is not to reproduce or store copyrighted works. This is the case, for example, for telephone answering machines and tapes, dictaphones, and minicassettes, and audio or visual storage media of limited duration.

As we have seen in section 3.3 above, **Germany** was the first country in the world to introduce in 1965 a levy on the sale of recording equipment. The amount of the levies for the reproduction of sound and audiovisual works and the recording equipment and media that is subject to the payment of levies are determined by the collecting society Zentralstelle für Private Überspielungsrechte (ZPÜ). The fees have been revised recently and fixed as follows: •1,28 for each audio recording appliance; •2,56 for each audio and video recording appliance for whose operation separate mediums are not required (i.e. integrated devices); •9,21 for each video recording appliance with or without audio recording; and •18,42 for each audio and video recording appliance for whose operation separate mediums (i.e. integrated devices) are not required.

In **Italy**, there is no levy either on reprographic equipment or on video recording equipment, but there is one on sound recording apparatus. Article 3(2) of the Act of 1992 provides that the remuneration on sound recording apparatus is 3 per cent of the selling price to the retailer of such equipment.

In **Spain**, article 25 (5) of the Copyright Code requires the payment of a levy on the sale of recording equipment in the following terms: •0,60 (or 100 pesetas) per each unit of equipment or apparatus for phonogram reproduction; and •6,61 equipment (or 1,100 pesetas) per each unit of apparatus for videogram reproduction.

#### 4.1.1.3 Remuneration on recording media

In **Belgium**, the levy on recording media has been established under the Royal Decree of 1996 at •0,0496 per hour of playing time for analogue audio and videocassettes, and at •0,1239 per hour of playing time for digital storage media.

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<sup>41</sup> See: BGH, Decision of 28 January 1999, I ZR 208/96, JurPC Web-Dock. 132/1999, where the Federal Supreme Court of Germany declared that fax machines fall under the category of equipment for which a levy must be paid.

In **France**, there are no levies on the sale of reprographic or recording equipment. France imposes levies only on the sale of recording media, remuneration that depends on the type of support and its playing time. The fees are established by a commission created pursuant to article L. 311-5 of the Code. The price for analogue audio and videocassettes is •0,285 and •0,43 respectively, for each hour of playing time given customary use.

In addition to the levy on recording equipment, **Germany** introduced in 1985 a levy on the sale of recording media. According to the fee schedule appearing in Annex to the German Copyright Act, a remuneration of • 0,0614 must be paid in respect of audio recording media, for each hour of playing time in normal utilization, whereas a remuneration of • 0,0870 must be paid in respect of video recording media, for each hour of playing time in normal utilization.

In **Italy**, a remuneration is paid on the sale of recording media according to the following rates: (a) 10 per cent of the selling price to the retailer of tapes or comparable sound recording media (music cassettes and other sound media); and (b) 5 per cent of the selling price to the retailer of tapes or comparable video recording media (videocassettes and other video media).

In the **Netherlands**, the level of remuneration is determined by the *Stichting Onderhandeligen Thuiskopievergoeding* (SONT), which was designated by the government as the organisation competent to decide the amount of remuneration due for the private copying of sound and audiovisual works. The SONT was set up in 1991 by representatives of the tape industry (Stichting Overlegorgaan Blanco Informatiedragers: STOBI) and the *Stichting de Thuiskopie*, which represents rights holders. According to article 16(e)(2) of the Dutch Copyright Act of 1912, the running or playing time of the object in question is of particular importance in determining the level of the remuneration. Accordingly, a remuneration of •0,23 must be paid in respect of audio recording media, for each hour of playing time in normal utilization, whereas a remuneration of •0,33 for each analogue video recording media, for each hour of playing time in normal utilization.

Article 25(5) of the **Spanish** Copyright Code requires the payment of the following remuneration on the sale of recording media: sound reproduction material in the amount of 30 pesetas per hour of recording or 0.50 pesetas per minute of recording; and visual or audiovisual recording material in the amount of 50 pesetas per hour of recording or 0.80 pesetas per minute of recording. The Royal Decree of 1992 on the remuneration due for private copying of sound and audiovisual works<sup>42</sup> contains a provision according to which certain recording equipment and storage media is expressly excluded from the payment of the remuneration, because its primary use is not to reproduce copyrighted works. This is the case, for example, for telephone answering machines and tapes, dictaphones, minicassettes, and audio or visual storage media of limited duration or having specific characteristics.<sup>43</sup>

#### 4.1.1.4 Proportional remuneration for reprographic activities

In most Member States, the remuneration due for reproductions made by means of reprography is calculated in proportion to the amount of copies made in a year. The price per copy may vary according to the type of work reproduced, i.e. scientific or educational book, novels, magazines, or newspapers, and according to the type of equipment used or to the quality of the reproductions. In determining the price per copy, most countries and collecting societies also make a distinction according to the sector of activity, i.e. the private sector, the public sector, and the educational sector. This distinction corresponds to objective considerations. The amount of copies made of protected

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<sup>42</sup> Royal Decree 1434/1992, of 27 November 1992, Art. 15 as modified by Royal Decree 325/1994, of 25 February 1994, BOE 63/1994 de 15-03-1994, p. 8328.

<sup>43</sup> On the exclusion of tapes equal or superior to 12,7 millimetres, see: Decision of the Court of Appeal of Madrid, 8th Ch., 22 March 1999 (*AGEDI, AISGE, AIE, CEDRO, EGEDA, SGAE and VEGAP v. Mayro Magnetics*); and Decision of the Court of Appeal of Madrid, 9th Ch., 27 April 2001 (*KODAK, S.A. v. EGEDA, AISGE, AIE, CEDRO, SGAE, VEGAP and AGEDI*).

works varies from one sector to another, where the educational sector realises a greater amount of copies than the two other sectors.<sup>44</sup>

In addition to the levy imposed on reprographic equipment, **Belgian** users of reprographic material must also pay a remuneration proportional to the amount of copies realised in a year. Standardised tariffs for the reproduction of protected works by means of reprography have been established by sector of activity, according to the number of reprographic equipment in use, to the number of employees and to the estimated amount of copies of protected works realised in a year. The tariffs applicable to sectors other than the educational and public lending institutions have been revised recently to take account of a new calculation period, of the modified tax rate and of the conversion to the euro.<sup>45</sup> The standard tariffs, calculated on the basis of the number of pages copied per year, distinguish between users who cooperate in the payment of the remuneration and those who do not. Hence, people or entities that do cooperate with the collecting society are charged a fee of •0,0160 per page copied or •0,0120 per page copied in the case of copies made by means of an equipment used in an educational institution or in a public lending institution. These fees are doubled for colour copies. Where a person or entity does not cooperate with Repobel, the fees are of •0,0266 and •0,0200 respectively.

With respect to reprographic activities, **France** only imposes the payment of a remuneration proportional to the amount of copies realised in a year. The fees, fixed by the Centre Français de la Copie, vary from •0,03 to •0,76 per page, depending on the type of work reproduced, i.e. scientific or educational book, novels, magazines, or newspapers, and on the number of copies made in a year.

In addition to the payment of a levy on reprographic equipment, **German** users of reprographic material must also pay a remuneration proportional to the amount of copies realised in a year. Article 54(d) paragraph 2 states that ‘the amount of the total remuneration to be paid by the operator shall depend on the type and extent of utilization of the appliance that is to be expected in view of the circumstances, particularly the location and the habitual use’. With respect to reproductions on paper size A4, that are exclusively used for educational purposes, the fee is •0,0256 per black and white reproduction and •0,0512 per colour reproduction. For all other reproductions, users must pay a fee of •0,0103 per black and white reproduction and a fee of •0,0206 per colour reproduction. To spare users from an intractable bureaucracy, the collecting society VG Wort adopted, in consultation with all interested parties, several standardised tariffs that take the three following criteria into account: the estimated amount of copies of copyright protected works, in view of the type of equipment used and its location, a minimum amount of copies per machine and the price of •0,0103 per copy. A first standardised tariff applies to copy shops and similar establishments, where the number and capacity of photocopy machines, and the proximity of an educational institution constitute determining factors for the determination of the fee. A second standardised tariff applies to the business sector, where the number and capacity of photocopy machines are the factors taken into account. A third standardised tariff applies to money or card operated photocopy machines that are available to the public in schools, libraries, or other public locations.<sup>46</sup>

In **Italy**, there are no levies on the sale of reprographic equipment. However, users of reprographic material must pay a remuneration proportional to the amount of copies realised in a year, pursuant to article 68 of the Italian Copyright Act. This provision specifies that ‘all responsables for premises or copy centers where copying or xerocopying machines or similar reproduction means are utilized or made available to third parties even for free, must pay a compensation to the authors and publishers of works of the mind published in printed form that by means of such machines are reproduced for the

<sup>44</sup> Young and Roosen 1998, p. 99.

<sup>45</sup> Arrêté ministériel du 3 mai 2002 portant agrément de la grille standardisée applicable aux autres débiteurs de la rémunération proportionnelle visée à l'article 60 de la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins, Moniteur Belge, 12 June 2002, p. 27062.

<sup>46</sup> VG-Wort, ‘Höhe und Abwicklung der Betreiberabgabe’, available at: <http://www.vgwort.de/reprographieabgaben.php>

uses specified in the first sentence of this paragraph. The amount of said compensation and the terms of its collection and distribution are determined by the *Società Italiana degli Autori ed Editori* (SIAE). Unless otherwise agreed between SIAE and the interested trade associations, such compensation for each page reproduced cannot be less than the average price per page that is determined each year by ISTAT with reference to books.’ The standard tariffs, calculated on the basis of the number of pages copied per year, distinguish between users who cooperate in the payment of the remuneration and those who do not. The fees have been established for 2003 at •0,06 per page for general users and at •0,05 per page for users who adhered to the Associations that have signed the agreements with the SIAE.

In the **Netherlands**, users of reprographic material must also pay a remuneration proportional to the amount of copies realised in a year. The level of the remuneration determined by the *Stichting Reprerecht*. The general tariff per page reproduced is •0,045, tariff that applies to governmental institutions, libraries, educational institutions and other institutions active in areas of public interest as well as private enterprises.

#### 4.1.2 Who pays the levies?

As a rule, the obligation to pay the remuneration imposed on recording or reprographic equipment as well as on blank recording media does not lie on the consumer, but rather on the manufacturers, importers, or intra-community acquirer of such devices and media. This is true in all six EU Member States examined here. In the majority of cases, manufacturers and importers of reproduction equipment or media pass the charge on to the consumers by means of the sales price such equipment or media. Geller observes that ‘where levies are imposed, for example, on the sales price of a copy machine, facsimile machine, or blank-recording tapes, there is only an intrusion at that point where these instruments enter commerce, not in private life. Where, by contrast, levies are imposed on machines already purchased by users, some method is needed to police these users, for example, concerning what they do in their offices or homes, or at least to collect monies due’.<sup>47</sup> Similarly, we note that the obligation to pay the proportional remuneration for reprographic activities generally lies with the legal person under whose supervision, direction, or control the reprographic equipment is used.

##### 4.1.2.1 Manufacturer, importer or intra-community acquirer

In all six EU Member States examined here, the obligation to pay the remuneration due on the sale of reproduction equipment or media generally falls on the manufacturer, the importer or the intra-community acquirer of such equipment or media, as soon as they are put in circulation on the national territory.<sup>48</sup> ‘Importer’ is defined under the German Copyright Act as ‘the person who introduces the appliances or the video or audio recording mediums, or causes them to be introduced, into the territory to which this Law applies. Where the importing is based on a contract with a person foreign to that territory, the importer shall be that contractual party alone who is domiciled in the territory to which the law applies, insofar as he is commercially active. Any person who acts simply as forwarding agent, carrier, or the like in the introduction of the goods shall not be considered the importer. A person who introduces goods from third countries, or causes them to be introduced, into a free zone or a free warehouse in accordance with Article 166 of Council Regulation (EEC) No. 2913/92 of October 12, 1992 establishing the Community Customs Code (OJ No. L 302, p. 1) shall only be deemed the importer if the items are used in that territory or if they are released for free circulation for customs purposes’.<sup>49</sup>

In addition to the manufacturer, the importer, or the intra-community acquirer of reproduction equipment or media, the dealer of appliances or of video and audio recording media is jointly liable

<sup>47</sup> Geller 1987, p. 35.

<sup>48</sup> Belgian Copyright Act, art. 55 and 59; French CPI, art. L. 311-4; German Copyright Act, § 54(2); Italian Act of 1992, art. 3(3); Dutch Copyright Act of 1912, art. 16(c)(2) and (3); and Spanish Copyright Code, art. 25(4)(a).

<sup>49</sup> German Copyright Act, § 54(2).

with the importer for the payment of the remuneration, under the **German** Copyright Act and the **Spanish** Copyright Code. The German Act specifies that a dealer is not liable if he either procures video or audio recording media with less than 6,000 hours of playing time and less than 100 appliances in one half calendar year, in the case of sound or audiovisual recording equipment or media; or, if he procures less than 20 appliances in one half calendar year, in the case of reprographic equipment. The Spanish Code contains no similar exemption for small or incidental retailers.

#### 4.1.2.2 Users of reprographic equipment

In **Belgium**, the proportional remuneration for reprographic activities is payable by any physical and legal person who makes copies, or as the case may be, by the person who places reprographic equipment at the disposal of others, whether or not it is for economic gain.<sup>50</sup> This provision therefore applies to anyone who is in a position to exercise supervision, direction, or control over the equipment, whether or not she owns the apparatus, such as copyshops, enterprises, government offices, libraries, or educational institutions. The same regime applies in **France**, **Germany**, and the **Netherlands**, where the obligation to pay remuneration applies to anyone who is in a position to exercise supervision, direction, or control over the equipment, whether or not she owns the apparatus, such as copyshops, enterprises, government offices, libraries, or educational institutions. In the Netherlands, the Copyright Act of 1912 was in fact recently modified to extend the obligation pay proportional remuneration, from the public sector only, to the private sector, including enterprises and copy shops.<sup>51</sup>

On 18 August 2000, the **Italian** legislator adopted Law No. 248 concerning new provisions for the protection of authors' rights in particular with regard to reprography, audiovisual works, phonograms, computer software and similar products (off-line) and broadcasting (on-line). As professor Fabiani explains, the law seeks, in connection with reprography, to reconcile the interests of the public and those of authors and publishers by allowing photocopying of protected works where it does not exceed 15 % of each volume or issue of a periodical and provided that the reproduction is made for personal use. In exchange for this limited freedom to copy, the law introduced a right to remuneration for authors and publishers. This remuneration is proportional to the number of copies if the photocopies are made by 'copy shops' ('reproduction centers' according to the definition given in the law), which are liable for payment. The remuneration takes the form of a flat fee for copies – still not exceeding 15 % - made by public libraries from works existing in the library. However, the whole volume or issue may be photocopied if the work existing in the library is rare or not included in publishing catalogues.<sup>52</sup> It remains unclear from the text of the new Italian Act whether governmental institutions and private enterprises, that do not qualify as 'copy shops' or 'reproduction centers', are liable to pay remuneration for photocopies made for internal purposes. Also unclear from the Italian Act is whether educational institutions are liable to pay remuneration for reprographic activities.

#### 4.1.3 Schedule of distribution

The workings of each collecting society and the determination of the schedule of distribution vary from one country to another. Remuneration rights with respect to reprography and private copying are generally exercised through collecting societies. In countries such as France, Germany, Italy and Spain, the law imposes the mandatory collective administration of these rights.<sup>53</sup> In a few countries however, rights owners are given the possibility to deal directly with users regarding the payment of

<sup>50</sup> Arrêté ministériel du 3 mai 2002 portant agrément de la grille standardisée applicable aux autres débiteurs de la rémunération proportionnelle visée à l' article 60 de la loi du 30 juin 1994 relative au droit d' auteur et aux droits voisins, Moniteur **Blge**, May 3, 2002.

<sup>51</sup> Wet van 28 maart 2002 tot wijziging van de Auteurswet 1912 inzake het reprografisch verveelvoudigen, *Staatsblad* 2002, No. 186.

<sup>52</sup> Fabiani 2002, p. 150.

<sup>53</sup> French CPI, art. L. 122-10 (for the reprography right); German Copyright Act, § 54h(1) (for the reprography right and the private copying right); Italian Act of 1992, art. 3(4), 3(6) (for the private copying right); Spanish Copyright Code, art. 25(1) (for the reprography right and the private copying right).



remuneration, under an ‘opt-out’ system. This is the case in the Netherlands with respect to reprography.<sup>54</sup> Most often, the levies paid for reprographic or private copying activities are collected by a central organisation. This organisation may then distribute the money directly to the rights owners, like in Italy, where the SIAE is the sole entity entrusted with the collection and distribution of the levies. Or, it may further distribute the sums collected among other societies that represent the interests of specific categories of rights holders, like in Germany, where the Zentralstelle für Private Überspielungsrechte (ZPÜ) collects the levies due for private copying to then re-distribute these sums among the societies of authors and publishers, phonogram producers, film and video producers etc. In some countries, the schedule of distribution among rights owners is determined once and for all in the legislation, while in other countries, the schedule must be negotiated between the collecting societies and their members, subject to its approval by a public authority. There may be additional variations in the distribution schedules of the different societies, depending for example on the percentage of money allocated to cover administration costs or on the amount of money put aside for social or cultural funds created for the benefit of authors or performing artists.

#### 4.1.3.1 Reprography

In **Belgium**, the Copyright Act expressly states that the remuneration collected for reprographic activities must be distributed equally between authors and publishers.<sup>55</sup> Although the law is silent on this point, the same rule has been made to apply in **Italy** and in the **Netherlands**, where the negotiations between the collecting societies and the rights holders have resulted in an equal distribution of money between authors and publishers. In **France**, the schedule of distribution is established by the Centre Français de la Copie, subject to approval by the Minister of Culture.<sup>56</sup> The sums collected from the reprography levies are distributed in France between authors and publishers according to the type of work involved. For example, publishers of schoolbooks receive a 70 % share of the sums collected, leaving authors with a 30 % share. The respective shares of publishers and authors in the sums collected from the reprography of other types of books and periodicals vary according to the amount of books or periodicals sold in the year, whereby the lower the sales are the bigger is the publisher’s share. In other words, the higher is the risk for the publisher, the higher is his share of the profits. In **Germany**, the sums collected by the ZPÜ for reprographic activities are first transferred to the society VG Wort, which then distributes them among authors and publishers according to a schedule established after consultation of its members. In contrast to other collecting societies, the VG Wort is rather generous with its authors. Accordingly, authors of works that are out of print receive 100% of the sums collected, while the respective shares of publishers and authors in the sums collected from the reprography of printed works is 70 % for authors and 30 % for publishers. In the case of translations, the translator is awarded a proportion of 50 % of the sums collected for reprographic activities, taken from the author’s share. In **Spain**, the schedule of distribution of the remuneration collected for reprographic activities is fixed in the Royal Decree of 1992 in a proportion of 55 % for authors and 45 % for publishers.<sup>57</sup>

#### 4.1.3.2 Private copying of sound recordings

In **Belgium**, article 58, first paragraph, of the Copyright Act provides that the remuneration collected from private copying of sound recordings must be divided equally between authors (33 %), performing artists (33 %) and producers (33 %). The second paragraph of the same article provides that the Communities and the federal State may decide to allocate 30 % of the revenues generated by the levies for private copying to the promotion of creation. In **France**, **Italy**, and **Spain**, the sums collected for private copying of sound recordings are divided under the copyright act, as follows:

<sup>54</sup> Wet van 28 maart 2002 tot wijziging van de Auteurswet 1912 inzake het reprografisch verveelvoudigen, *Staatsblad* 2002, No. 186, art. 161 *in fine*.

<sup>55</sup> Belgian Copyright Act, art. 61;

<sup>56</sup> French CPI, art. L. 321-3.

<sup>57</sup> Spanish Royal Decree of 1992, art. 36(c).

authors 50%, artists 25% and producers 25%.<sup>58</sup> In France, the collecting society Sorecop is obligated by law to award a portion of 25% to the financing of aid programs for the creation,<sup>59</sup> the diffusion of live shows, and the training of artists. Since it is practically impossible to know, in the analogue world, which song or film has been recorded in the intimacy of the home, or how many times the individual user has played the work within the family circle, the sums collected from the home-taping levies are distributed in France on the basis of opinion polls, following a decreasing scale of success.<sup>60</sup> In Spain, the SGAE must award a proportion of 20 % of the sums collected for private copying to the promotion of activities and services to the benefit of its members as well as activities of training for authors and performing artists.

The schedules of distribution of the remuneration collected for private copying of sound recordings in Germany and in the Netherlands differ from those in force in other countries in the sense that they are not established by law, but are negotiated between the collecting societies and their members. The results of these negotiations are as follows: in **Germany**, authors receive a share of 58 % (42 % to the GEMA and 16 % to the VG Wort) and 42 % to performing artists and phonogram producers; in the **Netherlands**, authors receive a share of 40 %, performing artists receive a share of 30 % and phonogram producers receive a share of 30 %.

#### 4.1.3.3 Private copying of audiovisual works

In **Belgium**, article 58, first paragraph, of the Copyright Act provides that the remuneration collected from private copying of sound recordings must be divided equally between authors (33 %), performing artists (33 %) and producers (33 %). The second paragraph of the same article provides that the Communities and the federal State may decide to allocate 30 % of the revenues generated by the levies for private copying to the promotion of creation. According to article L. 311-7, second paragraph, of the **French** CPI, the sums collected for private copying of audiovisual works are divided equally between authors (33 %), performing artists (33 %) and producers (33 %), after a portion of 25% has been deducted to finance aid programs for the creation, the diffusion of live shows, and the training of artists. Collecting societies in **Italy** and **Spain** must follow the same schedule of distribution. Again, the schedules of distribution of the remuneration collected for private copying in Germany and in the Netherlands differ from others in the sense that they are not established by law but are negotiated between the collecting societies and their members. The results of these negotiations are as follows: in **Germany**, authors receive a share of 29 % (21 % to the GEMA and 8 % to the VG Wort) and 21 % to performing artists and phonogram producers, and 50 % to film producers and other rights holders. In the **Netherlands**, authors receive a share of 33,75 %, performing artists a share of 25,50 % and phonogram producers a share of 40,75 %.

#### 4.1.4 Exemption from payment

Legislators have acknowledged three main reasons from granting an exemption from the payment of the remuneration on reprographic or recording equipment or media. As we shall see below, the first reason is that the equipment and the media are not put in circulation on the national territory, i.e. that they are destined for exportation. The second motive is that the equipment and media are not used for private purposes but for professional ends, for which there is no levy to be paid on reproduction equipment or media. Third, public interest concerns may warrant the reimbursement or the exemption from the payment of the levy, for example with respect to equipment and media bought to aid people with physical disabilities, or for keeping archives. Public interest concerns, such as the dissemination of information, may also justify in some EU Member States the imposition of a different tariff for the proportional remuneration due with respect to reprographic activities taking place in educational institutions or public libraries.

<sup>58</sup> French CPI, art. L. 311-7, first paragraph; Italian Act of 1992, art. 3(4) and (5); and Spanish Royal Decree of 1992, art. 36(a).

<sup>59</sup> French CPI, art. L. 321-9.

<sup>60</sup> Gautier 1999, p. 254.

#### 4.1.4.1 Equipment and media not put in circulation on the national territory

In **Belgium**, the Royal Decree of 1997 concerning the remuneration due for reprographic activities provides that entities are exempted from paying the lump sum normally due for putting reprographic equipment on the market, in the following three cases:

1. Where a piece of equipment is made available for a short period to a potential client, exclusively on a trial basis;
2. Where a piece of equipment was used by the debtor for demonstration purposes; and
3. Where non-used equipment is exported or delivered in the Community from the national territory.

In the **Netherlands**, the *Stichting de Thuiskopie* grants to the manufacturer and the importer of storage media an exemption from the obligation to pay the remuneration on storage media bought for export. Article 25(6) of the **Spanish** Copyright Code exempts from the payment of remuneration on recording equipment and media natural persons who acquire the said equipment, apparatus and material outside Spanish territory under the arrangements for travellers and in such a quantity that it may be reasonably presumed that they are intended for private use on the said territory.

#### 4.1.4.2 Equipment and media used for professional ends

Article 57 of the **Belgian** Act states that the obligation to pay the remuneration due under the home taping regime is lifted with regard to producers of sound and audiovisual works, and broadcasting organisations. Similarly, article L. 311-8 of the **French** CPI states that the obligation to pay remuneration due under the private copying regime does not apply in respect of audiovisual communications enterprises, phonogram and videogram producers, and publishers of works published on a digital support. In the **Netherlands**, the *Stichting de Thuiskopie* grants to manufacturers and importers of storage media an exemption from the obligation to pay the remuneration on storage media bought for professional use. Article 25(6) of the **Spanish** Copyright Code exempts producers of phonograms or videograms and broadcasting organizations for equipment, apparatus, or material intended for the pursuit of their activity, from the payment of remuneration on recording equipment and media.

#### 4.1.4.3 Public interest concerns

Article 57 of the **Belgian** Act states that the obligation to pay the remuneration due under the home taping regime is lifted with regard to the following people or entities:

1. Institutions officially recognized and publicly funded for the conservation of sound or audiovisual documents;
  2. Blind, visually impaired, deaf, and hearing-impaired people and the institutions created for their needs;
  3. Recognized educational institutions that use sound or audiovisual documents for teaching purposes.
- Reimbursement granted only on storage media destined for conservation of sound and audiovisual documents and for their consultation on the premises.

As mentioned above, the Belgian Royal Decrees of 1997 and 2002 grant a price reduction for people and entities that cooperate with the collecting society Reprobel in the payment of the proportional levy. The reduction of payment in favour of cooperating entities is explained by the fact that, without such a cooperation, Reprobel's administrative costs would increase bringing with it two important consequences: first, that less money would be distributed to the rights holders; and second, that part of the economic burden created by such a behaviour would have to be born by the entities that do cooperate.<sup>61</sup>

Article L. 311-8 of the **French** CPI states that the obligation to pay remuneration due under the private copying regime is lifted with regard to legal persons or organisms using recording supports as aids for visually handicapped or hearing impaired people.

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<sup>61</sup> Young and Roosen 1998, p. 102.

In the **Netherlands**, a reduction in price has been created in favour of educational institutions that are not part of an academic institution, for which the tariff applicable is only €0,011 per page copied. The reason invoked for this difference in treatment is that educational institutions that do not provide academic education or that do not conduct scientific research generally reproduce works that are significantly less costly than their academic counterparts.<sup>62</sup>

#### 4.2 Expansion of levies into digital media and equipment

Digital technology allows a single carrier medium to store an entire spectrum of copyrighted works, which in the analogue world would have required in several distinct media or platforms, such as text on paper, sound on magnetic tape and images on videocassettes. Likewise, the machine used to reproduce text, sound, and image in digital form is the same (a computer), whereas different ‘dedicated’ machines have traditionally been used for reproduction in the analogue environment, i.e. photocopying machines, tape recorders, or VCR’s. This convergence of media and platforms is one of many reasons why the extension of existing ‘analogue’ levy schemes into the digital environment is problematic.<sup>63</sup> Nevertheless, collecting societies in several Member States have been successful in promoting such an extension. Indeed, several countries already impose levies on digital recording equipment and media. Moreover, a number of European legislators are now taking the opportunity given to them by the implementation process of the EC Directive on Copyright in the Information Society, or Copyright Directive, to consider the particularly controversial topic of whether levies should be imposed on digital equipment or media. Let us recall that the Member States were required to implement the provisions of the Copyright Directive into national law on or before 22 December 2002. Only two Member States met the deadline: Greece and Denmark. All other Member States are still, at one stage or another, in the process of transposing the Copyright Directive into their own national law. So far, however, Ireland, Luxembourg, Portugal, and Sweden have yet to present draft legislation with the view to implementing the Directive. Draft Bills are circulating in France and Spain. Bills have been presented to parliament in Austria, Belgium, Finland, Germany, the Netherlands, and draft regulations are being examined in Italy and the United Kingdom.

In this section, we will examine the current situation in each of the six EU Member States with regard to the application of levies to digital recording equipment and media, as well as the proposed changes – if any – that the implementation of the Copyright Directive would bring about on this subject. We also give a brief account of the pending modifications in other EU Member States regarding the application of levies to digital recording equipment and media as a result of the implementation of the Copyright Directive. However, we leave the analysis of the proposed modifications flowing from article 6 of the Directive concerning the protection of technological measures for a subsequent chapter.

##### 4.2.1 *Belgium*

The Royal Decree of 1997 concerning the remuneration due for reprographic activities does not apply to printers, computers, and devices permitting the reproduction of digital data on magnetic or opto-numerical media. At the time the Royal Decree was adopted, interested parties argued that it would have been difficult to evaluate the concrete effects of the development of the market for digital copying in view of the rapid evolution of communications techniques and of the distribution of information. The Report to the King, annexed to the Decree, also explained that future technical developments would allow rights owners to subject the use of protected works to their prior authorisation.<sup>64</sup> Although this is far from being the case today, scanners are the only digital equipment subject to the payment of a levy in Belgium. The amount of this levy is determined following three criteria: the horizontal optical resolution, the type of scanner involved, and the price.

In November 1997, the Belgian collecting society Auvibel brought action against the Hewlett Packard Corporation, on the ground that Hewlett Packard’s marketing of ‘CD-Writers’ without payment of the remuneration established for private copying constituted an infringement of copyright and related

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<sup>62</sup> Staatsblad 2002, 574, p. 1.

<sup>63</sup> See discussion of rationale of levies in Chapters 5 and 6.

<sup>64</sup> Young and Roosen 1998, p. 96.

rights in sound and audiovisual works, contrary to article 55 of the Copyright Act. The Court of first Instance of Brussels rejected the action mainly on the ground that the physical or legal people who acquired these devices and the corresponding storage media (of a capacity of 650 MB) did so primarily for professional reasons, such as storage of data, and that the private copying of sound or audiovisual works only occurred on a marginal basis. Moreover, the Court agreed with the defendant that the fee established on digital devices and media was 0 % of the sales price and that, in any case, the equipment and storage media involved in the case did appear in the list of digital material not subject to payment of a fee. Finally, the Court declared that if such material were to be used for copyright relevant acts, it would be the King's task to revise the Royal Decree of 1996. To this day, the Royal Decree of 1996 has not been modified and still imposes a levy of 0 % of the sales price of digital recording equipment, such as CD-writers, discrecorders, camcorders, and the like. However, Auvibel does collect a fee on digital storage media, in the amount of 0,0496 ₣ for audio supports and 0,1239 ₣ for video supports, in accordance with article 2(1) of the Royal Decree of 1996.

The Belgian Proposal for an Act modifying the Copyright and Neighbouring Rights Act of 1994 was presented to the Chamber on 23 March 2001 by Senator Monfils, i.e. two months before the final adoption of the Copyright Directive itself.<sup>65</sup> The Proposal is meant to implement the provisions of the Copyright Directive into Belgian law. Amendments have been presented to make it more in conformity with the Directive, but the Proposal has not yet been adopted. In any case, it would bring no changes to the existing Belgian levy scheme, nor is there any mention, either in the Proposal or in the accompanying Explanatory Memorandum, of the relationship between levies and the application of technical protection measures.

#### 4.2.2 France

In 2001 and 2002, the Commission Brun-Buisson in charge of establishing the amount and the basis of remuneration due for private copying activities in France adopted two decisions in order to extend the levy regime to digital recording media.<sup>66</sup> Since then, levies are imposed on such digital media as minidiscs, CDR & RW audio and data, DVDR and RW video, DVD-ram, DVDR and RW data, DVHS, removable audio memory, and MP3 recordable. In between these two decisions, the French Parliament amended Article L. 311-1 of the Intellectual Property Code, by adding a second paragraph providing that such remuneration is also due 'to the authors and publishers of works fixed on any medium other than phonograms and videos, for reproducing them in the circumstances set out in paragraph 2 of Article 122-5 of the Intellectual Property Code, on a digital recording medium.' This modification is meant to take account of the fact that works concerned by private copying in the digital age can no longer be confined to music and film, but include text, graphics, photographs, and the like. To this end, the *Société française des intérêts des auteurs de l'écrit* (SOFIA), created in 1999, received the task in February 2002 to collect and distribute equally between authors and publishers the remuneration due for the digital private copying of literary works.<sup>67</sup> However, the application of this legislative change will not be without problems since the legislator has 'forgotten' to amend the criterion for the duration of recording required to calculate the amount of remuneration. And yet, it has to be said that the duration of recording, of a photograph, for example, is not the easiest of things to ascertain. Admittedly, it is always possible to convert that criterion into a compression rate and calculate in bytes rather than minutes. But such a shift is unconvincing. The duration that serves as a

<sup>65</sup> *Proposition de loi modifiant la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins dans le contexte du développement de la société de l'information* Session de 2000-2001, 23 mars 2001, Document législatif n° 2-704/1 [ci-après « Projet de loi belge »].

<sup>66</sup> Décision n°1 du 4 janvier 2001 de la commission prévue à l'article L.31-5 du code de la propriété intellectuelle relative à la rémunération pour copie privée, NOR: MCCB00000005S, J.O n° 6, of 7 January 2001, p. 336; and Décision n° 3 du 4 juillet 2002 de la commission prévue à l'article L. 31-5 du code de la propriété intellectuelle relative à la rémunération pour copie privée NOR: MCCB0200522S, JO n° 174, of 27 July 2002, p. 12877-12878.

<sup>67</sup> Arrêté du 28 février 2002 modifiant l'arrêté du 13 mars 2000 relatif à la commission prévue à l'article L. 311-5 du code de la propriété intellectuelle, J.O. No. 53, 3 March 2002, p. 4098, art. 2.

legal basis for defining this levy begins as from the initial duration of the work and not from an initial conversion into compressed data.<sup>68</sup>

A draft Bill to modify the French CPI with a view to implementing the Copyright Directive has been circulated in December 2002. However, the draft Bill would make no change to the current levy system, nor does it mention the relationship between levies on blank recording media and the application of technical protection measures. In a report on the remuneration for private copying, published by the *Conseil supérieur de la propriété littéraire et artistique* before the draft Bill was made available, one can read that ‘as long as the remuneration for private copying will remain far lower than the prejudice that this practice causes to the rights holders, the application of technical protection measures will not justify a reduction of the level of remuneration’.<sup>69</sup>

#### 4.2.3 Germany

As we have seen above, Germany has the most elaborate reprographic and private copying regimes in continental Europe, where levies are imposed on recording equipment and media, in addition to a proportional remuneration for users of reprographic equipment. Levies are imposed in Germany on digital recording equipment and media that are recognizably intended for copying works, like scanners, digital compact cassette, digital audiotapes, CD-Rs and RWs, and minidisks.<sup>70</sup> The further expansion of private copying levies to other types of digital recording equipment and media has been a very controversial issue in Germany over the past few years. The call for an expansion of the levy system to other types of digital recording equipment and media comes not only from the side of the collecting societies but also from the government. In a report published in June 2000, the Federal Government plead for a commensurable increase in the current royalty rates on video and audio recording equipment and blank recording media.<sup>71</sup> The report also suggested the inclusion of CD writers, recordable DVD’s, MP3 recording devices and PC’s, in addition to the hardware and storage media that are already acknowledged in current practice as falling under the obligation to pay royalties. Moreover, there is an observable tendency among the German Courts to include digital reproduction technologies within the scope of paragraphs 54 and 54a of the Copyright Act and therefore to subject digital equipment and media to the payment of royalties.<sup>72</sup>

Contrary to the statutes or regulations of other EU Member States, the German Copyright Act does not contain an exact list of equipment and media subject to private copying levies. As we have seen in section 4.1.1.1 above, article 13 of the German Administration of Copyright and Neighbouring Rights Act leaves the task to the relevant collecting societies to draw up tariffs in respect of the rights they administer. The Zentralstelle für Private Überspielungsrechte (ZPÜ) and the VG WORT are thus respectively competent to determine the level and the actual basis for remuneration owed for private copying or reprography. If a general contract exists, the rates of remuneration agreed upon in such a contract constitutes the tariffs for the whole branch. Any dispute arising between a collecting society and a user concerning the tariffs imposed may be submitted to an arbitration panel composed under the supervisory authority of the German Patent and Trademark Office. The Arbitration Board must then endeavour to obtain an amicable settlement to the dispute, which may be brought before the ordinary courts for a binding decision. The levy on scanners is also the result of such an arbitration procedure, dispute, which the parties brought all the way up to the Federal Supreme Court.<sup>73</sup> There are currently two on-going disputes opposing collecting societies to digital equipment manufacturers, concerning the payment of levies on CD writers and on personal computers (PC’s). Since these proceedings are

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<sup>68</sup> Mossé 2001, p. 4.

<sup>69</sup> Report available at: < <http://www.droitsdauteur.culture.gouv.fr/culture/cspla/comcopieprivee.htm> >

<sup>70</sup> See: Kreile 2002, p. 21.

<sup>71</sup> *Zweiter Bericht über die Entwicklung der urheberrechtlichen Vergütung gemäß §§ 54 UrhG*, Drucksache 14/3972, 11 July 2000.

<sup>72</sup> See: BGHZ 121, p. 215 (‘Readerprinter’); and BGH ZUM 1999, p. 649 (‘Fax machines’). See also: Winghardt 2002, p. 353.

<sup>73</sup> BGH, 5 July 2001, I ZR 335/98, *GRUR* 2002/3, p. 246.

not final, the tariffs imposed by each collecting society are not yet binding on the manufacturers and importers of these devices.

The first dispute deals with the imposition of levies on CD writers. In view of the continued refusal of manufacturers and importers to pay royalties on CD writers, the ZPÜ instituted model proceedings before the Arbitration Board at the German Patent and Trademark Office against Hewlett Packard. The Arbitration Board ruled on 5 May 2000 that 'CD Writers' should also be subject to statutory royalties for private copying. The Board saw no legal difference between analogue and digital copying and suggested that the defendant supply information on the number of CD writers that had been sold or put on the market since 1<sup>st</sup> February 1998 in Germany, so that a royalty of DM 17.- plus 7 % VAT for each CD writer could be applied. Hewlett Packard's objection to this settlement proposal forced the ZPÜ to have recourse to the general courts of law. The action was introduced before the Stuttgart District Court, which in a decision of 21 June 2001, found partly in favour of the ZPÜ. It ordered Hewlett Packard to provide information about the number of CD writers that had been sold or put on the market since 1<sup>st</sup> February 1998 and about the type designations and the quantities of CD writers sold or put on the market since 1<sup>st</sup> May 1999 that can be operated as internal or external peripherals to a PC.<sup>74</sup> The Court believed that the copies made using a CD writer could be qualified as falling under the scope of paragraph 54 of the Copyright Act and that this interpretation was not contrary to the 'three-step-test' of article 9(2) of the Berne Convention or article 13 of the TRIPs Agreement. The District Court's decision was confirmed in appeal.<sup>75</sup> Considering the amounts of money involved, the parties have in all likelihood decided to bring the case to the Supreme Court. In any case, it appears that the ZPÜ has not yet begun to collect the levy on CD writers.

The second dispute involves levies on personal computers – PC's – for the reproduction of texts and other graphic works. The collecting society VG Wort and the representatives of the home electronics industry had agreed to a moratorium on the imposition of a levy on PC's, which expired on 31 December 2000. Since months of negotiations between the rights owners and the industry on this subject remained unsuccessful, the collecting societies VG Wort and VG Bild-Kunst unilaterally published a tariff on PC's in the amount of •30. For every personal computer sold in Germany, a levy of •30 would therefore have to be paid, as of 1<sup>st</sup> January 2001, for the reproduction of texts and other graphic works. This time again, the refusal of the members of the home electronics industry to pay the levy fixed by the collecting society, spurred the VG Wort to institute model proceedings before the Arbitration Board at the German Patent and Trademark Office against Fujitsu Siemens Computers. In its settlement proposal, the Arbitration Board ruled that for every PC sold in Germany a levy of •12 should be paid. The association for information economy, telecommunication, and new media, known as Bitkom, has immediately expressed its objection to the settlement proposal. Bitkom argues that there is no legal basis for a levy on PC's since a PC is not a photocopier and since levies must already or will have to be paid on such computer components as scanners and CD writers, that are actually responsible for the reproduction of texts and images.<sup>76</sup> It is to be expected that the parties will not let the case rest and that the courts will be called upon to intervene. Until the courts have settled the matter, no levy is raised on the sale of PC's in Germany.

On 31 July 2002, the German government presented its Proposal for an Act concerning Copyright in the Information Society in first reading of the Bundestag. Although no changes are suggested to the existing levy scheme, the current version of the Proposal would make certain modifications related to the private use exemption in Germany, as a result of which the scope of the private use exemption would be much narrower than under existing law. More importantly for the purpose of this study is the proposed change to paragraph 13 of the German Administration of Copyright and Neighbouring Rights Act. According to this Proposal, a fourth subparagraph would be added to the current paragraph 13 to read as follows:

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<sup>74</sup> LG Stuttgart, ZUM 2001, p. 614.

<sup>75</sup> OLG Stuttgart, 4.9.2001 (4 U 142/01).

<sup>76</sup> See: Bitkom, 'BITKOM lehnt Vorschlag der Schiedsstelle für Pauschalabgaben auf PCs ab', Press Release of 4 February 2003, available at: <<http://www.bitkom.org/index.cfm>> (12.02.2003)

‘(4) When establishing the tariffs, which are based on §§ 54 and 54a of the Copyright Act, consideration must also be taken of the extent to which technical protection measures are applied according to § 95a of the Copyright Act to the works concerned or other subject matter concerned.’

Lobby groups have welcomed this Proposal, but suggested that the provision should at least refer to ‘effective’ technical protection measures.<sup>77</sup> The Proposal’s provision essentially incorporates the requirement set out in article 5(2)(b) of the Copyright Directive according to which the fair compensation due to authors and other rights holders for private copying must ‘take account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned’. Unfortunately, the Proposal contains no criteria of application for this provision, and the issue would therefore have to be fought out between the ZPÜ and the consumer electronics industry.

#### 4.2.4 Italy

Apart from the levy imposed on analogue audio and videocassettes, a levy is currently imposed in Italy only on blank CD-R and CD-RW data (2 % of the retail sales price), CD-R and CD-RW audio, and minidisks (10 % of the retail sales price). The expansion of the levy system to digital storage media was the result of negotiations carried out between the collecting society SIAE and three organisations representing the interests of the debtors of the remuneration for private copying, i.e. ASMI (Associazione Supporti Multimediali Italiana), ANIE (Associazione Nazionale Imprese Elettrotecniche ed Elettroniche) and ANDEC (Associazione Nazionale Distributori Elettronica Civile).

In March 2002, the Italian Parliament delegated to the government the power to transpose the provisions of the Copyright Directive into Italian law.<sup>78</sup> In September 2002, the government released a draft legislative decree implementing the provisions of the Directive.<sup>79</sup> Article 71-septies provides that the compensation for private copying is determined by decree of the Minister for Cultural Activities and Patrimony. In determining the level of compensation, account will be taken of the application or non-application of the technological measures, as well as of the different impact of the digital copy compared to the analogue copy (Article 71-septies (2)). The decree will be subject to review every three years. Until such time as the decree fixing the compensation for private copying is adopted and in any event until 31 December 2005, article 39 of the draft decree implementing the Directive provides that the compensation owed for private copying will be as follows:

- a) analogue audio supports: 0,23 euro per each registration hour;
- b) dedicated digital audio supports, such as minidisks, CD-R audio and CD-RW audio: 0,29 euro per hour of registration. The compensation is proportionately increased for supports, which have a longer duration;
- c) non-dedicated digital supports which can be used for the registration of sound, such as data CD-R and data CD-RW: 0,23 euro for 650 megabytes.
- d) digital fixed and transferable audio dedicated memories, such as flash memories and cartridges for MP3 and analogous players: 0,36 euro for 64 megabytes;
- e) analogue video supports: 0,29 euro for each hour of registration;
- f) dedicated digital video supports, such as DVHS, DVD-R video and DVD-RW video: 0,29 euro per hour, which is equal to 0,87 euro for a support with a registration capacity of 180 minutes. The compensation is proportionately augmented for supports that have a longer duration;
- g) digital supports which can be used for the registration of sound and video, such as DVD Ram, DVD-R and DVD-RW: 0,87 euro per 4,7 gigabytes. The compensation is proportionately augmented for supports that have a longer duration;

<sup>77</sup> Verband Privater Rundfunk und Telekommunikation e.V. (VPRT), *Positionspapier des VPRT zum Gesetzentwurf der Bundesregierung für ein “Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft” BT-Drucks. 15/38*, 6 November 2002, p. 13.

<sup>78</sup> Legge 1 marzo 2002, n. 39, *Disposizioni per l’adempimento di obblighi derivanti dall’appartenenza dell’Italia alle Comunità europee – Legge comunitaria 2001*, Gazette officielle n° 72 du 26 mars 2002 – Supplément ordinaire n° 54, art. 30.

<sup>79</sup> Attuazione della direttiva 2001/29/CE del Parlamento Europeo e del Consiglio del 22 maggio 2001 sull’armonizzazione di taluni aspetti del diritto d’autore e dei diritti connessi nella società dell’informazione, SEGRETARIATO GENERALE, Servizio XI, Diritto d’Autore e Vigilanza sulla SIAE, available at: <<http://www.iusreporter.it/Testi/schemadecreto2001-29-ce.htm>> (12.02.2003)



h) devices exclusively dedicated to analogue or digital video or audio recording: 3 percent of the reseller's price.<sup>80</sup>

#### 4.2.5 The Netherlands

The *Stichting Onderhandeligen Thuiskopievergoeding* (SONT) recently extended the application of the remuneration due for private copying for a year, until 2003.<sup>81</sup> The current remuneration applicable to analogue and digital supports remains unchanged during that period, that is: •0,32 on minidisks, •0,42 on CDR and CDRW audio and •0,14 on CDR and CDRW data

On 22 July 2002, the Dutch government presented its Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive to the Second Chamber of Parliament.<sup>82</sup> A parliamentary committee has examined the Proposal in December 2002, but its adoption was delayed due to elections. With respect to the private copying of sound and audiovisual works on blank supports, Article 16(c) of the Copyright Act 1912 would be modified to better conform to the provisions of the Copyright Directive. For the purposes of this study, the most relevant modification to the private copying regime would concern the manner in which the level of remuneration and the types of supports to which it applies are determined. Until now, these two aspects of the remuneration for private copying were determined solely by the *Stichting Onderhandeligen Thuiskopievergoeding* (SONT), according to article 16(e) of the Copyright Act 1912. Although the SONT is still the designated organisation in the area, the government would be given the task to determine, by statutory instrument, the types of supports to which the remuneration would apply. The government would also be given the power to specify rules and conditions for the determination of the form and level of the 'fair compensation' due for private copying.<sup>83</sup> In addition, the Proposal would abolish Article 16(e)(2) of the Dutch Copyright Act of 1912, according to which the 'running or playing time of the object in question is of particular importance in determining the level of the remuneration'. This was a welcomed suggestion, since interested circles consider that the parties, i.e. the SONT and the *Stichting de Thuiskopie*, are in the best position to know which factors should be taken into consideration in determining the level of remuneration.<sup>84</sup>

Contrary to the German Proposal, the Dutch Act would make no express reference to the requirement of Article 5(2) of the Copyright Directive, according to which the fair compensation due to authors and other rights holders for private copying must 'take account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'. In the Explanatory Memorandum accompanying the Proposal, the Minister of Justice declares on this point that, for the time being, the current private copying regime should be applied to analogue and digital storage media, since the reasons initially invoked for the creation of such a regime are still valid and since there are no practical alternatives currently available.<sup>85</sup> The Minister adds that it is to be expected that the technology will in the future allow the regulation of private copying activities so that there will then be little or no need for a levy system. The task is thus given to the Minister of Justice to

<sup>80</sup> Text quoted is from draft decree, as revised in February 2003. Art. 39(h) of the original proposal read as follows: 'equipment for analogue or digital, video and sound registration, including the components of information (computer) systems, players that can be used for registration and digital jukeboxes: 3% of the price charged to the retailer. For multifunctional equipment, the percentage is reduced to 1,5% of the price charged to the retailer.'

<sup>81</sup> Staatscourant, 18 November 2002, No. 222, p. 9.

<sup>82</sup> Kamerstukken, Tweede Kamer, vergaderjaar 2001-2002, 28 482, No. 1-2.

<sup>83</sup> Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, Year 2001-2002, 28 482, No. 1-2, art. 16(c)(7).

<sup>84</sup> Rapport van de Studiecommissie Informatiemaatschappij van de Vereniging voor Auteursrecht, *Reactie op het Wetsvoorstel 28 482 tot uitvoering van de Richtlijn, Auteursrechten en naburige rechten in de informatiemaatschappij (2001/29/EG)*, Amsterdam, 10 October 2002.

<sup>85</sup> Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, Year 2001-2002, 28 482, No. 3, p. 46.

determine the types of supports to which the remuneration would apply, on the belief that his involvement would ensure a better transition between a levy regime and a technical protection regime.

The Explanatory Memorandum further explains that, when the technical protection measures will have replaced the levy regime, the compensation will be deemed included in the price asked for the purchase of the support or for the on-line delivery of protected material. Other calculation methods would also be possible, according to the Minister. The requirement set out in Article 5(2)(b) of the Copyright Directive means that consideration must not only be taken of whether technical protection measures are actually applied, but also of whether these techniques are really available, for whom, and for which type of protected material. If technical protection measures are available in practice, i.e. if they can be used on an economical basis, the levies should not become a bonus for rights holders who make no use of technical protection measures. In such a case, there would be, depending on the state of things, less need for a compensation system as the levy regime. The Minister of Justice believes that the current Proposal is able to take account of the developments in the area. The report of the parliamentary committee did not react on this issue.<sup>86</sup>

#### 4.2.6 Spain

Until now, Spain has imposed levies only on analogue recording devices and storage media. The extension of the levy system to digital recording devices and digital storage media has been a highly debated issue recently, following the decision of 2 January 2002 of the Tribunal of First Instance of Barcelona No. 22, in a case opposing the Sociedad General de Autores y Editores (SGAE) against Traxdata Ibérica, S.L., an enterprise specialised in the importation and distribution in Spain of compact disc recordables. The Tribunal granted SGAE's demand and ordered Traxdata Ibérica to supply the SGAE with the necessary information concerning the importation and distribution of CD-R's in recent years. According to the Tribunal, it is obvious that the CD-R data is the ideal medium for the reproduction of phonograms for private use. It is thus unacceptable for the defendant to argue the impossibility to control the abusive use by the consumers of CD-R data, because it is common knowledge that the primary habit of Spanish consumers is to copy CDs legally acquired by others, or to store music or other protected material directly from the Internet. If consumers do it, it is because the supports like CD-Rs audio or data allow it. Aware of the characteristics of the Spanish market, the responsibility lies in these circumstances on the manufacturers, importers, or distributors of such storage media. Someone who takes advantage of the commercial popularity of the CD-R format, and of its multiple possibilities to record music, may not escape the accomplishment of the obligations set by law, so that the obligation to pay remuneration to provide information clearly rest on the defendant.

On 7 November 2002, the Spanish Ministry of Education, Culture, and Sports released a draft Proposal for an Act to modify the Royal Legislative Decree of 12 April 1996, which approved the consolidated text of the Intellectual Property Act (TRLPI). Article 25 of the TRLPI, dealing with private copying, would be entirely replaced. The most significant modification would be, like in the Netherlands, the manner in which the level of remuneration and the types of supports to which it applies are determined. Until now, these two essential features of the private copying regime were determined in the TRLPI itself or in applicable royal decrees. Article 25(4) of the draft Proposal reads as follows:

The Council of Ministers, upon proposition by the Minister of Education, Culture, and Sports, after hearing the parties and after obtaining prior report from the Commission on Intellectual Property, will establish and actualise, at least twice a year:

- a) The list of equipment or devices and material that are subject to the payment of remuneration taking account for each of them of their objective reproduction capacity and their inherent effectiveness in realising the reproductions to which paragraph 1 refers;
- b) The levies applicable to each equipment or device and material, taking account among other criteria, of the type of equipment, device or material concerned, of their capacity and quality for copy or storage, of their incidence in the realisation of the private copies and of their effect on the market for the work or other subject

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<sup>86</sup> Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Report issued on 26 November 2002, Parliamentary documents, Second Chamber, Year 2002-2003, No. 4.

matter involved. Consideration must also be taken of the application or non-application to the work or subject-matter concerned of the technological measures referred to in article 172.

In the Explanatory Memorandum, the Spanish government explains that although nothing precludes the application of the TRLPI to the digital context, given its technology-neutral formulation, one cannot ignore the fact that the norms and criteria for the concrete application of the remuneration right were designed for the analogue world. It is therefore considered appropriate to maintain an express reference to the objective reproduction capacity of equipment, devices, and material. To this end, the Administration would be given the task of determining and periodically actualising which equipment, device or material is subject to payment of remuneration, as well as the level of remuneration, after a consultation process among interested parties has taken place.

#### *4.2.7 Implementation of Copyright Directive in other EU Member States*

Apart from the implementing efforts of the six EU Member States, which we have examined above, there are only few legislative developments of interest to report. The most interesting in fact is the Greek legislative amendment. **Greece** was the first Member State of the European Union to formally implement the Copyright Directive on September 24, 2002, upon the voting of a bill of the Ministry of Culture (article 81 of law 2725 for the implementation of the Directive 2001/29/EC of the European Parliament and of the Council, of 29 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and other provisions).

In connection with the transposition of the Directive, the controversial 2% levy on PCs, part of the law on hardware levies, was abolished. The law was amended as follows (article 14 of law 3049):

- i. The 2% levy on PCs is abolished
- ii. The 4% levy on photocopying machines and paper remained.
- iii. A new 4% levy on scanners and diskettes (with storage capability under 200 Mbytes) was added, which is distributed to authors and publishers
- iv. Audio and audiovisual devices and storage means including digital devices, which are not internal part or cannot be incorporated in a computer subject to a 6% levy.
- v. All levies being calculated either on import price or on sales price if the items are produced in Greece (not on whole sale or retail price)

**Denmark** was the second Member State of the European Union to formally implement the Copyright Directive on 11 December 2002. The Act does not amend the levy system as set forth in Articles 39 - 46 of the Copyright Act. It is expected that a separate bill revising the system will be proposed at a later stage.

As we have mentioned above, **Ireland, Luxembourg, Portugal** and **Sweden**, have yet to publish any kind of implementing legislation. In **Austria**, the Ministry of Justice had circulated among interested circles a draft Proposal for the implementation of the Copyright Directive already by November 2001. On the basis of this draft text, a Proposal for an Act to modify the Copyright Act was drawn up and was opened for comment until 20 September 2002.<sup>87</sup> However, the adoption process came to a halt when the Parliament was dissolved and the election process was launched during the Fall 2002. Although no changes are suggested to the existing levy scheme, the Austrian Proposal would have narrowed down the existing private use exemption. There was further no mention, either in the Proposal or in the accompanying Explanatory Memorandum, of the relationship between the application of levies on blank recording media and the application of technical protection measures on works or other subject matter. In **Finland**, the latest information available is that the constitutional law committee failed to review Government Proposal 177/2002 on Copyright Law Reform in time before the March elections. The proposal has effectively been cancelled, and returned to the Ministry of Education for further drafting. A new proposal is expected later this year.

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<sup>87</sup> Ministerialentwurf einer Urheberrechtsgesetz-Novellierung 2002, GZ 8.117/25- I.4/2002. See: Walter 2002, p. 217.

Finally, the **United Kingdom** also issued in August 2002 a Consultation Paper on UK Implementation of the EC Directive on the harmonisation of certain aspects of copyright and related rights in the information society. As with the earlier Directives, the UK government proposes to amend current legislation by means of Regulations under section 2(2) of the European Communities Act 1972 (ECA). However, in view of the fact that almost 300 responses were sent by interest groups and individuals to the government's consultation paper, the UK Patent Office was forced to publish a notice announcing that 'while [it] now sees no prospect of meeting the Directive's transposition date of 22 December 2002, [it] does remain committed to the earliest possible implementation of this important Directive. [It] will endeavour to implement the Directive by 31 March 2003 at the very latest'. Be that as it may, the Proposed Regulations are of limited relevance to the present study, since no levy system is in force in the United Kingdom today, nor would the Proposed Regulations introduce one.

## 5. Private copying, levies and DRM under the EC Copyright Directive

The EC Copyright Directive is the first piece of EC legislation to deal directly with private copying. Previous attempts by the European Commission to harmonise this thorny issue, including a widely circulated, but never-published draft proposal for a directive<sup>88</sup>, were aborted, most likely because existing differences in private copying legislation in the Member States were considered too large to overcome. The Copyright Directive allows Member States to maintain or introduce private copying exemptions under two concurrent regimes:

- the reprography provision of Art. 5.2 (a), which allows exemptions in respect of photographic copying on paper or similar media (i.e. photocopying) for unspecified purposes, including private use; and
- the more restricted and precise private copying provision *stricto sensu* of Art. 5.2 (b).

In the remainder of this report, we will focus on the latter.

### 5.1 Notion of private copying

The Directive does not define, or even use, the term ‘private copying’. Art. 5.2 (b) allows exceptions or limitations to the reproduction right:

‘in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.’

Reproductions excepted pursuant to Art. 5.2 (b) must be ‘made by a natural person for private use and for ends that are neither directly nor indirectly commercial’. This clearly excludes any form of commercial copying, be it for legitimate business-related purposes or ordinary ‘piracy’. Moreover, Art. 5.2 (b) does not permit exemptions allowing ‘private’ copying by or within business enterprises or other *legal* persons, even if such copying is without commercial purpose. Consequently, the scope of any exemption permitted by Art. 5.2(b) is fairly limited, as must be any system of private copying levies directly associated with it. Levies, as a form of ‘fair compensation’ prescribed by Art. 5.2(b), therefore cannot serve to compensate right holders for losses incurred by acts not exempted pursuant to this provision, such as intra-company uses (e.g. back-up copying, archival copying or ephemeral copying), ‘private’ uses that exceed the scope of the exemption (e.g. peer-to-peer ‘file sharing’) or acts of piracy pure and simple (e.g. distributing unauthorised copies online or offline). This is an important observation, that we will revisit later on this study. In all, Art. 5.2(b) leaves room only for purely private copying, i.e. reproduction for personal uses. Concomitantly, any levies due pursuant to Art. 5.2(b) must be related directly to media and/or equipment used for such limited purposes.

It is also important to note that the Directive does not *impose* an exception for private copying upon the Member States. National legislatures remain free not to permit private copying at all, or to restrict existing exemptions to analogue uses. Moreover, if and when Member States decide to maintain or introduce private copying exemptions, such limitations must comply with Art. 5.5 of the Directive, which incorporates the so-called ‘three-step test’:

‘The exceptions and limitations provided for in paragraphs 1,2,3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

The three-step test, which can be found in various instruments of international copyright law (Art. 9.2 Berne Convention, Art. 13 TRIPs Agreement and Art. 10 WIPO Copyright Treaty), serves as a general restriction to *all* exemptions presently found, or to be introduced, in the Member States’ copyright

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<sup>88</sup> European Commission, Proposition de Directive du Parlement Européen et du Conseil relative à l’harmonisation de certaines règles du droit d’auteur en des droits voisin applicables à la copie privée, Brussels, December 1995 (unpublished).

laws. Even if an exemption falls within one of the 21 enumerated categories of permitted exceptions, it is for the national legislatures (and, eventually, the courts) to determine on a case-by-case basis whether the general criteria of the three-step test are met. Exemptions permitting digital private copying, therefore, are permitted only (1) ‘in certain special cases’; (2) ‘which do not conflict with a normal exploitation of the work’; and (3) ‘do not unreasonably prejudice the legitimate interests of the rightholder.’

It is a matter of some speculation, and eventually for the European Court of Justice to decide, whether a generally worded private copying exemption will pass this test.<sup>89</sup> On the one hand one might argue that in the digital environment, where end users are capable of producing perfect copies by the proverbial ‘push-of-a-button’, private copying is not a ‘certain special case’ or conflicts with a ‘normal exploitation of the work’ almost by definition. On the other hand, it should be pointed out that broadly worded private copying exemptions already existed in many European countries at the time when Art. 9.2 BC, the predecessor of Art. 5.5 of the Directive, was introduced in the Berne Convention in 1967.<sup>90</sup> It is generally assumed that such exemptions were ‘grand-fathered’ into the BC, and are therefore not in conflict with the test.<sup>91</sup> Then again, one might agree with Recital 38 preceding the Directive that digital private copying is ‘likely to be more widespread and have a greater economic impact’ [than analogue private copying].

### *Privacy*

Finally, it is important to underscore that private copying exemptions serve, at least in part, to protect fundamental freedoms, such as users’ rights to privacy.<sup>92</sup> Privacy considerations played a crucial role in the German Federal Supreme Court’s landmark *Personalausweise* decision, which eventually led to the introduction of a levy on tape recording equipment in lieu of an outright prohibition on private copying.<sup>93</sup> The Court considered that the monitoring of individual users’ private copying behaviour would inevitably encroach upon their constitutionally protected private sphere.<sup>94</sup>

As Bygrave predicts, privacy protection will become less problematic as DRM systems incorporate so-called privacy-enhancing technologies (‘PET’s’), which are aimed at safeguarding the privacy rights of content users<sup>95</sup> by allowing users to use content and transact with content providers in relative anonymity. Such anonymity may be implemented in a DRM system in a variety of ways, e.g. by allowing for payment in the form of ‘digital cash’ and for users to transact in ‘digital anonymity’ (or pseudonymity),<sup>96</sup> in order to prevent unwanted ‘profiling’ based on users’ intellectual preferences.<sup>97</sup>

Recital 57 preceding the EC Copyright Directive underscores the importance of implementing privacy safeguards in DRM systems, so as to avoid a conflict with EC data protection law:<sup>98</sup>

‘Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24

<sup>89</sup> See e.g. Ricketson, p. 10: ‘the use must be for a specific, designated purpose: a broadly framed exemption, for example, for private or personal use generally, would not be justified here.’ But see Landgericht Stuttgart, 19 June 2001, Case 17 O 519/00 (*CD-Brenner*), § 46 ff (private copying exemption in articles 53-54 of German Copyright Act deemed to pass three-step test).

<sup>90</sup> WIPO, Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967.

<sup>91</sup> Ricketson 1987, p. 479-481.

<sup>92</sup> Hugenholtz 1999, p. 107.

<sup>93</sup> Visser 1996, p. 49-51.

<sup>94</sup> BGH 29 May 1964, GRUR 1965, p. 106 (*Personalausweise*). See discussion elsewhere in this report at § 3.3 (above) and § 6.1 (below).

<sup>95</sup> Bygrave 2002, p. 57; see generally Bygrave & Koelman 2000, p. 99 ff.

<sup>96</sup> Bygrave and Koelman 2000, *ibidem*.

<sup>97</sup> Cohen 1996, p. 981.

<sup>98</sup> European Commission 2002, p. 14.

October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.’

To be sure, European data protection law does allow identifying users or monitoring usage inasmuch as this ‘is necessary for the performance of a contract to which the data subject is party’ (Art. 7 (b) EC Data Protection Directive). In other words, personal data gathering by DRM systems is subjected to a test of proportionality. If less privacy-intrusive means of operating the system are available, they should be applied. The importance of building privacy safeguards into DRM systems, therefore, can hardly be overstated, not only to ensure compliance with privacy legislation, but also as a potential ‘trigger point’ in a future phase-out of copyright levies.<sup>99</sup>

Clearly, some DRM systems bear a greater risk of privacy invasion than others. Whereas it is difficult to see how a simple copy-protection measure applied to digital media (e.g. a music CD) would pose such a risk, more sophisticated online DRM services that allow the monitoring of individual usage might indeed, if not equipped with PET’s, infringe a user’s right to privacy. Whether, and to what extent, existing and future DRM systems actually comply with privacy legislation, however, is a question that merits separate study and certainly beyond the scope of the present report.

## 5.2 Policies underlying the Copyright Directive

It goes without saying that any legal system that allows for digital private copying subject to levies will be difficult to reconcile with a legal regime aimed at protecting and promoting digital rights management systems. Indeed, as a recent study by the Dutch Ministry of Justice<sup>100</sup> on the future of copyright clearly demonstrates, one cannot have one’s cake and eat it. Lawmakers will eventually have to decide between a policy of further ‘levitation’ (i.e. expanding levies to cover all digital media and equipment), and one of creating incentives for digital rights management. The Dutch Ministry opts for the latter approach, primarily because the social costs of law enforcement are expected to be considerably lower in an environment where right holders are in a position to control themselves, by legal and technical means, the uses that are made of their works. The study suggests that the wide-scale introduction of digital rights management would diminish the burden of piracy-related lawsuits on the courts and public prosecutors. The study also notes the undesirable side effect of a world where levies and DRM go hand in hand: *double payment*, i.e. the danger of consumers paying twice for the same service: first by paying a license fee for the use of DRM-controlled content, second by paying a levy on media or equipment.<sup>101</sup>

The framers of the EC Copyright Directive, however, have not chosen between a scenario of levies and one of DRM. Instead, they have tried in vain to square the circle, by permitting digital private copying exceptions, subject to ‘fair compensation’ (Art. 5.2 b), and at the same time rigorously protecting so-called ‘technical protection measures’ (Art. 6) and rights management information (Art. 7). This ambivalent approach is also apparent from the recitals preceding the Directive. Whereas Recital 13 insists that ‘consistent application at European level of technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law’, Recitals 38 and 39 allow the continuation of private copying levy schemes, or even the expansion thereof into the digital environment, subject to certain conditions and restrictions.

Undoubtedly, the aim of the European Commission was to create a solid legal framework for the development and growth of digital rights management systems, which would foster the development of ‘pay-as-you-go’ (on-demand) type business models, in which users would pay for each use of every

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<sup>99</sup> See further discussion at § 6.1 and 6.3 (below).

<sup>100</sup> Dutch Ministry of Justice 2001. See also letter to the Dutch Parliament of 19 March 2002, Second Chamber, 26538, no. 6.

<sup>101</sup> Dutch Ministry of Justice 2001, p. 57. See also European Commission 2002, p. 16.

(portion of a) work retrieved from the internet.<sup>102</sup> To this end, the original proposal of the Directive attempted to restrict statutory limitations as much as possible. Indeed, in the light of the *acquis communautaire* of the Computer Programs Directive<sup>103</sup> and the Database Directive,<sup>104</sup> one might have expected a total prohibition of digital private copying. Both under the Database Directive's copyright regime (Article 6.2) and *sui generis* right (Article 9a), reproduction for private purposes is permitted only with regard to 'non-electronic' databases. The Computer Programs Directive prohibits private copying of computer software altogether, except for the occasional back-up copy (Article 5.2).

As finally adopted, the Directive does allow Member States a measure of freedom to preserve, or even introduce, private copying regimes, including such that would allow private copying onto digital media or platforms. The Directive tries to reconcile the irreconcilable in a variety of ways:

- by underscoring (in Recital 38) that digital private copying is 'likely to be more widespread and have a greater economic impact' [than analogue private copying], and that '[d]ue account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.'
- by admonishing (in Recital 39) that '[w]hen applying the exception or limitation on private copying, Member States 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.'
- by prescribing in Art. 5.2 (b), as elucidated in Recital 35, that in calculating the amount of 'fair compensation' for acts of digital private copying the 'application or non-application of technological measures' be taken into account.
- by allowing in Art. 6.4(2) Member States to impose 'appropriate measures' upon right holders with the aim of allowing qualified users to exercise their freedom to make digital private copies of technically protected copies.

### 5.3 Fair compensation

In the remainder of this Chapter, we shall focus on the notion of 'fair compensation', as it applies to digital private copying. 'Fair compensation' is a novelty in EC copyright law. The EC Rental Rights Directive provides for a right to 'equitable remuneration', in only two instances: for rental of phonograms or films embodying works or performances (Art. 4.1) and for broadcasting of phonograms (Art. 8.2).<sup>105</sup> Similar notions already existed in some Member States' copyright and patent laws, as part of statutory or compulsory license schemes.

Judging from its distinct and unique wording, 'fair compensation' must be distinguished from 'equitable remuneration'. The term 'fair compensation' saw light in the amended proposal of the Copyright Directive, following an amendment by the European Parliament in first reading.<sup>106</sup> As finally adopted, the Directive provides for a right to 'fair compensation' in three instances: for reprographic reproduction (Art. 5.2 (a)), for private copying (Art. 5.2(b)), and for reproduction of broadcast programs by social institutions (Art. 5.2(e)). The Directive itself provides little guidance in interpreting this notion. By contrast, Recital 35 states:

'In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account

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<sup>102</sup> Koelman 2003. See e.g. the description of 'The 'on-line'' market' in the Explanatory Memorandum accompanying the Directive (original proposal), § 6-8.

<sup>103</sup> Council Directive 91/250 on the legal protection of computer programmes, Official Journal No. L 122/42 of 17 May 1991.

<sup>104</sup> Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, 11 March 1996, OJ No. L 77/20 of 27 March 1996.

<sup>105</sup> See European Court of Justice, 6 February 2003, Case C-245/00 (SENA v. NOS).

<sup>106</sup> Reinbothe 2001, p. 738.



should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.'

Recital 35 confirms that 'fair compensation' is not the same as 'equitable remuneration'. By introducing the notion of 'fair compensation' the framers of the Directive have attempted to bridge the gap between those (continental-European) Member States having a levy system that provides for 'equitable remuneration', and those (such as the United Kingdom and Ireland) that have so far resisted levies altogether.<sup>107</sup>

Member States must tailor the form and level of 'fair compensation' to 'the particular circumstances of each case'. Primary reference point for determining the 'possible' level of such compensation is the 'possible harm to the rightholders resulting from the act in question' or the 'prejudice to the rightholder'. The notion of fair compensation is thereby intricately linked to the notion of *harm* (damage), i.e. the prejudice suffered by a right holder due to acts of private copying. This is a clear departure from the notion of 'equitable remuneration', which is rooted in notions of natural justice and based on the theory, developed particularly in German copyright doctrine, that authors have a right to remuneration for each and every act of usage of their copyrighted works ('Vergütungsprinzip'). Whereas 'equitable remuneration' may, therefore, be due in situations where rightholders suffer no (actual or potential) harm at all, Recital 35 clarifies that 'fair compensation' is required only when and if rightholders are (actually or potentially) harmed by acts of private copying. Consequently, one might argue that Member States are under an obligation to provide for compensation only if the likelihood of such harm can be reasonably established.

Moreover, Recital 35 establishes a *de minimis* rule, by suggesting that 'in certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.' In a statement on Recital 35 the European Commission has indicated that 'time shifting' (i.e. the recording of radio or television broadcasts for later consumption) would qualify as such a situation.<sup>108</sup> In many cases, the probability of more than *de minimis* harm being caused by acts of private copying will be low. More often than not private copies do not compete with copies sold or licensed in the market place.<sup>109</sup> Another example of such 'harmless' private copying might be 'porting' of legally purchased music CD's to equipment elsewhere in the home (e.g., PC's), outside the house (e.g., car stereo, holiday home or camper van ) or onto portable media (e.g., disk man). A third example might be the creation of a CD compilation containing the 'best of my own record collection'.

In this context it is important to underscore that the payment of 'fair compensation', as required by the Directive, is not intended, as sometimes mistakenly believed, to compensate right holders for acts of *illegal* copying (i.e. acts of piracy or 'private' copying exceeding applicable exemptions).<sup>110</sup> 'Fair compensation' is due only in cases of *legitimate private copying*, as permitted under the copyright laws of the Member States. The 'digital piracy' of copyrighted works and phonograms, as is presently occurring on a rampant scale – particularly over peer-to-peer networks or 'file-sharing' sites – therefore cannot and may not be a factor in determining the level of 'fair compensation'.

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<sup>107</sup> Reinbothe 2001, *ibidem*.

<sup>108</sup> Reinbothe 2001, *ibidem*.

<sup>109</sup> In practice private copying is likely to bring a mixture of benefits and harm to content owners. Copying (whether legal, private or unauthorized) may in some cases actually lead to increased sales, for example, where a user is given or acquires a copy or sample of content, and then decides to purchase the original.

<sup>110</sup> Gillian Davies, 'Private Copying of Sound and Audio-Visual Recordings', EC Study, p. 11-12.

Also, no ‘fair compensation’ is due for the vast quantities of internet-(web-)based content which are downloaded for archival purposes with the implied or express consent of the content providers, and therefore fall outside the scope of any private copying regime altogether. Most providers of freely available content on the web are likely to applaud private copying, and would certainly not expect remuneration under a levy scheme.<sup>111</sup> Moreover, no levies are due for digital private copies of public domain materials, such as works in which copyrights have expired or (as in most Member States) laws, regulations and other government-produced information.

The scope of Art. 5.2(b) based levies is further narrowed down by the fact that the Directive does not apply to ‘digital’ subject matter covered by previous EC directives, such as computer programs and databases.<sup>112</sup> Any copies permitted under those pre-existing directives, such as the making of back-up copies (an exception mandated by Art. 5.2 of the Computer Programs Directive), therefore, may not be taken into account.

Recital 35 confirms that the framers of the Directive have attempted to avoid double payment by consumers of copyrighted works. No compensation is required ‘in cases where rightholders have already received payment in some other form, for instance as part of a licence fee’. Therefore, no levy is due for files copied by users of proprietary online services or (other) digital rights management systems. Also, insofar as a work or phonogram is distributed in copy-protected form, and the accompanying end-user license allows for (a measure of) private copying, no compensation is in order. A literal interpretation of the quoted part of Recital 35 even suggests that where retail prices of information products (e.g. academic publications) are set taking into account *a priori* a measure of private copying, ‘rightholders have already received payment in some other form’. Arguably, the same holds true in cases where content owners charge different prices for copy-protected and reproducible content (e.g. music CD’s).

What the Directive does not say, but is clearly implied by its instruction to take ‘account of the application or non-application of technological measures’, is that compensation would be wholly unjustified in cases where private copying has been made technically impossible, or at least practically infeasible, as in the case of DVD’s. Due to the tremendous success on the consumer market of the DVD format, it is expected that content will soon no longer be available on VHS or other analogue platforms. We will further discuss the implications of the (non)application of technological measures in § 6.3.

In sum, in all probability a more than substantial number of digital copies – possibly the majority of copies – that end users of copyrighted works produce in practice, either on digital media or digital equipment, will either not cause more than minimal harm to the right holders, or fall outside the scope of Art. 5.2(b) of the Directive altogether. Seen in this light, legislatures and courts in Member States should think twice before ‘automatically’ expanding existing analogue levies to digital media or equipment.

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<sup>111</sup> Interestingly, an organisation that promotes the creation of a ‘commons’ of freely available copyrighted content (Creative Commons), is currently developing a digital rights management system that allows and encourages users to ‘share’ content for non-commercial purposes. See [www.creativecommons.org](http://www.creativecommons.org).

<sup>112</sup> Art. 1.2 EC Copyright Directive.

## 6. Interpreting and implementing the phase-out provision

In this chapter, we shall attempt to interpret the ‘phase-out’ provision of Art. 5.2 (b) of the Copyright Directive which is the central issue of this study. How should account be taken of ‘the application or non-application of technological measures’ when calculating the amount of ‘fair compensation’ for acts of digital private copying?

### 6.1 Contributory liability revisited

Before shedding light on this important question, let us again consider the *raison d’être* of the existing system of levies, as described in Chapters 3 and 4. Recall that the German levy system, which has served as a model for all present-day levy systems, was directly inspired by a series of five cases decided by the German Federal Supreme Court in the 1950’s and 1960’s. Applying a theory of ‘adequate causation’<sup>113</sup>, the Court held that producers or merchants of tape recording equipment were liable for contributory copyright infringement.

In the *Personalausweise* decision of 1964 the Court distinguished the allegedly unlawful act of selling tape recorders to consumers, thereby facilitating unauthorized private copying, from the perfectly legitimate act of trading in musical instruments (such as church organs), which are equally suitable – indeed, purpose-built – for performing copyright infringing acts. The crucial difference, in the opinion of the Supreme Court, was the lack of (legal) possibilities to monitor and control the use of the equipment in the private sphere. Whereas performances of musical works, using musical instruments, generally occur in public, and therefore can be easily patrolled, no such possibilities exist in respect of acts of private copying.<sup>114</sup> For this reason, the Court considered an extensive application of the doctrine of causation appropriate in the case at hand.

The infeasibility of licensing and enforcing copyrights within the private sphere, in connection with the invasion of personal privacy any such enforcement would inevitably entail, inspired the Supreme Court to impose upon the manufacturers and distributors of tape recording equipment a court-made levy, which eventually led to the introduction, in the new German copyright law of 1965, of a statutory equipment levy.<sup>115</sup>

In the light of subsequent technological development, culminating in the digital rights management technologies described in Chapter 2, it is uncertain whether the court would arrive at a similar conclusion today.<sup>116</sup> Copy-protection technologies currently available enable right holders to restrict private copying without necessarily encroaching upon the users’ private sphere.<sup>117</sup>

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<sup>113</sup> Koelman & Hugenholtz 1999, p. 8: ‘Adequate causation is found if an act or omission has, in a general and appreciable way, enhanced the objective possibility of a consequence of the kind that is the subject of the case. In deciding this, account is taken of all the circumstances recognisable at the time the event occurred.’ In the cases decided by the Federal Supreme Court, the unlawfulness of manufacturing, selling or advertising tape recorders was based on § 1004 of the German Civil Code (‘Störung’, i.e. interference with property rights), and/or § 823 ff. (unlawful conduct). See summary of cases by D. Reimer, GRUR 1965, p. 109-110.

<sup>114</sup> BGH 29 May 1964, GRUR 1965, p. 106 (‘*Personalausweise*’): ‘Anders liegt es dagegen, wenn Instrumente geliefert werden, deren bestimmungsmässiger Gebrauch in der Regel einen Eingriff in die Rechte dritter mit sich bringt, dieser Gebrauch sich aber in dem privaten Bereich abspielt, der einer wirksamen und der Allgemeinheit zumutbaren Kontrolle weitgehend entzogen ist.’

<sup>115</sup> Winghardt 2002, p. 352.

<sup>116</sup> Compare Davies 2001, p. 307-308 (‘[when levies were introduced in Germany], technical solutions to private copying were science fiction.’) with Landgericht Stuttgart, 19 June 2001, Case 17 O 519/00 (CD-Brenner), at § 39 (private copying by means of CD-writer no more controllable and licensable than home copying on tape and video recorders).

<sup>117</sup> Again, the importance of applying PET’s in DRM’s cannot be overstressed; see *supra* at § 5.1

Elsewhere in the European Union, courts have generally refrained from imposing liability on manufacturers of reproduction-enhancing technology. In most jurisdictions, liability is based on a ‘duty to care’. Failure to satisfy such duty may constitute an unlawful act or a tort in itself, or may play a role in the requirement of fault, and therefore result in liability. Courts typically consider such factors as the probability of harm, the costs of avoidance, and the magnitude of the danger if it is realised. The social utility of the activity is also taken into account in establishing the scope of a duty of care. Public policy considerations and fundamental rights may therefore play a role in determining the existence and the limits of a duty of care, and consequently, in establishing the scope of liability.<sup>118</sup> Applying these principles, courts have been reluctant to impose liability upon hardware manufacturers or online service providers, even in cases where OSP servers were abused for copyright-infringing purposes on a massive scale.<sup>119</sup>

The seminal case involving contributory liability for hardware manufacturers and sellers is, of course, *Sony v. Universal Studios*, which was decided by the U.S. Supreme Court in 1984.<sup>120</sup> Contributory liability in *Sony* rested on whether video tape recorders were sold with constructive knowledge that customers might make unauthorized copies of copyrighted material. To answer this question, the Supreme Court modified and adopted a ‘staple article of commerce’ test from patent law. Under that test, the sale of a copying device will not constitute contributory infringement if the device can be widely used for legitimate, unobjectionable purposes.<sup>121</sup> The *Sony* evidentiary record established that ‘time-shifting’ was the primary use of video tape recorders and that a substantial number of copyright holders would not object to time-shifting. The Court found that unauthorized home time-shifting was fair use. Based upon that finding and the record, the Court then held that the private use of video tape recorders for time-shifting was a commercially significant non-infringing use precluding contributory liability.

If one were to apply the *Sony* rule today to a case of manufacturing or selling digital recording media or equipment, the outcome would likely be the same; see the overview of contributory copyright infringement case law in the United States in Annex 2 to this report. As illustrated in § 5.3, perfectly legitimate uses of digital media and equipment, ranging from the downloading of web-based content to the making of back-up copies of computer software, abound.

The liability doctrines discussed above are reflected in the way some existing European levy schemes define equipment for which levies are due. Both in Belgium and in Spain certain categories of equipment of which the primary use is not to reproduce or store copyrighted works, such as telephone answering machines and tapes, dictaphones, and mini-cassettes, are exempted expressly from the system.<sup>122</sup> The Italian draft legislative decree, as recently revised, limits equipment levies to ‘devices exclusively dedicated to analogue or digital video or audio recording’, thereby ruling out PC’s and (presumably) CD-writers.<sup>123</sup>

Similar ‘primary use’ reasoning lies behind the provisions of the EC Computer Programs Directive and the EC Copyright Directive that deal with the protection of technological protection measures. Art. 7.1(c) of the former directive looks to the ‘sole intended purpose’ of a device in determining whether it should be qualified as an illegal circumventing device. Art. 6.2 of the latter applies a somewhat broader test, by prohibiting the manufacture and distribution of devices or components which:

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<sup>118</sup> Koelman & Hugenholtz 1999, p. 7.

<sup>119</sup> See Koelman & Hugenholtz 1999, for detailed analysis of OSP liability case law.

<sup>120</sup> *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984); see also *RIAA v. Diamond Multimedia Systems, Inc.*, 180 F3d. 1072 (9<sup>th</sup> Cir. 1999) (computers and hard drives not considered ‘digital audio recording devices’ within meaning of the Audio Home Recording Act of 1992) and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001) (peer-to-peer technology not considered illegal per se).

<sup>121</sup> Note that the Supreme Court’s test is whether the equipment is *capable* of such non-infringing uses.

<sup>122</sup> See § 4.1.1.2 and § 4.1.1.3 (above).

<sup>123</sup> See § 4.2.4 (above).

‘(a) are promoted, advertised or marketed for the purpose of circumvention of, or  
(b) have only a limited commercially significant purpose or use other than to circumvent, or  
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,  
any effective technological measures.’

Both directives implicitly recognize the legitimacy of so-called ‘dual-use’ (or multi-purpose) technology, i.e. hardware or software that may serve both legitimate and illegitimate purposes.

## 6.2 Expansion of levies to digital media and equipment

The existence of multipurpose technology has troubled copyright levy systems since the early beginnings. Why subject tape recorders to levies, and leave typewriters and cameras untaxed? The answer, presumably, lies in the ‘primary use’ argument discussed in the previous section. If the primary use of certain equipment is not to reproduce protected works, performances or phonograms for private purposes, subjecting such equipment to a levy would not be justified. As our overview of existing levies systems in Europe has demonstrated, it is not always easy to distinguish ‘primary use’ equipment, subject to levies, from multipurpose apparatus that should remain outside the system.

The ongoing process of digitalisation has exacerbated this problem. In analogue times, private copying requirement distinguished (‘dedicated’) machinery for different content types. Written works and photos were reproduced on photocopying machines, musical performances on tape recorders, moving pictures on video recorders, et cetera. In those days of dedicated hardware, designating e.g. a tape recorder as ‘primary use’ equipment subject to a levy was a relatively straightforward decision.

This is no longer true in the digital environment. Computers can process and reproduce all different content types, represented as digital data: text, photographs, audio and video files, computer programs and databases. PC’s can be put to a wide variety of uses, ranging from word processing to downloading MP3 files, from editing holiday snapshots to ‘file sharing’. Even if PC’s and their peripherals, such as CD writers, are used by many consumers for private copying of protected subject matter, it is clear this is not, in general, their ‘primary use’.<sup>124</sup> Indeed, the very *raison d’être* of the computer lies in its being a ‘Turing machine’, a universal apparatus that can be programmed to perform just about any task imaginable.

The increasing performance of computers coupled with the dramatic decrease of components’ prices (e.g. microchips, hard disks, et cetera) has also lead to a blurring between consumer and professional markets that were traditionally distinct. Since professional equipment users do not qualify for private copying exemptions, ‘professional’ equipment has been traditionally excluded from most existing levy systems.<sup>125</sup> Now that the borderlines between professional equipment (e.g. a digital sound studio) and consumer electronics (e.g. an advanced multimedia PC) has become increasingly difficult to draw, such a distinction will be very hard, if not impossible, to maintain.<sup>126</sup>

The proliferation into consumer and professional markets of cheap and powerful personal computers, and their offspring such as laptops, notebooks and personal assistant devices, clearly requires a thorough rethinking of existing levy systems. Applying the ‘primary use’ test, which – implicitly or expressly – underlies current levy systems, most digital equipment and media (PC’s, CD writers, hard disks, CD-RW’s) should probably remain ‘unlevied’.

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<sup>124</sup> Another problem is that PC’s are not uniform nor immutable machines. They may or may not include facilities or devices for recording of sound, images and video (e.g., sound cards, video cards, scanners, etc.).

<sup>125</sup> See § 4.1.4.2 (above).

<sup>126</sup> See Conseil supérieur de la propriété littéraire et artistique (France), Avis no. 2002-3 sur les usages professionnels et le dispositif de rémunération pour copie privée, p. 1 : ‘Pour tous ces produits [CD Data, DVD Data], il n’est plus possible de raisonner en termes de supports d’enregistrement destinés «par nature» au grand public ou au marché professionnel.’

However, as § 4.2 of our study has demonstrated, courts and lawmakers are under great pressure from collecting societies to nonetheless impose levies on digital media and equipment. Collecting societies, understandably, point to the fact that the proliferation amongst consumers of PC's and peripheral devices, such as CD writers, has facilitated private copying on a scale far exceeding previous 'analogue' practices – to the detriment of authors and other right holders.

In our view, however, a mixture of arguments, both legal, economical and practical, militate against such an expansion. First, an expanded system would no longer reflect the contributory liability rationale on which the existing system of levies was originally based. As noted previously, a PC's 'primary use' is not for private copying. Second, applying levies to multi-purpose digital machines such as PC's would necessarily lead to further expansion of levies to all sorts of other hardware equipped with memory chips: radio and television sets, digital cameras, digital video units, telephones, car stereo's, automobile information systems, watches, kitchen appliances, et cetera. If levies were indeed imposed on all digital media and equipment, an increasingly large number of users would end up paying a 'copyright tax' without actually using copyrighted content. Indeed, large numbers of consumers would be cross-subsidising a relatively limited group of 'private copiers.'<sup>127</sup> Needless to say, any such expansion would negatively affect the (increasingly 'digital') economy by distorting emerging markets.

Third, an expansion would eventually compromise the credibility of the copyright system as such. If users were to pay levies 'on everything', many users would probably consider themselves legitimised to use and abuse copyrighted works in any manner they see fit. An all-encompassing levy system would be generally perceived as an unlimited 'license to copy'. The net result would be a near-total 'levitation' of the copyright system. Exclusive rights would effectively cease to exist; right holders would become totally dependent on remuneration rights collected by collecting societies.

Indeed, an unlimited expansion of levies into the digital realm, taking into account of such popular consumer practices as peer-to-peer file sharing, would almost necessarily imply a widening of existing private copying privileges. As we have repeatedly stressed in this report, existing levies are intended to compensate right holders only for acts exempted under current (mostly restrictive) private copying exemptions. Any extension of levies aimed at compensating right holders for harm incurred by other practices, such as file sharing, could only be justified by providing for corresponding exemptions.

Applying levies to all digital media and equipment would also entail huge practical problems of administration and repartition. Which authors would have the rights to claim 'digital' levies?<sup>128</sup> Which collecting societies would have a mandate to collect them: reprographic rights societies, 'home taping' societies or perhaps mechanical rights societies?

In sum, the ongoing digitalisation of media and markets presents a powerful argument in itself for a restrictive application of levies, even absent the 'application or non-application' of technological measures to which we will now return.

### 6.3 Interpreting the phase-out provision

The preceding sections suggest that there is no place for levies in a world where right holders can realistically, and legally, control private copying and private use themselves. Apparently, when drafting the Copyright Directive, its framers had arrived at similar conclusions. Both in its body text and its recitals the Directive refers to the abolishment of levies in a world where right holders have at

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<sup>127</sup> See W. Fisher, 'Digital Music: Problems and Possibilities', available at: <[http://www.harvard.edu/Academic\\_Affairs/coursepages/tfisher/Music.html](http://www.harvard.edu/Academic_Affairs/coursepages/tfisher/Music.html)>, and N.W. Netanel, 'Impose a Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing', available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=352560](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=352560)>, for discussion of pro's and con's of extending levy system into digital environment.

<sup>128</sup> See Hugenholtz, 2000, p. 482-493 (discussing logistical problems of administrating digital rights collectively).

their disposal the technical means to control private copying. Thus, the Explanatory Memorandum accompanying the initial proposal states:

‘It is expected that digital technology may allow the effective control of private copying, and the replacement of levy schemes by individual licensing solutions which are under development (in the context of “electronic copyright management”), at least in the on-line environment.’<sup>129</sup>

In subsequent versions of the Directive, the idea of a phase-out of levies has gradually materialized. As finally adopted, Art. 5.2 (b) of the Directive directly links the requirement to provide for ‘fair compensation’ to the ‘application or non-application of technological measures’. According to Recital 35, ‘[t]he level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive.’ Recital 39 adds that ‘[w]hen applying the exception or limitation on private copying, Member States 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.’

What to make of this test? The provision instructs Member States, when providing for ‘fair compensation’, to take account of the application or non-application of technological measures ‘to the work or subject matter concerned’. A literal reading would suggest that each individual right holder’s claim to fair compensation would depend on whether or not his works (‘or other subject matter’, e.g. performances or phonographic recordings) were actually marketed in a technically protected format. Right holders would thus be obliged to inform, on a case by case basis, their collecting societies of the formats in which their works are being published. Needless to say, this would place a heavy administrative burden on existing levy schemes, particularly on the collecting societies that administer them in practice. And even if such administration were possible, practical problems would still abound. The Directive’s regime of technological protection measures presupposes that right holders and those applying technological protection measures are the same. This might be true for a few large and integrated media companies, but in most cases right holders (e.g. musical composers or authors of literary works) are not involved in the process of marketing their works, whether through secure systems or otherwise. More often than not right holders will not even know if their works are sold in technically protected formats at all.

Another problem a literal reading of Article 5.2(b) inspires is that it does not take into account the situation where a work is marketed both in technically protected and ‘unprotected’ formats, thus allowing consumers a choice between a cheap ‘copy-once’ version and an expensive ‘copy-as-often-as-you-like’ variety. Would the availability on the market of the ‘unprotected’ version keep right holders’ claim to compensation alive? If so, the perfect market that such price discrimination allows, would be distorted, and consumers would end up paying twice (again).

All in all, a literal interpretation of Article 5.2(b) along the lines of the previous paragraphs appears to be highly improbable. A somewhat more rational reading would be to interpret the requirement to ‘take into account the application or non-application of technological measures’ in statistical terms. This is, indeed, what Recital 35 suggests: ‘The level of fair compensation should take full account of the *degree of use* of technological protection measures referred to in this Directive.’ Read in this way, Article 5.2(b) would impose on Member States (i.e. the authorities that determine levies) an obligation to regularly monitor market developments, and to ascertain to what extent technical measures are actually applied in the market place. As the ‘degree of use’ of TPM’s increases, the amount of ‘fair compensation’ would decrease. Thus, for example, the tremendous market success of the copy-protected DVD format, that has all but superseded the ‘unprotected’ VHS format, would imply a substantial decrease or abolition of levies for the private copying of audiovisual works.

This statistical approach may appear to be reasonable and practicable at first blush, upon further examination it raises difficult questions as well. What parameters are to be factored in when

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<sup>129</sup> Explanatory Memorandum Proposal, p. 37. According to European Commission 2002, p. 16, ‘a growing use of technological measures should eventually lead to a natural, market driven phasing out of levies’.

measuring or estimating the ‘degree of use’ of TPM’s? As Chapter 2 of this study has illustrated, in some segments of the information market, notably in traditional ‘analogue’ industries such as print publication, TPM’s are scarcely applied or even difficult to imagine, whereas in other segments (e.g. software and music) technical measures have become, or are rapidly becoming, normal practice.<sup>130</sup> It would therefore be irrational to measure the ‘degree of use’ indiscriminately across all media and platforms. Instead, a more segmented approach would appear in order.

A possible way forward might be to measure the ‘degree of use’ of TPM’s for each category of media or equipment that, in a given jurisdiction, is subjected to a levy. Levy rates could then be adjusted accordingly. If, for example, it were established that 30% of pre-recorded CD’s available on the market are copy-protected, levies on recordable CD’s might be decreased by the same percentage.<sup>131</sup> If a ‘degree of use’ were found to be sufficiently high for a given platform, authorities might even decide that a levy no longer applies.<sup>132</sup>

An even more complicated alternative would be to measure the ‘degree of use’ in relation to certain classes of works, e.g. music, film, photographs, text, etc. The actual application of TPM’s to a given class could lead to a reduction of levies for media or equipment, following a complex process of weighting which might reflect established percentages of levy repartition (e.g., a 30% ‘degree of use’ for musical recordings would carry more weight than a 30% degree of use for scholarly publications). Clearly, setting the parameters of any such statistics-based system in an objective way would not be easy. Assuming a ‘degree of use’ could be objectively established in the first place, which is unlikely, how much ‘use’ would be enough to trigger a (full or partial) phasing out of levies? Even in the content industry’s most optimistic scenarios of a perfect DRM-driven market, the ‘degree of use’ of TPM’s will never even come close to 100%. Publishers or producers will always have good reasons not to apply TPM’s in certain situations, e.g., to cater to consumers preferring (possibly more expensive) ‘unprotected’ formats, to distribute samples, ‘freeware’ or sponsored content. Moreover, most non-professional authors will prefer to circulate ‘home-made’ content in unprotected formats, as is customary on the internet today, even after DRM software has become generally and cheaply available. In other words, defining a baseline against which the ‘degree of use’ of TPM’s can be measured will be extremely difficult.

The most serious objection against any ‘degree of use’ based system, however, is purely economical. The wording of Article 5.2 (b) and Recital 35 implies a direct connection between the actual application (or ‘degree of use’) of technological measures and the obligation to provide for fair compensation. Such a reading suggests that right holders would continue to receive ‘fair compensation’ through levies even where DRM systems have become technically and economically viable alternatives. This, in our opinion, would be putting the cart before the horse. As we have demonstrated in this study, levies have been introduced primarily to compensate right holders because at the time of their introduction no viable system of individual licensing of private use was available or feasible. Levies were never more than a ‘crude and rough justice measure’,<sup>133</sup> principally intended to cure a classic case of ‘market failure’ – the inability of right holders to transact with ‘private users’ individually. If a phase-out of levies were made conditional upon the actual application of technological measures, the Directive would put a premium on not applying them. Indeed, right holders (e.g. authors) and media companies might have conflicting interests here. Authors might prefer the guaranteed proceeds from levies on ‘open’ media over unknown royalties to flow from

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<sup>130</sup> See ‘Overview of existing systems and platforms’, Table 1 of Annex 1 of this report.

<sup>131</sup> This is a highly simplified example. In reality no linear relationship between ‘degree of use’ and private copying will be found to exist. To make matters even more complicated, CD’s will be marketed in protected formats to varying ‘degrees’, depending on market segments and content types (e.g. music, video, software, games, databases).

<sup>132</sup> Content producers or electronics manufacturers might, of course, be tempted to hasten a phase-out by conspiring not to support ‘unprotected’ media or platforms. Such a strategy, however, would bear a serious risk of being qualified as anti-competitive behaviour, subject to penalties under national or EC competition law.

<sup>133</sup> Hart, EIPR 2002, p. 60.



exploitation in secure formats. From a perspective of sound economic policy, and in the light of the Directive's stated aim to promote systems of digital rights management (Recital 13), such a literal interpretation must therefore be called into doubt.

Recital 39 suggests a more rational and forward-looking interpretation. Here Member States are advised, in more general terms, to 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*.' The recital suggests linking a possible phase-out of levies to technological and economic development, not to actual market behaviour. If and when technological and economic development allows right holders to apply technological measures in ways that are economically and legally viable, the requirement to pay 'fair compensation' is lifted.

Law and policy makers will probably find this economically oriented approach much more attractive, not only because it would relieve authorities from a hopeless task of measuring the 'immeasurable', but also – and perhaps in the first place – because governments might want to use the instrument of levies as a tool of economic, judicial or information policy.<sup>134</sup> Of course, even this approach could not do without a measure of monitoring, or rather *technology assessment*. However, instead of having to indulge in endless and complicated market research exercises, authorities would merely be required to observe ongoing technological and economical progress in the area of DRM development, e.g. by organising regular hearings or commissioning expert studies. After a finding that for a given media type or platform the application of TPM's is, or soon is to become, economically viable, the corresponding levy might be phased out, either gradually or at once.

Factors ('trigger points') to be considered in such a phase-out procedure might include:

- Upfront costs to producers and intermediaries (i.e. DRM technology should be cheaply available to SME's);
- Incremental costs or savings for consumers;<sup>135</sup>
- Consumer-friendliness and acceptance, as reflected e.g. in market share;<sup>136</sup>
- Incorporation of PET's in DRM systems;<sup>137</sup>
- Accessibility of DRM protected content by disabled users and users with special needs.

The *effectiveness*<sup>138</sup> of TPM's might also be a factor. As right holders never fail to point out, every technological measure will eventually be cracked. However, this problem should not be overestimated. Admitting that TPM's will never provide fail-safe protection against cracking or hacking, the large majority of users will not be able, or simply not have the time or stamina to do so. Therefore, even 'light-weight' TPM's, such as the copy-protection mechanisms which are currently applied to music CD's, might be deemed 'effective' in an economical sense.

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<sup>134</sup> See § 5.2 (above). Abolishing levies would likely promote 'self-enforcement' of rights, which in turn might decrease the costs of judicially administered enforcement. Conversely, policy makers afraid of 'digital enclosure' through the large-scale application of DRM's, might opt for a policy of continued or increased 'levitation'.

<sup>135</sup> If DRM systems would fulfil their promise of enabling price discrimination, prices for copy-protected content might actually go down.

<sup>136</sup> Thus the actual 'degree of use' of TPM's might still play a role in a phase-out decision. Needless to say, developers of DRM systems are well advised to design systems that take into account reasonable consumer expectations, e.g., permit a measure of private copying. See e.g. the 'Digital Consumer's Bill of Rights', [www.digitalconsumer.org/bill.html](http://www.digitalconsumer.org/bill.html). Art. 6.4(2) of the Copyright Directive appears to leave national legislatures some room for mandating such consumer-friendly systems.

<sup>137</sup> See § 5.1 (above).

<sup>138</sup> Unfortunately, the rather circular definition of 'effective' technological measures in Article 6.2 of the EC Copyright Directive provides little guidance in this respect.

## 6.4 Implementing legislation

As our overview of recent and pending legislation demonstrates, only precious few Member States have actually implemented the language of Article 5.2(b) or its accompanying recitals. The German implementation proposal would amend the German Administration of Copyright and Neighbouring Rights Act to mirror the language of Art. 5.2(b) as follows: ‘When establishing the tariffs [...] consideration must also be taken of the extent to which technical protection measures are applied [...] to the works concerned or other subject matter concerned.’<sup>139</sup> Similarly in Italy, following the pending revision of the Italian copyright law, ‘account will be taken of the application or non-application of the technological measures, as well as of the different impact of the digital copy compared to the analogue copy.’<sup>140</sup> The Dutch proposal does not incorporate similar language in its provisions, but does empower the Minister of Justice to determine the types of supports to which the remuneration would apply, on the belief that his involvement would ensure a better transition between a levy regime and a technical protection regime.<sup>141</sup> Moreover, the Explanatory Memorandum speculates at some length on a future phasing out of levies. According to the Dutch Government account must be taken not only of the actual application of technical protection measures, but also of their being available. If technical protection measures are available in practice, i.e. if they can be used on an economical basis, levies should not become a bonus for rights holders who make no use of technical protection measures.

Similar to the Dutch bill, the Spanish proposal would empower the Council of Ministers to designate levies equipment and media, and to set tariffs, ‘taking account among other criteria, of the type of equipment, device or material concerned, of their capacity and quality for copy or storage, of their incidence in the realisation of the private copies and of their effect on the market for the work or other subject matter involved. Consideration must also be taken of the application or non-application to the work or subject-matter concerned of the technological measures.’<sup>142</sup>

## 6.5 Integration of levies into DRM systems

Possibly, in the more distant future technology itself might offer a solution to the problem of reconciling levies and DRM systems, in a way that is not contemplated by the Directive. As explained in Chapter 2 of this study, in sophisticated DRM systems content is delivered accompanied by metadata (‘copyright management information’) that inform users of the copyright status of the work, licensing conditions, etc. Similar data might be embedded in blank recording media, or even equipment, to indicate that a levy has been paid. The metadata representing the prepaid levy might thus serve as (partial) payment to right holders, e.g. in return for the right to make a private copy or similar privilege. Needless to say, such a technical solution would require extensive further study and research, and would at best be available only in the long run.

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<sup>139</sup> See § 4.2.3 (above).

<sup>140</sup> See § 4.2.4 (above).

<sup>141</sup> See § 4.2.5 (above).

<sup>142</sup> See § 4.2.6 (above).

## 7. Conclusions and recommendations

If this study has demonstrated anything, it is that the framers of the Directive have not given the phasing out of levies – ‘taking account of the application or non-application of technological measures’ – too much thought. This conclusion comes as no surprise to those who have noticed similar weaknesses elsewhere in the Directive. Since the language of Article 5.2(b) and its corresponding recitals offer little guidance in establishing the true meaning of the phase-out provision, we have attempted to come up with a sensible and practicable interpretation of our own, which might be suitable for implementation by the Member States. Needless to say, it will be for the European Court of Justice to eventually decide whether our interpretation is within the confines of the Directive.

What we propose – to Member States and their levy-setting authorities – is not to engage in attempts to measure the actual ‘application or non-application of technological measures’ or ‘degree of use’ of such measures. We predict that such an undertaking will prove to be a fruitless and frustrating exercise, in view of the non-linear relationship between content, technical protection measure, media, equipment and levy, and absent any baseline to measure the ‘degree of use’ against it. Instead, we recommend a more sensible and workable interpretation of Article 5.2(b), which is inspired mainly by economical and practical considerations, and which is supported by the recitals preceding the Directive. In our proposal, levies are to be phased out not in function of actual use, but of *availability* of technical measures on the market place. The phasing-out of levies should be a decision based on technology assessment, not on measuring the immeasurable.

‘Availability’, however, should not be confused with the technological state of the art. In our proposal, technological protection measures are ‘available’ only if and to the extent that they can be realistically, and legally, applied in the market place. Factors to be assessed might include: upfront costs to producers and intermediaries; incremental costs or savings for consumers; consumer friendliness and acceptance, as reflected in market share; incorporation of PET’s in DRM systems; accessibility of DRM protected content by disabled users and users with special needs; etc.

Clearly, in view of the public interest at stake in such a decision making process, it should not be left to market players (e.g., collecting societies and electronics manufacturers) to decide over a phase-out amongst themselves. Instead, we propose that Member States vest the authority to set rates and designate media and equipment in a public body (e.g., Minister of Justice, Copyright Tribunal or other public authority), which has the ability and competence to evaluate and adjust levy schemes and rates on a regular (e.g., annual or bi-annual) basis. Indeed, in several Member States, such as Spain and the Netherlands, such flexible mechanisms already exist, or are in the making as part of the process of transposing the Directive. Such a rulemaking procedure might include hearings, where right holders, collecting societies, media companies and electronics manufacturers can express their views and furnish evidence. A decision to phase-out existing levies for certain media or equipment would, most likely, be taken step-by-step.

In this context it is important to underscore that the payment of ‘fair compensation’, as required by the Directive, is not intended, as sometimes mistakenly believed, to compensate right holders for acts of illegal copying (piracy). ‘Fair compensation’ is due only in cases of legitimate private copying. The ‘digital piracy’ of copyrighted works and phonograms, as is presently occurring on a rampant scale particularly over peer-to-peer networks, therefore cannot and should not be a factor in determining the level of ‘fair compensation’.

To be sure, the existence of technological measures in the digital field cannot and should not undermine the continued existence of levy schemes in respect of analogue media and equipment. The development of digital rights management systems will not, by itself, make ‘analogue’ levies (e.g. on photocopying equipment or on blank video and audio tape) illegitimate or less deserving. Rather, analogue levy schemes are expected to gradually become extinct by virtue of technological innovation.

Particularly in the area of music and video, digital recording media have already virtually replaced analogue equivalents. Indeed, as reported by Davies, the European Commission, when drafting the Directive, saw no need to harmonize private copying remuneration schemes a project left undone for almost a decade, because analogue media were expected to eventually become obsolete.<sup>143</sup>

Of course, a phasing out of levies will not be popular with the collecting societies that administrate existing levy schemes. Collecting societies, however, will find some comfort in the knowledge that they are likely to play an important, possibly even essential role, in the administration of DRM systems in the future. Over the years, collecting societies have acquired vast and invaluable expertise in the area of rights management. Moreover, collecting societies currently control much of the rights management information that is indispensable for any sophisticated DRM to work.

Our study has also shown that, completely independent of the development or application of DRM technology, there are good reasons not to extend levies to multipurpose digital media and equipment. Levies are rooted in notions of contributory liability; in most countries, levies are imposed only on media or equipment the 'primary use' of which is private copying. Personal computers and their peripherals, however, are universal machines, and have no 'primary use'. If levies were imposed on most or all digital media and equipment, large numbers of consumers would be cross-subsidising a relatively limited group of 'private copiers'. Moreover, many users would perceive a levy system encompassing all digital media and equipment as an unlimited 'license to copy'. The net result might be a near-total 'levitation' of the copyright system: exclusive rights would effectively cease to exist.

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<sup>143</sup> Davies 2001, p. 309.

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## **Annex 1 - Comparative Tables**

## 1.1 Overview of existing technical measures per platform / existing and claimed levies

In the 'levies' columns, the symbol '•' indicates actual levies, and the symbol '◐' indicates claimed levies. The symbol '-' indicates no levies. Levies on (reprographic) equipment that are proportional to the use of complementary media are indicated with the symbol '⊕' in the 'Media' column.

Content type		Text	Pictures	Audiovisual	Audio	Data	Software	Offline	Online	Recording (copying)	Analog Playback	Digital	Platform / hardware equipment	Levies					Media	Levies					Type of technical measures (TPM/DRM)	Products	
														Spain	Netherlands	Italy	Germany	France		Belgium	Spain	Netherlands	Italy	Germany			France
Publishing (text, pictures)	(text,	•	•					•	p	r	a		pen, pencil etc.	-	-	-	-	-	paper	-	-	-	-	-	-	-	-
Publishing (text, pictures)	(text,	•	•					•	p		d		printer	-	-	•	•	-	?	paper	-	-	-	-	-	-	-
Publishing (text, pictures)	(text,	•	•					•		r	a	d	photocopier	•	-	•	-	-	•	photocopies on (copying) paper (see §4.1.1.4)	⊕	⊕	⊕	⊕	⊕	-	-
Publishing (text, pictures)	(text,	•	•					•	p	r	a		fax	•	-	•	-	-	?	(fax) paper	⊕	-	⊕	-	-	-	-
Publishing (text, pictures)	(text,	•	•					•		r	d		scanner	•	-	•	•	-	?	Storage of data files <sup>1</sup> on PC (removable) memory chip, hard disk (etc.)	⊕	•	⊕	-	-	-	?
																				•	•	•	•	-	-		
																				-	•	-	-	-	-		

<sup>1</sup> Data files may be of various formats; e.g. for text, .txt; .pdf; .doc; for pictures, e.g. .pdf, .png, .gif, .jpg, .bmp.

Publishing pictures)	(text,	•	•					•	•	p	r	d	PC	-	-	•	•	-	?	(removable) memory chip, hard disk (etc.)	•	•	•	•	-	-	DRM (incl. encryption: RSA Security license)	eBook, ACS (Adobe)
Publishing pictures)	(text,	•	•					•	•	p	r	d	PC	-	-	•	•	-	?	(removable) memory chip, hard disk (etc.)	•	•	•	•	-	-	DRM	Get-a-copy (Info2Clear )
Publishing pictures)	(text,	•	•					•	•	p	r	d	PC	-	-	•	•	-	?	(removable) memory chip, hard disk (etc.)	•	•	•	•	-	-	DRM	various (OverDrive )
Publishing pictures)	(text,	•	•					•	•	p	r	d	PDA	-	-	•	•	-	?	(removable) memory chip	•	•	•	•	-	-	DRM	Palm Retail Encryption Server (Palm)
Publishing pictures)	(text,	•	•					•	•	p	r	d	mobile telephone (iMode)	-	-	•	•	-	?	(removable) memory chip	•	•	•	•	-	-	DRM	EMMS (IBM)
Pictures		•						•		r	a		analog camera (various types)	-	-	-	-	-	-	celluloid film (various types)	-	-	-	-	-	-	-	-
Pictures		•						•		r	d		digital camera (various types)	-	-	-	-	-	-	storage of data files on (removable) memory chip	?	?	?	?	?	?	-	-
Audio			•					•		r	a		microphone	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Audio			•					•		p	a		compact cassette player	-	-	-	-	-	-	compact cassette	•	•	•	•	•	•	-	-

Audio				•		•	p	r	a	compact cassette recorder / player	•	-	•	•	-	•	compact cassette	•	•	•	•	•	•	-	-
Audio				•		•	p	r	a	tape recorder / player	•	-	•	•	-	•	tape	•	•	•	•	•	•	-	-
Audio				•		•	p		d	compact disc (CD) player	-	-	-	-	-	-	prerecorded CD	-	-	-	-	-	-	-	-
Audio				•		•	p		d	compact disc (CD) player	-	-	-	-	-	-	prerecorded CD	-	-	-	-	-	-	copy protection	? (Sony)
Audio				•		•	p		d	compact disc (CD)	-	-	-	-	-	-	prerecorded CD	-	-	-	-	-	-	copy protection	? (EMI)
Audio				•		•	p	r	d	DAT player / recorder	•	-	•	•	-	•	DAT-cassette	•	-	•	-	-	-	copy protection	SCMS
Audio				•		•	p	r	d	DCC player / recorder	•	-	•	•	-	•	DCC-cassette	•	-	•	-	-	-	copy protection	SCMS
Audio				•		•	p		d	MiniDisc (MD) player / recorder	•	-	•	•	-	•	MiniDisc	•	•	•	•	•	-	copy protection	SCMS
Audio				•		•	p	r	d	CD-R player / recorder ('burner')	-	-	•	-	-	?	CD-R (recordable) disc	•	•	•	•	•	•	-	-
Audio				•		•	p	r	d	CD-RW (rewritable) player / recorder	-	-	•	-	-	?	CD-R (recordable) / CD-RW (rewritable) disc	•	•	•	•	•	•	-	-
Audio				•		•	p	r	d	ADAT (Alesis)	?	?	?	?	?	?	video cassette (S-VHS)	?	?	?	?	?	?	copy protection	SCMS (with 'defeat' option)

Audio			•		•	p	r	d	DA-38, DA-88, DA-98, DA-78HR (Tascam)	?	•	?	?	?	?	video cassette (NTSC 120 Hi8 tape)	?	?	?	?	?	?	-	-	
Audio			•		•	p	r	d	Hard disk recorders	-	•	-	-	-	?	hard disks, removable storage media (floppy, Zip disk etc.)	-	-	•	-	-	-	-	-	
Audio			•		•	p		d	MP3 player	-	-	•	•	-	?	memory stick, ram chip, hard-disk, cd-r(w)	•	•	•	-	-	-			
Audio		•			•	p	r	a	d	Video cassette recorder (VCR)	•	-	•	?	-	?	video cassettes	•	•	•	•	•	•	-	-
Audio		•			•	p		d	DVD-Audio player	-	-	-	?	-	?	prerecorded DVD-R / DVD-RW discs	-	-	-	-	-	-	copy protection		
Audio		•			•	p	r	d	DVD-Audio player / recorder	?	-	?	?	-	?	DVD-R / DVD-RW discs	?	?	?	?	?	?			

Audio, Data, Pictures, Video, etc.	•	•	•	•	•	•	•	p	r	d	MP3 player, PC, Digital camera, Digital video recorder, etc.	-	-	•	•	-	?	various removable memory chips: 'Flash' memory (‘pendrives’); CompactFlas h; SmartMedia; MultiMediaC ard; MemoryStick	•	•	•	•	-	-	none	
Audio, Data, Pictures, Video, etc.	•	•	•	•	•	•	•	p	r	d	MP3 player, PC, Digital camera, Digital video recorder, etc.	-	-	•	•	-	?	Secure Digital 'Flash' memory	•	•	•	•	-	-	copy protection (only when used in portable music player, not in PC)	
Audio, Data, Pictures, Video, etc.	•	•	•	•	•	•	•	p	r	d	MP3 player, PC, Digital camera, Digital video recorder, etc.	-	-	•	•	-	?	Netac OnlyDisc 'Flash' memory	•	•	•	•	-	-	access protection	
Audio, Pictures, Video, etc.	•	•	•	•	•	•	•	p	r	d	MP3 player, PC, Digital camera, Digital video recorder, etc.	-	-	•	•	-	?	THL Thumbdrive 'Flash' memory	-	•	•	•	-	-	access protection	

Audio			•			•	p	d	Super Audio CD (SACD) player <sup>2</sup>	?	?	?	?	?	?	SACD discs	?	?	?	?	?	?	copy protection, conditional access (for additional content)	
Audio			•			•	p	r	d	Direct Stream Digital (DSD) <sup>3</sup> recorder	?	?	?	?	?	?	hard disk, SACD disc	?	?	?	?	?	identification code	
Audio			•			•	p	a	radio	-	-	-	-	-	-								-	-
Audio			•			•	p	d	(digital) radio (Digital Audio Broadcasting (DAB))	-	-	-	-	-	-								-	-
Audio			•			•	p	d	PC	-	-	•	-	-	?	storage of data files on PC ((removable) memory chip, hard disk)	•	•	•	•	-	-	DRM	LiquidAudio (patents bought by Microsoft)
Audio			•			•	p	d	PC	-	-	•	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-	DRM	On Demand Distribution (OD2)
Audio, video, games			•	•	•	•	p	d	PC	-	-	•	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-	DRM	(RealNetworks)

<sup>2</sup> Playback of hybrid type SACD discs (which have an extra layer of audio in the CD format) is possible on some regular CD players; Playback of CD, CD-R and CD-RW discs is also possible on SACD players. See <http://interprod.imgusa.com/son-403/format.asp> and [http://www.wired4music.com/SACD\\_FAQ.htm](http://www.wired4music.com/SACD_FAQ.htm) for forward / backward compatibility issues.

<sup>3</sup> The *Direct Stream Digital* encoding format is used by the SACD platform; see <http://interprod.imgusa.com/son-403/technology.asp>.



Video			•			•	p	r	a	Video cassette player (VCR) (various types)	•	-	•	-	-	-	prerecorded video cassettes (various types)	?	?	?	?	?	?	-	-
Video			•			•	p	r	a	Video cassette recorder	•	-	•	•	-	•	video cassettes	•	•	•	•	•	•	-	-
Video			•			•	p	r	a	Digital Video recorder (e.g. TiVo)	?	•	?	?	-	?	hard disk	-	⊕	-	-	-	-	-	-
Video			•			•	p	r	a	Video cassette recorder (VHS)	•	-	•	•	-	•	(VHS) video cassettes	•	•	•	•	•	•	copy protection	automatic gain control (AGC) (Macrovision)
Video			•			•	p	r	a	Video cassette recorder (VCR)	•	-	•	•	-	•	prerecorded video cassettes	?	?	?	?	?	?	copy protection	four-line colorstripe (Macrovision)
Video			•			•	p		d	DVD (Digital Versatile Disk) player	-	-	-	•	-	•	prerecorded DVD discs	-	-	-	-	-	-	access protection (encryption) / region code	Content Scrambling System (CSS, CSS II)
Video			•			•	p		d	DVD player	-	-	-	•	-	-	prerecorded DVD discs	-	-	-	-	-	-	copy protection	CGMS
Video			•			•	p		d	DVD player	-	-	-	•	-	-	prerecorded DVD discs	-	-	-	-	-	-	access / copy protection	CPPM/CPRM
Video			•			•	p	r	d	DVD-R recorder	-	?	?	•	-	?	DVD-R discs	•	•	•	•	-	•		

Video			•			•	p	r	d	DVD-RW recorder	-	?	?	•	-	?	DVD-RW discs	•	•	•	•	-	•		
Video			•			•	p	r	d	DVD+RW recorder	-	?	?	•	-	?	DVD+RW discs	•	•	•	•	-	•		
Video				•		•	p	a		television	-	-	-	-	-	-							-	-	
Video				•		•	p		d	television	-	-	-	-	-	-							copy protection	FCC broadcast flag	
Video	•	•	•	•		•			d	(digital) television set top box ('decoders')	-	-	-	•	-	-							access protection	(various)	
Video			•			•	•	p		d	television	-	-	-	-	-	-						DRM	MPEG-21	
Multi-media						•	p		d	CD-I	-	-	-	-	-	-	prerecorded CD-I disc	-	-	-	-	-	?	?	
Multi-media	•	•	•	•	•	•				d	PDA's			-		?	(removable) memory chips	-	•	•	•	-	-	?	?
Multi-media	•	•	•	•	•	•			a	d	Mobile phones					?	(removable) memory chips	-	•	•	•	-	-	?	?
Data	•	•	•	•	•	•	•	p		d	CD-rom player	-				?	prerecorded CD, CD-ROM	-	-	-	-	-	-	-	-
Data	•	•	•	•	•	•	•	p	r	d	CD-R player / recorder ('burner')	-	•			?	CD-R (recordable) disc	•	•	•	•	•	•	-	-
Data	•	•	•	•	•	•	•	p	r	d	CD-RW (rewritable) player / recorder	-	•			?	CD-R (recordable) / CD-RW (rewritable) disc	•	•	•	•	•	•	-	-

Data	•	•	•	•	•	•	•		p	r	d	DVD-R recorder	-	-	-	?	DVD-R discs	-	•	•	•	-	-			
Data	•	•	•	•	•	•	•		p	r	d	DVD-RW recorder	-	-	-	?	DVD-RW discs	-	•	•	•	-	-			
Data	•	•	•	•	•	•	•		p	r	d	DVD+RW recorder	-	-	-	?	DVD+RW discs	-	•	•	•	-	-			
Multi-media	•	•	•	•	•	•	•	•	p	r	d	PC	-	-	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-	DRM	XrML (Content-Guard)
Multi-media	•	•	•	•	•	•	•	•	p	r	d	PC	-	-	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-	DRM	(InterTrust; owned by Philips & Sony)
Multi-media	•	•	•	•	•	•	•	•	p	r	d	PC	-	-	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-	DRM	(Macrovision)
Multi-media	•	•	•	•	•	•	•	•	p	r	d	PC	-	-	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-		Windows XP, WMP, IE (Microsoft) <sup>4</sup>
Multi-media	•	•	•	•	•	•	•	•	p	r	d	PC	-	-	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-	DRM	(Sealed Media)
Multi-media	•	•	•	•	•	•	•	•	p	r	d	PC	-	-	•	-	?	(removable) memory chip, hard disk	•	•	•	•	-	-	DRM	(SDC)

<sup>4</sup> DRM components are incorporated into Windows XP, Windows Media Player and Internet Explorer: <http://www.microsoft.com/windows/windowsmedia/drm.asp>.

## 1.2 Relevant legislative provisions and collecting societies

	Legislative provisions	Collective societies
<b>Belgium</b>	art. 22 §1 <sup>er</sup> (4) and (5), 55-60 Copyright Act Royal decrees of 28.03.1996 and of 20.07.2000 Royal decrees of 15.19.1997, and of 13.12.2002 Ministerial decree of of 03.05.2002	SABAM, SIMIM, REPROBEL, AUVIBEL, URADEX, MICROCAM
<b>France</b>	L. 122-5, 122-10 to 12, 211-3, 311-1 to 8 Code Prop. Intel. Ministerial decision No. 1 of 4.01.2001, Ministerial decision No. 3 of 4.07.2002	CFC, SORECOP, Copie France, SOFIA, ADAMI, SPEDIDAM
<b>Germany</b>	§ 53, 54, 54a to 54h Copyright Act of 9.09.1965, as last mod. by Act of 28.3.2002	ZPÜ, GEMA, VG WORT, GVL, VFF, VG Bild-Kunst, GWFF, VGF, GÜFA
<b>Italy</b>	art. 12, 13, 68 of Law No. 633 of 22.04.1941, as last mod. by Law No. 248 of 18.08.2000 Law No. 93 of February 5, 1992	SIAE, IMAIE
<b>Netherlands</b>	art. 16b-16g Copyright Act of 1912, as last mod. by Act of 6.12.2001	ThuisKopie, Reprorecht, Stemra, Lira, NORMA, Irda, NVPI, VEVAM, SEKAM, Beeldrecht/Burafo
<b>Spain</b>	art. 25 Texto Refundido de la Ley de Propiedad Intelectual (TRLPI)	SGAE, CEDRO, AISGE

### 1.3 Remuneration per type of reproduction device/storage medium

Device/ medium	Belgium	France	Germany	Italy	Netherlands	Spain
<b>Photocopy machines</b>	price per page/minute for B&W and colour		price per page/minute for B&W and colour			price per page/minute
<b>Fax machines</b>	price per page/minute for B&W and colour		price per page/minute for B&W and colour			
<b>Scanners</b>	price per page/minute for B&W and colour		price per page/minute for B&W and colour			
<b>Photocopies (books, magazines, newspapers etc.)</b>	basic fee + price per page/type of institution	0,03 to 0,76 per page/type of work	price per page/minute for B&W and colour	•0,05 or •0,06 per page	•0,045 per page •0,011 per page for education	
<b>Audio recording device</b>	3% sales price		•1,28 or •2,56	3 % sales price		•0,60
<b>CD-burner</b>			•7,50 <sup>3</sup>			
<b>Analogue audio cassette</b>	•0,0496 <sup>1</sup>	•0,285 <sup>1</sup>	•0,0614 <sup>1</sup>	10% sales price	•0,23 <sup>1</sup>	•0,18 <sup>1</sup>
<b>Digital Compact Cassette</b>	•0,1239 <sup>1</sup>		•0,0614 <sup>1</sup>			
<b>Digital audio tape (DAT)</b>	•0,1239		•0,0614 <sup>1</sup>			
<b>Minidisc</b>	•0,1239	•0,564 <sup>2</sup>	•0,0614 <sup>1</sup>	10 % sales price	•0,32 <sup>1</sup>	
<b>Audio CDR &amp; RW</b>	•0,1239	•0,564 <sup>2</sup>	•0,0614 <sup>1</sup>	10% sales price	•0,42 <sup>1</sup>	•0,18 <sup>1,3</sup>
<b>Hard disk space for audio</b>		•8, 10, 12, 15, 20 for cap. 5, 10, 15, or 20 GB				
<b>MP3 recordable</b>	•0,1239	•0,335 for 32 MB	•0,0614 <sup>1,3</sup>			
<b>Video recording device</b>	3% sales price		•9, 21 or •18,42			•6,61
<b>Analogue video cassettes</b>	•0,0496	•0,428 <sup>1</sup>	•0,0870 <sup>1</sup>	5 % sales price	•0,33 <sup>1</sup>	•0,30 <sup>1</sup>
<b>DVDR &amp; RW video</b>	•0,1239	•3,773 <sup>2</sup>	•1,59 per 4,7 GB			•0,30 <sup>1,3</sup>
<b>DVHS</b>	•0,1239	•8,80 <sup>2</sup>				
<b>PVR</b>		•10 for < 40 GB				
<b>CDR &amp; RW data</b>	•0,1239	15 •for 40 < x < 80 G B	•0,02 <sup>2</sup>	2 % sales price	•0,14 <sup>2</sup>	•0,18 <sup>1,3</sup>
<b>DVD-ram &amp; DVDR and RW data</b>		•0,327 <sup>2</sup>				
<b>Personal Computer</b>		•1,588 <sup>2</sup>	•12 <sup>3</sup>			

<sup>1</sup> Price established 'for each hour of playing time given customary use'.

<sup>2</sup> Price per disk or unit.

<sup>3</sup> The levy is 'claimed' by the relevant collecting societies, but has not yet been actually collected.

## 1.4 Exemption from payment

	REPROGRAPHY	HOME TAPING
<b>Belgium</b>	<b>Art. 5 § 1 of the Royal Decree of 1997</b> 1. Inapplicability of the obligation to pay remuneration for making equipment available for short period to potential client, exclusively on a trial basis; 2. Inapplicability of the obligation to pay remuneration for the use of equipment for demonstration purposes; 3. Inapplicability of the obligation to pay remuneration on Export	<b>Article 57 of the Act</b> Exemption granted to: 1. Producers of sound and audiovisual works; 2. Broadcasting organisations; 3. Institutions officially recognized and publicly funded for the conservation of sound or audiovisual documents; 4. Blind, visually impaired, deaf, and hearing impaired people and the institutions created for their needs; 5. Recognized educational institutions that use sound or audiovisual documents for teaching purposes. Reimbursement granted only on storage media destined for conservation of sound and audiovisual documents and for their consultation on the premises.
<b>France</b>		<b>Article L. 311-8 of the CPI</b> 1. Audiovisual communications enterprises; 2. Phonogram and video producers; 3. Publishers of works published on a digital support; 4. Legal persons or organisms using recording supports as aids for visually handicapped or hearing impaired people.
<b>Germany</b>	<b>Article 54a of the Act</b> A dealer shall not be liable if he procures less than 20 appliances in one half calendar year. <b>Article 54c of the Act</b> Inapplicability of the obligation to pay remuneration on Export	<b>Article 54(1) of the Act</b> A dealer shall not be liable if he procures in one half calendar year video or audio recording mediums with less than 6,000 hours of playing time and less than 100 appliances. <b>Article 54c of the Act</b> Inapplicability of the Obligation to Pay Remuneration on Export
<b>Italy</b>		<b>Article 8(1) of the Act of 1992</b> Within the 180 days following the date of the entry into force of this Law, the Minister of National Education shall enact provisions to promote school access to phonograms, including music phonograms, recorded on disc, tape and any comparable medium as a means of disseminating culture and encouraging education, and shall establish criteria and programs according to the budgetary credits already authorized.

REPROGRAPHY		HOME TAPING
Netherlands	Royal Decree No. 574 of 27 November 2002 Educational institutions that are not part of a scientific institution only pay •0,011 per page reproduced	Ad hoc exemption granted by the Foundation de Thuis kopie: 'No payment for storage media bought for professional use or export'.
Spain		<p><b>Article 25(6) of the TRLPI</b>  (a) the producers of phonograms or videos and broadcasting organizations for equipment, apparatus or material intended for the pursuit of their activity  (b) natural persons who acquire the said equipment, apparatus and material outside Spanish territory under the arrangements for travellers and in such a quantity that it may be reasonably presumed that they are intended for private use on the said territory.</p> <p><b>Article 25(12) of the TRLPI</b>  The same detail shall be used to deduct the amounts corresponding to equipment, apparatus and material destined to be taken out of Spanish territory and those relating to such as is exempted under the provisions of paragraph (6) of this Article.</p>

## 1.5 Debtors of the obligation to pay remuneration

	Manufac- turer	Importer/Who- lesaler	Retailer	Public Libraries	Schools	Governmental Institutions	Enterprises	'Copy-shops'	
<b>Belgium</b>	per device	per device		per page	per page	per page	per page	per page	Reprography
<b>France</b>	per device/ medium	per device/medium		per page	per institution/ pro rata of students & copies	per page	per page	per machine/ pro rata of repr. capacity	Audio & Video Reprography
<b>Germany</b>	per medium	per medium							Audio & Video
	per device	per device	per device	per page	per page	per page	per page	per page	Reprography
	per device/ medium	per device/ medium	per device/ medium						Audio & Video
<b>Italy</b>				per page	?	?	?	per page	Reprography
	per device/ medium	per device/ medium							Audio & Video
<b>Netherlands</b>				per page	per page	per page	per page	per page	Reprography
	per medium	per medium							Audio & Video
<b>Spain</b>	per device	per device	per device						Reprography
	per device/ medium	per device/ medium	per device/ medium						Audio & Video



## 1.6 Distribution of remuneration among rightsholders and other accounting items

	Authors	Publishers	Performing artists	Phonogram Producer	Film Producer	Social Fund	Administration Costs	
<b>Belgium</b>	50 %	50 %					Reprobel: % unknown	Reprography
	33 %		33 %	33 %		possibility of 30%	Auvibel: % unknown	Audio
	33 %		33 %		33 %	possibility of 30%	Auvibel: % unknown	Video
<b>France</b>	10% < x < 50% per type of work 50 %	50% < x < 90% per type of work				not yet...may come	CFC: 11%	Reprography
			25 %: 50 % SPEDIDAM 50 % ADAMI	25 %		SORECOP: 25 %	SORECOP: 3,5 %	Audio
	33,33 %		33,33 %: 20 % SPEDIDAM 80 % ADAMI		33,33 %	ADAMI + Copie France: 25% video home taping + 100% of money owed to untraceable performers VG Wort: 10%	Copie France: 0,85 % ADAMI: cir. 4 %	Video
<b>Germany</b>	100% for works out of print 70% for printed works translators: 50% of authors' share	0% works out of print 30% for printed works 30% for printed works					VG Wort: 7,69%	Reprography
	GEMA: 42 % VG WORT: 16 % GEMA: 21 % VG WORT: 8 %		GVL <sup>4</sup> : 42 %			GEMA: 10%	GEMA: 4 to 5 %	Audio
			GVL: 21 %		GÜFA, VFF, VG Bild-Kunst, VGF, WFF: 50 %	GEMA: 10%	GEMA: 4 to 5 %	Video

<sup>4</sup> Note that the collecting society GVL represents both performing artists and phonogram producers.

	Authors	Publishers	Performing artists	Phonogram Producer	Film Producer	Social Fund	Administration Costs	
Italy	50 %	50 %	25 %	25 %	33 %	IMAIE: 100 % of money owed to untraceable authors SIAE: 5 % paid by the producers Reprorecht: Made up of money owed to untraceable authors Thuisakopie: 15 % NORMA: % unknown IRDA: 0 %	SIAE: % unknown	Reprography
	50 %							Audio
	33 %							Video
Netherlands	50 %	50 %	30 %	30 %	40,75 %	CEDRO: 20 % SGAE: 20 % SGAE: 20 %	Reprorecht: 6 % Thuisakopie: % unknown NORMA: 8 to 14 % IRDA: 6 to 8 % Thuisakopie: % unknown CEDRO: % unknown SGAE: 15,6 % SGAE: 15,6 % AISGE: % unknown	Reprography
	40 %							Audio
	33,75 %							Video
Spain	55 %	45 %	25,50 %	25 %	33 %			Reprography
	50 %							Audio
	33 %							Video



## **Annex 2 - Contributory Copyright Infringement (CCI)**

## Contributory Copyright Infringement (CCI)

Although the U.S. Copyright Act<sup>1</sup> does not expressly impose liability for contributory infringement, absence of express language does not preclude a finding of such liability for the direct infringement of others. To commit contributory infringement, a defendant must, (1) with knowledge of the infringing activity, (2) induce, cause or materially contribute to the infringing conduct of another. *Gershwin Publishing Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Contributory infringement may be found where conduct encourages or assists the infringement or where machinery or goods are provided that facilitate infringement. *Matthew Bender & Co. v. West Publishing*, 158 F.3d 693, 706 (2nd Cir. 1998).

Contributory infringement is a species of the broader problem of identifying the circumstances in which to hold one accountable for the wrongful actions of another. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp.2d 1290, 1293 (D.Utah, Dec 06, 1999). The lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn. Contributory infringement is based upon the concept of enterprise liability requiring “knowledge and participation” 75 F.Supp.2d at 1293.<sup>2</sup>

- The Threshold Requirement of Direct Copyright Infringement

Without direct copyright infringement, there can be no contributory infringement. *Subafilms, Ltd. v. MGM-Pathe Comms. Co.*, 24 F.3d 1088, 1092 (9th Cir. 1994). Direct infringement requires the possession by the victim of a valid copyright and the copying of protectable elements of the copyrighted work. *Intellectual Reserve*, 75 F.Supp.2d at 1292.

“Fair use” becomes an affirmative defense to copyright infringement, requiring a case-by-case analysis. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985). The purposes for copying, such as criticism, comment, news reporting, teaching, scholarship, or research, and the purpose and character of the use, the nature of the work copied, the amount and substantiality used, and the effect upon potential markets must be considered in when determining fair use. 17 U.S.C. 107; *Stewart v. Abend*, 495 U.S. 207, 236-37 (1990). Fair use copying is non-infringement. 17 U.S.C. § 107.

- The First Element of CCI: Knowledge of the Infringing Activity

Contributory liability requires that the secondary infringer know or have reason to know of direct infringement. *A&M Records, Inc. v. Napster, Inc.*, 2001 U.S. App. LEXIS 1941, 239 F.3d 1004 (9<sup>th</sup> Cir. February 12, 2001)(“*Napster II*”)<sup>3</sup>. The Ninth Circuit in *Napster II* rejected the argument that a file sharing service could not distinguish infringing from non-infringing files and therefore did not “know” of direct infringement. *Napster II*, 2001 U.S. App. LEXIS 1941 at \*35. In *Aimster*, defendants more recently argued that the system’s encryption technology prevented actual knowledge of specific transfers of specific infringing material between specific users. Rejecting that argument, the district

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<sup>1</sup> 17 U.S.C. § 101, et seq. (2001).

<sup>2</sup> Vicarious liability is derived from the agency concept of *respondeat superior* requiring benefit and control. *Intellectual Reserve, Inc.*, 75 F.Supp.2d at 1293. Vicarious liability may be found where defendant has the right or ability to supervise the infringing activity and also has a direct financial interest in such activities. *Fonovisa, Inc. v. Cherry Auction*, 76 F.3d 259, 262 (9th Cir. 1996). The “staple article of commerce” analysis has no application to vicarious liability. *A&M Records, Inc. v. Napster, Inc.*, 2001 U.S. App. LEXIS 1941 at \*43, 239 F.3d 1004 (9<sup>th</sup> Cir. February 12, 2001); *Sony v. Universal Studios*, 464 U.S. 417, 434-437 (1984).

<sup>3</sup> See also *Cable/Home Communication Corp. Network Prods., Inc.*, 902 F.2d 829, 846 (11th Cir. 1990); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1373-74 (N.D. Cal. 1995)

court held that such specificity of knowledge was not required. *In Re Aimster Copyright Litigation*, Case No. 01C8933, Memorandum Opinion and Order, p. 23 (N.D. Ill. Sept. 4, 2002).<sup>4</sup>

In *Sony v. Universal Studios*, 464 U.S. 417 (1984), the U.S. Supreme Court distinguished cases involving ongoing relationships between direct and secondary infringers from those in which the only contact between the seller and the users of copying equipment was at the moment of sale. *Sony*, 464 U.S. at 437. *Sony* remains the leading case on the applicability of contributory liability to the sale of copying devices.

Contributory liability in *Sony* rested on whether video tape recorders were sold with constructive knowledge that customers might make unauthorized copies of copyrighted material. 464 U.S. at 439. To answer that question, the Supreme Court modified and adopted a “staple article of commerce” test from patent law. Under that test, the sale of a copying device will not constitute contributory infringement if the device can be widely used for legitimate, unobjectionable purposes. 464 U.S. at 442.

The *Sony* evidentiary record established that “time-shifting” was the primary use of video tape recorders and that a substantial number of copyright holders would not object to time-shifting. 464 U.S. at 442, 447. The Court found that unauthorized home time-shifting was “fair use”. Based upon that finding and the record, the Court then held that the private use of video tape recorders for time-shifting was a commercially significant non-infringing use precluding contributory liability. 464 U.S. at 455.

Use of the “staple article of commerce” test has limited applicability where actual or constructive knowledge has been established by conduct beyond the mere distribution of a “staple product”. In *Napster II*, the court refused to hold that a file sharing service had constructive knowledge merely because its system had been used to infringe copyrights. The court reasoned that plaintiffs would still likely establish actual or constructive knowledge of direct infringement regardless of the number of non-infringing uses. *Napster II*, 2001 U.S. App. LEXIS 1941 at \*38.

Even more recently in *Aimster*, the district court distinguished its circumstances and found *Sony* inapplicable based upon the following considerations: the principal use of video recorders was non-infringing; *Sony* applied to a staple article of commerce, having no ongoing relationship between the parties; the use in *Sony* involved private home copying with no issue of distribution; the district court in *Sony* found no influence or encouragement beyond that of an innocent enabler; and finally, unlike the video tape recorders, *Aimster*’s service was specifically designed to aid copyright infringement.<sup>5</sup> Memorandum Opinion and Order, p. 27.

Advancing technology may further test the scope and reach of the *Sony*. Two recently filed related cases, *Paramount Picture Corp. v. ReplayTV Inc.*, Case No. 01CV-9358 (C.D. Cal. Oct. 31, 2001) and *Newmark v. Turner Broadcasting System, Inc.*, Case No. 02CV-04445 (C.D. Cal. 2002), involve a recording device specifically designed to allow broadcast television programs to be copied, viewed without commercials and distributed to others via an internet connection. Although the standard recording capabilities of the device previously resolved by *Sony* are not challenged, contributory and direct copyright infringement claims are implicated as the result of the device’s additional capabilities and the seller’s continuing relationship with the user.

- The Second Element of CCI: Material Contribution

In *Fonovisa, Inc. v. Cherry Auction*, 76 F.3d 259 (9th Cir. 1996), operators of a swap meet were held to have materially contributed to the infringing acts of vendors who were selling pirated music

<sup>4</sup> 2001 U.S. Dist. LEXIS 19135, 2002 WL 31006142 (N.D. Ill. Sept. 4, 2002)

<sup>5</sup> See also *Cable/Home Comm. v. Network Prods., Inc.*, 902 F.2d 829, 846 (11th Cir. 1990); *A&M Records, Inc. v. Abdallah.*, 948 F.Supp. 1449, 1456 (C.D. Cal. 1996).

recordings by providing services such as parking spaces, advertising and utilities. The court found that those services created the environment necessary for infringement stating that “it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet.” 76 F.3d at 264.

In *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), substantial participation was found where a computer bill board system supported the posting of infringing material and the operator failed to cancel a user's infringing message to stop distribution. 907 F. Supp. at 1371. In *Napster II*, providing the site and facilities for direct infringement was sufficient for a finding of material contribution. *Napster II*, 2001 U.S. App. LEXIS 1941 at \*41. Similarly, in *Aimster*, the Court found that without defendants' services, infringing users would need to find some other way to connect. Even without such “but for” causation, *Aimster* was found to predicate its service upon furnishing a “road map” for users to find, copy, and distribute copyrighted music. *Aimster*, Memorandum Opinion and Order, p. 24.

- Audio Home Recording Act and “Space Shifting”

In *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072-1079 (9th Cir. 1999), the only issue before the court was whether a hand held device, which was capable of copying, playing, but not transferring digital music, was subject to the Audio Home Recording Act of 1992 (AHRA)<sup>6</sup>. Copies of digital music files were transferred to the device in order to “space-shift” files that were residing on the user's computer hard drive. While no claims of direct or contributory copyright infringement were at issue, the court found such copying “paradigmatic non-commercial personal use” and entirely consistent with the purposes of the AHRA. 180 F.3d at 1079. However, the device did not meet the act's definition of a “digital audio recording device” and was not subject to AHRA, or its copying control and royalty requirements. 180 F.3d at 1075-1079; 17 U.S.C. § 1002; 17 U.S.C. § 1003.

The court in *Napster II* rejected the argument that “space shifting” was fair use, distinguishing “space shifting” for distribution to others from private, in home time or space-shifting. 2001 U.S. App. LEXIS 1941 at \*32-33<sup>7</sup>

- CCI and the Issue of Royalties

Justice Blackburn, in his dissent to the 5-4 majority decision in *Sony* noted that the Court confused the question of liability with the question of fashioning an appropriate remedy when it relied upon the factual finding that many copyright holders would have no objection to time-shifting. 464 U.S. at 460. The dissent further considered that remedies, including royalty payments or technical measures to prevent unauthorized copying, might be available that would not interfere with authorized time-shifting. 464 U.S. at 493-494. Further, had *Sony* been found liable (i.e., by a finding that “time shifting” was not “fair use”), Justice Blackburn concurred with the suggestion that royalties might have been an appropriate means of balancing the equities in the case. 464 U.S. at 500. The dissent particularly noted that other nations have imposed royalties on the manufacturers of products used to infringe copyright. 464 U.S. at 500, n 51.

The use of the handheld device in *Diamond Multimedia* was found to be consistent with the purpose of the AHRA (i.e., to ensure the right of consumers to make audio recordings of copyrighted music for “private, noncommercial use”). 180 F.3d at 1079. However, the AHRA expressly sets off its private use purpose and corresponding liability protection against its copy control and royalty provisions. 17 U.S.C. §§ 1002; 1003, and 1008.

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<sup>6</sup> 17 U.S.C. §1001, et seq.

<sup>7</sup> See also *Aimster*, Memorandum Opinion and Order at p. 27; *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d at 351-52; *Religious Tech. Ctr. v. Lerma*, No. 95-1107A, 1996 WL 633131, at \*6 (E.D. Va. Oct. 4, 1996).

In *Napster II*, where “fair use”, “private use” and *Sony* were inapplicable, the court rejected defendants’ request for a continuing royalty instead of an injunction. 2001 U.S. App. LEXIS 1941 at \*62-64. The court narrowly construe whether compulsory royalties were appropriate in that context because Congress had arguably limited the application of compulsory royalties to specific circumstances. 2001 U.S. App. LEXIS 1941 at \*63; 17 U.S.C. § 115.

The question of whether or not the general characterization of a use (e.g., “fair use”, “private use”, “infringing use”) has a direct relationship to the utilization of royalties as compensation, remuneration or remedy for copying remains to be further developed by the courts or Congress.



beslut enligt 15 kap. rättegångsbalken.

Talan om utdömande av vite förs av den som har ansökt om förbudet. I samband med sådan talan får talan föras om nytt vitesförbud. *Lag (1996:846).*

*Lag (1985:206) om viten* - Då väl sannolika skäl enl. 2 st. för intrång förelåg men otillräcklig säkerhet ställts vid påstått intrång i upphovsrätt till porslinservis avlogs yrkande om interimistiskt vitesförbud **H 1995:631.**

**54 §** Den som i strid mot denna lag eller mot föreskrift enligt 41 § andra stycket utnyttjar ett verk skall till upphovsmannen eller hans rättsinnehavare gälda ersättning, utgörande skäligt vederlag för utnyttjandet.

Sker det uppsåtliga eller av oaktsamhet, skall ersättning jämväl utgå för annan förlust än uteblivet vederlag, så ock för lidande eller annat förfång.

Den som eljest uppsåtliga eller av oaktsamhet vidtager åtgärd, som innebär intrång eller överträdelse varom i 53 § sägs, skall ersätta upphovsmannen eller hans rättsinnehavare förlust, lidande eller annat förfång av åtgärden.

**H 1976:282** anm. vid 45 § - Ang. 1 st. **H 1981:313** anm. vid 1 §, **H 1986:226** (regeln i 1 st. ej tillämplig vid intrång i titel enl. 50 §) - Ang. 2 st. **H 1984:34** (skadestånd för utbudande och försäljning av olovligen framställda grammofonskivor), **H 1985:807** (ersättning för ideell skada p. g. a. olovligt utnyttjande av tidningsartikel för viss marknadsföringsåtgärd), **H 1985:813** anm. vid 49 § - Ang. 3 st. **H 1974:94**; **H 1996:354** anm. vid 3 § - Fråga om skadeståndsskyldighet för styrelseledamot och firmatecknare som tillika var anställd hos det bolag i vars verksamhet intrång i upphovsrätt skett **H 1986:702** - Fråga vid olovligt utnyttjande av tidningsartikel om tidningens medarbetare såsom upphovsman ägde, utom tidningsföretaget, rätt till ersättning för skada genom intrånget **H 1993:390**; jfr **H 1987:266** - Fråga, om oaktsamhet förelegat **H 1995:164** anm. även vid 1 § - Återgivande i dagstidning av en i annan dagstidning införd intervjuartikel utgjorde intrång i upphovsrätt **H 1996:712.**

Hovrättsfall: **RH 1985:83, RH 1995:59**

**55 §** Den som vidtager åtgärd som innebär intrång eller överträdelse varom i 53 § sägs är skyldig att, såvitt det finnes skäligt, mot lösen avstå egendom med avseende på vilken

med § 3, stk. 1 og 2, hvis kulturelle interesser herved krænkes.

## Kapitel 7 Retshåndhævelse

### Straf

§ 76. Med bøde straffes den, som forsætligt eller groft uagtsomt

- 1) overtræder § 2 eller § 3,
- 2) overtræder §§ 65, 66, 67, 69, 70 eller 71,
- 3) overtræder § 11, stk. 2, § 60 eller §§ 72-75,
- 4) undlader at fremsende opgørelse efter § 38, stk. 6,
- 5) undlader at lade sig anmelde eller undlader at meddele oplysninger til fællesorganisationen efter § 41, stk. 1, og § 46, 1. pkt., eller undlader at føre eller opbevare regnskaber i henhold til § 45, eller
- 6) overtræder forskrifter, der er givet efter § 61, stk. 2.

Stk. 2. Er en forsætlig overtrædelse af de i stk. 1, nr. 1 og 2, nævnte bestemmelser begået ved erhvervsmæssigt at fremstille eller blandt almenheden sprede eksemplarer af værker eller frembringelser, der beskyttes efter §§ 65-71, kan straffen under særligt skærpende omstændigheder stige til hæfte eller fængsel indtil 1 år. Særligt skærpende omstændigheder anses navnlig at foreligge, hvis overtrædelsen vedrører et betydeligt antal eksemplarer, eller hvis der ved overtrædelsen tilsigtes en betydelig vinding.

§ 77. Når eksemplarer af værker eller frembringelser, der beskyttes efter §§ 65-71, er fremstillet uden for Danmark under sådanne omstændigheder, at en tilsvarende fremstilling i Danmark ville være i strid med loven, straffes med bøde den, som forsætligt eller groft uagtsomt indfører sådanne eksemplarer med henblik på at gøre dem tilgængelige for almenheden.

Stk. 2. Bestemmelsen i § 76, stk. 2, finder tilsvarende anvendelse på forsætlige overtrædelser af bestemmelsen i stk. 1.

§ 78. Med bøde straffes den, som forsætligt eller groft uagtsomt omsætter eller i kommercielt øjemed besidder midler, hvis eneste formål er at lette ulovlig fjernelse eller omgåelse af tekniske indretninger, som måtte være anvendt til at beskytte et edb-program.

§ 79. I forskrifter, der udstedes efter § 16, § 31, stk. 2, § 42, stk. 4, § 43, stk. 2, § 44, stk. 2, § 45, stk. 2, og § 47, stk. 2, kan der fastsættes straf af bøde for overtrædelse af bestemmelser i forskrifterne.

§ 80. Er en overtrædelse begået af et selskab, en forening, en fond eller lignende, kan der pålægges den juridiske person som sådan bødeansvar. Er overtrædelsen begået af staten, en kommune eller et kommunalt fællesskab, jf. § 60 i lov om kommunernes styrelse, kan der pålægges staten, kommunen eller det kommunale fællesskab bødeansvar.

### Påtale

§ 81. Overtrædelser, som omfattes af § 76, stk. 1, § 77, stk. 1, eller § 79, påtales af den forurettede.

Stk. 2. Efter ophavsmandens død kan overtrædelser af § 3 og af de i medfør af § 61, stk. 2, givne forskrifter endvidere påtales af ophavsmandens ægtefælle, slægtning i ret op- eller nedstigende linie eller søskende.

Stk. 3. Efter ophavsmandens død kan overtrædelser af §§ 3 og 73-74 endvidere påtales af det offentlige. Ved overtrædelser af § 3 kan offentlig påtale dog kun finde sted, når kulturelle interesser må anses for krænket ved overtrædelsen.

Stk. 4. Overtrædelser af §§ 75 og 78 påtales af det offentlige.

§ 82. Overtrædelser, som omfattes af § 76, stk. 2, eller § 77, stk. 2, påtales af det offentlige, når den forurettede begærer det.

Stk. 2. Ransagning i sager om overtrædelse af bestemmelser i denne lov sker i overensstemmelse med retsplejelovens regler om ransagning i sager, som efter loven kan medføre frihedsstraf.

### Erstatning og godtgørelse

§ 83. Den, som forsætligt eller uagtsomt overtræder en af de i §§ 76 og 77 nævnte bestemmelser, har pligt til at udrede rimeligt vederlag for udnyttelsen samt erstatning for den yderligere skade, som overtrædelsen måtte have medført.

Stk. 2. Selv om overtrædelsen er begået i god tro, kan der tilkendes den forurettede vederlag og erstatning efter bestemmelsen i stk. 1, i det

omfang det skønnes rimeligt. Vederlaget og erstatningen kan dog ikke overstige den ved overtrædelsen indvundne fortjeneste.

*Stk. 3.* En ophavsmand, fotograf eller udøvende kunstner, hvis ret er krænkede ved retsstridigt forhold, har krav på godtgørelse for ikke-økonomisk skade.

#### *Inddragelse mv.*

§ 84. Når eksemplarer af værker eller frembringelser, der beskyttes efter §§ 65-71, er fremstillet, indført eller gjort tilgængelige for almenheden i Danmark i strid med denne lov eller med forskrifter givet efter § 61, stk. 2, kan det ved dom bestemmes, at eksemplarerne skal inddrages til fordel for den forurettede eller overdrages til ham mod et vederlag, der ikke overstiger fremstillingsomkostningerne.

*Stk. 2.* I stedet for inddragelse eller overdragelse kan det bestemmes, at eksemplarerne helt eller delvis skal tilintetgøres eller på anden måde gøres uanvendelige til ulovlig brug. Hvis det under hensyn til eksemplarenes kunstneriske eller økonomiske værdi eller omstændighederne i øvrigt skønnes rimeligt, kan retten tillade, at de fremstillede eksemplarer gøres tilgængelige for almenheden mod erstatning og godtgørelse til den forurettede.

*Stk. 3.* Bestemmelserne i stk. 1 og 2 finder tilsvarende anvendelse på tryksatser, klicheer, forme og andet, som kan tjene til ulovlig fremstilling eller brug af værket eller frembringelsen.

*Stk. 4.* Bestemmelserne i stk. 1-3 kan ikke bringes i anvendelse over for den, som i god tro har erhvervet eksemplarer til privat brug.

*Stk. 5.* Bygninger kan ikke kræves inddraget eller tilintetgjort i medfør af stk. 1 og 2.

### Kapitel 8

#### Lovens anvendelsesområde

##### *Ophavsret*

§ 85. Lovens bestemmelser om ophavsret gælder for

- 1) værker af danske statsborgere eller personer, der er bosat i Danmark,
- 2) værker, som er udgivet første gang i Danmark, eller som er udgivet første gang samtidig i Danmark og i et andet land,
- 3) filmværker, hvis producent har sit hovedsæde eller er bosat i Danmark,

4) bygningsværker, som er beliggende i Danmark, og

5) kunstværker, som er indføjet i bygninger eller anlæg i Danmark.

*Stk. 2.* Ved anvendelsen af stk. 1, nr. 2, anses samtidig udgivelse at have fundet sted, såfremt værket efter udgivelse i et andet land inden 30 dage udgives i Danmark.

*Stk. 3.* Ved anvendelsen af stk. 1, nr. 3, anses, når andet ikke er oplyst, den som producent, hvis navn på sædvanlig måde er angivet på filmen.

*Stk. 4.* Bestemmelserne i § 38 gælder for værker af danske statsborgere og personer, der er bosat i Danmark.

*Stk. 5.* Bestemmelserne i §§ 73-75 gælder for ethvert værk.

#### *Andre rettigheder*

§ 86. Bestemmelserne i §§ 65, 66 og 68 gælder for fremførelser og lydoptagelser, som har fundet sted i Danmark.

*Stk. 2.* Bestemmelserne i §§ 65 og 66 om optagelse og eftergørelse gælder dog for alle lydoptagelser.

*Stk. 3.* Bestemmelsen i § 67 gælder for

- 1) billedoptagelser, som har fundet sted i Danmark,
- 2) billedoptagelser, som er fremstillet af danske statsborgere og personer, der er bosat i Danmark, og
- 3) billedoptagelser, som er fremstillet af et selskab, der har hovedsæde i Danmark.

*Stk. 4.* Bestemmelsen i § 69 gælder for

- 1) radio- og fjernsynsudsendelser, som har fundet sted i Danmark, og
- 2) radio- og fjernsynsforetagender, der har hovedsæde i Danmark.

*Stk. 5.* Bestemmelserne i § 85 finder tilsvarende anvendelse på fotografiske billeder efter § 70.

*Stk. 6.* Bestemmelsen i § 71 gælder for

- 1) kataloger mv., som er fremstillet af danske statsborgere og personer, der er bosat i Danmark,
- 2) kataloger mv., som er fremstillet af selskaber, der har hovedsæde i Danmark, og
- 3) kataloger mv., som er udgivet første gang i Danmark.

*Stk. 7.* Bestemmelserne i stk. 6, nr. 1 og 2, finder tilsvarende anvendelse på pressemeddelelser, som nævnt i § 72.

#### *Lovens anvendelse*

§ 87. Undersøgelser kan ved kgl. bestemmelse udføres.

*Stk. 2.* Endvidere kan gøres anordninger af udgivet af samt på ikke-organiseringer.

#### *Ikrafttrædelse*

§ 88. Lovens

*Stk. 2.* Samt

1) lov om oplysningsskole

714 af 8. s.

2) lov om re

lovbekend

1993, og

3) administrativ medfør af

*Stk. 3.* For

fremføres i

1995-96.

§ 89. Lovens

bringelser m

beskyttelse e

rære og kuns

ten til fotogr

*Stk. 2.* Eks

let for lovens

menheden og

1. pkt. gælde

af filmværke

læsbar form,



## Kongsberg byrett

Den 9. februar 1999 ble rett holdt i Kongsberg byrett.

**Dommer:** Dommerfullmektig Knut Erik Sæther  
m/begr.fullm.

**Protokoll-  
fører:** Dommeren

**Sak nr** 98-00296 A

**Saksøker:** Microsoft Corporation Inc  
**Prosessfullmektig:** Advokat Grete Funderud

**Saksøker:** Microsoft Norge AS  
**Prosessfullmektig:** Advokat Grete Funderud

**Saksøkt:** Kongsberg kommune  
**Prosessfullmektig:** Advokat Frode Sæter

Den 9 februar ble rett satt på sorenskriverkontoret på Kongsberg.  
Det ble avsagt slik

#### k j e n n e l s e:

Ved stevning innkommet til Kongsberg byrett 2 september 1998 reiste Microsoft Corporation Inc og Microsoft Norge AS søksmål mot Kongsberg kommune med krav om erstatning for uberettiget bruk av programvare. Bakgrunnen for at både Microsoft Corporation Inc og Microsoft Norge AS var saksøkere, var ifølge stevningen at bare deler av rettighetene til programvaren var overført fra Microsoft Corporation Inc til Microsoft Norge AS.

Under saksforberedelsen oppstod det spørsmål om Microsoft Norge AS hadde rettslig interesse i saken. I prosesskriv 21 desember 1998 fra saksøkernes prosessfullmektig ble saken trukket for Microsoft Norge AS, slik at dette selskapet ikke lenger var part i saken. Det ble videre opplyst at den gjenværende saksøkeren, Microsoft Corporation Inc, påtar seg det fulle omkostningsansvar. Dette ble gjentatt under hovedforhandlingen i saken 28 og 29 januar 1999, og det ble her opplyst at ingen av rettighetene til den aktuelle programvaren var overført fra Microsoft Corporation Inc til Microsoft Norge AS.

Advokat Frode Sæter har fremsatt særskilt omkostningsoppgave på kr 7 750,- i forbindelse med at saken er trukket for Microsoft Norge AS sitt vedkommende. Omkostningsoppgaven er forelagt for advokat Funderud, som ikke har hatt innsigelser mot oppgavens størrelse.

Tvistemålsloven § 175 fastslår at dersom en sak blir avvist eller den ellers ender uten dom, skal det pålegges saksøkeren å erstatte saksøktes omkostninger, med mindre utfallet skyldes omstendigheter som ikke kan legges saksøkeren til last. I den foreliggende sak er det således klart at saksøkerne skal erstatte saksøktes saksomkostninger på dette punkt. Disse blir å sette i samsvar med den fremlagte omkostningsoppgaven på kr 7 750,-.

#### S l u t n i n g:

1. Sak nr 98-00296 A heves i forhold til saksøkeren Microsoft Norge AS.
2. Microsoft Norge AS dømmes til å erstatte Kongsberg kommune kr 7 750,- kronersyvtusensyvhundreogfemti - i saksomkostninger.
3. Oppfyllelsesfristen er 2 - to - uker fra kjennelsen er forkynt.

Det ble deretter avsagt slik

#### D o m:

#### I

Ved stevning 1 september 1998 - innkommet til Kongsberg byrett 2

september s å - reiste det amerikanske selskapet Microsoft Corporation Inc og Microsoft Norge AS søksmål mot Kongsberg kommune med krav om erstatning for ulovlig bruk av programvare. Saken er senere hevet i forhold til Microsoft Norge AS, jf Kongsberg byretts kjennelse 9 februar 1999.

I stevningen er det angitt at saken gjelder erstatning for uberettighet bruk av programvare. I tilsvaret 18 september 1998 avviser Kongsberg kommune kravet på erstatning, og det har ikke senere lyktes partene å komme til enighet. Hovedforhandling i saken er holdt 28 og 29 januar i Kongsberg byrett. Microsoft Corporation Inc har ikke møtt med partsrepresentant. Salgssjef Leif Anders Aasen i Microsoft Norge AS har møtt og i medhold av tvistemålsloven § 213 annet ledd gitt adgang til å følge forhandlingene i sin helhet.

## II

Saksforholdet er i all korthet følgende:

Kongsberg kommune har et felles IT-nettverk, administrert under kommunens IT-seksjon. I de senere år er det besluttet å endre kommunens IT-strategi ved å velge enhetlige løsninger for nytt nettverk og kontorstøtte basert på Windows NT-plattform fra Microsoft Corporation Inc. Overgangen til den nye plattformen har vært gjennomført gradvis, og er ennå ikke avsluttet.

Som ledd i overgangen til Microsoft programvareplattform ble det vinteren 1997 avholdt et møte mellom Kongsberg kommune, SMB Data AS (kommunens lokale leverandør) og Microdialog AS (lisensrevisor og samarbeidspartner med SMB Data AS). I møtetreferat i telefaks 17 april 1997 fra SMB Data AS v/ daglig leder Bent Gurholt heter det blant annet:

"Jeg viser til vårt møte med undertegnede, Microdialog og deg. Vi har et behov for å gå gjennom ditt totale lisensbehov etter at du har lagt om fra WP til Word. Denne overgangen har vært flytende, men nå er alle stort sett i gang med Word.

Jeg foreslår følgende handlingsplan:

1. I.1.a 2 kvartal gjennomføre telling av lisenser i Kongsberg kommune.
2. Starte oppgradering av lisenser til Office 97.
3. Punkt 2 må koordineres med kursing av de ansatte. Vår erfaring tilsier at kurs bør gjennomføres om høsten for å samle flest mulig.

Konklusjon: Full oppgradering bør gjennomføres i.1.a høsten og 1 kvartal 1998. Vi må også sjekke kapasiteten på serverne dine. Men samtidig bør det kjøpes nye lisenser når nye brukere skal "opp og gå" slik at dette blir i tråd med gjeldende regler.

Jeg kontakter vår distributør for eksakt pristilbud på Office-97 lisenser."

Rettighetshaveren til Word, Microsoft Corporation Inc, er et

amerikansk basert selskap som blant annet utvikler operativsystemer og annen programvare for PC. Selskapet er medlem av den internasjonale interesseorganisasjonen Business Software Alliance (BSA) som har som formål å motvirke ulovlig eksemplarframstilling, - bruk og distribusjon av medlemmenes programvareprodukter.

I brev 26 juni 1997 henvendte advokatfirmaet Smith Grette Wille DA seg på vegne av BSA til Kontrollutvalget i Kongsberg kommune. I brevet ble det opplyst at BSA hadde mottatt opplysninger om at ansatte i kommunen kunne ha benyttet ulovlige programvarekopier, og det ble bedt om at Kontrollutvalget undersøkte forholdene for å bringe på det rene om ulovligheter hadde funnet sted.

Kongsberg kommune ved rådmannen svarte i brev 2 juli 1997 til advokatfirmaet Smith Grette Wille DA at brevet 26 juni 1997 kunne forstås slik at ansatte i Kongsberg kommune hadde benyttet ulovlige programvarekopier, og ba om konkrete opplysninger dersom så var tilfelle. Det ble pekt på at administrasjonen i kommunen også har "et ansvar for at kommunen opptre i henhold til regelverk og ikke gjør overtredelser av den art De antyder." Kommunen ved leder for IT-seksjonen Bjørn Næss utdypet i brev 22 juli 1997 at kommunen ønsket å gjennomføre en lisensrevisjon for å forsikre seg om at kommunen har korrekt lisensiering og for å forsikre seg om at kommunen har den gunstigste lisensportefølje og lisensavtale for kommunens reelle behov og bruksmønster.

Avtale om lisensrevisjon ble undertegnet 11 august 1997 mellom Kongsberg kommune, SMB Data AS og Microdialog AS. Ifølge avtalen punkt 2 var gjennomføringen av avtalen delt inn i tre faser. Den første fasen er omtalt som "Oppstartsrevisjon", og omfattet "installasjon av inventeringsverktøy", "installasjon av bruksmønsterverktøy", "kartlegging av programvare installert" og "kartlegging av bruksmønster". Den andre fasen i avtalen er omtalt som "Justering av evt. misforhold" og består av "rapport på beste lisensieringsløsning", "kartlegging av dokumenterte lisenser", "justering av misforhold (oppdragsgivers kjøp eller sletting/begrensning av programbruk)" og "utstedelse av sertifikat på korrekt lisensiering". Den tredje og siste fasen er omtalt som "Halvårs-revisjon" og innbefatter "ny kartlegging av bruk", "justering av eventuelle nye misforhold (kjøp/sletting/begrensning av programvarebruk)", "fornyelse av sertifikat" samt "rapport til oppdragsgivers revisorinstans på korrekt lisensiering". I avtalen punkt 4 heter det videre at:

"Tjenesteleverandør er økonomisk ansvarlig for korrekt lisensiering av all programvare hos oppdragsgiver. ... Basert på bruksmønsteranalyser etter oppstartsrevisjon skal det utarbeides en rapport over den beste lisensavtaleform for oppdragsgiver."

På vegne av BSA ba advokatfirmaet Smith Grette Wille DA om innsyn i rapporten Microdialog AS skulle utarbeide. Kommunen bekreftet i brev 26 november 1997 at lisensrevisjonen var gjennomført, og i brev 2 desember 1997 sendte kommunen over deler av rapporten samt en avtale 13 november 1997 som viste at kommunen hadde inngått avtale med den lokale leverandøren SMB Data AS om levering av Microsoft Office produkter. Produktene det var snakk om, er i avtalen beskrevet som 5

stk Office Std lisens vedlikehold, 140 stk Office Std lisens. Ny lisens/Vedlikehold og endelig 5 stk Office Pro lisens vedlikehold.

Etter ny henvendelse fra advokatfirmaet Smith Grette Wille DA 5 desember 1997 til Kongsberg kommune mottok advokatfirmaet 17 februar 1998 en komplett lisensrapport datert 10 november 1997. I notat 17 februar 1998 fra Kongsberg kommune ved leder for IT-seksjonen Bjørn Næss til advokatfirmaet Smith Grette Wille DA ble det oversendt kopi av revisjonssertifikat 13 februar 1998, og det ble opplyst at Kontrollutvalget i kommunen etter å ha blitt orientert om saken 16 februar 1998 var fornøyd med resultatet og ville avslutte saken med et skriv til administrasjonen i kommunen.

BSA mente lisensrapporten viste at kommunen hadde underdekning av lisenser, at programmer derfor var ulovlig installert og fremmet i brev 11 juni 1998 fra advokatfirmaet Arntzen, Underland & Co ANS krav om lisenser som etter BSA sitt syn manglet. Kravet var beregnet slik at hver programvare som det ble pretendert at manglet lisenser ble prissatt, fratrasket forhandlerens påslag og mva og ganget opp med antallet programmer som ifølge BSA manglet lisenser. Nettotapet ble beregnet til NOK 112 888,-.

Kommunen svarte i brev 29 juli 1998 at rapporten inneholdt enkelte feil og at kommunen ikke kunne akseptere måten tapet var beregnet på.

### III

Partenes anførsler og påstander:

Saksøkeren, Microsoft Corporation Inc, heretter for korthets skyld benevnt Microsoft, har sammenfatningsvis anført følgende:

Prinsipalt anføres at kommunen har gjort seg skyldig i brudd på åndsverkloven på en måte som gir krav på erstatning. Datamaskinprogrammer vernes av åndsverkloven § 1 nr 12. Dette gir i følge åndsverkloven § 2 rettighetshaveren, her Microsoft, krav på enerett til å fremstille eksemplarer av åndsverket og å gjøre det tilgjengelig for allmenheten. Lisensrapporten og andre bevis som saksøker har ført for retten viser at Kongsberg kommune har forbrutt seg mot disse reglene ved å installere og ta i bruk programvare uten å betale lisensavgift for disse. Dette fører til erstatningsansvar i henhold til åndsverksloven § 55 første ledd første punktum som viser til de alminnelige erstatningsregler. Det er ingen tvil om at kommunen har opptrådt uaktsomt, og det foreligger årsakssammenheng mellom Microsoft sitt økonomiske tap og kommunens erstatningsbetingende handling. Subsidiært, forutsatt at kommunens handlemåte ikke rammes av åndsverkloven, anføres at kommunen har gjort seg skyldig i erstatningsbetingende avtalebrudd når den ikke har rettet seg etter de avtalevilkårene som følger med programvaren. Det er ingen tvil om at avtalevilkårene er vedtatt av Kongsberg kommune. Det må i den forbindelse legges vekt på at kommunen er en profesjonell aktør som må være kjent med avtalevilkårene. Avtalebruddet må bedømmes som uaktsomt, og under enhver omstendighet gjelder objektivt erstatningsansvar i slike tilfeller.



Microsoft sitt økonomiske tap som kreves erstattet består av to elementer. For det første kreves erstattet det vederlag Microsoft ville fått dersom kommunen hadde betalt lisensavgift slik den pliktet å gjøre. Det spiller i den sammenheng ingen rolle at kommunen senere kjøpte de lisensene den manglet. Ved erstatningsutmålingen må det således ses helt bort fra disse etterfølgende forholdene. Det foreligger ikke norsk rettspraksis som direkte tar for seg et tilsvarende tilfelle, men et slikt resultat understøttes av lovens ordlyd sett i sammenheng med formålsbetraktninger, utenlandsk rettspraksis, folkerettslige forpliktelser, reelle hensyn og juridisk teori. Å ta i betraktning at kommunen senere skaffet seg de nødvendige lisensene ville lede til urimelige konsekvenser og oppmuntre til ulovlig bruk av programvare. Nøyaktig hvor mange lisenser som manglet har ikke latt seg fastslå, men i lys av de bevisene som er ført for retten gjelder det vesentlig flere lisenser enn dem som mangler ifølge rapporten. Det bestrides blant annet at kommunen hadde 40 Word 6.0 lisenser slik rapporten gir uttrykk for. Det riktige tallet skal være 1. De 39 øvrige lisensene er skaffet til veie på et senere tidsrom og kan ikke tas i betraktning. Den nærmere tallfesting av hvor mange lisenser som manglet overlates til rettens skjønn, jf tvistemålsloven § 192. I tillegg til det tapte vederlagskravet kreves erstatning for annet tap som kommunens handlemåte har påført Microsoft i form av tap av goodwill, markedsforstyrrelser og oppsporingsutgifter. Det kreves også erstatning for Microsoft sine utgifter til finansieringen av BSA og til juridisk bistand frem til stevning ble tatt ut. Noe eksakt økonomisk tap har heller ikke her latt seg beregne. Under hovedforhandlingen har vært antydnet en samlet sum på NOK 50 000,-, men også her bes retten om å fastsette erstatningsbeløp etter sitt skjønn, jf tvistemålsloven § 192. Noen lempning av erstatningsansvaret, jf skadeserstatningsloven § 5-2, er det ikke grunnlag for.

Under hovedforhandlingen har saksøkeren nedlagt slik påstand:

1. Kongsberg kommune tilpliktes å betale Microsoft Corporation en samlet erstatning fastsatt etter rettens skjønn med tillegg av 12 % rente p a fra forfall til betaling finner sted.
2. Kongsberg kommune dømmes til å betale sakens omkostninger med tillegg av 12 % rente p a fra forfall til betaling finner sted.

Saksøkte har sammenfatningsvis gjort gjeldende:

Prinsipalt anføres at Kongsberg kommune til enhver tid har hatt de nødvendige lisenser, og kommunen har derfor ikke utvist noen erstatningsbetingende handlemåte. Lisensrapporten gir ikke noe dekkende bilde av de reelle forholdene, og den må leses i sammenheng og holdes sammen med annen lisensdokumentasjon enn lisensbevis. Hvis retten mot formodning kommer frem til at kommunen ikke har hatt de tilstrekkelige lisenser, gjøres gjeldende at åndsverksloven § 2 ikke får anvendelse i dette tilfellet. Saksøkers anførsel om at kommunen har brutt åndsverkloven § 2 ved å gjøre åndsverket tilgjengelig for allmenheten, er fremsatt for sent og må prekluderes ved rettens kjennelse i medhold av tvistemålsloven § 335. Eneretten til eksemplarframstilling er ikke overtrådt. Det er i den sammenheng

vist til at Kongsberg kommune har installert og bruker programvaren på en måte som gjør at det bare er fragmenter av programvaren som kopieres før den tas i bruk av den enkelte brukeren. En slik ytterst begrenset og helt fragmentarisk kopiering er ikke fremstilling av åndsverket slik åndsverkloven nytter uttrykket. Dersom retten mot formodning kommer til at kommunen har overtrådt Microsoft sin enerett til eksemplarframstilling i henhold til åndsverkloven § 2, anføres at kommunen ikke har utvist erstatningsbetingende uaktsomhet. Kommunen har tvert imot på mange måter vært et mønster for hvorledes en programvarebruker bør håndtere lisensspørsmål ved omstilling fra en IT-plattform til en annen. Dette underbygges blant annet av kommunens åpne holdning og ønske om å klarlegge lisenssituasjonen. For det tilfelle at retten skulle finne kommunens lovbrudd uaktsomt, gjøres gjeldende at det i beregningen av Microsoft sitt økonomiske tap må tas hensyn til at kommunen senere har ervervet de nødvendige lisensene. Noe annet ville føre til at kommunen betalte dobbelt opp for de aktuelle lisensene. En slik erstatningsutmåling basert på pønale hensyn gir ikke norsk erstatningsrett rom for. Det er vist til flere rettsavgjørelser som avviser et slikt krav. Saksøkerens anførsel om at kommunen ikke hadde 40 Word 6.0 lisenser slik lisensrevisjonsrapporten gir uttrykk for, men bare 1, er for sent fremsatt og må prekluderes i medhold av tvistemålsloven § 335.

Microsoft har i høyden krav på en avsavnsrente for den tiden programvaren har vært i bruk uten at kommunen har hatt gyldig lisens. De øvrige tapspostene er grunnløse i dette tilfellet og under ingen omstendighet tilstrekkelig dokumentert. Vilklårene for fastsettelse av erstatning etter rettens skjønn slik tvistemålsloven § 192 gir anvisning på, er ikke oppfylt.

Microsoft har heller ikke krav på erstatning på kontraktsrettslig grunnlag. Den typen avtalevilkår det her er tale om, som stiller kjøperen i en dårligere stilling enn etter åndsverkloven og som ikke presenteres for kjøperen før programvaren er kjøpt, kan ikke anses vedtatt av kommunen. Det er vist til juridisk litteratur som underbygger et slikt synspunkt. Selv om vilklårene skulle anses vedtatt, er de så omfattende, så omskiftelige og så uklare at kommunen ikke har utvist uaktsomhet ved ikke å følge dem. Noe objektivt ansvar er det ikke grunnlag for. Om erstatningsutmålingen vises til det som er sagt i tilknytning til erstatning etter åndsverkloven.

Saksøkte nedla deretter følgende påstand:

1. Kongsberg kommune frifinnes.
2. Microsoft Corporation dømmes til å erstatte Kongsberg kommune sakens omkostninger innen 14 dager etter dommens forkynning, med tillegg av 12 % fra forfall til betaling skjer.

## IV

Rettens merknader:

1. Microsoft har reist krav om erstatning fra Kongsberg kommune for ulovlig eller uberettiget bruk av programvare. Saken reiser en rekke faktiske og rettslige spørsmål som retten må ta stilling til. Enten et erstatningskrav bygger på overtredelse av åndsverkloven eller på kontraktsbrudd, er det et nødvendig vilkår for å kunne kreve erstatning at Kongsberg kommune rent faktisk har benyttet programvare kommunen ikke har hatt lisens for. Retten finner det derfor hensiktsmessig å først ta stilling til om det må legges til grunn at så er tilfelle.

2. Spørsmålet om kommunen har benyttet programvare den ikke har hatt lisens for

Retten finner det naturlig å ta utgangspunkt i lisensrevisjonsrapporten datert 10 november 1997 som ble utarbeidet av Microdialog AS på oppdrag av Kongsberg kommune og som lå til grunn for erstatningskravet fra BSA og senere fra Microsoft. Rapporten er bygget opp som en matrise med to hovedkolonner, benevnt henholdsvis "Bruk status" og "Lisens status". Brukskolonnen viser hvor mange eksemplarer av en gitt programvare som er funnet i bruk, enten installert lokalt på harddisken til den enkelte arbeidsstasjonen, eller installert på server og knyttet til den enkelte brukers logiske område på denne. Den andre kolonnen, kalt "Lisens status", viser hvor mange lisenser kommunen har hatt på det aktuelle tidspunktet, og munner ut i en egen kolonne kalt "differanse" som viser det antall lisenser som mangler og som må kjøpes.

Partene er enige om at det skal legges til grunn at lederen for IT-seksjonen i Kongsberg kommune Bjørn Næss hadde gyldig medlemskap i Microsoft Developer Network i det aktuelle tidsrommet. Medlemsskapet teller som lisens for enkelte programvarer, herunder programvaren NT Server 4.0 Norsk. Retten finner det derfor bevist og legger til grunn at Kongsberg kommune gjennom medlemsskapet til Bjørn Næss hadde gyldig lisens for det ene eksemplaret av denne programvaren som ble funnet i samband med at lisensrevisjonsrapporten ble utarbeidet. Det er således ikke grunnlag for erstatning som følge av ulovlig eller uberettiget bruk av programvaren NT Server 4.0 Norsk. For øvrig hersker det stor uenighet mellom partene om hvordan rapporten skal tolkes, og om i hvilken grad den gir uttrykk for de korrekte faktiske forhold.

Før retten redegjør nærmere for hvordan den har vurdert bevisene i saken, finner den grunn til å understreke at bevisbedømmelsen må skje på grunnlag av alminnelige sivilprosessuelle prinsipper. Retten har lagt til grunn det den har funnet mest sannsynlig etter en konkret totalvurdering av de bevisene som er ført for retten under hovedforhandlingen. Retten er ikke bundet av de særskilte dokumentasjonskrav Microsoft eller Microsoft Norge AS oppstiller for å legge til grunn at en programvarebruker har gyldig lisens. På den annen side kan det etter omstendighetene være slik at det må kreves sterkere bevis enn å være i besittelse av lisensbevisene når innehav

skal dokumenteres for en forutgående periode.

Retten vil først vurdere hvor mange Microsoft Office lisenser det må legges til grunn at kommunen har hatt på tidspunktet for lisensrevisjonen. Dette er et særlig sentralt spørsmål, fordi Office-lisensene teller som lisens for programvarene Word, Excel og PowerPoint. Kommunen har under saksforberedelsen og hovedforhandlingen lagt frem tilsammen 50 Office-lisenser. Det dreier seg om 40 oppgraderingslisenser fra Word Perfect til Microsoft Office Standard versjon 4.2, heretter benevnt oppgraderingslisensene, fem enkeltlisenser til av denne programvaren, og endelig fem lisenser for Office Pro versjon 4.3.

Lisensrevisjonsrapporten konkluderer med at det foreligger underdekning på fire lisenser for programvaren Office Pro 97; fem var i bruk, mens det forelå en lisens. Retten kan ikke se at kommunen har fremlagt lisens for denne programvaren utover det som følger av Microsoft Developer Network-medlemsskapet til Næss. Saksøker er enig i at medlemsskapet skal telle som en lisens. Saksøkte har gjort gjeldende at Næss sitt medlemsskap må føre til at underdekningen blir ennå mindre, fordi medlemsskapet gir ham som bruker så mange lisenser som utprøvingen av nye applikasjoner gjør nødvendig, og fordi det må legges til grunn at han logget seg på flere ganger under bruksmålingen, slik at hans pålogging er registrert som flere bruk. Saksøkte har anslagsvis gjort gjeldende at det kan dreie seg om minst tre simultane pålogginger. Retten ser det som sannsynlig at lederen for kommunens IT-seksjon fra tid til annen kan ha behov for å logge seg på flere maskiner samtidig, f.eks. for å bistå en ansatt i kommunen. Men retten mener det har formodningen mot seg at Næss under målingsperioden, som hadde som formål å gi treffsikre anslag om kommunens fremtidige bruk, på dette tidspunktet har logget seg på flere ganger og på den måten bidratt til å være en mulig feilkilde. Næss sitt medlemsskap fører etter dette til at kommunen godskrives en lisens, slik at det legges til grunn som bevist at det har vært en underdekning på fire Office Pro 97 lisenser.

Det tallmessig største avviket mellom bruk og lisenser gjelder ifølge lisensrevisjonsrapporten programvaren Word 6.0 i norsk versjon. Det maksimale antall samtidige brukere var ifølge lisensrevisjonsrapporten 59, mens rapporten legger til grunn at kommunen hadde 40 Word 6.0 lisenser. Under prosedyren har MS gjort gjeldende at avviket var ennå større, slik at det bare forelå en, og ikke 40, Word 6.0 lisenser da rapporten ble utarbeidet. Kongsberg kommune har under prosedyren krevd at denne anførselen må prekluderes i medhold av tvistemålsloven § 335. Ettersom den faktiske anførselen og kravet om preklusjon ble fremsatt sent under hovedforhandlingen, fant retten det hensiktsmessig å vente med å ta stilling til preklusjonsspørsmålet til saken ble tatt opp til doms og treffe avgjørelsen som ledd i realitetsavgjørelsen i saken, jf. Tore Schei, Tvistemålsloven med kommentarer bind II s 234. Retten finner det nødvendig å ta stilling til preklusjonskravet før den eventuelt tar stilling til om kommunen skal godskrives minst 40 Word 6.0 lisenser slik lisensrevisjonsrapporten gir uttrykk for.

Tvistemålsloven § 335 gir retten adgang til ved kjennelse å sette ut

av betraktning faktiske anførsler når disse fremsettes forsinket i hensikt å overrumple motparten. Et grunnvilkår for å kunne prekludere den faktiske anførselen er at denne er forsinket fremsatt. Om anførselen må anses som rettidig fremsatt, vil særlig avhenge av utviklingen i saken. Retten har i sin vurdering av dette lagt en viss vekt på at kommunens dokumentasjon i form av originale lisensbevis ble tilgjengelig for saksøkerne bare noen få dager før hovedforhandlingen tok til. Retten har videre lagt vekt på at opplysninger som kunne så tvil om kommunen hadde de 40 lisensene allerede på tidspunktet da lisensrevisjonsrapporten ble utarbeidet, blant annet fremkom under avhøringen av vitnet Arnfinn Johannesen. Vitnet, som var innkalt av kommunen, ble avhørt på tampen av hovedforhandlingens første dag. Retten finner på denne bakgrunn at den faktiske anførselen ikke er forsinket i tvistemålslovens forstand, og ikke blir å prekludere.

Spørsmålet blir så om det må legges til grunn som bevist at Kongsberg kommune hadde de 40 lisensene allerede når revisjonsrapporten ble utarbeidet. Kommunen har som nevnt lagt frem i kopi og senere i original 40 oppgraderingslisenser fra Word Perfect til Microsoft Office Standard versjon 4.2. Besittelsen er i seg selv et tungtveiende bevismoment, fordi det dreier seg om ihendehaverlisenser. Noen nærmere identifikasjon av den enkelte lisensen og den enkelte kjøperen, f.eks. i form av individualiserende nummer, er det ikke lagt opp til. Lisensbeviset gir selv uttrykk for at:

"Denne Lisensavtalen er Deres bevis på at de innehar lisens. Vennligst ta vare på denne Lisensavtalen som et verdipapir."

Noe krav om at kjøperen må ta vare på faktura/kvittering og oppbevare dette sammen med lisensen, stilles det ikke noe krav om. Rent bevismessig leder dette til at det er sterke holdepunkter for at den som kan fremvise en lisens, også er den som har ervervet rettigheten. Det har også formodningen for seg at vedkommende har vært i besittelse av lisensen i en forutgående periode, slik at det er den som hevder at så ikke er tilfelle, som må sannsynliggjøre dette. Dette er en naturlig konsekvens av det lisenssystemet som er valgt, der kjøpstidspunktet og hvem som er kjøper ikke nedfelles i lisensen eller er et nødvendig supplement til denne. Besittelsen kan likevel ikke være avgjørende, dersom det foreligger andre bevis som gjør det mest sannsynlig at kommunen ikke har vært i besittelse av lisensene i en aktuell forutgående periode.

Et slikt moment kan være kjøpsfakturaer, som tidfester når kommunen har kjøpt et gitt antall lisenser av en bestemt type. Kommunen har ikke lagt frem slike fakturaer til tross for at det er fremprovosert. Begrunnelsen har vært at fremleggelse er særdeles arbeidskrevende, samtidig som bevisverdien er begrenset fordi fakturaene ikke nødvendigvis individualiserer det enkelte programvareprodukt. I en slik situasjon, hvor en part har mulighet til å sikre bevis mens motparten ikke har noen slik mulighet, må den bevisuklarheten som følger i betydelig grad gå ut over den som hadde mulighet til dette, jf f.eks. Rt 1990 side 688. Dette må etter rettens syn gjelde selv om det kan være arbeidskrevende å finne frem til fakturaene. Men at fakturaene ikke er fremlagt kan ikke i seg

selv tillegges så stor beviskraft at det må legges til grunn at kommunen ikke hadde lisensene da bruksmålingene ble foretatt. Retten viser i den forbindelse til det som er sagt ovenfor om at det dreier seg om ihendehaverlisenser der det klare utgangspunktet er at besittelse er tilstrekkelig.

Lisensrevisjonsrapporten gir ikke uttrykk for at det forelå 40 oppgraderingslisenser fra Word Perfect til Microsoft Office Standard 4.2 på revisjonstidspunktet. Derimot er det oppført 40 Word 6.0 lisenser i rapporten. Dersom det forelå 40 oppgraderingslisenser Office Standard 4.2 slik kommunen har anført, forstår ikke retten hvorfor lisensene er oppført bare i rubrikken "Word 6.0". Rapporten tildeler en egen rubrikk til Office Standard 4.2 programvaren, en rubrikk hvor det er oppført et funn av 4 lisenser. Det naturlige ville være at de 40 Office-lisensene ble tatt med her. Identifikasjon av hva slags programvare en lisens knytter seg til er meget enkelt å konstatere, og Microdialog AS er en profesjonell aktør som åpenbart skulle være i stand til dette. Rapporten trekker imidlertid i retning at av det forelå et antall på 40 lisenser slik kommunen har lagt frem, og at de i rapporten er oppført som Word 6.0 lisenser kan bero på at det der er fokusert på at Office-lisensene teller som Word 6.0 lisenser, eller på en feil. Vedkommende som i all hovedsak hadde utarbeidet rapporten og som kunne kastet lys over revisjonsarbeidet, John Erik Sogn, var opprinnelig oppført som vitne av kommunen, men ble frafalt før hovedforhandlingen. At de 40 oppgraderingslisensene ikke var oppført i rapporten som Office Standard 4.2 lisenser trekker isolert sett i retning av at kommunen ikke var innehaver av de 40 oppgraderingslisensene på tidspunktet da bruksmålingene ble foretatt, men er ikke uforenlige med at kommunen var innehaver av lisensene.

Saksøkeren har pekt på enkelte andre omstendigheter som kan tale for at 39 av lisensene ikke forelå når rapporten ble utarbeidet. Vitnet Arnfinn Johannesen har i sin vitneforklaring forklart at han selv ikke fikk se mer enn 1 Word 6.0 lisens i møtet han hadde med kommunen i forbindelse med at rapporten ble utarbeidet. Kommunen kunne på et møte der Johannesen skulle telle lisenser - møtet var avtalt på forhånd - ikke fremvise mer enn 1 Word 6.0 lisens, men opplyste at den hadde ytterligere 39 lisenser som den skulle frembringe senere. Vitnet fortalte videre at den videre håndteringen av rapporten ble utført at John Erik Sogn i Microdialog AS. Johannesen opplyste videre at han hadde hørt rykter om at selskapet han på denne tiden var ansatt i, Microdialog AS, i enkelte tilfeller hadde "reddet" klienter ved å forstrekke dem med lisenser klienten selv ikke hadde anskaffet, men understreket at dette bare var rykter og ikke noe han ved selvsyn hadde konstatert. Slik retten ser det er ikke Johannesens vitneprov uforenlig med at kommunen har vært i besittelse av de 40 oppgraderingslisensene på det tidspunktet da lisensrevisjonsrapporten ble utarbeidet. Vitnet hadde bare en begrenset befatning med rapporten, og at kommunen ikke under møtet presenterte alle lisensene den pretenderte å ha, kan ha sammenheng med en mangel på oversikt over lisenssituasjonen i kommunen, noe retten vil komme tilbake til nedenfor i tilknytning til spørsmålet om kommunen har utvist uaktsomhet.

Saksøkeren har også fremlagt et annet bevis som kan trekke i retning

av at kommunen ikke hadde de 40 lisensene da revisjonsrapporten ble utarbeidet. Etter at saksøker fikk tilgang til lisensbevisene i original form, ble det undersøkt når de aktuelle produktene første gang ble tilgjengelige i Norge. Ifølge en telefaks 27 januar 1999 fra Microsoft European Operations Centre i Irland ble de programvareproduktene som kommunens fremlagte oppgraderingslisenser knytter seg til, først tilgjengelige i Norge i mai 1994. Dette har latt seg undersøke ved å sammenholde et produktnummer som fremgår av lisensene med opplysninger i Irland om når programvaren ble sendt derfra. På denne bakgrunnen kan det fremstå som uforklart at kommunen ifølge brev til Kongsberg kommune 15 desember 1997 fra leverandøren R.H Data AS skal ha anskaffet enkelte av sine oppgraderingslisenser allerede 24 september 1993. Alle de 40 oppgraderingslisensene hadde det samme produksjonsnummeret. I sin bedømmelse av hvilken vekt dette skal tillegges, har retten tatt utgangspunkt i at opplysningene fra Irland ikke er uforenlige med at kommunen har vært i besittelse av de 40 fremlagte lisensene på det tidspunktet da rapporten ble utarbeidet. Programvareproduksjonen som de fremlagte lisensene knytter seg til, hadde på dette tidspunktet vært tilgjengelig på det norske markedet i flere år. Det beviset direkte gir uttrykk for, er at kommunen i 1993 ervervet oppgraderingslisenser som ikke er lagt frem for retten. Ut fra Næss sin partsforklaring, der han gav uttrykk for at kommunen ikke hadde særlig god oversikt over hvilke lisenser den hadde ervervet, er det mulig at lisensene som ble ervervet i 1993 ikke har blitt funnet. Kommunen kan ikke godskrives lisenser den ikke har kunnet dokumentere. På den andre siden kan ikke det at kommunen ikke har lagt frem lisensene fra 1993 være noen tungtveiende bevisfaktor i retning av at kommunen heller ikke senere har ervervet oppgraderingslisensene. Brevet fra RH Data AS viser at kommunen ervervet oppgraderingslisenser også i 1994, og da etter at programvaren som hører til de 40 oppgraderingslisensene var tilgjengelige i Norge.

Retten har etter en konkret helhetsvurdering av bevisene som er fremlagt kommet til at det er mest sannsynlig at kommunen var innehaver av de 40 fremlagte oppgraderingslisensene fra Word Perfect til Microsoft Office Standard versjon 4.2 på det tidspunktet da målingen av 59 brukere av Word 6.0 ble foretatt. Retten har lagt avgjørende vekt på at kommunen har hatt lisensene i sin besittelse og fremlagt disse, og har ikke funnet tilstrekkelige holdepunkter for at kommunen ikke har hatt besittelsen allerede da rapporten ble utarbeidet. Enkelte av de forholdene saksøker har pekt på og som er referert ovenfor, har likevel vært såvidt tungtveiende at de har skapt kvalifisert tvil om hva som må legges til grunn som bevist.

Når det gjelder en eventuell underdekning av Word 6.0 lisenser legger retten til grunn at det forelå 40 oppgraderingslisenser fra Word Perfect til Microsoft Office Standard 4.2 på tidspunktet da brukermålingen ble foretatt. Ettersom en Office lisens innbefatter en Word 6.0 lisens, leder dette i utgangspunktet til en underdekning på 19 Word 6.0 lisenser slik rapporten gir uttrykk for. Retten finner imidlertid at det må gjøres flere justeringer. Partene er enig om at Næss på det aktuelle tidspunktet var medlem i Microsofts Developer Network, hvilket gav han rett til å utprøve applikasjoner, herunder Word 6.0. Retten finner det sannsynliggjort at Næss logget

seg på nettverket under målingen av bruken, og at dette er registrert som ett av de 59 samtidige brukene. Underdekningen må derfor i tråd med dette reduseres til 18 Word 6.0 lisenser. Saksøkte har gjort gjeldende at Næss sitt medlemskap må føre til at underdekningen blir ennå mindre, fordi medlemskapet gir ham som bruker så mange lisenser som utprøvingen av nye applikasjoner gjør nødvendig, og fordi det må legges til grunn at han logget seg på flere ganger under bruksmålingen, slik at hans pålogging er registrert som flere bruk. Saksøkte har anslagsvis gjort gjeldende at det kan dreie seg om tre simultane pålogginger. Retten ser det som sannsynlig at lederen for kommunens IT-seksjon fra tid til annen kan ha behov for å logge seg på flere maskiner samtidig, f.eks. for å bistå en ansatt i kommunen. Men retten mener det har formodningen mot seg at Næss under målingsperioden, som hadde som formål å gi treffsikre anslag om kommunens fremtidige bruk, på dette tidspunktet har logget seg på flere ganger og på den måten bidratt til å være en mulig feilkilde. Næss sitt medlemskap fører etter dette til at kommunen godskrives en lisens, slik at underdekningen med dette er nede i 18 Word 6.0 lisenser.

Retten har videre funnet bevist at kommunen gjennom å fremlegge lisensbevis har hatt ytterligere 5 enkeltlisenser for programvaren Office Standard versjon 4.2, og legger til grunn at disse må tas i betraktning slik at de teller som Word 6.0 lisenser. Underdekningen reduseres ytterligere i tråd med dette og utgjør da 13 Word 6.0 lisenser. Det samme må gjelde for de tilsammen 5 lisenser for programvaren Office Pro versjon 4.3, hvorav en av lisensene består av Microsoft Access samt Office Standard 4.2, som kommunen har lagt frem. Retten viser til det som er sagt ovenfor om at lisensene er ihendehaverlisenser, og retten har slik saken ligger an ikke funnet grunn til å kreve annen og sterkere tilknytning mellom lisensene og Kongsberg kommune. Underdekningen av Word 6.0 lisenser utgjør etter dette 8 lisenser.

Som følge av at retten har lagt til grunn at kommunen har tilsammen 50 Office lisenser, og fordi Office-programvaren innbefatter programvarene Excel og Powerpoint, har kommunen hatt et tilstrekkelig antall lisenser for disse programvarene. Noen ulovlig bruk av disse programvarene har derfor ikke funnet sted, og gir ikke grunnlag for erstatning.

Lisensrevisjonen avdekket bruk av 18 Word 2.0 programmer, mens lisensrevisjonen bare avdekket en lisens, noe som indikerer en underdekning på 17. Partene er enige om at en lisens for en nyere versjon av en programvare samtidig gir rett til bruk av en tidligere versjon, men at dette ikke gir bruksrett til mer enn en bruker. Saksøkte har på denne bakgrunnen anført at det ikke har vært underdekning av Word 2.0 lisenser fordi rapporten bare viser at programvaren foreligger, ikke at den har vært i bruk. Slik retten forstår rapporten trekker den likevel i retning av at kommunen benytter programmene på en måte som gjør at lisens er nødvendig, jf differanse-kolonnen der det er avmerket en underdekning på 17 lisenser. Retten legger avgjørende vekt på dette og finner bevist at Word 2.0 programmene har vært i bruk av kommunen. Det springende punkt blir om denne bruken er lisensiert gjennom Word 6.0 programmene. Når det først er lagt til grunn at programmene ikke



bare har vært installert, men også i bruk, er Word 6.0 lisensene bare tilstrekkelige dersom de to programvarene ikke er benyttet samtidig, men vekselvis. Retten bygger i sin vurdering av dette på den alminnelige erfaring at nyere versjoner av en programvare er bedre enn tidligere versjoner, og grunnen til at tidligere versjoner som Word 2.0 fremdeles er i bruk, er gjerne at den lokale arbeidsstasjonen til brukeren ikke har kapasitet til å ta i bruk nye og mer plasskrevende programmer. Dette tilsier at bruken av Word 2.0 programmene var i bruk på en måte som gjør at Word 6.0 lisensene ikke teller som lisenser for Word 2.0. Slik sakens fakta er presentert for retten finner den det derfor mest sannsynlig at kommunen ikke hadde gyldig lisens for 16 Word 2.0 programmer etter at det er tatt hensyn til Næss sitt medlemskap i Microsoft Developer Network. Hvor lenge det må legges til grunn at den ulovlige bruken fant sted, vil retten komme tilbake til nedenfor i tilknytning til erstatningsspørsmålet.

3. Som det har fremgått legger retten til grunn som bevist at kommunen ikke har hatt det tilstrekkelige antall lisenser. Retten må derfor innenfor rammen av partenes anførsler og påstander ta stilling til hvilke rettslige konsekvenser dette skal få.

3.1 Spørsmålet om kommunen har overtrådt åndsverkloven  
Retten vil først ta stilling til om åndsverkloven er overtrådt slik at et erstatningskrav eventuelt kan bygges på åndsverkloven § 55. Det er uomtvistet og følger uttrykkelig av åndsverkloven § 1 annet ledd nr 12 at også datamaskinprogrammer kan være "åndsverk" i lovens forstand. Spørsmålet som partene tvistes om, er om kommunen har krenket MS sine rettigheter slik disse er nedfelt i åndsverkloven § 2.

Åndsverkloven § 2 lyder etter lovendring 23 juni 1995 nr 37 som følger:

"Opphavsretten gir innen de grenser som er angitt i denne lov, enerett til å råde over åndsverket ved å fremstille eksemplar av det og ved å gjøre det tilgjengelig for almenheten, i opprinnelig eller endret skikkelse, i oversettelse eller bearbeidelse, i annen litteratur- eller kunstart eller i annen teknikk.

Som fremstilling av eksemplar regnes også overføring til innretning som kan gjengi verket.

Verket gjøres tilgjengelig for almenheten når det fremføres utenfor det private område, eller når eksemplar av verket frembys til salg, utleie eller utlån eller på annen måte spres eller vises utenfor dette området."

Første ledd hjemler to selvstendige rettigheter; eksemplarfremstilling og å gjøre åndsverket tilgjengelig for almenheten. Microsoft har gjort gjeldende at kommunen har overtrådt dem begge. Kommunen har på sin side gjort gjeldende at anførslen om at kommunen ulovlig har gjort åndsverket tilgjengelig for almenheten er for sent fremsatt, og har krevd at denne blir prekludert i medhold av tvistemålsloven § 335.

Til preklusjonsspørsmålet vil retten understreke at det ikke er noen preklusjonsadgang for rettslige betraktninger, jf tvistemålsloven §

191. Det som eventuelt kan prekluderes som for sent fremsatt, er de rettsfakta - det faktiske grunnlag - som anføres til støtte for at den aktuelle rettsregelen får anvendelse. Tidspunktet for når i saksforberedelsen og hovedforhandlingen som det er vist til det aktuelle alternativet i åndsverkloven § 2, er således ikke avgjørende for om anførselen er forsinket fremsatt i lovens forstand. Retten kan ikke se at det for sent er fremlagt nye rettsfakta som pretenderes å underbygge at rettigheten til å gjøre et åndsverk tilgjengelig for almenheten er brutt. Noen preklusjon kan det derfor ikke bli tale om.

Til realiteten forsåvidt gjelder rettigheten til å gjøre verket tilgjengelig for almenheten, vil retten bemerke at dette selvstendige rettslige grunnlaget med tilhørende rettsfakta i liten grad har blitt viet oppmerksomhet under saksforberedelsen og under hovedforhandlingen. Fokus har i all hovedsak blitt rettet mot retten til eksemplarfremstilling. Kommunen har etter rettens syn ført bevis for at det er en begrenset krets av kommunalt ansatte som har hatt tilgang til programvaren. Nærmere rettsfakta som tilgjengeliggjøringsalternativet i § 2 utpeker som relevante, som f.eks. hvordan kommunens nettverk er skjermet overfor eksterne brukere og hvorledes arbeidsmiljøet ellers er innrettet, er ikke fremprovosert eller lagt frem for retten. Plikten til å føre bevis påhviler etter alminnelige sivilprosessuelle prinsipper den som gjør rettsgrunnlaget gjeldende. Det å gjøre et åndsverk tilgjengelig for almenheten er en annen rettighet enn å utnytte åndsverk på enn å fremstille eksemplar, og dette rettslige grunnlaget må slik retten ser det i stor grad bygges på andre rettsfakta enn eksemplarfremstillingsretten. Retten kan etter dette ikke se at det er ført tilstrekkelig bevis for at kommunen har overtrådt Microsoft sin eksklusive rett til å gjøre programvaren tilgjengelig for almenheten. Avgjørende for om kommunen ved å mangle nødvendige lisenser har overtrådt åndsverkloven, blir derfor om kommunen ulovlig har fremstilt eksemplarer av programvaren.

Spørsmålet om kommunen ved å bruke programvare uten å ha tilstrekkelig antall lisenser har overtrådt Microsoft sin rett til eksemplarfremstilling, vil i noen grad avhenge av hvorledes kommunen har innrettet seg teknisk ved installasjonen og bruken av programvaren. Retten finner på grunnlag av Bjørn Næss sin partsforklaring det bevist at installasjon og bruk av programvaren har skjedd ved at programvaren er installert på en server. Deretter har deler av programvaren blitt kopiert over til den enkelte brukers logiske område på serveren. Det er noe uenighet mellom partene om hvor store deler av programvaren som er kopiert over til brukernes egne logiske områder på serveren. Kommunen har gjort gjeldende at bare helt marginale deler av programvaren - anslagsvis en milliontedel av programvarens samlede størrelse - har blitt kopiert over til brukernes logiske områder på serveren. Det som ble kopiert var såkalte styrefiler, som gav muligheter for individuelle tilpasninger og gjorde det mulig for de ulike brukerne å få tilgang til programfilen slik at programmet kunne kjøres. Styrefilene ble fylt ut av kommunen selv. Styrefilen fylles normalt ut bare en gang for hver bruker og inneholder slikt som navn og andre individuelt tilpassede parametre. Microsoft har på sin side fremholdt at dette er en uvanlig måte å installere og bruke programvare på, og har

gjort gjeldende at mer omfattende kopiering er nødvendig for at programmene skal kunne brukes. Microsoft har videre gjort gjeldende at det også må ha blitt kopiert og brukt såkalte underprogrammer, dvs mindre filer som gjør individuelle innstillinger i Windows, som f eks individuelle ordlister og linjaler som genereres automatisk. Til dette har kommunen svart at verktøy som f eks ordlister er felles for alle brukerne og ikke individuelt tilpasset.

Retten har i sin bevisvurdering lagt til grunn at kommunen selv er nærmest til å vite hvorledes den teknisk sett har gått frem når den har installert og brukt programvaren. Retten kan ikke se at Microsoft har ført bevis for at kommunens fremstilling av de tekniske forholdene rundt installasjonen og bruken er uriktige. Kommunens tekniske fremstilling legges derfor til grunn. Retten legger videre til grunn at det når programvaren brukes skjer en midlertidig nedlasting av deler av programvaren i den lokale arbeidsstasjonens arbeidsminne. Retten finner ikke bevist at Kongsberg kommune har innrettet seg slik at programvaren brukes uten at det skjer en slik temporær lokal lagring.

En naturlig språklig forståelse av åndsverkloven § 2 første ledd, og da særlig uttrykket "fremstille eksemplar", trekker i retning av at det må stilles krav til omfang, selvstendighet og varighet for at et nytt eksemplar av åndsverket skal kunne sies å foreligge. Hensynet til konsekvens og sammenheng i lovteksten tilsier at de samme krav stilles til den "innretning" loven omtaler i annet ledd. Retten finner uten videre å kunne konkludere med at installasjonen av programvaren på nettverkserveren ikke i seg selv kan anses som noen eksemplarfremstilling så lenge programvaren som installeres er lisensiert og ikke på annen måte kopiert eller tatt i bruk. Det er videre tvilsomt om den meget begrensede kopieringen av programvaren til den enkelte brukers logiske område på den felles filserveren tilfredsstiller lovens krav til åndsverk-kvalitet. Etter det som er opplyst om styringsfilene, bærer de preg av å være såvidt små og standardiserte at de isolert sett ligger helt i grenseområdet for hva som har selvstendig åndsverk-kvalitet. Også spørsmålet om den midlertidige lagringen i den lokale arbeidsstasjonens arbeidsminne i seg selv utgjør en eksemplarfremstilling, byr på atskillig tvil, se f eks Wagle og Ødegaard, Opphavsrett i en digital verden, s 157 flg. Retten finner det for sin del ikke nødvendig å ta stilling til om de enkelte prosessene som her er nevnt isolert sett utgjør en eksemplarfremstilling i lovens forstand. Det avgjørende er om installasjonen av programvaren på den felles filserveren, den meget begrensede kopieringen til brukernes logiske område på den felles filserveren kombinert med den midlertidige lagringen i den lokale arbeidsstasjonens arbeidsminne samlet sett er tilstrekkelig til at kommunen kan sies å ha fremstilt eksemplarer av programvaren når de enkelte brukerne har tatt den i bruk, jf åndsverkloven § 2 første og annet ledd. Retten har etter en helhetsvurdering kommet til at spørsmålet må besvares bekreftende. Retten vil særlig fremheve at rettighetshavere til programvare også i slike tilfeller som det foreliggende har et legitimt behov for vern av sine intellektuelle rettigheter. Ut fra formålet som åndsverkloven § 2 er tuftet på ville det være uheldig dersom valg av tekniske fremgangsmåter for å bruke en programvare ble avgjørende for om rettighetshaveren nyter godt av lovens vern eller blir prisgitt en supplerende

avtalerettslig regulering.

3.2 Spørsmålet om kommunen har vedtatt og er bundet av Microsoft sine avtalevilkår

Ettersom det må legges til grunn at kommunen har overtrådt åndsverkloven § 2, og sett hen til erstatning basert på kontraktsbrudd fremstod som en subsidiær og ikke komplimentær anførsel fra saksøkeren, ser ikke retten det som nødvendig å ta stilling til om kommunen har akseptert Microsoft sine kontraktsvilkår. Retten kan ikke se at en eventuell avtalerettslig binding mellom partene får noen selvstendig betydning for de øvrige erstatningsrettslige problemstillingene saken reiser.

3.3 Spørsmålet om ansvarsgrunnlag

Som følge av at kommunen har overtrådt åndsverkloven § 2, blir erstatningsspørsmålet å forankre i åndsverkloven § 55 som etter lovendring 9 januar 1998 nr 4 lyder som følger:

"Skade som voldes ved overtredelse som nevnt i § 54 eller ved overtredelse av § 49 første ledd, kan kreves erstattet etter alminnelige erstatningsrettslige regler. Er opphavsmanns eller en utøvende kunstners rett, eller den avbildedes rett etter § 45c, krenket forsettlig eller grovt uaktsomt, kan retten dessuten tilkjenne ham et pengebeløp som oppreisning for skade av ikke-økonomisk art.

Selv om gjerningsmannen har handlet i god tro, kan den fornærmede uansett skadens størrelse kreve utbetalt nettofortjenesten ved den ulovlige handling."

Åndsverkloven § 54 første ledd som § 55 første ledd viser til, nevner bl a bestemmelsene til vern for opphavsretten i loven kapittel 1, herunder § 2.

Henvisningen til alminnelige erstatningsrettslige regler innebærer at det i tillegg til å ha blitt foretatt en rettsstridig handling - i saken her kommunens bruk av programvare uten tilstrekkelig lisenser - at det må foreligge et ansvarsgrunnlag, et økonomisk tap og en tilstrekkelig påregnelig årsakssammenheng mellom den erstatningsbetingende handlingen og det økonomiske tapet.

Når det gjelder kravet om ansvarsgrunnlag, må den alminnelige culpa-regelen som rammer forsettlig og uaktsom opptreden legges til grunn. Retten finner det ikke bevist at kommunen forsettlig har overtrådt åndsverkloven § 2. Retten har ikke funnet det bevist at kommunen bevisst skal ha nedprioritert utgiftene forbundet med innkjøp av tilstrekkelig antall lisenser for i stedet å ha benyttet midlene til løsning av andre kommunale oppgaver. Spørsmålet blir derfor om kommunen har opptrådt uaktsomt. Ettersom saksøkeren ikke har gjort gjeldende krav om oppreisning, jf åndsverkloven § 55 første ledd annet punktum, er det tilstrekkelig at kommunen har utvist simpel uaktsomhet.

Culpavurderingen har en objektiv og en subjektiv side. Den objektive delen går ut på å vurdere om kommunens handlemåte i det ytre tilfredsstiller de krav som åndsverkloven stiller. I tråd med at retten ovenfor har konkludert med at kommunen har overtrådt

åndsverkloven § 2, må svaret være at kommunen ikke tilfredsstiller de krav som atferdsnormen i åndsverkloven § 2 stiller, og handlingen må anses som rettstridig. Retten peker i den forbindelse på at åndsverkloven § 2 gir uttrykk for hva som må anses som en forsvarlig handlemåte, at det er årsakssammenheng mellom overtredelsen av loven og det tap som eventuelt er voldt, og at lovbestemmelsen skal avverge slik skade som den som faktisk har inntrådt. Avgjørende for om kommunen da har handlet uaktsomt, er om det foreligger unnskyldende grunner som gjør at kommunen likevel ikke kan sies å ha opptrådt uforsvarlig. I vurderingen av om det foreligger slike unnskyldende grunner, vil det stå sentralt om kommunen kunne og burde ha handlet på en annen måte enn den gjorde.

Retten legger til grunn at kommunen hadde flere handlingsalternativer som - dersom de hadde blitt benyttet - ville ført til at åndsverkloven § 2 ikke hadde blitt overtrådt. Det mest nærliggende ville være å skaffe seg en bedre oversikt over lisens- og brukersituasjonen i kommunen på et tidligere tidspunkt, før programvarene ble tatt i bruk av så mange brukere. Til dette har kommunen innvendt at man befant seg i en overgang fra et operativsystem til et annet, og at det ville være urimelig ressurskrevende å håndtere overgangen på en annen og mer lisensorientert måte. Retten kan ikke følge kommunen på dette punktet. Etter bevisførselen sitter retten igjen med et klart inntrykk av at kommunen ikke har hatt tilstrekkelig god oversikt over hvilke og hvor mange lisenser den til enhver tid har vært i besittelse av. Kommunen har i stor utstrekning ervervet sine lisenser ved kjøp av en eller flere lisenser der lisensbeviset ligger vedlagt i den enkelte forpakning. For å ha oversikt over lisenssituasjonen vil det i slike tilfeller være nødvendig å ha rutiner som sikrer kommunen oversikt over og betryggende oppbevaring av lisensene. I sin partsforklaring har Næss opplyst at enkelte av lisensene ble oppbevart hos Microdialog, mens andre ble oppbevart på ulike plasser i kommunen. Slike oppbevaringsrutiner - eller snarere mangelen på slike - kan ikke etter rettens skjønn anses å være tilstrekkelig forsvarlige. Dette underbygges også av at det tok lang tid før kommunen la frem lisensdokumentasjonen.

Kommunen har videre fremholdt at den selv tok initiativet til lisensrevisjonen, og at den hele tiden har spilt med åpne kort. Til en viss grad er retten enig i at dette taler i kommunens favør i uaktsomhetsvurderingen. Hvor stor vekt forholdene har, er noe mer usikkert. Retten peker i den forbindelse på at det var et møte mellom SMB Data AS, Microdialog AS og kommunen allerede vinteren 1997 uten at dette umiddelbart resulterte i noen avtale om lisensrevisjon. Slik avtale kom først i stand etter at BSA kontaktet kommunen og antydte at det forelå underdekning. Selv om det selvsagt kan være at kommunen ville inngått en lisensrevisjonsavtale selv uten dette påtrykket utenfra, svekker kommunens noe avventende holdning inntrykket av kommunen som pådriver til granskning av lisenssituasjonen. Åpenheten ble for øvrig utvist på et tidspunkt da det ikke forelå holdepunkter for at Microsoft ville gå til rettslig forfølgning av sitt erstatningskrav.

Det er på det rene at BSA - interesseorganisasjonen bl a Microsoft er medlem av - ved et par anledninger har praktisert en såkalt

"amnesti"-ordning, slik at utvalgte kunder som oppfylte visse vilkår, deriblant gjennomførte en lisensrevisjon og ervervet lisenser i den grad det ble avdekket underdekning, ikke ville risikere å bli rettslig forfulgt selv om det skulle vise seg at de manglet lisenser. Det er på det rene at Kongsberg kommune ikke var blant de kundene amnesti-tilbudet rettet seg mot. Det er videre klart at Kongsberg kommune ikke har hatt noe krav på å få et slikt tilbud, og noen usaklig forskjellsbehandling kan det vanskelig bli tale om all den tid private aktører står fritt med hensyn til hvem som skal motta denne type "amnesti". Retten vil likevel ikke utelukke at vissheten om at det har blitt praktisert en slik ordning, rent faktisk har skapt en forventning i kommunen om at den fremgangsmåten kommunen valgte, ved først i etterkant å undersøke om lisensdekningen hadde vært god nok, ikke var klanderverdig. Noen omstendighet som fritar kommunen fra ansvar, kan det likevel ikke være tale om. At Kongsberg kommune følte seg dolket i ryggen av Microdialog, som på den ene siden bisto kommunen med lisensrevisjon og samtidig skal ha tipset BSA om ulovlig bruk, kan heller ikke frita kommunen for ansvar.

Retten har etter dette kommet til at kommunen ved alminnelig oversikt over lisenssituasjonen i kommunen, særlig i form av bedre rutiner for lisenshåndtering og eventuelt ved hjelp av en tidligere undersøkelse av lisenssituasjonen, ville ha innsett at bruken av programvare i kommunen var i strid med åndsverkloven § 2. Det må legges til grunn at kommunens overtredelse av åndsverkloven var uaktsom, og kravet til ansvarsgrunnlag er dermed oppfylt.

### 3.4 Erstatningsutmålingen

Utmålingen av erstatningen reiser to hovedspørsmål. For det første må retten ta stilling til om Microsoft kan kreve erstatning for lisensene som manglet selv om kommunen i ettertid har anskaffet dem. Mer presist er spørsmålet om det ved utmålingen av Microsoft sitt økonomiske tap skal ses bort fra at kommunen i ettertid ervervet de nødvendige lisensene. I den form den her foreligger har problemstillingen etter hva retten kjenner til ikke tidligere blitt behandlet av norske domstoler, og mye av fokus i saken er blitt rettet nettopp mot dette prinsipielle spørsmålet. Retten kan ikke se at det slik denne saken ligger an får noen rettslig betydning om spørsmålet vurderes på bakgrunn av kontraktsbrudd eller overtredelse av åndsverkloven § 55.

Loven selv er et naturlig forankringspunkt for rettens vurdering. I lovens henvisning til "alminnelige erstatningsregler", jf åndsverkloven § 55 første ledd, ligger i henhold til tradisjonelle erstatningsrettslige prinsipper et krav om økonomisk tap. Dette understøttes også av sammenhengen med § 55 første ledd annet punktum, som gir grunnlag for oppreisning for skade av ikke-økonomisk art - noe som for øvrig ikke er påberopt av Microsoft.

En av de "alminnelige erstatningsreglene" loven viser til, er den såkalte berikelsesgrunnsetningen som er hjemlet i prinsippet om full erstatning og som innebærer at den skadelidte, her Microsoft, skal gis erstatning som gjør at selskapet kommer i samme stilling som om den ulovlige lisensbruken ikke hadde funnet sted. Saken her reiser spørsmål om hvilke etterfølgende forhold som skal tas i betraktning

når berikelsesgrunnsetningen skal anvendes.

Retten vil ikke se bort fra at det kan forekomme tilfeller der det at den som har brukt programvare ulovlig senere erverver lisenser, står i en så fjern sammenheng med den ulisensierte bruken at det av den grunn ikke er grunn til å ta ervervet i betraktning i utmålingen av erstatning for den ulovlige bruken. Dette vil f eks kunne være tilfelle der et internasjonalt selskap sin virksomhet i ett land mangler lisenser, og selskapets virksomhet i et annet land senere erverver et overskudd av lisenser fra samme rettighetshaver. Retten finner imidlertid ikke grunn til å forfølge dette nærmere i saken her. Kommunes erverv av lisenser bærer klart preg av å være en redningshandling, en kompensasjon for underdekningen lisensrevisjonsrapporten gav uttrykk for. Det er således en nær og klar sammenheng mellom mangelen på lisenser og det senere ervervet av lisenser. At kommunen som følge av sitt fremtidige økende bruksbehov ervervet atskillig flere lisenser enn det var underdekning for, kan ikke endre dette. Det må derfor legges til grunn at det er de lisensene kommunen manglet som den senere har ervervet. Ut fra dette saksforholdet blir den rettslige problemstillingen i det følgende om det etterfølgende lisenservervet likevel ikke skal tas i betraktning ved utmålingen av utmålingen av Microsoft sitt økonomiske tap. Forarbeidene til åndsverkloven berører såvidt retten kan se ikke spørsmålet.

Saksøkeren har vist til dommen referert i Rt 1933 s 1114 til støtte for sitt syn. Saken gjaldt et aksjeselskap som hadde misligholdt en tidsbefraktningavtale. Rederen, som misligholdet hadde påført en del utgifter, bortfraktet så skipet til en tredjemann. Den nye kontrakten var gunstigere enn den som ble misligholdt. For Høyesterett reiste dette spørsmål om det ved utmålingen av erstatning for misligholdet skulle gjøres fradrag for rederens ekstra fortjeneste som følge av at den nye kontrakten var gunstigere for ham. Høyesterett besvarte spørsmålet benektende, og begrunnet dette med at det ville "være støtende om den som har begaaet rettsbruddet, skulde kunne kreve hele certepartitiden tatt i betraktning og saaledes benytte rederens kapital og arbeide til at oparbeide hans tap og forminske sitt ansvar. Særlig klart er dette ved ennu langvarige kontrakter." Hagstrøm, Fragmenter fra obligasjonsrett I s 226, sammenfatter dommen slik at kreditor, i saken her Microsoft, har krav på å bli stillet som om den første kontrakten hadde blitt riktig oppfylt - i dette tilfellet som om kommunen hadde skaffet seg lisenser til riktig tid. Hagstrøm uttaler videre at hva "som ellers ville ha skjedd m.h.t. alternativ kontrahering, er et rent hypotetisk spørsmål som 1933-dommen ikke lar den uaktsomme debitor nyte godt av." Retten vil bemerke at saksforholdet i dommen fra 1933 på flere punkter atskiller seg fra saksforholdet i saken Kongsberg byrett skal ta stilling til. Avgjørende er dommen fra 1933 således ikke. Men dommen kan sies å underbygge en mer generell lære om at det kan gjøres unntak fra den alminnelige berikelsesgrunnsetningen - altså at skadelidte ikke skal tjene på den erstatningsbetingende handlingen - dersom det ville virke støtende å ta de etterfølgende forholdene i betraktning ved erstatningsutmålingen til fordel for skadevolder. Retten kan imidlertid ikke se at å ta i betraktning at kommunen senere erverver lisensene, er direkte støtende slik forholdene ligger an i saken

her. Åndsverkloven stiller dessuten opp andre og mer vidtgående sanksjoner for de grovere tilfellene av overtramp, se nedenfor om straff og oppreisning hvor etterfølgende kjøp spiller mindre rolle.

Av den rettspraksis retten ellers er kjent med, synes en uttrykt dom avsagt av Agder lagmannsrett 19 oktober 1987 (sak 173/86) å ha et til en viss grad sammenlignbart saksforhold. Forholdet var her at ankemotparten hadde produsert og solgt musikkverker vernet etter åndsverkloven uten å ha innhentet tillatelse fra og betalt vederlag til forvalteren av rettighetene, selskapet NCB. Den ankende part anførte til erstatningsutmålingen at når kassetene ble produsert og solgt ulovlig, måtte erstatningen settes til en betydelig høyere avgift enn den vanlige avgiften som skulle vært betalt. Lagmannsretten uttalte til dette (dommen side 13):

"Lagmannsretten er, på samme måte som byretten, kommet til at erstatningen ikke kan fastsettes til det den ankende part krever (dobbelt avgift) såfremt dette kravet ikke er ubillig. ... Lagmannsrettens konklusjon så langt blir at erstatningen må fastsettes på grunnlag av de prinsipper som gjelder for erstatningsutmålingen utenfor kontraktsforhold. Lagmannsretten vil ikke unnlate å nevne at det på dette området kan være mye som taler for en friere måte å beregne erstatningen på. Skadene synes her å være av en annen karakter enn vanlige fysiske skadegjørende handlinger og det økonomiske tap som følger kan ofte være vanskelig å bevise. En slik friere og mindre stiv måte å beregne erstatningen på antas det imidlertid ikke å være hjemmel for i norsk rett i dag."

Slik lagmannsrettens rettslige premisser er utformet er det nærliggende å ta dem til inntekt for at det ikke er adgang til å tilkjenne Microsoft erstatning for den ulisensierte bruken når kommunen senere har ervervet lisensene. At det i motsetning til saken her ikke gjaldt erstatningskrav rettet mot sluttbrukere, kan ikke retten se at reduserer vekten dommen må tillegges. Retten kan imidlertid heller ikke se at den upubliserte dommen fra lagmannsretten uten videre blir avgjørende for hvilke rettssetninger Kongsberg byrett skal legge til grunn i saken her.

Det finnes enkelte rettsavgjørelser der norske domstoler i sin erstatningsutmåling har stilt seg noe friere ved beregningen av det økonomisk tap. I dom avsagt av Oslo byrett 28 september 1982 referert i NIR 1983 s 138, anla retten hva den kalte et "kvasi-kontraktsmessig vederlagssynspunkt" og utmålte erstatningen til det beløp den fant rimelig å kreve for den ulovlige bruk. Selv om avgjørelsen med dette gir en tilslutning til tanken om utmåling av økonomisk tap til en viss grad kan skje basert på rimelighet, synes avgjørelsen å være så konkret begrunnet og ha et såvidt avvikende saksforhold at det er lite å hente i dommen av interesse for saken her. Kongsberg byrett nøyer seg i den forbindelse med å påpeke av tillatelse til å bruke åndsverket neppe ville blitt gitt i den nevnte saken fra Oslo byrett, og erstatningen ble satt langt lavere enn hva et vederlag ville beløpt seg på.

Fra finsk rettspraksis foreligger det et par rettsavgjørelser av interesse. I en dom avsagt av Högsta Domstolen i Finland 21 august



1998 (sak R 97/88) uttales det blant annet (dommen side 5) at "the fair compensation must be comparable to the compensation that anyone legally acquiring the right of the use of the program must pay for it". Erstatningsutmålingen i de underinstansene blir omtalt som "fair" og opprettholdt. Etter hva Kongsberg byrett forstår var det imidlertid i saken som Høgsta Domstolen tok stilling til slik at den som hadde overtrådt opphavsmannens rettigheter ikke senere hadde ervervet lisensene slik som i saken her, og de rettslige synspunktene fra den finske dommen kan da ikke sies å gi særlig veiledning utover en knapp tilslutning til en "fair" dvs rettferdig og rimelig erstatningsutmåling, hvilket er for upresist til å kunne tillegges nevneverdig vekt. Domspremisser som mer direkte berører denne sakens tolkningsspørsmål, finnes i en dom avsagt av en finsk distriktrettsdomstol (Alavus, sak R 95/130) 15 februar 1996. I premissene (dommen side 26) heter det bl a at

"in assessing the amount of a fair compensation, it cannot be taken into account whether the offender possibly acquired the legal programs later on and paid the normal price after having had to surrender in connection with the confiscation, the illegal programs."

De siterte premissene har relevans for saken her, og gir uttrykk for at rettsregelen er at det ikke skal tas hensyn til kommunens senere erverv av lisensene den manglet. Vekten må imidlertid anses som beskjedent. Hensett til at det dreier seg om en finsk dom fra en lav instans besatt med en fagdommer og tre legdommere, er det ikke tale om noen presedensvekt slik en tilsvarende norsk rettsavgjørelse kunne ha hatt. Hvor stor vekt dommen skal tillegges, må i all hovedsak avgjøres ut fra hvor overbevisende argumentasjonen fremstår. Og noen nærmere begrunnelse for resultatet, gir dommen ikke.

Saksøkeren har gjort gjeldende at den norske stats folkerettslige forpliktelser tilsier at man ikke skal ta hensyn til kommunens senere erverv av lisenser i erstatningsutmålingen, og at presumsjonsprinsippet leder til at dette bør få betydning ved fastleggingen av hva som er gjeldende norsk rett. Det det siktes til er gjennomføringen av den såkalte TRIPS-avtalen (Trade Related Intellectual Property Rights eller på norsk Avtalen om handelsrelaterte sider ved immaterielle rettigheter). Avtalen var en del av avtaleverket som ble fremforhandlet under den såkalte Uruguay-runden i regi av GATT-medlemmene, se nærmere St prp nr 65 (1993-94) Om resultatet av Uruguay-runden (1986-93) og om samtykke til ratifikasjon av Avtale om opprettelse av Verdens Handelsorganisasjon (WTO) m.m. Avtalen ble undertegnet av Norge 14 april 1994, ratifisert 7 desember samme år og trådte i kraft 1 januar 1995. Regjeringen så det slik at avtalen i det vesentlige stadfestet den beskyttelsen av immaterielle rettigheter som er alminnelig utbredt i bl a Norge, se proposisjonen side 160 venstre spalte, slik at det bare var på enkelte punkter at avtalen krevde lovendringer i norsk rett. De erstatningsrettslige reglene som skal anvendes i saken her er ikke blant dem, og må derfor tolkes på en måte som gjør at de tilfredsstiller avtalens krav. I avtalens artikkel 41 nr 1 heter det at:

"Medlemmene skal sørge for at håndhevningsprosedyrene i denne del er nedfelt i deres lovgivning, slik at det kan treffes effektive tiltak mot enhver krenkelse av denne Avtale, herunde raske tiltak for å forhindre krenkelser og tiltak som effektivt kan forebygge nye krenkelser. Prosedyrene skal anvendes på en slik måte at det ikke skapes hindringer for lovlig handel, og at det gis sikkerhet for at de ikke misbrukes."

I avtalen artikkel 45 nr 1 heter det at:

"Rettsmyndighetene skal kunne pålegge den som krenker en rettighet, å betale rettighetshaveren tilstrekkelig erstatning for den skade rettighetshaveren er påført fordi vedkommendes immaterielle rettighet er krenket av en som visste eller hadde rimelig grunn til å vite at hans virksomhet innebar at en rettighet ble krenket".

Slik retten ser det er det vanskelig å utlede noe av de generelle formuleringene "effektive tiltak" og "tilstrekkelig erstatning" som kan gi nevneverdig veiledning i tolkningsspørsmålet retten står overfor. Kravene avtalen har gir uttrykk for må anses som oppfylt selv om kommunens senere erverv av lisensene tas i betraktning i erstatningsutmålingen. Retten understreker videre at det i vurderingen av hvorledes norsk intern rett skal forstås for å oppfylle avtalens krav, må det også tas i betraktning at norsk intern rett gir anvisning på andre og mer vidtgående sanksjoner enn utmåling av erstatning for økonomisk tap, se nærmere nedenfor om straff og oppreisning.

Juridisk teori har på forskjellig vis berørt problemstillingen på måter som kan gi veiledning i saken her. Microsoft har vist til at Høyesterettsdommer Karsten Gaarder i en artikkel i Nordisk Immaterialt Rättsskydd (NIR) hefte 3 for 1986 s 245 flg kommer med uttalelser som umiddelbart kan forstås slik at man ved erstatningsutmålingen i saker om krenkelse av åndsverk i noen grad kan fri seg fra det alminnelige kravet om økonomisk tap, se særlig side 252 der det uttales at synspunktet erstatning ikke passer i alle tilfeller, og at erstatningsgrunnlaget blir "quasi-kontraktsrettslig" med den konsekvens at det skal betales erstatning etter prinsippet i det som i nåværende kjøpslov § 45 omtales som gjengs pris. Retten oppfatter imidlertid Gaarder slik at han omtaler den situasjon at den som har krenket åndsverket ikke senere har fått noe honorar. Dette atskiller seg fra saksforholdet i saken her, der kommunen senere har betalt for lisensene, og artikkelen kan neppe tas til inntekt for det syn at kommunens senere lisenserverv ikke er relevant i erstatningsutmålingen.

Microsoft har anført at reelle hensyn taler for at kommunens senere erverv ikke skal tas i betraktning ved erstatningsutmålingen. Særlig er det pekt på at det ikke skal lønne seg å krenke de anerkjente rettighetene i åndsverkloven. At dette er et tungtveiende reelt hensyn, er retten enig i. Dersom den som krenker opphavsrettigheter skal kunne slippe unna sanksjoner ved å betale for seg dersom han blir oppdaget, og ellers ikke, kan forholdet undergrave rettighetshaverens intellektuelle vern. Retten vil likevel understreke at etterfølgende handlinger som reduserer skadelidtes tap er generelt sett relevant å ta i betraktning ved

erstatningsutmålingen både i og utenfor kontraktsforhold. Hensynet til at erstatningsansvar skal ha en preventiv effekt kan nok sies å veie særlig tungt i saker som denne, fordi datamaskinprogrammer er uvanlig sårbare for kopiering og andre former for ulovlig bruk sammenlignet med andre verkstyper. Slik retten ser det vil imidlertid behovet for effektive og preventive sanksjoner langt på vei være varetatt gjennom andre rettsregler enn gjennom reglene om utmåling av erstatning for økonomisk tap. Behovet for et effektivt og avskrekkende sanksjonssystem i saker om overtredelse av opphavsmannens rettigheter varetas dels gjennom muligheten til å kreve oppreisning for ikke-økonomisk tap, noe som ikke er påberopt i saken her, og dels gjennom strafftrusselen åndsverkloven § 54 oppstiller. Forsåvidt gjelder straff viser retten særlig til lovendring 23 desember 1988 nr 101, der det ble foretatt flere justeringer med det formål å effektivisere straffsanksjonen, jf Ot prp nr 34 (1987-88) s 41 flg. Når det gjelder oppreisning, understreker retten at oppreisning omfattes av organansvaret, jf op cit s 57 høyre spalte.

Retten har etter dette kommet til at det i samsvar med gjeldende rett i erstatningsutmålingen må tas hensyn til at kommunen senere ervervet de lisensene den manglet. Dette innebærer at Microsoft bare har krav på rente fra tidspunktet for den ulovlige bruken til tidspunktet da de nødvendige lisensene ble ervervet. Erstatningsutmålingen må nødvendigvis i stor grad bli skjønnspreget, jf tvistemålsloven § 192. Dette skyldes flere forhold. For det første er det på grunn av kommunens gradvise overgang til den nye IT-plattformen vanskelig å tidfeste når den ulisensierte bruken tok til. For det andre hefter betydelig usikkerhet knyttet til hvilke beløp forsinkelsesrente skal beregnes av.

Når de gjelder rentesats er det naturlig å forstå saksøkers anførsler dithen at det kreves forsinkelsesrente på 12 % p a. Renten starter å løpe fra tidspunktet da den erstatningsbetingende ulisensierte bruken av programvaren fant sted til nye lisensavtaler ble inngått, jf forsinkelsesrenteloven § 2 første ledd jf § 3 første ledd sammenholdt med res 17 desember 1993. Ettersom kommunens ibruktakelse av Microsoft sine programvarer har skjedd gradvis, lar det seg ikke gjøre ut fra de opplysningene retten er kjent med mulig å tidfeste eksakt når den ulisensierte bruken av programvarene tok til. I referat fra møte 17 april 1997, sitert under II foran, heter det at "nå er alle stort sett i gang med Word", men reservasjonen "stort sett" sammenholdt med at kommunen manglet 8 av 59 Word 6.0 lisenser medfører at ulovlig bruk av Word 6.0 først kan anses som bevist da lisensrevisjonsrapporten ble utarbeidet, dvs 10 november 1997. Det vises i den forbindelse også til at målingen av 59 samtidige brukere var en maksimalmåling, og ikke representativ for kommunens gjennomsnittlige bruk. Tidsrommet som forsinkelsesrenten skal kompensere for settes skjønnsmessig til en måned som dekker tiden fra bruksmålingene ble foretatt, og frem til 13 november 1997 da kommunen inngikk avtale med SMB Data AS om nye lisenser for bruk av Microsoft produkter. Det samme legges til grunn for Office Pro. Fra utsalgsprisen ekskl mva må det gjøres fradrag for forhandlerpåslag som settes til 20 %. Det må også gjøres fradrag for det vederlag Microsoft Norge AS får for sin kommisjonærrolle. Microsoft har ikke villet opplyse om hvor mange prosent det dreier

seg om, og retten blir nødt til å fastsette prosentsatsen skjønnsmessig. Satsen settes til 20 %. Beløpet det skal regnes forsinkelsesrente utgjør etter disse justeringene kr 21 816,-, hvorav forsinkelsesrente for en måned utgjør avrundet kr 218,-. Når det gjelder Word 2.0 finner retten det mest sannsynlig at den ulisensierte bruken har pågått i noe lengre tid, mer presist siden april 1997. Ut fra dette skal det betales forsinkelsesrente for syv måneder. Utsalgsprisen ekskl mva utgjør kr 44 800,-. Etter fradrag for forhandlerpåslag og kommisjonærutgifter til Microsoft Norge AS, skal det regnes forsinkelsesrente for syv måneder av kr 26 880,-. Forsinkelsesrenten utgjør da kr 1882,- for Word 2.0, tilsammen kr 2 100,-. Det er ikke adgang til å kreve rentesrente av forsinkelsesrente, jf Rt 1993 s 373 og Rt 1994 s 25.

Microsoft krever også erstatning for en del andre økonomiske tap som skal være forårsaket av kommunens ulisensierte bruk av programvare. Retten understreker at det er Microsoft Corporation sine tap som kreves erstattet, Microsoft Norge AS er ikke lenger part i saken.

For det første kreves erstatning for såkalte markedsforstyrrelser. Med dette siktes til forstyrrelser av markedssituasjonen for et åndsverk, f eks i form av mindre interesse for det aktuelle åndsverket. Microsoft har utdypet dette slik at brukere av ulisensierte programmer ikke har krav på brukerstøtte, noe som kan føre til misnøye med programvaren spesielt og Microsoft generelt. Produktet oppleves som mindreverdig og ufullstendig, og dette kan i sin tur svekke markedssituasjonen for Microsoft. Retten finner det ikke bevist at kommunens ulisensierte bruk har medført markedsforstyrrelser. Kommunen har ikke fremstilt eksemplarer som så er overdratt til tredjemenn som er nektet support og som sitter igjen med negativt inntrykk av programvaren eller Microsoft. Det er bare kommunen selv som eventuelt kan ha opplevd de negative sidene ved å bruke ulisensiert programvare, og hva skadevolder måtte ha erfart i så måte er ikke relevant i utmålingen av Microsoft sitt tap. Det er for øvrig ikke ført bevis for at kommunen skal ha blitt nektet hjelp. Retten finner det heller ikke bevist at kommunens handlemåte har påført Microsoft økonomisk tap i form av tapt goodwill.

Videre krever Microsoft erstattet rettighetshaverens kostnader forbundet med å oppspore og påvise lovovertrедelsen, gjerne stikkordsmessig angitt som oppsporingsutgifter. Rettspraksis på området er sparsom. I dommen avsagt av Agder lagmannsrett 19 oktober 1987 ble rettighetshaveren NCB tilkjent en skjønnsmessig erstatning for kostnadene ved å hyre inspektører til å overvåke markedet. I saken her kan eventuelle oppsporingsutgifter dels knytte seg til Microsoft sine bidrag til finansieringen av BSA, dels til utgifter selskapet selv har måttet erlegge f eks til juridisk bistand før stevning ble tatt ut. Saksøker har ikke dokumentert nærmere hva slags utgifter eller hvilke beløp det er tale om. Retten understreker at kravet til påregnelighet (adekvans) under enhver omstendighet setter grenser for hvor store deler av finansieringen av kontrollapparatet som kan kreves av kommunen. Retten har også lagt vekt på at kommunen gjennom å utvise åpenhet har redusert oppsporingsutgifter som ellers kunne vært aktuelle. Retten finner det likevel sannsynliggjort at Microsoft har hatt slike utgifter, og

viser bl a til den pådriverrollen BSA spilte i sakens innledende faser. Retten finner at erstatningen for oppsporingsutgifter skjønnsmessig bør settes til kr 5 000,-.

### 3.5 Saksomkostningsspørsmålet

Microsoft har utformet sin påstand som et krav om erstatning utmålt etter rettens skjønn uten noen øvre eller nedre grense. Retten bemerker for ordens skyld at det er påstanden i stevningen med eventuelle senere utvidelser som er avgjørende. I saken her ble det foretatt enkelte endringer i saksøkers påstand, men ingen av disse - fjerning av Microsoft Norge AS som rettighetssubjekt og fjerning av installasjonstidspunktet som utgangspunkt for erstatningsberegningen - kan regnes som utvidelser i lovens forstand.

Saksomkostningsspørsmålet må derfor avgjøres med utgangspunkt i påstanden i stevningen. Microsoft er tilkjent erstatning, men da med et vesentlig lavere beløp enn det krav på kr 112 888,- som ble rettet mot kommunen før stevning ble tatt ut og antydningen i stevningen om at en samlet erstatning i størrelsesordenen kr 160 000,- ville være passende. Dette reiser spørsmål om Microsoft skal anses for å ha vunnet saken fullstendig, slik at kommunen i utgangspunktet skal erstatte Microsoft sine saksomkostnader i samsvar med hovedregelen i tvistemålsloven § 172 første ledd. Dersom det til grunn for et skjønnsmessig krav ligger krav om erstatning for flere skadeposter, og saksøkeren ikke har fått medhold i at erstatningen skal omfatte alle disse postene, vil han ikke ha vunnet saken fullstendig, jf kjøremålsutvalget obiter dictum i Rt 1964 s 1081 på side 1082, og Hr kjm utv 498K/1998 samt Tore Schei, Tvistemålsloven med kommentarer Bind I side 561. I saken her ble ikke Microsoft tilkjent erstatning for lisensene som kommunen først manglet og deretter kjøpte, og heller ikke for tap som følge av markedsforstyrrelser eller tap av goodwill. Ut fra dette legger retten til grunn at saken er dels vunnet og dels tapt for Microsoft slik at hver av partene bærer sine saksomkostninger i samsvar med hovedregelen i tvistemålsloven § 174 første ledd. Retten føyer til at dersom det måtte legges til grunn at Microsoft hadde vunnet saken fullstendig, måtte det ha blitt gjort unntak etter § 172 annet ledd første alternativ, i det saken for retten har fremstått som kvalifisert tvilsom på en slik måte at det var rimelig grunn for kommunen til å la saken bli prøvet av domstolene. Retten viser særlig til at bevisbedømmelsen i saken har reist meget tvilsomme spørsmål, til at saken har berørt erstatningsrettslige spørsmål som bare i ytterst begrenset utstrekning tidligere har vært prøvet for norske domstoler, og til at erstatningen på kr 5000,- samt kravet på forsinkelsesrente på kr 2 100,- er markant lavere enn det krav som Microsoft opprinnelig fremsatte overfor kommunen og som initierte saksanlegg.

## D O M S S L U T N I N G:

1. Kongsberg kommune dømmes til å betale Microsoft Corporation erstatning på kr 5000,- kronerfemtusen - innen 2 - to - uker fra dommens forkynnelse med tillegg av 12 - tolv - % rente p a fra forfall til betaling finner sted.
2. Kongsberg kommune dømmes til å betale Microsoft Corporation påløpt og forfalt forsinkelsesrente på kr 2100,- kronertotusenettthundre - innen 2 - to - uker fra dommens forkynnelse.
3. Hver av partene bærer selv sine saksomkostninger, jf tvistemålsloven § 174 første ledd.

Retten hevet

  
Knut Erik Sæther  
dfmRETT UTSKRIFT BEKREFTET  
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