

# "Private Copying, Levies and DRMs against the Background of the EU Copyright Framework"

by Mr. Jörg Reinbothe (\*)  
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## I. Introduction

The preceding speakers have provided us with interesting, partly diverging, views and a lot of information. Discussions should, indeed, be based on information. One gets the impression that the ongoing debate about the continued existence of levies in the digital environment of the Information Society has been guided, at least at times, by emotions rather than by what seems to be needed most, also in this context: a pragmatic approach and sound knowledge of the facts.

I am hardly in a position to present a solution or a perspective for the future of DRM systems and levies, which seems to be the main driver of today's workshop. Instead, let me highlight certain parameters and principles - "the facts" that should be kept in mind when discussing such perspectives: what is "private copying"; what is the legal and political background for the "levies"; and what do DRM systems have to do with all this.

## II. Private Copying

The right of reproduction has often been described as the "crown right" of authors and other rightholders. It is this right that has determined the name of an entire field of law: "copyright". Reproduction rights are, at least in principle, exclusive rights to authorise or prohibit all kinds of acts of reproduction, be they temporary, virtual or private reproductions. This is commonplace, based on the Berne Convention, and is also reflected in several provisions of the EU copyright framework.

No right without exceptions, of course. The Berne Convention allows its Contracting States to provide for exceptions and limitations to the right of reproduction, if the conditions of the three steps test are met. No doubt, acts of private copying do qualify as "certain specific cases", one of the conditions of that test. And, indeed, most jurisdictions, one way or another, exempt or limit the application of the reproduction right for acts of private copying.

### III. The Levies

Regarding private copying, many countries around the world, including 12 out of the 15 present Member States of the EU, have chosen to limit the reproduction right and to "downgrade" its exclusive nature to a right of equitable remuneration. This right is administered collectively by collecting societies and levied upon recording equipment and/or blank recording support - hence the expression "levies".

Consequently, the levies are no tax; they are a copyright royalty. Their conditions and, in many cases anyway, their amount are defined by national law. It is also national law that determines their beneficiaries: entitled to a share in the levies are national rightholders plus all those enjoying national treatment under the jurisdiction in question.

Private copy levies were introduced for the first time in 1966 in one of our Member States, where they then applied to recording equipment only. Other countries followed this example applying levies to recording equipment and/or to blank tapes. It is worth having a closer look at the policy reasons for the introduction of private copying exceptions combined with levy regimes in most EU Member States.

1. **"Enforceability"**: It was obvious that, at least in the analogue environment, the exclusive right of reproduction could either not have been enforced at all individually, or at least not without serious interference with the privacy of consumers. This lack of enforceability of the exclusive right of reproduction in the private sphere has, consequently, been an important reasoning for the levies. In the digital environment, this element is less strong, to say the least.
2. **"Sharing the market"**: It is widely believed, and we have heard it again earlier this morning, that the levies are to compensate rightholders for the harm done by acts of private copying. Now, the degree of such harm, in particular in terms of lost sales of pre-recorded music or films, is obviously difficult to establish. Rather than on this harm aspect, Member States have therefore based their reasoning for the private copying levies on the economic argument of the market share. They claim that the advent of private copying technology has established a new market for the exploitation of copyright and neighbouring rights. Economic beneficiaries of this market are, in first instance, the manufacturers of recording equipment (reel-to-reel tape recorders in the old days, and nowadays burners) and of blank support, such as blank cassettes or CD-Rs. Member States have established levy systems with a view to according rightholders their share of this market. Therefore, levies are not - at least not only - perceived as a compensation in the first place, and certainly not as a compensation for acts of piracy.
3. **"Justice"**: This market-based argument presented by those Member States that have equitable remuneration schemes (levy systems) in place, has obviously also something to do with justice. It is directly linked to the three steps test set out in the Berne Convention and other conventions, which establishes the conditions for any limitation of the reproduction right.
4. **"Equity"**: Another aspect, and another brick stone national legislators have had in mind when designing levies, is the need to take account of the large number of rightholders and their varying bargaining power. In fact, European copyright laws grant intellectual property rights to authors of all categories of works and to various neighbouring rightholders alike. A number of genuine rightholders share the same or similar rights. Many Member States hold that remuneration rights for private copying, which are to be administered collectively, are more beneficial in particular for small rightholders than exclusive rights that the latter cannot exploit individually. In this spirit, levies are the means to allow all rightholders (big and

small) to participate in the market and to ensure "equitable remuneration".

5. **"Easy Access"**: It is also claimed that the private copy levies safeguard access by consumers to copying. They are presented as a convenient means to provide consumers with the facility to make private copies taking due account of the economic interests of rightholders. Certainly, it is a political decision not to give rightholders full control over copying in the private sphere and to safeguard easy access to copying.
6. **"National treatment"**: As I have said before, private copy levies are a royalty by nature, and based on a statutory licensing scheme. It follows that its beneficiaries are determined by the national law of the Member States applying them. The remuneration must be shared with all (but only those) rightholders which are subject to national treatment. This is another aspect Member States providing for levies have had in mind.

## IV. The Advent of DRM Systems

Digital Rights Management (DRM) systems enable digital solutions to license rights and administer payments of royalty on an individual scale. They are the basis to develop new (electronic) business models aiming at making available digital content to users and also to receive remuneration for it. Expectations in DRM systems run high - some DRMs are already applied on the market. Are DRM systems then what Charles Clark had in mind with his famous expression "the answer to the machine is in the machine"?

Today's Conference focuses on the relation between DRM systems and private copy levies. And, in fact, some seem to believe that the potential of DRM systems as an alternative option to the application of levy schemes will decide on the success of DRMs. Is the management of private copy royalties - either collectively on the basis of levy schemes or individually through DRMs - the catalyst for the success or failure of DRM systems?

### 1. Views of the Equipment Industry

Equipment and hardware manufacturers, in particular, plead in favour of "phasing levies out" and replacing them by DRMs in the digital environment. They claim that private copying levies put an undue burden on their price calculation; that they thus have a negative impact on the EU 's competitiveness; and that they result in consumers' paying twice for certain digital products.

### 2. Views of Major Corporate Rightholders

In general, big corporate rightholders, such as phonogram producers and film producers, also seem to prefer DRMs to levy systems, as applying DRM systems would

1. give them more control over certain uses; and
2. could facilitate the deployment of new business models
3. Moreover, the differences between the national levy systems, in their view, also have a negative impact on the functioning of the Internal Market in protected goods and services.

### 3. Views of Small Rightholders, Collecting Societies, Specific User Groups

Other interests (smaller rightholders, collecting societies, and specific user groups) tend to plead in favour of the continuation of levy systems, for reprography and analogue private copying in general, which will not be affected by DRMs, but also for digital private copying. The key arguments are

1. **Lack of Security and Interoperability:** DRMs, as for now, are in their view not yet sufficiently secure, interoperable, and flexible to replace the remuneration schemes. This view is, to some extent, shared between all rightholders, big and small.
2. **Lack of Justice:** DRM systems might be operated by big producers only, which may not pass on the revenues to authors and other non-corporate rightholders as collecting societies do according to their distribution keys. Individual rights management based on DRMs may, therefore, not ensure that all rightholders get their "fair share".
3. **Availability of Private Copies:** Some users feel that statutory exceptions for private copying combined with levies better safeguard consumer interests than exclusive rights administered through DRMs.

## V. The EU Copyright Framework

The question of how to deal with "private copying" under copyright terms, has always been a highly sensitive issue among EU Member States - legally, economically and politically.

The harmonisation of the "private copy schemes" was addressed as early as 1988, in the Commission Green Paper on Copyright and the Challenge of Technology. In its conclusions of the Green Paper consultation, the Commission, in 1990, announced its intention to present a proposal for a Directive on private copying in which it intended to propose a limited harmonisation of the levy schemes. In view of the complexity of the issue, such a proposal never saw the light of day.

In view of its close link to the harmonisation of copyright in the Information Society, in particular as regards digital private copying, it was decided to further pursue the issue in the context of the proposal for a Directive on Copyright and Related Rights in the Information Society.

When the proposal was prepared in the course of 1997, the Commission decided to propose optional exceptions, such as for private copying, but, again, not to harmonise the sensitive issue of "copyright levies". As a reaction, the EP came forward with a new concept, the principle of "fair compensation". Under the Directive, MS are required to ensure "fair compensation" for three exceptions to the reproduction right listed in the Directive, in particular the exception for "private copying" (Article 5(2)(b)),

The new concept of "fair compensation" is not identical with (and rather less strong than) the concept of "equitable remuneration", which is usually used for describing the "levies". The term "fair compensation" is obviously linked to the harm aspect, as Recital (35) confirms. It allows Member States considerable flexibility in determining the form, detailed arrangements or level of any scheme of fair compensation. The Directive contains several indications on the relation between the concept of "fair compensation" and the existing levy schemes. It follows from Recitals (35) and (38) of the Directive that Member States do not have to introduce levy schemes but that those schemes do fulfil the condition of ensuring fair compensation. Moreover, the Directive recognises that levy schemes for private copying may continue "although differences between those remuneration schemes affect the functioning of the Internal Market" (Recital 38).

Regarding digital private copying, Recital (38) states that this should have a greater economic impact, and that therefore due account should be taken of the differences between digital and analogue private copying and a distinction made in certain respects between them. At the same time, the Directive in its Article 6 provides for a framework, which protects the use of technological measures, such as copy control devices and digital rights management systems (DRMs), which may also be designed to allow for, and to monitor, copying in the private sphere and to ensure direct remuneration in the digital environment. Probably the most obvious interface between digital private copying and the levies is contained in Recital (39), which states that "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".

This legal framework aims at ensuring that levy schemes and "fair compensation" take into account the use of these technological systems, as is reflected in Article 5(2)(b). However, it does not oblige Member States to abandon levies once rightholders are technically able to protect and seek payment on a licence basis. On the whole, the Directive does not take a position in favour or against levies as compared to DRM systems.

## VI. The State of Play in Member States today

In 2001 and 2002, the Commission organised four informal meetings with Member States to discuss the implementation of Directive 2001/29. And though the Directive does not decide on the issue of levies in relation to DRMs, it was discussed at length. The state of play in Member States seems to be the following. Those Member States which already provided for levies in the past (12 out of 15, the exceptions being Ireland, Luxembourg and the UK) are likely to continue the practice of allowing private copying or reprography combined with levy schemes, and to apply them also with respect to certain digital products, at least for the time being - and this as the result of lengthy and often complicated consultations with interested parties at national level. Those Member States' arguments are:

1. **No adequate alternatives:** the application of DRMs mentioned above are deemed by the Member States not yet to be sufficiently widespread or accepted on the marketplace, particularly by consumers, to justify any changes to the approach to levy schemes.
2. **The "old" policy reasons remain valid:** Several MS seem to take the view that DRMs cannot by themselves ensure an appropriate balance between the interests of all stakeholders involved, nor are they (or can they replace) policy solutions based on the considerations I have outlined before, in particular access to private copying, justice and equity between all stakeholders. It is for policy reasons, therefore, that they apparently prefer to continue to provide for exceptions in the public interest and to ensure for adequate payment of all entitled rightholders via levy systems.

## VII. Conclusions

The constantly evolving management of copyright and related rights in the digital environment through DRM systems is a major achievement. I am confident that technology will overcome the remaining security gaps; that the markets will build up consumer acceptance; and that DRM systems will eventually be successful and become the established practice in many areas. At the same time, their fate, their success or failure should not be measured against their potential to replace schemes of equitable remuneration for private copying, the levies.

The future of levy schemes depends on developments in the markets and, to an even higher degree, on the policy decision of EU Member States. For the time being, the various national systems are likely to continue to provide for differences in application of the levies, as regards the media or equipment to which they apply and the amount charged, including differences in application to digital media. This is due to the fact that the EC legislator decided against a higher degree of harmonisation in this respect.

The Commission is carefully observing all developments to make sure that any modifications to Member States' laws do not have a negative impact on the proper functioning of the Internal Market, the development of the Information Society, or the competitiveness of the European economy as a whole.

The issues, and notably the issue of digital private copying, will also continuously be tackled in the framework of the Contact Committee established by the Directive, which, inter alia, is a forum for the assessment of the digital market, including private copying and the use of technological measures. The next meeting will take place this autumn.

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