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Who Pays for Private Copying?

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Private Copying Levies at the Crossroads

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- Private Copying Levies
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Who Pays for Private Copying?

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Foreword

Triangular relationships are not only a challenge in human life but also in legal settings. In the case of private copying levies, the three points of the triangle are the creators of works, legally acting copyists and copyright pirates. Their interaction is to some extent, and possibly not sufficiently, guided by law.

Given that we all wish to have a large variety of content, we mostly agree that creative forces need protection in order to stay creative and obtain income in order to finance their creativity. Hence, in the interest of the general public, legislators around the globe have made creativity financially attractive by conferring legal rights upon authors and other creative forces. These rightsholders can "sell" the use of their rights to make a living. But we do not always need to buy in order to enjoy the copyright protected works. It is here that copyists enter the picture because many legislations allow certain uses of works even against the will of rightsholders. This naturally complicates the relationship between rightsholders and users, who would otherwise be customers (or pirates). At the same time countries that allow for copyright exceptions – such as private use – appease rightsholders by systems of fair compensation. This delicate balance is tilted by pirates who use copyright protected works without being covered by any copyright exception. For rightsholders this lost income is not covered by any fair compensation scheme. How much they lose is hard to tell, not least because illegal copying is often done in a way that blurs the distinction between pirates and legally acting copyists. To make the compensation fair and to block unlawful use not covered by the schemes is therefore not an easy task.

Key factors in the equation are what uses to allow, how to measure fair compensation, whom to ask for payment, and how to prevent the disrespect of the system thus developed. We can currently witness a very intense debate about all these points linked to the issue of private copying levies, a legal construct that may or may not be good guidance for the triangular relationship.

The lead article sheds light on the roots and current regulation of private copying levies. In particular it addresses the question of how to respond to the increase of private copying triggered by the digital means of reproduction and distribution. Do we need a new rule for digital reception devices to compensate rightsholders? Looking at the same problem from a different angle, the lead article also investigates various ways of how to deal with file-sharing.

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Can/should it be legalized at the price of fair compensation? The related reporting articles pick up on the same two issues. They present recent developments concerning private copying levies and how different countries strike the balance between piracy and legal – compensated for – private use. Finally, this IRIS *plus's* Zoom section gives an overview on where to find provisions on reproduction rights, private copying exceptions and rules on fair compensation in the various EU countries. It should be noted that the URLs provided in this section lead to the consolidated texts in the (many) cases where laws have been revised and/or amended.

Strasbourg, June 2011

Susanne Nikoltchev
IRIS Coordinator
Head of the Department for Legal Information
European Audiovisual Observatory

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Private Copying Levies at the Crossroads

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

I. Introduction

Since the dawn of humanity, there have been copyists. From Egyptian scribes to medieval monks, the transmission of knowledge has been in the hands of mainly anonymous people.[1] To produce a single copy of a work, such copyists required long hours of manual work and skills that at that time were only available to an elite. That is why the invention of the printing press by Gutenberg was a major revolution. For the first time in the history of civilization, a machine could automatise the process of copying an intellectual work. Nevertheless, the press concerned only textual works, so that anybody wanting to copy e.g. the Mona Lisa still had to sit in front of it for hours and would probably come out only with a pale reflection of Da Vinci's masterstrokes. Performing arts like music were partially out of the copying realm. While musical works could be put down on paper, the real purpose of those partitions was to serve as guidance for performing musicians. Only at the beginning of the twentieth century, a major invention, the phonogram, would bring a miracle to the homes of millions of people: the recording of a performance of a work. Now there was no need to leave the house or learn to play the piano anymore to enjoy the pleasures of music listening. With the phonogram also a new business was born: the production and the sale of music recordings.

A further revolution came in the early 1950s, when sound recording equipment was introduced into the mass market. This was a major change for both consumers and the recording industry. For the first time, any individual could make at home exact, inexpensive reproductions of sound recordings. This also meant that for the first time there existed an easy way to circumvent the business of selling copies of sound recordings to private persons. The film industry would also experience a similar revolution in the late 1970s, when video recorders found their way into the homes of most people.

This new revolution was met with some resistance from the content industries. Not so long ago the former MPAA president, Jack Valenti, declared at a hearing on home recording of copyrighted works that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone".[2] Later the film industry discovered that there was money to be made with the "play" button of a video recorder and embraced videotapes. Currently, the film industry makes more money with the sale of DVDs and BluRay discs than with theatrical

1) For instance, Greek philosophy would have been probably lost to the world without the labor of Arab translators, who preserved for posterity the works of Aristotle and Plato by "copying" them into a different language.
2) http://cryptome.org/hrcw-hear.htm

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exploitation. But both the film industry and the recording industry never liked the "rec" button. To them, private copying was taking a slice of their market pie. Therefore they tried – though unsuccessfully – to have such recording equipment declared illegal.

Short of a legal basis to outlaw recording equipment and blank media, the issue became how to mitigate the harm undoubtedly caused to rightsholders by private copying of music recordings and audiovisual works. In 1965 Germany pioneered the solution to this problem in Europe: it introduced in the *Gesetz über Urheberrecht und verwandte Schutzrechte* (German Copyright Act) a levy on the sale of sound and video recording equipment. In 1985, it added to the same law a levy on blank tapes for sound and audiovisual recording. Soon, other European countries followed this path and introduced a system of copyright levies in their national legislation.[3]

In the analogue world, the solution to impose a levy on recording devices and media seemed reasonable, because tape and video recorders were almost exclusively used to copy protected works. Then came the digital revolution, and everything became a lot more complicated. Since almost nobody used analogue equipment and blank media for home recording anymore, it seemed logical to impose levies on their digital surrogates in order to compensate rightsholders for losses incurred as a result of private copying. However, this has been abundantly criticised by the IT industry, users' associations and even some members of academia. They argue that imposing levies on digital recording equipment and blank media may go beyond the original purpose of private copying levies. In our times, when every piece of information is literally reduced to bits and any communication takes the form of zeroes and ones, the same recording device or support can be used for copying Lady Gaga's latest album, for backing up a company's yearly accounts or for safeguarding last summer's holiday pictures. A system of private copying levies that taxes digital reproduction equipment and media without taking into consideration their actual use may remunerate rightsholders for acts of copying unrelated to their creative work.

While private copying levies are being attacked by the IT industry and users' associations, simultaneously different proposals are being made to extend the concept of private copying levies to file-sharing on the Internet (*licence globale* in France, *Kulturflatrate* in Germany, etc). They submit that a file-sharing levy paid by Internet users in addition to their Internet access flat-rate can result in adequate remuneration for rightsholders and solve (at least in part) the problem of Internet piracy. It seems therefore that private copying levies stand at a crossroads: some argue for minimizing them, others for expanding them, and some would rather keep the status quo.

This article retraces the path leading to this crossroads: its first part presents a short history of private copying levies and a description of the legal status quo. Regarding the discussion about extending levies to the digital environment, special consideration is given to the recent decision of the Court of Justice of the EU in the case Padawan v. SGAE and its effects on Spain and on other EU member states. The second part introduces proposals aimed at legalising file-sharing on the Internet in return for the introduction of remuneration schemes for rightsholders. It entails a legal analysis of possible models and presents the surrounding controversy. The article concludes with some comments about the future of private copying.

II. Private Copying Levies

If you can't beat them, join them, says the proverb. Or better than joining them, make them pay. Even though acts of private copying cause economic harm to rightsholders, these acts can neither be controlled or licensed nor effectively banned. Therefore, the best way of compensating rightsholders is to authorise private copying through an exception to the exclusive right of reproduction and to couple this exception with the obligation to indemnify rightsholders. This

3) For more details on the history of private copying levies see P.B. Hugenholtz, L. Guibault, S. van Geffen, *The Future of Levies in a Digital Environment*, available at: http://www.ivir.nl/publications/other/DRM&levies-report.pdf

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compensation usually takes the form of a levy imposed on manufacturers, importers or distributors of analogue or digital equipment or media that allow consumers to make private copies.[4]

According to Jörg Reinbothe, former Head of the Unit "Copyright and Neighbouring Rights" of the DG Internal Market of the European Commission, the policy reasons for introducing private copying exceptions combined with levy systems were the following:

- Enforceability: the exclusive right of reproduction is not enforceable in the private sphere, or at least not without serious interference with privacy rights.

- Sharing the market: the advent of private copying technology has established a new market for the exploitation of copyrighted works. The main beneficiaries of this market are manufacturers of recording equipment and of blank media. Private copying levies accord rightsholders their share of this market.

- Justice: this is directly linked to the three-step test set out in the Berne Convention and other conventions (see *infra*), which establishes the conditions for any limitation of the reproduction right.

- Equity: remuneration for private copying is administered collectively and therefore is more beneficial for small rightsholders than exclusive rights that the latter cannot exploit individually. In this way, levies provide the opportunity for all rightsholders, big and small, to participate in the market and to receive "equitable remuneration".

- Easy access: the system of private copying levies permits consumers to make private copies while taking due account of the economic interests of rightsholders.

- National treatment: the beneficiaries are determined by the national law of the member states applying the levies. The remuneration is shared with those rightsholders subject to national treatment.[5]

1. Private Copying Exception at EU Level

The private copying exception and the corresponding levies have been harmonised at EU level to a certain extent by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter the InfoSoc Directive or InfoSoc).[6] The objectives of the InfoSoc Directive are to adapt legislation on copyright and related rights to reflect technological developments and to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996 (WIPO Copyright Treaty[7] and WIPO Performances and Phonograms Treaty[8]).

The Directive harmonised the rights of reproduction, distribution, and communication to the public, as well as the legal protection of anti-copying devices and rights management systems. It also introduced an exhaustive, optional list of exceptions to copyrights. Art. 2 InfoSoc defines the

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4) See European Commission, *Background Document 'Fair Compensation for Acts of Private Copying'*, available at: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/background_en.pdf
5) J. Reinbothe, "*Private Copying, Levies and DRMs against the Background of the EU Copyright Framework*", DRM Levies Conference, 8th September 2003, available at: http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm
6) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT
7) WIPO Copyright Treaty, available at: http://www.wipo.int/treaties/en/ip/wct/
8) WIPO Performances and Phonograms Treaty, available at: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html

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reproduction right as "an exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;
(b) for performers, of fixations of their performances;
(c) for phonogram producers, of their phonograms;
(d) for the producers of the first fixations of films, in respect of the original and copies of their films;
(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite."

This exclusive reproduction right is tempered through a list of non-mandatory exceptions and limitations. With regard to private copying, Art. 5.2(b) InfoSoc stipulates that member states may provide for 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 rightsholders 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".

Following the definition of Art. 5.2(b) InfoSoc, the following characteristics of the private copying exception can be inferred:

- The often called "right to private copying" is in fact an exception to an exclusive right of authors and other rightsholders;
- The medium on which the copy is made is not relevant;
- The copy has to be made by a natural person, which excludes enterprises and public bodies from the scope of the exception;
- All types of commercial ends are excluded;
- The rightsholders have to receive fair compensation;
- The application of technological measures introduced by rightsholders against copying are to be taken into account when applying the fair compensation.[9]

Moreover, according to Art. 5.5 InfoSoc member states wishing to introduce this exception or limitation to the reproduction right have to take into account the so-called three-step test, which provides that exceptions and limitations 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 rightsholder."

2. Fair Compensation

In order to remunerate rightsholders for the losses caused by private copying, the InfoSoc Directive demands fair compensation. The Directive lists the possible harm that the act of private copying can cause to rightsholders as one "valuable criterion" to determine the form, detailed arrangements and possible level of fair compensation. However, no compensation may be due if rightsholders have already received payment in some other form, for instance as part of a licence fee.

9) For more information on the interplay between the private copying exception and technical protection measures see e.g. Cabrera Blázquez, F.J., *Digital Rights Management Systems (DRMs): Recent Developments in Europe*, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus1_2007.pdf.en

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In cases where the prejudice to the rightsholder would be minimal, it might not be necessary to provide for compensation.

Very importantly, fair compensation applies for acts of legal private copying and therefore excludes any act of copyright infringement.

Currently the laws of 25 EU member states have a private copying exception. The two EU countries which did not opt for it are the United Kingdom and Ireland. Following Art. 5.2(b) InfoSoc, fair compensation must be provided to rightsholders for acts of private copying; however the Directive leaves member states free to decide how to implement this obligation. Out of 25 member states with a private copying exception, 23 have a system of private copying levies.

Only four member states have not implemented a system of private copying levies. The UK and Ireland do not need such a system since they do not have a private copying exception. Malta and Luxembourg have introduced such an exception into their laws, but have done so without implementing a system of levies.

It is no surprise that remarkable differences exist among EU member states with regard to private copying levies because the harmonisation of the private copying exception envisaged by the InfoSoc Directive is only partial and leaves national legislators with significant options and courts with plenty of room for interpretation.[10]

3. The Padawan Case

The trend towards extending private copying levies has been subject to criticism for some time, notably by the IT industry, users' associations and academia. In their opinion, a system of private copying levies that taxes digital reproduction equipment and media goes beyond the scope of Art. 5.2(b) InfoSoc, because according to Recital 35 of the Directive the purpose of fair compensation is solely to compensate rightsholders adequately for the use made of their protected works or other subject-matter. However, these critics had to wait until October 2010 to see the Court of Justice of the European Union (CJEU) render a ground-breaking judgment concerning the applicability of private copying levies to digital reproduction equipment and media. In its decision in the case of Padawan v. SGAE,[11] the CJEU clarified important issues such as the uniform interpretation of the concept of fair compensation, the persons liable to pay the levy and the relationship between the imposition of the levy and the use of recording equipment or media for the purposes of private copying.

3.1. The CJEU Judgment

The parties to this case were the *Sociedad General de Autores y Editores* (a Spanish collecting society for authors and editors – SGAE), and Padawan, a Spanish company that markets CD-Rs, CD-RWs, DVD-Rs and MP3 players. SGAE requested from Padawan payment of the private copying levy for the years 2002 to 2004. The defendant Padawan opposed the claim on the ground that the indiscriminate application of a levy to digital media, regardless of the purpose for which they were used (private use or other professional or commercial activities), was incompatible with the InfoSoc Directive. On 14 June 2007, the *Juzgado de lo Mercantil No 4 de Barcelona* (Commercial Court n.4 of Barcelona) upheld SGAE's claim in its entirety and ordered Padawan to pay EUR 16,759.25 plus interest. Padawan appealed the judgment with the *Audiencia Provincial de Barcelona* (Provincial Court, Barcelona). On 15 September 2008, the *Audiencia Provincial de Barcelona* referred the case

10) For a full picture of the systems in all EU member states see the ZOOM part of this publication.
11) Judgment of the Court of Justice of the European Union (Third Chamber), case C-467/08, 21 October 2010, available at: http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79898978C19080467&doc=T&ouvert=T&seance=ARRET

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to the CJEU for a preliminary ruling under Article 234 EC.[12] The Barcelona court asked the CJEU the following questions:

- "Does the concept of 'fair compensation' in Article 5(2)(b) InfoSoc entail harmonisation, irrespective of the Member States' right to choose the system of collection which they deem appropriate for the purposes of giving effect to the right to fair compensation of intellectual property rightsholders affected by the adoption of the private copying exception or limitation?

- Regardless of the system used by each Member State to calculate fair compensation, must that system ensure a fair balance between the persons affected, the intellectual property rightsholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other, and is that balance determined by the reason for the fair compensation, which is to mitigate the harm arising from the private copying exception?

- Where a Member State opts for a system of charging or levying in respect of digital reproduction equipment, devices and media, in accordance with the aim pursued by Article 5(2)(b) InfoSoc and the context of that provision, must that charge (the fair compensation for private copying) necessarily be linked to the presumed use of those equipment and media for making reproductions covered by the private copying exception, with the result that the application of the charge would be justified where it may be presumed that the digital reproduction equipment, devices and media are to be used for private copying, but not otherwise?

- If a Member State adopts a private copying 'levy' system, is the indiscriminate application of that 'levy' to undertakings and professional persons who clearly purchase digital reproduction devices and media for purposes other than private copying compatible with the concept of 'fair compensation'?

- Might the system adopted by the Spanish State of applying the private copying levy indiscriminately to all digital reproduction equipment, devices and media infringe Directive 2001/29, in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because to a large extent it is applied to different situations in which the limitation of rights justifying the compensation does not exist?"

With regard to the Spanish system of private copying levies, Article 25 of the *Ley de Propiedad Intelectual* (Intellectual Property Act – LPI)[13] regulates fair compensation for acts of "[r]eproduction exclusively for private use, by means of non-typographical devices or technical instruments, of works circulated in the form of books or publications, deemed by regulation to be equivalent, and phonograms, videograms and other sound, visual or audiovisual media". These acts of reproduction shall give rise to fair compensation paid at a flat rate for each of the said methods of reproduction. The creditors of this compensation are the authors of works publicly exploited in one of the aforementioned forms, as well as editors, producers of phonograms and videograms and performers whose performances have been fixed on those phonograms and videograms. Collective management of this compensation is mandatory. The debtors of this compensation are

12) Reference for a preliminary ruling under Article 234 EC from the *Audiencia Provincial de Barcelona*, made by decision of 15 September 2008.

13) See *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia* (Royal Legislative Decree 1/1996 of 12 April 1996, approving the consolidated text of the Law on Intellectual Property). That royal legislative decree was amended in the context of the transposition of the InfoSoc Directive by Act 23/2006 of 7 July 2006 amending the consolidated text of the Law on Intellectual Property approved by Royal Legislative Decree 1/1996 (BOE No 162 of 8 July 2006, p. 25561). A consolidated version (with further modifications up to 2011) is available at: http://civil.udg.es/normacivil/estatal/reals/Lpi.html

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manufacturers established in Spain, where they operate as commercial distributors, and persons who acquire outside Spanish territory, the equipment, devices and media referred to with a view to their commercial distribution or use in Spain. Distributors, wholesalers and retailers shall pay compensation jointly and severally with their suppliers for the products concerned, unless they prove that that compensation has in fact been paid for them.

In its judgment of 21 October 2010, the CJEU made a number of important clarifications for the future of private copying levies:

- The concept of "fair compensation" must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union. Neither Article 5.2(b) nor any other provision of the InfoSoc Directive refers to the national law of member states as regards this concept. In such cases, the need for a uniform application of EU law and the principle of equality require that an EU law provision must normally be given an independent and uniform interpretation throughout the European Union, taking into account the context of the provision and the objective of the relevant legislation.[14]

- Member states have the power to determine, within the limits imposed by EU law and in particular by the InfoSoc Directive, the form and detailed arrangements for financing and collection, as well as the level of what constitutes fair compensation.

- Fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception.

- The copying of works by natural persons, for their own private use, is likely to cause harm to rightsholders. In principle, it is for that person to compensate the rightsholders. However, identifying private users and obliging them to compensate rightsholders on a case by case basis is practically impossible. Moreover, the harm caused by each private use considered separately may be minimal. Therefore, systems of private copying levies charged to those who make digital recording equipment and media available to private users or who provide copying services for them are acceptable since their activity is the factual precondition for natural persons to obtain private copies. Moreover, the costs of the private copying levy can be passed on in the price charged to the final user, who is then indirectly liable to pay fair compensation.

- The digital reproduction equipment and media charged with a levy have to be liable to be used for private copying and likely to cause harm to the rightsholder. Article 5.2(b) InfoSoc must be interpreted as meaning that there is a necessary link between the application of the levy to the digital reproduction equipment and media and their use for acts of private copying.

- The indiscriminate application of the private copying levy to all types of digital reproduction equipment and media, including in the case at hand in which they are acquired by non-natural persons for purposes clearly unrelated to private copying, does not comply with Article 5.2(b) of the InfoSoc Directive.

- If the digital reproduction equipment or media have been made available to natural persons as private users the application of the private copying levy is justified without need of proving that actual private copying has taken place. The possibility of causing harm to the rightsholder suffices.

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14) The judgment quotes here Case 327/82 Ekro [1984] ECR 107, paragraph 11; Case C-287/98 Linster [2000] ECR I-6917, paragraph 43; and Case C-523/07 A [2009] ECR I 2805, paragraph 34.

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3.2. Effects of the Padawan Judgment in Spain

The CJEU judgment does not answer the question whether or not the Spanish system conforms to the provisions regulating the private copying exception in the InfoSoc Directive. The CJEU recalls that, "except in an action for a declaration of a failure to fulfill obligations", the CJEU cannot rule on the compatibility of a national provision with EU law. That competence belongs to the referring court, after having obtained from the CJEU, by way of a reference for a preliminary ruling, a clarification as may be necessary on the scope and interpretation of that law.[15]

On 2 March 2011, the *Audiencia Provincial de Barcelona* took note of the CJEU judgment and decided[16] that Art. 25 LPI had to be interpreted along the lines defined by the CJEU judgment. Therefore, the indiscriminate application of the private copying levy as provided for in Art. 25 LPI, in particular with respect to digital reproduction equipment and media not made available to private users and clearly reserved for uses other than private copying, could not be considered fair. The next step was to decide whether or not the defendant, Padawan, had to pay the amounts due for private copying levies for the years 2002 to 2004. Indeed, many of the defendant's customers were companies. The court, unable to determine which equipment and blank media had been sold to companies and which to individuals, upheld the appeal and decided that the defendant would not have to pay the private copying levies claimed by SGAE.

It is worth noting, however, that on 28 February 2011 another Spanish court, the *Juzgado de lo Mercantil número 6 bis de Madrid*, issued a judgment[17] in a similar case that contradicts the decision taken by the *Audiencia Provincial de Barcelona* in the Padawan case. Here the court decided that the debtor (a Spanish company selling digital reproduction equipment, devices and media) was obliged to provide information to the creditor (in this case EGEDA, a Spanish collecting society for producers of audiovisual works) as to the number of digital reproduction equipment and media sold by the debtor in order to calculate the fair compensation it owed to EGEDA.

The effects of the CJEU judgment go well beyond the Padawan case. One of the unsolved issues is what will happen to those amounts already collected by rightsholders' societies in accordance with Spanish legislation but in breach of EU law? If collecting societies were unduly cashing in on private copying levies from companies, professionals and public bodies, do they have to return that money? The collecting societies have already declared that they will not pay back those amounts because they consider that the Padawan decision does not have retroactive effect.[18] However, some public bodies have announced that they will ask for a refund of the private copying levies paid in the past.[19]

To complicate things further, on 22 March 2011 the Spanish *Audiencia Nacional* (High Court) annulled[20] for formal reasons the Spanish ordinance that determines which reproduction equipment and blank media are subject to the private copying levies.[21] The ordinance had been challenged

15) See Case C-347/87 Triveneta Zuccheri and Others v Commission [1990] ECR I-1083, paragraph 16.
16) Judgment of the *Audiencia Provincial de Barcelona* (Barcelona Provincial Court) Case Padawan v SGAE, 2 March 2011, available at: http://www.institutoautor.org/uploads/website/docs/2157-2-STPADAWAN.pdf
17) Judgment of the *Juzgado de lo Mercantil número 6 bis de Madrid* (Commercial Court of Madrid no. 6 bis), 28 February 2011, available at: http://www.institutoautor.org/uploads/website/docs/2157-1-Egeda.pdf
18) *Las sociedades de gestión rechazan devolver dinero por el canon*, elpais.com, 25 October 2010, available at: http://www.elpais.com/articulo/cultura/sociedades/gestion/rechazan/devolver/dinero/canon/elpepucul/20101025 elpepucul_8/Tes
19) See e.g. *La Generalitat de Cataluña reclamará a la SGAE la devolución del canon digital*, facua.org, 11 November 2010, available at: https://www.facua.org/es/noticia.php?Id=5422&IdAmbito=21
20) Judgment of the Audiencia Nacional, Sala de lo Contencioso-Administrativo, sección tercera, 22 March 2011, available at: http://estaticos.elmundo.es/documentos/2011/03/24/canon.pdf
21) *Orden PRE/1743/2008, de 18 de junio, por la que se establece la relación de equipos, aparatos y soportes materiales sujetos al pago de la compensación equitativa por copia privada, las cantidades aplicables a cada uno de ellos y la distribución entre las diferentes modalidades de reproducción*, available at: http://noticias.juridicas.com/base_datos/Admin/o1743-2008-pre.html

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before the Spanish courts by the *Asociación de Internautas*[22] (an Internet users' association – AI) for reasons similar to those put forward in the Padawan case, notably that the indiscriminate application of a private copying levy to all types of digital equipment and blank media, regardless of the purpose for which they are intended (private use or other professional or commercial activities), is arbitrary and therefore illegal. Moreover, AI also pointed to procedural shortfalls in the adoption of the ordinance, such as that it lacks the mandatory opinion of the State Council as well as other obligatory reports. In its judgment, the *Audiencia Nacional* took the easy way out and annulled the ordinance for the aforementioned procedural flaws without deciding whether or not the rules concerning the private copying levies are legal. The logical consequence of this judgment would be that the previously existing rules of 2006 on private copying levies apply.[23] However, the Spanish collecting societies have already announced that they will appeal the judgment before the Supreme Court[24] so the case is not closed yet. In the meantime, uncertainty grows as to the current application of private copying levies in Spain and especially concerning the fate of those payments already made under an allegedly flawed system.

Regarding the future, the Spanish government has announced that it will introduce changes to the current legislation in order to adapt it to the CJEU judgment. The recently adopted Sustainable Economy Act includes a somewhat curious provision[25] stipulating that before June 2011 the government will take action to change the Spanish regulation on fair compensation for private copying by passing a Royal Decree to achieve full conformity with the regulatory framework and jurisprudence of the European Union.

3.3. Effects in other EU Member States?

In a press release on the CJEU's judgment, the European Grouping of Societies of Authors and Composers (GESAC) welcomed the CJEU's confirmation "that private copying levy systems achieve a fair balance between the interests of authors and those of users of copyright protected content" and the fact that the judgment "settles a number of controversial issues concerning how authors and composers must be fairly compensated for these reproductions".[26] With regard to the parts of the judgment relating to professional uses, GESAC does not expect that this will lead to significant changes (if any) being introduced into national legislations. According to GESAC, national private copying levy systems in the EU already contain solutions for the implementation of the CJEU stated principle that private copying levies cannot be applied to copies which companies make for professional purposes with digital reproduction equipment, devices and media acquired by them. GESAC points to the example provided by the Nordic region, where a mechanism of exemptions and refunds for professional users exists. In other countries such as France, the fact that some of the levied products are used by companies or public administrations for purposes other than private copying is taken into account for the calculation of the levy's tariff. For this reason, the French collecting societies have recently stated that French legislation complies with the requirements of the CJEU judgment.[27] A similar position is taken e.g. by the German *Zentralstelle für private Überspielungsrechte* (Central office for private recording rights – ZPÜ)[28] and by the Belgian *Société*

22) http://www.internautas.org/
23) See *Disposición Transitoria Única de la Ley 23/2006, de 7 de julio, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril*, available at: http://noticias.juridicas.com/base_datos/Privado/l23-2006.html#dtu
24) http://www.finanzas.com/noticias/formacion/2011-04-10/463004_entidades-gestoras-derechos-autor-recurriran.html
25) See *disposición adicional duodécima* (twelfth additional provision) of *Ley 2/2011, de 4 de marzo, de Economía Sostenible* (Sustainable Economy Act, Act 2/2011 of 4 March 2011), available at: http://www.boe.es/boe/dias/2011/03/05/pdfs/BOE-A-2011-4117.pdf
26) Press release of GESAC, 29 October 2010, available at: http://www.gesac.org/ENG/NEWS/COMMUNIQUESDEPRESSE/download/COMMUNIQUESEN_20101029_GESAC%20welcomes%20the%20ECJ%E2%80%99s%20confirmation%20in%20the%20SGAE-Padawan%20decision%20.pdf
27) See the press release of Sorecop, Copie France, Sofia, Sorimage of 22 October 2010, available at: http://www.copieprivee.org/Communique-de-Sorecop-Copie-France.html
28) See *EuGH entscheidet über Anwendungsbereich des Vergütungsanspruchs für private Vervielfältigung*, available at: https://www.gema.de/presse/aktuelle-pressemitteilungen/presse-details/article/eugh-entscheidet-ueber-anwendungsbereich-des-verguetungsanspruchs-fuer-private-vervielfaeltigung.html

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de gestion collective pour la copie privée d'oeuvres sonores et audiovisuelles (Collecting society for private copying of audio and audiovisual works – Auvibel).[29]

Representatives of the European IT industry read the decision in a different light: the European Imaging Association (EURIMAG) considers that the judgment "clearly states that copyright levies claims on devices used by businesses are illegal" and it urges the European Commission and members of the European Parliament to seize the opportunity provided by the forthcoming Collective Rights Management Directive (CRM) to address the "shortcomings of the current copyright levy systems".[30] For DIGITALEUROPE, the Padawan judgment outlaws "the indiscriminate application of copyright levies to devices used for business purposes" and constitutes "a precedent for a more balanced system of compensation to be established."[31] At the national level the reactions are similar: for example, in Germany BITKOM asks the German government to adapt national rules on private copying levies to European legislation and jurisprudence (making express mention of the judgment in the Padawan case) so that products used for commercial purposes will not be subject to levies.[32]

Notwithstanding the political controversy, the final decision on the consequences of the Padawan decision for each member state rests with the national courts as recently demonstrated by the French *Conseil d'Etat*. On 17 June 2011 the *Conseil d'Etat* dismissed the reasoning put forward by French collecting societies (see *supra*) and ruled that the French system, which also obliges companies and public administrations to pay the private copying levy, is in breach of EU legislation.[33] It seems most probable that national courts of other member states may be called upon as well in order to decide on the meaning of the Padawan holding, although the outcome may vary from case to case.

III. A File-Sharing Levy: Panacea or Chimera?

In 2006, the prominent Italian politician Roberto Maroni declared in an interview that he downloaded music illegally from the Internet and that music should be "free and accessible to all." This stirred quite a controversy in a country known to have one of the worst piracy records in the EU.[34] Later in 2010, a group of parliamentarians, academics, and journalists, joined by different consumer groups, wrote an open letter[35] to Maroni (who in the meantime had become Minister of the Interior) reminding him of his former "sins" and asking him to support the legalisation of non-commercial file sharing.

This is not an isolated initiative: in different European countries (e. g. Germany,[36] France,[37] the

29) See *Suite à l'arrêt Padawan vs SGAE CJUE (C467/08): la rémunération pour copie privée tient la route*, available at : http://www.auvibel.be/fr/actualites/p/detail/suite-a-larret-padawan-vs-sgae-cjue-c46708-la-remuneration-pour-copie-privee-tient-la-route
30) See *EU Highest Court confirms copyright levies on devices sold to businesses are illegal*, available at: http://www.eurimag.eu/index.php?option=com_flexicontent&view=items&cid=8&id=59&Itemid=12
31) See *Court Ruling on Copyright Levies Paves the Way for Change*, 21 October 2010, available at: http://www.digitaleurope.org/index.php?id=32&id_article=504
32) See *BITKOM zum Korrekturbedarf beim Pauschalabgabensystem*, available at: http://www.bitkom.org/de/themen/37153_64777.aspx
33) Conseil d'Etat, 17 juin 2011, Canal + distribution et autres, Nos 324816, 325439, 325463, 325468, 325469. Séance du 16 mai 2011 - Lecture du 17 juin 2011, available at : http://www.conseil-etat.fr/cde/node.php?articleid=2363
34) See *Right-winger sparks piracy debate*, available at: http://www.variety.com/article/VR1117950064?categoryid=19&cs=1
35) *Lettera aperta al ministro Roberto Maroni per legalizzare gli usi non commerciali del file sharing* (Open letter to Minister Roberto Maroni written by Parliamentarians, academics, journalists and consumer groups to ask the minister to support the legalization of non-commercial file sharing), available at: http://www.agoradigitale.org/letteramaroni
36) See *infra*.
37) See *infra*.

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Netherlands,[38] Belgium,[39] Italy[40]), proposals have been made for the introduction of remuneration schemes whereby rightsholders would be paid for the file-sharing activities of Internet users. These schemes are based (with certain variations) on a monthly fee to be paid by the Internet user to his/her Internet Access Provider, which is in charge of transmitting the payment to the relevant collecting societies. These solutions aim to adapt the concept of private copying levies to the online world. Hereinafter, they will therefore be referred to as "file-sharing levies". Those who favour the idea of file-sharing levies believe that it is neither possible nor desirable to block the exchanges that millions of people have on the Internet. However, they also support the view that rightsholders should be remunerated for the unauthorised sharing of their works. In their opinion, making Internet users pay a flat-rate fee would compensate for a sharing activity that currently leaves rightsholders without any tangible benefit.[41]

However, this is easier said than done. Current legislation at the EU level does not allow the unauthorised sharing of copyrighted works. A file-sharing levy would probably require an important modification of copyright rules at national and EU level. Furthermore, such a levy raises important economic and logistical questions.

1. Legal Analysis

In the analogue world, things were pretty straightforward: piracy was a profit-making activity run by various mafias, which was based on the illegal reproduction of copyright material on physical carriers. With the advent of the Internet, a new type of so-called piracy has appeared: file sharing. However, file-sharing is not a profit-making mafia-led activity, but rather the free exchange of digital files between a virtually unlimited number of anonymous users. Here, the commercial aspect is missing, and some argue that this sharing of content is covered by the private copying exception because it is done for personal use.

In order to clarify whether file sharing infringes copyright, two different actions have to be analysed separately: offering copyright works to members of a network (uploading) and copying of those works by members of the network (downloading).

Uploading copyright works to websites and file-sharing networks is what the InfoSoc Directive calls the "making available to the public of works and other subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them". It is also called "right of making available" or "making available right". This exclusive right forms part of the right of communication to the public. Currently, neither the InfoSoc Directive, nor the TRIPs Agreement, nor the WIPO treaties foresee an exception to the making available right for non-commercial/private uses. Therefore, uploading copyright works to the Internet (e.g. to file-sharing networks or services such as Rapidshare) without the required authorisation infringes the exclusive right of making available.

In principle, copying copyrighted works without authorisation violates the reproduction right. But a person who downloads copyright-protected works from p2p file-sharing networks does this normally for "private purposes", that is, in order to listen to or watch these works at home, on a

38) See Torrentfreak.com, *Dutch Artist Unions Call Government to Legalize File-Sharing*, available at: http://torrentfreak.com/dutch-artist-unions-call-government-to-legalize-file-sharing-101124/
39) See *Proposition de loi visant à adapter la perception du droit d'auteur à l'évolution technologique tout en préservant le droit à la vie privée des usagers d'Internet (Déposée par M. Benoit Hellings et Mme Freya Piryns)*, 2 March 2010, available at : http://www.bela.be/media/109096/proposition%20de%20loi%20ecolo-groen%20licence%20globale%20hellings-piryns.pdf
40) See e.g. *Proposta di Legge d'iniziativa dei deputati Beltrandi, Bernardini, Zamparutti, Farina Coscioni, Maurizio Turco, Mecacci, Modifiche alla legge 22 aprile 1941, n. 633, in materia di comunicazione di opere al pubblico da parte di persone fisiche che scambiano archivi attraverso reti digitali per fini personali e senza scopo di lucro, nonche´ di riproduzione privata dei fonogrammi e videogrammi dalle medesime messi a disposizione del pubblico, presentata il 29 aprile 2008*, available at: http://www.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0008140.pdf
41) Software is normally excluded from such proposals.

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computer, mobile phone or MP3 player. So the real question is: do downloads fall under the private copying exception? First of all, this depends on whether or not the law of the country concerned includes such an exception. If that is the case, the unauthorised downloading of copyrighted works from p2p networks must be covered by the scope of the exception.

Among countries with a private copying exception, two groups can be distinguished:

- Those that have adapted the exception to explicitly exclude from its scope the unauthorised downloading from websites or p2p networks;

- Those that have so far maintained the exception as it was included in their national legislation before the so-called digital revolution.

The first group includes countries like Germany, where §53 para. 1 UrhG forbids private copies if they result from duplicating a "copy that was clearly illegally produced or made publicly accessible".

The second group consists of countries that have kept a broader private copying exception in their national legislations. In such countries, a literal interpretation of the law could lead to the conclusion that unauthorised downloads are protected by the private copying exception.

In the Netherlands, for example, different court decisions have made it clear that the unauthorised downloading of protected works from the Internet falls under the scope of the private copying exception.[42] Moreover, a decision of the Court of Appeals of The Hague has gone so far as to state that, since downloading from an illegal source for private use is not forbidden, this fact should be taken into account for the calculation of the amount of private copying levies.[43] This holding might, however, be reversed by legislation. In 2009 a parliamentary working group on copyright (the Gerkens Committee) published a report[44] proposing to prohibit downloading from illegal sources, following the German example and to gradually abolish home copying levies. In response the Minister of Justice stated that the Dutch Cabinet generally agreed with the Committee's proposals.[45] More recently, on 11 April 2011 Fred Teeven, the Dutch State Secretary for Public Safety and Justice, published a mission statement[46] in which he proposes to modernise Dutch Copyright.[47] Among other plans, he proposes to make file-sharing illegal and to abolish the private copying levy *inter alia* on blank CDs and DVDs.[48]

In most EU countries the unauthorised downloading of copyrighted material is illegal. And if file sharing is not an act of private copying, it is not covered by private copying levies. Different countries are introducing stronger rules against the unauthorized sharing of copyright-protected material. However, many voices insist that file sharing is here to stay and will not be stopped by coercive measures. They argue that it is time to go a different way in order solve this digital conundrum.

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42) See e.g. IRIS 2011-1/41 and IRIS 2011-1/42.
43) Court of Appeals of The Hague, 15 November 2010, ACI c.s. v. Stichting De Thuiskopie & SONT, LJN BO3982, 200.018.226/01, 05-2233, available at: http://www.cedar.nl/uploads/files/file/Cedar/uitspraak%20151110.pdf
See also http://merlin.obs.coe.int/iris/2011/1/article42.en.html
44) Final Report of Parliamentary Working Group on Copyright (Gerkens Committee), Tweede Kamer (Second Chamber), 2008-2009, 29 838 and 31 766, no. 19. Available at:
http://www.tweedekamer.nl/images/Herdruk_rapport_auteursrecht_118-191067.pdf
45) See P. Bernt Hugenholtz, [RIDA 2010] Chronicle of the Netherlands - Dutch copyright law, 2001-2010, available at: http://www.ivir.nl/publications/hugenholtz/RIDA_2010.pdf
46) *Staatssecretaris Teeven biedt de Tweede Kamer, mede namens de Minister van Economische Zaken, Landbouw en Innovatie en de Staatssecretaris van Onderwijs, Cultuur en Wetenschap de speerpuntenbrief Auteursrecht 20©20 aan* (Mission Statement by State Secretary for Public Safety and Justice Fred Teeven), available at:
http://www.rijksoverheid.nl/documenten-en-publicaties/brieven/2011/04/11/speerpuntenbrief-auteursrecht-20-20.html
47) See IRIS 2011-5/34
48) The author would like to thank Kevin van 't Klooster from the Institute for Information Law of the University of Amsterdam for providing him with information on the Dutch situation.

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Two main options have been proposed to legalise file-sharing:

i. Exception to the right of making available;

ii. Compulsory collective management of the right of making available.

Both proposals imply the introduction of a private copying exception and compulsory collective management of the right to remuneration attached thereto.[49]

The first proposal, namely to introduce an exception to the right of making available, presupposes the modification of the InfoSoc Directive, TRIPs Agreement and WIPO treaties to introduce an exception to the making available right for non-commercial purposes. Such an exception would have to comply with the three-step test provided for in these legal instruments (see *supra*).

In Germany, the *Bündnis 90/Die Grüne* (German Green Party) currently proposes as part of its political programme a so-called *Kulturflatrate* (Culture flat-rate). The basic idea is that Internet users would have to pay a flat fee attached to their monthly Internet subscription rate. This fee would be compulsory for the user and would give him/her the right to make cultural products available to other Internet users for non-commercial purposes.

In order to support this proposal, the parliamentary group of *Bündnis 90/Die Grüne* and the Greens/European Free Alliance in the European Parliament commissioned a report on the legal feasibility of the *Kulturflatrate* according to national and European law.[50] This report was presented to the European Parliament in March 2009.

The report analyses the legal hurdles that the *Kulturflatrate* has to overcome in order to be introduced in the German legal system. According to the authors, the *Kulturflatrate* is legally possible but it would require a modification of the InfoSoc Directive and the German Copyright Act because of the need to introduce an exception to the making available right. The authors state that such an exception, once introduced, would comply with the three-step test.

The second proposal, namely to introduce compulsory collective management of the making available right, does not entail the introduction of any exception to the making available right but rather the obligation for rightsholders to manage this right through a collecting society.[51]

In France in 2001, the *société civile pour l'Administration des Droits des Artistes et Musiciens Interprètes* (French collecting society for performers' rights – Adami) developed the concept of a *licence globale* (global licence). This concept was officially presented in 2004 at the *Rencontres européennes des Artistes* (European Meeting of Artists) in Cabourg. To advance this concept the *Alliance Public-Artistes* was created in May 2005. It is an association of organizations representing the interests of those artists and consumers, who backed the *licence globale*.[52]

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49) For a third proposal involving extended collective licences see Philippe Aigrain, *Internet et Création*, available at: http://paigrain.debatpublic.net/?page_id=171. See also NEXA Center for Internet and Society, *Remunerating Creativity, Freeing Knowledge: File-Sharing And Extended Collective Licenses*, available at: http://nexa.polito.it/nexafiles/NEXACenter-ExtendedCollectiveLicenses-EnglishVersion-June2009.pdf

50) Alexander Roßnagel, Silke Jandt, Christoph Schnabel, Anne Yliniva-Hoffmann, *Die Zulässigkeit einer Kulturflatrate nach nationalem und europäischem Recht*, available at: http://www.gruene-bundestag.de/cms/netzpolitik/dokbin/278/278059.kurzgutachten_zur_kulturflatrate.pdf

51) For an in-depth explanation of this proposal see: Carine Bernault & Audrey Lebois (under the supervision of André Lucas), *Peer-to-peer File Sharing and Literary and Artistic Property - A Feasibility Study regarding a system of compensation for the exchange of works via the Internet*, available at: http://www.privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf

52) L'Alliance Public-Artistes brings together over 15 organizations representing the interests of musicians and actors (SPEDIDAM, ADAMI, NSF, NPS-FO SAMUP, SNEA-UNSA, UMJ), photographers, designers, visual artists (SAIF, UPC, SNAP-CGT), independent producers (Qwartz Electronic Music Awards), educators (La Ligue de l'enseignement), families (UNAF), Internet music fans (Les Audionautes) and consumers (CLCV and UFC Que-Choisir).

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The *licence globale*[53] is an authorization that would be granted to users so that they may legally access cultural content on the Internet and share it with others for non-commercial purposes. In return users would have to pay rightsholders a monthly fee that would be added to their Internet subscription fee. This *licence globale* would be optional for the user, so that those who do not engage in file-sharing would not have to pay it. Furthermore, the licence is not intended to cover downloads from commercial platforms.

The *licence globale* is a system composed of two separate authorisations: first, the private copying exception as already existing in French legislation.[54] Second, an authorization given by the representatives of rightsholders for acts of making available to the public. This second part of the system would require the following elements:

- Compulsory collective management: rightsholders would be obliged by law to have their right of making available partially managed by a collecting society. The legislator would designate a newly created collecting society by way of *agrément ministeriel* (ministerial designation), which would be in a position to give individual licences of the right of making available for non-commercial purposes.

- Remuneration rates for authors, performers and producers and limits of permitted acts would be freely negotiated and fixed by agreement between representatives of rightsholders, consumers and Internet Access Providers. A specialised committee would decide on cases where the interested parties failed to come to an agreement.

- Internet Access Providers would be obliged to inform their subscribers of the terms and conditions of the *licence globale* on behalf of rightsholders.

- The remuneration would be collected by the Internet Access Provider and transmitted to the mandated collecting society. This collecting society would be in charge of distributing the total amount among the different collecting societies.

According to the *Alliance Public-Artistes*, the development of new technologies and the collective management of rights will allow new ways of gathering information on who shares what on the Internet without infringing the right to the protection of personal data, in order to enable an accurate distribution to rightsholders.

During the parliamentary debates of the DADVSI Act,[55] the idea of a *licence globale* was introduced by two amendments tabled by members of the political parties UMP and PS. These amendments to the DADVSI bill were adopted by the Assemblée nationale, although they were later overturned in an ulterior reading and never made it into law.[56]

2. Controversy

In the final scene of Brian de Palma's film "The Untouchables", with Al Capone already behind bars, Eliot Ness is informed by a reporter that Prohibition is going to be repealed. When the reporter asks him what he is going to do then, Ness answers nonchalantly "I think I'll have a drink". To understand the joke one must know that Ness was a famous Prohibition agent in Chicago. Now that selling alcoholic beverages was legal again, he was about to do something he had been fighting against professionally for years…

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53) See *Qu'est-ce que la licence globale ?*, available at : http://alliance.bugiweb.com/pages/2_1.html
54) See Art. L.122-5-2, Art. L.211-3-2 and Art. L.311-1 of the *Code de la propriété intellectuelle* (Code of Intellectual Property), available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414
55) *Loi no 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information*, available at : http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000266350
56) See http://merlin.obs.coe.int/iris/2006/7/article20.fr.html and http://merlin.obs.coe.int/iris/2006/2/article15.en.html

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Obviously, comparing the US Prohibition to file sharing makes little sense. However, with the introduction of a file-sharing levy the law-abiding people that now buy their CDs and DVDs or use download services like iTunes might react in a similar way as Eliot Ness in the film: they might switch to sharing files since it now would be legal and they would pay the licence fee anyway. If everybody did that, one might fear a huge incalculable impact and the most pessimistic could see the levy as a blanket licence to kill the cultural industries.

On 25 January 2010, the *Bundesverband Musikindustrie* (German Association of the Music Industry – BVMI) published a position paper in which it presented ten arguments against the *Kulturflatrate*.[57] According to the BVMI, the *Kulturflatrate* would be an unfair measure because consumers would pay for something they did not use and it would lead to a disproportionate burden on all consumers and especially those socially disadvantaged and vulnerable. The BVMI also fears that (i) from an economic point of view, the *Kulturflatrate* is contrary to the economic principles of our society and would cut off the economic base of new digital business models; (ii) from a legal point of view, the *Kulturflatrate* is contrary to international copyright treaties, takes away from authors and artists the right to determine the use of their works and leads to a devaluation of intellectual property; (iii) from an administrative point of view, the *Kulturflatrate* raises more questions than it answers and would require the building of a gigantic bureaucracy and administrative apparatus and (iv), moreover, the *Kulturflatrate* would "flatten" culture.

In France, there have also been negative reactions: the *commission sur la distribution des contenus numériques en ligne du Conseil supérieur de la propriété littéraire et artistique* considered the proposal of a *licence globale* as not viable from an economic point of view.[58]

It is indeed true that a file-sharing levy opens up a lot of questions:

- First of all, what should be the amount of the levy? If one were to link the amount to the impact that the file-sharing levy would have on other existing commercial products and services, it could be very high…;

- How should the levy be distributed among rightsholders? Measuring success on the Internet is everything but an exact science…;

- What would happen to media windows? At the moment when a work is available for sharing, all media windows become obsolete;

- What would happen to cross-border sharing? If a user downloaded a file made available in a country where there was no file-sharing levy then the right of making available would not be covered and there would be infringement;

- What would be the definition of non-commercial purposes? Would this include business models built on the file-sharing of others?

There are surely many other questions to solve. Maybe the American inventor Charles F. Kettering was right when he said that "[w]e have a lot of people revolutionizing the world because they've never had to present a working model".[59] Introducing such a revolutionary measure cannot be done without having it thoroughly tested in advance, a thing that seems impossible to do. But the fact of proposing alternatives to the so-called Internet piracy may serve as encouragement for further reflection on this seemingly unsolvable problem. And that cannot be a bad thing after all…

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57) Bundesverband Musikindustrie (BVMI), *Positionspapier zur Kulturflatrate*, available at: http://www.musikindustrie.de/politik_einzelansicht/back/56/news/positionspapier-zur-kulturflatrate/
58) See *Pierre Sirinelli : "la licence légale n'est pas économiquement viable"*, available at : http://www.lemonde.fr/technologies/article/2005/12/19/pierre-sirinelli-la-licence-legale-n-est-pas-economiquement-viable_722969_651865.html
59) See http://thinkexist.com/quotes/charles_f._kettering/

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IV. The Way Forward

I'm standing at the crossroads
There are many roads to take
But I stand here so silently
For fear of a mistake

Calvin Russell, *Crossroads*

On 5th November 2010, Neelie Kroes, the Vice-President of the European Commission in charge of the Digital Agenda, announced that the Commission would examine again the problem of divergent national private copy levies. Furthermore, Michel Barnier, Commissioner in charge of copyright matters, has recently released a European strategy on intellectual property announcing the appointment of a high-level mediator with a view to brokering stakeholder agreement on private copying levies.[60] Indeed, private copying levies have been on the European Commission's agenda for quite a while now, but so far this has not resulted in any decisive action. This is a very sensitive issue, so it is understandable that the Commission prefers to take a conservative stance in this matter. However, the CJEU decision in the Padawan case might accelerate things, at least at national level.

With regard to file-sharing levies, an agreement on the introduction of any of such proposals does not seem in sight. Nevertheless, more and more voices are heard complaining that those who are allegedly the main beneficiaries of unauthorised file-sharing, Internet Access Providers, do not contribute to the remuneration of creativity. In France for example, the collecting societies SACEM and Adami jointly called in 2009 for the introduction of a tax imposed on the overall turnover of the Internet Access Providers. According to their common press release,[61] this contribution would be adjustable depending on the overall volume of unauthorized sharing. It should take into account both the economic damage already incurred and future damage. This tax would be managed collectively. However, this solution has not been taken into account by the French Government so far.

Whatever the road leading out of this crossroads, it will surely require a wide consensus among all parties involved. And this might be the most difficult thing to achieve…

60) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe", 24 May 2011, COM(2011) 287 final, available at:
http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf

61) Press release of SACEM & Adami, 6 October 2009, *Les auteurs, les compositeurs, les artistes-interprètes et les éditeurs de musique pour une contribution compensatoire sur Internet*, available at :
http://www.adami.fr/fileadmin/user_upload/pdf___docs/02_Defendre/Les_droits_sur_internet/communique_Adami_Sacem_mission_Zelnik_oct2009.pdf

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Turning Copyright Golden?

Private copying levies become more and more a topical legal issue. As the related reporting section shows, they have been addressed by the Bulgarian legislator in a recent amendment to the copyright and related rights act and they are certainly a long-running issue in Spain. Firstly, the current practice of collecting private copying levies in Spain has been examined by the Court of Justice of the European Union, was then stopped by a national regional court before finally the Spanish National Court annulled an order that had detailed how and from whom private copying levies were to be collected in practice. Whereas private copying levies remain legal in Spain, the legislator will have to find out how to align them with European requirements before they can be correctly applied. In France, the *Conseil d'Etat* has also recently overturned the current system of private copying levies with regard to professional uses of digital recording media.

News from Belgium and Germany concern the **stopping** of **piracy** for actions such as illegal downloading or deep linking aimed at bypassing technical protection measures. In the Netherlands this would still seem like a step ahead of time in light of two recent decisions, where downloading was considered to be legal despite the illegal uploading of the files. But the situation might soon change should a mission statement of the Dutch State Secretary for Public Safety and Justice be turned into law, on which another article reports.

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Private Copying Levies

Bulgaria

Amendments to the Copyright and Related Rights Act

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On 25 March 2011 amendments to the *Закон за авторското право и сродните му права* (Bulgarian Copyright and Related Rights Act - ЗАПСП) entered into force. These are the result of long and heated discussions between the author of the bill, the Ministry of Culture through the Council of Ministers, on the one side, the Members of Parliament on another side and representatives of users and rightsholders on the third side (see IRIS 2010-10/15).

In general, the amendments concern many different topics but those presented as being the most important were a new system of remuneration for private copying and a new status for collecting societies.

After some hesitation the MPs decided that the right of natural persons to make a copy of a protected work without the explicit consent of the rightsholder but against payment of levies shall be reserved. However, the circle of persons obliged to pay such levies was significantly reduced. At first, the new Act does not provide for any obligation to pay levies on persons/organisations that produce or import recording equipment and devices. According to the new version of Art. 26 of the Act, such levies shall be paid only by persons/organisations that produce or import from third countries blank CDs, DVDs and other media predominantly used for the recording of works protected by copyright. Secondly, the amount of the due remuneration is reduced from 5 percent of the manufacturing costs to an amount between 1-1.5 percent of the delivery price according to the accounting standards. Additionally, the Law provides that the list of media that shall be paid for and the exact amount of the levy shall be determined annually after a special agreement between the organisations collecting the levies and the associations of those persons obliged to pay them.

Another very important part of the amendments are the new rules for the registration of organisations acting as collecting societies. The new procedure is much more detailed than before and provides for a quasi-monopoly in the administration of one type of copyright or related right. According to Art. 40b, paragraph 4 the Minister shall grant a registration to an applicant to become a collecting society for a certain type of right, which another organisation is already registered for, only if the applicant presents an agreement with the first registered organisation. On the basis of this agreement the later organisation has to authorise the first one to collect the remuneration in its name and in compliance with the tariff of the first one. In fact, according to the new rules only the organisation registered first as a collecting society for the respective type of right will have the right to negotiate with the users on the amount of the remuneration. All the others shall follow its tariff and have to grant to the users the right to use their catalogue in accordance with the price fixed by the first registered organisation. Organisations that have already been registered under the old law shall submit to the Ministry of Culture a request for new registration within three months from the date of the new law entering into force. They have the right to continue their work until a final decision is taken by the Minister.

- *ЗАКОН за изменение и допълнение на Закона заавторското право и сродните му права (обн.,ДВ, бр. 56 от 1993 г.; изм., бр. 63 от 1994 г.,бр. 10 от 1998 г., бр. 28 и 107 от 2000 г., бр. 77от 2002 г., бр. 28, 43, 74, 99 и 105 от 2005 г.,бр. 29, 30 и 73 от 2006 г., бр. 59 от 2007 г. ибр. 12 и 32 от 2009 г.)* (Law on the Amendments to the Copyright and Related Rights Act, State Gazette issue 25 of 25 March 2011) http://merlin.obs.coe.int/redirect.php?id=12958

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Court of Justice of the European Union

Private Copying Levy in the Eye of the Storm

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On 21 October 2010 the European Court of Justice rendered its judgement in case C-467/08 Padawan v SGAE, calling the current application of Spanish private copying levy into question.

The judgment maintains that the Spanish private copying levy is abusive and that it does not meet with what Directive 2001/29/EC establishes. The Court ruled that the levy should only be charged on individuals, but not legal entities, companies or national authorities, which should be exempted.

Firstly it should be clarified, as opposed to what has been implied in the media, that the ruling of the European Court of Justice does not prohibit the existence of a private copying levy in Spain, as the application of a fee to compensate the rightsholders for private copying is recognised under Directive 2001/29/EC.

What the ruling of the European Court of Justice actually prohibits is the indiscriminate application of the private copying levy to each and every one of the equipment and devices that can store works protected under copyright, regardless of the intended use that such equipment or devices would eventually receive.

The purpose of the levy is to compensate rightsholders for damage suffered by the private copying of protected works. The indiscriminate application of a levy on all types of equipment and devices, including those that will be used for purposes clearly unrelated to private copying (e.g. when acquired by a company, a professional or a public administration that will not use them for private copying purposes), does not respect the need for a direct correspondence between the fair compensation of rightsholders and the private copying exception.

The ruling will not mean the elimination of the levy in Spain. In fact, it confirms the validity of systems of private copy compensation, including the system under Spanish law, but will probably lead, in the short term, to a modification of the Spanish legislation forbidding the indiscriminate application of the private copying levy to all equipment and devices regardless of the purpose for which they will be used.

Moreover, the decision opens the door to possible claims for repayment of the amounts unduly paid to collecting societies, although it is not clear yet how events will develop in practice.

- Case C-467/08 Padawan v SGAE, 21 October 2010
  http://merlin.obs.coe.int/redirect.php?id=12743

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Spain

Private Copying Levy Will not be Applied to Blank Media Acquired by Companies

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On 2 March 2011, the *Audiencia Provincial de Barcelona*(Barcelona Provincial Court) acquitted Padawan, a company which owns a computer store and which had been sued by the Spanish collecting society *Sociedad General de Autores y Editores* (General Society of Authors and Publishers - SGAE) for not paying the private copying levy in respect of CD-R, CD-RW, DVD-R and MP3 players marketed by it. The Court stated that, in this case, it had not been able to determine which equipment and devices were sold to companies and which were sold to individuals.

This is the first case challenging the private copying levy to come before the courts in Spain. The Barcelona Provincial Court vindicated the defendant and found that the levy may not be applied indiscriminately, but should only be applied in cases where the device is clearly intended for private copying. Furthermore, the ultimate recipient of the copying device must be a private individual.

Thus, in order to earn the fair compensation for private copying, although it is not necessary to prove the effective use of the copy device affected by the levy, it must be credible that the device would be able to serve that goal. Therefore the judge, having found that many of the defendant's customers were companies, reasoned that the levy would, if permitted in this case, be applied indiscriminately, even to situations where it is clearly not going to be for private copying. In fact, according to European Law and to the Spanish Copyright Law, private copying may be performed only by individuals, entitling collecting societies to apply a levy, thus achieving a fair balance of interests affected, only over equipment and devices sold to individuals, not to companies or professionals.

The new ruling is in line with the response of the Court of Justice of the European Union on this issue, published last October (see IRIS 2010-10/7), to a question raised at the request of Padawan in this case. The Court of Justice considered that the indiscriminate application of the levy in relation to any equipment or device, including those purchased by persons other than individuals for purposes clearly unrelated to private copying is not in conformity with the European Copyright Directive.

Along those lines, the Barcelona Provincial Court ruled that it was not able to distinguish in this case which devices were sold to private individuals and which to companies. Accordingly, the defendants' appeal was upheld. The costs for the first instance proceedings were imposed on SGAE.

- *Sentencia n. 89/2011 de la Audiencia Provincial de Barcelona, 2 de Marzo de 2011* (Judgement n. 89/2011 of the Barcelona Provincial Court, Case Padawan v SGAE, 2 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13060

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Private Copying Levy Order Annulled

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On 22 March 2011, the Spanish private copying levy received another serious judicial setback, as the National Court (Audiencia Nacional) declared the nullity of the 2008 Order which set out the fees, the devices and the equipment which are subject to payment of a fair compensation for private copying.

The Court analysed the administrative Order that set the fees in 2008 and concluded that it is incomprehensible that, while the standard fixed fee for analogue devices took the form of an Order, with all the prescribed procedures that this entails, the standard set with regard to the digital levy was a simple administrative act, which does not need to comply with the same procedural requirements.

The levy itself remains in force, but the Order that regulated its application has now been declared null, as the Court concluded that is a mandatory provision that has been developed and launched without meeting several requirements, especially the compulsory report from the State Council (*Consejo de Estado*) and the financial report. The fees that will be applicable from now on will be those from 2006, which do not specifically address some new devices such as MP3s, MP4s or certain mobile phones with multimedia faculties. Devices and equipment such as CD recorders, DVD, CD-R, CD-RW, DVD-R, DVD-RW, multifunction printers and multifunction inkjet and laser scanners remain taxed by the private copying levy, but in accordance with the old fees.

Regarding the amounts already collected by the collecting entities, although the decision does not contain any provision about an automatic refund to the plaintiffs, it seems logical that individuals will turn to the courts to claim back money paid on equipment or devices not regulated under the 2006 fees.

Meanwhile, the Spanish Government is forced to proceed with the adoption of a new regulatory framework for the private copying levy after a decision of the ECJ which found that the levy may not be applied indiscriminately, but should only be applied in cases where the device is clearly intended for private copying (see IRIS 2010-10/7).

- *Audiencia Nacional, Sala de lo Contencioso-Administrativo, sección tercera, 22 de Marzo de 2011* (Judgment of the Audiencia Nacional, Chamber of Administrative Jurisdiction, Third Section, 22 March 2011)
  http://merlin.obs.coe.int/redirect.php?id=13129

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France

Council of State Revokes Application of Private Copying Levy to Products Acquired for Professional Purposes

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In a decision of 17 June 2011, the *Conseil d'Etat* (Council of State) revoked the application of private copying levies to products acquired for professional purposes. Under Article L. 311-1 of the Intellectual Property Code, which transposes Directive 2001/29/EC, the authors, performers and producers of works fixed on phonograms or videograms are entitled to compensation for the reproduction of their works for private copying purposes. Authors and producers of works fixed on any other media for their reproduction for private copying purposes on a digital recording device are also entitled to the compensation. Article L. 311-5 of the Code entrusts a committee (known as the "Private Copying Committee") with the task of determining the types of equipment, rates of compensation (which depend on the type of equipment and the maximum length of recording) and how the compensation should be paid.

A number of companies and professional associations of equipment manufacturers and retailers asked the *Conseil d'Etat* to revoke the decision of 17 December 2008 in which the Private Copying Committee had extended the compensation scheme to include certain "new" media and fixed the relevant levies. The applicants disputed the inclusion in the scheme of products acquired by professionals for purposes other than private copying. In its decision, the *Conseil d'Etat* set out the principles governing compensation for private copying. It then pointed out that, in its Padawan judgement of 21 October 2010, the Court of Justice of the European Union, ruling on a preliminary question, said that the indiscriminate application of the private copying levy, particularly to equipment, devices and digital reproduction media that were not sold to private users but clearly intended for uses other than copying for private use, was incompatible with Directive 2001/29/EC. The *Conseil d'Etat* therefore revoked the disputed decision of the Private Copying Committee to apply the levy to all equipment without the possibility of exempting devices acquired, particularly for professional purposes, "whose conditions of use do not suggest that they are to be used for private copying purposes". The fact that the committee had calculated the rate of remuneration for certain equipment depending on the extent to which it was used for professional purposes was deemed irrelevant by the *Conseil d'Etat*.

In principle, when an administrative act is revoked, it is considered never to have existed. However, it is thought that, if this act was revoked retroactively, both rightsholders and companies which had paid the levy would face considerable uncertainty, with the risk of requests for reimbursement or additional payments so numerous that the future of the whole private copying compensation system could be seriously affected. For this reason, the *Conseil d'Etat* ruled that the decision should be revoked after a period of six months. This delay should enable the committee to set out new remuneration scales, taking this decision into account. The rightsholders, for their part, believe that "it is now up to the public authorities and the Private Copying Committee to make the necessary adjustments to the private copying remuneration mechanism, while safeguarding the fair compensation of rightsholders."

- *Conseil d'Etat* (Council of State) (10th and 9th sections combined), 17 June 2011 – Canal + Distribution, Motorola, Nokia et a.
  http://www.conseil-etat.fr/cde/node.php?articleid=2363

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Stopping Piracy?

Belgium

Proposal of Bill for Better Protection of Cultural Creations on the Internet

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On 26 January 2011 a bill intended to achieve better protection of cultural creations on the Internet was formally proposed. The proposers (members of the Mouvement Réformateur (MR), a liberal party from French-speaking Belgium), emphasising the fundamental importance of cultural creations for every society and highlighting the danger represented by the activity of illegal downloading, stress the need for an appropriate balance between protection for cultural creations and respect for individual liberties.

The system proposed is principally built on five pillars. Firstly, the proposal suggests intensifying the fight against so-called hacker-sites (Articles 3 and 4), by imposing additional measures to stem their continuous growth. For example, providers that are aware of the existence of such sites without reporting this to the competent authorities risk more severe sanctions. Secondly, the proposal aims at informing about and encouraging the use of the legal online offer (Articles 5, 6 and 25), in order to bring about a change in attitude within the community of Internet users. The third pillar consists in creating a system of database operators through which creations are made available to the public (Articles 7 and 11). According to the fourth pillar, providers should deliberate on the conditions for and restrictions to exchanging creations that are protected by copyright law (Articles 12 and 13). Fifthly and most importantly, the proposal implements a four-strike policy with regard to internet users who fail to comply with the imposed conditions and restrictions for exchanging protected creations or who illegally download such creations (Articles 14-24). At an early stage they are only cautioned (Article 17, 1°). If a new violation takes place within six months, a fine is imposed (Article 17, 2°). If the user keeps violating the rules his/her file is sent to the public prosecutor, which can take various measures, such as financial settlement or bringing the case before the courts (Article 18). The latter can impose a fine and reduce the user's access to a public online communication service (only broadband Internet is blocked at this stage, making downloading extremely difficult). Finally, in cases of recidivism, the fine is doubled and access to the Internet can be entirely cut off (Article 18, 8°).

This proposal bears a resemblance to the French Création et Internet law, in which so-called Hadopi-measures are imposed, including a similar (three-step) gradual response to violations. The proposal follows the optional bicameral procedure (Article 78 of the Belgian Constitution) and, after having been amended by the Senate, it is now pending before the *Kamer van Volksvertegenwoordigers* (Chamber of Representatives) of the Belgian Parliament.

- *Proposition de loi favorisant la protection de la création culturelle sur internet* (Proposal of Bill for Better Protection of Cultural Creations on the Internet)
  http://merlin.obs.coe.int/redirect.php?id=13130

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Germany

BGH Rules on Deep Links Copyright Violation

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In a recently published decision, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled that links to third-party content can breach copyright in some cases.

The plaintiff in the procedure concerned operates a website from which street maps can be downloaded. After filling in a search form on the home page, the user is taken to the requested map on a different page. The plaintiff charges a fee for commercial or long-term use of the service. When they visit the home page, private users are given a session ID that is valid for a limited period of time, enabling them to use the service free of charge. The defendant, a letting agency, enabled visitors to its website to access maps showing the location of homes available for rent using a hyperlink direct to the plaintiff's relevant web page, therefore bypassing the home page. The plaintiff considered this to represent a breach of its exclusive right to make copyright-protected works available to the public (Art. 19a of the *Urheberrechtsgesetz* - Copyright Act, UrhG) and instituted legal proceedings.

Unlike the courts of lower instance, the BGH upheld the complaint. In principle, the creation of a hyperlink to protected third-party works - including by means of a so-called "deep link", i.e., one that bypasses the home page - did not infringe copyright, since the work was made accessible to the public not by means of the link, but through the fact that it was published on the Internet (see IRIS 2003-8/32 concerning the "Paperboy" decision). However, it was a different matter if a deep link bypassed technical measures taken by the copyright holder to ensure that its protected works could only be accessed by certain users or through certain channels. In this connection, the courts of lower instance had wrongly assumed that the measures had to be effective technical measures in the sense of Article 95a(1) UrhG. Rather, in this case, the crucial element was the scope of the protection provided by Article 2 UrhG, which should not be confused with the much higher demands of Article 95a UrhG, which dealt with the protection measures themselves. The decisive factor was that the copyright holder had taken protection measures that could be recognised as such by third parties. By using the session ID, the plaintiff had taken a security measure, ensuring that users could only access the service after visiting the home page. The defendant had therefore made the plaintiff's street maps available to the public against the plaintiff's will. The defendant should have recognised this.

The BGH overturned the lower instance decisions, but referred the case back to the *Oberlandes-gericht* (regional appeal court), which had not yet verified whether the maps were copyright protected.

- *Urteil des BGH vom 29. April 2010 (Az. I ZR 39/08)* (BGH ruling of 29 April 2010 (case no. I ZR 39/08)) http://merlin.obs.coe.int/redirect.php?id=12838

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Court Rulings on Illegal Online Music File-Sharing Networks

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On 8 October 2010, the *Landgericht Hamburg* (Hamburg regional court - LG), in a legal dispute over the distribution of two music tracks via an Internet file-sharing network, ordered the defendant to pay two music publishers EUR 15 per track in compensation.

The court decided that the defendant had culpably and illegally infringed the music publishers' copyright (reproduction right and right to make available to the public) by copying the music tracks without permission and uploading them to a file-sharing network. The court's assessment of the level of compensation due is particularly significant. Whereas the plaintiffs had each asked for EUR 300 per track, the court decided that EUR 15 per track was adequate. It was important to consider what reasonable parties concluding a hypothetical licensing agreement would have agreed was an appropriate licence fee for the use of the music recordings. Since the tracks in question had been released many years previously, it could be assumed that demand for them was limited. It should also be borne in mind that the tracks were only available on the file-sharing network for a very short time, during which neither track could have been downloaded more than 100 times. The LG took into account the fees normally applied by the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte*(music copyright collecting society - GEMA) for the private use of works obtained through music-on-demand services.

On 5 October, the *Oberlandesgericht Köln* (Cologne regional court of appeal - OLG), in a procedure relating to the use of an illegal file-sharing network, granted the owner of an Internet connection the right to appeal against a court order requiring the provider to pass his personal details on to a copyright holder.

According to the OLG, the copyright holder was entitled, under Article 101(9) of the *Urheberrechtsgesetz* (Copyright Act), to require the provider to disclose the information (user's name and address) if the act of making the work available to the public was a clear breach of the law committed on a commercial scale. The *Landgericht Köln* (Cologne regional court - LG) had previously granted copyright holders' requests for information in several cases. It considered that the legal requirements were met if a whole album was uploaded for sharing purposes.

The OLG granted the user of the file-sharing network the right to appeal in the original procedure. Although the owner of the Internet connection had certain rights vis-à-vis the copyright holder, which did not include the right to appeal against the court order, his defence was "seriously impeded" if what he considered to be incorrect conclusions reached by the court could not be verified until a subsequent procedure. The appeal should only relate to the examination of whether the legal requirements were met for the copyright holder's request for information to be granted. In this case, the OLG found that the LG's decision to grant the information request infringed the user's rights because the "commercial scale" criterion had not been met. The album uploaded by the appellant had already been published and on sale for a year and a half. Only in particular circumstances could there be considered to be a "commercial scale" to the operation. It had a "commercial scale" if "a sufficiently large file was made available to the public during its relevant sale and exploitation phase".

The court stressed the need for the law to be developed further and for consistent case-law in this field, and granted leave to appeal.

- *Urteil des LG Hamburg vom 8. Oktober 2010 (Az. 308 O 710/09)* (Ruling of the Hamburg regional court, 8 October 2010 (case no. 308 O 710/09))
  http://merlin.obs.coe.int/redirect.php?id=12842

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• *Beschluss des OLG Köln vom 5. Oktober 2010 (Az. 6 W 82/10)* (Ruling of the Cologne regional court of appeal, 5 October 2010 (case no. 6 W 82/10))
http://merlin.obs.coe.int/redirect.php?id=12843

IRIS 2011-1/17

Netherlands

Court of Appeals Declares Downloading from Illegal Sources Legal for Private Use No.1

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On 15 November 2010 the Court of Appeals of the district of The Hague (Court of Appeals) issued judgments in two separate cases regarding the private use exception under Dutch Copyright law (see also IRIS 2011-1/42). In FTD BV v. Eyeworks Film & TV Drama BV, the Court of Appeals ruled on the appeal by FTD BV against a judgment in preliminary proceedings (see IRIS 2010-7/30).

The Court of Appeals ruled that FTD did not infringe the copyright of Eyeworks because their platform does not make copyrighted material available to the public. The FTD application did not contain any signal that referred to the films of Eyeworks; it merely contained indirect indications as to where the film could be found on Usenet. The film could therefore not be downloaded by merely using the FTD application. Additional steps and applications were needed to achieve that result. This argument was strengthened by the fact that the original application as provided by FTD (without any modifications by third parties) does not provide any NZB-files, which would make the process much easier for the end-user.

The Court of Appeals then ruled as to whether downloading from an illegal source is allowed under the private use exception of Article 16c of the Dutch Copyright Act (DCA). The Court of Appeals answered this question in the affirmative. It stated that article 16c DCA is either in compliance with the three-step test of Article 5 section 5 of the Copyright Directive or it is not. If it is not, according to the Court of Appeals, it is so contrary to the Copyright Directive that an interpretation in compliance with the Directive is not possible because it would be contra legem. In either case therefore the explanation of the Court of Appeals should prevail.

Despite the above-mentioned outcome, the Court of Appeals did find that FTD committed a tort. Deliberately, structurally and/or systematically providing an application that stimulates illegal uploading constitutes a tortious act, especially since FTD is gaining profit by advertisements featured in the application, while the copyright of Eyeworks is being breached. The Court of Appeals reversed the judgment in the preliminary proceedings and annulled the ex-parte injunction.

• *Gerechtshof 's-Gravenhage, 15 november 2010, FTD BV v. Eyeworks Film & TV Drama BV, LJN BO3980, 200.069.970/01, 0-639* (Court of Appeals of The Hague, 15 November 2010, FTD BV v. Eyeworks Film & TV Drama BV, LJN BO3980, 200.069.970/01, 0-639)
http://merlin.obs.coe.int/redirect.php?id=12862

IRIS 2011-1/41

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Court of Appeals Declares Downloading from Illegal Sources Legal for Private Use No.2

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In ACI c.s. v. Stichting de Thuiskopie & SONT, the second judgment issued by the Court of Appeals of The Hague district (Court of Appeals) regarding the private use exception under Dutch Copyright law, on 15 November 2010 (see IRIS 2011-1/41), the Court ruled on the appeal by ACI c.s. on the judgment of the District Court of The Hague. This is another judgment in a series of cases involving the *Stichting de Thuiskopie* (Foundation for the Private Copy) (e.g., see IRIS 2005-9/30).

The action was brought by ACI c.s. and questions the preconditions and criteria that are applicable in calculating the amount of private copying levies. These levies are collected by the *Stichting de Thuiskopie* and are set by the *Stichting Onderhandelingen Thuiskopievergoeding* (Foundation for the Negotiations of Private Copy Levies).

The Court of Appeals - contrary to ACI c.s. - did not find it necessary to refer questions for a preliminary ruling to the Court of Justice of the European Union due to acte clair. The Court of Appeals first clarified what losses are applicable for fair compensation. Rightsholders are only eligible for a fair compensation in the case of loss of income by private copies under Article 16c of the Dutch Copyright Act. This includes loss of licence fees and is the only criterion for a fair compensation.

The argument of ACI c.s. to not take into account copies for time-shifting purposes (e.g., recording a TV show for later viewing) and porting (copying for use with multiple personal devices) due the minimal effect on losses, was not followed by the court. The claim of ACI c.s. that the existence of DRM technologies should be taken into account for the calculation of the private copying levies is already being done according to the Court of Appeals and SONT.

Reiterating that uploading is illegal, the Court of Appeals held - similarly to the FTD v. Eyeworks case - that downloading from an illegal source for private use is not forbidden. It furthermore ruled that this fact should be taken into account for the calculation of the amount of private copy levies as well.

- *Gerechtshof 's-Gravenhage, 15 november 2010, ACI c.s. v. Stichting De Thuiskopie & SONT, LJN BO3982, 200.018.226/01, 05-2233* (Court of Appeals of The Hague, 15 November 2010, ACI c.s. v. Stichting De Thuiskopie & SONT, LJN BO3982, 200.018.226/01, 05-2233)

IRIS 2011-1/42

Downloading... soon to Be Illegal in the Netherlands?

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On 11 April 2011 Fred Teeven, the Dutch State Secretary for Public Safety and Justice, published a mission statement titled *"Speerpuntenbrief auteursrecht 20©20"* in which he proposes to modernise the Dutch Copyright Law. In his mission statement Teeven addresses a number of issues, which will be discussed below. The main emphasis of the mission statement is to enhance the public's trust in the copyright system and strengthen the position of authors of copyright protected works.

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First and foremost Teeven plans to alter the download system in the Netherlands. At present it is legal to download copyrighted works, such as books, films and music, from an illegal source, as long as the downloader does not also upload the works. The statutory basis for this can found in the private copy exception. The mission statement, by contrast, would provide copyright holders with the ability to protect their rights based on civil law. Unlike France and the United Kingdom, no three strikes provision is proposed. However, copyright will be enforced against intermediaries, such as website owners and hosting providers, but not on individuals who occasionally upload and download copyright-protected files.

Secondly, rightsholders will have the possibility to request that Internet Access Providers block foreign websites and services that provide illegal content. However, some critics argue that this plan is unnecessary, since Art. 26d Dutch Copyright Act already establishes such a regime. Another aspect to consider in this context is the role of search engines. According to Teeven, search engines should prioritise search results that show websites with legal content. It is unclear whether search engines would have to start filtering their search results to prevent the appearance of illegal content.

A further step towards modernising the Dutch Copyright Law is the plan to abolish the private copying levy *inter alia* on blank CDs and DVDs. In order to compensate for the consequent loss of income copyright owners may have to increase the price of their products. Another suggestion is that copyright owners protect their works by using technical measures that prevent copying. Various interest groups have expressed great concerns and criticism in this context. It is argued that the proposal on abolishing the private copying levy is contrary to European Copyright Directive, as well as the recent Case C-467/08 *Padawan v*SGAE, in which the EU Court of Justice ruled that the aim of fair compensation is to "adequately" compensate authors for unauthorised uses made of their works (see IRIS 2010-10/7).

A final point of interest in the mission statement is adherence with European proposals. The State Secretary supports European proposals to abandon territorial limitations on copyright licenses and craft a system addressing the orphan works situation in order to stimulate plans to digitise works that are of importance for the preservation of the European cultural heritage (see IRIS 2011-3/5). Furthermore, Teeven calls for the introduction of a European fair use exception to enhance creative uses or the so-called remixing of existing works.

• *Staatssecretaris Teeven biedt de Tweede Kamer, mede namens de Minister van Economische Zaken, Landbouw en Innovatie en de Staatssecretaris van Onderwijs, Cultuur en Wetenschap de speerpuntenbrief Auteursrecht 20©20 aan* (Mission Statement by State Secretary for Public Safety and Justice Fred Teeven) http://merlin.obs.coe.int/redirect.php?id=13132

IRIS 2011-5/34

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Overview of Primary Legislation Concerning Private Copying Levies in the EU

Please note that the given links to the English version of each legal text do not necessarily provide the latest version of the text in question. This is simply because the most recent version may not yet exist in translation. Non-consolidated texts are marked with an asterisk (*).

Country	Primary Legislation	Reproduction Right	Exception	Fair Compensation
AT–Austria	*Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz). StF: BGBl. Nr. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19.)* http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001848 Federal Act BGBI No. 111 of 1936 on Copyright in Works of Literature and Art and on Neighbouring Rights	§15 §38 §66 §76 §76a	§42 §42a §69(2) §76(4) §76a(3)	§42b
BE–Belgium	*Loi relative au droit d'auteur et aux droits voisins du 30 juin 1994* http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?language=fr&caller=list&cn=1994063035&la=f&fromtab=loi&sql=dt=%27loi%27&tri=dd+as+rank&rech=1&numero=1 Act on Copyright and Neighbouring Rights of 30 June 1994	Art. 1(1) Art. 35(1) Art. 39 Art. 44b	Art. 22(1)5 Art. 46(1)4	Arts. 55-58

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Country	Primary Legislation	Reproduction Right	Exception	Fair Compensation
BG–Bulgaria	*ЗАКОН ЗА АВТОРСКОТО ПРАВО И СРОДНИТЕ МУ ПРАВА В сила от 01.08.1993 г.* http://lex.bg/laws/ldoc/2133094401 Act on Copyright and Related Rights with effect from 1 August 1993	Art. 18(2)1 Art. 76(1) 1 Art. 86(1)1 Art. 90a(1)5 Art. 91(1)2	Art. 25(1)2	Art. 26
CY–Cyprus	*Ο περί του Δικαιώματος Πνευματικής Ιδιοκτησίας Νόμος του 1976, Ν.59/1976* http://www.intercollege.ac.cy/library/files/view_pdf.pdf Act on the Protection of Copyright and Neighbouring Rights, N. 59/1976, Official gazette, 3 December 1976 http://www.wipo.int/wipolex/en/profile.jsp?code=CY (*)	Art. 7(1) Art. 7A Art. 7B Art. 7C Art. 7E Art. 7Θ Art. 9 Art. 10	Art. 7(2)(a), (e), (f) Art. 7B(4) Art. 7C(2)(b) Art. 7C(3)(b) Art. 7Θ(2)	
CZ–Czech Republic	*56604. 121/2000 Sb. ZÁKON ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon) ve znění zákonů č. 81/2005 Sb., č. 61/2006 Sb., č. 186/2006 Sb., č. 216/2006 Sb., č. 168/2008 Sb., č. 41/2009 Sb., č. 227/2009 Sb., č. 153/2010 Sb. a č. 424/2010 Sb.* http://www.epravo.cz/top/zakony/uplna-zneni/1212000-sb-zakon-ze-dne-7-dubna-2000-o-pravu-autorskem-o-pravech-souvisejicich-s-pravem-autorskym-a-o-zmene-nekterych-zakonu-autorsky-zakon-ve-zneni-zakonu-c-812005-sb-c-612006-sb-c-1862006-sb-c-2162006-sb-c-1682008-sb-c-412009-sb-c-2272009-sb-c-1532010-sb-a-c-4242010-sb-56604.html Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts http://www.wipo.int/wipolex/en/text.jsp?file_id=186403 (*)	Art. 12(4)a Art. 71(2)c Art. 76(2)a Art. 80(2)a Art. 84(2)b	Art. 30 Art. 74 Art. 78 Art. 82 Art. 86	Art. 25 Art. 74 Art. 78 Art. 82 Art. 86

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DE–Germany	*Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), zuletzt geändert durch Artikel 83 des Gesetzes vom 17. Dezember 2008 (BGBl. I S. 2586)* http://www.gesetze-im-internet.de/urhg/BJNR012730965.html Copyright Act of 9 September 1965	§16 §77 §85 §87 §94 §95	§53 §83 §85 §87 §94 §95	§54 §§54a-h
DK–Denmark	*Bekendtgørelse af lov om ophavsret. LBK nr 202 af 27/02/2010 Gældende (Ophavsretsloven)* http://www.wipo.int/wipolex/en/text.jsp?file_id=191419 Copyright Act. Consolidation Act No. 202 of 27 February 2010 (Copyright Act) http://www.wipo.int/wipolex/en/details.jsp?id=7394	Art. 2(1)-2(2) Art. 65 Art. 66 Art. 67 Art. 69	Art. 12	Art. 39-46a
EE–Estonia	*Autoriõiguse seadus Vastu võetud 11.11.1992 RT 1992, 49, 615 jõustumine 12.12.1992* https://www.riigiteataja.ee/akt/106012011034 Copyright Act adopted on 11 November 1992 http://www.legaltext.ee/text/en/X40022K7.htm (*)	§13(1)1 §33(2) §67(2)5 §70(1)1 §73(1)3	§26	§26-27
ES–Spain	*Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia* http://noticias.juridicas.com/base_datos/Admin/rdleg1-1996.html Royal Legislative Decree 1/1996 of 12 April 1996, approving the consolidated text of the Act on Intellectual Property	Art. 17-18 Art. 107 Art. 115 Art. 121 Art. 126(1)b	Art. 31(2) Art. 132	Art. 25

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Country	Primary Legislation	Reproduction Right	Exception	Fair Compensation
FI–Finland	*Tekijänoikeuslaki* http://www.wipo.int/wipolex/en/text.jsp?file_id=194351 Copyright Act 404/1961 http://www.wipo.int/wipolex/en/details.jsp?id=7512 (*)	Section 2(1)-2(2) Section 45 Section 46 Section 46a Section 48 Section 49a	Section 12	Sections 26a-h
FR–France	*Code de la propriété intellectuelle* http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414 Code of Intellectual Property	Art. L122-1 Art. L212-3 Art. L213-1 Art. L215-1 Art. L216-1	Art. L122-5-2 Art. L211-3-2	Arts. L311-1-L311-8
GB–United Kingdom	Copyright, Designs and Patents Act 1988 http://www.legislation.gov.uk/ukpga/1988/48/contents	Section 16(1)a Section 182A		
GR–Greece	*Νόμος 2121/1993* *Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα* *ΦΕΚ Α 25 1993* *Θέση σε ισχύ : 04.03.1993* http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html Act 2121/1993 Copyright, Related Rights and Cultural Matters Official Journal A 25 1993 http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html	Art. 3 Art. 46(2)b Art. 47(1)a Art. 48(1)d	Art. 18(1) Art. 18(2) Art. 52b	Art. 18(3)-18(11)
HU–Hungary	*1999. évi LXXVI. törvény a szerzői jogról* http://hjegy.mhk.hu/cgi_bin_i/njt_doc.exe?docid=40129.423738 Act No. LXXVI of 1999 on copyright	Art. 18-19 Art. 73(1)c Art. 76(1)a Art. 80(1)c Art. 82(1)a Art. 84/A(1)a	Art. 34(1)-(3) Art. 35 Art. 36(1)-(2) Art. 37 Art. 40	Art. 20

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IE–Ireland	Copyright and Related Rights Act, 2000 http://www.irishstatutebook.ie/2000/en/act/pub/0028/index.html	Section 39 Section 204		
IT–Italy	*Legge 22 aprile 1941, n. 633 e successive modificazioni - Protezione del diritto d'autore e di altri diritti connessi al suo esercizio. Testo consolidato alla data del 1° luglio 2010* http://www.siae.it/documents/BG_Normativa_LeggeDirittoAutore.pdf?862163 Act of 22 April 1941, No 633 and subsequent amendments - Protection of Copyright and other Related Rights	Art. 13 Art. 45 Art. 61 b) Art. 72 a) Art 78 ter a) Art. 79 b) Art. 80 b)	Art. 71 *sexies* Art. 71 *decies*	Art. 71 *septies* Art. 71 *octies*
LV–Latvia	*Autortiesību likums 06/04/2000, Latvijas Vēstnesis 148/150, 27/04/2000* http://www.likumi.lv/doc.php?id=5138 Copyright Act, adopted on 6 April 2000, Official Journal No. 148/150, on 27 April 2000, in force since 11 May 2000	Section15(1)9 Section 48(3)7 Section 50(5) Section 51(4) Section 53(1)6	Section 34(1) Section 54(5)	Section 34
LT–Lithuania	*Įstatymo dėl autorių teisių ir gretutinių teisių Nr VIII-1185 18 gegužė 1999 (Su pakeitimais, padarytais 2010 m. sausio 19 - Įstatymas Nr XI-656)* http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=364672 Act on Copyright and Related Rights No VIII-1185 of May 18, 1999 (as amended on 19 January 2010 – by Act No XI-656) http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=370617	Art. 15(1)1 Art. 53(1)3 Art. 54(1)1 Art. 56(1)4 Art. 57(1)1	Art. 20(1) Art. 58(2)	Art. 20(3)-(6)

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LU–Luxembourg	*Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données.* http://www.luxorr.lu/000058.pdf Act of 18 April 2001 on Copyright, Neighbouring Rights and Databases	Art. 3(1)-(3) Art. 43(1)-(2) Art. 53b Art. 71*quinquies* (4)	Art. 10(4) Art. 46(4) Art. 55	Art. 10(4) Art. 46(4) Art. 55
MT–Malta	Copyright Act, Chapter 415 of the Laws of Malta http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8881&l=1	Art. 7(1)(a) & (e) 13b 15a 17(1)(b)	Art. 9(1)(c) Art. 21	Art. 9(1)(b)(c) & (f) Art. 19 Art. 41
NL–Netherlands	*Auteurswet* http://wetten.overheid.nl/BWBR0001886/ Copyright Act http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf	Art. 13-14	Art. 16c	Art. 16d-ga Art. 35c
	Wet op de naburige rechten http://wetten.overheid.nl/BWBR0005921/ Act on Neighbouring Rights http://www.ivir.nl/legislation/nl/relatedrights_unofficial.pdf	Art. 2(1)b Art. 6(1)a Art. 7a(1)a Art. 8(1)b	Art. 10e	Art. 10e
PL–Poland	*Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych* http://isap.sejm.gov.pl/DetailsServlet?id=WDU19940240083 Act on Copyright and Neighbouring Rights http://www.wipo.int/wipolex/en/text.jsp?file_id=129377 (*) http://www.wipo.int/wipolex/en/text.jsp?file_id=195361 (*)	Art. 17 Art. 86(2)a Art. 94(4)1 Art. 97(2)	Art. 23	Art. 20

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PT-Portugal	*Código do Direito de Autor e dos Direitos Conexos* http://www.wipo.int/wipolex/en/text.jsp?file_id=199767 Code of Copyright and Neighbouring Rights	Art. 68 Art. 178(1)c Art. 184(1) Art. 187(1)c	Art. 75(2)a Art. 189(1)a	Art. 76(1)b
RO–Romania	*Legea nr. 8/1996 privind dreptul de autor şi drepturile conexe, republicată* http://www.legi-internet.ro/legislatie-itc/drept-de-autor/legea-dreptului-de-autor.html Act No. 8 of March 14, 1996 on Copyright and Neighbouring Rights http://www.wipo.int/wipolex/en/text.jsp?file_id=208582 (*)	Art. 13a Art. 14 Art. 33(1)a, c, d, f, (2), (3) Art. 37(1) Art. 40 Art. 98(1)b, (2) Art. 101 Art. 105(1)a Art. 106.3(1)a Art. 113b Art. 123.2(1)a Art. 139.6(10) Art. 140(1)a	Art. 34(1)	Art. 34(2) Art. 107(1), (2), (4), (7) Art. 107.1 Art. 107.2(1) Art. 108 Art. 123.1(1)a Art. 125.1c Art. 131.2(2) Art. 147.1
SE–Sweden	*Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk* http://www.riksdagen.se/webbnav/?nid=3911&bet=1960:729 Act on Copyright in Literary and Artistic works No. 729, of 30 December 1960 http://www.regeringen.se/content/1/c6/01/51/95/20edd6df.pdf	Art.2 Art. 45(2) Art. 46(1) Art. 48(2)	Art. 12 Art. 45 Art. 46 Art. 48	Art. 26k-m Art. 42a Art. 45 Art. 46 Art. 48
SI–Slovenia	*717. Zakon o avtorski in sorodnih pravicah (uradno prečiščeno besedilo) (ZASP-UPB3), Stran 1805* http://www.uradni-list.si/1/objava.jsp?urlid=200716&objava=717 Copyright and Related Rights Act of 30 March 1995 http://www.uil-sipo.si/fileadmin/upload_folder/zakonodaja/ZASP_EN_2007.pdf	Art. 22 Art. 23 Art. 121(2) Art. 129(1) Art. 134(1) Art. 137(4) Art. 147(3)	Art. 50	Art. 37-39 Art. 123 Art. 131 Art. 135

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SK–Slovakia	*618 ZÁKON zo 4. decembra 2003 o autorskom práve a právach súvisiacich s autorským právom (autorský zákon)* http://www.slpk.sk/dokumenty/03-z618.pdf Copyright Act No. 618/2003 of 4th December 2003 on Copyright and Rights Related to Copyright (the Copyright Act) http://www.wipo.int//wipolex/en/text.jsp?file_id=189474	Section 18(2)a Section 63(2)b Section 64(2)a Section 66(2)a Section 68(2)c	Section 24(1)	Section 24(4) Section 24(6)-(10) Section 69(1)

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