

Copyright World
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THE PRIVATE SPHERE MARTIN KRETSCHMER CONSIDERS THE EC LEVY CONSULTATION

What is the nature of private copying? It's an age old question. If we permit private copying (and most countries do), why? Is it because it is inconvenient, or even impossible for the right owner to exercise her rights? Is it because there are important consumer benefits to allowing access under "equitable remuneration" licences? Is it because of a special status of the private sphere?

Digital technologies, it has been argued since the early 1990s, no longer distinguish between the public (commercial) sphere and private use. Any digitised copy can become the master of further proliferation and exploitation. But equally, digital systems allow right holders to extend technologically enforced contracts into previously private areas through digital rights management (DRM) systems.

Thus the argument for a private copying exemption appears to break down twice. (i) Allowing private copying has become commercially dangerous; (ii) Technologically, we don't need to permit private copying any more.

Some countries, such as Ireland, Malta and the UK, have taken the view that it is primarily the right owner's choice if private copying is tolerated. Copyright statutes here conceive exceptions very narrowly, for example in the time-shifting provisions under section 70 of the UK's CDPA 1988, which allows recording of a broadcast "in domestic premises for private and domestic use... solely for the purpose of enabling it to be viewed or listened to at a more convenient time". Famously, there is no corresponding exception for moving legitimately obtained sound recordings to a different format for private consumption, e.g. CD to MP3. Under the UK conception, this activity carried out by more than half of music buying adults (National Consumer Council) is unlawful, and if the record industry chose to commence millions of infringement proceedings, it could do so.

Many civil law jurisdictions have avoided this dichotomy between free use and exclusive rights following the concept of *Vergütungsanspruch*, or claim to remuneration, in the German copyright law of 1965. A statutory claim to remuneration for unauthorised private copying could be seen as an additional debt of the user (i.e. not an exception) or as a compulsory licence. In any case, the income streams attached to this new construction were soon considerable. Levies were set on both copy equipment (such as photocopiers and CD-burners) and media (such as blank tapes, CD-Rs and memory cards). For example, there is currently a levy of €12 on all personal computers sold in Germany. In 2004, the largest collecting societies GEMA (musical works) and VG Wort (literary works) had levy fee income in the region of €30 million each!

Under the German *Urheberwahrnehmungsgesetz*, the law regulating collecting societies, there is an obligation on collecting societies to foster “culturally important works and contributions” (§6) and set up welfare and assistance schemes for right holders (§7). Thus in addition to being (i) a debt, or (ii) a statutory licence, the levy may also become (iii) an instrument of domestic cultural policy. In Germany, 10% of levy income is used in this way, in Spain 20%, in France 25%, in Denmark 33%, and in Austria 51%.

To complete the picture, several European Directives have created rights that can only be exercised via collecting societies (rental 1992/100/EEC; cable retransmission 1993/83/EEC; *droit d’suite* 2001/84/EC). Again, are these rights to “equitable remuneration” to be treated as debts, compulsory licences or cultural policy measures? How does this correspond to the concepts used in levy schemes?

The current consultation of the European Commission on levy reform fulfils an obligation under Article 12 of the Information Society Directive (2001/29/EC), to assess in particular the development of the digital market in relation to the application of Articles 5, 6, and 8 (dealing with technological measures, such as DRM systems that may prevent private copying). The consultation document cites a report by Forrester Research that “by 2010, 37% of music sold will be protected by technological means against unauthorised copying”. Does it not follow that consumers cannot be asked to pay twice, and that levies should be phased out as copy-protected content increases?

Well, I would submit this depends on your justification of levies in the first place. If the levy compensates for an additional consumer debt the right owner has been unable to recover, then indeed it should be phased out. And what remains of it, should be allocated to the right owners to whom the debt is owed, including 1:1 distribution from domestic use to foreign right owners (a point of discussion in the consultation).

If you take the view that the enforcement of exclusive rights into the private sphere denies important spill-over benefits of information and knowledge, a levy system remains a powerful alternative to exclusive rights. Under this approach, I would argue that there is a need to fundamentally reassess where the “toll boot” should be placed. Here, taxing PCs sounds less convincing than taxing broadband traffic via ISPs.

As for copyright as an instrument of cultural policy, I am not sure I can solve this in one modest column... The consultation closes on 14 July.

About the author

Martin Kretschmer is Professor of Information Jurisprudence and Joint Director of the Centre for Intellectual Property Policy & Management (www.cippm.org.uk) at Bournemouth University, UK. He is also project director (with Prof. Lionel Bently) of a major Arts and Humanities Research Council (AHRC) project on copyright history at the Centre for Intellectual Property & Information Law, Cambridge University (2005-7). Previously, Martin was consultant editor at BBC Worldwide (1994-5) and a faculty member at City University’s Cass Business School, London (1996-9).