

**Remuneration for
private copying in
Australia:
A Discussion Paper**

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Part 1: Introduction

1.1 Scope of this study

This main focus of this study is remuneration for private copying of audio and audiovisual recordings. At the end of the study, we briefly discuss remuneration for private copying of other material.

1.2 Extent of private copying

a. Recorded music

In a survey about means of access to music by young people, published by the Australian Broadcasting Authority (ABA) in 1998, 67% of respondents reported that they recorded or borrowed music from their friends, 42% recorded from the radio, 31% recorded or borrowed from family, 27% recorded from television and 4% recorded or downloaded from the Internet.¹

The relatively recent availability of CD burners – including dual deck recorders – at prices affordable for home recording has created renewed concern about the effects on copyright owners of home copying.² In December 1998, blank recordable compact discs (CD-R) were the highest selling item for retailer Harvey Norman.³ In June 1999, TDK released ReWritable Audio CD (CD-RW), which it said had been “specifically developed for use in stand-alone home audio CD recorders”.

Linked with your hi-fi system you can record from CD, MiniDisc, DAT, tape, radio or LP. As CD recording decks and writers provide the highest possible fidelity when recording from a digital source, the music dubbed on to TDK's new ReWritable Audio CD will be an exact digital-to-digital copy of the original.

The advent of TDK's CD-RW74 combined with ReWritable home use CD recorders now means analogue sources such as tape and LP can be transferred to this outstanding medium.⁴

A French study in January 2000 found that 30 million of the 90 million blank CD units sold in 1999 were used to copy recorded music, that there would be an estimated 300,000 CD-R hardware units by the end of 2000, and that the average collection of CD-R music was 35 units.⁵

b. Television programs

According to AC Neilson, 88% of homes in metropolitan areas and 87% of homes in regional areas owned one or more VCRs in 1999. In 1998, approximately 8.2% of television usage was for recording a program.

The findings from a survey by AGB McNair in 1995 included:

¹ G Ramsay, “Headbanging or dancing? Youth and Music in Australia: Part 2, Monograph 8, Australian Broadcasting Authority, Sydney, 1998 at 74

² “Cheap mass market CD-R machines seen as a threat to soundcarrier sales”, (1998) 148 Music & Copyright 3; Sean Simmons, “Digital Killed the Recording Star”, (1999) 39 Computers & Law 7

³ Australian Technology News, “Huge Sales Point to Rise in CD Piracy, 30 December 1998, cited at in “Parallel Importing and CD Piracy” (Australian Institute of Criminology, January 2000, at p18), a report commissioned by the Intellectual Property and Competition Review.

⁴ TDK press release dated 11 June 1999, on www.tdk.com.au

⁵ (2000) Music & Copyright 11

- less than 20% of private purchases of blank VCR tapes were used for non-copyright recording purposes;
- 94% of households with a VCR had at least one tape containing material recorded from television;
- less than 3% of households with a VCR machine had tape collections contain exclusively non-copyright material;
- more than half the holdings of video tapes contained programs for retention (as opposed to time-shift); and
- less than 20% of households with VCR machines had tapes exclusively for time-shift purposes.⁶

According to an ABA survey published in 1993, viewers taped an average of about two programs a week. 27% of the people surveyed taped more than two a week. While the primary reason for taping was to watch a program at a more convenient time, other reasons were program clash, for viewing by children, to build up a tape library, or to watch a preferred program again.⁷

The decreasing cost of DVD technology means that it, like CD-R and CD-RW, it will also become increasingly attractive for home recording.

c. Sales of blank media

The International Recording Media Association estimates the demand for CD-R (ie sales to wholesalers, retailer, direct marketers, etc) to be as follows:⁸

	1999	2000	2001
CD-R worldwide (millions of units)	1,509	2,250	3,270
CD-R North America (millions of units)	494	800	1,150

It estimates the Blank VHS Consumer Videotape Demand 1999-2001 to be as follows:

(Millions of Units - T-120 Equivalents)

	1999	2000	2001
Blank VHS consumer videotape worldwide (Millions of Units - T-120 Equivalents)	1,463	1,400	1,275
Blank VHS consumer videotape North America (Millions of Units - T-120 Equivalents)	382	370	350

⁶ Survey report: private copying on videotape, 31 October 1995, prepared for Audio-Visual Copyright Society (now trading as Screenrights).

⁷ Linda Sheldon, Kate Aisbett and Nick Herd, "Living with Television", Australian Broadcasting Authority, Sydney, 1993

⁸ <http://www.recordingmedia.org/mainstatidx.html>

Part 2: Brief history of remuneration for private copying in Australia

2.1 The 1989 scheme

In 1983, the then Attorney-General announced that the Government would introduce a blank tape royalty scheme.⁹ The proposal lapsed for a period as a result of concerns that the scheme may constitute a tax. The Attorney-General subsequently received advice that the scheme could be formulated so as not to constitute a tax, and the Attorney-General's Department reviewed the issue as part of a review of audio-visual issues.

In September 1986, the House of Representatives Standing Committee on Expenditure published "Power, Patronage and the Muse: Inquiry into Commonwealth Assistance to the Arts". One of the Committee's recommendations was that; "The Government should, as a matter of priority, introduce a levy on the sale of blank audio recording tape to finance royalty payments to holders of copyright in recorded material".¹⁰ The Committee referred to a 1985 study presented to the British Parliament, which it said "found that there was not doubt that home copying resulted in the loss of a significant number of record sales, and recommended the introduction of a levy on blank audio and video tape in Britain."¹¹

In late 1986, the Department circulated a proposed scheme for comment.¹²

The proposal was subsequently drafted into legislation, and a blank tape royalty scheme was introduced as part of the Copyright Amendment Act 1989.

An application was made by copyright owners to the Copyright Tribunal to set a royalty rate. The application was put on hold, however, pending the outcome of the application by blank tape manufacturers to the High Court challenging the constitutionality of the scheme.

2.2 1993 High Court decision on constitutionality of 1989 scheme

In 1993, the High Court handed down its decision on the Constitutional validity of the 1989 scheme.¹³ The scheme was challenged on four bases:

1. that the scheme was not a law about copyright, and thus outside the power of the Commonwealth Parliament to enact;
2. that section 135ZZM(1) contravened the Constitution as it effected an acquisition of property otherwise than on just terms (section 135ZZM(1) provided that it was not an infringement to make a copy of a sound recording for private and domestic use);
3. that section 135ZZP(1) contravened the Constitution as it effected an acquisition of property otherwise than on just terms (section 13ZZP(1) provided that the royalty was payable by vendors of blank tapes); and

⁹ "Attorney-General 'accepts' blank tape royalty", 1983 2(1) Copy Repr 1

¹⁰ Recommendation 24, at p 175.

¹¹ *The Recording and Rental of Audio and Video Copyright Material: A Consultative Document*, HMSO, London, 1985 at p2. Such a scheme was never introduced in Britain, and there are no current plans to introduce one.

¹² "Proposed blank tape royalty scheme", (1986) 4(6) Copy Rptr 1

¹³ *Australian Tape Manufacturers Assoc v Commonwealth* (1993) 25 IPR 1

4. that the “royalty” was really a tax, and the legislation thus did not comply with the Constitutional requirement that legislation imposing a tax deal only with the tax and not other matters.

All seven judges held that the scheme was a law about copyright. All seven also held that section 135ZZM(1) reduced the scope of an exclusive right, but that this was not an acquisition of property.

Four of the judges, however, found that the royalty was a tax, and that the scheme thus did not comply with section 55 of the Constitution. Their reasons included:

- that the people liable to pay the levy – vendors of blank tapes – did not get anything in return for payment of the levy; payment of the levy did not entitle them to do something they were otherwise not entitled to do;¹⁴
- that the levy was not consideration for a right to copy – the exemption for private copying was not contingent upon the levy having been paid on the blank tape.

The other three judges held that the royalty was not a tax.

All judges held that section 135ZZP(1) did not effect an acquisition of property on other than just terms, but for different reasons:

- because the royalty was a tax (the majority’s view)
- because the royalty was a debt due to the collecting society, and payment of a debt did not constitute an acquisition of property by the collecting society (the minority’s view).

The majority went on to say, however, that if the royalty were not a tax, then section 135ZZP(1) would be an acquisition of property (ie money) on other than just terms, as the people liable to pay the money received no benefit from the payment.

2.3 Legal actions against suppliers of blank tapes and recording devices

In 1987, WEA, a record company, was unsuccessful in its action against Hanimex relating to Hanimex’s advertising of blank tapes. WEA claimed that Hanimex had breached section 52 of the Trade Practices Act because people listening to Hanimex’s advertisement would be misled or deceived about whether their copying onto blank tapes would infringe copyright. WEA also claimed that Hanimex authorised infringements of copyright by its advertisements.¹⁵

Similar actions in the United States and United Kingdom were also unsuccessful.¹⁶

The issue has arisen again recently – for example in relation to the advertisements for the new Apple iMacs with built-in CD burners.

2.4 1993 BARML proposal

Following the High Court’s decision, the Government proposed a new private copying scheme, referred to as the Blank Audio Media Recording Levy (BARML). Under the proposal, a levy to

¹⁴ The Court referred to cases in Australia, the United States and the United Kingdom in which vendors of blank tapes and recording devices had been held not to authorise, or be contributorily liable for, infringements by people using the tapes or devices.

¹⁵ WEA v Hanimex (1987) 77 ALR 456; (1987) 10 IPR 349

¹⁶ CBS Songs v Amstrad [1988] AC 1013; Sony Corp of America v Universal City Studios (1984) 464 US 417

compensate copyright owners would have been collected as a tax.¹⁷ There were a number of consultations with industry, and an interdepartmental committee was formed to consider the issue.

The Government considered two options for collection of the levy:¹⁸

- collection by Customs, as an additional customs duty on imported blank audio media and as an additional excise on locally assembled or manufactured media; and
- collection by the Australian Tax Office (the preferred option).

The preferred model under consideration by the Government also included the following features:

- the levy would be payable on all blank tape media, as an addition to sales tax, set at 10%;
- the levy would be equally distributed to the performers, record companies and music rights owners;
- the performers' portion would be paid directly to them;
- the levy would be distributed on the basis of reciprocity, not national treatment;
- in calculating the levy, there would be no discount for music from countries without private copying schemes; the proportion of the levy otherwise payable to those countries would be used instead for purposes aimed at benefiting performers and composers in particular, and record industry more generally;
- there may also be a payment to Ausmusic, as contemplated under the 1989 scheme;¹⁹
- there would be exemptions from payment of the levy for people not required to pay sales tax (eg Australian and foreign governments, hospitals, charities, non-profit educational institutions). Other bodies which were liable for sales tax would be entitled to a rebate from the collecting society –eg broadcasters and non-profit organisations administering educational institutions.

The Government thought the total collections would be in the range of \$2 to \$3M.

The proposal was not pursued, however, apparently because the issue was eclipsed by other copyright reform issues – initially CD rental, and subsequently digital agenda issues and moral rights. The periodic resurfacing of the parallel importation issue may also have been a factor.

2.5 Subsequent proposals and recommendations

a. CLRC report on simplification of the Copyright Act

The Copyright Law Review Committee (CLRC) published Part 1 of its report on simplification of the Copyright Act in 1998, and Part 2 in 1999. The Committee did not expressly deal with the issue of private copying. It did, however, recommend (in Part 1) that the Copyright Act be amended to include provisions allowing “fair dealing” for any purpose, following the approach in

¹⁷ See “Australian government to re-introduce tape levy”, (1993) 20 (June) *Music & Copyright* 4; “Australian High Court declares blank tape levy unconstitutional”, (1993) 14 *Music & Copyright* 11.

¹⁸ Letter to ARIA from Attorney-General's Department, 13 October 1993

¹⁹ Ausmusic was established to foster Australian music, and developed into a provider of music education: <http://www.ausmusic.org.au>.

the United States Copyright Act.²⁰ As with the current provisions allowing fair dealing in the Australian Copyright Act, and the provision allowing fair use in the US Act, the new provision would only apply if the dealing were fair having regard to a list of factors set out in the legislation. It is unlikely, however, that private copying of entire musical works or television programs would be fair under the CLRC's proposal.

b. AIC report

The report commissioned by the Intellectual Property and Competition Review (IPCRC) from the Australian Institute of Criminology referred to private copying in connection with its estimates of level of piracy in Australia.

Commercial forms of piracy aside, there appears to be an increase in private unauthorised copying of CDs, with retailer Harvey Norman reporting that blank recordable compact discs (CD-Rs) were their largest selling item during Christmas 1998 (Australian Technology News, 'Huge Sales Point to Rise in CD Piracy', 30 December 1998). This situation can be seen as parallel to the surges of unauthorised home copying that accompanied the introduction in previous decades of blank cassettes and videotapes. More recently, it has become possible to download music in digital form directly from the Internet (in what is called MP-3 format) and, with the use of a readily purchased CD 'burner' (a laser CD writing device), compile CDs according to individual preferences. Such technological developments suggest that concerns over levels of physically imported pirate CDs will progressively give way to a concentration on copyright infringement in cyberspace (Davison 1997; Grabosky and Smith 1998).²¹

There is no reference to the issue, however, in the IPCRC's report.

c. LACA Committee

The House of Representatives Legal and Constitutional Affairs Committee briefly considered the issue of private copying in its reports "Cracking down on copycats: enforcement of copyright in Australia" (at paras 2.41 to 2.44). The Committee recommended (but not as part of its main recommendations) against the reintroduction of a blank media royalty scheme. Its reasons were:

- In the Committee's view, many people are not aware that home taping is an infringement of copyright, or regard its effect as trivial. The change in public attitudes that the Committee thought would result from its recommendations relating to public education "should lead to a decrease in the amount of private copying".²²
- In the Committee's view, private copying would in the future predominantly take place in the electronic environment, where the use of "traditional media" such as blank video and audio cassettes would be minor in comparison.
- The Committee referred to the submission of the Australian Consumer Association that "the digital economy not be used for increasing pursuit of consumers".
- The Committee referred to the submission of the Australian Digital Alliance that "there is in any case a public policy debate over whether private copying constitutes infringement".²³

²⁰ The Australian Copyright Act currently allows fair dealing for specified purposes only – research or study, criticism or review, reporting new and legal advice.

²¹ "Parallel Importing and CD Piracy" (Australian Institute of Criminology, January 2000, at p18

²² para 2.43

²³ The ACA and ADA submissions are available from <http://www.aph.gov.au/house/committee/laca/copyrightenforcement/submiss.htm>

Part 3: International context

Australia is a party to a number of international treaties which include copyright obligations. There are higher international standards of protection for literary, dramatic, musical and artistic works (“works”) and films than there are for phonograms, performances and broadcasts.

The most important treaties are the Berne Convention (which applies to works and films), the TRIPS agreement (which applies to all subject matter). The Rome Convention, which applies to phonograms, performances and broadcasts, also has some relevance in this context.²⁴

Countries which are bound by the treaties have two broad obligations:

- to provide copyright protection, under their national law, which complies with the minimum standards in the treaty (a country may provide more extensive protection if it chooses); and
- to give protection to nationals from other countries which are also bound by the treaty (national treatment).²⁵

The TRIPS Agreement also has a Most Favoured Nation (MFN) requirement, whereby any advantage or benefit given to one country must also be given to all other countries.²⁶

The treaties allow for certain exceptions and limitations to the exclusive rights of copyright owners, but are no express provisions dealing with remuneration for private copying. However, under the Berne Convention and the TRIPS Agreement, any exceptions or limitations must comply with the “three-step test”. That is, they must:

- only apply in certain special cases;
- not conflict with a normal exploitation of a work; and
- not unreasonably prejudice the legitimate interests of the rights owner.²⁷

Two new treaties were adopted at a World Intellectual Property Organization (WIPO) Diplomatic Conference in December 1996 – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These new treaties are intended to establish new international standards for copyright in the online environment set out in the treaties adopted. At the time of writing, neither of the treaties had come into force, as neither has the required 30 accessions or ratifications. The treaties are likely to come into force, however, once the new European Directive on copyright and related rights in the information age comes into force, if

²⁴ Australia has been a party to the Berne Convention, administered by the World Intellectual Property Organisation, in its own right since 1928, and has been bound by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) as a result of its membership of the World Trade Organization since 1995.

²⁵ In the TRIPS Agreement, this obligation applies to phonograms, performances and broadcasts only in relation to the rights provided under the Agreement (Article 3).

²⁶ Article 4. As for national treatment, this obligation applies to phonograms, performances and broadcasts only in relation to the rights provided under the Agreement (Article 3).

²⁷ Article 13, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); Article 9(2) Berne Convention.

The Rome Convention allows four specified exceptions – one of which is private copying – and any other exception that a contracting state applies to copyright material (Article 15). These exceptions are effectively subject to the three-step test, however, given Article 13 of TRIPS.

not before.²⁸ Australia has not yet acceded to either treaty, but has indicated its intention to do so.²⁹

Both treaties incorporate the three-step test. There are no specific provisions relating to private copying in the final text of either of the treaties, although proposals for private copying provisions were considered in the meetings preceding the adoption of the treaties.³⁰

Although there are no specific provisions in any of the treaties dealing with remuneration for private copying, other requirements of the treaties – particularly those relating to national treatment and the three-step test – affect how a private copying scheme is formulated and how it applies for foreign rights owners.

²⁸ The Directive is discussed below.

²⁹ The Digital Agenda amendments were intended to comply with the “digital provisions” in the new treaties applying to works, films and sound recordings, but further amendments to the Copyright Act would be needed before Australia could accede to the treaties – including amendments to the performers’ rights provisions, the term of protection for photographs and possibility the provisions dealing with distribution and importation of articles containing copyright material.

³⁰ The WCT and WPPT began as a proposed protocol to the Berne Convention. WIPO prepared discussion papers, including proposals for the contents of the protocol, to be considered by the Committee of Experts at their meetings on the protocol. In its discussion paper for the February 1992 meeting (WIPO BCP/CE/I/3 paras 94 to 103), WIPO included a proposal that the protocol should require member countries to provide compensation for private copying by imposing a levy on blank recording media and/or recording equipment. There were two parts to the proposal. The first was that the private copying of certain material (computer programs, electronic databases, sheet music and entire books) should not be permitted at all. The second part was that certain other private copying could be permitted provided copyright owners were compensated. This was private copying of audiovisual works, sound recordings and works embodied in sound recordings, and reprographic reproduction (except of sheet music and entire books). The proposal excluded serial digital reproduction, and provided that payment be made by the manufacturers of blank recording material or recording equipment (at p 63).

While there was general support at the meeting for the view that the protocol should deal with private copying, there was a divergence of views as to how this should be done. The chairman’s summary of the discussion noted insufficient support for prohibiting private copying at all, except of computer programs. He also noted the general support for a right to remuneration for private copying of audiovisual works and sound recordings, but only limited support for a right to remuneration for private reprographic reproduction. There was also support for the view that private copying should be dealt with by other means, such as copy-protection devices or copy-management systems or new licensing techniques (WIPO BCP/CE/II/1 paras 64 to 78).

WIPO also prepared a proposal on compensation to performers and phonogram producers for private copying of sound recordings, which was discussed at the November 1993 meeting on a possible new treaty for performers and phonogram producers (which later became the WPPT). Again, there was general support for a right to remuneration for private copying but divergent views about the details of such a right. The delegates at the meeting also discussed the administration of a remuneration scheme and provision for use of the income for cultural or general purposes rather than distribution to individual rights owners.

Part 4: Private copying schemes in other jurisdictions

There are at least 42 countries which have a remuneration scheme for private copying. The laws of these countries are summarised in the following tables, and some of them are discussed in more detail below.

4.1 Table: countries with private copying schemes³¹

Country	Year scheme started	Blank audio media	Audio recording devices	Blank audiovisual media	Audiovisual recording devices
Algeria	1997?	✓	✓	✓	✓
Austria	1980	✓		✓	
Belarus		✓	✓	✓	✓
Belgium ³²	1992	✓	✓	✓	✓
Bulgaria	1991	✓		✓	
Cameroon	1990	✓		✓	
Canada	1997	✓			
Congo	1982	✓		✓	
Czech Republic		✓		✓	
Denmark	1992	✓		✓	
Ecuador		✓	✓	✓	✓
Estonia	1999	✓	✓	✓	✓
Finland	1984	✓		✓	
France	1985	✓		✓	
Gabon	1987	✓		✓	
Germany	1985	✓	✓	✓	✓
Greece	1994	✓	✓	✓	✓
Hungary	1982	✓		✓	
Iceland	1984	✓	✓	✓	✓
Israel	1996	✓		✓	
Italy	1992	✓	✓	✓	
Japan ³³	1993	✓	✓	✓	✓
Kazakstan		✓	✓	✓	✓
Kenya	1989	✓	✓		
Latvia ³⁴		✓	✓	✓	✓
Mauritius ³⁵		✓	✓	✓	✓
Moldova ³⁶		✓	✓	✓	✓
Netherlands	1990	✓		✓	
Nigeria ³⁷	1994	✓	✓	✓	✓

³¹ Based on Appendix 3, Gillian Davies and Michèle Hung, "Music and Private Copying: An International Survey of the Problem and the Law, Sweet & Maxwell 1993, and updated for developments from 1992.

³² Belgian Copyright Act Article 22(1)(5)

³³ Digital media and devices only

³⁴ Copyright Law, Article 34

³⁵ Copyright Act 1997, Article 13

³⁶ Law on Copyright and Neighbouring Rights 1994, Article 20. The right to remuneration applies to all material of which the legislation allows private copying (excluding buildings, databases, computer programs, complete books, musical scores and originals of fine art). Remuneration is payable on "recording appliances (sound recording equipment, video recorders etc) and mediums (texts and cassettes for sound and video recording, optical discs, compact discs etc)".

³⁷ Copyright Act 1992, Article 32C. The levy is payable "on any material used or capable of being used to infringe copyright in a work" (Article 32C(1)).

Paraguay ³⁸		✓	✓	✓	✓
Poland		✓	✓	✓	✓
Portugal ³⁹	1985	✓	✓	✓	✓
Romania ⁴⁰		✓	✓	✓	✓
Russia ⁴¹	1999	✓	✓	✓	✓
Slovakia ⁴²		✓	✓	✓	✓
Slovenia ⁴³		✓	✓	✓	✓
Spain ⁴⁴	1987	✓	✓	✓	✓
Sweden	1999	✓		✓	
Switzerland ⁴⁵	1992	✓		✓	
Ukraine ⁴⁶		✓	✓	✓	✓
United States ⁴⁷	1992	✓	✓		
Uzbekistan ⁴⁸		✓	✓	✓	✓

4.2 Canada

The Canadian private copying provisions came into force in 1997. The main features of the scheme are:

- it applies only to blank recording media, and not to recording devices;
- it applies only to audio recording media and not to audiovisual recording media;
- a levy is payable by importers and manufacturers of blank audio recording media sold or distributed in Canada; and
- the amount of the levy is determined by the Copyright Board of Canada.
- the levy is collected and distributed by a new copyright collecting society, Canadian Private Copying Collective (CPPCC).

³⁸ Law No 1328/98 on Copyright and Related Rights 1998, Articles 34 to 37. The remuneration applies to “owners of rights published in graphic form or in the form of videograms or phonograms or any kind of sound or audiovisual recording” which are made “by means of non-typographical technical apparatus” (Article 34)

³⁹ Code of Copyright and Related Rights 1985, Article 82

⁴⁰ Law on Copyright and Neighbouring Rights 1996, Article 34

⁴¹ Law on Copyright and Neighbouring Rights, Article 26

⁴² Law on Copyright (No 38 of 5 December 1997), Articles 21 and 51(2)

⁴³ Copyright and Related Rights Act 1995, Article 37. The right to remuneration applies to the making of a sound or audiovisual fixation and to photocopying and “other similar technical means of reproduction”.

⁴⁴ Consolidate Text of the Law on Intellectual Property 1996, Articles 25 and 31. The right to remuneration applies to reproduction “by means of a non-typographical technical apparatus or instrument” of “works publicly exploited in the form of books or publications assimilated thereto by regulation ... and also in the form of phonograms, videograms or other sound, visual or audiovisual media” (Article 25(1)).

See also Santiago Martinérez and Javier Vías Alonso, “Compensation for the making of private copies”, [1994] 6 ENT.LR E-125

⁴⁵ Federal Law on Copyright and Neighbouring Rights 1992, Article 21

⁴⁶ Law of Ukraine on Copyright and Related Rights 1993, Article 19.

⁴⁷ Digital media and devices only

⁴⁸ Law on Copyright and Neighbouring Rights 1996. Article 27 provides that “the law may provide that, where sound or visual recordings are used for personal reasons, the author, performer and the producer of the recording shall be entitled to remuneration”.

The Canadian legislation was challenged on a number of grounds before the Copyright Board of Canada, in connection with applications to the Board to determine the levies payable under the scheme.⁴⁹ These challenges included:

- that the scheme was not a law about copyright and thus outside the Canadian Parliament's legislative power; and
- that the levy was a tax, and the scheme was thus invalid as non-compliant with the requirements for tax legislation in the Canadian Constitution.

The Board – which referred to the Australian High Court decision in *Australian Tape Manufacturers Association* in relation to both issues – held that the scheme was a law about copyright, and that the levy was not a tax. On the tax issue, the Board thus reached a different decision about the Canadian legislation, having regard to the Canadian Constitution and law, than the Australian High Court reached in relation to the 1989 Australian scheme.

4.3 United States

Remunerated private copying is allowed in some circumstances under the US Digital Home Recording Act.⁵⁰

The main features of the scheme are:

- it requires payment only in relation to *digital* recording devices and media;
- it requires payment by people who import and distribute, or manufacture and distribute, such devices and media– it does not apply to people who manufacture or import but do not distribute, or who distribute but do not manufacture or import;
- it prohibits the manufacture, importation and distribution of digital recording devices [and interface devices] that do not include a serial copying material system;
- it does not allow “serial copying” – ie it does not allow the further copying of a copy made under the scheme; and
- it does not apply to digital downloads (eg downloading MP3 files from the Internet to a computer hard disk), or copying music from a computer to a portable listening device.

4.4 Europe

a. European Union “Information Society” Directive

Most Member States of the European Union have private copying schemes. Three – United Kingdom, Ireland and Luxembourg – do not, and have no current plans for introducing a scheme.

Proposals to introduce a European Union Directive on private copying failed due to opposition by countries without private copying legislation, principally the UK. The last proposal, a Consultation Document on private copying issued by the Commission of the European

⁴⁹ Decision of the Copyright Board of Canada 17 December 1999.

⁵⁰ Private copying may in some circumstances be allowed under the fair use provision.

Communities in October 1992, was abandoned following objections raised by the UK, Ireland, Luxembourg and Italy.⁵¹

On 9 May 2001, the European Union adopted a new Directive on harmonisation of certain aspects of copyright and related rights in the information society (the Information Society Directive).⁵² The Directive allows, but does not require, Member States to allow private copying subject to compensation. It thus does not harmonise laws in the EU in relation to private copying, as had been the aim of the earlier proposals for a directive on private copying.

The implementation deadline for the Directive is 18 months, which may be the end of 2002 (depending on when the final Directive is published).

The Directive is intended to be consistent with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). It thus deals with the “digital” issues in the WIPO Treaties:

- right of communication to the public
- temporary reproductions
- circumvention of technological protection measures, and
- tampering with rights management information.

The Directive also, however, includes matters not expressly dealt with in the WCT or WPPT.

The Directive includes, in Article 5, a series of provisions dealing with exceptions and limitations to the exclusive rights of copyright owners. Most of these exceptions and limitations are optional – the Directive allows Member States to provide for them in their national laws but does not require them to do so.⁵³

Article 5(2) provides as follows:

Member States may provide for exceptions and limitations to the reproduction right provided for in Article 2 in the following cases:

...

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

Article 5(5) provides:

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

The Directive thus incorporates the “three-step test” from other treaties – the Berne Convention, the TRIPS Agreement, the WCT and the WPPT. Any exception for private copying in a national law must comply with the three-step test.

⁵¹ Theodore M Shapiro, “Cassettes, Lies and Videotape: Private Copying in the EC” [1993] 4 ENT.LR131; William I Hochburg, “Battle Royal-ty: The Clash Between the Continentals and the Anglos Over Digital and Analogue Musical Royalties”, (1994) 46 Copyright World 20; “UK Government Blocks European levy” (1992) 2 *Music & Copyright* (September 29) at 5

⁵² On 14 February 2001, the European Parliament approved the draft Directive, with nine amendments to the Council of Ministers’ Common Position on the draft. Those nine amendments were approved by the Council of Ministers on 9 May 2001.

⁵³ The Directive has been criticised, as a result, as it fails to harmonise the law in relation to these issues.

The relationship between exceptions and limitations (including the private copying provision) and the provisions about circumvention of technological protection measures was a hotly debated issue.

Article 6(1) provides:

Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

Article 6(4) provides:

Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States *shall* take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject matter concerned.

A Member State *may* also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provision of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

However, Recital 53 provides that where interactive on-demand services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) do not apply.⁵⁴

Recitals 38 and 39 provide as follows:

- Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the international market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.
- When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

There are concerns that the Directive may contain a “loophole”, whereby national legislation consistent with the Directive could allow private copying using file-sharing software such as Napster.⁵⁵

It is also not clear whether the countries whose legislation includes a provision allowing private use of copyright material without payment will be entitled to retain those provisions. This also applies to the exemption in the United Kingdom for fair dealing for research or study, which will often be a private use.

⁵⁴ The Recital goes on to provide that non-interactive forms of online use remain subject to the first and second subparagraphs of Article 6(4).

⁵⁵ (2001) 15 WIPR 6; “Legal Affairs Committee opts for wide definition of private copying”, (2001) 199 Music & Copyright 1.

b. Austria

Any person may make single copies of a work for personal use.⁵⁶ However, an author is entitled to equitable remuneration via the blank tape levy.⁵⁷ The blank tape levy is payable by the person who first makes the recording material commercially available in Austria. A manufacturer who is not the first distributor is treated as a guarantor for the payment.

In determining the amount of the levy, the playing time is taken into account. A claim for payment of the levy may only be made by a collecting society. Reciprocity is deemed to exist if determined in a notice of the Federal Minister of Justice (Article 96).

c. France

The French Intellectual Property Code allows copies or reproductions reserved strictly for the private use of the copier and not for collective use.⁵⁸ Authors and performers of works fixed on phonograms or videograms, and the producers of such phonograms or videograms, are entitled to remuneration for such copies.

A levy is payable by manufacturers and importers of recording media “that may be used for the reproduction for private use of works fixed on phonograms or videograms”.⁵⁹ The amount of the levy is determined by a Committee chaired by a representative of the State and comprising representatives of rights owners, manufacturers and importers of recording media, and consumers.⁶⁰

Under the Code, a levy is payable on blank recording media used for copying audio and audiovisual works. The levy is payable by the manufacturers and importers of the media. The rates of the levies, and the media subject to the levies, are determined by an administrative body. The Code allows for reimbursement of the levy on blank media used for other purposes, such as for people with disabilities.

The moneys collected are distributed by collecting societies. The distribution is only to rightsholders in audio and video recordings first fixed in France.⁶¹

In January 2001, the French Culture Ministry’s copyright commission announced that a levy would become payable on blank compact discs, digital video discs and CD-ROMs. According to a report in World Intellectual Property Report, the levy on CDs will start at FF 2.15, the levy on Flash memory cards in MP3 players will be FF 2.20, and the levy on DVDs will range from FF 10.42.⁶²

In addition, the levies payable on blank audio and video cassettes were increased on 22 January 2001, from FF 1.50 per hour to FF 1.87 per hour for audio cassettes, and FF 2.25 per hour to FF 2.81 per hour for video cassettes. The two moves are expected to double the revenue collected from FF 500 million per annum to FF 1 billion per annum.

⁵⁶ Austrian copyright legislation, Article 42

⁵⁷ Article 42b

⁵⁸ Article L.122-5(2) and 211-3(2).

⁵⁹ Article L. 311-4. Recently, a shopkeeper was held to have infringed copyright by making a CD burning machine available. The Court held that the shopkeeper’s use of the machine had gone beyond the legal definition of “private copying” and was an infringement of copyright. The Court’s decision to impose heavy fines and penalties was upheld on appeal: (2001) 15 WIPR 7.

⁶⁰ Article L. 311-5

⁶¹ Article L311-2. See Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, FRA-118–FRA-119, § 8[2][a][i][B]; FRA-84, § 6[1][a][ii][B]

⁶² (2001) 15 WIPR 10. See also (2001) 107 Copyright World 4.

The levies are payable to a fund for copyright owners. About 75% is paid to the copyright owners and about 25% used “to encourage fresh talent”.⁶³

The copyright commission has also indicated it will investigate other means of digital storage, including computer hard drives, electronic games machines, cable television decoders with built-in memory, CD burners and new-generation mobile phones.⁶⁴ This proposal has generated considerable controversy and opposition from manufacturers of the equipment.

d. Germany

The German Copyright Act allows the making of a single copy of a work for private use.

The Act requires the payment of a levy on blank audio and audiovisual recording media and devices. The levies are payable to a centralised body – ZPÜ (the Central Agency for Private Copying Rights) – and then paid to collecting societies for distribution to authors, performing artists and producers.

There is a similar scheme requiring the payment of a levy on photocopiers and similar machines, and by certain institutional users of such machines (such as educational institutions).⁶⁵

In November 2000, the claim by ZPÜ against Hewlett Packard for payment of levies on CD burners was settled before the Stuttgart Regional Court. Under the settlement agreement, Hewlett Packard agreed to pay DM12 to the ZPÜ for each CD burner imported or sold from the settlement date, and to make payment for CD burners distributed prior to the settlement.⁶⁶

In addition, in July 2000, GEMA launched a campaign demanding payment of levies from manufacturers and importers of personal computers (PCs).⁶⁷

e. Greece

A levy is payable on copying equipment and on recording media. The levies are: 6% of the price of recording machines and blank tapes, 4% of the price of photocopiers and paper usable for photocopiers, and 2% of the price of computers.

Levies collected from sales of recording machines blank tapes are distributed 55% to authors, 25% to performing artists and 20% to producers.⁶⁸

f. Sweden

The scheme covers both digital analogue recordings. Levies are payable on audiotape, videotapes, recordable CDs and Mini-discs, but not on computer hard drives and floppy discs.⁶⁹

The levy is payable by manufacturers and importers to a collecting society called COPYSWEDE.

⁶³ (2001) 107 Copyright World 4.

⁶⁴ (2001) 15 WIPR 10; (2001) 107 Copyright World 4.

⁶⁵ Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, GER-109–GER110, § 8[2][a][ii]

⁶⁶ Media release by the German collecting society GEMA, http://www.gema.de/eng/updates/pm_stuttgart.html. See also “Germany wins levy on CD-R burners, bu CD-R copying is still rife in Europe”, (2000) 182 Music & Copyright 4

⁶⁷ Media release by the German collecting society GEMA, http://www.gema.de/eng/updates/pm_computer.html. See also news item in (2001) 110 Copyright World 5, “Royalties on PC sales”

⁶⁸ Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, GRE-39 to GRE-40, § 8[2][d]

⁶⁹ Newsletter, International Association of Entertainment Lawyers, Autumn 1999, a p6

In 1999, the levy was 1.2 Skr per hour, to a maximum of 6 Skr, a low rate compared to other schemes in Europe.

Payments are made only to rightholders from Member States of the European Union.

g. United Kingdom

The United Kingdom has not introduced a private copying scheme, despite recommendations to the Government in favour of such a scheme. A blank tape levy on audio and vide tapes was recommended in a consultative document on copyright for audio-visual material presented to the British Parliament by the Secretary of State for Trade and Industry in 1985,⁷⁰ and in the Government's 1986 White Paper on Intellectual Property and Innovation. These recommendations were not followed as a result of pressure from tape manufactures and consumer groups.⁷¹ There are no current plans to introduce a private copying scheme.⁷²

4.5 Other countries

a. Algeria

A levy is payable on blank media and equipment.⁷³ It is calculated as a percentage of selling price for blank media, and as a lump sum for equipment, in each case set by the Minister for Culture, after having obtained the opinion of the National Copyright and Related Rights Office or the "representatives of the accountable persons". The royalties are payable to, and distributed by, the National Copyright and Related Rights Office⁷⁴

b. Israel

Payment is made by the Government to the collecting societies representing the majority of copyright owners, owners of performing rights, and producers of audio and video works a yearly amount equal to 5% of the retail price of all cassettes that were sold for private or home use in the previous year.⁷⁵

c. Japan

A remuneration scheme for digital copying for private purposes was introduced in 1992.

The levies are payable on digital audio tape recorders (DAT), digital compact cassettes (DCC) and mini discs. The levy on DAT recorders is 2% of the retail price with a ceiling of 1000 yen. The levy on digital recording media is 3% (reviewable after 3 years).

⁷⁰ The Recording and Rental of Audio and Video Copyright Material: A Consultative Document, HMSO, London, 1985

⁷¹ "UK Government locks European levy" (1992) 2 *Music & Copyright* (September 29) at 5

⁷² See Rico Calleja, "Copyright Directive", (2001) 109 *Copyright World* 5. According to the Minutes of meeting for Europcopy 22 April 1999, a government meeting on private copying was to be held in June 1999.

⁷³ Ordinance No 97-10 of 27 Shawwal 1417, Corresponding to March 6, 1997, Concerning Authors' Right and Related Rights

⁷⁴ Article 127

⁷⁵ Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, ISR-35 to ISR-36, § 8[2][d]

The levy on specified digital video recording devices and on specified digital video recording media is 1% of the standard price.⁷⁶

From July 1999, a 1% levy has been payable on digital image recording devices (devices that use digital video cassette recorder (DVCR) and data video home system (D-VHS) formats).⁷⁷

⁷⁶ Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, JAP-63 to JAP-64, S 8[2][d]

⁷⁷ “Cabinet approves fee for recording of digital images”, (1999) 13 WIPR 261

Part 5: Remuneration for private copying in Australia: the issues

5.1 Scope of the exemption

a. Rationale

The rationale for private copying remuneration schemes is that, in practice, copyright owners are unable to prevent or license private copying. The schemes are thus a practical, compromise, solution to an enforcement problem. The schemes do not reflect a policy position that, in the absence of the enforcement issue, people should be able to make private copies for any purpose without infringing copyright.

The rationale may thus be differentiated from that for special exceptions such as fair dealing for criticism or review, or for reporting the news, where Parliament has taken the view these purposes warrant limitations on copyright owner's otherwise exclusive rights.

b. What could be copied under the exemption?

As noted above, this study is confined to issues associated with the private copying of audio and audiovisual recordings.

In most countries which have a private copying scheme, the scheme applies to audio and audiovisual recordings. In some countries, such as the United States and Canada, the scheme only applies to audio recordings (and in the United States, only to digital music recordings).⁷⁸

The 1989 Australian scheme allowed the copying for private use of all published sound recordings embodying copyright subject matter, including those containing audio material other than recorded music.

The Canadian scheme allows the copying of a sound recording of a musical work. The scheme thus does not allow copying of other recorded audio material such as spoken words. It would, however, appear to allow the copying of the recorded music component from an article or recording that also contains other material, such as an enhanced CD, a CD-ROM or a broadcast.

The United States scheme exempts from copyright infringement the noncommercial use of digital audio recording media, analogue recording media, a digital audio recording device and/or an analogue recording device to make digital musical recordings or analogue musical recordings.⁷⁹

A "digital musical recording" is a material object in which sounds (and certain incidental material) are fixed in digital format, but does not include a material object in which the fixed sounds are principally spoken words, or a material object in which one or more computer programs are fixed.⁸⁰ There is no definition of audio musical recording.

⁷⁸ The US scheme effectively implemented an industry agreement between copyright owners and recording equipment manufacturers resulting from legal action instituted by copyright owners.

⁷⁹ USC §1008

⁸⁰ 17 USC § 1001(5)(B). A digital musical recording may, however, contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to bring about the perception, reproduction or communication of the fixed sounds and incidental material.

The US scheme would appear to allow the copying of the recorded music component of certain articles containing material other than recorded music, if the copying can be done using a device principally used for individual copying of digital musical recordings, onto a medium principally used to make digital reproductions of digital music recordings.

MP3 files

An issue which has not yet received express judicial consideration is whether an MP3 file is a “sound recording” and/or a “copy” of a sound recording for the purposes of the Copyright Act. The position is not clear, but the view of most commentators seems to be that a court is likely to take a broad approach to the issue.⁸¹ This is particularly so given the decision in *Sega v Galaxy*, in which the court held that a computer game was a “cinematograph film”..⁸²

Non-broadcast audiovisual material

While most taping of audiovisual material is of television programs, the scheme could also apply to the copying of audiovisual material including rented or purchased videos. This appears to be the case in countries which currently have remuneration schemes for audiovisual private copying.

Private copying of online audiovisual material is also likely to increase with technological advances in bandwidth and compression.

In addition, the decreasing cost of DVD may mean that people want to transfer the contents of their videotapes onto DVD.

Computer games

Under Australian copyright law, a computer game may be a “cinematograph film”.⁸³ If the scheme is not confined to the recording of television programs, there would need to a policy decision about whether computer games would be covered.⁸⁴

c. Nexus between exemption and entitlement to remuneration

An exemption allowing private copying must comply with the three-step test in international treaties to which Australia is a party.

It is unlikely that an exemption for private copying without remuneration to rights owners would comply with the three-step test.⁸⁵ This raises issues about whether the three-step test requires an entitlement of all rights owners whose material is copied in reliance on the exemption to a share of the remuneration collected, including foreign rights owners.

⁸¹ See Ricketson, *The Law of Intellectual Property: Copyright Designs and Confidential Information*, LBC, at para 8.29; Lahore, *Copyright and Designs*, Butterworths, para 8005. See also Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues*, Commonwealth of Australia, Canberra, 1999, at 7.18–7.22.

⁸² *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1996) 35 IPR 5161; confirmed on appeal to Full Court (1997) 37 IPR 462

⁸³ *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1996) 35 IPR 5161; confirmed on appeal to Full Court (1997) 37 IPR 462

⁸⁴ This issue has arisen in Europe as the private copying schemes are being extended to digital recording media and devices – see, for example, letter to members on this issue from Eurocopya, 22 December 2000.

⁸⁵ See, for example, James Lahore “Pointing the Berne: 2. The Blank Tape Royalty Scheme: some comments on Australia's obligations under the Berne Convention” (1989) 7(1) *Copy Repr* 15

The approach to this issue varies in countries with private copying schemes; distribution to foreign rights owners is discussed below.

d. Purposes for which copy could be made

1989 Australian scheme

The 1989 Australian scheme provided that it was not an infringement of copyright to make, on private premises, a copy of a sound recording for the private and domestic use of the person who made it.⁸⁶ Selling, distributing, exhibiting, broadcasting and playing in public were deemed to not be “private and domestic use”.⁸⁷ In addition, the subsequent use of a private use copy for a purpose other than private and domestic use had the effect of rendering the original copy an infringement from the time it was made.⁸⁸

Canada

The Canadian scheme provides that it is not an infringement of copyright to reproduce protected material embodied in a sound recording onto an audio recording medium for the private use of the person who makes the copy.⁸⁹ The Canadian scheme, similarly to the 1989 Australian scheme, expressly excludes selling, renting, exhibiting for sale, distributing, communicating and playing in public from “private use”. It does not, however, appear to require that the copying take place on private premises, or deal with subsequent use of a “private use” copy for other purposes.

United States

The United States scheme provides that no action for infringement can be taken which is based on the manufacture, importation, distribution of digital recording media or digital recording devices, or of analogue recording media or analogue recording devices. It also provides that no action for infringement can be taken based on the *noncommercial* use of digital audio media, analogue recording media, a digital recording device, or an analogue recording device to make digital musical recordings or analogue musical recordings.⁹⁰

The scheme thus provides an exemption in relation to both digital and analogue audio recording media, devices and activity, but requires payment of the levies and serial copyright management only in relation to digital media and devices.

EU

The EU Directive allows a natural person to make reproductions on any medium, for private use and for ends that are neither directly nor indirectly commercial, provided there is a compensation scheme.⁹¹

⁸⁶ Section 135ZZM(1)

⁸⁷ Section 135ZZK

⁸⁸ Section 135ZZM(3). There are similar provisions in Part VA and Part VB dealing with the subsequent use of copies initially made for educational purposes.

⁸⁹ Section 80

⁹⁰ 17 USC §1008

⁹¹ Article 5(2)

e. Requirements for source material

Publication

The private copying exemptions in many countries require that the material copied has been made public. This was not a requirement of the 1989 Australian scheme, but would seem desirable.

Pirate or unlicensed recordings

There was no requirement in the 1989 Australian scheme that the “source copy” – the copy of the sound recording from which a private use copy could be made – be a non-infringing copy.

Nor does there appear to be any such requirement in the Canadian scheme or the US scheme.

Such a qualification would seem desirable, however, particularly given the ease of copying using digital technology and the vast numbers of unlicensed copies of sound recordings which have resulted from file-sharing software such as Napster.

One approach would be to limit the exemption to copying of:

- copies of sound recordings and cinematograph films, and reproductions of works embodied in those sound recordings and films, made or imported into Australia with the copyright owner’s licence;
- reproductions of works made under the mechanical statutory licence;⁹² and
- “non-infringing” copies of sound recordings imported pursuant to section 44D.

If the exemption were to apply to copies of sound recordings accessed online from other territories, consideration would need to be given to the definition of “non-infringing” in this context (ie whether it would differ from the definition of “non-infringing” as it applies to importation of sound recordings under s44D).

Serial copying

The scheme could exclude “serial copying” – that is, a private use copy made from a copy already made under the scheme.

The United States legislation does not allow serial copying, and includes provisions which require recording devices and media to contain technological devices designed to prevent serial copying.

The Canadian scheme, on the other hand, would appear to allow serial copying.

f. Requirements for recording media

The exemption in the 1989 Australian scheme allowed a person to make a private copy on a “blank tape”. A “blank tape” was a “tape, other than an exempt tape, of a kind ordinarily purchased or hired for use for making copies of sound recordings whether or not any sounds are embodied in the tape”.⁹³

⁹² Sections 54 to 64

⁹³ An “exempt tape” was a tape with a normal playing time of 30 minutes or less, a second-hand tape, microcassette, reel-to-reel tape, video tape or tape for storing computer data or programs.

The Canadian scheme allows reproduction for private use onto an “audio recording medium”, which is “recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose”.⁹⁴

In its 1999 decision on the tariffs payable for private copying, the Canadian Copyright Board considered the meaning of “ordinarily used by individual consumers”. The Board, having regard to the objects of the scheme, took a broad view of the definition in the Act.

A broad interpretation of the definition of helps to level the playing field for importers and manufacturers by ensuring that only those media that clearly are not used to make private copies are not subject to the levy. Consequently, ordinary use, as that expression is found in the definition of “audio recording medium”, ought to be interpreted as including all non-negligible.

...

Furthermore, since the definition speaks of ordinary use by *individual consumers*, the analysis must focus on the person who uses the medium for her own enjoyment, to the exclusion of others. Thus, the fact that only five percent of a given type of medium is sold to individual consumers does not mean that it does not qualify. In fact, all those media, including the 95 per cent sold to “non-consumers”, will be subject to the levy as long as a non-marginal number of consumers use them for private copying in a fashion that is not marginal.⁹⁵

The Board held that the following were ordinarily used by individual consumers to reproduce sound recordings: audio cassettes of 40 minutes or more, CD-R, CD-RW, CD-R Audio, CD-RW Audio and MiniDisc. It excluded media “that are clearly meant for purposes other than private copying”, giving as examples microcassettes commonly used in dictating machines, and digital audio tapes (“as for all practical purposes, they are used by professional, not by individual consumers”).⁹⁶

The Board did not discuss whether a computer hard disk may be an audio recording medium for the purposes of the scheme.

The United States scheme allows the noncommercial use of digital audio media or analogue recording media, a digital recording device, or an analogue recording device to make digital musical recordings or analogue musical recordings.⁹⁷

A “digital audio recording medium” is:

any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.⁹⁸

A “digital audio copied recording” is:

a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.⁹⁹

A “digital musical recording” is

a material object—

- (i) in which are fixed, in a digital recording format, only sounds, and material, statements or instructions incidental to those fixed sounds, if any, and

⁹⁴ Canadian Copyright Act Section 79

⁹⁵ at page 30

⁹⁶ at page 30

⁹⁷ 17 USC §1008

⁹⁸ 17 USC § 1001(3)

⁹⁹ 17 USC 1001(1)

- (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

The definition expressly provides that a “digital musical recording” does not include a material object

- (i) in which the fixed sounds consist entirely of spoken word recordings, or
- (ii) in which one or more computer programs are fixed.¹⁰⁰

The application of the exemption to use of a digital recording medium thus only applies to a recording medium whose primary purpose is the making of digital reproductions from a material object whose sole contents (apart from “incidental” material) are sounds.¹⁰¹

The US scheme would thus seem to apply to media such as CD-R Audio and CD-RW Audio, but – unlike the Canadian legislation – not to media such CD-R as CD-RW whose primary purpose is not to make digital musical recordings.

There is no definition of analogue recording medium or analogue recording device.

g. Requirements for recording device

The United States scheme allows the noncommercial use of a digital recording device or an analogue recording device to make digital musical recordings or analogue musical recordings.¹⁰²

A “digital audio recording device” is:

any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.¹⁰³

Excluded are devices designed, marketed, manufactured and intended for use by recording professionals, and equipment designed and marketed primarily to record non-musical sounds, such as dictation machines and answering machines.

The meanings of “digital audio copied recording” and “digital musical recording” are explained above.

The application of the exemption to use of a digital recording device thus only applies to a recording device whose primary purpose is the making of digital reproductions, for private use, from a material object whose sole contents (apart from “incidental” material) are sounds.¹⁰⁴

In the *Rio* case,¹⁰⁵ the Court held that the hand-held Rio device was not a digital audio recording device because it could only copy music files from a computer hard drive, and a computer hard drive was not a digital musical recording.¹⁰⁶ The Court also held that neither a computer nor its

¹⁰⁰ but a digital musical recording may contain “statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material” (§1001(5)(B)).

¹⁰¹ But not if the sounds entirely consist of spoken words

¹⁰² 17 USC §1008

¹⁰³ 17 USC § 1001(3)

¹⁰⁴ But not if the sounds entirely consist of spoken words

¹⁰⁵ *Recording Industry of America In v Diamond Multimedia Systems Inc* 180 F. 3d 1072 (9th Cir. 1999)

¹⁰⁶ Not only do computer hard drives contain material other than sounds, but they contain computer programs and are thus expressly excluded from the definition of “audio musical recording”.

hard drive are a “digital recording device”, as their primary purpose is not to make digital audio recordings.¹⁰⁷

There is no definition of analogue recording device.

h. Copying of online material

The Canadian legislation would allow private copying of a sound recording accessed online, but only if it is copied onto a recording medium “onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual customers for that purpose”. In its decisions on the tariffs payable under the scheme, the Canadian Copyright Board discussed the meaning of “ordinarily used by individual consumers”, and held that it included CD-R, CD-RW, CD-R Audio, CD-RW Audio, but did not discuss the possibility that a computer hard disk may be an “audio recording medium”. If “audio recording medium” does not include computer hard drives, then the scheme would only apply to copies made directly onto a recording medium such as CD-R.

The United States scheme would appear not to apply to the copying of online material onto a computer because:

- a computer is not a recording device whose use is covered by the exemption; and
- a computer hard drive is unlikely to be a recording medium covered by the exemption, because its primary purpose is not to make digital audio recordings.

The scheme may apply, however, to the copying of online material directly onto a recording medium whose primary purpose is to make digital audio recordings, such as CD-R Audio.

The EU Directive would appear to allow a Member State to have an exemption for private copying of online material, provided there was compensation.

i. Technological protection measures

New provisions in the Australian Copyright Act have recently come into force, which prohibit the circumvention of technological protection measures. These prohibitions apply to the manufacturers and suppliers of circumvention devices and services, but not to the users of them. There are, however, certain specified purposes for which a circumvention device or service can be manufactured or supplied – for example, to enable a library to reproduce an article for a client.

An option for an Australian scheme would be to exclude from the exemption a private copy made from material made accessible by a circumvention device or service (by the copier or by anyone else).

The United States Copyright Act also contains provisions prohibiting the circumvention of technological protections measures.¹⁰⁸ Unlike the Australian legislation, the US legislation prohibits the use, as well as the manufacture and supply, of circumvention devices and services. The exemptions in the United States Act are more limited than those in the Australian Act, and do not apply to private copying covered by the Audio Home Recording Act.¹⁰⁹ The Audio Home Recording Act itself contains anti-circumvention provisions as part of its obligations relating to the Serial Copying Management System.

¹⁰⁷ See also (2000) 182 Music & Copyright 4 – AHRA does not apply to writeable CD-burners but does apply to stand-alone audio CD burners, such as Philips’s twin deck CD-R.

¹⁰⁸ The US provisions differentiate technological measures to control access, and measures to control use.

¹⁰⁹ It is possible that the Audio Home Recording Act applies

The Canadian Copyright Act does not yet include provisions dealing with the circumvention of technological protection measures. There appears to be nothing in the Canadian scheme which would prevent a person relying on the scheme to copy a sound recording to which that person had obtained access by circumventing a technological protection measure.

In the European Union, the relationship between remuneration schemes for private copying and circumvention of technological protection measures was a hotly debated issue in the lead-up to the adoption of the Directive. In the final text of the Directive, there is a specific reference to technological protection measures in the provision which allows Member States to introduce or continue compensation schemes for private copying.¹¹⁰ The reference resulted from concerns that consumers may have to a levy for private copying, but be unable to make private copies because of technological protection measures.

In addition, the Directive includes a provision which allows (but does not require) Member States to include provisions in their legislation ensuring access for the purposes of private copying.¹¹¹ Two things to note about this provision when considering it from an Australian perspective are:

- most European countries do not have “fair dealing” provisions equivalent to those in Australia; and
- the Directive appears to require Member States to prohibit the use of circumvention devices and services (the Australian provisions do not – they are directed at the manufacturers and suppliers).

In the proposal for an Australian scheme, the extent to which copyright material is accessible for private copying could be taken into account when determining and reviewing the amount of the levy payable on various types of recording media and/or equipment or – if the scheme is funded without a special levy – the amount made available for compensation.

As noted above, the rationale for a private copying levy in Australia is to compensate copyright owners for private copying they are unable to prevent or license in practice.

j. Location of copying

The exemption in the 1989 Australian scheme only applied to a copy made “on private premises”.¹¹²

k. Contracting out

EU Information Society Directive

The EU Directive provides that it is without prejudice to other laws, including the law of contract.¹¹³

The Recitals provide that the exceptions and limitations referred to in Article 5(2), (3) and (4) – which include the private copying exception – “should not ... prevent the definition of contractual relations designed to ensure fair compensation for rightholders insofar as permitted by national law.”¹¹⁴

¹¹⁰ Article 5(2)(b)

¹¹¹ Article 6(4) paragraph 2

¹¹² Section 135ZZM(1)

¹¹³ Article 9

¹¹⁴ Recital 45

The Recitals also provide that where interactive on-demand services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) do not apply.¹¹⁵ As noted above, these subparagraphs allow a Member State to take “appropriate measures” to ensure that rightholders allow the beneficiaries of certain exceptions to benefit from that exception – for example, to allow people otherwise prevented by technological measures to make private copies.

Australia

Under Australian law, a copyright owner can generally enter a contract under which the other party agrees not to do something he or she person may otherwise be entitled to do under the Copyright Act.

There is, however, a provision in the Copyright Act which deems that an agreement, or part of an agreement, that excludes or limits the operation of certain exceptions relating to computer software has no effect.¹¹⁶ These exceptions relate to studying the ideas behind a computer program, making a back-up copy of a computer program, making interoperable products, error correction and security testing. The provision implements a recommendation by the CLRC in its 1995 report *Computer Software Protection*, which in turn was based on Article 9 of the EU Directive on computer programs.¹¹⁷

The provision is intended to make the government’s policy of allowing uses of computer software for purposes such as reverse engineering more effective, by ensuring that these uses are not prevented by contract.

The same considerations do not apply to private copying. The purpose of a private copying scheme is not to encourage private copying, but rather to compensate for an unpreventable and otherwise unlicensable use.

On 30 April 2001, the Copyright Law Review Committee (CLRC) began a 12 month inquiry into the relationship between contract and copyright law, with particular focus on online agreements which exclude or modify exceptions to copyright infringement.¹¹⁸

Exceeding scope of bare licence

A related issue is whether the exemption should allow copying which exceeds the scope of a bare licence. For example, it is common for material published online to be subject to an express, but non-contractual, licence to do certain things with the material. Such licences, however, usually allow private use, and the circumstances in which the private use exemption would exceed the terms of a bare licence are likely to be rare.

I. Application to existing unlevied media

The 1989 Australian scheme was to operate from a date set by proclamation after the Copyright Tribunal had determined the royalty rate, and would have allowed private copies to be made on blank tapes purchased both before after the commencement of the scheme. A preferable approach would be to limit the exemption to copying onto levied media using a levied device.

¹¹⁵ Recital 53. The Recital goes on to provide that non-interactive forms of online use remain subject to the first and second subparagraphs of Article 6(4).

¹¹⁶ Section 47H

¹¹⁷ Copyright Law Review Committee, *Computer Software Protection*, Commonwealth of Australia, Canberra, 1995 at para 10.106. The report is available from www.law.gov.au/clrc.

¹¹⁸ see www.law.gov.au/clrc

5.2 Funding of remuneration

a. Royalty, tax or allocation from Consolidated Revenue?

Royalty

To overcome the objections of the majority of the High Court in the ATMA case, the levy would need to be effectively payable by someone – the consumer, the manufacturer/importer or the vendor – who receives a benefit in return.

While consumers clearly receive a benefit – an exemption from liability for infringement – it is not practical for the collecting society to collect payment directly from them. The only practical option would be to collect the royalty as part of the process for collecting GST, but even then the royalty would probably have to be collected initially by the ATO, which may make it difficult to characterise the payment as a royalty rather than a tax.

It may be possible to characterise the royalty as ultimately paid by the consumer, however – for example, if the scheme expressly allowed vendors (wholesalers and retailers) to recover the royalty amount by adding it to the cost of the royalty to the sale price until the item reached the consumer.

Another option may be to impose a liability on manufacturers, importers and/or wholesalers, from which there is an exemption if the levy is paid. For example, a supplier could be deemed to authorise infringements of copyright by supplying blank recording media ordinarily used for private copying, but be exempted from liability by payment of the levy (the exemption for the person making the private copy would also need to be contingent upon the payment of the levy).¹¹⁹ Such a provision would be contrary to the decision in *WEA v Hanimex*, where the Federal Court held that Hanimex did not authorise infringements of copyright through its advertising and sale of blank tapes.

One issue may be whether the manufacturers and importers could avoid the deemed authorisation of infringement – for example by prominent warning notices on equipment.

New tax

Introducing the scheme as a special levy has the advantage of avoiding a Constitutional challenge similar to the challenge to the 1989 scheme. This was the approach in the proposed 1993 BARML scheme.

There is, however, likely to be political resistance to a new tax, particularly following the imposition of the GST. It also looks like taxation will be a key election issue for this year's Federal election.

Allocation from Consolidated Revenue

One possibility is that the Government not introduce a new tax at all, but make an allocation from moneys from other sources in Consolidated Revenue to compensate copyright owners whose material is subject to private copying. The Government already does this to fund the Public Lending Right scheme (PLR) and the Educational Lending Right Scheme (ELR),

¹¹⁹ For authorisation, there must be an infringement by the user of the blank tape. If the private copying exemption is not contingent upon payment of the levy, then there is no infringement by the user of the blank tape whether or not the levy is paid, and thus no authorisation by the blank tape supplier.

administered through the Department for Communications, Information Technology and the Arts. There is no special tax on libraries or borrowers from libraries to fund these schemes.

PLR was introduced in 1974, and is paid by the Government to eligible Australian authors, illustrators and publishers, whose books are held in Australian public libraries. Payments are based on data provided by libraries about their holdings. In 1996-97, the PLR allocation was \$5.116 million.¹²⁰ In 1999-2000, it was \$5.368 million, paid to 8,253 creators and publishers.¹²¹

ELR is a similar – more recent – scheme for authors, illustrators and publishers of books held in educational lending libraries.¹²² The Government has set aside \$38 million for the scheme over four years, as part of the Book Industry Assistance Plan.¹²³

In June 2001, the first payment of more than \$7.44 million was paid to almost 5,500 Australian authors, illustrators, editors, translators and publishers for works ranging from studyguides, primary school readers and fiction to autobiographies and non-fiction.¹²⁴ The allocation is to rise to \$11M in the fourth year.¹²⁵

A disadvantage of an allocation from Consolidated Revenue is that copyright owners are directly dependant on a decision of the Government of the day about how much money it will make available for the compensation fund.

One possibility is that the GST already being collected on blank media (and possibly also on recording devices) be allocated for private copying remuneration. If this would generate insufficient income (depending on projections for blank media and recording devices), there may also be the possibility of a higher GST on these items.

b. Issues if there is a tax or royalty

If the compensation scheme is funded by a special levy, then the questions of who would be liable to pay the levy, and to whom it would be payable, need to be considered.

From whom would the levy be collected?

Under most schemes, the levy is paid by the first distributor, who can pass on the cost so that it is ultimately paid by the consumer.

Under the 1989 Australian scheme, the levy was payable quarterly by the vendor who first sold, hired or otherwise distributed blank tapes in Australia.¹²⁶

Under the Canadian scheme, the levy is payable by manufacturers and importers of blank audio recording media.¹²⁷

Under the United States scheme, the levy is payable by people who import and distribute, or who manufacture and distribute, digital audio recording media or digital audio recording devices.¹²⁸

¹²⁰ http://www.dca.gov.au/nsapi-text/?MIval=dca_dispdoc&pathid=%2fahnb%2foutline%2ehtml

¹²¹ http://www.dca.gov.au/nsapi-text/?MIval=dca_dispdoc&pathid=%2fahnb%2faboutplr%2ehtml

¹²² http://www.dca.gov.au/nsapi-text/?MIval=dca_dispdoc&pathid=%2felr%2fguidelines%2ehtml

¹²³ Appropriation (Supplementary Measures) Bill (No. 1) 1999; this measure was introduced as part of a range of “sweeteners” to compensate the Australian book industry for the likely impact of the Goods and Services Tax.

¹²⁴ Australian Society of Authors media release, 22 June 2001 and information from the Government.

¹²⁵ Information provided by DCITA by email 27 April 2001.

¹²⁶ Section 135ZZP. A “vendor” was a person who, in the usual course of his or her business, sold, hired or otherwise distributed blank tapes.

¹²⁷ Section 82

¹²⁸

“Distribute” means “sell, lease, or assign a product to consumers, or for ultimate transfer to consumers, in the United States. The levy would not be payable, for example, on a person who manufactured solely for export.

It is clearly easier and cheaper to collect the levy from the first distributors than from subsequent distributors as there are fewer of them. There is also likely to be resistance from retailers, particularly small businesses, to the payment of a levy.

On the other hand, if the levy were to be collected as a royalty rather than as a tax, imposing the liability on the retailer may create a closer nexus between the payment of the levy (recovered by the retailer from the customer) and the benefit to the customer.

To whom would the levy be paid?

In most countries with private copying schemes, the levies are collected by copyright collecting societies. This would have been the case with the 1989 Australian scheme, under which levies were payable to a single collecting society, declared by the Attorney-General to be the collecting society for the purposes of the scheme.¹²⁹ A collecting society – the Private Audio Copyright Collection Service (PACCS) – was established.

In Canada, the levy is collected by the Canadian Private Copying Collective (CPCC), and distributed by other collecting societies which represent various types of rightsowners.

In the United States, the levies are payable to the Register of Copyrights, divided into funds for the various types of rightsholders, and distributed by collecting societies.

In Germany, the levies are payable to a centralised body – ZPÜ (the Central Agency for Private Copying Rights) – and then paid to collecting societies for distribution to authors, performing artists and producers.

In Australia, if the levy were a tax, it would be collected by the Government and paid into consolidated revenue. This is what was proposed under the 1993 BARML scheme. The levies could then be paid to the various collecting societies for distribution to the relevant rights owners.

If the levy were a royalty, it would be payable to a collecting society, and the approach in the 1989 scheme could be followed.

c. The amount of the levy

Australia

Under the 1989 Australian scheme, the amount of the levy would have been the rate per minute determined by the Copyright Tribunal, multiplied by the number of minutes of playing time.¹³⁰ The Tribunal was to take into account all relevant matters including the extent to which blank tapes are used for the purposes of making eligible sound recordings and works for private and

¹²⁹ This was a similar approach to other statutory licence schemes in the Copyright Act, such as the educational use schemes and the retransmission of broadcasts scheme, which require collecting societies to meet certain criteria in the Act and Regulations, and to be declared by the Attorney-General.

¹³⁰ Section 135ZZN

domestic use.¹³¹ An application was made to the Tribunal, but the proceedings were adjourned pending the outcome of the Constitutional challenge to the legislation in the High Court.¹³²

If the levy is collected as a tax rather than as a royalty, then the amount of the tax would presumably be determined by the Government.

When the 1993 BARML proposal was under consideration, copyright owners argued that the levy should be \$1 per blank tape. At that time, the Australian Record Industry Association (ARIA) estimated that 20 million blank tapes were sold annually in Australia.¹³³

The Government's proposal, however, was for a 10% levy to be collected in addition to sales tax, which would have resulted in an annual total collection of around \$2 to \$3M.

Austria

0.75 Euros per hour on blank videotape.¹³⁴

Belgium

Belgium: 3% of selling price of hardware; 2 Belgian francs per hour for analogue media; 3 Belgian francs per hour for digital media¹³⁵

Bulgaria

5% of the manufacturing price, or of the customs-dutiable value of recording media; 2% of the manufacturing price, or of the customs-dutiable value of recording equipment.

Canada

Under the Canadian scheme, the amount of the levy is determined by the Copyright Board.

In its 1999 decision on tariffs payable under the scheme, the Board expressly rejected the submission of the CSMA (representing the majority of blank media manufacturers and importers) that the rate should be a percentage of the wholesale price:

A tariff set as a percentage of the wholesale price would be unfair. Wholesale prices of blank audio recording media are expected to fall significantly; the value of the underlying intellectual property will not.¹³⁶

The rates initially set by the Board were:

- Audio cassettes (40 minutes or more): 23.3¢
- CD-R and CD-RW: 5.2¢
- CD-R Audio, CD-RW Audio and MiniDisc: 60.8¢.¹³⁷

¹³¹ Section 153E

¹³² See Mary Padbury, "Determination of the blank tape royalty by the Copyright Tribunal", (1990) 8 (5/6) Copyright Reporter 15

¹³³ "Australian government to re-introduce tape levy", (1993) 10 (June) *Music & Copyright* 4.

¹³⁴ Eurocopya chart.

¹³⁵ Article 56. These rates apply in the absence of a Royal Decree. According to a Eurocopya chart the rates for audiovisual are – blank videotape: 0.05Euros per hour; digital blank videotape: 0.12 Euros per hour; video recorders: 3% of selling price.

¹³⁶ Ibid at p42

In setting the levies, the Board looked at the remuneration that typically flows to rightsholders for a “top-line pre-recorded CD”, and then made reductions to allow for non-eligible repertoire, and the “secondary nature” of the private copying market.

At the time of the Board’s determination, no foreign performers or producers were eligible (as there had been no statement by the Minister under s85 of the Act), and the Board determined that 28% of private copies were made using the repertoire of eligible performers, and 23% using the repertoire of eligible producers. Although foreign authors are eligible without Ministerial statement, the Board made a deduction for works in the public domain and determined that 96% of private copies were made using the repertoire of eligible authors.

The Board subsequently revised the levies for 2000 and 2001:

- Audio cassettes (40 minutes of more): 29¢
- CD-R and CD-RW: 21¢
- CD-R Audio, CD-RW Audio and MiniDisc: 77¢

Denmark

For blank videotape: 0.52 Euros per hour.¹³⁸

France

The private copying rates for digital carrier formats (per the capacity indicated) are:¹³⁹

Format	US\$	capacity
minidisc, audio CD-R and CD-RW	0.54	74minutes
DVD-R and DVD-RW	3.59	180 minutes
Data CD-R and CD-RW	0.31	650Mb
Data DVD-RAM and DVD-R	1.51	4.7Gb
DVHS	8.38	420 minutes
removable audio memory, MP3 memory card	0.32	32Mb

Gabon

10% of retail selling price of blank media.¹⁴⁰

Germany

In 1998, the levies were:

- audio tape – 7 cents per hour
- video tape – 10 cents per hour
- audio hardware – \$1.41

¹³⁷ Copyright owners considered the initial rates too low (see CPCC media release of 17 December 1999), but happier with the revised rates for 2000–2001 while still regarding them as too low (see CPCC media release of 15 December 2000)

¹³⁸ Eurocopy chart.

¹³⁹ (2001) 197 Music & Copyright 12. According to a Eurocopy chart, the rate for blank videotape is 0.34 Euros per hour.

¹⁴⁰ law Instituting Protection for Copyright and Neighbouring Rights, Article 89

- video hardware – \$10.18¹⁴¹

In 2000, the levies were:

- CD-R recording devices – US\$2.29 per device agreed by Hewlett Packard;
- CD-R – US\$1.09 per CD plus 5 cents per hour of playing time.¹⁴²

Greece

6% of the price of recording machines and blank tapes

Israel

5% of the retail price of cassettes

Italy

- 10% of the selling price to the retailer of audio tapes
- 5% of the selling price to the retailer of video tapes
- 3% of the selling price to the retailer of sound recording equipment

No remuneration on audiovisual recording equipment.¹⁴³

Japan

DAT recorders –2% of the retail price with a ceiling of 1000 yen; digital recording media – 3% (reviewable after 3 years); specified digital video recording devices and specified digital video recording media – 1% of the standard price.

Netherlands

For blank videotape: 0.022 Euros per hour.¹⁴⁴

Poland

3% of revenues of sales of blank recording media and recording devices.¹⁴⁵

Spain

- equipment or apparatus for phonogram reproduction: 100 pesetas per unitary recording
- equipment or apparatus for videogram reproduction: 1,100 pesetas per unitary recording
- sound reproduction material: 30 pesetas per hour of recording or 0.5 pesetas per minute of recording

¹⁴¹ “Corporate report: GEMA”, (1998) 136 Music & Copyright 13 at 14

¹⁴² (2000) 195 Music & Copyright 2. According to a Eurocopya chart (undated), the rate for blank videotape is 0.09 Euros per hour, and the rate for video recorders is 9 Euros per unit.

¹⁴³ Mario Fabiani, “News from Italy”, (1992) RIDA 160

¹⁴⁴ Eurocopya chart

¹⁴⁵ Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, POL-44 to POL-45, § 8[2][d]

- visual or audiovisual recording material: 50 pesetas per hour of recording or 0.833 pesetas per minute of recording.¹⁴⁶

Sweden

In 1999 the rate for video was SK 0.02 (0.002 Euros) per recordable hour with a maximum of SK 6 (0.68 Euros) per tape or disc.¹⁴⁷

Switzerland

The rate until 31 December 2001 is SFO 46 (0.29 Euros) per hour for videocassettes.¹⁴⁸

In 1997, the levies were:

- audio tapes – 38 cents per hour
- video tapes – 53 cents per hour.¹⁴⁹

United States

Under the United Scheme, manufacturers and importers must pay 3% of the “transfer price” of digital audio recording media. For imported media, this is value entered at Customs.¹⁵⁰ For media manufactured in the United States, it is the manufacturer’s transfer price “(FOB the manufacturer, and exclusive of any direct sales taxes or excise taxes incurred in connection with the sale)”.¹⁵¹

The levy payable on recording devices is generally 2% of the transfer price, but less for “combined devices” which have other functions.¹⁵² There is also a minimum payment of US\$1, and a maximum payment of US\$8 (US\$12 for dual port recorders). There is provision in the scheme for the ceiling to be increased.

¹⁴⁶ Article 25(5). According to a Eurocopya chart, the rate for blank videotape is 0.3 Euros per hour, and the rate for video recorders is 6.67 Euros per unit.

¹⁴⁷ Minutes of Meeting of Eurocopya 22 April 1999. See also the (undated) Eurocopya chart, which shows the rate for blank videotape as 0.14 Euros per hour (max), and for digital blank videotape as 0.68 Euros per unit.

¹⁴⁸ Minutes of Meeting of Eurocopya 22 April 1999.

¹⁴⁹ “Market survey: Switzerland” (1997) 126 Music & Copyright 8 at 9.

¹⁵⁰ 17 USC § 1001(12)(A)(i)

¹⁵¹ 17 USC § 1001(12)(A)(ii)

¹⁵² 17 USC §1004(a)(2)

d. Total amounts collected in countries with private copying

Amounts are in US\$M.

Country	Collecting society	1996	1997	1998	1999	2000
Austria	Austro-Mechanica	2.5 ¹⁵³	2.6 ¹⁵⁴			
Belgium	SABAM		<0.5 ¹⁵⁵			
Czech Republic	OSA				0.05 ¹⁵⁶	
Denmark	KODA		1.6 ¹⁵⁷		2.7 ¹⁵⁸	
Finland	Teosto	10.2 ¹⁵⁹	11.2 ¹⁶⁰		7.1 ¹⁶¹	
France	SACEM	24.4 ¹⁶²	21.4 ¹⁶³	22.4	19.8	15.6 ¹⁶⁴
Germany	GEMA		17.0 ¹⁶⁵	24.8 ¹⁶⁶		

¹⁵³ “Market survey:: Austria”, (1998) 140 Music & Copyright 8 at 11.

¹⁵⁴ “Market survey:: Austria”, (1998) 140 Music & Copyright 8 at 11. A Eurocopya chart shows collection for video as 1.2M Euros in 1996 and 1.1M Euros in 1997.

¹⁵⁵ (2000) 74 Music & Copyright 1. A Eurocopya chart shows collection for video 1.3M Euros in each of the years 1996, 1997 and 1998.

¹⁵⁶ This was a 65% increase on the previous year. (2000) 185 Music & Copyright 10

¹⁵⁷ “Statistics”, (1998) 145 Music & Copyright 6. The report notes that the blank tape income represented 4% of Koda’s total income.

¹⁵⁸ An increase of 3% on the previous year (2000) 182 Music & Copyright 6 – cf “Market survey: Denmark”, (2000) 177 Music & Copyright 11, which notes (at p10) that revenues from private copying had fallen by 5% to just under US\$1M in 1999, following a 25% drop in 1998 which KODA attributed to declining sales of blank audio and video tapes and increasing sales of digital rewriteable formats.

Eurocopya chart shows collection for video as 3.2M Euros in 1996 and 2.8M Euros in 1997.

¹⁵⁹ “Market survey: the Nordics” (1997) 119 Music & Copyright 8 at 10. The report noted that the 1997 income was a 36% increase from the previous year, and that 82% of the income derived from video tapes.

¹⁶⁰ “Statistics”, (1998) 145 Music & Copyright 6. The report notes that the blank tape income represented 28.7% of Teosto’s total income. It also appears from the report that most of the blank tape income (US\$10.5M) was paid to the Finnish Ministry of Education rather than distributed to individual copyright owners.

¹⁶¹ A drop of 1.4% on the previous year: (2000) 182 Music & Copyright 6.

¹⁶² “GEMA, SACEM and SGAE report increased revenues in 1996”, (1997) 117 Music & Copyright 11 at13. The report notes that this was 7% drop from the previous year.

¹⁶³ “Corporate report: SACEM”, (1998) 143 Music & Copyright 12. The report notes that private copying had decreased by 10% from the previous year. This was attributed by SACEM to decreased sales and lower prices for blank tapes, growing availability of specialised film channels on cable and satellite tv, and popularity of CD singles and personal CD players.

See also “Market survey: France” (1998) 137 Music & Copyright 8 at 14

¹⁶⁴ An 8.1% decrease on the previous year. The downward trend was attributed by SACEM to falling sales for analogue media, and the lack of rates at that time for most digital media (rates have since been introduced).

(2001) 197 Music & Copyright 12. In 1992, private copying revenue collected by SACEM was US \$27.62:

“European authors’ societies’ revenues rise by over 6%”, (1993) 23 Music & Copyright 3

A Eurocopya chart shows collection for video as 27M Euros in 1996, 26M Euros in 1997 and 26.5M Euros in 1998.

¹⁶⁵ “Corporate report: GEMA” (1998) 136 Music & Copyright 12. The figure includes income from audio rental. The report notes that the fall in revenue of 5% from the previous year was attributed by GEMA to a general decline in the use of cassettes for making copies of sound recordings

¹⁶⁶ “GEMA reports a 3% increase in collections and distributions for 1998”, (1999) 160 Music & Copyright 12. A 2% decrease from the previous year (which was down 5% on 1996). The amount collected for copying onto CD-ROM, CD-I, DVD discs and Internet transactions was just over US\$1M, a 60% increase on such collections in the previous year.

The downward trend for total collections – also seen in other countries – was attributed to the replacement of analogue recording media with minidisc and CD-R as the favoured format for private copying.

In 1992, the income collected was 19.87: “European authors’ societies’ revenues rise by over 6%”, (1993) 23 Music & Copyright 3.

Hungary	Artijus		0.82 ¹⁶⁷	1 ¹⁶⁸		
Italy			30.0 ¹⁶⁹			
Japan	JASRAC			4.0 ¹⁷⁰		
Netherlands	BUMA/STEMRA	2.1	2.0	2.0	1.8 ¹⁷¹	
Spain	SGAE		15.1 ¹⁷²	10.8 ¹⁷³	12.1 ¹⁷⁴	10.3 ¹⁷⁵
Switzerland	SUISA	11.8 ¹⁷⁶				
United States		0.33	0.61 ¹⁷⁷			

Japan

In 1999, the Japanese collecting society JASRAC collected ¥ 821,061,143 for private copying (out of a total income of ¥98,970,906,551).¹⁷⁸

In 1998-1999, JASRAC collected US\$5.9M in private copying revenue, an increase of 48.8% on the previous year.¹⁷⁹

United States

The following amounts are reported as being collected in the United States from 1992 to 1997:

1992: US\$ 120,000

-
- A Eurocopy chart shows collection for video as 23.9M Euros in 1996 and 22.4M Euros in 1997.
- ¹⁶⁷ “Statistics”, (1998) Music & Copyright 7. The report notes that income from private copying increased overall by 8% on the previous year, but that blank tape video royalties fell by 5% to US\$465,000, attributed to a decline in blank video sales resulting from an increasing popularity of cable tv.
- ¹⁶⁸ An increase of 39% on the previous year: (2000) 169 Music & Copyright 11
- ¹⁶⁹ “Market survey: Italy”, (1998) 149 Music & Copyright 10. The report states that this was an unusually high amount, as it represented back-payment for previous years by hardware manufacturers.
- ¹⁷⁰ “Corporate report: JASRAC”, (1998) 150 Music & Copyright 12. This figure is for the financial year 1997-1998. It was 93.1% increase on the previous year. The report (at p11) attributed the increase to the increasing popularity of blank mini-disks as a home recording format, and predicted that revenues would further increase from the introduction of CD-R.
- See also “Statistics” (1998) 138 Music & Copyright 7, which cites a lower figure for private copying income in the financial year 1997-1998 of US\$3.4M (but the same percentage increase on the previous year of 93%).
- ¹⁷¹ In 1995, the income was US\$2.1M: (2000) 182 Music & Copyright 13. In 1992, the income was 2.44: “European authors’ societies’ revenues rise by over 6%”, (1993) 23 Music & Copyright 3.
- A Eurocopy chart shows collection for video as 2.6M Euros in 1996 and 2.5M Euros in 1997.
- ¹⁷² “Corporate report: SGAE”, (1998) 142 Music & Copyright 12. The total amount comprised US\$4.9M from the audio tape levy (increase of 30% from previous year) and US\$6.4M for video tape levy (25% increase from previous year), and US\$3.8M for distribution to other interested parties. SGAE attributed the 27% increase to settlement of legal proceedings against tape manufacturers, and receipt of back payments for previous years.
- ¹⁷³ (1999) 160 Music and Copyright 10; “GEMA reports a 3% increase in collections and distributions for 1998”, (1999) 160 Music & Copyright 12
- ¹⁷⁴ An increase of 21% from the previous year: (2001) 198 Music & Copyright 10
- ¹⁷⁵ (2001) 198 Music & Copyright 10. In 2000, private copying revenue collected by SGAE was \$10.3M, a 10% decrease on the previous year. The decrease was attributed to a drop in video-related royalties resulting from an ongoing dispute, and noted that “against the European trend, SGAE’s collections for blank recording media rose 17% which the society attributes to better auditing and control, as well as rising CD-R sales.”
- A Eurocopy chart shows collection from video as 5.5M Euros in 1996, 6M Euros in 1997 and 6.8M Euros in 1998.
- ¹⁷⁶ SUISA’s share was US\$3.2M.”Market survey: Switzerland (1997) 126 Music & Copyright 8 at 9.
- ¹⁷⁷ “Lewis Kurlantzick and Jacqueline E Pennino “The Audio Home Recording Act of 1992 and the Formation of Copyright Policy” (1998) 45 J. Copr. Soc’y 497 at 508 (footnote 19)
- ¹⁷⁸ <http://www.jasrac.or.jp/ejhp/statistics/annual99.htm#1>
- ¹⁷⁹ (2000) 167 Music & Copyright 7

1993: US\$ 520,000
1994: US\$ 520,000
1995: US\$ 470,000
1996: US\$ 330,000
1997: US\$ 610,000¹⁸⁰

In a statement to the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary United States House of Representatives on 2 May 2001, the Register of Copyrights said:¹⁸¹

[A] distribution of \$792,975.53 occurred on January 27, 2000. This distribution was a partial distribution of the 1995, 1996, 1997, and 1998 DART [Digital Audio Recording Technology] royalty funds less a reserve held for Copyright Arbitration Royalty Panel (CARP) costs and amounts in controversy.

...

Also, a full distribution of the Sound Recording Fund for 1999 DART royalties in the amount of \$2,242,230.81 was made on June 15, 2000.

In a Statement to the Subcommittee on Courts and Intellectual Property Committee on Judiciary United States House of Representatives on May 25, 2000, the Register of Copyrights said the following amounts had been distributed:¹⁸²

- 100% of the 1995-1997 DART Sound Recording royalties, totalling \$777,866.00, has been distributed.
- 98% of the 1998 DART Sound Recording royalties, totalling \$922,984.00, has been distributed.
- 21% of the 1995 DART Musical Works royalties, totalling \$26,297.00, has been distributed.
- 100% of the 1996 DART Musical Works royalties, totalling \$220,587.00, has been distributed.
- 43% of the 1997 DART Musical Works royalties, totalling \$92,697.00, has been distributed.
- 84% of the 1998 DART Musical Works royalties, totalling \$453,395.00, has been distributed.

e. Exemptions from payment of the levy

The 1989 Australian legislation allowed for “up-front” exemptions to certain organisations, and a refund procedure to other organisations and individuals. The royalty was not be payable where the sale was to a “prescribed organisation” (such as educational institutions, broadcasters, pre-recorded cassette manufacturers) or to “exempt bodies”.¹⁸³ An organisation could become an exempt body by applying to the collecting society, which could declare the body to be exempt if it was satisfied the body was not using or supplying blank tapes to the body’s members for copying copyright material.¹⁸⁴

¹⁸⁰ “Lewis Kurlantzick and Jacqueline E Pennino “The Audio Home Recording Act of 1992 and the Formation of Copyright Policy” (1998) 45 J. Copr. Soc’y 497 at 508 (footnote 19)

¹⁸¹ <http://lcweb.loc.gov/copyright/docs/regstat5201.html>

¹⁸² <http://www.loc.gov/copyright/docs/regstat52500-2.html>

¹⁸³ Section 135ZZR. The examples are from the Explanatory Memorandum to the Bill.

¹⁸⁴ Section 135ZZT

Individuals were not entitled to apply to become exempt bodies, but were able to apply to the collecting society for a refund by producing a receipt and a statutory declaration that the tape was not used to record copyright material. The refund was also available to prescribed organisations and exempt bodies who purchased tapes without the up-front deductions, and to organisations other than prescribed organisations and exempt bodies.¹⁸⁵

The Canadian scheme has only one exemption – for sales to an organisation representing people with a perceptual disability.¹⁸⁶ However, the private copying collecting society, CPCC, has voluntarily established a “zero-rating program” which allows certain organisations to purchase blank audio recording media free of the levy. These organisations include: religious organisations, broadcasters, law enforcement agencies, courts, tribunals and court reporters, and schools, music and advertising industry users (such as production studios) and “professional users” (such as telemarketing firms and conference organisers).¹⁸⁷

To exercise the exemption and the zero-rating scheme, organisations register with CPCC, which grants them a certificate number allowing them to purchase levy-free recording media from participating suppliers.

5.3 Distribution

Under the 1989 Australian scheme, the levies collected were to be distributed by the collecting society declared by the Attorney-General to be the single collecting society for the scheme. The scheme included a number of requirements for the society, including that all relevant copyright owners be entitled to membership, and that its rules include provisions to ensure its members’ interests were adequately protected in relation to distribution of amounts collected by it. Thus, distribution policy was to be determined by the society according to rules provided to the Attorney-General as part of the declaration process. A similar approach has been taken in Australia to the collection and distribution of money under other statutory licence schemes, such as the educational use schemes in Parts VA and VB, and the new retransmission scheme in Part VC.

Even if the levy were collected by the Government as a tax, it could be distributed by a declared collecting society. This was envisaged in the 1993 BARML proposal.

a. Classes of rightsowners eligible for payment

The 1989 Australian scheme would have entitled “eligible” owners of copyright in sound recordings, and in works embodied in sound recordings, to participate in the distribution of remuneration from the scheme. The other groups requiring consideration are performers, film directors and broadcasters.

Performers

Under the 1989 Australian scheme, performers had no direct entitlement to a share of the blank tape levies. However, in his Second Reading Speech on the Bill introducing the scheme, the then Attorney-General said:

Copyright owners who will benefit from the scheme will include composers, lyricists, authors, music publishing companies and record producers. Very importantly, the recording companies have agreed that a substantial share of the royalty will be passed on to performers under their contracts. This would

¹⁸⁵ Section 135ZZS

¹⁸⁶ Section 85

¹⁸⁷ See further www.ccp.ca

ordinarily amount to 1/3 of the royalties collected by the society. The Government would be concerned if this share were eroded and will be monitoring this aspect closely.

The Bill which introduced the blank tape scheme also introduced new rights for performers. These rights essentially require a performer's consent to the recording of a live performance, and to certain uses of unauthorised recordings. Consent for use of an authorised recording is needed only for the use of a sound recording in a soundtrack of a film, where the sound recording was not authorised for that purpose. Thus, private copying does not infringe performers' rights, unless it is of an unauthorised recording.¹⁸⁸

Since then, a new international treaty dealing with performers' rights has been adopted, although it is not yet in operation: the WIPO Performers and Phonograms Treaty (WPPT). Countries which are party to that treaty are required to grant performers an exclusive right to reproduce audio fixations of their work.¹⁸⁹ Exceptions and limitations to exclusive rights required by the treaty must meet the "three-step test". Thus, it is likely that if a party to the treaty allowed private copying of recorded performances, it would need to compensate the performers.

In December 2000, WIPO convened a Diplomatic Conference with a view to adopting a similar treaty dealing with performances fixed in audiovisual media. The proposed treaty was not adopted at the meeting, but there is still a possibility that a treaty will be adopted at a later date.

Australia is not a party to the WPPT, and has not indicated whether it would become a party to it or to the proposed new treaty for audiovisual recordings if it is eventually adopted. If it does become a party, however, it is likely it would be required to ensure payment to the rightsowners of performers' rights.

Film directors

Under Australian legislation, unlike the legislation in some other countries, film directors are not regarded as "authors" of films, except in relation to moral rights. As a result, film directors have no direct entitlement to a share of money collected under statutory licence schemes, such as those for educational copying, retransmission and government copying. The same would be the case for a private copying scheme. The Government is currently considering whether the Copyright Act should be amended to recognise the contribution of film directors. If the Act is amended, film directors may become entitled to a direct share of private copying income. If not, their only source of entitlement will be their contracts with the producers.

Broadcasters

Under the 1989 Australian scheme, broadcasters would not have received a share of the blank tape royalty, as the Copyright Act provides that broadcaster's copyright is not infringed by recording a broadcast for private use.¹⁹⁰

Broadcasters receive a share of private copying income in some, but not all, countries which currently have private copying compensation schemes.

There is no payment to broadcasters under the US or Canadian schemes (which apply only to private copying of audio recordings).

¹⁸⁸ There are in fact express exemptions for private and domestic use – making a recording of a live broadcast performance, and making copies of that recording (section 248A definition of "exempt recording"). The performers' rights provisions were intended to comply with the requirements of the Rome Convention. Similar provisions to those in the Rome Convention on performers' rights were subsequently included in the TRIPS Agreement.

¹⁸⁹ Article 7

¹⁹⁰ Section 111

Broadcasters receive a share of video royalties in Austria, Belgium, Denmark, France and the Netherlands. They have no entitlement under the German scheme.¹⁹¹

b. Proportional allocation to groups of rightowners

Algeria

Article 129 of the Algerian copyright legislation provides for distribution by the National Copyright and Related Rights Office as follows:

- 30% to the authors and composers
- 15% to the performers
- 25% to the phonogram and/or videogram producers
- 30% to “promotional activities for the creation of works of the mind and the conservation of the traditional cultural heritage”.

Austria

For video:

- 43.5% to authors
- 5.9% to performers
- 24.8% to producers and directors
- 25.8% to broadcasters¹⁹²

Belgium

The remuneration is distributed as follows:

- one-third to authors
- one-third to performers
- one-third to producers¹⁹³
- 30% of the remuneration may be used to promote the creation of new works.¹⁹⁴

Bulgaria

- one-third to authors
- one-third to performers
- one-third to producers¹⁹⁵

¹⁹¹ This was a decision of the German Supreme Federal Court – “Broadcasters not entitled to levy proceeds”, (1999) 151 Music & Copyright 15

¹⁹² Eurocopya chart

¹⁹³ Belgian copyright legislation, Article 58(1). According to a Eurocopya chart, a broadcasters’ share is included in the producers’ share.

¹⁹⁴ Article 58(2)

Prior to distribution, 20% is set aside for the National Fund for Culture.¹⁹⁶

Canada

Under the Canadian scheme, the Canadian Copyright Board determines the proportion of the levies collected to be distributed to the various groups of rights owners.

In its 1999 tariff decision, the Board apportioned the distribution of the levies collected among the groups of eligible rights owners as follows: 60.8% to authors, 21.5% to performers and 17.7% to producers.

In the tariff for 2001-2001, the Board revised the distribution proportions and directed the collecting society CPCC to distribute the amounts collected, less operating costs, as follows:

- 66% for eligible authors, to be distributed via three collecting societies representing composers and publishers (SOCAN, CMRRA and SODRAC)
- 18.9% for eligible performers, to be distributed via two collecting societies (NRCC and SOGEDAM)
- 15.1% for eligible makers, to be distributed via NRCC.

Czech Republic

- 40% for authors
- 30% for performers
- 30% for film producers.¹⁹⁷

Denmark

For video:

- 27.33% to authors
- 27.33% to performers
- 40% to producers
- 5.33% to broadcasters¹⁹⁸

Ecuador

Equal shares to authors, producers and performers.¹⁹⁹

France

Under the French Intellectual Property Code, levies on blank media for copying audio and audiovisual recordings are distributed as follows:

¹⁹⁵ Article 26(4)

¹⁹⁶ Article 26(3)

¹⁹⁷ Minutes of Meeting of Eurocopya 22 April 1999

¹⁹⁸ Eurocopya chart

¹⁹⁹ Law on Intellectual Property, Article 105

Audio copying

- 50% to authors
- 25% to performing artists
- 25% to producers

Audiovisual copying

- one-third to authors
- one-third to performing artists
- one-third to producers.²⁰⁰

Germany

The blank tape levy is initially collected by the composers' collecting society GEMA and distributed as follows:

Audio levy

- 42% to GEMA for composers
- 42% to GVL for neighbouring rights (producers and performers)
- 16% to VG Wort for literary authors

Video levy

- 21% to GEMA for composers
- 21% to GVL for neighbouring rights (producers and performers)
- 8% to VG Wort for literary authors
- 50% to five film rights organisations²⁰¹

Italy

For audio:

- 50% to authors
- 50% to producers

For video:

- one third to authors
- one third to the original producers of the audiovisual works
- one third to the producers of the videograms (who are required to pay 5% of their share to the Performers' Mutual Benefit Institute).

²⁰⁰ Article L. 3-117; Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, FRA-119, § 8[2][a][i][B]. According to a Eurocopya chart, a broadcasters' share is included in the producers' share.

²⁰¹ "Corporate report: GEMA" (1998) 136 Music & Copyright 13, at 14.

Kazakstan

- 40% for authors
- 30% for performers
- 30% for producers²⁰²

Kyrgyzstan

- 40% for authors
- 30% for performers
- 30% for producers²⁰³

Netherlands

For video:

- 33.75% to authors
- 25.5% to performers
- 33.75% to producers
- 7% to broadcasters²⁰⁴

Poland

- 50% to authors
- 24% to performers
- 25% to producers.²⁰⁵

Republic of Moldova

- 40% for authors
- 30% for performers
- 30% for producers²⁰⁶

Russian Federation

- 40% for authors
- 30% for performers
- 30% for producers²⁰⁷

²⁰² Law on Copyright and Neighbouring Rights 1996, Article 26

²⁰³ Law on Copyright and Related Rights 1997, Article 26

²⁰⁴ Eurocopya chart

²⁰⁵ Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, POL-44 to POL-45, § 8[2][d]

²⁰⁶ Law on Copyright and Neighbouring Rights 1994, Article 20

Spain

For video:

- one third to authors
- one third to performers
- one third to producers²⁰⁸

Switzerland

In 1997, SUIISA distributed the video revenues it collected for neighbouring rights owners as follows:

- 1% to audio performers
- 29% to video performers
- 1% to audio producers
- 29% to audiovisual producers
- 40% to broadcasters

25% of the total collection are paid to Swissperform, which distributes as follows:

- 45% to Swissperform for audio performers²⁰⁹
- 45% to Swissperform for audio performers
- 10% to audio broadcasters.

United States

The United States scheme also prescribes how the levies collected are to be distributed, requiring two-thirds of the money collected to be paid to the Sound Recording fund, and one-third to the Musical Works fund, and then paid in prescribed portions to the various beneficiaries under those funds. The beneficiaries of the Sound Recordings fund are:

- non-featured musicians (2.625%)
- non-featured vocalists (1.375%)
- featured artists (38.4%)
- owners of copyright in sound recordings (57.6%)

The beneficiaries of the Musical Works fund are divided 50% to music publishers and 50% to writers.

The distribution of the funds in each subfund is by voluntary agreement, or as determined by the Librarian of Congress in the absence of agreement.²¹⁰

²⁰⁷ Law on Copyright and Neighbouring Rights, Article 26

²⁰⁸ Eurocopya chart

²⁰⁹ "Market survey: Switzerland" (1997) 126 Music & Copyright 8 at 10

²¹⁰ 17 USC §1007(a)(1)

c. Basis of distribution to individual rights owners

1989 Australian scheme

The Explanatory Memorandum to the Bill which introduced the 1989 Australian scheme said:

It is envisaged that the regulations would provide that distribution of monies collected by the collecting society should be substantially restricted to relevant copyright owners or their agents who are members of the society in accordance with surveys of sales and air play, which are presumed to be a guide to the extent to which materials are copied.²¹¹

Under the 1993 BARML scheme it was proposed that there would be surveys to estimate the percentage of copying from radio, the percentage from purchased recordings and the percentage from other sources. This information would then be used, in conjunction with information already collected by the Australian Record Industry Association (ARIA), the Phonographic Performance Company of Australia (PPCA), the Australasian Mechanical Copyright Owners' Society (AMCOS) and the Australasian Performing Right Association (APRA) about airplay and record sales, to determine the recipients under the scheme.

United States

Distribution under the US scheme is based upon record sales during the year for which the royalties were paid.²¹² There is provision for arbitration if there is no agreement about how the money should be distributed amongst the rightsowners in a recording (eg between the record company, music publisher/composer, performing artist).

d. Foreign rights owners

One of the most contentious issues relating to private copying schemes is whether the money collected is distributed only to rightsholders from countries which also have a private copying scheme (reciprocity) or to all rightsholders whose material is copied under the private copying exemption (national treatment).²¹³

1989 Australian scheme

Under the 1989 Australian scheme, foreign rights owners were entitled to payment only if their country was listed as an "eligible foreign country" in the Regulations, which could occur only if there was a blank tape royalty scheme operating in that country under which adequate payments were made to Australian rights owners. The scheme thus operated on the basis of reciprocity rather than national treatment. The Government was criticised by some for this approach.²¹⁴ In his Second Reading Speech on the Bill introducing the scheme, the then Attorney-General said:

One aspect of the scheme the Government has examined very closely is how to treat foreign-owned copyright material. The Government has been concerned to prevent outflow of funds from Australia to foreign countries which do not reciprocate with similar benefits to Australian copyright owners. For

²¹¹ para 199

²¹² Record Industry Association of America website www.riaa.com

²¹³ The rightsholder must also be from a country which is a party to a copyright treaty, but most countries are party to one or more treaty.

A Eurocopya chart shows that moneys collected for video in Europe are distributed on a national treatment basis by Austria (50% to US), Germany and Netherlands (30% to US). Belgium, France and Sweden distribute to the EU, Spain distributes to EU and US, and Denmark distributes to EU, BU and US (50% to US).

²¹⁴ See, for example, James Lahore, "Pointing the Berne: 2 The Blank Tape Royalty Scheme", (1989) 7(1) Copyright Reporter 15

this reason, the royalty will be collected for the benefit only of “relevant” copyright owners, that is owners of Australian audio copyright materials and owner of audio copyright materials in countries which have similar schemes which provide comparable benefits to Australian owners. This will ensure that Australia adheres to the spirit of the international copyright conventions without providing a windfall to foreign owners in countries which have not addressed the problem of home-taping.

Under the 1993 BARML scheme, the levy would also have been distributed on the basis of reciprocity rather than national treatment.²¹⁵

Canada

Under the Canadian legislation, moneys collected a payable to all foreign authors of works protected by copyright in Canada, but only to “eligible” foreign makers of sound recordings and “eligible” foreign performers – that is, those from countries declared by the Minister to have a similar scheme benefiting Canadians.²¹⁶

France

The French copyright law was amended in 1995, so that distribution is to foreign rights owners of the “authors’ share” is distributed according to the meaning of “author” in French law. The issue arose because the copyright law in some countries (including the US and the UK) defines “author” to include legal entities as well as individuals. The tax on blank audio and video tapes is initially collected by SDRM, which comprises three collecting societies : SACEM (composers and publishers), SACD (Society for Drama Authors and Composers) and SCAM. SACEM was distributing was distributing the authors’ share of the audiovisual blank tape remuneration to US film producers. The amendment meant that that the authors’ share for foreign rights owners would in the future be distributed by SACD to the “authors” according to French law, which include film directors.²¹⁷

Germany

Distribution of remuneration of private copying royalties between German and foreign rightsowners is now divided as follows:

- 39.6% for foreign films (previously 44%);
- 32.4% for German and European films released in German cinemas (previously 28%, and for German films only); and
- 28% for German series.²¹⁸

Distribution to Australian rights owners from foreign private copying schemes

Australian rightsowners currently receive some payments from private copying schemes in other countries. The introduction of an Australian scheme would mean that Australian rights owners would benefit from schemes in countries which distribute on basis of reciprocity.

²¹⁵ As noted above, the money collected for non-eligible foreign recordings and works was to be used for collective purposes.

²¹⁶ Sections 84, 79 and 85

²¹⁷ Elisabeth Logeais, “Introduction of new copyright law governing photocopying and payment of royalties to ‘authors’ of audiovisual works”, [1995] 5 ENT.LR E-30

²¹⁸ Minutes of meeting of Eurocopya 22 April 1999. The division was previously 44% to foreign films, 32.4% for German films released in German cinemas, and 28% for German series.

Implications of source of funding for distribution

If the remuneration scheme is funded by an allocation from Consolidated Revenue, there is likely to be greater resistance by the Government to distributing to foreign rights owners than if the scheme is funded by a special tax or a royalty.

Payments under the PLR and ELR schemes are only to Australian authors²¹⁹ and to publishers. This is also the case with similar schemes in other countries (except Germany, which grants a public lending rights as a copyright right, and distributes to foreign rights holders).²²⁰

However, the PLR and ELR schemes do not include an exemption to an exclusive copyright right, and thus do not require consideration of international treaty obligations in relation to national treatment and the three-step test for exceptions and limitations to exclusive rights.

e. Cultural fund deduction

Some countries set aside a share of the money collected from private copying levies for “cultural” or social purposes. The amount retained ranges from 4% to more than half (51% in Austria):

Algeria	30%
Austria	51%
Belgium	30%
Bulgaria	20%
Denmark	28%
France	25%
Germany	4%
Netherlands	15%
Spain	20%
Iceland	15%
Italy	5%
Switzerland	10% ²²¹

There is no such fund in the US or Canada.

Deductions for cultural funding is a controversial aspect of private copying schemes, as it reduces the amounts directly payable to rights owners, and foreign rights owners are unlikely to receive any benefit from the expenditure of the cultural fund. Deductions by the European collecting societies have been criticised by the US and UK collecting societies.

Cultural deductions are also made from other collecting society funds such as those for performing rights, usually at a lower percentage but nevertheless controversial.²²²

Germany

In 1998, the German authors society GEMA (which collects for performing rights as well as private copying) made deductions of US\$5.1M for social welfare and US\$12M for cultural activities.²²³

²¹⁹ There are no PLR distributions to the estates of dead authors.

²²⁰ Paul Edward Geller and Melville B Nimmer, *International Copyright Law and Practice*, GER -74; GER- 106

²²¹ Minutes of Meeting of Eurocopya 22 April 1999

²²² This issue is discussed in Shane Simpson, *Review of Australian Copyright Collecting Societies*, Commonwealth of Australia, 1994

France

In 1999, the French authors' society SACEM distributed US\$29.5M for social funds, US\$2.3M for cultural funds, and US\$5.4M on cultural sponsorship.²²⁴

1989 Australian scheme

The Regulations relating to the collecting society for the 1989 scheme included a requirement that

the total amount of any gifts for cultural or benevolent purposes made by the collecting society in respect of an accounting period must not exceed such percentage of the total amount of equitable remuneration received by the society for that accounting period as is specified in the rules.²²⁵

The Society's rules could thus nominate a percentage of income useable for "cultural purposes", provided the rules also ensured that the interests members of the collecting society who are relevant copyright owners are adequately met.²²⁶

At the time the scheme was announced, representatives of relevant copyright owners announced that 15% of the royalty collected would be given to the Australian Contemporary Music Development Corporation (later known as Ausmusic). This was to be a voluntary allocation by copyright owners through the collecting society; it was not required by the legislation.

1993 BARML proposal

Money collected for non-eligible foreign rights owners was to be used for purposes aimed at benefiting performers and composers in particular, and the record industry more generally. There was a possibility of a payments to Ausmusic.²²⁷

1994 Review of Australian Collecting Societies

The 1994 Review of Australian Collecting Societies recommended that "Declared Societies be required to allocate a specific proportion of gross distributions and undistributable funds, to cultural purposes".

It also recommended that the distribution of funds to foreign rights owners be reviewed.

These recommendations were opposed by most of the collecting societies.²²⁸

²²³ (1999) 160 Music & Copyright 12

²²⁴ "French authors' society SACEM forecasts 1% rise in revenues for 2000 to \$542M", (2001) 197 Music & Copyright 12

²²⁵ Regulation 23P(1)(d). There is a similar requirement for the rules of a collecting society declared for the new statutory licence for retransmission of broadcasts – see Regulation 23L(1)(d)

²²⁶ Section 135ZZT(3)(d)

²²⁷ Letter to ARIA from Attorney-General's Department, 13 October 1993

²²⁸ See also Susan Bridge, "Cultural Funding by Collection Societies", (1997) 14 Copy Repr 156