I. INTRODUCTORY REMARKS

The problem. - Technologies of digitization and networking open up new possibilities of creating, using, transforming and distributing copyrighted material. Similarly, the possibilities of using someone else’s copyrighted material, and the quality of such use have dramatically increased. At the same time both the ease and the cost for copying someone else’s copyrighted material for one’s own private use have dramatically lowered, especially if compared to the time, money and effort required even under more advanced analogue reproduction technologies.

These changes are not without effect on the current way in which copyright material is distributed and used. However, the effects due to changed distribution, copy and use patterns, are somewhat ambiguous. Due to the rapid development of technology, especially in view of the development of both more powerful hard- and software and of more efficient protection mechanisms, it can hardly be forseen what the future holds. Hence the new developments are met with different attitudes, depending on who is reacting to them.

For example:

• Rightholders tend to fear the loss of control more than they value the benefits of less costly reproduction and distribution of their own products in digital form as compared to reproduction and distribution in analog form. Moreover, due to both the general trend towards product diversification and the convergence of services, rightholders generally want to reserve the marketing of their protected material in digital form to themselves. Since a broad private copying permission might imperil such desire, rightholders in general tend to argue in favour of a strong exclusive right and/or for narrowing down private copyright exceptions as they have been crafted in view of analog reproduction technology, if they don’t plead for abolishing them altogether.

• End-users, on the other hand, tend to argue that they should be allowed to benefit from a private use exception as broad as they used to in the analog world. Any curtailing is seen as
cutting end-users off from the benefits of the new technologies.

- Moreover, the position of new independent third parties comes into play, which indirectly benefit from the private use exception. These third parties are those who provide services of making copies for, or distributing copies to the end-user. In the analog world, such independent parties are mainly those who operate copyshops. In the digital world they comprise, e.g., libraries sending out digital copies and enterprises who offer their help in creating private digital archives to those who benefit from a private copying exception.

It is of importance to note that these problems are not unregulated by law. Quite to the contrary, at the international level, Art. 13 TRIPS has set an international framework regarding the minimum protection to be granted to authors. Against this so-called „three-step-test”, which has been taken from Art. 9 (2) Berne Convention, any national legislation has to be measured. However, this test is broad enough as to allow for quite diverging national legal solutions. Indeed, national legislation has found quite different answers to the problem just described. Furthermore, within Europe, even as regards analog copying, no consensus has so far been reached regarding the question whether or not a levy should mandatorily be introduced at the European level. The consensus arrived at at present is that the EU-Directive on copyright in the information society leaves it open to Member States to introduce or maintain a levy system, but does not oblige them to do so.

The situation is even more disharmonized regarding private copying of copyrighted material in digital form. In some states, legislation which was initially designed for analog copying applies to private copying of digital material as well. In others, special rules have been adopted for certain activities of digital private copying. It is difficult to compare all these rules, since they are rather dispersed. Moreover, little is generally known as to how old and/or new rules on private copying work in practice.

The subject at issue is particularly complex for several reasons:

- First, at present the exploitation of copyrighted material takes place in parallel both in analog and in digital form, and it is likely to continue taking place in both forms for some time to come. However, the effects of one and the same rule are different if they are applied to private copying in analog or in digital form.

- Second, due to the digital form of storage, one single carrier medium can store all sorts of copyrighted materials which in the analog world used to be stored on different carrier media (such as text on paper, sound on magnetic tape and image material on video cassettes). Likewise, the machine used to reproduce text, sound and image in digital form is the same (the computer), whereas different machines have to be used for reproduction in the analog world (the copymachine on the one hand, and tape recorders and VCR’s on the other). From this it follows that any legal rule which takes either the machine which is used for making the private copy, or the medium on which the private copy is stored or recorded, as its starting point, can no longer draw distinctions by reference to the recording and storage technology, as distinct from the type of copyright material.
Third, it is far from easy to apply existing rules which were designed in order to solve the problem of private copying in analog form to private copying in the digital environment:

- The main reason is that the legislature, when drafting the rules on analog private copying could not foresee the effects which digital copying will have on the distribution and use of original copies distributed by the rightholder himself (both in analog and in digital form). Hence, the legislature has struck in the past a balance of conflicting interests in view of analog reproduction technologies. However, due to the ease, low cost, speed and high quality of digital copies, these interests are no longer the same in a digital context.

- Moreover, the private use exception in the analog world is at least in part based on market failure (i.e. private transaction cannot be made, or would require unreasonably high transaction cost). At least to some extent, this market failure no longer exists in a digital and networked environment, or could at much lower cost be overcome. Hence, a literal application of existing private copying rules tends to be overbroad in scope.

- At the same time, if judges have to apply existing rules to the new circumstances they may find it difficult, since the criteria necessary in order to narrow down the scope of existing rules on private copying have not been prescribed.

Fourth, so far, there seems to exist little, if any knowledge on the actual scope of the effects of digital private copying on the exploitation of original material by the rightholders themselves. Hence any prognostication of the effect of digital copies made under a private use exception on the market for copies distributed by the rightholder him- or herself - be they in analog, be they in digital form - is rather a guess based on the overall feeling about digital copying. On the one hand, it is often claimed that any single private copy reduces the number of those who buy from the rightholder by one, if it is not feared that each digital private copy satisfies a far greater demand due to the speed and ease of copying and distributing it further. On the other hand, it is claimed that not all digital private copies open up new use possibilities, that rightholders could ultimately benefit from widespread private digital copying, provided they added value o their own products, and that it there is no need to limit the scope for permitted private copying since rightholders can to an increasing degree protect acces to, and copying of, their copyrighted material by technological mechanisms.

Fifth, the development of technology is hardly foreseeable. This is particularly true regarding the availability, implementation and effectiveness of technological access and copying mechanisms. Likewise, it seems uncertain to what extent, and at what point in time, existing market failure will be overcome by systems which allow for micropayment or some other form of remuneration (such as, e.g., consortia licensing, collective licensing; subscription based payment models) which would be acceptable to users and rightholders/authors alike.

The mandate. - ALAI’s Executive Committee has therefore considered it useful if ALAI could establish a study on current legislation on private copying. This would help ALAI to take the forefront in shaping the legal framework for our digital and networked future. At the same time, it could place ALAI in a position to advise legislators in the phase of implementing the EU-directive or of designing
new legislation aimed at providing a fair and adequate solution to the intricate issues raised by private copying in a digital and networked environment.

To this effect, a small study Group has formed itself within the Executive Committe (Dreier, Ginsburg, Laundry, Sirinelli, Spoor). Thomas Dreier has been entrusted with the task of preparing this initial outline of the study.

The present outline. - In view of the complexity of the subject matter and the necessary comparative legal information required, the following presentation can only be a first outline of the study which has yet to be completed. In view of this, the following text mainly aims at structuring the problem and defining a set of criteria which will have to be taken into account in making a proposal for a fair and adequate private copying exception to the exclusive reproduction right in a digital and networked context.

The criteria listed, and further elaborated upon below are the following:

- A general description of the legal treatment of private copying; in particular, is the regulation of private copying based on an exclusive right, a right to remuneration (statutory or nonvoluntary licence), or on a total exception from copyright?

- Which use acts are covered by legislation on private copying? Are there any use acts which are expressly excluded from the privilege of private copying?

- Does national legislation provide for special treatment of a particular class, or particular classes of works?

- Which devices are covered by legislation on private copying? Are there any devices excluded by legislation on private copying?

- Which activities give rise to a levy?

- Who has to pay the remuneration?

- How is the remuneration/levy being fixed?

- Who is entitled to, and who collects the remuneration? and, finally

- how is the remuneration collected being distributed?

Also, it might enhance the practical value of the study, if it listed and cited relevant national court cases and supranational decisions, such as decisions handed down by the European Court of Justice and WTO-panels.
As an example, the information to be provided regarding other national legal systems as well, is given for the national legal situation of Germany.

**Further work.** - It is proposed by this outline to proceed as follows: as a first step, the respective national legislative solutions should be ascertained and described in terms of the criteria set out in this outline. In a second step, the information thus received should be presented in comparative terms. Finally, as a third step a model solution should be drafted.

Of course, other ways of structuring the work are also possible and should be discussed at the meeting of ALAI’s Executive Committee in Paris on January 19, 2002.

**Organisation of future work.** Provided the proposed work plan will be accepted, the work to be done could then be organised as follows:

- the presidents of each national group should be asked to provide the information on their respective national legal system regarding private copying;
- on the basis of the information received, the members of the study group could then draft the comparative part of the study, and
- finally, the study group should draft an „ideal” formulation, i.e.an adequate and fair legal solution to private copying in a digital and networked environment.

**II. STRUCTURE OF LEGISLATIVE SOLUTIONS**

This section of the outline elaborates somewhat further on the criteria set out in the introduction. In the final Report, this part would contain a full description of the different types of solutions, and conclude with a comparative analysis thereof.

**II.1 Legal treatment of private copying (overview); in particular, is the basis of the system an exclusive right, a right to remuneration (statutory or nonvoluntary licence), or a total exemption from copyright?**

It seems advisable that for each national system there should be a brief description of the legislative system in force for private copying, both analog and digital. Such a brief description would make it easier for the drafting group to compare the systems.
The legal regime of private copying may vary as to its conceptual foundations. In some countries the exclusive right is maintained and its exercise entrusted with collecting parties; in others, the same activities are not subject to an exclusive right, but the exclusive right has been replaced by a claim for remuneration, whereas in yet other countries private copying might be copyright free altogether.

There exists, of course, a conceptual problem since it might be questioned to what extent activities which are covered by an exclusive right which is exercised by a collecting society or even by the individual rightholder, would be within the scope of this study on private copying regimes. However, inclusion seems to be advisable, provided the activity covered is by its nature one of private copying as opposed to copying for non-private and, especially, commercial purposes. Of course, this definition of activities is somewhat self-referential, since what private copying exactly is can only be found out after having analysed how it is treated under national law. But it is believed that in the end, these difficulties are not much of a practical problem. If national law does not provide for special legislative treatment of some acts which are covered by the definition of „private copying” as proposed here, then that should be explicitly stated, since otherwise a comparison of the different legal solutions would remain incomplete. This is all the more true when it comes to the description of the legal rules regarding digital copying.

II.2 Use Acts covered by legislation on private copying
(including use acts excluded from the privilege of private copying)

Some countries describe use acts rather narrowly, whereas others describe them rather broadly by privileging not only private use acts in the narrow sense, but likewise so-called „other personal uses” made of copyrighted works. Any case law which interprets which acts are covered by legislation on private copying should be cited and briefly described.

II. 3 Special treatment of a particular class, or particular classes of works

Another question is, whether in its regulation of private copying, national legislation forsees special treatment of a particular class, or particular classes, of protected works (e.g., in Germany, private copying of whole books, of sheet music and of database works is only allowed under narrower circumstances than private copying of other copyrighted works, if it is not excluded right away).

II.4 Devices covered by legislation on private copying
(including devices excluded by legislation on private copying)

One of the core questions is to know which devices are covered by legislation on private copying. This is of prime importance in countries which impose a levy on devices; it is, of course of less importance in countries which do not provide for a levy on devices. Yet, such countries might have a different legal treatment of private copying depending on what kind of device is used in making a reproduction.
Here, a first distinction is whether national legislation covers only recording devices or whether it covers recording media (such as, e.g., blank tapes and cassettes) as well. Furthermore, it is of paramount interest to know whether or not national legislation distinguishes between analog and digital recording devices. Likewise, the precise legislative definition of the devices covered would be of great importance. Is the definition general, or is it device specific? Are digital recording devices expressly mentioned in the law, or has their coverage been ascertained by case law? If so, to what extent and under what conditions? Current legislative proposals should be reported.

It would be most helpful if any national report could have the respective national statutory provisions annexed (in English as well as in their original language), as well as a table of cases (see the example for the German situation in the Annex to this outline).

II.5 Activities subject to a levy for private copying

Here, the focus is not on which use acts are deemed private copying, but which activities regarding the manufacture, importation and sale of reproduction devices and recording media give rise to a levy. Also, respondents should refer to activities which do not give rise to remuneration, when a similar activity does give rise to remuneration in comparable circumstances (e.g., under current German law, the owners of copy shops have to pay a remuneration for their copying activities, whereas private industry does not).

II.6 Who has to pay the remuneration?

Closely related to II.6 is the question of who has to pay the remuneration. This includes information on the economic business models, e.g., whether or not in practice the remuneration is passed on to the end-user.

II.7 Who is entitled to remuneration and who collects it?

Under some national laws, remuneration can only be claimed by a limited number of persons or organisations, such as collecting societies. It will be of interest to know who these persons or organisations are, whom they represent, what other rights such organisations have (e.g. information rights), and what the legal position of the individual rightholder is, if a representative organisation is solely entitled to claim the remuneration from those who owe it.

II.8 How is the amount of the remuneration/levy fixed?

Any remuneration or levy due for acts of private copying may be freely negotiated, set by collecting societies as a tariff, or be fixed by law. It would be helpful, if some information could be obtained regarding the criteria according to which such payment is being fixed in practice, in particular, how it
relates to the marketing of primary analog and digital products, and whether a distinction is made between analog and private digital copying when it comes to setting or determining the remuneration/levy due for private copying.

II.9 How is the remuneration collected distributed?

Here, it would be most interesting to know according to what schemes the levies collected are distributed, and, in particular, what is the level of generalisation when the levies collected are being distributed. Already as far as levies collected for private copying in analog form are concerned, the degree of generalisation tends to vary considerably depending on both the feasibility and the cost-benefit relationship of individual accounting (e.g., the distribution of levies for private reprography can most likely only be rather general, since little, if nothing is known about who has copied which articles, whereas levies for hometaping might to some degree be based on actual viewer figures of particular tv-programs). The crucial question is how close may distribution mirror the actual use of each individual work. How close should it do so? After all, a distribution which exactly mirrors the actual use made abolishes the system of - partial - mutual support on which some of the continental European collecting societies are based. Also, the practice of setting aside part of the amount collected may be in jeopardy. Another issue in this regard is to find out to what extent technology can help in shifting the distribution from lump-sum payments to one based on individual use activities. Finally, such a shift has to be considered in terms of a cost-benefit relationship.

III. TOWARDS A PROPOSED SOLUTION

Finding a proposed solution

- first, requires a comparison of existing legal national solutions;
- second, has to take into consideration what the practical experience has been with the different solutions in different countries so far;
- third, has to take into account the framework set for possible exceptions from the exclusive reproduction as set by, e.g., the EU-Directive 2001/29/EC and Art. 13 TRIPS (the so-called three-step-test).

However, even before having completed a thorough comparative analysis, the following already seems to be accepted:

- any future solution cannot merely transcribe existing solutions which have been designed in view of only analog reproduction techniques. Rather, the effect on digital and networking technology on the production, use and distribution of copyrighted material - both analog and
digital - has to be taken into consideration;

• this includes taking into account the effects which technical access control mechanisms, copy protection devices and technical features which enable rightholders to account for individual use transactions might have on the production, use and distribution of copyrighted material in digital form;

• a fundamental question to be raised is whether or not end-users have, or should have, a „right” to make private copies. If the exception of private copying is only regarded as a reaction to market failure, then the basis for having a private copying exception erodes to the extent that technical measures are able to correct and eliminate this market failure. Even if, in addition, the reason for the private copying exception also lies in concerns about protecting the end-users’ privacy, the basis for a private copying exception might still erode to the extent that data protection technology allows rightholders to monitor what copyrighted material has been used without discovering by whom it has been used;

• another important issue is the question, on the assumption that a levy is introduced, of which devices should be subject to a levy, and how high the levy should be. The answer to the latter question depends on the legal justification of the levy. The levy may be seen as a compensation to authors for lost sales on the primary market, or it may be seen as a compensation for secondary market uses. It has also to be considered that in some instances private copying may increase - and not diminish - the demand for primary copyrighted material. Also, it will have to be considered that the higher the levy, the smaller the price gap will be between a copy made under a private copy exception and an original copy of the same copyrighted material. Moreover, convergence of technologies and compression techniques may make it unsatisfactory to base the calculation of a levy on criteria such as „recording time”, which could provide a good measure in the analog world. Furthermore, if, as suggested below, a totally different approach would be retained (e.g., charging for communication instead of charging for reproduction), then the levy might have to be measured according to other criteria (such as, e.g., communication time or the amount of data transmitted)

• moreover, the study should examine to what extent traditional collective administration of rights might be replaced by other forms of collective licensing in view of digital monitoring and rights management techniques;

• if the study will likewise take into consideration the international dimension of private copying and of transborder distribution of the remuneration collected, then the additional issues will have to be discussed whether there is an obligation to introduce a remuneration system as regards private copying, and whether national treatment applies in this regard.

If this approach will be followed, the study should include

• an in-depth analysis of existing technology which provides for access and copy control, as a
result of which rightholders may directly charge the end-user;

- an analysis of current business models available to rightholders in marketing their initial products in both analog and digital form;

- an inquiry whether, in terms of an economically sound innovation and information dissemination policy, a remuneration scheme would be preferable to a price discrimination system based on an exclusive right. This may be the most difficult part. It implies some evidence regarding the effects of a price discrimination system on both the production activity and purchase price of copyrighted material to the end-consumer, which in turn depends on the degree of substitutability of the works in question. This question somehow mirrors the question of the best business models for rightholders to adopt for marketing copyrighted subject matter, since a levy scheme tends to charge a lump sum rather than individual use and thus resembles more a sales price or subscription model than a pay-per-view scheme. Of course, technology might be used to alter this traditional pattern (e.g., a levy could be imposed on a storage medium which can only be used for one copy or for one consumption of the copyrighted material stored). This, of course leads to the question of consumer acceptance of such technological measures. In this respect, it will also have to be considered that technology-specific legislation risks being out-dated before long;

- also, looking into the future might require the drafting of alternative solutions, such as charging not for reproduction, but for communication of copyrighted material.

Of course, such way of proceeding would considerably enlarge the scope of the final study to be undertaken. A less ambitious goal might be decided by the Executive Committee at its meeting in Paris in January 2002.

Karlsruhe, 12. Januar 2002  Thomas Dreier
THE LEGAL SITUATION REGARDING PRIVATE COPYING IN GERMANY

1. A general description of the legal treatment of private copying; is the regulation of private copying based on an exclusive right, a right to remuneration (statutory or nonvoluntary licence), or on a total exemption from copyright?

§§ 53 et seq. of the German Copyright Act provide for a private copying system which is based on a legal license. Acts of reproduction for private and other purposes are exempt from the exclusive right, and as a counterpart, there is a levy imposed on reproduction machines, recording media and to a certain extent on those who operate copy machines.

A detailed description of the German system, its development and future perspectives can be found in a Report of the German Government of 11.7.2000, entitled „Zweiter Bericht der Bundesregierung über die Entwicklung der urheberrechtlichen Vergütung gemäß §§ 54 ff. Urheberrechtsgesetz (2. Vergütungsbericht), BT-Drucks. 14/3972 (available online in the DATIS-Database of the Institute for Informations Law at the University of Karlsruhe at http://www.iurdat.de; use „Titelsuche“ and type in: Vergütungsbericht). Contrary to demands by some interested parties, the report does not support a total exclusion of the private copying exception with regard to digital copying. The reason given is that a total prohibition of private copying would be difficult to enforce. Rather, the report favors a „rather limited“ possibility to make private copies to be compensated by an adequate remuneration (op. cit., p.26).

2. Which use acts are covered by legislation on private copying? Are there any use acts which are expressly excluded by legislation on private copying?

§ 53 of the German Copyright Act privileges the following use acts:

- the making of single copies of a work for private use. A person entitled to make such copies may also cause such copies to be made by another person; however, this applies to the transfer of works to video or audio recording media and to the reproduction of works of fine art only if no payment is received therefor;

- in addition, single copies of a work may be made or caused to be made (1) for personal scientific use, if and to the extent that such reproduction is necessary for the purpose; (2) to be included in personal files, if and to the extent that reproduction for this purpose is necessary and if a personal copy of the work is used as the model for reproduction; (3) for personal information concerning current events, in the case of a broadcast work; and (4) for other personal uses, in the case of small parts of published works or individual contributions that have been published in newspapers or periodicals, and in the case of a work that has been out of print for at least two years. Finally, it no permission by the rightholder is needed for copies
of small parts of a printed work or of individual contributions published in newspapers or periodicals for personal use in teaching, in non-commercial institutions of education and further education or in institutions of vocational education in a quantity required for one school class, or for State examinations and examinations in schools, universities, non-commercial institutions of education and further education and in vocational education in the required quantity, if and to the extent that such reproduction is necessary for this purpose.

It should be noted that according to § 53 (6) of the German Copyright Act, copies may neither be disseminated nor used for public communication. It is permissible, however, to lend out lawfully made copies of newspapers and works that are out of print or such copies in which small damaged or lost parts have been replaced with reproduced copies.

Recently, the German Federal Supreme Court (Bundesgerichtshof, BGH) had in several cases to deal with the question to what extent third parties could benefit from the privilege of a person to whom they offered services which would help these persons in making or obtaining copies which these persons would then use for private or other personal uses. In general, the German BGH has taken care that the private copying exception is not too broadly interpreted. Thus, the privilege of archiving (§ 53 (2) No. 2 of the German Copyright Act) cannot be invoked if the copy archived is to be made accessible to third parties. Furthermore, while it is legal to make copies commissioned by someone who is privileged unter § 53 of the German Copyright Act, it is beyond the scope of the copyright exception of § 53 (2) No. 4a of the German Copyright Act to offer a research service in addition to the making of the copies of the articles which have been researched (BGH, GRUR 1997, 459 - CB-Infobank I; see also BGH, GRUR 1997, 464 - CB-Infobank II). Similarly, an electronic press archive, which a firm creates in order to make it accessible to its employees has been held to be beyond the limits of the archiving privilege of § 53 (2) No. 2 of the German Copyright Act, because auf the heightened use possibilities it opens up compared to analog archives (BGH, GRUR 1999, 324 - Elektronische Pressedienste). However, the BGH has also held that the privilege to have copies made does not confine the one who makes the reproductions for the person privileged to the mere act of copying. Rather, in the case to decided, a library which sends copies of analog material upon request to private users was allowed to facilitate access by an automated catalogue system (BGH, GRUR 1999, 704 - Kopienversanddienst; but he court said this would give rise to a remuneration, although such remuneration is not explicitly foresee in the statutory text).

3. Does national legislation provide for special treatment of a particular class, or particular classes of works?

There are certain exceptions from the privilege to make private reproductions:

- According to § 53 (7) of the German Copyright Act, the recording of public lectures, representations or performances of works on video or audio recording mediums, the realization of plans and sketches for works of fine art, and the reproduction of works of architecture is only be permissible with the consent of the copyright owner.
• According to § 53 (4) of the German Copyright Act, reproduction of graphic recordings of musical works and of essentially complete copies of a book or a periodical are only allowed if carried out by manual copying; or for inclusion in a personal archive, if and to the extent that reproduction for this purpose is necessary and if a personal copy of the work is used as the model for reproduction; or for personal use in the case of a work that has been out of print for at least two years.

• According to § 53 (5) of the German Copyright Act, with the exception of copying for personal scientific use (under the general condition and only to the extent to which such reproduction is necessary for the purpose, as well as under the special, additional condition that the scientific use is not made for commercial purposes) copying of an electronic database for private and other personal uses is not permitted.

• Moreover, § 53 (2) lit. 2 - 4 of the German Copyright Act limits the freedom of reproductions for so-called other personal use, i.e. personal use which is not private use in the strict sense, to certain classes of works or partes of whole works, namely
  - to works broadcast in the case of copying for personal information concerning current events;
  - to individual contributions that have been published in newspapers or periodicals, and
to small parts of published works, unless a work has been out of print for at least two years.

Furthermore, §§ 69d and e, 87 c and e of the German Copyright Act restrict private copying with regard to computer programs and the sui-generis right for databases.

4. Which devices are covered by legislation on private copying? Are there any devices excluded by legislation on private copying?

As far as private copying of audiovisual and sound is concerned, there is a levy on recording devices and on video or audio recording mediums „that are obviously intended for the making of such reproductions“ (§ 54 (1) (a) and (b) of the German Copyright Act). As far as private reprography is concerned, the levy is on machines „intended for the making of such reproductions;“ (§ 54a (1) of the German Copyright Act). Digital reproduction devices and recording media are not expressly mentioned in the German Copyright Act, but it is generally assumed that the present definition covers digital copying machines and digital storage media as well (Zweiter Bericht der Bundesregierung über die Entwicklung der urheberrechtlichen Vergütung gemäß §§ 54 ff. Urheberrechtsgesetz, of 11 July 2000, BT-Drucks. 14/3972, pp. 26 et seq., 29).

The definitions just mentioned cover traditional analog copy machines, video and tape recorders, as well as blank cassettes and tapes. In addition, the Federal Supreme Court has decided that readerprinters (BGH, GRUR 1993, 553 - Readerprinter), telecopiers (BGH, GRUR 1999, 928 - Telefaxgeräte) and scanners (BGH, I ZR 335/98, not yet published) are likewise covered.
In practice, a levy is collected on recordable CD-ROMs. In addition, there is a legal dispute going on regarding the amount of the levy due on CD-burners.

Furthermore, the report by the German government on private copying has stated that already now digital storage media, such as DAT, DCC, Minidisc, Audio-CD-R and Audio-CD-RW and most likely also recordable DVDs are already covered by the law in its current form. The report is likewise of the opinion, that MP3-recorders and that hard discs of personal computers should be subject to a levy (Zweiter Bericht der Bundesregierung über die Entwicklung der urheberrechtlichen Vergütung gemäß §§ 54 ff. Urheberrechtsgesetz, of 11 July 2000, BT-Drucks. 14/3972, p. 26). However, as regards the levy on harddiscs of personal computers, no agreement has been reached yet between the collecting societies on the one hand, and the association of hardware producers on the other. The collecting society VG Wort has initiated legal proceedings; in parallel, negotiations chaired by the Federal Ministry of Justice are currently under way.

5. **Which activities are subject to a levy for private copying?**

According to §§ 54 (1) and 54 a (1) of the German Copyright Act, there is a levy on manufacturing/importing of, or dealing in, reproduction machines for both reprography and home taping. In addition, as far as home taping is concerned, there is a levy on recording devices. As far as reprography is concerned, amongst those who operate copy machines, educational institutions (such as schools, universities, vocational training institutions and other educational and further education institutions), research institutions, public libraries and copyshops which charge for copying have to pay a levy in their capacity as an operator of copy machines. It has been suggested that private industry, which so far is exempt from payment, should likewise be subject to an operator’s levy (Zweiter Bericht der Bundesregierung über die Entwicklung der urheberrechtlichen Vergütung gemäß §§ 54 ff. Urheberrechtsgesetz, of 11 July 2000, BT-Drucks. 14/3972, p. 29).

6. **Who has to pay the remuneration?**

The levy due on recording devices and on recording media has to be paid by the manufacturer, but there is joint liability of the importer and any dealer (§§ 54 (1) and 54 (1) of the German Copyright Act). However, according to § 54 b of the German Copyright Act, the dealer is exonerated from his or her payment obligation (1) where a person required to pay the remuneration, from whom the dealer obtains the appliances or the video or audio recording mediums, is bound by an inclusive contract concerning the remuneration; or (2) if the dealer notifies the collecting society in writing of the nature and quantity of the appliances and video or audio recording mediums received and of his source of supply by January 10 and July 10 for each preceding half calendar year. Operators are liable for paying the operators’ levy.

7. **Who is entitled to, and who collects the remuneration?**
As a matter of principle, individual authors are entitled to the levy. However, for practical reasons, under German Copyright Law, only collecting societies may claim the levy due for private copying (§ 54 h (1) of the German Copyright Act). On the other hand, since there is more than one collecting society which shares in the total amount of the levies collected, collecting societies are obliged to form one joint receiving office for each of the levies according to §§ 54 (1) and § 54a (1) of the German Copyright Act.

In order to facilitate the payment process and to enhance the possibilities for control payment obligations, collecting societies are intitled to certain information to be provided by anyone who owes the remuneration (§ 54 g of the German Copyright Act). Moreover, manufacturers, importers and dealers are subject to certain obligations to report the nature and quantity of items imported, and to refer to the copyright remuneration in their invoices (§ 54 e of the German Copyright Act).

At the procedural level, § 13 b of the German Act of Dealings in Copyright contains a presumption that a collecting society is entitled to exercise all remuneration rights under §§ 54 (1) and (2) of the German Copyright Act (where more than one collecting society is entitled to assert the claim, the presumption shall only apply where the claim is asserted jointly by all entitled collecting societies).

8. How is the remuneration to be paid being fixed?

According to §§ 54 (1), 54a (1) of the German Copyright Act, authors are entitled to payment of an equitable remuneration in respect of the possibility of making reproductions for private and other own personal uses, which is created by the sale of the copy machines and of recording media as well as of operating copy machines.

In 1985, the German legislator has decided to fix the remuneration due for private copying by law. § 54 e of the German Copyright Act has an annex, and the amounts set out in this annex are deemed equitable remuneration in accordance with §§ 54(1) and 54 a (1) and (2) of the German Copyright Act.

However, the act leaves it expressly open to the parties to freely negotiate the amount to be paid. Furthermore, § 54d (2) of the German Copyright Act states that the amount of the total remuneration to be paid by an operator of copy machines shall depend on the type and extent of utilization of the appliance that is to be expected in view of the circumstances, particularly the location and the habitual use. In practice, collecting societies and associations of operators usually agree on the taking of sample numbers which then form the basis for calculating the remuneration due by operators of copyshops, e.g. near universities or in small cities. The remuneration due by public universities, research facilities and libraries has to be negotiated with public authorities and is often influenced by public budget restrictions.

Regarding digital private copying, the report by the German Government is of the opinion that the amount due should differ between analog and digital copy devices/storage media. But the report is not sure whether a higher or lower levy might be called for. On the one hand, the quality of digital copies
is much higher, they may be made much quicker and can be transferred to archives or be distributed online. On the other hand, due to the ease of digital copying, many copies which are made may not be actually used (Zweiter Bericht der Bundesregierung über die Entwicklung der urheberrechtlichen Vergütung gemäß §§ 54 ff. Urheberrechtsgesetz, of 11 July 2000, BT-Drucks. 14/3972, p. 27).

9. **How is the remuneration/levy collected being distributed?**

Each copyright is entitled to an equitable share in the remuneration paid under §§ 54 and 54a of the German Copyright Act. Distribution is made in accordance with the distribution schemes established by collecting societies, which are subject to review by the German Patent Office as the institution supervising the activities of collecting societies.

It cannot be explained here in full detail, how the levies collected for private and other personal copying are distributed amongst all rightholders (for further information contact VG WORT [http://www.vgwort.de/] and GEMA [http://www.gema.de]).
10. Legislative provisions

§ 53: Vervielfältigungen zum privaten und sonstigen eigenen Gebrauch

(1) Zulässig ist, einzelne Vervielfältigungsstücke eines Werkes zum privaten Gebrauch herzustellen. Der zur Vervielfältigung Befugte darf die Vervielfältigungsstücke auch durch einen anderen herstellen lassen; doch gilt dies für die Übertragung von Werken auf Bild- oder Tonträger und die Vervielfältigung von Werken der bildenden Künste nur, wenn es unentgeltlich geschieht.

(2) Zulässig ist, einzelne Vervielfältigungsstücke eines Werkes herzustellen oder herstellen zu lassen

1. um eigenen wissenschaftlichen Gebrauch, wenn und soweit die Vervielfältigung zu diesem Zweck geboten ist,
2. zur Aufnahme in ein eigenes Archiv, wenn und soweit die Vervielfältigung zu diesem Zweck geboten ist und als Vorlage für die Vervielfältigung ein eigenes Werkstück benutzt wird,
3. zur eigenen Unterrichtung über Tagesfragen, wenn es sich um ein durch Funk gesendetes Werk handelt,
4. zum sonstigen eigenen Gebrauch,
   a) wenn es sich um kleine Teile eines erschienenen Werkes oder um einzelne Beiträge handelt, die in Zeitungen oder Zeitschriften erschienen sind,
   b) wenn es sich um ein seit mindestens zwei Jahren vergriffenes Werk handelt.

(3) Zulässig ist, Vervielfältigungsstücke von kleinen Teilen eines Druckwerkes oder von einzelnen Beiträgen, die in Zeitungen oder Zeitschriften erschienen sind, zum eigenen Gebrauch

1. im Schulunterricht, in nichtgewerblichen Einrichtungen der Aus- und Weiterbildung sowie in Einrichtungen der Berufsbildung in der für eine Schulkasse erforderlichen Anzahl oder
2. für staatliche Prüfungen und Prüfungen in Schulen, Hochschulen, in nichtgewerblichen Einrichtungen der Aus- und Weiterbildung sowie in der Berufsbildung in der erforderlichen Anzahl herzustellen oder herstellen zu lassen, wenn und soweit die Vervielfältigung zu diesem Zweck geboten ist.

(4) Die Vervielfältigung

a) graphischer Aufzeichnungen von Werken der Musik,

b) eines Buches oder einer Zeitschrift, wenn es sich um eine im wesentlichen vollständige Vervielfältigung handelt,

ist, soweit sie nicht durch Abschreiben vorgenommen wird, stets nur mit Einwilligung des Berechtigten zulässig oder unter den Voraussetzungen des Absatzes 2 Nr. 2 oder zum eigenen Gebrauch, wenn es sich um ein seit mindestens zwei Jahren vergriffenes Werk handelt.
(5) Absatz 1 sowie Absatz 2 Nr. 2 bis 4 finden keine Anwendung auf Datenbankwerke, deren Elemente einzeln mit Hilfe elektronischer Mittel zugänglich sind. Absatz 2 Nr. 1 findet auf solche Datenbankwerke mit der Maßgabe Anwendung, daß der wissenschaftliche Gebrauch nicht zu gewerblichen Zwecken erfolgt.


§ 54: Vergütungspflicht

(1) Ist nach der Art eines Werkes zu erwarten, daß es durch Aufnahme von Funksendungen auf Bild- oder Tonträger oder durch Übertragung von einem Bild- oder Tonträger auf einen anderen nach § 53 Abs. 1 oder 2 vervielfältigt wird, so hat der Urheber des Werkes gegen den Hersteller
1. von Geräten und
2. von Bild- oder Tonträger,

§ 54 a: Vergütungspflicht für Vervielfältigung im Wege der Ablichtung


(2) Werden Geräte dieser Art in Schulen, Hochschulen sowie Einrichtungen der Berufsbildung oder der sonstigen Aus- und Weiterbildung (Bildungseinrichtungen), Forschungseinrichtungen, öffentlichen Bibliotheken oder in Einrichtungen betrieben, die Geräte für die Herstellung von Ablichtungen entgeltlich bereithalten, so hat der Urheber auch gegen den Betreiber des Gerätes einen Anspruch auf Zahlung einer angemessenen Vergütung.

(3) § 54 Abs. 2 gilt entsprechend.

§ 54 b: Wegfall der Vergütungspflicht des Händlers

Der Vergütungsanspruch des Händlers (§ 54 Abs. 1 und § 54a Abs. 1) entfällt,
1. soweit ein zur Zahlung der Vergütung Verpflichteter, von dem der Händler die Geräte oder die Bild- oder Tonträger bezieht, an einen Gesamtvertrag über die Vergütung gebunden ist oder

§ 54 c: Wegfall der Vergütungspflicht bei Ausfuhr

Der Anspruch nach § 54 Abs. 1 und § 54a Abs. 1 entfällt, soweit nach den Umständen mit Wahrscheinlichkeit erwartet werden kann, daß die Geräte oder die Bild- oder Tonträger nicht zu Vervielfältigungen im Geltungsbereich dieses Gesetzes benutzt werden.

§ 54 d: Vergütungshöhe

(1) Als angemessene Vergütung nach § 54 Abs. 1 und § 54a Abs. 1 und 2 gelten die in der Anlage bestimmten Sätze, soweit nicht etwas anderes vereinbart wird.

-ix-
Die Höhe der von dem Betreiber nach § 54a Abs. 2 insgesamt geschuldeten Vergütung bemisst sich nach der Art und dem Umfang der Nutzung des Gerätes, die nach den Umständen, insbesondere nach dem Standort und der üblichen Verwendung, wahrscheinlich ist.

Anlage zu § 54 UrhG

Vergütungssätze

I. Vergütung nach § 54 Abs. 1:

<table>
<thead>
<tr>
<th>Nummer</th>
<th>Beschreibung</th>
<th>Betrag</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>für jedes Tonaufzeichnungsggerät</td>
<td>2,50 DM</td>
</tr>
<tr>
<td>2</td>
<td>für jedes Bildaufzeichnungsgerät mit oder ohne Tonteil</td>
<td>18,00 DM</td>
</tr>
<tr>
<td>3</td>
<td>bei Tonträgern für jede Stunde Spieldauer bei üblicher Nutzung</td>
<td>0,12 DM</td>
</tr>
<tr>
<td>4</td>
<td>bei Bildträgern für jede Stunde Spieldauer bei üblicher Nutzung</td>
<td>0,17 DM</td>
</tr>
<tr>
<td>5</td>
<td>für jedes Ton- oder Bildaufzeichnungsgerät für dessen Betrieb nach seiner Bauart gesonderte Träger (Nummern 3 und 4) nicht erforderlich sind, das Doppelte der Vergütungssätze nach den Nummern 1 und 2</td>
<td></td>
</tr>
</tbody>
</table>

II. Vergütung nach § 54a Abs. 1 und 2:

1. Die Vergütung aller Berechtigten nach § 54a Abs. 1 beträgt für jedes Vervielfältigungsgerät mit einer Leistung
   - bis 12 Vervielfältigungen je Minute 75,00 DM
   - von 13 bis 35 Vervielfältigungen je Minute 100,00 DM
   - von 36 bis 70 Vervielfältigungen je Minute 150,00 DM
   - über 70 Vervielfältigungen je Minute 600,00 DM

2. Die Vergütung aller Berechtigten nach § 54 Abs. 2 Satz 2 beträgt für jede DIN-A4-Seite der Ablichtung
   a) bei Ablichtungen, die aus ausschließlich für den Schulgebrauch bestimmten, von einer Landesbehörde als Schulbuch zugelassenen Büchern hergestellt werden, 0,05 DM
   b) bei allen übrigen Ablichtungen 0,02 DM


§ 54 e: Hinweispflicht in Rechnungen auf urheberrechtliche Vergütungen

1. In Rechnungen für die Veräußerung oder ein sonstiges Inverkehrbringen der Geräte nach § 54a Abs. 1 ist auf die auf das Gerät entfallende Urhebervergütung hinzuweisen.
(2) In Rechnungen für die Veräußerung oder ein sonstiges Inverkehrbringen der in § 54 Abs. 1 genannten Geräte oder Bild- oder Tonträger, in denen die Umsatzsteuer nach § 14 Abs. 1 Satz 1 des Umsatzsteuergesetzes gesondert auszuweisen ist, ist zu vermerken, ob die auf das Gerät oder die Bild- oder Tonträger entfallende Umsatzsteuer entrichtet wurde.

§ 54 f: Meldepflicht


(2) Absatz 1 gilt entsprechend für Geräte, die zur Vornahme von Vervielfältigungen durch Ablichtung eines Werkstücks oder in einem Verfahren vergleichbarer Wirkung bestimmt sind.

(3) Kommt der Meldepflichtige seiner Meldepflicht nicht, nur unvollständig oder sonst unrichtig nach, so kann der doppelte Vergütungssatz verlangt werden.

§ 54 g: Auskunftspflicht

(1) Der Urheber kann von dem nach § 54 Abs. 1 oder § 54a Abs. 1 zur Zahlung der Vergütung Verpflichteten Auskunft über Art und Stückzahl der im Geltungsbereich dieses Gesetzes veräußerten oder in Verkehr gebrachten Geräte und Bild- oder Tonträger verlangen. Die Auskunftspflicht des Händlers erstreckt sich auch auf die Benennung der Bezugsquellen; sie besteht auch in den Fällen des § 54 Abs. 1 Satz 3, des § 54a Abs. 1 Satz 3 und des § 54b Nr. 1. § 26 Abs. 6 gilt entsprechend.

(2) Der Urheber kann von dem Betreiber eines Gerätes, in einer Einrichtung im Sinne des § 54a Abs. 2 Satz 1 die für die Bemessung der Vergütung erforderliche Auskunft verlangen.

(3) Kommt der zur Zahlung der Vergütung Verpflichtete seiner Auskunftspflicht nicht, nur unvollständig oder sonst unrichtig nach, so kann der doppelte Vergütungssatz verlangt werden.

§ 54 h: Verwertungsgesellschaften; Handhabung der Mitteilungen

(1) Die Ansprüche nach den §§ 54, 54a, 54f Abs. 3 und § 54g können nur durch eine Verwertungsgesellschaft geltend gemacht werden.

(2) Jedem Berechtigten steht ein angemessener Anteil an den nach § 54 und § 54a gezahlten
(3) Für Mitteilungen nach den §§ 54b und 54f haben die Verwertungsgesellschaften dem Patentamt, je gesondert für die Vergütungsansprüche nach § 54 Abs. 1 und § 54a Abs. 1 eine gemeinsame Empfangsstelle zu bezeichnen. Das Patentamt gibt diese im Bundesanzeiger bekannt.

(4) Das Patentamt kann Muster für die Mitteilungen nach § 54h Nr. 2 und § 54f im Bundesanzeiger bekanntmachen. Diese Muster sind zu verwenden.

(5) Die Verwertungsgesellschaften und die Empfangsstelle dürfen die gemäß § 54b Nr. 2, §§ 54f und 54g erhaltenen Angaben nur zur Geltendmachung der Ansprüche nach Absatz 1 verwenden.

§ 69 d: Ausnahmen von den zustimmungsbedürftigen Handlungen

(1) Soweit keine besonderen vertraglichen Bestimmungen vorliegen, bedürfen die in § 69c Nr. 1 und 2 genannten Handlungen nicht der Zustimmung des Rechtsinhabers, wenn sie für eine bestimmungsgemäße Benutzung des Computerprogramms einschließlich der Fehlerberichtigung durch jeden zur Verwendung eines Vervielfältigungsstücks des Programms Berechtigten notwendig sind.

(2) Die Erstellung einer Sicherungskopie durch eine Person, die zur Benutzung des Programms berechtigt ist, darf nicht vertraglich untersagt werden, wenn sie für die Sicherung künftiger Benutzung erforderlich ist.

(3) Der zur Verwendung eines Vervielfältigungsstücks eines Programms Berechtigte kann ohne Zustimmung des Rechtsinhabers das Funktionieren dieses Programms beobachten, untersuchen oder testen, um die einem Programmelement zugrundeliegenden Ideen und Grundsätze zu ermitteln, wenn dies durch Handlungen zum Laden, Anzeigen, Ablaufen, Übertragen oder Speichern des Programms geschieht, zu denen er berechtigt ist.

§ 69 e: Dekompilierung

(1) Die Zustimmung des Rechtsinhabers ist nicht erforderlich, wenn die Vervielfältigung des Codes oder die Übersetzung der Codeform im Sinne des § 69c Nr. 1 und 2 unerlässlich ist, um die erforderlichen Informationen zur Herstellung der Interoperabilität eines unabhängig geschaffenen Computerprogramms mit anderen Programmen zu erhalten, sofern folgende Bedingungen erfüllt sind:
1. Die Handlungen werden von dem Lizenznehmer oder von einer anderen zur Verwendung eines Vervielfältigungsstücks des Programms berechtigten Person oder in deren Namen von einer hierzu ermächtigten Person vorgenommen;
2. die für die Herstellung der Interoperabilität notwendigen Informationen sind für die in Nummer 1 genannten Personen noch nicht ohne weiteres zugänglich gemacht;
3. die Handlungen beschränken sich auf die Teile des ursprünglichen Programms, die zur Herstellung der Interoperabilität notwendig sind.

(2) Bei Handlungen nach Absatz 1 gewonnene Informationen dürfen nicht
1. zu anderen Zwecken als zur Herstellung der Interoperabilität des unabhängig geschaffenen Programms verwendet werden,
2. an Dritte weitergegeben werden, es sei denn, daß dies für die Interoperabilität des unabhängig geschaffenen Programms notwendig ist,
3. für die Entwicklung, Herstellung oder Vermarktung eines Programms mit im wesentlichen ähnlicher Ausdrucksform oder für irgendwelche anderen das Urheberrecht verletzenden Handlungen verwendet werden.

(3) Die Absätze 1 und 2 sind so auszulegen, daß ihre Anwendung weder die normale Auswertung des Werkes beeinträchtigt noch die berechtigten Interessen des Rechtsinhabers unzumutbar verletzt.

... 

§ 87 c: Schranken des Rechts des Datenbankherstellers

(1) Die Vervielfältigung eines nach Art oder Umfang wesentlichen Teils einer Datenbank ist zulässig
1. zum privaten Gebrauch; dies gilt nicht für eine Datenbank, deren Elemente einzeln mit Hilfe elektronischer Mittel zugänglich sind,
2. zum eigenen wissenschaftlichen Gebrauch, wenn und soweit die Vervielfältigung zu diesem Zweck geboten ist und der wissenschaftliche Gebrauch nicht zu gewerblichen Zwecken erfolgt,
3. für die Benutzung zur Veranschaulichung des Unterrichts, sofern sie nicht zu gewerblichen Zwecken erfolgt.
In den Fällen der Nummern 2 und 3 ist die Quelle deutlich anzugeben.

§ 87 e: Verträge über die Benutzung einer Datenbank


[English version to be supplied]
Table of cases

(Germany)

BGH, 28.1.1993 - I ZR 34/91, GRUR 1993, 553 - Readerprinter


BGH, 10.12.1998 - I ZR 100/96, GRUR 1999, 324 - Elektronische Pressedienste

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BGH, 25.2.1999 - I ZR 118/96, GRUR 1999, 704 - Kopienversanddienst

BGH, I ZR 335/98, not yet published

Karlsruhe, 12 January 2002

Thomas DREIER