Political Questions Relating to the Legal Treatment of Reproduction and Dissemination through Digital Networks
(Translation)

Alberto Bercovitz
Estudio Jurídico Alberto Bercovitz
Madrid, Spain

In Spain, at the present moment, a public debate is taking place in the media concerning the issues which form the subject of our discussion. It is important to emphasize that there is great public interest in the debate; it is making headlines in the major national newspapers.

The controversy stems from two issues.

Firstly, the launch of the last disc of a very popular singer, Alejandro Sanz, entitled, "No es lo mismo", was criticized by the Association of Internet Users attached to the authority of consumer affairs: it demands the withdrawal of the disc from sale as it contains an anti-copying device. According to the association this anti-copying device breaks the Law on Intellectual Property (Art. 31.2), which authorizes the reproduction of protected works intended for the private use of the consumer, without the express permission of the author. Consequently, the debate centers on the non-conformity of the product. The Association refers to a decision handed down in France after a complaint there from the authority of consumer affairs made against the multinational EMI for having included an anti-copying device on the disc, "Je veux du live" by the French singer Alain Souchon.

In other words, the demand of the Association of Internet Users claims that the addition of an anti-copying device is illegal as it violates the rights of individuals to make copies for private use, a privilege guaranteed by the copyright law.

The second issue at the centre of the controversy is the recent signature of an agreement between the collective management organizations and ASIMELEC, which is composed of the majority of CD manufacturers, on the remuneration of levies on blank supports for private copies, for both CDs and DVDs, in force since 31 August 2003.

This agreement has also been the object of criticism because a significant proportion of blank CDs are not used for private copying but are intended for other purposes. Furthermore, it should be noted that computer programs are formally excluded from the right to remuneration for private copying by the very same Law on Intellectual Property.

Besides, it seems absurd to impose a levy on blank CDs for private copying when CDs released on the market contain a device which prevents copying.

As we can see, this public debate poses exactly the same questions as those before our panel today; that is to say, whether there is a right to private copying; whether this right is compatible with the use of anti-copying devices; and whether digital supports should have a levy imposed on them as remuneration for private copying.

We find at the heart of the debate, the question of the survival of the right to private copying and the authentic nature of this right, which may be opposed to the copyright-holder's right.

The traditional legislation for copyright has always excluded private copying from the domain of exclusivity, as, for example, Article 31.2 of the Spanish Law on Intellectual Property, 1996, stipulates.

However, it is undeniable that this exclusion dates from that time when making copies required a lot of work (copies being made by hand or typing machine) or was purely and simply impossible for a private individual. In other words, in most cases, it was more economically viable to acquire a commercial copy with the author's permission rather than to make a private copy. This is the reason why the exclusion of private copying did not have a detrimental effect on the exploitation of the work.

But, the situation has changed radically since the emergence of modern copying technology, whether for written works, or musical or audio-visual recordings. The ease of copying as well as its low cost has encouraged the spread of private copying, which, today, is having serious negative effects on the exploitation of works available on the market.

In order to deal with this new situation, certain national laws, such as the Spanish Law (Article 25), have established a right to remuneration for private copying imposing a levy on manufacturers and importers of technology used for the making of copies. The courts have decided (for example, the decision of the court of the first instance of Barcelona, 2 January 2002) that CD-Rs, which allow the reproduction of phonograms for private use, should have a legally determined levy imposed on them. It is precisely on the basis of this piece of case-law that the Spanish Association of CD Manufacturers agreed to sign an agreement with the collective management organizations concerning remuneration for private in the form of levies on digital supports.

This legal settlement confirms that, even if the exclusive right is not applied to private copying, there is no right to obtain copies in this way against the intentions of the right holders, and that, thus, the right holders can establish technical systems preventing the making of copies. It is one thing that one should be able to obtain copies of released works without any responsibility towards the holder of the intellectual property rights; it is a completely different thing whether or not

this right holder is permitted to establish anti-copying devices. Evidently, the holder is within his rights to establish such systems.

It seems appropriate to ask ourselves if this kind of regulation, in force in certain countries, in other words: the exclusion of private copying from the exclusive right combined with a right to remuneration, is really satisfactory in the light of present circumstances. It seems that this is not the case.

In reality, considering that private copies can be made with extraordinary ease, ridiculously cheaply, it would seem necessary to apply the general principle of law, which states that nobody is permitted, simply from his own volition and without a justifying cause, to freely appropriate another person's good, which has an economic value on the market, because this appropriation would mean an unjust enrichment.

This principle is completely applicable to the reproduction of protected works by private individuals: they enrich themselves unjustly by the acquisition of a protected work at a cost infinitely less than the market price and, naturally, resulting in financial losses to the holder of exclusive right.

It is clear that such a situation cannot be tolerated and that the general principle allowing the making of copies for private use, as it is defined by traditional copyright law, should be modified in order to avoid a generalized acceptance of activities allowing an unjust enrichment of individuals at the expense of the holders of copyright and neighboring rights.

It should be noted that this unjust enrichment did not take place before the appearance of new copying technology, since the effort required to make a copy represented an investment, either equal to, or greater than, the price of a commercial copy on the market.

As a result, it is necessary to establish as a point of departure that reproduction of copies for private use should be covered by exclusive rights of holders of copyright or neighboring rights.

The exclusion from the framework of protection of the exclusive right would only be defensible on the condition that the copied work is not available on the market, and thus it is only possible to obtain it through private copying.

Evidently, the reality of the problem exists on a different level; that is to say at the level of control of copies for private use. It goes without saying that right holders are not able to prevent the proliferation of these copies since the technology required for copying is available on the market and accessible to the public. This is why the only solution is to establish a compensatory payment which the manufacturers and importers of this technology would pay to the collective management organizations in order to compensate right holders for the losses caused to them by private copying.

If the solution that we have just described is applied, then the first conclusion that we must draw is that there is no right of the members of the public to make

copies for private purposes. Consequently, the right holders would be perfectly within their rights in including anti-copying devices into the copies of their works released on the market. If these anti-copying systems are properly installed, the right holders do not need and are not supposed to have a right to remuneration for private copying.

This means that it would be necessary, in the event of anti-copying systems being generally installed, to reduce the scope and level of levies since, in respect of the works concerned the exercise of exclusive rights become possible, and thus no separate right to remuneration is justified.

If works are still released on the market without an anti-copying device, as a matter of pure pragmatism, it would be necessary to maintain the right to make copies for private use; however, this opportunity to make private copies would be based on a statutory license.

This approach, based on the inclusion of private copying under the coverage of the exclusive right of reproduction and the consequent legitimacy of technical measures integrating anti-copying systems, along with a statutory license for private copying combined with a right to remuneration for the cases where the works do not contain an anti-copying system, is completely compatible with the Community Directive of May 22, 2001, on copyright in the information society. One could even consider that this solution is expressly foreseen by the Directive.

In reality, the exception or limitation to the right to reproduction with respect to copies made by a physical person for his private use and without either direct or indirect commercial intent, is provided for by Article 5(2)(b) of the Directive as having a facultative character; that is to say, it may be included in the national laws of Member States, but is not obligatory. This exception or limitation, if it is provided for, should be associated with fair remuneration for the rights holders "which takes into account the application or non-application of technological measures referred to in Article 6 [of the Directive] to the work or subject-matter concerned."

Nevertheless, it is important to make clear that the same Directive stipulates that, when the right holder has included anti-copy devices, the Member States may establish measures to ensure the possibility of private copying (Article 6.4) in their legislation. We can see, consequently, that this principle does not offer, in general, any right to the public to circumvent anti-copying systems nor to demand, in spite of the presence of such systems, the possibility of making private copies.

The problem resides in the absence of clarity in the Directive's terminology concerning this point. It refers to reproduction for private uses as a possible exception or limitation to the right to reproduction. It seems that the legal construction would be considerably more coherent if, instead of providing for a facultative exception or limitation to the exclusive right, it were mentioned that

there is the possibility for Member States of providing for a statutory license for the private copying of works not equipped with anti-copying devices, fixing, at the same time, a payment for the right-holders as a royalty for the statutory license.

The approach dealt with here, implying that private copying should be included under the coverage of the exclusive right of reproduction, is based also on Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement. Under the test provided for in these provisions, an exception or limitation to the right of reproduction is only allowed in special cases, it should not conflict with a normal exploitation of works, and it should not unreasonably prejudice the legitimate interests of the right holders.

However, we cannot deny, today, that the exception for by private copying conflicts with the normal exploitation of works and unreasonably prejudices the legitimate interests of the right holders.

This means that the Berne Convention and the TRIPS Agreement require, under the present circumstances, that private copying be covered by the exclusive right of reproduction, or, in other words, they prevent national legislation from excluding private copying from the coverage of the exclusive right.

At the same time, it is possible to establish, in national legislation, a statutory license for private copying, together with a system of payment to the authors as a function of such a license.

This system is to be equally applied to the transmission of private copies by digital networks since such transmission necessarily implies the reproduction of the transmitted work.

Naturally, the statutory license would cover a single transmission by a particular person of a particular work as an act of private copying, but it would not cover a plurality of transmissions of works. The holder of exclusive right would also be able to apply technological protection measures to prevent the transmission of works or making copies thereof. The incorporation of an anti-copying device would, of course, have to exclude the work from any right to remuneration for private copying. The remuneration could be applied, as is already the case in several countries which impose the payment of a sum on technology used in copying such as CD-R; however, it would be equally logical to impose this payment on the hard discs of computers by calculating the percentage of their storage capacity possibly destined to store copied works, fairly estimated statistically.

One could consider other systems of payment for the authors, but, it is fundamental to note that, once a private copy has fallen into the framework of the exclusive right of reproduction, this copy can only be legally authorized after obtaining an appropriate license and paying for it in some form.