Observations to the Summary

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First of all I want to thank the Hungarian ALAI group, and ALAI generally, for inviting me. It is with some trepidation that an American lawyer ventures into a discussion of one of the most complex – and particularly European – issues encountered today, namely the inter-relationship or interface of technical protection measures and levies.

Here, I would repeat what Jon Bing stated so well the other day. "So much has been said already and there is little to add. Thus, there is a reasonable probability that I will stay within my allotted time."

I am usually called upon to provide the collective views of the U.S. copyright industries that I represent in the International Intellectual Property Alliance – industries producing, movies, records, books, entertainment and business software. For years, I have been able to do this since the views of all these industries, the "copyright family" as Carlo Lavizzari called it, have been virtually identical in the global environment; particularly outside the European context. It has meant a lot over the years that these industries have been able to speak with one voice. However on this issue we do not have complete unity.

Emery Simon told you about BSA's – the business software industry's – views of levies and if I might repeat his conclusion – though not as articulately as he did – "we at BSA do not like them, we consider levies counterproductive, dangerous and we believe that they undermine exclusive rights." I apologize to Emery if I did not quote him quite right, but I do think that this expresses his thoughts. I would also venture to say that the videogame/entertainment software industry would also agree with BSA's conclusion. The audiovisual, the recording and the book publishing industries take a slightly different view, however.

Their position is that the application – and adequate protection – of technological measures is the right solution for protecting works in the digital environment, but they also accept that levies, in certain specific circumstances, for example, for recording of music and audiovisual works from over the air radio and television and other similar forms of private copying *from legal sources* – it is very important to stress, that the copying must be from legal sources – may continue to exist.

Returning to the issue pointed out by Bernt Hugenholtz concerning the question of "application" versus "availability" of technological protection measures, the audiovisual and the recording industries want a strict definition, namely the application of technical protection measures must exist "*in practice"; in other words, it is not sufficient that the measure simply be "available."* The latter seems to be the position that BSA is taking.

So, while there are differences, all of these industries agree that technological protection measures are the future in the digital environment, and they should be granted effective protection against unauthorized circumvention, with appropriate exceptions, of course. Bob Hadl and Ted Shapiro have noted in their presentations at this Congress that a type of technological protection measures used in the analog world, namely, Macrovision, (to protect videocassettes) has worked pretty well. Today DVDs have become the primary means to distribute audiovisual material to end-users, and effective copy protection technologies have become even more necessary than with videocassettes, which are, of course, not perfect copies.

The enforcement of copyright on the Internet creates new challenges and, of course, is a complex task. However, there is hope that, although it will not be easy, effective enforcement will, contrary to the opinion of many, work to deter unauthorized uses. We have the Napster case, for example, in which a U.S. appellate court held that both uploading and downloading are clear acts of infringement. And you now have the record companies winning a case – the Verizon case – which allows them to expeditiously get the names of potential infringers from ISPs. This has enabled that industry to bring hundreds of court actions against uploaders of 1000 tunes or more.

As a consequence of all this litigation, it is quite interesting what has happened from a political and a public relations point of view in the United States. While I think it is a little early to tell what the ultimate outcome will be, I saw an editorial in the New York Times last weekend which was surprisingly pro-copyright – supporting this litigation strategy. It was the first time that I had seen such a positive article for quite a long time. It shows, I believe, that this strategy has had a positive impact. Indeed preliminary indications are that unauthorized downloading has begun to decrease. We have been saying for many years now that any attempt to deal effectively with piracy will necessitate taking this kind of deterrent action, not only to bring a deterrent element into the system, but to create a clear legal framework that the public can understand. I think that this is now coming about – slowly but surely.

I also want to revert to what Maria Martin-Prat noted in her remarks; namely that the record industry's revenues decreased almost 30 % in the last three years and that this was due, to a great extent, to the fact that millions and millions of tunes have been downloaded illegally. This kind of infringement simply should

not be subject to levies. As Shira Perlmutter and Ted Shapiro and others have noted, technological protection measures, based on exclusive rights, is a key element of any serious enforcement effort.

Doctor Dietz made a comment that perhaps we should consider levies as a form of "statutory damages" to compensate rightholders for piracy. As everybody knows, we in the United States love statutory damages. We think such a system is great, but we do not think that it should apply in this context at all!

We think that with regard to the issue of exceptions to exclusive rights, and, particularly, with limiting the exclusive right of reproduction to a mere right to remuneration – levies – Article 9 to the Berne Convention and Article 13 of the TRIPS agreement must be taken into account. It should not be forgotten that Berne Article 9(2) is fully applicable also to private copying: that is, any exception to exclusive rights – or limitation to a simple right to remuneration – is only allowed if it covers a "special case," if the exception, or the limitation of the exclusive right to a right to remuneration, does not "conflict with a normal exploitation" of the works concerned, and if no "unreasonable prejudice" is caused to the "legitimate interests of the rightholder." It is clear that the licensing of the right to copy from over the Internet has become an increasingly important form of exploitation of works, and, thus, Article 9 of the Berne Convention and Article 13 of the TRIPS agreement do not allow exceptions or limitations to cover all such copying. This means that, in the digital environment, the replacement of the exclusive right of reproduction – supported by effective technological protection measures – is only possible in the narrowest area: to extend, for example, only to copies made of digital television broadcasts. It is very important to note that national legislators are simply not allowed to freely "improvise" in this field as if their countries were not bound by these norms under the existing international conventions.

Time and again it is suggested that levies – as contrasted with exclusive rights – are better for authors in both the digital and the analog environment. My view is that this conclusion is now subject to serious challenge. The exercise of exclusive rights through DRMs along with a system of "micro-payments" for highly granular uses of works is going to deliver much more to authors than any levy ever could. Therefore, this whole issue must really be looked at and be re-examined.

The digital environment offers huge opportunities. Copyright owners, individual authors and high-tech companies must come together to make it work. Right holders must use all available means for the enforcement of their rights, and governments must establish the necessary legal and organizational framework to allow all of us to capitalize on these opportunities.

Thank you.