

Copyright and the Challenge of the New

Information Law Series

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Copyright and the Challenge of the New

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CHAPTER 7

The Story of the Tape Recorder and the History of Copyright Levies

P. Bernt Hugenholtz

§7.01 INTRODUCTION

Nowhere else in the history of copyright is the link between technological development and revision of the law as apparent and direct as in the field of levies. There is a straight line to be drawn from the development of magnetic tape recording in Germany in the late 1930s, through the introduction on the German consumer market in the early post-war years to the legal invention of copyright levies – a statutory scheme of remuneration in respect of recording equipment (and later: tape media) – in German legal doctrine, case law and legislation. The German levy system, in turn, became a model for the world, initially for tape recording, later for video taping, and eventually for an entire spectrum of recording and reproduction apparatus and ‘blank’ media. Although tape recorders have become all but extinct, copyright levy schemes are operational in well over 40 countries in the world,¹ covering a broad range of private recording equipment and blank media.

This chapter traces the history of copyright levies from the early 1950s, when the introduction of magnetic tape recorders on the German consumer market immediately led to an unprecedented explosion of litigation, to the mid 1960s, when a system of statutory private copying levies became part of the new German Copyright Act.

As this chapter reveals, at least two other stories can be told on the impact of tape recording on copyright. Although tape recording is most directly associated to the introduction of levies, the phenomenon of ‘home copying’ that the tape recorder

1. See Australian Copyright Council, ‘Remuneration for private copying in Australia: a Discussion Paper’ (2001), available at <http://www.screenrights.org/sites/default/files/uploads/acpaper.pdf>.

enabled, also – for the first time in legal history – led to incisive legal debates and case law on the interface between copyright enforcement and right to privacy, and on contributory liability of tape recorder manufacturers and retailers.² Although these issues will be flagged in the course of this chapter, its focus will remain on the way the invention and market success of magnetic tape recording inspired and shaped the statutory system of copyright levies.

Underneath these stories, all meriting a separate chapter in this book, lies a common theme that is as topical today as it was when this story unfolded. With the proliferation of reproduction technology among the masses, copyright – a vehicle originally designed to regulate and control commercial and institutional users – suddenly came to confront the rights and expectations of normal consumers and citizens. With the proliferation of digital technology amongst consumers and the subsequent explosion of unauthorized ‘file sharing’, the underlying question of this chapter is whether the German levy saga can teach us anything about the future of copyright law.

This chapter is structured as follows. First (in § 2) a brief history of magnetic recording and the early copyright issues it gave rise to will be sketched. The next section (§ 3) will describe and discuss the rich German case law of the 1950s and 1960s that eventually led to the German levy scheme, which will be treated in § 4. The gradual proliferation of levies in other countries will be depicted in § 5. Finally, § 6 asks what lessons might be drawn for the future of copyright from the short but fascinating history of tape recording levies.

§7.02 THE HISTORY OF MAGNETIC RECORDING AND THE PRE-HISTORY OF LEVIES

It was not a German, but an American inventor who first applied the idea of recording sound on a magnetic medium. In 1877 Oberlin Smith started experimenting with the use of cotton thread woven with tiny pieces of chopped-up iron running through a magnetic spool at constant speed.³ Smith probably never managed to convert his ideas into a workable machine, and never patented his invention.⁴ The first working magnetic recording machine, a wire recorder, was constructed by Danish engineer Valdemar Poulsen in 1896 and patented in Denmark and elsewhere in 1898. Poulsen’s ‘Telegraphone’ – basically a primitive telephone answering machine – attracted huge interest at the Paris World Fair of 1900, where it recorded the voice of the Austrian emperor Franz Joseph – likely the oldest remaining magnetic recording of the human voice.⁵

2. See Matthias Leistner, ‘Von “Grundig-Reporter(n) zu Paperboy(s)”: Entwicklungsperspektiven der Verantwortlichkeit im Urheberrecht’, GRUR 2006, 801.

3. Friedrich Engel & Peter Hammar, ‘Selected History of Magnetic Recording’, available at http://www.richardhess.com/tape/history/Engel_Hammar_-_Magnetic_Tape_History.pdf.; see also http://www.ieeeeghn.org/wiki/index.php/Oberlin_Smith.

4. Engel & Hammar, *supra* note 3.

5. Eric D. Daniel, C. Denis Mee & Mark H. Clark, *Magnetic recording: the first 100 years* (1998), 20; the recording is available at http://www.youtube.com/watch?v=pzrB_pwi2TM.

It took more than twenty more years before magnetic recording devices were developed into practicable and commercially viable sound recorders. This required, first, the use of amplification by way of vacuum tubes, and, second, replacing wire coils by tape reels, which allowed higher recording speeds and recordings of longer duration and greater fidelity. The German inventor Curt Stille is widely credited for developing the first actual tape recorder. Stille's recorder had large reels of thin tape made of steel. Stille licensed his invention to German–British film producer Ludwig (Louis) Blattner, who immediately recognized the machine's potential for the film industry, where the new craze of 'talking pictures' required high-quality sound recording and reproduction. His 'Blattnerphone' in turn attracted interest from the BBC, which rented several machines for use in its shortwave radio studios. Blattner thereafter sold the rights to the machine to the British Marconi company that further developed the steel tape recorder together with the Stille company.⁶

The final step towards fruition of the tape recorder was the invention of magnetized paper tape by the Austrian inventor Fritz Pfelemer, for which he received a German patent in 1928. Looking for an investor Pfelemer in 1931 signed an agreement with German electronics manufacturer AEG, which then sought collaboration with chemical plant BASF to further develop magnetic tape technology. The product of this collaboration, the 'Magnetophon', a machine closely resembling the tape recording machines that were sold commercially until the 1990s, was launched at the Radio Exhibition in Berlin in 1935, and caused an immediate sensation. Magnetophons soon were in general use by the German public radio service.⁷

In the early 1950s, as tape recorder technology was refined and modern plastic coated tape replaced paper, tape recorders were gradually developed into consumer products. Other German electronics manufacturers, such as Loewe-Opta, Grundig and Lorenz, competed with AEG for a piece of the rapidly emerging German consumer market. Machines were made 'plug and play' compatible with radio receivers and record players, with separate input buttons for 'radio' and 'record player', so users could easily tape music off the air or copy phonorecords. Grundig, for example, publicly advertised its 'Grundig Reporter' model as the ideal machine to record 'your favourite melodies from the radio'.⁸

Although still quite expensive, tape recorders became an instant hit in Germany. All over the country, clubs of amateur 'sound hunters' (*Tonjäger*) were formed, not unlike the hacker communities that emerged some forty years later with the advent of the Internet. For these amateur communities tape recorders were not merely, or even

6. Engel & Hammar, *supra* note 3, 35; James D. Livingston, '100 Years of Magnetic Memories', *Scientific American*, November 1998, 82–83.

7. In the United States tape recorders of the modern kind remained virtually unknown until a US Army mission 'captured' an AEG Magnetophon with several reels of tape at a radio station in Frankfurt at the end of World War 2. This war bounty was still in use in the NBC studio complex in Hollywood when Bing Crosby had his popular radio show magnetically recorded for the first time in 1947. See Don Rushin, 'The History of Magnetic Tape', available at http://web.archive.org/web/20040603153341/www.tvhandbook.com/History/History_tape.htm.

8. See *Grundig Reporter*, German Federal Supreme Court (Bundesgerichtshof), Case I ZR 8/54, GRUR 1955, 492, at 493.

primarily, instruments for recording music, but also means of capturing and sharing sounds recorded ‘in the wild’, such as bird songs or the roar of motor engines.

All this, inevitably, caught the ears and eyes of Dr Erich Schulze, the General Director of the newly founded musical rights collecting society GEMA.⁹ In a booklet published by GEMA in 1950 Schulze wrote on the copyright implications of tape recording. ‘As long as tape recording is only used in the radio and the record industry, authors were in a position to control the making of tapes, so no unauthorized uses of tape could occur. However this has changed at once now that the industry has gone on to produce such machines for the free market. In its promotional material the industry advertises the many possible uses of these machines, in particular the possibility of record musical broadcasts and phonorecords. [...] Every owner of such a machine is now able [...] to create a tape archive according to his own taste, [and] he no longer needs to purchase phonorecords. [...] Making tape recordings no longer lies solely in the hands of a certain industry, but *everyone* who possesses a magnetic tape recording device can make tape recordings as he sees fit.’¹⁰ According to GEMA, all this amounted to large-scale infringement of the musical copyrights it represented.

As a solution Dr Schulze proposed that every owner of a tape recording machine would pay to the copyright owners (i.e. GEMA) a monthly lump sum that would allow them to make tape recordings for personal use. The proposal was presented by GEMA in 1950, as the first magnetic tape recorders hit the German consumer market. Not surprisingly the scheme met with strong criticism, from the community of sound hunters and the electronic industry alike. Critics could not understand why tape recorders should be treated in any differently from musical instruments, such as violins or piano’s, which could also be used for copyright infringing purposes, but did not require a licence for personal possession.¹¹ Moreover, as some early critics could not fail to notice, GEMA’s position that private ownership of a tape recorder required a licence, had serious implications for the owners’ right to privacy, which was prominently protected in the new German Constitution. As one commentator pointed out, the proposed scheme inevitably required monitoring inside the home, and thus reminded of Germany’s recent wartime past.¹² Critics were also not convinced that authors were actually harmed by the proliferation of tape recorders. Instead of the cumbersome process of home taping most consumers would surely prefer to play prerecorded tapes purchased legally off the shelf. Why wasn’t the music industry catering to this demand?¹³ In the mean time, consumers could hardly be blamed for exercising their right to make personal copies.

9. Gesellschaft für musikalische Aufführungs- und Vervielfältigungsrechte. GEMA was the successor of STAGMA, which was disbanded after World War 2.

10. Erich Schulze, *Das deutsche Urheberrecht an Werken der Tonkunst und die Entwicklung der mechanischen Musik*, GEMA (1950), 35–38 (translation by the author). See also K. Runge, ‘Rechtsfragen um das Magnetophon’, GRUR 1951, 234–236.

11. Harald Mediger, ‘Magnetton und Urheberrecht’, GRUR 1951, 382, 385.

12. Siegfried Haeger, ‘Zur Gefahr der Urheberrechtsverletzung durch Tonband-Vervielfältigung gemäss § 15 Abs. 2 LUG’, GRUR 1964, 52, 55.

13. *Ibid.*

As could be expected, the GEMA scheme never became popular.¹⁴ Instead, market leaders AEG and Loewe Opta agreed to pay directly to GEMA 1% of the production value of each manufactured tape recorder by way of a one-time licence fee – essentially a voluntary levy scheme. An article that appeared in news magazine *Der Spiegel* in 1953 speculates on the reasons why AEG and Loewe Opta agreed to this arrangement – most likely because these companies wished to maintain their market advantage without the impediment of copyright infringement suits looming over their customers, or themselves.¹⁵ Other manufacturers, such as Grundig, however refused to enter into a licence agreement with GEMA. According to these manufacturers, what consumers did or did not do with their newly acquired machines was their own business, and could in any case not be attributed to, let alone monitored by, the manufacturers. Moreover, as GEMA’s opponents confidently pointed out, the German Copyright Act of 1901 expressly allowed the making of copies for personal use.¹⁶

§7.03 THE GERMAN TAPE RECORDER CASES

Even before consumers were given a chance to purchase these marvellous new machines, courts in Germany were already busy solving the copyright problems of tape recording. In 1952 the German Federal Supreme Court (*Bundesgerichtshof*) decided an early controversy by holding that tape recording of copyright works qualified as an act of reproduction, not adaptation.¹⁷ The Court also held that the recording of musical works from a phonorecord followed by the playing of the recorded music at a trade fair was not copying for ‘personal use’, as permitted under Art. 15(2) of the German Act.¹⁸

But the big decisions were yet to come. Late 1952 GEMA and several record companies sued Grundig, Schaub, Lorenz and Metz – four tape recorder manufacturers that had so far refused to deal with the right holders. In the case of Grundig GEMA sought an injunction ordering Grundig not to sell, rent, lease or distribute any of its tape recorders without requiring the purchasers to seek GEMA’s permission to use them for taping musical works in GEMA’s repertoire. In addition GEMA sought an injunction prohibiting Grundig from advertising its machines without a notice stating that any taping of works in the GEMA repertoire required a licence from GEMA.

In May 1953 the Court of First Instance of Berlin granted the injunctions, to the considerable shock and dismay of the German electronics industry and the growing army of sound amateurs,¹⁹ but in line with several legal opinions solicited by GEMA from leading copyright scholars.²⁰ The cases eventually found their way to the Federal Supreme Court, which decided the cases in two nearly identical landmark

14. See text accompanying footnotes 38 and 39 below.

15. ‘Lauscher an der Wand’, *Der Spiegel*, 27 May 1953, 27.

16. Gesetz betreffend das Urheberrecht an Werken der Literatur und Tonkunst (LUG), 19 June 1901, Reichsgesetzblatt 1901, 227, as amended, Art. 15(2).

17. German Federal Supreme Court (*Bundesgerichtshof*), 21 November 1952, NJW 1953, 540.

18. LUG, Art. 15(2) allowed any “reproduction for personal use when it does not have the purpose of extracting an income from the work” (translation by the author).

19. ‘Lauscher an der Wand’, *Der Spiegel*, 27 May 1953, 28.

20. GEMA, *Magnettongeräte und Urheberrecht. Eine Sammlung von Rechtsgutachten* (1952).

decisions – one concerning the copyrights of the composers, the other concerning the neighbouring rights in sound recordings of the record companies.²¹

More than half a century later the decisions by the Federal Court still make fascinating reading, covering a range of fundamental copyright issues that have remained topical in the twenty-first century: the underlying rationale of copyright, copyright's scope in the private sphere, the problems of copyright enforceability, and the issue of contributory liability of equipment manufacturers. The analysis by the Court concentrated on two main questions: (1) is 'home taping' permitted under the German provision that allows copying for personal use?; and (2) if not, are tape recorder manufacturers liable for injunctive relief?

Of these two the first question was certainly the most vexing. Since the start of the tape recorder debate in Germany, legal doctrine was sharply divided on the question whether making recordings in the private home qualified as exempted copying for personal use. Proponents of this position pointed not only to the letter of the law, which seemed to allow private copying regardless of the technology employed, but more generally espoused the principle that copyright protection ends where the private sphere begins. According to Prof. Eduard Reimer, who was consulted by AEG in 1950, the purpose of the private copying exception 'is to avoid that the rights of author affect the personal sphere of another. Within his four walls everyone should be free to use the work "for personal use" as he pleases. Whether the copyright good is privately copied by using a (feather) pen or type writer or the act of reproduction occurs through technical means of the modern or most modern kind, does not play a role'.²² Reimer's opinion echoed the theory of the famous nineteenth century legal scholar Josef Kohler, who laid the groundwork for the theory of intellectual property. According to Kohler, copyright protects authors against acts of unauthorized communication, not consumptive usage. What is decisive is whether or not a copy of a work 'is intended to serve as a means of communicating [the work] to others'.²³

Other scholars, such as De Boor, Möhring and Ulmer, however took a different view. According to Prof. Ulmer, who later became the Director of the Max Planck Institute in Munich, the introduction of recording technology into the home was a watershed event. Whereas in the old days mechanical reproduction of copyright works could only be carried out by an industry, tape recorders allowed private users to produce perfect copies at home. According to Ulmer and others, this implied that private users, like commercial users, should become liable for compensating the authors.²⁴

21. *Grundig Reporter*, German Federal Supreme Court (Bundesgerichtshof), 18 May 1955, Case I ZR 8/54, GRUR 492 (concerning copyrights administered by GEMA); and German Federal Supreme Court (Bundesgerichtshof), Case I ZR 10/54 (concerning neighboring rights of record companies). See Ernest A. Seemann, 'Sound and Video-Recording and the Copyright Law: The German Approach', 225 *Cardozo Arts & Ent. L.J.* (1983), 234–237.

22. Eduard Reimer, in: *GEMA, Magnettongeräte und Urheberrecht. Eine Sammlung von Rechtsgutachten* (1952), 34 (translation by the author); see also Heinz W. Auerswald, in *ibid.*, 161.

23. Josef Kohler, *Das Autorrecht: eine Zivilistische Abhandlung* (1880), 230 (translation by the author); see Jaap H. Spoor, *Scripta Manent. De reproductie in het auteursrecht* (1976), 11.

24. Eugen Ulmer, in: *GEMA, Magnettongeräte und Urheberrecht. Eine Sammlung von Rechtsgutachten* (1952), 12.

The Bundesgerichtshof eventually agreed. The Court first considered that the German legislature could not have foreseen in 1910, when the German act was last amended, that technology would one day allow private users to produce high-quality copies of musical performances inside their homes. According to the Court ‘the possibility to record performances of all kinds, by a simple mechanical process not requiring any technical skills, at home on tapes, which could reproduce the fixed performance in perfect sound-volume and completely lifelike’ was ‘beyond the imagination of the legislator’ in 1901.²⁵ Under such circumstances, according to the Court, a literal interpretation application of the law ought to give way to a reading in the light of its original intention and purpose.

In this connection the Court first posited as a matter of principle that authors have a right to equitable remuneration for each use of their work, including uses by new technical means. Referring to Art. 27(2) of the Universal Declaration on Human Rights, the Court asserted that it is generally recognized ‘in all civilized states’ that authors deserve protection not only of their moral interests, but also of their right to a just pecuniary reward for their work. This right does not follow from any positive act of the lawmaker, but derives directly from nature. The internal justification of the author’s right to equitable remuneration is the enjoyment of the work by individuals; whether this occurs in public or at home should make no difference.²⁶ The Court then went on to analyse the conflict of interests that gave rise to the personal use limitation in German law. According to the defendants this rule was essentially technology-neutral and reflected the fundamental principle that copyright should never extend into the private sphere. The Court however rejected this argument:

If it were true that according to the basic idea of copyright the private sphere created an insuperable barrier to the economic rights of the author and thereby for his right to compensation, an author could no longer reap the fruits of his labour from all such works that are created primarily for enjoyment in the private sphere [...], whenever technology allows the individual, without special cost and effort, to produce copies of works in the home that provide perfect enjoyment of the work, and are equivalent to commercially manufactured copies. [...] Following the basic idea of copyright, which above all intends to safeguard the economic interests of the author, in the case of such a conflict of interests between the creative sphere of the author and the private sphere of the user of the work, it is rather the creative sphere, without which the use of the work would not at all be possible, that should be given precedence [...]²⁷

Thus the Court concluded that a freedom to make copies in the private sphere does not exist as a matter of principle. Or as a modern-day commentator would rephrase it, no ‘right’ to make private copies was recognized under German law. From the legislative history of the 1901 Act the Court derived a much more limited rationale. Private copying was permitted primarily to allow financially weak musicians to make

25. J. Reinbothe, ‘Compensation for Private Taping Under Sec. 53(5) of the German Copyright Act’, IIC 1981, 36, 38.

26. *Grundig Reporter*, GRUR 1955, 496.

27. *Ibid.*, 497 (translation by the author).

hand-written copies of copyright protected sheet music.²⁸ In light of this limited purpose it would make no sense to extend the benefit of the limitation to every user of a tape recorder, since only a small number of users would actually use the recorders to improve their musical skills.²⁹

Moreover, tape recording allows the making of high quality and durable reproductions, whereas hand-written copies are by their very nature more cumbersome to produce, and usually less durable and of lower quality. Thus the risk of private copies ending up in the hands of (possibly commercially operating) third parties is significant.³⁰ More importantly, the Court considered that magnetic recording's capability of producing near-perfect copies directly undermines the sales of phonorecords.³¹

Defendants had also argued, as several outside observers had before, that if home taping was not exempted, it would have been impossible for the right holders to enforce their rights against the users, making the exclusive right in respect of private recording essentially meaningless. In response, the Court opined that 'the existence of a right cannot depend upon the degree of its enforceability'.³² Moreover, as the Court subtly noted – clearly hinting at the voluntary licensing scheme originally proposed by GEMA – it was for the parties to effectuate, through appropriate measures and agreements, the claims of the authors in a way that would not necessitate measures of control.³³

Having concluded that home taping was not exempted under German copyright law, the Bundesgerichtshof then had to deal with the question of liability of the recorder manufacturers. Clearly, the manufacturers could not be held directly liable for acts of copyright infringement committed by their customers. Reasoning by analogy from the concept of indirect liability developed in patent case law, the Court however held that Grundig could be held liable for injunctive relief because the equipment that was sold on the market was suitable for copyright infringing purposes and was advertised as such. The mere fact that the Grundig Reporter might also be used as a (non-infringing) dictation machine, as was argued by the defendant, was not deemed to be a reason for immunity, since the Grundig machines were equipped with 'radio' and 'disk' (phonorecord) input buttons, and advertised for such potentially infringing uses.

On the other hand, the Court rejected GEMA's request for a court order obliging Grundig to require each customer to sign a declaration promising to acquire a licence from GEMA. According to the Court, such a measure would be disproportionate – and probably ineffective anyway. The Court concluded that it would be sufficient for Grundig to sell its tape recorders together with a notice warning customers not to infringe the copyrights represented by GEMA ('GEMA notice').

Following the decision Grundig and other manufacturers however ceased to advertise tape recorders as suitable equipment for taping radio broadcasts and copying

28. *Ibid.*, 498 at (b).

29. *Ibid.*, 498 at (c).

30. *Ibid.*, 499 at (e).

31. *Ibid.*, 499 at (f).

32. *Ibid.*, 499.

33. *Ibid.*, 499.

records, thereby escaping liability under the Grundig Reporter dictum. Presumably this meant that no ‘GEMA notices’ were necessary.³⁴ In a follow-on case, once again brought by GEMA against Grundig, the Bundesgerichtshof subsequently expanded its dictum, and obliged Grundig to include ‘GEMA notices’ in all its advertising and promotional materials, even if the machines were advertised in a neutral way.³⁵ Later cases brought against manufacturers of recording tape and against retailers³⁶ led to similar decisions.

But GEMA’s crusade against Grundig and the other tape recorder manufacturers was far from over. Even with a series of legal victories against the tape recording industries, and incidental injunctions against private owners of tape recorders,³⁷ the German tape recorder case law had little practical effect on the ground. More than a decade had now passed since GEMA had introduced Dr Schulze’s original voluntary licensing scheme, which offered licences to private owners of tape recorders at a royalty rate of DM 10 (later DM 12) per machine per year. Halfway the 1960s approximately three million tape recorders had been sold in Germany.³⁸ However only about 5,000 private owners had signed up to the GEMA user licence.³⁹

In desperation GEMA took yet another, highly controversial step in its efforts to coax private tape recorder owners into its licensing scheme. This eventually led to the *Personalausweise* decision of 1964,⁴⁰ the fifth tape recorder case decided by the German Supreme Court within a decade. In this case GEMA had asked for a court order obliging manufacturers of tape recording equipment, upon delivery of such recording equipment to wholesalers or retailers, to request from the latter that they communicate the identity of the purchasers to GEMA so as to enable the society to verify whether these customers engaged in lawful activities or propose a licence.

GEMA’s new enforcement strategy hit a raw nerve in a country still recovering from its dark totalitarian past, and neighbouring a state that was developing citizens’ surveillance into an art form. According to Reimer, who had been sympathetic to the cause of GEMA in previous tape recorder cases, ‘the demand of proof of identity [...]

34. Seemann, *supra* note 21, 237.

35. *GEMA-Hinweis*, German Federal Supreme Court (Bundesgerichtshof), 22 January 1960, Case I ZR 41/58, GRUR 1960, 340.

36. German Federal Supreme Court (Bundesgerichtshof), 12 June 1963, GRUR 1964, 91; German Federal Supreme Court (Bundesgerichtshof), 26 June 1963, GRUR 1964, 94. See Adolf Dietz, ‘Ton- und Bildaufnahmen sowie Fotokopie (reprografische Vervielfältigung) zum eigenen Gebrauch in Recht und Praxis der Bundesrepublik Deutschland’, GRUR 1978, at 459.

37. See Der Spiegel, ‘Mister fünf Prozent’, 1961, No. 50, 44–45; the article suggests that GEMA’s strategy of suing sample individuals was to coax the manufacturers into accepting a licensing arrangement; see also T. Collova, ‘Über die Entwicklung der gesetzlichen und vertraglichen Regelung der Vervielfältigung zum persönlichen Gebrauch (private Überspielung) in der Bundesrepublik Deutschland’, UFITA vol. 125 (1994), 53, 60.

38. See for sales figures for the 1956–1962 period: Erich Schulze, ‘Der Urheber- und Leistungsschutzrechte bei der privaten Tonbandvervielfältigung’, GRUR 1963, 615, 616.

39. Dietrich Reimer, GRUR 1965, 109.

40. *Personalausweise*, German Federal Supreme Court (Bundesgerichtshof), 29 May 1964, Case Ib ZR 4/63, GRUR 1965, 104; see Dirk J.G. Visser, ‘Copyright Exemptions Old and New: Learning from Old Media Experiences’, in P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (1996), 49, at 50.

evokes unpleasant memories of police state circumstances.’⁴¹ Another commentator compared the GEMA scheme to recent DDR rules that obliged consumers to disclose their identities to the authorities when purchasing a television set.⁴²

Unsurprisingly, GEMA’s stepped-up claim against the recorder industry and its consumer base was ultimately rejected. The Court reiterated earlier decisions holding that the manufacturers could be subjected to injunctive relief, pointing out that the manufacturers of recording equipment were taking advantage of the popularity of private home taping and that copyrights were especially difficult to enforce in the private sphere. However, a general prohibition to sell tape recorders to the general public, which was implicit in GEMA’s demands, was deemed to be unfounded, because a non-negligible part of the customers purchased tape recorders not for the purpose of recording copyright protected works, but for other uses⁴³ (e.g. dictation or taping sounds in nature). More importantly, the Court order that GEMA sought would be wholly disproportionate in light of each citizen’s right to the inviolability of his home, as guaranteed by Article 13 of the German Constitution (*Grundgesetz*). In this connection the Court pointed out that knowing the identity of a purchaser would not be enough for GEMA to pursue its licensing strategy. Tape recorders could and would be used by their owners for non-infringing purposes. Moreover, they could be resold or given away to other individuals. In other words, GEMA would in any way need additional means to enforce its members’ copyright, making the requested measure, which the Court labelled ‘highly unusual’ and would severely impact Grundig’s relations to its retailers and its customers, disproportionate.

Having rejected its principal claim, the Court did offer GEMA some hope for the future. Responding to GEMA’s lament that denying its claim would effectively leave it empty-handed with regard to home taping, the Court wrote up a most interesting obiter dictum. If it turned out that no practical ways could be found to collect tape recording royalties from private users, then GEMA might ask the tape recorder manufacturers to compensate GEMA by way of a one-time lump sum payment.⁴⁴ According to the Court shifting the obligation to pay equitable remuneration from private users to equipment manufacturers would not be at odds with existing licensing practices. For instance, record producers, publishers and concert organizers regularly pay royalties, which are then passed on to the end users as part of the consumer price.

§7.04 THE INTRODUCTION OF COPYRIGHT LEVIES IN GERMANY

While the Bundesgerichtshof is generally credited for having ‘invented’ copyright levies in its *Personalausweise* decision, the ground work for a levy scheme was already well in place before 1964. The idea of a levy can actually be traced to the voluntary

41. D. Reimer, GRUR 1965, 110, quoted from Seemann, *supra* note 21, 239, note 36.

42. A. Metzger, ‘Die private Tonbandvervielfältigung’, GRUR 1964, 253, 254.

43. *Personalausweise*, German Federal Supreme Court (Bundesgerichtshof), 29 May 1964, Case Ib ZR 4/63, GRUR 1965, 104, 107.

44. *Ibid.*, 108; Seemann, *supra* note 21, 243.

scheme developed by GEMA in the early 1950s, under which tape recorder manufacturers and importers were offered blanket licences for a one-time licence fee per recorder.⁴⁵ Although only few manufacturers signed up to this licensing arrangement, which allowed them to sell ‘GEMA free machines’ on the consumer market,⁴⁶ its accounting structure (charging a lump-sum fee to manufacturers of recording equipment, not to the actual users) clearly anticipated the statutory levy scheme that was suggested by the German Supreme Court and eventually adopted in the new German Copyright Act of 1965.

Another significant factor was the rise of photocopying technology that occurred in parallel with the success of tape recording. Only one month after its landmark *Grundig Reporter* decision of 1955, the BGH determined that the use of photocopying equipment in a commercial enterprise exceeded the scope of the private copying exception, and therefore also amounted to infringement.⁴⁷ The decision led to an agreement in 1958 between the German publishers and the German industry union, which provided for a lump-sum payment for photocopying in commercial settings.⁴⁸

In sum, the time was ripe for converting these existing voluntary levy schemes into law when Germany set to reform its antiquated copyright law, including its rules on private copying. Within the legislature there existed consensus that a new provision should accept the realities of the day, and therefore not prohibit home taping, but also guarantee to right holders equitable remuneration. A government draft of a new private copying regime that was published in 1962, however, still did not provide for levies. Instead, the draft proposed to impose a statutory obligation to pay remuneration directly on private owners of recording equipment. The German Parliament’s Judiciary Committee however preferred the model suggested by the Bundesgerichtshof in *Personalausweise*.⁴⁹ The Committee expected that claims against private users would probably remain unenforceable, whereas a levy imposed on equipment manufacturers and importers might work. Like the Court, the Committee assumed that the producers of recording equipment would pass on the costs of the levy to the purchasers of the equipment. Moreover, the Committee was not impressed by the argument that had previously deterred the German government from proposing levies, i.e. that some tape recorders would not be used to record protected works, but rather for dictation. In fact the Committee considered it unlikely ‘that recording equipment suitable for private taping would never be used in that capacity during its whole lifetime’.⁵⁰ The Committee however did not go as far as to recommend the introduction of an additional levy on blank tapes on the ground that in the case of blank tapes it could not be determined

45. According to an article in *Der Spiegel* GEMA’s asking price of a licence fee of 5% of the retail price was well above what the manufacturers were willing to pay; *Der Spiegel*, ‘Mister fünf Prozent’, 1961, No. 50, 45.

46. Adolf Dietz, ‘Ton- und Bildaufnahmen sowie Fotokopie (reprografische Vervielfältigung) zum eigenen Gebrauch in Recht und Praxis der Bundesrepublik Deutschland’, *GRUR* 1978, 457, at 459.

47. German Federal Supreme Court (Bundesgerichtshof), 24 June 1955, Case I ZR 88/54, *GRUR* 1955, 544.

48. Martin Senftleben, *Copyright, Limitations and the Three-step Test* (2004), 54.

49. Collova, *supra* note 37, 64–65.

50. Reinbothe, *supra* note 25, 40.

‘whether they would serve just dictation purposes or rather the recording of protected works’.⁵¹

In the end, a new Article 53 that allowed home taping and photocopying subject to an equipment levy became part of the new German Law on Author’s Right, which was adopted on 9 September 1965 and entered into force on 1 January 1966.⁵²

The obligation for manufacturers and importers of reproduction equipment to pay levies was formulated in Article 53(5) as follows:

If from the nature of the work it is to be expected that it will be reproduced for personal use by the fixation of broadcasts on visual or sound records, or by transferring from one visual or sound record to another, the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions.⁵³

The levy would be payable by manufacturers and importers of recording and reproduction equipment to a collecting society representing authors of works likely to be privately copied – not including, for instance, architectural works. For this purpose GEMA, the record companies and the literary rights society VG Wort had already set up the *Zentralstelle für private Überspielungsrechte* (ZPÜ), the central agency for private record rights. The amount of the levy was to be negotiated between the collecting society and equipment manufacturers and importers, but could never exceed 5% of the factory price of the equipment.

The final episode in the German tape recorder saga was a constitutional challenge brought against the statutory levy regime by tape recorder manufacturer Uher in 1966. Uher’s main complaint was that the levy scheme unfairly favoured producers of recording equipment that was actually used to record copyright protected works over the manufacturers of equipment that was not. According to Uher this was against the equality principle enshrined in the German Constitution, Article 2. In 1971 the Federal Constitutional Court (Bundesverfassungsgericht) dismissed the action. According to the Court, no unequal treatment occurred since the levies were ultimately passed on to the purchasers of the equipment.⁵⁴ Having thus survived this final challenge, the German levy was gradually expanded and refined in the course of later decades.

Since the law’s entry into force, the amount of the remuneration has steadily increased. In its first year the levy generated approximately DM 4 million in fees collected by the ZPÜ. By 1978 the proceeds of the levy had already increased sixfold.⁵⁵ In 1985, as retail prices for recording equipment sank with the success of cheap cassette recorders,⁵⁶ levies were extended to manufacturers and importers of blank tape, and

51. *Ibid.* Blank tape levies would be introduced in Germany only much later, in 1985.

52. Gesetz über Urheberrechte und verwandte Schutzrechte (Urheberrechtsgesetz) (German Copyright Act) of 9 September 1965; published in [1965] BGBl. I 1273. See Reinbothe, *supra* note 25, 36.

53. WIPO translation.

54. German Federal Constitutional Court (Bundesverfassungsgericht), 7 July 1971, Case 1 BvR 775/66, GRUR 1972, 488.

55. Reinbothe, *supra* note 25, 43.

56. *Ibid.*, 46.

levy rates were set by the law.⁵⁷ The scope of the equipment levy was furthermore gradually expanded by the operation of the law that was cast in technology-neutral terms, as new home recording and reproduction equipment became available to the consumers. Consequently, equipment levies were also imposed on cassette recorders and – much later – on video recorders.

More recently, German levies have proliferated into the digital realm. The ZPÜ currently collects levies for a wide range of digital equipment, including CD and DVD burners, DVD recorders and MP3 players, and digital media such as blank CD's and DVD's, USB sticks, flash media, external hard disks, and even mobile phones with memory capacity.⁵⁸ The ZPÜ has also agreed to a levy on PC's with the German Federation of Computer Manufacturers, but this agreement is not supported by the entire computer industry. Whether a PC levy has a sound basis in the law is a contentious issue that will eventually be decided by the Court of Justice of the European Union.⁵⁹

§7.05 PROLIFERATION OF LEVIES ACROSS THE WORLD

For well over a decade after 1965 Germany remained the only country that provided for a statutory home taping levy. At the ALAI Congress of Amsterdam in 1956 the *Grundig Reporter* case was presented by Dr Gerda Krüger-Nieland, one of the Bundesgerichtshof justices that had produced the decision, to general applause.⁶⁰ The Amsterdam Congress even adopted an official resolution, considering that existing private copying exceptions were outdated in the light of modern techniques and advising national legislatures to deal with the issue in such a way that 'the legitimate interest of the authors' are effectively safeguarded. The ALAI resolution however had little immediate effect.

The German copyright reform of 1965 did have a noticeable impact on the deliberations at the Stockholm conference on the revision of the Berne Convention that gave birth to the 'three-step test' enshrined in Article 9(2) of the Convention. While a German proposal to directly include in the three-step test mention of the author's right to equitable remuneration was eventually rejected, a reference to equitable remuneration as an element of the third step did make it into the final report of the conference.⁶¹

Nevertheless, it took some fifteen more years before Austria became the second country in the world to establish a statutory levy scheme, which closely followed the German model. As cassette tape recorders, which were invented by the Dutch Philips

57. P. Bernt Hugenholtz, Lucie Guibault & Sjoerd van Geffen, 'The Future of Levies in a Digital Environment' (2003), available at <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>, 12.

58. See <https://www.gema.de/musiknutzer/lizenzieren/meine-lizenz/hersteller-von-leermedien-und-geraeten/unterhaltungselektronik.html>.

59. See pending cases C-457/11 (VG Wort), C-458/11 (VG Wort), C-459/11 (Fujitsu Technology Solutions) and C-460/11 (Hewlett-Packard).

60. ALAI, *Compte rendu du 47ème congrès d'Amsterdam* (3–8 septembre 1956), Paris (1966), 161.

61. Senftleben, *supra* note 48, 55–56.

company in the early 1960s, gradually replaced traditional reel-to-reel recorders and became affordable and popular consumer products everywhere, levies spread across continental Europe like wildfire. After Germany and Austria came Finland (1984), Iceland (1984), France (1985), Netherlands (1990), Switzerland (1992), Spain (1992), Denmark (1992), Italy (1992), Belgium (1994), Greece (1994) and Portugal (1998).⁶²

Norway (1981) and Sweden (1982) were amongst the first countries to introduce a system of levies; however the Nordic levy scheme originally resembled a public tax more than a private compensation scheme. Both countries later changed their systems. While Sweden now follows a traditional levy model, the Norwegian levy is funded out of the state budget.⁶³ Outside the EU, levy schemes have also been adopted in Russia (1999) and other former states of the Soviet Union, in Japan (1993), and in several states in Africa and South America.⁶⁴

In 2001 levy regimes were given tacit endorsement by the EU legislature, when it adopted Directive 2001/29/EC, the Information Society Directive.⁶⁵ The lack of harmonization in this field had been a thorn in the side of the Community for many decades. Previous attempts by the European Commission to harmonize the issue, including a widely circulated, but never-published draft proposal for a directive,⁶⁶ were aborted, most likely because existing differences in private copying legislation in the Member States were considered too large to overcome. The Information Society Directive allows, but does not require Member States to provide for home copying exemptions under the conditions set out in Article 5.2 (b), including an obligation to provide for 'fair compensation' to authors and other right holders.⁶⁷ While levies are not specifically mentioned in the Directive, the right to fair compensation is an implicit recognition of the levy schemes that have become the norm in over twenty EU Member States.

The Directive however seems to reject the natural rights rationale that underlies the German levy scheme. The notion of 'fair compensation' is not intended to guarantee to authors a just reward, but is directly linked to the notion of *harm* (damage), i.e. the prejudice suffered by a right holder due to acts of private copying.

62. For an overview of levy schemes existing in Europe in 2009 see Martin Kretschmer, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, Report for the UK Intellectual Property Office, October 2011, available at <http://www.cippm.org.uk/pdfs/copyright-levy-kretschmer.pdf>, 27–28.

63. Tarja Koskinen-Olsson, in Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, 2nd ed. (2010), 288.

64. See Australian Copyright Council, 'Remuneration for private copying in Australia: a Discussion Paper' (2001), available at <http://www.screenrights.org/sites/default/files/uploads/acpaper.pdf>.

65. Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ No. L 167/10, 22 June 2001.

66. European Commission, Proposition de Directive du Parlement Européen et du Conseil relative à l'harmonisation de certaines règles du droit d'auteur en des droits voisins applicables à la copie privée, Brussels, December 1995 (unpublished).

67. P. Bernt Hugenholtz, Lucie Guibault & Sjoerd van Geffen, 'The Future of Levies in a Digital Environment' (2003), available at <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>. See also Martin Kretschmer, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, Report for the UK Intellectual Property Office, October 2011, available at <http://www.cippm.org.uk/pdfs/copyright-levy-kretschmer.pdf>, 20–22.

Recital 35 of the Directive clarifies that ‘fair compensation’ is required when rightholders are (actually or potentially) harmed by acts of private copying. Consequently, Member States are obliged to provide for compensation only if the likelihood of such harm can be reasonably established.⁶⁸

Nevertheless, only a handful EU Member States have so far refrained from implementing a levy system: the United Kingdom, Ireland, Luxembourg, Cyprus and Malta. Not surprisingly, four of these countries do not follow the author’s right tradition. The United Kingdom twice came close to introducing a levy. In 1977 the Whitford Committee on copyright law reform recommended a levy similar to the German model, but the UK Government was not convinced.⁶⁹ Levies were recommended once again in 1985 in a consultative document presented to the British Parliament by the Secretary of State for Trade and Industry.⁷⁰ While the UK Government’s 1986 White Paper on Intellectual Property and Innovation embraced the proposal, mounting pressure from tape manufactures and consumer groups eventually led to its withdrawal. A court claim by the music industry aimed at imposing liability on tape recorder manufacturer Amstrad for ‘authorizing infringement’ was eventually rejected by the House of Lords in 1988.⁷¹

While author’s rights regimes are certainly more conducive to the introduction of levy schemes, levies have also – albeit reluctantly – spread to some countries of the common law (copyright) tradition. For a few years in the late 1980s Australia had a statutory tape levy, but this was declared an unconstitutional tax in 1993.⁷² Several common law countries have adopted levy schemes, including Israel (1996) and Canada (1997). Even the United States can make a modest claim to a statutory levy scheme on recording devices and blank media, after the adoption in 1992 of the US Digital Home Recording Act.⁷³ The levy scheme however applies only to digital tape (DAT) recording, a technology that was never successful on the consumer market, and the importance of the US levy has therefore remained negligible.

Whether or not analogue audio home recording ever was, or still is, exempted under the ‘fair use’ doctrine, has been a matter of some controversy. For video home taping this issue was largely settled by the US Supreme Court in *Sony* – the 1984 landmark decision on contributory liability of equipment manufacturers.⁷⁴ One can only speculate what would have been the law in the United States, if the case was decided differently. Whereas the facts in *Sony*, which dealt with video recorders, were quite similar to those in *Grundig Reporter*, the decisions are diametrically opposed.

68. *Padawan v. SGAE*, Court of Justice of the European Union, 21 October 2010, Case C-467/08; and *Stichting de ThuisKopie v. Opus Supplies Deutschland*, Court of Justice of the European Union, 16 June 2011, Case C-462/09.

69. Gillian Davies, *Private Copying of Sound and Audio-visual Recordings*, study prepared for the European Commission (1984), 104.

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

71. *CBS Songs Ltd and Others v. Amstrad Consumer Electronics Plc and Another*, House of Lords, 12 May 1988, [1987] 2 WLR 1191.

72. *Australian Tape Manufacturers Association Ltd v. Commonwealth* (1993) 176 CLR 480.

73. 17 U.S.C. §§ 1001–10.

74. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

While the US Supreme Court did not find contributory liability on the part of video recording manufacturer Sony, because home taping qualified as *fair use* in case of ‘time shifting’ of television programs, and Sony’s devices therefore were found to have ‘substantial non-infringing uses’, the German Federal Supreme Court came to opposite conclusions that eventually led to the introduction of levies.

Although at the time major doctrinal and circumstantial differences existed – and presently still exist – between US and German copyright law, which might explain this radically different outcome, the Sony case was in fact decided by only the narrowest of margins.⁷⁵ If a single Justice of the Supreme Court had voted the other way, video recorders (and by implication tape and cassette recorders) would have been declared illegal in the US. Would this have resulted in the introduction of a full-blown levy scheme in the United States? In light of the AHRA that was adopted just eight years after *Sony*, this is entirely possible.

§7.06 CONCLUSION: LESSONS FROM THE PAST

As this historic account reveals, the emergence of tape recorders as a consumer product in the 1950s and 1960s gave rise to a range of problems that have haunted the law of copyright ever since. With the introduction of recording technology in private homes, which allowed normal consumers to produce high-quality copies of musical works with the proverbial ‘push of a button’, copyright law for the first time entered the private sphere. In response to the early copyright claims made in Germany against manufacturers and owners of tape recording equipment, the *Bundesgerichtshof* produced an impressive body of case law that directly dealt with, and anticipated, many vexing questions that persist in the field of copyright until this day. Should copyright extend to, and be enforceable in the private sphere? Are copyright management systems compatible with personal data protection? Can manufacturers of reproduction technology be held accountable for facilitating copyright infringement, or is such technology essentially ‘neutral’?

While some may disagree with the way the German Supreme Court mediated between the competing claims of copyright and privacy, the tape recorder case law that the Court produced between 1953 and 1964 is remarkable, and deserves praise for the way the Court has attempted to reconcile the seemingly irreconcilable. Whereas the Court held that copyright protection does not stop short of the private sphere, and that authors deserve remuneration for home copying, it would not accept that copyright be enforced at the expense of the end users’ right to informational privacy. Whereas the Court held manufacturers of recording equipment liable for facilitating copyright infringement without ‘GEMA notice’, the manufacturing of tape recording equipment was never actually prohibited. In retrospect, the Court’s ‘invention’ of a levy scheme in its final and most famous tape recorder decision – *Personalausweise* of 1964 – was the

75. See Pamela Samuelson, ‘The Generativity of *Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens’, 74 *Fordham L Rev* 1831 (2006).

logical consequence of its previous rulings; a pragmatic compromise between protecting authors' interests, respecting consumers' privacy and allowing a prosperous electronics industry to flourish.

Having been invented by the German Federal Supreme Court in 1964, copyright levies became a staple item of copyright law in most Member States of the EU and many countries outside Europe. With the notable exception of the common law countries, such as the UK and Ireland, where private copying has never been fully legalized, most Member States gradually introduced a system of private copying levies. Levies are imposed on the importation and manufacture of copying equipment, blank media or both, collected by collecting societies representing authors, performing artists, film producers and publishers, and ultimately paid for by consumers.

Aggregate levy income in the European Union peaked at well over €500 million per year in 2004, but in more recent years is gradually declining, as the costs of blank media have fallen and the use thereof has decreased.⁷⁶ As tape recorders were gradually replaced by digital recording and reproduction devices, levies have inevitably spread into the digital realm, and thereby rekindled old discussions. Should home copying exemptions survive in the digital environment, now that digital rights management allows right holders control of private uses? Is digital reproduction equipment, such as a personal computer, 'guilty' technology to be subjected to a levy, or essentially neutral?⁷⁷ With the adoption in the European Union of the Information Society Directive of 2001, these questions have become increasingly urgent. Article 5.2 (b) of the Directive obliges Member States that wish to adopt or maintain private copy exemptions to provide for 'fair compensation' that 'takes account of the application or non-application of technological measures'. Although the meaning of this provision is far from clear, its most likely interpretation is that no (or fewer) levies are due as digital rights management technology becomes available for right holders as a means to prevent or control private uses.⁷⁸ In some countries, such as the Netherlands, the Directive has inspired a thorough rethinking of the copyright levy scheme. A policy paper published by the Dutch Government in 2011 proposes to reduce the scope of the private copying exemption by prohibiting downloading from illegal sources, and to gradually phase out existing copyright levies.⁷⁹

By contrast, in scholarly literature the interest in levy schemes as a pragmatic way of dealing with the problems of mass copyright infringement over the Internet is on the rise. In the United States, where home taping levies have never existed in a meaningful way, various scholars have called for the introduction of levies on digital equipment or broadband Internet connections as part of a scheme that would legalize

76. Martin Kretschmer, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, Report for the UK Intellectual Property Office, October 2011, available at <http://www.cippm.org.uk/pdfs/copyright-levy-kretschmer.pdf>, 30.

77. See P.B. Hugenholtz, L. Guibault and S. van Geffen, *The Future of Levies in a Digital Environment*, *Institute for Information Law* (2003), available at <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>, 40.

78. *Ibid.*, 42.

79. Minister of Security and Justice (The Netherlands), Letter to the Second Chamber of Parliament, 11 April 2011, Kamerstukken II, 2010–2011, No. 29.

non-commercial peer-to-peer file sharing.⁸⁰ Similar proposals for legalization of digital file sharing subject to a ‘content flat rate’ are becoming increasingly popular in Germany⁸¹ and elsewhere in Europe.⁸²

Are levies on their way out – a temporary remedy for a market failure that will soon be cured by way of DRM – or will they come back with a vengeance, as the only practicable way of compensating authors while respecting fundamental freedoms in the digital environment? Only time will tell.

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80. Neil Weinstock Netanel, ‘Impose a Non-commercial Use Levy to Allow Free P2P File-Swapping and Remixing’, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=352560; a somewhat similar, but tax-based remuneration scheme has been proposed by William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainments* (2004).
 81. Volker Grassmuck, ‘Recent Copyright Trends on the Internet’, 5 April 2008, available at http://waste.informatik.hu-berlin.de/Grassmuck/Texts/08-04-05_ICC-Mag_Flatrate.pdf.
 82. Francisco J. Cabrera Blázquez, ‘Private Copying Levies at the Crossroads’, IRIS Plus, 2011, No. 4, 7.