

Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches

Andrew F. Christie*

Intellectual Property Research Institute of Australia
The University of Melbourne

Intellectual Property Research Institute of Australia

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Intellectual Property Research Institute of Australia
The University of Melbourne
Law School Building
Victoria 3010 Australia
Telephone: 61 (0) 3 8344 1127
Fax: 61 (0) 3 9348 2353
Email: info@ipria.org
www.ipria.org

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*Davies Collison Cave Professor of Intellectual Property, University of Melbourne Law School; and Director, Intellectual Property Research Institute of Australia, University of Melbourne. The author gratefully acknowledges the contributions of John Davidson, Saba Elkman, Katerina Gaita and Sarah Moritz.

I INTRODUCTION

The issue of private copying and its implications for copyright owners is not new, and suggested resolutions of the conflicting interests at stake are varied. One such resolution is the implementation of statutory licence and levy schemes. This short paper examines a paradox about these schemes.

Statutory licence and levy schemes for private copying have been readily accepted in continental European countries for many decades. By contrast, such schemes have only recently begun to emerge in common law countries. This situation is paradoxical — the statutory licence and levy scheme is common in those jurisdictions which place significant emphasis on authors' moral rights, and yet is rare in those countries that give primacy to the utilitarian rationale for copyright. Why is this so?

This paper makes some observations on this topic, which may explain the paradox. It begins by analyzing the differing starting points for dealing with private copying in civilian and common law systems, using the German, United Kingdom and Australian experiences as paradigmatic. This analysis sheds light on the way in which the nature of the problem of private copying is perceived in those two systems. This paper then observes the legislative responses to this problem that have occurred in the two systems, and in particular in Germany, Canada and the United States. A view is then offered about what conclusions might tentatively be drawn from these analyses and observations in respect of the future resolution of the problem of private copying.

II THE PARADOX

When one looks at statutory licence and levy schemes for private copying through-out the world, it becomes apparent that the vast majority of such schemes are in the civilian law countries of continental Europe.¹ Very few of such schemes are in the common law world.

This appears paradoxical, because the continental European copyright system is viewed stereotypically as a system of 'authors' rights'² — that is, a system where the primary

¹ Countries with a statutory licence and levy for analogue recording media include Austria, Belgium, Denmark, France, Finland, Germany, Greece, Hungary, Iceland, Italy, The Netherlands, Norway, Poland, Portugal, Spain, Sweden and Switzerland. At least one of these countries also has a similar legislative scheme for digital media: see article 56 *Law on Copyright and Neighbouring Rights* (Belgium).

² See e.g. Reh binder, M. 2002 *Urheberrecht*, 182; Ricketson, S. 1984 *The Law of Intellectual Property*, 6; Garnett, K. et al. 1999 *Copinger and Skone James on Copyright: Volume I*, 29.

purpose of copyright is to protect the personal interests of authors. Under this view, copyright is a natural entitlement of the author: because a work reflects the personality of the author, copyright must exist so that the author can control the uses to which the work is put.³ Consequently, the emphases in the copyright law of civilian countries are often significantly different from those in the copyright law of common law countries. There is, for example, a greater emphasis on moral rights, and the authors' economic rights are treated somewhat differently.⁴

A statutory licence and levy scheme may appear antithetical to a copyright system in which the authors' rights are paramount. This is because a statutory licence and levy directly interferes with the relationship between the author and the audience which enjoys the author's work. Put simply, a statutory licence and levy removes a degree of control from the author. Such a scheme effectively declares that a licence will be imposed, for which compensation is received by means of a levy, irrespective of authorial consent. This appears contrary to one's stereotype of the principles underpinning continental European copyright law. It is, however, a fact that all the early private copying licence and levy schemes were enacted in continental Europe. Hence one is led to ask why this might be.

The stereotype of the Anglo-American common law copyright system is that it is a system of 'owner's rights'.⁵ Under this view, copyright is an economic tool: it provides a solution to an economic problem. The economic problem is one of suboptimal levels of creation of works. The solution is the grant of proprietary rights over the author's work. Put simply, copyright's essential purpose is to correct market failure. This market failure arises because the work, by virtue of being intangible, is non-rivalrous and non-excludable. That is to say, the consumption of the work by one person does not deprive other persons of it, and it is not possible to exclude other persons from consumption of the work unless proprietary rights are given in relation to it. Without the grant of proprietary rights in relation to the work, the work is likely to be subject to free-riding by third parties (e.g. unauthorized reproduction of the work) and hence the creator of the work is unable to appropriate the full value of the work. This, in turn, reduces the incentive for creators to create works, with the result that there is suboptimal production of works (a "deadweight loss"). Copyright avoids this deadweight loss by granting proprietary rights in relation to the work.

³ As reflected in the foundational case *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, [1955] GRUR 492: 'The author's control of his work...results from its very own nature ... and merely finds recognition and form through legislation.'

⁴ McKeough, J. et al. 2002 *Intellectual Property: Commentary and Materials*, 18.

⁵ Ricketson S. 1984 *The Law of Intellectual Property*, 7; See also Lindsay, D. 2002 *The Law and Economics of Copyright, Contract and Mass Market Licences*.

Given this strongly utilitarian rationale for copyright, one would assume that the common law copyright system would be particularly sensitive to, and embracing of, schemes solving economic problems. Private copying is an economic problem, and a statutory licence and levy scheme is a solution to this problem. Thus, one would expect to see statutory licence and levy schemes for private copying within the copyright laws of common law countries. Yet, until relatively recently, there were no such schemes in common law copyright regimes; and even today they are relatively rare.

So the paradox emerges: the common law copyright system resists the solution of a statutory licence and levy scheme, despite it appearing consistent with a utilitarian justification for copyright — and yet the civilian copyright system embraces it, despite such an approach appearing antithetical to a system that places the entitlement of the author as paramount. Why?

III RESOLVING THE PARADOX

A. The Default Position

It may be argued that the reason for the paradoxical situation described above is the different ‘default’ position on private copying within the civilian and the common law copyright systems. The different default positions are illustrated in Figure 1.



Figure 1 - Default Position on Private Copying

In Figure 1, Germany (DE) is used as the paradigm of the civilian copyright system. Put in simple terms, prior to the introduction of a statutory licence and levy, there existed in German

copyright law the situation that private copying was excepted from infringement, and there was no obligation on private copiers to remunerate the author for private copying.⁶ Essentially it was understood that the author could not control consumption of a work in the domestic realm where private copying was involved, insofar as such private copying was for noncommercial purposes.⁷ All the author could practically control was the dissemination of the work to the audience. The author's right to remuneration was viewed as resulting from the enjoyment which an audience derives from it.⁸ Given the genuine exception to copyright infringement vis-à-vis private copying as contained in article 15(2) of the Literatururherberggesetz 1901, however, payment was not owed to the author. The author had no exclusive rights over such copying, and hence was not entitled to remuneration for it.

The situation in Germany before the introduction of a statutory licence and levy contrasts markedly with copyright law as it is at present in the United Kingdom and Australia,⁹ and as it was until recently in Canada. In these legal systems there exist very limited exceptions to the copyright owner's rights. The most important exception is for copying done for research and study.¹⁰ That exception does not, however, cover private copying in the sense discussed here. The default position in the common law world (as exemplified by the United Kingdom and Australia) is, therefore, that no private copying is permitted.

Further, *in practice* there is generally no remuneration paid for private copying which occurs in the common law countries. It is true that *if* the copyright owner can identify the occurrence of private copying and can prosecute those doing it, then the copyright owner can receive remuneration for it. In practice, however, there is really no entitlement to remuneration for private copying. This is because the occurrence of such copying is so difficult to identify, and thus is so difficult to prosecute, and hence is so difficult to licence.

The situation described above is a polarisation. At one extreme (exemplified by Germany pre-1965), private copying is permitted as a matter of law; at the other extreme (exemplified by the United Kingdom, Australia and, until recently, Canada), private copying is not permitted as a matter of law. Interestingly, in neither case is remuneration available to the

⁶ Article 15(2) *Literatururherberggesetz* (LUG) 1901.

⁷ *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 271-2 [1955] GRUR 492.

⁸ *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 278 [1955] GRUR 492.

⁹ In fact, a statutory licence and levy scheme for private audio copying was introduced into Australian copyright law in the late-1980s, but was found unconstitutional: see *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 176 CLR 480. In that case, the High Court ruled that Part VC of the *Copyright Amendment Act 1989* (Cth) was invalid because it was a revenue enactment that had been passed in the legislature in an incorrect manner.

¹⁰ For example: s29(1) *Copyright, Designs and Patent Act 1988* (UK); ss40 and 103C *Copyright Act 1968* (Aus); and s 29 *Copyright Act R.S.C. 1985, c. C-42* (Canada).

copyright owner whose work has been privately copied. In the case where private copying is permitted, remuneration is not required as a matter of law. In the case, where private copying is not permitted, remuneration is generally not available due to the practicalities of enforcing the right to prevent private copying.

1. THE MOVE TO THE MIDDLE GROUND

As with all polarisations, there is a middle ground. The middle ground is that private copying is permitted (under a statutory licence) and remuneration for it is paid (under a statutory levy). The rationale for this middle ground is as follows. The reality is that private copying is occurring, and increasingly so given technological developments. Such copying is objectionable to the copyright owner, but in practice it cannot be prevented. The compromise solution is to legitimise the inevitable (the private copying) and at the same time provide the owner with the otherwise unobtainable (remuneration for the copying).

It is noteworthy that no jurisdiction appears to make use of the middle ground as the *default* position on private copying. Nevertheless, this middle ground position is now being obtained by way of legislative reform. It was first achieved in the civilian copyright system, with Germany leading the way in 1965.¹¹ It was only quite recently, however, that this middle ground position was reached in the common law system too, with the new provisions on private copying in Canada.¹² This move to the middle ground is illustrated in Figure 2.

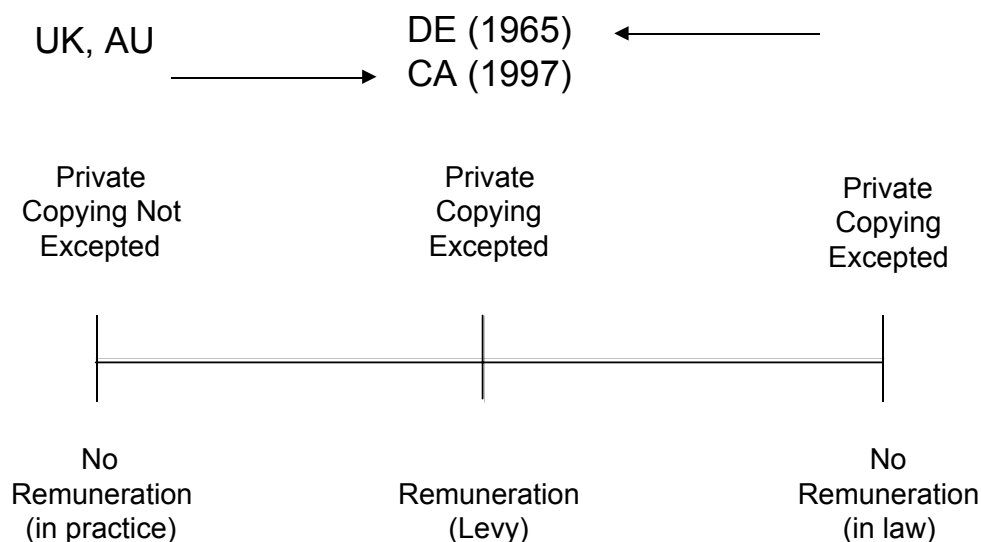


Figure 2 - Move to the Middle Ground: Statutory Licence and Levy

¹¹ s53 *Urhebergesetz* (UrhG) 1965.

¹² Part VIII: Private Copying, *Copyright Act* (R.S. 1985, c. C-42).

The idea for a middle ground solution to the problem of private copying emanated from Germany in 1965. At that time, it was recognized that the previous treatment of private copying warranted reconsideration, due to technological advancement. In particular, the nature and potential scale of private copying was changing, due to the possibilities for automation of private copying provided by tape recording machines. It would be unfair were the author not entitled to prevent such automated private copying.¹³ Accordingly, such copying was found to not be within the private copying exception.¹⁴

The problem that arose upon this finding was how to permit the copyright owner to enforce the right against this sort of copying. There was a particular dilemma in that privacy was then, and continues to be, guaranteed in article 13 of the *Basic Law*. All mechanisms considered for the enforcement of copyright against the infringing private copier interfered with that right to privacy. It was because of this dilemma that a solution was reached, whereby a statutory licence was introduced for private copying onto tapes, and a statutory levy was imposed on manufacturers of recording devices.¹⁵ It was understood that this levy would ultimately reach the person who benefited directly from the licence to copy for private, noncommercial purposes.

Canada, in somewhat different circumstances, adopted a very similar system in 1997.¹⁶ At the outset there was no licence for private copying under the Canadian copyright legislation. However, by the mid-1990s it was recognised that one type of private copying in particular – the private copying of musical works – was so pervasive that it constituted a significant financial loss to copyright owners. In justifying the need for a private copying regime, the Canadian government cited the 1995 *Report of the Task Force on the Future of the Canadian Music Industry*, which found that nearly 44 million blank tapes were sold in Canada in 1995 and, of those, that approximately 39 million were likely used by consumers to copy sound recordings.¹⁷ In response to this problem, Canada introduced both a licence and a levy for the

¹³ *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 278, 290 [1955] GRUR 492.

¹⁴ *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 290 [1955] GRUR 492.

¹⁵ s53 *UrhG 1965* (Germany). It should be noted that a European Union Directive has been passed in an attempt to harmonise elements of copyright in the Member States of the European Union. The relevant Directive is the Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001/29/EC. This Directive will, of course, impact on the law concerning private copying in Germany (as well as other Member States). However, the Directive allows Member States to retain legislative exceptions, or indeed to legislate to create exceptions, to copyright for private copying for private use and non-commercial purposes: see article 5(2)(b).

¹⁶ Part VIII: Private Copying, *Copyright Act* (R.S. 1985, c. C-42) (Canada).

¹⁷ See Canada, House of Commons of Canada, Standing Committee on Canadian Heritage, 'A study of Bill C-32, An Act to amend the Copyright Act' (3 October 1996), Evidence of Hon. Sheila Copps ([then] Deputy Prime Minister and Minister of Canadian Heritage), online: Parliament of Canada <http://www.parl.gc.ca/committees/352/heri/evidence/21_96-10-03/heri-21-blk101.html> (date accessed: 21 March 2001).

private copying of musical works.¹⁸ Canada now finds itself in essentially the same middle ground position as Germany did in 1965.

2. THE REASON FOR THE MOVE

As Figure 3 shows diagrammatically, there has been a convergence of approach to the problem of private copying amongst the civil law and the common law countries. It appears that the civilian copyright systems converged to the middle ground to solve what was essentially a *philosophical* problem. This philosophical problem was that traditionally the author should not enter the private space of the user of copyright material,¹⁹ and yet not to allow the author to do so in the world of automated copying is unfair.²⁰ By contrast, the Canadians converged to the middle ground to resolve what was primarily a *practical* problem. This practical problem is that the author needs to be allowed to control private copying but cannot do so due to the difficulty in identifying and restraining its occurrence. The resolution to these problems is the same: the legislature expressly sanctions private copying (by way of a statutory licence) and at the same time expressly mandates compensation to the author (by way of a statutory levy).

What can be learned from the convergence, from very different starting points, of the German and Canadian copyright systems insofar as they address private copying? Perhaps the German statutory licence and levy scheme was earlier in time precisely because German copyright law was confronted with a philosophical dilemma. On the one hand, privacy was and continues to be routed in the *Basic Law*; on the other hand, an author has a moral entitlement to remuneration which results from the ‘debt of gratitude’ owed by consumers for their enjoyment of an author’s work.²¹ By contrast, the general understanding of copyright in the common law world is that it provides an incentive for the production of the optimal amount of creative works. So long as authors continue to create, the practical problem of the enforcement of an author’s remuneration right does not demand a resolution, or such a resolution first gains impetus only when the financial values involved are considerable.

¹⁸ See ss80 and 82 of Part VIII: Private Copying, *Copyright Act* (R.S. 1985, c.C-42) (Canada).

¹⁹ *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 279 [1955] GRUR 492.

²⁰ *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 278 [1955] GRUR 492.

²¹ *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 278 [1955] GRUR 492.

IV THE CURIOUS CASE OF THE UNITED STATES

The case of private copying in the United States is unique: the default position of the law has aspects of both the continental European system and the Anglo-common law system. This unique position results from the primary legislative provision applicable to private copying: the ‘fair use’ defence.²²

The allegory of Schrödinger’s Cat comes to mind when one thinks about the United States’ fair use provision. Whether or not an instance of private copying is an infringement of copyright under US law depends on whether that copying constitutes a fair use. What is and is not a fair use is fact-specific, and cannot be predicted with certainty in advance of a court ruling. In the allegory of Schrödinger’s Cat, there is a superposition of possible outcomes (the cat is both dead and alive) prior to opening the lid of the box. Likewise with fair use, there is a superposition of possible outcomes (the private copying is both permitted and is an infringement) prior to a court ruling on the matter. The superposition of states of Schrödinger’s Cat does not collapse to a single outcome (a cat that is either dead or alive) until the lid of the box is lifted and the cat is observed for signs of life. With fair use, the superposition of states does not collapse to a single outcome (an act of private copying that is either permitted or is an infringement of copyright) until a court rules definitively on an infringement suit.

If an act of private copying is a fair use, then that act is not an infringement of the rights of the owner of the copyright in the work that was copied, and accordingly the law does not require the payment of any remuneration to the copyright owner. If, however, an act of private copying is *not* a fair use, then that act is an infringement of the rights of the owner of the copyright in the work copied. It does follow, however, that the copyright owner will in fact receive remuneration for such acts of private copying. As discussed above, there is the practical problem of the copyright owner identifying acts of private copying and enforcing rights against private copiers. In practice, the copyright owner is generally unable to obtain remuneration for private copying even when it is not permitted as a fair use.

It follows, therefore, that the default position in the United States has aspects of both the continental European civilian system and the Anglo-common law system default positions. This position is illustrated in Figure 3.

²² *Copyright Act 1976*, 17 U.S.C. §107.

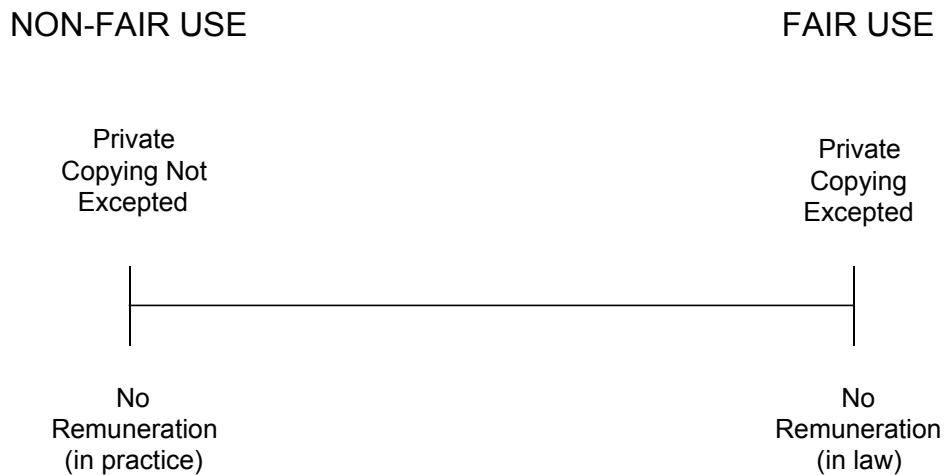


Figure 3 - US Default Position: Fair Use Exception

Recently (albeit in a minor way) the United States, like Canada, has moved to the middle ground. The case in point is the *Audio Home Recording Act of 1992*.²³ This Act confers on consumers a right to engage in non-commercial audio home recording, and provides compensation to copyright owners for losses arising out of such recording by way of a royalty on the transfer price of recording devices and recording media.²⁴ It is, in short, a statutory licence and levy scheme. The situation pertaining to certain private copying in the US post enactment of the *Audio Home Recording Act* is illustrated in Figure 4.

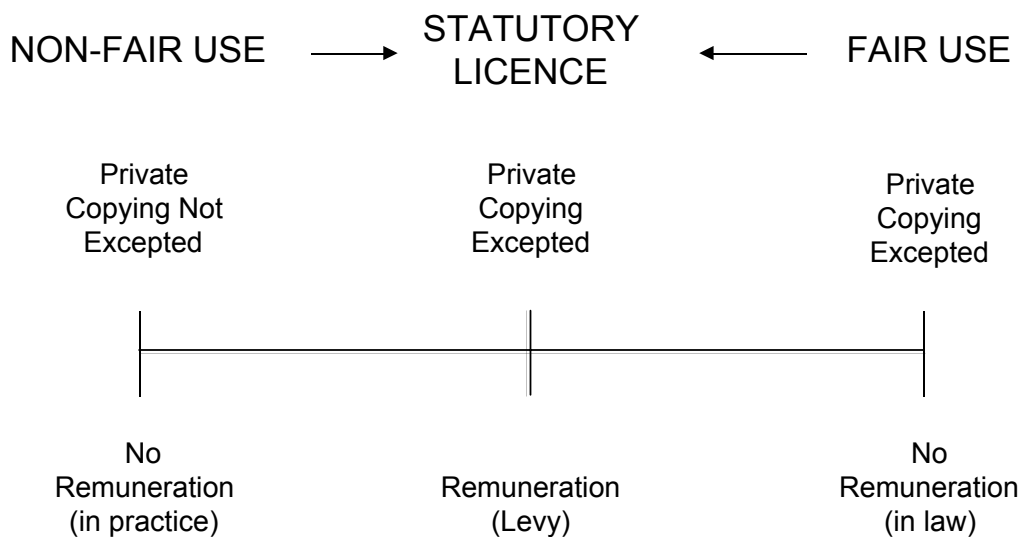


Figure 4 - Alternative US Approach: AHRA (1992)

²³ Pub. L. No. 102-563, 106 Stat. 4237 (1992); codified at 17 U.S.C. §§ 1001-1010.

²⁴ In addition, the Act obliges manufacturers to incorporate technological copy protection measures into recording devices.

V CONCLUSION

What, if anything, can be concluded from the above analyses of and observations on the response of civilian and common law copyright systems to the problem of private copying? It would seem that there is an inexorable move in each system towards the middle ground of resolving the dilemma of private copying by way of a statutory licence and levy – irrespective of the underlying rationale for and philosophy of the copyright law concerned. Although this move to the middle ground occurred earlier and more comprehensively in Europe, the US and Canadian experiences suggest that the adoption of a statutory licence and levy approach will become more common in common law jurisdictions in the future.

It was surmised above that the reason for the time-delay in this convergence of the two systems is explained by the way in which the problem is perceived within those systems. Because the problem of private copying was perceived essentially as a philosophical problem within the civilian system, the need for a solution to the problem was perhaps considered more pressing than it was in the common law system. The latter responded only when the economic nature of the problem became particularly significant. Looking at these developments at an abstract level, it might be concluded that there has been and will continue to be a natural evolution of both the authors' rights system and the owners' rights system towards statutory licence and levy schemes as a means of solving the problem of private copying, whatever the technology involved.²⁵

²⁵ It is acknowledged that the observed moves toward statutory licences and levies have occurred in either the analogue era (e.g. Germany) or the early digital era (e.g. United States and Canada) rather than the more mature digital era of the 21st century. By 'early digital', the author means the digital era prior to mass use of the Internet. In the context of private copying, the 'early digital era' does not include the Napster phenomenon. The US *Audio Home Recording Act of 1992* is 'early digital', in that it is concerned primarily with copying by digital tape recording machines; computers are excluded from its operation: *Recording Industry Association of America v Diamond Multimedia Sys., Inc.* 180 F. 3d 1072, 1076 (9th Cir. 1999). The Canadian legislation, similarly, does not (yet) target computer equipment used for private copying. It might be argued that in the current, more mature, digital era – that is, the era post-Napster – the situation will be different. This author thinks not.

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