PRIVATE COPIES BETWEEN FAIR USE AND LEVY SYSTEMS: A COMPARISON OF THE 1976 COPYRIGHT ACT AND THE DEVELOPMENT IN GERMANY

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As a comparative thought experiment in alternate history, this article compares the U.S. and German responses to the challenges that new copying technologies posed for copyright law in the second half of the twentieth century. It asks how copyright law might have developed had Sony Corporation of America v. Universal City Studios, Inc. *been decided differently and the United States responded to private copying through the development of an effective statutory remuneration scheme, rather than through the extension of the fair use doctrine to new technological uses. The article shows that Germany's levy system for private copying at the outset did not originate in legislative design, but in a series of remarkably innovative judicial decisions that later shaped the German Copyright Act of 1965. Compared to the development in the United States (and also in the United Kingdom), this is an intriguing example of how, under the right institutional conditions, civil law courts will sometimes act as bolder architects of legal development than their common law counterparts. The comparison suggests that collective remuneration schemes offer a viable alternative to fair use for addressing certain forms of uses, based on new technologies, by providing fair remuneration without unduly impeding technological development. As copyright law again confronts new technological uses, including artificial intelligence, the German and European experience invites renewed consideration of collective remuneration schemes as an institutional option for addressing questions of value distribution. This will require an understanding of these schemes not just as a "second-best" option for replacing individual licenses in situations of concrete, identifiable market failure, but instead as a "first-best" distributive policy tool for value allocation in the realm of utility-expanding technologies.*

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INTRODUCTION

The U.S. Copyright Act of 1976[2] left to future case law, based on the fair use doctrine, the issue of dealing with private reproductions of copyright-protected works using new vastly more effective reproduction technologies, such as tape recorders and, later, reprography. The 1976 Act codified the doctrine in 17 U.S.C. § 107, albeit without changing its flexible, open-ended character[3] (see Part I). Certainly, in the overall context of the legislative history and in light of other provisions in the 1976 Copyright Act, such as those involving compulsory licenses for uses in the context of certain nascent technologies, the fair use route was not entirely without alternative. In this regard, it is an interesting thought experiment in alternate history to consider what else could have happened if U.S. Congress had chosen a different approach in 1976 or if the U.S. Supreme Court had later decided *Sony Corporation of America v. Universal City Studios, Inc.*[4] (the Sony Betamax case) in a different way.

The development of German copyright law is a case in point for an alternative development. Following a groundbreaking series of German Federal Court of Justice cases in the 1950s and 1960s, the German Legislator, in the new German Copyright Act of 1965,[5] introduced a remuneration scheme based on a lump-sum payment, akin to a compulsory or rather statutory license. This arrangement imposed a levy on the production or distribution of certain copying devices (and later also blank media) based on a broad and open-ended definition of such reproduction devices and media (see Part II).

The German example is interesting for a couple of reasons. On a methodological level, it shows how even in a civil law system, groundbreaking, courageous court decisions can shape the law and policy in certain sectors for decades or longer. At the same time, on the level of substantive copyright law, it shows that institutional alternatives to fair use, such as levy-based or compulsory license–based systems, were not inherent to or otherwise self-evident in the context of an author-centric continental European copyright law. Instead, the implementation of these systems was initiated by the courts as an interest-oriented, distributively just reaction to market failure and, thus, a reaction to respective market demand. Consequently, given the right institutional circumstances, they can indeed work efficiently and without causing undue bureaucracy

[2] Pub. L. No. 94-553, 90 Stat. 2541 (1976).
[3] *See* H.R. REP. NO. 94-1476, at 66 (1976).
[4] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
[5] Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BGBl. I at 1273 (Ger.).

or transaction costs in practice. They therefore provide authors with fair compensation for the use of their works while not unduly stifling technological progress (see Part III).

I. REPRODUCTIONS FOR LIBRARIES AND ARCHIVES, EDUCATIONAL USE, AND "PRIVATE COPIES" IN THE WAKE OF THE 1976 COPYRIGHT ACT

In the mid-1970s, and in the advent of the 1976 Copyright Act, the discussion was already ongoing on new copying technology, which had intensified the economic impact of reproductions in libraries and archives, classroom copying (reprography technology), and new audio home copying (tape recorders).[6] While the Act provided for detailed, albeit inconclusive,[7] provisions on reproductions for the purposes of libraries and archives,[8] it left the necessary balancing of interests regarding the regulation of classroom copying[9] and private copying entirely to the fair use doctrine.[10] Regarding classroom copying, this led to the parallel negotiation of influential, yet nonbinding guidelines between publishers and educational groups during the Act's drafting, with the fair use doctrine being applicable as a general framework. These guidelines were included in the House Report on the 1976 Copyright Act and provided for minimum standards for safe-harbor copying.[11]

By contrast, in the realm of home private copying, the sale of new copying technology, in particular tape recorders, already led to economically significant reproductions. With respect to *private* consumers, no specific regulation or guidelines were enacted in the United States—for example, vis-à-vis the producers of audio home recording equipment.[12] This outcome was not without an alternative. In other areas, where the development of new technology for the reproduction and distribution of

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[6] *See* Charles L. Finke, *The Copyright Act of 1976: Home Use of Audiovisual Recording and Presentation Systems*, 58 NEB. L. REV. 467, 467 *et seq.* (1978); *see also* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS 11–14, 25, 32–34 (Comm. Print 1960); STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 15: PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES (Comm. Print 1960); STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 26: UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS (Comm. Print 1961) (addressing the more fundamental question of protection of sound recordings against (commercial) dubbing while addressing only in passing the issue of technology-enhanced private or personal use); U.S. COPYRIGHT OFF., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 7–8 (1977), https://www.copyright.gov/reports/guide-to-copyright.pdf.

[7] *See* 17 U.S.C. § 108(f)(4); H.R. REP. NO. 94-1476, at 77 (1976).

[8] *See* 17 U.S.C. § 108.

[9] A regulation of reproductions for educational purposes was discussed in the advent of the Act. However, apart from a smattering of smaller provisions, the Act did not regulate classroom copying. *See* H.R. REP. NO. 94-1476, at 66–67 (1976).

[10] 17 U.S.C. § 107; *cf*. H.R. REP. NO. 94-1476, at 66–67 (1976) (discussing photocopying and taping and the applicable "normal and reasonable limits of fair use").

[11] *Cf.* H.R. REP. NO. 94-1476, at 68–70 (1976) (concerning only books and periodicals while leaving the question of how to deal with audiovisual media for separate analysis and future legislation).

[12] *See* H.R. REP. NO. 94-1476, at 66 (1976) (stating that photocopying and taping are to be treated as new reproduction techniques under the normal and reasonable limits of the general fair use doctrine and that no special treatment is intended); *cf*. Finke, *supra* note 6, at 467 *et seq.* (already discussing videotape recording).

copyright-protected subject matter had led to new interest conflicts and hold-ups between copyright holders on the one hand and providers and *commercial* users of such technology on the other, the 1976 Copyright Act either upheld compulsory licensing provisions (in the case of mechanical reproductions of musical compositions stemming from the 1909 Copyright Act) or introduced new compulsory licenses, such as for cable retransmission and, later, also satellite retransmission. Meanwhile, the Act contains compulsory licenses for jukeboxes and certain public television uses.[13]

Had Congress followed the opinion that audio (and later video) home recording constituted copyright-relevant use, not justified by the fair use doctrine, and had it further been of the opinion that selling respective technological equipment established liability (or at least some kind of accountability[14]) for such use on the side of the technology providers and/or sellers, one might have already considered similar approaches in the wake of the 1976 Copyright Act—for example, in the shape of a lump-sum levy on such copying equipment. Instead, the issue was left to case law on fair use, by which Congress did not intend to implicitly exempt all private uses from copyright law, but rather left the issue to the courts. Against that background, the Supreme Court later took a liberal, technology-friendly stance in its widely discussed *Sony* judgment.[15] According to that judgment, at least noncommercial, time-shifted copying of free broadcast television was regarded as fair use.[16] Since home taping constituted a substantial part of the use private consumers made of video recorders, the judgment, in turn, prevented the mere sale of video recorders to consumers from giving rise to secondary liability as contributory infringers (amid other reasons concerning the interests of other right holders who agreed with such use of the equipment, as well as broadcasters).[17] Again, this outcome was certainly not without an alternative. In *Sony*, the dissenting opinion of Justice Blackmun (with whom Justices Marshall, Powell, and Rehnquist joined) considered at length the possibility of contributory infringement and the fashioning of an appropriate remedy, such as "the possibility of a royalty payment that would allow [videotape recorder] sales and time-shifting to continue unabated," and expressed his hope that Congress ultimately would achieve a fair balance of interest.[18]

It was only later, in the 1990s, that Congress established a sector- and technology-specific levy-based approach in the Audio Home Recording Act of 1992,[19]

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[13] Jane C. Ginsburg, *Humanist Copyright*, 6 J. FREE SPEECH L. 91, 118 *et seq.* (2025).

[14] That would undoubtedly have been possible. *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 457 (1984) (Blackmun, J.) (considering the legislative history of the 1976 Copyright Act). On a possible differentiation between liability and accountability in EU law, which resembles the German concept of "*Stoererhaftung*" (interferers' liability), *see infra* Part II. *See also* Martin Husovec, *Accountable, Not Liable: Injunctions Against Intermediaries* (Tilburg L. & Econ. Ctr., Discussion Paper No. 2016-012, 2016). For a more comprehensive treatise, *see* MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? (2017).

[15] *Sony*, 464 U.S. 417.

[16] *Id.* at 454 *et seq.*

[17] *Id.* at 446–56.

[18] *See id*. at 457, 494 *et seq.*

[19] Pub. L. No. 102-563, 106 Stat. 4237 (1992).

instead of relying on the fair use doctrine. That statute imposes remuneration duty on digital audio recording devices and media. Because it sets aside a part of the remuneration for authors and artists, it could have formed the basis for a workable and effective modern remuneration scheme, akin to the established systems in Europe. Alas, for practical economical purposes, the Act was dead on arrival, since it defined digital audio recording devices and media too narrowly to adapt to rapidly changing technology effectively.[20] In other words, the Act was too little, too late, especially for proponents of using collective, levy-based statutory remuneration schemes as a form of compulsory licensing. Admittedly, there are rather few uses of statutory liability rules in the United States,[21] yet there are sound reasons in favor of such use in certain cases.[22]

It is an intriguing thought experiment in alternate history[23] to consider what might have happened had Congress, in 1976, already enacted a levy-based statutory remuneration system for audio home recording (and also for reproductions for educational purposes). It seems, at least, equally worthwhile to consider what might have happened had the Supreme Court decided differently in *Sony*, following the carefully

[20] Ginsburg, *Humanist Copyright*, *supra* note 13, at 119.

[21] Robert Merges discusses different proposals and ultimately favors a property rights system based on contractual licenses granted by collective rights organizations and, thus, a system of market-based *contracting* into liability rules. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996); *see also* Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2699 (1994) (preventing the emergence of efficient rights-clearance technologies and institutions). With a more balanced view, emphasizing certain shortcomings and inefficiencies of the existing compulsory license system in U.S. law while arguing that reconceptualized compulsory licenses could be a better fit than the application of the fair use doctrine regarding certain cases of utility-enhancing fair use); *cf.* Ginsburg, *Humanist Copyright*, *supra* note 13, at 118 *et seq.* (holding a rather optimistic view, due partly to funds set aside to pay authors and artists directly); Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 971 *et seq.* (2020); Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887 (2021).

[22] Statutory licensing schemes not only overcome problems of market power of copyright holders in certain sectors, resulting in potential hold-up in relation to the emergence of new technologies. In contrast to a "utility-expanding," technology-friendly application of the fair use doctrine, these schemes also guarantee the right holders (and in the case of adequate direct remuneration for authors and artists) at least a fair remuneration for the use of their copyrighted works. Under certain conditions, they can thus be an efficient means of equitable and fair redistribution—in particular, where other solutions fail. *Cf.* Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S.—Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, 12 ZGE/IPJ 123, 166 *et seq.* (2020), https://ssrn.com/abstract=3572040 (arguing for a positive perspective on compulsory licensing in the context of certain privileged *de minimis* uses in the context of user-generated content on online content-sharing platforms).

[23] The experiment in alternate history also makes sense since this might have well happened. Congress considered legislative action at the time, and an alternative outcome in *Sony* might well have spurred Congress into action. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 463 (Blackmun, J., dissenting).

argued dissenting opinion by Justice Blackmun.[24] The dilemma of fair use's (or fair dealing's) black-and-white approach for courts seeking an efficient way to foster, or at least not unduly hamper, technological innovation while at the same time safeguarding adequate remuneration for authors was aptly outlined in the 1988 English case of *CBS Songs Ltd v. Amstrad Consumer Electronics Plc*, which concerned analog double-speed twin-tape recorders.[25] On the one hand, the UK House of Lords denied secondary liability under the head of authorization. On the other hand, the court recognized that while the sellers of such devices did not authorize the (autonomously acting) purchasers to copy—whether to do so or in relation to what to copy—they still *facilitated* possible copying in breach of copyright. In fact, their advertisements, at least, implicitly encouraged such copying. Against this background, Lord Templeman expressed regret for the Court that there was no statutory levy-based solution in the United Kingdom, although such a levy had met with favorable consideration in the wake of the 1977 report released by the UK Parliament's Whitford Committee.[26] That report recommended such a levy on a wider range of recording equipment (as well as possibly blank tapes) in return for a blanket license to make recordings in single copies for personal use. Lord Templeman stated:

> These proceedings will have served a useful purpose if they remind Parliament of the grievances of the recording companies and other owners of copyright and if at the same time they draw the attention of Parliament to the fact that home copying cannot be prevented, is widely practised and brings the law into disrepute.[27]

In other words, the House of Lords was seemingly tempted to develop a blanket license in return for a levy-based remuneration approach, akin to a compulsory license. However felt, the Court did not have the legislative authority to do so, since the development and provision of such an instrument was reserved to the legislature, which was better equipped to carry out the necessary investigations and preparatory works to structure an efficient and adequate remuneration scheme for private copying.

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[24] In fact, *Sony* was decided after a lengthy deadlock and on a slim majority. On the historical background and development of the litigation as well as the deliberations in the Supreme Court (critical of the ultimate judgment), *see* Peter S. Menell & David Nimmer, *Unwinding* Sony, 95 Calif. L. Rev. 941, 945 *et seq.* (2007); *cf.* Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox 149–57 (1994) (stating that Justice Blackmun's opinion was to have been the majority opinion, until Justice Stevens rallied sufficient colleagues to his dissent to shift the outcome).

[25] [1988] 1 A.C. 1013 (Eng.).

[26] Committee to Consider the Law on Copyright and Designs, Copyright and Design Laws, 1977, Cm. 6732 (UK).

[27] *Cf. CBS Songs*, [1988] 1 A.C. 1013, 1060.

II. THE LEVY SYSTEM FOR AUDIO RECORDING DEVICES IN THE GERMAN COPYRIGHT ACT OF 1965 AND THE PRECEDING GERMAN FEDERAL COURT OF JUSTICE'S CASE LAW

A. The German Copyright Act of 1965

In contrast to the all-or-nothing approach in the common law realm, based on fair use (as it was held in *Sony*) or fair dealing, the new German Copyright Act of 1965, at a relatively early point in time, already imposed a levy on a wide range of recording equipment (defined in a functional, open-ended manner) in return for a blanket license (in the form of a statutory exception) to make recordings in single copies for personal use (and certain other uses).[28] This levy-based collective system was later repeatedly extended, first to fully cover reprography by way of an additional remuneration duty on certain institutions and so-called large copiers, secondly to put an additional levy on a broad and open-ended range of blank media,[29] and thirdly to provide for comparable compromise solutions based on statutory exceptions complemented with collective claims to fair compensation. This system effectively instituted liability rules not only in certain cases of market failure but also regarding many other privileged uses.[30]

The entire system of remunerated exceptions in Germany, and similarly in many other EU Member States, inspired related solutions in EU Copyright law—first, in the Rental and Lending Directive[31] and ultimately in the Information Society Directive of 2001, which expressly allowed the Member States to extend the exception for private copying to digital private reproductions under the condition that the right holders receive fair compensation for such private reproductions, whether in analog or digital form.[32] Importantly, the Court of Justice of the European Union ("CJEU") has since clarified that such compensation, in particular compensation based on respective levy schemes, must go directly to individual human authors, not secondary right holders.[33] At the same time, the Court accepts certain necessary statistical generalization (in the interest of efficiency and workability) and expressly accepts the possibility of a set-aside for certain general social and cultural support institutions as long as the latter relate to the support of the entire collective of authors and artists.[34]

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[28] *See* Copyright Act, 1965, § 53 (Ger.).
[29] *Cf.* Urheberrechtsgesetz [UrhG] [Copyright Act], 1985, BGBl. I at 1137, 1138 (Ger.) (consolidating and expanding further later).
[30] *Cf. id.* §§ 20b, 20d, 27 ¶ 2, 60a–d (concerning lending, cable, and satellite retransmission, various research, and teaching uses and others, sometimes even combining an individual license with a direct claim of the authors to fair remuneration—for example, § 27(1) on rental right).
[31] Directive 2006/115, art. 5, 2006 O.J. (L 376) 28 (EC) (providing an unwaivable right to equitable remuneration).
[32] *See* Directive 2001/29/EC, art. 5(2)(a)–(b), 2001 O.J. (L 167) 10.
[33] Case C-572/13, Hewlett Packard Belg. SPRL v. Reprobel SCRL, ECLI:EU:C:2015:750, ¶ 44 *et seq.* (Dec. 18, 2015); *cf.* Case C-277/10, Luksan v. van der Let, ECLI:EU:C:2012:65, ¶¶ 88–100 (Mar. 2, 2012).
[34] Case C-521/11, Amazon.com Int'l Sales Inc v. Austro-Mechana GmbH, ECLI:EU:C:2013:515, ¶ 49 *et seq.* (July 11, 2013); *cf.* Case C-840/24, VG Wort, Opinion of Advocate General Szpunar, ECLI:EU:C:2026:123 (Feb. 26, 2026).

B. The Origin of the 1965 German Copyright Act's Levy Scheme in the German Federal Court of Justice's Case Law

From a bird's eye comparative law perspective and with hindsight, it might seem logical enough that a continental European, *droit d'auteur*–influenced, author-centric copyright jurisdiction, such as Germany,[35] provided for a statutory remuneration approach for private copying at a comparatively early point in time. At a closer look, the actual historic development in Germany, however, provides for an intriguing example of bold case law development by judges. In the time period before the 1965 German Copyright Act, the German statutory copyright system, in fact, pointed in a rather different, and less copyright-expansive, direction, as it clearly did not cover private acts of reproduction (of whichever kind).

Against that background, at first sight, rather surprisingly for a civil law system,[36] the entire development was sparked by two courageous, in fact outright groundbreaking, judgments of the German Federal Court of Justice: the *Grundig-Reporter* judgment of 1955[37] and the *Personalausweise* (ID-Card) judgment of 1964.[38] In these (and the other so-called tape recorder judgments[39]), the Court rather free-handedly developed the concept of a blanket license for the sales of audio home copying equipment on the condition of a fair lump-sum payment by the producers or suppliers of such technology to provide adequate compensation to the authors without unduly restricting the wide distribution of new and important advanced technology.

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[35] The impression that German copyright law is predominantly based on personal rights or other individualistic objectives would be false anyway. Instead, German copyright law—at least, modern German copyright law—is equally based on utilitarian objectives. In the framework of the so-called monistic conception of German copyright law, the latter is inextricably intertwined with the additional infusion of personality rights–related objectives. C*f.* Matthias Leistner & Gerd Hansen, *Die Begründung des Urheberrechts im digitalen Zeitalter—Versuch einer Zusammenführung von individualistischen und utilitaristischen Rechtfertigungsbemühungen*, 110 GRUR 479 (2008) (Ger.) (providing further references). Likewise, an impression that U.S. Copyright law—before and after the 1976 Copyright Act—was exclusively based on and shaped according to purely utilitarian objectives and elements would be equally false. *Cf.* Ginsburg, *Humanist Copyright*, *supra* note 13, at 91. Rather, the two systems have converged to a certain extent in recent decades.

[36] In fact, this might not be so surprising after all. See the text below on the typical judicial restraint of common law judges, when compared to their civil law colleagues adjudicating within certain flexible pockets of statutory law.

[37] Bundesgerichtshof [BGH] [Federal Court of Justice] May 18, 1955, I ZR 8/54, 1955 GRUR 492 (Ger.) (*Grundig-Reporter*).

[38] Bundesgerichtshof [BGH] [Federal Court of Justice] May 29, 1964, I ZR 4/63, 1965 GRUR 104, 108 *et seq.* (Ger.) (*Personalausweise*).

[39] *Cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 22, 1960, I ZR 41/58, 1960 GRUR 340 (Ger.) (*Werbung für Tonbandgeräte*); Bundesgerichtshof [BGH] [Federal Court of Justice] June 12, 1963, Ib ZR 23/62, 1964 GRUR 91 (Ger.) (*Tonbänder-Werbung*); Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 1963, Ib ZR 127/62, 1964 GRUR 94, 95 *et seq.* (Ger.) (*Tonbandgeräte-Händler*).

Germany's statutory copyright law was bifurcated at the time. The relevant statutes dated from 1901—*Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst* [Act on Copyright in Works of Literature and Musical Art] ("LUG 1901")[40]—and 1907—*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie* [Act on Copyright in Works of Art and Photography].[41] The relevant provision concerning the issue of audio home recording was in § 15, paragraph 2 of the LUG 1901, which expressly exempted reproductions for private purposes from copyright law protection. To be sure, the Legislator of 1901 was not aware that new technologies, such as analog tape recorders, would allow for potentially economically harmful audio home recording. Instead, the historic Legislator had in mind more limited activities that could hardly have significantly prejudiced the right holders' legitimate interests, such as the manual copying of musical scores. Still, the language of the statute was unambiguous:

> § 15 Abs. 2: *Die Vervielfältigung eines Werkes ist zum persönlichen Gebrauch erlaubt, vorausgesetzt jedoch, dass sie nicht den Zweck hat, aus dem Werk eine Einnahme zu erzielen.* [§ 15 Paragraph 2: The reproduction of a work is permitted for personal use, albeit on the condition that its purpose is not to obtain a revenue from the work.]

Thus, the applicable German statute in the 1950s, according to its wording, provided an arguably even broader and certainly more unambiguous exception for private copying than the fair use standard at the time in the United States; at that time, the standard was still grounded in common law and not yet codified in the 1976 Copyright Act. What is more, the German Draft Bill for a new unitary Copyright Act of 1954 expressly proposed to maintain the exception for private copying, arguing that this principle was already laid down in the LUG 1901 and reflected the fundamental necessity to keep the private sphere free from intrusion by third parties based on claims grounded in copyright law.[42]

Against this background, German music collecting society GEMA filed a case concerning a copyright-based claim against the sale of new Grundig portable tape recorders (the "Grundig Reporter" device) before the German Federal Court of Justice in 1955. Given the unambiguous wording of the LUG 1901, it would have seemed natural enough and an easy way out for the Court to characterize private home audio recording as an excepted use under § 15, paragraph 2 of the LUG 1901—and, in consequence, to rule that the production and distribution of equipment for such use could not give rise to any form of copyright liability.

Instead, the Court dug deeper than that. Doctrinally, the Court argued that there was no principle of free private use or immunity of the private domain as an inherent limitation to the very substance of copyright protection. Rather, it stated that privileging private reproductions amounted to an exception to the principle of copyright protection, and the fundamental right to intellectual property. Against this background, the existing exception for private copying in the LUG 1901, according to the Court, was only justified

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[40] Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst [LUG] [Literary and Musical Works Copyright Act], June 19, 1901, RGBl. at 227 (Ger.).

[41] Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie [KUG] [Act on Copyright in Works of Art and Photography], Jan. 9, 1907, RGBl. at 7 (Ger.).

[42] Referentenentwürfe zur Urheberrechtsreform [Draft Bill for Copyright Reform], Bundesjustizministerium, 21 *et seq.*, 148 *et seq.* (1954) (Ger.).

and justifiable based on the assumption that the covered acts of private reproduction did not substantially prejudice the economic interests of the authors. In the Court's opinion, this position corresponded to the historical will of the Legislator who, in 1901, was not aware that new reproduction technology might allow private copying on a scale that might be substantively harmful to the authors' legitimate economic interests.[43] Accordingly, the Court concluded that under a purposive construction, in line with the general objectives behind copyright law and the theory of intellectual property, the exception for private copying, despite its wording, did not cover private copying at a scale that resulted in substantial prejudice to the economical remuneration for authors. Hence, private copying at large scale using new reproduction technologies (such as portable tape recorders, which were capable of extensive use at home for high-volume, high-quality private reproduction and possible sharing) was not exempted from copyright law under § 15, paragraph 2 of the LUG 1901.

What is more, there were, of course, also ample legitimate uses of these new recording devices, since the defendant had designed certain features of the recording device in a way to simplify the reproduction of phonograms and emphasized this possible use of its portable tape recorder in its advertisements. Nevertheless, the Court held that the producer of these devices was liable for the copyright infringements by their users under the German doctrine of *Stoererhaftung* (interferers' liability), which the Court interpreted rather broadly.[44] Interferers' liability, which the Court based on an analogy to a rule related to (physical) property in § 1004 of the German Civil Code,[45] was triggered by any third-party causal act that enabled another party to infringe copyrights. At the same time, the remedies were limited to the ordering of *proportionate* protective measures against such copyright-infringing use. Thus, while third-party producers and distributors of copying equipment and infrastructure or other intermediaries had to take certain proportionate protective measures, such as *copyright notices or warnings* in relation to their users, claims for damages or full injunctions could generally not be grounded on interferers' liability. (Later, with the advent of platform technology, this arrangement was extended to include certain proportionate notice-and-takedown duties, specific limited filtering duties, and others). As a result, the liability developed in the *Grundig-Reporter* judgment, at the time, only required the producers of the devices to take certain protective measures regarding possible copyright infringements by their users—in particular, warning them not to use the devices in a copyright-infringing way. Since about the 2010s, this liability arrangement has been partly replaced in German law by new liability concepts based on the CJEU's case law and new EU Directives.[46]

All in all, the rather broad and protection-friendly approach regarding copyright infringement, the narrow interpretation of statutory exceptions, and the broad grounds for

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[43] The Federal Court of Justice supported this by a detailed analysis of the legislative process leading up to the LUG 1901. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] May 18, 1955, I ZR 8/54, 1955 GRUR 492, 497 *et seq.* (Ger.) (*Grundig-Reporter*).

[44] *Id.* at 500.

[45] Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896, RGBl. at 195 (Ger.); Urheberrechtsgesetz [UrhG] [Copyright Act], 2002, BGBl. I at 42 (Ger.).

[46] For comprehensive discussion, *see* Matthias Leistner, *§ 97 UrhG*, *in* URHEBERRECHT, ¶ 72 et seq. (Ulrich Loewenheim, Matthias Leistner & Ansgar Ohly eds., 2020) (Ger.).

liability were balanced by limiting the remedies strictly to measures that were easy to implement for the producers of the respective home audiotape recorders. Thus, the remedies were proportionate and did not substantively interfere with their legitimate business models. Namely, the producers were ordered to warn the users against copyright-infringing use of the tape recorders. In a series of follow-up judgments, that obligation was extended to certain distributors and sellers.[47] As might be expected, mere respective warnings not to infringe copyright, however, were not very effective in preventing audio home copying by the users of the devices but instead were more honored in the breach in the following years.

It was at exactly this point that the history of the German Federal Court's case law on audio home recording and the existence and extent of liability of the producers or distributors of respective technological equipment took a decisive turn. From a trite property rights–oriented, author-centric, protection-friendly narrative of narrow interpretation of the exceptions to copyright and the construction of a rather broad liability doctrine, the Court moved towards a truly innovative groundbreaking approach *in case law* that has since proven capable of reconciling the legitimate interests of the authors in adequate remuneration for any economically relevant use of their works with the interest of the technology providers and society at large in the development and broad distribution and use of modern technology.

This historical turn unfolded as follows. Having noticed that mere warnings did not work, GEMA filed several other lawsuits requiring the sellers of tape recorders to identify buyers for the sake of later copyright enforcement by requiring these buyers to present identity cards at the time of purchase. Again, one of the respective cases, later neatly named the *Personalausweise* case, reached the German Federal Court of Justice.[48] In 1964, and thus in the middle of the preparatory legislative works for the new German Copyright Act of 1965, the Court decided the following: Since there was ample room for legitimate uses of the portable tape recorders, and particularly in light of the fundamental welfare interest of society in the distribution and use of a groundbreaking new technology, the claimant should not be in a position, based on copyright law, to entirely block the distribution of such devices by way of injunctions. At the same time, the Court accepted that the hitherto conceived alternative measures, such as warnings or an identification duty, were either ineffective or too far-reaching with respect to the fundamental rights of users to their privacy—in particular, the protection of their personal sphere in their private homes. Because the measures were either not effectively workable or disproportionate, a new solution was needed not only to address market failure (no identification for the purpose of individual licensing possible because of privacy considerations as well as concerns about inefficiency)[49] but also in light of the involved

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[47] *See* the references in *supra* note 39.

[48] Bundesgerichtshof [BGH] [Federal Court of Justice] May 29, 1964, Ib ZR 4/63, 1955 GRUR 104 (Ger.) (*Personalausweise*).

[49] On fair use as a reaction to market failure and a fair-use test based on the underlying considerations, drawing on the example of *Sony*, see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982). For a broader view on fair use, expanding the original perspective, see Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 COPYRIGHT SOC'Y U.S.A. 149 (2003); Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 70 GEO. WASH. L. REV. 1814 (2011).

interests[50]—namely, the authors' interest in adequate remuneration versus the technology providers', users', and general welfare interest in the broad distribution and use of the groundbreaking new technology. That solution should be efficient and technology-friendly in its implementation but should also take into account the authors' legitimate interests. Put in a nutshell, the Court tried to find a compromise by allowing the use in question and shielding it from any burdensome, or even practically prohibitive, need for individual licenses. At the same time, it also tried to sustain the necessary incentives for authors and, thus, provide at least fair remuneration regarding that use. Based on these considerations, the Court, although not supported expressly or implicitly by German statutory law at the time—came to the conclusion that while interferers' liability did not permit the right holders to enjoin the distributors of tape recorders, it allowed them to authorize the distribution of such devices *only on the condition* that *an appropriate lump-sum payment be made as adequate compensation* for their later use. In the words of the German Federal Court of Justice:

> *Sollten sich gangbare und die Allgemeinheit nicht über Gebühr belastende Wege, gegenüber den privaten Nutzern der Geräte den Anspruch auf die Vervielfältigungsgebühr zu verwirklichen, nicht auffinden lassen, so bleibt der Klägerin die Möglichkeit, der Beklagten den Vertrieb der Tonbandgeräte nur unter der Voraussetzung zu gestatten, dass sie ihrerseits die Vervielfältigungsgebühren durch ein angemessenes Pauschalentgelt ablöst.* [If no workable means can be found to enforce the right to the reproduction royalty against private users of the devices without unduly burdening the general public, the plaintiff retains the option of permitting the defendant to distribute the tape recorders only on the condition that the defendant, for its part, settles the reproduction royalties through an appropriate lump-sum payment.][51]

Et voilà, without any basis in the statute at the time and based only on the broad concept of interferers' liability with its flexible remedies, the German Federal Court of Justice had developed a compulsory licensing approach for the sale or distribution of tape recorders, based on an appropriate lump-sum payment for their prospective copyright-relevant use. It was in fact exactly the kind of solution that the UK House of Lords encouraged Parliament to develop, while feeling that a court would be ill-equipped or even unable to do so. That is also the solution Justice Blackmun would have encouraged the district court to consider in *Sony*, which the German court effectively "invented" from scratch.

This development was striking from not only a substantive copyright law perspective but also a comparative perspective. The judgment illustrates a notable and well-known

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[50] For a more interest-oriented view on fair use, *see* Abraham Bell & Gideon Parchomovsky, *The Dual-Grant Theory of Fair Use*, 83 U. CHI. L. REV. 1051 (2016) (offering a dual interest–oriented view and an informative synthesis of the extant fair use literature); William Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988) (starting from a comprehensive normative perspective); Edward Lee, *Technological Fair Use*, 83 S. CALIF. L. REV. 797 (2010) (specifically conceptualizing fair use for the technology sector and typical use cases of the technology industry); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (emphasizing the relevance of certain policy-based, use-oriented clusters).

[51] Bundesgerichtshof [BGH] [Federal Court of Justice] May 29, 1964, Ib ZR 4/63, 1955 GRUR 104, 108 (Ger.) (*Personalausweise*).

paradox: Civil law courts, seemingly anchored by the relative stability of a statutory framework, tend to feel more "protected" and thus more flexible in developing entirely new legal figures or remedies if standards in the code allow them to do so (and sometimes even beyond certain statutory limits).[52] By contrast, common law courts, typically, bear a greater responsibility for the organic development of the law itself. Burdened by this systemic weight, and lacking the "stabilizing structures" of a comprehensive code to alleviate that responsibility, they are frequently more sensitive to, and cautious about, introducing new remedies or novel causes of action.

III. A BRIEF OUTLINE OF DEVELOPMENTS SINCE 1965

The rest is history. On the substance, the *Personalausweise* case was the model for the statutory license (remunerated exception) for private copying introduced in § 53 of the German Copyright Act of 1965.[53] In essence, the provision exempted the reproduction of single copies for personal use under certain conditions in return for the payment of a levy on all relevant copying devices. This levy was initially paid by the producers, importers, and distributors of such devices in Germany (and passed on to consumers in the price of the devices). Later case law broadened this exemption to up to approximately seven copies, depending on the individual circumstances of the case group.

This provision was later extended to reproductions in digital format, provided that the originals from which the reproductions were made were not obviously illegal, such as in cases involving file-sharing or making available of copyright-protected subject matter on the internet. Such reproductions were always complemented by respective levies on any kind of copying device (also in the digital realm), which were later extended to blank media of all kinds—both analog and digital. In fact, the developments since 1965 resemble a cascade of success for the levy-based system of fair compensation for authors when confronted with new use forms enabled by innovative technological development.

To begin with, the broad and open-ended levy-based solution undoubtedly strengthened and broadened the institutional system of collecting societies. Founded in 1948 for the music sector, GEMA was probably the least dependent on the income stream from the new statutory private copying levy, since it already thrived on the licensing of secondary exclusive rights in the music sector—that is, mechanical rights, rights of communication to the public, and broadcasting rights. By contrast, VG Wort (founded in 1958 in Munich for the literature sector)[54] and VG Bild-Kunst (founded in 1968 for the

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[52] Under certain conditions, *Rechtsfortbildung* in German law goes beyond the limits set by the interpretation of the wording of the statute even when the latter leaves no room for doubt.

[53] On the details of the parallel legislative development (and the role of the BGH judgments), *see* Ulrich Loewenheim & Malte Stieper, *§ 53 UrhG*, *in* URHEBERRECHT, *supra* note 46, § 53, ¶ 5 *et seq.* (providing further references from the legislative history).

[54] In fact, the major income of VG Wort derives from statutory remuneration claims, the overwhelming part of which is private copying remuneration. The income also includes statutory remunerations for classroom copying, archive and library copying, lending by public libraries, certain well-defined commercial uses, and a couple of others. The licensing of exclusive rights for certain secondary uses only forms a very small part of VG Wort's business model.

sector of fine arts, including stage designs and similar works)[55] very much depended on the copying levies and other remuneration claims introduced in the German Copyright Act of 1965. Thus, the new levy-based remuneration system for private copies introduced by the Act has considerably strengthened collecting societies or even enabled their existence. Ultimately, this initial development resulted in a kind of a domino effect. One might well argue that it was the collecting societies' comparatively strong early positioning, based on the early case law of the German Federal Court of Justice and the levy system introduced by the new German Copyright Act already in 1965, that enabled them to react effectively and increasingly efficiently to each new technological challenge to copyright protection, such as reprography, digital copies, the platforms, and most recently generative artificial intelligence ("AI") technology.

In sum, the reliance of the German Copyright Act on forms of collective remuneration—in particular, on levy-based solutions—in dealing with the challenges of new technological developments for copyright law, and its respective success, was by no means inherent or a given within the German statutory copyright system pre-1965. Nor was it the result of a purely author-centric approach or the Legislator striking a balance in favor of the remuneration interests of authors. Rather, it was a result of the early case law of the German Federal Court of Justice that started this development. The rise and efficiency of the German collecting societies, despite some ripples, was therefore an almost logical consequence from the German Federal Court of Justice having set the course as early as 1955.

CONCLUSION

While the 1976 Copyright Act upheld and introduced certain compulsory licenses in cases of mechanical reproductions and cable and satellite retransmission,[56] the Act left the issue of dealing with the development of new technologies for the reproduction and distribution of copyrighted works in a utility-expanding manner to the courts in the confines of the fair use doctrine. Since then, U.S. courts have tended to construe the doctrine rather extensively, effectively fostering the development of infant technology-based industries at a (sometimes) breathtaking scale. While this development has partly been met with approval,[57] parts of the literature also view it with reserve[58] and diagnose a growing mismatch between an efficient regulation of utility-expanding technologies and fair use.[59] In the future, there would be room for alternative

[55] While VG Bild-Kunst, similar to VG Wort, also licenses exclusive rights—in particular, for transmission, re-transmission, and certain internet uses—its business model is mostly based on statutory remuneration.

[56] 17 U.S.C. §§ 111, 115, 119.

[57] *See, e.g.*, Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 840 *et seq.* (2015).

[58] *See, e.g.*, Jane C. Ginsburg, *Letter from the U.S.: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms—Part II (Fair Use)*, 241 REVUE INTERNATIONALE DU DROIT D'AUTEUR 163 (2014); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 441 (2008).

[59] Victor, *Utility-Expanding Fair Use*, *supra* note 21, at 1887.

development, as Justice Blackmun's dissenting opinion in *Sony Betamax* quite aptly showed, and the picture might change—or it might not. But at least, the juries are literally still out—for example, on new issues such as how to treat AI training under the fair use doctrine within that entire strand of case law.

U.S. literature[60] has occasionally remarked that the concepts of compulsory licensing—and also voluntary collective licensing, if it were exempted from antitrust law in certain sectors[61]—might be a better fit to bridge the gap between the interests of authors, users, technology companies, and the general public in fostering both the creative industries and technological innovation. However, inefficiencies and shortcomings of the compulsory license concept in the United States have hitherto prevented this concept from playing a larger role in the institutional mix. In particular, levy-based approaches, such as those in the Audio Home Recording Act of 1992, have not worked satisfactorily, since they were too narrowly drafted to be capable of providing an effective and resilient solution to the envisaged category of cases.

The goal of this Article was to compare the restraint under the U.S. Copyright Act of 1976 with the slightly earlier development in Germany, where the courts, in the advent of the German Copyright Act of 1965, had already intensely grappled with the challenges posed to copyright law by new (then-analog) high-quality and portable home audio recording technology—that is, the first generation of portable tape recorders. It was the resulting case law of the German Federal Court of Justice that inspired the "German" way of dealing with these challenges—namely, by granting a statutory exception for personal copies in return for a broad and open-ended lump-sum levy claim connected to any production, importation, or distribution of any copying devices (and later also blank media).

This German development gives rise to an interesting "what if?" experiment: What would have happened if the U.S. Supreme Court (or rather the district court upon remand) had decided that Sony was liable for contributory infringement but had then ordered a lump-sum payment for each device, in lieu of an injunction, as a flexible remedy following Justice Blackmun's dissenting opinion. Would Congress have reacted and revised the 1976 Copyright Act to include a broadly applicable and resilient compulsory license–based solution for cases now treated as what has been called "technological fair use" today?[62] Would this solution have helped solve issues of digital copying and other cases of transient copying efficiently in the context of transformative uses, instead of years-long litigation at each new step of technological development? Or would it have stifled the breathtaking technological development in the wake of digitalization through an inefficient scheme of compulsory licenses? Would such a scheme have been capable of contributing to a fairer copyright system under the perspective of distributive justice while providing for an efficient solution in situations of market failure in the United States? These questions are hard to answer. At least, on the level of substantive copyright

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[60] *Id. See generally* Victor, *Reconceptualizing Compulsory Copyright Licenses*, *supra* note 21 (comparing reconceptualized compulsory licensing in the music sector based on a more policy- and interest-oriented view with efforts focusing exclusively on market failure–related "market mimicking function").

[61] Following the model of 17 U.S.C. § 118(b) concerning use of nondramatic musical works and works of fine art by public broadcasting entities.

[62] *See* BELL & PARCHOMOVSKY, *supra* note 50.

law, the German example shows that there are institutional alternatives to fair use in certain case groups. Interestingly, on a methodological level, the German example also shows that—sometimes if the conditions are right—even in civil law systems, single judgments can boldly develop the law inspiring fundamentally new solutions that, along with path dependency, shape the further legal and economic development for decades, if not centuries. It is telling in this respect that the application of levy-based schemes to the output of generative AI models is now increasingly discussed in Europe[63]—a development that would have hardly been possible had the German Federal Court of Justice not mustered remarkable courage in 1955.

[63] Matthias Leistner, *Urheberrecht und KI: Die Trainingslizenzen kommen—warum Europa weiterdenken und den Output regulieren muss*, 2026 GRUR 273 (Ger.); Matthias Leistner & Lucie Antoine, *TDM and AI Training in the European Union—From "LAION" to Possible Ways Ahead?*, 74 GRUR INT'L 1027, 1043 (2025); Josef Drexl, *KI-Nutzungen und Kreative: Umrisse eines gerechten Ausgleichs*, 70 ZUM 153, 164 *et seq.* (2026) (Ger.); Martin Senftleben, *Generative AI and Author Remuneration*, 54 INT'L REV. INTELL. PROP. & COMPETITION L. 1535, 1549 (2023).