

# **Principle or Compromise?: Understanding the original thinking behind statutory licence and levy schemes for private copying.**

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## **Abstract**

In the era of digital technology the issue of private copying — copying undertaken for non-commercial, non-public use — is once again topical. A statutory licence and levy is one possible solution to the apparently diverging interests of copyright owners and private copiers. Such a scheme effectively grants a general licence to copy copyright protected works for private use, in exchange for which levies are imposed on recording equipment and/or media. This paper examines the history of, as well as the rationales and the principles behind, the first statutory licence and levy scheme for private copying - the German scheme of 1965. It illustrates that the very principled German conception of copyright law reconciles strong protection of authors' moral rights with what appears to the common law world to be a very pragmatic solution. It can be seen that in Germany authorial control over reproduction for private use is not absolute, but exists because of the authors' right to remuneration. The user of a work is indebted to the author, because she derives enjoyment from it. There ceases to exist a right to authorial control once the right to remuneration is met. An analysis of the German experience presents a possible solution to, and at the very least an alternative conception of, the issue of private copying. It sheds new light on contemporary Australian discussion of private copying in the digital era.

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# I INTRODUCTION

## A. Background

The problem of ‘private copying’<sup>1</sup> is now well known in copyright circles and Australia, like the rest of the world, currently faces the dilemma of how to respond to that problem in the era of digital technology. One possible response is that first adopted by Germany as early as 1965 and which is now implemented widely in various forms throughout the world – a statutory licence and levy scheme.<sup>2</sup> In essence, a statutory licence and levy scheme grants a general licence to copy a copyright work for one’s own private use, and then imposes a levy on recording equipment and/or media, the proceeds from which are used to remunerate copyright holders. A statutory licence and levy scheme may be useful on its own or in conjunction with other measures, such as technological protection measures<sup>3</sup> and anti-circumvention laws.<sup>4</sup> Indeed, a growing body of literature is emerging around the world in favour of levy-based statutory licenses for private digital copying.<sup>5</sup> In Australia, in September 2001, the Copyright Council released a discussion paper on ‘Remuneration For Private Copying’<sup>6</sup> and in 2003, various collecting societies and arts industry organizations put

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<sup>1</sup> For the purposes of this paper, ‘private’ copying is copying undertaken for non-commercial, non-public use.

<sup>2</sup> Statutory licence and levy schemes for private copying, whether analogue, digital or both, now exist in numerous countries, including: Austria (1980), Finland (1984), France (1985), the Netherlands (1990), Spain (1992), Switzerland (1992), Denmark (1992), Italy (1992), Belgium (1992), Greece (1992), Portugal (1998), Sweden (1999), Japan (1993), Canada (1997) and the United States (1992). See also: Australian Copyright Council, *Remuneration for Private Copying in Australia: A Discussion Paper*, September 2001, 9-17 (available at: <http://www.copyright.org.au/PDF/Articles/PrivCopDiscPprAV.pdf>) for a more comprehensive list of countries with statutory licence and levy schemes and further details of those schemes.

<sup>3</sup> A satisfactory working definition of Technological Protection Measures (TPMs) remains problematic (see *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906). However, for the purposes of this paper, the term is used to denote technical measures taken to prevent or deter copyright infringement, including copying, of copyright works.

<sup>4</sup> Anti-circumvention laws prohibit the unauthorized use and distribution of means to circumvent TPMs. Key examples include: *World Intellectual Property Organisation Copyright Treaty*, adopted by the Diplomatic Conference on 20 December 1996, CNCR/DC/94, arts 11-12 (entered into force 6 March 2002) (*WIPO Copyright Treaty*); *European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, issued on 22 May 2001, 2001/28/EC, arts 6-7 (*EU Copyright Directive*); *Digital Millennium Copyright Act* (US) s 103, 17 U.S.C. s1201(1999); *Copyright Amendment Act (Digital Agenda) 2000* (Cth), Schedule 1, Division 2A.

<sup>5</sup> See eg: Neil W Netanel, ‘Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File-Swapping and Remixing’ (2003) 17 *Harvard Journal of Law and Technology* 1; Brendan M Schilman, *The Song Heard ‘Round the World: The Copyright Implications of MP3s and the Future of Digital Music* (1999) 12 *Harvard Journal of Law and Technology* 590, 628-30; Glynn S Lunney Jr ‘The Death of Copyright: Digital Technology, Private Copying and the Digital Millennium Copyright Act’ (2002) 87 *Virginia Law Review* 813, 910-8.

<sup>6</sup> Australian Copyright Council, above n 2.

forward a proposal for a the Federal Government to introduce a private use royalty scheme.<sup>7</sup> The current Australian government has not shown legislative interest in the proposal. However, a statutory licence and levy scheme appears to remain the preferred response to private copying of key copyright industry organisations.<sup>8</sup>

## B. Aims of the Paper

This article seeks to develop a better understanding of the history and theory behind the statutory licence and levy approach to private copying. To date, most discussions of statutory licence and levy schemes for private copying written in English have reviewed the way in which the schemes function, the ways in which they have been implemented in different jurisdictions, their effectiveness in terms of raising revenue and their future in the face of digital rights management.<sup>9</sup> A few of these documented the history of the first implementation of the statutory licence and levy scheme for private copying in Germany.<sup>10</sup> This article attempts to draw out of that history, and out of some primary materials, the rationales of and the principles behind the original conception of the statutory licence and levy approach to private copying in Germany. It seeks to do so because an understanding of the original thinking behind the statutory licence and levy approach will be valuable should Australia choose to adopt such an approach. It is also hoped that, regardless of the response to private copying that Australia eventually adopts, the insight such an investigation can provide

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<sup>7</sup> See: Simon Minahan, 'Copyright – the Devil and the Detail' in *The Age* (Melbourne), 1 April 2003, 'Next 6' <<http://www.theage.com.au/articles/2003/03/31/1048962685581.html>> at 22 April 2004.

<sup>8</sup> See Australasian Performing Rights Association (APRA) 'Music Industry professionals agree: change private copying laws' (Media Release 20 November 2003), <[www.apra.com.au/Comm/Mr031120.htm](http://www.apra.com.au/Comm/Mr031120.htm)> at 22 April 2004.

<sup>9</sup> See eg: Jörg Reinbothe, 'Compensation for Private Taping Under Sec 53(5) of the German Copyright Act' (1981) 12 *International Review of Industrial Property and Copyright Law* 36; Juergen Weimann 'Private Home Taping Under Sec 53(5) of the German Copyright Act or 1965' (1982) 30 *Journal of the Copyright Society of the USA* 153; Ernest A Seemann, 'Sound and Video-Recording and the Copyright Law: The German Approach' (1983) 2 *Cardozo Arts and Entertainment Law Journal* 225; Frank Thoms 'Remuneration for Reprographic Copies' (1984) 15 *International Review of Industrial Property and Copyright Law* 702; Reinhold Kreile 'Collection and Distribution of the Statutory Remuneration for Private Copying with Respect to Recorders and Blank Cassettes in Germany' (1992) 23 *International Review of Industrial Property and Copyright Law* 449; Dr Thomas Dreier, *Copyright Law and Digital Exploitation of Works: The Current Copyright Landscape in the Age of the Internet and Multimedia* (1997) <<http://library.fes.de/fulltext/stabsabteilung/00218toc.htm>> at 22 April 2004; Don E Tomlinson and Timothy Nielander 'Red Apples and Green Persimons: A Comparative Analysis of Audio Home-Recording Royalty Laws in the United States and Abroad' (1999) *Mississippi College Law Review* 5; Prof P Bernt Hugenholtz, Dr Lucie Guibalt, Mr Sjoerd van Geffen, *The Future of Levies in a Digital Environment*, March 2003 <<http://www.inir.nl/publications/other/DRM&levies-report.pdf>> at 22 April 2004; Rightscom and Business Software Alliance *Economic Impact Study: Private Copying Levies on Digital Equipment and Media in Europe*, September 2003 <<http://global.bsa.org/eupolicy/LeviesEconomicImpactAna.pdf>> at 22 April 2004.

<sup>10</sup> Reinbothe, above n 9; Weimann, above n 9; Seemann, above n 9.

will increase the depth and complexity of Australian discussion and thinking about private copying, and the way in which we respond to it.

Specifically, this paper seeks to understand what fundamental principle or particular conceptualisation of copyright the German statutory licence and levy model reflects. Clearly, it reflects the thought that copyright holders should be remunerated for the private copying of their work - but on what basis? Is it merely compensation for lost income? If so, on what grounds is the copyright holder considered entitled to that lost income? Is it her natural right on the basis of the labour she has invested or is there some other basis? Does the remuneration represent compensation for a deeper, non-monetary wrong done to the copyright holder (eg. a trespass on her personal relation to the work, perhaps, through the abrogation of her complete control over it)? Is the remuneration not concerned with any wrong done to the copyright holder at all, but rather with the unjust enrichment of the private copier or, simply, with maintaining the incentive provided by copyright to produce works? Is it concerned with all of the above?

What about the statutory licence element of the approach? How does it square with the strong protection of authors' connection to and control over their work that is normally associated with continental European copyright systems? In fact, is it not paradoxical that the statutory licence and levy scheme, which is *prima facie* so pragmatic and utilitarian, and which fundamentally denies the author the right to control the use of her work, emanates from a country renowned for its highly principled protection of authors' connection to and control over their works through moral rights? Does the statutory licence and levy sacrifice some of those principles of protection in order to find a practicable solution to the private copying dilemma? Or can the statutory licence and moral rights be reconciled?

This paper seeks to answer these questions. In doing so, it will identify what insight the German development of the statutory licence and levy scheme can give into the nature of copyright and the issues at play in the private copying dilemma.<sup>11</sup> It is hoped this insight might then inform the Australian way of thinking about those issues and how to respond to

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<sup>11</sup> Although Germany has recently enacted a legislation that severely affects its citizens' ability to utilise the statutory licence to copy for private use in respect of digital copying (*Copyright Amendment Act, 2003*), the legislation is a result of European harmonisation of copyright laws, rather than German conceptions or theories of copyright. Indeed, the new legislation has proved controversial in Germany precisely because it is seen to conflict with the historical and constitutionally required balance between authors' and users' rights in German copyright law. As such, the new legislation, though significant for the future of private copying in Germany, receives no more than passing reference in this paper (see below: section 2.4 'The Legislation Since 1965').

them, or at least provide another perspective from which to assess our own conceptions of authors' and users' entitlements.

### **C. Outline of the Paper**

The investigation that occurs in this paper will be performed in various parts. Part 2 reviews the history of the statutory licence and levy scheme in Germany, and in particular the influential case, *GEMA v Grundig (GEMA)*.<sup>12</sup> Part 3 then analyses the key principles and ideas that can be extracted from the history and the *GEMA* judgment. Whilst this analysis provides some insight into the nature of the German conception of copyright, it does not resolve the apparent paradox presented by the concurrent existence of moral rights and the statutory licence and levy scheme under German law.

For this reason, Part 4 looks at the fundamental concepts behind German law's protection of moral rights in order to assess whether they can be reconciled with the abrogation of authorial control and autonomy effected through the establishment of a statutory licence. It concludes that moral rights and a statutory licence to copy for private use can be reconciled.

The understanding of the conceptual basis for moral rights gained in Part 4 provides the basis for an argument, presented in Part 5, that, in fact, the statutory licence and levy scheme is a logical consequence of the German recognition of authors' moral rights. This argument is not to be found expressed in any of the German copyright theory or jurisprudence. Rather, it is the authors' interpretation of the 'spirit' of German copyright law and of German law in general, gleaned through readings of the original moral rights theory, the German Copyright Act (UrhG) and, most significantly, German constitutional theory. The relevant parts of all these sources are presented in Part 4.

The paper concludes in Part 6 by drawing together the conclusions reached in Parts 2, 3, 4 and 5 in order to assess what Australia can learn from the German statutory licence and levy experience. It concludes that a statutory licence and levy approach to private copying need not be a compromise, but rather, it is consistent with, even demanded by, a principled understanding of copyright that values highly the rights of authors, the rights of users and the potentially personal and spiritual nature of works. Furthermore, even if a statutory licence and levy approach is not a viable solution to private copying for Australia in the digital era, the background to the approach in Germany provides an alternative perspective from which to view copyright in general that can contribute to and even move forward our thinking

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<sup>12</sup> Decision of May 18, 1955, I ZR 8/54, 17 BGHZ 266; 1955 GRUR 492. Unless stated otherwise, quoted from *GEMA v Grundig* contained in this paper are translated from the original German case by Sarah Moritz.

around the issue of private copying. In particular, it challenges us to understand copyright as based on a conception of works that, when applied to the private copying dilemma, requires us to recognise and protect not just the monetary interests of authors and their producers, but also the potentially deep spiritual, intellectual and emotional interests of those who ‘use’ the works.

## **II HISTORY OF THE GERMAN STATUTORY LICENCE AND LEVY SCHEME**

### **A. The Legislation Prior to 1965**

The statutory licence and levy scheme was first introduced in Germany with the *Copyright Act 1965 (Urheberrechtsgesetz - UrhG)*, which, subject to various amendments, is still in force today. Prior to 1965, private copying in Germany was either not covered by copyright laws or expressly exempt from them. Article 15(2) of the UrhG’s predecessor, the *Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst* (1901) (LUG), expressly permitted “copying for private use ... in cases where the purpose [was] not to gain income from the work”.<sup>13</sup> As late as 1954 a draft of the UrhG also retained a private copying exemption in its proposed article 47.<sup>14</sup>

Parliament’s stated reasoning behind article 47 was that an individual’s private sphere must be free from claims of copyright infringement.<sup>15</sup> It also mentioned that policing a provision against private copying would be impossible, as it would require a violation of citizens’ absolute right to privacy, guaranteed in article 13 of the German Constitution. Article 47 was,

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<sup>13</sup> As translated by Matthias Schulze and Kathrin Böttcher.

<sup>14</sup> The proposed article 47 read as follows (translated by Sarah Moritz):

- (1) Every person is permitted to make, or have made, where free of charge, individual copies of a work for private use. Private use does not include use for job-related or commercial purposes.
- (2) Every person is permitted to make, or have made, individual copies of a work, with the exception of visual artworks;
  1. when the copy is undertaken by hand or with a typewriter
  2. when the work concerned is not published or not in print
  3. when small parts of a work, or an essay, that have been published in the newspaper or magazines are concerned
- (3) The copies shall not be published or used for public lectures, performances, presentations, or broadcasts.
- (4) The implementation of plans or designs of visual artwork, and the reproduction of an architectural work, is always only permissible with the consent of the authorised person.

<sup>15</sup> Seemann, above n 9, 244.



however, controversial as it failed to allow for the significant threat to authors' interests posed by the recent development of audiotape recorders.

Prior to the development of audiotape recorders, private reproduction of works was essentially limited to manual copying of printed works. Such copying was laborious and could not compete with commercial publications, either in quantity or in quality. Modern copying machines, however, were available to and operable by private users. Copies made on these machines were capable of acting as a substitute for bought publications. Moreover, the machines could copy sounds as well as printed notes. Thus, private copying, for the first time, became a notable threat to copyright holders' interests. As Möhring observes, "the exceptions provided for in arts. 15, para. 2, LUG ... , which had been intended by the legislator as a tiny safety-valve, [had] become an enormous pair of sluice-gates".<sup>16</sup>

## **B. The GEMA v Grundig case**

In 1954, against the background of this controversy, the German Collecting Society for Musical Performing and Mechanical Reproduction Rights (GEMA) commenced proceedings against Grundig Corporation, a manufacturer of home tape recorders, under articles 11(1) and 15(1) of the LUG. Combined, these articles gave authors the exclusive rights to copy and distribute their work and made illegitimate any copying of a work without the consent of the copyright owner. In addition, article 1004 of Germany's civil code (*Bürgerlichesgesetzbuch* – BGB) permits copyright owners to sue for injunctive relief against any party who interferes with or jeopardises their exclusive rights, even indirectly. Hence, GEMA claimed that even though it had not copied any works, Grundig jeopardised GEMA's members' exclusive rights by selling tape recorders and advertising their suitability for taping records and by providing explicit instructions on how to tape phonorecords and radio broadcasts, without advising customers of the law regarding the copying of copyright works and of their responsibility to observe the exclusive rights of copyright owners. GEMA sought the prohibition of any sales that took place without reference to the law and to purchasers' responsibilities. It also sued for damages.

In defence, Grundig relied on the article 15(2) limitation on copyright for private copying and emphasised the Parliament's rationale behind the proposed article 47, namely that "the rights of the author must never transcend the individual's interest in keeping his private sphere free

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<sup>16</sup> Quoted in J H Spoor, W R Cornish and P F Nolan *Copies in Copyright* (1980), 25.

from claims under the copyright act”.<sup>17</sup> Thus, Grundig argued that article 15(2) was not a mere exception to the application of copyright, but rather that it marked an intrinsic limit of copyright’s scope.

The Supreme Court held that the sole issue for consideration was whether the particular type of copying at issue lay within the scope of article 15(2). It acknowledged that according to the wording of article 15(2), audiotape recordings fell within its scope. However, the Court also held, that at the time the legislation was drafted, the possibilities created by the invention and public sale of tape recorders “lay outside the imagination of the legislator”.<sup>18</sup> In such a situation, the Court concluded, it was the duty of the Court to uphold the legislator’s “spirit and purpose” behind the provision in question over and above its actual wording.<sup>19</sup>

With respect to whether article 15(2) represented an intrinsic limit to copyright rather than simply an exception, the Court held that “so sweeping a principle cannot however be deduced from copyright law”.<sup>20</sup> In support of this decision, the Court observed that “even within the privacy of one’s home no-one may injure the author’s interests in personality rights, diminishing his rights of recognition, or alter the author’s work”.<sup>21</sup> Furthermore, the court argued, the author not only has a right to the protection of his personal relationship to the work, but also to legal certainty of just remuneration.

According to the Court:

Were it to be true that, according to the fundamental idea of copyright law, the private sphere constitutes an unsurpassable barrier for the author’s rights ... authors of all works, which are predominantly created for the enjoyment in the private realm, ... could derive virtually no economic fruits from their labours, as soon as technology makes it possible for the individual to produce [high quality] units of work in the domestic realm without particular costs and effort ... This consideration alone shows that it is irreconcilable with copyright law principles to assume that the protection of the private sphere plainly prohibits payment for his creation from accruing to the author when the use of the work happens in the private sphere.<sup>22</sup>

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<sup>17</sup> Seemann, above n 9, 236.

<sup>18</sup> *GEMA v Grundig*, above n 12, 275.

<sup>19</sup> *Ibid* 277.

<sup>20</sup> *Ibid* .

<sup>21</sup> *Ibid* 277 quoted in Seemann, above n 9, 236

<sup>22</sup> *GEMA v Grundig*, above n 12, 280.

This right of remuneration, the Court emphasised, is a natural right that “merely finds recognition and form through legislation”<sup>23</sup> and that arises from the “debt of gratitude ... grounded in the fulfilment of the individual [user’s] appetite for art”.<sup>24</sup> Therefore, “it is precisely the individual enjoyment of the work – irrespective of whether this enjoyment of the work occurs in the public or in the domestic domain – that constitutes the internal justification for the copyright owner to reasonable remuneration”.<sup>25</sup>

Thus, the Court made clear that the private and personal use exemption in article 15(2) of the LUG was in the nature of an exception (determined by practical circumstance) rather than an inherent limit on the author’s exclusive right of reproduction. The Court found the practical circumstances determining article 15(2) in the statement of official reasons for the LUG, according to which the legislators’ intention behind article 15(2) was “primarily to allow the reproduction of sheet music by means of transcription free of charge to a restricted circle of financially weak performers of music, in the interest of furthering music and for social reasons”.<sup>26</sup> This intention, the Court decided, was not furthered by including audiotape recordings within the 15(2) exception, since the considerable purchase price of tape recording machines meant they were only available to “a class of the population which does not require the social protection aimed for by article 15(2)”.<sup>27</sup> Moreover, the reproduction made by the machines requires no skill of musical knowledge, again signalling their use amongst a completely different subgroup of people than those for whom article 15(2) was intended.

Hence, the Court held that private copying by way of mechanical sound recording did not fall within the scope of article 15(2). The Court ordered Grundig not to sell its equipment without reference to possible copyright infringements (a ‘GEMA-notice’), but denied GEMA’s claim for damages, on the ground that the legal situation had been too uncertain to find negligence on the part of Grundig.<sup>28</sup>

### **C. The Road to Article 53 of the Current Act**

Following the Supreme Court’s decision, Grundig tried to get around the ruling by simply removing all references to the suitability of its product for recording copyright works, rather

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<sup>23</sup> Ibid 278.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 284.

<sup>27</sup> Ibid 286.

<sup>28</sup> See Reinbothe, above n 9, 39.

than attach a GEMA-notice. However, GEMA sued again and the Court held that “neutral advertising” was not sufficient to avoid liability under articles 11(1) and 15(1).<sup>29</sup> Following this second decision, manufacturers of recorders began entering into licensing agreements with GEMA in exchange for an exemption from the GEMA-notice. GEMA’s main objective in suing Grundig, however, had been to use a judgment in its favour to encourage individual users of recorders to pay it a yearly flat fee, in order to avoid individual liability for private copying.<sup>30</sup> Despite the Grundig case, and further suits against producers of blank tapes and retailers of tape recorders,<sup>31</sup> GEMA was unable to extract the fee it had hoped for. Thus, in 1964 GEMA initiated another lawsuit.<sup>32</sup>

GEMA’s 1964 suit sought retailers of tape recorder machines to be required to sell those machines only to customers who presented legal identification and signed a license agreement with GEMA.<sup>33</sup> Further, GEMA requested that the Court require the names and addresses of purchasers, and the signed licence agreement, be sent to GEMA. However, the Court rejected GEMA’s claims, declaring that authors’ rights did not extend so far as to allow GEMA to condition the sale of tape recorders on the presentation of identification and the signing of a license agreement. Such a finding, it observed, would “transcend the limits of reasonableness”.<sup>34</sup> The Court further observed that the measures GEMA wished to impose would only make sense if GEMA were able to control the actions of tape recorder users in their own homes and that the means GEMA had declared it would use to impose such control would interfere with the inviolability of the home guaranteed in article 13 of the German Constitution.<sup>35</sup>

Although it could not uphold the enforcement of authors’ exclusive reproduction right in violation of individuals’ right to privacy, the Supreme Court did offer an alternative solution. It suggested that, despite the use of GEMA-notices by manufacturers of tape-recorders, GEMA might nevertheless have an action against those manufacturers of recording

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<sup>29</sup> Decision of 22 January 1960, GRUR 1960, 340.

<sup>30</sup> See Weimann, above n 9, 158-9.

<sup>31</sup> Decision of 12 June 1953, GRUR 1964, 91 and decision of 26 June 1963, GRUR 1964, 94. See also Weimann, above n 9, 159.

<sup>32</sup> See: German Supreme Court decision of 29 May, 1964, BGHZ 42, 118, GRUR 1965 104.

<sup>33</sup> Weimann, above n 9, 159.

<sup>34</sup> Seemann, above n 9, 239.

<sup>35</sup> GEMA had declared that it was considering the possibility of using neighbours, doormen etc as informants – See: Seemann, above n 9, 239 and Weimann, above n 9, 159.

equipment, who knowingly aided and abetted their customers' infringement of copyright.<sup>36</sup> This suggestion paved the way for GEMA to enter into licensing agreements with manufacturers in exchange for a fee. It was also a decisive influence on the German legislature's response to private copying.

During the period between the first Grundig case and GEMA's 1964 case against tape recording machine retailers, the German Parliament had made a number of attempts to address the issue of private copying in legislative form. This included a 1962 legislative proposal, which first put forward a statutory licence and levy model. The 1962 proposal, however, intentionally did not impose legal liability to pay the levy upon the producers or retailers of recording equipment, who the Parliament argued, were not the parties making the infringing copies. Rather, it imposed the duty to remunerate authors on the individual private users of copying equipment. But with no way for authors or their collecting society to enforce users' duty to remunerate, this proposal was considered unsatisfactory.

Following the Supreme Court's 1964 decision raising the possibility of contributory infringement by manufacturers and retailers, the Judiciary Committee of the German Parliament proposed that a levy be imposed upon producers of recording equipment, who "took express advantage of the popularity of home taping"<sup>37</sup> and aided and abetted it. When stating the reasons for its proposal, the Committee recognised the impossibility of enforcing individual claims against private home taping and noted that it assumed the charge imposed by the levy would ultimately be passed on to consumers anyway. Thus, in 1965 a new Copyright Act, the *Urheberrechtsgesetz* (UrhG), was enacted, introducing, in article 53, the world's first statutory licence and levy scheme for private copying.

## **D. The Legislation Since 1965**

The statutory licence and levy model introduced by article 53 of the UrhG remains in force today. However, as times and technology have changed, it has undergone some amendments. In 1985 a *Copyright Amendment Act* introduced a levy on blank audio recording media in addition to the levy already existing on audio recording equipment.<sup>38</sup> It also introduced a levy

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<sup>36</sup> See: Seemann, above n 9, 243 and 246; Weimann, above n 9, 160; and Reinbothe, above n 9, 40.

<sup>37</sup> Reinbothe, above n 9, 40.

<sup>38</sup> See Kreile, above n 9, 452. See also: German Collecting Society for Musical Performing and Mechanical Reproduction Rights (GEMA) 'The obligation to pay royalties for recording equipment and unrecorded audio and video carriers' (webpage) <[http://www.gema.de/engl/customers/zpue/pay\\_royalties.shtml](http://www.gema.de/engl/customers/zpue/pay_royalties.shtml)> at 26 April 2004.

on photocopying equipment.<sup>39</sup> Furthermore, the 1985 *Amendment Act* restructured the UrhG so as to spread the licence/levy scheme across articles 53 and 54-54h. This allowed the system to be set out in a much more comprehensive manner, covering not only the obligations to pay remuneration, but also those to provide information on sales of leviable products.

On 13 September, 2003 the UrhG was amended<sup>40</sup> in accordance with *EU Directive 2001/29/EG* of 22 May 2001, aimed at harmonising various aspects of copyright law within the Member States.<sup>41</sup> The provisions of the *EU Copyright Directive* (the Directive) have been controversial within Germany and, therefore, the new law only translates the mandatory provisions of the Directive into German copyright law. The remaining provisions have been left to a second round of reform, known as ‘the second basket’, due to be completed by the end of 2004. The main cause of tension regarding the Directive, and the German *Copyright Amendment Act 2003*, appear to be the provisions affecting digital private copying.

Although section 53 still permits copying for private and personal use, and now even explicitly states that it applies equally to digital and analogue reproductions,<sup>42</sup> the making of reproductions is now expressly prohibited if the source for reproduction is “obviously unlawful”.<sup>43</sup> This ambiguous term has yet to be interpreted by the courts, but it appears to be aimed at preventing downloading from unauthorized ‘peer-to-peer’ platforms.<sup>44</sup> Further, in accordance with article 6(1) to (3) of the EU Directive, a new section 95(a) of the UrhG prohibits circumvention of ‘Technological Protection Measures’ (TPMs), defined in the new section as “any technology, device or component that, in the normal course of its operations, is designed to prevent or restrict acts in respect of works, which are not authorised by the rightholder.”<sup>45</sup> In accordance with article 6 of the Directive, this provision is backed up by sanctions, which provide for criminal proceedings against the party circumventing the TPM,

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<sup>39</sup> See generally: Thoms, above n 9.

<sup>40</sup> *Copyright Amendment Act 2003*

<sup>41</sup> EU Copyright Directive, above n 4.

<sup>42</sup> Thomas Ramsauer, ‘Germany’s Copyright Law on the Edge of the Information Age’ [December 2003] *e.Copyright Bulletin* <[http://portal.unesco.org/culture/en/file\\_download.php/e3ca707578a0ebf3f26d6b9961411052T.+Ramsauer+E.pdf](http://portal.unesco.org/culture/en/file_download.php/e3ca707578a0ebf3f26d6b9961411052T.+Ramsauer+E.pdf)> at 26 April 2004., 4.

<sup>43</sup> *Ibid* 5.

<sup>44</sup> *Ibid*.

<sup>45</sup> UrhG, article 95(a)(2), quoted from Ramsauer, above n 42, 6.

other than in cases of circumvention for the purpose of private copying. In such instances, the only action available is a civil action for damages.<sup>46</sup>

There is no exception to the prohibition of circumvention of TPMs contained in article 95(a). However, in order to maintain certain exceptions to and limitations on authors' exclusive rights already contained in the UrhG, such as the right to make copies for the administration of justice and public safety,<sup>47</sup> article 95b(1) gives beneficiaries of those exceptions or limitations the right to demand access from rightholders.<sup>48</sup> If rightholders do not provide access on demand in the specified circumstances, then they may be fined up to 50,000 Euro. This right, however, does not extend to the limitation on copyright for the purpose of private copying contained within section 53 of the UrhG (except if the copy is made on paper using analogue means of copying). Thus, whilst the right to copy for personal or private use is theoretically maintained in Germany, including with regard to digital copies, in effect it has been all but abolished in the case of digital copying, because almost all digital copying will eventually involve circumvention of TPMs.

This situation has received considerable criticism in Germany, not only as unsatisfactory due to its inconsistency and ambiguity, but also because "it fails to achieve the constitutionally required balance of interests of authors, exploiters and users of digital works."<sup>49</sup> Certainly the recent amendments are a result of increasing harmonisation of copyright within Europe, rather than a reflection of the German approach to copyright and to private copying. Since the purpose of this paper is to understand the fundamental principles and thinking behind German copyright law with regard to private copying and, in particular, behind the original introduction of the statutory license and levy scheme, these changes, whilst significant for the future private copying in Germany, do not have any major bearing on the object and the ultimate the findings of this paper. They are, therefore, given no further attention within it.

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<sup>46</sup> Ramsauer, above n 42, 6.

<sup>47</sup> *Urheberrechtsgesetz* (UrhG), article 45. Other limitations on copyright protected in article 95b include: article 45a persons with a disability, article 46 Collections for religious, school or instructional use; article 47 school broadcasts, article 52a making available to the public for education and research; and article 55 reproduction by broadcasting agencies.

<sup>48</sup> Ramsauer, above n 42, 6-7. See also: *Privatkopie German Parliament Passed EUCD Implementation* (Press Release) <<http://www.privatkopie.net/files/de-eucd-passed.htm>> at 22 April 2004.

<sup>49</sup> *Privatkopie*, above n 48.

### III THE NATURAL RIGHT OF REMUNERATION IN GERMAN COPYRIGHT LAW

#### A. Remuneration Right Theory and Law

The history of article 53 makes clear that the German statutory licence and levy scheme was a pragmatic solution to the dilemma created by technologies enabling widespread private copying. After a decade of trying to enforce authors' right to remuneration without unacceptable breaches of the private sphere, the statutory license and levy approach seems to have been the last resort. Indeed, by 1965 a de facto licence and levy scheme was already in place by way of contractual agreements between GEMA and manufactures of tape recorders, negotiated under threat of further legal action for aiding and abetting copyright infringement. However, the history, in particular the original GEMA case of 1954, also reveals the significance and the nature of the remuneration right under German copyright law and within German copyright theory.

The GEMA case makes clear that the author's right violated by private tape recording is that of remuneration for one's work. It also makes clear that the right of remuneration is a fundamental principle of copyright. Indeed, the GEMA judgment refers to the remuneration right as "*the* fundamental principle of copyright"<sup>50</sup> and as the "legal principle which rules copyright law".<sup>51</sup> Thus, the GEMA case recognises that the right to remuneration is equally, if not more, important as the moral rights in copyright. Moreover, the remuneration right is also equally principled – grounded not in the utilitarian objective of ensuring sufficient incentive for authors to produce works, as it is under Anglo law, but in a deep-rooted notion of natural rights.

The notion of natural rights as a basis for copyright first arose in Germany towards the end of the Seventeenth Century, when attempts were made, in both Europe and England, to establish a theoretical basis for rights over literary works, derived from natural law and John Locke's labour theory.<sup>52</sup> Whereas in England, and later in the United States, a utilitarian basis for copyright protection soon overtook the natural rights theory, in Europe "the idea of a natural

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<sup>50</sup> *GEMA v Grundig*, above n 12, 281.

<sup>51</sup> *Ibid*, 278-9.

<sup>52</sup> Gillian Davies, *Copyright and the Public Interest* (2002), 106. These original attempts focused on publishers' rights over works, However, as the theories developed, more attention was paid to authors' rights with eventual



law-based right to published works was not resisted as strongly as in England and the United States”.<sup>53</sup> Thus, by the mid nineteenth century, a natural rights theory of copyright was popular throughout continental Europe,<sup>54</sup> based on the concept of the right to the fruit of one’s labour.

Between 1880 and 1908 Josef Kohler adapted the Lockean theory to the immaterial nature of a work.<sup>55</sup> To do this, Kohler drew on a distinction already being made by German theorists, including Immanuel Kant<sup>56</sup> and Johan Gottlieb Fichte,<sup>57</sup> between the physical copy of the work, such as a manuscript, and the intellectual creation embodied therein. He agreed with those theorists that an author’s right subsists in the incorporeal work, not its corporeal manifestation. However, he emphasised a different type of right from others before him. Kohler’s right had as its foundation the basic pseudo-Lockean thought that authors’ intellectual labours give rise to a natural right over their works, but it also depended on Kohler’s observation “that incorporeal goods are so utterly different from corporeal ones that they cannot be subject of a kind of ownership but only of a right *sui generis*, the immaterial property right”.<sup>58</sup>

The content of Kohler’s *sui generis* right is a right of exploitation, which, Kohler posited, was equivalent to the right of ownership in corporeal goods. That is to say, whereas the content of a material property right is ownership, the content of an *immaterial* property right is exploitation. Exploitation, Kohler argued, can only take place via communication, which in turn can have two forms – incorporeal communication (such as performances) and corporeal communication (such as manuscripts and paintings). Accordingly, Kohler’s immaterial property right comprises rights of control over both incorporeal and corporeal manifestations of a work. However, these rights of control (exclusive rights) are simply a *means* of realising the original right of exploitation in the work, rather than being the end content of copyright themselves.<sup>59</sup>

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<sup>53</sup> Jacqueline Seignette, *Challenges to the Creator Doctrine: Authorship, Copyright Ownership and the Exploitation of Creative Works in the Netherlands, Germany and the United States* (1994), 22.

<sup>54</sup> See: Neil Netanel, ‘Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Europe’ (1994) 12 *Cardozo Arts and Entertainment Law Journal* 1, 14-17. See also: Davies, above n 52, 106

<sup>55</sup> Spoor et al, above n 16, 13.

<sup>56</sup> See: Netanel, above n 54, 17.

<sup>57</sup> See: Seignette, above n 53, 26;

<sup>58</sup> Spoor et al, above n 16, 13.

<sup>59</sup> For a more detailed discussion of Kohler’s theory of immaterial property, see: Spoor et al, above n 16, 13-15; 24. See also, Seignette, above n 53, 27.

Today in Germany, Kohler's right of exploitation has been expanded to a more general right of 'just remuneration'. It has also been incorporated within the wider theory of monism, which conceives of copyright as containing both a right of exploitation (remuneration) and rights of personality (moral rights), and which is embodied in the current German Copyright Act.<sup>60</sup> Article 11 of the UrhG, for example, declares that:

Copyright protects the author with respect to his intellectual and personal relationship with his work, and also with respect to utilisation of his work. At the same time, it serves to secure a reasonable remuneration for the use of that work.

Section IV of the UrhG, 'Scope of Copyright' also expressly divides authors' rights into 'moral rights' and 'exploitation rights of authors' under different headings.

In addition, the principle of just remuneration is evident in various provisions of the UrhG. Article 36 allows authors to demand an adjustment of their contracts with parties to whom they have granted a 'utilisation right', to secure them an equitable share of the income generated by their works, in cases where that income turns out "to be grossly disproportionate to" the consideration originally agreed upon. The author may not waive this right in advance.<sup>61</sup> Article 41 also provides that if a holder of a 'utilisation right' does not exercise the right or does so insufficiently, thereby causing injury to the author's legitimate interests, the author may revoke the utilisation right. Again, this right may not be waived in advance, but it does require certain reasonable behaviour on the part of the author, including an obligation to indemnify the person affected by the revocation to the extent required by equity.<sup>62</sup> Finally, the just remuneration principle is embodied in the various provisions for remunerating authors for exploitation and uses of their work beyond their control, or which are exempted from copyright on public interest grounds, such as: a *droite de suite*,<sup>63</sup> a right of remuneration for rental and lending;<sup>64</sup> a remuneration provision for reproductions and distribution in aid of

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<sup>60</sup> Seignette, above n 53, 29 and Netanel, above n 54, 21. Monism is to be distinguished from 'dualist' theories of copyright, which have been incorporated into French law, and which also recognize both authors' economic rights and their moral rights. In contrast to monism, dualism conceives of these two types of authors' rights as conceptually and legally distinct and separable. For a more detailed discussion of the differences between monism and dualism see: Seignette above n 53, 28-30 and Netanel, above n 54, 21-3.

<sup>61</sup> UrhG, article 36(2), (3). The right expires, however, two years after she is first aware of the circumstances giving rise to her claim or after ten years irrespective of that knowledge.

<sup>62</sup> UrhG, article 41(4), (6).

<sup>63</sup> UrhG, article 26 (Resale Royalty Right).

<sup>64</sup> UrhG, article 27.

religious, school or instructional use;<sup>65</sup> and the statutory licence and levy scheme that is the subject of this paper.<sup>66</sup>

## **B. The Remuneration Right and the Statutory Licence and Levy Scheme**

The extent and significance of the right to just remuneration within German copyright law is, therefore, clear from the law's history and current embodiment. However, the GEMA judgment also made clear one other important point about the remuneration right, namely that it entitles the author to more than the mere economic fruits of his labour. According to the Court in GEMA:

the main idea recognised in copyright judicial rulings and [academic] literature, that the author is entitled to the economic fruits which derive from his work only constitutes a minimum requirement for the protection of the material needs of the author and is tailored to the system which dominates in copyright law of the commercial relaying of works. This main idea does not entitle the opposing conclusion, that the author does not receive remuneration for his accomplishment when it is appraised without direct economic value.<sup>67</sup>

This is because the remuneration right has its 'intrinsic justification' in the "very enjoyment by the individual [users] of the author's work",<sup>68</sup> which creates a debt to the author for the fulfilment of their "appetite for art".<sup>69</sup>

Thus, it can be argued that unlike the libertarian Lockean notion of a right to reap the fruit of one's labour, the remuneration right captured in the GEMA judgment conveys a sense of the wrong done to the author through private copying, and of the spirit and substance of the remuneration right, in ways that go much deeper than reaping the material benefits of one's work. It conveys a sense of the author's work as an offering, the recognition of the spirit of which requires a display of gratitude or respect from the receiver. In other words: the offering indebts the receiver to the author. The wrong done to an author when another copies her work

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<sup>65</sup> UrhG, article 46.

<sup>66</sup> UrhG, articles 53-54h.

<sup>67</sup> *GEMA v Grundig*, above n 12, 282.

<sup>68</sup> *GEMA v Grundig* above n 12, quoted in Spoor et al, above n 16, 25.

<sup>69</sup> *GEMA v Grundig*, above n 12, 278.

without paying, therefore, is of the nature of disrespect for the value of the author's gesture in making her offering and an affront to the author's intellectual and personal investment in her work. In this way, the court's enunciation of the remuneration right and of the wrong of private copying captures the human significance of works as well as their pecuniary value.

Hence, the right of remuneration is not only fundamental to the German concept of copyright, it is also highly principled and rooted in an understanding of the deeply personal or spiritual needs that works fulfill. In so far as the statutory licence and levy scheme enables remuneration, it is therefore entirely consistent with Germany's highly principled approach to copyright, despite the fact that it takes from authors some control over the reproduction of their work. Indeed, for the purpose of an author's 'property' or economic interest in her work, the exclusive right of control is merely the means to the ultimate end – just remuneration. Where just remuneration is provided by other means, the exclusive right of control becomes an "empty shell"<sup>70</sup> and its abrogation does not detract from that 'property' right.

This understanding of the remuneration right may partly explain the apparent paradox highlighted in the introduction to this paper between the principled nature of German copyright law and the apparent utilitarian and pragmatic nature of a statutory license and levy scheme. However, the issue of an author's 'moral' right of control remains. The statutory licence and levy scheme may not conflict with an author's economic interests in her work, but how does it affect her personal connection with the work, which we know to be protected under German law? Can the removal of an author's control over the use of her work by way of a statutory licence be reconciled with the protection of moral rights under German law or does the statutory licence and levy scheme reveal a tension between the need to protect the remuneration right and authors' moral rights that was resolved in favour of remuneration? Part 4 of this paper will delve into the history and theory of moral rights in German copyright law in an attempt to shed some light on this question.

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<sup>70</sup> Margaret Möller 'Copyright and the New Technologies – The German Federal Republic's Solution? (1988) 2 EIPR 42, 43.

## IV MORAL RIGHTS IN GERMAN COPYRIGHT LAW

### A. Moral Rights Theory and Law

Although not incorporated into German copyright law until 1965, the German concept of moral rights is rooted in Immanuel Kant's theory of personality rights in literary works, articulated in 1785.<sup>71</sup> The UrhG also reflects later developments of Kant's theory by other German theorists. However, it is Kant's characterisation of the *nature* of a 'work', and of the consequent rights to which authorship gives rise, that lie at the heart of moral rights protection, and which will be the key to understanding the relationship between moral rights and the statutory licence and levy scheme. Hence, the following section is concerned primarily with Kant's theory as the *essence* of moral rights, despite the fact that their current *form* in German copyright law reflects considerable other influences.

Kant characterised a 'work' not as an *object*, but as an *action*. Through writing, Kant argued, "the author *speaks* to his reader";<sup>72</sup> he carries on "an affair ... with the public".<sup>73</sup> Here he distinguished between the material copy of a book (the '*opus mechanicum*'), which is an object, and its content, which is "a continuing expression of his inner self ... an exertion of the author's will, rather than an external thing".<sup>74</sup> Based, on this characterisation, Kant drew on Roman law, upon which German law was based, and which divided rights into three categories: real rights (such as property); personal rights (such as contracts and torts) and personality rights (such as privacy and reputation). Whereas a material copy of the work gives rise to a real right, Kant argued, an author's right over his work, "is not a right in an object, ... but an innate right inherent in his own person"<sup>75</sup> – a personality right.

From this characterisation of a work and of the right to which it gives rise, certain things follow. First, although the author can grant another the right to act on his or her behalf, one's right in one's work is inalienable. The author may sell *copies* of her work, and the purchaser

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<sup>71</sup> Kant, Immanuel Kant, 'On the wrongfulness of unauthorized publication of books' (1785) reprinted in Mary J Gregor, *Practical Philosophy/Immanuel Kant* (1996). It should be noted that Kant's theory is posited only with regard to books. Indeed Kant expressly excludes works of arts from his theory. He does so on the basis that works of art are 'things' rather than the speech of an artist. Presumably, if this presumption can be refuted, then Kant's theory is equally applicable to works of art and other works that can be classified as the speech of the author. However, the practical consequences of the theory may differ according to the form the speech takes.

<sup>72</sup> Kant, above n 71, 30.

<sup>73</sup> Ibid, 33.

<sup>74</sup> Netanel, above n 54, 17.

<sup>75</sup> Ibid, quoting Kant, *Doctrine de droit*, II, 'Metaphysical Elements Of The Doctrine Of Law', §31.

of those copies may, in turn, on-sell them, as with any commodity. However, an author can never transfer title to her work. This idea is embodied in article 28(1) which allows copyright to be transferred by inheritance only. So as to enable the author to exploit her works, however, article 31(1) allows the author to grant both exclusive and non-exclusive rights to use the work (utilisation rights).

Second, a publisher is, consequently, an author's agent, through whom the author speaks. According to Kant, the publisher:

speaks, by his copy, not for himself but simply and solely in the author's name ... to let someone speak publicly, to bring his speech as such to the public ... is undoubtedly an affair that someone can execute only in another's name and never in his own name.<sup>76</sup>

Hence, the UrhG provides, in article 13 under the express heading of 'moral rights', the right to be recognised as the author of one's work or to be published anonymously or under a pseudonym.<sup>77</sup> Article 39 prohibits the holder of an 'utilisation right' from altering the work unless otherwise agreed with the author.

Third, another cannot publish or distribute the work, without the author's consent:

Any person who illicitly publishes and distributes a literary work infringes upon the author's freedom because he is speaking in the author's name without the author's consent. The infringer is, in effect, forcing the author to speak against his will, in a forum and through a vehicle that is not of the author's choosing.<sup>78</sup>

Consequently, as well as exclusive exploitation rights (which are not moral rights under German copyright law), the UrhG grants authors the 'moral right' "to decided whether and how a work is to be published", as well as the right to summarise first to the public the content of one's work.<sup>79</sup> Article 34(1) also stipulates that recipients of a utilisation right may only transfer that right with the author's consent.

Fourth, article 14 of the UrhG allows an author "to prohibit any distortion or any other mutilation of [one's] work which would jeopardise [one's] legitimate intellectual or personal

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<sup>76</sup> Kant, above n 71, 30.

<sup>77</sup> UrhG, article 13 - 'Recognition of Authorship'

<sup>78</sup> Netanel, above n 54, 17.

<sup>79</sup> UrhG, article 12 - 'Right of Publication.'

interests in the work”.<sup>80</sup> Furthermore, article 42 grants authors an unwaivable right to “revoke a utilisation right if the work no longer reflects his conviction and he therefore can no longer be expected to agree to the exploitation of the work”. These rights were not part of Kant’s original theory. However, they can both be seen to continue his characterisation of ‘works’ as the expression of one’s inner self and of authors’ rights as protecting the author’s control over that expression.

## **B. Moral Rights and the Statutory Licence and Levy Scheme**

From Kant’s theory of personality rights and from the moral rights protected under German law, we can see that this is the essence of moral rights: they protect an author’s right to control whether, through whom, and how, her inner self is represented to others. Hence, moral rights comprise the specific rights of publication, of attribution and of integrity of one’s work. It does not follow, however, that moral rights constitute an absolute right of control over one’s work, such that, for example, the author has a right to control the private enjoyment of her published work. Once published, the author has no right to determine either who enjoys it or how they enjoy it. Continuing Kant’s characterisation of a work as the author’s speech: a person who speaks out loud in a public place, has no right to choose who listens.

Private copying is essentially the act of taking a work for private enjoyment or use. As such, according to the rationale behind moral rights, an author has no *moral* right to prohibit such copying, provided she has already published her work. It is true that, according to German copyright law, “each copy of a copyright protected work is, *as a matter of principle*, exclusively reserved to its author”.<sup>81</sup> This was one of the main and most emphasised points of the GEMA judgment. However, the German Supreme Court also made clear in that judgment that the principle, according to which an author has exclusive control over every copy of her work, was the principle of “intellectual property” rather than personality rights. By ‘intellectual property’ the court clearly meant the natural ‘property’ right in an author’s work, rather than the general notion of intellectual property to which the term refers in Anglo jurisdictions.

As we have seen, the essence of that German notion of intellectual property is that an author has a natural right to just remuneration for every third party utilisation of the work grounded

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<sup>80</sup> UrhG, article 14 – ‘Distortion of the Work’.

<sup>81</sup> *GEMA v Grundig*, above n 12, 271 (emphasis added).

in her “creative act”<sup>82</sup> and the “fulfilment of the [user’s] appetite for art”.<sup>83</sup> In explaining the author’s natural right of control over every copy of her work, the Supreme Court explained that the “author’s control over his work...is the basis of a right to just remuneration for third party utilisation”<sup>84</sup> and that “the author’s rights of use are merely the radiation of his intellectual property”.<sup>85</sup> Hence, it is not the right to control the work that is a matter of principle, but the right to remuneration (to which the right of control is a means of realization). However, where the remuneration right is already provided for - such as under the statutory licence and levy system - the right of control has no other foundation upon which it can stand alone, such as a moral right of control.

An analysis of the rationale behind moral rights, therefore, reveals no inconsistencies with the statutory licence and levy scheme. The loss of control that is a consequence of the statutory licence does not affect the relationship between the author and the content of her work that is the object of protection of moral rights. Furthermore, the following part of this paper will argue that the statutory licence and levy scheme, in fact, continues the ‘spirit’ of moral rights protection.

## **V MORAL RIGHTS AND THE USERS OF COPYRIGHT**

### **A. The Relevance of the User**

Part 4 of this paper revealed that the foundation of moral rights is the characterisation of a work as a form of speech by an author to his audience. Within that notion of a work as speech is also the idea that the work is a communication of one’s inner self, which builds a relationship (‘an affair’) with the audience. The work is not a commodity, but an intimate human interaction. Although Kant’s theory focused on the significance of this characterisation in terms of the author’s rights, equally significant to this characterisation of the work is the receiver (user) of the work, with whom the author establishes her relationship. Therefore, if one is prepared to recognise the deep, personal significance of the work based on its nature as an expression of one’s inner self, then one must also be prepared to recognise

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<sup>82</sup> Ibid, 278.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.



the potential for the work to affect, deeply and personally, the person in receipt of that expression. Indeed, the basis for authors' right of remuneration, as expounded in the GEMA case, rests on the very recognition of a work's role "in the fulfilment of the individual's appetite for art".<sup>86</sup> This statement by the German Supreme Court recognises not only the indebtedness, to which an author's offering gives rise, but also the deep need all human beings have for 'art'.

According to the above observations, a law that, based on the deeply human nature of works, seeks to protect the personal relationship between authors and their works, should logically seek to protect users' interests in those works, at least so far as they do not conflict with those of the authors. Hence, where the author's remuneration right can be protected and where there is no conflict with moral rights, it can be argued that it would be against the spirit of moral rights and of German copyright law unduly to restrict users' access to a work. According to this view of moral rights, the statutory licence and levy scheme, in that it ensures an author's right to remuneration and at the same time ensures public access to works at an affordable cost, is in fact completely in accordance with German protection of moral rights. Whilst this argument has not previously been expressly articulated, support for it can be found in German constitutional theory, which, as will be seen, permeates every aspect of German law, including copyright law.

## **B. German Constitutional Law**

Enacted in 1949 in response to the horrors of Nazism and the Third Reich, and based heavily on German philosophy, the "Basic Law was designed not only to create a system of governance, but also to foster a secure and preferred way of life".<sup>87</sup> Hence, it is not "the simple expression of an existent order of power", nor even simply a charter of fundamental rights. Rather:

the Basic Law is a value oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality, that are

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<sup>86</sup> Ibid.

<sup>87</sup> Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997), 39.

designed to restore the centrality of humanity to the social order, and thereby secure a stable democratic society on this basis.<sup>88</sup>

The German constitution is a “blueprint for society”;<sup>89</sup> it sets out a hierarchical value order that is considered pre-existing and applies to the entire German society, including all its laws. Copyright is no exception.

At the “apex” of the value order is the concept of human dignity. As “the Constitutional Court has repeatedly emphasized, [it] is the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of all guaranteed rights”.<sup>90</sup> This significance of human dignity is also reflected in the Basic Law itself, in its protection in article 1 and in its inalterability established in article 79(3) (the “eternity clause”).<sup>91</sup> Since no law in Germany is valid unless it adheres to the constitutional order, and since human dignity is at the crux of that constitutional order, no law in Germany can be understood fully without an understanding of human dignity under the German Basic Law.

Article 1 of the Basic Law reads:

- (1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.
- (2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world.
- (3) The following basic rights are binding on legislature, executive, and judiciary as directly valid law.

Articles 2-19 then set out basic rights that “are binding on legislature, executive, and judiciary as directly valid law,”<sup>92</sup> including rights to: liberty;<sup>93</sup> equality;<sup>94</sup> faith, religion, conscience or creed;<sup>95</sup> expression;<sup>96</sup> marriage and family;<sup>97</sup> education;<sup>98</sup> assembly;<sup>99</sup>

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<sup>88</sup> Edward J Eberle, ‘Human Dignity, Privacy and Personality in German and American Constitutional Law’ [1997] *Utah Law Review* 963, 967.

<sup>89</sup> *Ibid* 968-9.

<sup>90</sup> Kommers, above n 87, 32.

<sup>91</sup> Article 79(3) of the German Basic Law states: ‘Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.’

<sup>92</sup> Basic Law, art 1(3).

<sup>93</sup> Basic Law, art 2.

<sup>94</sup> Basic Law, art 3.

<sup>95</sup> Basic Law, art 4.

movement;<sup>100</sup> choice of occupation;<sup>101</sup> inviolability of the home;<sup>102</sup> property;<sup>103</sup> citizenship;<sup>104</sup> asylum;<sup>105</sup> and petition.<sup>106</sup>

Article 1 makes clear that respect for and protection of human dignity necessarily gives rise to certain inviolable and inalienable human rights and, inversely, that at the base of every constitutional right in Germany is human dignity. However, inherent in the concept of human dignity enshrined in article 1(1) is also moral duty or obligation. This duty is articulated expressly in article 1(1) with regard to state authority, but “according to the standard interpretation, private individuals [also] have the duty to respect each other’s dignity”.<sup>107</sup>

As the German Constitutional Court has declared many times, the concept of human dignity in German constitutional law rests on the Kantian conception of human persons as “spiritual-moral beings”.<sup>108</sup> ‘Spiritual’ in this context refers to the human need to develop one’s personality, talents and self to the fullest; it refers to human “rationality and self-determination”.<sup>109</sup> ‘Moral’ refers to the innate human sense of moral duty. Hence “spiritual-moral beings” can be defined as “beings who act freely, but [whose] actions are bound by a sense of moral duty”.<sup>110</sup> Or, according to the German Constitutional Court, the “human person is “an autonomous being developing freely within the social community”.<sup>111</sup> A human person is defined, therefore, as much by her “community-boundedness” as her individual

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<sup>96</sup> Basic Law, art 5.

<sup>97</sup> Basic Law, art 6.

<sup>98</sup> Basic Law, art 7.

<sup>99</sup> Basic Law, art 8.

<sup>100</sup> Basic Law, article 11.

<sup>101</sup> Basic Law, art 12.

<sup>102</sup> Basic Law, article 13.

<sup>103</sup> Basic Law, article 14. This has been held to include intellectual property (see below, part 5.3 ‘The German Constitution and Copyright Law’).

<sup>104</sup> Basic Law, article 16.

<sup>105</sup> Basic Law, article 16a.

<sup>106</sup> Basic Law, article 17.

<sup>107</sup> G P Fletcher ‘Human Dignity as a Constitutional Value’ (1984) 22 *University of Western Ontario Law Review* 171, 179.

<sup>108</sup> Eberle, above n 88, 973.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid 974.

will. Inherent in the Kantian notion of humanity, upon which the Basic Law concept of human dignity rests, are, therefore, both free individual self-determination and moral obligation or responsibility.

From this understanding of human dignity and the place of human dignity at the core of the German constitutional order, many things follow. Unfortunately there is not the space here to examine them all. However, those most relevant in the copyright and private copying context are outlined in the succeeding paragraphs.

First, the primary right enshrined in the German Basic Law, set out in article 2 – directly below the protection of human dignity – is the “right to free development of [one’s] personality in so far as [it] does not violate the rights of others or offend against the constitutional order”. This right captures the essence of personhood behind the key concept of human dignity and, therefore, of the protection of human dignity itself. All other rights enshrined within the constitution can be seen as more specific examples of this overarching right. Most significantly for the purpose of this paper, however, article 2 (when combined with article 1) is understood within German constitutional jurisprudence as providing a constitutional basis for personality rights, including those enshrined as ‘moral rights’ within the UrhG.<sup>112</sup> This is because a work is viewed as deriving from the development of one’s personality.<sup>113</sup>

Second, as well as rights, the German Basic Law also sets forth certain duties citizens or government must perform:

Thus citizens have both claims to subjective rights, which they may exercise, and objective rights, which they can call on government to perform, but must also assume duties corollary to such rights.<sup>114</sup>

Third, a similar, but slightly different consequence is that, in contrast to rights founded on a notion of individual liberty, such as those in the United States’ *Bill of Rights*, rights derived from the inviolability of human dignity are imbued with inherent balance between freedom and responsibility. They tend, therefore, to be less individualistic and absolutist; coexisting within a value order, rather than standing in opposition within a charter, under which the strongest right wins. This does not mean there is no conflict of interests under German law. However, where there is conflict, its resolution lies not in placing the rights in opposition to

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<sup>112</sup> Manfred Rehbinder, *Urheberrecht* (12<sup>th</sup> ed, 2002), 71-2 [106].

<sup>113</sup> *Ibid* 71 [106].

<sup>114</sup> Eberle, above n 88, 969.

one another, and prioritising one. Rather the extent of each right will be determined by the moral obligation each individual has to the other. The question is not ‘who has the stronger right’? Rather it can be seen as: ‘what does the recognition of the human dignity of each party require of the other’?

### **C. The German Constitution and Copyright Law**

As with all German laws, the constitutional order, imbued with its understanding of human dignity, has laid the foundations for the UrhG. The framework for the balance between the freedom and the responsibility of the author is established by the Basic Law. As we have seen, the moral rights of the author are grounded in articles 1 and 2. Further, article 5 (freedom of expression, art and science) is seen to support the author’s rights to work through which they express themselves,<sup>115</sup> and article 14, discussed further below, guarantees the author’s right to her property.

Just as the Basic Law sets up the framework for the author’s rights, so too it establishes that these rights are associated with responsibilities. The current version of the UrhG, therefore, whilst highly protective of authors’ rights and on very principled grounds, also either places clear limits on copyright or places responsibilities on authors to exercise their rights reasonably and fairly with regard to those who might make use of their works. For example, as well as providing exceptions to the exclusive reproduction right for certain purposes such as religious, school and instructional use and for news reporting and public speeches, article 34(1) of the UrhG dictates that although an “exploitation right may be transferred only with the author’s consent ... [, the] author may not unreasonably refuse his consent”. Similarly, whilst article 29(1) requires an author’s permission to alter a work, article 39(2) provides that “[a]lterations to the work and its title which the author cannot reasonably refuse shall be permissible”. Finally, article 52 establishes a statutory licence to communicate a work publicly, provided that the communication provides no gainful purpose on the part of the organizer, spectators are admitted free of charge, none of the performers receive special remuneration, and an “equitable remuneration” is paid to the author of the work.

Perhaps the most apparent example of this balance of interests in the context of copyright can be seen in article 14 of the Basic Law, which enshrines the right to property and which has

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<sup>115</sup> Reh binder, above n 112, 75 [111].

been held by the Constitutional Court to apply to intellectual property, including copyright.<sup>116</sup> Article 14(1) guarantees property and the right of inheritance. However, article 14(2) also declares: “Property imposes duties. Its use should also serve the public weal.” Hence, the Constitutional Court has held:

the court must keep in mind that the legislature is not only obliged to safeguard the interests of the individual but also to circumscribe individual rights to the extent necessary to secure the public good. It must strive to bring about a fair balance between the sphere of individual liberty and the interests of the public.<sup>117</sup>

Specifically with regard to copyright, the Court has held in the *Schoolbook Case* that:

[w]hen a protected work has been published it is no longer at the exclusive disposal of the individual [author], for [at that point] it simultaneously enters the social sphere and thus become an independent factor contributing to the cultural and intellectual climate of the time.<sup>118</sup>

Accordingly, the Court in the *Schoolbook Case* held that the “public’s interest in unrestricted access to works” prevents an author from being “wholly free to bar the use of his work in an [educational] collection”.<sup>119</sup> However, the Court still found article 46 of the UrhG unconstitutional on the ground that it allowed the unauthorised reproduction of works within a collection for religious, school or instructional use without providing for just remuneration of the author. The public’s interest, it found, did not justify the denial of the right to remuneration. Article 46 now provides that “the author shall be paid equitable remuneration for the reproduction and distribution”.

These limitations on an author’s rights can be seen to acknowledge the German perception of the significance of the work to all parties. That is, the interests of the author must be balanced against the interests of the individual user, the cultural industry and the general public.<sup>120</sup> Indeed, article 5(I) of the Basic Law is viewed by some academics as guaranteeing an individual’s claim to participation in cultural life, for the purpose of the individual’s

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<sup>116</sup> The applicability of article 14 to intellectual property was established through 5 controversial cases decided in 1971 in response to the introduction of the UrhG in 1965, including the constitutional challenge to article 53. Those 5 cases were: *Schoolbook Case* (1971) 31 BVerfGE 229; *Broadcast Lending Case* (1971) 31 BVerfGE 248; *Tape Recording Case* (1971) 31 BVerfGE 255; *School Broadcast Case* (1971) 31 BVerfGE 270; and *Phonograph Record Case* (1971) 31 BVerfGE 275. See: Kommers, above n 87, 261.

<sup>117</sup> *The Schoolbook Case* (1971) 31 BVerfGE 229 in Kommers, above n 87, 264.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Reh binder, above n 112, 200 [253].

furtherance and development<sup>121</sup> and private copying, itself, is viewed by some commentators as furthering an individual's right to the free development of her personality,<sup>122</sup> as protected by article 2(1) of the Basic Law. However, these interests of the users are obviously limited by the protection of the author's dignity.<sup>123</sup>

Thus, from the constitutional theory that surrounds German copyright law, certain things are evident. The two foundational concepts of German constitutional theory, human dignity and persons as moral-spiritual beings, are informed equally by a sense of and respect for 'other' as well as by a sense of 'self'. Consequently, all rights within German law, including copyright law, contain inherent limits determined by one's moral obligation to the human dignity of others. One aspect of human dignity, according to German constitutional theory, is the 'right to the free development of one's personality'. Whilst this right is the constitutional basis for personality rights (moral rights) within the current German Copyright Act, it is also the basis for the constitutional right to participate in cultural life, which, when applied to German copyright law, entails a general right to access works, provided that the author is remunerated.

Kant's philosophical basis for moral rights was a recognition of a work as an interaction (an "affair") between the author and receiver of a work. In part 5.1 of this paper, it was posited that it logically follows from this philosophical basis for moral rights that the importance of works to their receivers must also be given recognition, which in turn, places limits on authors' rights of control over their work. Accordingly, the balance achieved by the statutory licence and levy scheme is not just compatible with moral rights, but is, in fact, in accordance with their very essence. In that it requires certain limits on authors' exercise of their rights and protects public access to works, constitutional theory certainly lends support to this argument. Moreover, although the balance achieved through constitutional theory does not draw on philosophical basis for moral rights, the recognition of the full humanity of the 'other' required by the foundational concepts of human dignity and moral-spiritual beings (both of which are also Kantian concepts) parallels the recognition of the 'receiver' of a work put forward in this argument. Constitutional theory thereby provides support for the method of reasoning contained within the argument put forward in part 5.1 of this paper, as well as its outcome.

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<sup>121</sup> Haimo Schack, *Urheber- und Urhebervertragsrecht* (2<sup>nd</sup> ed, 2001), 8, [16].

<sup>122</sup> Reh binder, above n 112, 202 [255].

<sup>123</sup> Ibid 71 [106].

## VI CONCLUSION

### A. The German Conception of Private Copying

In the introduction to this paper, various questions were posed, which the investigation and analysis performed in parts 2, 3, 4 and 5 now place us in a position to answer.

The statutory licence and levy scheme in German copyright law reflects not simply the thought that copyright holders should be remunerated for the private copying of their work, but rather that authors' right to remuneration for any use of their works is one of the most fundamental and inviolable principles of German copyright law. The basis for this principle lies in a modified version of natural rights theory, which though "founded in [the author's] creative act"<sup>124</sup> goes deeper than an entitlement to the fruit of one's labour, amounting instead to a debt of gratitude owed to the author by every individual user of her work for "the fulfilment of the individual's appetite for art".<sup>125</sup>

The right to remuneration can therefore be seen to embody a sense of a deeper, non-monetary wrong that exists when private copying occurs *without* remuneration – a wrong akin to ingratitude or disrespect towards the author. However, the remuneration element of the statutory licence and levy scheme does not represent compensation for the abrogation of the author's control over her work that occurs via the statutory licence, since the author's exclusive right to control the reproduction of her work has its basis in the right of remuneration – the end to which it is merely a means. Where that right to remuneration is already provided for, as in the statutory licence and levy model, there exists no other basis for authorial control over reproduction for private use. Hence, the abrogation of the exclusive reproduction right that is conferred by the UrhG represents no wrong to the author that needs to be compensated.

Nor is there any indication from our examination of the statutory licence and levy scheme that the right to remuneration is concerned with the unjust enrichment of the private copier. Whilst it is clearly fundamental to German copyright law that users of works should not take the work without paying for it, the basis for this principle is not that the user has gained undeservedly, but rather that to do so wrongs the author by depriving her of possible income from her work and by disrespecting the personal and valuable offering she has made by way of her creative act. Finally, in marked contrast to the Anglo-common law approach to

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<sup>124</sup> *GEMA v Grundig*, above n 12, 278.

<sup>125</sup> *Ibid.*



copyright, the utilitarian justification for authors' remuneration right as an incentive to produce more works does not feature as influential in the German approach to private copying, or in fact in the German approach to copyright in general.

As we have seen, the statutory licence element of the licence/levy approach to private copying is not inconsistent with the strong protection of authors' connection to and control over their works in the form of moral rights under German copyright law. That is because the rationale behind the strong protection provides no basis for an absolute right of control over the private enjoyment of one's work once it has been published. In fact, it can be argued that the very basis for the protection of moral rights (the recognition of the nature of a 'work' as not simply an object, but as a personal interaction between the author and her readers) also requires the acknowledgment of the deep significance of works to their users. Indeed, public interest in access to works has been confirmed as constitutionally protected, though not to the point that it overrides authors' remuneration right. Hence, the solution to the private copying dilemma that is truest to the German understanding of copyright is one that ensures the fulfilment of authors' right to remuneration, whilst minimising the impact on access to works by their users. This is indeed the result of the statutory licence and levy scheme.

Thus examination of the history and theory behind the German statutory licence and levy scheme reveals a conception of copyright that is highly principled and highly protective of authors' interests in their works; but which is also extremely fair. Indeed the entire UrhG reads like a code of civilised conduct amongst all parties involved with a work. This fairness and civility is partly because, underlying all German law is a complex constitutional value order, which places respect for individual human dignity at the heart of German society and its laws and which ensures that all rights are balanced by an obligation on the possessor to exercise them mindful of others and their human dignity. However, essential to the spirit of German copyright law is also the conception of the nature of a work as a relationship between human beings: the extension of one's person and intellect on the part of the author and the fulfillment of a deep need for 'art' on the part of the receiver.

This conception of a 'work' has its origins in Kant's theory of personality rights and most obviously underlies the German protection of moral rights. However, it is also evident in the German Supreme Court's explanation of the remuneration right in the *GEMA* case whereby the right arises out of the indebtedness of the user for the fulfillment of her need for art. In fact, it seems to inform the entire German copyright law, ensuring all parties involved with a work must behave in a manner that is not only respectful of one another as fellow human

beings, but is also respectful of the nature of a ‘work’ and its significance for those other human beings.

## **B. Relevance to Australia**

Most obviously, for Australia, the study undertaken in this paper reveals that a statutory licence and levy approach to the dilemma of private copying need not be a compromise or imperfect solution. Rather, it may be seen as consistent with, even demanded by, a principled understanding of copyright that values highly the rights of authors, the rights of users and the potentially personal and spiritual nature of works.

Secondly, even if a statutory licence and levy scheme is no longer a workable solution in the digital era,<sup>126</sup> the understanding of German copyright law reached in this paper provides a different conception of copyright law that it is hoped can contribute to the debate surrounding private copying in the digital era in Australia.

Most significantly, the German approach to copyright, as revealed in this paper, challenges our conception of the very subject matter of copyright law – works. At the heart of German copyright law is a conception of works, not merely as commodities – as things of value to various parties whose interests must be balanced in accordance with the utilitarian objective of maximum total value for society (determined by the market) – but rather as an interaction between spiritual-moral beings that is significant to the intellectual, spiritual and emotional development of all parties. Secondly, German copyright law, imbued as it is with the constitutional value order, focuses on the human persons (the spiritual-moral beings) behind the law. Combined, these conceptions of works and of the people involved with works demand a copyright regime that requires participants in any action involving copyright works to behave in such a way that is respectful of the nature of the work and of its significance to the ‘others’ (primarily users, but also publishers, licensees and other parties) involved with it. This requirement is manifest in the statutory licence and levy scheme for analogue private copying, in that authors are not permitted to prevent the use of their works, but neither are users of works allowed to take without remunerating the author for that use. It is also manifest in that remuneration for use of one’s work is stipulated in the UrhG as ‘reasonable’. In the digital era, the German conception of works and of the people involved with them

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<sup>126</sup> Although the point is not conceded, it is recognised that a statutory licence and levy scheme may be too approximate to provide viable remuneration for the scale of private copying that is possible with digital technology.

requires a solution that allows copyright holders to make private copying subject to remuneration, but not to restrict access to private copying on any other basis. Moreover, in order to ensure that access to private copying is not unduly restricted – substantively as well as formally – the solution must require that access is not prohibitively expensive or complicated.

Unfortunately, Germany itself is yet to find a solution to private copying in the digital era that is in accordance with these requirements. The recent *Copyright Amendment Act* does not meet them. It maintains the freedom to copy for personal or private use in theory, but effectively prohibits the means to copy in practice. Nonetheless, the Amendment Act was driven by EU harmonisation, rather than adherence to the principles and theory of German copyright law and it does not follow that these principles and theory need to be abandoned. Indeed, the criticism and controversy that has surrounded the Amendment Act since its enactment, and the ongoing tensions surrounding private copying in our own jurisdiction and around the world, signify that a principled solution is needed. That solution must recognise and protect not only the monetary interests of authors and their producers in works, but also the potentially deep spiritual, intellectual and emotional interests of those who ‘use’ the works. A satisfactory solution in Australia must, ultimately, respond to this need.

## IPRIA Working Papers

No.	Title	Author(s)
04/04	Principle or Compromise?: Understanding the original thinking behind statutory licence and levy schemes for private copying	<i>Gaita / Christie</i>
03/04	Patterns of Trademarking Activity in Australia	<i>Jensen / Webster</i>
02/04	Protecting Indigenous Signs And Trade Marks Under The New Zealand Trade Marks Act 2002	<i>Morgan</i>
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