

# OPINION

## The Answer to the Machine Should Not be the Machine: Safeguarding the Private Copy Exception in the Digital Environment\*

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Ⓛ Anti-copying devices; Copyright; EC law; Private copying

### Introduction

This article focuses on maybe the most controversial subject concerning copyright limitations and exceptions: the question of what should be the future of the private copy exception in the digital environment. The major players of the entertainment industry have advocated the abolishing of the private copy exception in the digital world for many years and many scholars already pleaded for the suppression of the private copy exception in the digital environment.<sup>1</sup> The arguments brought forward are serious and in the meantime well known. Anyhow, this article takes the counter position and tries to demonstrate why the private copy exception should be saved from disappearing in the digital world.

Of course, this claim is also not new and is regularly made by consumer organisations. But the arguments they bring forward are often more political than legal. In fact, the answers to the question of the future of the private copy exception are merely political ones and should be decided on the political level by the legislature. The problem is that the question is so sensitive that the legislature refrains from taking any decisions and often leaves the task of finding solutions to the courts or to some regulation authority. That means that judges often have to solve the deficiencies of politicians, which is maybe already worrying for our democratic systems, but this is another question. . . .<sup>2</sup> This article will try to enquire why the

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1 See for example J. C. Ginsburg/Y. Gaubiac, "Private Copying in the Digital Environment", in J.J.C. Kabel/G.J.H.M. Mom (eds), *Intellectual Property and Information Law, Essays in Honour of Herman Cohen Jehoram* (The Hague, London, Boston: Kluwer Law International, 1998), p.149; G. Davies, *Copyright and the public interest*, 2nd edn (London: Sweet and Maxwell, 2002), p.291 and from the same author: "Copyright in the Information Society, Technical Devices to Control Private Copying", in P. Ganeev/C. Heath/G. Schriker, *Urheberrecht, Gestern—Heute—Morgen, Festschrift Adolf Dietz, Beck, München* (2001) p.318; Y. Gaubiac, "Les exceptions, La méthode suivie et les résultats obtenus" *Propri. Intell.* (2002) 2, 17; C. Berger, "Die Neuregelung der Privatkopie in § 53 Abs. 1 UrhG im Spannungsverhältnis von geistigem Eigentum, technischen Schutzmaßnahmen und Informationsfreiheit", *ZUM* 2004, p.265.

2 This is not surprising, as Prof. Andersen rightly points out, because as a substitute for consensus, complex and often "political" issues in copyright law are more and more left to courts to decide upon, so that the interpreter (in this case the courts) are faced with a crucial role in copyright legislation. According to this author, the interpreters should therefore, "be careful not to step out of the objective role in which they are placed by constitution or, just as important, by respect of the legal community" (M.B. Andersen, "The Role of the Interpreter—The Harmonization Aspect", in *Exploring the Sources of Copyright*, Proceedings of the ALAI Congress 2005, Paris, AFPIDA, (2007) p.343). Of course, leaving space for judicial decision-making is not necessarily a bad thing and it can on the contrary allow interesting flexibilities to adjust the balances of copyright law. In "common law" countries for example, the idea of "judge-made law" is much better accepted, see in this sense L. Bently, "Interpretation of Copyright Rules: The Role of the Interpreter—The Creation Function", in