



## Copyright Levies

### ***EU***

On 7 January 2010 talks aimed at modernizing the system of private copy levies in Europe broke down when industry called time. The discussions, dating back to July 2008, had been held in the context of a 'Stakeholder Platform' facilitated by the European Commission involving Collecting Societies and industry representatives, with BEUC (the European consumer organization) having observer status. After 18 months, as far as industry was concerned, the talks had failed to deliver any concrete results and there was no prospect even of agreeing a way forward.

Industry had been looking for an EU Internal Market approach, whereas the Collecting Societies had no desire to depart from the current patchwork of national systems. This caused an impasse.

The Stakeholder Platform was also perceived as a politically convenient way of 'burying' the levies topic. There was a wide misconception in other parts of the Commission and in national ministries that real progress was being made. The talks were infamously behind closed doors, and so as long as they continued there was no prospect of the Commission, or even national ministries, starting any separate initiative. For this reason it suited Collecting Societies to (1) procrastinate (they had nothing to lose by maintaining the status quo), (2) call for the stakeholder forum to continue, and (3) blame industry for the failure.

Industry argued that failure of the Stakeholder Platform clearly demonstrated that there are fundamental tensions in the private copy levy system which cannot simply be resolved by the stakeholders themselves, and therefore urged political and legislative action at European level.

In the mean time there has been a new Commission and, specifically, a new French Commissioner, Michel Barnier in charge of DG Internal Market (MARKT), with responsibility for copyright (and hence the Levies topic). France is notoriously one of the strongest supporters of the Private Copy Levy system, with strong political and cultural motivations, and it is becoming noticeably more difficult to get any political traction on levies within the Commission. There do appear to be some internal tensions with other directorates who take a different view, but other parts of the Commission have not had much influence and other Commissioners have shown little appetite to confront the Commission, at least publicly.

Against this pessimistic political backdrop, Industry's efforts in recent months have focussed primarily on trying to get Levies back on the EU policy/legislative agenda during 2010. Three key vehicles have been identified to achieve this end, namely (1) the Single Market Act expected in October, (2) the Collective Rights Management framework directive expected early in 2011, and (3) the "Application Report"

The IP Federation is the operating name of the Trade Marks, Patents and Designs Federation  
Registered Office 5th floor, 63-66 Hatton Garden, London EC1N 8LE

Email: [admin@ipfederation.com](mailto:admin@ipfederation.com) | Tel: 0207 2423923 | Fax: 0207 2423924 | Web: [www.ipfederation.com](http://www.ipfederation.com)

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(essentially a 3-yearly review procedure) prescribed in Article 12 of the Copyright Directive 2001/29/EC (the one and only previous Application Report was in 2007).

In its Communication "Towards a Single Market Act" published on 27 October 2010, the European Commission acknowledges that levies are an obstacle to the internal market. Although no specific actions are proposed, the Commission says it will "take account of the dialogue between interested parties in order to find paths to a sound solution."

In CJEU case C-467/08 (*Padawan v. SGAE*) published on 21 October 2010, it was held that 'fair compensation' prescribed in the 2001 Copyright Directive is an autonomous concept of EU law and has to be interpreted uniformly in Member States that have a private copy exception. This does not seem to mean harmonised tariffs as it is left open for Member States to determine the details of fair compensation arrangements. Importantly, the criterion of 'harm' was held to be the right basis for calculating the tariff amount. At the heart of the case was the issue of business / professional use, and the court held that the indiscriminate application of levies on equipment and media not made available to private users and clearly reserved for uses other than private copying is not compatible with EU law. On the other hand devices made available to natural persons for private purposes and *capable* of copying are presumed to be used for private copying, even if they are not *actually* used for private copying. However, actual private copy use would still seem to be relevant in calculating the amount of levy, in view of the harm-based approach endorsed by the court in this case.

## **UK**

The IPO and Economic and Social Research Council (ESRC) are jointly funding a 12-month academic research project to examine the impact of copyright levy systems. The project specification is available at:

[http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/opportunities/placement/IPO\\_2010.aspx](http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/opportunities/placement/IPO_2010.aspx)

In August the project was awarded to Professor Martin Kretschmer of Bournemouth University. Martin is Professor of Information Jurisprudence and Director of the Centre for Intellectual Property Policy & Management (CIPPM) at Bournemouth University Executive Business Centre.

The project is a 'Placement Fellowship' which means that Professor Kretschmer will be based at the IPO several days a week. The study, which started in September, was originally envisaged to take up to 12 months, but it is anticipated the final report may be ready by summer 2011.

It is believed the IPO is intending to set up a Project Board, which would include industry representation, to help steer the project.

It is understood that this initiative does not foreshadow a change in UK policy, but more to provide a more concrete empirical base for the UK's historical "no-levy" position in the face of persistent pressure from pro-levy interests, and in case there may be future moves within the EU towards harmonisation.

As the Copyright Levy topic is somewhat sector-specific, the Federation has tended to endorse positions and actions of Intellect (the UK trade association representing

the information and communication technology (ICT) sector) having members in common.

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