



Advancing Industry's View On Intellectual Property Since 1920

EU Stakeholder Consultation on Copyright Levies in a Converging World

TMPDF Response

1 WHAT ARE COPYRIGHT LEVIES?

A Do you agree with this description of copyright levies?

We broadly agree with the description in Section 1.

B Are there elements that you consider should be added?

- 1 Although it is explained in section 1 that levies are not directly imposed on those that carry out acts of private copying, namely the consumers, but that the copyright levy is applied to the equipment or media and imposed on the manufacturers, importers or distributors, it is not mentioned that in fact it is the consumer that eventually pays. Generally the consumer is not aware that she is paying a copyright levy, nor how much she is paying, nor what acts of private copying she is legitimately entitled to perform against such payment.
- 2 In connection with the point that five Member States (including the UK) have no copyright levies, this does not necessarily mean that consumers in those Member States completely escape the burden of levies, but may be subsidising consumers in Member States where levies apply while deriving no benefit from such payments - see our answers to Questions 8C and 10 below
- 3 Also, we would emphasise that levies are intended as a mechanism only for remunerating legitimate private copying (which has not been compensated by other means, e.g. by means of a licence fee having been paid) and not at all to compensate for copyright piracy or any unauthorised use.

C Do you believe it efficient that the debtor of the copyright levy is not the party that carries out and controls the private copying?

No, it is very inefficient. The further upstream in the distribution chain (manufacturer-importer-distributor-wholesaler-retailer-consumer) that levies are applied the more difficult it is to correlate the amounts collected with the actual harm caused by the eventual private copying involved.

The problem is exacerbated because the further upstream levies are applied, the less the debtor knows about whether the goods (equipment or media) will ultimately be sold to private end-users or business customers (who are not entitled

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to make private copies and so levy payments should not apply). Consequently many goods end up being levied (unfairly and unnecessarily) regardless of actual end-use. Because levies are eventually passed on to customers it means that those who are not using goods for legitimate private copying are subsidising those who are.

2 WHO ADMINISTERS COPYRIGHT LEVIES?

A Do you agree with this description?

Yes.

B Are there elements that you think should be added?

There is also a lack of transparency as to the quantum of levies applied. The methodology collecting societies use to determine the amount of a levy is usually not at all clear.

C Are you satisfied with how the collection and distribution of copyright levies functions?

No. As far as collection of levies is concerned, we have several concerns.

Apart from the often apparently arbitrary and opaque manner in which the amounts of levies are set, levies are often claimed on goods which will not be used for private copying, or may be exported. In some Member States there are several different collecting societies applying levies for different aspects of the same goods, which results in some goods being subject to several levies. Also, in the case of interconnected components of a "system" (for example: computer, CD drive, memory stick, printer and scanner), levies may be applied to the individual components resulting in the consumer paying multiple times.

D Do you believe that rights holders who are (1) nationals of other Member States or who may be resident in another Member State other than that of which they are nationals; or (2) third country nationals receive a proportion of copyright levies that corresponds to the actual amount of copying of their works or other subject matter (such as phonograms of broadcasts) including in comparison to nationals themselves?

We do not have sufficient evidence to make an informed judgement on this, but based on the information in the Consultation Document alone, it would seem that - broadly speaking - rightholders outside a particular Member State are disadvantaged and are not receiving a proportion of the copyright levies commensurate with the actual amount of copying of their material in that Member State. See also our answers to section 3 below.

E How can current distribution keys reflect the actual amount of copying of works or other subject matter?

There is almost no visibility about how the amounts collected are distributed because of a general lack of transparency in the way collecting societies operate. This makes it difficult for us to give a meaningful reply to this question.

F Do you think that there should be greater accountability of collecting societies with respect to the application, collection and distribution of copyright [levies] and if so, in what form?

There is a compelling need for collecting societies to be more accountable. Member States should each have or establish an independent, specialised forum competent to review any levy or claimed levy and with the power to vary (or cancel) any levy amount, as appropriate. These independent fora should be supported by an EU-level oversight body, open to participation by all stakeholders.

3 DISTRIBUTION OF COPYRIGHT LEVIES

A What conclusion can be drawn from the above Table with respect to the relationship between the levy collected and distributed and the administrative cost of distribution?

The Table shows there is a wide variation in administrative efficiency, with costs of the collecting societies in different Member State ranging from 4% in Italy to 20% (or thereabouts) for some classes of work in France, Germany and Hungary. There is little transparency as to what these administrative costs include and the Consultation itself notes that it does not reflect the collection service. It is the rightholders who are deprived of these amounts collected on their behalf.

The Table also clearly shows that significant amounts are directed towards cultural and collective purposes, which is quite simply a "tax". In Austria, for example, the Table shows that this cultural "tax" is more than 50%, and in four other Member States (Denmark, France, Lithuania, and Spain) it is 20% or more. As these amounts are not at all compensating rightholders for harm caused by private copying, the corresponding amounts should be removed from levies altogether.

The Table demonstrates not only the range of different practices in the different Member States, but highlights the inefficiency in the distribution system. Even if the collected amounts were being distributed to right holders in proportion to the amount of actual private copying of their work - but, as we have said, there is doubt about that - the Table shows that levies are a very blunt instrument for giving rightholders anything like a fair return on their creativity.

B What conclusion can be drawn from the above Table with respect to the ratio of distribution at national level as opposed to distribution to other Member States?

The table shows a propensity for Collecting Societies to distribute the majority of the collected amounts to rightholders within their own country. Only two member

States (Denmark and Spain) pay more than half the collected amounts abroad. Unless there is evidence that consumers privately copy more from fellow-national rightholders than from right holders outside their own country (and there is no indication there is any such evidence) this suggests that in terms of distribution, Collecting Societies are favouring their own national rightholders at the expense of rightholders from other Member States and third countries.

4 DIGITAL RIGHTS MANAGEMENT AND DIGITAL MUSIC SALES

A Do you agree with the above assessment on the growth of digital and technologically protected sales?

Yes.

B Are there other elements that you consider relevant?

As the Commission has pointed out, DRMs are indeed an enabling technology, providing opportunities to develop new (electronic) business models aimed at making digital content available to users and allowing right holders to be compensated directly in a manner commensurate with intended use. However, the new, sometimes complex business models can be confusing to consumers, who need to be able to understand clearly what they are purchasing and what they are entitled to do, and care should be taken to ensure that the consumer is appropriately protected against any potentially unfair practices.

C In your opinion, which system can provide better remuneration of right holders—licensing models through digital sales or the copyright levy system?

Without a doubt licensing through digital sales provides a much fairer remuneration mechanism for right holders because the remuneration they receive is correlated to actual use of their copyright works. Copyright levies, on the other hand, are at best based on an inaccurate approximation of actual use, and as such the levies system is often rightly referred to as “rough justice”. Rough justice is tolerable in a civilised society only when more targeted justice is not possible. Here, through licensing, it is.

Furthermore, payments through digital sales licensing mean payments are not subject to substantial deductions for administrative costs as they are with the levies system, because digital licensing means that payments are made directly to rightholders at the point of purchase, with no “middle-man” and with little or no administrative overheads. Nor is part of the payment diverted into a social or cultural fund. In other words rightholders receive more of the remuneration due to them.

D. Do you think that the current levy system has an impact on the development of digital sales in Europe?

Yes. Firstly, levies increase the cost of digital products to the consumer.

Secondly, DRM system costs are carried by the technology companies. The additional burden of levies acts as a disincentive from investing in developing new delivery methods, creating new markets and enabling new business models.

5 COPYRIGHT LEVIES AND THE NOTION OF HARM BASED ON PRIVATE COPYING

A Do you agree with the above assessment?

Yes.

B Do you believe that private copying causes harm to rights holders and if so, how can this harm be reliably quantified?

There should not be any automatic presumption that private copying causes harm to right holders. Indeed the onus should be on right holders (or their representatives) to demonstrate any harm they have suffered and to correlate any claim for levy payment with such harm. Quantifying the harm is certainly difficult, but that is no reason for a presumption of harm in every case. When no harm is caused to the rightholder, the compensation should be zero.

C How can harm to rights holders be identified? Have situations been identified or account been taken of instances where no obligation for payment would arise on the basis that there is no harm?

There are categories of private copying where the consumer copies a work merely to enjoy it in a more convenient way. They do not result in a lost sale because the consumer would not have purchased an additional copy of the same work. Hence the right holder suffers no material harm. Examples include recording a broadcast programme to listen or watch later ("time shifting"), copying a CD to an audio cassette to play in the car ("platform shifting"); copying a CD to play in a different room in the home or in the car ("place shifting"), copying selected "favourite" tracks from a CD ("recompiling").

D How can harm be quantified where the equipment or media has a dual or multifunction?

It really can't. It is hard to anticipate how consumers actually use multifunction devices. Letting them tailor the device to their own personal needs is often the main point of such devices.

Of course, if there were no copyright levies, and remuneration was made on a case by case basis by digital sales licensing - whereby consumers just pay for what they actually need and want to use - there would be no need to quantify harm.

E Are there other elements that you consider relevant?

We note that section 5 does not mention that the notion of harm is actually enshrined in the EU Copyright Directive which specifies that where there is no harm or where harm is nominal, no payment may be due.

We also note that there is no commonly understood meaning or definition of private copying so that the yardstick for measuring harm based on private copying is anyway indeterminate.

The extraordinary variety in the amounts of levies and the arbitrary and inconsistent way they are applied is ample evidence that there is no correlation between levy payments and any objective assessment of any harm suffered by rightholders, demonstrating once again that levies should have no place in the digital worlds. This cannot be accounted for simply on the basis of the different scope of private copying in different Member States, and there does not appear to be any evidence of significant difference in behaviour of consumers with respect to private copying between different Member States.

6 THE CRITERIA FOR ESTABLISHING WHETHER A LEVY IS IMPOSED ON PARTICULAR EQUIPMENT OR MEDIA

A Do you believe that levies should be applied to hard disks or removable memory cards as "blank media"?

No. Hard disks and memory cards are increasingly used in many different kinds of equipment (e.g. MP3 players, mobile phones, cameras to name but a few) and for many different purposes (e.g. storing the user's own photographs, personal documents, pre-paid "licensed" music tracks etc), most of which have nothing to do with the copying of third-party material under private copying exceptions.

B Do you believe that these items are dedicated to the production of private copies?

No, not at all. See our response to the previous question. These items are no more dedicated to the production of private copies than is blank paper.

C Do you believe that the dedicated function of an item or recording device should play a role in deciding whether a levy is applied to it?

Yes. Multi-function devices should be totally exempt from levies. Even a dedicated copying device should not automatically attract levies - the right holder must be able to demonstrate actual harm as a prerequisite.

D Do you believe that levies should only be applied to equipment and/or blank media that are dedicated to the production of private copies?

Yes. Again the right holder must be able to demonstrate actual harm as a prerequisite.

D (sic) Do you think that there is an objective and verifiable standard on whether equipment or media is dedicated to the production of private copies?

The mere suitability of a device (or category of device) to make copies should not be a sufficient basis to apply or claim levies.

One test might be whether the primary or sole purpose of the device is to facilitate the making of private copies.

E What kind of legal disputes are you aware of concerning the issue of whether certain recording equipment or other items are dedicated for the production of private copies?

None.

7 COPYRIGHT LEVIES AND CONVERGENCE

A Do you agree with the above analysis?

Yes. Digital convergence is indeed a strong trend which benefits the consumer who is able to enjoy ever-more functionality in a single device (for example a mobile phone including a calendar, camera, music player, television, email and internet capability). However, if levies were to be applied separately on each individual function it would increase end-prices to the consumer to unviable levels.

B Do you consider that multi-function equipment or multi-purpose of the sort described above should attract a copyright levy and if so which criteria should apply?

No. As we said in our answer to Q.6C, multi-function devices should be totally exempt from levies.

Also as we said above one test might be whether the primary or sole purpose of the device is to facilitate the making of private copies.

C Do you consider that infrastructure services should attract a copyright levy in a converging world?

Definitely not. Infrastructure levies would increase the cost of access to online services, penalising the majority of usage which is either not private copying or has already been levied on devices used to make private copies, which would have the effect of suppressing demand for online services, increasing the digital divide and slowing the growth of Europe's Information Society, inconsistent with the Community's Lisbon objectives.

D Do you believe that there is a link between levies on multi-function devices (such as a computer hard disk) and the development of the digital economy?

The application of levies inevitably increases the cost of computers and other multi-function devices to consumers. The development of the digital economy relies on the uptake of computers and multi-functional digital devices. Basic economics suggests that levies are an additional cost burden to consumers that can only have a negative impact on uptake and hence development of the digital economy.

E Do you think that copyright levies on multi-function devices have an effect on new business models for the distribution of content?

Yes. For example, in some European countries disputed levy claims on mobile phones with MP3 functionality is reducing sales of such products which in turn will have an impact on the market for ring-tones. Also, music downloads to mobile phones already account for a very substantial part of the legal online music market. If phone sales decline, so will downloads.

8 THE INTERNAL MARKET AND DIFFERENCES IN COPYRIGHT LEVY SYSTEMS

A Should consumers that buy equipment or blank media from online retailers in other Member States for delivery offline be considered importers?

This question demonstrates the very real distortive effect that levies have in the market place. It would be difficult (politically and practically) to make consumers liable for levy payments. On the other hand, if levies are not collected on private imports, it will induce private cross-border imports due to differential pricing contrary to Internal Market principles.

B How can online retailers or consumers have certainty in cross border transactions that goods can be marketed and bought at a particular price?

They cannot. They do not know if the goods would attract a levy in the destination country. Even if a levy is claimed it does not mean that a levy is necessarily due. This is likely to give rise to legal disputes further increasing the cost of cross-border transactions. Again this demonstrates the very real distortive effect that levies have in the market place in Europe.

C Do you consider that selective enforcement of copyright levies distorts competition to the detriment of major producers of equipment or media?

Yes, most definitely. If levies are claimed against some and not others in the same territory it manifestly puts those manufacturers/distributors/importers paying levies at a competitive disadvantage over those who do not.

This is by no means the only example of distortion on trade in the Internal Market. The levies regime is different in every Member State. Different amounts are charged for the same products or categories of product in different Member States. The basis of calculation also varies—in some Member States it is a fixed amount, in others it is a percentage. This lack of harmonisation and differential pricing significantly distorts trade among Member States.

Additionally, if manufacturers try and spread the cost of levies across Member States to avoid cross-border price differentials it means that consumers in those Member States that have no levies (or lower levies) are subsidising consumers in Member States that do apply a levy (or a higher levy), while deriving no benefit whatsoever from such payments.

9 TRANSPARENCY FOR STAKEHOLDERS

A How do you explain the above discrepancies?

We do not know the reasons for the discrepancies, but we assume there is a difference between the amounts of levies claimed and the amounts actually paid/received, although it is our understanding that the industry figures do clearly distinguish between currently collectible levies and levies that are claimed, but disputed. We also suspect that some companies are making reserves against claimed (but unpaid) levies.

The fact that there are such discrepancies is a manifestation of the lack of transparency and accountability of the collecting societies and demonstrates starkly that levies bear no objective relationship with any possible harm to the rightholder.

B Are these discrepancies due to the fact that copyright levies are being litigated in many jurisdictions?

As we said in the previous answer, it is our understanding that the industry figures do clearly distinguish between currently collectible levies and levies that are claimed, but disputed, so this does not seem to explain the discrepancies.

C Are the above discrepancies due to the fact that enforcement of levies remained selective due to copyright levy avoidance?

This might be the explanation. Again, we would say that the lack of transparency of collecting societies makes it difficult for us to do anything but speculate about the reasons for the discrepancies.

10 STAKEHOLDER OPINIONS

Does the above text correctly reflect the different stakeholders' positions?

We believe that section 10 does broadly reflect the different stakeholders' positions, as far as we know them.

From the Consumers' perspective we would again like to add the point that where (if) manufactures do spread the cost of levies across Member States to avoid cross-border price differentials it means that consumers in those Member States that have no levies (or lower levies) are subsidising consumers in Member States that do apply a levy (or a higher levy), while deriving no benefit whatsoever from such payments.

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The published views/opinions/submissions of the Federation are normally approved by consensus. In cases where there is a substantial majority view falling short of consensus, any significant disagreement will be indicated.

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