



## Copyright Levies

### **EU**

Since the collapse of the Commission-backed Stakeholder Platform in early 2010, industry has focused its efforts primarily on seeking to get copyright levies back on the EU policy / legislative agenda. Against the odds, that strategy has paid off - the topic is now well and truly back in the political spotlight.

In May, it was announced in the European Commission's Communication on a Single Market in Intellectual Property Rights that the Commission would appoint a high level independent mediator to kick-start a voluntary stakeholder 'agreement' building on the results of the previous stakeholder forum. According to that Communication this would "lay the ground for comprehensive legislative action at EU level in 2012".

Industry is deeply sceptical about a mediation process fearing it would turn out to be merely a re-hash of the disastrous Stakeholder Platform. It is industry's view that the parties are so far apart on fundamental issues that a voluntary solution is simply a fruitless exercise. In May, just ahead of the Commission's official announcement about the mediator, the industry association (DIGITALEUROPE) wrote to the Commission setting out strict conditions for mediation to be acceptable (scope, time limit etc.) and proposed that the mediator should also explore a broader reform of the levies system, including alternatives for providing fairer compensation to rights holders and improving the conditions to expand the market for the benefit of all.

In view of encouraging developments over the last year or so both at Member State level and in the CJEU (as reported below), it increasingly seems that now is the wrong moment to start mediation in Brussels. For this reason, in mid-November DIGITALEUROPE wrote again to the Commission emphasising that it would make more sense if the priority and focus of any mediation process would be the exploration of alternatives to the current hardware-based levy system.

The process for appointing a mediator has been slow and there were times during the year when it looked more like it may never happen. However, at the time of writing (late November) it has just been announced that Commissioner Barnier has asked a former European Commissioner for Justice and Home Affairs António Vitorino to act as mediator. Mr Vitorino is a Portuguese socialist and a lawyer by training. According to the Commission the objective is to explore possible approaches to harmonisation of both the methodology used to impose levies and the systems of administration of levies. It is planned that the discussions will commence at the beginning of 2012 and completed before the summer of 2012.

While industry is not at all optimistic about mediation, it is recognised that the Commission sees this as a precursor to any legislative action at EU level. Having said that, industry now believes that any EU initiatives under the current regime are unlikely to bring any real improvement, and may even lead to a worse situation than we have today. For example, there is talk of *harmonising* levies which might imply that countries like the UK that do not have levies would need to introduce them.

By contrast, more positive developments have been occurring politically at Member State level and through litigation. This means we are now seeing an interesting dynamic emerge between EU and national politics, and a careful balance has to be struck to ensure synergy and avoid that one does not harm or undermine the other.

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In Member States, there is now a tangible political inclination towards abolishing traditional device-based levies in the digital world (e.g. in Netherlands, Spain) and we are seeing initiatives around exploring alternative, fairer approaches to rights holder compensation (e.g. in Finland, Germany, Spain). The UK is proposing to introduce a narrow private copy exception to permit format shifting but without levies recognising that the price is included in the licence - see below for more details. The Netherlands has announced plans for copyright reforms which foresee levies being abolished altogether.

### **CJEU cases**

Following last year's landmark decision in *Padawan* the Court of Justice (CJEU) has handed down a further opinion in the *Opus* case and two new cases have been referred to the CJEU from Germany and Austria respectively.

The *Opus* case concerns cross-border 'distant' sales where a web shop in Germany was supplying private buyers in the Netherlands. The Court held that Member states that apply copyright levies on blank media have an obligation to guarantee the effective recovery of that levy. If it is impossible to get individuals to pay, recovery could be sought from the seller even if based abroad.

Five new questions about levies have been referred to the EU Court of Justice (CJEU) by the German Supreme Court (Bundesgerichtshof) in a case involving HP *et al.* This reference combines three printer cases and one PC case C-457/11 - C-460/11. Although nominally about printers and PCs, two of the questions are generic in nature and consequently have broad implications. One of those questions is about technical protection measures (TPMs) and the other is whether a license exhausts entitlement to fair compensation (levies).

Member States have the opportunity to file observations with the CJEU and the IP Federation has endorsed a paper submitted to the UK IPO by Intellect, the UK ICT industry association, encouraging the UK Government to intervene particularly in relation to the question on licensing / exhaustion on the basis that this has potentially significant implications for intended new legislation in the UK concerning private copying and format shifting in the wake of the Hargreaves Review - see below.

In a dispute involving Amazon and the Austrian Collecting Society, the Austrian Supreme Court has referred a series of questions to the CJEU probing further into what constitutes 'fair compensation' and whether Austrian law is compliant with EU law.

This growing activity on levies before the CJEU may itself have positive effects not only for the jurisprudence on levies in Europe (in terms of favourable interpretation of the Copyright Directive), but may even help to demonstrate that the system is not working and so eventually help to encourage supportive policy and legislative actions.

### **UK**

May saw the publication of the Hargreaves Review (reported in more detail in the separate article in this issue) which proposed that the UK should extend the current scope of the private copying exception to include normal consumer behaviour, but as this does not incur loss / damage to right holders there should be no additional compensation by way of levies, on top of the purchase price.

An Economic study of levies carried out by Oxera commissioned by Nokia, an IP Federation member, was also published in May just ahead of Hargreaves. Oxera's main findings were that:

1. Removing copyright levies would make all stakeholders better off and generate additional welfare for the EU economy of up to €1.88bn per year.
2. From an economic perspective, the copyright levy system is not well suited to the digital age because it creates distortions and inefficiencies affecting consumers, device manufacturers and rights holders. Levies hinder innovation, investment and the development of a European digital market.

3. Rights holders can make significant gains from the removal of copyright levies because levies hold back the development of new digital services thus limiting the growth of digital music sales and the effective compensation that rights holders can extract. Oxera calculates that rights holder remuneration could increase by up to €626 million per annum in the EU, should levies be removed.
4. An increased offering of innovative digital services would contribute to the reduction of piracy.

The full Oxera study can be found at:

<http://www.oxera.com/main.aspx?id=9481>

Shortly after the publication of Hargreaves, Nokia received a letter from George Osborne, Chancellor of the Exchequer (who had been sent a copy of the Oxera study) in which he noted that the Hargreaves Review “sees no economic argument for a levy on personal media devices that allow copying to accompany this.” Mr Osborne went on to say that “this is entirely in line with the findings of the Oxera study”. He concluded with the encouraging point that “Treasury tax policy is to avoid the introduction of new levies wherever possible.”

The Government’s official response to Hargreaves, published in August, shared the Review’s concern that a widespread flouting of copyright through private copying in particular brings the law into disrepute, noting that “it is not appropriate simply to tolerate unlawful private copying where it is not commercially damaging”. In that context it was announced that the Government will bring forward proposals in autumn 2011 for a substantial opening up of the UK’s copyright exceptions regime on this basis, including proposals for a limited private copying exception. At the time of writing, it is believed that legislative proposals are being considered to open up the full range of exceptions permitted under the Copyright Directive, not just private copying.

In October the long-awaited report on “Private Copying and Fair Compensation” by Professor Martin Kretschmer, commissioned by the UK IPO, was launched at a special event in London on 19 October 2011. Professor Kretschmer claims this is the first official empirical study of copyright levies in Europe and shows that the levies system across Europe is “deeply irrational”.

Importantly, Kretschmer supports Government proposals for introducing a wider (but still narrow) private copying exception to legitimise private format shifting *without levies*, based on the rationale that a certain amount of private copying is already priced into the retail purchase. This would cause no appreciable harm to right holders that would trigger an obligation for payment of “fair compensation” under the EU Copyright Directive.

Tim Frain, 12 December 2011