

Private Copying: Assessing Actual Harm and Implementing Alternative Systems to Device-Based Copyright Levies

Brussels, 22 June 2015

SUMMARY:

- DIGITALEUROPE encourages the European Commission and the EU Member States to initiate comprehensive reform and start a process of phasing out device-based levies systems.
- Compensation for private copying must be based on actual and demonstrable harm, and no compensation is due in case of minimal harm.
- DIGITALEUROPE believes the policy objective must now be to define a path towards compensation schemes that are closer to the reality of the digital age.

1- BACKGROUND

In many Member States' collecting societies impose levies to varying extents on electronic devices such as PCs, smartphones, recording media and printing/imaging devices. A portion of the funds collected is transferred to rightholders as fair compensation for private copying, and in some countries a portion is also used for cultural subsidy purposes. The device-based levy system is notoriously controversial. A relic designed for a by-gone analogue era, the device-based levy system is no longer fit for purpose in the digital economy:

- It significantly distorts and fragments the Digital Single Market, as the principles of the free movement of goods and services are forsaken. The device-based levy systems are highly divergent among Member States. Whilst some Member States do not have copyright levy systems at all, the Member States which operate levy systems decide individually which devices or media shall be levied and how the levies should be calculated. As a result, the scope of levied products and the corresponding amounts differ significantly in each country.
- It is impeding the development of innovative new business models for the delivery of legally created and sourced content.
- It blurs the boundaries between authorised and unauthorised copies with the unfortunate consequence of encouraging piracy.
- The levy systems are inefficient and unfair both in terms of collection and distribution. Mechanisms for reimbursement of wrongfully collected levies are either non-existent or unduly burdensome to use.
- European consumers are disadvantaged – generally they do not even know they are paying a levy, certainly not how much they are paying or what they are paying for and, in many cases

are double or even triple paying for making the same private copy.

- Artists themselves are negatively affected by the levy system as any payments, if at all, are made with great delay and payments are often nominal. The benefits to artists are mostly illusory as large portions of the collected sums are used to finance the administration of the collective management organisations themselves.

The world of copyrighted content has changed radically in the past decade thanks to the modern infrastructure and the new technologies provided by digital industries, to the benefit of artists and consumers alike. However, the fragmented copyright systems in Europe have not adapted to new trends in the creation, distribution and consumption of copyrighted content. In the digital era, an increasing number of content services deliver music and video to consumers by streaming (“access”). In this model, the content is not permanently copied to any local medium (hence no “ownership”), but rendered directly from the Internet. In other words, digital content is increasingly being delivered in ways that are less reliant on the reproduction right, with respect to which the right of private copying is relevant. As such streaming services gain share in relation to other forms of distributions (physical, download), any rationale for collecting levies on devices is naturally eroded. In these service-based models, the consumption of content is readily compensated through the price already paid for licensing and no further compensatory payments are necessary.

The EU Copyright Directive 2001/29 does not mandate or even mention copyright levies at all. Also, the multiplication of litigation cases both at the national and European levels since 2001 illustrates the urgent need to act and reform the broken system of copyright levies in Europe.

Despite the fact that the copyright levy systems are inefficient, counterproductive, unfair and opaque, the scope, application and level of copyright levies continue to increase rapidly in the digital environment, creating significant problems with double payments and grey markets in the EU Single Market. The proliferation of copyright levies to more devices and the prohibitive levels of levies demanded in many cases, increase the cost of technology for European consumers.

DIGITALEUROPE encourages the European Commission and the EU Member States to initiate comprehensive reform and start a process of phasing out device-based levies systems.

2- ASSESSING HARM CAUSED BY PRIVATE COPYING

It should be made clear that compensation for private copying must be based on actual and demonstrable harm, in compliance with the Court of Justice of the Europe Union’s (CJEU) ruling in case C-467/08 *Padawan* which states that “fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception”. It must also be made clear that no compensation is due in case of minimal harm, in compliance with Directive 2001/29 which mentions that “where the prejudice to the rightholder would be minimal, no obligation for payment may arise”.

As it seems necessary to define a strict and uniform interpretation of what falls under the private copy exception, it also seems necessary to adopt harmonised criteria for the definition of harm caused to rightholders. Harm should be defined as the actual economic harm caused to rightholders where it is proven that legitimate private copies are substituted for additional purchases of licensed copies. Furthermore, not all types of content should fall under the harm assessment:

- **Technical Protection measures:** Recital 35 and Article 5(2)(b) of the Copyright Directive specifically requires the level of fair compensation to take into account the application or non-application of Technical Protection Measures.
- **Legal Copies:** The Private Copy exception in Article 5(2)(b) only applies to legally acquired content and should not be used to compensate or offset losses as a result of piracy. This was made clear in the CJEU's ruling in *ACI Adam vs. Stichting de ThuisKopie* (C-435/12)
- **Professional use:** Following the CJEU's ruling in *Padawan* (C-467/08), fair compensation is exclusively applicable to sales of copying devices to natural persons who use them for making private copies, and not to equipment sold for professional use. Legal persons and professional persons (individuals acting in a professional capacity) cannot make private copies under Article 5(2)(b).
- **Exemption for Intermediaries:** Following the CJEU's ruling in *Copydan* (C-463/12), purchases by importers, intermediary resellers, and final resellers are exempt from private copying levies. Private copying levies can only be collected from the final reseller when final purchaser is a natural person. Furthermore, there must be a reimbursement mechanism in place that permits recovery of the paid levy if the natural person is purchasing for professional use.
- **Time and Format Shifting:** Copies made in form of time or format shifting does not cause any economic harm to rights holders. As identified in the 2011 UK Hargreaves report and subsequently adopted into UK Law, time or format shifting corresponds to consumer expectations and behaviour as does not result in any economic harm.
- **Public Domain and Open Licenses:** There needs to be a connection between harm and the rights holder's willingness to exploit their work for money. Many authors make their work publically available not to necessarily make maximum profit but to reach a widest possible audience. This has been greatly assisted by the web where an increasing amount of content is made available by means of user-generated content or through creative commons licenses, which allows for non-commercial copying/use of content. Furthermore there is significant amount of content where the intellectual property has elapsed and is now in the public domain – i.e. classical books. Copy of this content does not result in any economic harm to the creator and should therefore not require payment of compensation.

Minimal Harm

When minimal harm to rightholders is demonstrated by independent agents using objective and transparent methodologies, then no levy or any other form of compensation should be due. This principle is paramount to the exception and has been confirmed and reaffirmed by the European Court of justice on countless occasions.

The UK copyright legislation introduced in 2014 a narrow private copying exception which is sufficiently limited so that it causes no significant harm to rightholders. The rationale behind the new legislation is that a) some copying is already priced into the purchase of legally acquired licensed content and b) that there is no more than minimal harm to rightholders. As a consequence no further compensation is due to rightholders, and no levy system was put in place.

In countries such as the UK where there are no copyright levies, digital content sales are much stronger than in similar economies with device levies; 2009 data shows per capita consumption of digital music at €5.15 in the UK, €2.30 in France and €2.05 in Germany. In those countries where there are no levies, it appears that consumers benefit from more legal offers and rightholders benefit from increased license revenues.

Comparison between the European and US digital music markets

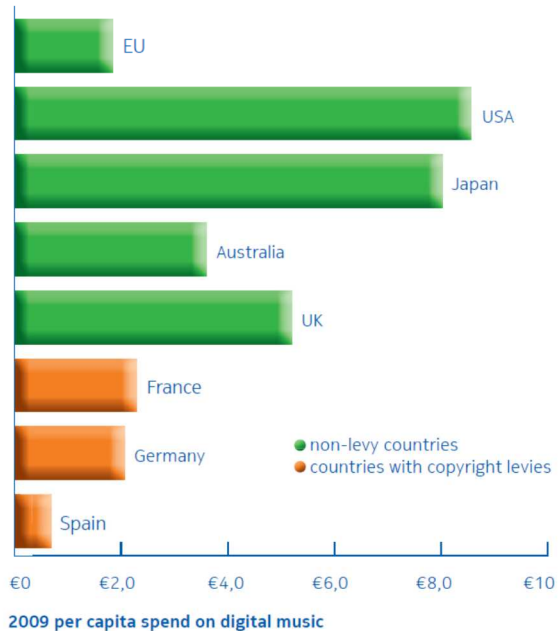
It is a highly concerning that the EU, including its wealthiest countries, lags behind the US so significantly. An important indicator of the health of EU market for digital music and for future creation comes from analysis Nokia has prepared based on data from IFPI's 'Recorded Music Industry in Numbers 2009'.

	EU	USA
Amazon (USA)	Available in 4 Member States	Available
Apple iTunes (USA)	Available in 15 Member States	Available
Microsoft Zune (USA)	Available in 5 Member States	Available
Napster (USA)	Available in 2 Member States	Available
Pandora (USA)	Launched and closed	Available
Slacker (USA)	Not launched	Available
Vevo (USA)	Not launched	Available
Yahoo Music (USA)	Launched and closed	Available
Nokia Ovi Music (EU)	Available in 12 Member States	Not Available
Spotify (EU)	Available in 6 Member States	Not Available

Source: Company websites.

	EU	USA	EU as % of USA
Population	501 million	310 million	162
GDP	€12.8 trillion	€11.1 trillion	115
Digital music market	€900 million	€ 2.7 billion	33
Digital share of the recorded music market	13%	43%	30

Comparison of per capita spend on digital music in key territories



A [report](#) by Oxera suggests that the EU economy would benefit by up to €1.8bn per annum if licensing was encouraged and device-based levies were phased out. By enabling and encouraging consumers to legally purchase access to copyrighted content through the market, legitimate digital content would be stimulated and would grow, with €626m of the gain accruing to rightholders due to a consequential increase in the market size, without increasing royalties.

2- ALTERNATIVES – A PATH TO THE FUTURE

After many unsuccessful attempts at EU and Member State level, we believe it will be impossible to find a standard EU-wide approach to assessing, collecting and distributing device-based copyright levies. The technical, legal and political problems are too complex and intertwined.

DIGITALEUROPE believes that the only way forward is to:

- Define a strict and uniform interpretation at EU level of the private copying exception in the countries which choose to apply it
- Adopt harmonised criteria for the definition of harm as the actual economic harm caused to rightholders where it is proven that legitimate private copies are substituted for additional purchases of licensed copies
- Phase out copyright levies where harm is minimal
- Set up alternative forms of compensation where harm is more than minimal

The EU Copyright Directive requires “fair compensation” for harm caused by private copies to rightholders, but it does not specifically require nor mandate a device-based copyright levy system. Given the major, ever-growing problems with the device-based levies system in the digitally connected world, DIGITALEUROPE believes it has become necessary to consider other alternative and fairer compensation solutions better suited to the digital world. Alternative forms of compensation may, to a certain extent, be left to the discretion of Member States to devise and implement nationally,

provided they align with single market principles.

In compliance with Article 5.2(b) of the EU Copyright Directive, such systems would allow for artists and creators to be compensated fairly for acts of private copying which cause more than minimal harm to rightholders in the digital era, without impeding the digital content ecosystem.

DIGITALEUROPE believes that the higher policy objective must now be to define a path towards realistic alternatives, aligned with digital single market principles and conducive to a dynamic legitimate licensing environment that permits and encourages innovation and experimentation in new business models.

Encouraging such alternative systems will not only ensure fair and reliable compensation for creators, but also more and better legal offers of content for consumers and thereby discourage piracy, while allowing the ICT industry in Europe to flourish in a truly unified market. In short, alternative solutions are without doubt a win-win scenario for all.

Below are a number of viable concrete suggestions for alternative forms of compensation more suited to the digitally connected online world than device-based levies. These examples are not intended to be exhaustive, but to illustrate the potential for alternative systems and to stimulate a more structured discussion at European level following the debates and studies that have taken place in a number of Member States.

2.1 - Licensing

Digital technologies and services have drastically changed consumption behaviours, as the general trend towards accessing content is confirming its rapid expansion over the analogue systems based on the ownership of content. Indeed, the recording industry's IFPI annual report for 2014 shows that revenues from streaming subscription have increased by 51.3% in 2014. In most EU Member States, usage of streaming subscription services is now much higher than usage of download services (i.e. in Sweden, where 47% of users access content via streaming platforms and only 7% purchase content through download services).

In this model it is assumed that normal use of the content by the consumer, including the ability to make all copies which they may make for private use, is already included in the purchase price. Licence agreements between publishers and rightholders depend on market forces and bilateral commercial negotiations. Currently different licence agreements may permit different levels of usage, which in turn may impact the royalty a rightholder can legitimately expect to receive.

Rightholders already receive remuneration for licensed content, especially in subscription/streaming based services. A user temporarily downloading the content onto his/her device should not constitute a copy in the sense of a private copy exception, but simply reflects the functional ability of the consumer to access and consume the service he/she has already paid for. In this respect, it does not cause any additional harm to rightholders, therefore no extra compensation is justified.

Any additional payment on top of the amounts that were already paid as part of license fees is paramount to double-payment, which is an injustice to European consumers. In *VG Wort* (C-457/11 to C-460/11) and in *Copydan* (C-463/12), the CJEU has ruled that rightholders do not have a right to authorise the reproduction of their protected works in Member States with a private copying exception. However, the CJEU does not say in these rulings that rightholders are entitled to be compensated twice, once for the licensing of their works for which they are compensated by license fees, and, again for reproduction or access to the same works in the form of fair compensation for private copies.

Fair compensation payments (funded by private copying levies) are for the economic harm caused by private copies; however, there is no economic harm when compensation is paid directly by users to right holders (or their authorized agent) in the form of charges for access and/or reproduction. Recital 35 of the Copyright Directive specifically identifies the injustice to consumers that would occur if rightholders receive fair compensation payments for private copies in addition to license fees that include the making of private copies. Although the CJEU's rulings in VG Wort and Copydan state that an author's authorization is irrelevant to fair compensation, the CJEU is not saying that authors are entitled to fair compensation payments for already "paid for" private copies. Economic harm must be demonstrated in order to justify fair compensation payments and these rulings cannot be interpreted to mean that double payments by consumers should be permitted.

2.2 - State budget

Norway, Spain and Finland have introduced a system whereby the compensation for harm is funded through the state budget. In Estonia the Minister of Culture has indicated that he will make a proposal to compensate private copying from the state budget. The state funded system is more transparent, more controlled, more pragmatic and a lot fairer to consumers and manufacturers than the device-based levy systems in place in other Member States. Member States that chose to collect compensation for private copying through the state budget could assign the funds to Collecting Societies for re-distribution to artists and creators if they did not want the administrative burden of managing distribution themselves.

Spain

In Spain the private copy exception continues to exist but since 1 January 2012 the economic compensation for acts of private copying has been provided through the state budget on the basis of an assessment of actual harm to rightholders. The new Spanish system has had a significant impact for consumers in terms of the price evolution for devices. Indeed there has been a remarkable decline in the retail price of audio-visual, photographic and information processing equipment, between December 2011 and April 2015, according to official data published by INE and EUROSTAT (HICP (Harmonized Index of Consumer Prices), "*Audio-visual, photographic and information processing equipment*"). In the period of December 2011 - April 2015, prices for the above mentioned equipment decreased by 26,2% in Spain. In the same period, prices from the same subgroup in the EU dropped 16,9%.

Finland

In Finland, the system of device based copyright levies was abolished and replaced with funding from the annual state budget, where the state would allocate 11 million Euros in 2015 and 2016 to compensate for private copying. The benefit of this approach is that this is technologically neutral and future proof due to the fact that all technology is now treated equally on the market. Whatever technological breakthrough lies around the corner, such breakthrough would not have to face the unequal and uncertain market environment that existed in Finland prior to 2015 due to device based copyright levies. On a further positive note, consumer prices show promise of decreasing on the previously affected devices, and the authors of copyright content are allotted more funds. In 2017 the budget will be adjusted, based on survey studies on private copying and harm.

In Finland, since the implementation of the new system of copyright levies funded by the State's budget, prices during the first months of 2015 have decreased by 2.1% while at the EU level, the decrease during that period has been significantly less (0.2%).

Norway

Norway compensates for legitimate private copying through the state budget, where harm is

determined through usage studies. The national budget for 2013 has allocated €5.8m for this purpose. Norwaco, an umbrella organisation for authors, performing artists and producers, distributes the amount allocated from the state budget to its member organisations and to rightholders in the European Economic Area (EEA).

2.3 - Cultural fee

In most Member States, broadcasting fees exist as a dedicated tax to fund public broadcasting. The fee is either linked to the possession of TVs and radios or is levied per household. In Germany for example the system changed in the year 2013 from a device based broadcasting fee to a household fee model, regardless of whether there are devices in the household or not. The change in Germany has been justified by the fact, that about 97 % of the population in a country is using TV/Radio/PCs etc. to watch TV or listen to the radio. The household penetration of devices where levies are applied have reached similar levels. The fees are charged, irrespective of the question if the viewer actually benefits from public broadcasting or not.

Such models can be used or combined with the compensation of rightholders for private copying. The idea behind the model of device based copyright levies was that the user who benefits from the copying act should pay the compensation to the rightholder if harm occurred. Similar to the broadcasting fee the levy per device has to be paid independent of if the user makes any copies or not. Today a similar part of the population has devices to consume broadcasting like devices used for private copying. Accordingly, both systems could be combined: The effort would be low to levy an additional small contribution to existing broadcasting fees or create similar models, which would cover the presumed private copying in those households, which pay already broadcasting fees.

In the conversion of such model it could be imaginable to give additionally a broader mandate and support cultural activities in that Member State.

In Member States with broadcasting fees, such as France's *'Redevance Audiovisuelle'* illustrate how collection systems can function. This system collects circa €2 billion per annum for the benefit of public television and radio stations. Its mandate could be broadened to compensate for harm caused by private copying.

In Austria a calculation was made on the financial impact of replacing the hardware based system with a household fee with truly astonishing results. A fee of only 0.50 Euro cents per household would result in a 22 million € a year in total. This would outmatch the amount societies are currently collecting and would drastically reduce their administrative burden. At the same time a household fee would safeguard consumers against arbitrary increases of levies, as the current system allows for.

A similar calculation has been initiated in Poland. The current collection rate for the public broadcasting fee is estimated at around 45%. This has led several policy makers to indicate the need to transform the public broadcasting fee into a more widespread audio-visual fee. One of the discussed possible directions of the reform includes combining such payment with an additional payment that would compensate for the private copying exception. Early estimates indicate that such solution could take the current fee paid per household down from around €56 by almost a half.

The amount should be defined by an independent commission based on objective parameters and user studies and be reviewed on a regular base. The ascertainment of the fee should be done by a central body which would transfer the money to collecting societies who distribute it to the rightholders. Such model could be a win-win-situation for all stakeholders concerned: Rightholders would get money on a regular base, the fee would be transparent for the user, an existing infrastructure could be used and an outdated device based levy system which pose obstacles to the internal market and represent a major impediment to Europe's digital economy would be removed.