DIGITALEUROPE

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# DIGITALEUROPE calls for EU action on copyright levies

## Executive Summary

Europe's current system of copyright levies continues to plague the proper functioning of the internal market and remains one of the last outstanding items in Europe's copyright legal framework that needs to be urgently addressed.

DIGITALEUROPE has always fully supported the right for authors and artists to be fairly compensated for the use and exploitation of their work. However, the device-based levies that has shown to be notoriously ineffective, non-transparent and disruptive system and is no longer fit to achieve this in today's digital world. It is a relic of the analogue time that is ill suited to modern innovative business models and multi-use devices and no longer reflects how copyright protected content is distributed, consumed and compensated.

The system is further frustrated by the current fragmentation in the Member States and the failure to meet firmly established legal standards. This has resulted in increased uncertainty in the market, double payment for consumers and a significant disruption to the internal market and the flow of goods.

**DIGITALEUROPE is therefore calling on the European Commission, as part of its new mandate, to issue and enforce recommendations or interpretative guidelines that will help national systems in the Member States at least comply with long accepted EU law and follow firmly established and confirmed jurisprudence. We encourage the next College of Commissioners to make copyright levies part of their agenda for the next five years and initiate a broader policy debate for a long-term, more transparent and fairer solution, taking into account market led licensing solutions that have increasingly replaced private copying.**

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# Introduction

Europe's current system of copyright levies continues to plague the proper functioning of the internal market and it remains one of the last outstanding items in Europe's copyright legal framework that need to be addressed.

DIGITALEUROPE fully supports the right for authors and artists to be fairly compensated for the use and exploitation of their work. However, the device-based levy system remains a notoriously ineffective means of achieving this objective.

A relic designed for a by-gone analogue era, the device-based levy system is no longer fit for purpose in today's digital world and does not reflect modern legitimate consumption habits of copyright protected content. User habits have fundamentally changed, streaming services have become the dominant way users legitimately access and consume content. Reports by the music industry show that these types of revenue streams vastly outweigh income derived by the sale of physical medium (CDs, DVDs) or pay per download[1]. Studies in the Member States have also shown that private copying is playing an increasingly irrelevant role for consumers[2].

Furthermore, the device-based levy system has become inadequate with the development of new technology. It was initially designed for devices/mediums which primary or sole purpose was to record or make copies (i.e. blank tapes, USB etc.). However, today's complex and always more innovative devices (smartphones, tablets etc.) have a multitude of uses and where the storage of private copy relevant material represents only a tiny - if any - portion of the functionality. Yet, levies are still applied indiscriminately. The legal framework is in desperate need of reform to reflect this.

DIGITALEUROPE has long called for a comprehensive reform of the system, which should lead to a gradual phasing out towards a more modern, fairer and efficient form of compensation. In the short term, we strongly advise the EU to urgently ensure that national systems in the Member States at least comply with long accepted EU law and follow firmly established and confirmed jurisprudence.

**We therefore ask the European Commission to:**

**(1) In the short term, put forward an EU instrument, such as a Recommendation or a Communication, that pulls together the established EU legal standards and rules and provide guidance to the Member States for their proper enforcement, and**

**(2) Initiate a broader policy debate with all stakeholders on a long-term solution. This is not a question about developing new law but ensuring that existing legislation is properly applied.**

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[1] IFPI Global Music Report 2018: State of the Industry, International Federation of the Phonographic Industry, 2018

[2] Study on the impact of the private copying in Spain, Mazars, September 2017
Analyse af markedet for blankmedier og privatkopierings-tendenser i Danmark, Danish Ministry of Culture, June 2017

**This would go a long way in easing tension in the system, help the functioning of the internal market and therefore ensure more certainty for all stakeholders.**

Below we provide an overview of the key areas where the legal standard has been established (through EU law or jurisprudence) and fundamental principles of good governance, fairness and transparency that the EU instrument should include. These principles should also be key criteria for an appropriate longer-term solution.

# Recommendations and comments

## 1. Harm

There needs to be a minimum common standard on the definition of harm. Whilst national governments have some discretion here, the current fragmentation is caused, to a significant degree, by the divergent practices in the Member States and the lack of clear definition of the 'harm' criterion. This issue has not only been identified consistently by the Court of Justice of the EU since the *Padawan vs. SGAE and others* case[3], but was also specifically called out in the 2013 Vitorino report[4].

Furthermore, once a common baseline has been set, in order to ensure more market acceptance, the harm needs to be demonstrated through usage studies, market developments etc. that are objective and subject to independent scrutiny. Equally it has been legally established on countless occasions that where there is no or only minimal harm (*de minimis)*, then no compensation is due[5].

## 2. Improved Governance

There needs to be a better system of good governance and transparency by the collecting societies as well as an objective tariff setting process that provides legal certainty for all stakeholders involved.

The current arbitrary process of deciding the applicability of levies and the tariff level is lengthy and burdensome and can take up to 10 years for an agreement to be reached. In addition, the practice in some countries of claiming levies retroactively makes it impossible to pass the levy on to the end-user, who is the beneficiary of the copyright exception as

[3] See among others, judgments of the CJEU of 21 October 2010 in *Padawan*, C-467/08, paragraph 40; 16 June 2011 in *Stichting de Thuiskopie*, C-462/09, paragraph 24; 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, paragraph 47; 10 April 2014 in *ACI Adam and Others*, C-435/12, paragraph 50; 5 March 2015 in *Copydan Båndkopi*, C-463/12, paragraph 21; 12 November 2015 in *Reprobel,* C-572/13, paragraph 68; 21 April 2016 in *Amazon II*, C-572/14, paragraph 19; 9 June 2016 in *EGEDA and others*, C-470/14 , paragraph 26; 22 September 2016 in Microsoft and others vs. SIAE, C-110/15, paragraph 28; and 18 January 2017 in *SAWP*, C-37/16, paragraph 30 .

[4] Recommendations resulting from the mediation on private copying and reprography levies, Antonio Vitorino, 31 January 2013

[5] See judgment of the CJEU of 5 March 2015 in *Copydan Båndkopi*, C-463/12, paragraph 28.

intended or to collect the documentation that is demanded by the collection societies to exculpate sales to commercial users from private copying levies (e.g. Sweden).

This creates significant legal and financial uncertainty for all stakeholders and higher prices for consumers. It is further exasperated where levies are claimed retroactively or where products are not sold directly by the manufacturer to the end-user. It is absolutely crucial that all stakeholders (rightholders, consumers and industry representatives) are involved in the negotiating process on an equal footing and that any tariff goes through regular independent revision and is scrutinized according to the legal framework.

## 3. Transparency

It is settled case-law[6] that the financial burden of the compensation must be borne by the end users, as they are the ones allegedly causing harm to the rightholders by making use of the exception.

As things stand, consumers in most Member States are largely not aware of what they are paying, why they are paying it or what rights they gain from it. Member States should introduce an obligation to inform final customers of the amount of the levy included in the price of the products together with the level of penalties for non-compliance. This would bring more transparency to the system and allow end users to know that a fair compensation for the acts of private copying they might operate is included in the price of sale of products subject to levies. There are only a few Member States that currently have such a requirement, with limited enforcement.

Transparency should not just be linked to consumer awareness but should be applied on all levels. In many Member States where the tariffs are set by Government decree, the underlying harm assessment studies are often not made public and therefore not subject to review nor they can be communicated to consumers. Equally collecting societies should be far more transparent on how they manage and redistribute revenues such as levies which are not based on specific usage (i.e. royalties) but are rather a blanket non–attributable income. This lack of transparency has resulted in a complete lack of accountability of the system.

## 4. *Ex-ante* and *ex-post* exemptions (i.e. professional use and exports)

Member States have continuously failed to implement a fully compliant exemption regime despite numerous judgments of the CJEU. For example, the Court has clarified the application of the EU law by providing that legal persons (and natural persons not acting as private users) should not, in any event, be held liable for payment of the private copying

[6] See, among others, judgments of the CJEU of 21 October 2010, *Padawan*, C-467/08, paragraph 45; 16 June 2011, *Stichting de Thuiskopie*, C-462/09, paragraph 26; 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, paragraph 23; and 22 September 2016 in *Microsoft and others* vs. SIAE, C-110/15, paragraph 30.

levy but must be exempted from such payment or, when practical difficulties exist to identify the final users, be refunded from such payment[7].

Some Member States have failed to provide any exemption or reimbursement, whilst schemes in other Member States are so inaccessible and burdensome that they have little practical value for entities that would qualify. This results in significant and unjustified overpayments.

It is well-established in EU law that any system of private copying levies must be based on a simple, clear, predictable and effective *ex-ante* exemption schemes which should be complemented with residual *ex-post* reimbursement scheme. This should also apply to products that designated for export.

## 5. Application of VAT

Levies should not be subject to VAT. This was established by a 2017 decision by the CJEU[8]. In many countries this is simply not reflected in local law and results in a significant increase in the private copying compensation payable by consumers.

## 6. Licensing

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.

Today, the most dominant business model for content services is by far subscription streaming and licensed services. Digital licensed copies have wholly replaced private copies in the sphere of music and in the sphere of TV programmes licenced network-PVRs are doing the same thing. This is desirable for consumers, authors, service providers and European developers who are able to develop truly innovative new services. These new services often allow offline copies, which are covered under the license they receive from rights-owners. Unfortunately, in a number of Member States, collecting societies are trying to include them as relevant private copies that require compensation. It needs to be clarified that this cannot be the case. Not only these copies are not permanent (they are only valid as long as consumer subscribes to a service), but also the rightsholders already receive remuneration through the license fee paid by the service provider and therefore there is no harm. Applying a levy for these types of services simply results in an unjustified double payment by consumers.

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[7] See, among others, judgments of the CJEU of 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, paragraphs 33-37; 5 March 2015 in *Copydan Båndkopi*, C-463/12, paragraphs 45-55; 9 June 2016 in *EGEDA and others*, C-470/14, paragraphs 36-40; 22 September 2016 in *Microsoft and others* vs. SIAE, C-110/15, paragraphs 35-36.

[8] Judgment of the CJEU of 18 January 2017 in *Minister Finansów v Stowarzyszenie Artystów Wykonawców Utworów Muzycznych i Słowno-Muzycznych (SAWP)*, C-37/16

## 7. Future proof and technology neutral system

The evidence that private copying is playing an increasingly insignificant role in today's digital world cannot be disputed. New technologies and distribution models have given rightsholders more control over the exploitation of their works and new remuneration opportunities, which has fundamentally changed the business models.

We therefore call for an honest conversation about the future of the system and urge the European Commission to encourage Member States to explore alternative models that would be fairer to consumers and better reflect today's reality.

# Conclusions

In the short-term, through a properly calibrated EU legal instrument, the European Commission has the opportunity to achieve some meaningful improvements to the current system. The need for such an intervention was only recently reaffirmed in a 2017 opinion issued by the REFIT Platform[9]: *"The Stakeholder group recommends that the European Commission considers what EU measures could be taken to achieve a greater level of consistency among national private copying levy systems, including common criteria for the calculation of the tariffs as well as the devices affected".*

**In the short term therefore, to ease the distortion caused to the single market by this system designed for a by-gone analogue era, DIGITALEUROPE calls for a more disciplined application of existing EU law and related jurisprudence setting established legal standards.**

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[9] REFIT Platform Opinion on the submissions by the Finnish Survey for Better Regulation and DIGITALEUROPE on the fragmentation of copyright levies system across the EU, 23 November 2017

## About DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

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