

## BACKGROUND DOCUMENT

# 'FAIR COMPENSATION FOR ACTS OF PRIVATE COPYING'

Brussels, 14/02/2008

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In 2006, the Commission analysed 20 national schemes that compensate for private home copying. The Bulgarian and Romanian levy schemes were not part of this analysis. Additional open issues require further consultation. In this respect, the present document illustrates the main characteristics of private copying levy systems in Europe and the issues that remain open after the first round of consultation. Annex 1 summarises positions of the respondents contributing to the first call for comments.

## **1. INTRODUCTION**

A 'private copying levy' is a form of compensation for rightholders based on the premise that an act of private copying cannot be licensed for practical purposes and thus causes economic harm to the relevant rightholders. The private copying levy systems were introduced at a Member State level on the basis that there were no effective means to monitor and therefore authorise acts of home copying of, e.g. music, films or books. There is no uniform Community-wide levy system.

The current levy systems are all national in scope. Member States have responded in different ways in setting the levies, even for identical digital equipment or blank media. Differences in rates apply to the same/similar media/equipment. The methodology applied by collecting societies to measure the incidence of 'home copying' varies. The result is that different levies apply in relation to the same products across Europe.

The national private copying levy is applied to the recording equipment or media that consumers use to produce 'home' copies. Those Member States that provide for private copying levies – 22 out of the 27 Member States - impose them on manufacturers, importers or distributors of analogue or digital equipment or media that allows consumers to copy. Some Member States even impose private copying levies on final consumers.

Five Member States (Ireland, UK, Malta, Cyprus and Luxembourg) currently have no private copying levies in place. In Ireland and the UK, the exclusive right of reproduction applies and there is no private copying exception, so acts of private copying by consumers are not authorised. In these Member States, only the time-shifting of broadcasts is authorised, i.e. the recording of a broadcast programme for viewing or listening at a later time for domestic purposes. Malta and Luxembourg have introduced a private copying exception into their laws, but have no system of levies. In Greece, the private copying levy scheme has not been enforced since 1999 and was suspended in 2003 amid controversy about its administration and pressure from the Greek ICT industry.

## **2. DEFINITIONS**

Under Directive 2001/29/EC<sup>1</sup> on the harmonisation of certain aspects of copyright and related rights in the information society (the 'Directive'), Member States may provide for certain exceptions and limitations to the exclusive right of reproduction. One such optional exception applies to acts of private copying (Article 5(2)(b) of the Directive) and allows Member States to introduce an exception to the right of reproduction only for natural persons who copy for

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<sup>1</sup> OJ L 167 of 22 June 2001, p. 10.

private use and for non-commercial purposes (i.e. private copying). According to Article 5(2)(b), Member States may provide for an exception:

*“in respect of reproductions on any medium made by a natural person for private ends that are neither directly or indirectly commercial, on condition that the rights holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or other subject matter concerned”.*<sup>2</sup>

With the exception of Ireland and the UK,<sup>3</sup> all Member States implemented the reprography exception under Article 5(2)(a)<sup>4</sup> and the private use exception under Article 5(2)(b). National provisions are very diverse. In Italy, for example, private copying is permitted only in relation to audiovisual works or sound recordings. Finnish law stipulates that the private copy must be made from a legally obtained copy, while in Germany the source should not be manifestly illegal. Finally, 'uploading' of works or sound recordings, in all Member States, does not appear to fall within the scope of the private copying exception.<sup>5</sup>

The Directive envisages fair compensation for acts of private copying. 'Fair compensation' was conceived by the Community legislator to provide adequate compensation to rightholders ('to compensate them adequately'). The term 'fair compensation' is not identical to the term 'equitable remuneration' as it is used in Articles 4(4) and 8(2) of the EC rental and lending rights directive<sup>6</sup>. While the notion of 'equitable remuneration' is based on the assumption that authors are entitled to remuneration for every act of usage of their protected works, fair compensation is, *inter alia*, linked to the possible harm that derives from acts of private copying (cf. recital 35 of the Directive). Article 5(2)(b) therefore requires that any payment to rightholders must be compensatory in nature.<sup>7</sup>

The Directive is neutral as to the form of fair compensation. Many Member States have implemented the requirement of 'fair compensation' for acts of private copying by means of a private copying levy system on recording equipment and/or blank media. But there are other

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<sup>2</sup> Article 6(3) of the Directive defines a 'technological measure' as any technology, device or component that is designed to prevent or restrict acts in respect of copyright-protected works or other subject matter which are not authorised by the rightholder. Technological measures are deemed 'effective' where the use of the protected work or other subject matter is controlled by rightholders by means of an access control or protection process, such as encryption, scrambling or other transformation of the work or subject matter or a copy control mechanism, which achieves the protection objective (cf. Article 6(3) of the Directive).

<sup>3</sup> In Ireland and UK, the private use exception is narrowly limited to copies of broadcasts (and of performances in Ireland) made for 'time-shifting' purposes.

<sup>4</sup> Some Member States have expressed concerns because 'amateur choirs and bands' cannot benefit from the reprography exception under Article 5(2)(a) as it expressly excludes sheet music.

<sup>5</sup> *Polydor Ltd and others v Brown and others*, High Court of Justice (Ch.D.), 28 November 2005, [2005] EWHC 3191 (Ch.D.). Similarly, in *EMI Sony Universal and others v Eirecom, BT Ireland*, Dublin High Court, 8 July 2005, [2006] ECDR 5, the High Court held that peer-to-peer software allowed infringement of the record producers' making available right with.

<sup>6</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

<sup>7</sup> This is explained further in recital 35. The payment of any compensation should take into account: (i) the 'possible harm to the rightholders'; (ii) whether rightholders 'have already received payment'; and (iii) that no obligation for payment arises where there is minimal harm to rightholders. Fair compensation is for the harm that could result from the act of private copying itself ('harm to the rightholders resulting from the act in question').

means of providing for fair compensation. For example, Norway provides 'fair compensation' by means of a state-run fund.<sup>8</sup>

### 3. MAIN CHARACTERISTICS OF THE PRIVATE COPYING LEVY SYSTEMS

The private copying levy systems currently in place in Member States vary in two major respects: (1) the media or equipment on which levies are imposed and (2) the rates applied.

#### 3.1. Differences in equipment and media that are subject to private copying levies

In some Member States, private copying levies apply to both equipment *and* media while in other Member States, private copying levies apply only to media. (In Germany, private copying levies are applied to individual pieces of equipment which function alongside each other to produce private copies.) This means that certain equipment or blank media will be levied in one Member State but not in another. Table 1 summarises the relevant information submitted by the Member States.<sup>9</sup>

Table 1: Equipment and blank media levies in the 20 Member States that apply levies

MEMBER STATE	AU	BE	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IT	LV	LT	NL	PL	PT	SK	SI	SE
Media*	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Equipment		X	X	X		X	X	X	X		X	X	X			X		X	X	
Notes:																				
* There is an apparent trend to treat hard disks integrated within equipment as media and therefore subject to a levy.																				

The following sub-sections provide concrete examples as to which products may or may not attract a private copying levy in the different Member States.

##### 3.1.1. Equipment levies

In many Member States it is incumbent on the collecting societies or an administrative body to determine the equipment on which a levy is applied and the amount that should be levied.

In Germany, a levy is currently applied to personal computers<sup>10</sup> and CD writers<sup>11</sup>. On the other hand, the Federal Supreme Court, in a ruling of 6 December 2007, held that a printer

<sup>8</sup> In Norway, fair compensation is not collected from the ICT industry. In order to fulfil its obligations under the Directive, the Norwegian Parliament has allocated a subsidy to rightsholders via the state budget. In 2005, the allocation to individual rightsholders in sound fixation and film amounted to NOK 32.5 million (€4 million). In addition, the Norwegian Parliament has allocated NOK 21.5 million (€2.7 million) for collective purposes to a fund for audio and audiovisual art (similar to the cultural funds in some Member States).

<sup>9</sup> Based on replies by Member States to the Commission's questionnaire in 2005.

<sup>10</sup> In response to the request by the German Writer's Collecting Society (VG Wort) to impose a private copying levy of €30 on PCs, the Arbitration Board of the German Patent and Trademark Office (Deutsches Patent- und Markenamt, or DPMA) decided, on 4 February 2003, to set a levy of €12 on all PC systems sold in Germany. This decision was accepted by neither VG Wort nor the German IT industry. VG Wort then proceeded to take court action in April 2003 against the IT industry to seek to recover private copying levies at its original proposed rate of €30. On 15 December 2005 the district court in Munich ruled that a €12 levy per PC should be paid. This judgment is currently under appeal before the Federal Supreme Court.

<sup>11</sup> OLG Stuttgart, 4 September 2001 (4 U 142/01).

was neither destined nor suitable to make 'reproductions by means of photocopying or other process producing a similar result', as stipulated by the relevant provision of the German Copyright Code (Section 54a).<sup>12</sup> In Belgium, CD writers do not appear to be subject to a levy.<sup>13</sup>

In Greece, Portugal and Spain computer hard disks are exempted from levies by law. In Austria, the Supreme Court ruled that levies do not apply to computer hard disks.<sup>14</sup> In Germany, levies are not applied to personal computers, if external hardware accessories that can be used with a personal computer to produce copies (e.g. a scanner) are already subject to a separate levy.<sup>15</sup>

The Federal Supreme Court specifically held that German law did not provide for the opportunity to levy several components of a 'functional unit', as it is one component (the scanner and not the personal computer) that is used to produce a private copy when the two are used together. If a personal computer is used together with a printer, neither piece is destined or suitable for the production of private copies.<sup>16</sup>

However, this rationale only applies to levy claims by one category of collecting society, in the case before the Federal Supreme Court, the collecting society for print authors. The Federal Supreme Court judgment does not exclude the fact that other categories of collecting societies, such as ZPÜ who collects for music and film, can still levy the personal computer.<sup>17</sup>

In 2006, the majority of Member States did not levy mobile phones. However, in Germany, equipment levies have been claimed on mobile phones with integrated hard disks. In Finland, Kopiosto, Gramex, Teosto and Tuotos, collecting societies for authors, phonogram producers and performers, are reportedly considering to start charging mobile phone manufacturers a levy for each mobile phone sold that is capable of playing MP3s or other music formats. The rationale is that a levy of up to €15 applies to stand-alone MP3 players, like the Apple iPod. It is therefore deemed unfair that mobile phones marketed as 'music phones' escape the levy.

### 3.1.2. *Blank media levies*

In addition to the most commonly levied blank media carriers like CDs and DVDs, many Member States, e.g. Austria, the Czech Republic, France, Hungary and Poland, levy removable memory cards that can be read by a variety of different devices, such as digital

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<sup>12</sup> Cf; *Bundesgerichtshof*, Press statement No 186/2007, available at: [http://www.doerre.com/aktuell/20071206\\_bgh\\_drucker.pdf](http://www.doerre.com/aktuell/20071206_bgh_drucker.pdf).

<sup>13</sup> According to the information available, the 1996 Royal Decree governing reprographic activities has not been modified to include CD writers, printers or personal computers.

<sup>14</sup> In the *GERICOM case* (4 Ob 115/05y); the Austrian Supreme Court decided on 12 July 2005 that no levies are due on PCs since the hard disk of a PC is used in a multi-functional way. The Court reasoned that a significant proportion of the uses made of a PC hard disk were unrelated to the copying of protected works or other subject matter. In these circumstances, it would be difficult to find adequate criteria for applying the levy. The Court found that this was different for the hard disk of MP3 players, which fall under the scope of levies in Austria because MP3 players are, at least at present, overwhelmingly used to copy protected material.

<sup>15</sup> *Bundesgerichtshof*, judgment of 5 July 2001 5I ZR 335/98 GRUR 2002, 246 – Scanner).

<sup>16</sup> Cf; *Bundesgerichtshof*, Press statement No 186/2007, available at: [http://www.doerre.com/aktuell/20071206\\_bgh\\_drucker.pdf](http://www.doerre.com/aktuell/20071206_bgh_drucker.pdf).

<sup>17</sup> See BITKOM, press release of 26 January 2006, available at: [http://www.bitkom.org/de/themen\\_gremien/37153\\_35883.aspx](http://www.bitkom.org/de/themen_gremien/37153_35883.aspx).

cameras, mobile phones, PDAs, automobile navigation systems, video game consoles and MP3 players. Other Member States levy the equipment with which the memory cards are used.

Some Member States (France, Austria) also levy the hard disks in digital equipment such as MP3 players, personal video recorders, set-top boxes or television sets with integrated hard disks. The reason invoked is that such hard disks qualify as 'blank media' suitable for reproducing copyright-protected material. Again, not all Member States levy hard disks.

Personal video recorders (PVRs) are levied in Austria and France as 'blank media', while they are levied as 'equipment' in the Czech Republic, Finland, Hungary and Poland.

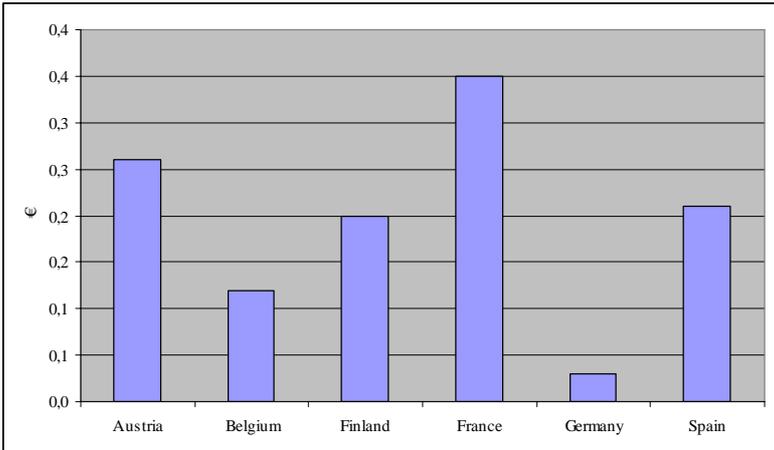
**3.2. Rate differentials**

In respect of digital media, some Member States have adopted a uniform rate which applies to a particular device or media, irrespective of its capacity. Some have switched from capacity-based levy setting to fixing the levy as a percentage of the purchase price. Others again have maintained rules based on analogue capacity. These varying approaches have led to differences in the rates for identical equipment or media.

Some Member States apply a uniform rate for a particular digital product that is independent of the recording capacity, others have opted for a capacity-based levy (e.g. per MB, GB). Still others calculate the levy set as a percentage of the sales price.<sup>18</sup>

Some Member States set private copying levies on blank media in Euro per hour or on the basis of recording capacity, while others set them per product unit or as a percentage of the sales price (see Table A1 in Annex 2). Table 2 presents an example of levy rates for blank media CD-R, based on data from the GESAC study.<sup>19</sup> The figures presented in Table 2 show that in France, the levy is 11 times higher than the rate applied in Germany for blank media CD-R.

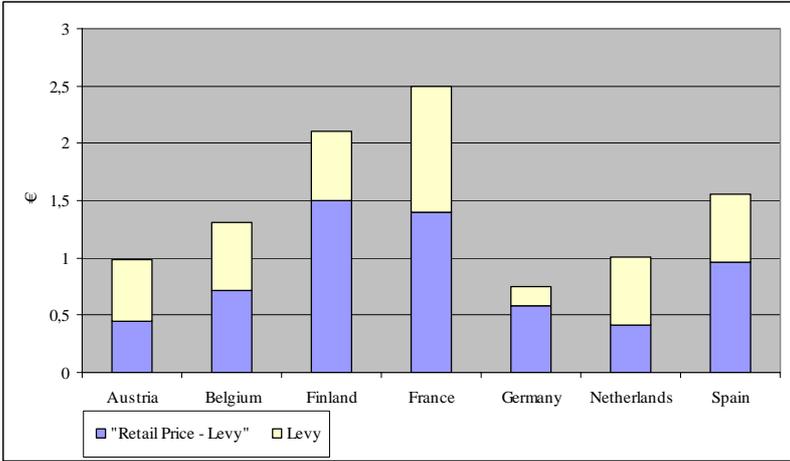
Table 2: Levy rates (in Euro) on data CD-R (Source: GESAC)



<sup>18</sup> Table A1 in Annex 2 shows the differences among Member States in setting a levy for digital music players with a 4 GB storage capacity. Moreover, some Member States that base their levy rates on storage capacity further differentiate whether storage is via integrated disk technology or memory card technology  
<sup>19</sup> GESAC study, prepared by ECONLAW, Economis Analysis of Private Copy Remuneration, 2007.

Table 3 shows levy rates for blank DVDs. The levy rates are presented in relation to the product's retail price, as provided by national collective management societies, minus the applicable private copying levy.<sup>20</sup>

Table 3: Comparison of levy rates and retail prices of blank DVD-R (in Euro) (Source: GESAC)



The tables above show that there are differences in private copying levy rates between Member States. In these circumstances, current systems can only function as 'rough justice' systems: they apply equally to consumers who engage in significant acts of private copying, and to consumers who rarely or never engage in such acts (see Table A2 in Annex 2).

**3.3. Economic and social dimension of private copying levies**

As revealed in the 2006 stakeholder consultation, there is no consensus on data pertaining to levy rates, equipment and blank media that attracts levies, amounts of levies collected and amounts of levies distributed. In addition, levy rates and the type of equipment and/or blank media that attracts levies are subject to frequent change.

The stakeholder consultation has also revealed that there is, in general, no consensus on revenues collected as part of private copying levies. The most widely cited figures for collecting societies are those published in the *Stichting de Thuiskopie*, the Dutch body that administers levies. Data from the Stichting do not include Estonia, Greece, Slovenia and Portugal, as well as those Member States that have no private copying exception or no collectively administered remuneration scheme (Cyprus, Malta, Luxemburg, Ireland and the UK). These figures are the most conservative estimate of levies collected in the different Member States. For illustration purposes, Table 4 presents the estimates on levies collected in selected European countries based on the 2005 report by the *Stichting de Thuiskopie*.

In 2004, more than €50 million in levies was collected on behalf of all rightholder organisations in 16 Member States of the Community. Table 4 shows that the collection of private copy levies almost doubled in the period from 2002 to 2004.<sup>21</sup>

<sup>20</sup> GESAC study, prepared by ECONLAW, Economis Analysis of Private Copy Remuneration, 2007.

<sup>21</sup> Overall values for 2002 and 2003 were calculated by accounting for the missing country data on the basis of these countries' share of total levy collection in 2004.

In contrast, the ICT industry estimates that the total amount of levies claimed for private copying in 2005 was €1.2 billion.<sup>22</sup>

Table 4: Levies collected (in million €) (Source: Stichting de ThuisKopie 2005)

	2002	2003	2004
Austria	10.993	16.381	15.897
Belgium	5.058	7.708	16.631
Czech Republic	1.142	1.011	1.159
Denmark	8.000	6.900	7.300
Finland	10.353	10.229	12.120
France	125.566	145.978	167.511
Germany	77.330	101.783	146.751
Hungary	5.832	9.814	10.154
Italy	7.385	18.943	74.049
Latvia		0.159	0.310
Lithuania			0.747
Netherlands	17.978	18.686	29.639
Poland		1.940	2.850
Slovakia	0.799	0.511	0.668
Spain	11.077	26.849	72.578
Sweden	7.816	9.082	9.409
<b>Total*</b>	<b>291.335</b>	<b>376.468</b>	<b>567.774</b>
Notes:			
* The total amounts are calculated for information purposes only, by approximating missing values on the basis of levy collection shares in the year 2004.			

The 2006 stakeholder consultation revealed that a proportion of levies are used for the financing of cultural activities. This practice is usually justified by the importance of cultural funds for the promotion of young artists and pension funds for the aid of artists whose careers are going through a temporary trough.

Cultural funding by way of deduction of funds received began in the 1930s in Germany<sup>23</sup> and was thereafter adopted by other continental European societies. A model agreement promoted by CISAC recommends the deduction of up to 10 percent of domestic revenues for social and cultural funds.<sup>24</sup> The model agreement applies to any source of revenue, including royalties. This 10% is thus not distributed to national and foreign rightholders, but set aside for funds for a variety of national social and cultural for national artists (e.g. in Germany - pension funds, in France – arts and music festivals).

Table 5 indicates that in 2004, out of a total of €567 million in levies collected, €129 million (on average 23%) were allocated to cultural or social funds.<sup>25</sup>

<sup>22</sup> Private Copying Levies on Digital Equipment and Media, by Nathan Associates, 2006.

<sup>23</sup> Cohen Jehoram: Gestao colectiva do direito de autor e direitos conexos no ambiente digital Riscos e desafios, <http://www.gda.pt/novidades/coloquio/cohen.html>

<sup>24</sup> See Art. 8 of the Model Agreement for the Public Performance and the Broadcasting Right within E.U. of CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs);

<sup>25</sup> The preponderant role of levies in cultural funding can further be elucidated by comparing the percentages of levies allocated to cultural funds (23%) with the percentage that authors and composers' collecting societies allocate to cultural funds out of their total income (3.7%). Indeed, out of a total income of €3.6 billion in EU25 (including performance and mechanical rights income plus financial income), authors and

Table 5: Levies allocated to cultural and social purposes in 2004 (Source: Replies from Member States, Stichting de Thuiskopie 2004 and 2005)

	Levies collected (million €)	Share of allocation for collective purposes (per cent)*	Total amount collected for collective purposes from levies (million €)
Austria	15.897	51	8.107
Belgium	16.631	0	0
Czech Republic	1.159	0	0
Denmark	7.3	33	2.409
Finland	12.12	42.5	5.151
France	167.511	25	41.878
Germany	146.751	10	14.675
Hungary	10.154	6.6	0.675
Italy	74.049	50	37.024
Latvia	0.31	10	0.031
Lithuania	0.747	25	0.187
Netherlands	29.639	15	4.446
Poland	2.85	0	0
Slovakia	0.668	0	0
Spain	72.578	20	14.516
Sweden	9.409	0	0
<b>Total</b>	<b>567.774</b>		<b>129.099</b>

Notes:  
 \* Share for Finland is calculated as a simple average of audio (35%) and video repertoire (50%); share for Hungary is calculated as a simple average of audio (3,3%) and video repertoire (10%). Some other countries have deductions for collective purposes (Greece - maximum 10%, Portugal 20%, Slovenia - maximum 30%, with real deductions of 15%), however they were not included in the Table because data for levies collections were not available in the Stichting de Thuiskopie.

#### 4. OPEN ISSUES

The following issues came to the fore in the 2006 stakeholder consultation.

##### 4.1. Cross-border trade and e-commerce issues

Private copying levies are required to be paid upon importation of the products covered by levy in the Member States of importation. There is a legal obligation upon the importer to 'self-report' the import to the national collecting society and pay the applicable national levy. This obligation applies irrespective of whether a levy applies to the product in the Member State of exportation or has in fact already been paid there.

For goods imported from other Member States, some national laws also provide that the 'intra-Community purchaser', i.e. the private end consumer that purchases goods in another Member State (via online retail or physically in the other Member State), is liable to pay the private copying levy.

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composers' collecting societies allocate €113 million to cultural and social activities (Figures for authors and composers collecting societies for the year 2002 are taken from Cap Gemini, Music in Europe: Sound or Silence? Source: Cap Gemini, Utrecht, 2004).

## Two examples of cross-border commerce issues

1) An importer in Member State B purchases a product from a supplier in Member State A. Both Member States apply private copying levies to that particular good. The purchase price for this product includes the levies applicable in the country where the purchase is made (country A). On importing the product into Member State B, the importer self-reports and is liable for the private copying levy applicable in Member State B. This obligation arises even if the levy in the Member State of exportation has already been paid.

Depending on the relevant national legislation, the importer may be able to apply to the collecting society in Member State A for a refund of the levy applicable in that Member State. But this is not always the case. In Germany, for example, refunds are available only to manufacturers and not to wholesalers. In France, on the other hand, the relevant copyright law does not foresee a refund procedure.

2) An internet retailer located in Member State A sells a product to a customer in Member State B. Both Member States apply levies on this product. The collecting society of Member State B requires the online retailer to pay the levy applicable in Member State B because the product is purchased by customers domiciled there.

As the internet retailer is not deemed under national law in Member State A to be an exporter to Member State B, he is not eligible for a refund.<sup>26</sup> This means that for all products sold across the border, the internet retailer pays the levy twice. This example appears most relevant where levy rates differ significantly between country A and B (e.g. German and Austrian rates for identical products differ both in scope and tariffs).

In principle, a total of over 6% of all intra-EU imports and exports, amounting in total to over €100 billion, are goods which actually or potentially attract a levy.<sup>27</sup>

Whilst some Member States have in place refund systems, these vary greatly and sometimes do not exist. Often, as mentioned above, not all traders in the value chain are eligible to request a refund, even if they are exporters. Refunds for exports are sometimes set by legislation but are often the result of private agreements between collecting societies and the exporters (see Table 6).

The administrative arrangements necessary for obtaining refunds vary considerably. Within certain systems, exports obtain a general exemption from paying levies while in others a refund has to be claimed.

Exporters of levied products argue that it is often difficult to assess whether and how the procedures for exemption or refund work in practice. They say that in light of this alleged lack of clarity, it is difficult for them to actually benefit from the refund/exemption mechanism.

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<sup>26</sup> German internet retailers cannot obtain a refund for the levy paid in Germany. Under the German Copyright Code, only manufacturers or importers can ask the German levy administrator ZPÜ for a refund of levies paid in Germany when the products are exported to another Member State. This implies that for all products sold across the border, the German retailer pays the levy twice on all sales made abroad.

<sup>27</sup> Data was extracted from the Eurostat Comext database for the year 2005. The relevant product codes that the Commission identified with the help of the experts in Eurostat are 8471, 8519-8528 CN8.

Table 6: Member State refund or exemption systems

Member State	Existence of refunds	Refunds in the law	Refunds in practice
AU	x	x	
BE	x	x	
CZ	x	?	?
DE	x	x	
DK	x	?	
EE		n/a	
EL	-	-	-
ES	x	x	
FI	x	?	?
FR	x		x
HU	x	?	?
IT	x		x
LV	x	?	?
LT	x	?	?
NL	x	x	
PL	x		x
PT	x	?	?
SK	-	-	-
SI	x	?	?
SE	x	?	?

#### 4.2. Professional users of ICT equipment

Levy systems do not distinguish between customers who intend to use equipment and media for copying protected material and those who do not. Many products - USB sticks, blank DVDs (which are often used to back up computer files), PCs, etc. – can be used for purposes wholly unrelated to the private copying exception provided for in the Directive. In fact, blank digital devices and media can be used to store many types of professional data (architectural blue prints, software code, professional manuals, etc). Users (such as industry, SMEs, public administrations, schools, etc.) pay private copying levies without engaging in acts of private copying.

While collecting societies acknowledge that professional users such as those mentioned above should, as a matter of principle, not be subject to private copying levies, they point out that a system exempting such users would be extremely burdensome and costly to administer.

#### 4.3. Grey market

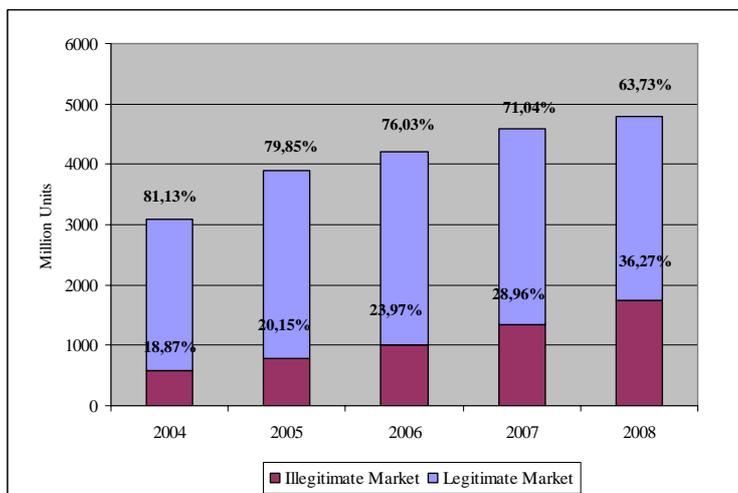
The current administration of private copying levies might encourage 'grey markets'.<sup>28</sup> Given the reliance on 'self-reporting', levy schemes depend heavily on the compliance of producers, importers and sometimes end consumers. There is some evidence suggesting that not all importers comply. This appears to distort trade and places 'honest' importers at a significant disadvantage. In addition, grey markets imply significant revenue losses for collecting societies that administer the levy system. For 2004, the Recording Media Industry Association of Europe ('RIAE')<sup>29</sup> estimated that the market for blank optical media sold within the European Union comprised about 3.1 billion blank optical media discs (see Table

<sup>28</sup> The term 'grey markets' usually refers to the flow of goods through distribution channels other than those authorised or intended by the manufacturer or producer. In the present case, grey markets are those trade flows that avoid levies by not declaring these trades at import.

<sup>29</sup> Market research report by Understanding & Solutions compiled for the RIAE, 11 July 2006.

7).<sup>30</sup> Of this total, around 600 million discs, or approximately 19%, were sold without payment of the applicable national private copying levy.

Table 7: Growth of legitimate and illegitimate trade in blank media (Source: RIAE)



Non-payment results in a significant loss of revenue to the collecting societies.<sup>31</sup> On the basis that the weighted average levy on optical media discs was €0.39 per DVD-R and €0.11 per CD-R disc, the RIAE estimates that collecting societies suffered a loss of collectible levies of €120 million in 2004. This essentially corresponds to the entirety of sums allocated to cultural funding in 2004 (€129 million, see Table 5 above).

Furthermore, failure to pay levies by a significant part of the optical disc market could undermine the future viability of the legitimate market and thus the collection of levies. Given the competitive advantage enjoyed by the section of the market that does not pay levies,<sup>32</sup> the grey market can be expected to continue to grow at the expense of legitimate operators.

#### 4.4. Consumer issues

In the past, the basis for calculating levy rates was recording capacity. This was based on the assumption that most consumer recording devices or media, such as tape recorders or cassette disks, had no other significant function than the production of private copies of protected works or other subject matter.

<sup>30</sup> United Kingdom, Ireland, France, Germany, Benelux, Italy, Spain, Greece, Portugal, Switzerland, Austria, Norway, Sweden, Denmark, Finland, San Marino, and Monaco.

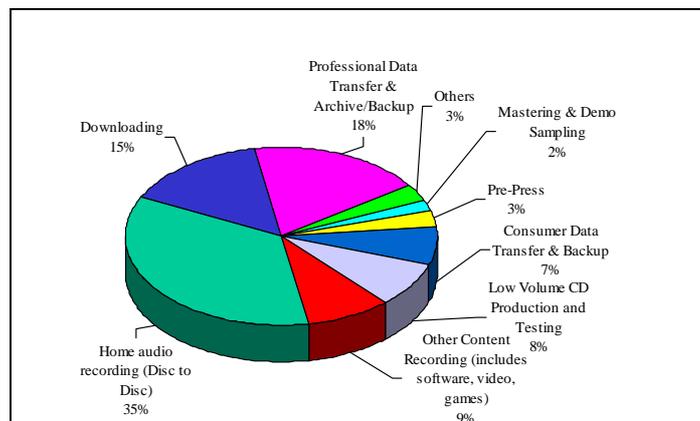
<sup>31</sup> The industry estimates that 50% of all DVDR sales in Paris do not include the applicable levies (EICTA: Levies: Distortion Effects on Trade in the Single Market, 2004).

<sup>32</sup> According to the RIAE, traders who do not pay levies are able to sell at prices that are up to 200% below the prices that can be offered by those who pay levies. This is because the amount of private copying levies in some Member States is 100% to 200% of the cost of the optical media. In France, for instance, the average selling price of a DVD-R disc to distribution in 2004 was €0.42. When the applicable French levy is added, the selling price is €2.01 as the levy amounts to €1.59. When a DVD-R disc is sold without applying the levy, any price above €0.42 yields a profit for the trader who does not pay the levy. The legitimate trader, on the other hand, will have to sell at €2.01 to cover all of his regulatory and other costs (cf. submission by TDK, citing a study undertaken by Understanding and Solutions, Optical Market Report, 2005).

But in the era of digital consumer equipment and media (e.g. computers, portable audio players, digital video players, digital set-top boxes or PVR devices), recording capacity and actual use for private copying can diverge. The German Federal Supreme Court has recently drawn attention to this issue by stating that the rationale for levying photocopying devices could not necessarily be expanded to cover multifunctional digital devices which may often not be used to a 'significant extent' to produce private copies.<sup>33</sup>

As an example, Table 8 presents the break-down of what blank data CD-Rs are used for by end users. It reveals that at least half of the consumer uses are not related to copying of protected material.

Table 8: Data CD-R blank media market by application (Source: Understanding and solutions, 2005)



'Convergence' is expected to amplify the effect of these different approaches with respect to equipment or media levies. Convergence occurs when multiple products come together to form one product with the advantages and functionalities of all of them. The release of mobile phones that can receive downloaded music is an example of media convergence in consumer electronics. Mobile phones increasingly incorporate digital cameras, MP3 players, camcorders, voice recorders and other devices.

The trend towards convergence would imply that more and more equipment or media could in principle attract levies, even if not used to any significant extent for the production of private copies.<sup>34</sup> Discrepancies in national levy regimes as described above can be expected to increase, as each Member State responds to convergence individually.

#### 4.5. Double payment

According to recital 35 of the Directive, no compensation is required 'in cases where rightholders have already received payment in some other form, for instance as part of a

<sup>33</sup> Cf; *Bundesgerichtshof*, Press statement No 186/2007, available at: [http://www.doerre.com/aktuell/20071206\\_bgh\\_drucker.pdf](http://www.doerre.com/aktuell/20071206_bgh_drucker.pdf).

<sup>34</sup> This conclusion is consistent with a finding in a recent study prepared by Rightscom, which considered the application of private copy levies in France, Germany, Italy, the Netherlands and Spain. This conclusion also echoes findings in a 2003 report from the Institute for Information Law at the University of Amsterdam (IViR), 'The Future of Levies in a Digital Environment', which suggested that the original limited scope of levies has been dramatically expanded by their application to digital media and equipment.

licence fee'. That would imply that no private copying compensation is due where protected works or sound recordings are downloaded from legitimate online services where copying is governed by the digital download contract between the consumer and a service provider (content provider, ISP or other).

The licensing practices of the various collecting societies that administer digital download contracts vary. When purchasing online, consumers often pay for the download itself and for a certain number of subsequent authorised copies via platform shifts to other mobile listening devices.<sup>35</sup> On the other hand, contracts of certain collecting societies license the content provider or online music service to provide a download service to the consumer 'without prejudice' to the same collecting society collecting a private copying levy for reproductions made of the very same licensed content.<sup>36</sup> It appears that the download licences administered by the record producers have specific rules on the amount of copies that are part of the download contract.

The consequence of such contracts appears to be that compensation via private copying is paid, even if some of the copies, such as 'platform shifts', have already been authorised directly under licence and for which the consumer has already paid.

#### 4.6. Alternative licensing

Alternative licensing models are based on advertising or on the idea of a 'Creative Commons' where works and sound recordings are made available without charge. These models, which have become increasingly popular in recent years with various rightholders, originate with the choice of content creators as to how to best exploit their works: either in a contract against payment or for free in order to promote their works. Where the rightholder has agreed to copies for non-commercial purposes free of charge, the consumer who downloads and reproduces this content on various media and equipment nonetheless pays the levy. In so doing, the levy is applied even though the copying has been authorised by the licensor.

#### 4.7. Distribution issues

The distribution of levies among rightholders is sometimes subject to regulation at national level. In most cases, however, the detailed distribution scheme is agreed between the various categories of rightholders. These distribution schemes are sometimes subject to approval by a public authority. Administrative costs<sup>37</sup> and the amount of money allocated for cultural or social funds often vary.

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<sup>35</sup> The following are sample clauses from contracts of authors' societies: "By 'Downloading With Consideration' shall be meant **any and all action** allowing **a consumer** to receive, in return for remuneration paid under any form whatsoever including for the purchase of any other product or service, a data file exclusively reproducing a Musical Work for the purpose of recording it in a storage unit, such as a personal computer and/or on various portable audio devices" (emphasis added).

<sup>36</sup> "The authorisation granted to the Contracting Party by the Authors' Societies shall **not in any way whatsoever call into question** the implementation of statutory and regulatory provisions in force concerning **remuneration for private copying** with respect to copies made by Consumers strictly and exclusively for private use of Musical Works to which he shall have lawful access, under and in accordance with the limits of this contract" (emphasis added).

<sup>37</sup> The 2006 consultation revealed that management and other fees incurred by different authors' societies in general in 2004 ranged from 4.2% to 20% (see 2006 stakeholder consultation document for details).

In these circumstances, some rightholders are concerned that they do not have sufficient information on how levies are distributed. They also think that payments are not always made within a reasonable time period after collection. In addition, rightholders in other Member States appear to believe that they are not receiving what they consider their 'fair share' of levies collected on their behalf in other Member States.

## **ANNEX 1: ABOUT THE RESPONSES AND THE RESPONDENTS**

Annex 1 presents the summarised positions of various stakeholders that participated in 2004(5) and 2006 consultations.

Main categories of stakeholders have provided the Commission with their replies:

- Member States (2004 and 2005 consultations)
- The EU ICT industry (2006 online consultation)
- Consumers, users and suppliers (2006 online consultation)
- Individual rightholders and collecting societies (2006 online consultation)

The questionnaires and the replies of Member States and other stakeholders that participated in both consultations can be accessed at the DG MARKET webpage: [http://ec.europa.eu/internal\\_market/copyright/levy\\_reform/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm).

### **A. MEMBER STATES**

In the period 2001-2004, the Commission monitored Member States' implementation of the Directive. As required by the Directive, this was done on the basis of specific information provided by Member States. In relation to the private copying exception in Article 5(2)(b), the assessment of national laws mostly indicated that the systems in place for private copying levies predated the Directive. This monitoring exercise culminated in the formal consultation of the Member States in October 2004 and again in October 2005, followed in 2006 by an online consultation to which all stakeholders were invited to respond. Member States were asked a series of questions in relation to their implementation of Article 5(2)(b). The consultation process was hindered by the late implementation of the Directive by some Member States.

In relation to the acts covered by the private copying exception, Member States' replies indicate that the twenty-one Member States that in 2006 provided for a private copying exception had adapted their national provisions to narrow the scope of private copying acts by including a requirement for personal or private use or use restricted to the family circle. A minority of Member States asserted that their national provisions were either compatible with or indeed already narrower than the Directive. A minority of Member States also specifically stated that the source of the reproduction should be a legal one (Germany, Sweden, Denmark, Spain, France and Hungary implicitly). In these Member States, unauthorised downloads from the internet (P2P, newsgroups) do not in principle appear to come under the exception.

In relation to the systems in place for fair compensation including the acts for which fair compensation is claimed, most Member States had not included the requirement to take into account the application or non-application of technological protection measures in their national law. Some asserted that this obligation was left to those responsible for the administration of fair compensation, in most cases collecting societies, or in a minority of cases either a special body with delegated responsibility (France, the Netherlands) or a mediation system established by the government (Germany).

Private copying schemes are premised on the use of equipment or media by consumers who engage in acts of either legal or illegal copying. The general nature of private copying levy schemes lends weight to this argument. For example, the notion of use, whether such use is actual, incidental or significant is disputed as a criterion. As long as private copying levy schemes apply such a premise, then there will be a continued reluctance to see a link between levy rates and actual usage of particular equipment for purposes of private copying.

### **B. THE EU ICT INDUSTRY**

The responses from the EU ICT industry range from producers of blank media, the consumer electronics, software and hardware manufacturers and telecom operators.

The EU ICT industry (EICTA, BSA, RIAE) favours the strict application of Article 5(2)(b) of the 2001 Directive. In line with this, the ICT industry believes that levies should be phased down and ultimately out

in line with the emergence of digital protection mechanisms that prevent unlicensed copying and the digital management of copyright.

In this respect, the ICT industry endorses more empirical analysis on the increasing availability of copy protection mechanisms and the emerging trends to manage copyright with Digital Rights Management (DRMs). The sales of DRM-enabled digital music should be taken into account when calculating the private copying levies.

The EU ICT industry also points out that uncertainty and litigation over levies lead to a considerable waste of financial resources. Equipment and hardware manufacturers claim that private copying levies put an undue burden on the way they calculate consumer prices; that they thus have a negative impact on the EU's competitiveness. They also claim that private copying levies result in consumers paying twice for online content, once when the content is purchased and once more when the digital recording equipment is purchased. In their view, reform of the current administration of private copying levies is urgent and that the overall competitiveness of the EU ICT industry should not be put at risk. The EU ICT industry deplores the alleged lack of transparency with respect to how levies are set and the basis for their calculation.

### **C. CONSUMERS, USERS AND SUPPLIERS**

Consumers take a particular interest in the issue of private copying as more and more products that consumers buy are levied. In general, consumer organisations point to the lack of certainty that prevails with respect to their rights and legal possibilities in the digital environment; they want to be better informed of their rights and possible restrictions to the use of digitally acquired works or other subject matter. Consumers also believe that prudence should prevail with respect to the application of DRM or Technical Protection Measures (TPM). In addition, consumers are in favour of maintaining a private copying exception, even in interactive online services.

*Consumers' organisations* (BEUC) point out that despite the increasing use of DRMs and TPMs, collecting societies seek to apply levies on new digital devices and recording media. Consumers are of the view that the private copying levies systems should reflect the actual economic harm caused by consumers' private copying. They claim that current levy systems are based on assumptions and not on empirical studies on the actual effects of private copying. They complain that no Member State has made any real assessment of the harm done by private copying. Such an assessment would indicate that only a minority of legally made digital copies of copyrighted works results in more than minimal harm to rightholders.

Consumers' organisations also acknowledge that private copying levies are not intended to compensate for acts of copyright infringement.<sup>38</sup> This entire debate is detrimental to consumers. Paying private copying levies on their computer/reproduction devices does not exempt consumers from liability. Consumers engaging in unauthorised acts might still face lawsuits from rightholders.

*Users groups* like 'Todos Contra El Canon' (i.e. 'All Against Levies') in Spain<sup>39</sup> deplore the typical rough justice features of levies systems. They express concern about various double payment aspects under current levies systems. They warn that extending levies to new digital products may broaden the digital divide. Todos Contra El Canon initiative in Spain had over 1.5 million signatures by the end of 2007. Some users warn of an increasing tendency for policymakers to assume that levies are intended to compensate rightholders for illegal copies of various kinds and yet consumer still face the risk of prosecution.

*Professional users* such as SMEs, public administrations, schools etc. pay private copying levies when buying the levied equipment and/or media without ever engaging in acts of private copying. In fact, any use they make of protected material actually falls outside of the scope of Article 5(2)(b) of the Directive. Therefore, current schemes are placing a significant economic burden on such professional users of ICT equipment who do not engage in acts of private copying.

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<sup>38</sup> BEUC p.3: "Fair compensation is only due in relation to legal private copying. The Directive does not envisage a compensation scheme for illegal copying."

<sup>39</sup> [http://www.todoscontraelcanon.es/index2.php?body=article\\_manifiesto&id\\_article=104](http://www.todoscontraelcanon.es/index2.php?body=article_manifiesto&id_article=104)

**E-commerce operators** selling products that attract levies to consumers within the Community meet many obstacles due to the way levies are administrated in different Member States. They state that the way in which territorially-based private copying levies are currently being applied and collected gives rise to barriers to trade, distortions to the functioning of the European internal market for online retailers and European consumers. They have major concerns about the lack of transparency for consumers in respect of the different rates for businesses, different collection procedures, the lack of dispute resolution, the absence of cross border cooperation, and the widening of the scope of products on which levies are imposed.

#### **D. INDIVIDUAL RIGHTHOLDERS AND COLLECTING SOCIETIES**

Collecting societies representing the various categories of rightholders benefiting from national levies systems replied in large numbers to the Commission's public consultation. They all favour levies as levies are an important source of revenue for the collecting societies and rightholders. Authors' societies perceive the levy system as a European specificity of authors rights, destined to stimulate creativity and cultural diversity. Authors' societies therefore point out that considerable percentages of the levies collected are channelled to cultural promotion funds which play a general role in the pursuit of European culture. The function of compensation for economic harm that results from consumer copying is ancillary.

**Authors' societies** (GESAC, AIDAA and members) that represent a broad mixture of rightholders take the position that collecting societies representing smaller rightholders need to protect private copying levies as a supplement of these rightholders' already precarious income. They point to the delicate situation faced by young authors and the challenge of rampant digital piracy. They stress that the societal impact of phasing out of levies needs to be taken into account. Their main argument for the maintenance of levies, at least at this stage, is the alleged lack of availability of DRM. They also do not view DRM as sufficiently secure, interoperable, and flexible to replace private copying levies. These collecting societies prefer a case-by-case approach in assessing whether a particular recording device attracts a levy or not. According to these stakeholders, harm is only one criterion to determine the level of fair compensation. The current linking of national levies to the storage capacity of products corresponds, in their opinion, to the actual usage and number of copies.

**Representatives of rightholders of literary and graphic works** such as publishers or societies which are dedicated to the administration of remuneration due from secondary uses (IFFRO, ENPA, FEP, FAEP, EVA, EFJ), especially in the print sector, point to the differences among the relevant creative industries. These rightholders are principally concerned with the licensing and administering of rights for what they call 'secondary uses'. They stress the importance of the distinction between the analogue and the digital environment. Publishers claim that they should be free to choose between collective or individual management. They allege that efficient DRMs are not available for works that are delivered in print. Their approach is the co-existence of levy and DRM systems.

**Performers' societies** (AEPO-ARTIS, GIART, EuroFIA, and their members) question the value of exclusive rights and exploitation of works based on DRM as performing artists will not get their fair share, since they lack bargaining power vis-à-vis large content providers. They argue that performing artists do not get their fair share since there is an expected immediate transfer of the rights of their members to the producer. Performers' societies point out that 'the *possible* harm' to the right holders is just *one possible* way of determining the level of fair compensation.

In general, collecting societies are of the opinion that no particular difficulties exist in relation to market distortions due to national levies systems.<sup>40</sup> However, many collecting societies acknowledge that private

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<sup>40</sup> GRAMEX: p.5: "Certain CR levy avoidance can be seen in Finland also. In Estonia, which is a neighbouring country of Finland, the copyright levies are lower than in Finland(...) Selective enforcement is not detrimental to the producers of equipment or media, they get their profits anyway of the selling of the devices. (...)" GESAC p.21:" The fact that enforcement of private copying remuneration may in some countries not cover all importers and manufacturers indeed distorts competition and prevents rights holders from collect the money that is due to them. However, this enforcement is by no means selective. (...)

copying levies are not intended to compensate for acts of copyright infringement (even though in some cases these same organisations call for extending levies to cover copyright infringements).<sup>41</sup>

**Major record and film producers** (IFPI, MPAA) would in principle prefer, where possible, in the digital environment to license consumers through online content providers where necessary with the use of technological measures. The use of DRM is of fundamental importance to them, in the long run, for the development of new formats and online services, and for the fight against piracy. Private copying levies should be 'phased down over time as DRM technologies are effectively deployed, as stated in Article 5(2)(b) of the Copyright Directive. They propose a 'levy-relief' mechanism, which justifies a reduced or non-payment of levies where equipment or devices incorporate or respond to a technological measure. The term 'harm' as a criterion to determine fair compensation is, however, inappropriate and inadequate to them. On the other hand, they state that it must be clear that levies are 'not intended to constitute a mechanism to compensate for piracy'. As to administration of levies, they express doubts with collection and distribution process (e.g. need for improved equal treatment, accountability and transparency).

**Small, independent record producers** (IMPALA, AFI) find DRM an improper way to control music distribution. DRM technology is still not secure and the application of this technology is still not appreciated by music fans. They stress that the number of infringing music files available on the internet is still outweighing the number of legitimate downloads. They argue that legitimate downloads could never compensate for loss of income, therefore the current levies systems should be maintained.

**Small film producers** (EUROCOPYA, EFCA and members) consider levies as secondary rights of exploitation. National private copying levies systems are an important source of their revenue. Nevertheless, they support a rapid introduction of reliable and consumer friendly DRM. They consider levies as complementary to DRM. They are not aware of any particular difficulties in relation to the internal market and point out that the EC had the opportunity to harmonise the levy system with the 2001/29 Directive.

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<sup>41</sup> EBU p.1: "Levies are above all compensation for lawful private copying, as permitted under copyright exceptions and limitations. Unlawful private copying remains prohibited and is therefore not compensated for by the levy."  
IFFRO p.2: "It should be also noted that they (levies) are not compensation for piracy, nor are they meant to be."  
MPA p.2: "It must be clear that levies are "not intended to constitute a mechanism to compensate for piracy".  
EVA p.4: "The text should include the legal purpose of the remuneration and should in particular include articles 5.2.a and 5.2b of the Directive."  
GESAC p.1: "Remuneration for private copying is due in return for an exception to the exclusive right of reproduction of right holders included in the Copyright Directive and in the legislation of most EU countries".  
EUROCOPYA p.6: "The levies are deemed to compensate the exception".

## ANNEX 2: EMPIRICAL EVIDENCE

Table A1: Levy rates that apply to digital music players with a 4 GB storage capacity

- In Austria, the levy for integrated disk technology or memory card technology is set at a uniform rate of €12. There is a discount of 1/3 if the levied device is considered multifunctional. A current arbitration case should shed further light on what a 'multi-functional' device is.
- In Belgium and the Netherlands, there is no levy on digital music players.
- In the Czech Republic, the levy amounts to 3% of the sale price of a recording device with integrated memory and 4% of the sales price if memory card technology is used. No explanation for this difference is given. Assuming that the sales price of an Apple iPod nano 4 GB is €259 (the price mentioned on the online Apple store website [www.apple.com/benl/ipod](http://www.apple.com/benl/ipod) in July 2006), this levy would amount to €7.77 for the integrated memory version and to €10.36 for the version equipped with a memory card.
- Germany applies a uniform rate of €2.56 for all digital music players. There seems to be a 6% rebate for members of the industry association Bitkom.
- In Estonia, the levy for a digital music player with integrated disk technology is 3% of the sales price (€7.77), but 8% of the sales price for the version equipped with a memory card (€20.72).
- In Greece, the levy amounts to €15.54 which equals 6% of sale price of a recording device with integrated memory. No information is available for the version equipped with a memory card.
- Spain determines the levy on the basis of recording capacity. There is a lump sum of €0.60 per device and an extra charge of €0.18 per hour of recording capacity. This leads to a levy of €12.60 for the 4 GB device with integrated memory and €12 for the device that comes with a memory card.
- In Finland, the levy is €15 for both devices. The levy is calculated on the basis of recording capacity with every starting minute costing €0.005.
- France, after aligning the tariffs for the integrated memory and memory card versions in December 2005, charges €8 for both devices.
- In Italy, the levy for a digital music player with integrated disk technology is 3% of the sales price (€7.77), but the version equipped with a memory card has not been levied since 2005 following the so-called 'Urbani decree'.
- In Lithuania and Slovakia, the levy for a digital music player with integrated disk technology is 3% of the sales price (€7.77), while the version equipped with a memory card is levied at 6% of the sales price, which equals €5.54.
- In Poland, the levy for a digital music player with integrated disk technology is 3% of the sales price (€7.77), while the version equipped with a memory card is levied at 1% of the sales price, which equals €2.59.
- In Sweden, the levy on both devices is either €1.80 or €1.84 depending on whether 1 GB is considered equal to 1024 or 1000 megabytes.

Table A2: The special case of printers

Example 1: Private copying levies do not reflect the amount of relevant private copying

According to a survey conducted by TNS Technology in Spain (June 2005) among home users of multifunctional printers, printer functionality usages represented a 57% of all user usages, copier functionality represented only 25% and scanning represented 18% of all usages. 93.4% of the copying functionality users reported that they have never used their device to copy any book pages. In other words, only a 6.6% of all those consumers reported to have 'ever' used their device to make a copy from a book, a half of those three or less times a year. By assuming that one fourth of the copies produced by such 6.6% of users corresponded to books, and the intensity of copying usage by any multifunctional printer users is the same, only a 1.65% of all copies made at home with multifunctional printers corresponded to books.

Considering a maximum 10 pages copied monthly<sup>42</sup> and the additional data reported from the Spanish survey, this would represent that about 0.165 book pages are copied monthly on average per each device sold, what means that 1.92 book pages are copied annually and between **5.76 and 7.68 book pages** are copied during an hypothetical average 3-4 years product life period.

Based on the finding that users of inkjet multifunctional printers copy 7.68 book pages on average during a 4-year product life, and comparing such amount with the per-page 'license fee' that has to be paid to the Spanish collecting society CEDRO for reprographic reproductions done by users outside the scope of the private copying exception (0.02348 euros/page)<sup>43</sup>, then it results that the maximum levy for those consumer multifunctional printer units should not be higher in any case than 0.18€per device. These 0.18€ result from the following operation: 7.68 pages x 0.02348 euros/page. However the actual private copying levy paid by manufacturers for multifunctional printers sold in Spain since January 1, 2004 is 15 euros<sup>44</sup> (plus VAT). This amount is actually almost 85 times higher that the maximum levy that should be paid based on an actual harm approach, what evidently shows that there is an unfair enrichment in favour of allegedly harmed right-holders.

Another way to quantify the same maximum harm threshold to be potentially compensated would be as follows: if the tariff published for reprographic reproductions done by users outside the scope of the private copying exception is 0.02348 euros/page, then a 15 €levy would be equivalent to the fee to pay for copying 638 pages, what represents almost 85 times the amount of pages (7.68 pages) that is estimated a user would copy in a hypothetical average 4 years product life period.

Example 2 – Levies on Multifunctional printers as compared to author royalties on books

Another approach to determine whether the current level of compensation via levies is proportionate could consist on comparing such levy and the royalties that authors receive for each book that is sold, and compare such quantities with the amount of books that are not bought because of such private copying acts.

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<sup>42</sup> Survey among 5700 users of inkjet multifunctional printers showed that a vast majority of users made less than ten copies (of any material, not only material protected by copyright) a month.

<sup>43</sup> CEDRO, Tariffs 2006 (Section 5: Reprographic Reproductions by Users in General) <http://www.cedro.org/Files/tarifas2006.pdf>

<sup>44</sup> This net amount results from a 16.67€levy, less a 10% discount contractually agreed with members of ASIMELEC.

By assuming that the average sales price per book in Spain is €12.16 and the average percentage of author rights per book 5.2016%<sup>45</sup>, then the minimum 15€ private copying levy currently in effect for multifunctional printers in Spain would be equivalent to the author rights of more than 23 books.<sup>46</sup>

In other words, the levy fee that is charged nowadays to manufacturers of low priced inkjet multifunctional printer devices in Spain is equivalent to assume that the average consumer would copy more than 23 books with the device and that, even more, such consumer is buying 23 books less because of such copies he made.

Even in case that a more conservative approach were used, based on the fact that book-related private copying levies are distributed among authors (55%) and publishers (45%), it would result that the levy compensates authors in the amount equivalent to the royalties for selling 13.03 books (55% \* 23.69).

However, the actual usage of multifunctional printers for private copying purposes is much lower and no reasonable person can believe that multifunctional printers users will copy on average 13.03 books (55% x 23.69) during the life of their product and would not buy such number of books because of such acts.

This analysis should be sufficient to show that the current levy is unfairly and disproportionately high (even more when considering the actual data on copying acts committed by consumers in Spain, as shown in the Example 1 above).

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<sup>45</sup> Source: Federation of Spanish Publishers Associations (2004) – (<http://www.mcu.es/libro/plantilla?id=4&area=libro>)

<sup>46</sup> If average sales price per book is €12.16 and average share of author rights per book is 5.2016%, then average amount of author rights per book in 2004 would be 5.2016% \* €12.16 = €0.633. Number of books to be copied to pay-off the levy amount per multifunctional printer is 15 € / 0.633 € = 23.69 books.

Table A3: Cultural funds

In **France** Article L. 311-9 of the Copyright Code provides for the allocation of 25% of the levies collected for private copying to the promotion of creative endeavours, the organisation of performances and the training of performers.

In **Spain**, Art. 39 of Royal Decree 1434 of 27 November 1992 provides that copyright collection societies must devote 20% of the levies they collect to a) promoting activities and services to assist their members; and b) arranging training and promotion activities for authors and performers.

In **Denmark** levies are distributed to the rightholder who are members of Copy-Dan Blank Tapes. 2/3 of the levies are distributed to individual rightholders, whereas 1/3 are designated for collective purposes.

In **Lithuania** 25% of the levies collected may be used for programmes for the support of creative activities.

In **Greece**, authors, performers, and producers of phonograms or organisations representing them can agree to fund foundations for the development of music, film, video, radio and television, and to finance educational and research programmes and to use the funds for other similar purposes, but only in an amount not exceeding 10 per cent of the remuneration subject to distribution between authors, performers, and producers of phonograms.

In **Austria** Article II (6) of the 1980 Copyright Act Amendment, BGBl. 1980/321 in the version of Federal Law BGBl. 1996/151 provides that a major share of the receipts from the blank-media levy is to be allocated to social and cultural purposes. Under this provision, all collecting societies set aside 51% for this purpose.

In **Germany**, collecting societies are required to set up welfare and assistance schemes for the holders of the rights and claims that they administer. As a rule, deductions from royalties or levies made by the collecting societies for social and cultural purposes amount to just under 10% of their receipts.

## GLOSSARY OF FREQUENTLY USED TERMS

<u>Levy</u>	A private copying levy is a form of indirect remuneration for rightholders, based on the premise that some acts of private copying cannot be licensed for practical purposes by the relevant rightholders. A private copying levy is typically attached to certain products (equipment or blank media) that can serve to reproduce audio, audio-visual and textual material such as music, films or books.
<u>TPM</u>	Technical Protection Measures are a technology that may be used to prevent unauthorised copying or digital distribution of content.
<u>DRM</u>	Digital Rights Management refers to systems that allow the management of licensed rights and administration of royalty payments on an individual basis by digital means. They underpin new electronic business models aimed at making digital content available to users for payment.
<u>P2P</u>	Peer-to-peer – P2P- networks allow users to share content with each other online. While P2P is often used to share files containing audio and video material (including illegal sharing of protected material), it can be used for many other purposes, including, for example, telephony. As it simply facilitates the exchange of data, the technology is not illegal as such.
<u>Download</u>	Downloading is the reception of data from a remote system, such as a website. For example a consumer 'downloads' music from an online store. In copyright terms the right of reproduction comes into play in the downloading and storage of a protected work or other subject matter (such as phonograms, fixation of performances or broadcasts).
<u>Upload</u>	Uploading is sending data from a local system to a remote system. For example, a person can 'upload' a piece of music from their computer to the internet. In copyright terms, acts of uploading involve the right of communication to the public and the right of 'making available'. There is no exception to the right of communication to the public, including the right of making available. Acts of 'uploading' do not fall within the scope of the private copying exception and that no compensation can be claimed for such acts.
<u>Optical disc</u>	disc (e.g. CD, DVD) whereon all kinds of data is/can be stored.
<u>CD-R</u>	the Compact Disc-Recordable optical disc is a format with a storage capacity of typically 700 MB.
<u>DVD-R</u>	the DVD-Recordable optical disc format with a storage capacity of typically 4.7 GB.
<u>DVD+R</u>	the DVD+R format is a competing format to the DVD-R. DVD+R cannot, or can only to a limited extent, copy protected material if technological protection measures meeting a contractually required standard of effectiveness are applied.

<u>RW</u>	the rewritable optical disc format has the ability to erase and rewrite data. Both CD and DVD formats have rewritable variants.
<u>PVR</u>	The Personal video recorder (PVR) is a device that records video without videotape to a hard drive-based digital storage medium. The term includes stand-alone set-top boxes and software for personal computers which enables video capture and playback to and from disk.
<u>Computer network</u>	denotes communication between computer systems. Such networks involve at least two devices capable of being networked with at least one usually being a computer.
<u>(Flash) memory card</u>	is a device for recording or storing information. Examples of applications include digital audio players, digital cameras and mobile phones.
<u>USB</u>	is standard to electronically connect different devices.
<u>Digital set-top box</u>	a device that connects to a television and some external source of signal, and turns the signal into content then displayed on the screen. This feature is used for decoding digital television.