REFIT Platform Opinion

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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

The REFIT Platform has considered the submissions by the Finnish Survey for Better Regulation and DIGITALEUROPE on the fragmentation of copyright levies system across the EU.

The Stakeholder group considers that greater consistency among national private copying levy systems, including common criteria for the calculation of the tariffs and devices affected, should be achieved and recommends that the European Commission examines whether a recommendation, based on the findings of the Vitorino Mediation report, would be feasible.

The Government group considers that a well-functioning levy system for legally permitted uses of copyrighted work should be achieved. The majority of contributing Member States invite the Commission to examine different means to achieve a greater level of consistency among national private copying levy systems and to take into account the findings of the Vitorino Mediation report and recent Court of Justice of the EU (CJEU) case law.

One Member State considers that a review of the private copying levy system, in particular with regard to admin burden, should be more comprehensive than the one presented in the Vitorino report. Any future action should take into account ongoing technological development and be examined by the Contact Committee established under Directive 2001/29.
Detailed Opinion

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1 Submissions IV.3.a-b

1.1 Submission IV.3.a by the Finnish Survey for Better Regulation

The copyright directive (29/2001/EC) leaves the regulation of copying for private use and the compensation system to the Member States, which has led to a wide range of systems. As a result of technological advancement, the copyright levy systems of the Member States have expanded to cover a considerable variety of device segments. The administrative burden due to the copyright levy systems has increased disproportionately compared to the compensation to be charged under the system. This complicates the emergence of new business models.

1.2 Submission IV.3.b by DIGITAL EUROPE

The Commission should deal with the obvious effects of fragmentation of the single market due to the implementation of the “fair compensation” for the private copying exception in the Member States.

There are numerous decisions of the Court of Justice of the European Union witnessing the practical effects of such fragmented application; these decisions evidence that similar concerns exists also for the “fair compensation” provided in the form of levies for the reprography exception under Article 5.2 (b) of the Directive 2001/29/EC.

DIGITALEUROPE, fully supports the findings of the Commission mentioned in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a modern, more European copyright framework” (COM(2015) 626 final from 9 December 2015), where in point 3 the Commission mentioned:

“Levies that compensate right holders for the reprography and private copying exceptions can be a significant source of revenue but also raise single market issues. Many Member States impose these levies on a wide range of media and devices, and they are set, applied and administered in a variety of different ways. This has caused considerable legal uncertainty. The substantial case law of the Court of Justice of the EU (CJEU) has clarified some of the issues signalled by the 2013 Vitorino Report as detrimental to the free movement of goods and services. However, persisting national disparities can be problematic, especially when products subject to levies are traded across the EU. Levies are sometimes imposed by Member States irrespective of payments already made in other Member States, or without proper exemption or refund schemes.”

The Commission concludes about the levies with the following statement:

“The Commission will assess the need for action to ensure that, when Member States impose levies for private copying and reprography to compensate right holders, their different systems
work well in the single market and do not raise barriers to the free movement of goods and services. Issues that may need to be addressed include the link between compensation and harm to right holders, the relation between contractual agreements and the sharing of levies, double payments, transparency towards consumers, exemptions and the principles governing refund schemes, and non-discrimination between nationals and non-nationals in the distribution of any levies collected.”

DIGITALEUROPE believes that the Commission has gathered through numerous case law, information provided by consumers and industry as well as through various public consultations enough evidence about why action is needed.

2 Policy context

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, also referred to as the 'Information Society' Directive or the 'InfoSoc' Directive, aimed at ensuring the smooth functioning of the internal market and a favourable environment protecting and stimulating creativity and innovative activities within the EU. Consistent with this objective, the Directive promoted harmonisation of exclusive rights and, to a lesser extent, of limitations and exceptions to these rights that are essential to the dissemination of content. The Directive entered into force on 22 June 2001 and the transposition was completed in all EU Member States in 2006.

Over the last years, the Commission carried out an in-depth analysis of the current EU copyright rules, in order to explore if they are still fit for purpose in view of the EU’s objective to achieve a genuine digital single market and in the face of challenges and opportunities posed by the new technology. This included a wide-ranging public consultation, which was met with broad interest with more than 9,500 replies¹, the stakeholder dialogue 'Licences for Europe'², as well as a series of legal and economic studies on various aspects of the existing copyright framework³. The consultation process also included a dedicated stakeholder dialogue on private copying and reprography levies presided by António Vitorino, former Commissioner for Justice and Home Affairs, who presented his recommendations in January 2013⁴.

On 9 December 2015 the Commission adopted the first legislative proposal for the copyright


² [https://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site](https://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site)

³ [http://ec.europa.eu/internal_market/copyright/studies/index_en.htm](http://ec.europa.eu/internal_market/copyright/studies/index_en.htm)

modernisation – a Regulation to enable the cross-border portability of online content services. In addition, on the same day, the Commission presented a Communication setting out its vision and a comprehensive action plan to make EU copyright fit for the digital age. The 2015 Communication specifically referred to the current situation regarding the levies system. In particular, the communication explained that substantial case law of the Court of Justice of the EU (CJEU) has clarified some of the issues signalled by the 2013 Vitorino Report as detrimental to the free movement of goods and services. In this regard, the Commission indicated it was still looking into the issue. Private copying levies were not included in the copyright modernisation package adopted by the Commission on 14 September 2016.

**Current state of play**

The Commission is carefully taking note of the clarifications on a number of open issues that the CJEU has provided in the recent past in various judgements in this field. There is also still a reference for a preliminary ruling pending. The Commission takes complaints in this area seriously and is ready to cooperate with all stakeholders to make sure that we national private copying systems fully comply with EU law, including with the case law of the CJEU.

### 3 Opinion of the REFIT Platform

#### 3.1 Considerations of the REFIT Platform Stakeholder group

The REFIT Stakeholder group takes note of the concerns expressed by the stakeholder as to the significant divergence among national private copying levy systems which impedes the well-functioning of the Single Market.

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. The consumers’ use of such devices and the new technology used for the distribution of content online e.g. streaming versus downloading should be considered in this respect.

The Stakeholder group in particular recommends that the European Commission should examine whether a European Commission recommendation based on the findings of the Vitorino Mediation report would be feasible.

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3.2 Considerations of the REFIT Platform Government group

13 Member States contributed to this Opinion and consider that a well-functioning levy system for legally permitted uses of copyrighted work should be achieved.

Ten out of twelve contributing Member States partially or fully support the recommendations of the Stakeholder group to alleviate the administrative burden relating to current copyright levy systems. Eight Member States also underline that any future action should be based on the findings of the Vitorino Mediation report and recent CJEU case law and be supported by a fully fledged Impact Assessment.

One Member State considers that a review of the private copying levy system, in particular with regard to administrative burden, should be more comprehensive than the one presented in the Vitorino report. Any future action should take into account ongoing technological development and be examined by the Contact Committee established under Directive 2001/29/EC.

Individual contributions from Member States

**Member State 1** supports the idea to achieve a greater level of consistency within the EU among national private copying levy systems, including common criteria for the calculation of the tariffs as well as the devices affected.

**Member States 2** supports the overall aim to alleviate the administrative burden relating to current copyright levy systems, but does not agree with the conclusions of the REFIT Platform Stakeholder group for the following reasons:

1) Directive 2001/29 foresees that private copying, the evolution of technological measures and their effects on the markets for protected subject-matter should be periodically assessed at EU level. According to Directive 2001/29/EC, this task should be performed by a Contact Committee set up in accordance with that directive. The Contact Committee has not yet been convened to perform this task. MS2 considers it should be convened before proceeding with any further harmonisation activities.

2) It has become apparent, that devices-based levy systems are becoming outdated because of the technological evolution and increasingly causes undue administrative burden in many Member States. The CJEU case-law seems in fact to cement current devices-based systems and restrict the possibility for Member States to adapt to changing circumstances and arrange the fair compensation in alternative ways which will cause less administrative burden for parties involved and less harmful effects in cross-border situations. Harmonisation of the existing devices-based levies is thus not the correct answer to the problems perceived.

3) MS2 notes that according to Directive 2001/29, which provides for fair compensation for private copying unless such use has been licensed or otherwise compensated, the modalities of the fair compensation for private copying have been expressly left to the
Member States. MS2 believes this has been done for very good reasons, which is closely linked to the fact that fair compensation is not a subjective right but a matter of cultural policy.

4) As a consequence, according to MS2, any legislative initiative in this area should focus on ensuring that the fair compensation schemes adopted in the Member State do not have a cross-border effect and at restoring the possibilities for Member States to adapt their compensation schemes to the developments at national level and with due regard of the cultural policy objectives involved.

In view of the above, MS2 underlines that the administrative burden relating to copyright levy systems is a very complex issue and therefore possible means to alleviate that burden must first be carefully examined. Taking into account the ongoing technological development in this field, MS2 considers that the Contact Committee established under directive 2001/29 should first be convened in order to assess the evolution of the relevant technology and private copying and their effects on the markets.

Member States 3 supports the position of the REFIT Platform Stakeholder group on Copyright levies. The number of issues in this field require intervention by the European Commission, in particular those resulting from the recent CJEU rulings. MS3 stresses however that the very idea of levies is right and supported by a huge legislative and judicial output in most EU countries, as well as their long practice how to effectively apply these regulations and that this should be respected. It should also be borne in mind that levies are an important part of the right holders’ income, so any proposal for new measures has to be duly consulted not only with the business and consumer circles, but also with the authors, performers and other beneficiaries, as generally represented by collecting management organizations.

Member States 4 and 13 agrees with both submissions. MS4 and MS13 do not operate a compensation system (sometimes referred to as “levies”) to remunerate creators for the private copying of their copyright works and has no plans to introduce such a system. As such, the proposals in these submissions would have minimal impact on MS4 and MS13. Generally speaking, MS4 and MS13 have no objection to further harmonisation of EU levy systems in line with the recommendations of the 2013 Vitorino Report, provided such harmonisation was limited to Member States which chose to operate such systems, and did not oblige MS4 to introduce its own levy system. From these MS's perspective, abolition of copyright levies at the EU level would be the best possible outcome, although MS4 and MS13 accept that this is unlikely to occur.

Member State 5 partially supports this suggestion. MS5 is of the opinion that a well-functioning levy system for legally permitted uses of copyrighted works is indispensable for the fair remuneration of authors and right holders. In MS5 views, such a system has to take into account the interests of users of copyrighted content and the interests of right holders alike: users gain legal access to content; right holders – i.e. authors and companies in the cultural industries – receive financial compensation. Where third parties are liable for paying the levies, as is the case with private copying levies, also their interests have to be taken into
account. To remain functional, MS5 believes that the levy system needs to be simplified and adapted to technological change. With the Vitorino Report of 2013 as a possible starting point, the discussion should take into account the complex case law of the CJEU. It should focus on innovative remuneration systems for new digital uses.

**Member State 6** supports further consideration of potential measures to be taken in order to achieve a greater level of consistency among national private copying levy systems in order to minimise cross-border issues and also help new business models.

At the same time, MS6 would like to highlight certain positive aspect of the copyright levy system in providing consistency in copyright protection thus ensuring incentive for creative content production. Since new technologies and devices enable massive high quality copying of copyrighted works, readily available also for private use, their impact on the markets of copyrighted work might not be insignificant, in particularly regarding the creative content production that is due to language of cultural specificities limited to smaller markets (e.g. smaller Member States).

**Member State 7** in favour of the opinion.

**Member State 8** supports the submission, has not yet thoroughly analysed whether there is a need for a review of the private copying levy system at an EU-level and if so, in which aspects.

**Member State 9** considers that more harmonisation is not justified and that the principle of subsidiarity must be fully applicable in this area.

Article 5-2 (b) of Directive 2001/29/EC leaves considerable latitude for Member States to organise their system of remuneration for private copying. In its ruling of 21 October 2010 in Case C-467/08 Padawan SL vs Sociedad General de Autores y Editores de España, the Court of Justice of the European Union (CJEU) has recognised the power of the Member States to determine, within the limits imposed by EU law, in particular by Directive 2001/29/EC, “the form, detailed arrangements for financing and collection, and the level of remuneration for private copying.

For MS9, the diversity of national legal models reflects the variety of national cultural policies, as observed in the context of the recommendations made on 31 January 2013 by the Mediation on Private Copying and Reprography Levies by António Vitorino. In general, the establishment of exceptions by Member States is a key aspect of the cultural policy since it reflects the delicate balance between exclusive rights of right holders and the choice of granting to certain categories of users of copyrighted works the benefit of an exception due to specific requirements recognised by the society to this category of beneficiaries.

Moreover, in MS9 views, only the necessity to respond to a cross-border need could justify more harmonisation of the system of remuneration for private copying. However, such a need is not substantiated by a solid impact assessment.
The real impact of private copying remuneration on the market is not further demonstrated. On the contrary, it appears that media and material prices do not vary according to the different rates of private copying levy applied across the Union. The Spanish case has shown that the abolition of private copying levies in 2012 has had no impact on media and material prices.

Finally, a number of CJEU judgments have clarified the criteria laid down by Article 5-2 (b) of Directive 2001/29/EC and the guiding principles of private copying remuneration. Those judgments thus ensure an adequate level of coherence between the different systems in place in the Member States.

MS9 believes that the preparation of a recommendation in order to harmonise national legislation on private copying levies does not therefore appear necessary. Priority should be a full and complete application of the Community framework of this exception. In particular it is important that Member States apply the private copying exception to observe the obligation of result laid down in the Directive and raised to case-law ‘Opus’, with remuneration (C 462/09, 16 June 2011, Stichting de Thuiskopie vs Opus Supplies Deutschland GmbH and others).

Together with the questions of economic impact and jobs on the market, MS9 considers it is also important to stress the issue of the sharing of the value in the online world and the importance of private copying remuneration in this context. Instruments, such private copyrights nurture creativity in Europe, contribute to the economic value chain and should therefore be protected.

**Member State 10** is willing to examine the possibility of harmonizing this issue in the EU. It is of utmost importance though that a detailed impact assessment is conducted by the European Commission, exploring the impact of potential measures on all involved parties e.g. Member States, right holders, stakeholders, before any decisions are made on the way forward. MS10 considers that the primary aim should be to tackle the legal uncertainty taking into consideration the CJEU previous judgments and eliminate any barriers this issue may have caused to the free movement of goods and services in the single market.

**Member State 11** agrees with the remarks of stakeholders and stakeholder group as well as the position of the European Commission. An analysis on private copying and reprography levies carried out in the MS11 in 2017 confirms that the levies represent a dynamic element of remuneration for right holders. It also confirms that the relevant legislation is partially outdated as a result of the technological advancement in this area.

Although some issues have been resolved as a result of the case law of the CJEU with more references for a preliminary ruling pending, some problems remain unsolved. MS11 believes that issues such as principles governing refund schemes, double payments and others can be satisfactorily resolved only on the EU level because of their cross-border nature. To that end, MS11 is prepared to cooperate with the European Commission, Member States and relevant stakeholders.

**Member State 12** does not operate a compensation/copyright levies system to remunerate
creators for the private copying of their copyright works. Whilst MS12 would in principle have no objection to the further harmonisation of EU levy systems in line with the recommendations of the 2013 Vitorino Report, it is important that such harmonisation is limited to Member States which chose to operate such systems or which already have some systems in place. Any action for harmonisation in this area should not include an obligation for a Member State to introduce its own levy system.