

STAKEHOLDER CONSULTATION ON
COPYRIGHT LEVIES IN A CONVERGING WORLD
JUNE 2006

The Directorate General for the Internal Market and Services wishes to consult stakeholders on the following questions that arise in relation to an examination of copyright levies in the Internal Market. An initiative on copyright levies is in the Commission Work Program for 2006.

These questions arise in the context of the ongoing review of Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of copyright and related rights in the Internal Market ("the Directive"). The Directive was one of the measures that formed the basis of the 2000 Lisbon Agenda¹. Article 12 of that Directive obliges the Commission to report on the application of that Directive and in particular to examine the application of Articles 5, 6 and 8 in the light of the development of the digital market. Article 12 also established a committee which, *inter alia*, acts as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

In October 2004, in the context of the committee established under Article 12, Member States were consulted on the scope of the private copying exception and existing systems of remuneration. The most prevalent system of remuneration is that of copyright levies. Replies from Member States were due by March 2005. Where relevant, Member States were asked to update their replies and return them by January 2006. Member States have authorised the publication of these replies. These replies can be found at the following website:

http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm

Member States and a series of stakeholders have already provided valuable input in the process and this additional follow-up consultation serves the dual purpose to further improve the quality of the policy outcome and at the same time enhance the involvement of interested parties and the public at large.

¹ LISBON EUROPEAN COUNCIL 23 AND 24 MARCH 2000

10. Realising Europe's full e-potential depends on creating the conditions for electronic commerce and the Internet to flourish, so that the Union can catch up with its competitors by hooking up many more businesses and homes to the Internet via fast connections. The rules for electronic commerce must be predictable and inspire business and consumer confidence. Steps must be taken to ensure that Europe maintains its lead in key technology areas such as mobile communications. The speed of technological change may require new and more flexible regulatory approaches in the future.

11. The European Council calls in particular on:

the Council along with the European Parliament, where appropriate, to adopt as rapidly as possible during 2000 pending legislation on the legal framework for electronic commerce, on copyright and related rights, on e-money, on the distance selling of financial services, on jurisdiction and the enforcement of judgements, and the dual-use export control regime; the Commission and the Council to consider how to promote consumer confidence in electronic commerce, in particular through alternative dispute resolution systems.

This additional follow-up consultation focuses on a series of salient points and will run from 6 June through 14 July 2006.

1. WHAT ARE COPYRIGHT LEVIES?

A 'copyright levy' is a form of indirect remuneration for rights holders based on the premise that an act of private copying cannot be licensed for practical purposes by the relevant rights holders. With a copyright levy, certain unlicensed acts of copying of audio, audio-visual and textual material such as music, films or books by consumers are allowed but should nevertheless be remunerated. The copyright levy system was introduced on the basis that there were no effective means to monitor and therefore authorise acts of copying by consumers.

Remuneration by means of levies can be described as indirect as copyright levies are not directly imposed on those that carry out acts of private copying, namely the consumers. The copyright levy is applied to the equipment or media that consumers use. Those Member States that provide for copyright levies impose them on manufacturers, importers or distributors of equipment or media that allows consumers to copy ("the ICT industry").

In certain Member States, copyright levies apply to both equipment *and* media, in other Member States, copyright levies apply to equipment *or* media. Five Member States (Ireland, UK, Malta, Cyprus and Luxembourg) have no copyright levies. In Ireland, UK and Malta, acts of private copying by consumers are not authorised –only acts of time-shifting of broadcasts i.e. acts of recording a broadcast programme for viewing or listening at a later time for domestic purposes. Luxembourg allows private copying and has not introduced copyright levies. Certain Member States that acceded in 2004 have only relatively recently introduced copyright levies.

**Question 1: A. Do you agree with this description of copyright levies?
B. Are there elements that you consider should be added?
C. Do you believe it efficient that the debtor of the copyright levy is not the party that carries out and controls the private copying?**

2. WHO ADMINISTERS COPYRIGHT LEVIES?

Copyright levies are not paid directly to the rights holders but are paid by the ICT industry to collecting societies acting on behalf of rights holders.

These collecting societies may provide a variety of management services to rights holders or may be specifically established to administer copyright levies only. In many instances, collecting societies play a key role in the application i.e. the setting of the copyright levies, although this process is often subject to lengthy litigation, especially when the levy is extended to new digital equipment or media. Disputes

between collecting societies and the ICT industry about the equipment subject to levies and the applicable rate are frequent.

In all instances, collecting societies are responsible for the collection and distribution of copyright levies to rights holders both at domestic level or resident in other Member States. Currently, rights holders in other Member States receive their copyright levies via their local collecting society under the series of bilateral reciprocal representation agreements that each collecting society concludes with its sister societies in other Member States. Rights holders are charged for the provision of this service and therefore the copyright levy is payable to rights holders net of deductions. This would include the deductions for the society that collects the levy in another Member State and the deductions for the collecting society that distributes the levy to the rights holder. Finally, both the accountability and the degree of involvement by the Member States in monitoring the application, collection and distribution of levies vary.

Some Member States apply a unified distribution approach, where one collecting society includes all other collecting societies and is given a monopoly for levy collection. This is the case, e.g., for Portugal, Slovenia and Belgium. In other Member States, levies are payable to a central agency that distributes to the separate collecting societies (Germany, Netherlands). In some Member States, several collecting societies representing the different categories of rights holders collect and distribute the levies separately.

Question 2: A. Do you agree with this description?

B. Are there elements that you think should be added?

C. Are you satisfied with how the collection and distribution of copyright levies functions?

D. Do you believe that rights holders who are (1) nationals of other Member States or who may be resident in another Member State other than that of which they are nationals; or (2) third country nationals receive a proportion of copyright levies that corresponds to the actual amount of copying of their works or other subject matter (such as phonograms of broadcasts) including in comparison to nationals themselves?

E. How can current distribution keys reflect the actual amount of copying of works or other subject matter?

F. Do you think that there should be greater accountability of collecting societies with respect to the application, collection and distribution of copyright and if so, in what form?

3. DISTRIBUTION OF COPYRIGHT LEVIES

The distribution of levies among rights owners is sometimes subject to detailed regulation at national level, while in other Member States, the distribution “schedule” must be negotiated between the collecting societies and their members, subject to its approval by a public authority (the so called “règlements de repartition”). Distribution

'schedules' vary between collecting societies depending on the cost of the administration of the society or on the amount of money allocated for cultural² or social³ funds created for the benefit of authors or performing artists.

The Table below provides an overview of how levies are distributed in the music sector. It also provides data on the management cost incurred by the different societies for the provision of the distribution service (this is separate from the collection service, the cost of which is not reflected in this table). The table also provides an indication on domestic distribution vs. distribution to right holders abroad, as practiced by the collecting societies in the different Member States. All figures contained in this Table have been provided by GESAC, the umbrella organisation of collecting societies for authors, composers and editors of musical works.

²

- France: Article L. 311-9 provides for the allocation of 25% of the levies collected for private copying to promotion of creation, diffusion of spectacle and the training of performers.
- Spain: Art. 39. of the Royal Decree 1434 of 27 November 1992, implementing Articles 24, 25 and 140): Management organisations must devote 20% of the levies to
 - a) Promote activities and services to assist their members.
 - b) Arrange training and promotion activities for authors and performers.
- Denmark: The levies are distributed to the rights holder organisations who are members of Copy-Dan Blank Tapes. 2/3 of the levies are distributed to individual rights holders, whereas 1/3 is designated for collective purposes.
- Lithuania: 25 % of compensation collected may be used for programmes for the support of creative activities.
- Greece: With the consent of authors, performers, and producers of phonograms or organisations representing them, foundations may also be paid for the development of music, film, video, radio and television, and in order to finance educational and research programmes and for use thereof 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.

³

- Austria: In accordance with Art. II (6) of the 1980 Copyright Act Amendment, BGBl. 1980/321 in the version of the Federal Law BGBl. 1996/151, the major share of the receipts from the blank-media remuneration is to be allocated to social and cultural purposes. On the basis of this provision all collecting societies use 51% for this purpose.
- Germany: Collecting societies shall set up welfare and assistance schemes for the holders of the rights and claims that they administer. As a rule, deductions made by the collecting societies for social and cultural purposes amount to just under 10% of their receipts.

Distribution by Authors' Societies of Amounts Collected for Private Copying in 2004

Country	Authors' Society	Repertoire	Society's Share	Management and Other Fees		Amounts for Social. Cultural and/or Collective Purposes		Total Distributed	Of Which in the Domestic Territory	Of Which in Foreign Territories
			€	€	%	€	%	€	%	%
Austria	AUSTRO-MECHANA*	Music	€ 5.445	€ 0.372	6.8%	€ 2.777	51.0%	€ 2.108	76.6%	23.4%
Belgium	SABAM SCAM	Multirepertoire Multimedia	Total Collection for Private Copy in 2004 was €16.631, to be distributed once the audio/video split for collections on CD-R/DVD-R Data media has been established and approved by the Minister for Economic Affairs.							
Cyprus No Remuneration Scheme for Private Copying										
Czech Republic	OSA**	Music	€ 1.12	€ 0.11	10.0%	€ 0	0.0%	€ 0.64	73.9%	26.1%
Denmark	KODA	Music	€ 1.197	€ 0.06	5.0%	€ 0.399	33.3%	€ 0.738	44.0%	56.0%
Estonia	EAÜ	EAÜ is not a member of GESAC								
Finland	TEOSTO***	Music	€ 1.961	€ 0.098	5.0%	€ 0	0.0%	€ 1.863	83.0%	17.0%
France	SACEM****	Music	€ 51.445	€ 2.572	5.0%	€ 14.20	25%+5%	€ 35.573	54.0%	46.0%
	SCAM	Multimedia	€ 3.781	€ 0.369	9.8%	€ 0.942	25%	€ 2.470	n/a	n/a
	ADAGP	Visual Arts	€ 0.635	€ 0.127	20.0%	€ 0.159	25%	€ 0.349	80.0%	20.0%
Germany	GEMA	Music	€ 33.150	€ 6.420	19.4%	€ 1.510	4.6%	€ 25.220	70.1%	29.9%
Greece	AEPI	Multirepertoire	Monies have not been collected in Greece since 1999 for lack of agreement with importers and manufacturers of equipment and carriers. A law suit has been filed for which judgment is pending.							
Hungary	ARTISJUS	Multirepertoire	€ 4.328	€ 0.707	16.3%	€ 0.311	7.2%	€ 3.311	55.0%	45.0%
	HUNGART	Visual Arts	€ 0.254	€ 0.051	20.0%	€ 0.025	10%	€ 0.178	n/a	n/a
Ireland No Remuneration Scheme for Private Copying										
Italy	SIAE*****	Multirepertoire	€ 27.919	€ 1.16	4.2%	€ 0	0%	€ 26.76	87.8%	12.2%
Latvia	AKKA-LAA*****	Multirepertoire	€ 1.56	€ 0.15	9.6%	€ 0.01	0.6%	€ 1.33	92.5%	7.5%
Lithuania	LATGA-A	Multirepertoire	€ 0.250	€ 0.040	16.0%	€ 0.05	20.0%	€ 0.160	50.0%	50.0%
Luxemburg No Remuneration Scheme for Private Copying										
Malta No Remuneration Scheme for Private Copying										
The Netherlands	LIRA-STICHTING	Literary Works	€ 0.85	€ 0.064	7.50%	€ 0.059	6.9%	€ 0.727	n/a	n/a
Poland	ZAKS	Multirepertoire	In Poland the share of the different authors' societies for monies collected in 2004 is currently negotiated following Regulation of the Minister of Culture of 2 June 2003. Total share for all authors' societies in 2004 was € 1.205 m.							
Portugal	SPA	Multirepertoire	In Portugal, no Amount for Private Copy was distributed to rightholders until October 2005.							
Slovakia	SOZA	Music	€ 0.193	€ 0.028	14.7%	€ 0	0%	€ 0.164	n/a	n/a
	LITA*****	Multirepertoire	€ 0.097	€ 0.016	16.5%	€ 0	0%	€ 0.081	69.1%	30.9%
Slovenia	AAS	AAS is not a member of GESAC								
Spain	SGAE	Multirepertoire	€ 29.290	€ 1.640	5.6%	€ 5.860	20.0%	€ 21.790	21.0%	79.0%
Sweden	STIM	Music	€ 1.890	€ 0	0%	€ 0	0%	€ 1.890	55.0%	45.0%
UK No Remuneration Scheme for Private Copying										

All Figures in € m.

- (*) AUSTRO-MECHANA deducted € 0.188 m as reserves that will be distributed at a later time.
 (**) OSA gave € 0.36 m to Literary Authors' Society DILIA.
 (***) TEOSTO's share already takes into account the deduction for cultural purposes made by the Ministry of Culture, hence the 0% in the corresponding column.
 (****) SACEM deducts 25% for cultural purposes, as set by the French Intellectual Property Code, and 5% for social purposes, as set by its statutes. This 5% is distributed in the domestic territory.
 (*****) Italy's information comes from calculations made from information provided by SIAE. Actual figures may vary. SIAE's domestic/foreign distribution refers only to Music works. The authors' share also includes hold over amounts or subject to further examination.
 (*****) AKKA/LAA deducted € 0.07 m as reserves that will be distributed at a later time.
 (*****) Management Fees refers to percentage deducted for administration costs as total amounts collected by LITA for all purposes in 2004.

Exchange rates (31/12/2004): € 1 = CZK 30,46
 DKK 7,44
 HUF 245,97
 PLN 4,157
 SEK 9,12
 SKK 38,75

Question 3:

A. What conclusion can be drawn from the above Table with respect to the relationship between the levy collected and distributed and the administrative cost of distribution?

B. What conclusion can be drawn from the above Table with respect to the ratio of distribution at national level as opposed to distribution to other Member States?

4. DIGITAL RIGHTS MANAGEMENT AND DIGITAL MUSIC SALES

In principle, digitisation has empowered rights holders to control the licensing of their works or other subject matter and transformed the collection and distribution of royalty into a process of individual electronic payment (pay-per-use).

DRM can be employed to authorise the making of copies of a purchased work. For example, technological developments present an opportunity to protect copyright by a variety of means. Technological protection measures (TPMs) may be used to prevent unauthorised copying or distribution of content. When combined with the terms and conditions that govern use of the work including payment is often referred to as "Digital Rights Management" or a "DRM".

DRM systems are the basis to develop new (electronic) business models aiming at making available digital content to users and also to receive remuneration for it. In sophisticated DRM systems content is delivered accompanied by metadata ('copyright management information') that inform users of the copyright status of the work or licensing conditions. DRM systems are becoming commonplace in consumer devices; they are used in mobile phones, music downloads (where they limit the usage of music prevent unauthorized copying)⁴.

The 2006 IFPI Digital Music Report describes technology-protected digital sales as an area of major growth potential. IFPI states:

"In 2006 we expect to see continued growth online and more innovative mobile services attracting music fans into the legal digital market. All our member record companies are now aggressively licensing and marketing music in digital formats."

IFPI also states that 420 million single tracks were downloaded in 2005, up more than twenty times on two years ago. This excludes the entire business of music on mobile phones; a market which is not far behind music downloads in value. Together in 2005, these two new distribution channels took record company revenues from digital sales to an estimated \$US 1.1 billion globally, tripling in value compared to 2004.

According to IFPI 2005 was a landmark year for digital music, when online and mobile music distribution emerged as the industry's fastest growing delivery channels. Digital sales in 2005 accounted for approximately 6% of global music sales based on the first six months of the year. IFPI states that legal online buying is catching up with illegal file-sharing and that mobile music has huge mass market potential.

According to Forrester Research, by 2010, 37% of music sold will be protected by technological means against unauthorized copying. Technologically protected sales of music are expected to generate a turnover of € 108 million in 2005 and increase to € 594 million in 2009.

⁴ Since 2004 nearly every Internet-enabled mobile phone made by Nokia has incorporated digital rights controls set out by the Open Mobile Alliance, a group of hardware and software companies and telecommunications operators, which are intended to thwart unauthorized use of commercial content.

- Question 4:**
- A. Do you agree with the above assessment on the growth of digital and technologically protected sales?**
 - B. Are there other elements that you consider relevant?**
 - C. In your opinion, which system can provide better remuneration of right holders –licensing models through digital sales or the copyright levy system?**
 - D. Do you think that the current levy system has an impact on the development of digital sales in Europe?**

5. COPYRIGHT LEVIES AND THE NOTION OF HARM BASED ON PRIVATE COPYING

Copyright levies cannot precisely quantify the actual harm that is attributable to private copying. Copyright levies are an imprecise tool to compensate for alleged "economic harm".

As copying takes place in the private sphere, the manufacturers of equipment and media are not in a position to know or control what the consumer actually does with the equipment and media. They do not know how much is being copied or what is being copied. Copyright levies do not attempt to calculate either the number of copies that consumers produce or the exact copyright protected works or other subject matter that is being copied. Survey evidence from samples of the population is one method used. However, neither the proportion nor the scale of copying can be reliably assessed on this basis yet it is on this basis that liability arises for a debt where the debtors bear no relationship to those that may conduct the activity in question.

As there is no proven method for identifying harm, distribution of copyright levies to rights holders is not based on evidence of concrete harm to particular rights holders nor is distribution commensurate to the degree of use of their works or other subject matter, but on a variety of distribution keys that are inherently difficult to justify.

- Question 5:**
- A. Do you agree with the above assessment?**
 - B. Do you believe that private copying causes harm to rights holders and if so, how can this harm be reliably quantified?**
 - C. How can harm to rights holders be identified? Have situations been identified or account been taken of instances where no obligation for payment would arise on the basis that there is no harm?**
 - D. How can harm be quantified where the equipment or media has a dual or multifunction?**
 - E. Are there other elements that you consider relevant?**

6. THE CRITERIA FOR ESTABLISHING WHETHER A LEVY IS IMPOSED ON PARTICULAR EQUIPMENT OR MEDIA

There are considerable differences in the internal market with respect to the equipment or media on which copyright levies are due.

In some Member States, levies are imposed on blank digital and analogue recording media, but not on the equipment. These Member States have begun to levy hard disks or removable memory cards in equipment, on the basis that these are classified as dedicated "blank media" for the reproduction of copyright works. In some Member States, computer hard disks are exempted from levies, by law (Greece) or by rulings of the courts (Austria)⁵.

By contrast, in other Member States, levies are imposed on both equipment and media. For example, German collecting societies have successfully imposed levies on personal computers and printers⁶. In Germany, levies are due irrespective of the separate levied on accessory hardware (e.g. CD-or DVD-writers). Most recently, copyright levies have been claimed on mobile telephones (Austria, Germany and the Czech Republic) with integrated MP3 players or memory cards.

A trend is apparent: Copyright levies that were intended to be limited in scope and applied to consumer copying executed with dedicated copying devices such as cassette decks are now being increasingly deployed on digital equipment including multifunction devices such as personal computers, hard disks and even printers.⁷ Levies are applied to these devices in spite of the fact that personal computers, hard disks or printers are not primarily destined or used for copying works protected by copyright and related rights⁸.

There is no empirical methodology of determining whether copyright levies should be on the copying equipment or on the blank media that are used for copying or on both equipment and media. General interpretation of the relevant copyright statutes often

⁵ In the GERICOM case (4 Ob 115/05y), the Austrian Supreme Court decided on July 12, 2005, that no levies are due on PCs since the hard disk of a PC is not "dedicated" to the copying of protected works (this in contrast to the hard disk of MP3 players, which fall under the scope of levies in Austria).

⁶ In response to the demand by the German Writer's Collecting Society (VG Wort) to institute a copyright 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 copyright levies at its original proposed rate of €30. On 15/12/2005 the district court in Munich ruled that a €12 levy per PC should be paid.

⁷ 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.

⁸ 69% of Internet users have used their computer to play digital music files *Digital Music Usage and DRM: Results from an European Consumer Survey* May 2005 <http://www.indicare.org> Nicole Dufft, Andreas Stiehler, Danny Vogeley, Thorsten Wichmann.

forms the basis of the assessment of the equipment and media which may refer only to a device for the making of reproductions for audio or audiovisual fixations.

Question 6:

- A. Do you believe that levies should be applied to hard disks or removable memory cards as "blank media"?**
- B. Do you believe that these items are dedicated to the production of private copies?**
- C. Do you believe that the dedicated function of an item or recording device should play a role in deciding whether a levy is applied to it?**
- D. Do you believe that levies should only be applied to equipment and/or blank media that are dedicated to the production of private copies?**
- D. Do you think that there is an objective and verifiable standard on whether equipment or media is dedicated to the production of private copies?**
- E. What kind of legal disputes are you aware of concern the issue of whether certain recording equipment or other items are dedicated for the production of private copies?**

7. COPYRIGHT LEVIES AND CONVERGENCE

The current system of copyright levies as a means of compensation for rights holders does not take into account of the phenomenon of convergence. Copyright levies were born in the analogue environment and were applied to dedicated equipment and devices which had a copying function only. This logic has been extended to the digital environment where equipment is no longer dedicated to a single function, such as copying, but is dual or multifunction. Examples are the personal computers, printers, and more recently mobile telephones.

With convergence, the medium of delivery will become irrelevant to the content, as in time, all content will be delivered across platforms and devices and equipment. Convergence occurs when multiple products come together to form one product with the advantages of all of them. This type of convergence is very popular. For the consumer it means more features in less space, while for the creative industries it provides more channels of delivery for dissemination of copyright works. The announcement of mobile phones that incorporates downloaded music is an example of media convergence in consumer electronics.

Convergence can also concern the underlying communication infrastructure. An example of this is triple play where communication services are packaged allowing consumers to purchase TV, internet and telephone services in one subscription.

Advances in hard disc technology will mean that hard discs will no longer be "dedicated" but "copying" will become a ubiquitous function. In most instances, it will only capture a digital encoded or encrypted stream.

The distinction currently applied in levy systems between media, equipment and devices is already outmoded as it has not been adapted for the advent of the digital environment. The current system is therefore ill prepared for the advent of convergence and advances in hard disc technology. The current system of copyright levies relies on the notion that there is a distinction between transmission, consumption and post-consumptive copying, i.e. media and equipment which serve a single or dual purpose. In a convergent environment, the analogue-era distinctions between transmission, consumption and copying will merge and become meaningless. Copying in a convergent environment will be ubiquitous as all transmissions within the system require "technical copies" to be made. In such circumstances, it would no longer be possible to hold only liable the manufacturers or importers of equipment and media. The logic of levies would also have to be applied to broadband and infrastructure service providers including telecommunications providers that carry content. If this were to happen, levies would proliferate and there would be a serious risk of a backlash against the rights holder community and consumer welfare.

Examples of convergence

The PlayStation2 is not only a games console but also a CD player, a DVD Player and provides a connection to the Internet. Mobile phones increasingly incorporate digital cameras, mp3 players, camcorders, voice recorders and other devices.

Multi-play is a marketing term describing the provision of different telecommunications services by organizations that traditionally only offered one or two of those services (high speed internet, television, and telephone; and high-speed internet, television, telephone, and mobile phone services respectively).

Hard disc technology the personal video recorder (PVR) or digital personal video recorder (DVR) is a consumer electronics device that records television shows to digital storage. This makes the "time-shifting" feature (traditionally done by a VCR) much more convenient. Currently, many satellite and cable companies are incorporating DVR functions into their set top boxes, such as Sky+. The satellite signal is already a digitally encoded stream which is provided to subscribers. The DVR simply stores the digital stream directly to disk.

Levies that were applied to photocopiers or cassette decks are being increasingly deployed on digital equipment, multifunction devices such as personal computers, hard disks and even printers.⁹

⁹ 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.

Personal computers, hard disks or printers are not primarily destined or used for copying of protected content. On the other hand, affordable access to this equipment is essential for the development of Europe's digital economy and for narrowing the "digital divide".

The trend toward convergence would imply that more and more equipment or media could in principle attract levies (for example a coffee maker that is equipped with a memory card). But it is often difficult to determine if and to what extent such convergent devices are effectively used for the production of "private" copies.

Table: Equipment levies¹⁰ in different Member States¹¹

MEMBER STATES	AU ^a	BE	CZ	DE	EE	EL	ES	FI	FR ^a	HU	IT	LT ^a	LV	PL	SK	SI	SE ^a
Analogue equipment	X	X	X	X	X	X	X	X		X	X		X	X	X	X	
CD-writer& DVD-writer	X		X	X	X			X		X			X	X	X	X	
Computer Hard disk	^b			X	X			X				X	X	X	X	(X)	
Scanner	(X)			X	X	X	X	X					X		X	(X)	
i-pod/MP3 players	(X)		X	X	X	X	X	X	X	X	X	X	X		X	X	X
Set top boxes	(X)			X	X	X	X	X	X		X	X		X	X	X	X
Mobile phone with MP3 function	(X)			X	X		X	X		X		X				(X)	X

Notes:

^a There is a trend that hard disks integrated in equipment are treated as media and are therefore subject to a levy.

^b **GERICOM case:** The Austrian Supreme Court decided that no levies are due on PCs since the hard disk of a PC is not dedicated to the copying of protected works (in contrast to the hard disk of MP3 players which seem dedicated to copying protected works).

Question 7:

A. Do you agree with the above analysis?

B. Do you consider that multi-function equipment or multi-purpose of the sort described above should attract a copyright levy and if so which criteria should apply?

C. Do you consider that infrastructure services should attract a copyright levy in a converging world?

¹⁰ It is unclear whether Member States' legal provisions on equipment levies are based on Article 5.2a (reprography) or 5.2.b) of the Directive (or even on both). The private copying exception applies to all recording media on the condition that copy is made by physical person in the private sphere. The reprography exception applies only to reproduction on paper or analogue medium, but goes further than the purely private use, e.g., it also covers use in private sector, schools, and institutions).

¹¹ Based on the replies by Member States on Commission's questionnaire and where necessary on the basis of additional sources. These data are subject to constant changes.

D. Do you believe that there is a link between levies on multi-function devices (such as a computer hard disk) and the development of the digital economy?

E. Do you think that copyright levies on multi-function devices have an effect on new business models for the distribution of content?

8. THE INTERNAL MARKET AND DIFFERENCES IN COPYRIGHT LEVY SYSTEMS

There are considerable differences with respect to the application and rate of levies within the internal market. The differences in copyright levy rates management pose a significant administrative and logistical burden on the stakeholders that are liable to pay levies including consumers. It is also an issue for major online retailers that export cross border and are faced with further claims for levies especially between Germany and Austria.

Copyright levies can also act as an obstacle to the free movement of goods as equipment and blank media that attract a copyright levy can no longer circulate unimpeded between Member States – even if equipment or media in commerce have not been used as a means to produce copies. Copyright levies are requested when blank media and/or equipment are imported:

1. from a levy free Member State into a Member State that applies levies; or
2. as between Member States that apply levies, where rates differ and where the importing state imposes a higher levy rate than the state of export.

This has led to what is described as trade in so called "grey" imports aimed at avoiding levies altogether or avoiding higher levies ("copyright levy avoidance"). Copyright levy avoidance has become an issue for major equipment and media manufacturers who complain that collective rights managers ignore this issue in practice and expect only the major equipment and media manufacturers or importers bear the cost of copyright levies.

In short, there is selective enforcement. By way of example in a recent case in France, in an attempt to protect national markets from online retailers, a local distributor brought an action against online retailers from Germany and the United Kingdom that provided goods ordered online for delivery to consumers in France, alleging unfair competition.¹² While the retail goods were correctly held to be in free circulation, the online retailers in Germany and the United Kingdom were required to comply with advertising restrictions because of their sales to France.

¹² Tribunal de Commerce de Bobigny 15 September 2005 SA Rue du Commerce. The Court held that the principles of free movement of goods applied and that the online retailers were engaged in legitimate business and were neither importers nor manufacturers under the relevant law. There was no jurisdiction over the online retailers but they were nevertheless ordered to stop advertising aimed at consumers in France unless the "taxe SACEM" was mentioned on their website including the rate and product as failure to do so makes the consumer liable as the importer to pay the levies directly.

Question 8:

A. Should consumers that buy equipment or blank media from online retailers in other Member States for delivery offline be considered importers?

B. How can online retailers or consumers have certainty in cross border transactions that goods can be marketed and bought at a particular price?

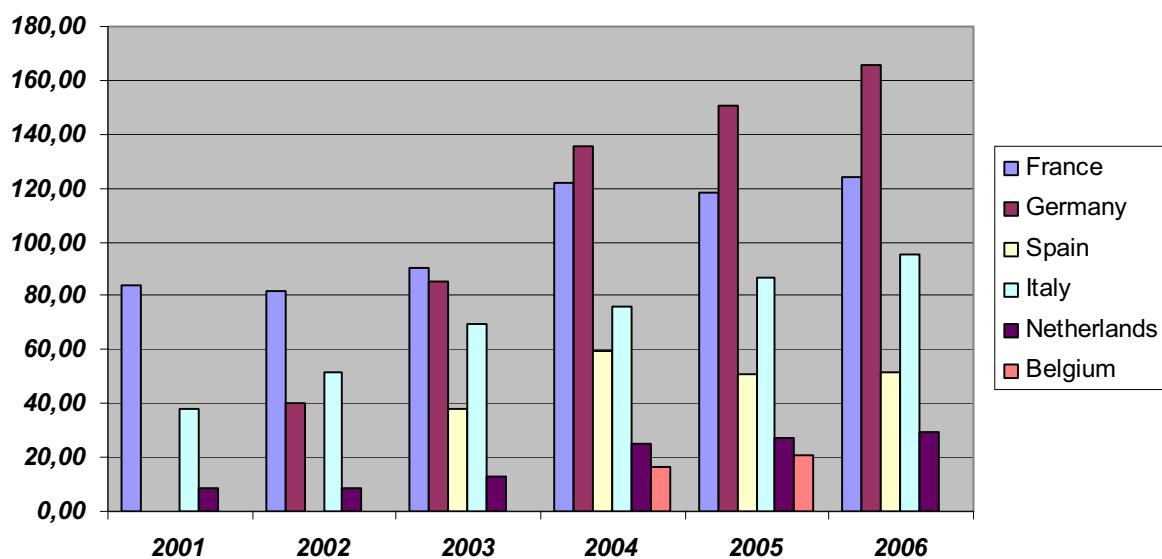
C. Do you consider that selective enforcement of copyright levies distorts competition to the detriment of major producers of equipment or media?

9. TRANSPARENCY FOR STAKEHOLDERS

The ICT industry, which owes the levies, and the collecting societies that administer the levies remain far apart on the actual levy amounts that are owed under the levy system:

- GESAC, speaking on behalf the musical authors' collecting societies, submits that its member societies only received € 130 million in levies in 2004.
- The Copyright Reform Alliance, speaking for several companies in the ICT industry, calculated "collectible levies" of € 500 million in 2001, 1.2 billion in 2005 and 2.0 billion in 2009.
- Eurocopya, which represents film producers' collecting societies claim that levy collections in five Member States, in 2005, amounted to € 454, 73 million.
- The Business Software Alliance representing the computer hardware and software industry claims that levies collected in the five States examined by Eurocopya in 2005 amounted to € 721, 26 million.

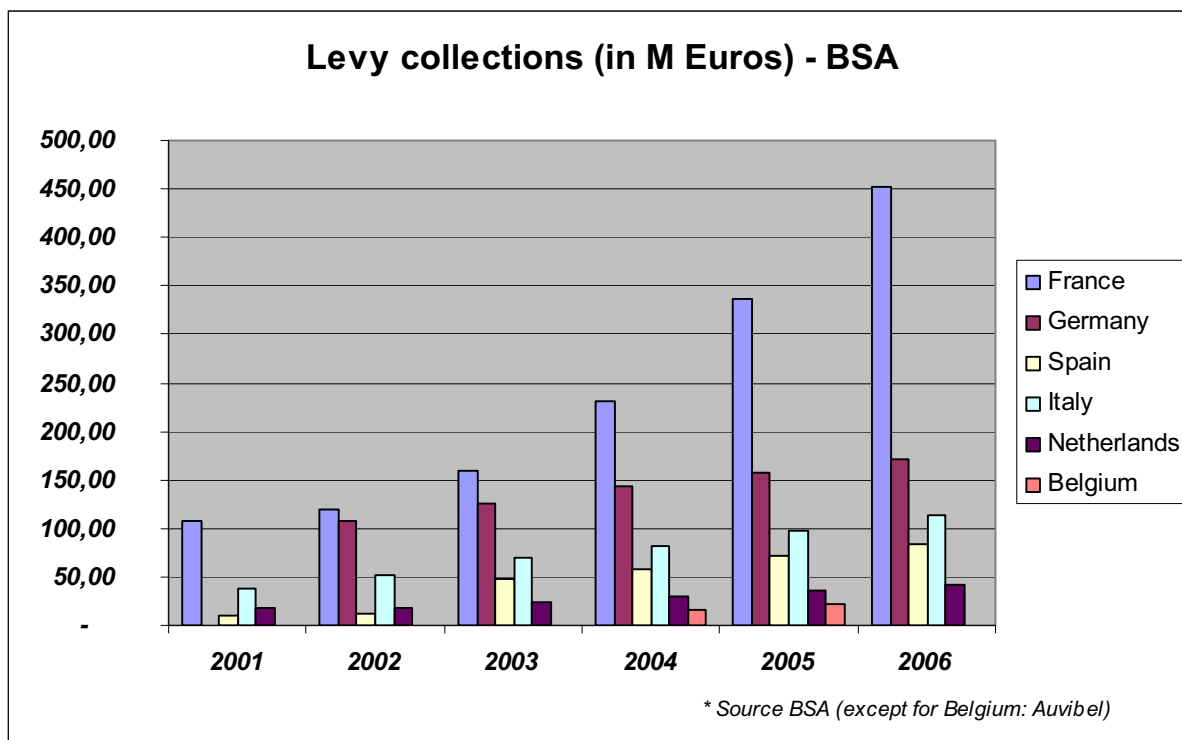
Levy collections (in M Euros) - Eurocopya



* Source Eurocopya (except for Belgium: Auvibel)

	2001	2002	2003	2004	2005	2006
France	84,17	81,41	90,54	122,01	118,51	123,77
Germany	-	40,50	85,07	135,21	150,29	165,40
Spain	-	-	38,20	59,72	50,80	51,49
Italy	37,84	51,92	69,46	76,09	86,65	95,47
Netherlands	8,40	8,78	12,83	25,44	27,47	29,63
Belgium	-	-	-	16,63	21,00	-
Total	130,41	182,61	296,09	435,10	454,73	465,76

* Source Eurocopya (except for Belgium: Auvibel)



	2001	2002	2003	2004	2005	2006
France	106,69	120,12	159,95	230,90	337,59	451,74
Germany	-	107,11	126,22	142,63	157,92	171,69
Spain	10,95	12,16	47,78	58,72	71,44	82,98
Italy	37,84	51,92	69,46	81,53	97,41	113,11
Netherlands	17,15	18,77	23,43	29,04	35,90	41,85
Belgium	-	-	-	16,63	21,00	-
<i>Total</i>	172,63	310,09	426,84	559,45	721,26	861,38

* Source BSA (except for Belgium: Auvibel)

Question 9:

- A. How do you explain the above discrepancies?
- B. Are these discrepancies due to the fact that copyright levies are being litigated in many jurisdictions?
- C. Are the above discrepancies due to the fact that enforcement of levies remained selective due to copyright levy avoidance?

10. STAKEHOLDER OPINIONS

Several sectors of the European economy are affected by copyright levies: (1) rights holders; (2) collecting societies; (3) the record and film industries; (4) the ICT industry (5) consumers of digital equipment and/or blank media. All of these stakeholders were consulted and submitted a variety of opinions.

10.1. Rights holders

Rights holders - authors, composers, performers, record producers, film producers and broadcasters- are the persons to whom the copying levies are distributed. In most instances, their views are expressed by collecting societies acting on their behalf. By and large, where collecting societies express views on behalf of individual rights holders, they state that rights holders are content for a variety of reasons (see below under Collecting Societies) to maintain levies as a source of revenue. It is fair to say that especially for those individual rights holders whose work is not commercially successful either nationally or Community wide, a revenue stream via the copyright levy has a perceived societal value –for the collecting society, the rights holder and in some instances for the Member State whose social obligations are alleviated, albeit to a small extent, by the levy payments.

The “solidarity” function of rights holders is often cited in support of collective management and this is nowhere more evident than in the **distribution** of copyright levies including the other purposes to which the copyright levy is applied. However, a copyright levy system which relies on the **collection** of copyright levies for the works or other subject matter of successful artists and thereafter bases **distribution** on keys which are not commensurate to the actual use of the works carries the inherent risk of fragmenting the solidarity function in the long term. This is true both at national and EU level and will become more acute once rightsholders are able to exercise greater choice in relation to their collecting society, its management structure and administrative fees and the operation of the reciprocal representation agreements amongst societies under which copyright levies are paid cross border.

Similarly, the absence of levies in certain Member States where rights holders exercise exclusive rights, most notably the UK and Ireland (either nationals of UK or Ireland or nationals of other Member States that are resident in the UK and Ireland), also threatens the solidarity function. The works or other subject matter of nationals or residents of these Member States constitute a major source of the copyright levy throughout the Community as a whole. Under the EC Treaty principle of non discrimination, monies collected on behalf of UK and Irish rights holders should be distributed to them irrespective of whether there is a similar system in those Member States. This has not always worked in practice to the satisfaction of either the rights holders or collecting societies in any Member State.

Individual rights holders' views are not always available save where there is a dispute with the collecting society. Disputes can be based on the amount due to particular rights holders from their collecting society or from the collecting society that collects on its behalf via a reciprocal arrangement with another society. In all cases, the disputes pertain either to the level of the payment including whether it accurately reflects the use of the works or other subject matter for which a copyright levy is due and collected; the amount and types of deductions made before payment; and whether the services are available to the rights holders from other Member States for the deduction that has been made.

Rights holders from third countries are obliged to receive national treatment under the relevant international conventions namely the Berne Convention in the case of authors and the Rome Convention (1961) for certain related rights holders. The

United States whose nationals often account for much of the repertoire that is used globally is not party to the Rome Convention and in practice this has led to negotiation either with collecting societies or at government level in order for US rights holders to receive their share of what has been collected.

10.2. Collecting societies

Collecting societies are involved in all aspects of levy administration.

GESAC and AEPO favour levies as it is a source of revenue for the collecting societies and the rights holders.¹³ These collecting societies believe that levies generate considerable income in an area where exclusive rights (to authorise or prohibit private copying) are difficult or too cumbersome to enforce.

GESAC's chief argument for the maintenance of copyright levies, at least at this stage, is the alleged lack of availability of DRMs.¹⁴ GESAC prefers a case-by-case approach in assessing whether a particular recording device attracts a levy or not. GESAC favours a system whereby bodies that set levies at national level have to take into account cases where DRM are actually applied. This would result in a gradual "phase down". GESAC believes that the status quo is the best means to disseminate works: individuals only have to pay "reasonable" levies. Systems based on an exclusive right are more expensive to the consumer and to the access to the works.

IFFRO states that exceptions provided for in Article 5.2(a) (reprography) and 5.2(b) of the Directive (private copying) sometimes overlap (e.g. natural person photocopying at home). IFFRO argue that its principle activity is not to collect copyright levies for private copying. In the area of reprography, IFFRO distinguishes four scenarios: (1) in case of reproduction of paper to paper DRM are not relevant; (2) in case of reproduction of digital media to paper DRM could play a role; (3) in the case of paper to digital, DRM play no role; (4) DRM can play a role digital to digital copying. The latter is now described as "digital document delivery services" IFFRO therefore argue in favour of the continuation of levy systems for reprography **and** analogue private copying (scenarios, 1,2 and 3) because these copies will not be affected by DRM systems.

AEPO questions the value of exclusive rights and exploitation of works based on DRM as authors and performing artists will not get their fair share, since they lack bargaining power vis-à-vis large content providers. AEPO is opposed to performers

¹³ GESAC, 27 February 2006.

¹⁴ But see the increasing significance of technology-protected digital sales as described in the 2006 IFPI Digital Music Report, p. 3: Some 420 million single tracks were downloaded in 2005, up more than twenty times on two years ago. And that excludes the entire business of music on mobile phones; a market which is not far behind music downloads in value. Together in 2005, these two new distribution channels took record company revenues from digital sales to an estimated \$US 1.1 billion globally, tripling in value compared to 2004. And there will be further significant growth in 2006. (page 4): 2005 was a landmark year for digital music, when online and mobile music distribution emerged as the industry's fastest growing delivery channels. Digital sales in 2005 accounted for approximately 6% of global music sales based on the first six months of the year. page 15: "(1) Legal online buying is catching up with illegal file-sharing" and "(5) Mobile music has huge mass market potential."

exercising their exclusive right by means of the application of DRM. The reason invoked is the expected immediate transfer of their rights to the producer. They argue that in many jurisdictions, levies are considered as rights that cannot be waived.

Other arguments advanced by collecting societies are:

- Collecting societies do not view DRMs as sufficiently secure, interoperable, and flexible to replace copyright levies and are reluctant to grant licences to those that wish to provide online services.
- DRM systems will, collecting societies fear, be operated by big producers only, which may not pass on to the collecting societies and therefore rights management based on DRMs may, therefore, not ensure that all rights holders get their "fair share".
- Collecting societies stress that the societal impact of phasing out of levies needs to be taken into account. An increase of economic efficiency in the administration of rights that a switch from copyright levies toward DRMs could entail has to be balanced against the societal impacts on those rights holders who rely on levies as part of their income or pension.
- Collecting societies that represent smaller and less successful rights holders have less incentive to take up digital tools. They take the position that collecting societies that represent the smaller rights holders need to protect copyright levies as a supplement of these rights holders' already precarious income. They believe that any proposal on policy in the area of levies would also have to address stakeholders that might be seen as "losers" in any attempt to create greater transparency and efficiency in cross-border administration of copyright.

10.3. Phonogram and film producers

Phonogram and film producers established collecting societies at national level in order to get their share of the levies collected.

In principle, phonogram producers would prefer, where possible, in the digital environment to license consumers through online content providers where necessary with the use of technological measures. This would allow for copying based on licensed use and help promote the sales of pre-recorded material. This would facilitate the deployment of new business models. Film producers are developing online business models and take the same position. Film producers receive the least under the copyright levies system. The US film industry has negotiated separately with EU collecting societies to receive a share of what is collected in relation to their works.

10.4. The ICT industry

The parties liable to pay the levies are the ICT industry. The ICT industry favors the strict application of Article 5(2)(b) of the 2001 Copyright 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 DRMs. They point to the fact that by 2011 37% of music sold will be protected by technological means against unauthorized copying.¹⁵ Technologically protected sales of music are expected to generate a turnover of € 108 million in 2005 and increase to € 594 million in 2009. These sales should be taken into account when calculating the copyright levies.

The ICT industry also points out that uncertainty and litigation over levies, their applicability and the rates, leads to considerable waste of financial resources. Equipment and hardware manufacturers, in particular, plead in favour of "phasing levies out" and replacing them by DRMs in the digital environment. They 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; and that they result in consumers' paying twice for online content, once when the content is purchased and once more when the digital recording equipment is purchased.

Nevertheless, this analysis should not neglect that reform of the current administration of copyright levies is pressing and that the overall competitiveness of the EU ICT industry should not be put at risk. The ICT industry deplores the alleged lack of transparency with respect to how levies are set and the basis for their calculation.

10.5. Online service providers

Online service providers are essential actors for fostering the take-off of EU online market and are dependent on wider and more readily available Community wide licensing. The current system of copyright levies might impede greater Community-wide licensing and more consumer-friendly business models for the provision of online services. This may be because of the following:

- Collecting societies representing all categories of rights holders grant licences to online content providers which do not properly take account of the use of DRMs by the licensed online content providers.
- Collecting societies prefer to keep the copyright levies as a form of statutory remuneration under national law rather than move towards more consumer friendly Community wide licensing models with online service providers. This has led to many online services being provided on a territorial basis only and consumers from other Member States cannot access a service in another Member State unless they can comply with certain requirements. This often leads to criticism of the online service provider which is the first port of call for consumers.

¹⁵ The ICT industry points to a study by Forrester Research.

10.6. Consumers

Although consumers know that levies exist (see the cases on parallel trade), they are usually unaware of the amounts of levies they are paying or to whom the levies are payable. The recent judgment in France against online retailers from other Member States that sell blank media or equipment into the French territory demonstrate that in the e-commerce environment, consumers run the risk of being deemed importers and therefore liable for direct payment.¹⁶ This scenario is likely to increase as consumers seek to achieve the best deal from online retail sales in cross border transactions.

Those consumers that are using legitimate download services are very surprised to learn that they are paying levies, which are typically built into the sales price.¹⁷ This in-built potential for "double compensation" reduces the acceptability of legitimate online music services.

Consumer acceptability is key to the widespread deployment of DRM in terms of pricing, availability and user friendliness. The rights of consumers in terms of data security and unfair contract terms are as relevant here as they are in the context of any other e-commerce transaction. However, as DRM concern the use of works protected by copyright and related rights of others in circumstances where the relevant rights are not subject to exhaustion, labelling requirements indicating what consumers can and cannot do with the acquired content. Furthermore, consumers also consider that all legally downloaded tracks should be playable on various devices and players ("interoperability"). The relatively recent introduction of sophisticated devices such as MP3players has led to the emergence of market leaders which link the device to a proprietary online music store. Whilst consumer acceptance of business models is key, the emergence of those business models also depends on the greater availability for Community wide licensing which is not limited by territory. Consumers should be able to access and use legitimate services from the territory of a Member State other than that where they are resident.

Moreover, consumers require legal certainty in relation to their activity. Whilst a degree of legal certainty can be achieved with a private copying exception which allows certain acts of copying for personal use, it is no guarantee against infringement for unlimited use irrespective of the source of the material.

Question 10: Does the above text correctly reflect the different stakeholders' positions?

¹⁶ See Tribunal de Commerce de Bobigny 15 September 2005 SA Rue de Commerce.

¹⁷ "I'm paying Apple iTunes for songs I can't copy, so why do I have to pay the government for something I can't even do?", "€3.28 extra per gigabyte?", IHT, 19 May 2005.