



EPC | European
Publishers
Council

COMMENTS OF THE EUROPEAN PUBLISHERS COUNCIL
on the
SECOND CALL FOR COMMENTS
'FAIR COMPENSATION FOR ACTS OF PRIVATE COPYING'

18th April 2008

Part 1 - Introduction and Summary

The European Publishers Council (EPC) is a high level group of Chairmen and Chief Executives of Europe's leading media corporations whose interests span newspapers, magazines, periodicals, books and journals, online database and internet publishing and, in many cases our members have significant interests in private commercial television and radio. A list of our members is attached.

In Part 1 of our Comments, we have made a number of observations on the issue of fair compensation for acts of private copying. In Part 2, we have commented on certain of the questions contained in the Commission's Second Call for Comments.

➤ *A period of upheaval and change*

The publishing and media industries are in a state of upheaval and change as they adapt to the digital world. Our members' primary focus is developing new digital content services and new business models, including both paid-for and advertising-supported, so that they can deliver or make available news, information and entertainment in whatever form and by whatever means their customers and users want. Delivery channels include all forms of electronic communications networks - Internet, Web, mobile and broadcast television (IP-TV, digital and terrestrial) - and fixed media such as CD-ROM and DVD. Our

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members' content is delivered to a range of digital devices, whether PC, mobile or multi-function devices.

➤ *Analogue and digital co-exist*

At the same time, analogue media continue to co-exist with digital media. The death of analogue has been long predicted but certainly in the world of publishing, the book, newspaper and magazine continue to form a vital part in the media mix and are likely to continue to do so for the foreseeable future.

➤ *Rightsholders' freedom of choice*

In this rapidly evolving environment, our members consider that the key to unlocking the potential of the digital content market, for the benefit of providers, customers and users is to ensure that rights holders retain the freedom to choose how to manage their rights, whether administered directly or via collecting societies or other agencies and whether through paper-based or machine readable permissions, with or without technical protection measures.

The use of digital rights management technologies makes it possible for rightsholders and their agents to manage rights in a way which is adapted to the digital world, by expressing licences and permissions in a machine-readable form. However, it is important to bear the following in mind when assessing the continuing role of levies and the issue of fair compensation in the context of digital rights management:-

- ⇒ The use of digital rights management tools is still at an early stage of development and adoption.
- ⇒ The assumption that technical protection measures ("TPMs") would be used invariably to enforce machine readable permissions is not correct. The development of "TPM-free" online music services proves this point. The same applies to many of our members' services.
- ⇒ Even where TPMs are used, there are many potential secondary uses of content which are not controlled by the primary (TPM controlled) licence.
- ⇒ The continued lifespan of analogue media means that private copying of copyright works under the exceptions for reprography and reproductions on any medium permitted under Article 5 2 (a) and Article 5 2 (b) respectively of the Directive 2001/29/EC of 22 May 2001 ("the Copyright Directive") - and not under contract or licence - will continue for the foreseeable future. As such, the case for 'fair compensation' through levies continues to apply.

➤ *Continuing role for a fair levy system*

For these reasons, EPC supports the continued operation of a fair levy system unless and until the case for a 'levy free' world, where digital rights management - with or without TPMs - is so pervasive that the need for 'fair

compensation' in the form of levies ceases to apply. Levies are a blunt instrument - a 'rough and ready' means of securing fair compensation and there are a number of anomalies in the way in which levy schemes operate between member states in terms of the equipment and media to which they are applied and the ways in which revenues are collected and administered. But in this period of upheaval and transition, EPC considers that levies have a continuing role to play as a means of providing fair compensation to our members for private copying of their works.

EPC endorses the Commission's approach to seek empirical evidence and to focus on ensuring a fair and consistent levy system across member states by seeking the elimination of disparities which may have an intra member state effect.

➤ *What levies do not cover*

Before dealing with the questions, EPC considers that, in the context of ongoing discussions of 'fair compensation' and levies, the following points are worth reiterating. They are clearly stated in the Final Report (March 2003) on "The Future of Levies in a Digital Environment" written by Professor Hugenholtz.

First, the payment of 'fair compensation' as required by the Directive is not intended to compensate rightsholders for acts of illegal copying. It applies only to *legitimate private copying*. Accordingly, any argument to the effect that the continued payment of levies is compensation for digital piracy - especially over peer to peer networks - must be firmly rejected.

Second, the exception in Article 5 2 (b) of the Copyright Directive expressly excludes private copying for "...ends that are neither directly nor indirectly commercial." Accordingly, levies do not represent compensation for any unlicensed copying taking place for such ends.

Part 2 - EPC's replies to the questions in the Second Call for Comments

EPC notes that many of the questions contained in the document are seeking empirical evidence. EPC members are not in possession of the statistical information of the kind sought by the Commission. As the Commission will no doubt be aware, it is the various collecting societies which are in possession of the relevant factual and statistical data and who will no doubt be able to assist the Commission in this regard.

Accordingly, EPC has confined its replies to certain of the questions which require an expression of opinion rather than of fact.

A. Main characteristics of private copying levy systems

2) *How could legal uncertainties as to which equipment is levied in different jurisdictions be dealt with?*

Article 6.2 of the Copyright Directive, dealing with legal protection against the manufacture, import, sale etc. of circumventing devices or services may prove a useful guide. EPC recognises that this is a very difficult issue. Whilst, the 'primary purpose' test may be useful in deciding which equipment should be levied, it is in practice difficult to apply in view of the fact that digital devices are increasingly 'multi-purpose'.

EPC considers that the solution to this problem requires close consultation between equipment manufacturers, rightsholders and their representatives.

3) *What would be the fairest method to determine the private copying levy rate that applies to digital equipment and blank media?*

It is not an easy task to harmonise rates within member states. This is not only because of the great differences between rates, the bases over which levies are calculated and the differences between the media and equipment to which levies are applied. Another significant - perhaps principal - reason is that in some cases a very high percentage of the gross amounts of levies collected are directed to cultural activities, including apparently pension funds. As a result, instead of levy income being applied to give fair compensation to specific rights owners for private copying of their works, it is used (or, at least, that is the impression given) as a tax instrument to finance cultural activities, which normally would be financed by governmental bodies (or by private bodies if that were the objective of that body, a foundation for example)

We believe it is of great importance to analyse and understand which specific types of equipment and media are used by consumers to copy protected content for their own personal use. For example, does it make sense to apply a levy on memory cards for photographic cameras, when 99% of all photos taken by consumers are family snaps?

We are therefore in favour of a detailed, independent study among consumers to find out what kind of content they copy and which equipment and media they use in doing so. Copied content may or may not be protected by copyright. If the end user of the equipment and media is the creator or producer or rightsholder of his own work it does not make sense for that person to pay to copy content which is his in the first place. This study could also help to ensure that there is a system which achieves fair distribution of monies collected to the several rightsholders of the content copied based on objective, evidence-based criteria

In order to have a fair system for private copying, we believe it needs to be a relatively simple and transparent one, so users know what and how much they are paying for and rightsholders have a clear understanding of the amounts that should revert to them. Levies based on the capacity of devices (measured in

gigabytes) seem preferable to a percentage of the sales price, as this latter option could lead to unfair competition. Why should the levy on a certain brand of product be different for another brand of the same product? It would seem easier to manage, control and audit a system with fixed amounts levied on media and equipment than one which is calculated on a percentage of the sales price.

End consumers who are professional users should be able to get a refund for levies they paid from the respective collecting societies in an easy way. This should also apply to exporters from one EU country to the other. If exports from one EU country to the other are to end consumers, the rate of the country of destination should be applied.

D Professional uses of ICT equipment

- 16) *How do private copying levies affect professional users (SMEs, others)?*
17) *How should collecting societies take account of professional users? Should professional users be exempted from payments in the first place or should such users be entitled to refund after payment?*

As mentioned above we agree with the refund route for professional users.

F. Consumer issues

- 21) *How should private copying levy schemes evolve to take into account convergence of consumer electronics?*

Please see our comments in reply to A 2).

Multi-functional devices combine functions of a photocopier, printer and/or scanner. They do not pay 3 levies, but get their own separate tariff. More importantly: all equipment that can be used to make copies should be subject to the levy.

At the same time, in the case of multi-functional devices (e.g. photocopier/printer/scanner and certain mobile devices), levy schemes should take account of the significance of the use of those devices for private copying as compared with other uses. The issue of applying levies to multi-functional devices is a complex one and that is why the gathering of empirical evidence about private copying is so important.

G. Double payment

- 22) *What are the main issues that consumers face when paying for digital downloads?*

It is important to recognise that the further uses of a downloaded copy beyond the authorised download may be restricted acts which, without authorisation, and in the absence of an exception, amount to infringement of copyright. Even if the first download is covered by a license, the permission does not necessarily extend to all further uses (such as printing out, scanning, storing, distribution of copies, etc). What is and what is not covered by the licence should be determined in each individual case.

23) Should licensing practices be adopted to take account of contractually authorised copies?

In the current state of the market, TPMs are in many cases not effectively used and we are also seeing the development of new services, such as in the music industry, where copyright content is made available without the use of TPMs. Both of these trends support the case, at least for the time being, for the continuation of a levy system to provide fair compensation to rightsholders for private copying.

H. Alternative licensing

24) If rightsholders decide that their works can be disseminated for free, how this should be taken into account when collecting private copying levies.

We think it is extremely important to clarify the meaning of disseminating works “for free”. Content may be available to users free at the point of use, but the content is never “free”. EPC members’ may use advertising-supported services but revenue must be earned directly or indirectly, otherwise there will be no content for users!

In particular cases, a rightsholder may choose to licence its content - whether under Creative Commons or any other licensing tool - for non-commercial purposes without charge - truly “for free”. If so, the issue of ‘fair compensation’ does not arise. In that circumstance, it would be true to say that the need for the levy on the equipment or media used to consume that content would be “double counting.”

However, this is not the case for commercial media enterprises such as those run by EPC members. Their businesses would not exist if they do not receive a fair return for the content they provide. In a digital environment, their businesses depend on the commercial exploitation of the rights which they hold in their works.

As we have already noted, the current state of the market is such that levies continue to play a role in ensuring that rightsholders receive fair compensation for the private copying of their works. But the overriding consideration for our members is ensuring their freedom to choose how to manage their rights. As licensed online services develop and mature, it is clear that the continuing nature and role of levy schemes will need to be kept under review and to change accordingly. We look forward to taking part in future discussions with the Commission.

European Publishers Council
18th April 2008

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