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Comments from the European Publishers Council

Submitted following the request for contributions from

Mr António Vitorino concerning private copying and reprography levies

31 May 2012

The European Publishers Council is a high level group of Chairmen and CEOs of leading European media corporations actively involved in multimedia markets spanning newspaper, magazine, book, journal, internet and online database publishers, and radio and TV broadcasting. One of our primary goals is to encourage good law-making for the media industry. A list of our members is attached.

1.0 Introduction

- The EPC welcomes the opportunity to contribute to the mediation process on private copying and reprography levies. For the purpose of this consultation, the EPC's contribution will be limited to the more general questions raised in the document.
- Increasingly digital distribution of content will become more and more sophisticated and offer easy to use licenses for consumers which take into account both the exclusive rights and the exceptions.
- When such digital consumption and distribution will start to outweigh – which is for the time being not the case in most publishing sectors – the analogue consumption, levies will most likely start to be phased out and right holders will have greater control of the use of their content through efficient technological tools.
- The internet inevitably brings with it the end of traditional ways of doing business. Nevertheless, this does not imply that copyright has somehow become an outmoded concept. There may be many who would like it to be so –

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and some with strong commercial interests that it should be so. But before we allow them to undermine what copyright has created, we should think very hard about what we would be losing through an end to levies, further harmonisation or indeed new exceptions. Instead we need to find ways of managing copyright that go with the grain of technology.

- The EPC submits that copyright is not an obstacle or a barrier to accessing content. On the contrary it is the solution to providing access while creating viable business models and pays those that invest in the content creation. The reward for this investment must first and foremost be organised by market led solutions responding to a consumer and market demand. When there is a consumer demand, markets naturally adapt and respond, offering appropriate licensing solutions that take into account the whole value chain: from the creative idea to the production, marketing, distribution and finally the enjoyment of the creation. This virtuous circle ensures that the media can continue to produce quality, trusted, entertaining content while at the same time contributing to creating value and growth.

1.1 Before going to the detail of the consultation, it can be helpful to clarify three points in particular regarding levies:

- Levies do not and can never compensate right holders for acts of illegal copying.
- Levies serve to compensate right holders for legitimate private copying and acts of reprography.
- Although publishers invest considerably in developing their digital business models, analogue media continue to co-exist with digital media. The mix of physical availability of books, newspaper, magazines and journals and the digital offer will continue to co-exist in the foreseeable future.

1.2 The call for contributions deals with two issues private copying levies and reprography levies.

- a) The first issue deals in particular with the right to fair compensation when a user makes a copy for private use (Article 5.2 (b) of the 2001/29/EC Directive), on which the right holders has no control over and, in the analogue world, have difficulties to authorise for practical reasons.

- b) The second issue deals with the exception in Article 5.2 (a) of the 2001/29/EC Directive concerning reprography on paper and on any similar medium on the condition that there is fair compensation to the right-holders. It should however be noted that the 2001/29/EC Directive states that existing national schemes for reprography do not create major barriers to the internal market (recital 37); EPC notes that this issue has not been addressed in the European Commission's roadmap in this area.

The EPC would like to recall that these two exceptions, as the other exceptions in the 2001/29/EC Directive are subject to the so called "three step test" in Article 5.5 of the Directive.

2.0 Methodology for setting levy tariffs

How could methodological coherence in tariff setting for private copying levies be achieved across the EU?

How could methodological coherence in tariff setting reprography levies be achieved across the EU?

On question 1 regarding methodology of setting private copying levy fees, as those Member States that have implemented a private copy exception use different systems related to calculating the compensation (taxes, levies etc) this has created a fragmented approach within Europe. The 2001/29/EC directive leaves the means on how to put a system of fair compensation into place up to Member States.

EPC supports the continued strive towards a fair levy system, unless and until the digital market has overcome the physical market, where digital rights management tool are so persuasive that the need for fair compensation in the form of levies ceases to apply. Levies are a rough and ready way of securing compensation and there are a number of anomalies in the way levy schemes operate between Member States in terms of equipment and media and how revenues are collected and administered. But while we are still in a mix of analogue and digital consumption of media services, levies continue to have a role to play in terms of providing fair compensation to our members for the private copying of their work.

The judgment by the European Court of Justice in the case C-467/08 Padawan v SGAE provides some guidance in order to favour harmonisation in Member States

applying the private copy exception, saying that the concept of fair compensation and fair balance should be interpreted in a harmonised way.

In terms of coherence in setting tariffs, it seems preferable to set levies based on the capacity of devices rather than a percentage of the sales price as the latter could lead to unfair competition. A way forward could be to encourage best practice between the authorities setting the tariffs to ensure some level of streamlining while seeking empirical evidence and elimination of disparities which may have an intra-Member State effect.

Regarding the second question, on reprography levies, the way in which Member States have chosen to deal with the reprography exception, and how levies in this field apply, can vary from Member State to Member State. It may be preferable to let Member States continue to operate according to their national scheme as the exception in article 5.2 (a) of the 2001/29/EC Directive does not specify the beneficiaries or the uses, but has left it up to the Member States to implement their schemes.

3.0 Cross border sales

How should levies be collected in cross border transactions?

How should double payment be avoided in cross border sales?

Regarding cross border sales, if exports from one EU country to another are to end the rate of the country of destination should apply. In other words the seller should be responsible to apply the levy tariff in force in the consumer's country. This solution would help to limit unfair competition.

To avoid the issue of double payment in cross border sales the possibility of refund should be available.

4.0 Determination of the person or entity liable to pay the levy

Who should be liable to pay private copy levies?

Who should be liable to pay reprography levies?

Regarding the question of who should be liable to pay private copy levies, guidance was also put forward by the above cited Padawan v SGAE case stating that *“it follows the fact the equipment or devices that are able to make copies is sufficient in itself to justify the application of the private copy levy, provided that the equipment or the devices have been made available to natural persons as private users”*.

This seems to narrow down the possibility to apply levies in an indiscriminate way, and notably for equipment that is sold to commercial entities, for commercial use.

In an earlier position from 2008 ([attached](#)), EPC stated that a refund possibility must be offered for professional users.

Regarding reprography levies as indicated in the first question related to methodology, Member State have chosen different approaches and schemes how to deal with this issue, and to which entities and organisations it applies, which would presumably correspond to the most efficient way in their country to deal with the issue. At any rate it is crucial for publishers that compensation for reprographic uses is duly paid.

5.0 Visibility of the levy

Should an obligation be introduced to display the levy on each invoice in the sales chain, including the consumer's invoice?

In the same way that the VAT is displayed on an invoice, one could argue that the amount of the levy should be displayed as well. Users seek transparency, and part of the difficulty in the levy debate is that it is often seen as an obscure and non-transparent fee. In the way the cable TV operators indicate the amount of the invoice which is dedicated to pay the right holders, similar transparent information could be available on invoices. Likewise right holders should benefit from the same transparency thus understanding the amount or amounts that revert back to them.

6.0 Private copying and reprography in the context of new digital technologies

In what way are levy systems affected by new business models and technological developments, do such developments allow right holders to control and license copying by private individuals to such an extent that it could have a material impact on the way private copying and reprography is dealt with at EU level ?

Increasingly digital distribution of content will become more and more sophisticated and offer easy to use licenses for consumers which take into account both the exclusive rights and the exceptions. When such digital consumption and distribution will start to outweigh the analogue consumption – which is for the time being not the case in most publishing sectors, levies will most likely start to be phased out and

right holders will have greater control of the use of their content through efficient technological tools.

Publishers must be able to choose freely between individual and collective management of their rights, and levies and DRMs will continue to be complementary.

As to the future, EPC is currently involved in a project called the ***Linked Content Coalition to create a framework for a fully interoperable and fully connected standards-based communications infrastructure. This will enable businesses and individuals to manage and communicate their rights more effectively online.*** This will lead to market led licensing systems with efficient micropayment systems handling both human and automated transactions. Once rights exchanges are fully operational and widespread, eventually one can imagine a day when levies are no longer appropriate. See www.linkedcontentcoalition.org for details.

European Publishers Council

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