

Q&A on private copying levies

1. What are copyright levies?

Copyright levies were created in the 1960s in some countries in order to compensate copyright holders for the supposed harm they suffered as a result of the private copying of content on analogue recording material and equipment, such as audio cassettes and video tapes and recorders. Nowadays levies are charged on all kinds of digital hardware equipment and devices (such as USB keys, mp3 players, blank CDs, mobile phones, computers, etc.) - anything that can potentially be used to make copies of music, films and other copyright-protected content.

2. Are copyright levies a source of remuneration or a method of compensation for private copying?

According to EU Directive 2001/29 article 5.2.b, levies are intended to compensate copyright holders for the private copying of their works. Collecting societies are still referring to 'equitable remuneration' and have not embraced the concept of fair compensation. Fair compensation and equitable remuneration are two totally different things: fair compensation relates to actual harm to the copyright holder, while remuneration is payment for mere usage.

3. Do private copying levies give a "right to copy"?

No. Saying that there is a right to make private copies is legally unsound, as evidenced by the jurisprudence in several Member States (e.g. the judgment from the French Cour de Cassation in the case *Mullholland Drive* of 28 February 2006). Private copying is a legal exception to the exclusive right which must be understood in a more restrictive way, that is to say private users who make copies within the exception do not infringe the exclusive right.

4. Are levies applied on devices or recording media which are not used for content storage or private copying?

Unfortunately, yes. The application of copyright levies is based on the crude presumption that consumers are making private copies on any devices which have a storage capacity or copying function. In reality, many consumers don't use all their devices to make copies of their music or video material. Legally, compensation through private copying levies should only be paid when it causes actual harm to copyright holders. Levies are often also unfairly charged on devices which are used for professional, rather than private purposes, in contradiction with the law and jurisprudence. For example, levies are charged on printers and mobile phones used exclusively for business purposes.

5. Is the copyright levy system functioning?

No. The copyright levy system is highly dysfunctional, unfair and opaque. Levy tariffs and scope vary from one Member State to the other, and that fact creates significant problems with double payments in the EU Single Market (since products are levied every time they cross a border). Another example of the failure of the levy system is that consumers end up paying several times to have access to the content they legally bought. Similarly every time a consumer buys a replacement device such as a new smartphone, and copies across the same content from their old device, they will pay a further levy, resulting in multiple payments.

6. Are copyright levies compliant with Internal Market principles?

No. The EU Internal Market is based on the principle of free movement of goods. The fragmented levy systems impose a form of tax on hardware equipment and devices, and an associated administrative burden for manufacturers, importers and distributors every time products cross a border, even if the same product has already been levied in another country. This aberration is in total contradiction with Internal Market principles. As different levy tariffs apply in different countries, even if only a single tariff is charged, it is important to know where the levy should rightly be paid (e.g. country of origin or destination) to exhaust further levy claims, but in practice this is clearly not working.

7. Why do some EU Member States choose not to have a copyright levy system?

Just like in the vast majority of countries around the world, several EU countries have decided not to implement a copyright levy system. The UK and Ireland take the view that copies made by users for their own private use do not cause any harm that requires additional remuneration in the form of private copying levies over and above the purchase price. Indeed, there is no justification for the fact that, for example, a consumer who legally buys a song should pay additional fees to the rightholders if he/she wants to copy it on another device that he/she owns. No consumer would agree to buy several originals of the same CD in order to play it at home, in the car or on a smartphone. Unfortunately this is one assumption which is generally used to justify copyright levies.

8. What are the amounts of “administrative fees” European collecting societies retain from the copyright levies collected?

Obtaining this information is particularly difficult, as only the collecting societies which are responsible for the collection of levies know the actual figures. In some countries though, recent scandals about mismanagement of funds by these collecting societies have shown that the cost of administration of the system can be more than the revenues distributed to artists, clearly demonstrating how inefficient a mechanism it really is. For example, in the Netherlands the cost for establishment and maintenance of a levy system has been estimated at 50million Euros, while the collected levies have not exceeded 40million Euros.

9. Are copyright levies preventing the development of innovation and new business models?

Yes. Copyright levies have a negative impact on new business models since levies are a kind of state monopoly, not subject to market forces, and so tend to increase prices uncontrollably and thus limit the attractiveness, competitiveness and development of business models based on new technologies. The obsolete levy systems hinder the establishment of a Digital Single Market within the EU, and they deter the EU from attracting and promoting digital innovation.

10. Is the notion of private copying relevant in the digital age?

No. For over ten years now, the digital shift has brought many changes to the way content is created and distributed, and new technologies have revolutionised consumption habits. At a time when consumers want to access their films and music anytime, anywhere and from any device through cloud services or streaming platforms, the very notion of private copying is obsolete.

11. Should levies be applied to cloud services?

No. It seems incomprehensible to extend to online services an outdated copyright levy system which is clearly not functioning in the offline world. One of the main advantages of cloud services is their global nature, therefore trying to impose territorial/national levy

systems on global services seems unfeasible and absurd, especially considering the principles of the Single Market. Cloud computing allows easier access to digital content for consumers and provides artists with new distribution models. In the digital era, consumers need to be able to access digital content from several connected devices at all times and from anywhere. European consumers and internet users would be the first victims of the imposition of levies on cloud services since prices for those services would most certainly rise. Applying the unfair copyright levy system to cloud services would result in unjustified triple payment by consumers (for the licensed content, for the connected device, and for the cloud service).

12. Is the calculation of copyright levies based on scientific data?

No. The calculation of copyright levies generally lacks transparency and is not based on any kind of scientific or methodical approach of assessing real harm from acts of private copying. Indeed in many Member States copyright levies are calculated by looking at the overall revenues needed (budgeted) by the collecting societies.

In France for example, collecting societies target revenues of around €200 million which is then simply divided into a list of tariffs per device in order to reach this total number. The French Conseil d'Etat (the highest administrative court) invalidated the tariffs fixed by the Private Copy Commission because they were trying to include illegal downloads. However, in a following decision, the Private Copy Commission fixed exactly the same tariffs as the one canceled by the Conseil d'Etat.

13. Are European manufacturers and SMEs affected by copyright levies?

Yes. European SMEs are directly affected by copyright levies. For example, small European manufacturers of products such as USB keys, based in countries with high levy rates like France or Germany cannot compete on price with manufacturers based in Luxembourg or the UK where there are no levies. Imposing levies on cloud services, as some in the copyright holders community demand, would have a major impact on European cloud service providers of all sizes, as any obligation to pay levies adds significant administrative burden and would significantly limit their price competitiveness in the global market.

14. Do copyright levies affect prices for European consumers?

Yes. The proliferation of hefty copyright levies on a wide range of devices often pushes up the cost of technology for European consumers. This is why consumer associations across Europe have been actively demanding the phasing out of copyright levies in Europe. In Spain for example, the consumers' voice was heard and the levy system was abandoned in 2011 and replaced by a State fund. As a consequence, prices for equipment decreased by over 12% in the period December 2011 - February 2013¹.

15. Are consumers informed of the fact that they are paying copyright levies?

No. Consumers are not made aware that they are paying copyright levies because they are not informed that this extra tax is included in the price of the equipment they buy. An obligation to inform final customers of the amount of the levy included in the price of the

¹ Source: INE and EUROSTAT HICP (Harmonized Index of Consumer Prices), "Audio-visual, photographic and information processing equipment".

products they buy would bring more transparency to the system. This was one of the recommendations made last year in the Vitorino report².

16. Do copyright levies benefit artists?

Not as much as they should. Collecting societies are coy about revealing how much of the levy revenues they gather actually get passed on to artists. The European Commission estimated in 2010 that together European collecting societies held EUR3.6 billion in undistributed copyright-related funds in their bank accounts³. Many musicians feel they don't receive a fair share of levy revenues, and they believe that the most famous (and richest) among them receive a disproportionately high share, to the detriment of lesser known artists.

17. Should manufacturers compensate artists for the revenues that producers are not paying them?

No. Some collecting societies claim that copyright levies are the only "remuneration" left for performing artists after they licensed their rights to the producers, because producers do not want to pay artists for "secondary use" of their artistic material. However the question of the remuneration of performers has no link whatsoever with private copying levies. This is a contractual issue between performers and other copyright holders such as music publishers and record labels, which should be settled outside of the debate on private copying levies. It is not for the manufacturers or consumers to "fill the gap" and pay one category of copyright holders deemed to be aggrieved by another group of copyright holders.

18. How are cultural deductions distributed?

In some European countries levy revenues are used to subsidize cultural pursuits. Information about the cultural deductions from the funds collected through the copyright levy system is only available from collecting societies and hasn't been made public in most EU countries which operate a levy system. In some countries these deductions represent a significant amount which is not directly redistributed to artists. For example in Austria, cultural deductions represent 50% of the total levies collected. In France it stands at 25%. In France a recent investigation by journalists⁴ revealed that these deductions from the levy pot have been used to pay for music producers' legal fees in recent legal battles with the musicians to whom the levies rightfully belonged. The musicians were in effect paying the legal fees of their opponents.

19. How long has the levy issue been debated in Europe?

In the past decade, the European Commission has organised several consultations (in 2006, 2008, 2012 and 2013) which helped gather a significant body of evidence on the failures of the copyright levy systems in Europe. However, little has been done to reform the copyright levy system which remains inefficient, un-transparent, and highly dysfunctional. This is illustrated very clearly by the growing number of legal disputes the levies system has been generating in recent years, both at national level and with the Court of Justice of the EU (CJEU).

² http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

³ http://ec.europa.eu/internal_market/copyright/docs/management/impact_assesment-com-2012-3722_en.pdf

⁴ <http://www.pcinpact.com/dossier/723-au-ministere-on-a-teste-la-transparence-de-la-copie-privee/2.htm>

20. Are there alternative systems?

Yes. The EU policy goal should be for copyright levies to be phased out and replaced by alternative forms of fair compensation based on proof of actual harm to the copyright holders, with Member States having complete discretion to decide what alternative compensation mechanism to implement nationally. One alternative is the State fund which was recently created in Spain. The European Commission should without further delay organise an open and public debate, engaging all stakeholders including consumers, manufacturers, content service providers and Member States to discuss the alternatives to copyright levies.