Response to consultation on private copying levies

31 May 2012

1. Methodology for setting levy tariffs

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

It is not possible to have a coherent approach to tariff setting if there is no coherence regarding the scope of private copying. There is also no possibility to achieve a coherent approach to tariff setting where there is legal protection for anti-circumvention technologies which prevent the enjoyment of the private copying exception. Trying to harmonise private copying levies without harmonising the copyright legislation and exceptions is fundamentally impossible.

The logic of private copying levies is that there is a specific harm to the creator caused by the legal owner of the content in question using the content in a way that they see fit. This assumption appears somewhat dubious on its own and becomes even more questionable when we consider that there are major question marks over whether or not the actual creators, particularly niche artists, receive an appropriate proportion of the monies collected in the EU Member States that currently collect levies. Moreover, in some Member States a part of the levies is redirected to fund cultural events i.e. it is specifically earmarked not to be spent on "compensating" the creators of the copied works. How can you legitimise a levy compensating specific harms to artists, but not redistribute the entire amount of the collected money to them?

On the other hand, while the harm caused to creators has never been clearly demonstrated, the damage to the equipment market in Europe is very easy to see, as is the exceptionally wasteful and costly collection of levies by and for collecting societies. For 1 Euro collected, there is a loss of 51.2 cents on the economy system. This is before we consider the fact that a significant percentage of the money collected through levies that does not reach the rightsholders, mostly due to administrative costs due to administrative costs of the collecting societies. Moreover, in countries where private copy levies exist, the functioning of those entities and the redistribution mechanisms lack transparency.

Private copying is a legitimate practice, if only because enforcing a ban on it would only be possible in a police state. Levying a tax on all consumers, even those who are buying equipment that will never be used for this purpose appears profoundly illogical. It becomes even more incomprehensible when the equipment in question is bought and used by SMEs and even independent artists for the purpose of creation and storage of their own content. A levy that has to be paid, but which pays for nothing. This issue was recently raised in the Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A Single Market for Intellectual Property Rights — Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe’. In this opinion in January 2012, the Committee stresses the unfairness of private copying levy as "private copying is an integral part of fair use". Moreover, the opinion underlines that "It should certainly not apply to hard drives used by businesses in the course of their industrial and commercial activities." (Point 1.5 of the Opinion) In its final point, the Opinion states that a tax levied in order to cover the cost of private copying is based on the presumption of guilt, and that instead "private copying is a legitimate practice which enables

the user to change media or hardware and which should be recognised as a right of the legal holder of the license for use under the concept of fair use". (point 4.6.7)

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

Reprography levies are part of the private copy levies and there is no reason that they are treated differently from other private copy levies.

2. Cross-border sales

1. How should levies be collected in cross-border transactions?
2. How should double payment be avoided in cross-border sales?

The question presumes that private copy levies should exist when, in fact, there does not appear to be any equitable solution to determine who should pay the levies. This is a problem in two aspects: firstly for the determination of who is liable to pay the levies and secondly for the determination of who should receive a compensation.

A solution that would avoid such problems would be to create a compensation scheme other than a system of private copy levies. A possibility would be to evaluate the alleged loss suffered by the rightsholders and the addition of this amount on the sale price of the work. This solution would solve both the issue of the compensation of the loss of creators and the question of who is liable to pay for this compensation. As a result, the problem of cross-border transactions and of double payment would be efficiently solved.

For example, this compensation system is already a common practice for academic/scientific books. They are targeted at students that do not have the money to afford them. These publications are bought by the libraries with a minimal increase in price to take into account the expected copying by students.

3. Determination of the person or entity liable to pay the levy

1. Who should be liable to pay private copying levies?

The reason for private copy levies is to compensate an alleged economic loss. This loss is supposed to be caused by private copying. If someone should pay a compensation, as the question suggested, then it should be the one causing the loss. The justification for the introduction of levies (i.e. intervention of the states) needs to be based on quantified evidence. However, it has never been clearly proven that private copying had any negative economic impact on authors and creators.

Since the Directive 2001/29/EC recognises the possibility of an exception for private copying, a levy imposed on exercising a right that is yours by law does not prima facie seem to be justified, unless there is a significant damage that can be quantified. Discussions on this alleged negative economic impact have been going on for a long time but the damage was never quantified. EDRI therefore believes that as long as the damage has not been quantified and not even clearly verified, no tax should be raised to compensate an unknown damage.

2. Who should be liable to pay reprography levies?

As it has been said earlier (cf question 1.2), EDRI believes that there should not be any distinction between reprography levies and any other private copying levies.

4. Visibility of the levy

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

If private copying levies are applied, levies should be displayed on each invoice including explicitly on the consumer's invoice. Transparency towards consumers should apply to create a trusted relationship with consumers. However, EDRI does not support a levy system, since it does not seem to be coherent neither
from a consumer's point of view nor when looking at the way levies are redistributed, nor when we consider the legal basis for the consumer's right to make private copies of legally obtained material.

5. Private copying and reprography in the context of new digital technologies

1. In what way are levy systems affected by new business models and technological developments? Do such developments allow rightholders 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?

It is argued that private copy levies create an incentive for rightsholders. However, private copy levies seem to hinder creativity and creation in the digital age more than they such creativity and creation. They skew the market by compensating rightsholders for economic losses that has never been clearly demonstrated. Private copy levies might even have a chilling effect on new business models including digital services.

New devices and services are being developed that allow the creation and commercialisation of works. These devices and services have their own models to remunerate creators. However, pressure is mounting for levies to be spread to cover such services, even when copying, particularly private copying, are not a main function of the services. Secondly, some emerging business models are based on licensing content and do not even envisage the possibility of private copies.

The question raises the issue of the impact of new technologies on private copy compensation, when the focus should be on how to promote innovation, research and creativity. We should avoid hindering new business models through a taxation system that will have an negative impact on new technologies.