



Private copying levies

The debate on private copying levies is part of the wider discussion on copyright, its adaptation to the digital age and its legitimacy in the eyes of the citizen. The implementation of this levy has been discussed for years within the EU but reform discussions are at a standstill and so far no solution has been found.

The private copying levy is a surcharge on the price of media capable of making copies. It is supposed to be redistributed to rights holders in order to compensate for an alleged loss suffered by them as a result of copies made under the private copying exception recognised by the legal frameworks in some Member States. In some countries, this levy may also be partly used to finance socio-cultural projects.

Private copying levies have one goal: to offset an assumed loss which results from lawful copies made for private consumer use. A conflation between private copying levies and a payment for any unauthorised use would have an adverse effect on the credibility of this levy reform, for two main reasons: first, it is impossible to justify that consumers who only make authorised copies or copies subject to exceptions should be penalised. Second, the payment of this levy would not make illegal activity legal, meaning that the consumer would pay but get absolutely nothing in return.

It is important that artists and creators get paid for their creativity. However, the use of this levy is controversial because it has helped create many obstacles to the achievement of a single market and serves to discredit copyright in the eyes of citizens. It is therefore necessary to think about the implementation and consequences of this levy.

A necessary improvement of the current situation

The enforcement of private copying levies differs from one Member State to another, thus disrupting the creation of the digital single market. There is also a significant risk of double payment and it creates an environment where competition is impaired.

Private copying levies rely on the assumption that a harm has been done to right holders as a result of private copying. Since the harm has not been clearly defined and proven, it is difficult to justify this levy. It is therefore necessary to identify and to conduct an independent study on the harm caused by private copying to artists and creators.

It is difficult to provide a coherent answer if the scope of enforcement of private copying levy is not consistent within the European Union. It is difficult to justify the existence of a private copying levy when some media legally prohibit any copying through digital rights management. The harmonisation of the private copying levy system is impossible without taking into account the harmonisation of copyright and its exceptions.

Finally, in order to have a functioning system, it is necessary to take into account social changes, changes in the use of content over recent years and to develop an approach that can adapt to future technological developments.

Mr Vitorino's report: a positive step

Mr. Vitorino's recommendations, presented to the European Commission last January, are a step forward in the discussions on private copying levies.

In his recommendations, Mr Vitorino acknowledges a change in the use of content. We are moving from an ownership model to a model based on access. We are witnessing a decline in the traditional private copying,

which challenges the system of private copying levies, since fewer and fewer traditional private copies are being made. The report emphasises the value of licensed digital services, recommending an exemption for such products in order not to cause harm to consumers by forcing them to pay both a levy and a licence, as it occurs under the current system. This simple measure could stimulate the introduction of new business models in the digital sector.

Mr Vitorino introduces a proposal to charge the levy to the final retailer and not the manufacturer, as it is currently the case in some European countries, since he believes this measure will avoid double payment of the levy. Although these recommendations tackle many controversial aspects of the private copying levy and are encouraging, it is regrettable that they only provide short and medium term measures and offer no solution in the long term.

The need to take into account market changes

The development of new technologies has greatly changed the way content is delivered and we are still at the beginning of this change. Every day, more access to content is provided through licensing systems. The artist is then paid through the licensing fee, so there seems to be no justification for the consumer to pay again for private copies. The work is not the property of the user, but it is made available via a licensing system. The consumer is then in a situation where s/he pays twice to copy content for private use when 1) the law recognises this right and the harm suffered by the creators has never been clearly demonstrated and 2) this right is recognised in the licence to which s/he has subscribed.

New uses not requiring an act of private copying grow, such as video on demand, catch-up TV or streaming. It is no longer necessary to record or store the content on a physical media held by the user. In such situations, it is difficult to allege a harm as private copying does not take place. Moreover, it would be counterproductive to advocate for a system that can not adapt to technological changes.

Transparency is essential

The possibility of obtaining fair compensation as a reimbursement for the use of works protected by copyright is provided by Directive 2001/29/EC. However, payment of this compensation is based on an assumption of a harm suffered by the authors and creators. But the harm has not been clearly determined or even demonstrated. What about the consumer's right to dispose of his lawfully acquired content, moreover, when the right to private copying has been recognised by the law? Furthermore, the private copying levy system today is opaque and it will be difficult to justify it as long as some transparency criteria have not been set.

If a system of private copying levies should apply, it is necessary to establish a relationship of trust with consumers and to clearly and explicitly display the amount of the levy. Transparency should also be promoted in the redistribution of the money collected. Although it is possible to know approximately how the amounts are distributed (the percentage distributed directly to the artists and the percentage used for the promotion of culture), it is nevertheless difficult to know on what basis this redistribution is calculated both for the separation between direct redistribution and use in culture, but also how the amount allocated to promote artists is redistributed among them. In addition, a large portion of these amounts is lost in the administrative costs¹. Redistribution mechanisms must be made transparent, otherwise such system loses legitimacy in the eyes of citizens.

Conclusion

It is argued that private copying levy is an incentive for creation. However under the current situation, it seems to be rather an obstacle to innovation. This system distorts the market by compensating economic loss that has never been clearly demonstrated, and appears to have a negative impact on new business models. The issue of the real impact of this levy on new technology must be addressed. It is necessary to take all these factors into consideration in any debate on private copying levy.

¹For 1 Euro collected, there is a loss of 51.2 cents on the economy system. ENTER Report - p.6 - http://www.ametic.es/CLI_AETIC/ftportalweb/documentos/migracion/media-Ou1-Informe%20Alternativas%20a%20Canon%20Digital_%20Ingles.pdf