



The Consumer Voice in Europe

Copyright levies mediation

BEUC response to public consultation

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Summary

BEUC strongly believes that the current system of copyright levies does not correspond to the needs of the digital environment. They are detrimental to consumers who have to bear the costs, while the divergence of national rules leads to the fragmentation of the Single Market.

In the short term, BEUC supports a reform of the current system; however, in the medium term copyright levies must be phased out as they no longer correspond to the new models of distribution in the digital environment.

BEUC calls for immediate EU action in order to address the following issues:

1. Clarification of the scope of private copying exceptions

- Business and professional use: the indiscriminate application of levies on equipment, media and devices clearly reserved for professional uses is incompatible with Directive 2001/29.
- Unauthorised reproduction: the payment of fair compensation is only due in cases of legitimate private copying, as permitted under the copyright laws of the Member States.
- Licensed copies: no private copying compensation should be due when private copying is governed by a digital download contract for content downloaded from legitimate online services.
- No levies for works freely distributed: no private copying compensation should be due if creators make their works freely available to users.

2. Definition of “actual use” of equipment and devices: To assess whether a levy shall apply, BEUC strongly advocates for the criterion of ‘actual use’ consumers make of each product. The European Court of Justice has confirmed that a link is necessary between the application of the levy and the deemed use of them for the purpose of private copying.

3. Definition of “economic harm”: Fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception. Furthermore, when the harm is only minimal there should not be a levy.

4. Visible fee: BEUC calls for a visible fee, with a clear breakdown of the copyright levy rate, to be indicated on the invoice at all stages of the supply chain and to be clearly indicated to the consumer. A visible fee should be displayed on the receipt, the price label in a shop and also on websites and electronic commerce platforms. Consumers have an undeniable right to know what they pay for.

5. Progressive phasing-out of levies: The more digital content consumers are able to acquire as part of licensing services, the less need there is for private copy compensation, as right holders will be directly and fairly compensated.

The European Consumer Organisation (BEUC) considers the current system of copyright levies to be outdated in light of digital technologies and the new business models for the distribution of creative content. The way in which copyright levies are calculated and managed, raises concerns as regards its compliance with the requirements of the Copyright Directive 2001/29¹ and necessitates urgent intervention at EU level.

BEUC welcomes the mediator's efforts to identify areas where EU intervention may be required. However, we are concerned that the focus of the mediation process is on the implementation of the current system, rather than on alternative schemes of fair compensation.

As clearly stated in our discussion paper², we call for a two-fold strategy: in the short term, the current system needs to be reformed; but in the medium term copyright levies must be phased out as they no longer correspond to the new models of distribution in the digital environment.

The current system of copyright levies is highly detrimental to consumers who bear the costs, while it has failed to fairly compensate creators and rights holders for acts of private copying. At the same time, the lack of coherence in its application across the EU has resulted in considerable legal insecurity, leading to fragmentation of the Internal Market and thus affecting Europe's competitiveness to the detriment of both business and consumers. BEUC believes that for the copyright levies system to continue to apply, considerable improvements are needed to ensure a transparent and fair system of compensation which is better adapted to the digital environment.

However, there is a need to look beyond copyright levies and examine alternative models of fair compensation.

1. 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 for reprography levies be achieved across the EU?

BEUC strongly believes that more coherence in the methodology used to set levy tariffs is needed in order to enhance legal certainty and ensure the current divergences in national rules no longer impede the establishment of the Digital Single Market. Copyright levies must be fair, predictable and based on clear and objective criteria. BEUC recommends a three-step approach:

1. Clarification of the scope of private copying exception;
2. Definition of "actual use" of equipment and devices;
3. Definition of "economic harm".

¹ ECJ Padawan ruling, C-467/08, Paragraph 59.

² BEUC Discussion Paper- Fair compensation for copyright protected material, X/079/2009 – 22/10/2009 would be good to insert a link here to the location of the paper on the website.

1 Clarification of the scope of the private copying exception

A clarification of the scope of the private copying exception should be the starting point. Fair compensation in the form of copyright levies should only be due for acts of private copying which fall under Article 5.2 of the Copyright Directive³.

❖ Business and professional use

The current system of copyright levies fails to distinguish between copies made by private users and copies made by professional users. However, such indiscriminate application on equipment, media and devices not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29 as stated by the European Court of Justice in the Padawan case⁴.

❖ Unauthorised reproduction

BEUC is concerned about the efforts by rights holders to increase the total amount of copyright levies to compensate for the alleged losses of their revenues due to unauthorized use of copyright-protected material⁵.

BEUC would like to stress that the payment of fair compensation is only due when consumers copy legally and is not intended to compensate creators and rights holders for acts of illegal copying. Fair compensation is due only in cases of legitimate private copying, as permitted under the copyright laws of the Member States. It goes without saying that fair compensation cannot be due for copies deriving from unauthorised reproduction and distribution. This has also been the conclusion of the Advocate General of the European Court of Justice in the *Padawan* case which explicitly pointed out that *"fair compensation within the meaning of Article 5.2.b of Directive 2001/29 is not aimed at compensating the right holder for illegal actions in connection with the unauthorized reproduction of works. There is only a claim to compensation in connection with private copying, provided that such copying is permitted according to the copyright laws of the Member States"*⁶.

❖ Licensed copies

In the digital environment, copyright works are increasingly being distributed subject to contracts which define the conditions of use of legally purchased content. In most cases, consumers will be granted the right to make a number of (licensed) copies without payment to creators and rights holders. Recital 35 of the Copyright Directive explicitly excludes fair compensation where the right holder has already received some kind of payment, while the ECJ excludes copies carried out with the permission of the author⁷. No private copying compensation should be due when private copying is permitted and governed by a digital download contract for content downloaded from legitimate online services. If the consumer has to pay a fee for the content, a copyright levy amounts to double payment.

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁴ ECJ Padawan ruling, C-467/08.

⁵ According to a study published by the Spanish Internet Users Association, levies are compensating not only the loss of rights resulting from private copying but even fully covering the loss of rights resulting from piracy, providing an extra-income amounting approximately 5 million Euros annually: <http://www.internautas.org/article.php?sid=1205>

⁶ Opinion of the Advocate General Trstenjak, Case C-467/08.

⁷ ECJ Padawan ruling, C-467/08, Paragraph 40: *"it is clear from those provisions that the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work **without his authorization**."*

❖ **No levies for works freely distributed**

In the digital environment, more and more creators opt to make their works freely available to online users, for instance in circumstances where payment has been waived, such as those of the open-access and non-commercial licensing models like that of Creative Commons. When a creator decides to distribute work freely, levies should not be due. The same principle should apply to works which have entered the public domain after their term of copyright protection has expired.

2. Definition of actual use

To assess whether a levy shall apply, BEUC strongly advocates for the criterion of 'actual use' consumers make of each product. Our position has also been confirmed by the ECJ, according to which "a link is necessary between the application of the levy and the deemed use of them for the purpose of private copying". The actual use encompasses not only the making of a copy of copyright protected material, but also the purpose and the use of the said copy.

Although the ECJ has ruled that it is not necessary to show that private users have indeed made private copies, this would only apply to equipment made available to natural persons for private purposes. This condition would require an assessment of the products in question, the potential harm (which must not be minimal) and the existence of a link between the product and the use, as reiterated by the ECJ. Once the devices have been defined in accordance with the harm criteria, the levy can be charged without it being necessary to individually verify whether the particular user is using the devices to make private copies or not.

BEUC is concerned about the tendency to apply levies to **multi-function** devices not primarily used for copying purposes. In the digital environment, equipment is now rarely dedicated to a single function, such as copying, but rather is dual or multifunction. This is the case with personal computers, hard disks and, more recently, with mobile phones which incorporate digital cameras, MP3 players, voice recorders and other devices. Such devices provide a great number of functions not related to private copying and should therefore be evaluated on the basis of their primary usage.

BEUC would also welcome the drafting of a **list of products** used for private copying and which should be subject to a levy. This will increase legal certainty and provide manufacturers with predictability when launching new products on the market. It will also reduce the risk of litigation and the retroactive removal of levies from products which have already been purchased by consumers.

As regards **new products**, the actual use of which has not been defined, it would be unfair to impose a levy on the basis of their similarity to existing products. Therefore, BEUC believes no levy should apply until the new product has reached sufficient market penetration to allow an assessment of whether it is used for acts of private copying or not.

3. Definition of economic harm

The main objective of copyright levies is to compensate for an assumed loss of revenue due to private copying. The term 'compensation' implies that levy systems are in place to compensate for the loss of revenue due to acts of private copying. As a result, the mere use of the devices for private copying should not trigger the application of levies. The ECJ has clarified that fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception⁸.

BEUC strongly believes that in order to measure such potential economic harm one must look at the different situations in which consumers copy and assess whether this particular type of practice amounts to a loss of sale for the creator.

Furthermore, when the harm is only minimal there should not be a levy⁹. BEUC has identified a number of private copying acts which only cause minimal harm.

❖ Format conversion and interoperability

Consumers make copies to secure interoperability by converting the file to another format or simply transfer the file from one piece of hardware to another, typically from a Personal Computer to a portable player. It would not be fair to expect consumers to buy the same album several times just to be able to use and listen to it on different devices. Consequently, there is no economic harm to creators and rights holders and no compensation should be due. Consumers should not be held liable for the lack of interoperability.

❖ Compilations

Consumers reproduce copyrighted material to make compilations with different songs and artists. Similar compilations would only cause damage to creators and rights holders if the same compilation was already in the market. However, more often than not, private copies do not compete with copies sold or licensed on the market, as consumers make compilations of the best of their own collection of copyrighted music. This practice is not in competition with the sale of CDs and therefore does not cause significant economic harm to right holders.

❖ Media used for computer back-up or private storage purposes

Consumers may use devices, such as USB keys or memory cards to store and save information. This is the case with back-up copies consumers make of content carried on their computers and personal servers in order to protect themselves from loss of their data in case of a computer breakdown. The primary purpose of back-up copying is to make copies of works purchased by copyright users in case the original copy is lost or damaged. In addition, (re)writable CDs may be subject to copyright levies, even when used for private storage purpose, such as when used for the storing of personal photos. Despite the ECJ ruling, BEUC considers that in both these cases, there is no economic harm to right holders and therefore there should be no levy at all.

⁸ ECJ *Padawan* ruling, C-467/08, Paragraph 40.

⁹ Recital 35 of the Copyright Directive 2001/29.

2. Cross-border sales

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

The current obligation upon manufacturers of having to pay the levy in the country of import and then requesting a refund in the country of origin makes cross-border trade more difficult than domestic transactions. The processing of having to pay the levy in the country of destination and then request a refund in the country of origin discriminates against imports as opposed to products sold domestically. Furthermore, the national refund systems vary significantly as well as the administrative arrangements necessary to obtain refunds¹⁰.

The current system constitutes a major obstacle to the development of cross border e-Commerce. In many cases, consumers are restricted from purchasing a range of products from another country due to claims by a collecting society for payment of a levy in the country of residence of the consumer, for products on which a levy in the country of the seller has already been paid¹¹. Such a system amounts to double payment.

BEUC contends that copyright levies should only be applied once - when a product is first placed on the market in the EU and should then circulate freely within the EU without additional copyright levies being applied. In order to ensure right holders in the consumers' country of residence receive the compensation, a clearing mechanism must be established among collecting societies. The forthcoming proposal on collective management is expected to establish strict criteria for all entities managing copyright and related rights, in particular with regards to accountability, supervision and transparency and should also deal with the management of copyright levies at a cross-border level.

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

- Who should be liable to pay private copying levies?
- Who should be liable to pay reprography levies?

Under the current system, the levy is charged on the manufacturer or importer of a device and then transferred throughout the distribution chain, without any margin for consideration of whether the specific device will actually be used by physical persons for private copying or by professional users. In order to address this specific problem, it might be more reasonable to impose levies upon retailers who are in a better position to assess whether the specific device will be used for private copying.

However, BEUC considers the question as to the liable entity for payment of levies as misleading, as it is based on the assumption that the levy is paid and absorbed by the manufacturer without any charge for the consumer. The European Court of Justice has made a distinction between the persons directly and indirectly liable to

¹⁰ European Commission , Background document, "Fair compensation for acts of private copying", Brussels 14/02/2008.

¹¹ In 2007 Amazon made a formal complaint to the European Commission regarding the copyright levies regime in Austria. The Austrian collecting society instigated legal proceedings against Amazon to pay the Austrian copyright levy for products purchased by Austrian consumers from Amazon's German website, despite the fact that the German copyright levy has already been paid in respect of these products in Germany.

pay the levy, noting that the entities liable to pay the levies are those who make the equipment available, as long as they can pass the levy on to the end-user who causes the harm to the right holder. Copyright levies will therefore be passed on to consumers irrespective of whether they are paid by the manufacturer or the retailer.

BEUC believes the main focus should be on reforming the current systems by the development of common methodology, the clarification of the scope of the private copying exception, the definition of actual use and the consideration of economic harm in the calculation of levies.

4. Visibility of the levy

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

BEUC calls for a visible fee, with a clear breakdown of the copyright levy rate, to be indicated on the invoice at all stages of the supply chain and to be clearly indicated to the consumer. A visible fee should be displayed on the receipt, the price label in a shop and also on websites and electronic commerce platforms. Consumers have an undeniable right to know what they pay for.

The mandatory introduction of a visible fee throughout the supply chain will improve the transparency of the copyright levies system, raise consumer awareness and improve compliance.

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

In what 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?

BEUC strongly believes that copyright levies as a form of compensation do not correspond to the needs of the digital environment and should be progressively phased out. The more digital content consumers are able to acquire as part of licensing services, the less need there is for private copy compensation, as right holders will be directly and fairly compensated.

Furthermore, the private copying exception should be applied in a manner which takes account of the availability and use of technological measures. Technical Protection Measures (TPMs) are still widely deployed allowing right holders to control the copies made within the private sphere. TPMs raise a number of concerns from the consumer point of view, in terms of access to content and interoperability. However, they enable the control and restriction of private copying.

In light of the emergence of new business models based on licensing and the availability of TPMs, it is no longer possible to justify the application of copyright levies, the objective of which is to compensate for acts of private copying which cannot be controlled and compensated.

We remain confident that the progressive phasing out of copyright levies would be beneficial both to consumers, creators and rights holders. Consumers would buy devices at lower prices and consume more legal digital content. Creators will receive

direct compensation from the licensing of their work for online consumption by a variety of business models. The removal of copyright levies would benefit the European economy by between €975m and €1880m per year¹².

END

¹² "Is there a case for copyright levies?, an economic impact analysis, April 2011, Oxera available online at <http://www.oxera.com/cmsDocuments/Is%20there%20a%20case%20for%20copyright%20levies%20May%202011.pdf>