

# Private Copying

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## What is private copying?

### **An exception to the reproduction right**

Private copying was born from copyright law adapting to the evolution of creative works' consumption. It is a modern tool, capable of adapting to current and future practices.

When the EU harmonised the list of possible exceptions to copyright in the EU 2001/29 Copyright Directive, it included the private copying exception - which already existed in many EU countries - on the condition that rightholders receive fair compensation. No harmonisation of any element of the compensation is provided by EU law (except some guidance in recital 35), so Member States continued to develop their own compensation systems. Almost all Member States which apply the private copying exception have introduced a system of levies on copying devices and media.

As an exception to copyright, it deprives rightholders of their right to authorise these copies. Therefore, any proposal to reintroduce private copies in the licensing system would necessitate deletion of the exception so that rightholders would be empowered to deliver authorisations. However, the SAA is not of the opinion that such a move would be beneficial to audiovisual authors and consumers (see below). The SAA supports the levy system for private copies.

- › Art 5(2)(b) of the EU 2001/29 Copyright Directive states that "Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: (...) (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;"
- › The [VG Wort CJEU ruling \(C-457/11 to C-460/11\)](#) clarified that the fact that rightholders' have expressly or implicitly authorised the reproduction of their protected work or other subject-matter and the possibility of applying technical protection measures (TPMs) have no bearing on the fair compensation owed.

The private copying system allows consumers to copy their music and audiovisual works from one device or multimedia carrier to another for personal use as much as they like without seeking the authorisation of the rightholder. It derives from the idea that it would be impractical for consumers to seek rightholders' authorisation each time they want to make a copy for private use.

The private copying system is a balance between the freedom to copy and rightholders' fair compensation for lost income opportunities, e.g. via the agreements they could have concluded if there were no exception.

The Padawan CJEU ruling (C-467/08) made clear that levies should be calculated according to the assumed harm sustained by rightholders by the private copying in question. In addition it stressed that whereas the harm of an individual copy is perhaps negligible, the harm caused by millions of copies is considerable.

### **A fair compensation**

The fair compensation is the condition for the private copying exception. It compensates creators' inability to enforce their authors' rights and the economic harm suffered by rightholders for the lost income opportunities. Such compensation is organised in most Member States via a system of levies applied to recording media and devices.

It is Not a tax - it is not collected by the State to supply the general budget and support public policy goals. The levies are organised by rightholders and their collective management organisations to compensate the harm caused by copies made outside the creators' control and thus without any possibility to request payment for them.

- › According to the [Padawan CJEU ruling \(C-467/08\)](#), the notion of fair compensation is an autonomous concept of EU law which must be interpreted in a uniform manner in all Member States, irrespective of the Member States' right to choose the system of collection (para 29).
- › As confirmed in the Padawan CJEU ruling (C-467/08) and the [Opus CJEU ruling \(C-462/09\)](#), the purpose of fair compensation is to make good the harm rightholders suffer as a result of unauthorised reproductions of their works.
- › Again, according to the Padawan CJEU ruling (C-467/08), it is consistent with the requirements of 'fair balance' to provide that persons who have digital reproduction equipment, devices and media and who on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it (para 50).

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## Main benefits

Private copying remuneration is a very important source of income for creators. It represents on average 5% of authors' revenues, with significant differences from one country to the other. In France for example, 179 million Euros in private copying levies for all rightholders were collected by Copie France in 2012. 47.3% of this amount was distributed to authors across all repertoires. SACD and Scam, two French

audiovisual authors' collective management organisations respectively collected 8.8 and 5.16 million Euros for their authors.

In a very uncertain environment for audiovisual authors, it is a reliable source of remuneration which is often invaluable during unpaid time spent developing projects.

Private copying remuneration operates in the virtuous economy of copyright which generates income distributed directly to authors. This remuneration helps authors achieve financial independence, stimulating their creativity and artistic freedom whilst allowing them to focus entirely on their art.

- › In 2010, private copying generated 648 million Euros in Europe, distributed among authors, performers and producers of musical and audiovisual works. WIPO and ThuisKopie publish annually an international study on private copying which details the products liable, the tariffs and the amounts collected country by country.

#### **Collective management of the fair compensation**

Private copying remuneration is a guaranteed remuneration for audiovisual authors because it comes directly from the collective management organisations (CMOs) and does not go through the contractual chain of rights which, in the audiovisual sector, can involve many intermediaries (producers, co-producers, international sellers, local distributors, broadcasters, DVD publishers, VOD services, etc.) which represent blocking points in the ascent of the remuneration to authors.

In most countries, the audiovisual private copying remuneration is distributed to authors, performers and producers of audiovisual works according to fixed shares (sometimes stipulated in the law), which guarantees that audiovisual authors receive a fair share (no less than 30% of the collections).

- › The CJEU ruling in the [Luksan-case \(C-277/10\)](#) clarified that the EU 2001/29 Copyright Directive could not be interpreted as allowing Member States to provide for a presumption of transfer to the producer of the right to fair compensation for private copies vested in the author (the film director in this case).
- › Collective management allows authors to negotiate in the best possible conditions their remuneration and guarantees that this remuneration benefits them and not other categories.

#### **Funding for cultural and social activities**

Audiovisual authors are also attached to the possibility of allocating part of the private copying remuneration collected for social and/or cultural purposes. Said possibility exists in most Member States where the exception has been implemented and some of them have even made it compulsory. 17 SAA members out of 25 apply cultural and social deductions which range from 2% to 50% of the private copying remuneration collected. Where it is not imposed by law, it is the decision of the creators' community of the CMO.

- › These funds contribute to the financing of social and/or cultural activities and circulation and breakthrough of authors and works. Out of 192 million Euros collected in France in 2011 in respect of private copying, 48 million were used for cultural actions, which represent support for 5.000 cultural events and initiatives. At a time when countries are cutting their public expenditure dedicated to supporting the cultural sector, these funds are essential for cultural activities to continue.
- › The CJEU confirmed in the recent [Austro-Mechana ruling \(C-521/11\)](#) on 11 July 2013, in a case regarding the Austrian law which stipulates that 50% of the private copying levies collected must be used for social and cultural purposes, that distribution of part of the private copying remuneration to social and cultural institutions to the benefit of rightholders is compatible with EU law.
- › The CJEU noted "that such a system of indirect compensation meets one of the objectives of the appropriate legal protection of intellectual property (...) which is to ensure that European cultural creativity and production receive the necessary resources to continue their creative and artistic work and to safeguard the independence and dignity of artistic creators and performers" (para 52).

#### **No impact on the cost of devices**

Even though the ones who are liable to pay the fair compensation, i.e. the manufacturers and importers of recording media and devices, can pass the burden of financing it on to private users, it is noticeable that prices of such products across Europe do not vary in proportion to the levy rates.

In Spain, the removal of private copying levies in 2012 has had no effect on the prices of the devices and media and allowed manufacturers and retailers to increase their profit margin. Consumers did not at all benefit from removal of the private copying levies. The cherry on the cake is the fact that the Spanish government is now thinking of reducing the scope of the exception for private copying in order to justify the very little amount of the fair compensation it put in place from 2012: 5 million Euros (in contrast to the 115 million collected in 2011) out of the State budget.

- › SAA and other Spanish and European right holders' organisations lodged a complaint to the European Commission against Spain for breach of the 2001/29 Copyright Directive.
- › The level of private copying levies must not compromise the commercial development of a product. However, European rightholders refuse a direct link between levies and the selling price of products, which would be set as a cap for these levies (e.g. a maximum of 20% of the sale price). This would conflict with the principle of fair compensation calculated on the basis of the amount of private copies actually carried out via these products.
- › The prices of devices seem to be more linked to commercial strategies and exchange rate policies of manufacturers and importers than to the level of the levies. A comparison of the prices of devices in the UK, where there are no private copying levies, and France proves it.

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## **Adapting the private copying system to the digital era**

Not just CDs and DVDs

Many accuse private copying levies of belonging to a bygone age of audio-cassettes and VHS but more copying for private use takes place now than ever before. The devices and media which enable or host private copies of protected works have increased, with storage capacities which have surged exponentially (new iPad of 128 Go, external hard disks of 5 To, etc.).

Consumers transfer songs and videos from computers to hard drives to phones to tablets to online lockers and back again in order to save and access their personal libraries whenever and wherever they want. All of these processes are undeniably acts of private copying.

- › In line with the principle of technical neutrality, copies made via cloud services (and other future digital services which do not yet exist) have the same purpose (private use) as the copies made by private individuals on their phones, tablets, etc. so should be included in the private copying system.
- › Applying private copying to certain cloud-based services means that copies made on those specific cloud-based services would be taken into account by usage studies which assess the harm caused.

### **New business models in the digital environment**

One of Mr. Vitorino's recommendations in January 2013 (licensed copies do not cause harm) suggests that all subsequent copies made of a work following purchase from digital services can be covered by licenses granted by rightholders to these services. He is therefore proposing to eliminate levies for "new business models in the digital environment".

This is based on a gross misconception of both the private copying system and the multitude of new digital services which provide access to protected works. Private copies cannot be licensed since they are covered by a statutory exception to copyright under the 2001/29 Copyright Directive. Therefore licensing and fair compensation for private copying can only be separate issues.

Moreover, if the private copying exception was questioned and private copies inserted into licences, the ones that would suffer most from such a change would be consumers and authors, the consumers losing their freedom to copy and the authors their fair compensation.

- › In practice, the authorisation, licence fee and commercial terms are negotiated by the holders of exclusive rights with each digital service during the licensing process, whereas fair compensation is collected through the levy system and distributed to rightholders by CMOs.
- › Mr. Vitorino's proposal derives from the flawed idea that digital services would allow rightholders to be compensated directly. In practice, only few rightholders or categories of rightholders grant licences to digital services. Other rightholders, such as audiovisual authors who transferred their exclusive rights to the producer for a lump-sum payment, do not have any direct relation with digital services and therefore, no possibility to be paid directly.
- › In this field, a huge advantage of the private copying system is that it corrects inequalities between rightholders and guarantees that each category of rightholders benefits from a fair share of the value.

### **Double payments**

Consumers should never pay twice for the same thing. Digital services should not license private copies when these are covered by an exception.

Furthermore, in the case where manufacturers/importers pay a private copying levy twice on the same equipment as part of a cross-border sale for example, then systems exist to ensure reimbursement of one of these payments. The CJEU ruled that levies are due in the country of residence of the private user since that is where the harm arises. The rightholders' proposal to introduce a single declaration point would facilitate declaration and payment procedures by manufacturers/importers.

- › During the 2008-2009 dialogue, under the aegis of the European Commission, rightholders and the ICT industry agreed on principles regarding export refunds and exemption schemes. In addition, they proposed that these principles be accompanied by means of audit and control of declarations and the information needed to ascertain the quantities of products subject to refund or exemption.
- › In line with the CJEU approach in the Opus-ruling (C-462/09), Mr. Vitorino concluded in his recommendations that in the case of cross-border transactions, levies should be collected only once, in the country in which the final user resides, since the harm suffered by the rightholders arises there.
- › The [Austro-Mechana-CJEU ruling \(C-521/11\)](#) clarified the country of destination principle. It was held that the obligation undertaken by Member States to pay fair compensation, when putting into circulation recording devices and media which could be used to carry out reproductions for commercial purposes and in return for a fee, or the private copy levy intended to finance it, may not be excluded even if a comparable levy has already been paid in another Member State. In such a case, it is up to the Member States to provide for reimbursement.

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## **An administration across Europe**

### **Liability of manufactures and importers**

The most efficient and cost-effective way to collect levies is to do so at the earliest stages of the sales chain, i.e. the manufacture or import stage. Shifting the liability to pay the levies onto retailers would render the system extremely complex and costly since this would considerably increase the number of those responsible to pay the levies (from 500 currently in France, with a small number responsible for the bulk of the sales, to approximately 20.000 according to Copie France) and the means needed to ensure billing and control systems (Copie France believes that it would have to deal with 40 times more information).

This prime responsibility of manufacturers and importers must go hand in hand with joint liability for all entities throughout the chain of sales down to the final consumer in order to avoid potential fraud and unfair competition. European right holders' organisations are willing to create a single European declaration point for manufacturers and importers in order to make the declaration process even less onerous.

- › The principle of joint and several liability of all players in the chain of sales was agreed between representatives of rightholders and the ICT industry during the 2008-2009 dialogue.
- › Mr. Vitorino's recommendation to shift the liability to the retailers was vigorously opposed by Member States, rightholders and the retailers themselves. Being largely linked to professional uses, Mr. Vitorino proposed a much better alternative: the introduction of ex ante exemptions (see below).
- › The proposal to create a single European declaration was put forward by European rightholders during the 2008-2009 dialogue, and agreed with the ICT industry. It aims to facilitate the implementation of the Opus-ruling of the CJEU (C-462/09). Via the European Central Point mechanism, distance sellers could submit declarations of sales of goods eligible to private copying levies at a single EU entry point, while the compensation would be invoiced and paid in the country of destination.

### **Professional uses**

Devices and blank media can serve other purposes than for the private copying of protected works. This should be taken into account when determining tariffs applicable to devices used to make private copies. In addition, there are cases where certain devices and media will clearly not be used for the purpose of private copying. We talk of 'professional uses'. In this context, exemptions and reimbursement systems should be in place to ensure that these equipment do not support levies. However, exempting any business from private copying levies would be excessive since equipment bought by companies can also generate private copies. The determining factor is the nature of the use, not the quality of the purchaser.

- › As recommended by the CJEU in the Padawan-ruling (C-467/08), professional uses should be excluded from payment of the levy, but not necessarily all purchases of professional users. Devices such as tablets or smartphones, despite being the property of a company, may well in fact be used by employees to copy protected works for private use. Recommending that private copying levies should apply exclusively to purchases by natural persons as private users would artificially reduce the scope of the private copying levy system.
- › Exemption and refund systems for professional uses should be designed at national level in consideration of the specificities of the Member States concerned.
- › The Austro-Mechana-CJEU ruling (C-521/11) confirmed that reimbursement schemes for the levies paid on devices that are not ultimately used for private purposes comply with EU law, as long as they are effectively applied and do not constitute an excessive burden for those who are entitled to reimbursement.

#### **Consistent definition of products subject to levies**

Leviable devices and blank media differ across Member States. Consequently, the same product can be subject to private copying levies in a Member State and not in another. Compensation systems should be in place for all devices and media whose value is increased by multimedia storage and playback features. Therefore, a consistent definition of devices and media subject to private copying levies in the respective Member States should be sought.

- › The SAA and other rightholders organisations proposed during the 2008-2009 dialogue that all products (devices and media) able to be used to make private copies of protected works should be eligible for the private copying compensation scheme, with a list of products established and regularly updated at EU level. However, the interruption of the dialogue by the ICT industry did not end in any concrete result.
- › The Vitorino mediation on private copying in 2012 was a missed opportunity since, despite suggesting a degree of harmonisation (such as regarding the definition of harm), Mr. Vitorino recommended Member State flexibility in the choice of devices subject to levies.

#### **The levy setting process**

European rightholders organisations agree that a quick and harmonised levy setting procedure should be developed across Europe. This would mean putting in place a European framework of definitions, principles and procedures to be respected by all Member States in the establishment of their levy setting process.

- › Rightholders and the ICT industry agreed during the 2008-2009 dialogue on the need for a quick decision-making process in every country with a tariff (provisional or final) decided and applied within 12 months of the date of introduction of the product.
- › Mr. Vitorino went further by proposing stricter time limits (decision re application of the levy within 1 month, application of provisional tariff within 3 months and final tariffs within 6 months).
- › Rightholders and the ICT industry also agreed during the 2008-2009 dialogue that tariffs should be based on actual private copying which is eligible for compensation, i.e. based on the estimation of the actual and future quantity of private copies made by the consumer in each category of product to be levied.
- › It was also proposed that actual and future private copying eligible for compensation should be evidenced through consumer behaviour surveys conducted (or commissioned) once a new product has achieved sufficient market penetration.
- › Finally, rightholders, ICT companies and consumers should be fairly represented and participate in a transparent tariff-setting process.

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## **Transparency**

#### **Consumer visibility**

Private copying levies should be clearly visible on all bills and contracts in the products' sales chain, including on consumers' invoices and till receipts. Consumers should be informed of the amount and destination of the levies and more generally the reason for this mechanism which compensates the freedom to copy they have thanks to the private copying exception.

- › All stakeholders agree on this point.

#### **Transparency of decision-making processes**

The levy-setting processes should follow clear and transparent rules and be made public whilst respecting trade secrets. Information on applicable tariffs, the methods of calculation of such tariffs, usage studies and other data used as a basis for such decisions should also be published as well as information on the decision-making body (composition, decision-making and participation rules) and records of meetings, agendas and decisions.