

## EUROCOPYA's contribution to Mr. Vitorino's questionnaire.

Eurocopya is the European association of audiovisual and cinematographic Producers' collecting societies in charge (notably) of Private Copy remunerations' management.

Private Copy is an exception to the exclusive reproduction right. It is part of the European "acquis". Since adoption of the 2001 Copyright Directive<sup>1</sup> and the implementation of private copying remuneration schemes by a majority of EU Member States, said schemes have been constantly challenged by the ICT industry. Eurocopya's position is that the European Commission's primary role is to safeguard the acquis and to take care of its proper enforcement.

In that respect, Eurocopya welcomes the mediation, and considers it as a double opportunity:

- an opportunity to improve the existing remuneration schemes so that they would better meet the Single Market expectations;
- an opportunity to enjoin the ICT industry to shift from its current European-wide conflictual attitude to a more productive dialogue and cooperation with the creators' representatives.

Furthermore, Eurocopya, as an association of collecting societies themselves representing European cinematographic and audiovisual producers, reminds that said **producers will always favor exploitation of their works based on exclusive licensing rights** (hereafter "exclusive rights"). Therefore, in line with its constituency's policy, Eurocopya does not consider private copy levies and/or collective management as an end in itself, but only as a mean for rightholders to be remunerated when exclusive rights cannot be exercised (for practical and/or economical reasons).

The present response to the Mediator's questionnaire only deals with private copy compensation *stricto sensu*, therefore excluding reprography levies.

**1. Methodology for setting levy tariffs:** How could methodological coherence in tariff setting for private copying levies be achieved across the EU?

Bearing in mind that "methodological coherence" cannot be achieved by full harmonization of tariffs, as long as some EU Member States (notably the UK and Ireland) do not implement any private copy exception (as such harmonization would necessarily drive tariffs existing in other Member States down to zero), it is Eurocopya's position that the level of tariffs should be left to negotiations between stakeholders in each concerned Member State. But improved methodological coherence can be achieved by building further on points of partial/conditional agreement as well as issues which were discussed during the previous 2008-2009 dialogue between Right holders, ICT Industry and Consumer representatives.

Areas where further discussions could take place in order to achieve improved coherence in the methodology for setting up private copy levies across the EU are the following:

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<sup>1</sup> 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.

- (i) Define better the scope of the private copy exception in the various Member states where such exception has been introduced.

The “perimeter” (or scope) of what is understood as “private copying” does vary between the various Member States where art 5.2.b of the 2001 Copyright Directive has been implemented.

As regards notably copies from illegal sources, Member States have different positions on the regime and associated remuneration applicable to copies resulting from illegal sources such as unauthorised P2P systems. Should however no agreement be possible on a harmonized position as regards copies downloaded from an illegal source, it is Eurocopya’s belief that this issue should here also be left to the Member States’ competence (“subsidiarity”).

As regards copies made from licensed source and/or DRM-protected content, Eurocopya does not pretend that contractually licensed copies made available to consumers through legal on-demand platforms should be remunerated through private copying remuneration schemes, as long as we speak about the downloading itself, which falls under the exercise of exclusive rights. Therefore, the first copy made in order to legally download copyright protected content (on a PC or directly on any other device) should not be considered as falling under the private copying exception and remuneration. What is much more contentious are the subsequent copies made for private use. ICT Industry representatives often advocate that such copies are remunerated in the price paid by consumers in order to acquire said content. Eurocopya, as well as other Right holders’ organization<sup>2</sup>, restates on the contrary that for those Members States where a private copying exception has been implemented, there can be no room left for exclusive rights (and corresponding remuneration) as far as private copying is concerned. The private copying exception, which is a permission to copy provided by the law, is incompatible with an authorisation to copy contractually granted by right holders: right holders cannot contractually authorise what is already permitted by the law. The same applies for subsequent copies “permitted” by DRM-driven technical protection measures: they are to be remunerated under the private copying exception in those Member States where such exception has been implemented.

As regards finally copies resulting from format- and time-shifting, it is Eurocopya’s position, as well as for other Right holders’ organization<sup>3</sup>, that such copies are significant sources of private copying and create harm to right holders (be it only because they substitute themselves to remunerated acts of “catch-up TV” for instance, as far as audiovisual private copy is concerned). When performed on legitimately acquired content and not resulting in circumvention of technical protection measures, it is generally not challenged that this type of reproduction acts fall under private copying. And as such, they should be compensated for (see below).

- (ii) Set clear guidelines to tariff negotiations in the various Member States where article 5.2.b of the 2001 Copyright Directive has been implemented, by addressing the following items:

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<sup>2</sup> See “Right holders’ joint submission for the private copying exception mediation process”, page 9.

<sup>3</sup> *Ibidem*.

- Confirmation of the principle that a compensation is due when a private copying exception is implemented in a Member State's law: as of today, some Member States indeed advocate (Luxemburg, Bulgaria) or envisage (UK, the Netherlands) that a private copying exception can be introduced in national law without the corresponding compensation. Eurocopya, together with other Right holders' organizations<sup>4</sup>, considers to the contrary that any private copying exception introduced in Member States' law according to art. 5.2.b of the Directive should be associated with the principle of "fair compensation", as provided under said article. As a consequence, "format-shifting" as well as "time-shifting" should clearly fall into those copies subjected to compensation.
  - The principle according to which the determination of the value of the compensation should take into account the remuneration that right holders would have received if they were in a position to authorize the use of the work should also be confirmed. Eurocopya agrees however that such principle should also be understood in consideration of the fact that resulting tariffs should not be set at a level that would impede product and market development of the relevant product.
  - The issue of provisional tariffs as well as the one of possible retroactivity of new tariffs need to be solved at EU level in order to ensure more legal and economical certainty for all stakeholders.
    - o As regards provisional tariffs, the "Padawan" ruling – whereby the ECJ states that the simple fact that media and/or equipment made available to natural persons as private users enables them to make copies is in itself sufficient to justify the application of levies – goes against the ICT Industry's traditional position according to which a usage study should be systematically performed as a prerequisite for the setting up of tariffs. The "Padawan" ruling allows for the possibility of setting provisional tariffs when usage studies are not yet available or even feasible (due to the insufficient developments of the market). Eurocopya, as well as other Right holders' organizations<sup>5</sup>, is ready to discuss the general framework and conditions under which such provisional tariffs could be adopted.
    - o As regards retroactivity, Eurocopya supports the principle of a quick decision-making process (see also (iii) below) and trade-off retroactivity against the reasonable certainty – be it notably through provisional tariffs – to have an applicable remuneration at the latest 12 months after introduction on the market of a new product eligible to private copy levies.
  - Tariffs should be based on actual private copying which is eligible for compensation, i.e. based on the quantity of private copies made by the consumer in each category of products to be levied. In order to implement this principle, actual private copying eligible for compensation should be evidenced through consumer behavior surveys conducted (or commissioned), once a new product has achieved a sufficient market penetration, jointly by the relevant collecting societies and ICT companies, and/or financed by public authorities. Such surveys should be designed in a manner sufficiently granular and detailed to measure and establish empirically the actual private copying taking place in the concerned EU Member State. These principles could be confirmed at EU level, in the light however of the above mentioned "Padawan" ruling whereby the ECJ states that the simple fact that media and/or equipment made available to natural persons as private users enables them to make copies is in itself sufficient to justify the application of levies.
- (iii) The decision-making process for setting-up levies (representation, recourse and transparency) could also be improved and harmonized at EU level. The principles agreed upon in the 2008-2009 dialogue

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<sup>4</sup> See "Right holders' joint submission for the private copying exception mediation process", page 10.

<sup>5</sup> *Ibidem*.

between Right holders, ICT Industry and Consumer representatives, could here be confirmed at EU level.<sup>6</sup>

## **2. Cross-border sales:**

### 1) How should levies be collected in cross-border transactions?

In the case of cross-border transactions, the importer is notably liable for payment of private copy levies applicable in the country of destination of goods eligible to such levies. Difficulties occurred in the Internal Market when cross-border transactions concerned sales made directly to a consumer localized a given Member States by distance sellers (websites notably) located in another country. In such cases, until the below mentioned EUJ “Opus ruling”, consumers were in general considered as “importers” and liable for payment of the applicable levies.

In such case, the distance seller (and not the consumer) should now be held responsible for payment of private copy levies applicable in the country of destination of goods eligible to such levies, as has been confirmed in the “Opus” ruling of the EUJ (C-462/09).

Eurocopya, as other right holders’ organizations<sup>7</sup>, is therefore supportive of new EU guidelines that should not only confirm the principles defined by said “Opus” ruling (application of the rule of the country of destination to cross-border sales) but also set the applicable measures necessary to enact said principles (i.e. set administrative rules and a “judicial path” for the enforcement of the “Opus” acquis).

In return, in order to facilitate the implementation of the “Opus” ruling, right holders could agree to facilitate distance sellers’ procedures by accepting declaration of sales of goods eligible to private copy levies to a single EU entry point (here above “European Central Point”), while the remuneration is invoiced and paid in the country of destination.

### 2) How should double payment be avoided in cross-border sales?

Reaffirmation of the principle that a levy is only due in the country of destination (final consumption) of the goods eligible to such levy, together with the implementation of above mentioned “European Central point” as well as practical mechanisms of exports refunds and exemption schemes regarding levies possibly collected on goods prior to their export to another country will avoid risk of double payment, if any.

Regarding exports refunds and exemption schemes, principles were agreed on in the 2008-2009 dialogue between Rightholders’ & ICT Industry’s representatives, and should be confirmed in an EU legal instrument, together with the means of audit and control of declarations and information needed to ascertain the quantities of products subject to refund or exemption<sup>8</sup>.

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<sup>6</sup> See “Right holders’ joint submission for the private copying exception mediation process”, page 6.

<sup>7</sup> See “Right holders’ joint submission for the private copying exception mediation process”, page 3.

<sup>8</sup> *Ibidem*: “Any distributor or retailer of products subject to a levy in a given EU and EEA Member State should be provided with the possibility to be directly refunded for the levy paid on such products when they have been exported from said Member State, subject to the possibility for the collecting society of said Member State to obtain, through regular declarations and/or audits from such distributor or retailer the necessary information to ascertain the quantities of products actually subject to levies that have been imported, put into circulation in the national market and/or exported.

Manufacturers or importers of products subject to a levy should be exempted from the payment of such levy in the country of manufacture or import for such products (i) directly exported by the latter without having been put into circulation in the national market, or (ii) delivered to a distributor located in the same country and directly exported by the latter, subject to the possibility for

**3. Determination of the person or entity liable to pay the levy:** Who should be liable to pay private copying levies?

As established by the EUCJ “Padawan” ruling, although final burden is to be supported by consumers (those physical persons realizing private copies), for practical reasons, entities liable for the payment of the levies should be those companies responsible for the first introduction of the levied goods into the local market: manufacturers, importers, and - in the case of direct cross-border sales to consumer - distance sellers (see our answers above to question # 2: in this latest case, distance seller should be held liable for payment of levies on goods eligible to such levies in the country where the consumer is domiciled). Levies paid by these companies should then be passed-on through the whole distribution chain down to the final consumer.

In order to minimize potential fraud and unfair competition resulting from non-payment of levies (when due), Eurocopya and other right holders’ organizations support the fact that all entities engaged in the chain of sales to the final consumer within a given country of products subject to levy in that country should, with the debtors who have supplied them, be jointly responsible for the payment of the levy, except where they give proof of having actually paid the levy to the entity that directly supplied to them the said products.<sup>9</sup>

**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?

Such obligation is indeed supported by Eurocopya as well as other rightholders’ organizations<sup>10</sup> and, to our knowledge, by ICT Industry representatives also. It is both a way to better inform consumers and improve control of the actual application of levies through the distribution chain of products eligible to such levies.

**5. Private copying and reprography in the context of new digital technologies:** In what way are levy systems affected by new business models and technological developments? Do such developments allow right holders 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?

The private copying exception is currently granted by law in several Member States. It is difficult to imagine - not to say irrelevant - that a contract could grant what is already permitted by law in those countries (see above Q.1 (i) - copies made from licensed source and/or DRM-protected content). New business models should therefore integrate exceptions where they are implemented by law.

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the collecting society of the country of import or export to obtain the necessary information to ascertain the quantities of concerned products that have been imported, put into circulation in the national market and/or exported.”

<sup>9</sup> See “Right holders’ joint submission for the private copying exception mediation process”, page 4:

- Applied levy tariffs should be separately indicated on all invoices and contracts throughout the supply chain and on final consumers’ invoices and/or receipts.

- The final consumer should be adequately informed of the purpose of the applicable copyright exception and of the levy.

<sup>10</sup> See “Right holders’ joint submission for the private copying exception mediation process”, pp. 4-5. Such obligation of information of consumers exists for instance in France (see « *Loi n°2011-1898 du 20 décembre 2011 relative à la rémunération pour copie* », article 3 § I.), and could be extended to EU level.

But having said that, private copy is not a right, it should remain an exception. And as said before, if exclusive rights can actually be implemented, such implementation should be favored, as it is so wished by audiovisual and cinematographic producers.

New business models and technological developments such as “catch-up TV” or “Cloud” based services have or may have a material impact on private copying, not so much in the way it is dealt with at EU level, but in the evolution such services may incur for private copying habits, and therefore, the evolution of the corresponding remuneration.

As regards “catch-up TV” (or TV-on-demand) services, corresponding rights are primarily if not exclusively managed by producers themselves through ad hoc individual licensing agreements with TV broadcasters<sup>11</sup>. And the more such services will develop, the more their “private copying” equivalent (“time-shifting” or traditional PVR copying) is likely to decrease.

As regards “Cloud” based services delivering services to consumers which may look like traditional private copying, the following distinctions and issues apply according to Eurocopya:

- First, the principle that the exercise of exclusive licensing rights should be favored when no exception to such exclusive rights exists should be reaffirmed and safeguarded. As said before, there is no right to private copy, and therefore no necessity to automatically extend exceptions to copyright (such as private copying) when copyright can be exercised.
- Such is the case for all “Cloud” based services which deliver cinematographic and audiovisual content, with the possible exception of cloud-based “personal lockers”, due in this latest case to the specific regime of limited responsibility which may possibly apply to operators who offer this kind of services to consumers (see hereafter). For the rest, Cloud is today a new mean to exploit protected works through streaming or downloaded copies (like for instance with “iTunes in the Cloud”). Here, the existence of individual acts of on-demand delivery of copyright protected content enables the right holders to be remunerated for such acts (through the right of making available), and therefore there is no need or necessity to cover possible corresponding copies by an exception to copyright such as private copying. Basically, what should continue to apply here is the principle already acknowledged before in the present contribution whereby copies made in order to legally download copyright protected content (on a PC or directly on any other device) should not be considered as falling under the private copying exception and remuneration. It is only the subsequent copies, if performed by the consumer himself from one media and/or device to the other (which will NOT be the case any longer with cloud-based synchronization systems like “iTunes in the Cloud”) which may qualify as private copies.
- As regards cloud-based “remote PVR” systems such as Wizzgo in France or – to take a non-EU example – Optus TV Now in Australia, whereby corresponding operators did not only offer distant storage capacities (like for personal lockers) but also a remote system of on-demand TV program

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<sup>11</sup> Some experiences exist however in some countries of producers’ catch-up rights managed voluntarily through collective management of corresponding exclusive rights (collective agreements with audiovisual distributors such as cable operators, IPTV and satellite platforms), like in Denmark for instance.

recordings, exclusive rights should continue to apply. As recognized by courts<sup>12</sup>, such services should be conditioned to previous authorization of right holders, and cannot benefit from a “private copy” (or, in the case of Australia, a “fair use”) exception.

- But cloud is also used by consumers to store/back up music and films copied from legal sources on a so-called “personal locker” (for instance services like “Drop Box”). Consumers rent capacity on cloud. The renting agreement made between the service provider and the consumer enables the latter to consider the rent capacity as his own, part of his private sphere. Such services, as long as they remain private (personal) (i.e. do not allow for sharing of the cloud-stored content with others), could be seen as equivalent to “traditional” private copying (it is just the storage capacity of the consumer that has been delocalized in the cloud). To that specific extent, cloud based personal lockers could be treated as an externalized –virtual– hard disk and contribute to the private copy compensation through a levy paid by the operator offering such services, in relation with the offered storage capacities and the use made thereof by consumers in general. Another option would be to clarify the fact that operators delivering such services cannot benefit from the specific regime of limited responsibility applicable to service providers offering hosting services (cf. article 14 of the Electronic Commerce Directive<sup>13</sup>), which would lift one of the practical barriers to the exercise of exclusive rights towards such operators.

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<sup>12</sup> See Court of Appeal of Paris, December 14<sup>th</sup>, 2011, as regards **Wizzgo**, and Federal Court of Appeal of Australia as regards **National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd** (<http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/59.html>)

<sup>13</sup> Article 14 – Hosting – of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')