

Stakeholder Consultation on  
Copyright Levies in a Converging World

June 2006

**General comments & Response submitted by EUROCOPYA**

**1. Presentation of EUROCOPYA**

Eurocopya is the international association of audiovisual producers' collecting societies which are in charge of private copy rights management in Europe.

Its statutory members are :

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**FILMKOPI (Denmark)**

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**G.W.F.F. (Germany)**

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**PROCIBEL (Belgium)**

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Eurocopya therefore expresses the view of the various European audiovisual producers whose rights are administered by their respective collecting societies, founding members of the organization.

Other collecting societies or organisations representing audiovisual producers, established in countries in and outside Europe where no audiovisual private copy remuneration system applies, or with whom no bilateral agreements have been concluded so far, are also associated to Eurocopya's activities.

Associated members of Eurocopya are : **ZAPA (Poland), FILMJUS (Hungary), INTERGRAM (Czech Republic), DACIN SARA (Rumania), SAPA (Slovakia), TUOTOS (Finland), COMPACT (United Kingdom), SCREENRIGHTS (Australia), CRC-SCRC (Canada).**

Eurocopya participated to the European Commission's High Level Group on DRM.

## **2. Preliminary Statement**

Eurocopya has had the opportunity to discover the draft staff working document issued by DG markt on 19<sup>th</sup> May 2006 -"Copyright levies in converging world"-.

The paper puts forward findings of the consultation that the DG is only presently launching - July 14th being the deadline for the interested parties to submit their positions.

Needless to say how strange not to say **unacceptable** this procedure is.

Eurocopya wants to emphasize the fact that the Commission's paper and the related consultation questionnaire are based on incorrect assumptions and responds only to the concerns of the ICT industry, which does not want to contribute to the creative industries, and therefore refuses to pay levies.

The Copyright Directive being today implemented, ICT industry is confronted with the resuming of setting up of levies in all concerned Member States. They bring the private copy issue at European level in order to influence the various undergoing negotiating procedures at national level.

Striking is the fact that those who are now challenging private copy levies are the same who fought during the 2001 EU Copyright Directive adoption process in order for the private copy exception to be maintained in the digital world, as they feared – at that time – that too much exclusive rights (and DRM's) would deprive electronic goods allowing for digital copy from their value. But now that the digital private copy exception has been confirmed in the Directive and in most EU member states, they refuse to pay for corresponding right holder remuneration...

### **The creative industries sustain the Lisbon strategy**

The creative industries are the basement of the Information society. Broadband networks, new services, digital devices need attractive contents. Their economic value is totally dependent on contents.

The Commission's paper ignores the creative industries and tackles the issue with the sole short term objective of the ICT industry in mind.

### **Levies remunerate the creative industries**

Creative industries need to be properly financed. Therefore, the common goal when analysing the private copy issue is how to maximise the creative industries revenues, how to organize and coordinate the different sources of revenues without fragilizing one source to the detriment of another one.

Levies are part of the creative industries revenues. They are part of the existing European Copyright law. The creative industries business models are build on the principle that each "exploitation" has to be remunerated, exploitations governed by exclusive rights and other ancillary exploitations governed by legal licences or collective agreements.

## The ICT industry refuses to contribute to creative content

Since the adoption of the 2001/29/EC directive, private copy exception is unceasingly challenged.

The reform of the levies is part of the 2006 European Commission working program.

The paper drafted by the Commission is an attempt to demonstrate the urgent need for a phasing out of the levies.

The paper reflects the well known opinion of the consumer's electronic industry. Thanks to the digital "revolution" the consumer's electronic industry has the opportunity to offer the consumers a full range of new media and devices dedicated among other functionalities to private copy.

In order to maximise their profits the industry does not want to pay the levies.

Therefore, they presented the private copy as an ubiquitous practice and the levies as an obstacle to the development of DRMs driven legal on-line services.

Even more, the Commission's paper suggests that the levies would oppose the Lisbon strategy and more specifically the I2010 strategy by deviating the investment of the industry from the development of DRMs and new on line services to the payment of outmoded levies.

The levies' goal is to bring to the creative industries their share of the revenues generated by the ICT industry when promoting private copies through the selling of numerous media and devices dedicated to that specific practice.

### Levies & DRMs

DRMs and levies are not to be opposed to each other. They are complementary.

With regard to their legal nature, the one (DRM) is a mean to implement exclusive rights (authors and neighbouring rights), the other (private copy levy) is an exception to said exclusive rights, subjected to compensation for right holders.

Copies which cannot be implemented through exclusive rights with the support of DRMs and which fall under private copy habits have to be remunerated through the levies.

Furthermore, one has to be pragmatic : a full DRM-driven market will never occur. A private copying playing field is a kind of "acquis" for consumers, as debates about copyright law in France or Sweden have proven.

Exclusive rights cannot in each case be enforced. In the digital environment, numerous sources of content are out of the DRMs control: Broadcasting<sup>1</sup>, copies made from legal downloads, copies from existing CD or DVDs, digital copies of analog works ("digital hole") ... : a huge stock of content will still be in the future subjected to private copy habits.

Finally, the degree of use of DRMs is regularly assessed when the levies are setting up. Therefore, impact of technical protection measures (TPMs) that would decrease copy habits will be taken into account in the level of said levies.

The same goes for DRM-driven copies made in application of exclusive rights (for instance on-line music downloads, or VOD services), which are not meant to be included in private copy levy calculations<sup>2</sup>.

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<sup>1</sup> To be noted that recently adopted French copyright law provides for a guaranty of audiovisual private copy from the TV source – see article 8 of said Law of June 30<sup>th</sup>, 2006, which forbids to include a DRM in TV broadcasting that would prevent private copying.

<sup>2</sup> To be noted here that some countries have even **anticipated the development of VOD services** – thus DRM-driven copies – in the calculation of private copy levies : see the French tariff on set top boxes and digital video

Therefore, levies will naturally adapt their level to the development of DRM driven copies. There is here no need to put the chicken before the egg...

### Levies and legal on line services

**The levies have no negative impact on the development of on line services.** Successful VOD services are operated in France, Spain or Germany, where private copying remuneration schemes are in place since a very long time. They are not less successful than similar services in place in the UK or in Ireland, where no such levies exist (*See NPA Conseil study on VOD services in 10 European Countries – May 2006 – submitted by Eurocinema & FERA*).

Development of VOD services depends on adequate broadband networks, reliable DRMs and market opportunities. Levies are not concerned, but will adapt naturally (if needed) to the level of actual subsequent private copies made (see above).

### Levies and convergence

Levies are part of the remuneration of the creative industries. They are not only a remedy for the market failure. They are today a specific element of national markets to be taken into account by the stakeholders exactly as other elements such as VAT, interest rates, currencies etc...

The digital environment and the ICT industry induce the consumers to purchase new media and devices. Private copy is not ubiquitous. It is a common practice to be considered as a kind of specific exploitation of a protected work. All copies have to be remunerated: through DRMs or through levies according to the different existing business models or according to specific actual situations.

The large majority of digital devices are today promoting private copying functionalities. Convergence leads to the situation where all devices have multifunction and are multimedia. Most of the devices are de facto a computer, the later being the central unit to manage among other functionalities private copies.

This has to be acknowledged at European level. There is no valid reason for not extending the levies to all media and devices dedicated to private copy – to the extent of average level of private copies made with concerned equipment or storage capacity, measured through reliable market surveys – so that the creative industries would get a reasonable share of the ICT industry revenues, a fair remuneration to compensate the exception to their exclusive rights.

For the rest, the consultation paper as well as the draft impact study of the Commission dedicate significant developments to the impact of convergence on distribution means. But these are totally irrelevant to the present issue of private copy levies, as the later are supposed to be applied only to storage media and – for some countries – equipment, and not to transmission processes (see article 5.1 of the 2001 EU Copyright Directive, which creates a specific unremunerated exception to exclusive rights for technical “cache” copies that are part of a transmission process)<sup>3</sup>.

### Levies and the consumers

Consumers can access rich and creative content from various sources: on line services, broadcasting, off line products. At home, to certain extent, within the scope of the exception, they have the ability to make copies for their private use.

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recorders with integrated hard disks, for which more than 50% of HDD's capacity has been excluded from calculations, as it was alleged by French satellite TV operators TPS and Canalsatellite to be used for VOD purposes.

<sup>3</sup> The French “Suguenot proposal” referred to in the Commission's draft impact study has ultimately been rejected by French Parliament, as being incompatible with international law.

Because the levies take into account the application or the non application of DRMs, the consumers do not pay twice for the same act of copying. For example a I pod is usually used for more than 95% for private copying acts and less than 5% for I Tunes downloads. The setting up of the I pod's levy will consider that figure.

iPod market figures clearly illustrate a more general phenomenon, which is that consumer acceptability is much higher for private copy than it is for DRM-driven copies (among other because of interoperability issues)<sup>4</sup>.

### **Levies and investment/Consumption**

The basic idea supported by the Commission is to say that the removal of the levies will stimulate additional investments in DRMs technologies and in consumption of on-line services.

It has to be emphasized that levies have no impact neither on consumption of on line services neither on investment on DRMs.

Usually the people who purchase the more blank media or devices are also the first customers of on-line services. The situation is not exclusive. The goal is to bring the Creative industry a fair remuneration for all kinds of uses of their protected works.

Levies are part of the rightholders remuneration. Levies together with the other rightholders' incomes finance the creative industries. Creative industries invest in creation and also in DRM's technologies. They cannot leave the protection of their works to the sole control of third parties. Creative industries are the basis of the Information society.

### **3. Response to the questionnaire**

The questionnaire drafted by the Commission is an attempt to demonstrate the urgent need for a phasing out of the levies.

The paper reflects the well known opinion of the consumer's electronic industry.

Thanks to the digital "revolution" the consumer's electronic industry has the opportunity to offer the consumers a full range of new media and devices dedicated among other functionalities to private copy.

In order to maximise their profits the industry does not want to pay the levies.

Therefore, they presented the private copy as an ubiquitous non valuable practice and the levies as an obstacle to the development of DRMs driven legal on line services.

The Commission's paper suggests that the levies would oppose the Lisbon strategy and more specifically the I 2010 strategy.

Needless to say that Lisbon, to the contrary, is a global strategy which should implement a win win situation for all parties at stake. Therefore, we invite the Commission to re-examine the issue of the levies in the light of all the parties at stake and not exclusively on the basis of the well known opinion of the ICT industry.

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<sup>4</sup> See debates in Norway, Sweden, Denmark, UK, France about Apple's Fairplay DRM-driven iTunes sales : <http://www.zdnet.fr/actualites/internet/0,39020774,39357458,00.htm>

## **Question 1 – What are copyright levies**

### **A. Do you agree with this description of copyright levies?**

No.

### **B. Are there elements that you consider should be added?**

The copyright levies do not exist as such but they are part of copyright legal framework which contains an exception to the exclusive right of reproduction. The levies are deemed to compensate the exception. Therefore, they can not legally be managed through exclusive rights implemented through DRMs.

The levies are an indirect mean of remuneration as many other rightholders means of remuneration. For example, when broadcasters acquire programs for their viewers, the later do not remunerate directly the rightholders.

The paper to that extend is rather confusing when it assesses at first that ICT industries support all the burden of the levies, and later emphasizes the fact that the consumers are those who pay too much levies.

Finally, it is suggested that “time shifting” could be a specific private copy habit not giving rise to compensation. Discussions during the adoption process of the 2001 EU Copyright Directive – where a specific non remunerated exception was suggested for “time shifting” by some member states, but was refused – clearly concluded to the contrary.

### **C. Do you believe it efficient that the debtor of the copyright levy is not the party that carries out and controls the private copying?**

Yes, it is efficient. Should the levies not exist, all copies made for private purposes would not be remunerated.

The group that carries out private copying are the consumers. They are invited to do so to a very large extend by the ICT industry which constantly proposes them new devices and media dedicated to copying. They pay the levies while purchasing blank media and equipment marketed by the ICT industries. Therefore, the system is not only efficient, but also fair.

## **Question 2 – Administration of copyright levies**

### **A. Do you agree with this description?**

No. This is a leading question.

### **B. Are there elements that you think should be added?**

The description is unfair. It provides a rather negative picture of collecting societies.

The collecting societies are indeed playing a key role in collecting and distributing the levies to their members, the rightholders.

They are non profit organizations acting on behalf of rightholders. They study the trends, and monitor the consumer’s behaviour in order to assess the proper level of levies.

Should the collecting societies not be involved in the process, each individual rightholder would have to collect its individual remuneration. This is unthinkable, even through DRMs.

Collecting societies are operating as an interface between all parties at stake.

They are indeed involved in the negotiation's process occurring for the setting up of the levies. The paper is trying to hold the collecting societies accountable for the disputes which the levies' setting up is giving rise to.

But the ICT industry is actually constantly opposing the introduction of levies on new digital media and/or equipment. The industry is in bad faith. The paper is responding to that bad faith. The collecting societies are not responsible of the permanent disputes. To the contrary. They are, with a constant market oriented approach doing their best efforts to propose reasonable tariffs which can fit the market.

Regarding cases of possible addition of management fees by the various collecting societies intervening in the distribution process, it is not proven that such practice is not efficient and justified by specific costs incurred by said distribution process. For example, adding up fees for collection and fees for distribution is not in contradiction with requested efficiency from rightholders, as all rightholders society usually put collection resources in common in order to seek savings (both fees are then lower than one single fee deducted by each collecting society setting up its own collection department). For the same reason, it seems justified that identification of foreign rightholders is more complex than identification of national rightholders : it is then more efficient to delegate such tasks to corresponding national society, and it can justify a more higher fee than the one applied to nationals.

Finally, levies being a legal license, they are at the end set up by National Public authorities. Deductions for cultural activities are part of the law, subject to the control of the States. Each Member State implemented its own regime, as this area falls under the subsidiarity competence of Member States.

**C. Are you satisfied with how the collection and distribution of copyright levies functions?**

The collections and distributions are done properly. But the system could be improved at the stage of the setting up of the levies.

New devices and/or media should be levied at the moment of their first introduction in the market and not few years later as it is most of the time the case, thanks to the ICT strong and permanent lobbying against new levies. When opposing the introduction of new levies, ICT is creating its own uncertainty. The delays required to introduce new levies because of ICT industry's own reluctance to negotiate fairly promotes legal uncertainty, fraud and unstable retail prices.

**D. Do you believe that rights holders who are (1) nationals of other Member States or who may be resident in another Member State other than that of which they are nationals; or (2) third country nationals receive a proportion of copyright levies that corresponds to the actual amount of copying of their works or other subject matter (such as phonograms of broadcasts) including in comparison to nationals themselves?**

Yes. To that respect, it is necessary to take into account the various legal frameworks. In some Member States the remuneration system is based on reciprocity for some categories of rightholders or on national treatment. Collecting societies distribute levies according to the applicable law and to actual (or approached) copying figures of each work. The European audiovisual markets are mainly national markets. On TV for example, national works scores are often better than international ones. This has a direct impact on the levies distributions.

**E. How can current distribution keys reflect the actual amount of copying of works or other subject matter?**

The collecting societies' core business is distributing royalties among their members. They have put in place secure and trustworthy tools and systems which manage the distributions. The distributions are based on precise data provided by ad hoc market surveys on private copy, which give an approximate but reliable and sound basis of the actual volume of private copies made in average on eligible media and equipment.

**F. Do you think that there should be greater accountability of collecting societies with respect to the application, collection and distribution of copyright and if so, in what form?**

The collecting societies' distribution rules and global operations are generally controlled by National Public authorities.

A greater accountability could be envisaged provided that it does not result in endless additional administrative tasks and costs.

**Question 3 – Distribution of copyright levies**

**A. What conclusion can be drawn from the Table included in the Consultation Paper with respect to the relationship between the levy collected and distributed and the administrative cost of distribution?**

Data provided are only dealing with the musical sector. Private copy concerns not only music but also film and other protected works.

However, costs incurred by collection and distribution of levies as shown by said data table seem reasonable. The approach in % is not always valid, as said costs are not necessarily connected to the amount put into distribution. If the amount is very low, the fixed cost of distribution remaining the same, the % can be higher.

Furthermore, unlike what could be deducted from provided table with regard to some countries such as France or Hungary, collection of private copy levies is always delegated to a single entity which collects on behalf of all entitled rightholders, providing therefore for lower costs of collection in the interest of all parties.

**B. What conclusion can be drawn from the Table included in the Consultation Paper with respect to the ratio of distribution at national level as opposed to distribution to other Member States?**

See Question 2 above.

**Question 4 - Digital Rights management**

**A. Do you agree with the above assessment on the growth of digital and technologically protected sales?**

Yes but DRMs are not becoming common place in consumers devices : true for mobile phones but not for music downloads or copy from TV programs for instance.

More over, beginning 2006 (18 weeks), the music on line sales decreased by 5.1% (Pali Research). Therefore one should forbid any simplistic analysis.

**B. Are there other elements that you consider relevant?**

The growth of new on-line services is not necessarily impacting the private copying habits. The on line services are progressively replacing some off-line protected works exploitation.

Further more, new on-line services are not exempted from private copying practices. For example, it is possible to burn unprotected audio CDs from purchased tracks. These audio CDs can be lent to family without any protection whatsoever.

**C. In your opinion, which system can provide better remuneration of right holders — licensing models through digital sales or the copyright levy system?**

Remuneration governed by exclusive rights cannot be compared with remuneration compensating exceptions which are governed by a legal license. The question has no merit but attest a full misinterpretation of the global issue. The point is that the rightholders should maximise their exclusive rights revenues and receive a fair compensation the private copies of their works as a secondary right of exploitation.

**D. Do you think that the current levy system has an impact on the development of digital sales in Europe?**

No.

The question seems to indicate that the on-line legal services would be less developed in Member States where a levy remuneration scheme is implemented. This is not true.

The I tunes service, for example, has not been launched in every country at the same period, therefore the penetration differs from one market to another.

Leading video on demand services are in place in France, Germany, Spain and Denmark, Member States where the levies remuneration scheme has been introduced in the 90's (see *Screen Digest* or *NPA Conseil*<sup>5</sup> surveys on development of VOD services in Europe).

In the Member States where no levies remuneration scheme has been introduced, the only fact is that the private copies are not remunerated.

**Question 5 - Copyright levies and the notion of harm based on private copying**

**A. Do you agree with the above assessment?**

No. The assessment responds to the common opinion of the ICT industry. This is to say that the levies are out of the blue, “le fait du prince”, the prince being the horrible collecting societies.

The paper seems to support the need of controlling what the consumers are doing/copying at home. This could oppose the privacy protection principle. The systems introduced by collecting societies to measuring private copying habits are not breaching the consumer's privacy protection since they are referring to global data and global – although precise and reliable – market analysis.

The setting up of levies is taking into account various parameters such as the degree of use of each specific media or device for protected works' private copying. What is copied and to which extend is provided by ad hoc market analysis used by collecting societies at the moment of negotiation as well as distribution.

**B. Do you believe that private copying causes harm to rights holders and if so, how can this harm be reliably quantified?**

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<sup>5</sup> NPA Conseil study on VOD services in 10 European countries – May 2006 – submitted by Eurocinema & FERA.

Yes. But the question once again is a leading one.

At this stage, it is although important to remind the recital 35 of the Directive which states that *one valuable criterion [among others] would be the possible harm....*

It is therefore not appropriate to consider the harm as the unique criteria or as the most important one. Is it necessary to quantify the harm?<sup>6</sup> Wouldn't it also be appropriate to consider the issue from another angle? Why not quantifying the revenues of the ICT industries generated by private copies and implementing accordingly a fair revenue sharing system between them and the content providers?

Here again the general approach seems to support the view that the levies are not founded.

This being said, the point is that the exception is a kind of "acquis". It causes harm from the moment that all the copies made are not properly remunerated. The creative industries, to be able to finance creation needs to maximise its revenues through primary rights of exploitation and secondary rights of exploitation. Instead of considering the harm, the Commission should equally consider the benefit of the consumers who can enjoy a private copying playing field for a symbolic payment when purchasing equipment and or media.

Would the prejudice be minimal in some particular cases? A practice such as the time shifting copying developed all over the European Union by 300.000.000 consumers would cause a minimal prejudice?

Time shifting has an impact on the value of free TV & audience. Time shifting has also an impact on other consumptions of works : DVDs, on line services, etc. On the other hand, what cannot be challenged neither is the fact that Time shifting (and therefore the corresponding consumption of copied protected works) supports the sale of a lot of sophisticated devices which deprived from said content & functionality would completely loose their attractiveness for consumers.

**C. How can harm to rights holders be identified? Have situations been identified or account been taken of instances where no obligation for payment would arise on the basis that there is no harm?**

See § B. above.

It is important to consider on one hand the total volume of private copying and on the other hand the total levies collected in a specific market.

One would immediately see that the compensation is very minimal. Thanks to the ICT industry which regularly introduces in the market new media and devices with private copy functionalities, the private copy practice is constantly growing. A recent paper published by Wired indicates that an iPod is 90% used for private copy.

**D. How can harm be quantified where the equipment or media has a dual or multifunction?**

Harm is not the sole criteria.

Where the equipment has dual of multifunction, the setting up of the levy takes that point into consideration and concentrates on the private copy functionality.

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<sup>6</sup> Preliminary results of surveys made in some member countries in order to assess such harm show very significant impact of copy habits and blank DVD sales on revenues arising from pre-recorded DVD sales. Generated harm is higher than the global level of collected levies.

Multi-functionality is actually promoting private copying. Private copying functionality is also an incentive to purchase one specific device instead of another one with less functionalities.

**E. Are there other elements that you consider relevant?**

The distributions of the levies are not based on harm but on the actual copies and the basic principle that all copies should receive a fair compensation/remuneration. Levies are ancillary rights.

**Question 6 - Criteria for establishing whether a levy is imposed on particular equipment or media**

**A. Do you believe that levies should be applied to hard disks or removable memory cards as “blank media”?**

Yes, to the extent of actual private copying uses made with said equipment and media.

Convergence leads to the situation where all devices are de facto a multifunction computer, the later being the central unit to manage among other functionalities private copies

**B. Do you believe that these items are dedicated to the production of private copies?**

If not dedicated, that are key instruments for private copying. Level of levies take into consideration the level of actual private copying uses made by consumers.

**C. Do you believe that the dedicated function of an item or recording device should play a role in deciding whether a levy is applied to it?**

From the moment a device includes a private copying functionality it should be subjected to corresponding applicable levy. The more products are involved in the remuneration scheme, the less the consumers will have to pay per unit.

**D. Do you believe that levies should only be applied to equipment and/or blank media that are dedicated to the production of private copies?**

No, if “dedicated” means used solely for private copy purposes.

If not used at all for private copy purposes, or only very marginally, said equipment or media should not be levied. But, because of the convergence and ICT today’s marketing approach, most of the device have multifunction. This is not a reason for excluding them from the remuneration scheme, to the contrary.

**D (bis). Do you think that there is an objective and verifiable standard on whether equipment or media is dedicated to the production of private copies?**

Yes. The setting up of levies considers at first the information provided by the industry itself: advertising, user’s guides etc.

**E. What kind of legal disputes are you aware of concerning the issue of whether certain recording equipment or other items are dedicated for the production of private copies?**

During the Copyright Directive adoption process, the ICT industry supported strongly the exception. Once the Directive adopted, from the day one, the industry disputed the compensation attached to the exception. The present exercise is part of the dispute which takes a particular mode in each relevant market.

## **Question 7 - Copyright levies and convergence**

### **A. Do you agree with the analysis under this heading set out in the Consultation paper?**

No.

Because of the methodology of calculation of the levies, which takes into account the specific share of copy corresponding to private copy uses, and not all types of uses, convergence and its consequences in terms of copying is properly taken into account in the current system of copyright levies.

The current levy system has also nothing to do with the notion of transmission (which is addressed by article 5.1 of the 2001 EU Copyright Directive, which provides for a specific non remunerated exception for technical copies that are part of a transmission process) or consumption (levy is due because of copying, not viewing, as is for instance the price paid for purchasing a CD or DVD, whether its content is later viewed or not). It is based on the idea that some media and devices allow consumers to enjoy copies of works outside the intended scope of copyrights at the time of purchase.

Excluding converging digital equipment from levies' scope of application is a move that shows the incapacity to acknowledge that convergence is not mutually exclusive with heavy private copying. EUROCOPYA also clearly challenges the paper's suggestion that levies are applied in a way that induces endless and exponential increase of collections. This position is based solely on BSA-Rightscom 2003 and CLRA 2006 surveys' alleged "findings", which prove to be full of clerical mistakes with regard to applicable remuneration rates<sup>7</sup> and market figures (see Question 9 below). Actual figures show a general moderate increase of levies which is coherent with corresponding development of private copy habits in EU countries.

### **B. Do you consider that multi-function equipment or multi-purpose of the sort described above should attract a copyright levy and if so which criteria should apply?**

Yes. The multifunction should be analysed together with the degree of use of the device for private copy purposes.

### **C. Do you consider that infrastructure services should attract a copyright levy in a converging world?**

No as far as private copy levies are concerned (not applicable).

The particular status of external storage capacities offered by some operators to on line services customers should however be further analysed.

### **D. Do you believe that there is a link between levies on multi-function devices (such as computer hard disk) and the development of the digital economy?**

No. Levies are not an obstacle to the development of the Digital economy. Strong creative industries will support a rapid development of the digital economy. Content is the raw material. It requires adequate financing. Levies are part of the creative industries' financing.

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<sup>7</sup> In 2003 as well as in 2006, said studies for instance used a rate three times higher than the actual rate in order to assess levies on recordable DVDs in France. For France, the 2003 Rightscom study therefore forecasted a total of collected levies that is almost 3 times higher (452 M Euros) than actual collections (circa 160 M Euros). The same clerical mistake applies to the more recent forecasts made in the 2006 CLRA survey (with a total figure of 248 M Euros for 2006) !

**E. Do you think that copyright levies on multi-function devices have an effect on new business models for the distribution of content.**

No. See Question 4, § D.

Levies to some extent are complementary to existing on-line services when they remunerate copies made from specific downloads. Levies are secondary rights of exploitation.

**Question 8 - Internal market and differences in copyright levy systems**

**A. Should consumers that buy equipment or blank media from online retailers in other Member States for delivery offline be considered importers?**

No (although some national legislations provide for such liability in principle). The party reliable for payment of the levy should be the foreign company selling media through Internet.

**B. How can online retailers or consumers have certainty in cross border transactions that goods can be marketed and bought at a particular price?**

Retailers should apply national law of their targeted market.

**C. Do you consider that selective enforcement of copyright levies distorts competition to the detriment of major producers of equipment or media?**

There is no selective enforcement specific to copyright levies. The “grey markets” are not only connected to the levies but to VAT and customs duties.

The collecting societies develop very important action to fight fraud and counterfeit. They do not ignore this issue but they cannot act as public authorities. They are private entities with restricted operation’s areas.

**Question 9 - Transparency for stakeholders**

**A. How do you explain the above discrepancies?**

The study undertaken by Rightscom in 2003 (as well as CLRA’s latter 2006 survey) is part of the general dispute conducted by the ICT industry. It has to be rejected because proven to be full of clerical mistakes regarding applicable levy rates and market forecasts (see above Question 7.A.). Said Rightscom 2003 & CLRA 2006 surveys also clearly try to confuse its readers by mixing the levies collected and the levies under dispute.

The only reliable sources of information are the collecting societies or the entities in charge of collection in the different Member States. Eurocopya therefore confirms the accuracy of the figures it provided (which concerned only collections on digital media & equipment, in order to be consistent with said Rightscom & CLRA surveys’ scopes).

**B. Are these discrepancies due to the fact that copyright levies are being litigated in many jurisdictions?**

Some levies are being litigated and many other are not yet implemented, the ICT industry disputing their setting up in the different ad hoc Commission at the Member States level.

**C. Are the above discrepancies due to the fact that enforcement of levies remained selective due to copyright levy avoidance?**

By definition, copyright levy avoidance (“grey market”) is difficult to assess.

Would the alleged discrepancies be explained by such avoidance – which is not the case, as discrepancies are as said before mainly explained by clerical errors in applicable remuneration rates –, it would then give the idea that the ICT industry - which financed the Rightscom challenged study - controls - not to say supports - the “grey markets”.

## **Question 10 - Stakeholder opinions**

### **Does the above text correctly reflect the different stakeholders’ positions?**

The collecting societies are the instruments developed by rightholders to manage their rights. Some rightholders decide to manage all their rights through collective management where some other decide to go to collective management in the sole cases where they cannot implement private or individual management.

Collecting societies are supposed to support their members’ interests, they are not competing with their members. Therefore, European film and audiovisual producers’ collecting societies represented by EUROCOPYA support development of DRMs, and are not opposing the move towards on-line services. But, as private copy levies can be compatible (and are actually complementary) to DRM-driven exclusive rights, that does not mean that said levies should be “phased out”.

Film producers consider levies as secondary rights of exploitation. Film producers receive their share under copyright levies system. Their share is defined by national law.

Film producers support a rapid introduction of reliable and consumer friendly DRMs. They consider levies as complementary to DRMs and they do not believe that the digital environment will put forward a “black and white” situation driven either by levies or by DRMs. The digital environment as it is the case in the analog world will permit an enforcement of exclusive rights outside the private sphere. Within the private sphere, levies will conserve a role to play beside other ways to remunerate the works.

Rightholders do not exercise their exclusive rights in a different manner in UK or in France. On line attractive services have been successfully launched in the two markets. Levies are in their opinion neither an obstacle to on line service nor a rough justice system born at the analog age.

All rightholders agree on taking into account the DRMs while setting up new levies.

Exclusive rights and ancillary rights are complementary. The same applies to DRMs and levies. Indirect remuneration and revenue sharing are common practice within the creative industries.

Digital economy is moving very fast. Private copy is today an practice which has to be remunerated. Levies strengthen the idea that content is not delivered for free.

Phasing out or phasing in? Will the ICT industry stop the promotion of private copy to the consumers?  
Are DRMs universal panacea?

The digital revolution is on track. We are approaching the end of the beginning. Let’s see what will be the outcome. Europe has a solid ICT industry regardless of the levies. Copyright law establishes a balance between the rightholders and the users. One should now concentrate on the reinforcement of the European content industries. That is the next goal on the agenda.