ScriptumLibre response to "Second Call for Comments on 'Fair Compensation for Acts of Private Copying'"

Who are ScriptumLibre?

ScriptumLibre is a not-for-profit organisation that produces libre (open and free) content and creates awareness about the economic and social meaning of free knowledge and culture for our society. ScriptumLibre fulfills both a protecting and promoting role. ScriptumLibre.org is the international branch of the Dutch Vrijschrift.org Foundation.

General comments on the questionnaire

The questionnaire is obviously based on the premise that copying levies are needed to compensate authors (and other rights owners). It focusses on the harmonisation and the execution of a levy system, before the question is answered whether such a system is justified at all and whether it is compliant with EU legislation.

Contrary to the popular belief, levies are not a compensation for illegal copying, but a compensation for private copies allowed by law. Is there any reason at all to compensate an author such as a composer once again if for instance the owner of a lawfully obtained CD makes a copy onto a MP3 player? Traditionally in copyright any "multiplication" was considered a "reserved act". But that rule stems from an era in which copying required expensive technology. In the digital era, the justification of a compensation of an author for non-commercial copies of lawfully obtained works for private use must be seriously questioned. We acknowledge that present treaties and statutes still are based on technological premises from a bygone era in which content was closely coupled with its medium. Any policy with ambitions for a strategy to foster Europe's competitiveness should take the realities of 21st century technologies into account. This includes asking the question whether the underlying economic reasoning for current laws and regulations still apply .

As regards the compliance of a levy system with EU legislation it should be noted that EU Directive 2001/29/EC obliges the Member States to create a system of fair compensation *in case* they allow home copies. There is no obligation to allow home copies, and some Member States indeed don't. A EU Directive on levies would require member states to allow home copies. If home copies are allowed, there are alternatives for levy systems in order to achieve a fair compensation for authors, such as subsidies from the general means.

It should be emphasized that EU Directive 2001/29/EC *only* allows levies for the purpose of compensation of private copies, where and when allowed: in the private sphere, by natural persons, for non-commercial ends, and only to the extent of a fair compensation. A pervasive system of levies on blank information media would violate the principle of proportionality as it would cover a plethora of applications of such media either not covered by copyright, or perhaps even disallowed by copyright. In addition to aforementioned issue of subsidiarity, there is the issue of rights holder who use so-called Digital Rights Management (DRM) technologies to limit the consumer's ability to use and/or copy protect. Any attempt to harmonise levies should take this into account and should prevent or at the very least limit DRM-using rights holders' claims to the proceedings of a harmonised levies regime.

Responses to selected questions

As a digital civil rights organisation ScriptumLibre is not directly involved with the execution of the

present levy system. Therefore we only respond and comment on questions related to policy issues. Factual data will logically be provided first hand by the organisations that currently collect and redistribute levies.

A. Main characteristics of the private copying levy systems

3) What would be the fairest method to determine the private copying levy rate that applies to digital equipment and blank media?

ScriptumLibre believes that it is virtually impossible to find a just tariff for media and equipment for information storage (from now on, in short: media).

Conceivably, the tariff could be based on the sales price of the media and on the capacity (currently usually expressed in megabytes and gigabytes). If the tariff is based on the sales price, the levies collected will decrease as technology progresses. So it would be more logical to base the tariff on capacity. But that is not a satisfactory base either. The production cost and market value of one megabyte of copyrighted material greatly varies, software, video, music and text all have very different characteristics. Even within the same kind of medium, production costs are mostly unrelated to the storage capacity required by the end result. Compare for example the costs of an hour of a well-researched documentary on African wildlife to that of an hour of so-called reality television.

Presently, levies are predominantly used to compensate authors and composers of art and entertainment, and their publishers and distributors. Media are used to store information. The information to be stored may be owned by the user of the media: people use media to store software, documents, pictures and videos they created themselves, and people use media to make backups. Furthermore, not all information is a "work" in the sense of copyright, and not all authors of copyrighted material want to make money from their work. A software licence includes the right to install software for use on a computer: that is not considered a "private copy". Information on websites usually serves the purpose to inform people, not the purpose of commercial exploitation by itself. Also it must be noted that any e-mail beyond a very low threshold of "originality" represents a "work" in the sense of copyright, so under the assumptions underlying a levy system, most e-mails would be entitled a compensation from levy money.

In the present "web 2.0" Internet, "user provided content" is essential, in Wiki's (such as Wikipedia), weblogs and YouTube videos. While some YouTube videos infringe on copyrights, many of them are original works. Sudden news events such as accidents and disasters are more likely to be covered by mobile phone videos than by professional camera teams. In all those cases, the authors would be entitled a copyright compensation. Logically, there should be a subsidy rather than a levy on the storage media in mobile telephones and digital cameras, especially now that the ubiquity of digital cameras (either by themselves or as a feature of mobile telephones) is making us all authors and therefore eligible to the proceedings of levies instead of having to pay them.

In sum, any levy tariff is arbitrary. It is an illusion to set a tariff that properly represents the interests of authors, even as an approximation. Consequently, levies are more like taxes. But then it may be more appropriate to compensate authors – if and when needed – from the general means.

B. Economic, social and cultural dimension of private copying levies

10) Should there be a Community-wide (binding or indicative) threshold for cultural fund deductions?

The question acknowledges that copyright has not just an economic purpose. Copyright also serves the purpose to foster cultural diversity. And copyright protects the moral rights of authors, including the right of self-determination with regard to the work: authors may decide themselves whether and how their works are exploited, either commercially or otherwise.

To some extent, collective rights organisations acknowledge the cultural dimension of copyright.

However this must be appreciated, the effect is that important decisions on cultural policy are made by organisations virtually lacking all democratic control. On the contrary, the "customers" of collective rights organisations, typically commercial authors, producers and distributors, logically would favour their constituency.

Levies primarily are assumed to cater for economic purposes. Levies do not correct but exacerbate the market failure that favours popular entertainment over cultural outings that attract a smaller audience, but nevertheless are essential for cultural diversity. Currently a minor part of the levy income is used for cultural diversity purpose. It should be a major part. The entertainment industry is currently dominated by a few major players, and the "barriers to entry" used to be high. Only rapidly dropping costs of digital technology are changing this and any policy making regarding levies should take into account the fact that potential losses of authors by the enhanced possibilities for copying their works through digital technology may at least partly be offset by a drop in costs in the production of their works. A levy system may very well in practice give the major players an advantage since they are more likely to have access to levy proceedings and thus only perpetuate the barriers to entry that have started to fall away.

In sum, if any levy system is to be harmonised, it should be used primarily for cultural policy purposes, not to create a flow of money to the entertainment industry. But making cultural policy is a task for the government, under democratic control, not for an executive body like a collective rights organisation. Again, the conclusion is that levies essentially are a tax. The adage "no taxation without representation" should be observed.

Making cultural policy is not an EU task. In Germany, it is not even a task for the federal government. Culture has a strong local dimension. Culture is more than just economics.

E. Grey market

As we explained above, if there is a levy system, tariffs are likely to be based on capacity: there will be a levy per bit, corrected by a factor in case of reusable media. Due to technological developments, the production price of a megabyte of digital storage has decreased exponentially in the past and there is no evidence of change in this trend[1]. At the same time progress in data compression technologies have increased the usefulness of a megabyte of digital storage, albeit in a more linear manner. . The net effect will be that an ever greater portion of the end-user sales price will consist of levies. So effectively illegal trade will become ever more attractive, requiring strong enforcement measures. Consequently, the "transaction cost" of a levy system will strongly increase over time. A levy system not effectively enforced will decrease the public's respect for the law.

If the levy system effectively is a kind of tax system, wouldn't it be more efficient not to have yet another kind of tax, with a huge administrative overhead, but to pay author compensation if and when needed from the general taxes?

F. Consumer issues

21) How should private copying levy schemes evolve to take into account convergence in consumer electronics?

The net effect of technological convergence is that media, hard disks in particular, nowadays are used for ever more diverse purposes. As we noted above, not all information is a "work" in the copyright sense, and not all copyrighted material stored on a disk is a "private copy" in the legal sense, notably software. And if it is a private copy, it may vary from email to text documents to music to videos.

In sum, this convergence is a strong reason to revisit the appropriateness of *any* kind of levy system.

1 The cost of five megabytes of harddisk storage was $ 10,000 in 1956, by 2004 the price of a gigabyte of harddisk storage had dropped to just $ 1. Which means a reduction of the price per megabyte of a factor of two million in about fifty years.

This does not require a complete overhaul, copyright law in the continental European tradition always has made a distinction between the so called *corpus mechanicum* (the medium) and the *corpus mysticum* (the actual work). Convergence only amplifies the original notion that copyright law should be concerned with the work and much less with the medium.

G. Double payment

22) What are the main issues that consumers face when paying for digital downloads?

23) Should licensing practices be adopted to account for contractually authorised copies?

If any levies system were to be harmonised, similar to our general remarks regarding DRM, rights holders should not lay claim to proceedings of levies in case they already authorised users through contract to make additional copies.

H. Alternative licensing

24) If rightholders decide that their works can be disseminated for free, how should this be taken into account when collecting private copying levies?

These questions demonstrate that the basic assumption of a levy system is incorrect: not all rights owners need to be compensated for private copies not compensated otherwise. The levy debate tends to focus on entertainment material: music and films. But there is much more copyrighted material under the sun, in particular now that "user provided content" is taking off. Most web pages and documents on the internet are copyright protected by law, but licensed implicitly to users. From a legal perspective, not all contracts are written documents: implicit licences are just as valid.

Such situations are no exceptions. The basic assumption underlying a levy system is false, even as a first approximation. Corrections for such situations are infeasible, if only because of the numbers involved.

I. Distribution issues

In The Netherlands, the collected levies are redistributed via many collective rights owner organisations (twelve, at last count). Experience in recent years is that large sums of levy money could not be attributed to rights owners. So the decision has been made that this money should be paid back to media manufacturers – which is easier said than done, because some of these manufacturers are organised and others are not. This highly undesirable situation attracted political attention.

While we do not have a comprehensive overview of the situation in other member states, similar issues are likely to occur elsewhere, due to the complexity of any levy system, with its many stakeholders. As the distribution systems are not always transparent, not all problems may become apparent. Still, the levy system can not be simplified. On the contrary, it will only become more complicated in today's digital world.

In our view, the only solution is to abolish the levy system. Its purpose to remedy market failure, for cultural purposes, can much easier be fulfilled from general means taxpayer money. There is no "logical" distribution key. It is a matter of cultural policy.

Conclusion

In the above answers and comments, we explained that there are many problems with levy systems, not just practical problems but also fundamental problems.

We get the impression that particular interest groups, notably in the entertainment industry, seek rents by saying that it is just a "logical" matter of justice to get a compensation for any and all private copies of material that has been paid for already, while actually this is a remnant of 19th century copyright, when private copying was still virtually impossible.

Some of the arguments given by the entertainment industry explicitly refer to the high profits in the electronics sector, while the record industry is languishing. Should the record industry really be

subsidised from copyright money? Is there a market failure that needs to be remedied by state intervention?

In our view the answer is negative, for two reasons. Firstly, distribution of copyrighted content on physical carriers such as CDs and DVDs is an outdated technology, with the proliferation of high speed internet access. Innovation inevitably involves "creative destruction", as the renowned economist Schumpeter noted a long time ago. Due to the introduction of the Euro many traditional exchange offices disappeared, and likewise traditional record companies will disappear due to the internet. But creative entrepreneurs have found new ways to make money, in both cases. And in many more cases. That is innovation. In view of the Lisbon strategy, Europe should definitely refrain from supporting outdated industries.

But there is another market failure. The purpose of copyright is not just to allow the entertainment industry to make money. Copyright has the purpose to foster culture, and cultural diversity. Cultural diversity requires an avant garde and other artistic expressions not part of a mass culture. The entertainment industry logically focusses on shareholder value and risk containment. Its high concentration creates "barriers to entry", as it is called in economic terms. Government intervention, by means of levies or otherwise, should counterbalance this market power, by an explicit culture policy. This is not something that can be left to the collective rights management organisations, who redistribute the levy money. They have no democratic legitimation, and they – logically – have close ties with the entertainment industry.

In sum, the focus on levies is only a short-term solution to shift money from the "rich" electronics industry to the "poor" entertainment industry. A visionary policy acknowledges that long-term objectives such as innovation and cultural diversity are much better served, and in a much more efficient and transparent manner, if no longer this curious "compensation" for private non-commercial copies of legally obtained material is envisaged, but only directed intervention is undertaken, from the general means, if and when needed.

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