



Brussels, 18th April 2008

FEP submission to the second call for comments from the European Commission on “Fair compensation for acts of private copying”

The Federation of European Publishers (FEP) is the association representing national book and learned journal publishers' associations from 26 European Union Member States and European Economic Area. Thus FEP is the voice of the great majority of publishers in Europe. Founded in 1967, FEP deals with European legislation and advises publishers' associations on copyright and other legislative issues.

FEP welcomes the possibility to contribute to this second call for comments on “fair compensation for acts of private copying”. We support the responses from our national member associations that have submitted individual responses such as the “Federación de Gremios de Editores de España” (FGEE) or the “Syndicat National de L’Edition” (SNE). We also support the responses from the International Federation of Reproduction Rights Organisations (IFRRO) and from the International Association of Scientific, Technical and Medical Publishers (STM). Our response is not comprehensive since it simply aims to stress some general points of interest for publishers at European level and we have therefore only provided answers to some of the questions in the consultation. Moreover, we would like to remind the Commission that our response to the previous consultation on private copying levies is still up-to-date and it should be considered in conjunction with this paper¹.

First of all one should consider the particularities of the publishing sector, where RROs usually manage secondary rights, and of each publishing segment when carrying out any analysis of the situation for private copying levies at EU level.

Secondly, we would like to stress again that copyright protection is essential for the further development of the publishing industry and both creators and publishers need to be rewarded by those using their works either in digital or analogue form. This principle should always remain as the basis of any discussions that might have an effect in the publishing sector.

Thirdly, the provisions in the 2001/29 Directive dealing with private copying lead to a twofold approach for European publishers (i) current existing levy systems where in place have their own merits. Levies are one of the ways foreseen to compensate private copying and publishers are in most cases perfectly satisfied with the collective management system in their countries. Furthermore (and as the Commission points out in its background document) some countries have chosen not to have private copying levies and this should be respected². (ii) Publishers should be able to choose freely between individual and collective management in the digital area which can also be complementary and not exclusive to each other.

¹http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/stakeholder_consultation/federation_publishers_1/ EN_1.0 &a=d

²In countries like the UK, publishers see developing collecting self regulatory licensing systems as a more sustainable approach to private copying levies.

General comments to the background document:

Directive 2001/29 clearly refers to “private copying” in its recitals 38 and 52 when mentioning the exception for private use included in Article 5(2) (b). Therefore, other terms such as “home copying” included in the Commission background document should be avoided. Otherwise there is a risk of creating legal uncertainty giving rise to unnecessary new interpretations of the terminology.

Answers to the consultation document:

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?

Generally speaking, remuneration which is paid directly to the individual right holder by the user seems the most natural way from an individual rights holder perspective. However, in those national legislations where exceptions for private copy have been introduced, levies are an accepted method to compensate rights holder.

It is important to stress once again that in certain cases, like reprography, publishers would not be able to control reproduction of the works if it were not for user-related collective licensing (voluntary or statutory). However, even in the digital world (where DRM can play an important role) the use of DRM and levies remain unrelated as DRM manage exclusive rights and will not act as compensation. Therefore, a case by case/ country by country analysis would have to be done to determine how the private copying levy should apply. The main issue related to the determination of private copying levy rates (to be decided at national level) seems to be whether it should be ascertained by law or by negotiations between interested parties.

In relation to the different methods planned at national level and among the countries that do have a levy scheme in place, France has foreseen in its *Code de la Propriété Intellectuelle*, a *Commission copie privée* which, whatever its evolution may be, we judge satisfying so far. It includes all interested parties which meet to agree on the media to be subject to levies and their respective rates, according to the storage capacity and uses of each device or storage unit.

4) Have new levies on either equipment or media have been introduced or abolished since 2006?

In France, new levies were introduced at the benefit of the written sector on secure digital cards, memory sticks and external hard drives.

C. Cross-border trade and e-commerce issues

12) Is there a refund system available in your jurisdictions when particular equipment or media is exported to another Member State? If so, are there limitations as to the category of traders or individuals who are entitled to such a refund upon exportation?

In Spain, for example, there is refund system available when particular equipment or media is exported to another Member State. In this case, CEDRO (the Spanish RRO) returns the amount of the levy for the equipment which was exported. The refund is carried out after proper accreditation that the equipment has been imported. Those who are entitled to such refund are the importers and the manufacturers (origin of the distribution chain) since these are the companies that declare to CEDRO which equipment is commercialised. The manufacturers and the importers are then the ones in charge to pass the refunds on to those who in fact paid the levy.

15) Who is the most suitable party to pay private copying levies? Should private end consumers be exempt to self-report intra-community purchases of blank media and equipment?

The fact that manufacturers and importers of products covered by private copying levies in Member States should remain the ones paying the levies is justified, inter alia, because their business models are often based on the selling of products that allow the making of copies to the public. Therefore manufacturers and importers of such products are also responsible for the protection of copyright. Moreover, it is in the basis of the levy system mechanism that in most cases consumers do not pay for the levy and therefore it should remain that way. However, these mechanisms often depend on the national systems in place and of national political decisions.

D. Professional users of ICT equipment

17) How should collecting societies take into account professional users? Should professional users be exempted from payments in the first place or should such users be entitled to a refund after payment?

It is not possible to generalise since the situation is not uniform at EU level. Having said these, the Spanish RRO CEDRO has a well functioning system in place for professional users which entails the granting of a voluntary license for collective purposes to the professional user and the further refund by the RRO.

F. Consumer issues

20) Are you aware of consumer surveys on private copying behaviour which are used as a basis for setting the levy rates? And consumer surveys on the main sources of works or sound recordings that are privately copied?

In France, consumers, collecting societies and media/ hardware manufacturers tender individual surveys, in order to determine the amount of copy, the nature of copied works for private use and the source of the copy. On this basis, they negotiate the amount of remuneration according to practices and uses of private copy within the Commission Copie Privée.

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

Private copying levy schemes, when in place, should provide for fair compensation to the right holder for the use of their copyright protected works and this should continue to be so even in case of convergence in the different products. The deciding factor should be the use made of the equipment or media not the nature of it.

In the analogue/reprographic area, it is impossible for publishers to control reproduction from paper to paper and therefore usage-related collective licensing (voluntary or statutory) provides for fair compensation. The same could apply to uses concerning copying from analogue format to digital format (e.g. scanning a book). When considering copying from a digital format to an analogue format it depends on the circumstances and it should be assessed on a case by case basis.

Sometimes, the reproduction of a work is ungovernable and levies are the only way to compensate copying (e.g. scanned short abstracts of a book or a scanned article printed on a printer). In some other cases copying could be dealt with thanks to DRMs and therefore there would be no need for levies to apply (e.g. short abstracts of a DRM protected eBook printed on a printer).

But publishers should remain free to decide whether they want to use DRM or not and in some cases there might be digital publications that do not include mechanisms to manage private copying. Therefore private copying schemes, where in place, should be assessed against the use made of the equipment or media.

G. Double payment

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

Consumers would greatly benefit from improved and safer payment methods when paying for digital downloads. Well functioning micro-payments systems are essential for consumers to benefit from new online business models in the publishing sector such as pay per view.

Consumers would also benefit from lower prices when paying for digital downloads of e-books if VAT discrimination between electronic and paper books does not continue. VAT rates for online publications should be lowered while ensuring that reduced VAT for printed publications is not endangered.

As to the issue of double payment, DRM do not acts as compensation for exceptions as it aims at managing exclusive rights. Therefore the development of DRM may not necessarily exempt users from paying levies as they remain unrelated.

Finally, it should also be borne in mind that a large number of materials (for e.g. databases that are accessible via subscription) may not be equipped with DRM which integrate copying management systems (some DRMs only permit authentication of the user) and in this case levies would be justified to compensate for the uses of such material covered by exceptions.

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

As we have explained in the response to question 22) in our view, DRM and levies in the publishing world are often unrelated. Moreover it could be that, in some cases, when sophisticated DRMs are in place these allow for direct remuneration for the reproduction of digital works (whether on an individual basis or through voluntary joint licensing). The appropriateness to lower a particular levy in case of a reduction of usage patterns or a shift towards DRM solutions should be determined on a case by case basis. In any case the complexity of the scenery recommends no intervention.

H. Alternative licensing

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

In those countries that have decided to implement the exception to private copy in their national legislation, right holders are entitled to fair compensation no matter how they decide to disseminate their work. Therefore, even if a work is disseminated for free, right holders should receive fair compensation.

For example, if a right holder decides to use advertising as their only revenue source, there is no justification why should they not receive fair compensation for private copying when foreseen in their national laws. A further example is when an author decides to make use of a “creative commons” license³, in most cases the license explicitly states that it is *without prejudice to the system of levies existing in that country or in any other country, compensating for mandatory licensing, nor to the perception of such levies*. The author could choose that they want to voluntarily waive compensation for private copying but obviously this is not always the case.

³ <http://creativecommons.org/worldwide/be/>.



I. Distribution issues

26) What are the main issues encountered with respect to cross-border distribution?

When considering cross-border distribution of levies for private copying in the publishing sector, one should take into account the fact that there are natural language barriers that limit the direct reproduction, such as photocopying of a book, in a country different to the one of original publication. The case would often be that translated versions are copied and these simply give rise to compensation to the local publisher who has acquired the foreign rights.