

## **IFRRO comments on António Vitorino's recommendations resulting from the mediation on private copying and reprographic levies**

We appreciate Mr Vitorino's intention to facilitate and advance future discussions on copyright levies. We find it helpful that the Report acknowledges that:

- levy systems are here to stay for the foreseeable future;
- the alternative forms of compensation touted by some stakeholders are not sufficiently worked out; and some may not even conform to existing law;
- reprographic levies need to be treated differently to private copying;
- “only equipment, media and devices made available to natural persons as private users can be subject to private copying levies” (*our underlining*)

Importantly, the Report recognises, *inter alia* on page 11, that text and image (reprography) levies differ from private copying levies in that they are not restricted to equipment sold to private users and that, under a levy based system, for this sector, in principle all equipment and devices with a copying capability could be subject to the levy. The Report leaves, correctly, to the Member States the decision on which products should be levied; this observes the principles of subsidiarity.

In respect of the Report's recommendations, we are generally favourable to the ones on page 12, that levies should be collected in cross-border transactions in the country of destination, and page 19, that levies should be made visible for the final customer. It would have been helpful if the Report had also indicated how the levy should be made visible.

We have issues with several of the other recommendations in Mr. Vitorino's report.

### **Copies made in the context of licensed services**

The Report's recommendation correctly assumes that double remuneration for the same reproduction act - both under a contractual license and a statutory compensation scheme - should be avoided but that, nonetheless, contractual and statutory licenses can co-exist. It is, however, also necessary to take account of the fact that national legislation may impose limitations on contractual licensing by the existence of exceptions. This should be considered when the Member States, in the Competitiveness Council and other fora, and the European Commission (EC) assess any follow-up to Mr. Vitorino's report.

### **Double payment in cross-border sales**

We do not think that the assertions on page 13 of the Report suggesting that “Most stakeholders complain heavily about double payment” are correct. It is inevitable that some complaints have been made but one should be careful about drawing firm generalised conclusions on that basis, without also considering the many who do not. Existing levy systems can already ensure that levies are exempted from payment or alternatively refunded for devices or media intended for re-export. Our experience is that, in practice, in the text and image sector, at least, systems for the reimbursement of levies upon re-export of devices generally function well and present few problems, with few complaints.

### **Liability to pay levies**

We have strong reservations about the Report's recommendations on page 15, to shift the liability to pay the levy to the retailer level. In respect of the text and image sector, the Report presents no assessment or arguments in favour of these changes, which will have severe negative impact on the rightholders as well as the users. It merely proposes to extend the proposed changes to the text and image sector (reprography) as a means to have a neatly uniform system.

This does not at all consider the requirements and specificities of the text and image sector. Those are factors which the Report otherwise repeatedly recognises. Among other things, levies in relation to text and image based works encompass private, professional/internal, educational and other forms of uses. The issue of the liability to pay the levy in the text and image sector therefore merits its proper examination. Also, Mr. Vitorino admits in the Report the complexity of the process that the solution would require, with declarations from manufacturers, importers and retailers alike. This is, however, not reflected in his recommendation.

In the text and image sector, to switch liability for payment of levies from the manufacturers and importers to the retailers would cause problems for all concerned: Market coverage and efficiency of levy administration would inevitably suffer with an impact on costs both for the retailers and the RROs (Reproduction Rights Organisations, the collectives for the text and image (reprography) levies), and thus ultimately for the users; Frame contracts, which the user and equipment levy debtors benefit from today and which allow discounts on tariffs, would no longer be possible. The ultimate losers would be the consumers, and also the rightholders; When the number of units liable to pay the levies moves from a few hundred to several hundred thousands, the management cost, which is mainly a function of the number of units responsible for paying the levy, would increase substantially. Even to identify all relevant outlets would be an enormous and costly undertaking. Moreover, fair compensation for rightholders under the proposed scheme would no longer be guaranteed because of reduced efficiency in levy payment coverage.

IFRRO therefore strongly urges that the Council and the EC, in any further work on Mr. Vitorini's recommendations, ensure that the liability to pay the levy may remain with the manufacturers and importers, at least for the text and image sector.

### **Specificities with regards to the reprography exception**

The recommendation on page 17, to place more emphasis on operator levies, is made completely without the submission of an accompanying analysis, including of the administrative burdens resulting from this, or any other form of impact assessment. Nor was it made subject to discussions during the mediation process or within the scope of what the mediator stated that he initially set out to do. We therefore question on what basis the mediator has drawn conclusions on this point.

This is a typical issue that should be left to the Member States to decide. When authors and publishers are compensated for certain uses of their works through a levy system, the remuneration may result from a combination of equipment and operator levies. As previously stated, text and image levies compensate for a large variety of uses. How this is split between equipment and operator levies is carefully worked out in each country depending on a number of factors, including the exceptions and limitations to which the remuneration relates. It should be left this way without any further recommendations.

We therefore submit that the Council and the European Commission (EC), in any further work on the issues of copyright levies, disregard the recommendation made by the mediator in respect of the operator levy. If, on the contrary, the Council or the Commission should wish to examine the subject-matter further, IFRRO will be pleased to offer information and expertise that can contribute to a better understanding of how this part of the levy system works.

### **The notion of harm**

Firstly, the recommendation should be rectified to read that “harm” relates to lost profit suffered by the authors and publishers (rightholders). The way it currently reads, the recommendation on page 21 does not seem to be coherent with the assessment made in the Report. From the assessment it seems clear that “harm” should be defined as lack of income or profit to the rightholders concerned. Contrary to this, the recommendation concludes that harm is lost profit to the consumer. This does not seem right and must be corrected.

Subsequently, we question whether there is a need to harmonise the concept of “harm”. In this we agree with the mediator when he states that “I do not believe that a comprehensive harmonization at EU level [...] should be envisaged.” The European Union Copyright Directive (EUCD) mentions harm only as *a* possible, and not *the* criterion, and European legislation already contains terms of references for calculating compensation on the basis of harm: Article 13 of the EU Enforcement Directive institutes that “harm” may be established on the basis of prejudice suffered by the harmed party, profit made by the infringer or by way of licensing analogy. It is therefore not correct when the Report states on page 20 that “The current legal framework is silent on what constitutes harm”. Moreover, it follows from various and consistent CJEU rulings that it is the *potential* harm for rightholders that should be taken into account and that the modalities of compensating them fairly and adequately should be left at Member States’ discretion.

### **Establishment of the level of tariffs**

Streamlining the process of tariff setting is generally helpful. However, the Report’s assessment and the recommendation stemming from it are contradictory on one element in recommendation 2) on page 22: To be consistent with the assessment it must be specified that the intention is that, ideally speaking, the ultimate level of the applicable levy should not, to the extent possible, differ substantially from the one imposed temporarily. The Council and the EC are asked not to read the recommendation as meaning that the temporarily set levy represents a maximum; the finally set applicable levy may both be higher or lower than, or exactly the same as the temporary one.

Moreover, the timeframe proposed in the recommendation does not seem to be realistic, unless it is combined with the right of the collective management organisation (CMO) to unilaterally impose a temporary tariff.

### **In conclusion**

Whilst we find that there are certainly positive elements in Mr. Vitorino’s recommendations, we believe that several of them are based on too loosely founded assertions. We therefore caution against paying too much attention to them in any further work on copyright levies in relation to the text and image sector.

Brussels, 30 April 2013