

International  
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Rights  
Organisations



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## **STAKEHOLDER CONSULTATION ON COPYRIGHT LEVIES IN A CONVERGING WORLD**

The **International Federation of Reproduction Rights Organisations (IFRRO)** represents collective management organisations in the field of print media, called Reproduction Rights Organisations (RROs). RROs administer and license the reprographic reproduction of printed and published material as well as certain digital uses. They are set up and governed by all categories of rights holders concerned, to administer reproduction rights in a number of different ways according to the laws and circumstances of each country. RROs represent authors/creators and publishers equally, also on governing bodies.

Members of IFRRO are also national and international associations of writers, creators and publishers, such as the Federation of European Publishers, European Writers Congress, European Visual Artists, the European Newspaper Publishers Association, the International Federation of Journalists, the International Publishers Association and the International Association of Scientific, Technical and Medical publishers; the Publishers Association, the Publishers Licensing Society, Authors Licensing and Collecting Society and the Design and Artists Copyright Society in the UK; as well as the Syndicat national de l'Édition, the Société Civile des Auteurs Multimédia, and the Société des Auteurs dans les Arts Graphiques et Plastiques in France.

For more information on RROs and the different models of operation please refer to our publications under [www.ifrro.org](http://www.ifrro.org).

### **GENERAL**

We thank you for the opportunity to comment on the Commission's work on copyright levies. Further clarification on the role of the current stakeholder consultation in the Commission's assessments is, however, needed and we would appreciate the opportunity to comment on the Impact Assessment itself and/or the draft Recommendations on the matter if and when available. As we have stressed also in meetings with the Commission, we offer to provide information that may be required to facilitate the assessment of systems ensuring fair compensation to rightsholders as required under Directive 2001/29, Articles 5(2)(a) and (b), in so far as these concern RROs.

We urge the Commission to take due account of the differences of the sectors within the creative fields in respect of copyright levies. The print sector is important in its own right generating EUR 22 bill. in turnover for books alone and by that yardstick being the largest of the European cultural industry sectors. As a consequence, it cannot easily be judged on the strength of analyses of other sectors. This applies equally to the primary and secondary exploitations of rights. It should also be noted that RROs are traditionally primarily concerned with the licensing and administering of rights for secondary uses.

It is important to note the distinction between the analogue and the digital environment. In the analogue arena it is difficult for rightsholders to control certain types of uses of their works. Consequently, the role

of collective management organisations is essential in most, if not all European Member States. In the digital environment rightsholders may wish to choose differently between individual and collective management of their rights depending on their ability to manage rights themselves, considering also that many publishing companies are small and medium sized enterprises (SMEs).

Moreover, we invite the Commission to consider topics beyond those mentioned in the Consultation. In particular, we urge that the effect on intellectual creativity and cultural diversity, in Europe as a whole as well as in the individual European countries, of measures proposed by the Commission be taken into consideration. It is important to examine how creativity and the production of more works can be supported and stimulated and that this is taken into consideration when assessing options for community actions, also so as to meet the needs of the Information Society and the Lisbon agenda.

Levies provide fair compensation to the rightsholders when their works are drawn on beyond their primary use which is typically to purchase the book or the newspaper. They have been and are the chosen tool in a majority of European Member States as an alternative to individual or collective voluntary or statutory licensing of a different kind. Levies on print products have had and still have a positive effect on the creation and protection of intellectual works. It should also be noted that they are not compensation for piracy, nor are they meant to be. Phasing them out or scaling them down would mean a considerable loss of income to authors and publishers, and this source of income would have to be replaced with the same amount of certainty of income to the authors and the publishers while keeping administrative costs and the burden on users at the same or a lower level than with levy systems. Otherwise there is a risk that damage could be caused to the EU copyright industries.

Finally, we encourage the Commission to pay attention to its approach and ensure to undertake a neutral assessment of the facts with which it has been presented. There are several examples in the Consultation that call for concern in that respect. The Consultation and also the “Road map” that sets out the Commission’s work plan in the field, contain unsubstantiated assertions about levy systems, collective management and collective management organisations. As regards print media, paper is expected to remain dominant for the foreseeable future and, as documented in our submission of 10 October 2005 on levy systems, Digital Rights Managements (DRMs) have no application from a paper original. Furthermore, as demonstrated on several occasions to the Commission, RROs are transparent.

We are therefore surprised by the way the stakeholder consultation and the questions in it are formulated, and we find them biased. Nor do we find that the Consultation or the “Road map” evidence that there is a need for a “Copyright Levy Reform”.

#### QUESTION 1

(a) The description is inadequate in several respects. A balanced description of fair compensation systems needs to include a presentation of their purpose and the obligation that follows from Directive 2001/29 to provide fair compensation as a precondition for the legislation of exceptions to the exclusive rights.

Copyright levies are not a “tax” but a way for users to pay as directly and as efficiently as possible for the use of their works under specific copyright exceptions. It is therefore not correct to describe them, as the Consultation does, as introduced because an act of private copying cannot be licensed for practical purposes. Levies simply serve as the one mechanism that under certain circumstances is, cumulatively, the most effective, least costly and, from a consumer perspective, the least intrusive way to compensate rightsholders for their creative efforts.

Furthermore, it could also be questioned whether the description of levies as “indirect remuneration” is appropriate. While national laws foresee payment to the RRO through the provider (i.e.

producer/importer/dealer) of devices/carriers, the levy is paid by consumers for this benefit and included in the purchase price, and usually identified on the invoice for the device/carrier.

(b) The description should state the purpose and reasons for levies, i.e. to fulfil the obligation to compensate rightsholders fairly for exceptions under national legislation. Only if the three-step test is met and fair compensation is provided may Member States include the exceptions under Articles 5(2)(a) and (b) of Directive 2001/29 into their laws. An exception in these cases without a system for fair compensation would be in breach of the Directive. The Consultation paper includes facts on the current status on levies and exceptions in the Members States, but omits discussing non compliance with the Directive when exceptions have been introduced without fair compensation. It should be noted that contrary to what could be understood from the Consultation, the legislation in Luxembourg includes a provision for private copying remuneration

Whereas exceptions must always be interpreted narrowly and withstand the scrutiny under the three-step-test enshrined under Article 5(5) of the Directive (and international treaties), it does not follow that provisions on the compensation system that the legislator is under an obligation to provide for the exception should be interpreted equally narrowly.

(c) Levy systems are a practical way to provide rightsholders with fair compensation for the exceptions to their exclusive rights pursuant to Articles 5(2)(a) and (b) when individual management or other forms of collective management through licensing are impractical in respect of enforcing exclusive rights. They provide a large number of rightsholders with fair compensation at a low cost. On average RROs administering levies deducted last year under 15% of collected fees to cover their administrative costs. This benefits the rightsholder as well as the user. Levy systems let consumers make a private and personal reproduction of the work in a legal way without the permission of rightsholders. It should also be noted that the levy solution has been adopted in 21 out of 25 Member States albeit not in a uniform fashion.

## QUESTION 2

(a) The description of the distribution of collected revenues is incomplete and inaccurate. It is true that rightsholders generally mandate their local RRO to administer their rights in this field. But some rightsholders have joined a foreign RRO. Funds from abroad are therefore not necessarily channelled through bilateral representation agreements but may also be paid out directly to an individual foreign rightsholder.

RROs are non-profit organisations. Administrative deductions represent the actual costs of administration. The decisions on the type and size of administrative deductions are made by the governing organs of the RRO which are made up of rightsholders, who thus are in control over how much an RRO can budget and spend on its administration. Also, European RROs are generally subject to the supervision by national authorities.

It is not accurate to say that the ICT industry as such pays levies. First of all, only those companies which provide equipment/carriers are subject to the obligation to collect levies. Secondly, the ICT industry does not pay levies out of its own pockets. It collects the levies from the end user and forwards the revenue to the appointed RRO for further distribution among the relevant rightsholders.

While RROs are one party to the negotiations on levies, it is important to note that they cannot act unilaterally. Not only are they governed by rightsholders, the providers of equipment/carriers are a strong negotiating partner.

The text gives the impression that levy fees are set by collecting societies/RROs unilaterally. Rather, they are often set by legislation, after consultation with all interested parties including collecting societies, industry and consumer representatives, or by negotiation between the collecting societies on behalf of the rightsholders, and industry, subject to government approval. In some countries collecting societies are obliged to set a tariff where a fee is not set in the law or negotiations fail, and the industry party then has the opportunity to challenge the fee set in arbitration and/or court proceedings.

(b) It is important to recognise that RROs are set up and governed by rightsholders as well as supervised by national governments. An RRO is a properly established legal entity, with a set of statutes providing for its governance, usually including a general assembly and a board of directors. These organs are made up of rightsholders, representing different types of works/markets. Rightsholders have control over the RRO to ensure its operation in an impartial, non-discriminatory and efficient manner. An RRO can only ever do what its rightsholders instruct it to do.

(c) – (e) With regard to secondary uses (rightsholders exploit the primary market, in case of publishers, they sell books to bookshops and/or access licences to institutions/users), as to which national legislation foresees an exception, levies are a practical method to provide rightsholders with fair compensation with low administration costs which benefits the whole range of rightsholders from authors of occasional articles to large international publishing houses as well as consumers and society as a whole. RROs have built expertise and have compiled data which enables them to assist rightsholders in establishing a fair and transparent distribution system.

Where Member States choose to include exceptions pursuant to Articles 5(2)(a) and/or (b), rightsholders have a right to receive fair compensation for the permitted uses. Without the fair compensation, there can be no exception. The compensation belongs to rightsholders. They will decide how the sums collected will be divided between them. In practice, the distribution plans are usually determined on the basis of statistical evidence within a system of objective availability (as to the details of which we invite the Commission to refer to our publications available under [www.ifrro.org](http://www.ifrro.org)). RROs do not discriminate foreign rightsholders; where the payments for levies are made through a bilateral agreement with another RRO, RROs are working to minimise costs whenever possible.

(f) As stated earlier, RROs are already subject to a set of tight internal as well as external controls over their operations so that no further regulation is necessary. The IFRRO Board has also adopted a Recommended Code of Conduct for RROs available on the IFRRO Home page.

### QUESTION 3

The data in this section only relates to music. It can therefore not be used to draw conclusions on the print sector.

### QUESTION 4:

The elaborations on DRM systems in the Consultation only relate to the music sector. It can therefore not be used to draw conclusions on the print sector, where, as pointed out in our letter of October 2005, the scope of DRM application is different. In practice, publishers in the print media have shown variable interest in technical protection measures that control the use in particular in the private environment, some publishers opting instead for contractual arrangements in which management of rights metadata is essential. This approach by no means excludes the co-existence of levy- and DRM systems. It should, however, be left to national legislation to determine the co-existence of levy and DRM systems, in accordance with existing practices, bearing in mind the needs of rightsholders, consumers and market development.

Regarding the application of technical protection measures in four scenarios in our sector (paper to paper, digital to paper, paper to digital and digital to digital), we refer to our submission of 10 October, 2005. In addition to what we stated in this submission, we would like to stress that RROs normally license or administer rights for secondary uses which appear to attract technical protection measures less frequently than primary uses. In other words, also where the primary use was managed with a technical protection measure, this does not necessarily protect the rightsholder regarding secondary uses. For example, once the user has printed the material delivered digitally, the rightsholder is unlikely to be technically protected against further photocopies or scans of this material. Secondary uses can supplement but must not and should not substitute primary uses. Levies on digital devices should take into account the way in which the equipment is used in practice and in relation to digital private copying the application or non-application of technical protection measures in accordance with Article 5(2)(b) of the Directive.

#### QUESTION 5

As we already stated in our submission of October 2005: *“Harm is mentioned in Recital 35 only as one possible criterion for fair compensation. The reference is to ‘possible harm’, not, as some maintain, ‘actual harm’, i.e. it’s not incumbent upon rightsholders to prove actual loss before they become entitled to compensation.”*

Question 5 would therefore appear to be based upon an imprecise representation of the wording of the Directive. The test under Recital 35 is whether or not the compensation to rightsholders is fair in the circumstances. The test does not require every single rightsholder to prove the exact loss caused by every single use made of every single work to receive compensation. The Directive does therefore not require rightsholders to prove “actual” harm. Nor does it require distribution to be based upon evidence of such. Consequently, it cannot be concluded the way the Consultation does, that distribution keys are inherently difficult to justify.

The assertion in the second paragraph that neither the proportion nor the scale of copying can be reliably assessed by survey evidence is not substantiated. According to our experience, it is incorrect. While there may be differences of opinion in individual cases as to how a survey should be designed or its data be interpreted, the use of statistical evidence obtained by surveys is a standard procedure in many different economic sectors and in scientific research. RROs ensure a high quality of their research by using sophisticated surveying techniques and they often employ external independent experts to carry out the studies. Also, users are regularly invited to co-operate in the design and carrying out of the survey.

#### QUESTION 6

IFRRO disassociates itself from the description. The way in which Member States define the criteria for equipment/carriers to be subject to the levy, is in the discretion of Member States, as the Directive does not deal with this matter.

The Consultation appears to assume that it is a requirement that devices have to be “primarily used” or “primarily destined” for the reproduction of copyright protected works under the exception for them to be included in a fair compensation scheme. These requirements can, however, be found neither in the Directive nor in national laws. The fourth paragraph therefore gives an inaccurate impression. Some national laws require the equipment to “permit”<sup>1</sup> the reproduction or to be “intended”<sup>2</sup> for it or “capable of”<sup>3</sup> it but none require this to be their primary function.

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<sup>1</sup> Belgium Art. 59 and Spain Art. 25(2)

<sup>2</sup> Austria, Section 42b (2)(1) and Germany, Section 54a

<sup>3</sup> Slovakia, S. 24(6)(c)

The legal definition of devices subject to equipment levies in national laws is on purpose technology neutral because it was apparent even when the first levies were introduced that the devices used for the reproductions permitted under the exceptions would be under constant development. It is therefore not accurate to say that they were intended to be limited in scope.

As we stated in our submission of October 2005, “*where a levy scheme has been established, remuneration should be paid for any device which can produce private copies of protected works, either alone or in conjunction with other devices*”.

We are of the opinion that the implementation of the Directive 2001/29 articles 5.(2)(a) and (b) with respect to exceptions and limitations to the exclusive right and systems of fair compensation is best handled on a national level also taking into account national considerations and traditions. The implementation of the Directive has been given careful consideration by governments and parliaments in Member States. In some Member States, implementation has only been completed recently. It is therefore too early to judge on the implementation across the EU.

#### QUESTION 7

(a) Both components of the opening statement that: “Copyright levies were born in the analogue environment and were applied to dedicated equipment and devices which had a copying function only.” are incorrect:

As stated in our reply to question 6, there is no requirement that copying be the primary function of a device. Multifunctional devices are no new phenomenon (e.g. analogue radios with a cassette deck would have been subject to a levy as recording devices and the primary function of such cassette players for many people was to play, not to copy).

Although it is true that the first levy system was introduced (in Germany in 1965 and in Spain in 1987) before digital technology existed, levies have been introduced, maintained or extended, in many national laws, including Germany and Spain, after the dawn of the digital age.

Since Article 5(1) of the Directive already provides for a mandatory exception for “technical” or “incidental” copies, there is no basis to require payment for these copies.

(b) The fact that a device, whether analogue or digital, has several functions, of which copying allowed by copyright exceptions is only one, is therefore no reason for not applying a levy to that device. Whether a device is only used to copy, or has other uses as well, the criterion for the amount of the levy should be the extent to which devices of that type are used to make relevant copies either alone or in conjunction with other devices.

Where a device can be used for audio, audio-visual as well as reprographic purposes, its capacity to copy textual material would still entitle rightsholders to a share in the levy on the device. For example in Germany, DVD and CD Burners are subject to levies. An overall tariff for all types of private copying has been agreed with industry which is then divided between the collecting societies representing different categories of rightsholder according to statistical surveys. (For CD Burners the levy is split as to 26.66% for reprography and 73.34% for audio/audio-visual copying, for DVD burners 22.06% and 77.94% respectively)

The table “Equipment levies in different member states” does not take into account the document we provided to the Commission in our meeting on 22 February 2006 and is thus incorrect regarding scanners. It is also unclear what is meant by “analogue equipment” in the first row, having regard, for example, to the fact that today every photocopying machine uses digital technology. It would, in our view, in any

event be more useful to distinguish between analogue and digital uses, rather than analogue and digital devices. We are further wondering why the table selected only some of the devices/carriers currently levied and only some of the Member States which provide for them.

(c) One might argue for applying levies to broadband and infrastructure service-providers as well as the manufacturers or importers of devices or media. For reprography, many countries already apply an “operator levy” to institutions making available copying devices for reprography to the public as well as applying an “equipment levy” to the devices themselves. The application of a similar levy on digital service providers, complementary to the equipment levy, could be considered by some, but whether to do so is for Member States to decide.

(d) We do not see how levies on any devices harm the market: the profits realised by the (usually non-EU) manufacturers of such devices appear healthy. For example, Hewlett Packard made a world-wide profit in 2004 of 4.2 billion US\$. Further, the sales in levy countries are often higher than the sales in non-levy countries. For example, according to GfK in the period February 2003 to September 2005 two and a half times as many DVD Burners were sold per household in Germany as in the UK, although they are subject to a levy in Germany but not in the UK.

(e) We do not think that levies on multi-functional devices have an effect on new business models. Rightsholders are at liberty to apply Technical Protection Measures (TPMs) and Digital Rights Managements systems (DRMs) to their content if they so choose. In the publishing world, works are published in a number of formats: first and foremost, paper and then audiobooks and ebooks. Publishers will not be able (or willing) to apply TPMs or DRMs to paper publications. Audiobooks are often published on a CD without TPM and for download with TPM. When DRM are used, they afford customers a great choice in content selection, flexibility, speed, ease of access and price precision. However, DRMs, which correspond to the exploitation of exclusive rights, cannot deal with all practices permitted by exceptions, in particular for reproduction from paper to digital. Therefore the various scenarios will have to be taken into account.

#### QUESTION 8

(a and b)

We have seen no evidence that consumers purchase devices in other Member States in order to avoid levies to any significant extent.

RROs do not enforce selectively. They claim payment from every debtor. That some of the debtors do not comply with their obligations to disclose information or refuse to pay can hardly be held against RROs. We have seen no evidence that grey importation is a serious problem.

Moreover, Member States often have provisions under which the payment for the equipment levy is reimbursed when the equipment is exported into another country.

#### QUESTION 9

(a) The tables do not reveal which types of devices/carriers are included. The accompanying text does not explain what collections are covered or the bases on which the tables have been compiled: whether they are based on actual payments or whether they are projections of what could have been paid using assumptions that are not explained. This makes it difficult to answer the question of how to explain the tables. From the text it looks as though CLRA is referring to claimed potential or calculated levies whereas other sources seem to be talking about levies actually collected.

As already stated, in our view collecting societies in general and RROs in particular are, and have to be, transparent. The fact that industry organisations make claims about actual and potential levies is no evidence of any lack of transparency.

We would, however, take this opportunity to comment on the “*Levies Collection Study: “Market Value of Private Copying Levies on Digital Equipment and Media in Europe”*” of April 2006 commissioned by the Copyright Levies Reform Alliance. We discourage the Commission from relying on the data and conclusions in it.

It is unclear on which facts the report bases its very optimistic predictions of future sales of devices and equipment throughout the report. The report further seems inaccurate as to the size of the tariffs it uses to predict the future levy payments as well as on the number of machines sold. We are prepared to elaborate further on this and leave it at this stage at a few examples to show the inaccuracies.

- The German tariff on PCs is presented as 48.42 EUR, consisting of EUR 30 reprographic and EUR 18.42 audiovisual share. In fact, the arbitration court and the court of first instance in Munich assessed the reprographic fee only at EUR 12. While the EUR 12 share may change on appeal, it is misleading to use a tariff of EUR 30 for reprography in predictions of the future. Equally, the German tariff on printers is not EUR 12. The arbitration court decided that it should only be EUR 4 per printer.
- In respect of Sweden, in addition to reporting collection and number of devices which exceed the actual figures, the study also refers to levies which do not exist. Despite the fact that there is no levy on mobile phones which include MP3 functions the report states that EUR 1 mill. was collected through such a levy in Sweden in 2005.
- In Belgium and Spain there is an obligation in the legislation to report on imported or produced reprographic devices. The study operates with a volume that is 3-6 times higher than the reported figures and in some instances even more. An example of this is that the figures provided by CLRA for Spain seem to indicate that CEDRO (the national RRO) had received a levy of 143€ in 2004 and 174€ in 2005 for each multifunctional device, whereas in these two years CEDRO collected only 15 € per multifunctional device, taking into consideration the discount of the 10% applied over the fee of 16,67€.

Similarly the “Economic Impact Study” by Nathan Associates for CLRA seems inaccurate on key points. *Inter alia* it appears to assume that there is a standard price for devices throughout Europe which simply reflects the cost of production and that the retail price is the product of that price and any applicable levy. In fact retail prices reflect a wide variety of factors including distribution costs, and VAT.

We therefore strongly urge the Commission to disregard the reports commissioned by the CLRA. All figures that the Commission would be asking for should be easily available and could be collected e.g. with the assistance of Member States and the collective management organisations concerned. In respect of reprography, IFRRO reiterates its offer to assist in providing accurate information.

#### QUESTION 10

We disassociate ourselves from the presentation of other stakeholders’ views and refer to their submissions in this regard.

Moreover, publishers have been omitted from the list of rightsholders on page 16 of the Consultation which should take account of authors, including visual creators, composers, performers, publishers, record producers, film producers and broadcasters.

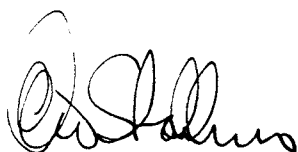


We also note that rightsholders and collecting societies are presented in different sections without accounting for the fact that they represent and are controlled by rightsholders. All rightsholders whose works are copied in the country with a levy system receive a share in the collection, irrespective of whether or not their country of origin has a levy system. In respect of the statement that “copyright levy system bases distribution on keys which are not commensurate to the actual use of the works” we refer to our answers and comments to Question 5.

Legal certainty regarding the extent of the use permitted under the exception is a matter of how clearly the exception is drafted and interpreted, rather than the fair compensation for it.

As explained in our submission of October 2005, the extent to which TPM can be effectively applied to secondary uses of print work is, and will for the foreseeable future remain, limited. IFRRO nevertheless favours and defends strongly the right of creators and publishers to use or not to use DRM and TPM in deciding to manage their rights individually and/or collectively. Levies remain an option also in the digital environment and are thus not by necessity confined to the analogue environment. It should be left to the rightsholders to decide how they wish to administer their rights, especially in the digital environment. Furthermore, copying from digital to digital cannot necessarily be described as “digital document delivery services”. While document delivery services may require copying, they require more rights (such as the making available right) and each right has to be cleared separately. Copying also occurs in many other instances.

Respectfully submitted



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