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Brussels, 18 April 2008.

**SECOND CALL FOR COMMENTS FROM THE EUROPEAN COMMISSION ON “FAIR
COMPENSATION FOR ACTS OF PRIVATE COPYING**

Dear Mr Lueder,

The International Federation of Reproduction Rights Organisations (IFRRO) represents collective management organisations in the field of print media, called Reproduction Rights Organisations (RROs). In membership of IFRRO are RROs and associate members (national and international associations of rightholders such as writers, visual creators and publishers of books, newspapers, magazines and sheet music). RROs administer and license the reprographic reproduction of printed and published material as well as certain digital uses. A number of European RROs collect and distribute payments from levy systems either for the private copy exception with regard to the share of authors and publishers of text and image based works (Article 5(2)(b)1) and/or for exceptions concerning reproductions on paper which we shall refer to as “reprography exceptions” (Article 5(2)(a)2). We refer to levies providing for fair compensation for an exception under Article 5(2)(a) as “reprographic levies”.

While we thank the Commission for the opportunity to comment on the consultation, we would appreciate clarification on the purpose it will serve and the use to be made of it.

We would like to draw your attention to the unsatisfactory quality of the translation of the questionnaire at least into French and German. A number of questions have a different meaning in the translations. We therefore refer only to the English version.

We would advise caution with industry sponsored studies and reports, such as the report prepared by Rightscom Ltd. referred to on page 14, footnote 34 and on which we commented previously (in July 2004).

¹ Of the Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L167, 22/06/2001, 10-19

² Ibid.

As we pointed out in our previous submissions on copyright levies of 10 October 2005, 19 January 2006 and 12 July 2006, there are significant differences between the two different exceptions (Article 5(2)(b) and 5(2)(a)) and thus between the levy systems to provide ‘fair compensation’ for them:

- the permitted use and its scope
- the beneficiaries of the exception
- the sectors of the creative industries concerned
- the type of collective management organisation administering it
- not all equipment and media is the same

It would therefore be imprudent to apply conclusions drawn from an analysis restricted to the environment of only one of these exceptions to both. The background paper displays a focus on Article 5(2)(b) in its argumentation and analysis although its conclusions seem to be applied also to Article 5(2)(a). In the light of this, the background paper should be corrected and revised in the following places:

- Page 3: the levy for reprography exceptions is actively collected by OSDEL, the RRO in membership of IFRRO
- Page 4, third paragraph: The distinction drawn between the two concepts of ‘equitable remuneration’ and ‘fair compensation’ seems debatable particularly in the absence of a definition. There is no apparent justification for denying authors remuneration for every act of usage where their right arises as “fair compensation” as opposed to “equitable remuneration”. We also refer to our previous submission of October 2005, page 6.
- Page 4/5: the paragraph at the bottom of page 4 and top of page 5 lists the different options chosen by Member States for fair compensation systems. It mentions levies for private copying i.e. for an exception under Article 5(2)(b). It should also mention reprographic levies, i.e. for an exception under Article 5(2)(a) to be comprehensive.
- Page 5: Equipment and media is listed regardless of whether the levy to which it is subject compensates for an exception under Article 5(2)(a) or (b), so that a printer is discussed in the same way as a mobile phone although different considerations apply.
- Page 7, Table 2, Page 8 Table 3, Page 9 Table 4: The tables were prepared based on data from GESAC and/or Stichting de Thuiskopie and do not indicate whether a share for rightholders of the text and image based industry has been included.
- Page 10, Table 5 (Levies allocated to cultural and social purposes in 2004): The Table purports to show the total situation but it is unclear whether (if at all) either the reprographic levy or the text and image share generally have been taken into account. The information from the private copying levy cannot simply be assumed to equally represent the situation for reprographic levies: Whereas deductions may apply to private copy levies, in Hungary, for example, the RRO HARR does not allocate any sums at all for cultural / social purposes although the table indicates otherwise.

- Page 12, Table 6 (Member State refund or exemption systems): Refund systems exist also for reprographic levies in theory and practice.
- Page 12 (Professional users of ICT equipment): The exception permitted under Article 5(2)(a) differs from the one permitted under 5(2)(b) regarding purpose and character of the permitted use. A number of Member States permit use by professionals such as teachers under Article 5(2)(a) so that there is no need to exempt such users from the levy because it compensates for a use permitted under the exception.

Even where the exception is strictly for private use, professional users by and large make private uses alongside professional uses so that a particular equipment and medium could be expected to be used for private purposes also where it was purchased by a professional user. Were such equipment/media exempt from the levy, the private use of the works on or with them would not be paid for. This would be in contravention to the fair compensation obligation. Moreover, many countries offer refund systems if the machine is not used for the purposes permitted in the exception (in Germany) or if the user takes up a licence for collective purposes (e.g. to distribute copies to his employees as in Spain).

A more precise manner of analysis in the background paper should significantly reduce any confusion or “lack of consensus” regarding figures on the collection of levies (page 8).

No distortion of the market

There is no empirical evidence that levies on equipment and/or media distort the market or that they are a decisive factor in pricing equipment/media. Rather, pricing seems to be the result of a number of commercial decisions and other factors, including VAT. Table 3 and studies show that differences in prices of a particular type of equipment cannot alone be explained by the levy.

Private copying, not “home copying”

The correct term for the use permitted by exceptions under Article 5(2)(b) provided that that a fair compensation system is in place is “private copying”, rather than “home copying”. “Home copying” is an undefined new concept which would cause the need for interpretation and general uncertainty where there is no reason for its introduction.

Factual corrections

We would recommend using official resources for court decisions to ensure an accurate basis for your conclusions. For example, footnote 12 on page 6 could be improved. The Federal Court of Germany has its own web-site (in German), offering its decisions for free: www.bundesgerichtshof.de. The decision on printers has docket number I ZR 94/05 and is available in full.

We also refer to the submissions by our members CEDRO and VG Wort for a more detailed record of corrections on their countries. We would just like to draw your attention to the reform to the German Copyright Act, in force from January 2008 which substantially altered the levy system.

On the individual questions in the consultation

A.1. Does Table 1 on equipment and blank media levies reflect the situation correctly? Is the information contained in Table 1 still correct?

As shown in the annex to this submission, Table 1 does not correctly reflect the situation. The table only covers 21 of the 27 Member States.

A.2 How could the legal uncertainties as to which equipment is levied in different jurisdictions be dealt with?

The resolution of conflicts over the interpretation of national law is a matter for national courts. National disputes are often not due to an uncertainty in the law but simply concern the enforcement of a debt and resistance to pay it.

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

Although the question is phrased only with reference to private copying, we will reply also regarding reprographic levies. There needs to be a swift and efficient decision making process to determine the tariffs. At the end of the process either an independent third party (whether the government or another body which represents or belongs to neither rightsholders nor potential debtors of the payment) or a committee including all interested parties should make a final, binding decision.

The decision should be based on solid objective evidence, including empirical data and the consultation of all relevant stakeholders. The criteria should be objective and quantifiable but may well differ from country to country. The decision should be reviewable after some time, to take into account inflation and other relevant changes.

The law should in any event facilitate the enforcement of levies.

A.4. Have new levies on either equipment or media been introduced or abolished since 2006?

No new equipment or media has overall been made subject to or excluded from levy systems since 2006. Different Member States have adjusted their systems and added or deleted certain types of equipment or media but no Member State has added a new type of equipment that was not already subject to a levy in another Member State.

B.5. Can you provide updated figures for 2007 on the amount of levies collected in those jurisdictions that apply a levy scheme?

Recent and regularly updated figures are available on www.ifrrro.org which we are happy to send you on request.

B.6. Are you aware of further economic studies on the topics discussed in the document?

- Study by TNS Infratest for VG WORT on use of CD/DVD Burners, PCs, Printers, Scanners, Fax machines and MF Machines in Germany, October 2007 [available from VG Wort]
- Study “Fragen zum PC” by GfK for VG WORT and VG Bild-Kunst, April 2001“ <http://www.vgwort.de/files/gfk.htm>
- ECONLAW “Economic Analysis of Private Copy Remuneration”, commissioned by GESAC, Madrid September 2007 <http://www.econlaw.es/ingles/pdf/PCR.pdf>

We draw your attention to CEDRO's submission on the study referred to in A2 of the consultation paper.

B.7. – B.11 (except B.10) on cultural and social funds.

Cultural and/or social deductions are required either by law or by the statutes of the RRO. Typically European RROs use less than the maximum allocation permitted in their statutes. The size of the cultural and social allocation is overstated. Contrary to footnote 25 on page 9 the share allocated is generally under 10% regarding the revenue from levies, not the total income in our sector. For example, it amounted to around 3% in the case of VG Wort, VG Bildkunst and Literar-Mechana. Footnote 25 is therefore also incorrect.

VG Wort and CEDRO provide detailed information on their social and cultural funds and the useful projects they are used for in their submissions and their annual reports which are available on their respective web-sites.

C. 12-15 on refund systems

Ultimately, if the manufacturers or importers so decide, the cost of the levy can be borne by the beneficiary of the exception, the end user. This does not mean that s/he would have to be directly involved in the collection process. The collection process is more practically arranged with the manufacturer, importer or retailer of equipment or their trade associations.

As far as we are aware, no member states have imposed a duty on private consumers to report their own importation of equipment and/or media which are subject to a levy in their country of residence because this is judged a minor phenomenon and reporting would be an unjustified intrusion into the private sphere. Neither would the private individual have to declare the purchase of media/equipment from a foreign supplier online. However, the foreign supplier would need to pay the levy of the country of destination (and would get a refund for the levy in his country of origin where there is a levy in his country).

As a rule, the most suitable party to claim a refund is the person who paid the levy. However, under some systems other persons can claim the refund (including retailers), subject to rules which ensure that there would not be a second claim for the same device by the party who originally paid the levy.

Generally, there are refund systems in law and practised by RROs administering levies in Europe. An example of a functioning system is Literar-Mechana's in Austria whose refunds amounted to a total of around 2% of its collections from reprographic levies (copies, fax, scanner, multi-functional devices and printers) in 2006.

It should also be noted that equipment/media destined for export is often exempted from payment of levies in the first place so that no refund is necessary in that case.

A complicating factor for all refund system is the VAT applied to the levy and the inconsistency with which Member States apply VAT.

D. 16 and 17. On the relationship between private copying levies and professional users

See our statements regarding page 12 of the background paper on page 2 of this submission.

E. 18 and 19 on grey markets

There is no evidence that grey markets are widespread so far as devices or media which can be used to copy text or media are concerned. Grey markets are notoriously difficult to measure. A statement that the grey markets reach a certain percentage is therefore hard to prove or disprove. IFRRO would be willing to assist in surveying the situation if this is desired.

Enforcement is a key task for RROs and all have their own policies and procedures in place. For details we refer to the submissions by our members.

National laws should contain strong enforcement provisions to oblige industry to provide the necessary information and payments. Many RROs cooperate with industry and their associations to obtain information.

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

The fact that a device has other functions apart from the reproduction of copyright material, is not in itself relevant for the consideration of whether a device is subject to a levy or not. If one of the functions is to copy copyright protected works, either alone or in conjunction with other devices or media, then a levy should be applied. The extent to which a device is used to copy can then be taken into account in relation to the amount of the remuneration. Levy schemes can also take account of the fact that devices may combine the functions of several, previously separate copying devices. For example, multi-functional devices in the print sector combine functions of a photocopier, printer and/or scanner and/or fax. These devices do not pay four levies but get their own separate tariff. A much more significant issue is that every equipment and media that can be used to make copies as permitted by the exception is subject to the levy.

G. 22 and 23 on double payment

In assessing levy tariffs the extent to which material is obtained and paid for under a licence can and should be taken into account in setting tariffs, so that no question of “double payment” arises. In any event in the text and image based sector, works are often offered either from sources not equipped with DRM which integrate copyright management systems (for instance databases accessible by subscription) or from freely available online or offline sources. In these cases levies are justified to compensate for the uses of such material when it is covered by an exception.

Moreover, DRMs used in conjunction with the exploitation of exclusive rights cannot deal with all cases permitted by exceptions, in particular when the reproduction is from a paper original for the purpose of digital format. Also the possibility of printouts from digital sources, for instance downloads from the Internet, or of further uses in ways which are covered by copyright exceptions and remunerated by levies should be borne in mind.

H. 24 on alternative licensing

Where rightsholders decide to make their works available for free regarding certain uses, this does not necessarily mean that they wish to forego fair compensation due to them for the use of their works under levy schemes. An example is where an author decides to make use of a creative commons licence. In Belgium, the Creative Commons Licence expressly states that the creator of the content does not waive the right to fair compensation from the levy: <http://creativecommons.org/international/be/>. The creator therefore allows the free dissemination

of his work up to the limit of the exception compensated for by law and no conflict or issue of double payment arises. A further example is where rightsholders decide to use advertising as their main revenue source. This is not a reason for them not to receive fair compensation for copying permitted under exceptions. It should also be noted that in some countries the rightsholders are not permitted by law to renounce their right to fair compensation. For example, in Germany, article 63a of the Copyright Law provides that rights to remuneration under various legal licences may not be waived in advance, and can only be assigned in advance to a collecting society.

I. 25 What is the typical frequency and schedule of levy payouts?

RROs distribute at least once a year, some RROs have two distribution cycles per year. RROs are set up and governed by all categories of rightholders concerned. This is reflected in their governance structures which make democratic decisions on the distribution plan. This democratic structure greatly limits disputes after a decision has been made.

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

Funds are exchanged between RROs according to the agreements between them. The size of funds to be paid for a particular foreign territory is measured using surveys or, where available, information from full reporting by users. An issue is the obligation to pay tax including, when applicable, VAT unless an exemption has been given by the tax authorities which can be a burdensome procedure, different from Member State to Member State. Also, rightholders are not prevented from joining RROs in other countries.

I. 27 What are the average administrative costs in levy administration (in per cent of collected revenue)?

Administrative costs are usually around 10% of the collected revenue, bearing in mind that younger organisations have start up costs.

If we may be of any further assistance we would be most happy to explain this and previous submissions to the European Commission made by IFRRO on copyright levies.

Respectfully submitted,



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Chief Executive



Franziska Schulze
General Counsel

Background paper, Table 1, modified in accordance with IFRRO comments

Table 1: Equipment and media levies in the Member States that apply levies

Member State	AU	BE	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IT	LV	LT	NL	PL	PT	RO	SK	SI	SE
Media	X	NO	X	X	NO	NO	X	NO	NO	X	NO	X	NO	NO	NO						
Equipment	X	X	X	X	NO	NO	X	X	NO	X	X	NO	NO	NO	NO	X	NO	X	X	X	NO

Explanations

X=share for text/images from private copy levy and/or reprographic levy

NO=either no levy or no share for text/images

Comments

Portugal has an exception and a decree but the levy for reprography is unenforceable because the decree excludes digital devices from the levy

In France there is no reprographic levy. There will be a levy on multimedia mobile phones, but not for the benefit of the written sector so far

In Spain the law foresees a levy on media for the benefit of authors and publishers of text and image based works but the Ministerial Decree to implement it is still pending

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