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## **ALTERNATIVES TO DEVICE-BASED COPYRIGHT LEVIES**

**DIGITALEUROPE CALLS FOR A FRESH PUBLIC DEBATE AROUND  
ALTERNATIVE FORMS OF FAIR COMPENSATION THAT ARE FIT  
FOR THE DIGITAL AGE.**

DIGITALEUROPE BELIEVES THE HIGHER POLICY OBJECTIVE MUST NOW BE TO  
DEFINE A PATH TOWARDS COMMERCIALY REALISTIC ALTERNATIVE SOLUTIONS.

THESE SHOULD BE ALIGNED WITH DIGITAL SINGLE MARKET PRINCIPLES AND  
CONDUCTIVE TO A DYNAMIC LEGITIMATE LICENSING ENVIRONMENT THAT PERMITS  
AND ENCOURAGES INNOVATION AND EXPERIMENTATION IN NEW BUSINESS  
MODELS.

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## ALTERNATIVES TO DEVICE-BASED COPYRIGHT LEVIES

### 1- BACKGROUND

In many Member States collecting societies impose levies to varying extents on electronic devices such as PCs, smartphones, recording media and printing/imaging devices. A portion of the funds collected is transferred to rightsholders as fair compensation for private copying. In some countries a portion is also used for cultural subsidy purposes.

The device-based levy system is notoriously controversial. A relic designed for a by-gone analogue era, it is no longer fit for purpose in the digital economy. It causes distortions and fragmentation of the digital single market, it is impeding the development of innovative new business models for the delivery of legal (licensed) content, and it blurs the boundaries between authorised and unauthorised copies with the unfortunate consequence of encouraging piracy. Additionally the levies system is inefficient and unfair both in terms of collection and distribution. It is burdensome and costly for device manufacturers and importers to implement. European consumers are disadvantaged – generally they do not even know they are paying a levy, certainly not how much they are paying or what they are paying for. An elaboration of the case for change is set out in the Appendix. In short the levies system simply is not working, and it is beyond repair.

The reason that Member States use device-based levies as a source of funding for rightsholder organizations is not that the EU Copyright Directive (also known as the Information Society Directive) mandates it. In fact, the Directive does not mention levies at all. Several Member States had device-based systems in place already, traditionally charging levies on analogue devices such as tape recorders, faxes and copying machines. Rather than update and reform their systems when the Directive was adopted, to adapt them from the analogue to the digital world, they simply left them in place and extended them into the digital domain.

DIGITALEUROPE encourages the Commission to use its good offices<sup>1</sup> to initiate comprehensive reform, and start a process of replacing device-based levies systems with alternative forms of compensation. After so many unsuccessful attempts at EU and Member State level, we believe it will be impossible to find a standard EU-wide approach to assessing, collecting and distributing copyright levies. The technical, legal and political problems are too complex and intertwined. Alternative solutions are the only way forward.

### 2- ALTERNATIVES – A PATH TO THE FUTURE

The EU Copyright Directive requires “fair compensation” but not a device-based copyright levy system. Given the major, ever-growing problems with the device-based levies system

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<sup>1</sup> For example through the ongoing Mediation process

in the digitally connected world as discussed in more detail in the Appendix, DIGITALEUROPE believes it has become necessary to consider other alternative and fairer compensation solutions better suited to the digital world. Alternative systems may, to a certain extent, be left to the discretion of Member States to devise and implement nationally, provided they align with single market principles.

In compliance with article 5.2(b) of the EU Copyright Directive, such systems would allow for artists and creators to be compensated fairly for acts of private copying which cause more than minimal harm to rightsholders in the digital era, without impeding the digital content ecosystem.

Outdated device-based levy schemes are a remnant from the analogue era even though they are still applied in some European Member States in the current digital economy.

**DIGITALEUROPE believes that the higher policy objective must now be to define a path towards commercially realistic alternative solutions, aligned with digital single market principles and conducive to a dynamic legitimate licensing environment that permits and encourages innovation and experimentation in new business models.**

Encouraging such alternative systems will not only ensure fair and reliable compensation for creators, but also more and better legal offers of content for consumers and thereby discourage piracy, while allowing the ICT industry in Europe to flourish in a truly unified market. In short, alternative solutions are without doubt a win-win scenario for all.

Below are a number of viable concrete suggestions for alternative compensation models more suited to the digitally connected online world than device-based levies. These examples are not intended to be exhaustive, but to illustrate the potential for alternative systems and to stimulate a more structured discussion at European level following the debates and studies that have taken place in a number of Member States. Alternatives to device-based levies have already been implemented or are being proposed at least in Estonia, Finland, Ireland, Netherlands, Norway, Spain, and UK.

### **3- 'PRICED INTO PURCHASE' OPTIONS<sup>2</sup>**

#### **3- 1- Licensing, not Levies**

In this model it is assumed that normal use of the content by the consumer, including all copies which they may make for private use, is already included in the purchase price, with rightsholders being compensated by receiving payment from the purchase price at already commercially negotiated rates. Licence agreements between publishers and rightsholders depend on market forces and bilateral commercial negotiations. Currently different licence agreements may permit different levels of usage, which in turn may impact the royalty a rightsholder can legitimately expect to receive. Nevertheless, a fundamental principle should

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<sup>2</sup> The President of IFPI acknowledged some time ago that a levy would not be necessary in the case of a 'priced into purchase' model, see e.g. Nueva Economía, El Mundo, 28 April 2002.

be that the scope of any license should be able to encompass acts classed as, or claimed to be, private copying. In other words private copying should clearly be licensable and once licensed exhaust any additional claim to fair compensation specifically by way of levies.

Reflecting this line of thinking, the UK and Irish governments are proposing to implement a private copy exception without levies. Specifically, the UK evaluation is that a narrow scope of private copying (format shifting) causes minimal harm to rightsholders and therefore does not require supplementary compensation over and above what is already paid to rightsholders as an integral component built into current retail pricing models.

In countries such as the UK where there are no copyright levies at all, digital content sales are much stronger than in similar economies with device levies; 2009 data shows per capita consumption of digital music at €5.15 in the UK, €2.30 in France and €2.05 in Germany. In those countries where there are no levies, it appears that consumers benefit from more legal offers and rightsholders benefit from increased license revenues.

A report<sup>3</sup> by Oxera for Nokia suggests that the EU economy would benefit by up to €1.8bn per annum if licensing was encouraged and device-based levies were phased out. By enabling and encouraging consumers to legally purchase access to copyrighted content the market in legitimate digital content would be stimulated and would grow, with €626m of the gain accruing to rights holders due to a consequential increase in the market size, without increasing royalties.

### **3- 2- Payment closer to end-user**

Although this option is not, strictly speaking, an alternative to device-based levies as such, we nevertheless offer it as an alternative to the current system recognizing that it may be more politically attractive and realistic at least in Member States that are absolutely wedded to the notion of device-based levies.

Currently, device-based levies are paid by intra-community importers, creating major fragmentation of the internal market. To illustrate this, Amazon stopped ICT product shipments from Germany to Austria because it was forced to pay the levy both in Germany and in Austria, without being able to recuperate the German levy, so creating a double taxation situation.

In addition, the system as currently designed, is not allowing the proper application of the CJEU *Padawan* decision, because the importer is unable to predict the nature of the final customer (private or business), so that it is not possible to exempt business users who should not pay the levy as they are not making copies for private use. A refund system to the final customer would be unmanageable therefore an ex-ante exemption should be favoured over reimbursement.

A system whereby liability to pay the levy is shifted further down the supply chain, as close to the end user as possible, would help solving two key aspects: the fragmentation of the single

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<sup>3</sup>Oxera study "Is there a case for copyright levies?" (May 2011): <http://www.oxera.com/main.aspx?id=9481>

market and the exemption of business users. First, products would freely circulate within the EU and the levy would be paid only in the country of final purchase avoiding issues of double taxation. Second, the lower level in the supply chain (e.g. point of sale) is in a position to assess whether the final customer is a private person or not and can execute an upfront exemption for business customers, without unnecessary reimbursements and associated administrative burden.

## **4- PUBLIC FUNDED OPTIONS**

### **4- 1- State budget**

Both Norway and, since 1 January 2012, Spain have a system of providing funding to creators through the state budget. In Estonia the Minister of Culture has indicated that he will make a proposal to compensate private copying from the state budget.

In Spain the private copy exception continues to exist and the economic compensation for acts of private copying will be provided through the state budget on the basis of an assessment of actual harm to rightsholders.

Norway compensates for legitimate private copying through the state budget, where harm is determined through usage studies. The national budget for 2012 has allocated NOK 42.4m or €5.5m for this purpose. Norwaco, an umbrella organisation for authors, performing artists and producers, distributes the amount allocated from the state budget to its member organisations and to rightsholders in the European Economic Area (EEA).

Member States that chose to collect compensation for private copying through the state budget could assign the funds to Collecting Societies for re-distribution to artists and creators if they did not want the administrative burden of managing distribution themselves.

### **4- 2- Radio and television fee**

In some Member States consumers pay a fee for receiving TV and radio broadcasts. In Member States where this exists, such a broadcast fee could be repurposed to give a broader mandate to support cultural activities in that Member State. Systems such as France's 'Redevance Audiovisuelle' illustrate how collection systems can function. This system collects circa €2 billion per annum for the benefit of public television and radio stations. Its mandate could be broadened to compensate for harm caused by private copying.

In Finland key stakeholders Nokia, Teosto, Sanomat and IFPI jointly made a public statement in May 2012 supporting use of the television fee (YLE-payment) for compensating private copying. Earlier a review carried out for the Ministry of Culture by Arne Wessberg (former CEO of the Finnish broadcasting company YLE and former president of EBU, European Broadcasting Union) proposed that the compensation collection scheme should be linked to a communications fund instituted on the basis of the current State Television and

Radio Fund into which income from the auction of frequency domains as well as television fees would be channelled.

### **4- 3- R&D funding**

Funding for the creative sector has often been thought of as subsidy rather than investment. Vehicles such as the private copy levy have been used to collect a subsidy rather than for their true fundamental purpose of compensating for any harm to rightsholders arising from private copying. In order to ensure the continued dynamism of the creative sector in the EU it would be preferable to provide proper innovation funding to the creative sector to promote investment and innovation in new business models, rather than a covert subsidy that distorts the market.

Such funding might take the form of grants from EU funds such as the 'Creative Europe' Programme - see below - or from Member State level innovation funds.

### **4- 4- EU fund**

EU initiatives such as the Creative Europe Programme<sup>4</sup> would allocate more than €900 million (2014-2020) in support of the cinema and audio-visual sector and almost €500 million for culture. The plans also include a new financial guarantee facility worth more than €210 million, which would enable small operators to access bank loans.

This new programme would follow on from the current Culture, MEDIA, and MEDIA Mundus programmes. EU initiatives such as these would be a suitable source of funding for Member States' cultural initiatives in place of device-based levies.

### **4- 5- Dedicated lottery**

Some sectors (for example health and sport) receive funding from lottery programs. These may be general lotteries, or lotteries tailored to those wishing to explicitly support a particular field. Additional funding for the creative sector and cultural pursuits generally could be drawn from a lottery scheme tailored specifically to supporting cultural interests and which would attract interest from the general public keen to support cultural initiatives. This would have the benefit of transparency as punters would know their money was being used directly for subsidising cultural activities.

All of the above public funding options examples would be suitable alone or in combination for substituting levy income both in respect of compensating harm as well as cultural subsidy, where applicable. However, it should be noted that EU law requires fair compensation for acts of private copying only if there is more than minimal harm caused to the legitimate rightsholder. Where there is no harm, or harm is minimal, no compensation is due so in that case any funding should be transparently labelled and seen explicitly as innovation and creativity funding or subsidy and collected and distributed accordingly. Should there be

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<sup>4</sup> [http://ec.europa.eu/culture/news/creative-europe\\_en.htm](http://ec.europa.eu/culture/news/creative-europe_en.htm)

harm, the level of harm and relevant compensation should be analysed and determined at Member State level.

## **5- ACCESS OVER OWNERSHIP - A KEY TREND**

An increasing number of content services deliver music and video to consumers by streaming (“access”) from the cloud, made possible by increasing availability of broadband connections, wired and wireless. In this model, the content is not permanently copied to any local medium (hence no “ownership”), but rendered directly from the internet. In other words, in the cloud environment, digital content is increasingly being delivered in ways that are less reliant on the reproduction right, with respect to which the right of private copying is relevant. As such streaming services gain share in relation to other forms of distributions (physical, download), any rationale for collecting levies on devices is naturally eroded.

This is because, from a legal perspective, the private copy exception applies only to the “reproduction right” within the meaning of the 2001 Copyright Directive. Consequently it is widely accepted that the private copying exception does not apply in the case of streaming where no reproduction right is implicated and consequently, neither do the provisions in Article 5.2(b) of that Directive relating to “fair compensation” for private copying. In other words levies naturally have a diminishing legal basis in the domain of streaming where there is no reproduction.

Furthermore, it has to be pointed out that in the context of the cloud and streaming, licensing of content is broadly working well. Licensing is in fact a well-functioning market compensation tool well-suited to the cloud. Consumption of music is readily compensated through the price already paid for licensing and no further compensatory payments are necessary.



## APPENDIX

### THE CASE FOR CHANGE

As said in the main paper, the device-based levy system is simply not working. It is not fit for purpose in the digital era, and is beyond repair. It causes distortions and fragmentation of the digital single market, it is impeding the development of innovative new business models for the delivery of legal (licensed) content, and it blurs the boundaries between authorised and unauthorised copies with the unfortunate consequence of encouraging piracy. Additionally the levies system is inefficient and unfair both in terms of collection and distribution. It is burdensome and costly for device manufacturers and importers to implement. European consumers are disadvantaged – generally they do not even know they are paying a levy, certainly not how much they are paying or what they are paying for.

The lack of modernization of the fair compensation system in the digital era is the fundamental reason for the ferociously difficult problems encountered today, which the European Commission is now seeking to address. The levies systems operated in the various countries are mutually inconsistent and contradictory.

Despite numerous attempts at European and Member State level, there is still no consistent application of the exceptions to the exclusive right of reproduction set out in the Directive. There is no clear concept of how 'fair compensation' might be defined. There is no agreed way to measure actual or potential harm to rightsholders arising from reproductions within the scope of the exceptions. There is no agreed way to categorise devices and products, and there is no consistent process for determining what products should be levied and at what rates.

It is not possible to agree on what constitutes fair compensation. Even those Member States that operate levies systems cannot agree on how to define the concept of fair compensation.

The result is politically negotiated rates that differ significantly from one Member State to another and on an arbitrary range of products, collected with varying degrees of efficiency, producing dramatically different levels of income for collecting societies, and fragmenting the internal market for digital products. These differences are not justified by differences in interpretation of the exception, harm assessment, or copying practices. The differences are simply a function of variations in national laws, in historical levels of collections, and political bargaining power.

The basic problem of assessing copyright levies on digital products is that digital devices and networks make no distinction between content that is copyrighted and potentially relevant for fair compensation (music, film and literature), and all manner of professional and private content (private photos/videos, administrative documents, PowerPoint presentations) which is clearly not relevant for compensation. These are multi-function, all-purpose devices, and assessing exactly how each type of device is used is impossible.

Furthermore, digital technology evolves at a rapid pace. Different types of device and media continue to emerge, and categories of device become more and more difficult to define. The



proliferation of devices ranging from desktop or laptop PCs, to various forms of tablets, to mobile phones and smartphones is the most obvious example. It would be impossible to devise a set of definitions and categories that can be updated and adapted quickly enough to be useful. Yet, a European levies system would have to do just that.

Then, we add Digital Rights Management (DRM)/Technical Protection Measures (TPM) to the mix. The Directive specifically requires fair compensation to take into account their application or non-application. Some content, such as DVDs, are copy protected. Video on demand (VOD) services let users rent/buy films and do not allow private copying. Online music tracks are sold under license and using technical protection. Even though the TPM provisions were introduced in 2001, no Member State has found a way to implement them in a way that allows levies to be adjusted. Most devices and recording media can be used to store and copy both protected and unprotected works. The devices allow content to be delivered and rendered in protected formats, precluding or limiting copying according to policies set by the content distributor. The devices also allow management of content that is not protected. As yet, no system has been devised for taking DRM/TPM into account in any meaningful way. The result is the legitimate challenge to the levies system of double (even multiple) payment.

Finally, it is worth noting that digital content is increasingly delivered in ways that do not involve private copying at all, and new business models are emerging all the time. An increasing number of content services deliver music or video to consumers by streaming. This is made possible by increasing availability of broadband connections, wired and wireless. In this model, the content is not copied to any local medium, but rendered from the Internet. As these services gain share and replace other forms of distributions (physical, download), the justification for collecting levies on devices is undermined.

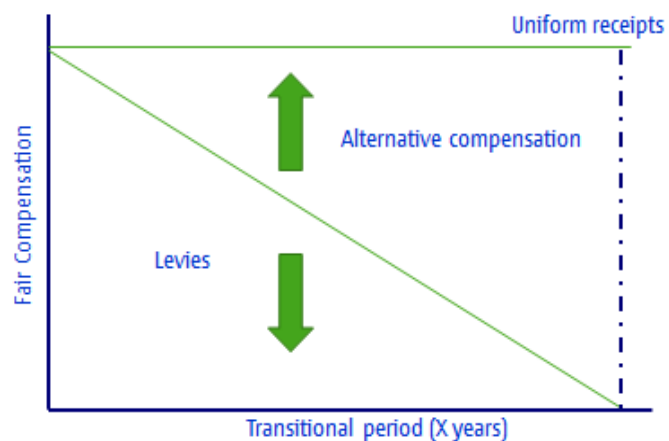
In short, the device-based levies system in Europe simply is not working, and it is beyond repair.

## Mediation – a Path to the Digital Future

The current mediation process is an excellent opportunity for charting a path away from device-based levies towards alternative and fairer compensation solutions fit for the digital era. This could build on the existing EU Copyright Directive 2001/29/EC, not change it, meaning that the Copyright directive itself would not need amendment.

In order to better align with the single market, a valuable outcome of the mediation process would be a recommendation for Member States to implement an alternative to device-based levies within a specified number of years, e.g. 3 years, and during this transitional period Member States should collect a gradually reducing amount through device-based levies. If there is a shortfall from actual measured harm to rightsholders, which is more than minimal, then this may be collected locally from alternative compensation.

### Fair Compensation over the transitional period



*Note: It is up to Member States to choose the rate of change during the transitional period*

Such a recommendation from the mediator would enable a gradual move away from device-based levies where individual Member States may choose their own rate of change during the transitional period rather than imposing any kind of “big bang”. Any shortfall as a consequence of reducing levy income may be collected through alternative means during the transitional period. The annual cumulative amount would be determined (capped) based on actual harm and of course the minimal harm principle must still apply in accordance with the existing Copyright Directive.

Importantly, a recommendation from the mediator framed in this way would be permissive not prescriptive, in that Member States can choose what form of alternatives to implement.

The recommendations from the mediator could also address the issue of cultural subsidy recognising that in some Member States a component of levy revenues is traditionally used for cultural funding. In such cases it would be prescribed that during the transitional period

there would be a gradual move towards the cultural component being paid instead by the Member State, e.g. from a central state budget. The substitute amount would be determined unilaterally by the Member State, and there would be no limit on the amount that could be collected this way, at the same time recognising that cultural funding generally will include many other sources. There would be no obligation on Member States that currently do not use levy revenues for cultural funding, or even on those that do, to implement the cultural component.

## ABOUT DIGITALEUROPE

**DIGITALEUROPE** represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

**DIGITALEUROPE** ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 60 global corporations and 33 national trade associations from across Europe. In total, 10,000 companies employing two million citizens and generating €1 trillion in revenues. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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