

# Copyright Levies: barriers to trade and innovation

Analysis under EC Competition Law

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## Agenda



### Part 1: What are copyright levies?

- EU Legal Framework



### Part 2: What are the main issues?

- Copyright levies as barriers to trade and innovation



### Part 3 – Legal Assessment

- Free Circulation of Goods
- EC Competition Law



## What are copyright levies?

- “Rough justice” national systems intended to compensate IP right-holders for (genuine) private copying based on the premise that an act of private copying cannot be licensed for practical purposes by the relevant right-holders.
  - Fee on products/media which are suitable/intended for (private) copying
  - Sound, audio-visual, literacy (including images)
  - To be paid by national manufacturers /importers (indirect compensation)
  - To collection societies (acting for authors, artists and producers/publishers)
  - Rates (and products) fixed by Government, by Collective Societies or others
  - Some sales may be exempted
- Originates in Germany (Copyright Act 1965 ) but has spread across EU:
  - Austria (1980), Finland (1984), France (1985), Netherlands (1990), Spain (1992), Denmark (1992), Italy (1992), Belgium (1994), ....
- Distribution to right-holders varies per country (and collecting societies):
  - Management fees / Social and Cultural Funds
  - Distribution to members , non-members and other collecting societies (reciprocity agreements)

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## EU Legal Framework - Directive 29/2001

- **Art. 5.2.b: Private copying exception**
  - reproductions on any medium,
  - by a natural person,
  - for private use and for ends that are neither directly or indirectly commercial,
  - on condition rightholders receive “fair compensation”,
  - which takes into account the application or non-application of TPMs
- **Recital 35: Criteria when determining fair compensation**
  - Harm to the right-holders (resulting strictly from private copying) – Recital 38
  - Payments received in some other form (for instance, as part of a license fee, so that no specific or separate payment may be due)
  - Degree of use of technological protection measures (“TPMs”)
  - No obligation for payment in those situations where the prejudice to the rightholder would be minimal (“de minimis” rule)

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# EU Legal Framework - Directive 29/2001



## • Additional provisions

- Reprography exception: article 5.2.a
  - ✓ Reproduction on paper or similar medium; and
  - ✓ By photographic technique or process with similar effects
- TPMs protected against circumvention: article 6
- Three-steps test: article 5.5
- Transposition deadline: December 22, 2002

## • International obligations

- Art. 9.1 TRIPs Agreement
- Art. 9 Berne Convention
- Art. 10 WCT
- Art. 16 WPPT
- Art. 15 Rome Convention (1961)

*Contracting parties may provide for (private use) exceptions to exclusive reproduction right, but do not require for compensation*



# What's the magnitude of levies system(s)?



***"In principle, a total of over 6% of all intra-EU imports and exports, amounting in total to over € 100 billion, are goods which actually or potentially attract a levy."***

Source: EC Internal Market, "Background Document – Fair Compensation for Acts of Private Copying" (February 14, 2008)  
[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/background\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/background_en.pdf)

### Sound and Audiovisual Levies (reported by Collecting Societies)

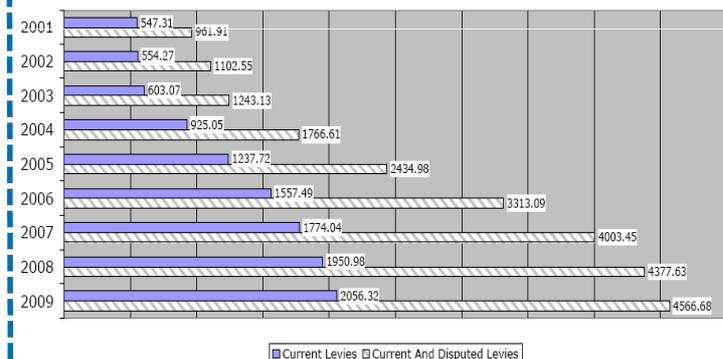
	2005	2006	2007 <sup>16</sup>
Austria	17.627	15.846	16.413
Belgium	21.458	19.984	19.574
Czech Republic	2.286	2.73	5.388
Denmark	6.300	5.000	4.715
Finland	11.575	11.617	15.515
France	155.320	156.005	163.680
Germany	153.723	156.094	n/a <sup>16</sup>
Hungary	9.762	12.489	11.540
Italy	72.791	70.922	70.956
Latvia	0.503	0.800	0.812
Lithuania	0.249	0.126	0.084
Netherlands	26.807	25.723	19.600
Poland	3.837	5.094	4.291
Slovakia	0.611	0.683	0.904
Spain	58.701	55.656	40.727
Sweden	15.484	18.873	20.983
<b>TOTAL</b>	<b>557.034</b>	<b>557.642</b>	<b>395.182*</b>

(Source: GESAC, EC Consultation on Levies - April 08)

- + Estimate Germany (~ €165M): **~ €560M** ←
- + Estimate Reprography (~30%EU) =: **~ €168M**

**TOTAL ~ €728M**

### Collectable levies + Disputed levies forecast (reported by ICT industry- Nathan Associates)



(Source: CLRA, EC Consultation on Levies - April 06)

NOTE: Comparable data reported by Nathan Associates Inc. ("Economic Impact Study Private Copying Levies on Digital Equipment and Media")

# Example: Some EU Financials for Deductions and Bilateral Agreements



Distribution by Authors' Societies of Amounts Collected for Private Copying in 2004

Country	Authors' Society	Repertoire	Society's Share	Management and Other Fees		Amounts for Social, Cultural and/or Collective Purposes		Total Distributed	Of Which in the Domestic Territory	Of Which in Foreign Territories	
				Total	%	Total	%				
Austria	AUSTRO-MECHANIA*	Music	€ 5.445	€ 0.372	6.8%	€ 2.777	51.0%	€ 2.108	76.8%	23.4%	
Belgium	SABAM SCAM	Multirepertoire Multimedia	Total Collection for Private Copy in 2004 was €16.631, to be distributed once the audio/video split for collections on CD-R/DVD-R Data media has been established and approved by the Minister for Economic Affairs.								
Cyprus	No Remuneration Scheme for Private Copying										
Czech Republic	OSA**	Music	€ 1.12	€ 0.11	10.0%	€ 0	0.0%	€ 0.84	73.9%	26.1%	
Denmark	KODA	Music	€ 1.197	€ 0.08	5.0%	€ 0.399	33.3%	€ 0.738	44.0%	56.0%	
Estonia	EAU	EAU is not a member of GESAC									
Finland	TEOSTO***	Music	€ 1.951	€ 0.098	5.0%	€ 0	0.0%	€ 1.853	83.0%	17.0%	
France	SACEM****	Music	€ 51.445	€ 2.672	6.0%	€ 14.20	25%+5%	€ 35.573	54.0%	46.0%	
	SCAM	Multimedia	€ 3.781	€ 0.389	9.8%	€ 0.942	25%	€ 2.470	n/a	n/a	
	ADAGP	Visual Arts	€ 0.635	€ 0.127	20.0%	€ 0.159	25%	€ 0.349	80.0%	20.0%	
Germany	GEMA	Music	€ 33.150	€ 0.420	19.4%	€ 1.510	4.6%	€ 25.220	70.1%	29.9%	
Greece	AEPF	Multirepertoire	Monies have not been collected in Greece since 1999 for lack of agreement with importers and manufacturers of equipment and carriers. A law suit has been filed for which judgment is pending.								
Hungary	ARTISJUS HUNGART	Multirepertoire Visual Arts	€ 4.328 € 0.254	€ 0.707 € 0.051	16.3% 20.0%	€ 0.311 € 0.025	7.2% 10%	€ 3.311 € 0.178	55.0% n/a	45.0% n/a	
Ireland	No Remuneration Scheme for Private Copying										
Italy	SIAE*****	Multirepertoire	€ 27.919	€ 1.18	4.2%	€ 0	0%	€ 26.76	87.9%	12.2%	
Latvia	AKKA-LAA*****	Multirepertoire	€ 1.66	€ 0.15	9.6%	€ 0.01	0.6%	€ 1.33	82.5%	7.5%	
Lithuania	LATGA-A	Multirepertoire	€ 0.250	€ 0.040	16.0%	€ 0.05	20.0%	€ 0.180	60.0%	50.0%	
Luxembourg	No Remuneration Scheme for Private Copying										
Malta	No Remuneration Scheme for Private Copying										
The Netherlands	LIRA-STICHTING	Literary Works	€ 0.85	€ 0.004	7.50%	€ 0.059	8.9%	€ 0.727	n/a	n/a	
Poland	ZAIKS	Multirepertoire	In Poland the share of the different authors' societies for monies collected in 2004 is currently negotiated following Regulation of the Minister of Culture of 2 June 2003. Total 1,205 m.								
Portugal	SPA	Multirepertoire	In Portugal, no Amount for Private Copy was distributed to rightholders until October 2005.								
Slovakia	SOZA LITA*****	Music Multirepertoire	€ 0.193 € 0.097	€ 0.028 € 0.016	14.7% 16.5%	€ 0 € 0	0% 0%	€ 0.164 € 0.081	n/a 69.1%	n/a 30.9%	
Slovenia	AAS	AAS is not a member of GESAC									
Spain	SGAE	Multirepertoire	€ 29.200	€ 1.640	6.6%	€ 5.860	20.0%	€ 21.790	21.0%	79.0%	
Sweden	STIM	Music	€ 1.890	€ 0	0%	€ 0	0%	€ 1.990	55.0%	45.0%	
UK	No Remuneration Scheme for Private Copying										

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All Figures in € m.

Note: partial information, including only some audio & video levies in Member States (not all collecting societies included; reprography levies not included)

Source: EC - "Stakeholder Consultation on Copyright Levies on a Converging World" (June 2006)

## What are the main issues that can affect trade?

Copyright levies may be a valid tool to fairly compensate IP rightholders. However, the existing system is not aligned with Community law and needs (major) adjustments.

Issue 1: Different systems with different parameters per Member State:

1.1) Legal uncertainty on applicability of levies

1.2) Legal uncertainty on levy applicable per device in multiple countries

Issue 2: Disparate and Excessive levies, not corresponding to economic value of private copying, which incite market distortion and incentive gray market

Issue 3: Administrative burdens: problems for levy classification (importation) and refund (exportation)

Issue 4: Levy fees based on technical specifications acting as a barrier to innovation

# National approach to levies

	Member State	Levies	Member State	Levies
	<a href="#">Austria</a>			<a href="#">Latvia</a>
	<a href="#">Belgium</a>			<a href="#">Lithuania</a>
	<a href="#">Bulgaria</a>			<a href="#">Luxembourg</a> <b>No Levies</b>
	<a href="#">Cyprus</a>	<b>No levies</b>		<a href="#">Malta</a> <b>No Levies</b>
	<a href="#">Czech Rep.</a>			<a href="#">Netherlands</a>
	<a href="#">Denmark</a>			<a href="#">Poland</a>
	<a href="#">Estonia</a>			<a href="#">Portugal</a>
	<a href="#">Finland</a>			<a href="#">Romania</a>
	<a href="#">France</a>			<a href="#">Slovakia</a>
	<a href="#">Germany</a>			<a href="#">Slovenia</a>
	<a href="#">Greece</a>			<a href="#">Spain</a>
	<a href="#">Hungary</a>			<a href="#">Sweden</a>
	<a href="#">Ireland</a>	<b>No Levies</b>		<a href="#">United Kingdom</a> <b>No levies</b>
	<a href="#">Italy</a>			

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# What's an audio / video recording device intended / suitable for private copying?



Cassette-deck



VCR



Dedicated CD/DVD burner



Burner for Camera?



CD/DVD Media?  
Audio/Video vs. DATA



PC CD/DVD  
data burners?



Memory  
cards?



Multimedia  
mobile phone?



PDA with  
integrated phone?



Digital Camera?



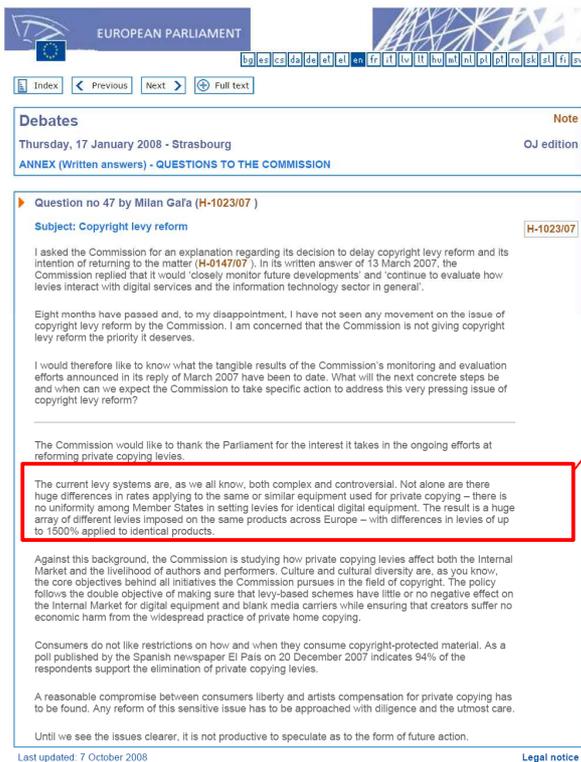
Digital Pictures Frame?

- What if devices include TPMs?
- What if devices are for business use?

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# Wide disparities on levies accross Europe

## Response from the Commission to MEP Question (17 Jan. 2008)



EUROPEAN PARLIAMENT

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Debates Thursday, 17 January 2008 - Strasbourg Note OJ edition

ANNEX (Written answers) - QUESTIONS TO THE COMMISSION

Question no 47 by Milan Gaľa (H-1023/07)

Subject: Copyright levy reform H-1023/07

I asked the Commission for an explanation regarding its decision to delay copyright levy reform and its intention of returning to the matter (H-9147/07). In its written answer of 13 March 2007, the Commission replied that it would 'closely monitor future developments' and 'continue to evaluate how levies interact with digital services and the information technology sector in general'.

Eight months have passed and, to my disappointment, I have not seen any movement on the issue of copyright levy reform by the Commission. I am concerned that the Commission is not giving copyright levy reform the priority it deserves.

I would therefore like to know what the tangible results of the Commission's monitoring and evaluation efforts announced in its reply of March 2007 have been to date. What will the next concrete steps be and when can we expect the Commission to take specific action to address this very pressing issue of copyright levy reform?

The Commission would like to thank the Parliament for the interest it takes in the ongoing efforts at reforming private copying levies.

The current levy systems are, as we all know, both complex and controversial. Not alone are there huge differences in rates applying to the same or similar equipment used for private copying – there is no uniformity among Member States in setting levies for identical digital equipment. The result is a huge array of different levies imposed on the same products across Europe – with differences in levies of up to 1500% applied to identical products.

Against this background, the Commission is studying how private copying levies affect both the Internal Market and the livelihood of authors and performers. Culture and cultural diversity are, as you know, the core objectives behind all initiatives the Commission pursues in the field of copyright. The policy follows the double objective of making sure that levy-based schemes have little or no negative effect on the Internal Market for digital equipment and blank media carriers while ensuring that creators suffer no economic harm from the widespread practice of private home copying.

Consumers do not like restrictions on how and when they consume copyright-protected material. As a poll published by the Spanish newspaper El País on 20 December 2007 indicates 94% of the respondents support the elimination of private copying levies.

A reasonable compromise between consumers liberty and artists compensation for private copying has to be found. Any reform of this sensitive issue has to be approached with diligence and the utmost care.

Until we see the issues clearer, it is not productive to speculate as to the form of future action.

Last updated: 7 October 2008 Legal notice

"The current levy systems are, as we all know, both complex and controversial. Not alone are there huge differences in rates applying to the same or similar equipment used for private copying – there is no uniformity among Member States in setting levies for identical digital equipment. The result is a huge array of different levies imposed on the same products across Europe – with differences in levies of up to 1500% applied to identical products."

# Assessment of "economic value" of private copying

- Levies not based on "harm" principles and "the minimis" rules, but on income expectations and bargaining power.
- Harm assessment, if any, does not take into account "genuine private copying" but usually:
  - (i) "copies" (consideration of copying behaviors falling outside the scope of the exception); and
  - (ii) assumptions of copying behaviours (suitability and potential maximum capacity of the device)
- Levies not based on assessment of "economic value" (harm) of private copying
  - Value of a private copy should be lower than the monopolistic price (IP royalties) that right-holders would perceive for each authorized reproduction of the original work



E-2864/07EN

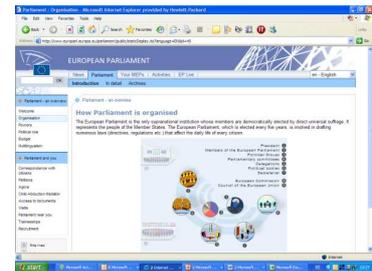
Answer given by Mr McCreevy (Internal Market EU Commissioner) on behalf of the Commission (September 19<sup>th</sup>, 2007)

The notion of "fair compensation" has been introduced by Directive 2001/29 (hereafter "the Directive") as a mean to compensate owners of copyright for acts that fall under the private copying exception.

(...)

According to the Commission's initial analysis of the issue, only media and equipment that can be used, and are effectively used to a significant extent to produce genuine private copies can attract a levy.

It also believes that equipment that is used for commercial purposes (e.g. in companies, public administrations) should not attract a levy since this would clearly go beyond requirement to provide for the compensation for permitted acts (i.e. private copying) as laid down in the Directive.



- QUESTION:

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2007-2864&language=EN>

- ANSWER:

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-2864&language=EN>



Price differences (Example: pricing at Bechtle website)

The Netherlands

[http://www.bechtle.nl/shop/MasterServlet;jsessionid=81f5ccd06dd3758b1df81ee1d2baf5cd081b4c74c4cb2622e1129e411319265?hybris\\_jakarta=81f5ccd06dd3758b1df81ee1d2baf5cd081b4c74c4cb2622e1129e411319265&i=ls1&newFE=false](http://www.bechtle.nl/shop/MasterServlet;jsessionid=81f5ccd06dd3758b1df81ee1d2baf5cd081b4c74c4cb2622e1129e411319265?hybris_jakarta=81f5ccd06dd3758b1df81ee1d2baf5cd081b4c74c4cb2622e1129e411319265&i=ls1&newFE=false)

Item	Quantity	Bechtle No.	Picture	Product name	Avail.	Price of item excluding VAT	Total price excluding VAT	
1	1	501173-03		HP LaserJet M1522N MFP Version: Dutch	✓	€ 263,00	€ 263,00	
							Subtotal	€ 263,00
							Flat rate delivery charge	€ 15,00
							VAT (19.0%)	€ 52,82
							<b>Total amount</b>	<b>€ 330,82</b>

Belgium

[https://www.bechtle.be/shop/MasterServlet;jsessionid=148fb590f6df5de47c10a2cf8acd519aec50cd07646ea5171ad644ced9d725c?hybris\\_jakarta=148fb590f6df5de47c10a2cf8acd519aec50cd07646ea5171ad644ced9d725c&i=pr2&newFE=false](https://www.bechtle.be/shop/MasterServlet;jsessionid=148fb590f6df5de47c10a2cf8acd519aec50cd07646ea5171ad644ced9d725c?hybris_jakarta=148fb590f6df5de47c10a2cf8acd519aec50cd07646ea5171ad644ced9d725c&i=pr2&newFE=false)

Item	Quantity	Bechtle No.	Picture	Product name	Avail.	Price of item excl. VAT & Gov. Fees	Total price excl. VAT & Gov. Fees	
1	1	501173-73		HP LaserJet M1522N MFP Version: Dutch (Belgium)	✓	€ 268,00	€ 268,00	
2	1	RECUPEL		RECUPEL		€ 0,04	€ 0,04	
3	1	REPRO		REPROBEL		€ 179,95	€ 179,95	
							Subtotal	€ 447,99
							Flat rate delivery charge	€ 15,00
							VAT (21.0%)	€ 97,23
							<b>Total amount</b>	<b>€ 560,22</b>

169%

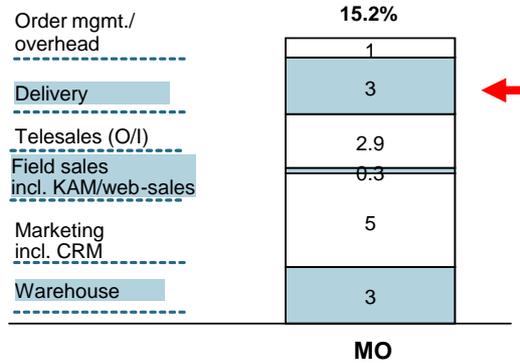


# Levy as an incentive to Gray Market (max. 3% levies)

- Within an internal market shipping cost becomes the key commercial argument for intra community trade.
- Levies higher than 3% start to incent arbitrage and attract free riders from no/low levy countries to ship into high levy countries – without complying to local rules.
- Barriers to gray market are weak:
  - 1) Self-reporting obligation
  - 2) Liability only on 1st tiers (with country exceptions)
  - 3) “hit and run” companies

**Roland Berger**  
Strategy Consultants

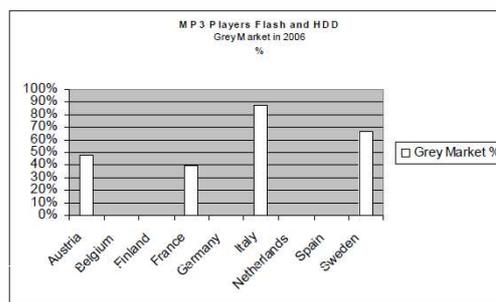
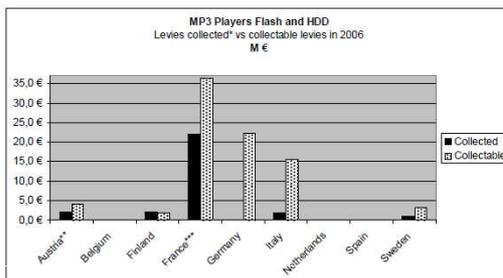
## Cost structure of Mail Order [% of end-user price]



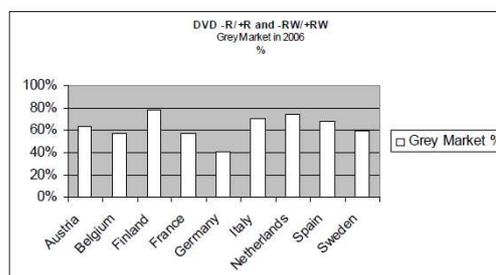
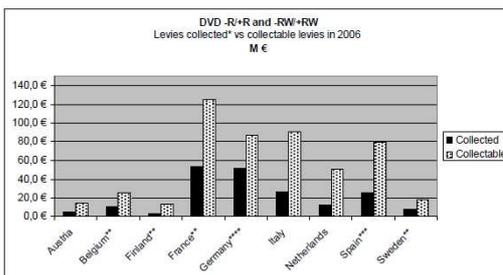
Source: Final tier interviews, Roland Berger

# Gray market in Europe

Levies collected versus collectable levies in 2006 for MP3 Players



Levies collected versus collectable levies in 2006 for DVD R/RW



Source: EICTA (April 2008)



## Example (imports): wide disparities on levies classification for multifunctional printers (MFPs)

- No levies on MFPs in 15 Member States
- Levy based only on copying speed in 2 Member States (*Belgium, Slovenia*) → ... and how copying speed is measured?
- Germany (08-10): Flat levy for inkjet and speed-based levy for laser MFPs
- Levy defined as a % of import /sale price in 6 Member States (0.5% - 5.26%)- *Austria, Bulgaria, Greece, Poland, Romania, Slovakia*
- Other approaches:
  - Czech Rep.*: Fix levy for products in a range of prices
  - Hungary*: combination of speed + a 2% price maximum cap
  - Spain*: weight criteria (17 kg) + standard copying speed above 17 kg

Product:	HP Officejet 5610 All-in-One	
Model:	Ink All-in-One (Color)	
Gross List Price:	110 €	
Flat-bed Scanner:	Yes	
Weight:	5,9 KG	
Copying Speed:	Fast (Black)	Up to 20 cpm
	Fast (Color)	Up to 13 cpm
	Normal (Black)	Up to 4 cpm
	Normal (Color)	Up to 3 cpm

Country	Levy	Comments
Belgium II	179,95 €	Draft Mode Black
Germany (settled)	12,00 €	(2008-2010)
Germany (litigated)	102,26 €	(before 2007)
Slovenia	8,35 €	
Spain	7,95 €	
Belgium I	4,61 €	Normal Mode Black
Austria	3,88 €	
Greece	2,95 €	
Slovakia	2,21 €	
Bulgaria	1,47 €	
Hungary *	1,47 €	
Czech Rep	0,93 €	
Poland	0,80 €	
Romania	0,37 €	
Cyprus	No Levy	
Denmark	No Levy	
Estonia	No Levy	
Finland	No Levy	
France	No Levy	
Ireland	No Levy	
Italy	No Levy	
Latvia	No Levy	
Lithuania	No Levy	
Luxemburg	No Levy	
Malta	No Levy	
Netherlands	No Levy	
Portugal	No Levy	
Sweden	No Levy	
UK	No Levy	



## Levies as barriers to export

### Double-Payments

Notes:

- Resistance from some collecting societies to reimburse 2nd tier resellers upon exportation (directly or indirectly)
- Export refund scheme not available in various Member States

SPAIN Split of Levy on DVD burners	% of the 3.4€ levy	Category of Right-holders	% among each category - €	Collecting Society invoicing the levy share
Books Right-holders	1,1% - 0,0374€	Authors & Publishers	100% - 0,0374€	CEDRO (100%) (collects also on behalf of VEGAP)
Sound Right-holders	29,08% - 0,98872€	Authors	50% - 0,49436€	SGAE (100%)
		Artists	25% - 0,24718€	AIE (100%)
		Producers	25% - 0,24718€	AGEDI (100%)
Audiovisual Right-holders	69,82% - 2,37388€	Authors	33% - 0,7913€	SGAE (~99%) DAMA (~1%)
		Artists	33% - 0,7913€	AISGE (~80%) AIE (~20%)
		Producers	33% - 0,7913€	EGEDA (100%)

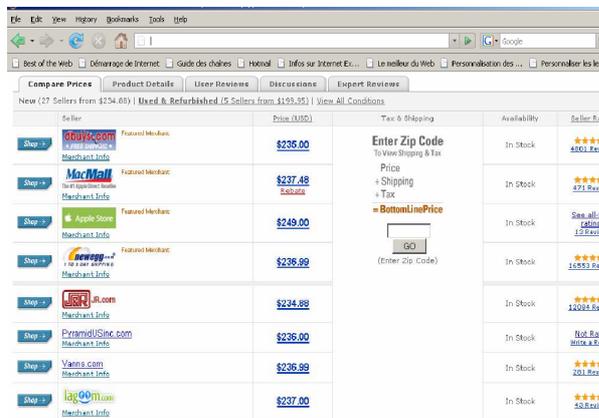


## Levies as barriers to multi-country e-commerce platforms?

- Application of levies based on country of destination? GESAC's proposal

(EC Consultation on Levies – April 2008)

[http://ec.europa.eu/internal\\_market/copyright/levy\\_reform/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm)



Seller	Price (USD)	Tax & Shipping	Availability	Seller Rating
BestBuy.com	\$235.00	Enter Zip Code To View Shipping & Tax	In Stock	4.9/5.0
MacMall	\$237.48	Price + Shipping + Tax	In Stock	4.9/5.0
Apple Store	\$249.00	BottomLinePrice	In Stock	See all 16,853 reviews
BestBuy.com	\$236.99	GO (Enter Zip Code)	In Stock	4.9/5.0
BestBuy.com	\$234.99		In Stock	4.9/5.0
ParamidiSinc.com	\$236.00		In Stock	Not Rated
Vainis.com	\$236.99		In Stock	4.9/5.0
BestBuy.com	\$237.00		In Stock	4.9/5.0

Impossibility of e-commerce platforms to deal with multi-country levies administration (levy classification, price factoring, declaration, payment, audit, ...)

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- Legal uncertainty on applicability of levies on cross-border sales

### ➤ Opus GmbH Case (The Netherlands)

- Court of Justice in The Hague (July 12, 2007)

- Court of First Instance of The Hague (Sept. 16, 2005)

### ➤ Rue de Commerce Case (France)

- Cour de Cassation (Nov. 27, 2008)

- Cour D'Appel de Paris (March 22, 2007)

- Tribunal de Commerce de Bobigny (Sept 15, 2005)

### ➤ ZPU vs. Luxemburg e-retailer

- LG State Court Köln (January 2008)

## Impact of copyright levies on product innovation

- While schemes in several Member States are migrating to flat-fee levies (i.e. 3.4€ per MP3/MP4 player) or a % price based levy (i.e. 2% import price), schemes based on technical product specs may hinder availability of innovative products:
  - Higher storage capacity may drive higher levies
  - Higher copying speeds may drive higher levies
  - Presence of an specific functionality may attract levies
- Some products are not available in the EU market because potential copyright levies made them unviable from a commercial perspective.
- Some capabilities of certain products may be capped by manufacturers to attract lower levies and make them commercially viable (in the country or EU).
- Copyright levies detract major funding from R&D activities.

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# Example: PC-connected MFP (product re-design specific for German market - July 08)

Levies on	1-12 ppm	13-35 ppm
Color InkJet All-in-Ones ( <i>disputed</i> )	€76.70	€102.26
Scanner levy ( <i>agreed in the past</i> ) (PC-connected copying color AiOs)	€10.23 (x7.5 times)	€31.96 (x3 times)

### Inkjet MFP Levy

- (1995-2007): under litigation
- (2008-2010): 12€ (settled since Dec. 08)

## Keystone Control Panel



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## USB Connected Computer

- 2 Copy Application automatically starts on computer and begins the scan
- 3 The scan finishes and the image is sent to the printer



## Part 2



### Economic Impact Study Private Copying Levies on Digital Equipment and Media

Direct Effects on Consumers and Producers and  
Indirect Effects on Sales of Online Music and Ringtones



**Each €1 Charged in Copyright Levies Imposes a €2 Cost  
on the European Economy Through Lost Sales and Competitiveness**

*Source: Nathan Associates (May 2006)*

- Impact on consumers and producers ( in 2005):  
– 1 € collected triggers 2 € extra costs:

Impact on consumers	1.2 bn €
Impact on producers	747 m €

61,63%

38,37%

NB: Based on levies currently applied in 2005. Claimed but disputed levies in 2005 amounted to an additional €2.3 billion



<http://www.bsa.org/eupolicy/press/newsreleases/pressrelease16may2006nathanstudyclra.cfm>



## 1.- Some Thoughts on Free Circulation of Goods (Articles 28-30 ECT)

## 2.- Some Thoughts under Article 81 ECT

## 3.- Some Thoughts under Article 82 ECT

## 4.- Some Thoughts under Article 86 ECT

- Directive 29/2001: main goal to ensure a proper functioning of the internal market (see Recitals 1 and 31, *inter alia*)
- Implementation of “fair compensation” must be compatible with the EC Treaty.
- Prohibition of measures having an equivalent effect to quantitative restrictions on imports and exports.
  - *Power of collecting societies to require an additional payment upon importation in another Member State?: No - GEMA case (C-55 and 57/80)*
    - ✓ *Consent from right-holders for levies paid in another Member State by virtue of bilateral agreements?*
    - ✓ *Note that ICT devices do not incorporate IP works or subject matters (sound recordings, ...)*
  - *Heavy administrative and financial burdens on (intra-community) imports and exports of ICT devices subject to levies in import / export countries*

## Single Market and Copyright Levies (2)



- Art. 30 ECT permits restrictions on grounds of the protection of industrial and commercial property, but copyright levies (for private copying / reprography):
  - Do not fall within the “specific subject matter” of copyright:
    - ✓ There is not commercial exploitation of the “compensation” in the form of licenses?;
    - ✓ Rightholders retain the right to exploit their reproduction right commercially;
    - ✓ Directive provides for “fair compensation” but is neutral on the form of compensation (do not require to be provided in the form of levies);
    - ✓ Directive acknowledges that in several cases no compensation is due;
    - ✓ International copyright agreements acknowledge the exception, but not the compensation (different to “equitable remuneration” concept);
    - ✓ Levies not (directly) paid by those “copying” + income used also for social and cultural purposes;
    - ✓ There is not a “right to make private copies” (but an optional exception)
  - Fail the tests of (i) Necessity, (ii) Proportionality, and (iii) Non-Discrimination
- Art. 30 is a derogation from fundamental EC principles to be interpreted narrowly (e.g. Case C-362/88, para. 19)

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## Application of EC Competition Law



- Art. 30 cannot restrict the application of EC Competition Law (*Consten and Grundig, Joined Cases 56 and 58/64 [1966], ECR 299*)
  - Distinction between the “existence” and the “exercise” of rights  
*Deutsche Grammophon case (C-78/70) [application of competition rules]*

### Some key variables for EC Competition Law Assessment

- |   |
|---|
| (1) What's the role of collecting societies to define what products are subject to levies and what fees have to be paid (and what criteria are followed for this definition)? |
| (2) What is the scope of the private copying exception? (relevant copying to calculate “economic value”)  |
| (3) What categories of sales are expressly excluded from levies and how these exceptions are implemented? (business users, ...)   |
| (4) How levies are collected and distributed (including cross-national distribution) among right-holders?   |
| (5) Are collecting societies authorized (by law or by-laws) to deduct any % of the collected amount for cultural and collective purposes?                                     |
| ➢ Relevant Market: national market of collective management of IP rights related to compensation for private copying?   |

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## Potential assessment under Article 81

- **Territorial allocation?** “Network effect” of bilateral agreements / concerted practices between collecting societies (or an association’s decision) leading to:
  - (1) an allocation of national markets (market partitioning effect);
  - (2) the impossibility of negotiating a unique EU-wide / multi-country copyright levy with the most efficient collecting society(ies); and
  - (3) the charging of higher levies in respect of the same act in different Member States.

*[see EC decision COMP/C2/38.698 – CISAC]*
- **Price-fixing?** Different collecting societies representing different right-holders (e.g. authors, artists and producers of sound works) negotiating together and agreeing on the levy fee to be applied, precluding individual negotiations with each category of right-holders (authors / artists / producers) separately.
  - *Information exchange network between collecting societies (European-wide)*
- **Other?** discriminatory treatment, joint litigation on “disputable devices”, agreements to apply levies on sales to professional end-users; (...)?

*Exemption under Article 81.3?  
(e.g. IFPI Simulcasting decision case COMP/C2/38.014)*

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## Potential assessment under Article 82

*QUESTION: Is Article 82 ECT applicable when the collecting society has autonomy to (i) request either statutory levies or lower levies unilaterally determined, (ii) freely interpret the criteria to assign the levy to the device (for example, methodology to calculate relevant copying speeds), or (iii) widely interpret what a “recording device” subject to levies is?*

- *Competition rules apply in case legal framework does not preclude collecting societies from engaging on autonomous conduct.*

### **EC decision - COMP/38.784 (Wanadoo vs Telefónica):**

*“(666) In this respect, the Court of Justice and the Court of First Instance have consistently held that competition rules may apply where sector specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distort competition 715.”*

715 Court of Justice in Joined Cases C-359/95 and C-379/95 P Commission and France vs. Ladroke Racing [1997] ECR I-6225, paragraph 34; Court of First Instance in Case T-228/97 Irish Sugar vs. Commission [1999] ECR II-296, paragraph 130; Court of First Instance in Case T-513 Consiglio Nazionale degli Spedizionieri Doganali [2000] II-1807, paragraphs 59 et seq.

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## Potential assessment under Article 82

- **Abusive pricing?**: levies not related to “economic value”, higher than levies charged by other collecting societies for objectively comparable behavior.
  - *What’s the economic value of a “private copy”?*
  - *What’s the amount of private copying with each device?*
  - *Application of private copying levies on sales to business users, where economic value of “private copying” is theoretically zero?*
  - *Are there “double payments”?*
  - *Reference to tech specs that are non-relevant*
- **Discriminatory pricing?**: collecting societies treating like situations in an unlike manner or unlike situations in a like manner, without objective justification
  - *Discrimination as between importers*
  - *Discrimination as between product types (same functionality with different levies; different functionalities with same levy)*
- **Others?**: retroactive claims on devices already sold; impossibility to make effective levies exemptions / refunds; seeking approval of unfair legal framework; (...)

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## Potential assessment under Article 86

Table 5: Levies allocated to cultural and social purposes in 2004 (Source: Replies from Member States, Stichting de Thuiskopie 2004 and 2005)

	Levies collected (million €)	Share of allocation for collective purposes (per cent)*	Total amount collected for collective purposes from levies (million €)
Austria	15.897	51	8.107
Belgium	16.631	0	0
Czech Republic	1.159	0	0
Denmark	7.3	33	2.409
Finland	12.12	42.5	5.151
France	167.511	25	41.878
Germany	146.751	10	14.675
Hungary	10.154	6.6	0.675
Italy	74.049	50	37.024
Latvia	0.31	10	0.031
Lithuania	0.747	25	0.187
Netherlands	29.639	15	4.446
Poland	2.85	0	0
Slovakia	0.668	0	0
Spain	72.578	20	14.516
Sweden	9.409	0	0
<b>Total</b>	<b>567.774</b>		<b>129.099</b>

Notes:

\* Share for Finland is calculated as a simple average of audio (35%) and video repertoire (50%); share for Hungary is calculated as a simple average of audio (3.3%) and video repertoire (10%). Some other countries have deductions for collective purposes (Greece - maximum 10%, Portugal 20%, Slovenia - maximum 30%, with real deductions of 15%), however they were not included in the Table because data for levies collections were not available in the Stichting de Thuiskopie.

Source: EC’ Stakeholder Consultation “Fair Compensation for Acts of Private Copying” (February 2008)

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- Collecting societies as undertakings granted with special or exclusive rights?
  - EC Communication on Management of Copyright: review under Article 86 where a collecting society is constituted as a legal monopoly or granted special rights under national law (paragraph 3.5.1).
  - Concerted practice to limit establishment of other societies?
- Measures facilitating infringement of Articles 12, 28-29, 81-82 ECT
- GT-Link A/S v DSB (Case C-242/95)
- Social / cultural funds:
  - Discrimination per nationality?
  - Effects on competition among collecting societies?

# A vision: Levies in the Single Market



- A “one-stop shop” scheme where:
  - ✓ Copyright levies are negotiated and agreed with most-efficient collecting societies that redistribute levies to other societies (bilateral agreements).
  - ✓ Levies paid only once; no levy-reassessment once devices are put into circulation in the Internal Market and moved from country to country.
  - ✓ “Fair compensation” based on economic value of relevant genuine private copying for the concerned devices
  - ✓ Single fee may result of a combination of each relevant country particularities (~ *Simulcasting decision*) or a uniform multi-country levy rate (~ *Cannes Agreement decision*).
  - ✓ “Fair compensation” does not become a factor of distortion in the common market.
- Additional alternatives to be considered, including refinement of current levy system (e.g. levy collection at retail level with no levies on professional sales; no double payment for “licensed copies”; ...), or different compensation schemes (e.g. State funds like in Norway).



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## BACK-UP SLIDES:

- Spain: example of reporting, payment and distribution functioning
- Example: example of magnitude of disputed levies
- Prejudicial questions on copyright levies referred to the ECJ
- Legends and notes to slide 9
- Calculation of economic value of private copying
- Size of gray market (levies unpaid) for recordable media in Europe
- Example of continuous developments / changes on national levies
- Some courts decisions on application of levies on online cross-border sales
- Example: impact of assigning conventional photocopiers levies + draft copying speed for calculation of consumer inkjet MFPs levies (Germany – 2007)
- Nathan Associates Study - Economic Impact of Copyright Levies (May 2006)
- Recitals 1 and 31 Directive 29/2001
- Reference to some ECJ judgments concerning copyright and Internal Market
- Example of Bilateral Agreements on Reprography
- Example: EC Competition Law (GT-Link A/S v DSB (Case C-242/95)).

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## Part 1

### An example: Spain

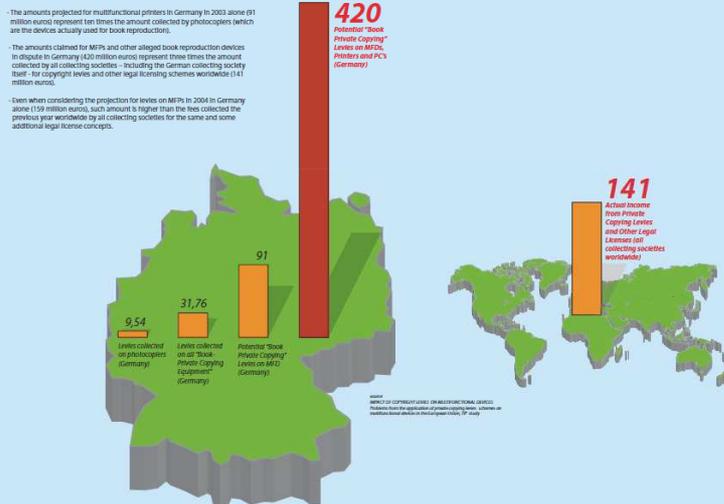
- Importation of 10,000 DVD burners for integration by PC manufacturers
- Levies liability upon shipment to PC-makers or resellers  
(10,000 units x 3.4€ = 34,000€ )
- Obligation to invoice levies to buyers
- Obligation to report levies quarterly to (national) collecting societies
- Obligation to pay within one month after reporting period.
- Exemption for subsequent shipments to other Member States?
- Distribution:
  - 20% deduction (10 % social funding and 10% cultural funding)
  - management fee (~10-13%)
  - members / non-members / other collecting societies (bilateral agreements)



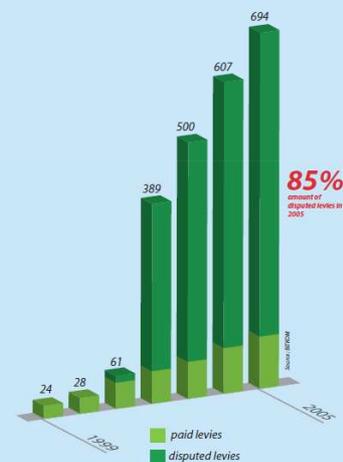
# An example: Germany (collected vs. disputed levies)

## Collective societies' income from copyright levies

Collected and Claimed book-related copyright levies in Germany vs. levies and other legal license incomes worldwide (2003, in million €)



Paid vs. Disputed levies in Germany (1999-2005)  
PCs, printers, multifunctional devices, photocopiers, faxes, scanners, CD-burners, DVD-burners and MP3



Increased levy rates, increased levied product range, high disputed levy amounts: barrier to European innovation

Source: EURIMAG – Response to the European Commission “Second Call for Comments on Fair Compensation for Acts of Private Copying” (April 2008)

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## Part 1 & 2 - Legal Framework and Excessive Levies

C 19/12

EN

Official Journal of the European Union

24.1.2009

Reference for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain) lodged on 31 October 2008 — Sociedad General de Autores y Editores de España (SGAE) v Padawan, S.L. and Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), interviner

(Case C-467/08)

(2009/C 19/21)

### Questions referred

- Does the concept of ‘fair compensation’ in Article 5(2)(b) of Directive 2001/29 (\*) entail harmonisation, irrespective of the Member States’ right to choose the system of collection which they deem appropriate for the purposes of giving effect to the right to fair compensation of intellectual property rightholders affected by the adoption of the private copying exception or limitation?
- Regardless of the system used by each Member State to calculate fair compensation, must that system ensure a fair balance between the persons affected, the intellectual property rightholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other, and is that balance determined by the reason for the fair compensation, which is to mitigate the harm arising from the private copying exception?
- Where a Member State opts for a system of charging or levying in respect of digital reproduction equipment, devices and media, in accordance with the aim pursued by Article 5(2)(b) of Directive 2001/29 and the context of that provision, must that charge (the fair compensation for private copying) necessarily be linked to the presumed use of those equipment and media for making reproductions covered by the private copying exception, with the result that the application of the charge would be justified where it may be presumed that the digital reproduction equipment, devices and media are to be used for private copying, but not otherwise?
- If a Member State adopts a private copying ‘levy’ system, is the indiscriminate application of that ‘levy’ to undertakings and professional persons who clearly purchase digital reproduction devices and media for purposes other than private copying compatible with the concept of ‘fair compensation’?
- Might the system adopted by the Spanish State of applying the private copying levy indiscriminately to all digital reproduction equipment, devices and media infringe Directive 2001/29, in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because to a large extent it is applied to different situations in which the limitation of rights justifying the compensation does not exist?

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## **Legends to Slide 9**



Sound and audiovisual levies on recordable media (including in some cases storage media / memory integrated in recorders, such as TV hard-disc recorders)



Additional sound and audiovisual levies on hardware operated with recordable media



Book related levies (under reprography / private copying)

*Note: Countries may additionally distinguish between “intended” vs. “suitable” devices, single-purpose vs. multi-purpose devices, analogue vs. digital; etc, and no national system is identical to another one.*

## **Which proxy should be used in determining the value of a private copy?**

- Private copying is an exception to the exclusive right. Therefore the value of a private copy should be lower than the monopolistic price (IP royalties) that right-holders perceive for each authorized reproduction of an original work.

Cfr. Copyright Board Canada, levy decisions on audio recording media:  
<http://www.cb-cda.gc.ca/decisions/copying-e.html>

“In the Board’s view, if there were a free market for private copies, the price paid for the underlying intellectual property would be much lower than royalties paid for top-line recordings. It is not reasonable to assume that consumers would pay as much for the underlying rights in a private copy of a CD they already own; on this point, the Board agrees with Professor Brander. It is also not reasonable to assume that there is a one-to-one correlation between lost sales and private copying activity. Economic theory tells us that faced with such market conditions, rights owners would lower their prices in order to maximize their revenues.”



# Which proxy should be used in determining the value of a private copy?

## *“Private Copying, Appropriability, and Optimal Copying Royalties”*

By: Stanley Besen, Sheila Nataraj Kirby  
<http://www.cgi.rand.org/pubs/reports/R3546/>

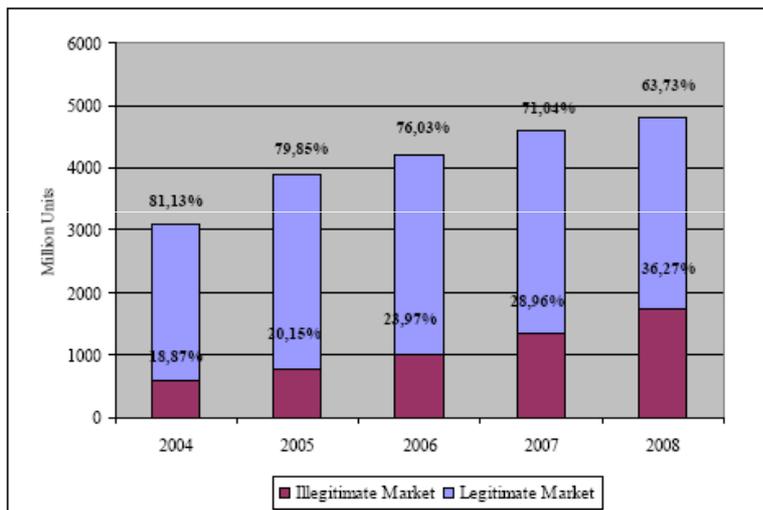
Under a broader definition, harm occurs if the new use reduces profits below the level they would have reached had the producer been able to exploit the market served without authorization. Thus, even where producer profits do not decline, unrestricted copying may still be thought of as causing harm. This is because, if the law permits royalties to be imposed, producers may be able to benefit from copying.<sup>1</sup> These charges would, of course, be less than the price that is charged for originals.<sup>2</sup> Alternatively, producers could benefit if a royalty were imposed on the copying medium with the proceeds being paid to producers.

<sup>2</sup>This is both because copies may be imperfect substitutes for originals and because there are costs associated with making copies.



# Gray market in Europe

Growth of legitimate and illegitimate trade in blank media (Source: RIAE)

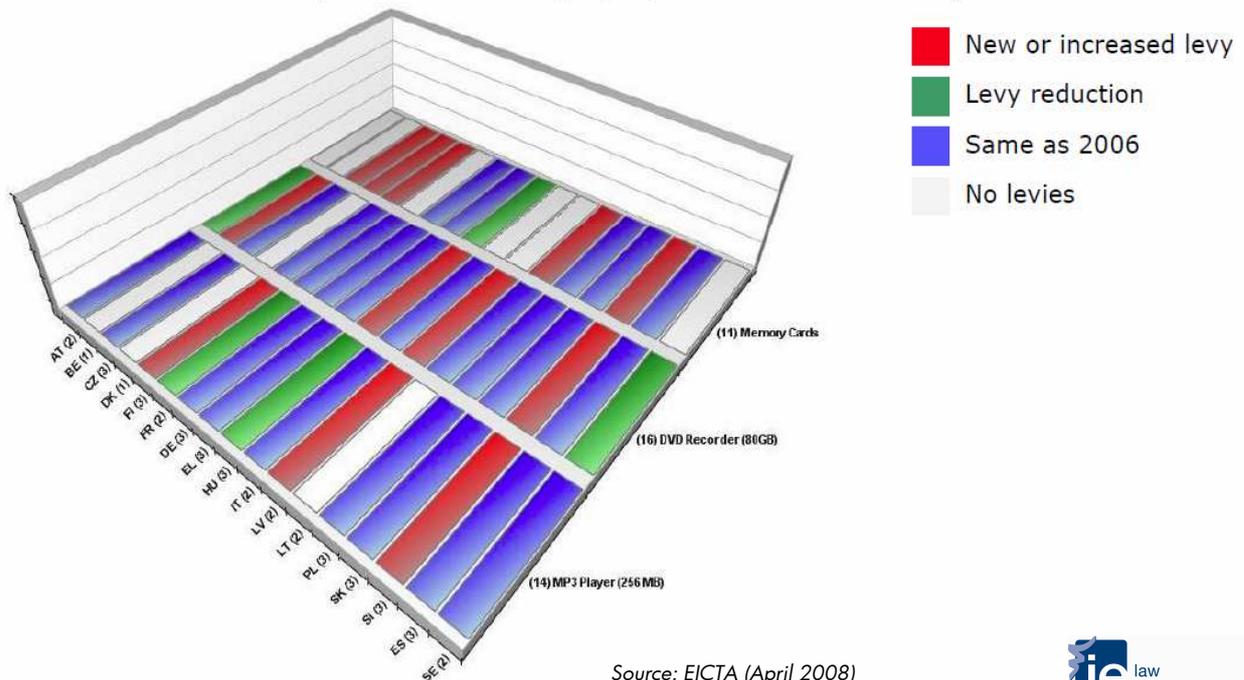


Source: RIAE - EC' Stakeholder Consultation "Fair Compensation for Acts of Private Copying (February 2008)



## Example: Levies under continuous changes

2007 levy situation for MP3 players, DVD-HDD and memory cards<sup>9</sup>



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## Levies as barriers to multi-country e-commerce platforms?

### • Rue de Commerce Case (France)

• First Instance: Commercial behavior of UK and German defendants in their intent to sell products to French consumers over Internet without paying levies do not qualify as unfair competition, but not informing consumers about their potential obligation to pay those levies do qualify.

### • Appeal:

- Copyright levies differences among Member States create price differences across EU.

- Internet retailer is not the importer and therefore not liable to French levies.

- No unfair competition exists even when the lack of payment of levies has an impact on consumer choice.

### • Supreme Court:

- Consumers are theoretically liable for levy payment on online imports.

- Foreign online merchants must disclose that levies are not included in the price

### • Opus GmbH Case (The Netherlands)

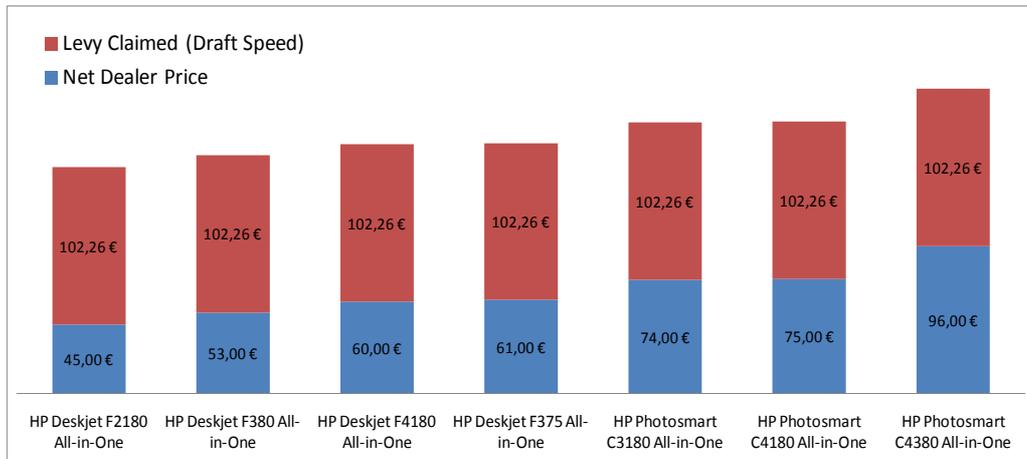
- Parties with residence in different Member States can agree where the products are delivered and who should take care of transportation (and be legally deemed as "importer" subject to payment of levies).

- Consumers who can be seen as importers are not obliged to pay levies under Dutch law.

- Even in case Opus GmbH had been in charge of transportation, it would be the "exporter" and not the "importer" (the meaning of import – shipping over and within the borders – shows that the importer is in the country of import)

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## Example: impact of assigning conventional photocopiers levies + draft copying speed for calculation of consumer inkjet MFPs levies



Levy claimed on best-sellers HP models with average Dealer Net Price between 45€ - 96€ in Germany in 2007

## Part 2



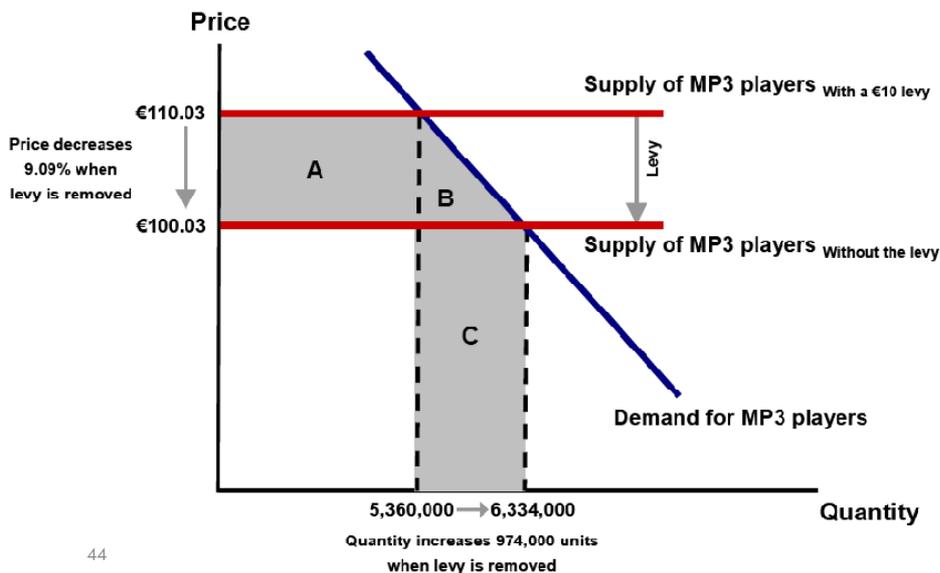
NATHAN ASSOCIATES INC.  
www.nathaninc.com

### Economic Impact Study Private Copying Levies on Digital Equipment and Media

Direct Effects on Consumers and Producers and  
Indirect Effects on Sales of Online Music and Ringtones

- Direct economic effect of levies is higher than the amount of levies collected
- Impact of levies is higher when the elasticity of demand is higher

**Figure 3**  
Direct Effects on Consumers and Producers from France's Levy on MP3 Players



- A = Amount of levy collected when levy was imposed
- B = Increase in the welfare of consumers upon levy removal
- C = Gain in producers revenue upon levy removal

## Single Market and Copyright Levies (1)



- **Directive 29/2001/EC**

*(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives. (...)*

*(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.*

## Single Market and Copyright Levies (2)



- **Dassonville (Case 8/74 [1974] ECR 837, para.5)**

*"5. All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions."*

- **Musik-Vertrieb Membran v GEMA (Cases 55 and 57/80 [1981] ECR 147)**

*"14 The argument put to the Court by the Belgian and Italian Governments that in the absence of harmonization in this sector the principle of the territoriality of copyright law always prevails over the principle of freedom of movement of goods within the common market cannot be accepted. Indeed, the essential purpose of the Treaty, which is to unite national markets into a single market, could not be attained if, under the various legal systems of the Member States, nationals of those Member States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States. (...)*

*18. It should be observed next that no provision of national legislation may permit an undertaking which is responsible for the management of copyrights and has a monopoly on the territory of a Member State by virtue of that management to charge a levy on products imported from another Member State where they were put into circulation by or with the consent of the copyright owner and thereby cause the Common Market to be partitioned. Such a practice would amount to allowing a private undertaking to impose a charge on the importation of sound recordings which are already in free circulation in the Common Market on account of their crossing a frontier; it would therefore have the effect of entrenching the isolation of national markets which the Treaty seeks to abolish."*

- **Deutsche Grammophon v Metro (Case 78/70 [1971] ECR 487)**

"11. Amongst the prohibitions or restrictions on the free movement of goods which it concedes Article [30] refers to industrial and commercial property. On the assumption that those provisions may be relevant to a right related to copyright, it is nevertheless clear from that article that, *although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty.* Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purposes of protecting industrial and commercial property, Article [30] only admits derogation from that freedom to the extent to which they are justified for the purpose safeguarding rights which *constitute the specific subject matter* of such property."

- Industrial and commercial property: "includes the protection conferred by copyright, especially when exploited commercially in the form of licenses capable of affecting distribution in the various Member States of goods incorporating the protected literary or artistic work." (Musik-Vertrieb Membran v GEMA (Cases 55 and 57/80 [1981] ECR 147, paragraph 9).

- Specific subject matter: "the right to exploit commercially the marketing of the protected product, particularly in the form of licenses granted in return for the payment of royalties" (Phil Collins and others; Joined cases C-92/92 and C-326/92 [1993] ECR I-5145, paragraph 20).

## Example - Network of Bilateral Agreements for Reprographic related Rights



International Federation of Reproduction Rights Organisations **ifrro**

**CEDRO**, Centro Español de Derechos Reprográficos

Home  
About IFRRO  
Members' Database  
Activities  
Copyright Legislation  
Library  
FAQ  
Links  
Contact

C/Monte Esquinza, 14  
28010 Madrid  
Spain  
Phone: +34 91 308 6330  
Fax: +34 91 308 6327  
e-mail: [cedro@cedro.org](mailto:cedro@cedro.org)  
Web: <http://www.cedro.org>

Right-holders represented by other collecting societies (Germany, Austria, Belgium, ...) consent to the Spanish fees (or even a lower amount after deductions) as "fair compensation" for copies of their works made in Spain.

### AGREEMENTS

Number of Bilateral agreements type A: 16

Bilateral agreements type A with: VG Wort (Germany), CAL (Australia), Literar Merchana (Austria), Reprobel (Belgium), Access (Canada), Copibec (Canada), Copydan (Denmark), CFC (France), CCC (USA), CLA (UK), Kopiosto (Finland), Stichting Reprorecht (Holland), ICLA (Ireland), KOPINOR (Norway), CLASS (Singapur), Pro Litters (Switzerland).

Number of Bilateral agreements type B: 13

Bilateral agreements type B with: ABDR (Brazil), CADRA (Argentina), CDR (Colombia), CEMPRO (Mexico), CLL (New Zealand), Fjölís (Iceland), KOPIPOL (Poland), OSDEL (Greece), HKRRLS (Hong Kong), Jamcopy (Jamaica), Autor (Uruguay), Copyrus (Russia), Dalro (South Africa).

Other agreements with RROs: CEDRO and VG Worth signed an agreement on 23th July 2007 for PLR.

<http://www.ifrro.org>

## Example - Network of Bilateral Agreements for Reprographic related Rights



<http://www.ifrro.org>

### SAMPLE – Bilateral Agreement Type A and Type B

#### "1.- LICENCE/AUTHORITY TO COLLECT

*On behalf of the rightsholders it represents, **Society A hereby grants to Society B the non-exclusive right to enter into licensing agreements with users and to collect fees for the reprographic reproduction in Territory B of the rights, works and publications as described in Schedule A to this Agreement** on the same basis and on the same conditions as Society B licenses and collects fees for reprographic reproduction of the rights, works and publications of the rightsholders it represents. (...)"*

- **Bilateral Agreement TYPE A: Implies transfer of funds between collecting societies**
- **Bilateral Agreement TYPE B: Implies retention of funds by each collecting society**

### SAMPLE – Bilateral Agreement Type B

#### "8. FUNDS

*Each RRO agrees that:*

- 1. Fees collected by Society B for reprographic reproduction of works and publications as set out in Clause 1 of this agreement will be retained by Society B.*
- 2. Fees collected by Society A for reprographic reproduction of works and publication as set out in Clause 2 of this agreement will be retained by Society A."*

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## EC Competition Law (1)



### • **GT-Link A/S v DSB (Case C-242/95. [1997], ECR I-4449)**

"33 The Court has previously had occasion to rule that **any measure adopted by a Member State which maintains in force a statutory provision that creates a situation in which a public undertaking cannot avoid infringing Article [82] of the Treaty is incompatible with the rules of the Treaty** (see, to that effect, Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 27).

34 In particular, a Member State infringes the prohibitions laid down in Article [86(1)] and Article [82] of the Treaty if, by adopting rules governing the port duties to be paid for the use of ports belonging to a public undertaking, it induces that undertaking to abuse the dominant position it occupies within the common market or a substantial part of it (see, to that effect, Case C-18/93 Corsica Ferries [1994] ECR I-1783, paragraph 43). (...)

38 Second, it should be noted that, according to Article [82(a) and (c)], an abuse of a dominant position may consist of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

39 The Court has ruled that **'unfair prices', for the purposes of Article [82(a)], means prices which are excessive because they have no reasonable relation to the economic value of the service supplied** (see, to that effect, United Brands, paragraph 250). (...)



(...)

45 The Court has already held that abusive practices which, like those at issue in the main proceedings, affect undertakings providing transport by sea between two Member States, may affect trade between Member States (Corsica Ferries, paragraph 44).

46 In the light of those considerations, the reply to the sixth and eighth questions must be that where a public undertaking which owns and operates a commercial port occupies a dominant position in a substantial part of the common market, **it is contrary to Article [86(1)] in conjunction with Article [82] of the Treaty for that undertaking to levy port duties of an unreasonable amount pursuant to regulations adopted by the Member State to which it is answerable** or for it to exempt from payment of those duties its own ferry services and, reciprocally, some of its trading partners' ferry services, in so far as such exemptions entail the application of dissimilar conditions to equivalent services. **It is for the national court to determine whether, having regard to the level of the duties and the economic value of the services supplied, the amount of duty is actually unfair.** It is also for the national court to determine whether exempting its own ferry services, and reciprocally those of some of its trading partners, from payment of duties in fact amounts to the application of dissimilar conditions to equivalent services."

### FURTHER READINGS:

- EC Internal Market: Stakeholders Consultations on Copyright Levies (2006 and 2008) and Member States Consultation (2004)  
[http://ec.europa.eu/internal\\_market/copyright/levy\\_reform/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm)
- Impact Assessment – Commission Staff Working Document – Fair Compensation for Private Copying in a Converging Environment (xx.12.2006)
- EICTA – Copyright Levies Working Group (2008) - <http://www.eicta.org/index.php?id=885>
- Nathan Associates Inc.- *“Economic Impact Study, Private Copying Levies on Digital Equipment and Media - Direct Effects on Consumers and Producers and Indirect Effects on Sales of Online Music and Ringtones”* (May 2006)  
<http://www.bsa.org/eupolicy/press/newsreleases/pressrelease16may2006nathanstudyclra.cfm>
- “No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law” By Natali Helberger & P. Bernt Hugenholtz (2007) – See additional reports  
<http://www.ivir.nl/staff/hugenholtz.html>
- Econlaw.- *“Economic Analysis of Private Copying Remuneration”* – Sept. 2007  
<http://www.gesac.org>