



**SUBMISSION TO THE
STAKEHOLDER CONSULTATION ON COPYRIGHT LEVIES IN A CONVERGING WORLD**

The International Federation of Musicians welcomes the *Stakeholder Consultation on Copyright Levies in a Converging World* as an opportunity to express the position of music performers in the EU on this critical issue.

As an introductory remark, we wish to underline that although the questionnaire circulated by the Commission can of course be answered in an open way, we were expecting a more neutral document, with regards to either the questionable figures provided by Eurocopya and BSA or the formulation of the questions. In our view, a fair and objective assessment should not be aimed only at supporting, consolidating, promoting or developing the income channels that fall under the sole control of the phonographic industry. The key question as to how creators can be better protected and remunerated should be considered at least as important. Unfortunately, most questions are clearly drafted in quite a biased way and do not seem to take the latter priority into account.

As already expressed in the past on similar occasions, we deeply regret that the Commission's working documents continue to be circulated in one language only. We also believe that the deadlines for interested parties to respond and make their comments known should be extended.

Question 1 – What are copyright levies?

A. Do you agree with this description of copyright levies?

The first part of this description looks outdated to us. The question today is in our view not to decide whether or not copyright levies still provide a satisfactory answer to technical aims, as they may have been seen 20 years ago. As a matter of fact, since their inception, levies have successfully contributed to establishing a stable and balanced relationship between all categories of right holders and users. This situation should be dealt with as a whole, bearing in mind that if this balance is to be improved, no decision should entail the risk of breaking it, thus prejudicing one or more of the parties involved.

We do not believe that the second paragraph describes the collection of levies appropriately. Any blank medium, analogue or digital, present or future, is manufactured for the only purpose of data incorporation – including protected contents. A blank medium is therefore intimately associated to the act of private copying. It is to this act, regarded as impossible to dissociate from the medium used, that the levy applies. Resorting to manufacturers as levy collectors is a practical and pragmatic choice, in adequacy with the targeted aim and relevant as such. At the end, it is the consumer who pays, which is exactly what levies are made for.

The third paragraph doesn't describe copyright levies in their principle, but underlines a non-homogenous situation at EU level, which could of course be improved. This is an area where a (cautious) reform could probably be envisaged.

B. Are there elements that you consider should be added?

The description of copyright levies should include other aspects.

1. Levies are a balanced system: they allow performers to receive a fair share of revenues deriving from private copies of their fixed performances, irrespective of recording contracts. They represent an essential source of income for performers.
2. They can be placed under the control of all right holders: performers can manage and distribute these incomes themselves through their collecting societies.

3. They represent the only answer to the analogue hole: as no technology can prevent a consumer to use digital-to-analogue conversion (followed by immediate analogue-to-digital re-conversion).
4. They contribute to the development of the sector: the part of these revenues that is allocated to cultural and social funds, under the control of right holders, generates activity and employment not only for the sector itself (live performance, recorded music, music teaching, vocational training) but also for the economy that revolves around the music industry (music broadcasting, tourism, instrument manufacturing, music publishing, music magazines, advertising, etc.).
5. They are well accepted by consumers: consumer organisations have repeatedly stated that they fully support the idea that performers should be adequately compensated for private copies made from their fixed performances.
6. They can be enforced without intrusion into citizens' privacy
7. They clearly cannot be replaced in the following cases:
 - Lawful private copies made from illegal sources
 - Copies made from sources that are not locked by any TPM

Finally, as the volume of private copying acts proves to remain unaffected by the increasingly widespread use of DRMs, we believe that levies only can represent an adequate and realistic solution.

C. Do you believe it efficient that the debtor of the copyright levy is not the party that carries out and control the private copying?

This question is in our view phrased in a biased way. The debtor of the levy definitely is the consumer/end user, who carries out and controls the private copying. As already stated above, the ITC company is only the collector. But it is also the party that financially benefits the most from all kinds of private copying, with or without levies. We therefore believe that the current collection system not only is an efficient one, but also has the major advantage to involve manufacturers into the chain of responsibility.

Question 2 – Who administers copyright levies?

- B. Do you agree with this description?**
- C. Are there elements that you think should be added?**

This description does not reflect reality. Taking for granted that levies are paid by the ITC companies is a very questionable shortcut to which we do not subscribe. We wish to reiterate the view that ITC companies collect levies from end-users.

As for the role of performers' collecting societies, we consider indeed unfortunate that they are described, implicitly or explicitly, as just costly intermediaries. As already expressed above, we believe that levies cannot be seen as a purely technical or theoretical answer to an outdated assessment of the copyright landscape. Although record companies have been granted intellectual property rights in order to secure their investments, this should never result in a situation where investors are the only ones to benefit from IPR in practice.

We should thus always come back to the ultimate question: what exactly do we want to achieve? We wish all right holders to benefit from their rights IN PRACTICE. The means to reach this aim may of course have a cost or require some time and efforts to become fully efficient, but this is not a problem in itself. This non-homogenous situation could be improved without questioning the relevance of levies.

For obvious reasons of efficiency, as the private copying levy addresses mass uses and involves a very high number of users and right holders, it must be subject to collective management. In the EU, collection of the levies is made either directly by performers' collecting societies or together with other categories or right holders.

D. Are you satisfied with how the collection and distribution of copyright levies functions?

- Collection:

The use of ITC companies as levy collectors is a simple and efficient process. It is also rather inexpensive, as manufacturers and importers are few and notoriously solvent. As for the tariffs applied, they can either be established as a fixed amount or as a percentage of the selling price. The latter option is however not in adequacy with the fast growing market of digital carriers, whose price is permanently decreasing while private copying continues to grow. Moreover, in some Member States, the levy doesn't apply to all carriers used for reproduction of fixed performances.

As for the uneven level of levies in the different Member States, it is important that they can all result in a fair compensation for right holders. Some harmonisation may therefore be necessary, to ensure that rates are high enough to constitute a fair compensation.

Stronger enforcement provisions might also be necessary in those Member States suffering from a massive black market of blank media.

Private copying levy is not collected for copies made from the Internet, although under several national legislations such copies could be considered reproduction for private purposes justifying a compensation payment.

- Distribution

As far as they are decided and organised by right holders' collecting societies, acting on their behalf and under their supervision, we don't have a problem with the distribution schemes.

E. Do you believe that right holders who are nationals [...] in comparison to nationals themselves?

No international obligation applies to the exception for private copying with respect to national treatment. This issue is therefore not dealt with uniformly from country to country.

Nevertheless, it must be underlined that exchange of remuneration between performers' collecting societies at EU level is only at its early stage. A number of national regulations were set up recently and collective administration of performers' rights has only just started in some European Member States. The cross border distribution among collecting societies can therefore be considered as being work in progress.

In addition, the EU Directive 2001/29, which harmonises the exception to the reproduction right for private use as well as the corresponding remuneration, has not been implemented in all EU Member States yet.

F. How can current distribution keys reflect the actual amount of copying of works or other subject matter?

Although accuracy is difficult to achieve, it can probably be improved continuously in time. But, here again, it is essential to guarantee that performers can receive a fair compensation for the private copying of their fixed performances in practice. The current distribution keys, as perfectible as they can be, allow for that to happen. To the contrary, DRMs are just likely to channel the money flow directly to the producers with almost nothing left to performers.

G. Do you think that there should be greater accountability of collecting societies with respect to the application, collection and distribution and if so, in what form?

Collecting societies are, to a large extent, what their members want them to be. As we are talking of performers' revenue, it is of course in the interest of performers that efficiency and transparency are increased and monitored.

Question 3: Distribution of copyright levies

- A. What conclusion can be drawn from the above Table with respect to the relationship between the levy collected and distributed and the administrative cost of distribution?
- B. What conclusion can be drawn from the above table with respect to the ratio of distribution at national level as opposed to distribution to other Member States?

It is impossible to draw any serious and objective conclusion from this table. Apart from the fact that no collecting society managing performers' rights is mentioned, some information is lacking:

- When were the collecting societies set up?
- What is the number of right holders represented?
- What is the size of the repertoire directly managed by these collecting societies?
- How many reciprocal agreements have been signed and with which countries?

No relevant comment can be made unless the table is adequately updated to incorporate this missing information.

Question 4: DRM and digital music sales

- A. Do you agree with the above assessment on the growth of digital and technologically protected sales?
- B. Are there other elements that you consider relevant?

We only agree on the use of "in principle" at the beginning of the first paragraph. It is actually a wise way to introduce this description, as principles and practice are quite far apart. If we changed these two introductory words into "in practice", the whole text would need to be rephrased. It could then be, for example:

"In practice, the main results of digitisation are the following:

- free exchanges of protected works over the Internet have developed much faster than any commercial offer, resulting in radical changes in the consumers' expectations and behaviours;
- the integration of content providers and device manufacturers has favoured the emergence of competing and incompatible formats, which tends to push consumers away from the on-line commercial platforms;
- record producers undertake an intense lobbying in order to replace the revenues based on legal licences with a pay-per-use system from which performers are unlikely to get any significant income. Indeed, individual contracts systematically imposed to the performers include a transfer of their rights to the producer without any fair compensation;
- By using intrusive technologies, TPMs have become increasingly suspect to users, thereby hindering the image of both record companies and performers signed on by these companies;
- in some countries, the industry's expectations vis-à-vis DRMs and TPMs are already facing a decline of on-line sales;
- despite the provisions of article 6.3 of directive 2001/29/EC ("technological measures shall be deemed 'effective' where the use of a protected work or other subject matter is controlled by the right holders [...]"), TPMs are in practice employed and implemented without the joint control of performers or their organizations;
- whilst major labels may have the ability to enforce their DRMs, albeit at a very high cost and with arguable results, independent labels will hardly have the ability to do so. Scrapping private copying levies would only deprive independent producers from an important source of revenue, much like the performers;
- finally, the analogue hole represents an impassable limit to the efficiency of technology in the fight against piracy."

That being said, Right Management Information can be a very useful tool for the identification of right holders and a more accurate distribution of the remuneration collected. But we find the following assumption questionable: "[...] *technological developments present an opportunity to protect copyright* [...]" DRMs/TPMs benefit only those right holders who can control their implementation (i.e. major producers) but not the others. It seems therefore that these systems actually present an opportunity to protect the producers' interests rather than copyright in itself.

C. In your opinion, which system can provide better remuneration of right holders: licensing models through digital sales or the copyright levy system?

The question is not taking into account the complete reality of the sector's economy. In theory, **if** all performers could benefit from fair contracts + **if** all these contracts were satisfactorily enforced + **if** a significant majority of consumers were to turn to commercial platforms in all major markets + **if** private copying acts proved to be confined to an insignificant peripheral phenomenon, **then** licensing models might be able to compete with copyright levy systems. Unfortunately, not only none of those criteria is met, but they are even quite unlikely to be met ever.

However, we wish to recall that, in the case of so-called "digital sales", most performers have no other choice but to transfer all their rights to the producers. As a result, only a few of them (usually big featured artists) receive a small percentage - around 4% out of €1.00 (current average sale price per track). Most performers do not receive any compensation for the further use of their fixed performances, scores of which are made available online without their consent.

Finally, if copyright levies were to be phased-out, the validity of all previous contracts might become questionable. The transfer of rights - in a context where right holders were entitled to remuneration for private copying - might be found invalid once this compensation ceases to exist.

In our opinion, the only reasonable and pragmatic way to ensure that all right holders – including performers – get proper compensation for private copying is therefore the levy system.

D. Do you think that the current levy system has an impact on the development of digital sales in Europe?

As an introductory remark, it might be useful to check whether everybody has the same understanding of the term "digital sales". What exactly is sold to the consumer? If we refer to the online sales occurring on commercial Internet platforms, it actually is a right to listen, under a set of restrictive conditions, to a piece of music embodied in a given digital format, and on certain devices only. Wouldn't it be relevant to question whether this heavy set of limitations is really an incentive for potential consumers?

Anyway, the levy system doesn't compete with that. As underlined by several surveys, one act of copying cannot be regarded as a substitute for one purchase. Even if it could, it would be irrelevant to performers, whose rights are systematically transferred to producers by contract. In a number of cases, private copying allows users to learn about music they would not otherwise hear, thus promoting new sales. Therefore, there is in our view no evidence of any impact of the levy system on the development of digital sales.

Another element of answer is the UK example. In the UK, private copying is prohibited, except for time-shifting. It is common knowledge that the sales of blank media in the country are not less important than in other similar national markets and are massively used for private copying. The absence of legal, realistic, efficient and consensual framework has resulted – and continue to result – in huge losses of revenues for all right holders, including performers.

Question 5. Copyright levies and the notion of harm based on private copying

A. Do you agree with the above assessment?

Copyright levies have not been based so far on a precise quantification of the actual harm that is attributable to private copying. But this is not really an issue. Any system aiming at ensuring fair compensation for the acts of private copying should in our view:

- be realistic
- be well accepted
- be balanced
- benefit to all categories of right holders.

The copyright levy system satisfies all these criteria.

B. Do you believe that private copying causes harm to right holders and, if so, how can this harm be reliably quantified?

Those who believe that technology will allow the control and monitoring of the consumers' behaviours should also know that technology will allow consumers to escape such control and monitoring. Even without state-of-the-art technology, the analogue hole proves that the copyright levy - as imprecise as it can be - remains the only viable way to economically compensate private copying.

We don't believe that the notion of harm caused to right holders needs to be established again, as this is now a commonly accepted fact. As for its accurate quantification, we think it is neither possible nor necessary.

E. Are there other elements that you consider relevant?

Copyright levies may not be absolutely precise. Repartition keys rely upon estimations. Discussions may arise when a new medium is entering the scope of levy. Appropriate measures could probably be taken in order to encourage or favour a more homogenous framework at European level. But still, no other system can prove to be able to reach the objectives stated above with more efficiency (see 2.C).

Question 6: The criteria for establishing whether a levy is imposed on particular equipment or media.

- A. Do you believe that levies should be applied to hard disks or removable memory cards as "blank media"?
- B. Do you believe that these items are dedicated to the production of private copies?
- C. Do you believe that the dedicated function of an item or recording device should play a role in deciding whether a levy is applied to it?
- D. Do you think that there is an objective and verifiable standard on whether equipment or media is dedicated to the production of private copies

All kinds of blank media (including hard disks and removable memory cards) that are used in practice for private copying acts should be subject to levies. Sample surveys should be carried out continuously in order to estimate the proportion of such or such blank medium that is used for acts of private copying.

The criterion of dedication to private copying was not found relevant in the past and it is not more relevant today. Potentially, all types of blank media can be used for the production of private copies. Memory cards are used in cameras, PDAs, mobile phones and can be read on computers. Equipments are increasingly converging: today, mobile phones are at the same time still- and movie-cameras, MP3-players, PDAs and... phones. They can be used to browse the web and download or exchange contents. The same goes for regular hard drives.

Question 7: Copyright levies and convergence

A. Do you agree with the above analysis?

In our view, the questionnaire should refer to *works* or *performances* rather than *contents*, which in our view tends to devalue the act of creation. We are talking about the creating activity of artists, not just about anonymous contents, circulating on the Internet pipelines.

Before focusing on all the new technical features described under title 7, it is essential to remind ourselves of the legitimate aims and objectives that are to be pursued. The Commission should include in the list of objectives a satisfactory protection of creators, as underlined by Prof. Hugenholtz in a comment on Directive 2001/29: "[...] the Directive does not do much for authors at all. It is primarily geared towards protecting the rights and interests of the 'main players' in the information industry (producers, broadcasters and institutional users), not of the creators that provide the invaluable 'content' that drives the industry. The Directive fails to protect authors or performers against publishers and producers imposing standard-form 'all rights' (buy-out) contracts, a dreadful practice that is rapidly becoming routine in this world of multimedia."¹

As for the description itself, we believe it is purely speculative. How could positive legislation be established on such grounds? Technological convergence is not more than an accessory notion, which should only be dealt with as such. The industry has already witnessed in the past how difficult it is to have the public subscribe to a new standard or adopt a predetermined behaviour. For an objective observer, it is quite difficult to imagine that consumers could just shift from downloading and copying to encrypted streaming only. In addition, no streaming technology can escape analogue private copying, which can be easily re-digitised without any perceivable loss of quality.

As for DRMs and TPMs, described as a modern *Excalibur*, are they designed to provide creators with decent revenues, or simply to give investors (Record producers? Telecom companies?) total control over protected works and performances?

B. Do you consider that multi-function equipment or multi-purpose of the sort described above should attract a copyright levy and, if so, which criteria should apply?

This is not a question to which an abstract answer can be given, but if the equipment is multi-functional, probably one or more functions can be used for private copying purposes. After an assessment is made on a concrete basis, a copyright levy could be imposed, based on the estimated average use of the equipment for private copying acts. Of course, a carrier or device that cannot be used for private copying purposes should be exempted from the levy.

C. Do you consider that infrastructures services should attract a copyright levy in a converging world?

Once again, no abstract answer can be given. Realism and pragmatism are essential. There is no reason to "a priori" exclude such solution if, at some point, it appears to be the best one. The rapid changes that continue to occur in the world of Internet and media still make it difficult to assess the relevance of such solution if it were to be implemented today in a non-homogenous way.

¹ *Why the Copyright Directive is Unimportant, and Possibly Invalid*. Berndt Hugenholtz. Published in [2000] *EIPR* 11, p. 501-502

Question 8. The internal market and differences in copyright levy systems

- A. Should consumers that buy equipment or blank media from online retailers in other Member States for delivery offline be considered importers?
- B. How can online retailers or consumers have certainty in cross-border transactions that goods can be marketed and bought at a particular price?
- C. Do you consider that selective enforcement of copyright levies distorts competition to the detriment of major producers of equipment or media?

We consider that some level of harmonisation is necessary. The EU legislation could notably provide an EU wide framework establishing that ITC companies shall collect a levy from end-users, at an adequate rate.

Question 9. Transparency for stakeholders

- A. How do you explain the above discrepancies
- B. Are these discrepancies due to the fact that copyright levies are being litigated in many jurisdictions?
- C. Are the above discrepancies due to the fact that enforcement of levies remained selective due to copyright levy avoidance?

Even a basic investigation is enough to prove that the figures provided are not reliable. Quite surprisingly, although official and authentic figures are easily available directly from the various collecting societies, the questionnaire makes the questionable choice of presenting tables taken from other sources. It is therefore impossible to seriously react upon such unreliable data.

Question 10. Stakeholder opinion. Does the above text correctly reflect the different stakeholders' positions?

As a first comment, the views of all stakeholders are not reported in the document. Collecting societies, who bear a mandate from performers as regards mainly collection and distribution of legal licences revenues, can certainly – and quite usefully - contribute to the debate . But performers' professional organisations should no be left aside on such a fundamental issue.

We wish to react upon the following assertions:

10.1 "[...] for those individual right holders whose work is not commercially successful either nationally or Community wide, a revenue stream via the copyright levy has a perceivable societal value [...]"

This comment assumes that the distribution of the copyright levy doesn't take achievement into account . Such assertion is ill founded. The fact that it is impossible to accurately quantify the harm caused to right holders by private copying acts does not have to imply an inaccurate distribution. Right Management Information could easily be used for the purpose of assessing which works are directly affected by private copying.

10.4 "[...] the overall competitiveness of the EU ICT industry should not be put at risk [...] the ICT industry deplores the alleged lack of transparency with respect to how levies are set and the basis for their calculation."

There is no evidence that the ICT industry is at risk in any way. Obviously, ICT companies wish to replace levies with an increased margin, thus being the only ones to benefit from the massive private copying market. Whether the latter is a legal one or not, is not something they are particularly concerned with. As for how the levies are set, the alleged lack of transparency is irrelevant (see collection and distribution above).

10.5. “[...] Collecting societies prefer to keep the copyright levies as a form of statutory remuneration under national law rather than move towards more consumer friendly Community wide licensing models with online service providers.”

Collecting societies don't have any preferences as such, but can only express those of the right holders who compose them. Furthermore, it is doubtful whether DRMs and TPMs are considered “friendly” by consumers. Finally, Community-wide licensing models cannot be considered an aim. They can just be regarded as a means among others and should be neutrally assessed, taking into account their practical impact on all categories of right holders, including the performers.