Private Copying and Fair Compensation: An empirical study of copyright levies in Europe

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EC levy definition (2006)

A private copying levy is a form of indirect remuneration for right holders, based on the premise that some acts of private copying cannot be licensed for practical purposes by the relevant right holders.

A copyright levy is typically attached to certain products (equipment or blank media) that can serve to reproduce audio, audio-visual and textual material such as music, films or books.
Policy context

ESRC Fellowship at UK IPO (2010/11)
- UK: What position on EU wide regulation?
- UK: Can a private copying exception be introduced without providing compensation?

Limitations and exceptions
- Are exceptions just a response to market failure?
- What activities should be possible without permission?
- If without permission, requirement to pay?

Empirical approach: If we don’t know how a “regulated” market works, we can’t intervene.
Levy history in the EU

- 1965: Germany UrhG §53
- 2006: EC recommendation (almost)
- October 2010: ECJ *Padawan* ("uniform interpretation", "calculation based on harm")
- May 2011: EC announces “comprehensive legislative action” regarding private copying levies (+ "mediator")
- August 2011: UK commitment to introduce private copying exception without compensation ("Hargreaves")
- [Norway], Finland, Netherlands, Spain
Aggregate levy revenues in EU (2002-2009) (€ millions)

Source: European Commission; de Thuiskopie; Business Software Alliance
Private copying: What is it?

(i) Making back-up copies / archiving / time shifting / format shifting
(ii) Passing copies to family / friends
(iii) Downloading for personal use
(iv) Uploading to digital storage facilities
(v) File sharing in digital networks
(vi) Online publication, performance and distribution within networks of friends
(vii) User generated content / mixing / mash-up
     (private activities made public)
Private copying (current EU law)

[Member States may provide for exceptions or limitations to the reproduction right] in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures.

*Padawan v SGAE, ECJ Case C-467/08 (2010)*:
The concept of “fair compensation” “must be regarded as an autonomous concept of European Union law to be interpreted uniformly throughout the EU”

With reference to Directive 2001/29, Recitals 35 and 38: “fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception”.
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Private copying (current UK law)

Copyright, Designs and Patents Act 1988:
Section 29 permits fair dealing “for the purposes of private study”
  – but only in relation to literary, dramatic, musical and artistic works
    (i.e. not sound recordings, films, broadcasts),
  – and only in very narrow circumstances (not by a third party).
Section 70 permits the recording of a broadcast for the purposes of
timeshifting “in domestic premises for private and domestic use”.
Under section 50, lawful users of computer programs are permitted
  – to make back up copies (s. 50A),
  – and certain other acts, such as decompiling (s. 50B), observing,
    studying and testing (s. 50BA).

Gowers Review 2006: recommended introduction of exception for
format shifting for all forms of content (unsuccessful)
Structure of report

STUDY I: Characteristics of levy schemes

STUDY II: Effects of levy schemes on prices

STUDY III: Economic and non-economic rationales
STUDY I:
Legal and policy context
Characteristics of levy schemes
A. Tariffs and revenues
<table>
<thead>
<tr>
<th>Amber State</th>
<th>Revenue per capita (€)</th>
<th>Levies applied to recordable media</th>
<th>Levies applied to equipment</th>
<th>Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>€0.34 (700MB – 0.54) (4.7GB)</td>
<td>✓ ✓ ✓</td>
<td>43.6% 1/3 authors 1/3 per 1 producers 1/3 A-P-P</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Belgium</td>
<td>€0.12-0.40 per unit</td>
<td>✓ ✓ ✓</td>
<td>66.41% 1/3 authors 1/3 per 1 producers 1/3 A-P-P</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>5% of manufacturing or import price</td>
<td>✓ ✓ ✓</td>
<td>As transferred from 'sister' collecting societies in levy countries</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>€0.008-0.021 per unit</td>
<td>✓ ✓ ✓</td>
<td>1/3 authors 1/3 producers 1/3 A-P-P</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Denmark</td>
<td>8% of manufacturing or import price</td>
<td>✓ ✓ ✓</td>
<td>1/3 A-P-P</td>
<td>33%</td>
</tr>
<tr>
<td>Estonia</td>
<td>8% of manufacturing or import price</td>
<td>✓ ✓ ✓</td>
<td>1/3 A-P-P</td>
<td>10%</td>
</tr>
<tr>
<td>Ireland</td>
<td>€0.6 per 4.7GB</td>
<td>✓ ✓ ✓</td>
<td>49% authors 9% producers 1/3 A-P-P</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>France</td>
<td>€1.0 per 4.7GB</td>
<td>✓ ✓ ✓</td>
<td>1/3 A-P-P</td>
<td>25%</td>
</tr>
<tr>
<td>Germany</td>
<td>€0.271 per 4.7GB</td>
<td>✓ ✓ ✓</td>
<td>1/3 GEMA 1/3 per 1 reprograph</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Greece</td>
<td>6% of manufacturing or import price</td>
<td>✓ ✓ ✓</td>
<td>55% creators 25% prod 31% GEMA 21% producers 8% repro 50% film</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Hungary</td>
<td>€0.27 per 4.7GB</td>
<td>✓ ✓ ✓</td>
<td>20% prod 25% authors 62% authors 13% prod 25% perf 3.3-10%</td>
<td></td>
</tr>
<tr>
<td>Iceland</td>
<td>€0.11&lt;2GB; €32 ≥ 2GB</td>
<td>✓ ✓ ✓</td>
<td>49% auth 64% per 1 prod</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Italy</td>
<td>€0.41 per 4.7GB</td>
<td>✓ ✓ ✓</td>
<td>50% authors 50% of video</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Ireland</td>
<td>€0.14-0.28 per unit</td>
<td>✓ ✓ ✓</td>
<td>40% auth 23% prod 64% auth 30% prod 25% 47 prod</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Lithuania</td>
<td>6% of manufacturing or import price</td>
<td>✓ ✓ ✓</td>
<td>As transferred from 'sister' collecting societies in levy countries</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>– – – – – – – – – – – – –</td>
<td>✓ ✓ ✓</td>
<td>As transferred from 'sister' collecting societies in levy countries</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Malta</td>
<td>– – – – – – – – – – – – –</td>
<td>✓ ✓ ✓</td>
<td>As transferred from 'sister' collecting societies in levy countries</td>
<td>✓ ✓</td>
</tr>
<tr>
<td>Netherlands</td>
<td>€0.4 per 4.7GB</td>
<td>✓ ✓ ✓</td>
<td>40% auth 33.7%</td>
<td>✓ ✓</td>
</tr>
</tbody>
</table>

€2.6pc | €1.0 per 4.7GB | MP3✓ | Printer– | PC✓
### Audio: ½ authors ½ performers/producers  
### Video: ⅓ A-P-P  
### Socio-cultural: 25%

<table>
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<tr>
<th>Member State</th>
<th>Revenue per capita (€)</th>
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<th>Levies applied to equipment</th>
<th>Distribution</th>
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</thead>
<tbody>
<tr>
<td>Austria</td>
<td>1.40.34 (700MB ~ 5.54 (4.7GB)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Belgium</td>
<td>1.20.12.0.40 per unit</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>0.75% of manufacturing or import price</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Cyprus</td>
<td>0.7€0.008-0.021 per unit</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>0.7 €0.008-0.021 per unit</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Denmark</td>
<td>0.78% of manufacturing or import price</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Estonia</td>
<td>0.78% of manufacturing or import price</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Ireland</td>
<td>1.6€0.6 per 4.7GB</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>France</td>
<td>2.6€1.0 per 4.7GB</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Germany</td>
<td>1.5€0.271 per 4.7GB</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Greece</td>
<td>0.136% of manufacturing or import price</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Hungary</td>
<td>0.9€0.27 per 4.7GB</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Iceland</td>
<td>0.6€0.11&lt;2GB; €32 ≥ 2GB</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Italy</td>
<td>0.7€0.41 per 4.7GB</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Ireland</td>
<td>0.16€0.14-0.28 per unit</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Lithuania</td>
<td>0.26% of manufacturing or import price</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0.76% of manufacturing or import price</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Malta</td>
<td>0.9€0.4 per 4.7GB</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

**Notes:**
- CD-R, DVD
- MP3 Player
- Printer
- PC

**Distribution Ratios:**
- Audio: ½ authors ½ performers/producers
- Video: ⅓ A-P-P
- Socio-cultural: 25%
Levies on MP3 Players, Printers and PCs (2009)

[Map showing levies in various countries across Europe, with different shades indicating the level of levy applied to MP3 players, printers, and PCs.]
Levy revenues per capita (2009)
B. Distribution

STUDY I:
Legal and policy context
Characteristics of levy schemes
## Levy distribution and incentives

**Table 3** Levy income as percentage of total collecting society revenues (2009)

<table>
<thead>
<tr>
<th></th>
<th>STEMRA (Netherlands)</th>
<th>SABAM (Belgium)</th>
<th>SGAE* (Spain)</th>
<th>SACEM (France)</th>
<th>GEMA** (Germany)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total revenues (€000)</td>
<td>40,680</td>
<td>192,434</td>
<td>333,936</td>
<td>762,309</td>
<td>862,961</td>
</tr>
<tr>
<td>Levy revenues (€000)</td>
<td>3,533</td>
<td>7,697</td>
<td>16,000</td>
<td>55,041</td>
<td>49,098</td>
</tr>
<tr>
<td>Levy as % of total revenues</td>
<td>8.7%</td>
<td>4%</td>
<td>4.8%</td>
<td>7.2%</td>
<td>5.7%</td>
</tr>
</tbody>
</table>

*Source: Annual reports (latest available): *SGAE 2008; **GEMA 2010*
Levy distribution and incentives

Table 4  Music authors’ share of levy income in Belgium (SABAM, 2009)

<table>
<thead>
<tr>
<th>Description of Author</th>
<th>Physical Sales (Albums/EPs)</th>
<th>Digital Downloads</th>
<th>Total Authors’ Rights Revenue (€)</th>
<th>Levy (private copy) Revenue (€)</th>
<th>Levy as % of Total Authors’ Rights Revenue</th>
<th>Levy Revenue per Album/EP (€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top dance charts USA</td>
<td>650,000</td>
<td>24,689</td>
<td>164,497</td>
<td>582</td>
<td>0.35%</td>
<td>0.00090</td>
</tr>
<tr>
<td>Pop band highest position 1997: 17th</td>
<td>95,000</td>
<td>1,200</td>
<td>11,955</td>
<td>60</td>
<td>0.50%</td>
<td>0.00063</td>
</tr>
<tr>
<td>DJ/producer Label owner</td>
<td>106,000</td>
<td>800</td>
<td>14,217</td>
<td>27</td>
<td>0.19%</td>
<td>0.00025</td>
</tr>
<tr>
<td>Author/producer 35th Belgian charts 2004</td>
<td>32,000</td>
<td>450</td>
<td>7,737</td>
<td>50</td>
<td>0.65%</td>
<td>0.00156</td>
</tr>
<tr>
<td>Singer/author popbands werchter Top 10</td>
<td>35,000</td>
<td>1,500</td>
<td>10,071</td>
<td>35</td>
<td>0.35%</td>
<td>0.00100</td>
</tr>
<tr>
<td>Top 10 British Charts</td>
<td>185,000</td>
<td>750</td>
<td>14,350</td>
<td>65</td>
<td>0.45%</td>
<td>0.00035</td>
</tr>
</tbody>
</table>

C. Consumer permissions

STUDY I:
Legal and policy context
Characteristics of levy schemes
- Denmark: lawful sources; not from borrowed media; family and close circle of friends
- France: lawful sources; cannot be invoked against effective technological measures (Mulholland Drive 2006)
- Germany: not from “evidently unlawful sources”; up to seven copies
- Netherlands: downloading from unlawful sources is permitted, and has to be compensated (Eyeworks v FTD; ACI v Stichting de Thuiskopie 2010)
- Switzerland: licence regardless of origin (Eigengebrauchsschranke, Art. 19 URG)
Consumer permissions?

Copyright Board of Canada (2006-2007)
evidence on Portable Music Players (such as iPods)

– in total, 1.63 billion copies made from July 2006 to June 2007
  o/w about half (808 million) were copied on digital recorders

– o/w about 345 million (42%) came from the Internet. Only 20% of these tracks were authorised downloads (e.g. from iTunes)

– on average 497 tracks of music on PMPs o/w of which 96% were copied
STUDY II:
Empirical effects of levy schemes
Retails prices
Relationship of levy and retail price (HP printer)

Price of HP Printer 4500 and “Aggregate Tax” (levy + VAT)

Correlation Coefficient between Market Price and Aggregate Tax = +0.2918

This shows a weak positive correlation between market price and aggregate tax.

Lowest online retail price available, at Euro exchange rates of 15 April 2011
Relationship of levy and retail price (iPod Touch)

<table>
<thead>
<tr>
<th>Price of iPod 64GB &amp; “Aggregate Tax” (levy + VAT)</th>
</tr>
</thead>
<tbody>
<tr>
<td>iPod Touch 64GB Market Price</td>
</tr>
</tbody>
</table>

Correlation Coefficient between Market Price and Aggregate Tax = +0.83864

This shows a strong positive correlation between market price and aggregate tax.

Lowest online retail price available, at Euro exchange rates of 15 April 2011
STUDY III: Economic rationales
What are levies for?
Economic rationales

Transaction costs
   Identifying and locating user/owner; Negotiating price; Monitoring and enforcement. Consumer as licensee, not beneficiary of exception.

State regulated licences
   Radio broadcasting (PRS/BBC 1923); Competition law

Consumer value
   Consumers’ freedom to copy increases the value of goods or services (MP3 players, Internet broadband). Right owners do not receive the right economic signals to produce more content.

Off balance sheet tax

[Creator rewards] [Privacy]
The concept of harm (1)

**Harm in law** (damage jurisprudence) = lost licensing opportunity; i.e. a fee that could have been charged.

Circularity! If there is a copyright exception, there is no infringement, and no licence could have been issued. Thus by definition, there is no harm from a permitted activity.

**Harm in economics** = lost sale; i.e. if copying replaces a purchase that otherwise would have been made (may also encompass broader economic impact on consumers and producers).

Normally, lost sales are not something to be compensated. If a second stall sets up in the market, it’s called competition.
The concept of harm (2)


- Situation where a publisher or producer “can completely determine the terms and conditions under which the products it sells can be consumed”. If sharing is permitted, or takes place, the producer is likely to sell fewer units of the work, but since the consumer derives greater value from each unit, the producer’s profit may even increase (if pricing is right).

- However, if availability of free copies pushes the retail price to marginal cost, the original seller will find it hard to raise the price to a level where he/she can recover the cost of production.

If priced into purchase ➔ no harm:

- “if the willingness-to-pay for the right to copy exceeds the reduction in sales, the seller will increase profit by allowing that right.” A certain amount of copying can already be priced into the retail sale of the first copy if the consumer understands these benefits. Rogers, Tomalin and Corrigan (2009) call this the “first sale” argument.
Solutions

Art. 2: Reproduction:
Art. 5(2)(b) exception possible (if compensated)

(i) Making back-up copies / archiving / time shifting / format shifting
(ii) Passing copies to family / friends
(iii) Downloading for personal use
(iv) Uploading to digital storage facilities
(v) File sharing in digital networks
(vi) Online publication, performance and distribution within networks of friends
(vii) User generated content / mixing / mash-up (private activities made public)

No harm ("first sale")

Art. 3: Communication to the public:
no exception possible