Pirate Party International response to "Second Call for Comments on 'Fair Compensation for Acts of Private Copying'"

Who or What is "Pirate Party International?

The Pirate Party International (PPI) is a political umbrella organization for Pirate Parties around the world. The first Pirate Party was founded in Sweden. What joins them is that they all have a critical view on how some aspects of copyright, patents, restriction on free information and erosion of civil rights and liberties are being handled by today by politicians.

The Pirate Parties are composed of individuals - among them: musicians, songwriters, writers, graphical artists, software developers and many copyright-related professional groups which are or could be legitimate stakeholders for levies. Because of its background and history, the pirate movement has developed a special point of view for copyright issues and levies.

General

A basic assumption of the consultation is that a levy system is essential in a modern copyright system, because authors would otherwise get little or close to no income from private copies of their work. We view this assumption as false.

A common misconception is that levies are some sort of advance payment of fines for illegal copying and file sharing. The actual purpose of levies is however to get a compensation for private copies made from legally obtained copyrighted material. If one buys a CD in the shop, and makes a copy on a MP3 player, the author would be entitled a compensation.

Making new copies has been a reserved right under copyright law since the Berne convention, established in the late 19th century. At the time, making copies required expensive technology. With the advent of tape recorders and Xerox copiers in the second half of last century, private copying became within reach and now, some time later, digital technology allowed copies to be made without any loss of quality. With the advent of high speed Internet in the past decade, the exchange of copyrighted data became even easier; improving the quality of life for millions of citizens.

While in the 19th century a compensation for every new copy was somehow understandable, since the society needed them as a incentive mainly for distribution, with today's technology it is clearly an outdated idea. Authors get compensated for the sale of their works, and we would like to show that there is no logic to compensate them again and again for every new copy.

Even if copyright levies would be justified, we would like to show that the execution of a levy system

leads to insurmountable problems. Below we will discuss details. Essentially levy systems suffer from the following problems:

- Levy systems assume that the copyright owner wants to sell the works he owns for money. This assumption contravenes the basic principle of self-determination. The concept of a copyrighted "work" is very wide. It includes all kinds of texts produced by people not for exploitation but simply to convey a message. Even musicians occasionally give their music away for free. Freedom of enterprise is a fundamental right that allows authors to decide whether and how to exploit their copyright on the basis of licence fees. While copyright basically is an Anglo-American conception, continental Europe traditionally fosters a droit d'auteur (authors' right, Urheberrecht) tradition that focuses on the personal, inalienable rights of authors. Making general assumptions about their economic purposes is unacceptable, even as a first approximation. The modern web, often called "web 2.0", increasingly depends on user provided content, contributed by volunteers rather than professionals. Examples include the highly successful Wikipedia encyclopedia, and films contributed to YouTube. These Youtube movies are often remixes of the users material together with other copyrighted material creating an even more difficult situation for a levy system.

- It is impossible to find a just basis for levy tariffs. Basically, there are two options: tariffs can be a percentage of the media sales price, or there can be a levy per (mega)bit. If it is a percentage, the author compensation will continually decrease as technology develops. However, a price per bit is not logical either: the author effort is virtually unrelated to the amount of storage needed. An Adobe Acrobat file is much larger than a "flat ASCII" file containing exactly the same text. For comparison, the PDF version of this document is 220kb, whilst the ODT document used to create it is only 90kb, yet the contents are identical. Also, if the tariff is based on storage capacity, a distinction must be made between media that are used only once, like blank CDs and DVDs, and media that are reused, such as hard-disks, MP3 players and USB memory sticks.

- The redistribution of the money collected by a levy system requires cultural policy decisions that can not simply be left to an executive office. The simplest solution would be to give popular artists most, but how to decide who is really a popular artist in this digital era? And more fundamentally: isn't one of or even the main purpose of copyright to foster cultural diversity? Some Collection Societies have established special funds that subsidize cultural activities. But that is fundamentally wrong. Then levies become some sort of tax, that is used for cultural policy purposes without any democratic control. Levy systems lack both market and democratic control.

- Levy systems are expensive. The collection and redistribution of levies involves huge 'transactions costs', that make such systems very inefficient. The enforcement of a levy system is expensive as well with negative social effects. If the present policy continues and develops on the same track, an ever greater portion of the societies resources must be spent on enforcement and control.

Give all those difficulties, the Pirate Party international is strongly opposed against a levy systems. In the information era, there is no place for a 19th century principles that can so easily be abused for 'rent seeking' purposes. New technology predominantly affects distributors, and creators to a much lesser extent. Innovative distributors now develop alternate business models, acknowledging that there is no longer as much demand for traditional distribution methods. As Schumpeter already noted a long time

ago, innovation involves a "creative destruction" process. Some traditional entities, such as record companies may suffer, but from a social welfare perspective innovative distribution means that replacement of obsolete distribution methods should be welcomed.

The very perceived need for a levy system demonstrates, that traditional copyright is no longer fit to remedy the market failure associated with information goods. It should be remembered that copyright does not have an (economic) purpose in itself, but it is rather a means to foster culture. If the society can gain substantially more culture, that is more diverse, without an enforcement on controlling copies sent with an non-for-profit reason, then the society should keep away for any control on non-for-profit copying. Copyright should never be seen as an income insurance, as the levies now are being formulated by special interest groups promoting the levies. Also if there really is a market failure, more sophisticated instruments are available nowadays. If the government must correct market failure, it should intervene directly under democratic control, not indirectly by means of a levy system with all its problems.

The premise of copyright levies

The background paper supplied for the consultation states:
A 'private copying levy' is a form of compensation for rightholders based on the premise that an act of private copying cannot be licensed for practical purposes and thus causes economic harm to the relevant rightholders.

All copyright levy schemes are based on the above premise. But is this premise really true? If the premise is not true, copyright levies is nothing but money-grabbing by copyright holders who are too good at lobbying. Unfortunately there is no credible scientific research that shows the premise to be true. On the contrary, we know of a lot of credible scientific research on both private copying and also illegal copying that indicates that the premise of economic harm to the copyright holders could be wrong.

Let examine some common examples of private copying:

- time-shifting a TV broadcasted film/series;
- copying the music from a CD bought in a shop to another CD, or to a MP3 player, or to any other device/media;
- (in some EU countries) sharing copyrighted works through P2P for non lucrative uses, provided peer-to-peer is just a merely sophisticated version of the traditional CD copying between pairs of individuals.

In all of these cases, there is no monetary nor material (i.e., CDs, DVDs, vinyls, books or other material media) loss. Therefore, where does the supposed economic harm lie?

It lies, falsely, on the assumption that cultural works are assimilable to private property, when it cannot be because of a main issue that is pointed out by even the highest private property supporters. Let this be highlighted: As we support non-commercial file sharing and oppose private copying levies we are falsely and unfairly accused of being against private property; nothing could be further from reality. scarcity principle. From Stephan Kinsella's words:
"What is it about tangible goods that makes them subjects for property rights? Why are tangible goods property? A little reflection will show that it is these goods' scarcity -the fact that there can be conflict

over these goods by multiple human actors-. The very possibility of conflict over a resource renders it scarce, giving rise to the need for ethical rules to govern its use. Thus, the fundamental social and ethical function of property rights is to prevent interpersonal conflict over scarce resources"

"Property rights must be demonstrably just, as well as visible, because they cannot serve their function of preventing conflict unless they are acceptable as fair by those affected by the rules. If property rights are allocated unfairly, or simply grabbed by force, this is like having no property rights at all; it is merely might versus right again, i.e., the pre-property rights situation."

"your taking my lawnmower would not really deprive me of it if I could conjure up another in the blink of an eye. Lawnmower-taking in these circumstances would not be "theft." Property rights are not applicable to things of infinite abundance, because there cannot be conflict over such things [...] like the magically-reproducible lawnmower, ideas are not scarce [...] if you copy a book I have written, I still have the original (tangible) book, and I also still "have" the pattern of words that constitute the book. Thus, authored works are not scarce in the same sense that a piece of land or a car are scarce. If you take my car, I no longer have it. But if you "take" a book-pattern and use it to make your own physical book, I still have my own copy. The same holds true for inventions and, indeed, for any "pattern" or information one generates or has. As Thomas Jefferson -himself an inventor, as well as the first Patent Examiner in the U.S.- wrote, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me"

We are also falsely accused of being against author's interests; we actually support author's rights, both moral and material rights, as they are part of the human rights (article 27.2). What we fully reject is the intellectual property concept as mentioned above, because private property does not naturally fit to non-scarce goods.

We are not the only ones: in the infamous Sony vs Universal case – also nicknamed the 'Betamax case' – it's not time to talk about the unbearable duality of being suffered by Sony, now Sony-BMG, a company which at the same time both insulting the users that make private copies of their copyrighted works and supply the required equipment to perform such copies-, US Supreme Court stated that: *"The record and the District Court's findings show [...] that there is no likelihood that time-shifting would cause non-minimal harm to the potential market for, or the value of, respondents' copyrighted works [...] private, non-commercial time-shifting in the home satisfies this standard of non-infringing uses both because respondents have no right to prevent other copyright holders from authorizing such time-shifting for their programs, and because the District Court's findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use"*

This case is a good example that what the rights holders want isn't always in their best interest. In particular they often try to outlaw new technology as they feel threatened by it. In this case the movie industry were lucky they didn't win, as the rental of video quickly became a bigger source of revenue than box-office sales. We urge the Commission to see opposition of new technology from rights holders in this light, and value the development of European culture higher than the urge of right holders to outlaw new technology.

Again: Why should we have a levy to compensate a non-existent harm? As has been shown, there is no

evidence of any harm, but instead an indication of a possible benefit of private copying to the rights holders.

Finally, because of the *probatio diabolica* principle, we are not the ones who have to prove the nonexistence of such harm, but the beneficiaries of private copying levies are who have to prove the existence of such harm. Whilst the only reason for private copying levies to exist remains being because rightholders want to, as Kinsella says, we will stay trapped in the might versus right - a scenario quite far from what can be seen as being fair.

A basic question about levies
Why is who going to be compensated for what, and how?

This question has too many unanswered elements. In the opinion of PPI, and not all of them have satisfactory answers. To make our views clear, we present a rather thorough discussion before even beginning to answer the questions, because the premises of this questionnaire all rely on this one simple question having an answer supportive of levies.

Unless the above question can be answered in a way that is reasonable, a copyright levy system will only serve to take money from someone to give it to others without a clear rationale. Although a copyright levy system is not formally a tax because the money does not go to the state, it works just like a tax for those paying it, and should therefore be subject to the same scrutiny as taxes.

The above question can be divided into several questions:

Why compensate?

This is the most basic question; without it, there is no room for levies.

As shown in the previous section "The premise of copyright levies", it has never been shown that private copying is causing a harm to rights holders. On the contrary it looks like private copying could actually benefit rights holders.

But when there is no harm to the rights holders, a compensation system is unjust and looks to the European population as unjust money-grapping made possible through lobbying.

What is the compensation for?

The word "compensation" assumes a loss that must be compensated. But does private copying really cause a financial loss for authors? As shown earlier in this document we believe that the premise of private copying causing copyright holders economic harm is untrue.

In civil law, compensation arises when concrete supposedly harmful actions happen. Regarding private copying levies, those actions are obviously private copying; because of that, no compensation should arise from any other actions. If no single private copying levies system observes this simple rule, then there wouldn't be room for any single private copying levies system.

Who should be compensated?

The obvious answer would be "copyright holders". However, the Pirate Parties in Europe claim that this does not fully answer the question.

For one, the purpose of a copyright levy should be to nurture the purpose of copyrights, which is to stimulate new creativity and more culture. The copyright industry as it currently functions does not work like that. The current copyright system employed in the EU, by its Member States and in the WTO all show the tendency of copyrights being stockpiled goods rather than a means for creators to gain compensation or attribution for their works. In essence, a copyright levy defined under such a system would only serve to promote the standing of already well-compensated copyright trolls having the financial means of lobbying for a bigger share of the levies. Therefore, a copyright levy could, by critical analysis, be seen as a way of undermining the spirit of copyright by centralizing financial assets around such businesses as stockpile copyrights.

Second, a copyright levy suffers from the inability to decide how such a levy would be distributed. Even if there would have been a real financial - or even moral - loss to be compensated, it would inevitably be impossible to find a true and fair basis for the distribution of the income from such a levy so that it benefits all the creators who are being copied, in proportion to real losses (if any). In particular, the Internet is an arena where a lot of copyrighted material is distributed, where you run a severe risk of colliding with fundamental human rights like privacy and the sanctity of private communication should you wish to get complete records for a basis of distribution. Therefore, a copyright levy could further be seen as a way of centralizing financial assets either around such businesses who are unscrupulous enough to obtain such records, or such businesses as already control of the non-Internet arenas.

In the views of our coalition, neither of these possibilities are enticing or even serving of the purpose of copyright, and therefore the levy system should be promptly turned down.

Let us use reductio ad absurdum: In civil law, arisen compensations have specific beneficiaries, and regarding private copying levies, those beneficiaries are the rights holders of the copied works; because of that, no compensation should be received by rights holders of non copied works, and the amount of the compensation should be kept proportional to the supposedly caused harm (it doesn't matter if, for instance, Alejandro Sanz sold 10 million copies of his last album for only 10.000 copies of the relatively unknown group X's last album; if the same amount of private copies were made from both albums, rights holders of both albums should receive the same amount of compensation). If no single private copying levies system observes this simple rule, then there wouldn't be room for any single private copying levies system.

How should the compensation work?

This question includes the questions of which media and equipment a levy should be placed on, how much the levy should be for different types of media and equipment, who should administrate the levy system and who should audit the levy system to ensure it stays fair and that levies are distributed according to the rules set up for the levy system.

Let us finish using reductio ad absurdum again:

We've found out that in civil law, no compensation should arise from any other actions than the supposedly harmful ones (i.e. private copying), and that no compensation should be received by rights holders of non copied works, as well as the amount of the compensation should be kept proportional to the supposedly caused harm. If no single private copying levies system observes this two simple rules, then there wouldn't be room for any single private copying levies system.

However, there is an extra rule to be observed: Rule of the law, in particular basic laws as declared in the declarations of human rights. It means that all laws have to be observed. Thus, quoting the article 30 of the Universal Declaration of Human Rights, "nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'". Which are such rights and freedoms?
Article 1, UDHR: *"All human beings are born free and equal in dignity and rights"*. No single rights holder should receive less compensation than others if suffering the same harm; no single citizen should surrender any kind of compensation if not causing any harm.
Article 7, UDHR: *"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination"*. The same argument as with article 1 applies here.
Article 12, UDHR: *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence"*. Any private copying levies system that, pursuing to observe the two previous articles, fails to observe this one, becomes invalid.

Thus, if our request to show reasons that may show why private copying levies should supposedly exist come to be ignored: If private copying levies come to be imposed following the might versus right path; if it happens, then everyone who would be willing to do it should stop and check if any proposed private copying levies model meets the already mentioned criteria. if no model meets the criteria, then not only private copying levies would result unfair, but also the mere act of defending their existence would become absurd.

The inner market

As the background document states, a total of over 6 percent of all intra-EU imports and exports are subject to copyright levy systems. As the intra-EU imports of these goods are subject to national import restrictions (payment of levy fees), the inner market does not work for these goods. This is simply unacceptable.

The Commission should work to ensure that private citizens of the EC can freely buy these goods in any other member country. And the commission should work to ensure that professional wholesale traders can import there goods from other member countries where a levy has already been paid without paying a levy again in the member country they import the goods to. This would make the free market forces work for harmonization of the size of the levies across member countries.

Professional users

The background document notes a problem with regard to professional users of goods subject to copyright levies, and we agree that there is also a problem here. The problem is that if people who create culture are subject to the levies, the free market is disturbed because these cultural creators are paying a levy to their competition. This problem does not only exist for professional creators, but also for non-professional cultural creators.

For example, think of a group of young independent (without a recording contract) musicians who record a music album. With the low cost of recording this is possible today even if the young musicians do not have a lot of money. But if the equipment (for example computers) they use to create their album is subject to copyright levies, they pay the levies to the existing music industry (their direct competition) but gets no part of the levies. This disturbs and biases the free market. If the young musicians think that selling copies of digital content is not the way to make money in the information age (as many young creators of cultural works think today), they might want to spread their album for free as widely as possible so they get popular and can make money from doing concerts. But if they copy their album to a large number of CD-recordables to send to radio stations to get publicity, they again pay levies that goes to their direct competition (the existing music industry). Thus the system of levies work to protect the existing music industry against competition from new and creative musicians.

Some may argue that allocating part of the levies for collective purposes could help this problem, as the young musicians in the example could ask for part of the collective funds.

We do not think so, for several reasons: The distribution of collective funds is rarely widely announced in member countries that allocate part of the levies for collective purposes, so the young musicians in our example would not know of this possibility. And even if they knew, the procedure for asking for part of the collective funds is not often announced, so they would not know how. If they knew how to ask for part of the collective funds, the decision on who should have parts of the collective funds is often done in a secretive committee controlled by older established copyright holders. Is it likely that copyright holders who make their earning from selling copies of music would give money to somebody who wants to compete with them by giving every customer who wants it free copies of their music? We do not think so.

Currently it looks like almost all of the collective funds are given to other people in the established copyright system (ie. to friends and associates of the people who decide on the distribution of the collective funds).

So there is not just a problem for professional users. The problem exists for everybody who create cultural works. Because the levies increase their cost of creating and distributing new cultural works, the copyright levy system works to limit cultural development. To ensure that cultural development in Europe is not limited by the copyright levy system, the Commission should work to ensure that levies do not apply for goods purchased with the intent of creating or distributing cultural works.

There is not just a problem for professional users, though it is also a problem for this group. When levies come to be in some countries even higher than the levied goods price, thus reducing margins to nothing, when inflation of prices caused by levies makes sales lower, when the behaviour of RMOs is not audited nor controlled by Member States (so possible abuses are not avoided), SMEs come to suffer really much; and SMEs suffering equals the suffering of national economies and an increase of

unemployment. Even, to get refunds in some countries, SMEs are relegated to almost no importance. Side effects of levies on SMEs have also to be taken on account.

Distribution issues

Fair distribution of the funds collected by the levies is a prerequisite for a copyright levy system. If the funds are not fairly distributed, the levy system will just be money grapping by those who are best at getting part of the funds. Such "rent seeking" strategies are well known in economics, but legislators should identify and avoid them.

An example: In Denmark a levy has to be paid for digital cameras with a removable memory module, that is paid mainly to the music industry, for the reason that the memory module can be removed and used in a mp3 player to store music. The fact that photographed (art) objects can be copyright protected as well is virtually ignored: architects and sculptors usually do not compensated from levies.

This is an example of the music industry being better of getting a part of the funds than the photographers. In fact the photographers are not even represented in the organization that distributes the levies in Denmark. And their only way of getting representation is if they can pressure the danish government to put enough pressure on the organization (Copydan Båndkopi) to make them accept a new member. Most likely the danish photographers do not think it is fair for them to get funds from a levy on a camera, as this obviously is not for their pictures, but for pictures the purchasers of the cameras make. We thing that levies should be avoided on all equipment used to create new cultural works, as such levies would only work to restrict cultural development in Europe.

In Denmark and Spain (and possibly other member countries) the regulations for the levies say that the state can audit the collection and distribution of funds from the levies. But in neither Denmark nor Spain this has ever happened. We fear that the governments refuse to audit because they know that their local copyright levy systems are so unfair that any audit would expose serious irregularities and make the people responsible for the distribution of the levies (who are usually very influential in the media) enemies of the government that audits.

In The Netherlands, the "Stichting Thuiskopie" was severely critized because it failed to redistribute the money it collected, and kept major amounts of money in cash. The Minister of Justice had to establish another organisation to oversee the operations of this organisation.

Studies made e.g. by ECONLAW (see http://www.gesac.org/eng/positions/privatecopying.asp) strongly emphasize the problems currently experienced by the traditional music industry due to the proliferation of internet distribution techniques. It should be remembered however that copyright covers much more than just music. All "original" writings are covered by copyright, even if the author is prepared to give it away for free, such as this report. And software is covered by copyright. Should a legal licensee of Windows pay yet another time because there is a levy on the computer hard disk?

Determining the actual use of information media for various types of copyrighted works is just one thing. This would be a tremendous effort. But even if all the data would be available, other questions on a fair distribution remain. How should various types of works be valued? The technical amount of storage required is hardly an appropriate measure. Should popular artists be rewarded most? Or should the system stimulate new entrants and innovation? Such decisions require a judgement beyond

numbers.

Media convergence

Long a futuristic dream, the convergence of equipment and media for all kinds of information has become a reality. People watch television and read newspapers on their PCs, listen to music and make photographs on their mobile phones. And despite all futuristic predictions, paper is still used on a large scale for information distribution.

If we take a PC hard disk as an example: it contains first of all the operating system the user already paid for. A Windows licence includes the right to install it on a PC, this is not to be considered a "private copy". And a PC hard disk typically contains a large number of e-mails, both sent and received. While theoretically all e-mails are covered by law by copyright, no e-mail would even think of asking for a copyright compensation. And it may contain copies of music and films. Note again that levies are not intended to be an advance payment of fines due for illegal use. Levies are only due for lawful private copies.

Transaction costs

The administrative overhead of a levy system tends to be large. A watertight system requires many types of media to be subject to a levy. And the distribution of the collected levies over numerous authors is even a more arduous task.

As technology develops, levies will be an ever greater portion of the sales price of media, making illegal trade ever more attractive. That requires tough enforcement measures, by police, customs authorities and other enforcement bodies. From a policy perspective, the enforcement costs should be considered part of the transaction costs.

For many authors, especially those who are still in an early stage of their career, the cost of the levy system will barely exceed the market value of their works, if at all. The extra cost of the levy paid by the consumer is just overhead in that case. But such authors are needed for cultural diversity.

Response to the questions posed.

A. Main characteristics of the private copying levy systems

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

For Germany, Spain, The Netherlands and Denmark, the information is correct. Though, there is a nuance about what is pointed out in the Table 1 footer (about hard disks): in Spain, computer hard disks are supposedly (we'll check it after the new digital levies become pass by Spanish government) exempted; however, autonomous hard disks (designed to directly play their audiovisual contents) would actually have levies.

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

This is a difficult problem. A European directive is not a solution. The tariffs can not reasonably be fixed in a directive, as new types of media appear. Also, experience learns that the implementation of a directive may differ from member state to member state, at least for some years. The least uncertainty is probably achieved if the decision is made to abolish all levies at the European level. As explained elsewhere in this response, there are other good reasons to consider abolition.

It would be a good idea to require that the part of the price paid by the consumer is always displayed at the point of sale, so the consumer knows how much he is paying for the actual good, and how much he is paying in levies, and which RMOs will receive the collected quantities.

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

In short, abolish. The economical harm done by the fundamental unfairness of the system does not justify the small increase of income for a few "big name" artists.

It is virtually an impossible task to determine a fair rate, for a number of reasons:
Media, digital media in particular are used for a variety of purposes. It is a mistake to assume that media are used only for music, or even for any type of entertainment in general. Media are also used for software and e-mail communication. Not all information is a "work" in the sense of copyright, and not all copyrighted works are intended to be exploited by their authors. For instance, information shown on websites usually is allowed to be cashed by an implicit or explicit copyright licence. Software licences always allow installation: an installation is not considered a private copy.
A proper base for a tariff is non-existant. A percentage of the sales price would be inappropriate as that would decrease the levy income as technology progresses. A price per megabyte would be inappropriate as well, as there is no natural relation between the amount of storage needed and the cost of a work. An unedited ("flat") text file is much smaller than an edited text file (for instance in the PDF format), yet the author effort is the same. A price per hour - as exists in some jurisdictions - ignores the fact that today, the amount of hours that can be recorded on given media varies by technology, compression technologies such as MP3 in particular. Finally, no one knows how often rewritable media is rewritten. An MP3 player may have its contents replaced every day, for many years.

As we explained in section a basic question about levies, if our claims for reasons (that may show why private copying levies should supposedly exist) come to be ignored; if private copying levies come to be imposed following the might versus right path; if it happens, then everyone who would be willing to do it should stop and check if any proposed private copying levies model meets two essential requirements from civil law:

- no compensation should arise from any other actions than the supposedly harmful ones (i.e., private copying),
- no compensation should be received by rights holders of non copied works, as well as the amount of the compensation should be kept proportional to the supposedly caused harm

So if no model meets the criteria, then not only private copying levies would result unfair, but also the mere act of defending their existence would become absurd.

4) Have new levies on either equipment or media have been introduced or abolished since 2006?

In Spain, though it has not been passed by Spanish government (due to recent general election, current government is just temporary), new levies (Spanish version) are going to be applied. Despite of lowering levies on DVD-Rs, CD-Rs and printers, the new levies on mobile phones, autonomous hard disks, pendrives and MP3/4 players show estimations (according to consumer associations like Asociación de Internautas (Spanish version)) of a 75 % percent of levies raise for 2008 from 80 to 145 million €, without considering levies paid by public offices (because of public offices would may become exempted according to your previous resolutions; if they wouldn't, amount would raise up to 225 million €). Such raises would come specially from mobile phones, as most of newly sold mobile phones include MP3, and there is a huge mobile phone devices market in Spain (in 2006, Nokia estimated (Spanish version) 22 million units sold only in Spain). These are, undoubtedly, significant changes on levies.

B. Economic, social and cultural dimension of private copying levies

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

This question has no response from us

6) Are you aware of further economic studies on the topics discussed in the Document?

There are many studies, most of whom are sponsored or paid for by rights holder organizations or collection societies. These studies cannot be trusted as the results of the studies may be influenced by those paying for the studies. There are also some independent studies, but these are rejected by rights holders and collection societies as being few and not representative.

We are unaware of any studies recently published, that can be independently verified, by the publication of their source data and methodologies so that independent analysis can verify the conclusions drawn by the studies.

We urge the Commission to fund such independent studies.

7) Table 5 reflects the percentage of private copying levies and the resulting amounts that are allocated to cultural and social funds. Does this table summarize the situation correctly? Could you provide updated figures for 2007?

In some countries like Spain this is impossible to say, as RMOs haven't been audited for the last twelve years; so, though they are supposed to allocate 20 % of collected levies in cultural and social funds and activities, no single authority has verified this. So, in some countries like Spain RMOs are managing hundreds of millions of euros because of levies without any control of just distribution of the collected means.

For some nations (like Sweden), this information is correct as of 2007. No money from Swedish private

copying levies are paid to cultural and/or social funds, and the levy money is distributed between different interest groups. Nobody who is getting paid via the private copying levy is a private individual copyright holder. The interest groups do not provide information about what the money they obtain from these levies go to.

In some nations like Denmark. the distribution is done by a committee of right holder representatives, and there is no control that they do not distribute the funds to their friends instead of distributing them for the general benefit of cultural development.

In The Netherlands, the levies collected by "Stichting Thuiscopy" (Home Copy Foundation) is distributed by over ten different collecting societies, who all have their own schemes. Professionals often become members of such societies. But amateurs that contribute content for instance to Wiki websites usually don't. In the recent past, Stichting Thuiscopy had major problems to redistribute the money, so it eventually decided to give some money back to media manufacturers, but that was problematic as well as some of those manufacturers were organized to contribute levies and others were not, due to controversies in that type of organisations.

> *8) What kind of events are funded by the sums set aside for cultural funds in the different jurisdictions? Who are the main beneficiaries of these monies?*

In some countries like Spain and Denmark, determining what kind of events are funded by the sums set aside for cultural funds comes to be impossible to say until RMOs become audited. Until that day, the daily activities of RMOs are an example of opacity; a situation that is completely unacceptable, and severely undermines the argument for levies in any shape or form.

As we noted above, in The Netherlands the collected levies are redistributed by many collective rights organizations, who all have different policies.

In most countries it looks like the funds are distributed to people who work within the old copyright system. We have not yet seen an example of funds being distributed to creators of cultural works who distribute their works for free, although the importance of these cultural creators for the cultural development of Europe is rising fast.

Another important question the "cultural funds" raise is: How can this be distribution of supposed losses when these funds are not distributed to the rights holders who are assumed to have had a loss on the private copying of their works.

> *9) What percentages of cultural funds are spent on cultural events and what percentages on pensions or social payments?*

As has been stated before, in some countries like Spain determining what percentages of cultural funds are spent on cultural events and what percentages on pensions or social payments comes to be impossible to say until RMOs become audited. Until that day, the daily activities of RMOs are an example of opacity; a situation that should be fixed immediately.

Similarly, in The Netherlands it all depends on different and varying policies of numerous collective rights organizations.

10) Should there be a Community-wide (binding or indicative) threshold for cultural fund deductions?

There should not be a levy, and there should not be deduction from such a levy to a cultural fund. In the event that the Union wishes to support such cultural funds, it would be better to put up a separate fund which is financed via redistribution of taxes in the Union, or by voluntary donations from citizens or businesses. Mitigating the uselessness of a copyright levy by forcing some of it to end up in a cultural fund does not work.

Nowadays, many national constitutions like Spanish or Portuguese entitle States to promote culture, thus that role shouldn't be entitled to RMOs (specially if these RMOs are not audited); a EU revision of VAT for cultural works would allow Member States to directly fund cultural events, pensions, social payments, cultural infrastructures, etc. Also, Member States may encourage tax deductions to private persons and companies which decide to spend money funding such events, infrastructures and social issues; there are so many ways for encouraging culture, from a public and also from a private viewpoint, that deductions to levies for cultural funds issue seems to be just a smoke curtain.

Cultural fund deductions for RMOs? It may be found to be as an excuse to recognize private copying levies (like arguing that by having such deductions levies become automatically acceptable, which is false). Let's stop using this kind of supposed reasonings: let's get to the point, and the point is why levies have to be collected (and only if the answer to that question comes to be true and satisfactory, then who should receive them, and how would it be determined, and who should pay them,and how would be it determined).

11) What share of individual rightholders' revenues do private copying levies represent?

Due to the opaque and complicated redistribution schemes, it is hard to give precise numbers.

Also there is the question if the right rights holders are getting the compensation, or if the compensation is going to those with the most influence in the collecting societies. Examples like levies on digital cameras being distributed to the music industry mentioned before indicate that the funds are not shared fairly. Thus, it is impossible to figure out what share of specific individual rights holders private copying levies represent; we would only be able to figure out that share for the whole collective of rights holders.

C. Cross-border trade and e-commerce issues

12) Is there a refund system available in your jurisdictions when particular equipment or media is exported to another Member State? If so, are there limitations as to the category of traders or individuals who are entitled to such a refund upon exportation?

This question has no response from us

13) What is the most suitable system of refunds upon exportation? Who is the most suitable party to claim those refunds?

The national levy systems act as trade barriers within the EU market. This is unacceptable.

We are aware that importation from other EU countries by private citizens in the countries where the levies are highest is quite common, even if illegal according to national regulations. But such national regulations restricting the free trade of goods within the inner market is against both the spirit and the word of the Treaty of Rome.

We urge the Commission to secure the free trade of goods subject to levies within the inner market, without having to pay the levies again in the importation country. Such rules would create a market pressure to harmonize the very different tariffs in different member countries.

> *14) Does Table 6 on national refund and exemption systems reflect the situation correctly? Please complete and update the table.*

This question has no response from us

> *15) Who is the most suitable party to pay private copying levies? Should private endconsumers be exempt to self-report intra-community purchases of blank media and equipment?*

Nobody. End consumers should not be bothered by reporting purchases done inside (or for that matter outside the EU), as the Treaty of Rome explicitly encourages free movement of goods and persons.Currently we are forcing private consumers, even retailers, to self-report intra-community purchases of blank media and equipments which is clearly against the spirit of the European Union. Also, any such requirement introduces bureaucratic overhead that seriously distort markets.

D. Professional users of ICT equipment

> *16) How do private copying levies affect professional users (SMEs, others)?*

As we have already explained in this document, statistics from RMOs may not per default be relied upon as unbiased or correct; for instance, Table 3 with data supplied by GESAC (a very unbiased source) about levy rates and retail prices of blank DVD-R.

Table 3 depicts a Spanish scenario where levies represent approx 35 % of final prices (already a very huge rate); those rates are not real, because the current (up to now, new digital levies have not been passed yet by Spanish government) levy on DVD-Rs in Spain is set at 0'60 €/unit for a 4'7 GB DVD-R.

Now please check the retailing prices at two big stores like El Corte Inglés and FNAC España:

Retailing price, 25 DVD-R Memorex, at El Corte Inglés (as per 1-IV-08):
34.95 € per 25 units, including 16 % V.A.T., also included levies
30.1293 € per 25 units, excluding 16 % V.A.T., but included levies
1.205172 € per unit, excluding 16 % V.A.T., but included levies
levies represent 49.78 % of final price, and also 99.14 % of net price

Retailing price, 25 DVD-R TDK, at FNAC España (as per 1-IV-08):
39.95 € per 25 units, including 16 % V.A.T., also included levies

34.439655 € per 25 units, excluding 16 % V.A.T., but included levies
1.377586 € per unit, excluding 16 % V.A.T., but included levies
levies represent 43.55 % of final price, and also 77.16 % of net price

When one faces even (with high competitive prices depending on mark and/or retailer) a 100 % inflation of prices, we have immediate effects:

- the mentioned inflation
- lower sales
- lower margins for retailers
- higher cost of creating new culture in Europe

Maybe big retailers like the two above mentioned can survive with the profit from other non technological products; but small, highly specialized retailers are the most suffering parties when margins hit the ground (this fact endangering competition in the EU by erasing small competitors not because of natural evolution of markets and competitive assets derived from business strategies, but because of intervention and arise of artificial barriers).

Of course other devices and media have lower percentages of levies impact ... that's as true as the fact that RMOs want to raise such percentages, thus suffocating SMEs. However, SME retailers are not the only affected; indirectly, everyone who professionally use such devices and media also suffer the inflating effects (specially when using the most inflated media). Effects are similar as for SME retailers: Higher tariffs and/or lowered margins (for SME professionals with already low margins, it means economic drama).

Finally we are not commenting abuses made in the past, in the present and (if nobody prevents it) in the future by RMOs on SMEs, because we are talking (for the answer to this concrete question) about rule-of-the-law scenarios; lack of auditings to RMOs, lack of protection for SMEs, and other absurdities that happen in some EU countries are more an issue for different questions.

> *17) How should collecting societies take into account professional users? Should professional users be exempted from payments in the first place or should such users be entitled to a refund after payment?*

As we have already discussed in this paper, it becomes useless to discuss whether to exempt anyone from payments, when the very existence of such payments (levies) have not been credibly supported by evidences of real economic harm to be compensated. Unless such evidences arise, there will be no room for levies.

If such harm becomes proven (we deeply believe it won't but ... let it be tried), then only the ones who directly cause the supposed harm will be the ones who would become levies' debtors. And if nobody is able to precisely identify those debtors without infringing basic civil rights and liberties, we won't talk about exemptions, we will talk about entire abolition of levies.

E. Grey market

> *18) Has the size of the grey market increased since 2006?*

It comes to be difficult to precisely estimate the size of the grey market; statistics from RMOs come to be mere speculative efforts.

It also depends on what is meant with grey market; the definition included in the background paper, "the term 'grey markets' usually refers to the flow of goods through distribution channels other than those authorized or intended by the manufacturer or producer [..] are those trade flows that avoid levies by not declaring these trades at import", mixed with the using of Table 7 (where such grey market is directly labeled as illegitimate), becomes unacceptable for us. Grey market should be interpreted merely as "the flow of goods through distribution channels other than those authorized or intended by the manufacturer or producer", channels that remain LEGAL in scenarios like the one of the European Union.

> *19) What are the measures Member States, collecting societies and the ICT industry are taking to reduce the size of grey market in their jurisdictions?*

Is this question asked by the executive branch of an European Union that in the Treaty of Rome, encourages the "prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect", and also "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital"? Because of Treaty of Rome, it would be surprising to find an EU body suggesting Member States to take any action against grey markets.

Unless the economic foundations of the European Union declared by the Treaty of Rome become applicable only when they serve the needs of certain parties, such foundations must be observed. Why being asking for measures to reduce the size of grey market? The only measure is to harmonize levies, and according to what we have shown in this document, harmonizing levies to zero (i.e., abolish them), because as long as levies remain not harmonized and the European Union remains a free movement of goods area, the grey market will remain natural, legal and ... growing.

We have to insist that going against "grey market" of levied goods (i.e., going against people buying goods in other EU member countries with lower levies) is a violation of the Rome Treaty.

F. Consumer issues

> *20) Are you aware of consumer surveys on private copying behaviour which are used as a basis for setting the levy rates? And consumer surveys on the main sources of works or sound recordings that are privately copied?*

No, at least in Spain and Denmark opacity is rule when those countries determine levy rates.

Reports, surveys and other papers are not made public (if made at all); we are just told to pay, without a solid why. If we are forced to pay a compensation to civil parties, usually in civil law the debtor is told the reasons for such payments; well, not in this case, only a bunch of demagogic set phrases: private

copying causes (supposedly) much harm (though such harm has not been proven, nor those surveys made public), culture is dying (though live concerts increase their incomings each year, and copyleft industry is a raising one).

If we were told how levy rates are determined, we would able to defend ourselves if (as we actually think) such reasons are not solid nor true any more. The feeling that the actual system causes in civic groups like Todos Contra el Canon (Everyone Against Levies, a Spanish civic group with more than 2 million collected signatures against levies) and many others is that the supposed harm, apart from being invented, is boldly and imprecisely determined in a way that it doesn't actually gives money to the rights holders of the most privately copied works, but just ends giving the collected levies to bestsellers artists; in Spain, the biggest RMO, SGAE, gives the voting rights according to the incomes received from each associate, less than 1.000 associates, from a more than 80.000 associates RMO, have more than 51 % of voting rights, and those associates are usually the bestselling ones. Then it turns levies to be a mere surplus for best selling artists, and for the entertainment industry.

Laws are meant to harmonize everyone's rights, not to serve a tiny minority by harassing a huge majority; and public offices are meant to work transparently, not to behave with such opacity (in Spain, since 1996 RMOs haven't been audited; RMOs only collect levies and later give no explanations about how do they spend the money). If surveys used to determine levy rates are not made public, this only confirms that private copying levies follows the might vs right model.

> *21) How should private copying levy schemes evolve to take into account convergence in consumer electronics?*

They shouldn't. If as we have explained in this paper, reasons for levies to exist have not been given, specially talking about levying devices because of convergence in consumer electronics comes to be offensive.

Because a mobile phone remains to be a mobile phone whether it has another features like MP3, digital camera, voice recorders, etc; absurdity becomes law when RMOs try to put levies on every single thing that may perform reproductions of copyrighted works. For instance, blank leafs may be used to write down copyrighted song lyrics and books, should it be levied? Also, if blank leafs are thus compared with DVD-Rs, should pencils, pens and other writing tools be compared with DVD recorders and be levied? We talk about absurdity because even working with current laws (in spite of us clearly disagree with the very existence of levies), levies are currently meant to be put on devices and media specifically meant to perform reproductions of copyrighted works.

We encourage you to answer if you believe that devices like mobile phones (even when considering convergence in consumer electronics) are devices meant to perform reproductions of copyrighted works. We know the answer (the answer is no, they aren't), as well as we know that RMOs and entertainment industry just search for new sources of incomes; the question is, why should those sources be surrendered to them without any reason, and at the cost of causing real prejudice (real, not as the fake harm supposedly caused by private copying) to the huge majority of citizens, SMEs, also authors (most of them don't see a cent from levies), etc?

G. Double payment

The question may suggest that, as a rule, a levy on a storage medium would compensate for the copy made on that medium, which is due under copyright, and which is not accomplished otherwise.

This assumption is false, even as a first approximation. Not all information is a "work" in the legal sense of copyright, and even when the information is a copyrighted work, the rights holder may already have given the private person permission to copy without paying a fee, as is the case for works distributed under a Creative Commons license. Licensees of computer software include the right to install software on their computers: That is not considered a "private copy". Now that copyrighted content is increasingly distributed over the Internet, the copy stored on the user's media is not an additional copy, but the first copy, that has already been paid for (as we noted before, levies fundamentally are not a kind of advance payment of fines for illegal file sharing). Finally, most copyrighted content is provided by people who don't intend commercial exploitation of their works, even if law allows. This is not limited to the "web 2.0" applications mentioned before. Conceivably any e-mail is a copyrighted work. If people have to pay a levy on computer disks as in Germany they would be entitled too for a copyright compensation. Think for instance of BLOGs.

In sum, any assumption on a "reasonable" levy per bit (of megabyte) is false, even as a first order approximation.

22) What are the main issues that consumers face when paying for digital downloads?

In many cases it is just impossible to pay for downloads. There are only very few stores were digital goods can be bought and downloaded legally and their product offering is rather limited. The situation has improved a bit in the field of music downloads but for example books or movies just can't be downloaded in a legal way in most cases. But even if the consumer finds a shop that offers the content her or she wants it is not easy to buy it. First it is necessary to leave a lot of personal information then he or she needs to download a software for the Windows operating system. Users of alternative operating systems are therefore excluded from legal downloading. But even if the customer has Windows installed on his PC, the software works and he is able to purchase and download the wanted content, there is most likely some kind of DRM on it which locks up the work into the software and limits the opportunities of the user. Therefore many customers are driven to so-called "piracy" where it is much easier to download content, operating system independent and the can use the downloaded files without any restrictions.

It should be the task of the content-industry to change their offers according to the needs of the consumers instead of asking for more and more criminalization of private copiers and higher levies for imagined losses.

The question apparently refers to the problems of Digital Rights Management, in any form. While we are fully aware of the problems of DRM, it would be wrong to assume that levies ought to be promoted as the only viable alternative now that DRM is found to be unfeasible. This conclusion is based on the false presumption that a proper copyright system eventually should allow charges for any piece of information distributed or copied. This presumption is false on many levels: not all information is a "work" in the sense of copyright, lots of information have already been paid for, and finally the cultural purpose of copyright is not served by attempts to create a "watertight" system.

23) Should licensing practices be adopted to account for contractually authorized copies?

As long as levies keep existing (we hope it isn't going to be so long), licensing practices should absolutely be adopted to account for contractually authorized copies; because of recital 35 of 2001/29/EC Directive (quoted in the background paper, "in cases where rightholders have already received payment in some other form, for instance as part of a license fee"), if a concrete copy is already authorized by license it doesn't generate any kind of obligation of levies payment.

This question, nevertheless, demonstrates the injustice of a levy system. One has to pay levies in spite of having already paid license fees; a vendor displaying his catalog on the Internet, or the Open Source rights holder would not even think of charging a license fee (but still it is a copyrighted work). In all these cases, and others related, the fee from any levies goes to the wrong persons.

H. Alternative licensing

> *24) If rightholders decide that their works can be disseminated for free, how should this be taken into account when collecting private copying levies?*

Rights holders who disseminate their work for free take an positive approach to improving cultural life, and feel that the levy collected on media on which their works are to be copy are an barrier against the dissemination of their work. Such rights holders are therefore often taken the stance that collecting societies are in no way authorized to collect such levies on their account, and consider the collecting of levies a harmful limitation of their rights.

The perspective of this question is apparently that most content distributed in an electronic form is content destined for commmercial exploitation as a copyrighted work, with a few exceptions for instance in case of artists who distribute their works for free for promotion purposes. The collecting societies that redistribute levy income predominantly represent professional authors in the art and entertainment industry, and their distributors.

In todays Internet, this perception does not nearly reflect reality. As we noted before, lots of information distributed over the Internet is not even a "work" in the sense of copyright, and if it is, it is usually written to inform the user rather than to directly generate revenue to the rights holder.

In sum, many, if not most rights holders do not care about copyright at all, and allow, or even welcome copying of their work. The only proper way to take this reality into account is to acknowledge that a levy system is infeasible. Instead of obstructing the of dissemination works by rights holders who want to distribute without payment, the Commission should realize the positive contribution such rights holders are making to European culture, and ensure that these people can distribute their works without levies going to professional rights holders.

I. Distribution issues

> *25) What is the typical frequency and schedule of levy payouts?*

This question has no response from us

> *26) What are the main issues encountered with respect to cross-border distribution?*

This question has no response from us

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

Due to the general non-transparent operation of collecting societies, it is extremely unclear how much money actually is retained by various collecting societies. This is further complicated by the fact that some collecting societies pay part of the fees to other collecting societies for further redistribution.

If not abolished, if EC sticks in the might vs right approach, any collection of levies should immediately be transferred from private parties to Member States public offices (which, in turn, would become responsible of distributing collected levies to RMOs and individual rightholders). With this approach at least we would be able to have a centralized management to be audited, and the the levy system would be under political control.

However, we hope that EC chooses right instead of might, thus abolishing levies because of the issues explained in this paper.

Pirate Party International
http://www.pp-international.net