

SECOND CALL FOR COMMENTS 'FAIR COMPENSATION FOR ACTS OF PRIVATE COPYING'

Eurocopya's contribution

EUROCOPYA is the European Association of Audiovisual & Film Producers' collective management societies. EUROCOPYA's statutory members are : **EGEDA (Spain), FILMKOPI (Denmark), G.W.F.F. (Germany), PROCIBEL (Belgium), PROCIREP (France), SEKAM VIDEO (Netherlands), V.A.M. (Austria), F.R.F. VIDEO (Sweden), SUISSIMAGE (Switzerland).**

Other collecting societies or organisations representing audiovisual producers, established in countries in and outside Europe are also associated to EUROCOPYA's activities. They are as of today : **ZAPA (Poland), FILMJUS (Hungary), INTERGRAM (Czech Republic), GEDIPE (Portugal), SAPA (Slovakia), TUOTOS (Finland), COMPACT (United Kingdom), SCREENRIGHTS (Australia), PACC (Canada).**

European Audiovisual & Film producers are remunerated through exclusive rights and - more marginally - through collectively collected remuneration rights (mainly cable retransmission rights & private copy levies).

EUROCOPYA expresses the view of the various European audiovisual & film producers whose rights are administered by their respective national collecting societies, founding members of the association.

EUROCOPYA's founding members entered into reciprocal agreements whereby they collect and distribute private copy levies in their own market according to their national law to the benefit of international rightholders.

Preliminary remarks

Since the adoption of the Council Directive 2001/29/EC, major developments have affected the general issue of private copying with respect to creative industries in general, and to the film industry in particular.

Without claiming being exhaustive, one can put forward the following facts:

- development of non linear audiovisual services: VOD, TV-on-demand ("catch-up TV") ;
- introduction of numerous new devices with increasing capacities dedicated to private copy ;
- a central role for personal computers (PC), shifting to "mediacenters" ;
- the impossibility to implement DRMs on all type of exploitation of protected works (especially in the music industry) ;
- legitimate consumers' expectations for private copying facilities
- ICT's non stop dilatory disputing attitude.

• Development of non-linear audiovisual services

A subscriber to a digital TV platform can access at home classic – so-called "linear" – broadcasting services, as well as various forms of non-linear – i.e. on-demand – services such as : subscription VOD, streaming/renting VOD, download to own (or "Electronic Sell-Through").

Important portions of linear broadcasting services are also available on-demand (“a la carte”) or through a subscription’s scheme : these are the so called “catch-up TV” services (or TV-on-demand).

Today, private copying interferes - not to say harms - directly with these new forms of audiovisual works’ exploitation.

People are still used to copy films from TV. Copying from digital TV on a hard disc decoder or on another digital device does not technically differ from most of these new on-demand services. Thanks to increasingly extensive electronic program guides (EPG), consumers today are able to constitute their own private digital libraries from regular digital broadcasting services. Those private “free-of-charge” libraries compete directly with the new non-linear commercial offers which bring additional revenues to rightholders.

It is true to say that VOD is developing well, but it is no less true that VOD is far from being able to substitute the DVD’s revenues which are more and more at risk.

There is a gap somewhere which is certainly ascribed to piracy but definitely also to private copy.

Private copy in general terms, in its capacity to provide legal content to users at home, compete with the film industry’s exclusive rights revenues such as DVDs, VOD, Pay-TV, Free-TV, and even theatrical exploitation.

The fact that a film is on average only watched 1 to 3 times reinforces the above assertion

To recoup its production and distribution costs, a film needs to be exploited chronologically on each window. Private copy to a certain extent impacts the chronology and the related revenues. This was and still is the reasoning behind the necessary fair compensation.

What was already true during the analogue age, is more than obvious in the digital environment.

One should face the evidence that in the digital environment- especially for films- the harm is never minimal. Let’s even put forward that private copy is more that ever a common practice the film industry has to deal with.

The chart in *Appendix 1* illustrates the issue.

- **Numerous new devices with increasing storage capacities**

ICT industries introduce on a fast track regime new devices partly or fully dedicated to private copy, with increasing storage capacities : portable hard disc drives with 3 TB capacity were presented at the last Cebit fair in Hanover, as well as lots of other devices integrating a copying functionality.

146 types of devices permitting private copying activity have been listed by AVO consultant on request of AUVIBEL, the Belgian collecting society.

It demonstrates by the number that private copying is a healthy promising market for at least one category of stakeholders : the ICT industry.

- **Personal computers becoming “mediacenters”**

It is a truism to describe the central role and the functionality of PC in the private copying process.

Nobody’s today would challenge that anymore.

It would be therefore coherent to levy PCs or their storage component/hard disc accordingly.

PCs are most of the time on endless disputes within bodies in charge of setting up levies.

When considering PCs in the field of private copying all parties involved should agree on basic principles which should prevent further disputes and facilitate the emergence of well balanced solutions at European level.

- **A more limited implementation of DRMs than expected**

At the moment the Copyright Directive was adopted, everybody sincerely believed that DRMs (Digital Rights Management systems) and TPMs (Technical Protection Measures) would drive the creative content's exploitation on very short term.

However, pursuant to pressure from both ICT industries and consumer organisations, the possibility for a private copy exception in the digital environment was finally maintained by said Directive (articles 5.2.b and 6.4).

Today the general situation is rather contrasting, and one can reasonably put forward – like it or not – that DRMs and TPMs didn't always meet the great expectations they were subjected to.

Some new services such as DRM-driven VOD are performing very well (including geo-localising systems providing for territorial exploitation of audiovisual rights), while some other DRM-driven products have been angrily rejected, especially in the music sector : not enough user's friendly... It is true to say that the sole accepted DRMs/TPMs today are the ones the user ignores. More and more rightholders in the music industry therefore recently took the decision to exploit their work without any DRMs/TPMs. That decision is their perfect (exclusive) right to do so. But, it cannot automatically be interpreted as a full renouncement to any remuneration/fair compensation. See also IFPI (International Federation of Phonogram Industry)'s change of position on private copy royalties...

- **Consumers' expectations regarding private copying**

Legitimately, consumers want to benefit from the exception maintained in the Copyright Directive. Submitted to ICT's aggressive advertising campaigns, they also want to maximise the use of their purchases. To consumers, private copying is therefore an "acquis", although not a right.

Citizens also enjoy a right for privacy. What is actually done in the private sphere cannot or should not be controlled. Restrictions in the private sphere of any kind are clearly difficult to be enforced.

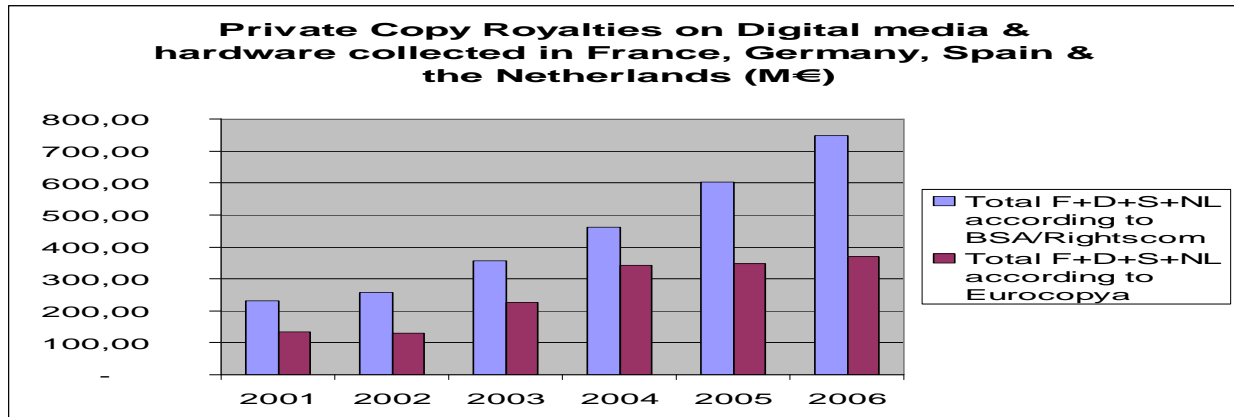
Therefore, levies are still today the best possible approach which reconciles the consumers' expectations to benefit of the exception, their wish for privacy and the rightholders' right to fair compensation.

- **ICT's non-stop dilatory disputing attitude**

Like said before, it was partly pursuant to pressure from ICT industries that the possibility for a private copy exception in the digital environment was finally maintained in the Copyright Directive. However, since its adoption and implementation in EU member states, there was no single day during which the ICT industries representatives did not dispute the counterpart to this exception to rightholders' exclusive rights, i.e. the levies.

In order to do so, one strategy has been in the past to announce totally unrealistic figures regarding the actual & future level of collection of private copy royalties.

For recollection purposes, here is a comparison between what was announced by ICT industries¹ in some key territories (France, Germany, Netherlands, Spain), and what has actually been collected :



After years 2002 to 2004, where existing private copy schemes in Europe have shifted to digital devices (in order to remunerate rightholders for the considerable increase in private copy uses, especially regarding music), the collections are evolving at a slow pace, when not decreasing, unlike what was – and sometimes still is – said to happen by ICT industry : No exponential increase of collections here, as confirmed by latest figures available (see Question 5 below).

This endless dispute process creates an uncomfortable situation not only for rightholders, whose due remunerations are constantly put at risk, but also for ICT industries themselves, because sometimes new products are introduced on the market without a full visibility on the possible private copy remuneration to which these products could finally be subjected to. The ICT industry’s dilatory attitude is actually what explains most of the different situations among Member States : for example, when MP3 players (“iPod”) are already levied for years in France, they are still in discussion in Belgium. The same applies for nearly every “leviable” device. The industry may complain about this, but itself takes a great role in creating this situation.

When introduced, levies may also differ from one Member State to another, according to Member States’ attitude towards IPR protection, and the bargaining power of stakeholders at national level. Together with differences in levied or not-levied devices from one country to another, these variations are also creating “grey markets” organised by some manufacturers & importers (i.e. the ICT industry itself) on some levied products.

But there again, instead of putting the blame on levies as such, the ICT industry should play an active role in the various negotiations, agree on some basic guidelines which would ease and harmonize a little further the setting up of levies at national level, and look together with rightholders on improvements that could be implemented in order to address possible “grey market” issues.

¹ See BSA/Rightscom study of November 2003

Eurocopya's Responses to the Questionnaire

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?

To our knowledge, the answer to both questions is Yes.

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

There are no “legal uncertainties” as such :

- Levies applicable to each media or equipment are public information easily accessible to any manufacturer or importer of good faith. In each Member State, rightholders usually join forces in order to organise centralised information and collection of royalties.
- Difficulties may arise when a potentially eligible media or equipment is not subjected yet to private copy remuneration. But this is mainly due to observed dilatory attitude of ICT industry representatives themselves in the various private copy remuneration negotiation processes underway in Member States (see “Preliminary remarks” above). One possible improvement in that respect would be to define a certain limited period of time after the introduction of a device on the market after which the levy should be set up in each relevant Member States.

When addressing so-called “legal uncertainties”, the background document actually seems to focus on the German case of “multi-functional devices”. In this very specific issue, with the German law providing for a remuneration both on equipment and media, we understand that for a given functional unit with several components (such as a PC with a scanner), only one tariff should apply. EUROCOPYA supports such a solution which seems to be the one recognised now by German law & courts.

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

First, the negotiation process should take into consideration the views of both the beneficiaries and the payers of the remuneration, i.e. the rightholders (including producers) on the one hand, and the consumers & concerned ICT industries on the other hand. Member States should seek to ensure that said negotiations are actually progressing in good faith in order to reach a well-timed balanced and reasonable remuneration for each eligible device.

For the rest, there is no “unfair” method as long as it is based on a negotiation in good faith taking into account a combination of the following criteria :

- The economical value of each type of protected work (in comparison with other means of access to the said protected work). This enables to take into consideration the harm created to rightholders by private copying.
- The technical functionalities of the submitted media (storage capacity, compression or not of the copies made, ...).

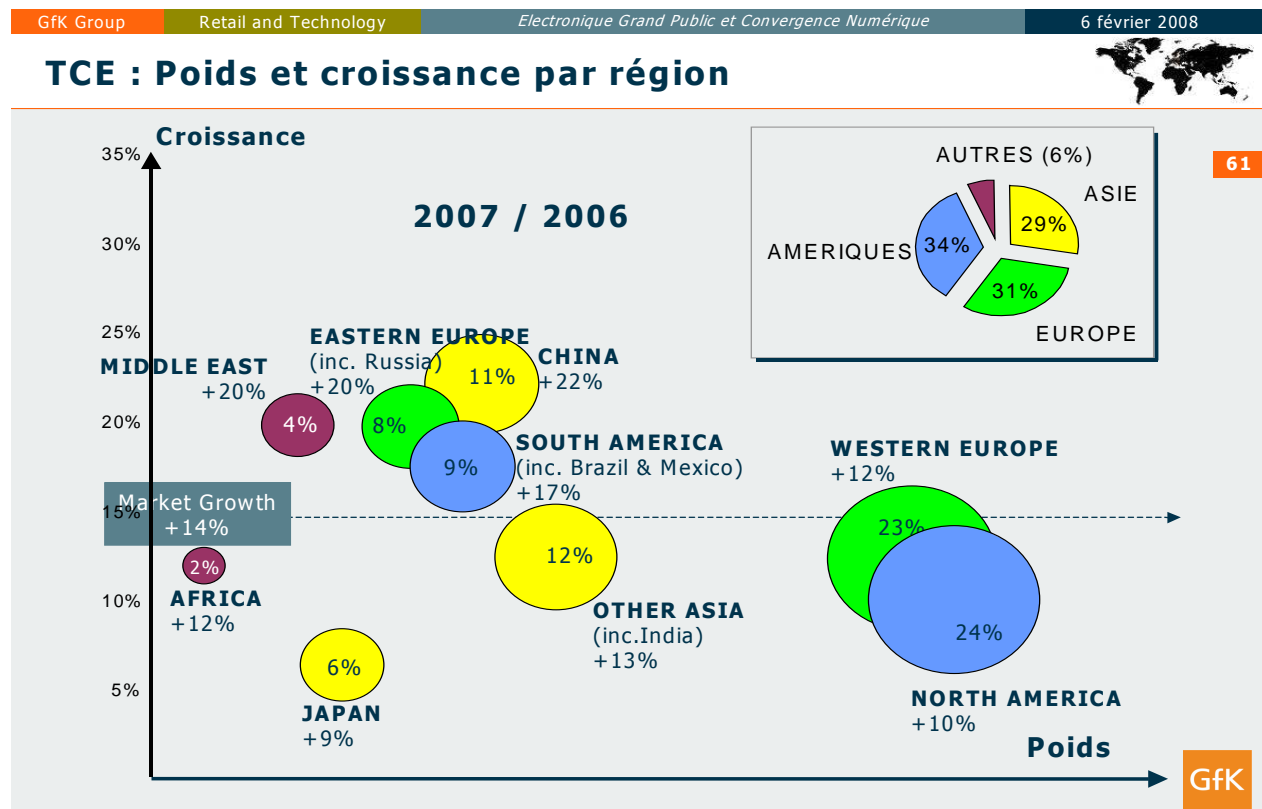
- The quality of the copies that are made with said device (a digital copy creates more harm than an degraded or analog one).
- The impact/degree of use of technical protection measures;
- The actual private copying usage of the submitted device, as measured if necessary through studies. Remunerations may however be set on provisional bases – or on the basis of pre-existing data – if said studies imply a significant delay. There is indeed a clear trend on the ICT’s side to use studies as a dilatory measure ...

Retail price may be a criteria to reach a final reasonable decision in some cases, but it cannot be a general criteria for the level of the remuneration. Private copy remuneration is intended to compensate rightholders of protected content, not be subjected to ICT industry’s pricing policy.

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

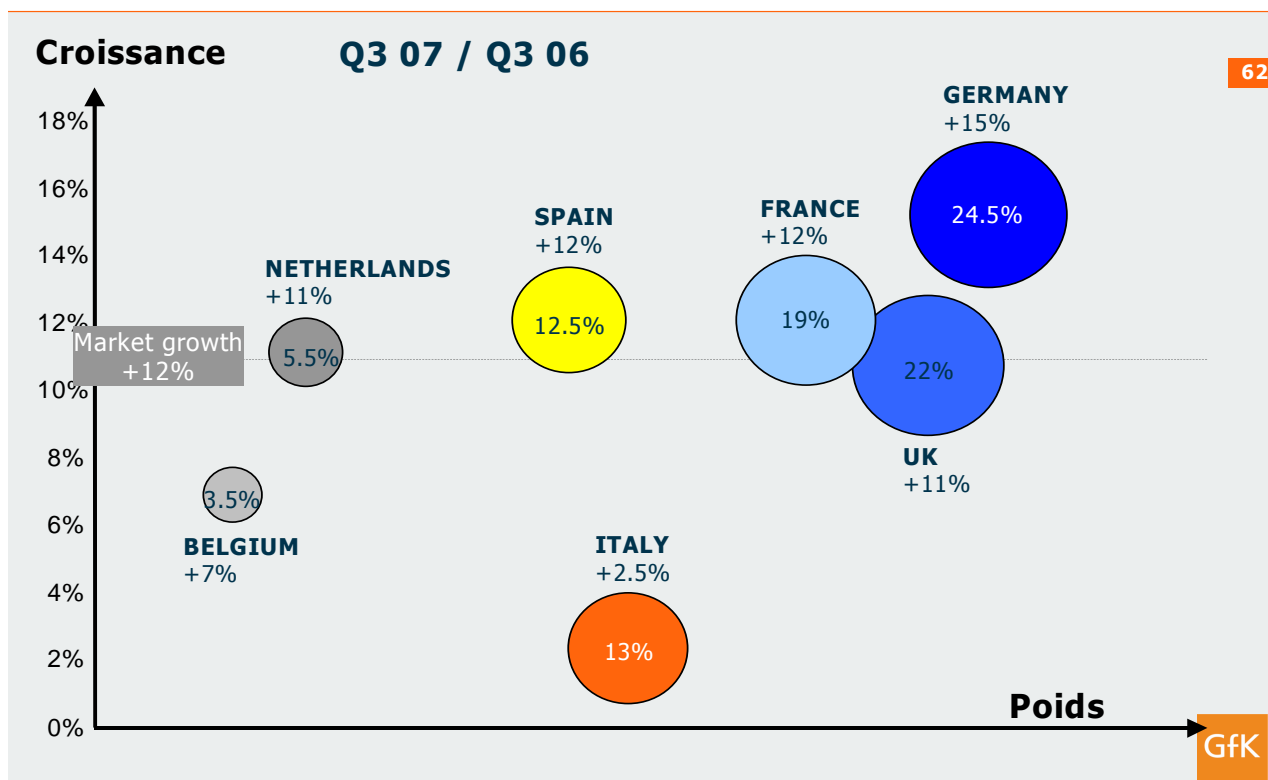
According to GfK, the evolution of the electronic goods (EG) industry in Europe since 2006 is characterised by a continuous and significant growth of revenues, with an increasing convergence & speed of acceptance of new product & devices by consumers, and said products & devices becoming more and more rapidly “obsolete” (“has been”) in said consumers’ mind. This should normally imply an increasing and quicker adaptation of private copy tariffs to those product & devices that are eligible to said private copy compensation.

It has also to be noted here that unlike what is often alleged by ICT industries to challenge private copy remuneration schemes in Europe, global growth of said market in Western Europe between 2006 & 2007, which was +12%, is close to world wide average (+14%), and above growth in North American countries (+10%). Global growth of European market is even higher than average if you add Eastern Europe countries.



On a country by country basis in Western Europe, growth of EG industries' global markets have been the following :

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To be noted here again that Germany, France & Spain (all on or above average) are those countries who contribute the most to total private copy royalties collections in the EU ...

Despite this evolution of the market, the situation in Europe on the private copy remuneration side is characterised by two extreme situations :

1. In a few countries, introduction or adaptation (if not abolishment) of private copy compensation schemes has continued at a pace more or less in accordance with the dynamic environment of devices partly or fully dedicated to private copy.

Such is especially the case in France where various decisions have been taken since 2006 :

- In July 2006, pre-existing private copy remuneration on hard disks integrated in set-top boxes & other electronic goods dedicated to video recording has been extended to the new higher capacities introduced on the French market (160 Gb, 250 Gb and higher), with an increasingly degressive tariff (the tariff per Gb decreases more and more with the increase of the devices' capacities)². On that occasion, a new tariff has also been set on storage

² Unlike what is often said by the EG Industry, the principle of a degressive tariff (i.e. tariff per Gb decreases with the increase of the storage capacities) exists already in France for years, actually since the decision of 2002 on set top boxes & PVR with integrated hard disks ...

capacities integrated in multimedia devices such as video portable players (so-called MP4 players).

- In July 2007, external hard disks, memory cards and USB keys have been subjected to new specific – and again degressive – tariffs.
- In December 2007, a specific degressive tariff has also been set for “multimedia hard disks” (as a specific sub-family of external hard disks).
- In February 2008, a provisional decision has been taken (still to be published) on some specific Mobile Phones integrating MP3 or MP4 players (such as iPhone, Walkman Sony Ericson, Nokia Xpress Music, etc...).
- Meanwhile, the private copy remuneration applicable to DVD-R/RW in France has been progressively reduced from 1,29 € per 4,7 Gb to 1,10 € in July 2006, and finally 1 € in July 2007.

In Switzerland, a tariff has also been adopted in 2007 regarding set top boxes with integrated hard disks, as well as for iPod & other MP3 players.

2. On the other hand, in most of the other countries, introduction and/or adaptation of private copy compensation schemes levies has been stopped, despite said very dynamic evolution of the European Electronic Goods’ market.

Such is for instance the case in Germany, where all pre-existing agreements have been terminated by the EG Industry, and where all devices’ tariffs are currently being renegotiated.

Such is also the case in Belgium, in Spain, in Sweden, in Finland, etc., where no new decisions have been taken since 2006 or even 2004, and where levies today basically apply only to analog media on the one hand, and CDRs/DVDRs and – sometimes - MP3 players on the other hand.

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 ?

Here are the figures know to us (excluding reprography rights) :

<i>Total private copy levies collected per year, in M€</i>	2005	2006	2007
Belgium	21,1	19,8	20,9
Czech Republic	2,3	2,7	5,4
Denmark	6,3	5,0	4,7
France	155,3	156,0	163,4
Finland	11,6	11,6	15,5
Germany	153,7	156,1	Not available
Hungary	9,8	12,5	11,5
Spain	60,9	55,9	40,9
Netherlands	26,1	19,9	Not available
Sweden	15,5	18,9	21,0
Poland	3,8	5,1	4,3

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

GESAC commissioned a study that was realised in 2007 by Spanish institute Econlaw, regarding the various private copy remuneration systems in Europe. Its conclusions are :

- the existing private copy remuneration systems in Europe are justified ;
- they have positive medium & long term effect because they favour development of creative industries in Europe and, as a consequence, the development of all content industries ;
- they are the best system possible in order to remunerate rightholders for private copying ;
- they comply with internal market regulation.

EUROCOPYA performed a study that was realised in 2006 based on GfK market figure in order to assess if there was a link between the level of applicable tariffs and the development of corresponding markets of MP3 players (see *Appendix 2*). Its conclusions were in line with what can also be concluded from GfK's further analysis as referred to under Question 4 above :

- there is no clear evidence of a possible correlation between level of private copy remuneration in studied countries (FR, DE, IT, SP, BE, UK, NL), and corresponding development of MP3 Players' markets.
- This is especially clear with regard to Flash/USB MP3 Players, but also with HDD MP3 Players, where market development rates are not influenced by said level of private copy remuneration.
- Allegations that private copy would hinder development of said markets, and more generally of new technologies in EU countries, is not substantiated, and seems therefore groundless.

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 summarise the situation correctly ? Could you provide updated figures for 2007 ?

To our knowledge, the answer to the first questions is Yes.

For France, the percentage is indeed 25%, and the resulting amount allocated to cultural and social funds for 2007 is 40,85 M€.

For Germany, the percentage is not set in the Law, and varies from one society to the other.

For further particulars, see local companies & Member States answers.

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 ?

For France, see <http://www.copieprivee.org/-4000-manifestations-.html>

For further particulars, see local companies & Member States answers.

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

Said percentages vary from one country to the other, and within each country from one society to the other.

For further particulars, see local companies & Member States answers.

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

EUROCOPYA has no opinion on that issue, which will be answered by national societies, but would like to stress the following points here :

- EUROCOPYA welcomes the principle of cultural funds managed by rightholders themselves, where corresponding monies are re-invested in content industry and other project providing for cultural diversity in Europe.
- If such a threshold was however to be envisaged, what would be the basis for EU intervention on such an issue ? Would such an intervention be needed, as possible improvements could already be made through bilateral agreements ?

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

Not available, but such share can be very significant for some rightholders. It is also important to note that even if the share is in certain cases minimal, it always contributes together with other incomes to break-even the production costs.

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 ?

EUROCOPYA encourages effective refund systems if goods eligible to private copy remuneration are re-exported. Such effective refund systems should be implemented through a process of refund of the original importer, in order to avoid misuse (said importer should then transfer said refund to the re-exporter). Furthermore, collecting societies should have the right to control those responsible for payment or benefiting from refund of private copy remuneration, and cooperation with customs to that extent should be possible.

For instance, unlike what seems to be stated in the Background Document (see for instance example on p.11 and table 6 on p.12), such a refund system is existing in France, and there are no limitations as to the category of traders or individuals who are entitled to refund, as long as they have been the original debtor of the remuneration (like said before, in order to avoid misuse) : whatever exporter that has previously paid the PCR can get refunded. If he wasn't the original debtor, he has to ask a refund to his creditor – usually an importer – who can himself get refunded by Copie France & Sorecop (the French collecting society for private copy rights).

Similar system also exists in Belgium, and to our knowledge in most of the EU countries where a PCR exists.

For further particulars, see local companies & Member States answers.

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

See Question 12 above : there should be no limitations as to the category of traders or individuals who are entitled to refund, as long as they have been the original debtor of the remuneration (like said before, in order to avoid misuse). The original debtor should then transfer said refund to the exporter.

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

No as far as France is concerned, as refunds are not only existing in practice, like said before, but also in the law.

For further particulars, see local companies & Member States answers.

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 ?

The most suitable party to pay private copying levies is the one responsible for the introduction of the media and equipment on the market (manufacturer or importer). It can be the endconsumer, for instance in the case of purchases of blank media and equipment from foreign web-sites. Said endconsumer could be exempted to self-report intra-community purchases of blank media and equipment in case the distributor (possibly a web-site) entered into an ad hoc arrangement with the collecting society.

Other parties than manufacturers or importers, especially distributors of said goods on the market, could be made jointly responsible too (like it is the case today in countries such as Italy, Germany, Spain, the Netherlands), in order to improve guaranty of payment of private copy rights. See GESAC proposals mentioned below under Question 18.

D. Professional users of ICT equipment

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

In some legislations, specific professional users are exempted from payment of private copy royalties (or get refunded from the remuneration included in the purchase price of their media and/or equipment). Such is for instance the case in France under provisions of art. L.311-8 of French copyright law (CPI). In Belgium, audiovisual producers are also entitled to a refund after payment, as well as schools ...

But most of the time, professional uses are taken in consideration when determining the level of remuneration for each device : the more said device will be used for professional uses, the less the applicable private copy remuneration will be. Professional uses are then taken into consideration on a mutualised (global) basis, and not user per user.

A 2002 study on this specific issue made by French governmental body CSPLA (Conseil Supérieur de la Propriété Littéraire & Artistique) highlights the pros & cons of this solution. See <http://www.culture.gouv.fr/culture/cspla/avis2002-3.htm>. Conclusions of said study seem still to

be relevant : because of convergence, which notably implies that no clear distinction cannot be made any longer between devices used by nature by professionals and devices used by nature by consumers, professional uses have to be taken into account in private copy remuneration schemes baring in mind that :

- the system has to remain effective : devices used for private copy have to be subjected to private copy remuneration;
- the system has to remain relevant : the level of said private copy remuneration has to take into account professional uses, i.e. more generally the fact that said devices are also used for purposes not covered by the private copy remuneration (said remuneration has to decrease the more professional uses are increasing);
- in order to avoid misuses, the system has to remain simple and acceptable by all parties.

The CSPLA therefore suggested not to change the current French system, which allowed for a balanced solution by taking into account professional uses (as measured through usage studies) on a mutualised basis, through a general rebate on tariffs applied to those devices that are used also for private copy :

- a general regime of refund for professional users was rejected, because there was a high risk of fraud; control means to be put in place would be too costly compared to the amounts involved. Furthermore, as a consequence of such refund, tariffs paid by other users of eligible devices would increase (as professional uses are not mutualised any longer through a general rebate on private copy tariffs).
- DRM-driven revenues were not considered to be an alternative (as a substitute for private copy remuneration). Since 2002, history has proven that this point was particularly relevant (see our introduction) ...
- Some devices (especially in the computer world) should clearly be excluded when their technical characteristics dedicate them to professional uses. Such was for instance the reasoning that drove the French Private Copy Commission to exclude some type of external hard disk drives from its decision of July 2007.

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 ?

Because of the reasons exposed above under Question 16, we are sharing the view that exemption should be very restricted. In some legislations, sole the audiovisual or music producers are exempted. All the other uses, as mentioned above, are mutualised. As such the relevant devices are *de facto* purchased and used for different needs so that it would be difficult not to say impossible to set up the limits per item.

Thank to convergence, new devices such as mobile phones are also dedicated to professional uses as well as to entertainment. The same applies for the media centers/computers.

E. Grey market

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

It is by definition impossible to assess the size of a “grey market”, and therefore difficult, if not impossible, to assess its evolution. ICT industries are not at all cooperative and refuse most of the time to provide accurate and transparent data to support the collecting societies’ efforts when analysing the market and fighting against grey market. On the contrary, overestimated figures

regarding “grey markets” seem to be the new way for ICT industries to lobby against private copy levies in Europe...

However, one has to recognise that there has always been some “grey market” related to differences in remuneration rates between Member States since private copy remuneration schemes exist in Europe.

It is EUROCOPYA’s members’ feeling that thanks to diligent action of local collecting societies, the size of the grey market has been reduced. But existing tools can be improved.

Today, “grey market” mainly seems to concern recordable CDs, recordable DVDs, as well as some MP3 players, especially when purchased from foreign web-sites. EUROCOPYA is therefore in favour of improvements proposed by GESAC in order to improve actual implementation of all private copy tariffs in Member States.

See GESAC proposals <http://www.gesac.org/fr/prisesdeposition/copie.asp>.

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?

Besides above mentioned GESAC proposals (<http://www.gesac.org/fr/prisesdeposition/copie.asp>), collecting societies in Member States are already pro-actively fighting against those who try to avoid payment of private copy remuneration. In order to do so :

- cooperation is existing with other foreign collecting societies;
- cooperation is sought with customs (but not always possible in existing law – see GESAC proposals);
- foreign websites set up in order to avoid local private copy remuneration schemes are sued when justified and possible (see GESAC proposals).
- cooperation is sought with the ICT industry. It has however to be noticed here that those who are complaining about the existence of a “grey market” are sometimes the same that are providing their products to consumers through said “grey market”. Therefore, although sought by collecting societies, cooperation from the ICT industry has remained at a deceptive level...

Unlike what seems to be stated in the background document, collecting societies are controlling and collecting from companies of all sizes, and not only dealing with the main actors on the market.

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 ?

Yes. Consumers surveys are produced regularly on request of collecting societies, in order to assess both the level of private copy remuneration and the way said remuneration should be redistributed to rightholders.

Cost of said studies are most of the time supported by the sole collecting societies, as they are needed to organise the distribution of the collected royalties. Said costs are therefore part of their administrative charges.

Studies used as basis for setting up the private copy remuneration tariffs are also sometimes financed and produced by the ICT industry itself, but taking into consideration the experienced reluctant attitude of Consumer organisations & ICT industry itself to finance such studies on a regular basis, one could think about a system organising a common budget in order to finance such studies, if necessary.

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

Private copying levy schemes are already taking into consideration convergence in consumer electronics, based on the methodology described in Question 3 above and consumer surveys referred to under Question 20 above, by adapting the tariffs to the actual average usage of each device for private copy purposes. For instance, said methodology explains why a 1 Gb MP3 player will be subjected to a 5 € private copy remuneration in France, when a standard 1 Gb USB key (same capacity, but used only partially for private copy purposes according to the consumer studies performed for France) will be subjected to 0,22 € only.

G. Double payment

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

Consumers are probably not enough informed about the licensing terms and conditions of said downloads.

When purchasing a work on line or off line, consumers “naturally” believe that they acquire a work as they only acquire a well defined license to use it. This is a fundamental misunderstanding prevailing in the creative industries. Each use or act is subjected to a specific payment. Paying twice is not necessarily a double payment.

For the rest, we do not believe that consumers are facing any other issue when paying for digital downloads : there is especially no alleged “double payment”, as the price paid for downloading (on-demand service referred to under article 6.4 of the Copyright Directive) has to be distinguished from subsequent private copy facilities (exception referred to under article 5.2 of said Directive). The situation is finally the same than the one that was prevailing in the off-line world: the purchase price of an original record or audio CD has never included the price for subsequent private copies on audio tapes or recordable CDs.

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

That’s in principle up to the rightholders’ decision as part of their exclusive rights, but there seems to be a legal barrier as far as private copy is concerned : how indeed can exclusive rights be implemented in an area where the exception to said exclusive rights is prevailing ? We therefore believe that when a private copy exception exists and is permitted by rightholders (for instance because said rightholders do not implement any TPM), corresponding remuneration CAN NOT – according to the Copyright Directive – be implemented through licensing practices (i.e. exclusive rights). This doesn’t prevent rightholders, if they want, from implementing other solutions such as selling protected CDs or DVDs with one attached copied file.

But, moreover, experience shows that said remuneration SHOULD NOT be implemented through licensing practices : it is in the rightholders’ interest to maintain current private copy

remuneration schemes, as any other remuneration system will face strong opposition on consumers' side. As consumers strongly request for private copy facilities, but are not willing to pay directly for it, private copy remuneration schemes – which provide for an indirect payment of said remuneration – are clearly the balanced win-win solution for all stakeholders.

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?

Such a decision is once again part of the exclusive right of the rightholder. If so, and if said rightholder abandons its right to private copy remuneration (such may be the case for Creative Commons licenses, but not necessarily for licensing models based on advertising), and if such practice is existing at a significant level for those protected works that are today benefiting from private copy remuneration (mainly films and music in most EU countries), it can be taken into consideration in the level of tariffs determined for each device used for private copy purposes.

I. Distribution issues

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

On an annual basis, at the moment the matching of copied works is completed, so that the beneficiaries of the remuneration are identified.

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

This is not a concern since collecting societies are cooperating at international level. EUROCOPYA members for instance entered into reciprocal agreements whereby they collect and distribute private copy levies in their own market according to their national law to the benefit of international rightholders. According to these agreements, all European works & rightholders benefit from domestic private copy remuneration schemes, including for instance British producers, although no actual reciprocity can be implemented in the UK because of the absence of private copy remuneration scheme in this country.

Main concern regarding cross border issues is the absence of remuneration for private copy exceptions existing in some EU countries, especially the UK.

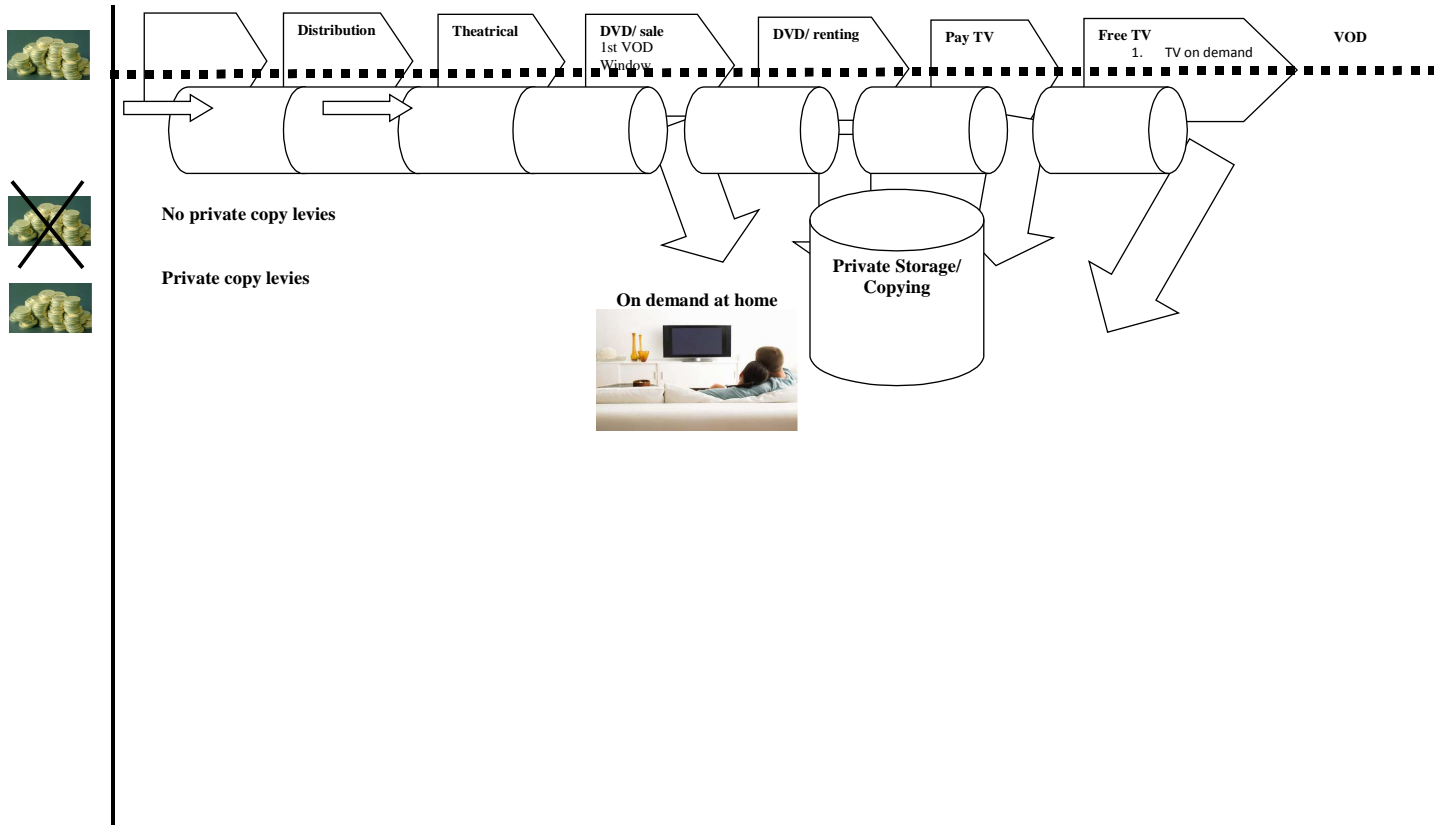
See enclosed [EUROCOPYA's response to the public consultation pursuant to the Gowers Review on UK Copyright Law \(Appendix 3\)](#).

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

Obviously, it depends on the revenues. The more revenues are low, the more the % may be high, as most distribution costs are not proportional to collected levies (when collections – not to say tariffs – are lower, the number of works & rightholders to be remunerated is not necessarily decreasing ...). The administrative costs include the production of consumer surveys, the monitoring of consumers electronic industries, the collection of royalties, the management of works & rights databases, the control & administration of payments to rightholders, ...

The average management fees for private copy remuneration in Germany is 10%. In Spain, it is 8 to 9%. In France, it is below 10%. For producers' right collective management societies represented within EUROCOPYA, said percentages can be even lower (4,9% in France in 2007; 4% in Germany) ...

Appendix 1



Appendix 2 :
[EUROCOPYA 2006 study on MP3 Players](#)

Appendix 3 :
[EUROCOPYA's response to the public consultation pursuant to the Gowers Review on UK Copyright Law](#)