

JBCE POSITION ON THE RELATIONSHIP BETWEEN COPYRIGHT LEVIES AND DIGITAL RIGHTS MANAGEMENT

1. INTRODUCTION

The advances in technology starting with the 1960s introduction of photocopiers and audio cassettes (which was followed by a home taping boom) and the later introduction of the videocassette recorder (“VCR”) caused concern to the content production industry. Because products that allowed for unrestricted copying of protected works had become commonplace in the home, the content industry feared damaging consequences for their business.

Because it was impossible to stop private copying by bringing individual copyright infringement actions against each individual engaged in copying, other solutions were sought. The solution chosen was the introduction of a system of copyright levies, which were in essence a blanket compensation for copying done by private individuals. The levy formed a part of the price of the product, and by paying that price, the consumer paid for any copying he engaged in using the product. Although many EU Member States adopted levy systems to address the private copying issue, other countries such as the United Kingdom, Ireland and Luxembourg have not done so.

The introduction of copyright levies was seen by many as an appropriate way to compensate rightholders for private copying. Levies were seen as necessary, as no means were available to control the copying itself. The perceived necessity justified their application despite the evident problems and injustices inherent to the system itself.

The necessity of levies is, however, now in doubt. Technological development has continued at a rapid pace, and society has made the move from an analogue world to a digital one, where computers and other digital devices are used to consume content. The advent of the digital world has also brought changes to the way content can be controlled. By utilizing digital rights management (“DRM”) solutions, rightholders can ensure that their rights are not exploited in a manner contrary to their interests, meaning that they have the technological capacity to prevent private copying altogether if they so wish. Thus the problem that copyright levies was designed to address, namely uncontrolled private copying, is no longer an issue in relation to content protected by DRM. However collecting societies still insist on expanding the scope of levies to cover digital devices utilizing DRM. Such expansion is unjustifiable and hinders the development of online businesses and digital technology by increasing the cost for consumers who are required to pay a levy for private copying even though they are not able to copy the work concerned, and even though they already remunerated the rightholder when they paid for the DRM-protected content.

JBCE believes strongly in encouraging creativity by ensuring that rightholders receive fair compensation for the use of their works. However, with the advent of the digital age, levies, which, although arguably necessary in case of an analogue products, have proven to be more a hindrance to creativity than its facilitator in the digital sphere. Therefore an alternative way to compensate authors for their work is required, and DRM is the perfect tool for this purpose. It is imperative that steps are taken to ensure that the adoption of DRM solutions are not hindered

by levies, and JBCE strongly supports any appropriate measures the European Commission plans to adopt to that effect.

2. THE INJUSTICE AND HARM CAUSED BY COPYRIGHT LEVIES

2.1 Generally

There is no doubt that rightholders need to be fairly compensated for the exploitation of their rights. The EU has expressly recognized this in Directive 2001/29/EC ("Information Society Directive"), which states that "rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter", and in assessing fair compensation, account should be taken of particular circumstances of the case, including harm to right holders.¹

Copyright levies regimes have never succeeded in fully adhering to this principle. Although they may have had a role to play in ensuring compensation for private copying done on analogue devices such as tape recorders where no alternative means for protecting rightholder interests are available, their flaws are evident: the lack of transparency in setting the levy amounts, and the harm caused by the inherent unfairness they exhibit in the way they apply regardless of whether consumers actually engage in any uncompensated private copying and whether any actual damage to rightholders is caused. It is only because of the perceived lack of a better solution that these faults have been tolerated.

2.2 Lack of transparency

The levy systems maintained by the collecting societies have drifted far from the basic rationale behind the imposition of levies and the harm that they cause far outweighs any benefits gained. Instead of assessing what is fair compensation for the damage caused to rightholders, the collecting societies have preferred to impose an arbitrarily set blanket fee without showing any link between the alleged damage and the amount of the levy supposedly compensating for the damage. The arbitrariness is demonstrated by the significant differences in the amount of levies different Member States impose on the same products.²

2.3 Inherent unfairness

Because levies need to be paid for devices and media regardless of whether a consumer is engaged in private copying, levies impose an unfair burden on consumers and businesses, which could historically only be justified by the fact that levies were perceived by some to be the only way to protect rightholders. Nevertheless, the harm they cause is serious and affects end-users (whether private consumers or companies), device manufacturers and even rightholders in the long run.

¹ Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, recital 35.

² A comparison conducted by EICTA in April 2006 showed how levy rates in different Member States vary not only in their levels, but also in type. Some countries impose a percentage-based levy, whereas others set a fixed sum levy. The differences demonstrate the arbitrariness of levies. The EICTA study is available at <http://www.eicta.org/files/Levies%20Collection-100413A.pdf>. For an overview of the market distorting effect of copyright levies, see also the Copyright Levy Reform Alliance's Economic Impact Study, available at <http://www.eicta.org/files/EconomicImpactStudy-193516A.pdf>.

Potential harm to end-users. Consumers not engaging in private copying are the primary victims of the arbitrariness of levies. Because businesses to a large extent pass the cost of levies to consumers by increasing the price of the product, every consumer who purchases a product burdened by a levy has to pay the levy, even if she has no interest at all in engaging in private copying of protected works. Thus for example under current court decisions, in Germany a customer who purchases a PC with a DVD-writer she can use to burn her digital family photos or videos on a DVD has to pay an extra 12 EUR for the PC, 9,21 EUR for the DVD-writer, and 0,09 EUR for *each* DVD she buys for her photos or videos, because the manufacturers will pass to her the burden of the levies they need to pay to compensate rightholders for private copying, even though the customer has no interest to engage in such activity. If she in addition decides to purchase a multifunctional device, which allows her to print her photos and to scan old photos, she ends up paying anywhere from 38,35 to 76,70 EUR notwithstanding her lack of interest to copy protected works.³ The same applies to a company purchasing devices or blank media for use in the management of enterprise data, not for copying of protected works. Such an outcome is inherently unfair to the end-user who is forced to pay a rightholder several times for the same thing, even though no loss occurs.

Potential harm to device manufacturers and rightholders. Because levies can increase the price of a product more than 50 percent,⁴ they deter demand for products as many customers consider them too expensive to purchase. The result is a reduction in the revenue businesses gain from products burdened by levies, causing them to be disincentivized from investing in the products in question. As a consequence of the decreased interest of businesses to develop and supply products that can be used to view, edit, or otherwise interact with protected content, there are less opportunities for rightholders to exploit their rights and gain royalty revenue because their revenue is dependent on customer demand for the products.

Perhaps the lack of a way of controlling private copying in a fair and non-discriminatory manner justified the adoption of a system that burdened everyone equally, regardless of whether they deserved the burden or not.⁵ But technology now provides alternative solutions that are fairer to all parties concerned. The most important of such solutions is DRM, which allows rightholders to control private copying of digital content.⁶

³ Based on levy amounts claimed by VG Wort from manufacturers of multifunctional devices.

⁴ For example in Germany, the collecting society VG Wort has claimed levies of over 50 EUR for a multifunctional device, which can have a retail price of less than 100 EUR.

⁵ It is doubtful whether the justification ever had any application at all with respect to business customers, who use their devices and media for purposes different than copying of copyright protected works.

⁶ Other solutions include different types of basic copy protection measures, which prevent copying but do not provide for rights management in the way DRM does, *i.e.*, these measures prevent all copying attempts without the possibility for providing for example limited rights of copying for those customers willing to pay for it like many DRM solutions do.

3. AN ALTERNATIVE TO LEVIES – DIGITAL RIGHTS MANAGEMENT AS A TOOL OF ENSURING PROPER REWARDS FOR CREATIVITY

3.1 Generally

JBCE believes that it is of fundamental importance that right holders are properly compensated for the exploitation of their rights. However, as seen above, copyright levies are at best an inadequate solution tainted by their inherent unfairness resulting from their blanket application. In fact, with the advent of new digital technologies that allow rights management through DRM, levies are no longer a solution, but a part of the problem, as they hinder the development of new business models, including those utilizing online content delivery, which would guarantee rightholders new sources of revenue and better control over the exploitation of their rights.

3.2 Benefits of DRMs

Any rightholder who does not wish her content to be freely copied is able to prevent copying by protecting, or demanding that a distributor protects, the content with DRM. In comparison to copyright levies, DRM is a superior solution for the protection of rightholder interests, as it gives rightholders and consumers more flexibility when dealing with content. A holder of copyright (whether an author's right or a related right) can decide by herself which of her exclusive rights she wants to license with the certainty that it is technologically impossible for the licensee to attempt to do anything more.

A consumer on the other hand is given the opportunity to decide what rights she wishes to acquire over the content, and will pay for only those rights that she wants to acquire. Unlike in case of levies, where every consumer needs to pay for a right to make private copies, in case of DRM content a consumer who does not wish to copy the work does not need to pay for the right of copying, thus obtaining the right to for example stream the content to her PC at a cheaper price than the consumer who wishes to obtain the right to copy the content.

3.3 Levies as a barrier to the adoption of DRMs

Despite the benefits DRMs offer, their adoption in Europe has been slow. The main reason for this is that the development of DRM as a method of facilitating licensing of digital content is held back by the legacy copyright levy system, which the collecting societies have expanded to cover also digital devices and media, regardless of the fact that private copying of digital content is not possible if the rightholder has decided to protect his rights with DRM. Levies should have no part to play in such a situation, because their underlying justification, the inability to control private copying, is not present. The EU has affirmed this fact in Article 5(2)(b) of the Information Society Directive, which states that in setting levy amounts it is necessary to "take account of the application or non-application of technological measures" and that "where the prejudice to the rightholder would be minimal, no obligation for payment may arise."⁷ Regrettably, as a recent study conducted by the Business Software Alliance demonstrates, "While some Member States have transposed [Article 5.2(b)] into national laws ... as a matter of practice it does not appear that levies are reduced" even if DRM is applied.⁸

⁷ *Supra* 1.

⁸ BSA Study, *Overview of Online Music Sales, Copyright Levies and Related Legal Matters in the European Union*, October 2005, available at: http://www.bsa.org/eupolicy/upload/DRMs Study - Country Reports_FINAL.pdf.

The harm copyright levies cause by preventing the full-scale adoption of digital rights management is significant. They hinder the development of the digital economy, as they negate the main benefit of DRMs, namely their flexibility and low cost, by obliging a consumer to pay a levy to compensate for private copying even though, because of the DRM, he has no opportunity to copy. As a consequence, there is a great disincentive to adopt DRM solutions, one of the primary technologies making online content delivery possible, thus preventing the emergence of business models based on online content transactions.

4. CONCLUSION AND NEXT STEPS - ENCOURAGING THE ADOPTION OF DRM SOLUTIONS

JBCE agrees with the Commission that there is no better way to "promote innovation than by encouraging the use of Digital Rights Management technologies,"⁹ but expresses concern that unless the Commission takes steps to help the market develop, DRMs will not achieve widespread adoption in the near future. As a consequence, the EU will lag behind its major trading partners such as the US where online content businesses are blossoming. It is no surprise that many major companies such as Yahoo and Google operate their online content businesses almost exclusively in the United States. Although all of them are gradually expanding to Europe, the progress is slow not only because of the need for them to obtain country-specific licenses to distribute their content, but also because of the lesser demand for online content due to the negative customer perception of DRM solutions amongst European consumers. The flexibility offered by DRM solutions fails to materialize in Europe as long as there is double tax imposed by levies on European consumers.

A legislative solution to the problem is urgently needed, and therefore JBCE applauds the Commission's recently announced initiative aimed at ensuring that Member States facilitate the adoption of DRM solutions by clearly setting out the relationship between copyright levies and DRM solutions, explaining in what circumstances the presence and active use of DRMs in protecting content should eliminate or, at the very least, decrease the levy on the product utilizing the content in question. In JBCE's view the key determining principle should be compensation for *actual loss* to rightholders. Modern DRM technology allows vastly better control over content than the tape recorders of the 1960s, and makes it possible to prevent actual loss from materializing at all. Thus if such technologies are applied, no levies should be due. Taking the actual loss principle further, in case of devices such as enterprise-level scanners and printers no levies should be imposed either, as only they are designed and marketed for business use and thus are not used for private copying of copyright protected works.

JBCE is looking forward to a constructive discussion in Europe on steps to be taken to encourage the adoption of Digital Rights Management solutions as an alternative for copyright levies, and encourages the Commission to take the debate forward with its reform initiative.

JBCE Information Society Committee

This committee discusses a wide range of issues regarding information society technologies and policies, including a regulatory framework for e-commerce, intellectual property, data

⁹ Speech by Commissioner McCreevy at the High Level Industry Seminar/Global Industry Roundtable on Levies & DRMs.

protection, security, e-Accessibility, etc. taking into consideration the technological opportunity and development in the area of ICT. One of its main focuses has been on the issue of digital rights management (DRM) system and the Member states' implementation of the fair compensation system required by the EU Copyright Directive 2001. As one of the outcomes of the discussion, JBCE submitted a position paper on DRM system to the EU Japan Business Dialogue Round Table on 8th of July, 2002 as “Views on Digital Right Management.” (You can find the material at the <http://www.jbce.org/files/DRM-Position.pdf>) The committee continues to follow up the further development of this issue as well as discuss other important issues in the information society policy field.

JBCE Information Society Committee Members: Canon Europe, Epson Europe,
Fuji Electric Holdings, Fujitsu(*as Chair*), Fuji Xerox, Hitachi Europe,
Mitsubishi Electric Europe, NEC Europe, Panasonic Europe, Ricoh Europe,
Sharp Electronics Europe, Sony Europe, Victor

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