ANSOL’s reply to
Levies
public consultation

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Abstract

The introduction of levies hurts all stakeholders because it is unfair and impossible to enforce without relinquishing the right to privacy.

Executive Summary

Private Copying Levy

The concept of a “private copying levy” aims to find a form of compensation for rights holders based on the premise that an act of private copying cannot be licensed for practical purposes and thus causes economic harm to the relevant rights holders. We believe that there’s no effective way of knowing how equipment and blank media is used, if it is used for home copying, and - if so - if that copy is of material that traditionally would generate a compensation to the rights holders. With that in mind, we believe that blindly levying equipment and media to compensate rights holders gives unfair compensations to a small number of citizens (some rights holders) while unfairly taxing a huge number of stakeholder citizens (equipment and media consumers). We go further, and question the fairness of levying equipment and media in the cases where they are used as supposed by this levy, since no actual harm or losses can be inferred by acts of private copying for non-commercial purposes.

Portugal

In Portugal, regarding levies, it is defined in the 82nd article of the 62/98 law that in the price to public of any mechanical, chemical, electric, electronic or other equipment that enables the fixation and reproduction of works, as well as all and whatever media that can be used for the fixation and reproduction of those works are subject to a levy destined to benefit the authors, artists, interpreters or performers, editors or producers. These levies are not applied if the equipment or media is purchased by communication entities, producers or entities that use them exclusively to help visual or auditory impaired people.

The value of those levies is defined in the 50/2004 law, that transposed the 2001/29/CE directive. That law defines that the levy for equipment must be 3% of the public price, before VAT is applied, and the levy for media should comply with table 1.

The levies are collected and managed by a collective person (AGECOP), that must publish every year a report and the figures of its activity in a nationwide newspaper. We have actively tried to know where the figures where published, but we have got no reply up until now, which is worrying.

Throughout pages 2 to 8, we will reply to the public consultation.
<table>
<thead>
<tr>
<th>Media type</th>
<th>Media</th>
<th>Levy in EUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Analog</td>
<td>Audio Cassette</td>
<td>0.14</td>
</tr>
<tr>
<td></td>
<td>Video Cassette</td>
<td>0.26</td>
</tr>
<tr>
<td>Digital</td>
<td>CD-R Audio</td>
<td>0.13</td>
</tr>
<tr>
<td></td>
<td>CD-R Data</td>
<td>0.05</td>
</tr>
<tr>
<td></td>
<td>CD 8 cm</td>
<td>0.27</td>
</tr>
<tr>
<td></td>
<td>Minidisc</td>
<td>0.19</td>
</tr>
<tr>
<td></td>
<td>CD-RW Audio</td>
<td>0.19</td>
</tr>
<tr>
<td></td>
<td>CD-RW Data</td>
<td>0.14</td>
</tr>
<tr>
<td></td>
<td>DVD-R</td>
<td>0.14</td>
</tr>
<tr>
<td></td>
<td>DVD-RW</td>
<td>0.30</td>
</tr>
<tr>
<td></td>
<td>DVD-RAM</td>
<td>1.00</td>
</tr>
</tbody>
</table>

Table 1: Levies in Portugal

Replies on Levies

Question 1

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

According to the Portuguese law, and the collecting entity, equipment is also subject to a levy, and those levies are being effectively collected in that scenario. Regarding to the Table 1 footnote, in Portugal hard disks are not subject to a levy.

Question 2

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

Since the legal uncertainties where introduced by law, the most effective form of dealing with these uncertainties is to remove them from law, harmonically throughout Europe. They don’t really work or serve their purpose, while at the same time they are unfair both to copyright owners and to consumers.

A simple example of the unfairness of this levies is the consumer that buys a Compact Disc to backup his data. If the data is subject of copyright, but the consumer is the rights holder, then he is theoretically paying to himself a levy, but he will never see that money back.

Question 3

What would be the fairest method to determine the private copying levy rate that applies to digital equipment and blank media?
If it is private copying, then it is impossible to know whether the media and equipment is used with copyrighted material, or who are the rights holders, short of requiring European citizens to relinquish their privacy rights. Thus there is no fairest method and so such methods should be abolished.

**Question 4**

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

No.

**Question 5**

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

While such figures are supposed to be public, they don’t seem to be publicly available. AGECOP was contacted regarding this issue, without response.

**Question 6**

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

There are several articles written by consumers disagreeing with this levies, and in a recent open discussion forum (Tecnonov 2008, Coimbra, Portugal), the intervenients reached the conclusion that these levies should be abolished.

**Question 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?

While such figures are supposed to be public, they don’t seem to be publicly available. AGECOP was contacted regarding this issue, without response.

**Question 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?

Answered together with answer to question 9.
Question 9

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

As far as we know, none of the collected money was used for cultural funds. Since the figures on how the collected money was distributed don’t seem to be publicly available we can only guess, but there is nothing in the Portuguese law saying that a part of the collected money should be used to cultural funds. As a matter of fact, the Portuguese law is quite explicit saying that the collected money must be used “to benefit authors, interpreter or performer artists and phonographic or videographic editors and producers”.

Question 10

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

This is excessive legislation which shouldn’t even be necessary at all if no levies were collected in the first place.

Question 11

What share of individual rightholders’ revenues do private copying levies represent?

While such figures are supposed to be public, they don’t seem to be publicly available. Also, individual rightholders’ revenues are not public, and there’s nothing in the Portuguese law determining that it should be so.

Question 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?

Equipment or media exported or sent to another Member State are exempt of paying the levy.

Question 13

What is the most suitable system of refunds upon exportation? Who is the most suitable party to claim these refunds?

We never heard of such refunds: our interpretation is that material bought for exportation does not pay levies in the first place.
Question 14

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

That table states that in Portugal there are refunds, but we never heard of them.

Question 15

Who is the most suitable party to pay private copying levies? Should private end-consumers be exempt to self-report intra-community purchases of blank media and equipment?

We think that everyone should be exempt of those levies, specially private end-consumers.

Question 16

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

Along with private end-consumers, professional users are also subject to these levies, even if - and specially in those cases - they are paying the levies to purchase blank media and equipment that is going to be used for non-copyrighted data, or data which copyright authorship belongs to themselves, thus increasing their operational cost.

Question 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?

This idea lacks in fairness to private and professional users alike. These levies should not exist on the first place. If they do exist, and professional users are exempted from payment, then citizens will be overcharged in order to compensate.

Question 18

Has the size of the grey market increased since 2006?

We can only guess. Yet, it would be hard to believe that the grey market did not increase.
Question 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?

None that we know of.

Question 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?

We are not aware of any of those kinds of surveys being conducted in Portugal, besides the ones we did ourselves. In those, these were the results we got:

<table>
<thead>
<tr>
<th>Use case</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>personal backups</td>
<td>83%</td>
</tr>
<tr>
<td>record material download via Internet</td>
<td>46%</td>
</tr>
<tr>
<td>recording other material</td>
<td>46%</td>
</tr>
<tr>
<td>professional backups</td>
<td>41%</td>
</tr>
<tr>
<td>other uses</td>
<td>29%</td>
</tr>
<tr>
<td>home-made recordings</td>
<td>16%</td>
</tr>
<tr>
<td>mastering and sampling</td>
<td>11%</td>
</tr>
<tr>
<td>low-quantity production and test of CDs</td>
<td>10%</td>
</tr>
<tr>
<td>recording of unfinished versions of content</td>
<td>7%</td>
</tr>
</tbody>
</table>

Table 2: On the use given to CDs and DVDs

<table>
<thead>
<tr>
<th>Source data used for</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>recording free content</td>
<td>51%</td>
</tr>
<tr>
<td>purposes of private copy</td>
<td>51%</td>
</tr>
<tr>
<td>recording their own content</td>
<td>49%</td>
</tr>
<tr>
<td>recording content downloaded from the internet and not subject to copyright</td>
<td>43%</td>
</tr>
<tr>
<td>other purposes</td>
<td>21%</td>
</tr>
</tbody>
</table>

Table 3: On the source of what is recorded in CDs and DVDs
Question 21

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

Private copying levy schemes should be abolished, reducing production cost and incentivizing consumer purchase.

Question 22

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

Globally, we think that the biggest problem is a lack of adjustment of the price, which usually isn’t seen by the consumer as a “fair price”. In Portugal, we can add the fact that Portuguese online music stores for digital downloads sell music with DRM restriction schemes, which are highly avoided by consumers since they restrict them from some of their law granted consumer rights, like the right of making a private copy. Recent numbers from Associação Fonográfica Portuguesa related to the music and movies market in Portugal tell us that the digital music market only arose 23.8%, from 2.1M Euro to 2.6M Euro, which are disappointing numbers if we consider other countries numbers. 2.6M Euro was the amount collected for 225.433 music downloads. This numbers talk about Portuguese consumption, not Portuguese sales.

Question 23

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

No. Licensing practices should not be permitted, since they conflict with the buyers default rights. Consumers are known to avoid those licensing practices, sometimes choosing less lawful uses as the way of consuming what they want without the unfair restrictions imposed by those licensing practices. We believe that fairness to the consumer has to be sought if we want to create an attractive alternative to unlawful uses.

Question 24

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

This is yet another instance of “we created a problem, and now want to create exceptions in order to reduce friction”. If levies did not exist, then this issue would be straightforwardly solved. In a scenario where they exist, there is no technically viable form of distinguishing consumers’ usage of products short of relinquishing their privacy rights, so it is neither accountable nor fair.
Question 25

What is the typical frequency and schedule of levy payouts?

Collectors pay to the collecting entity each trimester. We can only guess the frequency and schedule of the distribution of the levies collected to right holders.

Question 26

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

The levy scheme forces a lot of bureaucracy with cross-border distribution, making it harder and more expensive, thus encouraging a marked rise in the grey market.

Question 27

What are the average administrative costs in levy administration (in percent of collected revenue)?

While the figures regarding levies are supposed to be public, they don’t seem to be publicly available. Thus, we have no way of find an answer to this question.

Who wrote this paper

About ANSOL

ANSOL, Associação Nacional para o Software Livre (National Association for Free Software) is a non-profit Portuguese association which has as objectives the promotion, development, research and study of Free Informatics and its social, political, philosophical, cultural, technical and scientific repercussions.

Since levies unfairly tax authors, users and distributors of Free Software it is only a natural urge that we collaborate with the legislative sector in order to assure the user’s software freedom rights which are known as The Free Software Definition¹.

We hope this reply contributes to an improvement in the legal framework.

About Rui Miguel Silva Seabra

Rui Miguel Silva Seabra has a degree in Computer Sciences, from Universidade do Minho, in Braga Portugal, and works full-time as a Firewall and Systems Administrator at SIBS, SA, a finance IT company, and in no way represents or intends to represent any opinion in the name of his employer. As Vice-President of ANSOL and a collaborator of the DRM Work Group, wrote this reply in collaboration with other members of this Work Group, namely Marcos Marado.

¹http://www.fsf.org/philosophy/free-sw.html
About Marcos Marado

Leader of the DRM Work Group, Marcos Marado works at Sonae.com and in no way represents or intends to represent any opinion in the name of his employer.