STUDY I: Legal and policy context

The requirement of fair compensation

"Private copying" is a loose label for activities that most users of copyright materials believe should be beyond the control of right owners. It is important to note that the domain of the private is not co-extensive with the non-commercial. Some activities are pursued without monetary gain, yet addressed to a public audience. Some activities take place in the private sphere but may affect commercial exploitation.

In EU law, private copying has been given a specific meaning relating only to the reproduction right (i.e. not communication, performance or adaptation). Private copying is included among the exhaustive list of exceptions permitted under Article 5 of the 2001 Information Society Directive.[1] Article 5(2)(b) reads: [Member States may provide for exceptions or limitations to the reproduction right] "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures [referred to in Article 6]".[2]

In the 2010 *Padawan* decision, the European Court of Justice held that the concept of "fair compensation" "must be regarded as an autonomous concept of European Union law to be interpreted uniformly throughout the European Union".[3] The intellectual origins of the concept of "fair compensation" can be traced to a German decision in 1964 in which the highest federal court (*Bundesgerichtshof*) held that a prohibition against private

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[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[2] "Technological measures" is international treaty speak for copy protection, implemented by digital rights management systems. In December 1996, two "Internet" treaties were adopted under the auspices of the World Intellectual Property Organisation, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty". It was the objective of the Information Society Directive to transpose into EU law the main obligations under these Treaties.

[3] *Padawan SL v Sociedad General de Autores y Editores de España (SGAE),* Case C-467/08, 21 October 2010. In the Information Society Directive, a requirement of "fair compensation" is common to three possible exceptions and limitations: reprography (Art. 5(2)(a)), private use (Art. 5(2)(b)), and reproductions of broadcasts made by social institutions (Art. 5(2)(e)).

copying was not enforceable. The decision led to the introduction of the German levy system with the copyright law of 1965 (UrhG).[4]

While German copyright law construed the levy as a statutory licence necessitated by a constitutional norm (the inviolability of the private sphere), the new European concept of fair compensation relies on an evaluation of harm as a result of the unauthorised reproduction of protected works. With reference to Recitals 35 and 38 of the Information Society Directive, the ECJ found in *Padawan* (at 42) that "fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception".[5]

For ease of reference, Recitals 35 and 38 of the Information Society Directive (2001/29/EC) are given here in full:

> (35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.
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> (38) Member States should be allowed to provide for an exception or limitation

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[4] BGH, NJW 1964, 2157; GRUR 1965, 104 – *Personalausweise*; Fromm/Nordemann, *Urheberrecht: Kommentar zum Urheberrechtsgesetz, zum Verlagsgesetz und zum Urheberrechtswahrnehmungsgesetz* (10th edition, 2008). The author is grateful to Prof. Dr. Jürgen Becker [formerly CEO of GEMA and collecting agency ZPÜ] and Dr. Robert Staats [CEO, VG Wort] for discussions on the origins and legal context of the German levy system.

[5] "Fair compensation" must be distinguished from the concept of "equitable remuneration" (*angemessene Vergütung*), another autonomous EU construct with German origins. It appears in Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61). It has been interpreted as a right to obtain money in place of a full exclusive right (Case C-245/00 *SENA* [2003] ECR I-1251, at 24). According to the European Commission, equitable remuneration requires a minimum standard of payment without evaluation of harm (2006 Impact Assessment, p. 16).

> to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken on the differences between digital and analogue private copying and a distinction should be made in certain respects between them.

During the preparatory work for a 2006 Recommendation ("Fair Compensation for Private Copying in a Converging Environment"; not adopted), the European Commission explained levies as "a form of indirect remuneration for right holders, based on the premise that some acts of private copying cannot be licensed for practical purposes by the relevant right holders". If they could, there would be no need for a private copying exception, nor for levies.[6] The intention of the Recommendation was to encourage right owners to find ways to license individually, and perhaps over time phase out levies.[7] Consumers should not be charged twice, once for copy-protected individually licensed content, and once for private copying (that may, or may not be permitted under the licence).[8] The Recommendation was blocked from leaving the Commission reportedly by

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[6] This reasoning is sometimes extended to all exceptions: they should be eliminated where transaction costs between owner and users become low enough for negotiations to occur. Wendy J. Gordon (1982), "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors", 82 *Columbia Law Review* 1600. Gordon later clarified her position in "Market Failure and Intellectual Property: A Response to Professor Lunney", 82 *Boston University Law Review* 1031 (2002), drawing attention to the "danger of propertarian models" that "will cause us to lose the promise that could otherwise inhere in inexhaustibility" (at 1031). "To enquire into 'market failure' is simply to ask, when can we as a society not safely rely on the bargain between owner and user to achieve social goals?" (at 1037). The Gowers Review of Intellectual Property (London, HM Treasury 2006) recommended the introduction of more flexibility into the copyright system, including the introduction of a "limited private copying exception by 2008" but did not analyse the rationale for exceptions beyond vague references to reasonableness and transaction costs: "UK copyright law provides for a number of 'exceptions' to the broad rights granted to the owner of a copyright work to enable 'reasonable' use to be made of the work freely and without permission." (p. 40); "[O]ne of the purposes of exceptions to copyright is to reduce burdensome transaction costs associated with having to negotiate licences." (p. 47). [add Hargreaves / III]

[7] For a comprehensive analysis of the "phase out" provisions of the Information Society Directive, see P.B. Hugenholtz, L. Guibault, S. van Geffen (2003), *The Future of Levies in a Digital Environment*, Amsterdam: Institute for Information Law (IViR).

[8] Green Paper - Copyright and Related Rights in the Information Society, COM/95/0382, at 50 (emphasis added by 2006 Impact Evaluation, at 14).: "where there is the technical means to limit or prevent private copying, there is *no further justification for what amounts to a system of statutory licensing and equitable*

French opposition. There was concern about the loss of an income stream of collecting societies that was said to be an important component of creator remuneration and also a source of socio-cultural subsidies.[9]

In July 2008, the European Commission set up a Stakeholder Platform including collecting societies, industry representatives and consumer organisations with the aim to negotiate a consensus about modernising the system of private copy levies. Little progress was made, and in January 2010, representatives of the information technology, consumer electronics and telecommunications sectors (coordinated under the Digital Europe umbrella) withdrew from the talks. ICT firms have since focussed on challenging levy tariffs through the court system, while calling for a regulation of levies as part of a Directive on Pan-European Licensing.[10]

In May 2011, The European Commission published an intellectual property strategy paper announcing "comprehensive legislative action" regulating levy systems by 2012, following a further period of attempted mediation. Section 3.3.4 is headed "Private copying levies":[11]

> The proper functioning of the internal market also requires conciliation of private copying levies with the free movements of goods to enable the smooth cross-border trade in goods that are subject to private copying levies. Efforts will be redoubled to kick-start a stakeholder agreement built on the achievements of a

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remuneration"[8]. 2006 Impact Evaluation for Recommendation, at 58: "Where a rightholder has authorised an activity in excercising his exclusive rights, no claim for compensation should arise as the person performing the activity, i.e. the consumer, is a licensee here and not a beneficiary of the exception."

[9] "Industry Condemns Commission Backdown on Reform: Reform of Copyright Levies Abandoned Following Opposition From France", Statement by Copyright Levies Reform Alliance (13 December 2006, http://www.eicta.org/fileadmin/user_upload/document/document1166542590.pdf). According to French platform c*opie privée* (http://www.copieprivee.org, accessed May 2011) levies contribute to artistic vitality "by remunerating the creators we love and by helping nearly 5,000 cultural events we enjoy attending all over France. Private copy is necessary for music, cinema, theatre, dance, television, radio, photography, circus acts and literature to live." In France, 25% of collected revenues (in 2010, just under €50m) are used to fund cultural events. [reference III: off balance sheet]

[10] Statement by Digital Europe on the Collapse of Stakeholder Platform on Private Copy Levies (7 January 2010): http://www.digitaleurope.org/index.php?id=32&id_article=404. Digital Europe advert in *European Voice* (10 July 2010): "The announced Collective Rights Management Directive provides the perfect opportunity to modernise the EU levies regime."

[11] *A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, Communication from the European Commission (COM(2011) 287 final.

draft Memorandum of Understanding (MoU) brokered by the Commission in 2009. A high level independent mediator will be appointed in 2011 and tasked with exploring possible approaches with a view to harmonising the methodology used to impose levies, improve the administration of levies, specifically the type of equipment that is subject to levies, the setting of tariff rates, and the inter-operability of the various national systems in light of the cross-border effects that a disparate levy system has on the internal market. A concerted effort on all sides to resolve outstanding issues should lay the ground for comprehensive legislative action at EU level by 2012.

Sources of data

In Europe, the political economy of levy lobbying divides roughly along the following lines:[12]

Collecting societies: strongly in favour

ICT sector (including Apple, Nokia, HP, Dell, Amazon, RIM): strongly against

Major music right holders (including Universal, Sony, Warner, EMI): ambivalent (may benefit from "licensing through")

Music SMEs: in favour

Artists' representatives: in favour

Consumer organisations: against

Interested parties have commissioned consultancy reports, providing supporting evidence. Key submissions reviewed include:

- ICT sector: Nathan Associates 2006 (commissioned by CLRA)[13], Copyright Levy Reform Alliance (CLRA) 2006[14], Ferreira 2010 (commissioned by HP)[15], Oxera 2011 (commissioned by Nokia)[16];

[12] As part of the research for this report, the UK Intellectual Property Office facilitated a stakeholder workshop on copyright levies on 1 December 2010 which was attended by cross-section of interested parties, including Owen Atkinson (Authors' Licensing and Collecting Agency), Alan Dearling (Author), Martin Delaney (Copyright Licensing Agency), Karen Fishman (MCPS-PRS Alliance Ltd), Tim Frain (Nokia), Tuomas Haanpera (Oxera), Sam Ingleby (Representing Apple), Peter Jenner (Music Managers' Forum), Jim Killock (Open Rights Group), Florian Koempel (UK Music), Victoria Lustigman (Publishers' Association), Amanda Russell (Producers' Alliance for Cinema and Television), Laura Sallstrom (Dell), Nicola Searle (ESRC/IPO Fellow, University of Abertay), Saskia Walzel (Consumer Focus).

- Collecting Societies: EconLaw 2007 (commissioned by GESAC)[17];
- Artists: YOUNISON 2010[18];
- Consumers: Rogers/Tomalin/Corrigan 2009[19].

Many of these submissions confirm the adage that he who pays the piper calls the tune. However, several studies contain verifiable data and credible analytical tools.

In addition, annual reports of national collecting agencies are an important source of data. Dutch collecting agency *de Thuiskopie* publishes consolidated annual surveys on global levy tariffs, revenues and distribution, now in their 21st edition. These reports are generally regarded as reliable.[20]

Lastly, the European Commission has conducted several consultations on copyright levy reform. In preparation for the legislative instrument of a Commission Recommendation, a Stakeholder Consultation took place in 2006 ("Copyright Levies in a Converging World"), and an Impact Evaluation was drafted ("Fair Compensation for Private Copying in a Converging Environment"). In 2008, The Commission consulted again ("Fair Compensation for Acts of Private Copying", European Commission Background Document to questionnaire, DG MARKT, 14 February

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[13] Economic Impact Study: Private Copying Levies on Digital Equipment and Media – Direct Effects on Consumers and Producers and Indirect Effects on Sales of Online Music and Ringtones, report prepared by Nathan Associates for Copyright Levies Reform Alliance (May 2006).
[14] Analysis of National Levy Schemes and the EU Copyright Directive, EICTA/BSA/European-American Business Council/RIAE/EDIMA (April 2006).
[15] José Luis Ferreira (2010), "Compensation for Private Copying: An Economic Analysis of Alternative Models", ENTER–IE Business School.
[16] Is There a Case for Copyright Levies? An economic impact analysis (report prepared for Nokia), Oxera Consulting Ltd (April 2011).
[17] Economic Analysis of Private Copy Remuneration, Report prepared by EconLaw Strategic Consulting for Groupement Européen des Sociétés d'Auteurs et Compositeurs (GESAC) (September 2007).
[18] Transparency & Accountability in Collective Rights Management, YOUNISON (2010).
[19] Mark Rogers, Joshua Tomalin and Ray Corrigan (2009), "The Economic Impact of Consumer Copyright Exceptions: A literature review", Oxford: Harris Manchester College.
[20] International Survey on Private Copying Law & Practice, Stichting de Thuiskopie (www.thuiskopie.nl).

2008). All these Commission documents as well as Stakeholder and Member State submissions were examined.[21]

Implementation of levy schemes

A. Tariffs and revenues

22 out of 27 European Union members have chosen to meet the requirement of "fair compensation" for "private copying" through a levy system. The exceptions are the UK and Ireland (only time-shifting of broadcasts is permitted), Malta, Cyprus and Luxembourg (private copying treated as *de minimis*). Within the 22 countries that provide for a compensated private copying exception, levy schemes vary widely. The following table captures key variations among these levy systems:

- levies apply to different media or equipment that can be used to make copies (e.g. recordable carriers, MP3 players, printers, PCs);
- levies differ in tariffs for the same media or equipment, and apply different methods of calculation (e.g. memory capacity, % of price);
- levies differ in beneficiaries (music, audio-visual, reprographic rightholders; wider cultural or social purposes).

[21] They are publicly accessible at the portal of the Internal Market Directorate: http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm

Table: Levies in EU Member States (2009) [for density map]

Member State	*Revenue per capita*	*Levies applied to recordable media*	*Levies applied to equipment*			*Distribution*		
		CD-R, DVD	MP3 Player	Printer	PC	Audio	Video	Socio-cultural
Austria	1.4	€0.34 (700MB) – 0.54 (4.7GB)	✓	✓	–			✓
Belgium	1.2	€0.12-0.40 per unit	✓	✓	–	43.59% 1/3 authors 1/3 performers 1/3 producers	56.41% 1/3 authors 1/3 performers 1/3 producers	–
Bulgaria	?	5% of manufacturing or import price	✓	✓	–	1/3 A-P-P	1/3 A-P-P	✓
Cyprus	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Czech Republic	0.7	€0.008-0.021 per unit	✓	✓	✓	½ authors ½ performers /producers	60% authors 40% performers /producers	–
Denmark	0.7	8% of manufacturing or import price	–	–	–	1/3 A-P-P	1/3 A-P-P	33%
Estonia	0.1	8% of manufacturing or import price	✓	–	–	1/3 A-P-P	63% a 27% perf 10% prod	10%
Finland	1.6	€0.6 per 4.7GB	✓	–	–	49% authors 51% prod+perf	80.8% auth+perf 19.2% prod	✓
France	2.6	€1.0 per 4.7GB	✓	–	✓	½ authors ½ performers /producers	1/3 A-P-P	25%
Germany	1.5	€0.271 per 4.7GB	✓	✓	✓	42% GEMA 42% perf/prod 16% reprograph	21% GEMA 21% perf/prod 8% repro 50% film producers	–
Greece	0.13	6% of manufacturing or import price	✓	✓	–	55% creators 25% perf 20% prod	55% creators 25% perf 20% prod	–
Hungary	0.9	€0.27 per 4.7GB	✓	✓	–	45% authors 30% perf 25% prod	62% authors 13% prod 25% perf	3.3-10%
Italy	0.7	€0.41 per 4.7GB	✓		✓	50% authors 25% perf 25% prod	30% authors 23% perf 47% prod	✓ 50% of video
Ireland	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Latvia	0.16	€0.14-0.28 per unit	✓	–	–	40% auth 30% perf 30% prod	1/3 A-P-P	10%
Lithuania	0.2	6% of manufacturing or import price	–	–	–	40% auth 30% perf 30% prod	40% auth 30% perf 30% prod	✓
Luxembourg	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Malta	–	–	–	–	–	As transferred from 'sister' collecting		

						societies in levy countries		
Netherlands	0.9	€0.4 per 4.7GB	–	–	–	40% auth 30% perf 30% prod	33.75% auth 25.5% perf 40.75% prod	–
Poland	0.07	1.72-2.53% of sale price	✓	✓	–	50% auth 25% perf 25% prod	35% auth 25% perf 40% prod	–
Portugal	0.3	€0.05-0.14 per unit	–	–	–	40% auth 30% perf 30% prod	40% auth 30% perf 30% prod	20%
Romania	0.02	3% of sale price	✓	✓	–	40% auth 30% perf 30% prod	✓	–
Slovakia	0.1	6% of manufacturing or import price	✓	✓	–	40% auth 30% perf 30% prod	✓	–
Slovenia	0.5	€0.03 per GB (max. €16.69)	✓	✓	–	40% auth 30% perf 30% prod	–	–
Spain	1.7	€0.17-0.44 per unit	✓	✓	–	50% auth 25% perf 25% prod	1/3 A-P-P	20%
Sweden	1.1	€0.06 (900MB) – 0.26 (4.7GB)	✓	–	–	1/3 A-P-P	✓	?
United Kingdom	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		

Source: European Commission, *Background Document: 'Fair compensation for acts of private copying* ('2008); de Thuiskopie, *International Survey on Private Copying Law & Practice* (21st Revision 2010).

The result of these variations are different levels of levy density, i.e. how many transactions are involved in raising and distributing monies, as well as different levels of overall indirect taxation on manufacturers, importers, distributors or consumers of media and equipment (see Study II).

Regulatory structures also differ considerably. Are tariffs and distribution set in law or subject to negotiations? Are there appeal procedures? What are the required standards of governance and supervision of collecting agencies?

Following the 2001 Information Society Directive, total revenues from levy systems in the EU increased from €172 million in 2001 to €567 million in 2004. Collection plateaued around the €500 million mark between 2004 and 2008, and is now beginning to fall as blank tapes, CDs and DVDs are disappearing from the market, and levies on new

products are increasingly contested, resulting in considerable uncertainty. There is an increasing gap between claimed (but unpaid) and paid (but contested) tariffs.

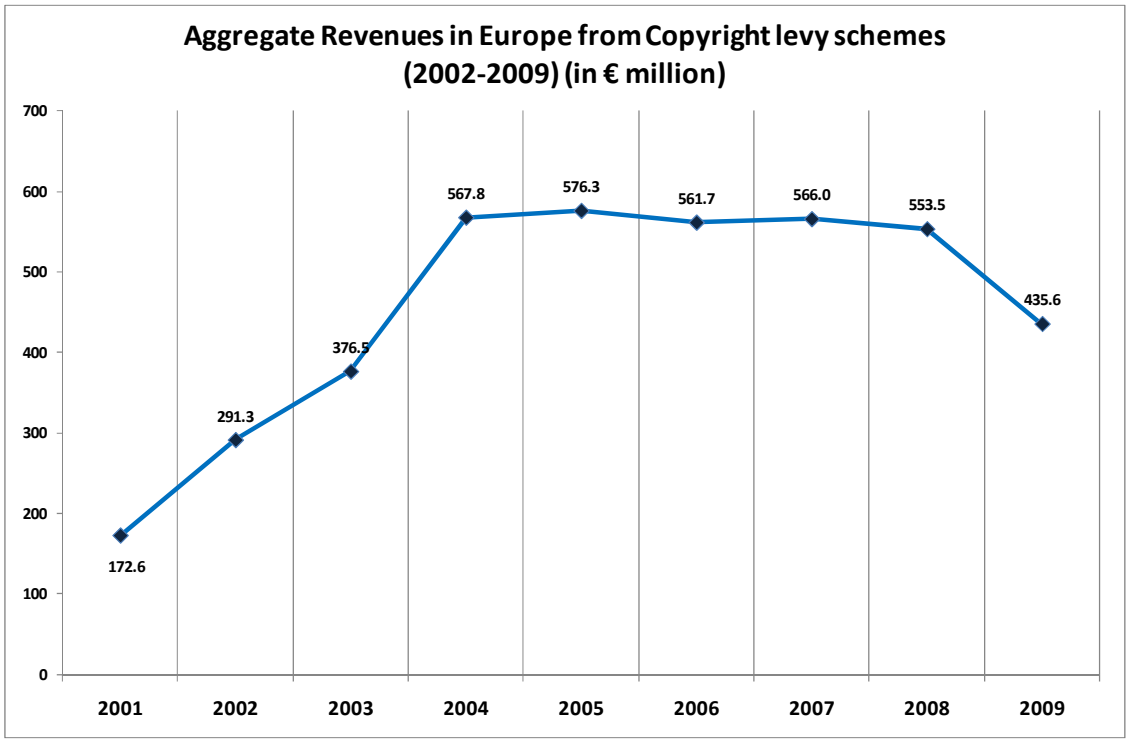
Key examples include:
1 January 2008: Amendment to German copyright law (*UrhG 2. Korb*): Tariffs in law replaced by negotiated tariffs between manufacturers and collecting agency ZPÜ; about €20m of fees withheld by manufacturers.
24 February 2009: Decision by highest Austrian court (OGH, 4 Ob 225/08d); PC levy cancelled; compensation can only be due on equipment that is designed for copying.
21 October 2010: Padawan SL v Sociedad General de Autores y Editores de España (SGAE), Case C-467/08, ECJ: Business media and equipment not leviable; Spanish collecting societies may have to return certain fees collected under Art. 25 of the *Ley de Propiedad Intelectual*.
11 April 2011: Dutch State Secretary for Public Safety and Justice Fred Teeven announces phasing out of levies (levies on recordable CDs will not be replaced by schemes on new media or equipment).
Across the EU, there are currently nine countries where levies for mobile phones are claimed but contested, amounting to about €192 million in 2010 which may or may not become payable.[22]

[22] Information from Digital Europe. For this report, the author made a sample calculation of potential liability for one manufacturer (Nokia) in the German market: Latest published levy tariffs (July 2010): Mobiles with touchscreen: €11, without touchscreen €4. Old tariffs (prior to 1 Jan 2008): Phone with music recording: €2.56 or €1.28 per phone plus €1,02 per 1GB memory capacity. Nokia's market share in 2009 was about 35% (of 51m mobile phone users = 17.85m). x €2.56 (basic old tariff) makes a conservative liability exceeding €45m. Given that every fourth mobile sold in Germany in 2010 is a smart phone (= 6.5m of a total of 26m), and that Nokia had a market share of 28-29% (= 1.8m), that would incur a potential liability of close to €20m for 2010 for smartphones alone. In November 2009, 21% of German mobile subscribers used the phone for online music via application or browser (ComScore, 26 January 2010).

The following graph represents the evolution of total collected revenues from levy schemes since the introduction of the requirement of "fair compensation" in the 2001 Information Society Directive.

Graphic Aggregate Revenues from Copyright levy schemes (2002-2009)

Source: European Commission; de Thuiskopie; Business Software Alliance



According to European artists' platform YOUNISON[23], revenues from private copying levies account for the following percentages of income of European collecting societies: France (SACEM): 7.2%; Netherlands (STEMRA) 8.7%; Belgium (SABAM) 4%; Spain (SGAE): 20%. However, on YOUNISON's analysis of the accounting statements of six Belgian artists from the main music collecting society SABAM (mechanical and performing rights of songwriters and music publishers), the authors' share of levy income is less than 0.65%.

Table: Music Authors' Share of Levy Income in Belgium (SABAM, 2009)

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

Source: Transparency & Accountability in Collective Rights Management, YOUNISON (2010).

[23] http://www.younison.eu

B. Consumer permissions

The previous section explained the unusual structure of a complex system of indirect remuneration of creators and investors, as well as (in some countries) of funding for wider social and cultural purposes. This section deals with the consumer permissions associated with these payments for "private copying".

The narrow focus of the reproduction right (as explained in section 1 above) does not map well onto typical copying behaviour in digital networks. Users may consider activities under the following headings to be private:

(i) Making back-up copies / archiving / time shifting / format shifting

(ii) Passing copies to family / friends

(iii) Downloading for personal use

(iv) Participation in file sharing networks / sharing digital storage facilities

(v) Online publication, performance and distribution within networks of friends

(vi) User generated content / mixing / mash-up (private activities made public)

In the analogue world, the private copying exception was aimed to permit discrete copies for non-commercial use in categories (i) and (ii). In digital networks, the distinction between private and public spheres has become blurred. Regularly, new services are invented that challenge earlier divisions (P2P, social networks, cloud lockers).

Under the Information Society Directive, only activities (i), (ii) and (iii) can possibly fall under the reproduction right (and therefore be eligible for a compensatable exception as private copying). Even within these groups of activities, the scope and legal construction of private copying differs considerably between countries. In some countries, sources need to be lawful, in others not; in some countries, there are a set number of permitted copies specified[24], in others there are definitions of private circles[25]; in some countries, the levy is constructed as a statutory licence, in others as a debt.

[24] For example, German case law indicates (BGH, GRUR 1978, 474) that making up to seven copies for non-commercial purposes remains within the ambit of "private copying".

There is a considerable academic debate whether "private copying" could be conceived as a user right, i.e. as something that could be asserted against the copyright owner, or if the exception is derived from a lack of enforceability, and can be overridden by contract and/or technological measures.[26] These legal arguments reflect the overall policy uncertainty about the levy system: What is the policy designed to achieve? Is state regulated compensation an alternative, or a complement to private enforcement? In many countries, there is a confusing reluctance to acknowledge that *any* consumer permissions are associated with levy payments.

This ambiguity has been particularly acute in a widely reported recent case from the Netherlands. In *ACI et al. v Stichting de Thuiskopie*, the Court of Appeal of The Hague argued that the legitimate interests of the right holders are more adequately protected in a regime that allows downloading from unlawful sources.[27]

However, across Europe, there is a trend by legislators and courts to remove all copies from unlawful sources from the scope of the private copy exception.[28] Consider evidence on the extent of private copying presented to the Copyright Board in Canada (where evidence is compiled and scrutinised in a transparent manner). It shows that in 2006-2007, portable music players (such as iPods) contained on average 497 tracks of music, of which 96% were copied. In total, 1.63 billion copies of tracks were being made in Canada from July 2006 to June 2007. Of these, about half (808 million) were copied on

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[25] Denmark's 2003 amendments of her copyright law, implementing the Information Society Directive, narrowed the private copy exception (not available for borrowed or rented media, and only strictly within family circle). [p. 56, n. 57, EC IA]

[26] See *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy,* London: SABIP (2010). The study includes papers by R. Watt on economic contract theory, M. Kretschmer on creator contracts, and E. Derclaye / M. Favale on user contracts.

[27] Cf. English summary of the case by Vivien Rörsch at http://the1709blog.blogspot.com/2010/11/copyright-owners-better-off-in-regime.html. [Switzerland has adopted a similar policy.]

[28] 2008 amendment to German copyright law (*UrhG 2. Korb*) excludes copies from "obviously unlawful sources ("offensichtlich rechtswidrig öffentlich zugänglich"). France [Cour de Cassation, p. 57]: Copies from illegal sources (including those "uploaded" in breach of the making available right) do not fall under the exception for private copying.

digital recorders; of these 808 million, about 345 million (42%) came from the Internet. Only 20% of these tracks were authorized downloads (e.g. from iTunes). Thus, from July 2006 to June 2007, there were 646 million copies being made from unauthorised Internet sources that found their way on the average portable music player.[29]

In most European countries, despite operating a system of fair compensation, these 646 million tracks could not be covered by levy payments. By focusing on sources rather than consumer activities, the copyright system becomes hard to understand.

[29] Exibit CPCC-3: *Étude de marché sur la copie privée d'enregistrements musicaux au Canada 2006-2007* (11 January 2008); 695pp report prepared by Réseau Circum for Société canadienne de perception de la copie privée (CPCC). The methodology is based on monthly telephone surveys of about 1,000 Canadians (above the age of 12), a sample representative of all Canadians. The data in the report are based on 12,011 "entrevues" between July 2006 and June 2007. Many thanks to Gilles McDougall, Acting Secretary General of the Copyright Board of Canada, for correspondence on the matter.