

About ANSOL

ANSOL, Associação Nacional para o Software Livre (national association for free software), is a non profit Portuguese association for Free Software which aims to divulge, promote, develop, research and study Free (as in freedom) Informatics and its social, political, philosophical, cultural, technical and scientific repercussions.

We also participated in a 2008 EU public consultation on private copy levies¹, and copyright and droit d'auteur laws are quite a central topic whose policies normally affect Free Software in one way or another.

These are our replies to the questionnaire promoted by Mr. Vitorino² who is mediating the 2012 consultation on private copy levies, for which we promptly thank the opportunity to have our opinion heard, even though we disagree with the one sided underlying tone of the questionnaire.

1. Methodology for setting levy tariffs

1) How could methodological coherence in tariff setting for private copying levies be achieved across the EU?

There should be a strong and strict European directive, replacing Directive 2001/29/EC, to drive state members into a similar legislation regarding private copying between them.

We strongly believe that trying to achieve methodological coherence for private copying levies won't have the desired effect if we don't start from the beginning, regulating authors' rights exceptions, in particular the private copy.

The present directive is weak in three major points:

- a) it doesn't standardize the authors rights exceptions, in particular the private copying exception;
- b) it doesn't mandate and enforce that the legal protection given to Technological Protection Measures is only for those cases where the circumvention of those measures have the purpose of law infringing activities (thus, circumventing TPM for, for instance, private copying, **must** be legal);
- c) any compensation scheme from private copying is meant to compensate the financial harm caused from it, and particularly taking into account that the said harm can in fact be a *de minimis value*, and if that's the case such compensation should not take place.

Taking that into consideration, any compensation scheme - private copying levy being an extreme method out of many - should be thought out with a harm calculation instrument as its main component. This is, we believe, no easy task. Since the concept of a compensation for the financial harm caused by private copying was introduced, no study was ever able to calculate that harm. We have, on the other hand, to highlight the opinion of the European Economic and Social Committee on the Communication to the European Parliament, published in the Official Journal of the European Union on the 6th of March 2012, where is is stated:

"As regards the private copying levy, the Committee believes that this is unfair given that private copying is an integral part of fair use. It should certainly not apply to hard drives used by businesses in the course of their industrial and commercial activities."

1 <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp> or more directly at <https://circabc.europa.eu/d/d/workspace/SpacesStore/0eff0fa3-f408-4805-a4fb-03a3d5f914f7/ANSOL.pdf>
2 http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/04/20120402_en.htm

They go on, stating:

"The Committee believes that the tax levied on any form of electronic and magnetic media in order to cover the cost of private copying is based on the presumption of guilt. Instead, the Committee holds the view that private copying is a legitimate practice which enables the user to change media or hardware and which should be recognized as a right of the legal holder of the license for use under the concept of fair use."

2) How could methodological coherence in tariff setting for reprography levies be achieved across the EU?

Reprography levies are meant to be applied as just another kind of private copying levies. Thus, there is no reason to treat reprography copies any different from other kinds of copies, and a new directive should consider them the same.

2. Cross-border sales

1) How should levies be collected in cross-border transactions?

One of the many problems of using private copying levies as a compensation mechanism is that there are no fair solutions to identify who should pay the levies, which is a problem for both the determination of who's liable to pay the levy and the determination who's meant to receive the compensation.

A possible way to solve this and the previously presented problem of calculating the harm, is to have a compensation scheme other than private copying levies. One such scheme could be the estimation of the value of harm by the rights holders, and annexation of that value on the sales price of the work. That way, not only the perceived harm value is compensated, but it is also effectively compensated by those who can effectively exercise the private copying exception. Since the compensation value is in the work's price, cross-border transactions are not an issue needed to be accounted for.

This methodology is already common practice on technical books, usually expensive and targeted to university students, many of which lacking the best financial status. They already expect their books will be copied and thus charge more per book, being University libraries the targeted buyers, rather than students. This practice was described by Umberto Eco in his book "De Bibliotheca":

"All publishers of the scientific type publish books knowing before hand that they'll be copied. Thus, the books are published in not more than one or two thousand copies, cost one hundred and fifty dollars and are meant to be bought by libraries, from which they will be copied. The big Dutch publishers of Linguistic, Philosophy or Nuclear Physics nowadays publish one book of one hundred and fifty pages that costs fifty or sixty dollars, one book with three hundred pages can cost around two hundred dollars, it will be sold to the circle of big libraries, after which the publisher is certain that all students and researchers will work only with copies."

2) How should double payment be avoided in cross-border sales?

Using a compensation scheme other than private copying levies (see previous answer).

3. Determination of the person or entity liable to pay the levy

1) Who should be liable to pay private copying levies?

The principle behind a compensation for private copying is that it is meant to compensate an alleged financial harm supposedly caused by the act of private copying, so the only possible answer for a question formulated like this one would be that those who do the private copy are the ones causing the said harm, thus being the ones liable to pay a compensation.

However, in order for such harm to be big enough in order to require state sponsorship (for instance, via the application of levies), one must first justify it, that is to say, quantify its dimension.

Since private copying is, in our view, a fair use, then it makes no sense to pay a levy for it unless there is a verifiable significant damage. For instance: what significant damage is there when people do a simple thing such as copying a CD they have bought into MP3 format so they can hear it while jogging?

In the past there has been a lot of discussion about this damage. It is our opinion that nobody should pay for an alleged damage that, after some decades, nobody could yet prove it exists; thus it is not quantified.

2) Who should be liable to pay reprography levies?

There should be no distinction between reprography private copying and all other means of private copying.

4. Visibility of the levy

1) Should an obligation be introduced to display the levy on each invoice in the sales chain, including on the consumer's invoice?

If a levy is applied, then by all means yes, all taxes charged must be explicit for the sake of a healthy and honest relationship towards the citizens.

However, we believe that there should not be a levy at all, which would make this a moot point.

5. Private copying and reprography in the context of new digital technologies

1) In what way are levy systems affected by new business models and technological developments? Do such developments allow rights holders to control and license copying by private individuals to such an extent that it could have a material impact on the way private copying and reprography is dealt with at EU level?

Private copying levies, instead of being an incentive to rights holders, hinder creativity and the creation of new and different business models in the digital world. Nowadays more and more devices and services are used to create and transact works, and more and more of them have their own models of compensating creators for their works. While some try to see this new technological developments as a possible way of getting more money from levies (by extending the levies to the

devices that can possibly be used to do private copies), we have to take into account that:

- a) even for those who use such devices to do private copies, private copying is not the main function of said devices;
- b) not only the main usage of those devices is not private copying, but most of the emergent business models - that will suffer if the target devices start paying levies - do not contemplate the existence of private copies at all, mainly by providing licenses for copies (turning the copies authorized copies, and not copies made under the private copy exception), as for example the free culture movements of Free Software and Creative Commons licensed content, which expect redistribution in massive ways and neither desire nor hold any expectations of compensation for those copies, but the mediums where they would be copied would be unfairly taxed anyway.

In sum, instead of trying to analyze the inevitable impact of new technology on private copying compensations (which happens, but there's no problem with it since it is a reflection of the reduction of actual private copies), any legislation regarding private copy must take into account that it shouldn't hinder innovation, research and creativity by taxing this new business models.