

**TELEFÓNICA GROUP COMMENTS ON STAKEHOLDER
CONSULTATION ON COPYRIGHT LEVIES
IN A CONVERGING WORLD**

Introduction.

Telefónica welcomes the opportunity it has been given by the European Commission to explain its position on the copyright levies in the Internal Market and, specially, as regards the role of the levy system in a converging world. To a great extent, Telefónica shares the general issues outlined in the Commission's Consultation Paper, however it considers it necessary that some general remarks be made.

Telefónica's main interest, as a telecom fully-fledged operator, is the development of the Information Society. Technical protection measures are a precondition for the success in the development and take up of broadband and 3G. It is clear that more high-quality content is needed to attract more users to these networks, and to help drive the take-off of the thriving broadband economy envisaged in Europe.

1.- What are copyright levies?

It is not efficient that the debtor of the copyright levy is not the party that carries out and controls the private copying.

Moreover the rationale for imposing levies on certain devices looks back at the technological environment in which the levy system was developed. This environment was characterised by being analogue in nature, which made it impossible to control private copying on an individual scale. It was also conditioned by the fact that these analogue devices (e.g., audio and videotapes) were obviously primarily aimed at making private copies. Therefore, given the limitations and conditions of the existing environment, a wholly imperfect, compensation system was established, albeit the only viable solution at the time, in such a way that levies both on equipment as well as analogue devices were imposed, irrespective of whether they were being used to make private copies or not.

This practice has been adopted by nearly all EU Member States, having been incorporated in the national legal frameworks as the primary mechanism for the

compensation of private copying (the only exceptions are UK, Ireland, Malta, Cyprus and Luxembourg).

In a digital technological environment such as the one we have today, in which the individual control of private copying is feasible and where devices are being used for numerous different uses for making private copies of multimedia content, it is more suitable to implement a specific model of remuneration for private copying (like DRM solutions), which is different from the one being used for analogue products and devices.

2.- Who administers copyright levies?

Telefónica Group is not satisfied with how the collection and distribution of copyright levies functions, specially because of the **lack of transparency** in which collecting societies operate.

Collecting societies currently enjoy a “de facto” or legally-established national monopoly. As a result, their bargaining power on levies-related issues is disproportionate when compared to authors or industry.

Therefore, it would be desirable:

- greater transparency and control of collecting society operations, particularly with respect to governance, accounting and fees, as well as
- greater transparency and legal certainty regarding the transfer of rights.

3.- Distribution of copyright levies

The Table demonstrates the dramatic range in administrative costs among Member States' collecting societies. These enormous differences cannot respond to actual underlying costs but more to the lack of information on collecting societies (what the costs reflected in the Table cover, how the fees are distributed, etc.).

This wide discretion over the functioning of collecting societies is not only against the interest of ICT sector and society in general, but also against the interest of the right holders themselves. It seems clear that there is scope for greater efficiency in the operation of many national regimes.

4.- Digital rights management and digital music sales

Telefónica Group agrees with the Commission's assessment on the growth of digital and technologically protected sales.

Licensing models through digital sales provide better remuneration of right holders. Indeed a licensing model enforced by DRM can provide right holders with remuneration which closely matches actual use of their work. The copyright levies system is unable to do this.

The possibilities offered by technological evolution (TPMs and DRMs) for the protection of intellectual property rights, allows the right holder to determine which copies can be made, to set the price per copy and even charge for this directly. This implies that

authors are fully and exactly compensated for the relevant usage of their works and that consumers are charged only for the actual use they make of the protected works.

However, the co-existence of levies on devices and DRM solutions could have the distorted effect of duplicate payment, in such a way that users pay for access to content two times:

- 1st) through the levy on the access device, and
- 2nd) through payment for access to content through the DRM system.

Therefore, we consider that the current levy system has a very negative impact on the development of digital sales in Europe, by unfairly and unnecessarily raising the end-users' cost of access to DRM-protected content. Indeed levies increase the selling price of digital products to the end user and even worse, the more storage capacity the higher the levy.

5.- Copyright levies and the notion of harm based on private copying

Telefónica Group agrees with the Commission's assessment on the shortcomings of the levy system in the sense that collection and distribution of levies is not based on evidence of concrete harm to right holders.

In any case, it is essential to distinguish between the two different concepts but which tend to be dealt with in an unjustifiably homogenous manner: private copying and piracy. Thus the payment of levies attempts to compensate the losses incurred by authorised private copying and not for piracy. Therefore, pirate copies must be excluded from any harm calculation.

Until now collecting societies have not quantified the "harm" caused by private copying. It is evident that not all private copies amount to lost sale, for instance, when a consumer makes a private copy (thus "authorised", legal copy) of a "protected" CD to enjoy it in a more convenient way, but this consumer would not buy a second CD.

6.- Criteria for establishing whether a levy is imposed on particular equipment or media

The digitisation of technology has introduced great complexity in the imposition of levies on devices, given that the causal link of the "principal use" of devices or supports, which was so clearly obvious in the case of photocopiers or audio/video tapes, has been broken.

The universal use of personal computers or mobile telephones has altered the "principal use" rule. Although they could be perfectly valid instruments for supporting private copying, in no way can it be understood that this activity constitutes their "primary use".

There are numerous reasons for which the imposition of levies on multipurpose devices such as mobile phones is not recommended. Based on a strict interpretation of the principle of technological neutrality, the imposition of levies should be expanded to include all equipment that has a storage capacity (radio, television sets, mobile telephones, personal computers, MP3 players, etc.) This indiscriminate expansion would lead to the generalisation of payments, by going from a levy to a tax that would

be met by all owners of said equipment, even when they were never used to make private copies. Therefore, it could be stated that access to digital content is being taxed in a disproportionate manner.

Telefónica Group considers that the EU should dissuade national authorities from extending copyright levies to digital equipment or storage media if technological solutions are applied to these. Particularly, new levies on mobile equipment, such as mobile handsets, would further hamper the successful development of the European mobile sector and give rise to trade distortions within the Single Market.

On this issue, Directive 29/2002/EC urges Member States to take technological developments into consideration, in particular regarding private copies and remuneration schemes.

7.- Copyright levies and convergence

The copyright levies system could be defined as an outdated 'IPR tax' that needs to be reformed in order to comply with existing EU law and to reflect technological developments.

It is clear that levies, which were created in an analogue world, do not take into account the phenomenon of convergence.

In this regard, we do not consider that infrastructure services should attract a copyright levy in our converging world.

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