

BACKGROUND DOCUMENT**SOME COMMENTS ON THE PRIVATE COPYING REMUNERATION**

Private copying remuneration schemes have been subject to an intense debate during the last year. In this document we have summarised our position vis-à-vis some of the main points of discussion.

- *General Considerations*

Our position vis-à-vis the private copy exception and private copying remuneration schemes is known. Authors' societies recognize the need for this exception to exist and that enforcing their exclusive right of reproduction in the private sphere of the consumer is not appropriate. However, this exception has to go hand in hand with a fair compensation, as stated in the Copyright Directive¹, and we understand that there are a number of reasons that justify that authors and other rights holders be remunerated for acts of private copying through private copying remuneration schemes.

- *The Rationale for Private Copying Remuneration Schemes to Exist*

The first argument that has to be raised is that it is a general principle of the copyright law that rightholders deserve a remuneration when their works are used. Consequently, it is totally justified that copyright holders receive a compensation when works are, as it is the case, used on a very large scale by consumers for private copying purpose.

Moreover, the introduction of such an exception creates a harm for rights holders. This harm is difficult to quantify in economic terms, but indeed all studies point at home recording as one of the reasons for the drop in music sales in the last years.²

However, there are other compelling reasons to justify the existence of private copying remuneration schemes. It is undeniable that sales of products that allow for these private copies to be made are skyrocketing. And this is due to the possibility given to consumers to

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 See for example, Understanding & Solutions, *Music Market Outlook – Formats and Technologies Report*, 10th June 2005.

make copies of copyright protected content, which in turn increases the value that consumers attach to these products. Copyright protected content and consumer electronics goods are thus complementary. Therefore it is only fair that some of these profits are shared with those who provide for the very content that is copied. Otherwise, manufacturers would be free riding on the effort and investment put by rights holders.

A third argument is that this remuneration, even though it is not the most significant source of revenues for rights holders, increases the incentives to create further. This contributes to increasing the quantity, the quality and the diversity of the content that is available, amounting to a growing demand for this content and also for complementary products, such as carriers and devices that allow for private copies to be made.

- *The Functioning of Private copying remuneration schemes*

Private copying remuneration schemes vary from country to country. They have generally proved to be the most effective tool to guarantee an adequate remuneration to rights holders in a framework which provides to consumers the possibility to make copies for private use freely and at a low cost and fosters consequently the sales of products allowing for such private copies. Consequently those schemes permit to achieve a very appropriate balance between the interest of rightholders, consumers and manufacturers of recording equipment and/or blank media.

We understand that for an optimal functioning of private copying remuneration schemes the following principles should be respected:

- Base and rates should be balanced and fair. They should not be set in stone but be open to regular revision, reflecting technological and economic developments on the ground and changes in consumer behaviour in the Member States. Consumer behaviour can be analysed through periodical surveys, which show to what extent they use the different carriers and devices in the market to store copyright protected material. Rates should therefore be set according the level of use of equipment and media to make copies of copyright protected content and the storage capacity of these products.
- Remuneration rates should be discussed and set at the national level and on a case-by-case basis, such that they are optimally adapted to national traditions of copyright protection and to prevailing local conditions in the market. These rates should be regularly decided and reviewed with the participation of the parties involved in a way that is fully transparent.

Even though private copying remuneration schemes have proved to be effective tools, a number of critics have been raised against them. In most cases these critics seem disproportionate and do not seem to aim at improving the system, but rather to serve as an excuse to do away with it altogether or significantly reduce the amount paid by manufacturers and the income it generates for rights holders.

We have summarised some of the issues that have been raised vis-à-vis private copying remuneration schemes in the following points.

- *Double Payment... For Double Use*

One of the arguments that has been put forward in the private copying remuneration debate is that of double payment. It has been argued that, when consumers buy music from online stores, they are paying twice, because they pay rights holders through the online music provider when they make the download of the purchased song, and again when they acquire devices or carriers on which they make copies of that song. We understand that consumers indeed pay twice, but not double, because they pay for two different acts. One act is the initial download, for which rights holders are remunerated through a royalty on the sales price collected on their behalf by their authors' societies, and a different act is the subsequent copies that a consumer may make from the purchased music. This second act would fall under the private copy exception, thus outside the scope of the exclusive right of reproduction. It is therefore remunerated through private copying remuneration schemes. This is no different from what happens in the offline world, where rights holders are remunerated through mechanical licences for the sales of CDs of their music on the one hand, and for the subsequent copies made of those CDs through private copying remuneration schemes on the other.

As a matter of fact, the licences granted by authors' societies only cover the initial download of the music, but not the subsequent copies, which fall under the private copy exception. The limitation that some online music providers apply to the number of copies that a consumer can make of a downloaded song is a purely commercial issue, on which authors' societies have no say. Authors' societies do not collect more or less royalties from online music providers depending on the number of copies that the latter allow consumers to make. As such, the license granted to iTunes, which applies a limitation to the number of copies that can be made from a downloaded song, is no different from that granted to other music service providers that apply no limitation whatsoever.

On the other hand, if we were to agree to a scheme in which consumers, at the time when they purchase a song from a legitimate online music service, also pay for a limited number of private copies that they will presumably do from that song, we would have three different scenarios. In the first scenario, a consumer would make the number of private copies he is entitled to. No more, no less. In this case, everyone, rights holders and consumers, would get what they are entitled to. In the second scenario, a consumer would make more copies than he is entitled to. This is very commonplace, since DRMs are often rendered ineffective once the music is copied on a CD. Here, rights holders would not receive their fair share. In the third scenario, a consumer would make fewer copies than he is entitled to, yet he would have to pay rights holders for the rest.

As we can see, it is difficult to sustain that, at least for the last two scenarios, which are indeed the most common ones, this would be a fairer system than one in which the remuneration is applied on the devices and carriers on which consumers store their private copies. Moreover, the question would arise to know how the private copying remuneration would be determined and distributed. The most probable scenario would be that the sales price of a song is fixed by the online music services in consideration of the market situation and that rightholders receive a share of it as negotiated in their licence agreements with the music services. In such case the most probable outcome is that right holders receive a very low remuneration because there is no certainty that the market situation will allow music

services to increase their sales price significantly enough to take into consideration the possibility to make copies.

Lastly, it is true that in some countries a private copying remuneration is applied to computer hard drives, the very medium where the initial download is stored. However, the reason why private copying remuneration is then applied to hard drives is because, as shown by surveys, they are indeed also used to make private copies of copyright protected material. It is these copies for which remuneration is paid and not for downloads.

- ***DRMs and Private Copying Remuneration***

Authors' societies are supportive of solutions that improve the management of online and mobile exploitations of copyright protected content. Indeed, they work with other operators in the development of DRM-solutions that help in the identification of musical works (the DDEX project) and facilitate interoperability (Moebius).

Specific types of DRMs limit the number of copies that consumers can make. These types of DRMs are sometimes referred to as Technological Protection Measures. These TPM, however, face numerous problems. They are not entirely effective, since they are constantly cracked, and even if they are not, they are often rendered ineffective once a copy of the TPM-protected song has been made on a blank CD. They lack consumer acceptance. And finally, there are some operators that are not convinced of the viability of TPM-based models: for example Apple's CEO, Steve Jobs, already made clear that he did not share the view of some record producers vis-à-vis the limitations on the number of copies that a consumer can make; EMI has decided to allow music services to provide its recordings to their clients without TPMs; other music service providers are already selling music without TPMs.

That is why any initiative in the line of phasing out private copying remuneration schemes by DRMs should not be considered.

Again, although DRM-solutions are applied to determine the payment of the initial download, in a survey conducted by GESAC amongst its members, it was confirmed to us that no payment has been received through DRM-solutions for acts of private copying.

Our position on this point is very clear: authors' societies grant licenses for the initial download but not for the subsequent copies. If the online music provider decides to apply limitations on the number of copies that consumers make and these limitations are accepted by the market and are adequately enforced through DRMs, this will have an impact in the number of private copies that consumers make. If that is the case, this will on the one hand have an impact on sales of carriers and devices that allow for these copies to be made, and will also be reflected in the surveys that authors' societies regularly conduct in order to determine the consumer behaviour and apply private copying remuneration rates accordingly.³

³ Having said that, however, it must be taken into consideration that in some instances the remuneration is not set according to the degree to which consumers use these products to make copies of copyright protected content. This is the case for example when reduced rates are applied to certain products in order to facilitate its market penetration. In those cases, if DRMs prove effective enough to reduce private copies, a further reduction in the tariff would not be automatically justified.

- *The Debate on the Legal Source*

Another argument that has been put forward is that only copies of works that have been legally acquired do fall under the private copy exception and have thus to be compensated.

The consequence of adopting such a measure would therefore imply that no compensation would be due for copies from an illegal source – e.g. copies made on an MP3 players of songs that have been illegally downloaded –, and the income of rights holders would be significantly reduced (subject to the observation made at the end of the previous point concerning reduced rates established to facilitate the market penetration of equipment and/or blank media). The economic implications of such a measure are thus significant.

From a political point of view, we think that the way to tackle this problem is the adoption of measures to reduce online piracy and thus illegal downloading and it would be politically unfair to adopt a decision that deprives rights holders from this minimal form of compensation that is private copy remuneration.

From a legal point of view, it must be recalled that the Copyright Directive does not include the legal source requirement. Article 5.2.b) defines private copies as “*reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial*”, irrespective of this copy being made from a work that has been legally or illegally acquired.⁴

From an economic point of view, too, it is hard to understand why only copies made from legitimate sources should be remunerated. Whether coming from legal or illegal sources, these copies have the same effects: rights holders suffer from an economic harm and manufacturers and importers of devices and carriers on which these private copies are made see their profits increased.

A third argument is based on justice consideration. Should these copies not be remunerated, then authors and composers would suffer from a double harm, because not only are they not remunerated for the initial illegal download, but neither do they receive a compensation for the copies made thereof.

Also, making a distinction between the different origins of the content copied is a difficult task. Getting information on the origin of this content is complicated. Surprising as it may sound, there is still a very significant percentage of people who do not consider acts of P2P illegal and, more generally, people are often unaware if the content they have access to is legally exploited or not. Moreover, those consumers who download content from illegal sources tend to be reluctant to admit it. Given the difficulty to determine the origin of this content, we just have to assume that consumers are acting legitimately.⁵

⁴ As a matter of fact, it is our understanding that in some Member States, notably the Netherlands, private copies made from an illegal source fall under the private copy exception.

⁵ Indeed, in the Netherlands a download is not considered illegal, even if it is made from an illegal source. It is argued that it is difficult for the consumer to know whether the source is legal or illegal. While we do not share this view, it is clear that these kinds of situations do not help in clearly differentiating the origin of the content.

Another argument that speaks against compensation for private copying being charged only if the copy is made from a legally acquired original is that such a rule would introduce an incentive to make copies of copyright protected material coming from an illegal source, thus increasing the demand for this type of material.

Lastly, and in order to avoid any misunderstanding, we want to recall that, as for the debate on whether the initial download should be considered a private copy or not, our position on this point is that acts of download, legal or illegal, fall under the exclusive right of reproduction and not under the private copying exception which only involves subsequent copies.

- ***Private copying remuneration schemes and the Internal Market***

Today, EU Member States apply different private copying remuneration schemes, or none at all, if they have opted for not implementing the private copy exception, like the UK⁶ and Ireland, or are in breach of the Copyright Directive, like Luxembourg,⁷ Cyprus or Malta.

The existence of differences in the way private copying remuneration schemes have been set up obey to a variety of reasons: different legal traditions, different economic developments, differences in consumer behaviour, and sometimes the success of manufacturers in excluding or limiting the scope of application of the private copying remuneration schemes of some countries about certain products that indeed are capable of making private copies.

The existence of different private copying remuneration schemes (or none at all) in the different EU Member States has been presented as an obstacle to the free movement of goods. GESAC is not aware of any Commission decision or ECJ judgment in that sense.

In any case, GESAC's position is that the existence of different systems in different countries is not a problem in itself, as long as, whenever a product crosses the border, it is subject to the payment of the remuneration applicable in the country of destination.

In order to reinforce this, GESAC is preparing a document with a number of legal and practical measures that should be adopted and that will be made public as soon as it is finalised.

- ***Purchases abroad and Distance Sales***

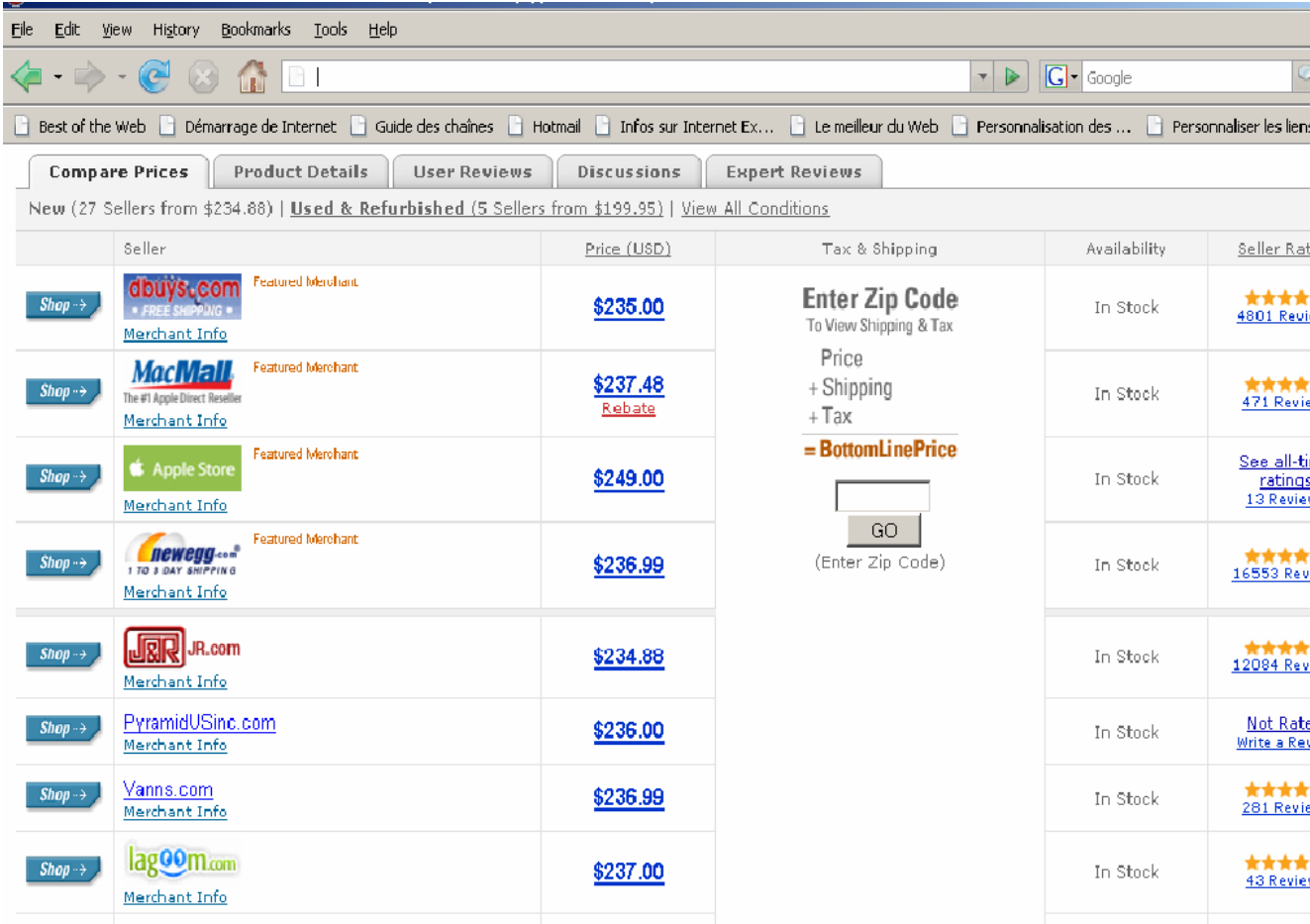
We understand that the applicable remuneration should be that of the country where the consumer is located at the time of purchase.

Therefore, if a consumer, when visiting a foreign country, decides to buy a product which is subject to the payment of private copying remuneration in his country of residence, he should not be held liable for this payment upon return.

⁶ The UK has indeed a limited private copying exception for time-shifting purposes.

⁷ The situation of Luxembourg, where no system is in place, despite the fact that there is a private copy exception, is particularly relevant, since it affects the application of private copying remuneration schemes in the surrounding countries.

In cases of distance sales (i.e.: online retailers), the remuneration due should be that of the country where the consumer is located and the debtor should be the distance seller. From a technical point of view such a scheme is easy to put in place. Distance sellers have to ask customers their country of residence anyway, in order to calculate the VAT applicable and to make the shipments. So, they can give him or her the bottom line price, including the private copying remuneration applicable to the product they wish to purchase, once the ZIP Code is introduced. This is often done by websites in the U.S., where online retailers have to apply the sales tax of the state where the consumer is located. This is how it works:



- **Transparency**

Much has been said on the transparency of collecting societies in the setting, collection and distribution of private copying remuneration. GESAC is in favour of a high degree of accountability with respect to the application, collection and distribution of private copy remuneration.

However, as regards the setting of the tariffs, the truth of the matter is that in no European country are these tariffs set unilaterally by collecting societies. They are either set by Law or Regulation, or through negotiations between rights holders, the ICT industry and in some cases the consumer organisations.

In the area of distribution, we understand that it is the rights holders alone who should be entitled to demand greater accountability. Apart from the control exercised on all their

activities by local authorities, usually through the Ministries of Culture or Justice or commissions appointed by national regulations, right holders who may be unhappy with the degree of transparency or how the monies are being distributed can on the one hand present claims and, on the other hand, demand for the system to be improved in the General Meetings or any equivalent body of the societies.

Regarding collection, any measure that is proposed as regards transparency should apply to all stakeholders, including both those who have to make the payments as well as those who collect them. In that sense, collecting societies are faced with obstacles to access the documents and records of debtors of the private copying remuneration. Access to these documents and records is essential to make sure that debtors are indeed complying with their obligations.