

**SECOND CALL FOR COMMENTS
“FAIR COMPENSATION FOR ACTS OF PRIVATE COPYING”****I. Preliminary Remarks**

GESAC represents 34 of the main collective copyright management societies (authors' societies) in the European Union, Norway and Switzerland, that administer the royalties of almost 500 000 authors, composers and writers of a variety of sectors (music, audiovisual, literary, visual arts, etc.), music publishers and other rights holders.

GESAC welcomes the opportunity to comment on the issues raised in this second call for comments on private copying and salutes Commissioner McCreevy's willingness to *“take a fresh look at all the issues involved”*. When this consultation was launched, Commissioner McCreevy rightly stated that *“[t]here can be no question of calling into doubt the entitlement of rightsholders to compensation for private copying”* and that *“[i]f pragmatic and workable solutions are to be found, all sides need to come to this debate with a constructive approach.”*

We support this constructive approach and look forward to looking at how the efficiency of private copying schemes can be improved.

However, GESAC regrets that the consultation, apparently launched in a great hurry, is based on a background document that contains a number of inaccuracies and which provides an unbalanced and, at best, only a superficial view of the issues and is clearly weighted in favour of those who want to eliminate or minimize private copying remuneration. For example, too much weight is given to issues with limited economic impact, such as whether rights holders are being paid once or twice for private copies made of legal downloads, whereas other issues of the utmost importance for right holders, such as the fight against online piracy, would have merited more attention.

Moreover, questionnaire portrays Private Copying Remuneration Schemes in an unnecessarily negative light.

We are disappointed that the two documents reproduce the spirit of the 2006 initiative and, as such, are in contradiction to the Commission's expressed will to *“to come to this debate with a constructive approach,”* to quote Commissioner McCreevy again.

In 2006, the intensity of the debate did not allow stakeholders to discuss important issues that would help make current private copying remuneration schemes more efficient. GESAC believes that focusing on the issues that were on the table in 2006 will probably make this initiative fail, too. Regrettably, most of the issues that were discussed at that time had one aim only, namely to reduce or eliminate the payments of private copying remuneration. In an environment where more and more consumers are increasingly using recording equipment and media to make private copies of copyright protected material, it is hard to understand how the Commission could justify continuing with this approach.

GESAC is confident that, with the support of all stakeholders, there is scope for improving the efficiency of current schemes, notably on their cross-border application, and will use this opportunity to share with the Commission some proposals to realise this. You will find these proposals in Annex I of this document. We believe that they could be used as a starting point for a dialogue between all relevant stakeholders.

II. Comments on the Background Document

As mentioned above, the background document contains a number of inaccuracies, biased interpretations and views and does not reflect the reality. This section includes GESAC's main comments to the document.

Please note that our comments in this submission are valid for all sectors. However, given the Commission's main focus on the impact of private copying remuneration on music, many of our examples refer to this sector only.

- *Countries with a Private Copying Exception and no Compensation Mechanism*

When describing the situation in the UK and Ireland, the background document seems to be somewhat contradictory. The Commission states that in the UK and Ireland "there is no private copying exception, so acts of private copying by consumers are not authorised." However, it acknowledges that acts of private copying are allowed indeed, if limited to time-shifting purposes. It says that "[i]n Ireland and UK, the private use exception is narrowly limited to copies of broadcasts (and of performances in Ireland) made for "time shifting" purposes." Indeed, these acts would fall under the scope of art. 5.2.b) of the Copyright Directive since they are "reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial". For all the above reasons, we believe that it is more accurate to say that, albeit limited to certain acts, there is a private copying exception in the UK and Ireland, for which right holders receive no compensation through private copying remuneration schemes or any other means.

GESAC is aware that the UK Government is currently considering the introduction of an exception for format shifting. In an unprecedented initiative, the UK music industry as a whole, including composers, songwriters, managers, producers, record labels, music publishers and their collecting societies, under the name of the Music Business Group, has proposed that rights holders be compensated if an exception is to be introduced. Even though the proposal made by the Music Business Group would not be able to be considered a private copying remuneration scheme, GESAC welcomes and supports this initiative, since the introduction of a format shifting exception without compensation would definitely put the UK in conflict with the Copyright Directive.

On the other hand, the Commission correctly describes the situation in Malta and Luxembourg, where there is a private copying exception but no private copying remuneration scheme. The Commission forgot to mention, however, that according to a study it commissioned, Cyprus is in the same situation.¹ Also, it should be added that rights holders do not receive compensation by any other means.

In all these five countries there is thus a private copying exception, albeit limited in the cases of the UK and Ireland. Since rights holders are not compensated for this exception, the Commission should state in the background document that these countries are in breach of the Copyright Directive.

¹ Institute for Information Law, University of Amsterdam, *Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*, February 2007.

As regards Greece, AEPI has in 2007 started to collect retroactively private copying remuneration on recording media and equipment, further to lawsuits filed against Greek importers/ producers.

- *The Scope of the Private Copying Exception*

The background document briefly touches on the scope of the private copying exception. While we salute that the Commission seems to accept that the uploading of works or sound recordings would not fall within the scope of the exception, we are somewhat puzzled that the Commission remains silent as regards acts of downloading. For the avoidance of doubt, in our view, acts of downloading would not fall within the scope of the exception, because it would be contrary to the three-step test. We certainly regret the Commission's silence on this issue both in this background document as well as in the *Report on the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society*, since this silence creates uncertainty as to the scope of the exception.

- *Compensation vs. Remuneration and the notion of harm*

While the Commission seems reluctant to make an interpretation on whether or not acts of downloading fall within the private copying exception, the background document includes one on what the Community legislator meant by "compensation". Basically, the Commission understands that "fair compensation" and "equitable remuneration" are not identical terms and that, since the former is "linked to the possible harm that derives from acts copying", art. 5.2.b) "therefore requires that any payment to rightholders must be compensatory in nature."² However, there is no case-law of the European Court of Justice on this issue. There is therefore no way to tell if this is the correct interpretation or not.

We would like to provide a different interpretation, in case there is a change in the policy of the Commission. First of all, we would like to stress that we completely disagree with the background document's interpretation of recital 35 of the Copyright Directive. Contrary to what is stated in footnote no. 7 of the document,³ the Copyright Directive does not seem to include an obligation to take into account the possible harm to rights holders. The wording in English is the following: "[...] a valuable criterion would be the possible harm to the rightholders resulting from the act in question." This part of the recital is drafted as an indication, not as an obligation.⁴ The same is true for the rest of recital. The following sentence is not drafted in compulsory terms either: "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."⁵ Nor is the last sentence of the recital: "In certain situations

² Page 4 of the background document.

³ As a matter of fact, the Commission should have included recital 35 itself, instead of an inaccurate summary.

⁴ Note that the wording used is "would be" instead of "will be". The same is true in other linguistic versions: "Für die Bewertung dieser Umstände könnte der sich aus der betreffenden Handlung für die Rechtsinhaber ergebende etwaige Schaden als brauchbares Kriterium herangezogen werden." (German); "[...] un critère utile serait le préjudice potentiel subi par les titulaires de droits [...]" (French); "[...] Un criterio útil para evaluar estas circunstancias sería el posible daño [...]" (Spanish).

⁵ The French version reads: "Dans le cas où des titulaires de droits auraient déjà reçu un paiement sous une autre forme, par exemple en tant que partie d'une redevance de licence, un paiement spécifique ou séparé pourrait ne pas être dû."

where the prejudice to the rightholder would be minimal, no obligation for payment may arise.”⁶

A second issue on which we disagree is the meaning that the background document gives to the term “*compensation*”. The dictionary defines compensation as the “*act or principle of compensating*”, and indeed includes remuneration as a synonym. “*Compensating*” in turn has two meanings:⁷

1. *To pay someone in exchange for work done or some other consideration.*
2. *To make up for; to do something in place of something else; to correct or fill.*

Clearly, the Commission only took into consideration the second definition and completely disregarded the first one. In our opinion, both definitions should be taken into account. This explains why recital 35 does not impose an obligation to take into account the possible harm, but merely indicates that this would be a - but not the only - criterion to determine the level of such compensation. It is generally understood that the European legislator wanted to make clear that fair compensation was due to rights holders, not only to make up for the harm caused by acts of private copying, but also to remunerate them for providing the content that consumers tend to copy most.⁸

We have noticed that the consumer electronics industry has used the indication that harm be taken into account when setting the tariffs to introduce the idea that products that merely allow consumers to make private copies for time or space-shifting be excluded from the payment of private copying remuneration. The idea is that rights holder already received a payment when the consumer acquired the work and sound recording, and, since there is no harm when the consumer makes a copy of this content there is no reason to compensate for a second time – in none of the meanings of the term – the rights holders. Consequently, a device such as an MP3 player that merely allows the consumer to listen to his discography in a different place would therefore not bear a private copying remuneration. If we take this argument to its limits, we can think of the following situation. Imagine that a consumer has purchased an MP3 player with a big storage capacity. Imagine, too, that the consumer has realised that this MP3 player is not comfortable enough when he goes jogging or to the gym and decides to acquire a smaller model of the same brand. Could he argue that the patent royalties be reduced from the final price on the grounds that he had already paid for those when he bought his first MP3 player and that, since the new one is just used in different situations as the old one, no harm is suffered by the patent developer?

In both instances, equipment and/or media are subject to the payment of remuneration to the right holder. OMA, the DRM used on most mobile phones costs (a) US \$1.00 per device (payable by the party that offers the device to an end user) and (b) 1% of any transaction in

⁶ The French version reads: “*Certains cas où le préjudice au titulaire du droit serait minime pourraient ne pas donner naissance à une obligation de paiement.*”

⁷ Source: Wiktionary.

⁸ This possibility given to consumers in turn increases the value that consumers attach to recording media and equipment. Since copyright protected content and consumer electronics goods are thus complementary, it is only fair that some of these profits are shared with those who provide for the very content that is copied and which is driving those profits. Otherwise, manufacturers would be free riding on the effort and investment of rights holders. Also 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.

which an end user pays for delivery of digital content using OMA 1.0 (payable by the service provider).⁹

These fees are payable directly or indirectly through affiliations to Microsoft, member of the BSA, Sony. Corp., member of the RIAE, Matsushita Electric Co. also member of the RIAE and Philips Electronics N.V., member of the EABC.

MP3 itself is protected by over 300 patents¹⁰ with a license fee of US \$0.75 per device and a royalty rate of 2% of sales price payable to Thomson, member of the EICTA.

We do not accept that there is any justification for different approaches for patent royalties and for private copying remuneration.

- *The Norwegian Model*

Throughout the document, the Commission describes the alleged drawbacks of private copying remuneration schemes, saying that they “*can only function as 'rough justice' systems.*”¹¹ However, the document also points at the Norwegian model. Interestingly enough, this state-run fund, in which all tax payers pay the compensation due to rights holders, does not seem to be considered as rough justice by the Commission.

- *Determining the equipment and media on which a private copying remuneration is applied*

The background document states that “[i]n many Member States it is incumbent on the collecting societies or an administrative body, to determine the equipment on which a levy is applied and the amount that should be levied.”¹² The ICT industry has spread the rumour that collecting societies unilaterally set private copying remuneration. The way the background document is drafted, the Commission would seem to echo this position. However, the Commission should know by now that this is untrue. As already indicated in our submission to the 2006 consultation,¹³ depending on the countries, private copying remuneration is set through legislation or through negotiation between the interested parties.

- *Reprography vs. Private Copying*

While it seems that the initiative would only cover private copying and its compensation, the background document is full of references to the reprography exception and its remuneration. This creates an enormous confusion, particularly on whether reprography remuneration schemes are covered by the initiative or not. Moreover, the rationale of one and the other compensation is not the same, nor are the specific elements that determine the equipment to be levied and the amount of such remuneration. This makes comparisons between one and the other system extremely inaccurate. For the avoidance of doubt, we would suggest that both

⁹ Source: http://www.mpegla.com/news/n_05-01-06_drm.pdf

¹⁰ Source : <http://www.mp3licensing.com/patents/index.html>

¹¹ Page 8 of the background document.

¹² Page 5 of the background document.

¹³ Page 3 of GESAC's 2006 contribution.

exceptions and their compensation be treated separately. Consequently, if the current initiative is focused solely on private copying, all references to reprography remuneration schemes should be deleted.

- *The Sources of the Information*

GESAC does not quite follow the rules applied by the Commission when indicating the source of the information. For example, GESAC's name often appears in the background document as the source of some information. However, the right source would be either ECONLAW, the consulting firm that prepared the study "Economic Analysis of Private Copying Remuneration", or the sources ECONLAW used in said study. Referring to this study as GESAC's study is also not accurate, as it would not be referring to the study prepared by Nathan Associates "Private Copying Levies on Digital Equipment and Media" as the Copyright Levy Reform Alliance's study. In the second case, however, the Commission rightly omitted the name of the organisation that commissioned the study. The same would go for a study commissioned by the DG MARKT. Note that in the first footnote of this document we refer to a study prepared by the Institute for Information Law of the University of Amsterdam. This study, in our understanding, should not be quoted as a Commission or DG MARKT study, merely because it was prepared at the request of this institution.

- *On Rate Differentials*

In point 3.2 the Commission focuses on rate differentials. However, as Table 3 of the background document shows, there are not only different rates in the private copying remuneration, but also significant differences in prices of DVD-R. As the Commission had the opportunity to see in the ECONLAW report it quotes, these differences appear also in other products subject to private copying remuneration. The Commission may want to comment on these differences, too, in order to improve the analysis.

- *The Alleged Lack of Consensus on Figures related to Private Copying*

The background document states that there is no consensus on figures related to private copying. We cannot but disagree with this statement, which only brings confusion to the debate. The Commission gives as an example the disparities between the figures provided by Stichting de ThuisKopie and those provided by Nathan Associates. However, these figures cannot be compared. Contrary to what the Commission states, the figures provided by Stichting de ThuisKopie are not estimates, nor are they conservative or adventurous. These are real figures on actual collections for private copying remuneration. Nathan Associates' figures, on the other hand, are estimates, which can indeed be conservative or exaggerated based on the methodology used. In this case, taken into account the extreme differences with the real figures provided for by Stichting de ThuisKopie, we would advise the Commission to disregard them, since the methodology has proven to be erroneous.

As for the figures provided for in Table 4, we regret that the Commission did not include more recent figures:¹⁴

	2005	2006	2007 ¹⁵
Austria	17.627	15.846	16.413
Belgium	21.458	19.984	19.574
Czech Republic	2.286	2.73	5.388
Denmark	6.300	5.000	4.715
Finland	11.575	11.617	15.515
France	155.320	156.005	163.680
Germany	153.723	156.094	n/a ¹⁶
Hungary	9.762	12.489	11.540
Italy	72.791	70.922	70.956
Latvia	0.503	0.800	0.812
Lithuania	0.249	0.126	0.084
Netherlands	26.807	25.723	19.600
Poland	3.837	5.094	4.291
Slovakia	0.611	0.683	0.904
Spain	58.701	55.656	40.727
Sweden	15.484	18.873	20.983
TOTAL	557.034	557.642	395.182*

In € million. * Germany not included

What we can see if we take figures of recent years is that, contrary to what the background document would suggest, revenues are not growing. Revenues have rather stagnated. This trend, however, does not seem to be reflected in the consumer electronics industry. If we take a look at figures of sales of consumer electronics, we see continued growth.¹⁷

Total Digital CE	2002	2003	2004	2005	2006	2007^(f)
Western Europe	18,844	25,125	32,566	40,359	47,341	50,418
France	3,677	4,849	6,000	6,800	8,100	8,600
Germany	4,331	5,402	6,900	8,700	10,100	10,700
Italy	1,560	2,386	3,700	4,600	4,700	4,800
Spain	1,633	2,549	3,300	4,100	4,800	5,100

In millions of Euros. (f): Forecast

The Commission should include these elements in its analysis.

- *The reference to CISAC Model Agreement and the Deductions for Cultural Purposes*

The reference made in the background document to CISAC Model Contract of Reciprocal Representation between Public Performance Rights Societies is inappropriate since this Contract concerns public performance activities, and would therefore not be applicable to collection and distribution of private copying remuneration.

¹⁴ Source: Stichting de ThuisKopie.

¹⁵ Please note that the comments on private copying collections for 2007 made in our answer to question No. 5 are valid here as well.

¹⁶ ZPÜ has not yet finalized its annual report. The figure for Germany for 2007 will be handed in as soon as ZPÜ's annual report is completed.

¹⁷ Source: ECONLAW, *Economic Analysis of Private Copying Remuneration*, September 2007, quoting figures of the European Information Technology Observatory.

In any case, the background document says that said contract “*recommends the deduction of up to 10 percent of domestic revenues for social and cultural funds.*”¹⁸ This statement is difficult to reconcile with the actual wording of art. 8 (II) of said contract, which reads:

“When it does not make any supplementary collection for the purpose of supporting its members’ pensions benevolent or provident funds, or for the encouragement of the national arts, or in favour of any funds serving similar purposes, each of the societies shall be entitled to deduct from the sums collected by it on behalf of the co-contracting society 10% at the maximum, which shall be allocated to the said purposes.”

It seems clear from the wording of this article that the aim of said provision is not to recommend any deduction, but rather to establish a cap on how much can be deducted for cultural funds, if such deductions are applied. If that is not the case the signatory societies do not usually include this provision in their reciprocal representation agreements.

As regards Table 5, there are some inaccuracies that will be addressed in our answer to question number 7.

- *On the Refund Schemes*

The background document gives a very inaccurate description of the situation, particularly in the two examples given.

In Table 6 the Commission acknowledges the existence of refund schemes in almost all the countries with a private copying remuneration schemes. However, in the same table, it suggests that many operators are unable to get a refund. The fact that certain operators cannot in certain countries, as for example in Germany, apply *directly* for a refund does not mean that a refund is not available. They just need ask the manufacturer or importer who has paid for the private copying remuneration to apply for the refund and then pass money back to them. As will be discussed below, this system works in practice, allowing for refunds to be effectively granted.

As regards the reference to the non existence of a refund scheme in the French Law, the document should have added that it exists in practice.

Finally, concerning the second example given, which seems to portray the Amazon case in Germany and Austria. Amazon is the only case known to ZPÜ – the German private copying collecting society –, in which the German refund system is said to cause difficulties. The Commission should know that Amazon never contacted ZPÜ and never asked ZPÜ to discuss refunds. Still, the Austrian private copying collecting society AUSTROMECHANA, in cooperation with its German counterpart ZPÜ, informed Amazon of the possibility of getting a refund for exports to Austria. Indeed, ZPÜ has consistently held that it would accept AUSTROMECHANA’s report of payment as proof of export. As Amazon refused to pay the remuneration due for sales made to Austrian residents, it has been sued by AUSTROMECHANA.

¹⁸ Page 9 of the Background Document.

- Grey Market

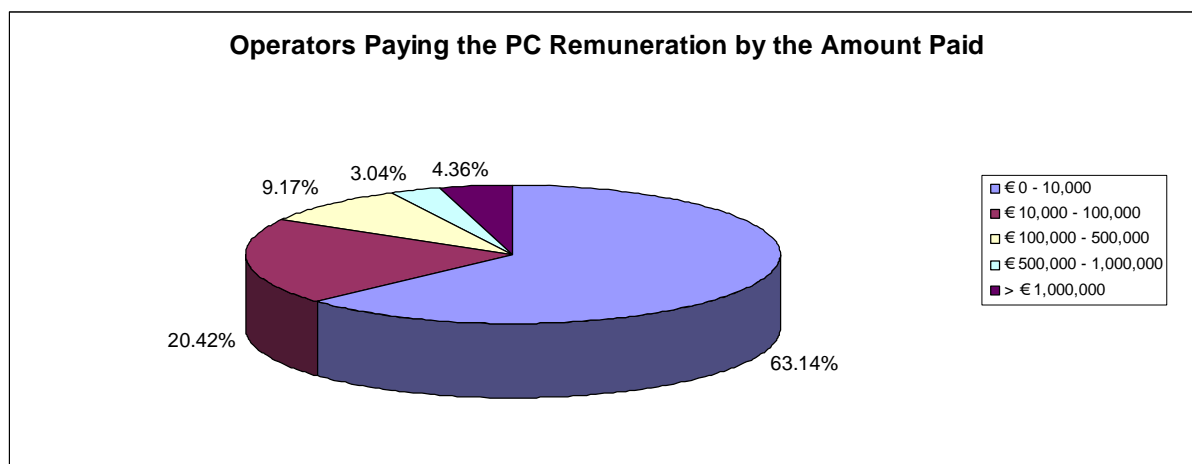
As regards “grey market”, GESAC welcomes that the Commission acknowledges the fact that it has the “*side-effect*” of creating revenue losses. However, the ones that suffer these revenue losses are rights holders themselves, not the collecting societies.

The Commission seems to believe that private copying remuneration schemes rely solely on self-reporting by debtors. This might also explain the assumption that “[t]he current administration of private copying levies might encourage “grey markets””.¹⁹ Collecting societies obviously rely on self-reporting, but they also audit debtors and file lawsuits in case operators do not pay the amounts due.

GESAC also regrets that no reference is made to the fact that while the consumer electronics industry is complaining about the grey market and giving figures of its size, it is itself feeding it.

At this point, it seems relevant to discuss one argument that has repeatedly been put forward by the ICT industry. In another attempt by the ICT industry to discredit the private copying remuneration schemes, it has been reported that collecting societies only focus on major operators and leave small ones untouched. This, as many other statements of the ICT industry, is plainly wrong. Collecting societies have an enforcement policy aimed at operators of all sizes. In fact, GESAC looked into the situation in eight countries of different sizes where the private copying remuneration is due.²⁰

Here are some 2006 figures on the split of operators currently paying the remuneration by the amount of money they pay:

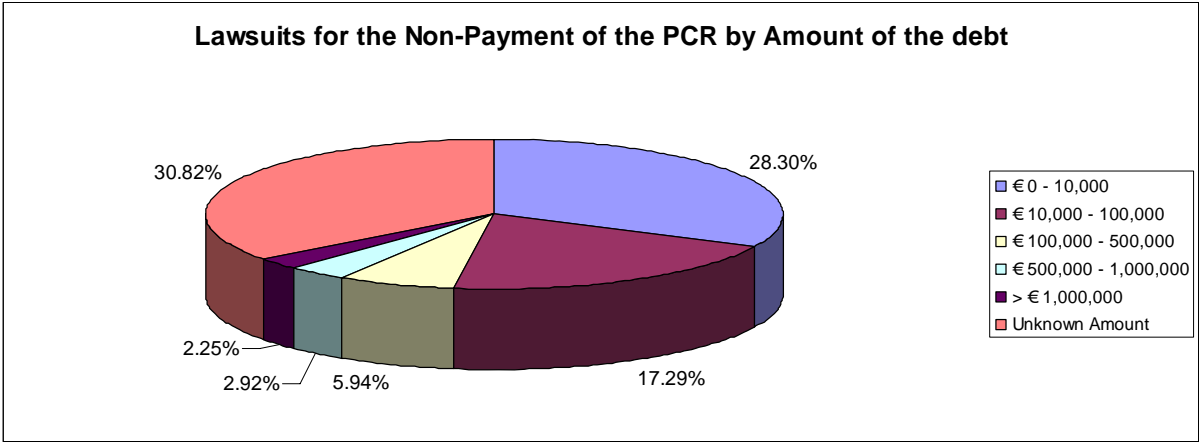


This shows that, on average almost two thirds of operators paid less than €10,000 in 2006 and over 80% paid less than €100,000.

¹⁹ Page 12 of the Background Document.

²⁰ The countries that were analyzed were Austria, Belgium, Finland, France, Germany, Italy, The Netherlands and Spain. Annex II includes a country-by-country breakdown.

GESAC also conducted a survey on the amount of the private copying remuneration debt for which collecting societies filed lawsuits in 2006. The results were equally indicative that collecting societies do not apply a selective enforcement policy:



As you can see, on average, almost two thirds of the lawsuits filed against debtors of the private copying remuneration were filed either for an unknown amount or for a sum below €10,000.

Another point that merits attention is the figures of the Recording Media Industry Association of Europe referred to in the background document. It seems that amongst the countries analysed to come up with the quoted figures, there are some that do not have a private copying remuneration scheme. That would include the UK, Ireland, Norway and Luxembourg.

- *On the Content Copied by Consumers*

GESAC welcomes the Commission’s inclusion of a break-down of what blank CDs are used for.²¹ However, this should have identified the territory of said break-down, since consumer behaviour varies from country to country. Also, we do not agree with the conclusion that Table 8 “reveals that at least half of the consumer uses are not related to copying of protected material.”²² If we add the percentages for home audio recording, recording of other content and the recording of downloaded content we come to the figure of 59%.

Also, including break-downs of use of other products, such as DVD-R, MP3 players or mobile phones, would have helped get a better picture of such behaviour.

- *On Alleged Double Payment*

The first thing GESAC would like to comment on is that the background document does not accurately reproduce the wording of recital 35. The background document says that no compensation “is required” in cases where rights holders have already received payment in

²¹ Page 14 of the Background Document.
²² Page 14 of the Background Document.

some other form.²³ The recital wording actually says that no compensation “*may be required*” in those cases. Contrary to what is stated in the background document, the recital does not exclude that private copying compensation where rights holders may have received payment in some other form. Again, in order to avoid misunderstandings, we would recommend that in those cases the Commission reproduce the recital verbatim.

Having said that, authors’ societies do not condone double payment. 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. This will be dealt with in greater detail in our answer to questions 22 and 23.

On the other hand, the Commission has not correctly understood the wording of the sample clause it reproduces in footnote 35, thus the misleading statement – at least as regards authors’ societies operating private copying schemes - that “*consumers often pay for the download itself and for a certain number of subsequent authorised copies via platform shifts to other mobile listening devices.*”²⁴ The fact that the provision “*in return for remuneration paid under any form whatsoever including for the purchase of any other product or service,*” is placed right after “[...] *allowing a consumer to receive*” has not been decided randomly. It obeys to the will to set clear that the licence is granted, and remuneration is paid in return, for any and all action allowing the reception of the file containing the musical work. The “any and all action” expression, to which the Commission has added emphasis, refers to actions allowing the reception, not any subsequent act. In any case, the Commission should have indicated the origin of these clauses, notably if these sample clauses are included in contracts licensing exploitations in countries where there is no private copying exception nor private copying remuneration schemes.

To give just a couple of examples, here are a sample clauses of the contract of the Spanish and German authors’ societies (SGAE and GEMA) for on demand exploitations:

- SGAE:

“SGAE grants the licensee, under the conditions and within the limits established in this contract, the non exclusive rights necessary to undertake the following operations:

Reproduction, be it directly or by a third party, of the works of SGAE’s repertoire from legally produced and distributed phonograms or videograms into a digital file in order to provide the service offered by the licensee and with the sole purpose of:

*Making the works of SGAE’s repertoire available to the recipients of said service, so that they can access the requested work on line from a place and at a time individually chosen by each one of them, with the aim of allowing one online permanent reproduction (download) of the musical work for his or her private use.”*²⁵

²³ Page 14 of the Background Document.

²⁴ Page 15 of the Background Document.

²⁵ SGAE concede a LICENCIATARIO, bajo las condiciones y dentro de los límites fijados en el presente contrato, los derechos no exclusivos para realizar las siguientes operaciones:
Grabación de las obras del repertorio de SGAE, a partir de fonogramas o videogramas lícitamente producidos y distribuidos, en un archivo digital, ya sea directamente o por un tercero, para el servicio que ofrece LICENCIATARIO y a los solos efectos de:

- GEMA

*“The licensee gives end-users of the service the possibility of downloading works of GEMA’s repertoire in full length on a computer or another device (Music On Demand Offer with Download)”.*²⁶

Subsequent copies are not covered by the licences.

- *On Alternative Licensing Models*

Although the effects of alternative licensing models will be discussed in detail in the answer to question number 24, we believe that background document wrongly gives the impression that any making available of works and sound recordings for free (e.g.: as part of a promotional activity or through a service that bases its business model on advertising) implies that the right holder has given up all of his or her rights vis-à-vis said works or sound recordings, including the right to receive a compensation for the private copying of this content.

This issue will be dealt with in greater detail in our answer to question number 24.

- *On Distribution Issues*

As regards this issue, the background document seems somewhat contradictory. While the document acknowledges that distribution schemes are decided or supervised by public authorities, it states that some rights holders complain of lack of information on distribution. We do not see the link between one and the other statement.

Also, we would appreciate if the Commission identified the source of these alleged rights holders complaints, and whether these complaints have been submitted to the corresponding collective management society.

In any case, issues regarding distribution will be addressed in our answers to questions 25 – 27.

- *Miscellaneous*

Annex 1 of the background document includes a reference to the Spanish movement “Todos contra el canon”, stating that it had collected over 1.5 million signatures by the end of 2007.²⁷ However, the Spanish newspaper Público reported on 26 February 2008 that the collection of signatures was full of irregularities.²⁸

Poner las obras del Repertorio de SGAE a disposición de los destinatarios de dichos servicios para que puedan acceder en línea a la que hayan solicitado desde el lugar y en el momento que cada uno elija, con la finalidad de permitir la realización en línea de una reproducción permanente (descarga) de la obra musical para uso privado.

²⁶ “Der Lizenznehmer räumt Endnutzern des Services die Möglichkeit ein, die Werke des GEMA-Repertoires in voller Länge auf einen Computer oder ein anderes Gerät herunter zu laden (Music-on-Demand-Angebot mit Download).”

²⁷ Page 18 of the Background Document.

²⁸ < <http://www.publico.es/dinero/053181/canon/digital/dos/millones/votos/millones/firmas> >

In Annex 2 of the background document (“Empirical Evidence”) it is wrongly stated digital music players are not subject to private copying remuneration in Italy since 2005. The Commission distinguishes between the digital music players with integrated hard disk and those equipped with a memory card. According to the document, only the former are subject to private copying remuneration, calculated on the basis of the rate applied to equipment (3% of the sale price), while the latter, following the modification of art. 39 of Legislative Decree 68 / 2003 made by Law no. 43/2005, are believed not to be subject to the private copying remuneration.

In fact, regardless of the technical features of the two products (affecting their functioning systems), **both are subject to the private copying remuneration as they are both recording devices.**

- *Conclusion*

All in all, given the inaccuracies of the background document, its one-sided and superficial approach and the lack of relevant economic data, we would like to request that the Commission publishes a new document that addresses these issues. Private copying remuneration is a serious issue that merits a more in-depth analysis.

III. GESAC's Reply to the Questionnaire

As a preliminary comment, we would like to say that we were surprised by the fact that the Commission added five questions to the first questionnaire without even introducing a warning message in the new draft or the website. As a consequence many stakeholders will either not answer the added questions, or answer them incompletely since by the time they found out about the changes, it was already too late to gather the information.

In addition the French and German translations seem to differ from the original in some points.

Hereinafter, GESAC will reply to the Questionnaire on Private Copying Remuneration. Please note that GESAC groups together authors' societies from most EU countries. Therefore, it will try to give a general picture of how private copying remuneration schemes are applied throughout Europe. However, although GESAC will try to provide as much information as possible, its answers cannot be considered to be exhaustive.

A. Main characteristics of the private copying levy systems

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

Our opinion is that the differentiation between equipment and media is no longer relevant. The demand for recording equipment with no storage media attached, such as standalone CD, DVD or video or audio tape recorders is decreasing rapidly. These products are being replaced in the market by devices with integrated memory or hard disk drives. The countries we are aware of that still apply a private copying remuneration on standalone recorders are Belgium, the Czech Republic, Germany, Greece, Italy, Latvia, Poland, Slovakia, Slovenia and Spain. In all these countries the decline in collections for these devices has already started or is expected to start shortly.

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

The ICT industry tends to exaggerate the legal uncertainties as to which equipment is levied. In those countries where the remuneration is established by law or regulation, the legal uncertainty is non-existent. These systems might have drawbacks, such as the difficulties it has to adapt itself to market developments, but legal uncertainty is certainly not one of them.

In those countries where private copying remuneration is subject to negotiation between the different stakeholders legal uncertainty is not a problem either. The consumer electronics industry will be part of the negotiations and will thus be aware from the beginning of their obligation to pay. More importantly, the decision will be legally binding and will be made public with the same formalities as any other binding legislation.

While the existence of private copying remuneration is not legally uncertain, there might be, however, lack - sometimes alleged - of knowledge. Collecting societies usually make the

applicable tariffs in their websites, but would be more than glad to set up a common website with all the European tariffs, if that would improve awareness on the applicable tariffs.

On the other hand, one thing that we have noticed is that debtors of private copying remuneration tend to refuse to collaborate with collecting societies whenever there is a debate on a possible reform of private copying remuneration schemes. This indeed creates legal uncertainty. We have seen this, for example, in Spain. Collections in Spain in 2004, right after an agreement was reached between collecting societies and the ICT industry totalled €73 million. In 2005 and 2006, when the Spanish Copyright Act was being debated and private copying remuneration was one of the hottest topics, and in 2007, when the Government had to set new tariffs after negotiations between rights holders and the consumer electronics industry failed, collections dropped to €59 million, €56 million and €41 million respectively.

3) What would be the fairest method to determine the private copying levy rate that applies to digital equipment and blank media?

The fairest method would be the one that best takes into account the economic situation and legal traditions of the different countries. Generally, GESAC is of the opinion 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.

Having said that, while GESAC supports flexible remuneration schemes, in which the participation of the parties involved is guaranteed, the introduction of such a system in some jurisdictions could be premature and provoke that negotiations be blocked indefinitely by one or the other party to avoid a detrimental change. This is usually the case when collecting societies try to introduce private copying remuneration to new products. In those jurisdictions it might be better that for the time being private copying remuneration be set by law or regulation.

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

We are aware that rates have changed in some countries. We can only give the following general information, and suggest consulting the latest issue of Stichting de Thuiskopie's *International Survey on Private Copying Law & Practice* for information on rates currently in place and compare it with the information that the Commission has.

In Sweden, rates on all products have been lowered. In France new private copying remuneration was introduced for the first time for external hard drives, USB keys and memory cards. The Private Copying Remuneration Commission also established a new remuneration on multimedia external hard drives and mobile phones with the same functionalities as MP3 and MP4 players. In Austria, discussions on the introduction of private copying remuneration on mobile phones are also taking place. In Germany, discussions on new tariffs altogether are underway, after the reformation of the German Copyright Act introduced a new legal framework on Private Copying, which is in effect since 1 January 2008.

However, we have also seen how in some countries the requests of collecting societies to extend private copying remuneration have not been addressed. In countries such as Belgium, Denmark or the Netherlands, there is no private copying remuneration on MP3 players, although it is difficult to think of a device more suited for the storage of copyright protected content. In Spain, after the Copyright Act was amended in July 2006, collecting societies and the consumer electronics industry negotiated for four months but did not come to an agreement. In that situation, the Law establishes that the Government shall take a decision on which products will be subject to the private copying remuneration and its level. The Spanish Government issued a proposal for new tariffs in December 2007, nine months after its initial deadline (March 2007) and almost one year and a half after the Copyright Act was amended. The Government has not yet made the new tariffs official.

B. Economic, social and cultural dimension of private copying levies

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

It should be pointed out that not all collecting societies may at this time have figures on collections **for** 2007, since payments of products sold until 31 December 2007 can be collected in the first months of 2008. The figures for private copying collections below might still be provisional and may refer to collections that took place either in 2007 or for 2007. They should therefore be regarded as indications.²⁹

²⁹ Source: Stichting de Thuiskopie. Stichting de Thuiskopie is at the time of writing still finalizing its annual report. Modifications in the figures may be introduced in the final version.

	2007
Austria	16.413
Belgium	19.574
Czech Republic	5.388
Denmark	4.715
Estonia	0.283
Finland	15.515
France	163.680
Germany	n/a ³⁰
Hungary	11.54
Italy	70.956
Latvia	0.812
Lithuania	0.084
Netherlands	19.600
Poland	4.291
Portugal	5.753
Slovakia	0.904
Spain	40.727
Sweden	20.983
TOTAL	401.218*

In €million. * Does not include Germany

While GESAC is happy to provide as much information as it has, we regret that no request has been made to the consumer electronics industry to provide figures on sales of products subject to private copying remuneration.

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

The Copenhagen Business School conducted in 2006 an economic study on the Danish copyright economy.³¹

The Commission should consider commissioning an economic study on private copying that would cover all possible aspects in the different countries of the European Union. This study could cover the impact of private copying remuneration schemes for the cultural industries and for the economy of the EU as a whole. As mentioned above, we believe that private copying remuneration is a serious issue that merits an in-depth analysis.

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?

As regards the amounts dedicated to collective purposes, Table 5 includes some inaccuracies. For example, in Italy, the 50% deduction indicated is not correct. It is only artists and performers who dedicate 50% of their video share to collective purposes. That would thus be 11.67% of video collections. In Germany, the 10% deduction mentioned in Table 5 applies

³⁰ ZPÜ has not yet finalized its annual report.

³¹ The report can be found on the website of the Copenhagen Business School:

< [http://research.cbs.dk/research/kortlaegning_af_den_danske_ophavsretsoekonomi\(281033\)/](http://research.cbs.dk/research/kortlaegning_af_den_danske_ophavsretsoekonomi(281033)/) >

only to GEMA, one of eight partners of ZPÜ, and within GEMA only to a part of GEMA's ZPÜ-share. The partners of GEMA also deduct by far less than 10%. ZPÜ itself distributes all income without applying any deduction, the only exception is the commission for the managing partner. In Latvia, the 10% deduction only affects the authors' share. In Greece, there are no deductions for collective purposes.³² While the inaccuracies in Latvia and Greece might not be significant in absolute terms, the German and Italian cases would considerably decrease the total amount to below €90 million (probably even lower since the German deduction is difficult to calculate). This would mean below 15% of sums collected, thus considerably lower than the 23% indicated in the Background Document.

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?

The types of events that are funded through the cultural deductions vary greatly.

In France, for example, part of the funds is spent in music festivals, as the Background Document rightly points out. However, these funds are spent on other initiatives. Over 4000 cultural activities a year are financed by the cultural deductions applied to collections for private copying remuneration. These activities can be divided into three groups: live events, support for creation and production and support for artists' and authors' education.

In Denmark it is spent in the development of new artists, funding innovative projects, like CD releases.

The Spanish authors' society SGAE funds a number of projects that vary from providing creators the premises in which they can do their art (renovation of old theatres, subsidising rehearsal rooms, etc.) to giving aids for the education of aspiring musicians or for research in cultural industries.

In the Netherlands, Stichting de Thuiskopie used to deduct 15% for cultural activities. This deduction was abolished. However, a deduction is still applied for anti-piracy activities, which is paramount for guaranteeing a viable cultural industry in the future.

In Finland, cultural deductions are applied for a variety of issues ranging from the support for new productions of old jazz composition to make them more accessible to younger audiences, thus creating new demand, to the financing of festivals, or of audiovisual productions such as short films, documentaries, etc.

In Germany, there is no legal obligation to apply cultural deductions specifically on collections for private copying remuneration. However, the Law on Collecting Management Societies imposes social duties on these societies. That is why GEMA has to dedicate part of the money collected to support authors and works. Events, on the other hand are not funded.

It must be pointed out that, when the members of an authors' society take the decision to make deductions to fund cultural activities, they do so because they believe it is good for their business. Funding cultural events can be regarded as a way of marketing, a promotion of a product that authors want to sell in competition with other form of entertainment, such as

³² Source: Stichting de Thuiskopie, *Internacional Survey on Private Copying Law & Practice*, 18th Revision 2007.

videogames or sports events. Moreover, these events provide for an outlet for young authors, who would probably have a hard time finding an opportunity to start a career and grow as a creator if these events did not exist. Therefore, for more business oriented minds these funds should be regarded as marketing, research and development and an investment in new talent that will in the future contribute to generate income for the cultural industries.

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

It must be pointed out that most of the legislations do not provide for an obligation to apply social deductions specifically to collections of private copying collections. These deductions might be applied none the less by some authors' societies themselves and might affect the share that is to be distributed to the individual rights holder, be it because there is a general legal obligation for the society to apply this deduction on all or part of the monies to be distributed or because the society itself decides to apply it. Hereinafter, we give a couple of examples of countries, which apply this deduction. However, please note that not all authors' societies apply these deductions.³³

In France, for example there is indeed a 5% social deduction applied to the amount to be distributed to the individual rights holders. This deduction is therefore applied to the private copying remuneration share that each rights holder is allocated after the cultural deduction. In Spain, of the 20% deduction, half goes for cultural events and half goes for welfare or social payments.

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

There are two types of cultural deductions, the ones established in the law and the ones decided by the rights holders themselves through the democratic channels provided for in the societies' by-laws and are never discriminatory vis-à-vis foreign rights holders. As regards the latter deductions, we do not see the need for the Commission to intervene in a matter that is already decided by the stakeholders themselves, notably since these decisions are supervised by public authorities.

As regards the deductions set by the law, authors' societies have no say. Since it is a matter of national policy with little Internal Market relevance, we are unsure as to what the Commission could do without invading the sphere of competences of Member States. It would be hard to understand that the Commission would set a cap on, say, an obligation for certain types of companies to dedicate part of their profits to R&D that was established by a Member State's legislation.

Authors' societies think it would be more useful to make clear that cultural funds be managed by rights holders themselves. If authors, for example, are to be deducted a share of their income they should have a say, through their authors' society, on how the money is spent, to make sure that in one way or another, directly or indirectly, he somehow benefits from it.

³³ This is the case for Finish society TEOSTO.

11) What share of individual rightholders' revenues do private copying levies represent?

The share that private copying remuneration represents in an individual rightholders' revenues varies by category of rightholder and by country. Even within the same category of rightholder and the same country, great variations may appear. As regards authors' societies, distribution amongst the different members is partly, if not wholly, based on other types of exploitations, having the income for mechanical rights usually more weight than the income for public performance. This may have as a consequent that an author, whose revenues are predominantly based on sales from sound recordings, would get a higher share than one, whose revenues come from radio airplay or live concerts. Therefore any figure on how much private copying remuneration represents for an individual rightholder should be regarded very carefully. None the less, as indicated in ECONLAW's *Economic Analysis of Private Copying Remuneration*, authors' societies estimate that private copying remuneration could be around 5% of a rights holder's total income. Now, this 5% might not look significant, but in more cases than you would think it really makes a difference in the possibility for a creator to be able to live from his or her art, and thus dedicate 100% of his or her professional activity to create new works or giving up on a professional artistic career.

We are, however, surprised that amongst the questions that the Commission decided to add to the questionnaire, there is none referring to how much private copying remuneration represents for the consumer electronics industry. As a matter of fact, ECONLAW calculated this figure in its *Economic Analysis of Private Copying Remuneration*. Private Copying Remuneration amounts received by collecting societies on behalf of rights holders represent around 5% of the sales of consumer electronics products.³⁴

The Commission will agree that 5% is in social terms more important for an individual author than for the manufacturers or importers of consumer electronics industry.

C. Cross-border trade and e-commerce issues

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?

Refund schemes for exported products are commonplace in EU Member States with private copying remuneration schemes. Generally speaking, there are two types of refund schemes.

In some countries, only the operator that has paid the private copying remuneration is entitled to get a refund. This operator will be refunded after showing proof that the product has been exported and after it has been checked that the private copying remuneration was effectively paid. If the exportation is not undertaken by the same operator that paid the private copying remuneration in the first place, the collecting society will, at the time or right after the refund has taken place, inform the exporter that he is entitled to be himself refunded from the operator that got the refund. This is the system applicable for example in Spain, France,

³⁴ ECONLAW, *Economic Analysis of Private Copying Remuneration*, September 2007.

Germany and the Netherlands. Note that in these countries, payment is due when the product is put into circulation in the national territory. This reduces the cases where a private copying remuneration is paid for a product that is later on re-exported.³⁵

The second type of refund schemes allows the exporter itself to be directly refunded by the collecting society if the private copying remuneration has indeed been paid and if the exporter can provide proof that the product has been exported. The system is similar to that of VAT refunds. This is the system applicable for example in Belgium, Finland, Italy and Austria.

The systems seem to be working well in the different countries. To give just a few examples for 2006, in Austria 98.62% of applications for export refund received a positive response. In Finland it was 96.69% and in Germany all applications received a positive reply. In Italy, it was also 100% in 2006 and 88% from 2004 until 2008. In the Netherlands and Spain, although we do not have exact figures, almost all applications received a positive reply. It must be noted that in those countries the respective collecting societies receive over 200 applications per year in the case of the Netherlands and over 60 applications a year in the case of Spain.³⁶ In France, too, almost all applications received a positive reply and 155 refunds were granted in 2006.

13) What is the most suitable system of refunds upon exportation? Who is the most suitable party to claim those refunds?

Given that, as mentioned above, none of the refund schemes create major problems, we understand that both systems are valid ones. The application of one or the other will depend on the specific legal framework of the country.

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

Table 6 is not precise. It is not clear whether by “Refunds in the Law” it is meant that goods that are exported are exempted for the payment or if the law itself introduces a refund mechanism.

In any case, for Denmark, Finland, Hungary, Latvia, Lithuania, Portugal, Slovenia and Sweden refunds for exports are set in their national legislation and work in practice.

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?

Irrespective of whether the purchase of products subject to the payment of private copying remuneration takes place through a traditional brick and mortar retailer or through a distance seller, GESAC’s position is the same. GESAC understands that the applicable private copying

³⁵ The Netherlands is the only exception. However, Stichting de Thuiskopie allows for the private copying remuneration to be paid when the goods are put into circulation to those operators that have an agreement with it.

³⁶ Figures refer to SGAE only, not to other CMSs collecting private copying remuneration.

remuneration should always be that of the country where the consumer is located at the time of the 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.

In cases of distance sales (i.e.: online retailers), our policy is that the remuneration due should be that of the country where the consumer is located and the party liable for the payment should be the distance seller. However, cross-border distance sellers, notably online retailers, are increasingly trying to find ways to avoid the payment of the private copying remuneration. This practice could affect consumers, who might in some jurisdictions and in some circumstances be considered the importer of the good and thus liable for the payment of the private copying remuneration. As mentioned above, the general point of departure to avoid this situation should be that, when a distance retailer is selling goods to a consumer located in a country where such goods are subject to the payment of the private copying remuneration, he, and not the consumer, should be the party liable for such payment applying the tariff of the country where the consumer is located.

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. They can thus 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:

Seller	Price (USD)	Tax & Shipping	Availability	Seller Rating
dbyus.com <small>Featured Merchant</small> * FREE SHIPPING Merchant Info	\$235.00	Enter Zip Code To View Shipping & Tax Price + Shipping + Tax = BottomLinePrice <input type="text"/> GO (Enter Zip Code)	In Stock	★★★★ 4801 Reviews
MacMall <small>Featured Merchant</small> The #1 Apple Direct Reseller Merchant Info	\$237.48 <small>Rebate</small>		In Stock	★★★★ 471 Reviews
Apple Store <small>Featured Merchant</small> Merchant Info	\$249.00		In Stock	See all-time ratings 13 Reviews
newegg.com <small>Featured Merchant</small> 1 TO 3 DAY SHIPPING Merchant Info	\$236.99		In Stock	★★★★ 16553 Reviews
JR.com <small>Featured Merchant</small> Merchant Info	\$234.88		In Stock	★★★★ 12084 Reviews
PyramidUSInc.com Merchant Info	\$236.00		In Stock	Not Rated Write a Review
Vanns.com Merchant Info	\$236.99		In Stock	★★★★ 281 Reviews
lagoom.com Merchant Info	\$237.00		In Stock	★★★★ 43 Reviews

D. Professional users of ICT equipment

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

Not applicable.

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?

First of all, it should be pointed out that it is not for collecting societies to take into account professional users. As already mentioned, private copying remuneration schemes, including the uses exempted, are not established by collecting societies, but by legal provisions or negotiations.

As for how professional uses should be taken into account, this can take place in two ways. First, when setting the tariff, which can be set higher or lower depending on whether or not some sort of special treatment is applied to professional users or not. Should a special treatment not exist, there would thus be a case for a lower tariff, since the professional uses would have an impact in the surveys.

A second option would of course be to apply a special treatment to this kind of uses. Please note that in any case special treatment have to be limited to special cases that can be easily monitored by collecting societies. As mentioned in the ECONLAW report, monitoring exempted uses has an impact on the management costs of collecting societies, which if regarded as a whole can make the special treatment economically inefficient.

Here are some examples of countries applying some sort of special treatment to professionals: Austria, Czech Republic, Denmark, Finland, France, Hungary, Italy, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain and Sweden.

Most of the times professional users can benefit from a special treatment through refund schemes. This might imply registration within the collecting society as a professional user.

E. Grey market

18) Has the size of the grey market increased since 2006?

We have no figures on the growth of the grey market.

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?

- *Collecting Societies*

The measures that collecting societies can adopt greatly depend on the legal tools available to them. With the limitations of legal tools that they have at their disposal, collecting societies are, as indicated above, applying a policy of monitoring and enforcement that covers all operators. By so doing collecting societies are sending the message that no matter how big or small a debtor of the private copying remuneration has to comply with existing rules.

As regards other measures that could be adopted by collecting societies, we refer to the commitments proposed in Annex I

- *The ICT Industry*

Cooperation from the ICT Industry in order to reduce the grey market has proved to be extremely helpful. Complying operators suffer greatly from competitors that do not pay the private copying remuneration and when they cooperate with collecting societies the grey market can be greatly reduced. In Sweden, for example, the private copying collecting society COPYSWEDE has a cooperation agreement, which includes conducting common surveys on where products that bear a private copying remuneration are sold, the provision of tip-offs by the industry on possible non-compliant importers and the possibility for COPYSWEDE to audit importers. These measures have drastically reduced the grey market in Sweden.

However, cooperation from the ICT Industry is not always a given. As mentioned above, in those countries where a reform of the current system is underway or where there is a heated debate on the subject, the ICT Industry has often opted to deny cooperation and use the existence of a grey market as an argument to do away with private copying remuneration schemes altogether.

Moreover, there are countries where collecting societies do not have the right to audit debtors of private copying remuneration. This implies that, some operators, which are currently paying the private copying remuneration, might be paying less than they are obliged to, without any means for the collecting society to check whether what is reported is the amount due.

Once again, GESAC would like to stress that it is the consumer electronics industry itself that is feeding the grey market, and they should bear part of the responsibility to curb it. Also, it is usually the case that the consumer electronics industry engages in a strategy of disputing current tariffs or the introduction of new ones. During the time the dispute is being solved they refuse to pay, while at the same time introducing as many products subject to the disputed private copying remuneration as possible. The resolution of the disputes might not have retroactive effects, thus creating a situation in which the market has a very important share of products that were introduced before the dispute was solved competing with others on which the private copying remuneration has been applied. Measures, such as the creation of escrows during the time that the dispute is being solved, or the retroactive application of the tariff that has been approved by a dispute resolution mechanism to all products that have entered the market since the dispute started, should be provided for.

- *Member States*

In Annex I of this document, GESAC has put together a number of measures that should be introduced in order to reduce the grey market. In fact, most of these measures are already in place in one or the other EU Member States, and what GESAC is asking is that they be applied in the whole EU.

- *The European Commission*

The European Commission could also play a role in curbing the grey market. An important share of the products that are sold without the payment of the private copying remuneration come from Internet retailers located in countries where there are no private copying remuneration schemes, Luxembourg being the clearest example. This country, as well as Malta and Cyprus, have introduced a private copying exception but have introduced no compensation mechanism. There are thus in breach of the Copyright Directive. The Commission should therefore seriously consider whether infringement procedures should be started against said countries.

F. Consumer issues

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?

Surveys on consumer behaviour are conducted or commissioned regularly by collecting societies, with the periodicity varying from one country to another. These surveys cover a variety of issues and are used to take decisions on the level of private copying remuneration and on its distribution.

In France, for example, SORECOP and COPIE FRANCE buy figures from GfK, a monitoring organisation specialised in consumer electronics products, on a quarterly basis. Those surveys monitor the sales in France of all products levied. SORECOP and COPIE FRANCE also commission CSA-TMO surveys in order to obtain information from end users on the sources of recording and the content that is recorded. These surveys are conducted on a monthly basis for DVD-D and on a quarterly basis for CD-D. COPIE FRANCE also collects through MEDIAMETRIE, an audiovisual content monitoring organisation, information on the recording of television programs. SORECOP annually obtains information from SOFRES, a poll organisation, on the copying of music (source, content, device/carrier used...).

In the Netherlands, Stichting de Thuiskopie collaborates with the representative body of importers and manufacturers to execute market surveys on private copying behaviour. The results are used for setting private copying remuneration rates and are also used for distributing the money collected. Consumers are being questioned continually and the report is published yearly. The Survey is executed by bureau Veldkamp together with GfK Marketing Services Benelux.

In Finland, too, surveys influence the setting of the tariffs and the distribution and have so far been conducted on an annual basis. Since the beginning of 2008, TEOSTO has a Research

Department, responsible for conducting surveys and other research. The surveys are partly commissioned with the consumer electronics industry. TEOSTO also uses external experts to improve transparency and reliability of the survey results.

In Belgium, surveys are also conducted in-house by AUVIBEL and influence mainly the distribution of the monies collected.

In Spain, SGAE also uses surveys on a variety of issues. Every three months the market is tested to know the places of purchase, the brand and the final use given by consumers to the products they acquire (recording of music, storing of personal data or other non copyright protected content, etc.). The same types of surveys are conducted twice a year to learn the use given by businesses to recording equipment and media. Surveys are also conducted to obtain information in order to obtain information from end users on the sources of recording and the particular content that is recorded. These surveys are then used for distribution purposes. SGAE as well commissions reports on the suitability of new equipment and blank media for copying purposes.

In Austria, AUSTROMECHANA also commissions surveys to independent market research institutes, and exchanges data with the Chamber of Economy of Austria, which represents the consumer electronics industry.

In Italy, SIAE has also entrusted independent companies with the making of market surveys on the different products used by consumers to make private copies and on consumer behaviour.

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

Convergence - understood as the existence of products with a variety of functionalities – has been around in one way or the other for a long time. Since the late 80s there have been, for example, tape recorders with an integrated radio receiver or a CD player. This did not preclude the application of private copying remuneration. In GESAC's view, irrespective of a product having a variety of functionalities or having as a sole functionality the recording and/or storage of content, our position is the same. Consumer behaviour should be analysed to determine on a case-by-case basis to what extent each form of equipment and/or blank media is used for the production of private copies in each market and apply the private copying remuneration accordingly.

A system that rendered “non-dedicated” equipment and/or blank media exempt from the application of the remuneration schemes for private copying would be totally unjustified, since it would not be able to be adapted to future changes of consumer behaviour. The fact that consumers make copies for their private use with “dedicated” or multi-functional devices is not relevant. What is relevant is that they do indeed make copies of copyright protected material with them.

G. Double payment

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

The only issues that we can think of relate to the alleged 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.

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.

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

A rights holder can only grant a licence for the exploitation of his work if he holds an exclusive right. If a rights holder has a limitation to the exercise of his exclusive right, such as the private copying exception, he is not entitled to licence or prohibit activities that fall outside the scope of his right. Therefore, an authors' society can for example grant a licence for the recording of the works it represents and its distribution in CDs. It can also grant a licence for the downloading of music. But it cannot grant a licence for an activity, such as the making of private copies, that is already legally permitted.

On the other hand, if societies could put in place 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. Sales price of a song is fixed by the online music services in consideration of the market situation and that rightholders would 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.

Finally, it should be pointed out that consumers have so far shown opposition to the application of DRM/TPM technologies that would limit their possibility of make private copies. In such a scenario of lack of consumer acceptance for DRM/TPMs, it seems difficult to put in practice a system whereby rights holders would be paid for a certain number of private copies.

H. Alternative licensing

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

The fact that a work is disseminated for free does not mean that a rights holder has totally or partially given up his rights. Many works are disseminated for free, for example in the radio or TV. This does not mean that rights holders are not remunerated for that or that he renounces to collecting any money from any other source. The same is true for the Internet. The fact that a rights holder makes content available without being remunerated, does not mean that he has not reserved other rights, such as the right to be compensated for acts of private copying.

Another point that the Commission did not address in its background document is that for any dissemination of a sound or audiovisual recording a licence from all the rights holders is needed. While a performing artist and his record company may want to distribute free copies of a sound recording for promotional purposes, this does not mean that the author or the music publisher accept this. By the same token, even if that artist and record company renounced to being compensated for acts of private copying, this does not mean that the author or the music publisher have taken the same position.

Finally, GESAC would like to express its concern with the weight given by the Commission to the dissemination of works through Creative Commons licences. First of all, the economic relevance of the content disseminated through this licences is marginal. We would encourage the Commission to provide figures on licences and impact of works and sound recordings disseminated with said licences.

Second, it is doubtful that Creative Commons licensees give up their right to receive fair compensation. Indeed, in some countries, such as Germany and Austria representatives of the Creative Commons movement and licensees consider that Creative Commons licence do not prevent them from receiving their share from the private copying remuneration.

Third, even in the case of rights holders expressly renouncing to their right to be remunerated for acts of private copying, their works could be treated as any other non-protected content.

I. Distribution issues

We are not aware of distribution of private copying remuneration being a problem. We conducted not long ago asking our members if there had been any complaints as regards distribution of the private copying remuneration. There was not a single complaint. Every now and then we consult representatives of our members in our working groups about the same issue, and the response is the same. Should the Commission have different information on the issue, we would appreciate it if it were to share it with us.

We would also like to point out that consumer electronics industry has consistently tried to spread the idea of collecting societies not being able of distributing the money to their members in an effective and transparent manner. As regards authors' societies, at least, this is far from being the truth. In any case, it is not of their direct concern how this money is being distributed. It is a matter to be dealt with by collective management societies and their members.

25) What is the typical frequency and schedule of levy payouts?

Distribution frequency varies from country to country. Moreover, payouts can take place in various steps. First, in the countries where there is a collecting society for private copying, the latter makes a first payout to the different rights holders' organisations. Second, in the case of GESAC members, authors' societies make a second payout to their members or to sister societies. Third, sister societies make a third payout to their members.

Here are a couple of examples of payout frequencies of collecting societies for private copying remuneration to the different rights holders' organisations.

Payments to CMS	
Austria	10 times a year
Belgium	Yearly (After June ³⁷)
France	Monthly
Finland	Yearly (October ³⁸)
Germany	5 times a year
Italy	Quarterly
The Netherlands	Quarterly
Spain	Not applicable ³⁹

As regards, payouts from collective management societies to their members or sister societies, frequencies vary depending on the CMS. As for authors' societies, payouts normally take place on a half-yearly (e.g.: France (SACEM) and Spain (SGAE), with payouts in spring and fall) or on a yearly basis (e.g.: Austria (AUSTROMECHANA), Belgium (SABAM), Finland (TEOSTO), Italy (SIAE), The Netherlands (STEMRA)). In Germany (GEMA), the distribution is partly distributed on a yearly basis (July) and partly on a half-yearly basis (January and July).

As regards payments between sister societies it should be pointed out that CISAC's Professional rules for Musical Societies establish clear minimum standards on, amongst other things, transparency, documentation and distribution frequency.⁴⁰

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

GESAC is not aware of any major issue regarding cross-border distribution of private copying remuneration. These monies are paid to sister societies in the same way as other types of collections irrespective of specific countries of the recipient societies having a private copying remuneration scheme or not.

³⁷ June is the deadline to close the booking year.

³⁸ Collections are reported to the Ministry of Culture in May. The latter gives a decision on distribution in October and subsequently the money is distributed.

³⁹ In Spain, there is no common collecting society for private copying and each CMS collects on behalf of its members.

⁴⁰ For more information, please visit: < <http://www.cisac.org/CisacPortal/consulterDocument.do?id=155> >

27) What are the average administrative costs in levy administration (in per cent of collected revenue)?

As regards management fees for collection of private copying remuneration, here is, for example, the information for Austria, Belgium, France, Finland, Germany, Italy, the Netherlands and Spain:

Management Fee For Collection	
Austria	5% (AUSTROMECHANA)
Belgium	5.85% (AUVIBEL)
France	0.7% (SORECOP) and 1% (COPIE FRANCE)
Finland	5.4% (TEOSTO)
Germany⁴¹	3-5% (ZPÜ)
Italy	5% (SIAE)
The Netherlands⁴²	5% (STICHTING DE THUISKOPIE)
Spain⁴³	0% (SGAE)

Figures for 2006.

Additional management fees may be applied by the different collective management societies for distribution to their members. As regards authors' societies the management fee is calculated in different ways. All in all, total management fees (collection and distribution) tend to be around 10% on average and rarely reach or exceed 15%.

⁴¹ The partners of ZPÜ each apply their own and therefore different management fees for the distribution of their share.

⁴² Note that in The Netherlands the distribution costs towards individual rights holders cannot bear a management fee above 15%.

⁴³ In Spain, there is no common collecting society for private copying and each CMS collects on behalf of its members. As regards, distribution of private copying remuneration, a management fee of 7% is applied.

ANNEX I: MEASURES FOR THE REDUCTION OF GREY MARKETS

The following are measures that GESAC would like to recommend in order to minimize the non payment of private copying remuneration.

1. Proposed Measures

- Declaration of cross-border movements of recording equipment and media

The main problem that private copying remuneration managers (PCRM) are faced with is that it is difficult to control which products subject to the payment of the private copying remuneration are entering each country. PCRM therefore need to be informed whenever these products enter their country.

⇒ Proposal No. 1: Member States should ensure that importers be obliged to declare to the PCRM all the products that have crossed the national border and are subject to the payment of the private copy remuneration. Also, payment should be due when the product crosses the national border and not when it is put into circulation.

PCRM are aware that some of the stock that some companies introduce in one country is then re exported to another one. Therefore, in order to avoid refund schemes, PCRM could agree to the following commitment:

⇒ Commitment No. 1: If the payment of the private copying remuneration is due when the product crosses the border, PCRM can agree by means of a code of conduct that they will only request payment to debtors when the product is put into circulation.

Such a system would incentivise debtors to cooperate and declare all the products that enter and leave the country, because otherwise they can be subject to the payment of their whole stock, irrespective of it being put into circulation in the country or not.

- Cooperation from customs authorities and VAT Authorities

PCRM would also find it very useful to have access to the information of the VAT and EU customs authorities.

On the one hand, VAT authorities can monitor through the European VAT Information Exchange System (VIAS) the flow of intra-Community trade to detect all kinds of irregularities. Access to that information, in order to check it against the declarations made (or not) when products subject to the payment of private copying remuneration crosses an intra-community border, could facilitate the monitoring by PCRM. The same would be true for information of the EU customs authorities.

On the other hand, national VAT authorities also have information about which products subject to the payment of the private copying remuneration have been marketed in the country where the VAT is due. That information should also be made available to PCRMs to improve their monitoring and combat fraud in the payment of private copying remuneration.

It should be stressed that in some countries the private copying remuneration itself is subject to the payment of VAT, and in those countries where it is not, the VAT has to be calculated including the private copying remuneration. Therefore, the exchange of information with VAT authorities would also be beneficial for the latter.

⇒ Proposal No. 2: PCRMs should have access to the information of VAT - notably the European VAT Information Exchange System (VIAS)- and EU customs authorities as regards cross-border movement and marketing of products subject to the payment of private copying remuneration.

⇒ Commitment No. 2: If VAT and EU customs authorities grant access to their information on cross-border movement and marketing of products subject to the payment of private copying remuneration, PCRMs commit themselves reciprocate as regards the equivalent information that they have.

- Right to audit debtors

Another problem that PCRMs are faced with are the obstacles that they encounter for accessing 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.

⇒ Proposal No. 3: PCRMs should have the right to audit debtors of the private copying remuneration. If the debtor is located in a Member State other than the Member State where the PCRM operates (i.e.: cases of distance sales), the latter may appoint a sister PCRM to conduct the auditing.

- Liability of operators other than manufacturers and importers

In some countries, like Finland or the Netherlands or Germany, distributors and retailers are subject to secondary liability for the payment of the private copying remuneration. In others, like Italy or Spain, the liability is of joint nature. This makes sure that importers and manufacturers that do not pay the remuneration due do not find an outlet for their products. The same rule should apply to other outlets of products subject to the private copying remuneration. This should include organisers of trade fairs, in which an ever increasing number of foreign traders sell hardware and recording equipment and media without paying the applicable remuneration, and Internet platforms for resellers of these products, such as eBay.

⇒ Proposal No. 4: Liability for the non-payment by importers or manufacturers of the private copying remuneration should be extended to the outlets of the products. These outlets should include i.a. distributors, retailers, organisers of trade fairs and Internet platforms for resellers of products subject to payment of the private copying remuneration.

- *Non-payment of the remuneration as a criminal offence*

PCRM generally fight the non-payment of the private copying remuneration through civil procedures. However, sometimes PCRM find it difficult to collect adequate evidence. Moreover, it is always desirable to have the support of enforcement authorities. Finally, adequate penalties can have a dissuasive effect.

⇒ Proposal No. 5: Member States should consider the non payment of the private copying remuneration as a criminal offence subject to penalties with a true dissuasive effect.

- *Distance sales*

Cross-border distance sellers, notably online retailers, are increasingly trying to find ways to avoid the payment of the private copying remuneration. As mentioned above, this could affect consumers, who might in some circumstances be considered the importer of the good and thus liable for the payment of the private copying remuneration. The general point of departure should be that any distance retailer selling goods in a certain country, and not the end consumer, should be subject to the payment of the private copying remuneration applicable in the country where the customer is located.

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 make the shipments. So, they can give him or her the bottom line price, including the applicable private copying remuneration, 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:

The screenshot shows a web browser window with a price comparison page. The browser's address bar contains the Google search engine. The page has several tabs: 'Compare Prices', 'Product Details', 'User Reviews', 'Discussions', and 'Expert Reviews'. Below the tabs, there are links for 'New (27 Sellers from \$234.88)', 'Used & Refurbished (5 Sellers from \$199.95)', and 'View All Conditions'. The main content is a table of sellers with columns for 'Seller', 'Price (USD)', 'Tax & Shipping', 'Availability', and 'Seller Rating'. The sellers listed are dbuys.com, MacMall, Apple Store, newegg.com, JR.com, PyramidUSinc.com, Vanns.com, and lagoom.com. A central form prompts the user to 'Enter Zip Code' to view shipping and tax details, showing a 'BottomLinePrice' and a 'GO' button.

Seller	Price (USD)	Tax & Shipping	Availability	Seller Rating
dbuys.com * FREE SHIPPING *	\$235.00	Enter Zip Code To View Shipping & Tax Price + Shipping + Tax = BottomLinePrice <input type="text"/> <input type="button" value="GO"/> (Enter Zip Code)	In Stock	★★★★★ 4801 Reviews
MacMall The #1 Apple Direct Reseller	\$237.48 Rebate		In Stock	★★★★★ 471 Reviews
Apple Store	\$249.00		In Stock	See all-time ratings 13 Reviews
newegg.com 1 TO 3 DAY SHIPPING	\$236.99		In Stock	★★★★★ 16553 Reviews
JR.com	\$234.88		In Stock	★★★★★ 12084 Reviews
PyramidUSinc.com	\$236.00		In Stock	Not Rated Write a Review
Vanns.com	\$236.99		In Stock	★★★★★ 281 Reviews
lagoom.com	\$237.00		In Stock	★★★★★ 43 Reviews

⇒ Proposal No. 6: Member States should ensure that distance sellers, and not consumers, be subject to the payment of the private copying remuneration applicable in the country where the customer is located.

As it has already been pointed out in Proposal No. 1, the distance seller would be obliged to declare the sale and make the payment to the PCRM of the country where the consumer is located when the shipment takes place. In order to alleviate the incumbent formalities on distance sellers, PCRM could agree to the following commitment:

⇒ Commitment No. 3: If the payment of the private copying remuneration is due when the product crosses the border, PCRM can agree by means of codes of conducts to receive declarations and payments on regular timeframes.

Also, PCRM need to be able to act against those distance sellers that do not comply with their obligation to declare and make the payment of the private copying remuneration. In order to do that, they have to be able to file the corresponding lawsuit in the country where they operate and not where the distance seller is located. Also, the applicable law should be the law of the country where the PCRM is located. To a certain extent, this could be done by

applying existing rules of International Private Law, notably if the non-payment of the private copying remuneration is considered a criminal offence throughout the EU.

Regarding jurisdiction, private copying creates harm where the consumer is located. That should trigger the application of article 5(3) of the Brussels I Regulation.^{44 45}

As regards the applicable law on non-contractual obligations, articles 4(1), 6(1) and 8(1) of the Rome II Regulation,^{46 47} should be applied to distance sales of products subject to the payment of private copy remuneration, when such remuneration has not been paid by the distance seller. This would also be consistent with articles 5(2) of the Berne Convention for the Protection of Literary and Artistic Works.^{48 49}

In addition, as regards electronic commerce in the Internal Market, Directive 2000/31/EC creates a basic legal framework compatible with the implementation of the above provisions in stating that information society services are, in principle, subject to the law of the Member State in which the service provider is established except for matters such as “copyright and neighbouring rights [...]”⁵⁰

Thus, for countries, like France, where such exception has been included in its legal framework, online services established in another Member State must comply with French copyright regulation.

⁴⁴ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴⁵ Article 5(3) of the Brussels I Regulation: “A person domiciled in a Member States may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”

⁴⁶ Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁴⁷ Article 4(1) of the Rome II Regulation: “Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

Article 6(1) of the Rome II Regulation: “The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.”

Article 8(1) of the Rome II Regulation: “The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

⁴⁸ Article 5(2) of the Berne Convention: “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”

⁴⁹ It should be noted that the European Community approved through Decision 94/800 EC the Agreement on Trade-Related Aspects of Intellectual Property Rights, which, in its Art. 9(1), obliges Member States to comply with Arts. 1 – 21 of the Berne Convention.

⁵⁰ Article 3 of the E-Commerce Directive: Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. [...]

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex. [...]

ANNEX: DEROGATIONS FROM ARTICLE 3 As provided for in Article 3(3), Article 3(1) and (2) do not apply to: copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC(2) as well as industrial property rights [...]

Concerning recognition and enforcement of judgments, articles 33(1) and 38(1)⁵¹ of the Brussels I Regulation and, in the case of uncontested claims, the rules laid down by Regulation 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, notably articles 3, 4, 5 and 20,⁵² could also be useful tools for the adequate application of PCRS.

⇒ Proposal No. 7: Articles 5(3), 33(1) and 38(1) of the Brussels I Regulation, articles 3, 4, 5 and 20 of Regulation 805/2004, articles 4(1), 6(1) and 8(1) of the Rome II Regulation, and article 5(2) of the Berne Convention, or the equivalent domestic provisions, should be applied to the non-payment of the private copying remuneration due in a country other than that where the distance seller is located, if need be by introducing the necessary amendments to these or other EC or national legislations.

This would be in harmony with the ECJ's line described in Recital 57 of the E-Commerce Directive.^{53 54}

⁵¹ Article 33(1) of the Brussels I Regulation: "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

Article 38(1) of the Brussels I Regulation: "A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there."

⁵² Article 3 of Regulation 805/2004: "1. This Regulation shall apply to judgments, court settlements and authentic instruments on uncontested claims.

A claim shall be regarded as uncontested if:

- (a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or
- (b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or
- (c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or
- (d) the debtor has expressly agreed to it in an authentic

2. This Regulation shall also apply to decisions delivered following challenges to judgments, court settlements or authentic instruments certified as European Enforcement Orders."

Article 4 (1) and (2) of Regulation 805/2004: "For the purposes of this Regulation, the following definitions shall apply:

- 1. 'judgment': any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court;
- 2. 'claim': a claim for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or authentic instrument;"

Article 5 of Regulation 805/2004: "A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition."

Article 20 (1) of Regulation 805/2004: "Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement.

A judgment certified as a European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement.

⁵³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market.

⁵⁴ Recital 57 of the E-Commerce Directive: "The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was

Finally, PCRMs need to be able to request that access to online retailers, which continue to sell products without paying the private copying remuneration due in the country where the customer is located, be terminated. That would be in line with article 12 (3) of the E-Commerce Directive.⁵⁵

⇒ Proposal No. 8: Member States shall ensure that intermediary service providers do not grant access to Internet sites from which products are being sold without the payment of the private copying remuneration due in the country where the customer is located.

- Cooperation between PCRMs

Cooperation between PCRMs is essential to improve the whole system and has therefore to be enhanced to the extent necessary to secure an adequate application of PCRSs and to reduce costs both for PCRMs and for operators liable for the payment of private copying remuneration.

⇒ Commitment No. 4: PCRMs commit themselves to enhance their cooperation in order to secure an adequate application of PCRSs in the Internal Market. This cooperation can take the form of:

- Exchange of information, notably on cross-border movement of goods subject to the payment of the private copying remuneration.
- Monitoring and auditing of debtors (i.a.: manufacturers, importers and distance sellers of products subject to the declaration and payment of private copy remuneration in the country where the consumer is located), to control that the cross-border movement and marketing of these goods is conducted in accordance with the legal provisions, including the rules of the PCRS, of the latter's territory;
- Filing of lawsuits on behalf of one another when access to records of the debtor has been denied and/or when the debtor has not abided by the rules of the PCRS of the country where it markets its products, in particular the non-payment of the remuneration due.

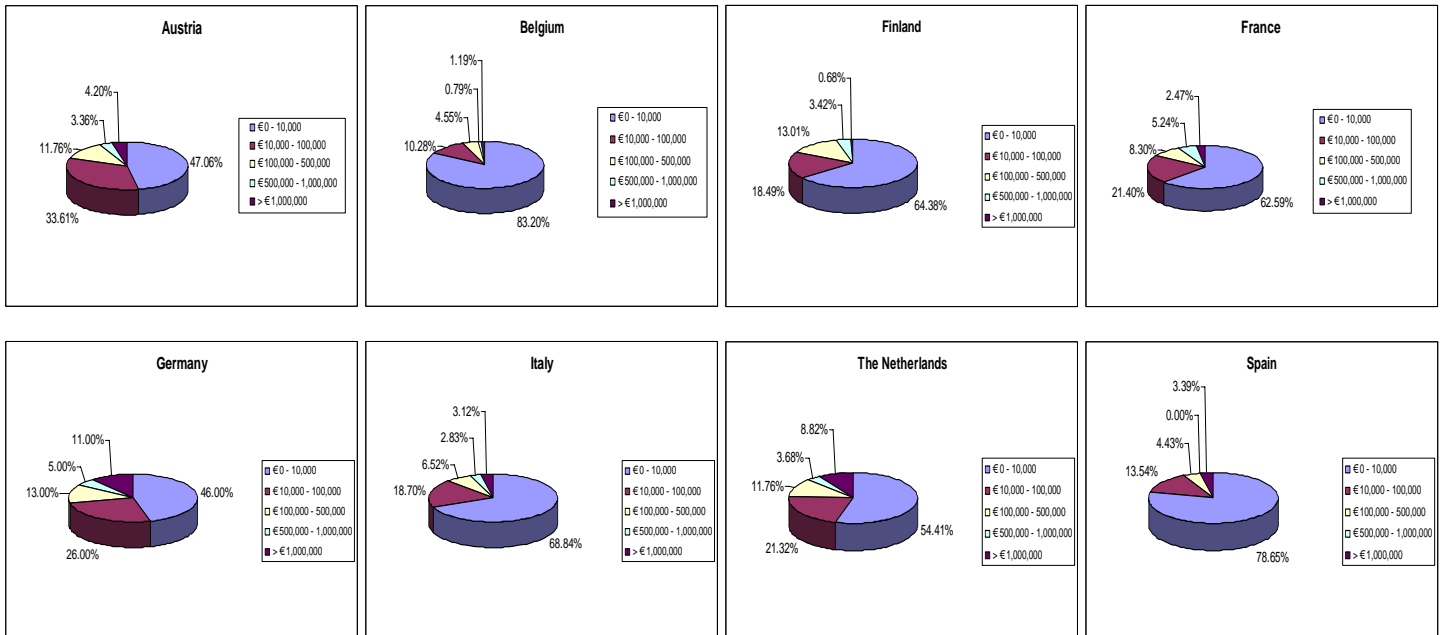
made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.”

Please note that the selling of goods on-line is considered an Information Society Service, as indicated in Recital 18 of the E-Commerce Directive: “*Information Society Services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; [...]*”

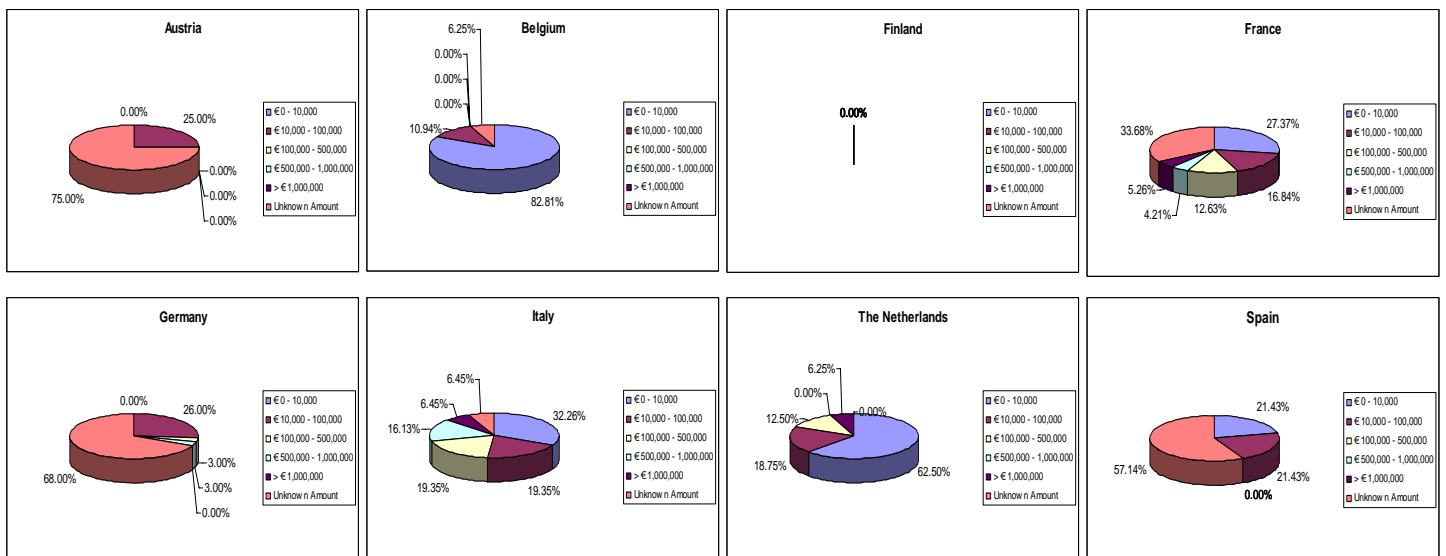
⁵⁵ Article 12 (3) of the E-Commerce Directive: “This article (mere conduit save heaven) shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement.”

ANNEX II: COUNTRY-BY-COUNTRY BREAKDOWN OF TYPE OF ACTUAL OR POTENTIAL DEBTORS OF PRIVATE COPYING REMUNERATION BY THE AMOUNT PAYED AND BY THE AMOUNT OWED

- Breakdown of operators by amount of private copying remuneration paid*



- Breakdown of number of lawsuits by amount owed⁵⁶*



⁵⁶ In Finland, no lawsuits were filed in 2006.