OPPORTUNITIES OF EU-LEVEL ADMINISTRATION OF PRIVATE COPYING LEVIES

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ABSTRACT

The foundation of the private copying levy is eroding. What was once a remuneration-based "reward" has transitioned into a compensation-based payment linked to the notion of rightholder "harm," resulting in a wide range of levy applications, calculations and distribution schemes among EU Member States. This administrative fragmentation is further compounded by new online business models, as streaming and cloud storage services forego the need to create private copies altogether. Yet in spite of this, the levy remains as relevant as ever: as an unwaivable contractual mechanism, it serves as a stable source of income for EU rightholders with limited bargaining power, and accounts for millions of Euros reinvested back into the creative economy. In the continued absence of an adequate technological means to track the private copying practices of users, it seems that the levy may provide an even longer-term solution than anticipated – what is still needed, then, is a means by which levy administration can be optimized for the digital era.

This paper will examine and critique one approach to improving the function of the private copying levy in EU Member States: administrative intervention at the EU-level. Part I will first identify theoretical and technological shifts that challenge the current existence of the levy. After these issues are addressed, Part II will assess the feasibility of an EU-level institutional approach by addressing regulatory gaps in three distinct areas: tariff setting, collection and distribution and technological monitoring. This paper will ultimately propose recommendations for improving the administration of the levy among EU Member States.

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INTRODUCTION

In 2013 the results of a large-scale public consultation on private copying levies in the EU was released. The appointed mediator for the project, António Vitorino, found that, "while it is true that the cases of private copying requiring compensation by means of levies are, on account of new business models and changing consumption patterns, likely to decline, they will not vanish from one day to the next."[1] In the same year, the International Confederation of Societies of Authors and Composers (CISAC) reported that private copying collections from its European societies increased by 9.9% from 2012.[2] More recently, in 2017 CISAC reported that "[p]rivate copying levies in Europe have grown sharply, increasing by over 100% since 2012, with 2016 seeing the largest increase (+22.1%)."[3]

At least part of Vitorino's prediction has held true: the private copying levy has certainly not vanished. But it hasn't diminished either, as the figures above seem to contradict the fact that some online business models affecting the dissemination of creative content have eliminated the consumer's need to make private copies altogether. To understand this contradiction, it is important to first understand the development of levy scheme in the EU.

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[1] Vitorino, A. (2013). "*Recommendations resulting from the Mediation on Private Copying and Reprography Levies.*" Brussels. 31 January 2013. p. 2-3. Available at: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf. Alternatively: https://www.mkcr.cz/doc/cms_library/130131_levies-vitorino-recommendations_en-1984.pdf. ["Vitorino Recommendations"]

[2] Figures based on data collected from CISAC's affiliated European collecting societies. *See,* "CISAC Global Collections Report 2015." pg. 11. Available at: http://www.cisac.org/CISAC-University/Library/Global-Collections-Reports/Global-Collections-Report-February-2015.

[3] This increase was explained, in part, by a retroactive agreement reached in Germany (for 2012-2016) regarding levies on smartphones and tablets. *See* "CISAC Global Collections Report 2017: For 2016 Data." pg. 35 Available at: http://www.cisac.org/CISAC-University/Library/Global-Collections-Reports/Global-Collections-Report-2017.

The fact is that the majority of Member States of the EU have long embraced the levy and supported its role in the EU's creative economy. Particularly in the EU, in addition to remunerating creators, the levy plays a unique cultural and social role in funding initiatives aimed at, "…supporting the creation, the promotion and the dissemination of works as well as enabling the training of artists and writers, all in the interest of the public."[4] These allocations often have a direct effect on the overall amount and frequency of cultural outputs within a Member State,[5] and in the case of countries like Germany, may also provide old artists with the security of pensions largely funded by private copying income.[6]

Yet the administration of the levy among EU Member States has remained a consistent problem. One complication lies in the criteria for setting the appropriate amount of the levy: the factors required to determine rightholder "harm" is not harmonized across the EU. Instead, each Member State is at liberty to determine "the form, detailed arrangements for financing and collection, and the level of…fair compensation."[7] In effect, this has led to 22 different national systems with "dramatic differences between countries in the methodology used for identifying leviable devices, setting tariffs, and allocating beneficiaries of the levy."[8] Furthermore, though the CJEU has played a role in harmonizing this system, it has been a limited one. The recent *VCAST* case, as discussed below, is only the latest in a string of missed opportunities for the CJEU to guide Member States through the contentious issue of applying the levy to new technologies.[9] In an age that has both welcomed hundreds of new devices within the last few years and edged others into obsolescence, the levy has become an increased year-on-year administrative burden on national regulatory bodies tasked with updating levies and continuously ensuring that the amount of compensation remains "fair."

The 2013 mediation, despite its ambitions, did not result in any new legislation[10] and marked another failed effort to harmonize the private copying levy in the EU since its appearance on the harmonization agenda in 1988.[11] While private copying levies were not explicitly addressed under the

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[4] CISAC (2017). "Private Copying Global Study 2017." CISAC Legal & Policy Department. pg. 9. Available at: http://www.cisac.org/CISAC-University/Library/Studies-Guides/Private-Copying-Global-Study.

[5] In France, one collecting society (SACEM) supports more than 1,600 artistic and cultural projects in France every year, including nearly 500 festivals. "Création sous tension 2e Panorama de l'économie de la culture et de la création en France." France Créative. October 2015. Pg. 103 Translated via Google Translate Tool. Available at: http://francecreative.org/wp-content/uploads/2018/11/EY-2e-panorama-de-l-economie-de-la-culture-et-de-la-creation-en-France.pdf

[6] WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 14.

[7] ECJ, Case 467/08, Padawan SL v. SGAE, (2011) ECDR 1, para. 7 [*Padawan*]

[8] Kretschmer, Martin (2011). "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. pg. 8. Available at: https://ssrn.com/abstract=2063809.

[9] *VCAST Limited v. RTI SpA,* C 265/16. ECLI:EU:C:2017:649. For detailed analysis, *see* Quintais, João Pedro & Rendas, Tito (2018). "EU Copyright Law and the Cloud: *VCAST* and the intersection of private copying and communication to the public." Journal of Intellectual Property Law and Practice, Forthcoming. 30 January 2018. Available at: https://ssrn.com/abstract=3113215.

[10] Poort, Joost and Quintais, João Pedro. "The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies." 4 JIPTEC 3, 206 (2013). Available at: https://www.jipitec.eu/issues/jipitec-4-3-2013/3846/Poort.pdf. (citing Council of the European Union, Press Release, 3242nd Council meeting Competitiveness (Internal Market, Industry, Research and Space), Brussels, 29-30 May 2013, 10142/13, pp. 2, 8, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/137340.pdf.)

[11] Id. at 205 (citing Green Paper on Copyright and the Challenge of Technology 1988, pp. 99-142.)

text of the recently passed Copyright Directive,[12] political will on behalf of rightholders seems to point towards preserving the levy.[13] What is still needed, then, is an approach to levy reform that can be both flexible enough to adapt to a rapidly-changing technological landscape, but authoritative enough to guide harmonization efforts across Member States.

This paper outlines a previously underexplored option that is likely to have both the necessary flexibility and authoritativeness to resolve the issues that persist with managing the private copying levy in the EU: administrative intervention by an EU-level regulator.[14] Part I will first identify theoretical and technological shifts that have both defined and challenge the existence of the private copying levy. In this section, the levy will be also examined in light of new technologies and online business models, particularly streaming and cloud computing. Part II will then consider the potential of EU-level administrative intervention by identifying regulatory gaps in current Member State administration. This section will be divided into three key aspects of levy administration – tariff-setting, collection/distribution, and technological monitoring – in order to discern where gaps currently exist and to determine how they might be bridged by EU-level intervention. Both legal and economic rationales will be utilized throughout the paper in the interest of formulating a pragmatic and functional approach to revision of the private copying levy in light of the Commission's "Digital Single Market" objective.[15]

I. Private Copying Levy in the EU: Current Theoretical and Technical Issues

This Part will examine the historical development of the levy and trace its application into the modern age. The goal of this section is to identify milestones in the development of the levy over time and to provide some necessary context for the recommendations made in Part II. Section A deals with the development of the levy theory over time, beginning with its first applications in Europe. Section B transitions into the current challenges that technology imposes on the levy, using the examples of DRM and Cloud Storage.

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[12] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. L 130. In explaining why the private copying issue was generally excluded from the recent draft text of the Directive, "the Commission announced it would continue to assess the need for action, to ensure that the different levy systems in place in Member States do not raise barriers in the single market." Madiega, Tambiama, European Parliamentary Research Service (EPRS), "Briefing: EU Legislation in Progress." July 2018, pg. 8. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593564/EPRS_BRI(2016)593564_EN.pdf.

[13] *See,* de Thuiskopie and WIPO (2017). "International Survey on Private Copying" Law & Practice 2016. pg. 4 Available at: https://www.wipo.int/publications/en/details.jsp?id=4183. ("The recent renewed interest of the European Commission and the European Parliament in investigating the viability of measures that would further the approximation and possibly the harmonization of [the important parts of] the private copying systems in the EU is of great significance for the future of levy systems.") *See also* Castex, Françoise. European Parliament, "Report on private copying levis (2013/2114(INI)) Committee on Legal Affairs. 17 February 2017. pg. 6 ["Castex Report"] ("…the private copying system is a virtuous system that balances the exception for copying for private use with the right to fair remuneration for rightholders, and that it is worth preserving…")

[14] This policy approach is further elaborated on and expanded to encompass more issues with regulating digital copyright law in the EU in the PhD thesis by the author, forthcoming (August 2020), titled "Copyright Reform in the EU: An Institutional Approach." This paper contextualizes the institutional approach to address the private copying levy issue in particular, and serves to present some preliminary findings of the current PhD research project.

[15] On the Digital Single Market objective, *See,* European Commission. "Priority: Digital single Market." Available at: https://ec.europa.eu/commission/priorities/digital-single-market_en.

A. Defining "Harm": Balancing a Moral Rights Tradition with Economic Rationales

At its most basic, according to current EU law, private copying is an exception to the copyright holder's exclusive right of reproduction where the creation of personal (*i.e.*, non-commercial) copies of lawfully-owned copyrighted material is deemed permissible.[16] In exchange, the rightholder is entitled to "fair compensation," which is collected in the form of a levy. The payment of the levy, as administered by most Member States of the EU,[17] is tied to the sale of physical media and/or equipment used for copying (such as CDs and USB drives), and collected from either manufacturers, importers or distributors of copying media or equipment, or collected from consumers themselves.[18]

The rationales that have grounded the administration of the private copying levy have changed considerably over time, and have evolved (not unlike other aspects of copyright law) in response to technological innovation. In the early 1950s, the invention of the audiotape recorder enabled the copying of visual and audio media to occur at a much more rapid pace and widespread scale than previously possible. This quickly became a perceptible threat to rightsholders, who condemned the technology as infringing on their exclusive rights to reproduce and disseminate their work. The audiotape recorder soon became the technological breakthrough that motivated the first legislative response in Germany in the form of a levy, and provided one of the earliest legal bases for the EU's current embodiment of the levy.[19]

1. Moral Rights Rationales: German Cases

In 1954, *Grundig* was the first case where German collecting society GEMA raised suit against a manufacturer of home tape recorders on the basis that their authors' exclusive rights to copy and distribute their work were bring violated.[20] As opposed to a direct liability claim and according to German civil code, manufacturer Grundig could be sued under what could be perceived today as a quasi-theory of contributory liability for infringement. According to the code, the manufacturing and selling of tape recorders "jeopardized [rightholders'] exclusive rights" by selling the goods "…without advising customers of the law regarding the copying of copyright works and of their responsibility to observe the exclusive rights of copyright owners."[21] While Grundig argued that under Article 15(2) LUG[22] user copying activity was expressly protected, and that on balance the user's privacy interest

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[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. [InfoSoc Directive; the Directive] Art. 5(2)(b).

[17] As of this writing, two jurisdictions that do not incorporate some form of the private copying levy into their national legislation are the UK and Ireland. WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17.

[18] Kretschmer, Martin (2011). "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. pg. 10. Available at: https://ssrn.com/abstract=2063809.

[19] Id. at 60. *See also*, P.B. Hugenholtz (2012). "The Story of the Tape Recorder and the History of Copyright Levies," in: B. Sherman and L. Wiseman (eds.), Copyright and the Challenge of the New. Kluwer Law International.

[20] *GEMA v. Grundig,* Decision of May 18, 1955, I ZR 8/54, 1955 GRUR 492.

[21] Gaita, K. and Christie, A. F. (2004). "Principle or Compromise? Understanding the Original Thinking Behind Statutory License and Levy Schemes for Private Copying." Intellectual Property Research Institute of Australia, Working Paper No. 04/04. Pg. 6. (citing Article 1004, *Bürgerlichegesetzbuch* (BGB)).

[22] *Gesetz betreffend das Urherberrecht an Werken der Literatur und der Tonkunst* (1901) (LUG), Article 15(2), permits the practice of, "'copying for private use…in cases where the purpose [was] not to gain income from

outweighed the rightholders' interest in licensing the use,[23] the Supreme Court held that it, "was the duty of the Court to uphold the legislator's 'spirit and purpose' behind the [Article 15(2)] provision in question over and above its actual wording."[24] The Court then acknowledged that the rights of the copyright owners were violated. Following the judgement, through intensive legislative efforts on behalf of the German Parliament following the *Grundig* case and others, in 1965 Germany became the first country in the world to introduce a statutory license and levy scheme on the sale of recording equipment.[25]

Recognizing the rapidity of the legislative efforts of the German Parliament following *Grundig* to codify a levy scheme, an interesting question surfaces: what exactly did the German Parliament determine as "harm" caused to the rightholder, especially since recognizing this harm would have contradicted its previous interest in shielding the user's private sphere from infringement claims? According to German legal tradition in copyright and legal philosophy from the 17th century, the harm that required remedy was an outgrowth of the "natural rights" ethos characteristic of author's rights systems. For Germany in particular, which followed philosophical strains of Kant in its intellectual property laws, this meant that authors were essentially owed remuneration on a fundamental rights basis, tied to a respect of their personhood.[26] This, of course, contrasts with utilitarian justifications of a right to remuneration as an incentive to create (as in Anglo-common law systems), as this theory "…does not feature as influential in the German approach to private copying; or in fact in the German approach to copyright in general."[27] At least at its inception, then, the private copying levy as it was first codified based its theory of rightholder harm on moral rights considerations.

Perhaps this is not so surprising to those familiar with the moral rights tradition reflected in the copyright rationales of most EU Member States, but it is important to be reminded of this grounding for interpreting the definition of "harm" in the administration of private copying levy by Member States today. As discussed further below, the InfoSoc Directive diverges from the German system by opting for the terminology of "fair compensation" as opposed to "equitable remuneration," the

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the work.'" (Translated in: Christie, A.F. and Gaita, K (2003), "Principle or Compromise?: Understanding the original thinking behind statutory license and levy schemes for private copying." Intellectual Property Research Institute of Australia, Working Paper No. 04/04. Intellectual Property Quarterly, pg. 5.)

[23] The proposed Article 47 of the Urheberrechgesetz (UrhG) was offered by Grundig on this point to show that Parliament's rationale was expressly that "the rights of the author must never transcend the individual's interest in keeping his private sphere free from claims under the copyright act." However, technologically speaking, the Article 47 was limited to copying "undertaken by hand or with a typewriter." *See* Gaita, at pg. 5, fn. 14.

[24] *Id.* at 6-7.

[25] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. pg. 15 Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[26] "The right to remuneration can therefore be seen to embody a sense of a deeper, non-monetary wrong that exists when private copying occurs *without* remuneration – a wrong akin to ingratitude or disrespect towards the author." Gaita, K. and Christie, A. F. (2004). "Principle or Compromise? Understanding the Original Thinking Behind Statutory License and Levy Schemes for Private Copying." Intellectual Property Research Institute of Australia, Working Paper No. 04/04. pg. 29. *See also*, Hugenholtz, et. al., "The Future of Levies in a Digital Environment" supra n. x.

[27] *Id.* at 30.

latter being more responsive to the protection of the author's natural rights.[28] Through this divergence, lack of sound interpretive guidance from the ECJ, and other idiosyncrasies of national law, there are in effect 22 different national systems that each have developed their own sets of criteria for calculating "harm" to the rightholder. Meanwhile, increasing interests in global competitiveness have only bolstered the shift towards economic rationales in the interpretation and administration of the private copying levy, which have since layered on heavily over existing premises of so-called EU copyright law. As described below, this additional economic sense of the levy has added complexity to an already loose theory of how the rightholder is harmed by private copying practices.

2. Economic Rationales: The InfoSoc Directive and Beyond

Private copying levies are something of a blunt instrument: they represent a second-best solution to an informational deficit, where the copying activity that needs to be measured occurs in the private sphere. In the absence of an ideal situation where each individual act of copying is "compensated," the levy represents an estimate of both copying activity across media and/or devices, and an estimate of distributions to rightholders, based on data sampling.[29] Although the use of sampling to estimate rates of remuneration in other copyright sectors are commonplace,[30] as Ruth Towse puts it,

> [f]rom an economic point of view, [the levy] is an even blunter instrument than the blanket license or equitable remuneration schemes, because all who buy the equipment have to pay the levy whether or not they use it for copyright purposes, and the revenues from the levy have to be distributed in a fairly arbitrary way between the different groups of rights holders, whose work may or may not have been copied (visual artists, authors and publishers, composers, performers, record labels, and so on).[31]

Despite its faults, this is the current working legal solution to the informational deficit posed by private copying practices. This highlights again the need to unify the rationales underpinning the levy at a conceptual level first before one can engage the question of how to update its applications to new technologies. Thus, it is worthwhile to analyze the levy at a higher level of abstraction, from an economic perspective, before engaging in an analysis of the EU's current implementation of the levy.

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[28] On the result of using "fair compensation" terminology as opposed to "equitable remuneration" in the Directive, see *infra*, section 2(b)(i).

[29] Use of compensation vs. remuneration terminology is not interchangeable, as explained in, *infra*, Section 2(b)(i).

[30] Ficsor, Mihaly. (2002) Collective Management of Copyright and Related Rights. WIPO, Geneva 2002. Available at: *ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_855e.pdf*. pg. 91. ("The distribution of private copying royalties by the competent joint management organizations is made by means of one of the most widespread techniques which is also used by some musical performing rights organizations, namely by means of sampling. This technique involves an element of rough justice but it still guarantees a fairly correct distribution to individual owners of rights reflecting essentially the actual use of the works protected.")

[31] Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. pg. 65. Available at: https://ssrn.com/abstract=2063809. (citing R. Towse (2010), "A Textbook of Cultural Economics," Cambridge: CUP pgs. 366-67).

a. Economic Theories of Harm: Lost Licensing vs. Value Added

Qualifying acts of private copying are compensated ideally by the copier himself, on the basis "harm" incurred by the rightholder. Economists might consider two possible definitions of such "harm" that can inform the calculation of the amount and applicability of the levy: either (1) economic loss suffered by the rightholder by "missing" an opportunity to license copies of his work; or (2) the payment owed by consumers based on the "added value" of the ability to copy the copyrighted work on their devices.[32] Again, in the most economically efficient case, the rightholder is compensated for every single private copy made.[33] Any significant deviation, then, from this ideal amount of compensation is unfavorable from an economic standpoint.

Turning to the first scenario, when users wish to generate a personal copy, understanding that each act of copying is an imposition on the rightholder's exclusive right of reproduction, the rightholder would have an opportunity to negotiate with the user again over the copy (*i.e.*, by licensing the ability to copy to the user, or by licensing each individual copy). Because this process would involve considerable transaction costs and would violate the user's countervailing privacy interests, a levy system might roughly estimate the private copying activities of all users *vis à vis* the copying capability of the copying medium (CDs, MP3 Players), and from this estimation would collect the levy and distribute the compensation back to the rightholder. The compensation in this case would be calculated on the assumption that that the rightholder is harmed by the "loss" of an opportunity to license the copy.[34]

Another way to perceive the concept of "harm" from an economic perspective is through the use of the levy mechanism in a "value added" scenario, where the rightholder is not *per se* harmed by the copying itself, but rather the user's added value in the ability to generate copies would not be able to be captured by the rightholder in the absence of a levy.[35] In this sense, consider the availability of

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[32] Boyer, Marcel (2017). "The Economics of Private Copying." Toulouse School of Economics, September 2017. Working Paper No. 17-845 pgs. 3-4; Ferreira, Jose Luis. (2010). "Compensation for private copying: an economic analysis of alternative models." ENTER IE Business School, July 2010. pg. 5. Available at: http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=853&PortalId=0&TabId=353 pg 3; Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. (lost licensing) pg. 17; (value added) pg. 61. Available at: https://ssrn.com/abstract=2063809.

[33] Ferreira, Jose Luis. (2010). "Compensation for private copying: an economic analysis of alternative models." ENTER IE Business School, July 2010. pg. 5. Available at: http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=853&PortalId=0&TabId=353.

[34] Though this may make sense economically speaking, as Kretschmer points out, "…there is a [legal] circularity…if there is a copyright exception, there is no infringement, and no license could have been issued. Thus by definition there is no harm in law from a permitted activity." *See* Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. pg. 17. Available at: https://ssrn.com/abstract=2063809.

[35] Ferreira, Jose Luis. (2010). "Compensation for private copying: an economic analysis of alternative models." ENTER IE Business School, July 2010. pg. 3. Available at: http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=853&PortalId=0&TabId=353. *See also* Kretschmer study, supra n. x at 61-62. "Were it not for PCR [private copying remuneration] charges, the additional social value created by the new use of IPR-protected works would be appropriated exclusively by consumers and the CE [consumer electronics] industry, while

content as an MP3 file versus vinyl record; the latter would involve considerably higher user costs to be able to generate a digital copy on another device (*a.k.a.* format shifting), whereas the digital file allows for an easy transfer across multiple platforms and devices. According to Ferriera, "[t]he technology that makes private copying possible increases the consumer's value of their legitimately purchased goods…Consumers' higher valuation leads to a new market equilibrium that is as efficient as the old one. From the economic efficiency perspective, this asymmetry needs no correction, but politically, it may be interpreted as harm that needs correcting."[36] In another "value added" scenario of a similar nature, it is alternatively explained that, "…since right owners do not profit from [the] higher value [of consumers being able to create private copies], they do not receive the right economic signals to produce more copyright content. Sharing this higher value through a system of compensation to right owners would increase economic efficiency."[37] This rationale is familiarly used in copyright traditions that emphasize the copyright as an economic, or property-based, right.[38]

One primary issue with the levy is the lack of a definitive stance on which definition of harm is correct. The uncertainty regarding how to define "harm" among the EU Member States therefore creates a twofold problem. First, that the means of justifying the imposition of the private copying levy identified above are not fully satisfactory on their own, even if one justification is ultimately picked over the other. Second, that Member States are not only at liberty to choose which justification to use when reaching the appropriate rate of compensation, but that they may also define which factors are relevant and irrelevant to the calculation of harm, on whatever theoretical basis they deem appropriate. If the first approach ("lost licensing" rationale) is maintained, should government intervention in the form of a levy be the solution? As pointed out by some scholars, lost licensing opportunities are not usually remedied by legal intervention, but are rather resolved through adapting one's strategy in the market to be able to capture adequate licensing revenue.[39] On the other hand, if the value-added scenario is determined to be a more amenable justification, would that not reflect a more "unjust enrichment" rationale, rather than "harm" to the rightholder *per se*, by requiring users to pay rightholders for their increased utility of a copyrighted work?

To help address these questions, the 2013 mediation on private copying levies essentially recommends picking one of the potential definitions of harm: basing the calculation of levies on the theory of lost licensing opportunities. Particularly, the levy would be calculated by, "look[ing] at the

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creators would remain uncompensated." (citing Economic Analysis of Private Copy Remuneration, Report prepared by EconLaw Strategic Consulting for Groupement Européen des Sociétés d'Auteurs et Compositeurs (GESAC) (September 2007), section 1.3, p. 7).

[36] Id.

[37] *See* Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. pg. 61. Available at: https://ssrn.com/abstract=2063809.

[38] I.e., Anglo-saxon property systems. *See generally,* Landes, William and Posner, Richard (1989). "An Economic Analysis of Copyright Law." 18 J. Leg. Stud. 325.

[39] "Normally, lost sales are not something to be compensated. If a second stall sets up in a market, it's called competition. However, if competition arises from a lack of enforceability of contracts or rights, the issue becomes more complicated….Kay argues that legislators should be reluctant to get involved in the enforcement of private rights: 'If right owners struggle to enforce contracts, this is not normally a point of public policy.'" Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. Available at: https://ssrn.com/abstract=2063809. (citing John Kay, The economics of copyright levies, IPO / ESRC Seminar, 14 October 2010).

situation which would have occurred had the exception not been in place" and, "assess[ing] the value that consumers attach to the additional copies of lawfully acquired content that they make for their personal use. [This] would allow the estimate of losses incurred by rightholders due to lost licensing opportunities ('economic harm'), *i.e.*, the additional payment they would have received for these additional copies if there were no exception."[40] Another study conducted by CEPS Digital Forum in the same year also maintains this approach: "A uniform concept of harm…should be adopted at EU level in order to enable an economics-based calculation of levies. The recommended criteria to estimate the harm to be compensated financially could be that of 'lost profit' and the economic value that consumers attach to private copies, i.e. the consumer's willingness to pay for the making of subsequent copies for personal use diminishes progressively and significantly."[41] In other words, adopting a "lost license" approach would definitively favor a purely economic basis on which to calculate harm. As shown below, however, no similar consensus has emerged yet among Member States.

b. The InfoSoc Directive

In the EU the private copying levy is addressed in Directive 2001/29/EC Article 5 as part of a closed list of exceptions to the reproduction right of copyright.[42] The Directive was intended to both harmonize the framework of copyright and related rights across the Member States that already had some commonalities between them, and also to facilitate the adaptation of this framework in Member States that did not already have such features in place to facilitate the free movement of goods in the so-called "Single Market."

As noted by Helberger, early drafts of the InfoSoc Directive did not permit the practice of digital private copying at all, as alluded to in Recital 38 of the Directive which forewarns that digital private copying is "likely to be more widespread and have a greater economic impact" than analogue private copying.[43] Its final inclusion, and the broad manner in which it was finally drawn into the Directive, may be explained by the interest in preserving the autonomy of those Member States that previously did not already recognize the exception (namely the UK and Ireland).[44]

Article 5(2)(b) sets out the primary part of the private copying legislation as an exception to the author's exclusive right of reproduction:

> [Member States may provide for exceptions or limitations to the reproduction right] "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account

[40] Vitorino Recommendations, supra n. 2, at 19.
[41] Mazziotti, Giuseppe (2013). "Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum." Centre for European Policy Studies, Brussels. June 2013. pg. 18.
[42] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. [InfoSoc Directive]
[43] Helberger, Natali, Hugenholtz, P. Bernt (2007). "No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law." 22 Berkeley Tech. L. J. 1061, 1071 at fn. 57.
[44] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 36. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

> of the application or non-application of technological measures [referred to in Article 6]. [45]

Instead of the very narrow copying exceptions seen in the precursory Database Directive (copies for private purposes, only non-electronic databases)[46] and Computer Programs Directive (prohibition of private copying except in cases of creating backup copies)[47], the exception embodied in the Directive seems much more expansive in the manner in which it grants Member States legislative autonomy. As the levy only bears its specific meaning in relation to the right of reproduction, Kretschmer deduces that the copying activities carried out on digital networks would necessarily be limited to, "(i) Making back-up copies/archiving/time shifting/format shifting; (ii) Passing copies to family / friends; (iii) Downloading for personal use; (iv) Uploading to digital storage facilities."[48] In fact, the actual scope of the application of the levy on digital goods is actually quite narrow in practice. Commercial or institutional copying, for either legitimate or illegal purposes, should be exempted entirely from payment, not to mention eliminating payment obligations for illegally made copies, a widespread phenomenon through the recent proliferation of peer-to-peer networks.[49] Additionally, compensation would not be due for,

> "…the vast quantities of internet-(web-)based content which are downloaded for archival purposes with the implied or express consent of the content providers… providers of freely available content on the web…copies of public domain materials… 'digital' subject matter covered by previous EC directives, such as computer programs and databases [(e.g., the making of back-up copies)]… or 'in cases where rightholders have already received payment in some other form, for instance as part of a licence fee' [e.g., where an] accompanying end-user license allows for (a measure of) private copying."[50]

Finally, exceptions allowed by article 5(2) are further subject to the so called three-step test, referred to in article 5(5) of the InfoSoc Directive,[51] and echoed in the Berne Convention, TRIPs, and the "WIPO Internet Treaties."[52]

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

[46] Council Directive 96/9 on the Legal Protection of Databases, 1996 O.J. (L 77) 20 (EC) [Database Directive]

[47] Council Directive 91/250 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42 (EC) [Computer Programs Directive]

[48] Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. Pg. 9-10. Available at: https://ssrn.com/abstract=2063809.

[49] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. pg. ii. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[50] *Id.* at 37.

[51] "The exceptions and limitations provided for in paragraphs 1, 2, 3, 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder." Article 5(5) InfoSoc Directive.

[52] Poort, Joost and Quintais, João Pedro. "The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies." 4 JIPTEC 3, 220 fn. 17 (2013). Available at: https://www.jipitec.eu/issues/jipitec-4-3-2013/3846/Poort.pdf. ("WIPO Internet Treaties" is meant here as an umbrella term for the WIPO Copyright Treaty, opened for signature 20 December 1996, 2186 U.N.T.S. 121 (entered into force 6 March 2002) [WCT] and the WIPO Performances and Phonograms Treaty, opened for signature 20 December 1996, 2186 U.N.T.S. 203 (entered into force 20 May 2002) [WPPT]).

i. Fair Compensation vs. Equitable Remuneration

Recital 35 of the InfoSoc Directive refers to the concept of fair compensation:

> "In certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the right holders resulting from the act in question. In cases where the right holders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due…[53]

Taking into account the initial narrowness of the levy's application in terms of digital copying, there is considerable significance in the choice of using "fair compensation" as opposed to "equitable remuneration" in the Directive.[54] It is first pointed out by Hugenholtz et. al. that the decision to use "fair compensation" as opposed to "equitable remuneration" in the private copying exception is "inextricably linked" with the "harm" criterion: "Whereas 'equitable remuneration' may … be due in situations where rightholders suffer no (actual or potential) harm at all, Recital 35 clarifies that ***'****fair compensation' is required only when and if rightholders are (actually or potentially) harmed by acts of private copying.* Consequently, one might argue that Member States are under an obligation to provide for compensation *only if the likelihood of such harm can be reasonably established."*[55]

Indeed, this choice differs from the natural rights ethos that was characteristic of the German implementation.[56] As also pointed out by Geiger, both the German translation of Recital 35 of the Directive and the French codification of private copying avoid the imprecision of the "compensation" language and opt for the "more neutral" term "remuneration."[57] What is especially interesting about

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[53] Recital 35 InfoSoc Directive, emphasis added.

[54] A separate concept, the idea of 'equitable remuneration', is found in Articles 4(1) and 8(2) of the Rental Right Directive. *See* European Court of Justice, 6 February 2003, Case C-245/00 (SENA v. NOS). Furthermore, the concept of "equitable remuneration" is explicitly distinguished from the concept of "fair compensation" in *Padawan*: "the concept of 'fair compensation' which appears in a provision of a directive which does not contain any reference to national laws must be regarded as an autonomous concept of European Union law and interpreted uniformly throughout the European Union (see, **by analogy**, as regards the concept of 'equitable remuneration' in Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) and Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 24)." Padawan, supra n. x at para. 33. Emphasis added.

[55] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 36. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf. (Emphasis added).

[56] Id. at 36. ("[Use of "fair compensation" language] is a clear departure from the notion of 'equitable remuneration'… developed particularly in German copyright doctrine, that authors have a right to remuneration for each and every act of usage of their copyrighted works ('Vergütungsprinzip').")

[57] Geiger, C. (2010). "Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law", 12 Vand. J. Ent. & Tech. L Issue 3, 515, 529. (citing Commission Directive 2001/29, art. 35 2001 O.J. (L 167) 10 (EC) and Code de la propriété intellectuelle (Intellectual Property Code) art. L. 311-1, respectively.)

this choice between "compensation" and "remuneration" is that this language seems to further translate into a pecuniary difference, as noted by Kretschmer and Hugenholtz et. al.:

> "According to the European Commission, equitable remuneration requires a minimum standard of payment without evaluation of harm (2006 Impact Assessment, p. 16). Hugenholtz et al. argue (2003, p. 36) that 'equitable remuneration', as a notion based on fairness, *may require higher levels of payment than payments based on harm.*"[58]

Taken together, "fair compensation" is to be considered an "autonomous EU law concept" distinct and separate from "equitable remuneration," with its own unique set of consequences. Furthermore, a finding of "harm" is only required for determining the level of fair compensation and not for equitable remuneration.

But is the requirement of "harm" as a criterion of fair compensation wholly consistent with the initial purpose of the levy? Returning briefly to the codification of the levy in the German system, the law specifically does one thing – granting remuneration to the rightholder – but it does *not* simultaneously permit the practice of private copying. In commenting on the InfoSoc Directive in 2001, the German Minister of Justice clarifies that, "German copyright law (Urheberrecht) does not recognise a right to private copying. There are only limits (Schranken) to copyright law, i.e. the right owner must tolerate copying for private use and, in return, participates in a collective remuneration scheme. Private copying is lawful under the rule: 'Protection, where you can protect. Remuneration, where you can't protect.'"[59] This justification is reinforced in the opinion of Attorney General Trstenjak in *Padawan*:

> "The right to 'fair compensation' … as the German Government correctly points out, primarily has the *character of a reward*. This is apparent from the first sentence of recital 10, pursuant to which if authors or performers are to continue their creative and artistic work, they have to receive an 'appropriate reward' for the use of their work. Recital 35 makes clear that 'fair compensation' should also be classified in this category of rewards, where it is stated that in certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter."[60]

However persuasive the case for interpreting the Directive based on remuneration-based theory and terminology, the CJEU regrettably does not follow this rationale and opts for a distinctly separate

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[58] Kretschmer Study, supra n. x at 23 fn. 5, emphasis added. (citing Hugenholtz et. al., supra n. x at 36: "Whereas 'equitable remuneration' may, therefore, be due in situations where rightholders suffer no (actual or potential) harm at all, Recital 35 clarifies that 'fair compensation' is required only when and if rightholders are ((actually or potentially)) harmed by acts of private copying. Consequently, one might argue that Member States are under an obligation to provide for compensation only if the likelihood of such harm can be reasonably established.") *Cf.* Geiger, C. (2010) at 530. ("In the end, it is probably not dispositive whether one starts from "compensation" or "remuneration" – the decisive aspect is likely that in both cases, there is a possibility for the author to participate in the fruits of his work. In this regard, only the *effectiveness* of the participation is important. What does a very extensive and developed exclusive right mean to the author if hardly any remuneration flows back to him in the end?").

[59] Id. at 60.

[60] Advocate General of the Court of Justice of the European Union V. Trstenjak delivered on 11 May 2010 in Case C-467/08, *Padawan,* para. 79.

conception of fair compensation as opposed to equitable remuneration – the appropriateness of which has been scrutinized.[61]

The CJEU decision in *Padawan* most prominently evidences the shift away from traditional moral-rights "fairness" inquiry in levy implementation towards an economic, or more "damages" based inquiry, nuanced by circumstances of provable rightholder "harm."[62] In *Padawan*, while the main issue under dispute was the enforceability of levies that did not discriminate between private and professional media users, the Court of Justice further interpreted that the concept of fair compensation, "must necessarily be calculated on the basis of the criterion of harm caused to authors of protected works by the introduction of the private copying exception,"[63] and that it "must be regarded as an autonomous concept of European Union law to be interpreted uniformly throughout the European Union."[64] While the intention of the Court may have been to guide a more uniform interpretation of fair compensation amongst Member States, without indicating which factors might be relevant or irrelevant to such a calculation, the crucial (and vague) criterion of harm continues to be a widely disputed aspect of the private copying levy as administered by EU Member States.

ii. Licensing and Waivability

The "licensability" of certain digital content raises interesting questions regarding the extent of private copying the Directive. The introduction of new online business models has renewed the debate over the longevity of the private copying levy, specifically in cases where rightholders are able to either directly license the works with end users, limit the amount and frequency of user downloads through technical protection measures (TPM),[65] or offer works entirely for free. Some ICT firms have argued that where "…private copying can be permitted under contract, there is no need for an exception. The appropriate compensation [should be] a license fee which should be left to the market."[66] This is similarly acknowledged in the text of Article 5(2)(b) of the Directive: "[i]n cases where the right holders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due."[67] It is also clarified by the Commission that, "[w]here a rightholder has authorized an activity in exercising his exclusive rights, no claim for compensation should arise as the person performing the activity, *i.e.*, the consumer, is a licensee

[61] See, e.g., Geiger, Christophe (2010). "Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law", 12 Vand. J. Ent. & Tech. L Issue 3, 515, 529. ("This 'compensation' or 'indemnity' terminology seems to imply some kind of damage has to be redressed…these terms appear to be incorrect. One should speak of 'remuneration' instead of 'compensation.' Hence, there would be remuneration by way of license and remuneration through a copyright limitation. It is preferable to use the term 'limitation-based remuneration rights' than the more established and misleading term of 'levies.'') See also, Kretschmer, supra n. x. at 2 ("Whilst this report indeed deplores the incoherence of the EU concept of fair compensation based on harm, and advances a *de minimis* interpretation for a narrowly conceived private copying exception, it also finds that there may be an economic case for statutory licences with levy characteristics.").
[62] *Padawan v SGAE,* C-467/08, October 21, 2010 (ECJ)
[63] *Padawan v SGAE,* C-467/08, October 21, 2010 (ECJ), para. 42.
[64] Id. at para. 33. (emphasis added).
[65] These models are also known as "licensing through" or licensing "all-you-can-eat". Kretschmer Study, supra n. x, at 59.
[66] Id.
[67] InfoSoc Directive, Recital 35.

here and not a beneficiary of the exception."[68] In short, if content dissemination becomes a fully licensable practice, then private copying is no longer required as exception to an exclusive right, and the rightholder is assumed to have received adequate compensation from the user in exchange for the license.

Though this clarification may have been to address concerns over consumers paying twice (in the form of 1.) the negotiated license and 2.) the levy on the copying media or equipment itself), this conclusion is still problematic from a consumer perspective. "Privately negotiated" levies (in the form of licenses), as briefly examined in Kretschmer's 2011 study, are at particular risk of being overly opaque in online transactions, especially in the manner in which the collected royalties are redistributed among stakeholders.[69] Furthermore, such a "fully licensed" solution would still need to be supplemented by regulatory oversight to ensure that a proper balance is struck between user expectations of the content and the rightholder's valuation of the exchange of their exclusive right.[70]

In the same vein, "TPMs" which are used in tandem with licensing agreements to regulate end-user copying, is mentioned by the Directive but in a very abstract sense. For example, in calculating the amount of fair compensation, "the application or non-application of technological measures" should be taken into account,[71] and Member States should ensure that users of copyrighted works are able to benefit from exceptions and limitations (private copying) notwithstanding the application of technical measures by the rightholder.[72] The exact legal consequences of this provision are unclear, as assessing in which cases the use of TPMs might unjustly encroach on the user's "benefit" of the private copying exception can involve many different approaches and yield some highly inconsistent results.[73]

What is clearer, however, is the legislative intention in the Directive anticipating the rise of TPM as a means for rightholders to regulate copying practices without resorting to a levy mechanism.[74] Yet

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[68] Kretschmer Study, supra n. x, at 59 (citing Inpact Evaluation for Proposed Recommendation, "Fair Compensation for Private Copying in a Converging Environment." (2006) pg. 58).

[69] Kretschmer Study, supra n. x, at 20.

[70] This might also mean going beyond the scope of Art. 5(2) of the Directive, which only contemplates private copying as an exception or limitation to the reproduction right, to potentially include communications to the public, distributions to the public, public performances or adaptations. *See* Kretschmer Study, supra n. x at 69.

[71] *See* Art 5(2)(b) InfoSoc Directive.

[72] Art 6(4) InfoSoc Directive:

> "Member States shall take appropriate measures to ensure that rightholders *make available to the beneficiary of an exception or limitation…the means of benefiting from that exception or limitation.* A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), *unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned* and in accordance with the provisions of Article 5(2)(b) and (5), *without preventing rightholders from adopting adequate measures regarding the number of reproductions* in accordance with these provisions." [emphasis added]

[73] See Helberger, No Place Like Home, pg. 1087 ("It is ambiguous whether and to what extent the private copying limitation in the Information Society Directive supports consumers' reasonable expectations to make private copies…the relationship between the private copying limitation, the three-step test, the limitation's interface with contract, and the rather cryptic provision of Article 6(4) of the Information Society Directive are confusing, to say the least.") See also, Poort, Levy Runs Dry, pg. 210

[74] *See* Hugenholtz, et. al., The Future of Levies in the Digital Environment, supra n. x at 42. (citing "Explanatory Memorandum on Directive Proposal": "'It is expected that digital technology may allow the effective control of

this raises concerns of its own, as the use of TPMs by rightholders operates on the fringes of the traditional copyright system and may tend to respond, instead, to "the organizational structure of firms and inter-industry political bargains."[75] Absent any regulatory oversight or transparency requirements in the various ways TPMs and license agreements are negotiated between rightholders and users, the resulting structures come dangerously close to disrupting the fundamental copyright *raison d'être*.[76]

Considering the waivability of the levy as might be negotiated through licenses or other agreements, the ECJ has made several determinations that in effect favor the levy system, but in a manner that produces some odd results relating to rightholder autonomy. As far as the rightholder's ability to waive fair compensation due to them, *e.g.*, through the use of a creative commons license to distribute their content,[77] the ECJ has held (in comparing to the conditions of "equitable remuneration" in the Rental Rights Directive) that "the EU legislator did 'not wish to allow the persons concerned to be able to waive payment of that compensation to them.'"[78] Accordingly, rightholder waiver of the ability to recover fair compensation for acts of private copying is, in the Court's view, "conceptually irreconcilable" with "Member States'…obligation to achieve the result of recovery of the fair compensation."[79] Further puzzling is the calculation of harm, where the Court has held that the rightholder's authorization to copy their work (or not) "is devoid of legal effects under the law of that State" and does not impact the calculation of harm caused by the reproduction.[80] As a result, "[rightholder] authorisations cannot be taken into consideration when calculating the level of fair compensation."[81] As emphasized by Poort and Quintais, this "represents a significant departure from the status quo in many Member States' levy systems, which take into consideration such [rightholder] authorization to either eliminate levies in certain cases or substantially limit their amount."[82]

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private copying, and the replacement of levy schemes by individual licensing solutions which are under development (in the context of " electronic copyright management"), at least in the on -line environment.'")

[75] Dinwoodie, Graeme (2004). "Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring." Journal of Institutional and Theoretical Economics, Vol. 1, p. 160, pg. 17.

[76] Dinwoodie, Graeme (2004). "Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring." Journal of Institutional and Theoretical Economics, Vol. 1, p. 160, pg. 17. ("…it will be important for public structuring to be prospective and dynamic (no less than copyright law itself must be able to react to change). The provisions in Article 6(4) of the EU Copyright Directive, if expanded in scope, appear to possess that potential, even if in the Directive they assume only an abstract form. And for such assessment to be made on an ongoing basis, whatever private ordering occurs must be subjected to the light of day. This can be done by non-governmental organizations, but more importantly such transparency must itself be built into the public structuring of the private system.")

[77] "Every [creative commons] license helps creators…retain copyright while allowing others to copy…their work…non-commercially." Interestingly, these licenses should not affect existing exceptions and limitations to copyright law, and cannot be accompanied by the use of TPM. See Creative Commons > About the Licenses. Available at: https://creativecommons.org/licenses/?lang=en. Last accessed: 27 February 2018.

[78] Poort, Levy Runs Dry, pg. 209-10. (citing ECJ, Case 277/10, Luksan, [2012] [Luksan] paras. 103, 105-106).

[79] *Luksan*, para. 106.

[80] Poort, Levy Runs Dry, pg. 210 (citing Joined ECJ, Cases C-457/11, C-458/11, C-459/11, C-460/11, Verwertungsgesellschaft Wort (VG Wort) v. KYOCERA Document Solutions Deutschland GmbH and Others, Canon Deutschland GmbH and Fujitsu Technology Solutions GmbH, and Hewlett- Packard GmbH v. Verwertungsgesellschaft Wort, [2013] [VG Wort] paras. 37-39).

[81] Id.

[82] Poort, Levy Runs Dry pg. 210.

Hence, in identifying the Directive's limited treatment of licensing and waivability in the administration of the private copying levy, both essential rightholder expectations as they participate in digital content markets, the ECJ rulings on these points have been either too vague or have produced results that do not coincide with the idea of rightholder autonomy in the way their content is consumed. Ultimately, the rulings thus far have been perhaps too careful not to interfere with Members States' broad discretion in this area, as they have failed to provide the necessary clarity in how to administer the levy effectively in an increasingly digital world.[83]

c. ECJ Decisions Interpreting the Concept of "Harm"

Though a number of cases regarding the administration of the private copying levy have been adjudicated by the ECJ, the decisions have shied away from providing concrete guidance to Member States in defining the proper scope of the harm criterion. In *Padawan*, as mentioned above, the discussion on the harm criterion is minimal, merely reinforcing that the amount of fair compensation must be linked to harm caused to the authors of protected works by introducing a private copying exception.[84] In the CJEU's preliminary ruling on the calculation of reprography levies in *Reprobel,*[85] the Court held that the Belgian system (which implemented a lump-sum payment scheme based on the sole criteria of copying speed) did not adequately account for the proportionality of "actual" harm caused to the rightholder in failing to draw distinctions between reproductions made for private use by legal or natural persons, for commercial or non-commercial purposes.[86] Consequentially, and in line with the opinion of the European Copyright Society,[87] "actual" harm can only be incurred by rightholders, and as such, fair compensation for acts of private copying is only due to rightholders.[88]

The notion of harm is itself a tricky concept, sometimes not adequately taking into account the realities of righholder and user interations. In *VG Wort*, for example, it was held that when calculating harm, the rightholder's explicit or implicit authorization to copy their work (or not) "is devoid of legal effects under the law of that State" and "…cannot be taken into consideration."[89] This does not address "double-payment" scenarios, when users pay to obtain content under a license, and also purchase levied copying equipment/media.

Another double-payment issue reaches a dubious result in *Stichting*, a case involving the dispute between Dutch collecting society and a German-based company selling to Dutch customers.[90] In that case, the notion of "harm" is discussed in terms of its *locus* – since the purpose of the levy is to remedy rightholder harm caused by engaging in private copying activities, it follows that compensation should be paid by the ones who commit the harm, *where* the harm occurs. In other

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[83] InfoSoc Directive, supra n. x at Recital 35.
[84] Padawan, supra n. x, at para. 42.
[85] Case C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [Reprobel]
[86] *Id.* For further analysis, *see* Laurent, Philippe (2015). "Belgian levies regime condemned by CJEU." Kluwer Law Blog. 23 February 2016. Available at: copyrightblog.kluweriplaw.com/2016/02/23/belgian-levies-regime-condemned-by-the-cjeu/.
[87] European Copyright Society (ECS) (2015). "European Copyright Society Opinion on The Reference to the CJEU in Case C-572/13 Hewlett-Packard Belgium SPRL v. Reprobel SCRL" 5 September 2015. Available at: https://europeancopyrightsociety.org/opinion-on-reprobel/.
[88] Reprobel, supra n. x at paras. 47-49.
[89] *See*, VG Wort, supra n. x.
[90] Case 462/09, Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH, [2011] 3 C.M.L.R. [*Stichting*]

words, the final user of the equipment/media who makes the copy, regardless of where the commercial sale of the equipment/media occurs, should be responsible for compensating rightholders for their private copying activities in the territory in which they reside.[91] This interpretation is certainly in line with the intent and purpose of the levy scheme, but in terms of guiding the practicalities of such an arrangement, the Court stops short. National courts were tasked to interpret national law to allow the recovery of compensation "from the person responsible for payment who is acting on a commercial basis," *i.e.* the manufacturer/importer of the technology, without any guidance on how the levy obligation should be managed in cross-border situations.[92] This would entail a national court determining the efficacy of measures applied in other Member States and vice versa, in which case a national court might be reluctant to interpret the law of a foreign Member State and determine its sufficiency according to its own jurisdiction's law. This crucial misstep has resulted in the continued practice of EU manufacturers and importers paying levies twice – once in the Member State in which the product is manufactured, and once in the country of destination.[93]

In all, the Directive's grant of wide discretionary powers provided to the Member States could have benefitted from more specific and consistent criteria upon which to calculate the levy. Furthermore, necessitating a finding of "harm" as the main criteria to determine "fair compensation," especially when the concept of "harm" is perhaps only meaningful from an economic perspective, diverges considerably from both the original purpose of the levy as envisioned in German law, and away from the authors' rights grounding emblematic of the EU copyright *aquis*. The result has been a fractured and vague inquiry at best, without any further guidance or assessment at the EU level on the sufficiency of Member State measures, especially in ever-increasing cross-border scenarios.

B. Challenges of New Technology – Present to Future

While a private use is possibly more easily discerned in the analogue world, digital networks tend to blur the distinctions between private and public space.[94] Copying activities occurring online and on many household devices such as computers, laptops and smartphones, are even more difficult to track and involve complex relationships between rightholders, intermediaries, and users. These relationships are fostered by new online business models, which are often access-based models for consuming copyright-protected content. Yet copyright itself was arguably never designed for the rightholder to be able to control the access to his work, but rather to control the use of his work by others.[95] Thus, copyright plays a tenuous role in the circulation of content online, where licensing

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[91] For further analysis, *see* Synodinou, Tatiana (2011). "ECJ: Private copying levies II – the Stichting de Thiuskopie v. Opus Supplies Deutschland GmbH case." Kluwer Copyright Blog. 26 June, 2011. Available at: http://copyrightblog.kluweriplaw.com/2011/06/26/ecj-private-copying-levies-ii-the-stichting-de-thuiskopie-v-opus-supplies-deutschland-gmbh-case/.

[92] *Stichting*, supra n. x at para. 42(2).

[93] See Vitorino Recommendations, supra n. x. pgs. 10-11.

[94] Some tricky examples include peer-to-peer networks (P2P), social networks, and cloud servers (as elaborated below, *infra*). *See* Kretschmer, Martin (2011). "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. pg. 10. Available at: https://ssrn.com/abstract=2063809.

[95] This is an ongoing debate, especially in terms of understanding copyright's role in relation to digitization. *See, e.g.,* Geiger, C. (2017). "Copyright as an access right: Securing cultural participation through the protection of creators' interests." in: What if we could reimagine copyright? Eds. Rebecca Giblin, Kimberlee Weatherwall.

schemes quickly have become the prevalent manner in which rightholders can exert control over their works. This has particular consequences for the application of private copying levies in the online world, as technological protection measures (TPMs), particularly Digital Rights Management (DRM) schemes used alongside license agreements, test the extent of the application of the levy for copying practices that are actually done in full awareness of the rightholder.

For the purposes of analyzing the digital copyrighted content market from a private copying perspective, the online market can be conceptualized as a bifurcated one, divided between user spend on digital permanent downloads and digital subscription (*i.e.* streaming) services.[96] In the first category, users purchase a copy of a media file and download the copy onto their device. In this case, private copies are possible: "format shifting" from one device to another, *e.g.*, copying the original file on one's laptop computer onto a USB flash drive, involves creating a copy of the original content file. However, in the second category of use involving subscription-based services and streaming, copying *per se* is not required: users need only access the content through their internet connection, and access is typically not limited to one user-owned device.[97] In this case, a user can access the same content from any of their devices with an internet connection, eliminating the need to store the files locally.[98] This is quickly becoming the standard, or as David Bowie had aptly characterized it in 2002, akin to paying for music as one pays for "running water or electricity."[99]

Within the last few years, revenues generated from digital permanent downloads have decreased, and it is estimated that the trend will continue. In the US market for example, it has been projected that digital music streaming revenue will outpace digital permanent download revenue by 18% within the next five years, a differential of over $20 billion by 2022.[100] This trend evinces the crucial need to reconsider rapidly evolving technologies to compensate rightholders who perhaps should,

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ANU Press, 2017. pgs. 79-103. *See also*, Efroni, Zohar (2011). "Access Right: The Future of Digital Copyright Law." Oxford University Press.

[96] For the sake of completeness, there is a third category known as "stream ripping," where a copy of streaming material is downloaded to the user's device by means of a program. Though the legality of this practice is still generally unclear, the Court of Appeal of Munich ruled in 2018 that "…a stream-ripping site that copies tracks from internet radio feeds cannot rely on the private copy exception to avoid liability for copyright infringement." Cooke, Chris (2018). "German court says stream-ripping not covered by private copying exception." Complete Music Update. 27 November 2018. Available at: https://completemusicupdate.com/article/german-court-says-stream-ripping-not-covered-by-private-copy-exception/.

[97] This has become an issue for media streaming services such as Netflix, where multiple users have used a single subscription account to access content. This issue has since been remedied, as the streaming service now implements measures to regulate simultaneous streaming on multiple devices. *See* Netflix Help Page. "Your Netflix account is in use on too many devices." https://help.netflix.com/en/node/29.

[98] One adaptation to this model which has recently been applied by many online streaming services, but will not be discussed at length here, includes "Offline" library access, which would involve storage of content on the device. Interestingly, such a feature is often considered a "premium" one, and requires a higher payment. *See, e.g.*, Spotify Premium model, allowing users to "…download up to 10,000 songs on each of up to 5 different devices." Spotify Support: Download Music and Podcasts. Available at: https://support.spotify.com/is/listen_everywhere/on_phone_tablet_desktop/listen-offline/.

[99] Titlow, John Paul. "David Bowie Predicted the Future of Music in 2002." Fast Company. 11 January 2016. Available at: https://www.fastcompany.com/3055340/david-bowie-predicted-the-future-of-music-in-2002

[100] van Eeden, Ennèl, Chow, Wilson. "Perspectives from the Global Entertainment & Media Outlook 2018–2022 Trending now: convergence, connections and trust." Price Waterhouse Cooper (PwC). pg. 9. Available at: https://www.pwc.com/gx/en/entertainment-media/outlook/perspectives-from-the-global-entertainment-and-media-outlook-2018-2022.pdf

but are still unable to, capture the value in this massive digital market growth.[101] The following section will specifically explore two types of digital technology that currently stretch the limits of the applicability and sustainability of the private copying levy in the modern age: DRM technology and Cloud storage.

1. Digital Rights Management

a. DRM and the InfoSoc Directive

Rightholder adoption of technological protection measures (TPMs) is not only addressed by the InfoSoc Directive multiple times in its text – it is encouraged.[102] Though the inclusion of the exception for private copying levy schemes is itself quite broadly drafted, the Directive is much more specific in anticipating the increased use of TPM and in simultaneously protecting users against abuses of such measures by rightholders. This is likely because of the concern that TPMs regulating access to works, while seen as beneficial to rightholders in online settings, can potentially unbalance the opposing interest in encouraging the accessibility of content and the dissemination of knowledge. Though Article 6(4) of the Directive seems to address precisely this issue, in the end the provision merely suggests that users should still be able to benefit from copyright exceptions or limitations despite the imposition of measures to prevent copying, without necessarily establishing the extent to which these measures can permissibly influence user autonomy.[103]

TPMs are further defined in Article 6(3) as "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorized by the rightholder."[104] Digital rights management (DRM) schemes are to be differentiated from the concept of TPMs in that "…DRM systems do *not* impede access or copying *per se,* but rather create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the right holders."[105] In effect, unlike

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[101] This argument is colloquially known as the "value gap" argument, or the gap between platform/intermediary profits and (declining) rightholder revenues. The concept is itself a polarizing issue, and will not be discussed at length here. Nevertheless, EU Commission publications seem to acknowledge the existence of the "value gap." *See e.g.*, European Commission (2019). "Questions & Answers: EU negotiators reach a breakthrough to modernise copyright rules." Strasbourg, 13 February 2019. Available at: http://europa.eu/rapid/press-release_MEMO-19-1151_en.htm. *But see*, Saquet, Maud (2016). "How the 'Value Gap' Rhetoric Endangers the Whole Tech Sector." Disruptive Competition Project. Available at: http://www.project-disco.org/european-union/080116-value-gap-rhetoric-endangers-whole-tech-sector/#.XS37PuhKiUk.

[102] *See* InfoSoc Directive, supra n. x at Recital 13. ("A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.")

[103] InfoSoc Directive, supra n. x at Article 6(4) para. 2. ("A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.")

[104] Id. at Art. 6(3)

[105] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 3. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

TPMs which are designed to impede access or copying activities, DRMs "*manage* access to content by combining technical measures with a payment mechanism….[ensuring] that consumers pay for actual use of content, and that the content is protected and cannot be accessed by unauthorized users."[106] This regulatory mechanism is typically implemented alongside online licenses on the digital copyrighted content itself.

The role of DRM in the private copying debate is of key interest. DRM schemes have the capability of regulating several relevant aspects of copyrighted content, from the amount of copies that can be made to the interoperability between copyrighted content and the "end technology" (ability to "read" the file on certain devices). DRM standards imposed on copyrighted content have been treated at the EU level quite liberally, and in the InfoSoc Directive go as far as to anticipate its role in the elimination of levying schemes. Recital 35 of the Directive states that, "[t]he level of fair compensation should take full account of the degree of use of technical protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise."[107] Furthermore, the inclusion of Recital 39 some interpret as "…linking a possible phase-out of levies to technological and economic development, [in which cases] the requirement to pay 'fair compensation' is [eventually] lifted" based on the ability of rightholders to implement such measures "…in ways that are economically and legally viable..."[108] But, as pointed out by Dinwoodie, the ability of rightsholders to implement DRM technology and choose which implementation best suits their interests (and also the interests of publishers and other figures at the 'seller' end of the market), may be an ominous thing – for some "seller" end stakeholders, perhaps maintaining the traditional balance of rights might not be a priority.[109]

In fact, "…the ability of DRM systems to create copyright-inconsistent norms is ensured by legislation that, in response to the onset of DRMs, immunized private acts of the content owner from being overridden by public values enshrined in the copyright law."[110] This may have been an unanticipated outcome for the drafters of the Directive, but can have far reaching consequences for the copyrighted content market if left alone.

Surprisingly, the use of DRM technology, for all its influence in the copyrighted content market, is still unregulated. As of this writing, while some DRM systems have been paired with certain media types in the past (Windows Media, OMA standards in mobile content), no single DRM technology nor

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[106] Id.

[107] InfoSoc Directive, supra n. x.

[108] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 44. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[109] Dinwoodie, Graeme B., (2004). "Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring." 1 Journal of Institutional and Theoretical Economics 160, pg. 14-15. Available at SSRN: https://ssrn.com/abstract=604161 ("[D]ecisions made in the construction of DRMs by content owners may determine whether norms of access to works are set nationally or internationally. [Content owners] have the capacity to set norms without reference to the balance of rights established in copyright law (whether national or international).")

[110] Dinwoodie, Graeme B., (2004). "Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring." 1 Journal of Institutional and Theoretical Economics 160, pg. 3 fn. 3 Available at SSRN: https://ssrn.com/abstract=604161

encoding format (MP3, WAV, FLAC, etc.) has become the accepted standard.[111] The practical effect is that rightholders (or, again, any party at the "seller" end of the value chain, including publishers) may freely incorporate DRM measures into their agreements in any form they wish, with little to no legal barriers in doing so.[112] If this practice is continues over time across different channels of distribution and technology sectors, it is uncertain whether a single industry standard will emerge – especially one that ensures a balanced outcome for stakeholders and in conformity with accepted copyright norms.

b. Levy Phase-Out and the Future of DRM

The language of the Directive seems to presuppose the eventual "phasing out" of levies in response to technological advancements. Taking the language of Recitals 35 and 39 together, which eliminate the requirement to grant rightholders fair compensation for private copying practices that are regulated individually via technical means (licenses), it seems apparent that the framers of the Directive anticipated that digital technology would eventually be able to overcome the informational deficit that the levy scheme was originally meant to address. Yet the ability for Member States to completely phase out their levy systems is dependent on, "...the degree of use of technological protection measures" where "Member States should take due account of technological and economic developments...when effective technological protection measures are available."[113] But, as pointed out by Hugenholtz et. al., to make the determination of the overall "degree of use" of TPM by tracking each individual rightholder use of TPM for each of their works, or by monitoring the use of TPM implementation by sector, would be an unwieldly task.[114] Therefore, the same have argued that a more feasible interpretation of levy phase out should be rather focused on the *availability* of TPM: in other words, assessing technology that rather accounts for factors such as "upfront costs to producers and intermediaries...; incremental costs or savings for consumers; consumer friendliness and acceptance, as reflected e.g. in market share...." etc.[115]

In further breaking down the levy phase out provision, two cognizable routes can be anticipated: The first route maintains the status quo, where private copying levies still provide the main avenue for copying revenue for rightsholders, balanced with the choice of DRM technology (and the present task of national governments to factor in DRM technology when determining appropriate levels of compensation). The second route entails switching to a purely licensed-based model, where companies directly license with private users on the terms of use of copyrighted content, and

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[111] Natali Helberger (ed.), Nicole Dufft, Stef van Gompel et. al., (2004). "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-Art Report." December 2004. Natali Helberger (ed.). The Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe (INDICARE). Pg. 102.

[112] For more detailed look at the status of DRM standard setting, including a list of industry-led standardization initiatives, *see* Natali Helberger (ed.), Nicole Dufft, Stef van Gompel et. al., (2004). "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-Art Report." December 2004. Natali Helberger (ed.). The Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe (INDICARE).

[113] InfoSoc Directive, supra n. x at Recitals 35 and 39, respectively.

[114] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 42. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[115] Id. at iv.

implement these licenses with DRM technology as the means of enforcement. Under this model, private copying levies would become obsolete because if the use is licensed by the user, it is accepted that the rightsholder has received fair compensation in exchange for such a grant of license.[116] This second route of progression can also only occur when the use of DRM technology is applied on a large enough scale to justify such a paradigmatic shift in the way the rightholder is compensated for user copying.

Though the second route reflects more of what the Directive's framers probably had in mind, it is important to recognize here that there are reasons for skepticism in regards to the continued use of DRM on the market. A more pessimistic view, one adopted by some in the tech industry, is that DRM on its own cannot be relied on by copyright industries because it is not failsafe, nor ever will be.[117] Relatedly, "[o]ne critical issue is hard to overlook…to this day, no DRM system has withheld the strains of the market. Ambitious initiatives by major right holders and ICT firms have repeatedly run into insurmountable obstacles. It seems premature to rely on a solution that is fit for the market to emerge in the near future."[118] Indeed, "[e]ven in the content industry's most optimistic scenarios of a perfect DRM -driven market, the 'degree of use' of TPM's will never even come close to 100%."[119] This is because consumer preferences will predictably favor "unprotected" formats that are easier to circulate, as is the norm on today's internet, and such consumers may even be willing to pay a premium for the ability to do so "even after DRM software has become generally and cheaply available."[120]

In fact, the use of TPM over the last few years has not been as strong as initially anticipated. In some recent cases, content industries have strategically turned to the use of "positive network effects" as opposed to DRM technology, to regulate content consumption.[121] This was an observable phenomenon for tech giant Apple and its beleaguered "FairPlay" DRM technology.[122] In one of its

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[116] Kretschmer, supra n. x at 24.

[117] Netanel, Neil Weinstock (2003). "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing."17 Harvard J. L. & Tech. 1, Fall 2003. Available at: http://jolt.law.harvard.edu/articles/pdf/v17/17HarvJLTech001.pdf. ("…skilled programmers can readily design software and other devices to circumvent [DRM] measures…computer security experts maintain that no technological barrier can ultimately prevail over determined hackers who have physical access to the encrypted items, including, in this instance, mass-marketed CDs and DVDs, personal computers, consumer electronic devices, and software embedded in those items.") (citing Peter Biddle et al., The Darknet and the Future of Content Distribution (2002), available at http://crypto.stanford.edu/DRM2002/darknet5.doc.)

[118] Handke, Christian, Towse, Ruth (2007). "Economics of Copyright Collecting Societies." 38 Int'l Rev. of I.P. & Comp. L. 8, p. 14.

[119] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. pg. 43. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[120] Id.

[121] Kafka, Benjamin (2010). "Apple Shows Us How to Use Network Effects as a Substitute for DRM." Available at: https://cyberbeartracks.wordpress.com/2010/11/24/apple-shows-us-how-to-use-network-effects-as-a-substitute-for-drm/. Last accessed 30 Jan 2019.

[122] Singleton, Micah, Lowensohn, Josh (2014). "Apple's DRM lawsuit: 10 years in the making." The Verge. 4 December 2014. Available at: https://www.theverge.com/2014/12/4/7333609/apples-drm-lawsuit-10-years-in-the-making; Healey, Jon (2014). "Opinion: Was Apple's FairPlay worse for the record labels than consumers?" LA Times. 5 December 2014. Available at: https://www.latimes.com/opinion/opinion-la/la-ol-apple-ipod-lawsuit-drm-competition-20141205-story.html; "Apple DRM illegal in Norway: Ombudsman." OUT-LAW.com. 24 Jan 2007. Available at: https://www.theregister.co.uk/2007/01/24/apple_drm_illegal_in_norway/

iterations, FairPlay prevented users from installing "third-party" applications on devices. Apple removed the DRM and instead increased its attention to "Mac App Store" offerings, imposing tight restrictions on the front end for developers wishing to deliver apps to the Apple user market.[123] Additionally, the once popularized practice of "jailbreaking" Apple devices, or the practice of users disabling locking technology embedded in their Apple devices, has become a significantly less popular practice as new features and flexibilities now available on the current Apple operating system (as well as tighter security) have nearly eliminated user interest in attempting circumvention.[124] Furthermore, abandoning DRM, "entails both an increase of directly known network effects and the creation of additional indirect network effects. Removing DRM now avails the iPod owner of the possibility to obtain online music also from other music download platforms directly resulting in higher degrees of freedom (and additional utility value) for existing iPod owners."[125]

Does all of this signal that the DRM experiment is over? Not necessarily. What is clear from these observations is that DRM technology, while useful, tends to work most effectively alongside other measures that reflect the ebb and flow of the relevant channel of distribution. Still needed is an effective means to oversee the structuring of such channels to properly balance rightholder and user rights in the consumption of digital content paired with DRM. To this end, information, and the regulatory bodies that control that information, will be key to creating a better-functioning DRM system that can be applied across sectors. As noted by Hugenholtz, et. al., "[collecting societies] will find some comfort in the knowledge that they are likely to play an important, possibly even essential role, in the administration of DRM systems in the future...collecting societies currently control much of the rights management information that is indispensable for any sophisticated DRM to work."[126] Building on this observation, the author suggests that an EU level regulator can serve to incentivize the use of DRM solutions going forward. If proper coordination of information between collecting societies can be fostered at the EU level, not only can an adequate assessment of technology occur, but the use of DRM may be bolstered by understanding the degree of its actual use on the Digital Market. This approach will be further elaborated on in, *infra*, Part II Section 2(C).

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[123] Id. This regulatory approach relying on positive network effects is colloquially known as the "walled garden" approach. For more on this approach in the context of IoT, *see*, Adomnita, Alexandr (2016). "Balancing walled garden and open platform approaches for the Internet of Things" JÖNKÖPING International Business School, September 2016. Available at: https://pdfs.semanticscholar.org/0bb3/8792b369bc95f0dd3241a3e2c38725eff830.pdf.

[124] Ghoshal, Abhimanyu. "iPhone Jailbreaking is Pretty Much Over." The Next Web. 24 November 2017. Last accessed 30 Jan 2019. Available at: https://thenextweb.com/apple/2017/11/24/iphone-jailbreaking-is-pretty-much-over/.

[125] Dorr, Jonathan et. al., (2009). "Will Abandoning DRM have a boomerang effect on Apple? An empirical analysis of lock-in and network effects." Proceedings of the 42nd Hawaii International Conference on System Sciences.

[126] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. pg. 47. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

2. Cloud Storage

The application of the private copying levy to cloud storage services remains highly debated.[127] Cloud computing, specifically cloud service providers, offer online storage of digital content either for free, on a periodic subscription basis or based on storage space.[128] The introduction of cloud technology in the early 2000s, and its recent ubiquity among everyday citizens in the form of Google Drive, Apple iCloud, Dropbox and more,[129] has only added to difficulties in defining the scope, level, and application of private copying levies to these services. Cloud services vary in terms of who (or what) directs the copying activity, where and how the copies are stored, how the content is accessed again by the user, and in how technical functions are distributed between companies where copying and storage involves more than one company.[130] On a theoretical level, some have even argued that in using cloud services users are paying for access to creative content, not the content itself.[131]

As discussed by Quintais and Rendas, the recent CJEU decision *VCAST* (2017) faces the question of the applicability of the private copying levy to cloud services, but concludes without a clear indication of its potential to be levied.[132] In *VCAST*, a case (initially) involving the applicability of the levy on free-to-air TV programs stored in private cloud storage spaces, the case was complicated by the fact

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[127] *See, e.g.*, European Parliament, "Motion for a European Parliament Resolution on private copying levies (2013/2114(INI)) Report 17 February 2014. ("Calls on the Commission to assess the impact on the private copying system of the use of cloud computing technology for the private recording and storage of protected works, so as to determine whether these private copies of protected works should be taken into account by the private copying compensation mechanisms and, if so, how this should be done.") http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0114&language=EN.

[128] Specifically, "Cloud computing is a means of storing content on remote servers made available by third parties. A cloud service provider offers external storage capacity together with the possibility of remote access of content. Copyright comes into play from the moment works are reproduced in the context of these services. If a copyright-relevant reproduction occurs, the question becomes whether the same qualifies under the private copying exception." *See* Quintais, João Pedro; Rendas, Tito (2018). "EU Copyright Law and the Cloud: VCAST and the intersection of private copying and communication to the public." Forthcoming in: Journal of Intellectual Property, Law and Practice. January 30, 2018 pg. 9. Available at: https://ssrn.com/abstract=3113215.

[129] For a succinct overview of current cloud storage technology available, *see* Faulkner, Cameron. "How to Pick the Cloud Storage Service that's Right for You." The Verge. 31 August 2018. Available at: https://www.theverge.com/2018/8/31/17796884/cloud-storage-service-google-drive-apple-icloud-microsoft-onedrive-dropbox-box-amazon.

[130] *See* Quintais, João Pedro; Rendas, Tito (2018). "EU Copyright Law and the Cloud: *VCAST* and the intersection of private copying and communication to the public." Forthcoming in: *Journal of Intellectual Property, Law and Practice.* January 30, 2018 Available at: https://ssrn.com/abstract=3113215. pg. 9. *See also*, ICMP. "Private copying levies and cloud computing." 25 May 2016. Available at: https://www.icmp-ciem.org/news/private-copying-levies-and-cloud-computing-0. For a more comprehensive description of cloud computing technology, *see* VanSycjel, Leah (2017). "White Paper: Cloud Computing: What's Your Service?" Sealevel Systems. 6 November 2017. Available at: https://www.sealevel.com/wp-content/uploads/2017/11/Sealevel-Systems-White-Paper-Cloud-Computing-SL9286-H17.pdf.

[131] In 2015, Loïc Rivière, the delegate general of the French Association of Software and Internet Solutions Editors (representing Google, Amazon and others), remarked that, "We are nearing the end of private copying by users, especially with the increased use of the cloud. We should no longer talk about private copying because today's users buy access to creative content, not the content itself." Barbière, Cécile (translated by Samuel White) (2015) "Private Copying Levy is in EU's firing line." EURACTIV. 13 March 2015. Available at: https://www.euractiv.com/section/languages-culture/news/private-copying-levy-in-eu-s-firing-line/.

[132] Quintais, João Pedro; Rendas, Tito (2018). "EU Copyright Law and the Cloud: *VCAST* and the intersection of private copying and communication to the public." Forthcoming in: *Journal of Intellectual Property, Law and Practice.* January 30, 2018 Available at: https://ssrn.com/abstract=3113215.

that some VCAST users recorded programs which they did not have legal authorized access to in the first place.[133] In terms of third-party cloud storage providers such as VCAST, the Court ultimately does not address whether or not acts of cloud copying can be covered by the private copying exception, instead focusing on a preliminary issue of whether or not rightholder authorization was necessary for the act of communication performed by VCAST.[134] Since the court found that a separate rightholder authorization was necessary for the communication performed by VCAST and was not obtained, it did not reach the question of the applicability of the private copying exception. Some other relevant open questions that remain include "...how to define the relevant copier, how to differentiate between types of cloud-based services for purposes of the private copying exception, and how to articulate the scope of the right of the communication to the public with that of the exception."[135] Needless to say, these challenges still have to be reconciled by Member State legislatures.

According to the 2013 Vitorino recommendation, cloud storage is discussed in regards to its "licensed" nature, or that use of such services is negotiated through agreement.[136] He highlights the third-party quality of the relationship between users and service providers, emphasizing that "...the private copying exception is limited to the private sphere, and that its intended purpose was never to serve as a basis for the commercial [copying] activities of third parties."[137] Essentially he argues that, where user copying behavior is subject to a license (as might be the case with some cloud services) such behavior should not also be subject to a levy.[138] On the other hand, the mere presence of a license should not militate against the application of the levy where a copy is made for a "private" purpose.

Notwithstanding, as of this writing Member States seem to be legislating towards levying cloud storage technologies. In the Netherlands, SONT has agreed on levies for cloud storage in the next few years (2018-2020) due to its finding that, "private copies are increasingly stored in the cloud (personal lockers)" and that because device use is usually in tandem with cloud storage, "the [cloud storage] levy has been incorporated in the levies on the devices that are mainly used for this purpose: PC/laptop, tablet and smartphone."[139] In France, cloud technology has likewise been addressed through legislative action on behalf of Copie Privee, a society established for the particular management of private copying levies. From July 2016, Network Personal Video Recorder (nPVR) services "offering cloud storage now fall within the scope of remuneration for private copying."[140] Though it is uncertain whether other EU jurisdictions will follow, since some Member States (*e.g.*,

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[133] C-265/16*, VCAST Limited v RTI SpA*, 29 November 2017.
[134] Quintais, supra n. x at 7.
[135] Id. at 12-13.
[136] Vitorino Recommendations, supra n. x at 5.
[137] Id.
[138] Id. at 6-8.
[139] Stichting Onderhandelingen Thuiskopievergoeding (2017). "SONT Decree on Private Copying Levies 2018 – 2020." Available at: https://www.cedar.nl/uploads/15/files/file/Thuiskopie/Persberichten/Press_release_new_private_copying_levies_the_Netherlands_24-10-2017.pdf.
[140] *See* WIPO and Stichting de Thuiskopie, International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 (2017), pgs. 7, 74–75

Hungary) have deliberately left cloud storage discussions off their agenda,[141] there are at least some early indications of willingness to expand the levy scheme to this form of technology.

Conclusion Part I.

Notably, at least at its inception, the justification for the statutory license and levy scheme embodied by the private copying levy was likely to have been rooted in the moral right traditions that are characteristic of the EU copyright *acquis*. Yet, as observed through the codification of this concept through legal instruments at the European and national level, and through the decisions rendered by the CJEU, this rationale has progressively shifted towards use of economic rationales to justify remuneration. Economic arguments supporting the levy have been bolstered over the last ten years by a series of CJEU rulings regarding criteria for calculating fair compensation, and echoed in EU Commission statements regarding economic objectives of the Digital Single Market as the key driver of modern, EU-level legislation. Under this premise, going forward a more economically-based rationale will prove influential when addressing modern questions on the applicability of the levy to new technologies.

Yet as identified above, there are still several outstanding theoretical issues that have not been resolved at the EU level, notwithstanding the technological challenges. By highlighting the theoretical development of the private copying levy from its moral rights grounding towards its arguably more economics-based rationale, it is questionable whether the development of the concept of "harm" to the rightholder will continue to develop in a predictable manner. Given the nature of previous CJEU decisions, judicial guidance on the interpretation of the already broadly circumscribed Directive language is predestined to be limited. But although the historical underpinnings of the levy originate from more moral rights-favored rationales, this rationale need not be sacrificed when considering the levy's future – the moral rights rationale should, in part, *inform* the practices today in order to achieve congruity with the logic and meaning which has defined the traditional role of the levy. In this sense, economic rationales should perhaps be considered as an *additional* rationale overlaying the traditional underpinnings of the levy, at least as applied in the EU. Furthermore, this balancing of theory should be done at the EU-level to guide Member States in applying a minimum threshold of factors in calculating the amount of "fair compensation." This solution is elaborated on in Part II Section C, *infra.*

In regards to the technological challenges in particular, DRM and Cloud Storage are but two technologies affecting the current administration of the levy. While according to caselaw a finding of "actual" harm must be used to determine the amount of fair compensation due to the rightholder to make copies of legally-acquired content, only in those narrow circumstances where a license is either unavailable or when the user has already paid in the form of a license, these technologies tend to pose many issues. In the case of DRM, where the user pays for the DRM-protected content (often used in tandem with a license), how can the "double payment" scenario be properly avoided where the user has paid in the form of equipment/media used for copying? In the case of cloud storage, where many different business models exist that define the copier, the storage of content, and

[141] Id. at 91.

subsequent access of content, how can the levy be applied uniformly at the Member State level (if it should be applied in the first place)?

As outlined in the next Part, these technological and theoretical questions should be understood at the EU level to avoid further fracturing of the existing system, and to promote a more unified and future-proof administrative solution going forward.

II. Implementation Gaps and Institutional Solutions

As demonstrated, there is a great need for further legislative guidance and technological monitoring to manage the administration of the private copying levy in the European digital market more effectively. This knowledge must also be able to be applied while being shielded from the highly polemic nature of stakeholders' interests – rightholders, publishers, manufacturers/importers, and consumers, among others. One approach would be to tackle the issue at the EU-level, by delegating a centralized institution in the form of an agency to gather and combine information from national regulatory bodies, and to provide recommendations and guidance to Member States in a neutral and systematic way.

The use of EU-level institutional mechanisms such as agencies to facilitate the implementation of law at the Member State level is in accordance with the current institutional structuring of the EU. The EU institutional setting is "conducive for the formation of agencies as specialized and relatively independent bodies with regard to the main political actors."[142] Such entities are able to remove the resolution of purely technical issues from political pressure, and allow specialists to tackle the issues in an environment of open information.[143] Additionally, setting up EU level agencies tends to "reduce transaction costs and ensure[s] neutrality regarding national interests."[144] These advantages directly correspond to the current challenges that remain in private copying levy management. In fact, using EU-level intervention to address longstanding harmonization issues with particular regard to the regulation of the private copying levy has been identified a few times in the past, including in the Vitorino Recommendations, but has never been examined in depth.[145]

This section will demonstrate both the presence of externalities as a result of the inherent limitations of national regulation, and the presence of a regulatory economy of scale in the levy, both of which may justify intervention at the EU level. Three distinct aspects of levy administration will be considered in turn: tariff-setting, collecting and distributing levies, and technological

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[142] Musa, Anamarija (2013). "Reforming the European Union Agency Governance: More Control, Greater Accountability." Croatian and Comparative Public Administration. 21 March 2014. pg. 320.
[143] Geradin, Damien, Petit, Nicolas (2004). "The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform." pg. 35-36. Available at SSRN: https://ssrn.com/abstract=489722
[144] Id.
[145] Vitorino Report, supra n. x at 12. (Some stakeholders identified, "…the possible introduction of a central administrative body at EU level, [where] [n]otifications on cross-border sales could be sent to a single point, and would then be forwarded to the national bodies competent for collecting levies"). The approach analyzed in this article also combines, to some degree, two of the proposed alternatives in Ferriera's study, incorporating elements of both "Alternative 1: European harmonized compensation system administered at the national level" and "Alternative 3: European harmonized compensation system administered at the European level." Ferriera, José Luis (2010). "Compensation for private copying: an economic analysis of alternative models." ENTER IE Business School, Spain. pg. 4.

monitoring/advisory functions. In each section, some Member State implementations of the private copying exception will be highlighted to discern the presence of externalities or regulatory gaps that may be bridged effectively by EU level administration. Lastly, throughout this section there will be an attempt to counterbalance this potential solution with subsidiarity and proportionality concerns of Member States.

A. Tariff Setting

It was pointed out by Vitorino that, "…one of the issues paralyzing the normal operation of the market for devices and media in the EU is the lengthy and burdensome process on the basis of which the applicability of levies and the levy tariffs are decided."[146] As identified by Stichting de Thuiskopie and WIPO, four different tariff-setting models have been implemented in EU member states: 1.) State-funded systems (no tariffs); 2.) Direct state intervention; 3.) Negotiation with industries and societies; and 4.) Tariffs set by law/government after proposals by rightholders or negotiation among stakeholders in special government-appointed bodies.[147] The determination of which products should be levied is also the responsibility of either the lawmaker/government, the court, or a special regulatory body appointed to either make the determination on its own or to advise the government.[148]

While the effectiveness of each style of tariff setting has not been empirically measured, it can be appreciated that the rapidly changing legal landscape over the past decade has challenged national governments to assess, reassess and adapt their systems as quickly as possible. One such catalyzing event was the Padawan decision in 2010, which triggered many Member States to change their national laws to differentiate between the costs of products used for private and professional copying purposes, the latter of which should not be levied at all.[149] In the wake of this decision, in 2011 the Spanish High Court favored the annulment of the levy system in place, which had previously been indiscriminately applied to any equipment or media commercially distributed in Spain.[150] However, the replacement collection mechanism implemented in 2012, which allocated a portion of the General State Budget to fund the levy, was also found to be incompatible with EU law in that it, "…did not ensure that the cost of the private copy levy is borne by the actual users of the private copies."[151] As a result, zero revenues were collected for the private copying levy in 2015, as opposed

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[146] Vitorino Recommendations, supra n. x at 20.

[147] WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 9.

[148] *Id.*

[149] Tinnefield, Christian (2014). "Copyright Levies in Germany – Settlement for Computers, Netbooks & Co." Hogan Lovells > Global Media and Communications Watch. 31 January 2014. Available at: https://www.hlmediacomms.com/2014/01/31/copyright-levies-in-germany-settlement-for-computers-notebooks-co/ ("…the CJEU took the view that an indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media, made available to business users (and clearly reserved for uses other than private copying) is incompatible with the Copyright Directive 2001/29/EC.")

[150] "Private copy levy system: how do recent developments in Spain compare with other EU jurisdictions?" Osborne Clark>Digital Single Market. 9 March 2017. Available at: ttps://www.osborneclarke.com/insights/private-copy-levy-system-how-do-recent-developments-in-spain-compare-with-other-eu-jurisdictions/.

[151] *See* EGEDA, DAMA and VEGAP v. the Spanish State*,* CJEU C-470/14*,* 9 June 2016 [*EGEDA*]; Spain has since reinstated its levy system. *Cf.* State-funded systems can potentially function adequately for private copying

to 5 million euros collected from the three years prior, and over 61.5 million euros collected in 2011 alone, marking a significant loss to rightholders.[152] In Germany, the Padawan decision affected ongoing negotiations of tariffs, where an already protracted legal dispute between German IT industry representatives (BITKOM) and the representative organization of the German collecting societies (ZPUE) came to an end only after the Padawan decision was rendered, concluding three years of legal dispute.[153] Over the last few years, "[b]y far the largest contributor to the volatility of total revenues [collected in the EU] is Germany," in that, "between 2013 and 2014…revenues almost tripled, but in 2015 they were back at the 2013 level, leading to an overall decline of 32% in the 2007-2015 period."[154]

Although the unpredictability and volatility of the current system has been the result of many factors, there are some identifiable gaps in the current regulatory practices of Member States that can potentially be bridged with the aid of EU-level guidance in some specific areas. Hence, the potential of EU-level intervention in tariff setting will be discussed in two respects: 1) in calculating tariff amounts and 2) in determining which devices should be subject to the levy.

1. Tariff Amounts

Notwithstanding the administrative difficulties that inure with setting different tariffs for each Member State, in theory there are some advantages in allowing Member States to tailor levy calculations to reflect national circumstances. Most importantly, permitting each Member State to calculate levies and determine leviability on its own is a practice underpinned by the subsidiarity principle, giving preference to Member States' ability to manage its own national systems in accordance with its own legal traditions.[155] Furthermore, country-to-country variances in levies should ideally reflect the differing purchasing powers of EU citizens.[156] Lastly, this amount should be linked to the notion of actual "harm" to the rightholder, a criterion which each Member State is allowed to define using its own set of relevant factors as discussed in, *supra*, Section I.

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levies, as in the case of Norway. WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 124-25.

[152] WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 16, Table 7: Total revenues (in current €).

[153] The resulting agreement failed to be comprehensive, as the leviability of Tablet PCs was ultimately not negotiated in the resulting settlement. Tinnefield, Christian (2014). "Copyright Levies in Germany – Settlement for Computers, Netbooks & Co." Hogan Lovells > Global Media and Communications Watch. 31 January 2014. Available at: https://www.hlmediacomms.com/2014/01/31/copyright-levies-in-germany-settlement-for-computers-notebooks-co/.

[154] WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 26; 15.

[155] Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. This principle also ensures that powers are exercised "as close to the citizen as possible." Article 10(3) of the TEU.

[156] And this does seem to be the case in practice. *See* WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 26. ("The higher the purchasing power per capita in a country, the higher the levy revenues per capita. This correlation is particularly strong within the EU. Hungary has by far the highest revenues from private copying levies relative to GNI; France comes second, followed by Lithuania, Italy and Belgium.")

Most commonly Member States will apply fixed tariffs in relation to the copying capacity or copying utility of manufactured goods.[157] Alternatively, some countries apply a variable tariff based on the percentage of the sales or import price.[158] Many other factors are also involved in determining the appropriate tariff amount which adds another wrinkle of complexity to rate setting. For example, adjusting tariff amounts to account for the revenues available to less-popular "marginal works" is one consideration that can serve to rebalance the market where popular works disproportionately reap most financial benefits from the current copyright system. France seems to be the strongest example of this kind of active rebalancing, as 25% of total revenues collected from the private copying levy are distributed towards cultural programs and social funds, impacting a range of artists.[159]

Though the calculation of tariffs in Member States should be a reflection of different legal traditions and correlate with the purchasing power of consumers, in actuality most of the time variances in levy amounts are difficult to rationalize. According to an empirical study on private copying levies conducted in 2011, the levy applicable to a 64 GB iPod Touch was nearly 20 euros per device in Sweden, but not levied at all in Germany, a difference that "cannot be explained by an underlying concept of economic harm to rightholders."[160] The system has been criticized in the past for being, "…deeply irrational, with levies for the same devices sold in different EU countries varying arbitrarily."[161] This is also in line with some of the findings of the Castex Report, the result of a Parliamentary research inquiry into the functioning of the levy: "when the prices at which material sells in a country that charges the levy are compared with those in one that does not, it becomes clear that the private copying levy has no appreciable impact on product prices."[162] These observations indicate that some stakeholders are being affected disproportionately by the levy and are absorbing costs instead of passing them on to the consumers, contrary to the purpose of the levy.[163] It was found that some manufacturers operating in the EU currently "…absorb the levy for some products where there is concentrated purchasing power of retailers."[164] For manufacturers of high value innovative products, "…[they] seem to ignore the levy. In a second phase, they may either decide to pass on, or absorb [the levy costs]."[165]

Furthermore, even when tariff amounts are published by a jurisdiction, the negotiation practices of collecting societies may also vary, at times offering significant tariff discounts to

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[157] Id. at 9.
[158] This includes Czech Republic, Latvia and Lithuania. Id.
[159] La copie privee. "What is Private Copying? Private Copying in France." Available at: http://www.copieprivee.org/en/la-copie-privee-cest-quoi/copie-privee-en-france/
[160] Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. Available at: https://ssrn.com/abstract=2063809. pg. 50, Table 5, and pg. 8 respectively.
[161] Kretschmer Report, supra n. x at 10.
[162] Castex Report, supra n. 13 at Recital K; Kretschmer, supra n. x at 57.
[163] Kretschmer, supra n. x at 8, 57.
[164] Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. Available at: https://ssrn.com/abstract=2063809. pg. 57.
[165] Id.

manufacturers/importers which remain unpublished.[166] As a consequence, it is difficult to form a complete picture of the true state of Member State tariff differences and reliably measure its effects.

In addition to these difficulties, the biggest challenge in reducing differences in national tariff amounts and tariff setting processes requires overcoming the strong subsidiarity/proportionality counterbalance that limits EU competencies. For the private copying levy in particular, Member States are empowered to, "…determin[e] the form, detailed arrangements and possible level of such fair compensation, [taking] account…of the particular circumstances of each case."[167] Yet in response to the strong argument for protecting the ability of Member States to adapt their levy systems to match their particular cultural and economic situations,[168] according to an empirical study conducted by Kretschmer in 2011, "[t]here appears to be a pan-European retail price point for many consumer devices *regardless of levy schemes* (with the exception of Scandinavia where consumers are willing to pay a premium.)"[169] In 2012, the Spanish government had completely abolished its levy system, but interestingly this "had no impact on media and material prices."[170] Perhaps these examples indicate that if an attempt is made to more closely align tariff amounts across Member States, the EU market would still be able to function.

All this considered, remedying disparities in tariff amounts would likely translate into concrete benefits for manufacturers and importers of technological goods. Indeed, manufacturers and importers have been identified as the group most likely to benefit from a more harmonized administration of the levy.[171] It is suggested here that setting reasonable lower and upper caps on tariff amounts at the EU level may potentially remedy some of the negative externalities resulting from the more volatile fluctuations in national tariff setting, helping to stabilize the market for levied goods. Setting these "caps" would also grant Member States enough legislative "breathing space" to adjust their levy schemes in accordance with national circumstances.

As for *who* should be making such determinations, the French and German examples may be interesting to consider. The French regulatory body in charge of the administration of the private copying levy, the Copie Privée Commission, consists of representatives from each stakeholder group: rightsholders (50%); manufacturers/importers of recording media (25%); and persons selected by consumer organizations (25%).[172] In theory, this representation split should enhance transparency in rate-setting and ensure that all relevant stakeholders have a say in the levy. In practice, however, negotiations have been tricky – the representative of UFC Que Choisir (Federal Union of Consumers)

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[166] Copyright Levies Reform Alliance (2006). "Analysis of National Levy Schemes and the EU Copyright Directive." April 2006. Available at: http://eurimag.eu/index.php?id=12&cid=31&fid=15&task=download&option=com_flexicontent&Itemid=11. ("…certain collecting societies offer discounts, which can be significant. These discounts do not appear to be clearly set forth in official publications, however; instead they are agreed separately and diverge from published tariffs.")

[167] InfoSoc Directive, supra n. x at Recital 35.

[168] Vitorino Recommendations, supra n. x at 10.

[169] Emphasis added. Kretschmer, Martin (2011) "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe." An Independent Report Commissioned by the UK Intellectual Property Office. 28 March 2012. Available at: https://ssrn.com/abstract=2063809. pg. 57.

[170] Castex Report, supra n. x at Recital O.

[171] Vitorino Recommendations, supra n. x at 17.

[172] Weiss, Marie-Andree. (2014). " What is in the Future for Private Copy Levies in the EU?" IPKat Blog. 16 December 2014. Available at: http://ipkitten.blogspot.com/2014/12/what-is-in-future-for-private-copy.html

left the Commission in the 2000's, and five of six manufacturer/importer representatives resigned from the Commission by the end of 2012.[173] Despite this, however, the levy system in France has shown a remarkable ability to keep pace with technological advancement, as it has recently applied levies to digital tablets and has introduced levy obligations on nPvR,[174] making France *de facto* one of the first jurisdictions in the EU levying cloud technology.[175]

The other relevant example of incorporating stakeholder input in tariff setting has been the German organization ZPÜ, which applies German law mandating that levies are set collectively.[176] The agreements reached collectively between ZPÜ and the industry representatives are the result of open negotiations between all stakeholders related to the levy – this bolsters the transparency of the levy calculation, as well as the reasonableness of the resulting amount.[177] Importantly, manufacturers/importers are not forced to become parties to these agreements once concluded. If they do choose to become a party to the agreement, however, their fees are slightly reduced. In turn, the parties are obligated to disclose the relevant figures (related to amount of devices imported, amount of levy paid, etc.), implementing a detailed system to prove that the appropriate amount has been paid. In cases where negotiations are unsuccessful, tariffs are set by ZPÜ based on market research data, "regularly lead[ing] to judicial proceedings, such that a new and valid tariff is suggested/set by the arbitration board or by the courts."[178] Interestingly, it has been found that this model of rate setting involving stakeholder negotiation tends to yield higher levy revenues per capita.[179]

Lastly, taking these examples into account, and recognizing that most practical modalities should still be left within the Member States' discretion,[180] setting some general minimum procedural standards at the EU-level may serve as a workable solution. Mediator Vitorino was, "…convinced that it is necessary to apply some general minimum standards," suggesting that "…in light of the principles of subsidiarity and proportionality…more coherence with regard to the process of setting levies…[including] some basic procedural requirements applicable to the process of levy setting [should be implemented]."[181] In this regard, a rate-setting procedure ensuring that equal stakeholder participation is present, as demonstrated by the French and German models, should be encouraged. Moreover, setting uniform baselines for the calculation of harm at the EU level, such as developing a list of generally-accepted factors of calculation, can potentially diminish some of the more radical tariff discrepancies among Member States. This suggestion most directly relates to Mediator

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[173] Id.

[174] NPvR, or "Network personal video recorder," allows users to save a program in a dematerialized space (on the cloud), and make that program available somewhere in the network. *See* Germain, Antoine. "Qu'est-ce que le NPVR ?" 4 June 2018. Translated by Google Translate. Available at: https://www.programme-tv.net/news/evenement/la-tele-et-vous/208167-quest-ce-que-le-npvr/

[175] WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17, pg. 7.

[176] § 53 (1) - (3) UrhG.

[177] The following observations were compiled via interview between the author and a representative of ZPÜ.

[178] WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17, pg. 80.

[179] Id. at 25. ("…the model in which the government sets the tariffs after negotiation between rightholders and the industry generally yields higher outcomes, while the model in which tariffs are set directly by the State seems to yield the lowest revenues per capita.")

[180] Vitorino Recommendations, supra n. x at 21.

[181] Id., Vitorino Recommendations, supra n. x at 10.

Vitorino's conclusion to defining the "harm" criterion at the EU level,[182] though here creating a baseline list of relevant factors would not foreclose on the ability of Member States to use additional criteria in their calculations.

If tariff amounts themselves remain at the Member States' discretion, but instead a list of leviable devices/technology is developed at the EU-level, differences between Member State implementations can be further limited without overly encroaching on their authority to make a final levy determination.[183] The following section presents this solution in more detail along with some challenges.

2. Leviable Devices

National governments have often been slow or reluctant to adapt their levy systems in response to technological change. One obvious reason could be that adding a levy a newly released technology poses a competitive disadvantage to some jurisdictions who want to incentivize device manufacturing domestically.[184] Another issue is that some jurisdictions simply lack the administrative capacity to keep pace with technological change. In the case of cloud storage, only a few Member States have considered establishing a levy, while others have outwardly claimed that it is not a priority.[185]

To use a recent example, "foldable smartphone" technology, which stretches current definitions of a tablet PC and smartphone, will pose a new challenge to national levy systems.[186] But this challenge will be much more burdensome to some jurisdictions than others – for countries with levy systems which do not differentiate on the basis of storage capacity alone, (*i.e.*, countries that levy smartphones and tablets differently despite the same storage capacity), determining the leviability of "foldable smartphones" might prove to be a more challenging task because those jurisdictions will

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[182] "…a common definition of 'harm' would certainly contribute towards increased legal certainty, since the starting point of the process of setting the levies would be the same across the EU." Id. at 18.

[183] "The mediator recommended that products (or classes of products) to be levied should continue to be identified at national level...an individualized approach would seem to be justified by the fact that choosing which products are subject to levies would allow member states to quantify the concept of 'harm' in a way that reflects the different purchasing power of consumers residing in different member states. That policy goal could still be achieved, however, by letting only tariffs be set at national level." Mazziotti, Giuseppe (2013). "Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum." Centre for European Policy Studies, Brussels. June 2013. pg. 20.

[184] "If some member states impose substantial levies on IT hardware and media and others do not do so, it is clear that many end users located in the member states which have a levy will purchase the products directly from a dealer located in a member state which has no copyright levy. Obviously, this is a material disadvantage of the importers and dealers in the member states that have a levy and, thus, will seriously affect trade between the member states." Duisberg, Alexander, Niemann, Fabian (2006). "Guide copyright levies Europe." Bird & Bird. April 2006. Available at: https://www.twobirds.com/en/news/articles/2006/guide-copyright-levies-europe.

[185] In 2016, France passed legislation bringing cloud storage (particularly "NPVR services offering cloud storage") within the scope of remuneration for private copying. This is in contrast to jurisdictions such as Hungary which left cloud storage off its reform agenda. *See* WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17.

[186] *See* Boxall, Andy (2019). "Foldable phone wars: Huawei's Mate X takes on Samsung's Galaxy Fold." Digital Trends, 24 February 2019. Available at: https://www.digitaltrends.com/mobile/huawei-folding-smartphone-news/.

also need to define a new category of technology into its existing framework.[187] Theoretically speaking, the same task might be easier for Member States that levy smartphones and tablets the same, adjusting the rate solely in relation to storage capacity. Ideally, private copying jurisdictions should be able to set a provisional tariff within one month of the release of new technology, but given that each Member State has its own particular definitions of the levy and unique criteria for tariff setting it is uncertain to what extent EU jurisdictions are actually able to meet this goal. [188]

Here again, making a determination of leviable devices at the EU level can be a more efficient approach. This can eliminate issues when Member States put themselves at a competitive disadvantage by levying a product which is unlevied in another jurisdiction. As also suggested by AGECOP, the Portuguese association for the management of private copying, "[l]evies should…increasingly tend to apply to the same devices across Europe."[189] If an EU authority is able to assess new technology quickly and issue a leviability notice to Member States, it will encourage efficiency and uniformity in levying devices, and will eliminate the competition rationale that currently spurs regulatory "sandbagging."

On this solution, it is worth mentioning that mediator Vitorino was skeptical, believing that it would be an overly burdensome task for an EU regulator to continuously monitor new technology and maintain a list of leviable devices.[190] However, as suggested here, if the appropriate EU level authority were in place, *i.e.,* in the form of an agency or similar regulatory mechanism, this would certainly address the concerns raised above. As Mazziotti supports, "[s]uch risk [of being too burdensome] could be easily avoided by giving an EU institution or agency the task of making such EU-wide determinations and ensuring a periodic and technology-wise update of the list of levied products."[191] Thus, determining leviable devices at the EU level may be a viable harmonizing step that can facilitate the administration of private copying across Member States without undermining the authority of Member States in setting appropriate tariff amounts.

B. Collection and Distribution

The implementation of private copying levies ranges from State-funded systems (Norway, Finland), to industry/society negotiation (Germany), to government-appointed bodies through stakeholder

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[187] *See, e.g.,* WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 Table 4 pg. 11

[188] Vitorino Recommendations, supra n. x at pg. 21. ("In the case of a new product being introduced on the market, the decision as to the applicability of levies should be taken within 1 month following its introduction. The provisional level of tariffs applicable should be determined not later than within 3 months following its introduction…The final tariff applicable to a given product should be agreed or set within 6 months period from its introduction on the market.").

[189] "Private Copy Compensation: AGECOP's Report on the Portuguese Legal Framework and Collection." Available at: https://circabc.europa.eu/sd/a/23654f9f-15a8-4325-927e-231ac260adfb/AGECOP.pdf. Pg. 13

[190] Vitorino Recommendations, supra n. x at 10. ("[a]pproaches involving EU intervention would bear the risk of being burdensome and not flexible enough, as they would require drawing up a list of products subject to a levy that would have to be updated constantly. It is difficult to imagine how, at the EU level, such a list could be reviewed and/or corrected (including the question of having an appropriate system of judicial review).")

[191] Mazziotti, Giuseppe (2013). "Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum." Centre for European Policy Studies, Brussels. June 2013. pg. 20.

negotiation and set by law (Belgium, France).[192] This range of implementation schemes, while mostly effective in managing national private copying law, nevertheless fail to address the transactional externalities that are characteristic of cross-border levy applications. Payment of non-nationals, for example, has been particularly identified as a private copying-related barrier to trade in the single market.[193]

Though some commonalities exist between private copying administrative schemes in EU Member States, when appreciated at the EU-level the nuances of each national system create (perhaps, predictably) far-reaching distortions in the "Single Market." In EU Member States remuneration rights with respect to private copying levies are generally exercised through national collecting societies. In certain jurisdictions (France, Germany, Italy and Spain), it is mandatory that these rights are managed by collecting societies.[194] The most commonly implemented collection system involves collecting levies from manufacturers or importers (a.k.a. Professional Traders), assuming that the costs incurred by this group will be "passed on" to the consumer in the amount of the final sale. In theory, the levy should be applied on "upstream" revenue, where the amount is included in the user's final purchase price of the recording equipment or media, and merely paid for in advance by manufacturers and importers.[195] These amounts are collected and monitored by either national collective management organizations, the government, or a nationally-appointed copyright administrative body.

Collections are then distributed back to the beneficiaries through fixed or percentage allocations (*e.g.*, for audio and audiovisual works a 1/3rd split between authors/composers, producers, and performing artists),[196] through negotiation between collecting societies and their members,[197] or by myriad other means.[198] Distributions are largely determined through sampling methods, not unlike

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[192] These are just a few examples. *See* Wijminga, Hester et. al., (2016). "International Survey on Private Copying: Law & Practice 2016." WIPO, Stichting de Thuiskopie. Available at: https://www.ivir.nl/publicaties/download/International_Survey_on_Private_Copying.pdf.

[193] *See* European Commission. "Stakeholder Consultation on Copyright Levies in a Converging World." June 2006. pg. 12.

[194] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 19-20. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[195] CISAC, "Private Copying Global Study 2017." CISAC Legal & Policy Department. pg. 9. Available at: http://www.cisac.org/CISAC-University/Library/Studies-Guides/Private-Copying-Global-Study.

[196] *See* Belgium Distribution Scheme. WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 37

[197] *See, e.g.,* German and Danish distribution schemes. Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 91. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[198] "[i]n some countries, the schedule of distribution among rights owners is determined once and for all in the legislation, while in other countries, the schedule must be negotiated between the collecting societies and their members, subject to its approval by a public authority. There may be additional variations in the distribution schedules of the different societies, depending for example on the percentage of money allocated to cover administration costs or on the amount of money put aside for social or cultural funds created for the benefit of authors or performing artists." CISAC, "Private Copying Global Study 2017." CISAC Legal & Policy Department. pg. 20. Available at: http://www.cisac.org/CISAC-University/Library/Studies-Guides/Private-Copying-Global-Study.

other remuneration mechanisms in copyright.[199] This distribution method is therefore considered, "…fairly cost-effective because the organizations dealing with it also manage certain other rights and the sampling methods – and, thus, the actual distribution – may also be easily connected to existing distribution systems."[200] Problematically, some of the EU Member States that recognize the creation of private copies as a lawful exception have yet to implement any means for collecting and distributing a levy for such practices, failing to comply with EU law.[201]

Collection problems primarily arise in cross-border situations, as addressed in *Stichting*, where the CJEU held that Member State authorities should ensure that fair compensation is recovered from the seller who makes available the leviable equipment/media, regardless of the seller's establishment in another Member State.[202] Yet it is difficult to assess the extent and efficacy of such enforcement measures as proposed in *Stichting* at the Member State level. This is largely because, "[a]part from the problems of identification of the distant on line seller which is based in another Member state, courts will have to accommodate the question of the proper enforcement of the payment by an entity which is based in another Member state."[203] Member State compliance with this ruling poses a difficult burden on Member States to ensure not only that the amount of fair compensation is collected from sellers based in other Member States, but that the amount reflects only those products purchased for personal (private), as opposed to professional, uses.

Unifying collection and distribution schemes, given all of their disparities as mentioned above, is realistically a daunting task. Nevertheless, many benefits can be derived from reviewing some discrete aspects of exemption and reimbursement schemes across Member States, as well as broadly encouraging the allocation of some funds to social and cultural purposes at the EU level. As articulated below, an EU level administrative body might be the right regulatory tool for the job, and can potentially lead to a sustainable result for all stakeholders involved with the levy.

1. Exemptions/Reimbursements

Given its nature as a "blunt" legal instrument, the private copying levy has a tendency to be applied in an overbroad manner. In some cases, manufacturers and importers pay the levy "twice:" once in the country where the manufacturer/importer is based, and once in the country where the purchaser is based. In other cases, the levied equipment or media will ultimately not be used for private copying, these cases being 1.) the supply of the copying equipment/media to legal, as opposed to natural, persons; 2.) the application of the levy on copies made by professional users; and 3.) the application of the levy on types of content that do not require compensation (e.g., making

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[199] Ficsor, Mihaly. (2002) Collective Management of Copyright and Related Rights. WIPO, Geneva 2002. Pg. 46. Available at: *ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_855e.pdf*.

[200] Ficsor, Mihaly. (2002) Collective Management of Copyright and Related Rights. WIPO, Geneva 2002. Available at: *ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_855e.pdf*. pg. 91

[201] These jurisdictions include Malta, Cyprus, Bulgaria, Slovenia and Luxembourg. CISAC, "Private Copying Global Study 2017." CISAC Legal & Policy Department. pg. 175. Available at: http://www.cisac.org/CISAC-University/Library/Studies-Guides/Private-Copying-Global-Study.

[202] Stichting v. Opus, supra n. x. at paras. 39-40.

[203] Synodinou, Tatiana (2011). "ECJ: Private copying levies II-the Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH case." Kluwer Copyright Blog. 26 June 2016. Available at: http://copyrightblog.kluweriplaw.com/2011/06/26/ecj-private-copying-levies-ii-the-stichting-de-thuiskopie-v-opus-supplies-deutschland-gmbh-case/

copies of personally taken photos; recording home videos). As such, the CJEU has confirmed that Member States must provide sufficiently adequate remedial measures to properly limit the scope of application of the levy in accordance with the Directive.[204] These remedial measures take the form of ex-ante exemptions from paying the levy, or ex-post reimbursements for levies shown to have been paid twice.

Currently there is no unified approach of Member States when providing remedial measures in the form of ex-ante exemptions and/or ex-post reimbursement schemes. Some Member States have neither ex-ante nor ex-post schemes in place, some have one scheme in place but not the other, and still others have ex-ante exemption schemes that either subject manufacturers/importers to prior registration with the national collecting society in form of a certification, or require a prior contractual agreement with the relevant collecting society.[205] The diversity of approaches involving this particular aspect of national levy schemes has further complicated the administration of the levy in cross-border situations, and presents significant administrative burdens on behalf of manufacturers/importers who are often faced with financing the levy payment on the front-end and waiting months, or even years, for reimbursement.[206]

According the established CJEU caselaw, it is necessary for Member States to provide adequate measures to mitigate the effects of overbroad applications of the private copying levy. Turning again briefly to the principles outlined in *Padawan*, it is accepted that the indiscriminate application of private copying levies to all devices does not comport with EU law.[207] Under this premise (and given no other reasonable alternative), in *Amazon* the CJEU further ruled that Member States may justifiably establish a rebuttable presumption of leviability on mediums made commercially available to natural persons for private uses under the conditions that 1.) there are "practical difficulties" associated with determining the private purpose of the end use; and 2.) there is an accompanying right to reimbursement in place which does not make the repayment of levies "excessively difficult."[208] Taking *Amazon* somewhat further, in *EGEDA* (and similarly in *Copydan*) the Court reinforces the notion that legal persons, unlike natural persons, cannot benefit from the private copying exception in the first place, and that "such legal persons should not in any event be the persons ultimately actually liable for payment of that burden."[209]

One argument raised by the Italian collective in *Microsoft Mobile,* a case examining both the ex-ante and ex-post elements of the Italian levy system, highlights once again the necessity for more

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[204] *See, generally,* Amazon v. Austro-Mechana, C 521/11, 11 July 2013 [Amazon]; Copydan Båndkopi v Nokia Danmark A/S. C-463/12. 5 March 2015. [Copydan]

[205] *See* "'Ex-ante' exemptions and 'Ex-post' reimbursement schemes for Private Copying Levies under EU law and their implementation across Member States' regimes." DigitalEurope, April 2018. pg. 1. Available at: https://www.digitaleurope.org/wp/wp-content/uploads/2019/01/DIGITALEUROPE%20comments%20on%20Business%20Exemption%20and%20Reimbursement%20(April%202018).pdf.

[206] *See* Vitorino Recommendations, supra n. x at 12.

[207] Padawan, supra n. x at paras. 54-57.

[208] Amazon v Austro-Mechana C-521/11, July 11, 2013 [Amazon], at paras. 24, 31.

[209] EGEDA, supra n. x at para. 36; *See also*, Copydan, supra n. x at 55 ("purchases by importers, intermediary resellers, and final resellers are exempt from private copying levies. Private copying levies can only be collected from the final reseller when final purchaser is a natural person.")

guidance when it comes to the implementation of certain provisions of copyright law. [210] Here in particular, the collecting society's compliance with national law meant a difficult-to-defend position down the line. In the proceedings, in an attempt to temporally limit the effect of the judgement, the collective SIAE "...claims that there is no doubt that it acted in good faith with the full conviction that the national legislation at issue in the main proceedings was fully compatible with EU law, a conviction reinforced by the fact that, despite application of that legislation over a long period, the Commission, which was fully aware of it, never made any objection as to its compatibility with EU law."[211] To this, the Court simply points to its previous ruling in *Padawan* regarding indiscriminate applications of the levy, and notes that, "having merely indicated that the compensation has already been distributed in full to the recipients and that it 'was probably not in a position to recover such amounts'" was not sufficient grounds to limit the judgement.[212]

As mentioned, Member States are explicitly granted wide discretion when determining the form, detailed arrangements and level of fair compensation when legislating towards the levy domestically.[213] But the fact that the there is no harmonized approach articulated by the Directive in providing remedial measures at the Member State level, as demonstrated by the caselaw above, comes at the expense of virtually every player involved in the private copying levy administration scheme.[214] To this end, and being cognizant of the principles already laid out in the Directive and in the aforementioned caselaw, some harmonizing steps can be taken at the EU level.[215]

As an initial step, it has been previously suggested that the principle of "country of destination" should be adopted as the default rule for determining levy liability.[216] This would add certainty to determining the locus of "harm," in effect placing the collection obligation nearest to the residence of the final user and, therefore, the likeliest place where a reproduction will occur that requires fair compensation. To this end, some Member states would have to adapt their national law to adhere to this principle. As DigitalEurope points out, many national systems are currently incompliant with the Directive and EU caselaw, and still require some form of adaptation especially in terms of their ex-ante exemptions and ex-post reimbursement schemes.[217]

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[210] Microsoft Mobile Sales International Oy (formerly Nokia Italia SpA, et. al.), v. SIAE, C-110/15, 22 September 2016. [Microsoft Mobile]
[211] Id. at para. 58.
[212] Id. at paras. 62-63.
[213] Directive, supra n. x. at Recital 35.
[214] See "'Ex-ante' exemptions and 'Ex-post' reimbursement schemes for Private Copying Levies under EU law and their implementation across Member States' regimes." DigitalEurope, April 2018. pg. 10-11. Available at: https://www.digitaleurope.org/wp/wp-content/uploads/2019/01/DIGITALEUROPE%20comments%20on%20Business%20Exemption%20and%20Reimbursement%20(April%202018).pdf
[215] It is emphasized by DigitalEurope that, "...if such necessary changes to the existing irrational and antiquated private copying regimes cannot be obtained through EU legislation, then it is incumbent upon the European Commission to render its own recommendation to the Member States and/or to take enforcement actions for the establishment of simple, clear, predictable and effective "ex-ante" exemption schemes which should be complemented with residual "ex post" reimbursement schemes." Id. at 14.
[216] Vitorino Recommendations, supra n. x at 12.
[217] DigitalEurope. "'Ex-ante' exemption and 'Ex-post' reimbursement schemes for Private Copying Levies under EU law and their implementation across Member States' regimes Annex I." April 2018. https://www.digitaleurope.org/wp/wp-

Next, a single, EU-wide declaration of goods may be a more efficient means for cross-border importers/manufacturers to disclose data related to the devices they sell, to which territories, to which retailers, etc. This particular solution was first proposed during the 2008-2009 stakeholder dialogues at the EU level and received the support of the ICT industry.[218] On this same suggestion an industry consensus had again been reached during the Vitorino Mediation in 2012-2013: "[s]ome stakeholders [] mentioned the possible introduction of a central administrative body at EU level. Notifications on cross-border sales could be sent to this single point, and would then be forwarded to the national bodies competent for collecting levies. Alternatively, such a central point could be directly responsible for the collection of levies."[219] Moreover, so-called "distance sellers," or outside-EU sellers, can benefit from a centralized declaration procedure. Using a centralized EU-level reporting mechanism, "distance sellers could submit declarations of sales of goods eligible to private copying levies at a single EU entry point, while the compensation would be invoiced and paid in the country of destination."[220] As Ferriera points out, "…European administration…would avoid some of the administrative problems that the collecting societies face with paying non-nationals."[221]

A further step in the right direction might also include the introduction of uniform rules of collection and reimbursement established at the EU level that can guide the procedures of exemption/reimbursement of Member States. This might consist of uniform rules for ex ante exemptions where manufacturers/importers can, at the outset, exempt all goods destined for 1.) cross border sales (with the exception of when goods are being sold directly to consumers); and 2.) goods that are bought and used by professional users. [222] Manufacturers/importers who sell goods in either of these categories can also benefit from a comprehensive and transparent dataset collected at the EU-level,[223] ensuring that no unfair competitive advantage was gained by firms which conclude exemption agreements with exporters (wholesalers), importers, and/or collecting societies.[224] Increasing transparency in these types of copyright transactions has been renewed as a goal in the CMO Directive of 2014.[225]

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content/uploads/2019/01/DIGITALEUROPE%20comments%20on%20Business%20Exemption%20and%20Reimbursement%20(Annex)%20(April%202018).pdf

[218] This was proposed in the context of compliance with the Opus ruling. (C-462/09). Society of Audiovisual Authors "Making Private Copying Levies Work in the Digital Age: Proposals for a European Framework." September 2013. Pg. 8. Available at: https://www.saa-authors.eu/file/57/download

[219] This solution is premised on the first suggestion, making the country of destination principle a default rule. Vitorino Recommendations, supra n. x at 12.

[220]). Society of Audiovisual Authors "Making Private Copying Levies Work in the Digital Age: Proposals for a European Framework." September 2013. Pg. 8. Available at: https://www.saa-authors.eu/file/57/download

[221] Ferreira, Jose Luis. (2010). "Compensation for private copying : an economic analysis of alternative models." ENTER IE Business School, July 2010. Available at: http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=853&PortalId=0&TabId=353.

[222] Vitorino Recommendations, supra n. x at 17.

[223] Vitorino Recommendations, supra n. x at 17.

[224] WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 pg. 11

[225] "the Directive of the European Parliament and of the Council on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, which was adopted by Parliament and the Council on 4 February 2014, reinforces the fact that the management of copyright requires particular emphasis on the transparency of the flows of remuneration

Lastly, establishing joint liability for the levy payment across the chain of manufacturers, importers and retailers will both ensure that the levy is complied with and that the debtors in these cases are properly incentivized to coordinate with each other and pay the levy.[226] The Society of Audiovisual Authors also agrees on the introduction of joint liability for all entities in the chain of sales to avoid potential fraud and unfair competition.[227]

2. Social and Cultural Funding

The private copying levy plays a unique role in the EU through its use to fund various social and cultural initiatives at the Member State level. According to a recent study conducted by CISAC, "[i]n addition to direct payments to creators, more than EUR50m annually is used to help creators via cultural, educational and social projects. Small shares of distributions are used to invest in a myriad of activities, for example in France, Germany, Italy, the Netherlands and Switzerland."[228] Though the allocation of a percentage of levy funds for social and cultural purposes is not mandatory according to the Directive, the amounts can often be substantial.

There are several justifications for using a portion of private copying levy revenues towards social and cultural purposes. In the first place, an important advantage of a statutory remuneration mechanism is the ability to subsidize individual creators as opposed to subsequent rightholders (*i.e.*, publishers).[229] To accomplish this, statutory rights to remuneration such as the levy are typically unwaivable.[230] This ensures that the bargaining position on the behalf of creators is not capable of being "excessively" overridden by contract. This would otherwise be the case if, for example, the agreement negotiated between the creator and publisher is a "buy-out" contract involving the exchange of a lump sum payment for "...the assignment or waiving of rights to remuneration (e.g. for

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collected, distributed and paid to rightholders by collecting societies, including for private copying." Castex Report, supra n. 15. at Section F.

[226] AGECOP goes a bit further than this to suggest that any agent of the selling chain of the good should be able to effectively pay and deliver the remuneration. "Private Copy Compensation: AGECOP's Report on the Portuguese Legal Framework and Collection." Available at: https://circabc.europa.eu/sd/a/23654f9f-15a8-4325-927e-231ac260adfb/AGECOP.pdf. Pg. 21

[227] Society of Audiovisual Authors "Making Private Copying Levies Work in the Digital Age: Proposals for a European Framework." September 2013. Available at: https://www.saa-authors.eu/file/57/download

[228] "CISAC Global Collections Report 2018: For 2017 Data." pg. 30 Available at: http://www.cisac.org/CISAC-University/Library/Global-Collections-Reports/Global-Collections-Report-2018.

[229] This interpretation becomes the point of argument in *Reprobel*, where in determining whether fair compensation was due to publishers, the ECJ ruled that, "publishers do not suffer any harm for the purposes of [the private copying and reprography exceptions]. They cannot, therefore, receive compensation under those exceptions when such receipt would have the result of depriving reproduction rightholders of all or part of the fair compensation to which they are entitled under those exceptions." Reprobel, supra n. x. at para. 48. This ruling may be overturned with the passage of the Digital Single Market Directive. *See* Jiří Maštálka, "Parliamentary Question: The unlimited scope of Article 12 of the proposed DSM Directive." Available at: http://www.europarl.europa.eu/doceo/document/E-8-2018-004361_EN.html. ("The HP/Reprobel case was only about compensation paid for private copying and reprographic rights. However, the proposed Article 12 would give publishers an unlimited share of all compensation paid for uses under exceptions and limitations now existing and any created in the future. This goes much further than the scope of the compensation in question in the HP/Reprobel case. An unlimited right to a share of compensation would unjustly transfer money from authors to publishers, give publishers an even stronger negotiating position and cause legal uncertainty, e.g. regarding existing publishing contracts and recipients of compensation.").

[230] See supra, Part I Section A 2 B II. Though the Directive and national law is sometimes unclear on this point, the unwaivability of the private copying levy is confirmed by the ECJ decision in Luksan, supra n. x at 105-106.

private copy or reprography), which annuls the compensation granted to the author by law and by the *acquis communautaire*."[231] The unwaivable nature of this right to compensation has had a direct effect on creators, especially those with little bargaining power, who have come to rely on the levy as a guaranteed source of income.[232]

Yet on its own, making the right unwaivable has not been adequate. Additional problems arise where collecting societies are unable to make payments directly to rightholders, partly due to issues of identifying them. In an extreme case, in 2007 the Netherlands "froze" its levy collections due to the fact that, by the end of 2004, 5.6 million Euros remained undistributed.[233] Relatedly, the adequacy of a collecting society's distribution scheme was scrutinized in *Amazon*. This case, however, established that fair compensation was not limited to direct forms of compensation to rightholders, but may also include indirect forms of compensation through social and cultural institutions set up for the benefit of authors and performing artists.[234] Indeed, it is inevitably the case that a small percentage of levy collections will include a number of "irrelevant" uses which cannot be directly redistributed – *e.g.*, when the equipment/recording material subject to the levy are not always used for the reproduction of works protected by copyright.[235] Reallocating a percentage of these collections for social or cultural purposes, therefore, "...may be used as a source of compensation to users – such as educational and cultural institutions – in the case of which the said irrelevant uses are more typical."[236] Altogether it seems reasonable to account for instances of under-distributions and over-collections by simply reinvesting these funds back into the creative sector.[237]

Taking these justifications into account, naturally there has been a sense of support among Member States for using a percentage of levy collections towards social and cultural funds. The percentage of levy collections used for this purpose in EU Member States averages 30%, with the highest percentage coming from Austria (50%).[238] Of the Member States with a levy system in place, 13 have included some form of cultural deductions which determined by either rightholder organizations or by law.[239] Interestingly, these funds are not always reallocated to rightholders in the jurisdiction of the collecting society. In the case of France, where 25% of collections are used towards social and cultural funds, "SACEM also finances, from this source, activities that are in the interest of foreign

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[231] Séverine Dusollier, Caroline Ker, Maria Iglesias et.al. (2014), "Contractual Arrangements Applicable to Creators: Law and Practice of Select Member States." European Parliament Committee on Legal Affairs. Pg. 12. Available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarangements_/contractualarangements_en.pdf

[232] Mazziotti, Giuseppe (2013). "Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum." Centre for European Policy Studies, Brussels. June 2013. pg. 3. Available at: https://www.ceps.eu/system/files/Copyright%20in%20the%20EU%20Digital%20Single%20Market%20FINAL%20e-version.pdf.

[233] Dirk Visser (2012). "Chapter 14: Private Copying" in pg. 432. Available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/20003/14_100jrAUTWET.pdf?sequence=1.

[234] Amazon, supra n. x at para. 76

[235] Ficsor, Mihaly. (2002) Collective Management of Copyright and Related Rights. WIPO, Geneva 2002. Available at: ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_855e.pdf. pg. 92-93.

[236] Id.

[237] Ficsor, Mihaly. (2002) pg 93.

[238] WIPO Study 2017, pg. 14.

[239] WIPO Study 2017, pg. 3, 14-15.

owners of rights."[240] Finally, these funds have a variety of applications across Member States. In Spain, 20% of private copying collections are used to promote member services as well as to train authors and performing artists.[241] In France, where the cultural funding accounts for 40 million euros, it is reported that in 2006 over 4,000 cultural events received support from the levy.[242] Finally, although not all Member States implement social and cultural deductions from levy collections, they are encouraged to do so. According to the Castex Report, Member States are encouraged to "earmark at least 25 % of revenue from private copying levies to promote the creative and performance arts and their production."[243]

Meanwhile, at the EU level incentivizing a so-called "EU Culture" remains an elusive goal.[244] This is reinforced by the fact that the EU has no direct competency to legislate in this area.[245] Instead, the EU's role is rather supplementary in nature, "to provide incentives and guidance to test new ideas and support Member States in advancing a shared agenda."[246] Perhaps contrary to these lofty goals, according to a 2018 study 54% of EU respondents were of the opinion that no common European culture exists "because European countries are too different from one another."[247] Nevertheless,

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[240] Ficsor, Mihaly. (2002) Collective Management of Copyright and Related Rights. WIPO, Geneva 2002. Available at: ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_855e.pdf. pg. 93

[241] Hugenholtz, P. Bernt, Guibault, Lucie and van Geffen, Sjoerd. "The Future of Levies in a Digital Environment: Final Report." Institute for Information Law (IViR), Amsterdam. March 2003. Pg. 21. Available at: https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf.

[242] "Cultural Policies in France." Coalition Française pour la Diversité Culturelle. Pg. 29. December 2008. Available at: http://www.coalitionfrancaise.org/wp-content/uploads/2013/11/Cultural-policies-in-France.pdf.

[243] Françoise Castex, "Motion for a European Parliament Resolution on private copying levies." European Parliament Committee on Legal Affairs. 2013/2114(INI). ["Castex report"] 17 February 2014. Recital 22.

[244] Commission of the European Communities (2007). "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world." Brussels, COM (2007) 242 final, pg. 13. ("The Commission would seek, together with the Member States, to increase EU-wide coordination of activities regarding cultural cooperation.")

[245] "The EU has no legislative competence in this broad policy area. Article 3(3) of the Treaty on European Union (TEU) states that the Union shall 'ensure that Europe's cultural heritage is safeguarded and enhanced', and Articles 6 and 167 of the Treaty on the Functioning of the European Union (TFEU) define its role as being to support (also financially), supplement and coordinate Member States' efforts in this field in order to preserve and respect the EU's cultural diversity as expressed in its motto 'United in diversity'. It also frames the role of the European Parliament as being to adopt incentive measures, together with the Council. Article 167(4) TFEU provides for cultural aspects to be taken into account across other policy areas under EU treaty provisions. As a sign of the recognition of the specificity of cultural heritage, state aid for cultural heritage conservation is declared to be compatible with internal market rules under Article 107(3d) TFEU, provided it does not affect trading and competition." Pasikowska-Schnass, Magdalena. (2018). "Promoting European Culture." European Parliamentary Research Service, August. Pg. 13. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623555/EPRS_BRI(2018)623555_EN.pdf

[246] European Commission (2018). " Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A New European Agenda for Culture." COM(2018) 267 final. Pg. 9. Brussels, 22 May 2018. Available at: https://ec.europa.eu/culture/sites/culture/files/commission_communication_-_a_new_european_agenda_for_culture_2018.pdf

[247] European Commission (2018). "Commission Staff Working Document: A New European Agenda for Culture – Background Information Accompanying the Document Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A New European Agenda for Culture." SWD(2018) 167 final. Brussels, 22 May 2018. Pg. 64. Available at: https://ec.europa.eu/culture/sites/culture/files/staff_working_document_-_a_new_european_agenda_for_culture_2018.pdf

while the most recent iteration of the EU's cultural agenda seems to restate some of the goals it has articulated many times in the past,[248] it is still the case that EU reinvestment into the creative sector and into strengthening cultural diplomacy "does not reach the level of the US and China."[249]

Given that it is desirable to rebalance the interests of rightholders across the EU, and given that it is also desirable to foster more EU level cooperation between Member States, it may be worthwhile to consider allocating a reasonable percentage of levy collections to be redistributed towards EU-wide social and cultural projects. This may likely contribute to the fulfillment of one of the stated objectives of the most recent EU Cultural Agenda, which suggests "[s]caling up culture and heritage projects supported by EU programmes."[250] Additionally, redistribution of a small percentage of national collections would perhaps serve as a better redistributive mechanism for the digital age, where private copying practices become increasingly difficult to localize. Lastly, if levies are ultimately applied to cloud technology and similar online services by other Member States, an EU level redistributive mechanism could serve to more properly rebalance the effects of copying that occurs in the less-than-transparent cloud.

C. Technological Monitoring and Advisory Functions

And what of the future of levies, in particular regards to its phase-out as is predicted in the Directive? According to Hugenholtz et. al's interpretation of Recital 39 of the InfoSoc Directive, levy phase-out is predicated on technological and economic development, when technological measures can finally be used by rightholders to capture the economic value of copies, lifting the "fair compensation" obligation.[251] Yet there are many aspects of this conclusion that would be difficult to reach given the current situation. Therefore, a centralized EU regulator with the ability to observe and advise Member States in the administration of the levy is preferable, especially given that there are many informational gaps that are yet to be assessed at the EU level.

1. DRM Standardization and Monitoring

As previously discussed, there is currently no mandatory standard for DRM in the EU. One explanation for the lack of a common standard is that both governments and industry groups have failed to agree on a standard that can be effectively maintained across different channels of distribution, devices, and content.[252] Standards are especially challenging to craft and enforce on

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[248] European Commission (2018). " Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A New European Agenda for Culture." COM(2018) 267 final. Brussels, 22 May 2018. Available at: https://ec.europa.eu/culture/sites/culture/files/commission_communication_-_a_new_european_agenda_for_culture_2018.pdf

[249] Pasikowska-Schnass, Magdalena. (2018). "Promoting European Culture." European Parliamentary Research Service, August. Pg. 13. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623555/EPRS_BRI(2018)623555_EN.pdf

[250] European Commission (2018). " Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A New European Agenda for Culture." COM(2018) 267 final. Brussels, 22 May 2018. Pg. 9 Available at: https://ec.europa.eu/culture/sites/culture/files/commission_communication_-_a_new_european_agenda_for_culture_2018.pdf

[251] Hugenholtz, Future of Levies, supra n. x. at 44.

[252] Natali Helberger (ed.), Nicole Dufft, Stef van Gompel et. al., (2004). "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-

digital mediums, where solutions often develop independently from one another and remain "compartmentalized" in product categories. Recognizing that DRM systems cannot continue to operate independently from one another, the standardization of DRM in the EU "must be decisive...in order to satisfy one of the basic needs of consumers: interoperability of the different systems."[253]

Industry standards can either develop into open standards, which typically involve a high number of different technology providers, or can become the result of a standard that emerges from a particularly strong market player (proprietary). Open standards have the advantage of incorporating many different market players at once, with the added consumer benefit of a higher chance of interoperable solutions. An example of an open DRM standard currently in development is the Open Digital Rights Language Initiative (ODRL), an international effort to adopt an open standard for rights expression in combination with DRM. [254] However this standard takes the somewhat limited form of a "language," where terms and conditions for content, permissions, etc. can be expressed in relation to rightholder agreements, but the DRM technology itself is still left to the device manufacturer/content provider.[255] Proprietary standards, on the other hand, are created by one or a few stakeholders with an interest in establishing a leading technology in the market. These types of standards might be beneficial to consumers in that it may be preferable over the lack of any standard, but may also have the deleterious effect of restricting the market to just a few options, ultimately limiting consumer choice. [256] In either case, the widespread adoption of an industry standard involves a lengthy process of market testing, gauging user acceptability, and measuring how competition evolves among stakeholders.[257]

In 2003, standard-setting institution ETSI released a report following the introduction of the InfoSoc Directive, stating that, "…there should be one standardized solution for…content protection…as part of the 3GPP [mobile] DRM specification. Options should be avoided as far as possible…a standardized DRM solution should be extensible. However, such an evolution shall occur within a tight standardization process that minimizes the number of parallel solutions existing in the market."[258] Taking this example, it seems favorable to both industry players and consumers that a single DRM

Art Report." December 2004. Natali Helberger (ed.). The Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe (INDICARE). Pg. 102.

[253] Natali Helberger (ed.), Nicole Dufft, Stef van Gompel et. al., (2004). "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-Art Report." December 2004. Natali Helberger (ed.). The Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe (INDICARE). Pg. 92

[254] Natali Helberger (ed.), Nicole Dufft, Stef van Gompel et. al., (2004). "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-Art Report." December 2004. Natali Helberger (ed.). The Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe (INDICARE). Pg. 90

[255] Id.

[256] Id. at 103.

[257] Natali Helberger (ed.), Nicole Dufft, Stef van Gompel et. al., (2004). "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-Art Report." December 2004. Natali Helberger (ed.). The Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe (INDICARE). Pg. 104

[258] This was eventually accepted as a standard for mobile (OMA DRM Specification) in 2008. ETSI (2003). "Universal Mobile Telecommunications System (UMTS); Digital Rights Management (DRM); Stage 1 (3GPP TS 22.242 version 6.2.0 Release 6)." Available at: https://www.etsi.org/deliver/etsi_ts/122200_122299/...02.../ts_122242v060200p.pdf.

standard emerge, mostly to prevent market disruption that may otherwise be caused by several coexisting DRM solutions on the market.

When considering exactly how a DRM standard might develop in the EU, one key question that remains is to what extent the EU regulator should intervene in the standardization process. As put by Helberger, legislative intervention depends on "whether policymakers want to promote stable conditions for competition, diversity and a multi-platform content market… – even if this eventually means that the technically best standard is not adopted – or to promote innovation and competition…there is still a chance that market pressure will induce market parties to agree on a standard voluntarily."[259] It is further acknowledged that "[s]tandardisation processes that are pushed too fast might suppress innovative ideas from being tested on the market."[260] According to Hugenholtz et. al., it is within the public interest to make as much as the decisionmaking process in the hands of a public authority as opposed to a market player such as a collecting society or manufacturer.[261] This is especially important considering the delicate interactions between DRM and user interests, particularly those interactions affecting creative uses specifically enabled by private copying practices.[262]

With this in mind, an effective means to oversee the standardization process of DRM in the EU may take the form of an EU level regulator. Importantly, as recognized before, regulating DRM technology should also able to counterbalance technological standards against existing copyright norms, factoring in legal considerations at the national and international level. Ideally, then, an EU-level regulator would have the competency to organize stakeholder dialogues, allowing interested parties to suggest solutions and produce evidence.[263] Lastly, extended monitoring can occur at the EU level to better anticipate levy phase-out, as an EU level assessment would be a more efficient means of gathering evidence and assessing to what extent DRM has been accepted by consumers participating in the digital marketplace.[264]

2. Observatory and Advisory Functions

Navigating the domestic implementation of the levy is challenging given the political nature of the decisionmaking. Legislators must balance not only stakeholder interests, but must thread policymaking through the needle of a number of international instruments.[265] This has especially been a challenge in recent years, as national systems are seeing increased pressure to adhere to ECJ decisions in the realm of private copying levies, but have had difficulties in complying with rulings.[266]

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[259] Id. at 121-122.
[260] Id. at 104.
[261] Hugenholtz et. al. at 46.
[262] *See* Geiger, Christophe (2008). "The Answer to the Machine should not be the Machine", EIPR, Vol. 4, pp. 121-129.
[263] Id. at 46.
[264] "In our proposal, levies are to be phased out not in function of actual use, but of availability of technical measures on the market place. The phasing-out of levies should be a decision based on technology assessment, not on measuring the immeasurable." Hugenholtz Future of Levies 46.
[265] These include the three-step test (as enumerated in Article 5.5 of the InfoSoc Directive, 9.2 of the Berne Convention, Article 10 WIPO Copyright Treaty and Art. 13 of the TRIPS Agreement), and The EU Charter on Fundamental Rights
[266] See Poort, Levy Runs Dry, supra n. x.

Currently many national collecting societies control a substantial portion of rights management information vital to understanding the effects of the private copying levy on the EU marketplace, yet this information is not centralized. This poses challenges for cross-border manufacturers and importers of goods subject to the levy, as well as limiting the ability of rightholders and consumers to understand how levy revenue is collected and distributed back to the right parties. Furthermore, many national authorities simply lack the resources to be able to assess and keep pace with technological advancement.

Though at the EU level some initiatives involving DRM studies were conducted in the early 2000s, most of these projects have since ended.[267] It is therefore worth considering a renewed effort to support the collection and distribution of information related to the levy at a centralized EU level. This might include a panel of experts in place to provide guidance to Member States in their domestic legislation, facilitating policymaking through evidence gathered from all Member States. The calculation of baselines for levies in the EU can be determined by such a panel of experts, and at this level EU wide studies and public hearings can be conducted efficiently. Such a body might also be able to monitor the impact of the levy in the EU. An EU level actor can further provide a platform of exchange between national private copying levy administrative bodies, and perhaps provide supplementary resources for jurisdictions without adequate private copying levy management at the national level.

Conclusion Part II

The long-settled foundation of the levy system in Europe has contributed to its continued acceptance across most Member States. Significantly, the levy has served as a guaranteed source of income for rightholders in the EU who might not otherwise have a strong bargaining position, and in cases where jurisdictions offer social and cultural funds the levy has an even more far-reaching role in sustaining and disseminating creative content. As evidenced by its new application to cloud copying, the levy shows signs of continuing to be applied to more technology going forward. Lastly, while DRM solutions seem like a promising means of enabling more direct agreements to be negotiated between rightholders and users, the levy is still a useful mechanism in the interim until a unified industry standard can emerge. Until that happens, it seems like the levy is here to stay -- the priority then should be optimization of the current levy system for digital copyrighted content.

When considering how ineffective the efforts have been thus far to address private copying levies in the EU, one noteworthy criticism of the Vitorino Recommendations was that "…the mediator showed an incomprehensible reluctance to propose effectively pan-European solutions."[268] Indeed, though many stakeholder suggestions were addressed and incorporated into the final recommendations in the report, perhaps it was this missing element which inhibited any comprehensive change. Nevertheless, in understanding the mediator's conclusions, it is easy to observe that there are large regulatory gaps in the existing system, and that there are practical EU-level solutions currently available which can facilitate the implementation of the levy across all Member States and "future-proof" the administration of the levy in the rapidly-changing digital landscape.

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[267] See, e.g., INDICARE (Project ended 2006). Available at: http://indicare.org/tiki-view_articles.php

[268] Mazziotti, Giuseppe (2013). "Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum." Centre for European Policy Studies, Brussels. June 2013. pg. 20.

First, in setting tariffs at the Member State level it is generally acknowledged by this paper that, respecting subsidiarity and proportionality principles, national systems should still be able to calculate levies on an individual Member State basis to reflect the differing purchasing powers of its citizens. However, creating a list of baseline factors relevant to the calculation of "harm", assessing new technology, and creating of a list of leviable devices and/or media at the EU level, can be effective ways to increase the efficiency and ease of administrating the levy.[269]

Furthermore, in terms of levy collection and distribution mechanisms, a centralized solution in cases of cross-border sales can be helpful to manufacturers and importers tasked with the administrative burden of applying for ex-ante exemptions and ex-post reimbursements. To this end, some baseline criteria can be set at the EU level to determine the qualifications of exemptions and reimbursements, especially as they involve cross-border producers/manufacturers and importers.

In addition, to enhance the cultural function of the levy, perhaps in the future a small percentage can be collected from each Member State and redistributed to ensure that rightholders across the EU are able to benefit from the levy, and that the levy system is able to be rebalanced on a European, as opposed to national, level. This is especially important to preserve given the reliance on the levy by creators. Furthermore, scaling the cultural impact of the levy collections to the EU level seems like an obvious way to incentivize and promote the thus unrealized "EU culture."

Lastly, by monitoring technological changes at the EU level, Member States need not incur the administrative and legislative burdens of determining how to deal with new technology as it emerges on the EU market. This advisory function can especially facilitate faster national legislative adaptations to new technology. Technological monitoring at the EU level can also serve as the best early indicator of the prevalence of DRM technology and help to anticipate levy phase-out. In the same regard, setting standards regarding the application and enforcement of DRM at the EU level can be a useful step towards facilitating the continued use of this underused technological regulatory mechanism. In these ways, monitoring technological change at the EU level can both balance current stakeholder interests in preserving the levy and promote a future where the levy mechanism is finally replaced by a widely-accepted, and more precise, regulatory instrument.

SUMMARY OF RECOMMENDATIONS:

- Setting upper and lower thresholds of tariff amounts to harmonize across MS
- Setting basic procedural requirements for rate-setting which encourage equal stakeholder participation
- Establishing unified "baseline" criteria of harm can be set at EU level, while national regulatory bodies simplify relevant factors contributing to harm
- Decision on leviable devices/media determined at EU level, subject to (variable) national tariffs

- Availability of Refunds/Exemptions for cross-border importers and manufacturers at a centralized point as opposed to applying per collecting society in each MS

[269] Ideally the creation of baselines/establishment of such lists of leviable devices should also be subject to judicial review.

- Unified criteria of exemptions (application of levy in "country of destination") + Ex-ante exemptions managed at the EU level in coordination with national systems; ex-post reimbursements handled in limited cases by national governments
- Cultural function of levy at EU level to incentivize "EU culture" and rebalance "harm" broadly

- Technological assessment of availability of DRM made at the EU level to anticipate levy phase-out
- Supervision of DRM standardization measures that are properly balanced with copyright objectives
- Advisory function to aid Member States' domestic legislative efforts