



PCR GESAC PROPOSALS – 6.09.2013

## **Private Copying Remuneration: Key element of the Digital Eco-System What do we want?**

Private copying remuneration schemes are a **key element of the Digital Eco-System**. They constitute a win-win model for all stakeholders including Member States as long as everybody plays the game. They are fully compatible with new business models, the development of new products and services and contribute to the dynamism of the market. However, there is room for improving the system and its functioning within the Single European Market. To increase predictability, transparency and avoid uncertainties, GESAC suggests the following:

### **1. Generalisation of Private Copying Remuneration Schemes within the EU**

Today, the exception for private copying is recognised in the law by most Member States which also provide for a remuneration scheme for right holders, the Padawan, Opus, VG Wort and Amazon rulings of the Court of Justice of the European Union confirming that Member States should **ensure** that right holders receive fair compensation.

GESAC considers that such remuneration schemes should be generalised to the entire EU.

### **2. Definition of common principles concerning the procedures to set the amount of levies**

***In line with the decisions of the CJEU, every product that allows private copying should be subject to compensation, both storage media/equipment and multi-functional products should be levied.*** Experience shows that multi-functional products are largely used for private purposes of copying of protected content. There is thus no reason to exclude them from the scope of the private copying compensation. However, the levy should only apply to the actual use of the product for private copying subject to fair compensation.

***A common list of products eligible for private copying compensation should be set at EU level and be periodically revised to add, as appropriate, new kinds of products.***

***Tariffs should be based on actual private copying which are eligible for compensation*** i.e. based on actual private copies made by the consumer in each category of products to be levied, evidenced through consumer behaviour surveys.

***Tariffs should not be set at a level that would impede product and market development of the relevant product.***

***Copies made for professional purposes should be excluded*** from the private copying exception and therefore should not be levied (enforcement of the CJEU “Padawan” ruling). The exemption should be based on the effective use made of the product (use for professional purpose) and not on the nature of the purchaser. The fact that the goods are sold to companies is not relevant since the

employees of those companies or any natural person who comes into the possession of the goods may use them for their own private purpose.

**Some principles on the tariff setting process can be fixed at EU level**, such as: involvement of the different parties in the decision-making, efficient system of recourse, obligation of transparency in terms of provisions of relevant information relating to the decision making.

**Full transparent accounts of levies** for all those concerned (CMOs, importers, manufacturers, distributors, retailers). Applied tariffs should be separately indicated on all invoices and contracts. The final consumer should also be adequately informed of the amount of the levy paid as well as of the purpose of the applicable private copying exception and of the levy.

### 3. Common rules on cross-border sales to be fixed at EU level

**The distance seller should be held responsible for the payment of the levy applicable by virtue of the law of the country where the consumer is located** (CJEU “Opus” and “Amazon” rulings)

**The applicable measures necessary to enforce this principle should be harmonised** (i.e. set administrative rules and a “judicial path” to enforce the “Opus” and “Amazon” acquis).

In line with the Amazon ruling of the CJEU, the principle that double payment of private copying levies (both in the country of import and export) cannot take place should be reaffirmed at EU level. **Refund schemes for distributors and retailers should be put in place** when products are exported. **Manufacturers or importers should be exempted** from the payment of private copying levies for products exported without having been put into circulation in the Member State of export.

**The principle of audit should be confirmed at EU Level.** Regular declaration and audit from importers, manufacturers, distributors and retailers should be provided so as to ascertain the quantities of products actually imported, exported, and put into circulation.

### 4. New digital technologies and private copying:

- *New business models*

New services emerge every day and their business models are different than each other.

As a principle, no private copying compensation should apply if there is no possibility for private copying and **“fair compensation” needs to be ensured if any private copying is involved in the usage of a device or service.**

So far, the market penetration of new devices and services, such as smart phones, tablets, cloud, etc. has not been prevented by the existence of private copying remuneration schemes. On the contrary, those markets have grown exponentially over the last years.

- *Contractual authorisation*

In the countries where private copying exception is provided by law, rightholders cannot contractually authorise the private copying. Therefore, any authorisation that is contractually given is devoid of any legal effect and has no bearing on the fair compensation owed, as recently confirmed by the CJEU in its VG Wort ruling.

- *Use of technological protection measures (TPM) and copies from licensed sources*

First, as also recently confirmed by the CJEU in its VG Wort ruling, if the law provides for a compensation for private copying, then TPMs cannot jeopardise the private copying exception but must on the contrary ensure that it is preserved. However TPMs can affect the actual level of the compensation insofar as their implementation, in conditions which are compatible with the private copying exception, limits the number of copies that can be made.

Second, technical measures are far from being generalised and consumers tend to dislike those measures that prevent them from making private copies of downloads or physical products that they have legally acquired. Moreover it is not realistic to introduce constraints on the possibility to make private copies; especially where there is a huge pressure from wide availability of free illegal content in the market.

## **5. Rules on the determination of the person or entity liable to pay levy**

In conformity with the principle provided in the Padawan and Opus rulings, ***liability to pay fair compensation should be borne by manufacturers and importers***, inasmuch as they are able to pass on to private users the actual burden of such payment, as they are causing the harm to the holder of the exclusive reproduction right.

In conformity with the principle provided in the Amazon ruling, given the practical difficulties in identifying the effective purpose of the use of the recording media at the time of purchase, ***a system which indiscriminately applies the private copying compensation on the first placing on the market of such media, irrespective of who acquires it***, should be admitted. This system should also obviously provide for an effective right to reimbursement in the event that the final use of those media does not meet the conditions of the private copying exception.

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