RECOMMENDATIONS

resulting from the

MEDIATION ON
PRIVATE COPYING AND REPROGRAPHY LEVIES

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Brussels, 31 January 2013

INTRODUCTION

The divergent national ways of imposing and administering private copying and reprography levies have been a source of friction with the Internal Market principles of the free movement of goods and services for quite some time. At the same time, levies have been, and to a large extent still are, a relevant source of income for rightholders. This important and sensitive subject has been debated for decades at both European and national level, and several attempts have been made to tackle the problem.

In its Communication of 24 May 2011, "*A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*"[1], the European Commission announced the launch of a mediation process with stakeholders in order to explore possible new approaches with regard to the imposition and the administration of private copying and reprography levies. Commissioner Barnier gave me the honour to preside over this mediation[2]. I started my mediation by calling on stakeholders to overcome entrenched positions and invited all interested parties to submit constructive contributions in writing[3]. Many of the numerous contributions that I have received contained innovative ideas and helpful information. I also conducted a series of bilateral meetings with stakeholders. These meetings helped me deepen my understanding of the issues and interests at stake. Drawing both on written contributions and the outcome of the bilateral meetings, I held a second round of meetings in order to bring stakeholders with diverging interests together and to try to develop workable solutions.

Most stakeholders were very constructive during the mediation process. Nonetheless, the interests at stake are conflicting and often prevented stakeholders from exploring common ground. The current state of affairs, with important CJEU rulings on this subject pending and the start of discussions in some Member States on possible alternatives to the device based levy system, also conditioned discussions to some extent. Although stakeholders were not yet able to bring their views closer on the most contentious issues, my aim remains to facilitate and advance future discussions as much as possible. In my recommendations, I will therefore try to build upon the issues that were raised in the mediation process by the different stakeholders, even if these issues were often presented from opposite angles. Drawing the divergent positions closer will ultimately depend on the willingness of all stakeholders to commit themselves to finding workable compromise solutions.

In addition to what I learned through the mediation itself, I analysed the relevant information that resulted from previous consultations, as well as the existing case law of the CJEU. I think that certain issues, especially those related to the setting and payment of levies in cross border transactions, can be settled on the basis of that case law. In particular the Court´s rulings in Cases C-467/08 (Padawan vs SGAE) and C-462/09 (Stichting de Thuiskopie vs Opus)

[1] http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf
[2] http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20111123/statement_en.pdf
[3] http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20120402/statement_en.pdf

contribute significantly to the clarification of many of the debated issues. I am convinced that the best way forward is to build on this case law. I will address the consequences of these judgments in detail, in the relevant parts of my recommendations.

Moreover, in an unprecedented number of new cases (Cases C-457/11 – C-460/11, VG Wort vs Kyocera Mita et al.; Case C-521/11, Austro Mechana vs Amazon; Case C-314/12, Constantin Filmverleih vs UPC Telekabel; Case C-463/12, Copydan Båndkopi vs Nokia and Case C-435/12 ACI Adam et al. vs Stichting de Thuiskopie) many other important questions on private copying and reprography levies have been referred to the Court. I expect the answers of the CJEU to these questions to provide further guidance on some essential issues, as I will mention later on in my recommendations.

Some stakeholders have put forward ideas to replace the current hardware based levy systems with other forms of fair compensation. It seems to me, however, that the alternatives that were put forward have not been sufficiently worked out in detail yet, and therefore do not justify the "phasing out" of hardware based levies in the immediate future; such a "big-bang" does not seem advisable. Some of these alternatives may also not be in conformity with the applicable legal framework. In particular, I think that the link between the persons causing the harm and benefitting from the exception and the persons financing a system of fair compensation should not be severed. That being said, I do believe that some of these alternatives deserve further consideration.

Although the remit of my mediation did not foresee a consultation with Member States, I think that such discussions will be needed to find a sustainable and future-proof solution to the problems identified in my recommendations. Stakeholders should nonetheless remain involved in the process, and assume their responsibility for finding workable compromise solutions. It is also essential to take proper account of current and evolving market developments. While it may be too early to determine which business models will be preferred by consumers in the long term, many stakeholders expect a shift from ownership based to access based models. The latter, combined with widespread and ubiquitous Internet access, have the potential of significantly decreasing the overall amount of copying undertaken by end users and, as a consequence, also the amount of levies required to compensate for acts of private copying. Moreover, existing and new online services should normally be based on licensing agreements and are often supported by technical measures, allowing rightholders to be remunerated directly for all forms of consumption of their creative content. In cases where rightholders are remunerated via licensing agreements, for the use (including the copying, as the case may be) of their works, it does not seem justified to make consumers pay a second time, in the form of levies. These and any other forms of double payment should be avoided. In my view, they are to the detriment not only of consumers but also of the functioning of copyright as a system to incentivise and reward creativity and investment. I will address these issues in the first part of my recommendations and indicate what a possible adjustment of the system to take account of new services and consumption patterns could look like.

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 content consumption patterns, likely to decline, they will not vanish from one day to the next. Therefore, levy systems will, in my view, remain relevant in the immediate future. In these circumstances, the most pressing objective is to ensure the greatest possible consistency, effectiveness and legitimacy of the levy systems that are in place today. Accordingly, the second part of my recommendations should be viewed as a critical analysis of these systems, providing targeted solutions to identified cross-border issues. Although most of my recommendations do not distinguish between private copying and reprography levies, it is important to take into account the specificities of the latter. I will indicate when these specificities require a different approach.

The evolution of the copyright system and its adaptation to the XXIst century is not an easy process. Copyright remains an essential element of our society and our economy. In this connection, I have noted with satisfaction that the Commission has recently adopted a Communication on Content in the Digital Single Market, which aims to ensure that copyright and copyright-related practices, such as licensing, stay fit for purpose and provide for effective solutions in this new digital context.

EXECUTIVE SUMMARY

These are the core elements of my recommendations:

I) In order to favor the development of new and innovative business models in the digital single market, based on licensing agreements between service providers and rightholders, I recommend:

- *Clarifying that copies that are made by end users for private purposes in the context of a service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies.*

II) In order to simplify the functioning of the levy systems and ensure the free movement of goods and services in the Internal Market, I recommend that:

- *Levies should be collected in cross-border transactions in the Member State in which the final customer resides;*
- *The liability for paying levies should be shifted from the manufacturer's or importer's level to the retailer's level while simplifying the levy tariff system and obliging manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy*
  - *Or alternatively, clear and predictable ex ante exemption schemes should be established;*
- *In the field of reprography, more emphasis should be placed on operator levies than on hardware based levies;*
- *Levies should be made visible for the final customer; and*
- *More coherence with regard to the process of setting levies should be ensured by*
  - *Defining 'harm' uniformly across the EU as the value consumers attach to the additional copies in question (lost profit); and*
  - *Providing a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits.*

I. NEW BUSINESS MODELS, LICENSED SERVICES AND THE PRIVATE COPYING EXCEPTION

New business models in the digital environment

Digital technology and the Internet have changed the distribution of copyright protected content. Consumers increasingly expect to have access to content through multiple devices, when and wherever they please. Business models are evolving to meet these new expectations. Especially in the online market, which is expected to be by far the most important distribution channel in the future, there is a broad variety of new services.

The market is moving fast and still developing. It is too early to talk about a consolidated model preferred by the majority of consumers. Nevertheless, most stakeholders identify a clear tendency towards services that offer a comprehensive package of features to consumers. These features include copying possibilities that go far beyond what would be allowed under the private copying (or any other) exception. They include the use of content on multiple devices, often via synchronisation possibilities. Many services, notably in the area of music, allow for the making of playlists and the sharing of such playlists with others. Services may also include the offering of "storing and matching services" to ensure access to content libraries by different devices and from any location. It is important to note that the latter services are increasingly access-based, in the sense that copyright protected content is not stored anymore on the customers' devices but rather centrally in the "cloud", on server storage space provided by the service operator.

These complex new services have in common that they need to be based on licensing agreements with rightholders, as only very few elements of the service are potentially covered by an exception. The numerous examples of licensed services existing today prove that such licensing agreements are a reality in the market, benefitting consumers, rightholders and service providers alike.

Some of the operators in the market may attempt to broaden the interpretation of the private copying exception, with a view to bypassing the necessity to conclude licences with rightholders. In this context, one should keep in mind 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 activities of third parties. Such attempts are therefore not only to the detriment of rightholders and legal offers based on licence agreements, but also legally questionable and should, in my view, not be supported. Moreover, they could bring along, as a logical counterpart, more and higher levies.

Copies made in the context of licensed services

While there is no doubt in my mind that the above-mentioned services must be licensed, the question arises as to how to treat the making of copies, as the case may be, in the context of these licensed services, by end users for private purposes. Usually, a service provider acquires a licence from the rightholder that covers all copyright relevant acts involved in the provision of the service, including the reproduction of copyright protected content by the end user. Such licensing agreements also reflect the view and the expectations of the end user. A person paying for e.g. the download of a song expects that this payment does not only cover the first download of that song onto his or her personal computer but also the subsequent copying of that song to a certain number of his or her mobile devices, as determined by the usage rules of the service provider. Similarly, a person subscribing to a music streaming service is usually not only paying for the online streaming to his or her device/s but also for the possibility to create "playlists" that can be listened to when "offline".

Some stakeholders, however, argue that the consent of e.g. an author to the reproduction of his or her work for private purposes does not have any legal effect, even if explicitly given in a licence agreement. They say that a rightholder's consent, if given within the scope of an exception, is null and void. This view seems to be heavily related to the functioning of the levy system. Arguing that the making of a copy for private purposes can never be allowed by the rightholder but only by way of the private copying exception paves the way for further argument that all such copies require fair compensation in the form of levies, regardless of whether they are already covered by a licence agreement or not.

Other stakeholders warn that this would mean that levies would be due on top of the licence fee that was contractually agreed between the service provider and the rightholder and intended to pay for all copyright relevant acts which are part of a given service. Moreover, they are of the view that rightholders should not be bound to a levy regime against their explicit will, but rather be allowed to choose a contractually agreed form of remuneration instead. Stakeholders in favour of giving rightholders such a choice also stress that this has nothing to do with the question of whether an exception can be contractually overridden, i.e. whether an act allowed by a statutory exception can be prohibited by contract. It is rather about whether an act that would already be allowed under an exception can also be contractually allowed by the rightholder. They further argue that a copy made for private purposes with the consent of the rightholder cannot cause any 'harm' that requires fair compensation in the form of levies.

It was also submitted to me that some agreements reached in the market could deliberately carve out acts of private copying from the scope of a licence for an online service, in order to lay ground for levy claims on top of the licence fee. While I do not want to question the rightholders' ability to contractually define the scope of their licences, I doubt that the primary function of the levy regime lies in guaranteeing a premium that rightholders could not achieve under market conditions.

In this context, it should be kept in mind that the levy system was put in place because, in the offline environment, rightholders did not have any other possibility to be compensated for copies made by end users. The online environment, however, allows a much more targeted provision of copyright protected content to consumers, including with regard to copies made for private purposes. Content can now be delivered to consumers in the exact way they expect to receive it. Licence agreements reflect these new ways of distributing content to consumers and allow rightholders to be adequately remunerated for the exploitation of their works and other protected subject matter. The use of so called "technical protection measures" enable the contractually agreed scope of a licence to be mirrored, and acts that go beyond what rightholders have been paid for in the form of a licence fee to be prevented. They are widely used to sustain different business models (for instance downloads versus streaming) and strengthen the case for direct licensing.

In general, I am convinced that it would be best for rightholders to fully embrace the new direct licensing opportunities in the digital environment. Licensing fees are already by far the most important source of income for rightholders, and are well suited to reflect the actual use of content and to ensure that the rightholders are paid for acts of copying that also take place in this context. I was, however, also made aware of the fact that authors and performers often transfer their exclusive rights in a work or other protected subject matter to the producer or the publisher. Some stakeholders claim that if such a work or other protected subject matter is then licensed to e.g. a service provider, authors and performers do not get a share of the licence fee, and need to be satisfied with the payment they received for the initial transfer of their rights. I understand that such authors and performers sometimes suffer from a lack of bargaining power. I do not think, however, that private copying levies are the right way to address this imbalance. Mandatory rules in copyright contract law or labour law would, in my view, be a better manner to ensure that authors and performers receive an adequate share when their works and other protected subject matter are exploited. Another option would be to help them to organise themselves better in order to conduct negotiations more successfully. The principle of subsidiarity, however, should be given specific consideration when examining this issue at EU level.

In light of all of the above, my view is that licensed copies should not trigger the application of levies. The opposite view would pave the way for double payments. Consumers cannot be expected to show understanding for such double payments.

My conclusions appear to be in line with the current legal framework (in particular Recitals 35 and 45 of Directive 2001/29/EC), as the latter allows for, and potentially favours, contractual relations that are designed to ensure the payment of rightholders. I also believe that my conclusion is supported by the decisions of the CJEU in Cases C-467/08 (Padawan vs SGAE) and C-462/09 (Stichting de Thuiskopie vs Opus). In these judgments the Court stressed that fair compensation must make good the harm rightholders suffer because of the unauthorised reproduction of their works. This could be seen as an indication that authorised – i.e. licensed - reproductions do not cause any 'harm' that would require fair compensation. The Court will have the opportunity to clarify this matter further in pending Cases C-457/11 – C-460/11 (VG Wort vs Kyocera Mita et al.).

RECOMMENDATION

- *Clarify that copies that are made by end users for private purposes in the context of a service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies.*

II. LEVY SYSTEMS IN THE INTERNAL MARKET

It is important to acknowledge the trend towards directly licensed services in the digital environment and its effect on the extent of private copying that should be compensated via levy systems. At the same time, it is clear that the level of market penetration of these services is still limited (as compared, for instance, to physical distribution or broadcasting). It is also important to recall that consumers enjoy increasing possibilities to make private copies (for instance of CDs) and to store them on multiple devices. The same applies as regards reprographic copies. The need to compensate for such acts of private copying will not vanish from one day to the next. Therefore, although the importance of levy systems will probably decline over time, they will, in my view, not be simply abolished in the near future, as some stakeholders would prefer. Thus, the rest of my recommendation will focus on how to improve the functioning of levy systems from the angle of the Internal Market.

Divergent levy systems have been the source of obstacles to the functioning of the Internal Market for a long time. For instance, the fact that one and the same product can be subject to a levy in one Member State but not in another can lead to distortions of competition and obstacles to the free movement of such product. Widely varying tariff levels add to the problem. One way to solve these Internal Market problems would be to fully harmonise levies, including tariffs. Some stakeholders warn that this could lead to a situation where harmonised tariffs more or less reflect the highest level of national tariffs in place today. They also say that the levy system is inherently broken, and that the problems associated with it can only be solved via its complete elimination. Other stakeholders oppose the harmonisation of tariffs for other reasons. They think that Member States should be given as much leeway as possible with regard to the modalities of their levy systems, in line with what they see as the right application of the principles of subsidiarity and proportionality, as well as different cultural traditions.

I believe that the truth lies somewhere in between. As a starting point, one has to acknowledge that there are various reasons for the above mentioned disparities. To a certain extent, they are linked to the different traditions and values underpinning the cultural policies of Member States, as well as to economic factors such as income *per capita*. I am, however, also convinced that at least the most severe barriers to cross-border trade in the Internal Market need to be tackled and that this can be done while taking into account the legitimate interests of rightholders and the situation in different Member States.

The general "leviability" of products

While the *acquis* remains silent on the question of which products can be levied, the CJEU has shed some light on this issue in its judgment in Case C-467/08 (Padawan vs SGAE). It stated that "*the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users*". It follows that (i) from

a technical point of view, in principle all media, equipment, and devices capable of making copies of copyright protected content can be subject to a levy; and that (ii) from a usage point of view, only equipment, media and devices made available to natural persons as private users can be subject to private copying levies. Reprography levies are not subject to the latter condition; I will come back to this specificity later on.

In my opinion, the general "leviability" of media, device or equipment therefore solely depends on whether a product is technically capable of making copies. Member States that opt for a levy system to provide for fair compensation under the private copying and reprography exceptions enjoy, however, discretion with regard to the modalities of organising the system and are certainly not obliged to make all products capable of making copies subject to a levy.

Whether a product is subject to a levy or not should therefore be left to Member States. I am not convinced that the EU legislator would be in the right position to make this determination. Approaches 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). Moreover, differing cultural traditions among Member States and factors such as the purchasing power of consumers could also justify such an individualised approach with regard to how Member States 'translate' the 'harm' sustained by the rightholder into the decision of which products should be subject to a levy and which tariffs should apply.

Nevertheless, levy systems must be reconciled with the principles of the Internal Market. For the abovementioned reasons and in the light of the principles of subsidiarity and proportionality, I think this should be done via (i) a shift of the liability to pay the levy to the entity selling to the end user or, alternatively, through clear and predictable ex ante exemption schemes - ideas which I explore further in the following sections concerning cross border transactions as well as transactions involving sales to professional users, (ii) ensuring the visibility of the levy to the final customer, and (iii) more coherence with regard to the process of setting levies, in particular through a common pan European definition of 'harm', and some basic procedural requirements applicable to the process of levy setting. I will explain all these recommendations in detail below.

The country of destination principle in cross-border transactions

In Case C-462/09 (Stichting de Thuiskopie vs Opus) the CJEU primarily addressed the obligation of a Member State that has introduced the private copying exception to provide fair compensation. The Court, however, also stressed that the 'harm' suffered by the rightholders arises on the territory where the final private users reside. Applying this concept to cross-border sales in general leads, in my view, to the conclusion that levies should only be collected in the country in which the final user has his residence. This is the country where the reproduction will most likely be made and, therefore, also the country where the 'harm' will occur. In pending Case C-521/11 (Austro Mechana vs Amazon) the Court will have the

possibility to clarify further the country of destination principle outlined in Case C-462/09 (Stichting de Thuiskopie vs Opus).

While some stakeholders support the country of destination approach, others argue that levies should only be collected in the Member State where a product is manufactured, or where it enters the EU for the first time, regardless of where the product will be finally used for private copying purposes (country of origin approach). As a consequence, it would no longer be possible to collect the levy in any other Member State. In their view, the main advantage of such a solution would be that a levy must only be paid once, and that moving a product across borders within the EU would not attract further levies.

I agree with the aim that a product should only be levied once in the EU. Nevertheless, I am convinced that the approach outlined by the CJEU should be followed. Otherwise, a product could simply be imported for the first time into the EU in e.g. a Member State where levy tariffs are extremely low, or where levies (on that product) do not even exist at all. Only the application of the levy in the country of residence of the final user (i.e. the country of destination) can ensure more fairness, clarity and predictability within the system. The issue of double payments in cross-border sales should, as I will outline below, be dealt with in a different way than via opting for a country of origin approach.

RECOMMENDATION:

- *Collect levies in cross-border transactions exclusively in the Member State in which the final customer resides.*

Double payments in cross-border sales and the liability to pay levies

In line with the above, levies should only be collected once in cross-border transactions, namely in the country of destination. Unfortunately, this is not always the case. Far too often, there are instances of double payments.

The issue of double payments is closely linked to the question of which entities in the sales chain are liable to pay levies. Member States follow different approaches, but in most cases levies are collected from manufacturers and importers. This means that, in principle, every time a product crosses a national border within the EU, the entity deemed responsible for the importation of that product has to pay a new levy, regardless of what has already been paid before in other Member States. Consequently, in the majority of cross-border transactions products are, at least, levied twice: first in the Member State where they are manufactured (or imported from outside the EU), and a second time in the Member State into which they are imported in order to be sold to the final customer. Most Member States try to mitigate the problem by providing for systems that allow entities that have already paid the levy for a certain product in e.g. Member State A to be reimbursed upon the exportation of that product into Member State B. The situation is, however, more complicated if the entity that has paid the levy in Member State A (e.g. the manufacturer) is different from the entity that exports the product into Member State B (e.g. a wholesaler). In such cases, the entity entitled to

reimbursement (e.g. the manufacturer) can only prove its claim with the help of information and documentation provided by another party, namely the entity exporting the product (e.g. the wholesaler).

Most stakeholders engaged in cross-border transactions complain heavily about double payments. They claim that ex post reimbursement systems are extremely cumbersome or wholly non-functioning. Even if the reimbursement systems work, these stakeholders do not understand why they should pre-finance the levy until they get reimbursed - a process that may take months, or sometimes even years. Accordingly, they favour a system whereby levies are collected exclusively at the point of final sale, i.e. at a level where the product will not be further moved across borders.

Other stakeholders defend the current system where primarily manufacturers and importers are obliged to pay the levy. They argue that the administrative effort for collecting and paying levies is significantly lower if they are collected mainly from manufacturers and importers, as opposed to from retailers (which are more numerous and spread out). Some stakeholders also stress that, in some Member States, the current system is based on framework agreements between organisations representing manufacturers and importers on the one hand and organisations representing rightholders on the other. Agreements with manufactures and importers would no longer be possible after a liability shift to the retailer's level and could, in their view, hardly be replicated with retailer organisations which are often less uniformly represented. These stakeholders also want other entities in the sales chain made jointly and severally liable, in order to reduce the possibilities of the payment being avoided.

Some stakeholders also 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. All proposals made in this context were, however, based on the application of the levy tariffs of the country of destination. Other stakeholders claim that such a system would not solve the problem of double payments. In cross-border transactions it would often be unclear in which Member State a product will finally be sold to the end user. In any case, it would be impossible to determine at this stage whether the final user will be a private or a professional one. Moreover, the costs associated with the introduction of such a complex administrative apparatus, probably including an IT system that is interoperable with all national systems, would be completely out of proportion to the amounts of levies actually collected in the EU.

From a regulatory point of view, it seems to me that a system is preferable where the obligation to pay levies is limited to the final point of sale, i.e. to entities that sell to final users. First and as indicated above, shifting the liability to pay levies from the manufacturer's or importer's to the retailer's level would ensure that, in cross-border situations, levies are only paid in the country where the consumers reside, as required by the CJEU. Second, such a shift would drastically reduce the risk of double payments. If e.g. a product is imported from outside the European Union into Member State A, and it is exported from A to a retailer in country B which sells it there, the levy will only have to be paid once, namely in Member

State B. The mere importation of the product into Member State A would not trigger the payment of a levy in Member State A. Questions regarding the possible reimbursement of the levy upon exportation would therefore simply not arise anymore.

As mentioned above, some stakeholders warn that a shift of the liability to pay the levy to the retailer´s level could create additional administrative burden and costs. I recognise that this may be true for some of the actors. Taking into account all actors involved in the system, I think, however, that the overall administrative burden would be reduced. The proposed shift would eliminate the administrative burden associated with reimbursement procedures in cross-border cases, and the need to declare, collect and eventually reimburse levies every time a product crosses a national border. Moreover, in several Member States collecting societies are already used to collecting levies from retailers, in particular when the latter are acting as importers or when they are jointly liable, together with manufacturers and importers. Finally, the markets for media and devices subject to levies are often highly concentrated, and the number of retailers representing the lion's share of the market in many Member States is fairly limited for many of the products levied.

Nevertheless, a balanced approach would require accompanying measures that alleviate the administrative effort associated with collecting levies exclusively from retailers. To that end, manufacturers and importers should be obliged, with due respect to competition rules, as appropriate, to inform collecting societies about their transactions that concern products subject to a levy (for example to which Member States they have been exported to or to which wholesaler or retailer their products have been sold). This would help collecting societies to track these goods and allow them to collect levies efficiently from the final retailer. This information obligation could be strengthened by making manufacturers and importers liable to pay the levies themselves if they are not able to demonstrate to whom goods subject to a private copying or reprography levy had been sold. In addition, retailers could be obliged to declare their sales of products that are subject to a levy periodically to collecting societies.

It must be taken into account that retailers usually offer a much wider range of products to their customers than manufacturers or importers. For this reason, it becomes more important to take complexity out of the system, and make the payment of levies as easy as possible. A possible shift of the liability to pay levies to the retailer´s level should therefore be accompanied by a drastic simplification of the levy tariff system by Member States. Taking into account the high number of different products that are usually sold by retailers it must be ensured that there are as few tariff classes as possible. Retailers should not be required to apply more than a handful of different tariffs when they sell goods. Furthermore, the entire system of the calculation of 'harm' and its 'translation' into tariffs would need to be improved. I shall come back to this issue below, when discussing the notion of 'harm' as well as procedural requirements concerning the process of tariff setting.

Finally retailers could, to a certain extent, also benefit from such a shift. Under the current system they are required to pay the levy upfront as part of the price of the product that they acquire. This means that they bear the financial burden of the levy until they pass it on in the price, when selling the product to the final customer. Conversely, when only the sale of a

product by a retailer to the final customer could trigger a levy, they would not be required to pre-finance the levy as long as the product is part of their inventory.

RECOMMENDATION:

- *Shift the liability to pay levies from the manufacturer's or importer's level to the retailer's level while at the same time simplifying the levy tariff system; and*
- *Oblige manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy.*

Non-application of private copying levies to professional users

While, in principle, all products capable of making copies of copyright protected content can be levied, the CJEU made clear in its judgment in Case C-467/08 (Padawan vs SGAE) that private copying levies must not be imposed on goods that are acquired for purposes clearly unrelated to private copying. This approach requires a distinction between transactions where a good is sold to a private user and transactions where a good is sold to a non-private user. The latter transactions must, in principle, not be subject to a private copying levy.

Pending Case C-521/11 (Austro Mechana vs Amazon) concerns, inter alia, the question of whether persons or organisations that sell to users other than natural persons as private users must be exempted ex ante from the obligation to pay the private copying levy, or whether a reimbursement scheme after the payment of the levy is also in line with the obligation not to apply private copying levies indiscriminately to all users. It will be up to the Court to clarify whether the current legal framework allows for the provision of a reimbursement scheme instead of an ex ante exemption.

Some stakeholders argue that manufacturers and importers usually do not sell to natural persons as private users, as required by the CJEU, but rather to wholesalers. Therefore, they want them to be exempted ex ante from the payment of levies. They also stress that only the final retailer is in a position to assess whether equipment, media or devices will be used by a natural person for private purposes or not. A manufacturer or an importer, on the other hand, cannot carry out that assessment. At this level of trade, operators simply do not know who the final user will be.

Other stakeholders consider that systems based on ex-post reimbursement perfectly comply with the CJEU's ruling in the Padawan case. They think it makes no difference whether a professional user buying a product subject to a levy is exempt ex ante from the payment of the levy or whether he has the possibility to be reimbursed ex post, as in both cases he would not have to bear the levy in the end.

In my view, it is preferable to have a system where the obligation to pay the levy is limited to entities that sell to a natural person as a private user. Such a system appears to be simpler, clearer and economically more justifiable than a system whereby purchases for non-private purposes can also attract a private copying levy. Persons and organisations who do not sell

equipment or media to natural persons as private users should not bear the financial risk and the administrative effort of being reimbursed at a later stage. Private copying levies should simply not apply to such transactions. Consequently, neither manufacturing a product capable of copying nor importing such a product should in itself be deemed sufficient to trigger a private copying levy. Private copying levies should rather apply exclusively to purchases made by natural persons as private users. Distinguishing such users from other users should be relatively easy. Using a VAT-number for a purchase could, for example, be a strong indication that a product will not be used for private purposes. Purchases by legal persons can also be exempted easily.

I would like to stress that the very same recommendation to shift the liability to pay the levy from the manufacturer's and importer's level exclusively to the point of final sale would both solve the problem of double payments in cross-border transactions - as mentioned above - and the problem of how to comply with the CJEU´s ruling in the Padawan case of non-application of private copying levies to professional users.

RECOMMENDATION:

- *Shift the liability to pay levies from the manufacturer's or importer's level to the retailer's level while at the same time simplifying the levy tariff system; and*
- *Oblige manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy.*

Specificities with regard to the reprography exception

The private copying exception and the reprography exception follow different approaches. Whereas the scope of the private copying exception is limited to reproductions that serve a specific purpose ("for private use"), the reprography exception covers reproductions on a specific medium (paper), using a specific method ("any kind of photographic technique"). Literally taken, reproductions on paper for private use are covered by both exceptions. The Directive does not regulate the relationship between the two exceptions.

Hardware-based levies exist both in the area of private copying (e.g. on DVD burners and USB sticks) and reprography (e.g. on printers and copy machines). Divergent levy systems have a negative impact on the proper functioning of the Internal Market in both areas, and the above mentioned problem of double payments in cross-border sales also concerns reprography levies. Unlike the private copying exception, however, the reprography exception is not limited to reproductions made for private purposes. Reprography levies can, on the basis of the current legal framework, be collected regardless of whether a good is sold to a private or a non-private user. In reprography, there is no need to distinguish between these two types of users. Some stakeholders in the field of reprography are particularly concerned about shifting the liability to pay levies to the retailer's level. Similarly as argued by some in the field of private copying, they think that such a shift would create additional administrative costs, and would make it impossible to rely on framework agreements between organisations

representing manufacturers and importers and organisations representing rightholders. They also stress that in reprography there is no need to ensure the non-applicability of levies to professional users (via shifting the liability to pay levies to the retailer's level).

In my opinion, it would not be advisable to shift the liability to pay levies to the retailer's level in the area of private copying alone, and not in the area of reprography. First, the problem of double payments must be addressed in the area of reprography as well. Second, it does not appear to be very efficient to collect levies partly at the level of manufacturers and importers and partly at the level of retailers. Therefore, my recommendation to shift the payment liability to the retailer's level also extends to reprography.

Operator levies are another specificity in the area of reprography. Several Member States operate a so-called dual system, consisting of hardware based levies (as in private copying) and operator levies. Operator levies are usually based on contractual agreements between collecting societies and organisations heavily engaged in reprographic copying (e.g. the operators of copy shops, universities, libraries, etc…). Operator levies pose no obstacle to the free movement of goods and services and are therefore, from an Internal Market perspective, clearly preferable to hardware-based levies.

Some stakeholders point out that some reproductions cannot be covered by operator levies, for example when a private person makes a paper copy with the help of his or her own copy machine.

While it may be true that hardware-based reprography levies cannot be replaced entirely be operator levies, the latter still have great potential for alleviating the negative effects of (reprography) levies on the Internal Market while ensuring fair compensation to rightholders. I therefore believe that, in the field of reprography, a gradual shift from hardware-based levies towards operator levies would be advisable.

RECOMMENDATION:

- *Place more emphasis on operator levies compared to hardware-based levies in the field of reprography.*

Ex ante exemptions as a possible alternative to shifting the liability to pay levies to the final point of sale

As explained above, in my view the liability shift to the final point of sale would be the best solution to the underlying cross-border problems caused by levy systems. I recognise, however, that such a shift would entail drastic changes to the system. This is all the more the case as it would most probably have to be accompanied by a significant reduction in the number of tariffs. In fact I see such a move, i.e. the simplification of the system by the reduction of the number of applicable tariffs to only few rates, as a prerequisite for the liability shift towards the level of retailers because the latter entities have to be in a position to easily establish whether, and if so at what level, a levy applies.

Therefore, since I am sure that it may take some time to reduce and simplify the number of levy tariffs and to reorganise the entire system of collection, it seems appropriate not to exclude alternative approaches.

They could consist, for example, of introducing uniform rules for ex ante exemptions for those entities which are liable to pay levies under the current levy systems i.e. manufacturers and importers. They could benefit from standardised procedures intended to exempt all their goods destined for cross-border sales (without prejudice to the liability for the payment of the levy in the country where the cross border sale takes place if the manufacturer and/or importer is selling directly to consumers – i.e. is also acting as retailer) as well as goods which will be bought and used by professional users.

First, manufacturers and/or importers whose products are sold cross-border or bought and used by professional users would need to be identified ex ante. Second, these undertakings would need to provide reliable data on the proportion of goods manufactured/imported by them which are usually destined for cross-border sales and/or are usually bought and used by professional users at the end of the sales-chain. In the case of new market entrants, this data could be based on estimations which would be subject to subsequent verification. Once the estimated amount of goods destined for cross-border sales or bought and used by professional users is established, manufacturers and importers would benefit from an ex ante exemption from the obligation to pay levies, in proportion to the part of their sales.

Although such an approach may be perceived as being simpler and less burdensome, it has significant shortcomings, too. Most importantly, in relation to goods bought and used by professional users at the end of the sales-chain, it seems difficult to ensure that they will actually benefit from the ex-ante deductions granted to manufacturers or importers. As a matter of fact, it does not seem very likely to me that the exemption from the levy granted for a particular product could be passed on through the entire sales chain. With the exception of situations when manufacturers or importers are selling directly to consumers, in the majority of other cases, they do not know whether a particular product will ultimately be bought and used by a professional user or not. Therefore, they would simply apply – in their sales to, for example, wholesalers – the same price. Consequently, it may well be that only manufacturers and importers – and not the final professional users would benefit from such a system based on ex-ante exemptions.

The visibility of levies

In Case C-467/08 (Padawan vs SGAE) the CJEU stressed that "nothing prevents those liable to pay the compensation from passing on the private copying levy in the price". Thus, the burden of the levy will ultimately be borne by the private user who pays that price and who must be regarded "as the person indirectly liable to pay fair compensation".

Some stakeholders said they would find it sometimes hard to pass on the levy (entirely) in the price and that they would "absorb" it instead. I believe that organisations and persons obliged

to pay levies – i.e. retailers, according to my recommendation - would find it easier to pass on the levy in the price if there were an obligation to make the levy visible to the final customer. Such a measure would also make the system more transparent and raise awareness among consumers. Moreover, evading the payment of the levy would in this way be made more difficult, and collecting societies might find it easier to collect the correct amount of levies from retailers.

During the mediation, most stakeholders were in favour of creating an obligation to make the levy visible to the final customer. Others feared additional administrative burden. Weighing the interests of various actors involved, I believe that introducing an obligation to display the levy to the final customer would, overall, benefit all parties involved.

Furthermore, in the scenario where the liability shift to the retailer's level does not immediately occur, levies could be made visible throughout the sales chain in order to facilitate claims for reimbursement and limit risks of evasion.

Finally, non-private users buying goods that are – in principle - subject to a levy would also benefit from such an approach, as sellers would be under pressure to sell them the products at a price which excludes the amount of the levy.

RECOMMENDATION:

- *Make levies visible for the final customer.*

Methodology

I am of the opinion that the diverging approaches taken by Member States both towards the determination of products subject to levies and towards the methodology for setting the tariffs lie at the heart of the challenges levies pose to the free movement of goods and services in the Internal Market.

As explained earlier in my recommendations, I do not believe that a comprehensive harmonization at EU level, including with regard to the goods subject to levies and the applicable tariffs, should be envisaged. Nevertheless, more clarity, simplicity and consistency in setting private copying and reprography levies are needed across the EU. As mentioned above, the number of tariffs could be simplified and reduced, in order to decrease the administrative burden both for the entity liable to pay the levy and the entity responsible for its collection. Moreover, the system could be significantly improved by harmonising some of the essential elements used for the calculation of levies, such as the underlying notion of 'harm' which needs to be compensated and the procedural framework within which levies are set. Indeed, 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. In a similar vein, some common principles concerning procedural aspects of the process of setting the levies would help to reduce the difficulties posed by the functioning of the current system, to the benefit of all players.

The notion of harm

Many of the stakeholders pointed to the difficulty of determining the nature of the 'harm' caused to rightholders by copies made by virtue of the private copying and reprography exceptions. Indeed, views on what constitutes 'harm' diverge.

The current legal framework is silent on what constitutes 'harm'. It merely refers to 'harm' as a valuable criterion in the calculation of the fair compensation (Recital 35 of Directive 2001/29/EC). The Court of Justice of the European Union, however, affirmed in its judgment in Case C–467/08 (Padawan v SGAE) that the fair compensation must necessarily be calculated on the basis of the criterion of the 'harm' caused to authors of protected works by the introduction of the private copying exception. The Court did not clarify, however, what exactly should be understood under the notion of 'harm'.

I believe that in order to guarantee more coherence and predictability in the process of setting tariffs, it would be sensible to ensure that the concept of 'harm' is interpreted uniformly across the EU. Defining and measuring that 'harm' would be crucial for the determination of the amount of 'fair compensation' which in most Member States is provided in the form of private copying and reprography levies. Furthermore, I think that for the amount of levies imposed on goods used for private copying and reprography to be accepted and understood, there must be an explainable and clear correlation between their level and the definition of 'harm'.

In my opinion, to determine the 'harm' sustained by rightholders because of the copies made within the scope of the private copying and the reprography exceptions one needs to look at the situation which would have occurred had the exception not been in place. In particular, one needs to assess the value that consumers attach to the additional copies of lawfully acquired content that they make for their personal use. It 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. I think it is fair to say that, in the majority of cases, this amount would neither reach the level comparable to the value of the initial copy nor would it be so negligible that it could be completely ignored.

Although such a definition of 'harm' is, at its most basic level, not contested by the majority of stakeholders, it seems that views on its practical implications diverge. Some stakeholders are of the opinion that once 'harm' is defined uniformly in the above manner, it would still simply refer to the number of copies made by consumers under the private copying exception, and all of them would need to be fully be taken into account when setting the levies. For others, the definition of 'harm' outlined above implies that the customers' willingness to pay for additional copies decreases proportionally to their number and that, therefore, the hypothetical licence-fee(s) which the rightholder would have obtained - had there been no exception - decreases with each additional copy made. Such an approach also seems to imply that, in many instances, the value of each additional copy could be so small that the 'harm' sustained by the rightholders should be considered as minimal, with no compensation obligation arising. Accordingly, it would be necessary to assess not the *actual* number of copies made

but rather the *hypothetical* (lower) number of copies that could have been licensed in the absence of the exception.

It seems to me that, since the main rationale underlying the private copying exception is linked to the practical difficulty of the licensing of copies made by consumers for their private use, it is fair and reasonable to compensate rightholders precisely for lost income opportunities, e.g. via the licence agreements they would have concluded if there were no exception. Moreover, in my view it would be justified for the level of compensation to reflect the actual value attached by consumers to such additional 'private' copies. The latter also depends on the form in which the copyright protected content is copied (analogue/digital). For instance, the value a consumer attaches to the fact that he can copy a book (instead of acquiring a subsequent copy of it) is different from the one he attributes to the possibility of copying a CD on multiple devices being in his possession. In any event, I am far from saying that these additional copies would cause minimal 'harm' and would not need to be compensated. But I equally think that measuring all the copies actually made by virtue of the exception without taking into account the consumers' willingness to pay for these copies if there were no exception could lead to compensating to a greater degree than EU law actually requires.

Finally I am aware that the value attributed to each private copy by a single consumer is rather small, and hence the resulting 'harm' may be minimal, but I also believe that the CJEU made clear in the judgment in Case C – 467/08 (Padawan v SGAE) that the 'harm' which is subject to fair compensation arises not from one single copy but from a number of a natural persons' activities which, taken together, amount to relevant 'harm' caused to rightholders.

RECOMMENDATION:

- *Ensure more coherence with regard to the process of setting levies by defining '**harm**' uniformly as the value consumers attach to additional copies in question (lost profit)*

Establishment of the level of tariffs

It became clear to me in the course of the mediation process that one of the issues paralysing 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.

Indeed, in some Member States stakeholders have been engaged in extensive and time–consuming disputes. It can take several years to decide whether a given category of devices should be subject to a levy, and if so, what its level should be. Such situations create major uncertainty, in particular for the entities that are, under the current legal framework, liable for the payment of levies in the majority of Member States (i.e. manufacturers and importers). These operators often do not know whether, and to what extent, they should have included levies in the price of their products. They often have to bear the financial risks of the possible differences between the tariffs adopted provisionally and the amounts decided at the end of

the process. The same problem arises where levies are claimed retroactively, due to a late decision on the applicability of a levy to a product that has been newly introduced to the market. These and other situations resulting from the sub-optimally functioning tariff setting procedures can lead to cases of under-payment or over-payment of levies. In a similar vein, the way the system currently functions has a negative impact on rightholders. Lengthy and cumbersome procedures for setting tariffs create uncertainties as to the levels of fair compensation they can expect. Furthermore, the payment may reach rightholders only a long time after a given product is put on the market and the 'harm' has occurred.

Most of these problems would persist even if the liability to pay levies were shifted from the manufacturers' and importers' to the retailers' level. In light of these considerations, I am convinced of the need to ensure that the process of tariff setting is improved and made as transparent as possible with all stakeholders equally represented. I also think that the process should be conducted under the auspices of national authorities. The latter should not intervene unless it becomes evident that an agreement is impossible. In such instances, however, Member States should assume the responsibility for taking decisions (on an interim or final basis), as this is the only way to avoid legal uncertainty and ensure the effectiveness of the whole process.

I am mindful of the fact that different legal traditions in Member States result in a variety of procedures for setting levies and that, in line with the principle of subsidiarity, practical modalities should be left to Member States. I am, however, convinced that it is necessary to apply some general minimum standards. Thus, I would recommend that:

> *1) 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.*
>
> *2) The ultimate level of the applicable levy should, to the extent possible, not be superior to the one imposed temporarily. If nevertheless this were the case, the resulting difference should be payable gradually and could be split into several instalments.*
>
> *3) The final tariff applicable to a given product should be agreed or set within 6 months period from its introduction on the market.*

Last but not least, it is beyond question that decisions through which levies are set should be subject to judicial review. Although I am perfectly aware of the varying legal traditions as well as substantial differences in the functioning of Member States' judicial systems, I am convinced that for litigation concerning levies to be as smooth and as effective as possible, some basic rules should be respected. In particular, I would encourage Member States to adopt all possible measures to reduce the overall duration of proceedings as much as possible. The tariff decided by court should be applicable from the date as specified in the court's decision.

<u>RECOMMENDATION:</u>

- *Ensure more coherence with regard to the process of setting levies by providing a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits.*

APPENDIX I

List of stakeholders involved in the mediation process on private copying and reprography levies (through meetings with the Mediator and/or written submissions)

Aepo – Artis (Association of European Performers' Organisations)

AGICOA (Association of International Collective Management of Audiovisual Works)

ALSO Actebis

Amazon

ANDEC Confcommercio

ANSOL (Associação Nacional para o Software Livre**)**

Apple

ARD/ZDF (Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland /Zweites Deutsches Fernsehen)

Asmi (Associazione Supporti e Sistemi Multimediali Italiana)

Associação Ensino Livre

Assotelecomunicazioni-Asstel

Auvibel (Collectieve beheersvennootschap voor het kopiëren voor eigen gebruik van geluidswerken en audiovisuele werken)

BEUC (Bureau européen des unions de consommateurs)

BITKOM (Hightech-Verband BITKOM)

Canon

Canadian Private Copying Collective

CEDRO (Centro Español de Derechos Reprográficos)

Nelson Cruz

Dell

DIGITALEUROPE

EDiMA (European Digital Media Association)

EFFI (Electronic Frontier Finland ry)

EGEDA (Entidad de Gestión de Derechos de los productores Audiovisuales)

ETNO (European Tele-communications Network Operators' Association*)*

EURIMAG (l'Association Européenne de groupes d'Imagerie)

Eurocinema (Association de Producteurs de Cinéma et de Télévision)

EuroCommerce

EUROCOPYA (European Association of Audiovisual & Film Producers' collective management societies)

EDRI (European Digital Rights)

EFJ (European Federation of Journalists)

European Publishers Council

EVA (European Visual Artists)

FEP (Federation of European Book Publishers)

FIAPF/IVF (International Federation of Film Producers Associations/ International Video Federation)

GESAC (European Grouping of Societies of Authors and Composers)

GiART (International Organisation representing the Performers' Collective Management Societies)

Google

GSMA (Global System for Mobile Communication Association Europe)

HP (Hewlett Packard)

ICMP (International Confederation of Music Publishers)

IFFRO (International Federation of Reproduction Rights Organisations)

IFPI (International Federation of the Phonographic Industry)

Iliad/Free SAS

Imation

IMPALA (The independent music companies association)

Intel

JVC France

Dr Stavroula Karapapa

Kopiosto (Copyright Society)

Literar-Mechana (Literar-Mechana Wahrnehmungsgesellschaft für Urheberrechte Ges. m. b. H)

LYHTY (LUOVAN TYÖN TEKIJÄT JA YRITTÄJÄT)

MPA (Motion Picture Association)

Nokia

Norma (Stichting Naburige rechten Organisatie voor Musici en Acteurs)

Panasonic

PRS for Music

Procirep (Société des Producteurs de Cinéma et de Télévision)

Reprobel

RIM (Research In Motion Limited)

SAA (Society of Audiovisual Authors)

SACEM (Société des auteurs, compositeurs et éditeurs de musique)

SAMSUNG

SECIMAVI (Syndicat des Entreprises de Commerce International de Matériel Audio, Vidéo et Informatique)

SOFIA (Société Française des Intérêts des Auteurs de l'Ecrit)

Syndicat National de l'Edition

TUOTOS ry (AGICOA Finland)

UK Music

Universal Music Publishing Group

VG Media (Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH)

VG Wort (Verwertungsgesellschaft Wort)

Virgin Media Limited

VISAPRESS (Gestão de Conteúdos dos Media)

Vodafone

VPRT (Verband Privater Rundfunk und Telemedien e.V.)

WKÖ (Wirtschaftskammer Österreich)

Warner Bros

Younison

ZItCo (Zentralverband Informationstechnik und Computerindustrie e.V.)

ZPÜ (Zentralstelle für private Überspielungsrechte)

APPENDIX II

Statement by Commissioner Barnier concerning the mission given to Mr Vitorino to act as a mediator in the dialogue on private copying levies

Brussels, 23 November 2011

I have proposed to Mr. António Vitorino, former European Commissioner for Justice and Home Affairs, to take up the mission of mediator to lead the process of the stakeholder dialogue on private copying levies.

The process which we are starting now, as announced in May this year in the Communication on a single market in intellectual property rights, has as its objective laying the ground for legislative action on private copying levies at EU level.

Mr. Vitorino's task will be to moderate stakeholder discussions with the objective of exploring possible approaches to harmonisation of both the methodology used to impose levies and the systems of administration of levies. It is planned that the discussions will commence in the beginning of 2012 and will be completed before the summer of 2012. The success of these discussions will depend on the constructive commitment of all relevant parties. I believe that a common effort on all sides, under the excellent leadership of Mr. Vitorino, will bring the expected results allowing us to propose legislation enabling the smooth cross-border trade in goods that are subject to private copying levies while ensuring that the rightholders receive appropriate compensation for acts of private copying.

I would like to also express my thanks to Mr. Vitorino for accepting to take up this challenging task.

APPENDIX III

Statement delivered by Mr António Vitorino at the launch of the mediation process concerning private copying and reprography levies

Brussels, 2 April 2012

I am happy to announce the start of the mediation process on private copying and reprography levies, over which Commissioner Barnier has given me the honour to preside.

In the framework of my appointment, I have been analysing the various issues at stake in this complex and important matter. This has reinforced my conviction that the good functioning of the Single Market requires that we try to ensure the greatest possible coherence, effectiveness and legitimacy in the implementation and application of the principles and legal framework underpinning it. We must find a way to reconcile the national private copying and reprography levy systems in place today with the smooth cross-border trade in goods and services in the Single Market. Moreover, in setting our sights on this ambitious target, it is essential to take proper account of the opportunities offered by the current development of new business models. Such models deliver new forms of authorised access to copyright protected content. They should at the same time enable rightholders to better control the use of their content and the manner in which they are remunerated for it.

Significant efforts have been made over the years on this sensitive subject. This has resulted in a considerable wealth of information and ideas that I can, and will, build on in order to take this issue forward in an efficient and pragmatic manner. I must stress, however, that the purpose of this mediation is to move beyond well-known and entrenched positions and to find workable and mutually acceptable solutions to issues that could not be resolved in past discussions.

My objective is twofold. Firstly I aim to identify possible ways to tackle the issue of disparate levy systems negatively affecting the functioning of the Single Market. At the same time I aim to assess the functioning and the scope of the private copying and the reprography exceptions in today's fast evolving digital environment. Both aspects may lead me to formulate recommendations for legislative action, as appropriate. As of this month, I will begin my talks with those whom I have identified as key stakeholders. My intention is to start, in the first instance, by holding these discussions on an individual basis as, in my view, this is a more effective and efficient way to achieve progress.

So far, I have identified the following core issues that will form the basis for my engagement with stakeholders:

1. Methodology for setting levy tariffs

2. Cross-border sales

3. Determination of the person or entity liable to pay the levy

4. Visibility of the levy

5. Private copying and reprography in the context of new digital forms of distribution of copyright-protected content and the implications for levy systems.

I also invite stakeholders and organisations which have a keen interest in finding workable solutions to the above-mentioned issues to send me their succinct and constructive contributions in writing. Contributions should be based on the questionnaire in Annex and sent to

markt-levies-mediation-2012@ec.europa.eu by 31 May 2012.

I expect to finalise my consultations in the course of the summer and to present my conclusions and recommendations to Commissioner Barnier during autumn 2012.