

PRIVATE COPYING OF MUSIC

A NEW MODEL FOR ARTIST COMPENSATION

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Future Thinking

...ideas, insight and inspiration
for tomorrow's music business

Contents

Executive Summary	3
Foreword	6
About MusicTank	6
Introduction	9
The Evolution Of The Concept Of Private Copying	13
Territorial Harmonisation Of Compensatory Systems For Private Copying	17
Current Situation In The United Kingdom	20
Consumption Behaviour: Ownership Model Vs. Access Model	23
Distribution Of Monies Collected For Private Copying	30
The Basis.....	30
Labels vs. Publishers.....	33
Collection Of The Blank Levy	34
Hardware-Based Levies	34
A Problem Of Information	36
Cloud-Based Storage	39
Digital Rights Management	40
The Proposed Model	41
Method Of Operation	42
The Figure	43
The Payee	44
Conclusion	47
Bibliography	52

[\[top\]](#)

Executive Summary

Compensatory systems for private copying are in urgent need of modernisation. Current systems not only show a lack of transparency but also fail to take into account the most recent developments in information technology, which are transforming how music is consumed.

Compensatory system models that are currently enforced throughout the European Union focus on the price and storage capacity of devices that allow the duplication of copyrighted material in order to collect copyright compensation fees.

However, it is now possible to use these devices to access externally stored music catalogues instead of creating multiple copies and storing them locally – typically cloud storage and on-demand streaming services.

The assumption that sales of devices are directly related to the level of private copying that is performed is therefore no longer valid and the emergence of access models of music consumption has called into question the enforceability of current compensatory systems for private copying.

Different territories within the European Union have enforced various models of compensation systems that do not necessarily share the same fundamentals. This has led to a heterogeneous situation where the interaction between the different models often leads to inconsistencies, such as duplicate payments in cross-border transactions, as a result of different models having differing points of collection of compensation revenue in the supply chain.

Thus there is an urgent need for the harmonisation of the fundamentals within different compensatory systems for private copying throughout the European Union - a single legal framework needs to be put in place in order to ensure a high degree of transparency and equal conditions for every stakeholder.

[\[top\]](#)

Currently in the United Kingdom, it constitutes copyright infringement to make copies of lawfully purchased CDs for private use. Immediate action is required in order to standardise current practice within all territories of the European Union, which entails reaching an agreement amongst all stakeholders involved in order to guarantee a legal framework that provides fair remuneration for creators.

It was announced by the Government that the implementation of a private copying exception would take effect from the 1st June 2014, which did not provide for compensation for rights holders; the government arguing that the harm caused by private copying was not significant enough. However, the implementation of the private copying exception has now been postponed to the 1st October 2014¹.

Compensatory systems for private copying need to be reviewed in depth in order to propose a model that does not become obsolete with the evolution of technology and this dissertation aims to propose the fundamentals of a model that responds to such a requirement.

It consists of a fee-per-sale model whereby a fixed tariff is charged on each sale of music, whether a single or album. Periodically, the tariffs from each sale are accounted-for and the total that is generated is then charged on to the retailers of devices that allow the duplication of copyrighted material.

The advantages of such a model are several. It would provide a higher degree of transparency due to the immediate identification of rightsholders that occurs at the time of accounting the total. It would also guarantee that the revenue generated from the system is proportional to the level of revenue of the ownership model of music consumption, which sources private copying exclusively.

Therefore, in the light of an ever-growing tendency of change towards access models of music consumption, the compensatory system for private copying would not suffer the threat of obsolescence.

¹ Since completing this thesis, private copy exemption did indeed become UK on this date.

Content industries need to address this issue as a matter of urgency, especially given the fact that private copying and blank levies are of broad and current interest within the European Union and its official bodies.

The European Parliament published its latest report on Private Copying on the 17th February 2014, where amongst other statements, it stressed that there is currently no other alternative approach to compensation systems for private copying that would ensure appropriate remuneration for rights holders, while simultaneously calling for further discussion to be conducted in order to update the mechanisms and make them more effective.

Although it may seem inadvisable for some of the more authoritative voices in this area that a major change in the way compensatory systems for private copying are enforced be carried out, the failure to fully address the question of technological change and transparency will inevitably pose a threat to the stability of the compensatory systems put in place.

Foreword

Sam Rudy's MA Music Business Management Project report argues for an immediate EU wide statutory introduction of an improved blank tape levy.

He proposes an evolution of the concept of private copying and in doing so suggests that this new levy could provide urgently needed remuneration to music rights holders.

Sam carried out extensive research and has put together a timely and convincing argument that a levy, even in these days of streaming, should still make up a substantial part of music industry finance.

In addition to his work at the university Sam worked full-time whilst attending the course and was an outstanding and generous student, producing some really great work. He now works for Miloco Studios.

On the strength of this paper and his academic achievement during his studies, Sam was awarded the MusicTank Award for Business and Innovation, Autumn 2014.

Sally Gross, Course Leader & Graham Ball, Deputy Course Leader

MA Music Business Management, University of Westminster

MA Music Business Management, Music Department

University of Westminster's MA MBM is truly unique, being the first and longest-running of its kind in the UK. As such, it is regarded by the music industry as a Gold standard in music business education, preparing and delivering consistently high-level, next-generation music industry leaders and entrepreneurs: [MA Details](#). [Other Courses...](#)

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About MusicTank

[MusicTank](#) is a pre-eminent information hub for UK music business, addressing change and innovation through informed debate, objective analysis and industry engagement. Established in 2003, MusicTank has built an enviable reputation for its ongoing and unique programme of think tank debates, events and conferences, a natural extension of which is its delivery on incisive reports commissioned from key industry figureheads.

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Introduction

Private copying came to the fore following the introduction of magnetic recording tape in the form of the cassette and has been a cause for concern to copyright holders ever since.

Private copying refers to the copying of media made by individual consumers onto devices such as CDs, computers and mobile phones for their own private use. During the past few decades, numerous representatives within the music industry have argued that manufacturers of such devices should compensate rights holders for having enabled consumers to record and duplicate copyrighted material.

During this time, many governments of the world have accepted this idea and have consequently created levy-based laws to ensure compensation is made. At the same time, finding an agreement on which legal mechanisms should be used to apply this compensation has been a very controversial matter.

As a result of this, countries have followed different criteria, resulting in a diverse number of differing compensation systems.

It is important in the first place to differentiate private copying from file sharing.

Private copying refers to the duplication of lawfully purchased content by the consumer for their own personal use. Examples of this concept are the format-shifting of songs (from a CD to a computer or an MP3 player) or the creation of a personal mix of songs from different 'original' sources. In other words, private copying involves one person only.

File sharing is the duplication of content in order to share it with other persons, which effectively results in a number of consumers obtaining content without compensation to the rights owners for doing so.

[\[top\]](#)

It is common to mix both concepts, especially when using the term 'copying', which could effectively refer to either of them. This essay will focus on private copying and the term 'copying' will hereafter exclusively refer to this concept, unless otherwise specified.

At first, private copying might seem like a concept that cannot cause any economic harm given that consumers performing it have lawfully acquired the original material and compensation has therefore been made to the rights owners. However, it must not be forgotten that the files that are being duplicated are protected by copyright and any permission to perform those duplications would therefore need to be licensed.

The way in which private copying can be harmful to the creative industries lies in the lack of compensation for the profit that device manufacturers make by enabling consumers to duplicate copyrighted material.

The practice of private copying is notoriously widespread and there is no reason to think that in the modern world, consumers should not have the right to perform it. However, it is perfectly reasonable to argue that rights owners receive compensation from the practice given that this content is protected by law from being duplicated.

Unfortunately, the issue of private copying provides a further example of the lack of awareness that exists regarding copyright amongst consumers and those outside the creative content industries.

Over the last decade music consumption has undergone historical changes. The appearance of the access model of music consumption has had a profound impact on some of the fundamentals that the recorded music industry used to rely upon.

What used to be an industry that relied exclusively on selling one product now relies on selling an amalgam of products and services. The concept of owning music on the part of the consumer now coexists with the concept of accessing external catalogues of music, as a result of the evolution in information and communication technology. Consequently, the enforceability of existing compensatory systems for private copying has been brought into question.

[\[top\]](#)

It was commonly believed that the sale of devices that allowed the duplication of copyrighted material was directly related to the amount of private copying that was being performed. Therefore, compensatory systems in other European countries relied on device levies in order to collect revenue.

However, now that devices can also be used to access externally stored music catalogues by third-party providers the assumption of a direct relationship between devices sold and the amount of private copying performed is no longer valid. The need has therefore arisen to review the fundamentals of compensatory systems for private copying in order to adapt them to modern practices of music consumption.

In the European Union, both the decision of whether a compensatory system for private copying should be established and the criterion on which it is based was devolved to each member state. As a result, member states created systems that tended to centre on national considerations and not all have been in compliance with the standards set by the European Parliament. *Padawan vs. SGAE* in Spain is a prime example of this.

The disparities that exist between the various models have many times led to disputes amongst the stakeholders involved. Evidence of these disparities are different collection rates² (which could at some point result in the emergence of a very profitable 'grey' market of illegal movement of devices from low tax to high tax markets), or the different point at which the collection takes place in the sales chain (which has often caused inconsistencies such as double payments in cross-border transactions).

Harmonisation of the fundamentals of compensatory systems throughout the European Union would be beneficial to all stakeholders and therefore, the creation of a European framework in order to guarantee equivalent conditions for every stakeholder needs to be considered by all member states.

Transparency in the way remuneration is collected, distributed and paid to the rights holders is one of the European Parliament's major concerns.

² In the 'Digital Opportunity' report, Ian Hargreaves outlines specific differences between member states in the EU.

[\[top\]](#)

Compensation systems for private copying have historically taken the shape of hardware-based levies, which are presented as a surcharge on the price of devices, which allow duplication of copyrighted material.

However, precisely what use is made of such devices is completely opaque³; therefore, a system that is based on the purchase of devices in order to collect the revenue can never guarantee a high degree of transparency.

It can only lead to an arbitrary decision being made as to what the appropriate division of the revenue between the different media that can be copied privately should be, and similarly, the revenue split between the different stakeholders within those media.

It is a contradiction to demand a high degree of transparency whilst ratifying a model that provides few guarantees in this regard.

Compensatory systems for private copying need to be reviewed in-depth. They not only show serious signs of obsolescence but they also do not provide equivalent and transparent conditions for every stakeholder.

The old hardware-based levy system can no longer be considered appropriate in an era where the possible modes of music consumption that devices offer are more diverse than ever and do not necessarily involve private copying.

The fundamentals of compensatory systems for private copying are therefore in urgent need of modernisation.

³ Devices are used to copy music, films, photographs, books, images and other media and to make back-up copies of work-related documents and individuals' own creative works. Consequently, it is impossible to distinguish what represents copyright infringement.

[\[top\]](#)

The Evolution Of The Concept Of Private Copying

The question of private copying became an important issue for the music industry following the introduction of the cassette in 1963 by the Dutch electronics company Philips (Millard, A., 1996). This device introduced to the average music consumer the possibility of transcoding audio streams and duplicating audio recordings. As such, the cassette could be considered the catalyst of private copying on a large scale.

Cassettes initiated the phenomena known as 'home taping': they made it easy to obtain music virtually for free by recording what the radio was playing or by duplicating an original album that someone else owned. It also allowed consumers to generate several copies of an album in order to keep them in different places, such as at home and in the car, and to select the songs that they wanted to group together in a version different from the original. This led to further dimensions of home taping such as 'mix-taping', which entailed the re-recording of items selected from various originals and their distribution as gifts, for which the rights owners received no remuneration.

Initially, cassette re-recordings received little public attention due to their poor quality in frequency response. However, it did not take long for companies such as Dolby or Philips themselves to come up with noise reduction systems and higher-end versions of the cassette (Drew, R., 2013).

Electronics manufacturers began to incorporate cassette decks into home stereos and with the appearance of 'boom boxes' and 'personal stereos' towards the end of the 1970s, cassettes had spread extensively amongst music consumers, adopted mainly by younger generations eager to capture radio hits and who found their portability very appealing (Millard, A., 1996) (Drew, R., 2013).

Further evolution in audio-recording technology made it easier to produce high quality copies of audio recordings. In 1986, Japanese and European manufacturers announced their intention to introduce consumer-model digital audiotape (DAT)

recorders into the US market (Congress of the United States, 1989). DAT technology represented a significant advance in sound quality compared to analogue tape recording allowing unlimited duplication of recordings with virtually no degradation in fidelity. The tools that allowed the duplication and transcoding of songs were being refined and consolidated to an ever-greater degree with the evolution of technology.

It was not long before the concept of private copying became a natural extension to the purchase of music. In 1979, Philips held a conference to present a product that resulted from the laser-read video disc system they had been working on from the early 1970s: this product was the Compact Disc (Barfe, L., 2005).

Several more years of development were necessary before the different manufacturers, mainly Philips and Sony, reached an agreement on the technical characteristics of the CD. Although it was not until 1992 when CD sales surpassed those of the cassettes in the United Kingdom (Barfe, L., 2005), the CD was a qualitatively different format from the analogue cassette and gave major impetus to the way in which music would be sold, engendering an evolutionary leap in the concept of private copying.

The CD, as a wholly digital format, was the catalyst of the dawn of an entirely new era for the music industry. The analogue formats of tape and groove reading had been substituted by binary code, which resulted in the ability to make perfect copies of the originals with no degradation in quality whatsoever.

The consolidation of the CD as the primary format for the consumption of music and the consequent 'digitalisation' of music catapulted private copying to an unprecedented level. The emergence of the MP3 format drastically reduced the size of the music files and made it possible to package a much greater quantity of music in the same amount of physical space than what had earlier been the equivalent to one album only.

It allowed consumers to re-record multiple albums onto one CD, which became a standardised task for music consumers who wanted to have access to a variety of music while away from home or, simply, while mobile.

[\[top\]](#)

Although the MP3 format was developed in the early 1990s by the Fraunhofer Institute, Germany, it did not become globally popular until 1998 when music consumers started to make use of it through the filesharing network Napster, which began as an unlicensed file sharing service (Barfe, L., 2005). After several litigation procedures and company buyouts, Napster was re-launched as a licensed subscription service in 2003 (Barfe, L., 2005).

However, several competitors had emerged, one of them being Apple's iTunes, which also offered the 'must-have' gadget of the day, the iPod MP3 player; its 40 gigabyte model capable of digitally storing 10,000 songs (Barfe, L., 2005).

The concept of private copying had by this time evolved into the systematic duplication of copyrighted material on the part of music consumers who expected to have copies of their music catalogues on different devices.

Computers, external hard-drives, MP3 players, blank CDs and DVDs were some of the most commonly used formats. The concept of 'mix-taping' evolved into 'playlisting', which became an pre-programmed option in desktop players as well as in MP3 players. Online digital music retailing emerged as there was no need to sell music through a physical carrier, given that consumers were now able to store music files in their own personal computers.

Consequently, device manufacturers found a market in devices' storage capacities of digital files. The music industry succeeded in transforming copyright-infringing Napster into a licensed subscription service but at the same time, new and improved unlicensed filesharing services such as Kazaa and Gnutella were emerging.

Device manufacturers were also benefiting from the fact that music could be acquired virtually for free from unlicensed file sharing services given that consumers could download and 'own' an unprecedented amount of music and consequently needed more digital storage space.

[\[top\]](#)

Every creative industry underwent a similar process of digitisation of content and as the features and capabilities of devices became ever greater, the boundaries between different media started to blur and the consumption of a variety of differing products on the same device became a reality.

Smartphones and tablets together with personal computers are currently the most popular devices on which, unlike MP3 players, not only music, but also films, books and other types of content can be consumed. The digital storage market has also evolved and companies such as Amazon or Apple themselves offer cloud-based storage, which allows consumers to keep a back-up of the digital content that they purchase or acquire by other means, remotely, on an external server in order to be able to access it from different locations and devices.

Parallel to these developments, music consumption has also undergone important changes over the last few years and the ownership model is no longer the only one available.

Access models of music consumption have emerged where consumers pay a subscription fee in order to access an externally stored catalogue of music. This model of music consumption does not source private copying in any way and given its growing popularity as shown in the IFPI's Digital Music Report of 2014⁴, the amount of private copying that is performed by consumers could consequently find itself reduced in the near future.

⁴ Latest report from the IFPI that gives an overview of the global digital market in the music industry.

Territorial Harmonisation Of Compensatory Systems For Private Copying

Territorial licensing has been a very relevant issue in the field of copyright ever since the digital era arrived. A number of authoritative voices, such as Giuseppe Mazziotti⁵, The Society of Audiovisual Authors⁶ (SAA) and Ian Hargreaves⁷ have commented on and criticised the lack of harmonisation in copyright and intellectual property laws within the European Union.

The SAA states *‘there is currently no single market for audiovisual authors (in the EU). SAA strongly believes that there is an urgent need of harmonisation of the economic rights of audiovisual authors (...)’* in its White Paper on ‘Audiovisual Authors’ Rights and Remuneration in Europe’, whereas Hargreaves and Mazziotti emphasise the diminished capability of trade within the European Union, due to its individualised approach to copyright law, with statements such as *‘there is plenty of evidence that the size of the US home market represents a distinct advantage in terms of stimulating innovation. IP harmonisation in Europe is therefore a high priority’* (Hargreaves, I., 2011), or *‘The unbearable complexity of online rights clearance process is a major problem for commercial users wishing to develop and launch pan-European online content services and to take advantage of the EU cultural sector as a whole’* (Mazziotti, G., 2011).

As these comments make clear, the European Union, which is formed of individual territories with similar IP and copyright markets, will continue to suffer competitively unless it pursues the establishment of a single EU copyright framework in order to benefit from the same advantages in innovation stimulation that greater markets have.

This idea acquires greater importance at a time when technology is developing rapidly, which regularly results in blurred market boundaries.

⁵ Assistant professor of Intellectual Property Law in the University of Copenhagen, visiting scholar at Columbia Law School and associate research fellow at the Centre for European Policy Studies. Author of the article ‘New Licensing Models for Online Music Services in The European Union’

⁶ The society representing the interests of the territorial audiovisual collective rights management societies at a European level

⁷ Professor of Digital Economy at the University of Cardiff. Author of the ‘Digital Opportunity’ report

Laws that cover a greater number of territories and take into account the latest developments in technology are necessary in today's intellectual property and copyright markets.

Private copying is one of the affected areas. As Hargreaves explains, '*EU laws permit member states to introduce an exception for private copying, provided that fair compensation is paid. In other EU countries (other than the UK) private copying exceptions are supported by levies on copying equipment, but the schemes vary greatly in terms of the size of levies, what they are charged on, and how the revenues are used*'.

Although European legislation does exist on the subject, the right of each country to introduce its own model of compensation system results in a lack of concordance amongst them. Some of the fundamentals of compensation systems for private copying have been shaped by European Parliament through court cases related to the subject.

A clear example is *Padawan vs. SGAE*, which stated that levies can only be applied to those devices that are made available to individuals as private users. However, other important questions such as whether persons other than natural persons as private users should be exempted *ex ante* or apply for reimbursement of the levy have not yet been answered, as Antonio Vitorino's⁸ meditation on private copying and reprography levies indicates.

Following different criteria at the time of establishing a compensatory system for private copying can only lead to ineffectiveness and inconsistencies.

Some of the most notorious inconsistencies in the interaction of different compensatory systems throughout the European Union are the issues related to cross-border transactions. As Vitorino explains, the collection of levies does not necessarily take place at the same point of the supply chain in every compensatory system, which often leads to devices being levied more than once.

⁸ Former European Commissioner for Justice and Home Affairs

[\[top\]](#)

Although reimbursement systems do exist in some territories, they represent another inconvenient administrative effort that does not tackle the problem effectively and leaves a number of companies trading in devices with an inflated bill for blank levies (Vitorino, A., 2013).

Examples of these issues are described in detail in *'Fair Compensation For Private Copying'*, a background document from the European Commission: *'An importer in Member State B purchases from a supplier in Member State A. Both Member States apply private copying levies to that particular good.'*

The purchase price for this product includes the levies applicable in the country where the purchase is made (country A). On importing the product to Member State B, the importer self-reports (and is liable for) the private copying levy applicable in Member State B. This obligation arises even if the levy in Member State of exportation has already been paid.

Depending on the relevant national legislation, the importer may be able to apply to the collecting society in Member State A for a refund of the levy applicable in that Member State. But this is not always the case. In Germany, for example, refunds are available only to manufacturers and not to wholesalers. In France, on the other hand, the relevant copyright law does not foresee a refund procedure' (European Commission, 2008).

Digital technology holds out the prospect of music fans being able to access the music they want wherever and whenever they want it. As explained in the 'Digital Opportunity' report by Ian Hargreaves, most territories in the European Union share similar issues that arise from the impact of the digital age on copyright and intellectual property matters. The evolution of technology affects every member state in a similar fashion and the lack of harmonisation amongst them leads to failure to adequately respond to both consumers' and producers' needs. It would appear quite apparent that individualised copyright and intellectual property frameworks do not interact well together in the European Union and result in tangled territorial licensing issues that restrain markets from growing.

Current Situation In The United Kingdom

In 2010, Prime Minister David Cameron announced a review of UK copyright law, arguing that current laws were stopping companies that could become the next Google from locating in the UK (Williamson, C., 2014). By June 2014, the government had intended to introduce a series of copyright exceptions, which included private copying, parody and quotation (Williamson, C., 2014). However, the date of the introduction of these copyright exceptions has been postponed to October 1st 2014 (Williamson, C., 2014).

The private copying exception that the Government wants to introduce would allow consumers to make copies of lawfully purchased music for personal purposes on an unlimited basis without infringing copyright. However, some restrictions will also apply. The original copy must be lawfully and permanently acquired without infringing copyright and it is not permitted to make permanent transfers of it to other people.

It is also not possible for a term of a contract to prevent consumers from making copies of the original files, which suggests that compensatory systems for private copying would not be enforceable. Finally, Digital Rights Management (DRM) technology can still be used in order to restrict the number of private copies being made (Williamson, C., 2014).

The European Parliament's Copyright Directive enables member states in the EU to introduce a private copying exemption provided that '*fair compensation*' is provided to rights holders, unless the harm that arises from private copying is proven to be minimal.

The intention of the United Kingdom Government was to introduce copyright exception for private copying without establishing a compensatory system, arguing that the harm caused was minimal and that rights holders ought to be able to benefit from the additional value that consumers derive from private copying by pricing it into the market through increased pricing or sales. However, they have not been able to support this

argument with any evidence to-date (Dipple, J., 2014).

After the announcement on behalf of the UK Government of the introduction of a private copying exemption, UK Music commissioned research on the subject. It was undertaken by Oliver & Ohlbaum Associates and demonstrated that the ability to copy music from CDs is what consumers value the most when purchasing a device, translating this value into tangible and more meaningful figures (Music Week, 2012).

The headline findings were:

1. In terms of MP3 players, being able to play music copied from a CD is worth:
 - a. 44% (£21.00) of a basic MP3 player costing £47.5
 - b. 53% (£65.17) of a mid-range player costing £122.95
 - c. 32% (£80.00) of a top end player costing £247.14

2. In the case of smartphones, being able to play music copied from a CD is worth:
 - a. 2.59% (£6.67) of a basic smartphone costing £257.46
 - b. 4.13% (£23.60) of a top end smartphone costing £571.33

3. With tablet computers, being able to play music copied from a CD is worth:
 - a. 6.7% (£33.50) of a tablet costing £499.79

Recently, UK Music commissioned a second consumer survey in an attempt to estimate the harm caused to rights holders from the lack of compensation for private copying. The survey considers consumers' willingness to pay for music CDs depending on the level and extent of copying that can be performed in respect of those CDs. The results were later analysed by economic experts Compass Lexecon, who produced a report to set out their findings.

[\[top\]](#)

The UK government has since acknowledged that the introduction of Private Copying Exemption would cause harm to rights holders but suggested that this harm would be minimal. However, the report commissioned by UK Music suggests the contrary and highlighted the following results:

1. Consumers are willing to pay £8.97 extra for CDs they can make unlimited licensed copies of, which results in a £2.4 billion loss in revenue between 2006 and 2012.
2. The amount that consumers are willing to pay for the ability to make one licensed digital copy of a CD is £0.72. By taking into account the number of CDs sold between 2006 and 2012, and the likely number of digital copies that consumers would make of those CDs, the potential value of those copies ranges between £100 million and £624 million.
3. By introducing Private Copying Exemption without a compensatory system, approximately £58 million of potential *yearly* revenue to the music industry would be lost.

Although it still remains to be seen what the UK Government will decide to do with regard to the private copying exception, the evidence that has been presented so far suggests that the introduction of such an exception with no compensation for rights holders would go against the European Union's Copyright Directive. It would also be clearly anachronistic in the current practice of other territories in the European Union and it is therefore not surprising that the introduction of private copying exception has been postponed. The lack of a single framework for private copying in the European Union is partly what allows the UK Government to make a decision that could be considered retrograde with respect to the right holders' interests.

[\[top\]](#)

On the other hand, in the event that a compensation system was established in the UK, it would be a unique opportunity to set a precedent in the modernisation of such systems and to lead their harmonisation throughout the EU if taken into account the fact that the UK's recorded music industry is the second largest in Europe, according to the IFPI's 'Recording Industry in Numbers' report of 2014—only surpassed by Germany's recorded music industry, although their total revenues are very similar: \$1.30 billion and \$1.37 billion respectively (Smirke, R., April 2014).

Consumption Behaviour: Ownership Model Vs. Access Model

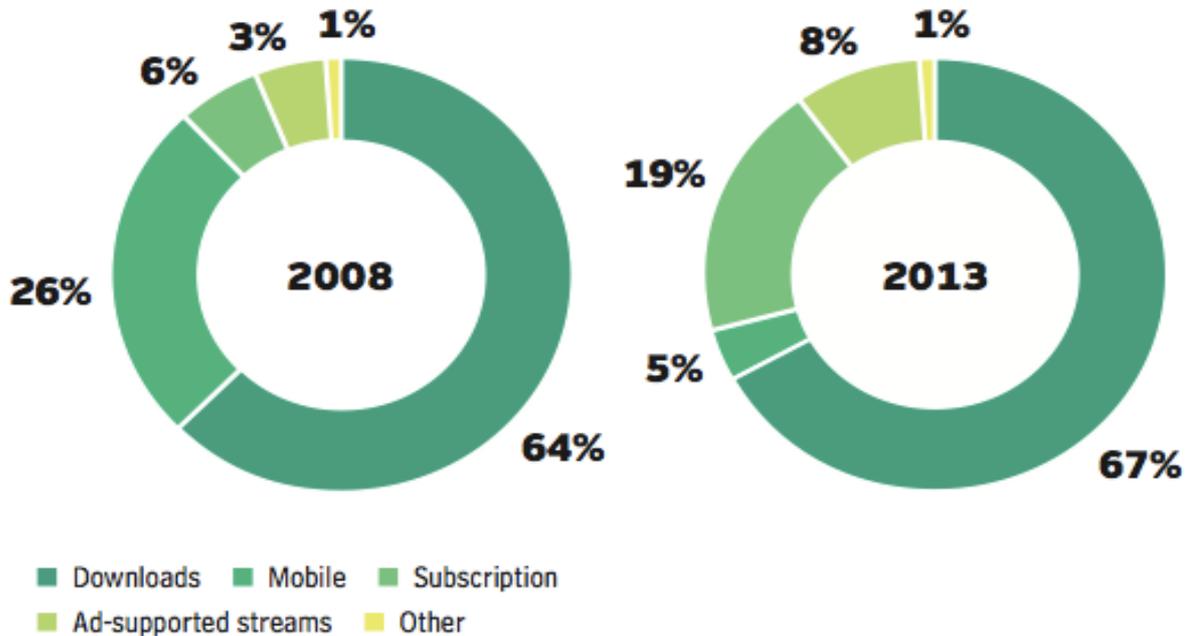
The diversification of income streams in the recording industry has introduced a new set of factors that needs to be addressed at the time of establishing a compensatory system for rights holders for private copying. Music consumers nowadays use devices not only to format-shift the music that they own but also to access music that they do not own, and the business models that have emerged from the latter concept already provide rights holders with monetisation schemes. It is therefore no longer possible to make the assumption of a direct relationship between the number of devices sold and the amount of music that is copied, since many of these devices will now be used to access externally stored music catalogues rather than to carry a copy of a personally owned one.

The IFPI's Digital Music Report of 2014 provides very useful information on the current relationship between the traditional ownership model and the access models of music consumption.

The ownership model is currently the basis for the recording industry's major source of revenue globally. Physical formats still account for more than half of the industry's total revenues (51.4%) and digital downloads sustain 67% of all digital revenues (IFPI, 2014). It is therefore reasonable to argue that the level of private copying performed by music consumers is still relevant enough to cause economic harm to the recording industry in spite of the emergence of access business models.

[\[top\]](#)

Figure 1: Digital revenue breakdown by format 2008 – 2013:



Source: IFPI

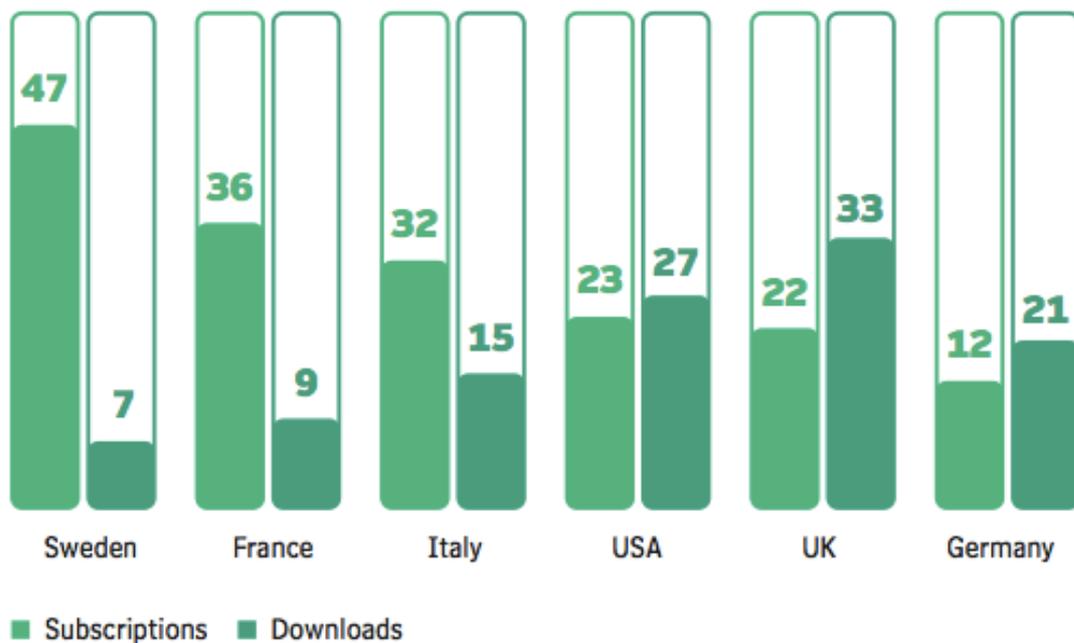
However, the number of worldwide paying subscribers to music streaming services has grown from 8 million in 2010 to 28 million in 2013 and the total digital revenue that these services provide, including ad-supported services, has increased from 9% to 27% in the last five years (IFPI, 2014).

In some countries such as Sweden, France and Italy, the percentage of Internet users using music subscription services is substantially higher than the percentage of Internet users using download services. Over the six months prior to IFPI’s report’s publication, 47% of Swedish Internet users accessed music via subscriptions against only 7% who purchased it via downloading platforms. France showed results of 36% (subscription) against 9% (downloads) and Italy’s results were 32% against 15% respectively. Interestingly, the results in countries with a stronger recording industry such as the United States, the United Kingdom and Germany showed that the number of Internet users who purchase music via downloading platforms is higher than the number of Internet users who access it via subscription-based platforms.

[\[top\]](#)

While the percentage of Internet users purchasing music accounted for 27% in the United States, 33% in the United Kingdom and 21% in Germany, the results for music subscriptions were 23%, 22% and 12% respectively (IFPI, 2014).

Figure 2: % Internet users using music subscriptions/ download services six months prior to the publication of the IFPI 2014 report:



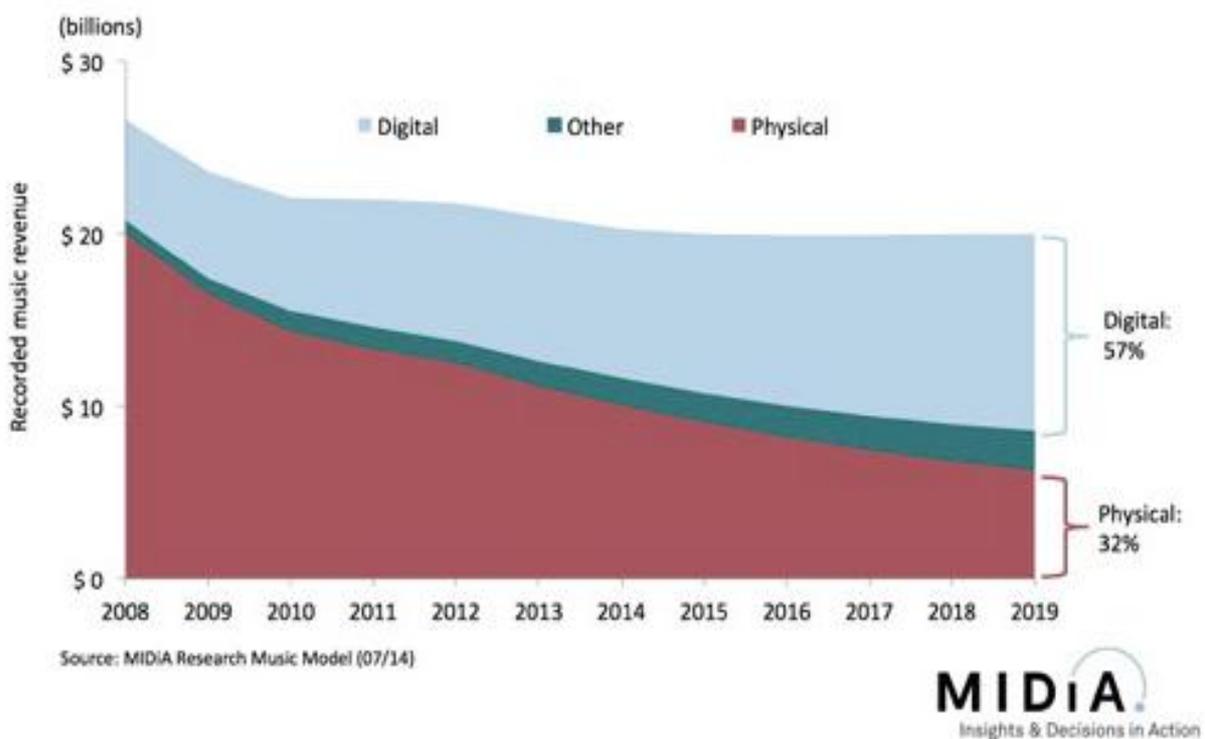
Source: Ipsos MediaCT *Also includes free users of subscription services

With regard to future trends in music consumption, the ‘Global Music Forecasts 2014 to 2019: The Shift to the Consumption Era’ report by MIDiA Research gives insight into how the relationship between physical and digital revenues as well as digital downloads and streaming revenues will evolve throughout the remaining years of this decade.

[\[top\]](#)

As shown in Figure 3, physical revenues are expected to decrease and represent 32% of the total revenue in the global recorded music market in 2019, while digital revenue will increasingly gain relevance and become the recorded music industry’s most important source of revenue by the same year, representing 57% of the total, according to ‘MIDiA Research’ (Peoples, G., 2014).

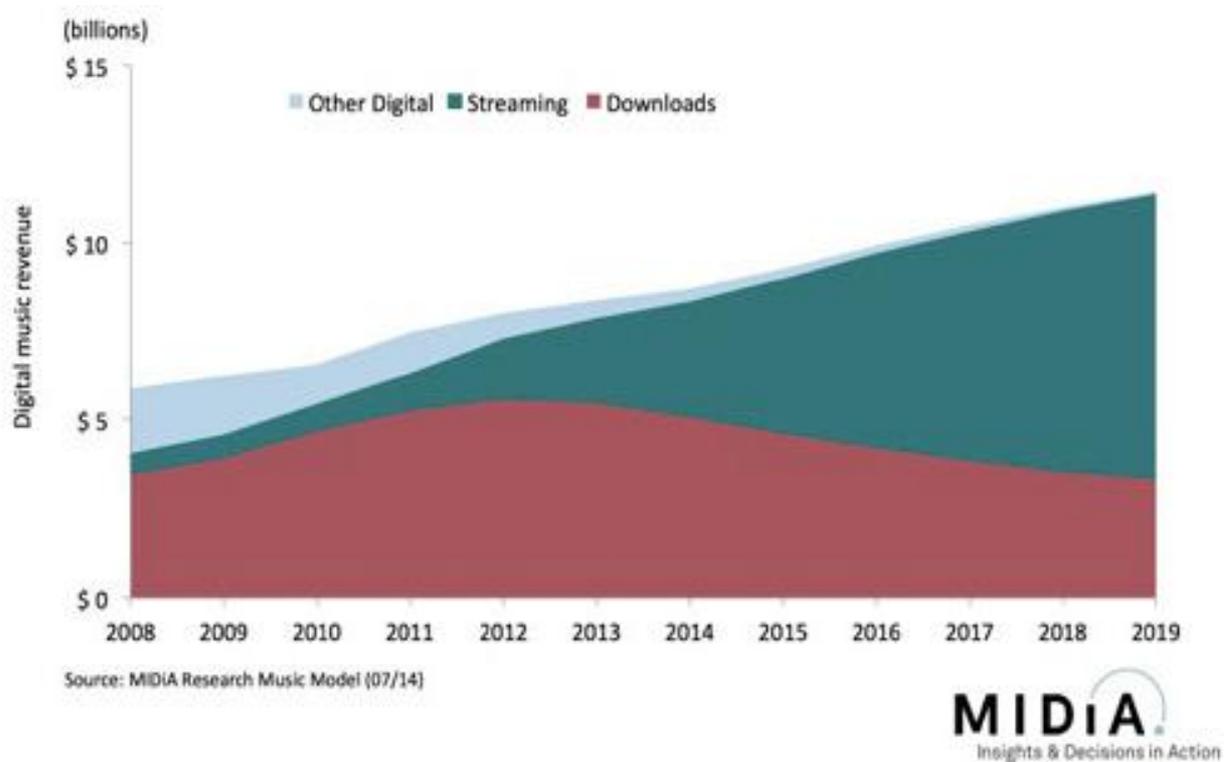
Figure 3: Global recorded music market - retail value 2008 to 2019



[\[top\]](#)

In Figure 4, it is possible to see the prediction that MIDiA Research makes regarding the relationship between the global revenue from digital downloads and streaming. Their projection is for streaming to grow 238% through 2019 and represent 71% of the digital revenue and 41% of the total revenue. Conversely, it is expected that digital download revenue will decrease by 39% during 2019 (Peoples, G., 2014).

Figure 4: Global digital music revenue - retail value 2008 to 2019:



The 'Global Music Forecasts 2014 to 2019: The Shift to the Consumption Era' report also stresses that the picture gets more complicated at a country level given that the rate of growth for new business models varies from market to market. The report notes that streaming services have had a higher degree of penetration in countries that had a lower success in digital downloads. While the Swedish market's digital download revenue never accounted for more than 8% of the total revenue of recorded music, US digital download revenues peaked at 43% (Peoples, G., 2014).

[\[top\]](#)

This information suggests that the ownership model of music consumption will remain relevant in the near future and music consumers will therefore still perform private copying. However, access models are increasingly gaining popularity in detriment to the traditional ownership model and will continue to do so in the future, which would effectively result in a progressive decrease of private copying on the part of music consumers.

A compensatory system for private copying must therefore provide a mechanism to ensure that the revenue generated by the system itself is directly proportional to the revenue generated by the ownership model. It is also important to take into account the differences in consumption behaviour within and amongst the different countries, especially in a European context.

If, by following the advice of Ian Hargreaves in the Digital Opportunity report and Giuseppe Mazziotti in the 'New Licensing Models for Online Music Services in the European Union' article regarding the harmonisation of copyright laws throughout the EU, a compensatory system for private copying is established at EU level, this system will also need to ensure that the revenue from the system in each country is concordant with the revenue that each country's ownership model generates.

Distribution Of Monies Collected For Private Copying

Those territories with a compensatory system for private copying in place have adopted varying models for the distribution of the collected revenue. Typically, two main aspects are taken into account for the establishment of these models: music sales and radio airplay.

Some models work with a combination of these two aspects whereas others take only one of them as the criterion for the distribution of the revenue. Furthermore, in some territories where the distribution is based on sales, only physical sales are taken into consideration.

The situation with regard to distribution methods in Europe has become quite diverse. Countries such as France and Holland base their distribution solely on sales whilst Germany takes the opposite approach and calculate compensation fees based solely on airplay and distribute it as an addition to the money that is collected for public performance (Gruschke, R., 2014).

The basis

It is possible to argue that sales do not give an entirely accurate representation of the ratio in which certain songs, albums or even music genres are copied.

It is commonly believed that certain music genres, such as electronic music, are copied more than others due to age demographics and relatively reduced numbers of singles or albums being played in public more than others, which sustains an argument that those particular songs or albums are copied at a higher ratio. This is precisely the reason why radio airplay is introduced as a determining factor in the distribution of monies in some compensation systems for private copying.

[\[top\]](#)

This approach seeks to establish a fairer way of distributing compensation fees amongst the rights holders by introducing a proxy, which serves to determine the music that is being copied by consumers for private use.

At first sight it may seem that there is a close correspondence between the apparent popularity of songs, the amount of airplay exposure these receive and the amount of copying of these songs for private use. However, including radio airplay in the distribution model of compensation systems introduces a series of issues that could negatively impact the enforceability of the system. There are a number of factors that one cannot evaluate adequately and the reliability of quantification is called into question.

First and foremost, it cannot be proved that there is a direct relationship between radio airplay and sales. Two very well known albums with multiple radio singles that charted similarly such as Avicii's *True* and Adele's *21* show very different sales results. *True* went platinum once, eight months after its release, while *21* had already gone ten times platinum in the same period of time (BPI, 2014).

It could be argued that precisely due to the high number of sales Adele's album encountered, there was less copying of it in comparison to Avicii's album, but this is an argument to be made from a file sharing point of view rather than private copying one. It is reasonable to assume that Avicii's album was obtained illegally by consumers a greater number of times than Adele's album but a higher number of sales does not imply a lower ratio of private copying.

Private copying is a direct consequence of the ownership of files by the consumers and it would therefore seem logical to think that the more an album is sold, the greater the potential for it to be copied privately. However, private copying can also derive from illegally obtained files but in the event that this amount of copying was also accounted for, it would imply an indirect acceptance of file sharing on behalf of the industry.

[\[top\]](#)

Furthermore, it is also no longer possible to necessarily speak about a direct relationship between radio airplay and sales given the different possibilities of music consumption in the digital era. Radio clearly does have an effect on the consumption of music but not necessarily on purchases of music. As a point of fact, one of the singles, *Wake Me Up*, from Avicii's *True* album is the most played song of all time on Spotify and the single *Hey Brother* is similarly ranked 16th, while Adele's *Rolling In The Deep*, her most played song on the same streaming service, is ranked 41st (Spotify, 2014).

Private copying is a direct consequence of the ownership model of music consumption and the effect that radio promotion has does not discriminate between consumption models. Therefore, radio play lacks validity as a determining factor for the distribution of the money generated from private copying.

Distribution based solely on music sales is the most appropriate system given that sales are the only factor that can indicate objectively the level of private copying that is performed. Although there might be a certain number of external factors, such as file sharing, that have an effect on sales and consequently make it impossible to guarantee one hundred per cent accuracy at the time of distributing the money in relation to the actual amount of private copying that is performed for each song or album, music sales do provide an objectively verifiable basis for the distribution of this money. It would seem logical to take both physical and digital sales into consideration to ensure the highest level of accuracy and fairness possible, given that both methods allow for private copying to be performed.

Currently in the United Kingdom, where no compensation system for private copying has been established, digital downloads and in-store purchases have different terms of sales. Purchases by the former method allow consumers to make unlimited copies of the files for personal use whereas the latter does not permit consumers to make any copies whatsoever (Intellectual Property Office, 2013). Private copying exemption needs to regard both distribution channels of the ownership model as sources of private copying.

Labels vs. Publishers

A compensatory system for private copying would eventually lead to the distribution of the collected revenue amongst the different rights holders. In the case of the music industry, these rights holders would be the record labels and the publishers.

It is important to reiterate that the harm of private copying is not so much the affect on sales but instead lies in the lack of compensation for the profit that device manufactures have made by allowing consumers to duplicate copyrighted material.

In a similar fashion to how radio stations have licensed permission to broadcast recorded music, compensation systems should be established in order to grant device manufacturers the permission to allow consumers to perform private copying in exchange for a fee, which is effectively also a license. Therefore, it would be logical to distribute the revenue from private copying amongst the different rights holders in compliance with the common method of distributing the money generated from the licensing of master recordings.

Collection Of The Blank Levy

The collection process in a compensatory system for private copying is probably the most delicate and controversial part of it. The large number of stakeholders involved in the process and the lack of precise information that is associated with all aspects of private copying (who? how much? for what purposes? etc.) are what make it difficult for the different parties involved to reach a consensus.

The evolution of technology over the last few decades has increasingly impacted on modes of music consumption - for instance, most recently the trend to mobility (of music) and streaming - which in turn create a need to renew the conceptual frameworks within the music industry itself, including compensatory systems for private copying.

The speed of change makes it highly important that new regulatory mechanisms, e.g. the modernisation of any compensatory system, are able to meet the challenges that rapid technological change will inevitably throw up.

Hardware-Based Levies

The compensation systems for private copying that are currently in practice focus on the price and the storage capacity of devices that enable the duplication of copyrighted material in order to establish the fee that should be charged.

They also focus on consumers as the payees of these fees based on the idea that ultimately they are the ones breaching the copyright laws that protect original files from being copied.

Such systems are therefore presented in a way in which consumers are required to pay a measurable fee for private copying each time they purchase a device which enables the duplication of copyrighted material, whether they actually copy or not.

[\[top\]](#)

It is reasonable to argue that the inception of a flat fee as a measure for compensation is first and foremost established precisely because of the impossibility of knowing if private copying is being performed or not and as a way of causing a minor impact on the consumers at an individual level.

However, the enforceability of a system that establishes a fixed fee per device based on its price and storage capacity has begun to show serious signs of obsolescence due to the most recent developments in the technology related to the consumption of music.

[As explained previously](#), the emergence of the access model of music consumption means the assumption that the amount of copying being performed is directly related to the number of devices sold no longer applies. Consequently, the fee per device model has lost much of its validity and will continue to do so to an ever-greater extent.

This system does not provide a mechanism to ensure the concordance between the revenue generated from the compensatory system and the one generated from the ownership model of music consumption, which is the exclusive source of private copying.

The revenue generated by the fee per device model only depends on the number of devices sold, which is not necessarily an indication of the amount of copying that is being carried out by consumers. It therefore imposes the obligation to pay a measurable fee on the growing number of music consumers that are switching to subscription-based, access model services for the consumption of music when they are not at all contributing to the reason why a blank levy is being established in the first place.

Device manufacturers have obtained profits by allowing consumers, who are both music and electronic device consumers, to duplicate copyrighted material without compensating the rights holders for it. Therefore, it is logical to target device manufactures as the payees of the levies instead of the consumers.

[\[top\]](#)

Although it is very likely that any compensatory system will have an effect on the final price of the device and ultimately the consumer will be covering the cost of it indirectly, it is important not to present the levy as a measurable fee that consumers are required to pay; otherwise, the number of arguments that can be used against the enforceability of a compensatory system for private copying can only become greater with time and the evolution of technology.

Given the changes in consumer behaviour that the industry is experiencing and as the growing tendency continues to be that the access model gains market share against the ownership model, any hardware-based levy system will need to be revised periodically in order to ensure the fee that is charged for each device is a realistic and appropriate amount. This only fuels the potential for increasing litigation costs for all stakeholders.

There are several creative and content industries that are susceptible to claim compensation for private copying. Music, film, editorial and other content industries have all suffered the consequences of device manufacturers enabling the duplication of the work that these creative industries invest in. However, it is again virtually impossible to know which material is being copied and consumers do not know what the back end process of the distribution of the levies is.

Therefore, consumers' perceptions of hardware-based levies is that of a tariff which does not discriminate between the different content that they might copy privately, which leads them to argue against hardware-based levies due to the lack of information that is inherently associated with them.

A Problem Of Information

One of the greatest concerns in the European Parliament with regard to compensatory systems for private copying is the provision of a mechanism that ensures that compensation is only provided to natural persons as private users, by the authority responsible for the collection of it.

[\[top\]](#)

Some European court cases, such as *Padawan vs. SGAE*, provide insight into the subject. This particular case involved the Spanish company Padawan S.L., which markets electronic storage media such as CDs, DVDs and MP3 Players, and the Spanish collecting society for songwriters, SGAE. The court ruled in favour of Padawan S.L. arguing that the levy had been applied to them in a non-discriminatory manner (Opinion of Advocate General Trstenjak, 2010).

As stated in the *Padawan vs. SGAE* case, '*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*' (Vitorino, A., 2013).

One of the main issues with hardware-based levies is that the assessment of who is a private user and who is not is in itself a very difficult task. Antonio Vitorino suggests that the collection of levies is devolved to the final retailers due to the fact that they are the ones who can adequately assess whether the devices will be used for private purposes or not by the people purchasing them.

It would seem reasonable to let retailers do the assessment as they are obviously in a better position than distributors and manufacturers to carry this out. However, if retailers were also responsible for the collection of the levies, it would create a situation of conflict of interest for them. There would be no incentive for retailers to assess correctly and charge a higher amount for the devices to the consumers. Retailers could find such a system detrimental to the level of their sales and decide not to charge the levy in order to keep prices as low as possible.

Furthermore, Vitorino also suggests that in the event that an *ex ante* exemption scheme was introduced, VAT numbers could be used as the indicator as to who is to benefit from exemption. This might seem like a reasonable way of tackling the problem at first sight but its effectiveness could be called into question given that it is common for many freelancers and companies in the creative industries (and other industries as well) to trade without being VAT registered, which could result in an inflated number of people

[\[top\]](#)

having to pay the levy when the actual use of those devices is meant for business or professional purposes.

The identification of natural persons as private users is a requirement that causes a high degree of inefficiency in a compensatory system for private copying. Measures to comply with such a requirement can only fuel the potential for a greater number of inconsistencies to occur such as the ones mentioned above in relation to Vitorino's suggestions.

In the case of hardware-based levies, there are also inconsistencies in the consumer's view given that the levy itself is being presented as a fee that the consumer needs to pay. Furthermore, it is virtually impossible to guarantee that private users only will be paying the levy, or that those users that are exempt from paying the levy will not perform any private copying; it therefore only deals with the problem in a partial way.

Private copying is first and foremost a problem of information. The impossibility of knowing what a device that allows for the duplication of copyrighted material will be used for is precisely the basis for the establishment of levies and it is very likely for them to have a negative effect on a minority of consumers that may well not perform any kind of private copying with certain devices.

The practice of private copying is notoriously widespread and establishing a requirement that can only introduce a considerable number of inconsistencies into the equation when trying to safeguard a minority of consumers can only complicate things to an extent that makes the effort of complying with the requirement not worth it.

[\[top\]](#)

Cloud-Based Storage

In 2013 the proposal made in the European Parliament to extend compensation systems for private copying to personal cloud-based storage services came from the French member of European Parliament, Françoise Castex, who argued that making copies of copyrighted material using cloud-based storage systems had the same purpose as making copies by traditional means such as copies to hard drives or blank CDs (Pankinkis, T., 2013).

Copyright exception that the UK government seeks to introduce in October 1st 2014 does include 'the cloud' as a tool for the duplication of copyrighted material (Williamson, C., 2014). It is important to differentiate between personal cloud-based storage and cloud-based content streaming services. Well-known examples of the latter are Spotify, Rdio and Amazon's Cloud Player, which are licensed services and offer remuneration schemes to rights holders. An example of personal cloud-based storage is Dropbox, used by consumers to store files as a back-up facility or to share files with other Dropbox users. The use of services like Dropbox is in essence the same as using an external hard drive, which is considered a 'leviable' device.

The latest European Parliament report on private copying, published on 17th February 2014, stresses that private copying exception arrangements should apply to certain online services, including cloud-computing services. However, it also calls on the Commission to assess the impact that the usage of cloud computing technologies for the storage of protected works might have on the private copying system in order to determine whether they should be taken into consideration in compensation systems for private copying.

Although it still remains unclear whether cloud computing technology should be levied or not, it appears that the issue has already been addressed by the European Parliament and it is therefore to be expected that a final decision will be made promptly. A logical response on the part of the European Parliament would be to consider cloud storage services, or at least those such as Dropbox, as 'leviable' as well, in agreement with the member of European Parliament, Françoise Castex.

Digital Rights Management

The idea of allowing consumers to make a limited number of copies of each file purchased was introduced into the content industries through DRM (digital rights management) flags. Each file would contain a code to only allow the purchaser to duplicate it a certain number of times. iTunes became one of the best-known examples of DRM usage, although secondary interests such as the promotion and consolidation of use of Apple's ecosystem was likely a motivating force as well.

However, the music industry and device industries understood very quickly that DRM technology was working against the consumers' interest. One of the ground rules that the digital era has established is that music fans want to access music wherever and whenever they want, which inevitably meant a head-on collision with DRM technology. As stated by the Entertainment Retailers Association's Director General, Kim Bayley, in an open letter in 2007, "*...proprietary incompatible standards increase costs, reduce growth and act to the detriment of the consumer – all of which can be seen in action in the nascent music download market*" (Cardew, B., 2007).

Research that had been carried out afterwards proved this point to be correct. A study conducted at the University of Toronto compared sales of nearly 6,000 albums from 634 artists before and after the removal of DRM. Factors such as album release date, genre and regular sales variations over time were taken into account. Results showed that after the removal of DRM, digital music revenue had increased by 10% (Hart, T., 2013).

But DRM is mostly ineffective for one key reason. In the digital world, once the digits are in the network, those who want to find them will find them. Removing any kind of anti-copying technology from files is not a tremendously complicated thing for hackers to do. Therefore, an inefficient measure that works against consumers' interest effectively represents an idea not worth pursuing, especially if it does not generate any additional revenue to pay the costs of designing and implementing the technology. Compensation systems for private copying must work on the basis that the allowance of private copying given to consumers is unlimited and they should seek to provide concordant remuneration.

The Proposed Model

It has been stressed by the European Parliament and think-tank expert Antonio Vitorino, amongst others, that current models of compensation systems are the most appropriate approach to ensure a concordant remuneration to rights holders.

Vitorino also suggests that alternative models could not comply with the applicable legal framework, although this framework has regularly been contested successfully in the courts. However, they do concur on the need to conduct further discussion and the consideration of alternative models.

It is virtually impossible to find a system that is completely fair for every stakeholder and therefore, there is a need to prioritise those aspects that will make the enforceability of a compensatory system as effective and sustainable as possible.

One of these aspects is transparency in the way the money is collected and distributed to the rights holders. In order to achieve this, it is important to keep the parameters that are used to quantify the amount that is charged and paid on to copyright owners as objective as possible. An effective means of making things transparent is to abide by those parameters that are quantifiable and easy to track. In the case of private copying, music sales provide the only parameter that offers these attributes.

A second aspect is that any modern compensatory system needs to be realistic about the trends and tendencies that the consumption of music is undergoing, and in this regard, a mechanism that ensures a proportional level of income from the compensatory system itself to the income from the ownership model of music consumption needs to be in place.

Devices on their own can no longer be the reference when establishing the amount that needs to be charged, given the multiple possibilities for music consumption that such devices nowadays offer.

[\[top\]](#)

The following proposal seeks to establish the fundamentals of a compensatory system for private copying that can guarantee a high degree of enforceability and transparency regardless of the evolution of technology and the changes in music consumption behaviour that might take place in the future.

Method Of Operation

The ownership model of music consumption is the source of private copying and therefore sales need to be the parameter that drives the compensatory system at all levels. A fee per song or album sold should be established in order to compensate for the private copying of that song or album and this should apply to both physical and digital formats.

This fee could vary depending on whether it is a single or an album that is being purchased. Singles often have a proportionately higher sale value than albums and it would therefore seem reasonable to apportion the fee for private copying to this value.

A total amount chargeable should be calculated, charged and distributed at regular fixed intervals and a reasonable amount of time that could allow businesses trading with devices to project this cost accurately should be established to do so. At the end of each interval, single and album sales would be established and the total chargeable amount would be determined and then charged on to the suppliers of the devices.

There are several industry bodies that could take responsibility for this procedure. The BPI⁹ or PRS¹⁰ for Music would seem the most logical choices given their prominence; the latter having the systems, databases and expertise in place as part of their day-to-day royalty collecting and distributing operations.

Unlike hardware-based levies where a fee-per-device-sold is charged based on the price and storage capacity of the device, the fee-per-song or album model would offer an immediate identification of the rights owner that the collected money should be paid to.

⁹ The British Phonographic Industry (BPI) represents the recorded music industry in the UK.

¹⁰ PRS for Music Limited is a UK copyright collection society and performance rights organisation undertaking collective rights management for musical works.

This is of particular interest when taking into account the fact that several creative industries are involved in fee recovery with a blank levy system in place and so there needs to be a mechanism that discerns among them.

In the event that every creative industry adopted a fee-per-sale model of compensatory system, an adequate level of income to each industry's ownership model's revenue would be guaranteed.

Hardware-based levies do not offer this mechanism, which results in the lack of transparency at the time of dividing the collected money amongst the different creative industries. The fee-per-sale model would eradicate the possibility of a disagreement over the way the levies are distributed amongst the different creative industries, which not only lead to litigation costs but also to the weakening of the close relationships amongst the different creative industries necessary to enforce a compensatory system against the counter interest of device manufacturers.

The Figure

In order to establish the fee that is charged per sale of a song or album, further and more extensive research would need to be carried out, not only into the economic harm caused by private copying, but also into the profit that device manufacturers have made from the sale of devices that allow the duplication of copyrighted material. Certain factors such as the value that consumers of both music and 'leviable' devices give to the ability to make copies of the catalogue that they lawfully purchase must be taken into consideration.

As mentioned previously, UK Music has already taken the lead in providing evidence and value to the harm caused by private copying to music rights holders in the United Kingdom. The previously mentioned reports provide specific figures on both the value that consumers give to the ability of duplicating music files that they purchase and the value they give to devices for the ability of copying this music into them.

[\[top\]](#)

These figures provide an initial basis for the estimation of tariffs in a pay-per-sale model of compensatory system for private copying. However, further research is indeed necessary in order to agree on a final figure given that this report only focuses on physical formats and private copying can also be performed when downloading music purchased from a licensed online digital platform.

The Payee

Consumers should not be targeted as the payees of the levy for private copying. Certainly they perform private copying but the only benefit that they obtain is the commodity of format-shifting the files that they have purchased. Rather, it is the companies trading in devices that enable the duplication of copyrighted material with ever-greater ease and efficiency that benefit economically from private copying. It is clearly logical to argue that the fee should be charged to such companies as a surcharge for the impact caused to the rights holders, despite the fact that it will be consumers who will ultimately perform private copying.

Based on the assumption that music ownership is proportional to private copying, there ought to be a higher level of private copying in those countries with higher revenue from the ownership model of music consumption. Furthermore, private copying (and consequently the 'harm' done to rights owners) is most likely to occur in the same territory where the music is purchased.

Therefore, it is entirely reasonable to argue that retailers be the entity in the sales chain liable for payment of the levy in order to ensure territorial concordance. Antonio Vitorino explains that many stakeholders defend the current structure where primarily manufacturers or importers are obliged to pay the levy due to the significantly lower administrative effort that it entails.

Another concern is the increased possibility of payment avoidance due to retailers being more numerous and spread out. However, the only way to ensure that the levy generated from sales in a certain territory is covered by businesses that trade with 'leviable' devices in that same territory is by establishing the retailers as the payees.

It is very likely for manufacturers to be based in countries or territories that could stall a compensatory system for private copying completely due to political or bureaucratic reasons and as far as distributors are concerned, the identification of which territory they might be supplying their devices to could be a greater administrative effort than the identification of 'leviable' device sale points.

Furthermore, the licensing for recorded music played in public already provides an example of a situation where the payees are numerous and spread out. Most businesses that play recorded music in public are legally required to obtain a license from PPL, as stated on its website. Therefore, the identification of retailers of 'leviable' devices should not represent a greater administrative effort than the addition of businesses needing identification.

The retailers' contribution to the levy should be proportional to the profit that they generate on 'leviable' devices. Retailers should be obliged to inform collecting societies about the profit generated from sales of devices that allow the duplication of copyrighted material. This would put retailers in a position where it will be in their own interest to identify as many other retailers of 'leviable' devices as possible, in order to keep the percentage to which they need to contribute to the levy as low as possible, which could have a positive effect at an administrative level. It is anticipated, however, that the retail price of devices would increase and that consumers would eventually cover the cost.

Retailers could choose to predict the cost of the levy each year and then allocate the price of the 'leviable' devices accordingly or the charge could be passed on to distributors and then on to manufacturers, which would eventually set a higher price for distributors and create a domino effect throughout the whole sales chain.

There would need to be a list of devices that must account for private copying purposes. Following Antonio Vitorino's suggestion, the assessment of which devices are 'leviable' should be devolved to each territory. As he explains, certain factors such as cultural traditions or the purchasing power of consumers could lead to different conclusions as to which devices the levy should be applied to.

It is likely for a European Union legislator not to be able to assess this kind of situation correctly. Furthermore, such an individualised approach would not affect the amount collected by rights holders in a fee-per-sale model of compensatory system given that no matter how many devices are considered 'leviable', the tariff will still remain the same.

The fee-per-sale model would effectively be taking the consumers out of the equation. The transaction would only involve the creative industries and the companies trading with devices that allow the duplication of copyrighted material.

In *Padawan vs. SGAE* it is stressed that the blank levy can only be applied to those devices that were made available to natural persons as private users. However, in a fee-per-sale model of a compensatory system where the levy is charged to businesses trading with devices that allow the duplication of copyrighted material as a surcharge for the harm caused to the rights holders of this material, such a requirement would no longer apply.

Conclusion

Evidence shows that private copying remains relevant in the digital era of music consumption and that the harm caused to rights holders must be compensated for given that the duplication of copyrighted material is currently performed systematically by consumers of electronic devices.

As new online services develop, the possibilities of licensing also increase. Rights holders have the right to authorise the reproduction of the content that they own and in the interest of public practicality, they are willing to accept a reasonable number of exceptions to this right as long as fair compensation is provided in exchange.

Technology has developed and diversified rapidly over recent decades and in the light of the emergence of new models of music consumption, it makes sense at this particular moment to re-evaluate the current models of compensation systems in order to modernise them and make them fit for current and future trends.

Territorial issues need tackling as a matter of priority. The European Union should seek the harmonisation of copyright laws throughout its Member States in the interest of public practicality and in order to end inconsistencies that individualised models generate amongst them. Content industries need to address this issue urgently, especially given the fact that private copying and blank levies are of broad and current interest within the European Union and its official bodies.

In order to fully benefit from the advantages that large, open markets offer in innovation and stimulation, the establishment of a single copyright framework at a European Union level should be urgently considered by all member states.

The foundations on which current compensation systems rely have started to show serious signs of obsolescence.

[\[top\]](#)

The emergence of access models of music consumption no longer make possible the assumption of a direct relationship between the level of private copying that is taking place and the level of sales of devices that allow the duplication of copyrighted material.

Storage capacity and retail price of devices that allow the duplication of copyrighted material can no longer be considered as indicators of the amount of private copying that is being performed by consumers. Furthermore, due to the multiple uses that devices can be given, it is also not possible to co-relate specific devices to specific industries within the creative industries. Therefore, in order to guarantee a fair and transparent distribution of revenues amongst the different creative industries that fall prey to private copying, a mechanism that identifies different types of content needs to be put into place.

The fee-per-sale model is a practical solution to mitigate the threat of obsolescence that the enforceability of compensatory systems for private copying is under, due to the most recent developments in technology. It provides a mechanism that ensures a directly proportional level of income from the compensatory system to the level of income of the ownership model of music consumption, which is what sources private copying in the first place.

Consequently, in view of a single copyright framework at a European Union level, the concordance between the level of income from compensation systems for private copying and the level of actual private copying that is performed in each territory would also be ensured.

This is of particular interest when taking into account that consumption behaviours throughout the Member States of European Union are not necessarily the same, as shown in the IFPI report of 2014. Moreover, it also provides a mechanism for the separation of creative industries' content, which results in a higher degree of transparency in the distribution of the collected revenue within these industries.

[\[top\]](#)

There would be no room for dispute as to the proportion by which the revenue is divided. Furthermore, within each of these industries, the identification of the rights owners to whom the revenue needs to be paid would automatically occur from gathering the information of sales of recorded music in order to generate the total amount payable.

Identifying the rights holders from the beginning of the entire process is of particular interest considering that the money generated from private copying passes through many hands before reaching the last of the beneficiaries. It would serve as a means of protection against the possibility of dishonest practice along the chain of transactions.

These are the fundamentals that need to be taken into consideration in order to ensure the concordance, enforceability and transparency in compensatory systems for private copying in the digital era of music consumption.

It is also important to examine the ancillary benefits that such a model could provide to the music industry in general. By using the sale of a song or an album as the trigger-point of the process, the correct registration of audio recordings would gain considerable value and therefore, the compensatory system would serve as an incentive for rights holders to properly register their works.

If enforced at European Union level, a great quantity of the work needed in order to centralise catalogues of audio recordings, as well as other types of content, would already be provided by the rights holders themselves. Needless to say, the value of accurate databases in the digital era is inestimable. The introduction of incentives for the proper registration of audio recordings could only be beneficial to the music industry, especially considering the administrative and economical effort needed for the implementation of such a task.

The proposed model of compensatory system for private copying would also allow for systems of reallocation of revenue to be enforced in the same way they do in current models.

[\[top\]](#)

As per the European Union's latest report on private copying, it would call on member states to designate at least 25% of the revenue from private copying levies to promote the creative and performance arts and their production. Whichever body is in charge of the collection of the revenue would still be able to carry out this task if required.

Unlike hardware-based levies, the fee-per-sale model would not be targeting consumers as the payees and the need to discriminate between private and non-private users would no longer apply. However, in the legal context that European Union court resolutions on compensation systems for private copying have provided, the fee-per-sale model could potentially be found flawed due to the resolution in favour of the segregation of private and non-private users in case *Padawan vs. SGAE*. This requirement is a consequence of having presented levies as a measurable fee to consumers and as a way of balancing the interests of all the stakeholders involved. It therefore remains uncertain whether the European Parliament would apply the same legal context to a model that drastically diverges from what was previously put into practice.

Had compensatory systems for private copying been enforced in a different way in the past, the requirement to discriminate between private and non-private users would have possibly not have been brought up by the European Parliament at all. Any new model of compensation system should not be influenced by the legal context that has arisen from previous models, especially if these models are obsolete.

The proposed model suggests a change of concept in the way private copying is compensated; mainly motivated by the most recent technological developments that have had an effect on the way music is consumed and has highlighted the signs of obsolescence in current compensation systems.

In response to such a change of concept, copyright laws would need to be reviewed in depth. A new and forward thinking legal framework would need to be established and priorities would need to be reconsidered in order to do so.

[\[top\]](#)

But the benefits would far outweigh the difficulties since it is key for any compensation system to be able to coexist with new and continually developing forms of music consumption in order for it to be enforceable and durable in time, and that is precisely what this new model would ensure.

FORTH-COMING EVENT:

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[\[top\]](#)

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