



JOINT STATEMENT BY THE INTERNATIONAL FEDERATION OF ACTORS (FIA), THE INTERNATIONAL FEDERATION OF MUSICIANS (FIM) AND UNI GLOBAL UNION - MEDIA ENTERTAINMENT AND ARTS (UNI MEI) CONCERNING THE RECOMMENDATIONS BY MR VITORINO ON THE FUTURE OF PRIVATE COPYING LEVIES

April 3, 2013

1. The International Federation of Actors (FIA), the International Federation of Musicians (FIM) and UNI Global Union – Media, Entertainment and Arts (UNI MEI) wish to express reservations with respect to some recommendations made by Mr Vitorino regarding the future of the private copying exception and the compensation that most national legislations in the EU have awarded to right holders. We believe that these recommendations represent a source of greater complexity and, if implemented, would damage the interests of authors and performers, whose revenues depend to a significant extent on this well established compensation mechanism.
2. Our federations deplore the fact that Mr Vitorino's two main conclusions urge the phasing out of private copying levies or, as an interim measure, shifting the liability for the payment of the levies from manufacturers/importers to retailers. Media and devices used to make private copies are mostly produced by multinational companies that are based outside the EU and that do not employ European labour. These companies have made of copy-enabling technology a major selling argument for their commercial products, grossing immense benefits from the sale of these devices, to the point where none of these can seriously be conceived today unless it also enables end-users to copy content, whether protected or not protected, for private or professional purposes.
3. In this context, it is astonishing to read in Mr Vitorino's recommendations the exact same arguments that those manufacturers and importers have consistently made to dodge the only limited contribution to European creative workers and content owners they have made in the last 20 years or less. Despite the fact that private copying mechanisms may be perfected to reduce possible inconsistencies with the internal market (e.g. double payments), as content right owners various times suggested during the mediation process, those payments represent a significant resource for creative workers and jobs in Europe – and an equally insignificant token paid by manufacturers and importers on account of the profits derived by sales of their copy-enabling devices and media.
4. Whereas commercial aspects seem to be the ultimate concern of Mr Vitorino, the impact of a possible termination of the private copying compensation on the creative sector, and those employed by it, is not even slightly addressed. We wish to stress the fact that this debate must not be taken in isolation, but rather in the context of a very critical situation that is threatening the creative industries – either as a result of the economic crisis, of dwindling public funding, widespread piracy or even recent EU Commission initiatives to undermine state aids to the film and audio-visual industry. Cultural diversity, a principle much cherished by the European Union and heralded by the Commission at international level, is at risk of becoming an empty shell unless strong and coherent policies are taken to encourage investment, protect employment and secure equitable terms and conditions for the legitimate exploitation of creative content. According to art. 167 of the TFEU, "The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures". We regret that such an important principle was overlooked in Mr Vitorino's report.

5. The exception for private copying and the need to provide fair compensation to the right holders are clearly established in the EU *acquis communautaire*. Further clarification regarding this exception, in particular the need for fair compensation to be calculated on the basis of the harm caused to right holders by the act of copying, has been provided by the European Court of Justice. We question the extent to which the suggested termination of this compensation, allegedly “absorbed” by the price set for licensed services, would be compatible with these provisions. Furthermore, recent attempts – such as in Spain – to break the link between compensation and the act of reproduction for private purposes have only amounted to a drastic reduction in the compensation offered to right owners, with no benefit whatsoever for the end-user as retail prices are still at the exact same level as before the reform.

6. Mr Vitorino claims that the “shift from ownership to access-based business models will significantly reduce the amount of physical copying undertaken by end-users and, as a consequence, also the amount of levies required to compensate for acts of private copying”. This statement relies on a misconception of how these services operate, as we know for a fact that all access-based business models rely on copying and may result in copies being made by the end user (including from streaming services). Copying is therefore not only still taking place but probably occurring more than ever, under new forms that are also more difficult to monitor. Private copying compensation system should thus be adapted, rather than erased, to take account of these new practices.

7. Finally, Mr Vitorino’s case for a termination of the levies, as new licensing models become mainstream, also appears to ignore a number of key issues:

- a. Licensing and the private copying exception are complementary and have successfully been implemented as such by a majority of EU member States. This is because they serve two distinct purposes: services are licensed to exploit protected content on the basis of the business model they wish to promote. Private copying, on the other hand, is to enable end-users to reproduce content for private purposes, regardless of the business model enabling them to access such content.
- b. Absorbing levies into the cost of licences would only bring Europe back in time, when private copying was illegal and use of copyright-protected content “secured” by technical protection measures that have since proven to be highly ineffective and also have been shunned by end-users on multiple occasions.
- c. Right holders’ ability to build compensation for private copies into direct licences will be minimal. Online distribution services, many of which are already enjoying a very dominant position in the market, are already dictating their terms to content owners. Even in the most optimistic situations, the weakest right holders in the production chain – among which are authors and performers – would hardly ever have enough leverage to bargain for a fair redistribution of the sums collected. Mr Vitorino calls for mandatory rules in copyright contract law or labour law – whilst very welcome – would need to be fulfilled before such option is even considered.
- d. Were licences to incorporate compensation on account of private copying, access to those services would only become more difficult and costly for the end-consumer, thereby limiting – rather than expanding – consumer choice.

8. As a temporary alternative to a possible future scrapping of private copying levies, Mr. Vitorino suggests a number of fundamental changes to the current system. Whilst we sympathize with the fact that adjustments may be needed to correct any anomalies deemed incompatible with the internal market (e.g. the double payments in cross-border sales), we wish to express strong reservations with regard to some of the main proposed “improvements”.

9. We believe that shifting the liability to pay levies from importers and manufacturers to retailers would profoundly undermine the overall sustainability of the system and possibly also fail the three-step test, as the administration and enforcement of the system will become more costly and more exposed to fraudulent practices. Contrary to what the report claims, retailers are ubiquitous and far more numerous to control, as opposed to a

limited and easily identifiable group of manufacturers and importers, operating not just from physical outlets but equally from a large, and less manageable, number of small and medium sized digital stores. This technical impediment only adds to the argument that the businesses grossing the most profits from copy-enabling devices and media should be the ones contributing to the compensation of content right holders.

10. If, as we believe, importers and manufacturers should continue to be liable for compensation, the shift from the country of origin to that of destination appears to create more problems than it seeks to solve. In this respect, and in light of the need to avoid any double payments on cross-border transactions, we would rather advocate a more transparent and compulsory EU labelling system, clearly mentioning the payment or nonpayment of the levy in the country of origin and closely tied up with the dispatching of goods.

11. Last but not least, we wish to express our concerns regarding a possible ex-ante general exemption to the benefit of professional users, in light of the fact that company-owned devices and blank media can equally be used for private copying purposes by the employees of those users. The exemption from the obligation to pay private copying levies should therefore be based on effective use that is made of the copying media or devices rather than simply on the nature of the user.

The International Federation of Actors (FIA) represents performers' trade unions, guilds and professional associations worldwide. It speaks on behalf of hundreds of thousands of professional actors, dancers, variety and circus artists, stunt performers and dubbing artists, among others, working in live shows, in the film and television industry, advertising, radio and new media.

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The International Federation of Musicians (FIM) is the international NGO representing musicians' trade unions, guilds and associations globally, with members in about 70 countries covering all regions of the world. In the European Union, FIM counts 26 member unions in 21 EU Member States.

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