

# Private copying levy

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A **private copying levy** (also known as **blank media tax** or **levy**) is a government-mandated scheme in which a special tax or levy (additional to any general sales tax) is charged on purchases of recordable media. Such taxes are in place in various countries and the income is typically allocated to the developers of "content". (A distinction is sometimes made between "tax" and "levy" based on the recipient of the accumulated funds; taxes are received by a government, while levies are received by a private body, such as a copyright collective.)

Levy system may operate in principle as a system of collectivisation, partially replacing a property approach of sale of individual units.

## History

If one buys a CD, and makes a copy on a MP3 player to listen to it when outdoors, should the author be compensated once more for this copy? According to age-old copyright principles the answer is affirmative: any copy represents a "multiplication" in the sense of copyright law. Those principles date from an era when copying required expensive, professional equipment. Should the old legal rule be maintained now that copying technology is pervasive? Some people find it hard to believe that payments are due for private copies of legally obtained material. Yet, that is the basis for private copying levies.

Such levies were first introduced in the USA in response to lobbying from the recording industry with the advent of the Audio cassette. Legislators were persuaded at the time that cassette recorders would decimate sales of records as friend after friend would then make copies of only one purchased album. This never happened and levies today are assessed on compact discs a form of media that did not exist when levies were first conceived with the bulk of unrecorded compact discs actually being used in the computing industry yet are still "taxed" to provide a revenue stream to the recording industry.

Levies are often considered a compensation for illegal file sharing. This is debatable however: levies could be seen as not being an advance for fines, but rather, only intended to compensate for copies in the private sphere that are legally allowed in many jurisdictions. A notable exception in Europe is the UK, that does not allow private copies. But generally legislators allow private copies for two reasons: firstly, because otherwise the enforcement would be unfeasible for private reasons, and secondly because the administrative burden would be disproportional.

## Questions on fairness

A difficulty that immediately arises is the practical impossibility of devising a mechanism for distributing the proceeds to copyright holders that is considered "fair" by all copyright holders and consumers. Implemented systems are typically restricted to music and may distribute the proceeds proportionally to a measurement of sales of CDs in music shops or amount of air-play on radio or the like. This ignores other distribution channels such as the Internet, and it disproportionately benefits popular artists and publishers of the related products. Fairer methods would arguably involve extensive sampling of purchasers to determine actual recording behaviour, or alternatively paying all musicians at a simple flat-rate (the preferred method will depend on one's political views).

While the prime purpose of levy systems is to compensate authors, some part of the collected money is also used for general cultural funding purposes. In Germany this is even required by law. It acknowledges the purpose of cultural diversity - which is not necessarily identical to free market effects. This funding is usually executed by the same entities (collecting societies) that distribute the levy money to individual authors. One may question however whether these entities are properly qualified to make culture policy.

Levy systems assume that all authors want to exploit their work for money. However this is not always true, especially on the internet. Many authors do not write to entertain, but to inform readers, listeners and viewers. Often their purpose is to reach the widest possible audience rather than make the maximum profit from the copyrighted

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work by itself. The discrepancy between reality and the assumption underlying a levy system is growing as "web 2.0" matures, with pervasive user-supplied content, from Wikipedia to YouTube.

A further problem is to find a proper tariff base for levies. Conceivably the levy may be a percentage of storage media sales price (e.g. 3% in the US). The implication of such a scheme is however that the author gets ever less as technology proceeds and becomes less expensive. But a price based on units of information (bits, or megabits) is not fair either, as for instance a DVD can be used to store a film, a computer game, a large amount of documents, or measurement data. The cost of producing a certain amount of bits widely varies by type of information. Measurement data is even not copyrighted at all. Yet in today's world of converging technology, storage media can be used for a wide range of purposes.

An implementation question that arises is whether the tax applies to any type of copyrighted work or is restricted to a limited field such as music. If it is restricted then the issue arises of how to collect the tax on media which can also be used for other purposes. The options include:

- Collecting the tax on all media, regardless of the end use, and ignoring the injustice to purchasers with non-covered uses.
- Allowing taxed and untaxed media to be sold, but with only the taxed media providing the copyright-relaxation benefits.
- Collecting the tax on all media but allowing purchasers to claim a refund for media applied to non-covered uses.

Contrary Fairness arguments

- Although these complexities make the systems of levies are far from perfect they do have some advantages related to fairness in that since there is compensation for private copying where as in countries where there is no levies, there is a substantial amount of copying taking place without any due compensation being made.
- With respect to fairness in countries with the levy everyone is shares in the financial burden caused by the levy. In countries that do not have the levy, many people are copying music and never receive any reprimands while others are made an example and prosecuted. This is the similar argument that non-proponents to the levy system use to show fault. They advocate that if the levy cannot be precisely applied to the people that are private copying, it is a faulty system. Likewise, if you cannot reprimand all people that are copying illegally and not compensating the music industry, this is also a faulty system. One system over subscribes, the other undersubscribes, both have faults.
- Finally, those counties that do not have private copying laws are in fact making many of their citizens criminals. A law which makes potentially more than 50% of your population criminals does not seem to be a fair business practice. Lawyers rather than artists may well be the greatest beneficiaries in non-private copying/levied countries.

## Legal effects

It is theorized that such levy may be linked to a corresponding relaxation of copyright law, by permitting the recording of copyrighted works on media for which the tax has been paid. However, there is little evidence to support this theory. On the contrary, lobbyists representing publishers and copyright holders have increased pressures to implement more restrictive laws, even on countries that have implemented private copying levy. In 2007, it was reported that International Intellectual Property Alliance put 23 of the world's 30 most populous countries into Priority Watch List, even though the United States, which was not in the list, has laws that are more liberal than the laws from the countries within the list.<sup>[1]</sup>

Even when restricting levy system to devices that primarily play music, this itself creates loopholes that prevents collecting levies from cellphones, PDAs, and other all-in-one portable electronic devices. As a result, copyright holders will have to rely on even more laws to collect levy, and to increase rates of already levied product to recover perceived losses, which run against the political trends toward eliminating levy systems.<sup>[2]</sup>

## Regulations

Examples of countries operating such schemes:

### Australia

Australia does not have a private copying levy. Although legislation to create one was passed in 1989, it was declared unconstitutional in *Australian Tape Manufacturers Association Ltd v Commonwealth*.

### Belgium

In Belgium a fee is charged on both blank media and recording equipment which is passed on to "Auvibel", which is in charge of distributing the funds. As of 1 February 2010, these fees are applicable for the following:<sup>[3]</sup>

- Equipment with integrated carrier:
  - MP3/MP4 player, cellphone with MP3/MP4 functionality:
    - capacity is less or equal to 2GB: € 1.00
    - capacity is higher than 2GB and less or equal to 16GB: € 2.50
    - capacity is higher than 16GB: € 3.00
  - TV, Hi-Fi, combined DVD writer and videorecorder, multifunctional DVD home cinema, set top box, multimediacenter:
    - capacity is less or equal to 256GB: € 3.30
    - capacity is higher than 256GB and less or equal to 1TB: € 10.75
    - capacity is higher than 1TB: € 13.00
- Non-integrated equipment with integrated carrier:
  - DVD recorder, DVD reader, CD writer, videorecorder, DVD home cinema:
    - capacity is less or equal to 256GB: € 3.30
    - capacity is higher than 256GB and less or equal to 1TB: € 10.75
    - capacity is higher than 1TB: € 13.00
- For the following equipment, without integrated carrier, that are not integrate-able in a computer and work standalone, have a fee of € 2.00:
  - Hi-Fi with radio-cassette-CD
  - Combined DVD writer and videorecorder
  - Combined DVD reader and videorecorder
  - Portable radio-cassette recorder
  - Combined portable radio-cassette-CD
  - TV and combined DVD writer
  - DVD recorder
  - Cassette deck
  - Videorecorder
  - CD writer
  - MiniDisc writer
  - CD audio to MiniDisc writer
- Digital carriers:
  - Memorystick, memorycard:
    - capacity is less or equal to 2GB: € 0.15
    - capacity is higher than 2GB and less or equal to 16GB: € 0.50
    - capacity is higher than 16GB: € 1.35

- External hard drive:
  - capacity is less or equal to 256GB: € 1.30
  - capacity is higher than 256GB and less or equal to 1TB: € 6.75
  - capacity is higher than 1TB: € 9.00
- blank CD-R/RW, MiniCD-R/RW, MiniDVD-R/RW, MiniDisc, audiocassette DAT: € 0.12/disc
- blank DVD+/-R/RW: € 0.40/disc
- Analogue carriers:
  - audiocassette, audiotape, videocassette 8mm: € 0.12
  - videocassette: € 0.40

## Canada

A blank media levy was introduced in Canada in 1997, by the addition of Part VIII, "Private Copying", to the Canadian Copyright Act. The power to set rates and to set the distribution allocation is vested in the Copyright Board of Canada. The Copyright Board has handed the task of collecting and distributing the funds to the Canadian Private Copying Collective, which is a non-profit private organization.

In Canada:

- The levy applies to "blank audio recording media", such as CD-Rs.
- The levy is paid by importers and manufacturers of such media sold within Canada (and typically passed on to the retailer, and passed on to the purchaser).
- With the exception of the zero-rating exemption, the levy is collected regardless of the purchaser's end use of the media.
- The private copying levy is distributed as per the Copyright Board's allocation as: 66% to eligible authors and publishers, 18.9% to eligible performers and 15.1% to eligible record companies.
- The Canadian Private Copying Collective has developed a methodology by which the proceeds are distributed to rights holders based on commercial radio airplay and commercial sales samples, ignoring radio/college airplay and independent record sales not logged by Soundscan. This methodology has been criticized as favouring major-label artists at the expense of the long-tail. As of September 7, 2007 over one hundred million dollars has been distributed.
- In conjunction with the levy, the Copyright Act allows individuals to make copies of sound recordings for their own private, non-commercial use. They may not distribute the copy.
- In 2005, the Federal Court of Appeal overruled a 2003 Copyright Board decision which had applied the blank media levy to MP3 players such as Apple Inc.'s iPod, on the basis that such devices did not qualify as "audio recording medium" as per the Copyright Act definition.<sup>[4]</sup> Before this, the proposed rates were \$2 for players with less than 1 GB of capacity, \$15 for players up to 15 GB, and \$25 for players 15 GB and over.
- On February 12, 2007, CPCC asked the Copyright Board of Canada to reintroduce the levy of \$5 to \$75, this time onto the memory component of the digital audio recorders (such as MP3 players) in Canada.<sup>[5]</sup> In addition, CPCC also proposed levies of \$2 to \$10 for memory cards (since withdrawn), 8 cent increases to CD, CD-R Audio, CD-RW Audio and MiniDiscs.<sup>[6]</sup> Certain parties objected to this tariff based on the 2005 Federal Court of Appeal precedent and brought a preliminary motion before the Copyright Board that would have prevented that part of the tariff application from being considered. The Copyright Board dismissed this preliminary motion in July 2007.
- In September 2007, an application for judicial review was brought before the Federal Court of Appeal to appeal the Copyright Board's dismissal. On October 26, 2007, the court granted the Canadian Recording Industry Association's request to intervene in the private copying/iPod levy judicial review.<sup>[7]</sup> Some argue that CRIA wanted to limit the scope of the private copying levy, given that it legalizes copying for the private use of the person making the copy, possibly regardless of whether the source is non-infringing or not.<sup>[8]</sup>

- In January 2008, the Federal Court of Appeal overturned the Copyright Board's July 2007 decision, stating that its previous ruling in the 2005 *Canadian Private Copying Collective v. Canadian Storage Media Alliance* case is dispositive authority for the proposition that "the Copyright Board has no legal authority to certify a tariff on digital audio recorders or on the memory permanently embedded in digital audio recorders." [9]<sup>[10]</sup>

Canada's current private copying levies are as follows: \$0.24 per unit for Audio Cassette tape (40min or longer), and \$0.29 per unit for CD-R, CD-RW, CD-R Audio, CD-RW Audio and MiniDisc.<sup>[11]</sup>

## Finland

As of beginning of 2011, the fees are (in Euros)<sup>[12]</sup>:

- €0.005/min for analog audio tapes (e.g. €0.30 for a 60 minute cassette)
- €0.0076/min for analog video tapes (e.g. €1.37 for an E180 tape)
- €0.20 per disk for CD and MiniDisc (capacity: up to 1 GB)
- €0.60 per disk for DVD, DVD-RAM, DVD-R DL and DVD+R DL (capacity: from 1 GB to 10 GB)
- €1.20 per disk for Blu-ray Disc and HD DVD (capacity: over 10 GB to 25 GB)
- €1.80 per disk for Blu-ray Disc and HD DVD (capacity: over 25 GB)
- €4 to €21 depending on capacity of digital audio players or personal video recorders.
  - €4, memory up to 512 MB
  - €7, over 512 MB to 1 GB
  - €10, over 1 GB to 20 GB
  - €12, over 20 GB to 50 GB
  - €15, over 50 GB to 150 GB
  - €18, over 150 GB to 250 GB
  - €21, over 250 GB
- €5 to 10€ for external hard disk drives:
  - 5€, over 250 GB to 950 GB
  - 10€, over 950 GB to 3 TB
  - smaller and bigger drives have no levies

There is no levy fee on mobile phones, computers, memory cards, game consoles, USB flash drives and 8 cm (3 in) CDs/DVDs. VAT of 9% is added to the levies.

## Germany

The world's first private copying system was created in Germany in 1965. It was a result of earlier successful litigation by GEMA against an audio equipment manufacturer in *GEMA v. Grundig*.

## Luxembourg

Luxembourg is the only EU member state on the continent without a private copying levy,<sup>[13]</sup> making it a popular "copying levy haven" for blank media buyers from countries such as France and Germany.

## Netherlands

In the Netherlands a fee is charged on blank media which is passed on to "Stichting ThuisKopie" (Foundation Homecopy), which is in charge of distributing the funds. Fees for February 17, 2007 until January 1, 2010 are as follows;

- Data CD-R/RW: € 0.14 per disc
- Audio CD-R/RW: € 0.42 per hour (€ 0.52 per 74 minutes)
- Blank DVD-R/RW: € 0.60 per 4.7 gigabyte

- Blank DVD+R/RW: € 0.40 per 4.7 gigabyte
- Blank DVD-RAM: exempt
- Video analog (video tapes): € 0.33 per hour
- Audio analog (cassette tapes) € 0.23 per hour
- MiniDisc: € 0.32 per hour
- HI-MD: € 1.10 per carrier

## Russian Federation

Article 1245 of Civil Code of Russian Federation "Remuneration for free reproduction of phonograms and audiovisual products for private purposes" ("Вознаграждение за свободное воспроизведение фонограмм и аудиовизуальных произведений в личных целях") mandates a fee, which is to be distributed in the following proportion: 40% to the authors, 30% to the singers, 40% to the manufacturers of the media. In practice, this fee had not been charged until after the Regulation of the Government of Russian Federation 829 <sup>[14]</sup> from October 14, 2010, which mandated a uniform 1% tax on computers, blank optical disks, memory sticks, TVs, video and audio recorders, radios, mobile phones, etc. The controversial decision of the government to award the collected funds to the Russian Union of Rights-Holders <sup>[15]</sup> for further distribution was criticized by the public and disputed in a lawsuit <sup>[16]</sup>.

## Sweden

In Sweden there is a fee called "privatkopieringsersättning" (private copy retribution) earlier called "kassettersättning" (cassette tape retribution) on compact cassettes, blank CDs, blank minidisks and other storage media. As of September 1, 2011, this fee will apply to external hard drives and other USB storages as well. The fee is 2.5 öre (0.025 SEK) per minute of storage for analog media or 0.4 öre per MB for re-recordable media or 0.25 öre per MB for write once media. The money collected (224436151 SEK as of 2005) is handled by Copyswede.

## Switzerland

- Tax on recordable DVD (GT 4d):<sup>[17]</sup>
  - CHF 0.36 per recordable DVD
  - CHF 1.00 per rewritable DVD
  - CHF 0.38 per 25 GB on HD disks (Blu-ray)
- Tax on digital storage media such as microchips or hard drive recording devices audio and audiovisual (GT 4d):<sup>[18]</sup>
  - Audio recorders CHF 0.80 per GB (gigabyte)
  - Audiovisual recorders:
    - CHF 0.10 per GB until 250 GB
    - CHF 25.00 and CHF 0.08 per GB from 250 GB
- Compensation for the transfer of use of set-top box with memory and vPVR (GT 12):<sup>[19]</sup>
  - CHF 1.00 per month and subscriber if the following charges do not apply
  - CHF 0.13 per month and subscriber if free or part of the basic package
  - CHF 0.55 per month and subscriber for monthly subscription fee up to a max of CHF 6.50

## United States

### Audio home recording in general

17 U.S.C. § 1008 <sup>[20]</sup>, as legislated by the Audio Home Recording Act of 1992, says that non-commercial copying by consumers of digital and analog musical recordings is not copyright infringement. Non-commercial includes such things as resale not in the course of business, perhaps of normal use working copies which are no longer wanted. It is unlikely to include resale of copies in bulk; Napster tried to use the Section 1008 defense but was rejected because it was a business.

From House Report No. 102-873(I), September 17, 1992: "*In the case of home taping, the [Section 1008] exemption protects all noncommercial copying by consumers of digital and analog musical recordings*".

From House Report No. 102-780(I), August 4, 1992: "*In short, the reported legislation [Section 1008] would clearly establish that consumers cannot be sued for making analog or digital audio copies for private noncommercial use*".

The United States music industry administers the Audio Home Recording Act and foreign hometaping royalties for artists on US sound recordings as well as US record labels. These royalties are administered by The Alliance of Artists and Recording Companies for featured artists and copyright owners, ASCAP/BMI/SESAC for writers, Harry Fox Agency for publishers, and The AFM/AFTRA Intellectual Property Rights Distributor Fund (Joint venture of AFM and AFTRA ) for non-featured artists. All societies also collect foreign remuneration for their respective funds.

### Blank music CDs and recorders

17 U.S.C. § 1008 <sup>[20]</sup> bars copyright infringement action and 17 U.S.C. § 1003 <sup>[21]</sup> provides for a royalty of 2% of the initial transfer price for devices and 3% for media.<sup>[22]</sup> The royalty rate in 17 U.S.C. § 1004 <sup>[23]</sup> was established by the Fairness in Music Licensing Act of 1998. This only applies to CDs which are labeled and sold for music use; they do not apply to blank computer CDs, even though they can be (and often are) used to record or "burn" music from the computer to CD. The royalty also applies to stand-alone CD recorders, but not to CD burners used with computers. Most recently, portable satellite radio recording devices contribute to this royalty fund. <sup>[24]</sup>

Thanks to a precedent established in a 1998 lawsuit involving the Rio PMP300 player, most MP3 players are deemed "computer peripherals" and are not subject to a royalty of this type in the U.S.

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## External links

- Copyright Act of Canada (<http://laws.justice.gc.ca/en/C-42/>)
- Copyright Board Canada (<http://www.cb-cda.gc.ca/>)
- Canadian Private Copying Collective (<http://www.cpcc.ca/>)
- CopySwede (<http://www.copyswede.se/default.asp?ML=2138>)
- The Finnish site for Private copying levy (<http://www.hyvitysmaksu.fi/main/index.php?module=front&item=&lang=en>)

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