



**THE EUROPEAN COMMISSION (DG Markt):
SECOND CALL FOR COMMENTS "FAIR COMPENSATION FOR ACTS OF PRIVATE COPYING"**

**Response by TEOSTO, Finnish Composers' Copyright Society
April 18, 2008**

I GENERAL ON TEOSTO

Teosto is a Finnish copyright organization that represents more than 19,000 Finnish music authors and 500 music publishers. Teosto is a non-profit organization whose supreme decision-making body is the General Meeting of Ordinary members. Performing right royalties collected by Teosto in 2007 for music used in Finland by various media totaled 36.6 million euros.

Our primary task is to promote the rights of composers, lyricists, arrangers and music publishers, and to strengthen the diversity of Finnish music. Teosto acts as a connecting link between music authors and business enterprises and communities that use music.

Teosto's position vis-à-vis private copying is twofold. On the one hand, Teosto is a copyright organization representing its members' interests in copyright matters, including private copying. On the other hand, Teosto has a technical and fiduciary role in the collection of the private copying compensation in Finland. The Finnish Copyright Act stipulates that the collection and administration of the compensation shall be carried out by an organization representing a large number of authors whose works are being exploited in Finland. The Ministry of Culture has for consecutive periods approved Teosto for this task since 1984. Within Teosto, Private Copying Unit is designated to perform the actual duties as set by the law.

II INCORRECT DATA ABOUT FINLAND

- Page 3: primarily the function of the private copying remuneration in the Finnish Copyright Act is to compensate for the use of works.
- Page 4: "Finland...from legally obtained copy" is not right, but "A limitation on copyright as provided in this chapter does not permit the reproduction of a copy of a work which has been made or made available to the public contrary to Section 2 or whose technological measures have been circumvented in violation of Section 50a (1)."
- Page 5, table 1: equipment are not subject to the private copying remuneration in Finland.
- Page 6: "In Finland...considering to start charging...". This wording gives a false impression that Finnish collecting societies unilaterally set private copying remuneration. This is not true. In Finland private copying remuneration is set through legislation after negotiation between the interested parties.
- Page 7: Finland should be in the following list: "Some member States (France, Austria)..." but not in the following list: " Personal video..."
- Page 12: there are two redundant question marks for Finland. Refund is defined in Section 26 of the Copyright Act. We also do have a functioning refund system in Finland.

- Page 14, table 8: does the table include consumers as well as end users? The table is unclear and fails to give even basic knowledge about the collection and selection of the data. Similar surveys conducted in Finland give rise to quite different conclusions.
- Annex 1: "A minority of Member States also specifically stated that the source of the reproduction should be a legal one (Germany,...)." Finland should be included in the list.
- Annex 2: In Finland the levy indeed was 15 euros for a 4 GB device in 2004. As of 2008 the private copying remuneration for such a device has however been reduced to 10 euros.

III GENERAL REMARKS ON THE COMMISSION'S BACKGROUND DOCUMENT

Teosto welcomes the possibility to comment on the issues raised in the second call for comments on private copying.

However, the document seems to have been drafted so that it portrays an incomplete, if not a negative image of private copying remuneration systems. The interpretations and the choice of data are not balanced. We would have appreciated if the Commission had taken a more objective approach.

It seems that the initiative only covers private copying and its compensation. The Commission's background document also includes references to the reprography exception and its remuneration. For the avoidance of doubt, we suggest that both exceptions and their compensation be treated separately. In this response paper we have only made remarks concerning the private copying remuneration system.

The data used in the Commission's background document is outdated and gives an incomplete picture of the situation of today. Most of the data seems to originate from the year 2004. More recent data is already available. For example, in Finland the remuneration of a 4 GB media is no longer 15 euros as it was in 2004 but 10 euros.

IV SUMMARY

Downloading digital entertainment content is a multi-format phenomenon in which users flexibly save the same content in various places, depending on the situation (mp3-player, mobile phone, computer, CD-R etc.). The possibility to privately copy thus gives consumers a totally new way to use protected works. The private copying remuneration system is used to compensate the creators, such as authors, performers and producers, for the private copying of their works. The system guarantees a legal and easy way for consumers to copy works (music, movies, texts etc.) into media provided by the manufacturers and importers.¹

The benefits of copying go to the consumers who purchase the media, the revenues of the sales go to the manufacturers and retailers of such products; yet it is the content that makes it all possible. Creative content is the backbone of successful development of the digital market. These benefits for consumers, manufacturers and trade should be taken into account when determining which media is subject to remuneration and for what price.

¹ In Finland products subject to the private copying remuneration include recordable media that are used to a significant extent for making copies of works for private use. Table 1 of the Commission's background document therefore gives incorrect information when claiming that both media and equipment are subject to private copying remuneration.

As for Finland, the following two concerns need to be highlighted.

A. Music phones are not subject to private copying remuneration in Finland

All media that are used for reproduction for private use should be subject to the private copying remuneration. **The system must be justified and equal to all players. This is not the case in Finland today.**

The private copying surveys that were conducted in the autumn 2007 confirm that copying for friends and family members is very common in Finland. Copies are made more than ever. **One key finding was that mobile phones have become one of the most popular media for listening to and downloading music.** The types of media mostly owned by younger respondents are computers, mp3 players and mobile phones. They use them to download and listen to music. The number of downloads onto various platforms is high. On average the respondents save 90 songs on their mobile phones. Another survey was conducted among owners of multimedia phones and phones with an mp3 player and a fixed memory/slot for memory card. The number of songs downloaded by owners of a multimedia phone was on average 80, and for other types of mobile phones the average was 45 songs. The surveys also confirmed that mobile phones contained protected video works.

Based on the said surveys, Finnish copyright holders have repeatedly claimed that mobile phones should fall under the scope of the private copying remuneration system. This claim is strongly supported by the sales figures of mp3 players that are constantly falling even when copying is more vivid than ever. **Mobile phones substitute for mp3 players. It is therefore only fair that also music phones should be subject to the private copying remuneration.** A summary of the surveys is available on the website www.hyvitysmaksu.fi.

On the basis of the Commission's background document one might get an impression that Finnish collecting societies unilaterally set the private copying remuneration. This is not true. In Finland, the private copying remuneration is set through legislation after negotiations between the interested parties.

B. Cross-border web shops are apt to escape the private copying remuneration

Grey market is not a problem in Finland. However, there is a growing number of web shops that sell media subject to the private copying remuneration to Finnish consumers from abroad. **Many cross-border web shops do not pay private copying remunerations at all: not to the country where they are located nor to the country where the consumer resides in.**² The web shops consider the consumer to be the importer of the goods, not the web shop.

From a technical point of view it would be easy to have distance sellers within the private copying remuneration system. **EU-level regulation would be needed here to ensure that the basic rules are the same to all parties; in particular, for the internal market to function adequately.** Routines similar to those applied to VAT could be applied also to private copying. Such routines are also common on websites in the U.S. where online retailers have to apply the sales tax of the state where the consumer is located.

Consumers should not be considered importers and liable to pay the private copying remuneration. **The general starting point should be that any retailer selling goods in a certain country should be subject to the payment of the private copying remuneration applicable in the country where the customer is located.** It should be noted that the product is consumed in the

² Audio or video carrier manufactured or imported to be distributed to the general public, or another equipment (i.e. media or support) that enables the reproduction of a work and which is in significant amounts used to make copies for private use can be subject to the private copying remuneration in Finland.

country where the consumer resides in. In addition, buying from a distance seller is no different from buying from a traditional shop. Therefore, these sellers should obey to the same rules as the importers/retailers in traditional shops.

In the following, subjects relevant from the Finnish point of view will be dealt with in more detail.

V PRIVATE COPYING REMUNERATION AND THE NOTION OF HARM BASED ON PRIVATE COPYING

The foundation of fair compensation lies in Article 5 paragraph 2(b) of the Infosoc Directive. A more detailed description of the modalities of fair compensation is in recital 35 of the Directive.

It seems that the Commission understands that "fair compensation" and "equitable remuneration" are not identical terms and that the latter is "linked to the possible harm that derives from acts of copying, Art 5 para 2 (b) and therefore requires that any payment to right holders must be compensatory in nature". We strongly disagree with this interpretation of the Directive.

One of the most important principles laid down in the Directive is the clear statement that fair compensation shall be paid to rightholders for the **use of their works** or protected subject matter, not of the harm or prejudice caused to them by copying for private use³. In this respect, the fair compensation is parallel with the actual exercise of copyright and related rights. Private copying remuneration must be based on the notion of the value of private copying. This value is:

- **Lost sales** when copies made are substitutes for the actual purchase of the recordings.
- **The added value** that comes to a particular media which is sold with copying facilities: the benefits of copying go to the consumers who purchase the media, the revenues of the sales go to the manufacturers and retailers of such products. Yet it is the content that makes it all possible.

The Copyright Directive (recital 35) therefore rightly states that **harm is only one of the criteria that can be taken into account** when determining form, detailed arrangements and possible level of the compensation, and that account should also be taken of the particular circumstances of each case.

The added value of private copying to the consumer can be determined by market surveys. These surveys are regularly conducted in Finland.

Market research gives information on the value of copying to the consumers but also on the volume (and therefore value) of the content copied on recordable media.

VI THE FINNISH PRIVATE COPYING REMUNERATION SYSTEM WORKS WELL AND IS EFFICIENT

The private copying remuneration covers recordable media on which a work can be copied and which is to a significant extent used for reproduction for private use only. Export and professional use is exempted. **The Finnish private copying remuneration system is efficient and transparent.** For example, the administration costs of the Private Copying Unit are low. They have varied between 4 and 7 per cent of gross revenue for the last five years.⁴ Big decisions - the scope of the private copying remuneration, the remuneration of the products and distribution of the collected funds - are made on the Ministry (or Government⁵) level.

³ Arguments supporting this approach, see legislative works (Government Bill HE 32/1984)

⁴ If the income of investments is counted, true administration costs are even lower, for example in 2006 only 1,5 %.

⁵ From 2008 onwards, the Government will decide upon the scope of the private copying remuneration after preparatory work by the Ministry of Culture. This procedure will first be applied to the remuneration to be imposed for the year 2009.

According to the Copyright Act, the remuneration shall be collected by an organization that represents a large number of authors whose works are exploited in Finland. The organization is approved for this task for a fixed period of time, at maximum five years, by the Ministry of Culture. The Finnish Composer's Copyright Society Teosto has been approved to act as an organization to collect the remuneration. The reporting and accounting obligation is enacted in the Copyright Act. Information about the administration of Teosto is available on our website www.hyvitysmaksu.fi also in English.

The Private Copying Unit has up-to-date and thorough knowledge about the media market in Finland and has conducted market supervision since 1984. In 1995, secondary liability imposed on retailers was introduced in the Copyright Act. Wholesalers and retailers who sell products subject to the private copying remuneration are responsible for paying the remuneration if the remuneration has not been previously paid by the importer or domestic manufacturer.

The Private Copying Unit relies on self-reporting but also audits debtors. The enforcement policy is aimed at operators of all sizes. For instance, 64.4 % of clients pay a yearly remuneration of less than 10,000 euros and 82.9 % of less than 100,000 euros.

VII SURVEY DATA ON PRIVATE COPYING GIVES INFORMATION ABOUT CURRENT COPYING

Throughout the Commission's background document the Commission describes the alleged drawbacks of private copying remuneration systems, saying that they "can only function as rough justice systems". This characterization does not fit in with the Finnish private copying remuneration system. **During the years the system has been under constant development.** Existing systems have been and are constantly being improved. Research and survey methods on private copying have recently been extensively developed to enable a more precise understanding and knowledge on the phenomenon of private copying in Finland. **With the help of surveys it is possible to define from which sources protected works were downloaded, the proportion of initial downloads vs. subsequent copies etc.** Any doubts on possible double payments can, among other things, be tackled with the help of surveys.

When deciding on the scope of the private copying remuneration, the Ministry of Culture also takes into account the survey data available on the volume of private copying and the extent of works on the market protected by DRM/TPM. In addition, for each type of media the Ministry considers the applicability of the media for copying of DRM/TPM protected and non-protected works. The Ministry of Culture annually lays down the arguments for the inclusion of any media within the scope of the remuneration and the price level for each such recordable media.

The Private Copying Unit has conducted surveys annually since 1998. As from the beginning of 2008 the Private Copying Unit employs a Research Manager/Technology Advisor who is responsible for the surveys and other research. Manufacturers/importers are consulted during the survey processes. Also external experts are used since transparency and reliability of survey results are seen extremely important. Surveys are under constant development.

VIII CONVERGENCE

The fact that certain types of a recordable media have dual or multiple functions does not prevent the application and calculation of the private copying remuneration. But it means that more parameters will have to be taken into account than in the case of a dedicated recordable media.

The fact that consumers make copies for their private use with "dedicated" or multi-functional media is not relevant. **What is relevant is that by using them consumers do indeed make copies of copyright protected material.** All products that are in a significant amount used to copy protected works should be subject to the private copying remuneration in accordance to their importance and value in copying protected works. **The scope of the products subject to private copying remuneration should be neutral and wide enough to cover all respective recordable media.**

IX MEMBER STATES DIFFER IN THE AREA OF PRIVATE COPYING

Our experience is that there are differences between Member States, for instance, in regard to general price level, grade of technical development, market penetration of consumer electronics, and other similar parameters. Consumer markets are in many ways national. These parameters reflect on the scope of products subject to private copying remuneration in different Member States as well.

The fairest method to determine the equitable share of the private copying remuneration in the consumer price of recordable media is to rely on market-driven balance. A critical factor in avoiding market disturbances is the amount of the remuneration in proportion to the consumer price of the product. When the proportion is right, *i.e.* all relevant copying technologies are within the remuneration system and the remuneration is not too high in proportion to the price level of those products, there is clearly a lower risk for undesirable market phenomena. By way of an example: in Finland the remuneration rate for a 4 GB mp3 player that in 2004 was 15 euros was reduced by 1/3 to 10 euros as from 1 January 2008.

X ONLY PRIVATE COPYING IS SUBJECT TO THE PRIVATE COPYING REMUNERATION

The purpose of the private copying remuneration is to compensate for the private copying of works. Accordingly, in certain situations the remuneration is not applied. These situations are defined in Section 26 of the Copyright Act.

The Copyright Act provides **an exemption from the private copying remuneration** when the products are:

- Exported
- Used to store material that is protected by the Copyright Act if the copy is made for professional use, teaching or scientific purposes
- Used to store material for disabled persons
- Used as memory or storage devices in professional data processing (for example, all digital storing of data that is part of normal business practices).

The Finnish refund system works well and it is easy for the clients. In the following, two examples of the functioning of the refund system are given.

A. Export

A refund can be granted for exported products for which the private copying remuneration has been paid for. The refund process is simple. The exporter needs to enclose two documents to the Private Copying Unit: 1) a copy of the paid invoice and 2) a copy of the export documents.

B. Professional use

All digital storing of data that is part of normal business practices may be seen as professional use, which does not fall within the scope of the remuneration. For example, making back-up copies in a business is a basis to get exemption from the private copying remuneration.

In Finland companies and societies can primarily be given the right to buy recordable media, for example CD-, DVD-, Blu-Ray- and HD DVD-discs, without the remuneration for private copying.

This can be done

1) By submitting a separate form to Teosto declaring that the purchased disks will not be used for private copying. After submitting the declaration the company or society will be given a registration number to be used when purchasing recordable media from those importers, manufacturers and wholesalers who have made an agreement with Teosto.

2) By making an application for refund for the remuneration afterwards.

Businesses with regular professional use tend to register with the Private Copying Unit. Businesses and the public sector are largely registered with Teosto and have a permanent right to buy products without the private copying remuneration.

XI FINAL REMARKS

EconLaw Strategic Consulting issued a report in September 2007 on the economic impact of private copying remuneration systems on the music sector, at the request of GESAC (European Grouping of Societies of Authors and Composers).

The report states that the private copying remuneration system has a sound economic justification; that it generates positive incentives to the creation of intellectual property rights protected works; and that it increases consumers' freedom of use of intellectual works. "The private copying remuneration system does not generate net negative effects on welfare", the report concludes.

In Helsinki, on April 18, 2008

TEOSTO, Finnish Composers' Copyright Society

Katri Sipilä, CEO