



Private Copying and Fair Compensation: An empirical study of copyright levies in Europe

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EC levy definition (2006)

A private copying levy is a form of indirect remuneration for right holders, based on the premise that some acts of private copying cannot be licensed for practical purposes by the relevant right holders.

A copyright levy is typically attached to certain products (equipment or blank media) that can serve to reproduce audio, audio-visual and textual material such as music, films or books.

Policy context

ESRC Fellowship at UK IPO (2010/11)

- UK: What position on EU wide regulation?
- UK: Can a private copying exception be introduced without providing compensation?

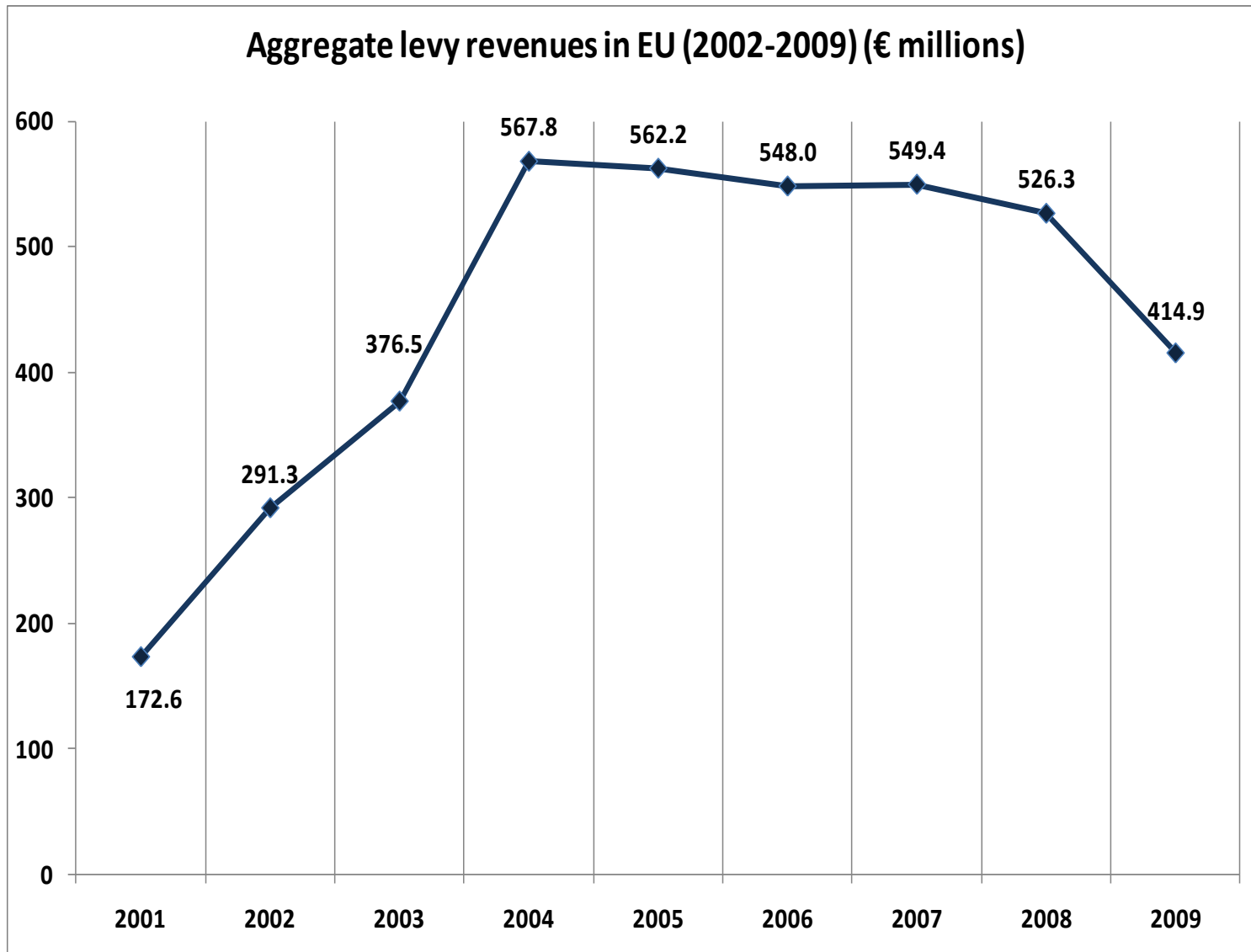
Limitations and exceptions

- Are exceptions just a response to market failure?
- What activities should be possible without permission?
- If without permission, requirement to pay?

Empirical approach: If we don't know how a "regulated" market works, we can't intervene.

Levy history in the EU

- 1965: Germany UrhG §53
- 2001: Info Soc Directive (“fair compensation”)
- 2006: EC recommendation (almost)
- October 2010: ECJ *Padawan* (“uniform interpretation”, “calculation based on harm”)
- May 2011: EC announces “comprehensive legislative action” regarding private copying levies (+ “mediator”)
- August 2011: UK commitment to introduce private copying exception without compensation (“Hargreaves”)
- [Norway], Finland, Netherlands, Spain



Source: European Commission; de Thuiskopie; Business Software Alliance

Private copying: What is it?

- (i) Making back-up copies / archiving / time shifting /
format shifting
- (ii) Passing copies to family / friends
- (iii) Downloading for personal use
- (iv) Uploading to digital storage facilities
- (v) File sharing in digital networks
- (vi) Online publication, performance and
distribution within networks of friends
- (vii) User generated content / mixing / mash-up
(private activities made public)

Private copying (current EU law)

Information Society Directive 2001/29/EC Article 5(2)(b):

[Member States may provide for exceptions or limitations to the reproduction right] in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures.

***Padawan v SGAE*, ECJ Case C-467/08 (2010):**

The concept of “fair compensation” “must be regarded as an autonomous concept of European Union law to be interpreted uniformly throughout the EU”

With reference to Directive 2001/29, Recitals 35 and 38: “fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception”.

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Private copying (current UK law)

Copyright, Designs and Patents Act 1988:

Section 29 permits fair dealing “for the purposes of private study”

- but only in relation to literary, dramatic, musical and artistic works (i.e. not sound recordings, films, broadcasts),
- and only in very narrow circumstances (not by a third party).

Section 70 permits the recording of a broadcast for the purposes of timeshifting “in domestic premises for private and domestic use”.

Under section 50, lawful users of computer programs are permitted

- to make back up copies (s. 50A),
- and certain other acts, such as decompiling (s. 50B), observing, studying and testing (s. 50BA).

Gowers Review 2006: recommended introduction of exception for format shifting for all forms of content (unsuccessful)

Structure of report

STUDY I: Characteristics of levy schemes

STUDY II: Effects of levy schemes on
prices

STUDY III: Economic and non-economic
rationales

STUDY I:

Legal and policy context

Characteristics of levy schemes

A. Tariffs and revenues

STUDY I:

Legal and policy context

Characteristics of levy schemes

Member State	Revenue per capita (€)	Levies applied to recordable media	Levies applied to equipment			Distribution		
			CD-R, DVD	MP3 Player	Printer	PC	Audio	Video
Austria	1.4	€0.34 (700MB) – 0.54 (4.7GB)	✓	✓	–			✓
Belgium	1.2	€0.12-0.40 per unit	✓	✓	–	43.59% 1/3 authors 1/3 performers 1/3 producers	56.41% 1/3 authors 1/3 performers 1/3 producers	–
Bulgaria	?	5% of manufacturing or import price	✓	✓	–			✓
Cyprus	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Czech Republic	0.7	€0.008-0.021 per unit	✓	✓	✓	½ authors ½ performers/producers	60% authors 40% performers/producers	–
Denmark	0.7	8% of manufacturing or import price	–	–	–	1/3 A-P-P	1/3 A-P-P	33%
Estonia	0.1	8% of manufacturing or import price	✓	–	–	1/3 A-P-P	63% authors 27% performers 10% producers	10%
Finland	1.6	€0.6 per 4.7GB	✓	–	–	49% authors 51% performers/producers	80.8% auth+perf 19.2% prod	✓
France	2.6	€1.0 per 4.7GB	✓	–	✓	prod+perf ½ authors ½ performers/producers	prod 1/3 A-P-P	25%
Germany	1.5	€0.271 per 4.7GB	✓	✓	✓	42% GEMA 42% reprograph 16% film producers	21% GEMA 21% repro 8% film producers	–
Greece	0.13	6% of manufacturing or import price	✓	✓	–	55% creators 25% perf 20% prod	55% creators 25% perf 20% prod	–
Hungary	0.9	€0.27 per 4.7GB	✓	✓	–	45% authors 30% perf 25% prod	62% authors 13% prod 25% perf	3.3-10%
Iceland	0.6	€0.11 < 2GB; €32 ≥ 2GB	✓	–	–	46% auth 54% performers/producers	✓	15%
Italy	0.7	€0.41 per 4.7GB	✓	–	✓	50% authors 25% perf 25% prod	30% authors 23% perf 47% prod	✓ 50% of video
Ireland	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Lithuania	0.2	6% of manufacturing or import price	–	–	–	40% auth 30% perf 30% prod	40% auth 30% perf 30% prod	✓
Luxembourg	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Malta	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Netherlands	0.9	€0.4 per 4.7GB	–	–	–	40% auth	33.75%	–

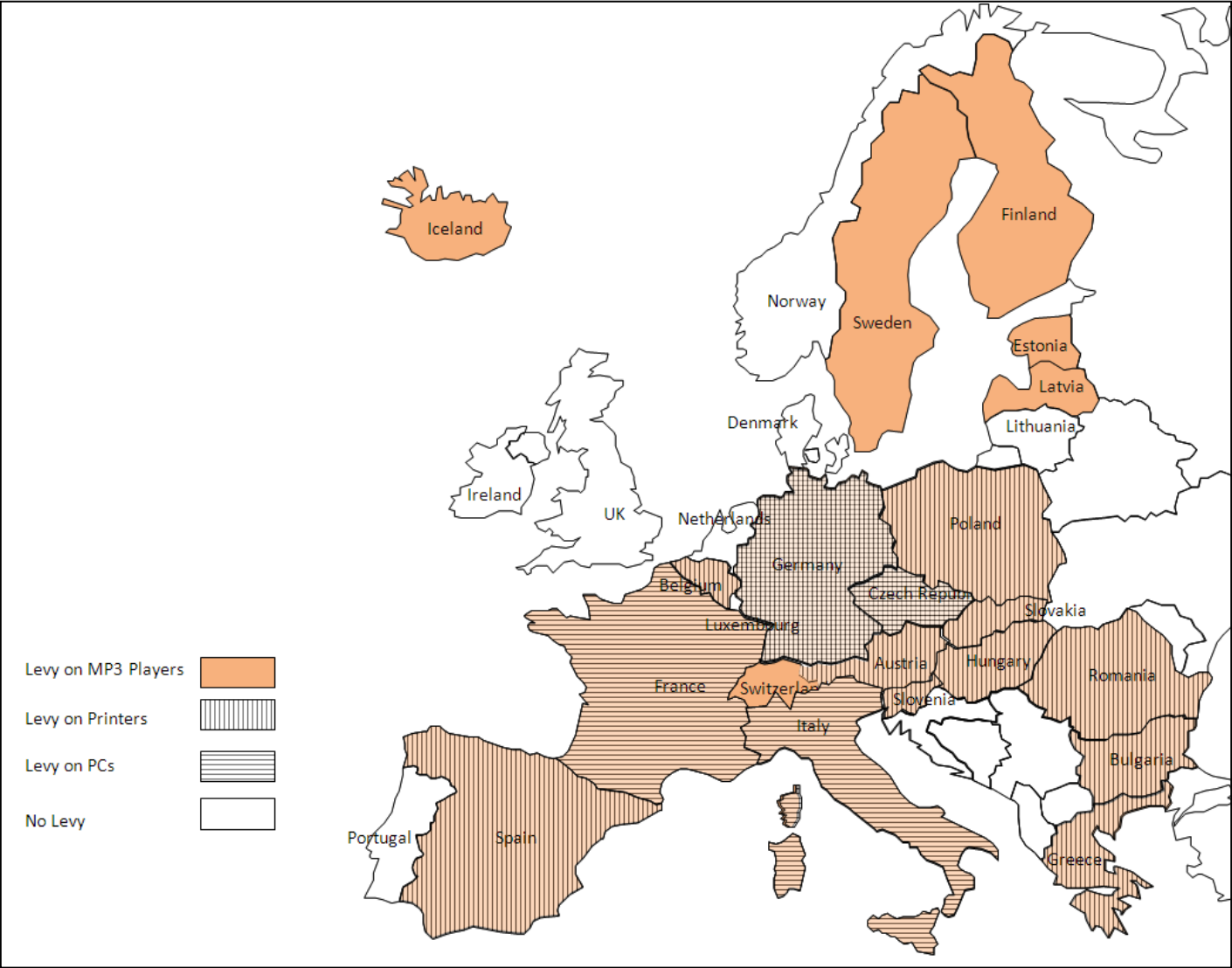
€2.6pc | €1.0 per 4.7GB | MP3✓ | Printer– | PC✓

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Bulgaria	?	5% of manufacturing or import price	✓	✓	–	–	–	✓
Cyprus	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
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Lithuania	0.2	6% of manufacturing or import price	–	–	–	40% auth 30% perf 30% prod	1/3 A-P-P 40% auth 30% perf 30% prod	10% ✓
Luxembourg	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Malta	–	–	–	–	–	As transferred from 'sister' collecting societies in levy countries		
Netherlands	0.9	€0.4 per 4.7GB	–	–	–	40% auth	33.75%	–

Audio: 1/2 authors
 1/2 performers/producers
 Video: 1/3 A-P-P
 Socio-cultural: 25%

€2.6pc | €1.0 per 4.7GB | MP3✓ | Printer– | PC✓

Levies on MP3 Players, Printers and PCs (2009)



Levy revenues per capita (2009)

France	€ 2.60
Switzerland	€ 2.10
Spain	€ 1.70
Finland	€ 1.60
Germany	€ 1.50
Austria	€ 1.40
Belgium	€ 1.20
Sweden	€ 1.10
Hungary	€ 0.90
Netherlands	€ 0.90
Norway	€ 0.90
Czech Republic	€ 0.70
Denmark	€ 0.70
Italy	€ 0.70
Iceland	€ 0.60
Slovenia	€ 0.50
Portugal	€ 0.30
Lithuania	€ 0.20
Latvia	€ 0.16
Greece	€ 0.13
Estonia	€ 0.10
Slovakia	€ 0.10
Poland	€ 0.07
Romania	€ 0.02
Bulgaria	€ 0.00
Cyprus	€ 0.00
Ireland	€ 0.00
Luxembourg	€ 0.00
Malta	€ 0.00
United Kingdom	€ 0.00



B. Distribution

STUDY I:

Legal and policy context

Characteristics of levy schemes

Levy distribution and incentives

Table 3 Levy income as percentage of total collecting society revenues (2009)

	STEMRA (Netherlands)	SABAM (Belgium)	SGAE* (Spain)	SACEM (France)	GEMA** (Germany)
Total revenues (€000)	40,680	192,434	333,936	762,309	862,961
Levy revenues (€000)	3,533	7,697	16,000	55,041	49,098
Levy as % of total revenues	8.7%	4%	4.8%	7.2%	5.7%

Source: Annual reports (latest available): *SGAE 2008; **GEMA 2010

Levy distribution and incentives

Table 4 Music authors' share of levy income in Belgium (SABAM, 2009)

Description of Author	Physical Sales (Albums/EPs)	Digital Downloads	Total Authors' Rights Revenue (€)	Levy (private copy) Revenue (€)	Levy as % of Total Authors' Rights Revenue	Levy Revenue per Album/EP (€)
Top dance charts USA	650,000	24,689	164,497	582	0.35%	0.00090
Pop band highest position 1997: 17 th	95,000	1,200	11,955	60	0.50%	0.00063
DJ/producer Label owner	106,000	800	14,217	27	0.19%	0.00025
Author/producer 35th Belgian charts 2004	32,000	450	7,737	50	0.65%	0.00156
Singer/author popbands werchter Top 10	35,000	1,500	10,071	35	0.35%	0.00100
Top 10 British Charts	185,000	750	14,350	65	0.45%	0.00035

Source: YOUNISON (*Transparency & Accountability in Collective Rights Management*, 2010).

C. Consumer permissions

STUDY I:

Legal and policy context

Characteristics of levy schemes

- Denmark: lawful sources; not from borrowed media; family and close circle of friends
- France: lawful sources; cannot be invoked against effective technological measures
(*Mulholland Drive* 2006)
- Germany: not from “evidently unlawful sources”; up to seven copies
- Netherlands: downloading from unlawful sources is permitted, and has to be compensated
(*Eyeworks v FTD; ACI v Stichting de Thuis kopie* 2010)
- Switzerland: licence regardless of origin
(*Eigengebrauchsschranke, Art. 19 URG*)

Consumer permissions?

Copyright Board of Canada (2006-2007)

evidence on Portable Music Players (such as iPods)

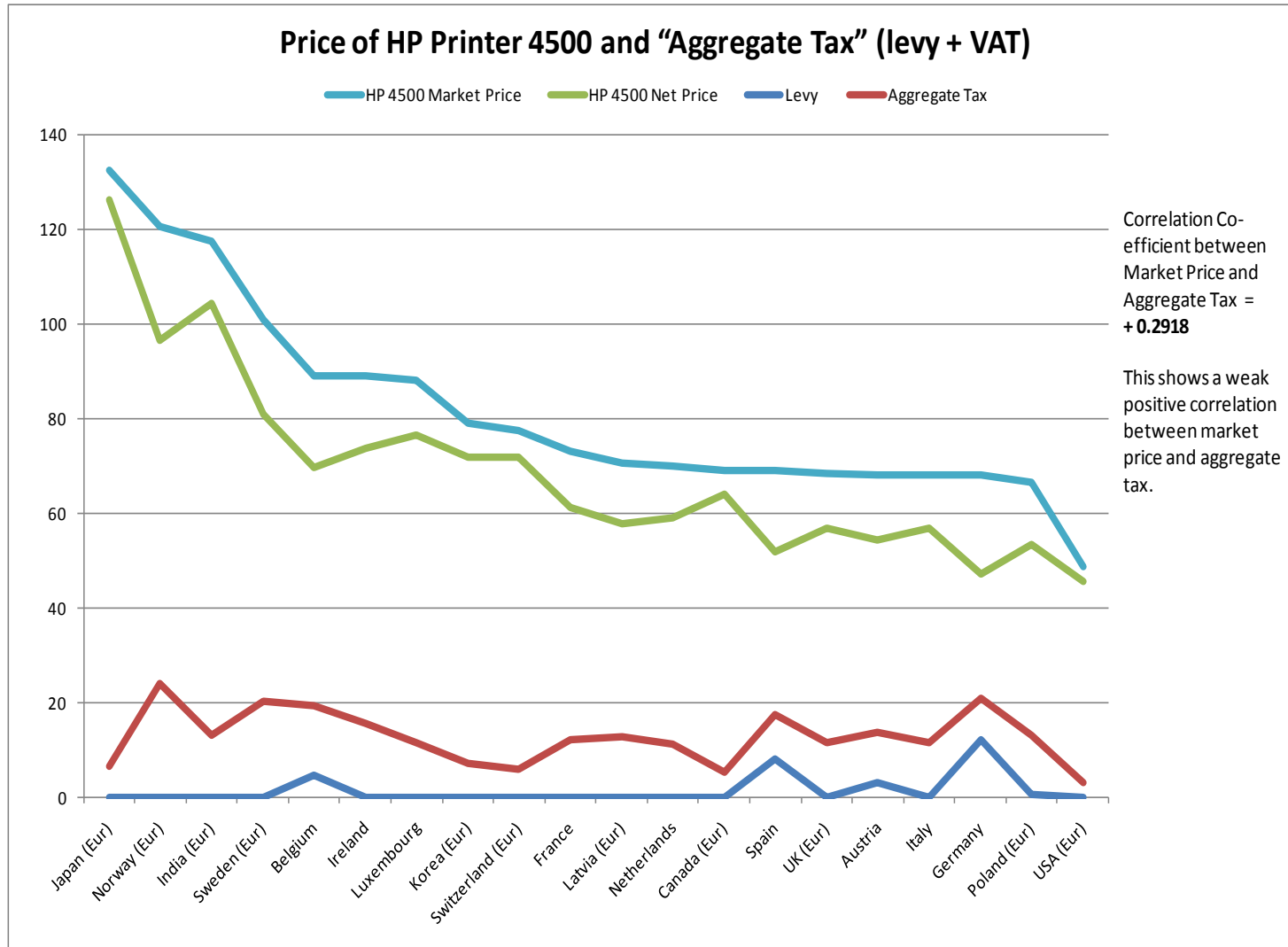
- in total, 1.63 billion copies made from July 2006 to June 2007
 - o/w about half (808 million) were copied on digital recorders
- o/w about 345 million (42%) came from the Internet. Only 20% of these tracks were authorised downloads (e.g. from iTunes)
- on average 497 tracks of music on PMPs
 - o/w of which 96% were copied

STUDY II:

Empirical effects of levy schemes

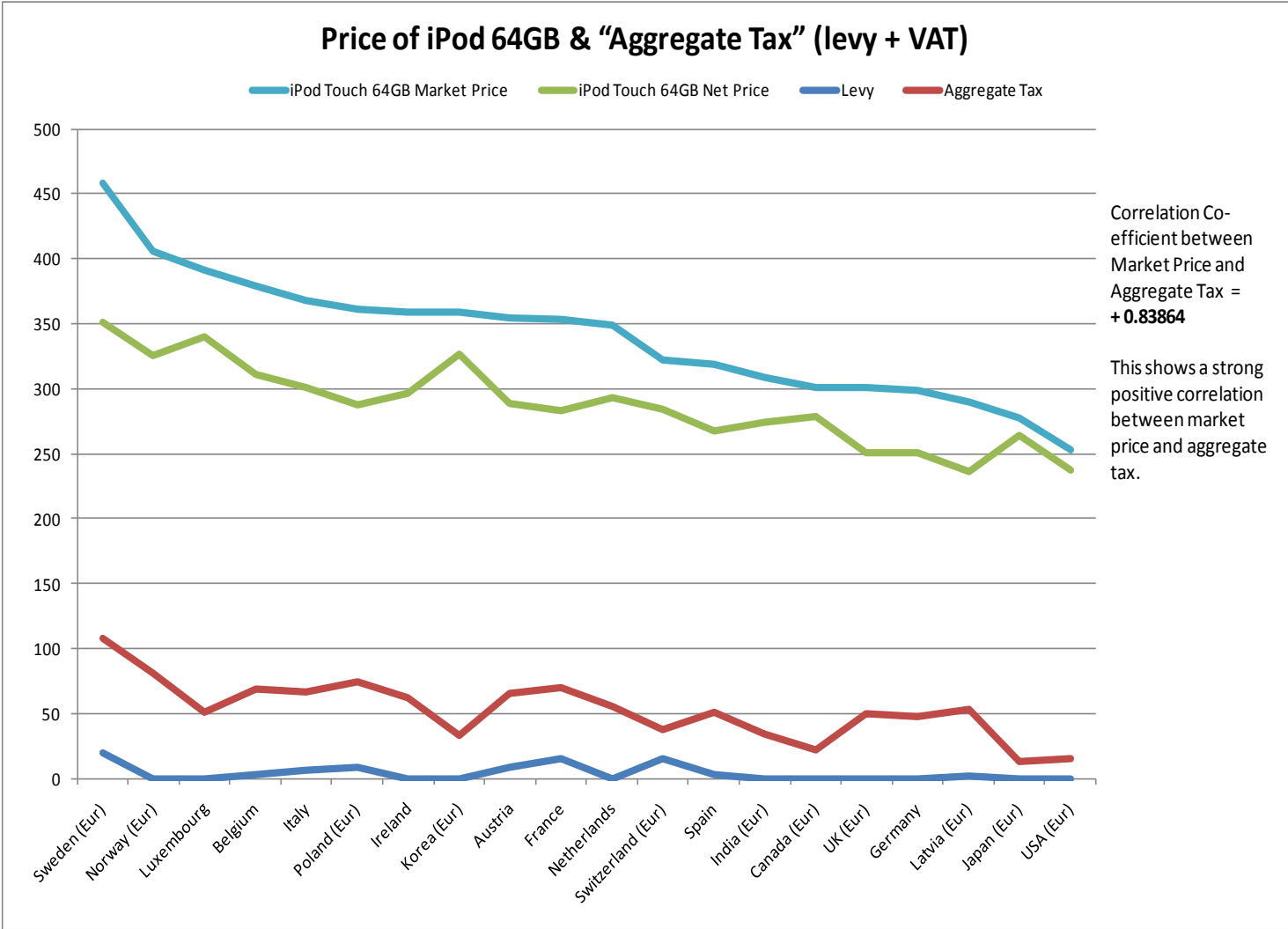
Retails prices

Relationship of levy and retail price (HP printer)



Lowest online retail price available, at Euro exchange rates of 15 April 2011

Relationship of levy and retail price (iPod Touch)



Lowest online retail price available, at Euro exchange rates of 15 April 2011

STUDY III:
Economic rationales
What are levies for?

Economic rationales

Transaction costs

Identifying and locating user/owner; Negotiating price; Monitoring and enforcement. Consumer as licensee, not beneficiary of exception.

State regulated licences

Radio broadcasting (PRS/BBC 1923); Competition law

Consumer value

Consumers' freedom to copy increases the value of goods or services (MP3 players, Internet broadband). Right owners do not receive the right economic signals to produce more content.

Off balance sheet tax

EC IE (2006) p. 42: "Some Member States [France] see levies as an important source of finance for cultural and social activities (alleviating demands on the State budget)."

[Creator rewards] [Privacy]

The concept of harm (1)

Harm in law (damage jurisprudence) = lost licensing opportunity; i.e. a fee that could have been charged.

Circularity! If there is a copyright exception, there is no infringement, and no licence could have been issued. Thus by definition, there is no harm from a permitted activity.

Harm in economics = lost sale; i.e. if copying replaces a purchase that otherwise would have been made (may also encompass broader economic impact on consumers and producers).

Normally, lost sales are not something to be compensated. If a second stall sets up in the market, it's called competition.

The concept of harm (2)

Hal Varian (2005), “Copying and Copyright”, *Journal of Economic Perspectives* 19(2): 121-138; p. 129

- Situation where a publisher or producer “can completely determine the terms and conditions under which the products it sells can be consumed”. If sharing is permitted, or takes place, the producer is likely to sell fewer units of the work, but since the consumer derives greater value from each unit, the producer’s profit may even increase (if pricing is right).
- However, if availability of free copies pushes the retail price to marginal cost, the original seller will find it hard to raise the price to a level where he/she can recover the cost of production.

If priced into purchase → no harm:

- “if the willingness-to-pay for the right to copy exceeds the reduction in sales, the seller will increase profit by allowing that right.” A certain amount of copying can already be priced into the retail sale of the first copy if the consumer understands these benefits. Rogers, Tomalin and Corrigan (2009) call this the “first sale” argument.

Solutions

**Art. 2:
Reproduction:**
Art. 5(2)(b)
exception
possible (if
compensated)



- (i) Making back-up copies / archiving / time shifting / format shifting
- (ii) Passing copies to family / friends
- (iii) Downloading for personal use
- (iv) Uploading to digital storage facilities



No harm
("first sale")

**Art. 3:
Communication
to the public:**
no exception
possible



- (v) File sharing in digital networks
- (vi) Online publication, performance and distribution within networks of friends
- (vii) User generated content / mixing / mash-up (private activities made public)

