

A wolf in sheep's clothing: the new Portuguese proposal on private copying levies

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On 2 May 2011 the Ministry of Culture in Portugal made public a [law proposal](#) concerning the regulation of private copying levies (the English version of which is unfortunately not available). The law currently in force dates from 2004 and had in turn made some changes to the original law, dated from 1998. There have been some concerns regarding the compatibility of this proposal with Creative Commons licenses, both in national and international fora. All that ado is about article 5 of the proposal, which reads something like "The equitable compensation of authors and performers is inalienable and cannot be waived. Any contractual clause to the contrary shall be null and void." While I agree that the closeness to moral rights jargon is regrettable, things are not as dark as one might perceive. In fact, this "equitable compensation" is solely the one due for private copying. In other words, what English speakers would call "private copying levies", the Portuguese call "equitable compensation." Linguistic idiosyncrasies aside, we can safely say that article 5 does not apply to all economic rights.

The Legal Project Lead of Creative Commons Portugal, Teresa Nobre, has also come to clarify that the proposal is compatible with licenses 3.0. This is because, in that version of Creative Commons licenses, the licensor reserves the right to collect statutory royalties or royalties under compulsory licenses for commercial uses. The stance taken by Ms. Nobre thus strikes me as correct.

That however does not mean that the proposal, if it ever becomes a law, will not be without (harmful) consequences. Attention should be driven away from the compatibility of the law proposal with Creative Commons - instead, we should carefully read the whole text (disclaimer: not for the faint-hearted).

First, Portuguese copyright law would have an economic right, subject to mandatory collective management, which cannot be waived. There is not enough space in a blog entry to even begin to list the philosophical implications of this incest between moral and economic rights, so I will just say: not a good idea. Moral and economic rights have different justifications and their legal regimes reflect important, underlying principles. There is a reason why moral rights cannot be waived. Can we seriously and safely say that such reasons are present in private copying levies? I don't think so.

Another innovation of this proposal is the inclusion in its scope of digital recording devices, which were traditionally exempted from levies altogether. Probably thrilled with this new world of possibilities, the drafters decided to include in the list of devices subject to levies: USB sticks (0,06 euro per GB); external drives (0,02 euro per GB); hard drives (0,02 euro per GB, plus 0,005 per GB over 1 TB); devices used to reproduce audio, visual or audiovisual files in compressed form, integrated or not in other devices, like mobile phones (0,50 euro per GB). Given the capacity of these media nowadays, I will let you do the math. Also, it seems that no one has thought that this type of equipment is not mainly used for private copying purposes - raise their hands those who use the hard drive of a computer to work on a daily basis (and shockingly not to make private copies of copyrighted works).

I shall finish with the greatest irony of all: the current version of the law exempts from the payment of levies, among others, certain non-profit cultural organizations, where they need to use recording media or devices in projects which are of "relevant public interest" (article 4 paragraph 1). The Ministry of Culture deleted such cultural organizations from the list of exempted entities. Interesting way of supporting culture.