



The European Consumers' Organisation

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Contact : Cornelia Kutterer
Email : cku@beuc.org
Lang : EN/FR

***Review of the EC legal framework
in the field of copyright and related rights
– Commission staff working paper –***

BEUC response

**Bureau Européen des Unions de Consommateurs, Avenue de Tervueren 36, bte 4, B-1040 Bruxelles
Tel: +32(0)27 43 15 90, Fax: +32(0)27 40 28 02, consumers@beuc.org, <http://www.beuc.org>**

Europäischer Verbraucherverband
Europese Consumentenorganisatie
Organización Europea de Consumidores
Organização Europeia de Consumidores
Organizzazione Europea dei Consumatori

Neytendasamtök Evrópu
Európai Fogyasztók Szervezete
Evropska potrošniška organizacija
Den Europeiske Forbrugerorganisasjonen

Euroopan Kuluttajaliitto
Europejska Organizacja Konsumentcka
Ευρωπαϊκή Οργάνωση Καταναλωτών
Den Europæiske Forbrugerorganisation
Den Europeiska Konsumentorganisationen

BEUC, the European Consumers' Organisation, is the representative organisation of 38 independent national consumer organisations from the countries of the EU, EEA, and elsewhere in Europe. BEUC, as the representative of consumers, attaches great importance to a balanced regime of intellectual property rights in the public interest. Access to works and information is essential to daily life, public dialogue, exchange of ideas and innovation.

BEUC welcomes the opportunity to comment on the Commission's review of the EC legal framework in the field of copyright and related rights.

I. Introduction

The objective of the review is twofold, to assess whether any inconsistencies on the definitions or on rules on exceptions and limitations between different Directives hamper the operation of the *acquis* or have a harmful impact on the fair balance of rights and other interests, in particular of consumers, and, to analyse whether the *acquis* contains shortcomings which have a negative impact on the functioning of the Internal Market.

As to the first part, the staff working paper considers adjustments to the Directives adopted in the field of copyright and related rights between 1991 and 1996¹ and measures to increase their consistency with one another and with the standards set by the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society (hereinafter the InfoSoc Directive) from a horizontal angle and more specifically regarding the *acquis* Directives.

Under the second aspect, the paper addresses certain specific issues (originality, ownership, definition of the term "public", points of attachment, moral rights, exhaustion of rights), which are currently not harmonised, in order to verify whether the lack of harmonisation has had an adverse effect on the good functioning of the Internal Market.²

We start our comments with a general remark on the Commission's approach and then examine the specific recommendations set forth by the Commission.

II. General concern as to the approach of the paper

BEUC welcomes the Commission's commitment to update and simplify the *acquis communautaire* as announced in its Annual Policy Strategy for 2004 and in the Better Regulation Action Plan. We generally value any attempt to simplify, fine-tune and codify legislation if done with due care.

We understand that the Commission is undertaking a tidying up exercise rather than a reform or in-depth review of the existing *acquis*. We fear that this approach in the context of the new copyright protection framework forecloses the proper assessment of some Directives, in particular the InfoSoc Directive, as to

1 These Directives are Council Directive 91/250/EEC of May 1991 on the legal protection of computer programs (hereinafter the Software Directive), Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter the Rental Right Directive), Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (hereinafter the Term Directive) and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (hereinafter the Database Directive).

2 The staff working paper does not consider Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and right related to copyright applicable to satellite broadcasting and cable transmission being part of a separate revision process.

their economic benefit and to the balance between exclusive rights in works and the public interest at stake. It is thus wholly inappropriate at this stage.

At present we observe the extension of exclusive rights and the deterioration of societal rights. We therefore believe that codification and fine-tuning should be exercised after a proper assessment of the existing acquis and not ahead of time, to ensure that necessary adjustments can be taken account of.

We are in particular worried about the fact that the Commission considers the InfoSoc Directive being the standard against which other Directives should be matched up to. We call into question that the InfoSoc Directive can be legitimately used as the benchmark. We believe that the InfoSoc Directive does not achieve its objectives to ensure that competition in the internal market is not distorted and that creativity and innovation is fostered.

With new technologies, in particular in the online environment, many ambiguities in the InfoSoc Directive have been crystallising to the detriment of consumers. The High Level Group on DRM – established under the aegis of Commissioner Liikanen – attempted to deal with some of the shortcomings, in particular interoperability, migration to legal services, levies, and consumer acceptance. BEUC as a member of the HLG opposed two-thirds of the report. The fourth aspect – consumer acceptance – has not been properly addressed.³ We also point to the Article 12 Contact Committee meeting of 11 October where problems arising from the implementation of the InfoSoc Directive were discussed, in particular in the context of private copying exception and levies. In our view, the meeting has made apparent that the InfoSoc Directive entails crucial flaws.

These failings are most evident with regard to the exhaustive but optional list of exception to exclusive rights which will not enhance the internal market. Levy systems in respective Member States are fundamentally different in scope and administration thereby inhibiting trade and competition. Article 6 (4) of the InfoSoc Directive hinders the benefit of certain exceptions and goes further than copyright, thereby suppressing innovation and legitimate uses.

As to the second objective – to analyse whether the legislative framework in the field of substantive copyright law still contains shortcomings - it is remarkable that the paper claims that there are no indications of any problems in practice despite the growing resistance to ever expanding intellectual property rights from society groups, consumer organisations, scientists and academics and an increasing community relying on alternatives (creative common, Gutenberg project, open source software, Wikipedia, etc.).⁴ Has the Commission so far simply rejected these concerns?

An increasing number of European proceedings in the field of competition law involving the abuse of monopolies based on intellectual property rights should be seen as an indicator that excessive intellectual protection is to the detriment of a competitive environment.⁵ Rights owners get a monopoly by law. In itself that is not unfair as they do constitute and protect “works of the mind” but the law-given monopoly requires effective government control. The idea that intellectual property rights constitutes one of the last law-given monopolies in the western world with only general and no specific competition laws to counterbalance that, is strange at least. In the telecoms market, each western country has a National Regulatory Authority that exist by law at least until there is a telecoms market that thrives through effective competition. A legal framework in the field of copyright and related rights that allows for more exclusive rights, which are difficult to get hold of and in some cases have a detrimental effect on the use of “works of the mind” by users, patients, consumers and creators is a risk we envisage with the review. Ensuring fair use of exclusive rights of rights holders allowing for the benefits of the law-given monopoly for all,

³ See BEUC Position Paper on DRM, 15 September, 2004.

⁴ See, for example, the Geneva Declaration on the Future of WIPO, September 2004.

⁵ See, among many others, IMS Health C-418/01, COMP/37.792_MICROSOFT/W2000 (as reverse-engineering Windows Media Player would contravene the Copyright Directive, it became necessary for DG Competition to demand Microsoft to unbundled it); Which? Press release, 15 September 2004.

should be the main effect of the review of the EC legal framework in the field of copyright and related rights.

The tension between exclusive rights as against the public interest and effective competition needs to be addressed. Consumers have an interest in ensuring that innovation is encouraged and creators and innovators receive a fair return. Protection should be strong enough to ensure innovation but not so strong as to stifle the benefits to the public, the consumer and competition. Intellectual property thus may confer time-limited monopoly privileges but these must not be excessive, and abused in an anti-competitive way to the detriment of consumers.

We welcome the Commission's engagement to reform collecting societies.⁶ We hope that the outcome will create a transparent and efficient system where creators are well represented. The system should promote open competition to the benefit of users and consumers. We also welcome the Commission decision to introduce a "repair-clause" into the Community's design legislation. The clause opens the independent aftermarket of visible vehicle spare parts and provides for free competition. We support these initiatives and wish to see the same vigorous engagement with respect to equally important interests at stake in the context of the review of the EC legal framework in the field of copyright and related rights.

Discussions still need to be initiated with respect to contractual arrangements, effective arbitration, statutory licensing, a need for a safety clause when technical protection measures are abused ("fruit of the poisoned tree clause"), and rights for consumers in the digital environment to traditional rights and usages (consumption), information, labelling, and redress.

BEUC thus recommends that these concerns are appropriately considered and suggests a broader approach with respect to the existing IP framework in the European Union in order to deal with crucial issues at stake and to re-balance the tension between competing policies. We consider that this balance was not always being fairly drawn to the benefit of rights holders (and not necessarily the creators) and to the detriment of consumers. Proper economic impact studies and cost benefit analysis must be undertaken as regards each single directive.

There is a need to make sure that copyrights do not constitute unnecessary barriers to access to- and use of- "works of the mind". In ensuring a good understanding of the effects of the review, these effects should be monitored and translated to the lives of ordinary people and not barely to the promised economic benefits for rights owners, moreover they should be set out in the benefits of society as a whole.

III. Horizontal issues (2.1)

Overall approach on exception and limitations (2.1.3.1) - BEUC agrees with the Commission that a case-by-case assessment should be undertaken as to whether or not there is a need for extending the scope of specific exceptions in earlier Directives.

However, this should not be limited to article 5 of the InfoSoc Directive. The different layers of provisions dealing with exceptions and limitations have contributed to legal uncertainty. The need to broaden the scope of exemptions or adding exemptions to the respective Directives should thus be examined within the revision of the respective Directive, additionally against the InfoSoc Directive, and more importantly, vice versa. It may, for example, be useful to also consider specific exemptions of the existing *acquis* to be transferred to the InfoSoc Directive, for example the back-up copy exemption of the Software Directive.

The exception for temporary acts of reproduction (2.1.3.2) - BEUC supports the Commission's conclusion to introduce an exception to copyright on software for temporary acts of reproduction aimed at

⁶ COM (2004) 261.

intermediaries transmitting, for example, software over networks. This will help to achieve legal certainty for delivery services.

We also support the alignment of the respective provisions of the Database Directive with Article 5 (1) of the InfoSoc for transitional reproduction. In this context, we believe that the terminology of 'lawful user' should be clarified, in particular as the InfoSoc Directive does not rely on this concept. In our view, the lawful user is a user permitted to access and to use a database on the basis of a statutory right or on the basis of a licence. There is a considerable risk that it might be interpreted in a restrictive manner merely based on contractual licences obtained for access and use of such database and not on the basis of a statutory right.

IV. Vertical issues (2.2)

1. The Software Directive (2.2.1)

The Software Directive seeks legal protection for computer programs which require the investment of considerable human, technical and financial resources and which play an increasing role in a broad range of industries. With the deployment of software in a wide range of consumer products, copyright law comes increasingly into conflict with consumer rights.⁷ Certain ownership rights in programmes have led to the maintenance of high prices and a lack of quality and reliability of programmes in the commercial chain and ultimately adversely effect the competitive environment of high-tech industries. The commercial "raison d'être" of the protection is unsurprisingly called into question by the expanding market shares of 'open source' programmes and 'free software' which rely on different revenue channels.

Definition of computer program (2.2.1.1) - BEUC agrees with the conclusion of the Commission that there would be no added value in inserting a definition of computer program in the Directive.

Decompilation (2.2.1.3) – BEUC strongly disagrees with the Commission's conclusion that amendments to the provisions on decompilation should not be envisaged. Although the Commission acknowledges that there are claims that "decompilation is in practice too limited and does not sufficiently meet the objectives of the provision", it suggests that there is no evidence for any need to revise.

BEUC believes that article 6 of the Software Directive is too narrowly drawn and inhibits competition and innovation. Decompilation, or reverse engineering, is common in many industries. Within the software industry, it is in particular important because software will usually depend on other software to function. Competition within the software solution market is very dependent on being able to interoperate. "Lock-ins" can only be avoided when the right to reverse-engineering can be interpreted widely given that the design of modern software is becoming less monolithic and more network-centric.

Protection of technological measures (2.2.1.4) – BEUC agrees with the conclusion that article 7 of the Software Directive remains a flexible solution and to refrain from introducing article 6 (1) of the InfoSoc Directive. The Commission acknowledges that, if a similar provision to Article 6 (1) of the InfoSoc Directive were to be introduced in the Software Directive, this may in practice inhibit or prevent the application of the exceptions in the Software Directive.

Further to this, it could effectively stifle competition within a particular market. If it was made illegal to work around methods such as encrypting in order to decompile the software then the whole right to decompile would be undermined. Interoperability could thus be prevented, proprietary markets would prevail and entry into markets could be foreclosed.

⁷ See, for example, Cour d'appel de Versailles 1ère Chambre, 1ère section 30 septembre 2004 S.A. EMI Music France/ CLCV.

Further to this, the Commission should ensure that other Directives, in particular the InfoSoc Directive, do not prevent developers from making use of their rights to decompile. As an example, the InfoSoc Directive seems to protect DRM systems against decompilation and thereby suppresses effective competition in the market place. We recommend inserting a provision to ensure that the right to decompile takes precedence.

In fact, a “fruit of the poisoned tree” rule (“abuse-it and lose-it”) could prevent right holders from abusing their monopoly. This should be considered in particular for the technical protection measures in the InfoSoc Directive.

2. The Rental Directive (2.2.2)

Derogation from the public lending right (2.2.2.1) – BEUC agrees with the Commission’s conclusion that no action needs to be taken with regard to the derogation from the public lending right contained in Article 5.

The paper also observes that the role of libraries is undergoing profound changes due to technology and that the market place needs to be continuously observed. We urge the Commission to take due account of the cultural promotion objective of public lending when assessing further actions in this respect.

Communication to the public (2.2.2.2) – BEUC agrees with the Commission’s conclusion that article 8 (2) of the Rental Directive should not be “up-graded” into an exclusive right.

We consider the most contentious issue in the context of this Directive is the unauthorized downloading of music or film files over the Internet. We criticise the pressure of the entertainment industry (especially companies involved in the production and sale of music) to further expand their rights and to establish simultaneously more robust mechanisms of punishment.⁸ We are extremely worried about the recent launch of European-wide lawsuits against consumers using file-sharing software to make their music collections available to others to download for free.⁹ Whilst illicit uploading and downloading of music and films cannot be ignored, it is possible that the industry’s approach will backfire. If the industry offered better value for money, which the technology should enable it to deliver, it would probably provide a greater disincentive to illicit downloading than it will by pursuing individuals through the courts. The challenges posed by the development of the digital economy will not be solved by introducing increasingly draconian measures against consumers through amendments to intellectual property law.

We believe that consumer rights in the digital environment could enhance the acceptance of music download or other on-demand services and diminish increasing annoyance of consumers. We therefore urge the Commission to take this perspective into account in order to avoid a clash between law and society.

3. The Term Directive (2.2.3)

Duration of related rights (2.2.3.1) – BEUC strongly supports the Commission’s conclusion that there is no need to extend the term of copyright protection. Extending the duration of right to 95 years (after the death of the creator) would lead to a reduction of choice on the market in Europe.

BEUC always argued that copyright should be a balance between an author’s right and the public interest. The public has an interest in being able to access the work and authors have a right to be remunerated for their efforts. To balance the interest of the public being able to access work, copyright extends a time-limited monopoly to the author as economic encouragement for them to make the work available. The

⁸ See BEUC’s Position Paper on DRM, 15 September 2004.

⁹ Financial Times 13 October 2004.

duration of rights is of direct interest to consumers as it affects the availability of works in the public domain.

It is unclear how copyright extensions meaningfully add to the incentives to produce new works to justify the loss of public benefit. There have been significant debates regarding the usefulness of posthumous continued recognition of rights as related to the incentive aspect of copyright. Already the balance is strongly in favour of authors. They enjoy a monopoly on the works for a period which far exceeds the useful lifespan of many works, most evident with regard to software. "Abandonware" is a remarkable result of excessive duration of protection.

However, other obstacles in the context of the duration of copy protection exist for the consumer to benefit from the availability of works. Many works do not stay in the commercial chain and a majority of sound recordings are locked in vaults. The public has limited choice and the performer has no royalties from albums which are unavailable. The Commission should consider measures to tackle these problems that lead to a significant reduction of works in the public domain. Such measures could entail a lessening of the duration of rights, or a sanction on exclusive rights when - once in the commercial chain - a work has been not made available for a certain period of time ("Use it or lose it").

4. Database (2.2.4)

We understand that the Commission will address a number of substantive issues in the forthcoming report on the functioning of the directive (due to be submitted in summer 2005).

The key issue regarding protection for databases is whether 'sweat of the brow' efforts (as opposed to innovation) should attract intellectual property protection at all. We would like to remind the Commission that there are serious doubts for a need on database protection. The Commission should therefore (and before finalizing the report) undertake an extended impact assessment to produce evidence that the database has increased investment. In case such evidence cannot be produced, the Commission may need to consider the repeal of the Database Directive. It should in any event refrain from promoting the protection of databases on an International level as long as an impact assessment has not been undertaken.

Databases protected by the sui generis right are protected for 15 years but any substantial change to the content of the database could qualify the database for its own term of protection, potentially giving such database owner perpetual protection.¹⁰ Notwithstanding our reservations about the validity of intellectual property protection for databases, this runs fundamentally counter the character of copy protection. The sui generis right has introduced a great imbalance between rights of database users and producers. We therefore suggest ensuring and clarifying that the protection of the sui generis right cannot exceed a maximum protection irrespective of how many times it was updated or the content was changed.

We urge the Commission to address these issues in the forthcoming report. We will have more to say then.

Exception for the disabled (2.2.4.1) – BEUC fully agrees with the Commission's conclusion to bring the database right into line with the exceptions allowed under Article 5(3)(b) of the InfoSoc Directive for the benefit of people with a disability.

The Commission's analysis of the issue in respect of possible different interpretation in Member States, however, shows that there is much legal uncertainty which needs to be addressed by the Commission. We also note that exemptions must be mandatory to evoke legal certainty in the internal market.

¹⁰ See Opinion of Advocate General Stix-Hackl in Case C-444/02 and in Case C-203/02.

Exception for the benefit of libraries (2.2.4.2) - BEUC supports the Commission's conclusion to include an exception regarding reproduction rights for libraries. Libraries must be enabled to preserve digital materials that might otherwise disappear once their immediate commercial distribution has been achieved.

V. Issues outside the acquis (3)

BEUC disagrees with the Commission's conclusion that further legislative action at Community level is at present for the most part unnecessary (see above, point II).

Initial ownership of rights (3.2) – BEUC supports the Commission to analyse this issue relating to the relationships between creators and rights holders further. The nature of creator/rightsholder relationship may hinder competitive developments in markets by limiting possibilities for new entrants and new works/products to the detriment of consumer choice.¹¹

Definition of term of public (3.3) – BEUC encourages the Commission to open a new debate on the public domain. The protection of the 'public' is increasingly central to IPR-related concerns for consumers.

Exhaustion of rights (3.6) – BEUC has always supported the principle of International exhaustion. Consumers can expect major benefits as price differences between goods sold in the EU and goods sold in third countries can be substantial. Competition in the EU and on a global level will lead to lower prices and better quality for consumers. Impeding parallel imports impedes competition on a global level and deprives consumers from potential economic benefits.

END

¹¹ See, for example, IMS Health C-418/01.