



*The European Consumers' Organisation*

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Contact : Ursula Pachtl

Email : [upa@beuc.org](mailto:upa@beuc.org)

Lang : EN

***Comments on the Common Position  
on the Directive on Copyright in the Information  
Society***

**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](mailto:consumers@beuc.org), <http://www.beuc.org>**

Europäischer Verbraucherverband  
Europese Consumentenorganisatie  
Organización Europea de Consumidores  
Organizzazione Europea dei Consumatori  
Európai Fogyasztók Szervezete

Evropska potrošniška organizacija  
Den Europeiske Forbrugerorganisasjonen  
Den Europeiska Konsumentorganisationen  
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Euroopan Kuluttajaliitto  
E?????aik? Opy???? s? Kat a?a??t??  
Den Europæiske Forbrugerorganisation  
Organização Europeia de Consumidores

## ***I. Introduction***

**BEUC** is the European Consumers' Organisation, based in Brussels. We represent the concerns of our members, 29 independent national consumer organisations from 20 European countries, to policy makers in the European Institutions.

For European consumers, the proposed copyright directive is a very important piece of EU legislation, which will have a crucial impact on the further development of the information society and the participation of Europe's citizens/consumers in it.

BEUC is particularly concerned with the way the new legislation will regulate exceptions/limitations to copyright, which allow citizens/consumers to make use of copyrighted work such as private copying and copying for other purposes in the public interest. Our main worry is to ensure that the proposed directive will not destroy the traditional balance between the economic interests of the rightholders/content industry and the interest of the consumers/users to maintain the right to make reasonable copies under limited, well-defined circumstances, also in a digital world. The main issue in preserving this balance is the question of limiting the use of contractual terms or technical protection means to overrule exceptions to copyright. .

BEUC was very unhappy with the former Parliament's first reading opinion<sup>1</sup> in March 1999. In an attempt to combat piracy of digital material on the Internet, the former Parliament adopted a number of amendments which changed the proposal for a Directive for the worse in terms of consumer protection. We are therefore pleased that governments introduced in their Common Position<sup>2</sup> some new concepts and clarified some questions, which aim at a more balanced proposal.

However, for the consumer as the beneficiary of the general exception to copyright for private, non-commercial copies, the common position still does not provide an acceptable solution, particularly when it comes to the question of copying in the on-line environment. Two provisions especially in the common position would have severe negative consequences for the development of the information society and the consumer's interest. These provisions, which should be reviewed by the Parliament, are the following:

1) The Council text stipulates that whenever copyrighted work based on a contract is provided, and the service is offered "on-demand" to the consumer, rightholders are free to impose any conditions they wish through contractual terms (Article 6.4, para 4). The consequence of this provision would be that any exceptions to copyright provided for in the law could be out-ruled by contract clauses.

2) The Council raised two different concepts for the enforcement of the most important exceptions to copyright. In the case of some exceptions, Member States are required to intervene if rightholders technically block such lawful uses and do not accommodate such exceptions by means of voluntary measures or pan-industry agreements (Article 6.4, para 1). By contrast, in the case of private copying, Member States are not obliged to intervene if lawful uses are blocked. We consider that there is no justified reason for this difference, which is contrary to the need to establish a Single Market and would disadvantage consumers in those countries in which governments prioritise rightholders' interests.

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<sup>1</sup> OJ C 150, 28.5.99, p. 171

<sup>2</sup> Common Position on a Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, OJ C xxxx

**For these reasons we now call on the Parliament to**

- ? **Ensure that legal exceptions for copying cannot be nullified through contractual clauses** (see point III.1.2.)
- ? **Harmonise the concept of the enforcement of exceptions by applying the same regime to all exceptions, including the exception on private copying** (see point III.1.1.)

## **II. General remarks**

It is generally acknowledged that technology brings new choices for copyright owners to limit/control/monitor the distribution of copyrighted work. We consider that this new technology should also offer new choices to consumers, but not take away established rights. To date European citizens and consumers still regard digital technology as potentially bringing them all kinds of benefits, including new choices for accessing and enjoying information, education and entertainment.

It has to be considered in this very context that the pending copyright directive is one of the main initiatives of the Commission's and the Council's e-Europe action plan, which is subtitled: *An information society for all*. However, it appears that the leitmotiv of the e-Europe initiative, namely to create an information society for all European citizens/consumers, has been interpreted by policy makers in the sense of creating an information society dominated by rightholders: According to the pending legislation, consumers will have less rights in the information society than they have in the traditional environment and they will have different rights in different countries. In addition they will not know which rights they have in relation to a cross-border transaction, given the unharmonised approach and the excessive room for manoeuvre of Member States in relation to private copying.

### The on-line environment

The new information/communication technology allows rightholders to sell their products directly to the consumer on the base of contractual terms. This direct link with the consumer leads to their total control over the copied work and allows them moreover to receive compensation not only for each single copy, but indeed for each single use of the protected material. Consumers will find themselves in a situation where they are charged for everything, from viewing to printing.

It is likely that through mass-market contracts/licenses - combined with the use of technical protection mechanisms - users/consumers will be impeded from making any reproductions for any purpose whatsoever. It seems that the instrument of contract law will lead to a perfect monopoly for controlling the flow of information. It will also lead to entirely different arrangements and dynamics of the use of protected material. The result of such a situation has nothing to do with conventional copyright protection.

For these reasons one of the basic challenges for the legislator in relation to the proposed directive is to clarify the relationship between the instrument of contract law, which so far has not been used by rightholders in relation to individual consumers, and copyright and its exceptions. BEUC is strictly opposed to the approach in the Common position, where this relationship is regulated only regarding on-demand services (see point III.1.2.) by giving total priority to contractual agreements.

Below we set out what changes should be made to the Common position. In doing so, we focus on the main/principal points for consumers/users.

### **III. Specific remarks**

#### **1. Need for changes of the Common position**

##### **1.1. Enforcement of exceptions - Article 6.4**

One of the big issues of this directive is the question of how the relationships between the exceptions to copyright in Article 5 on the one hand, and on the other hand, the use/protection of technical protection mechanism by rightholders to control copying, should be shaped. This is essential because due to technological development, these technical protection mechanisms could render all exceptions under Article 5, which the legislator established, meaningless.

##### 1.1.1. Enforcement of exceptions in general

According to the new Article 6 paragraph 4, Member States are required to intervene if beneficiaries of (some) exceptions cannot exercise these exceptions. In this case Member States are required to take "appropriate measures":

*"Art. 6 4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exceptions or limitation provided for in national law in accordance with article 5.2a, 2c, 2d, 2e, 3a, 3b or 3e the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation, where that beneficiary has legal access to the protected work or other subject matter concerned.*

It has to be stressed that with this provision, the Council opted for a regime which puts the responsibility as regards the impact of technical protection mechanism on exceptions first of all entirely into the hands of industry. Industry is supposed to take "voluntary measures" or "agreements with other parties concerned" to take into account these exceptions. Only where industry fails to come up with such measures, are governments asked to intervene.

This obligation for Member States applies only in the case of some exceptions, including reprographic copying, library use, illustration for teaching and scientific research and use by people with a disability, but not in the case of private copying.

According to this new concept, users/consumers are under no circumstances allowed to circumvent any technical protection mechanism, even if it is evident that a mechanism serves to block perfectly legal uses. In this case users would depend on the government to intervene. If the governments do not intervene, it would have to be taken to court. Indeed, this is not a very promising perspective for European consumers.

BEUC does not regard this concept as a very satisfactory solution; however, the main problem lies elsewhere: This paragraph applies only to some exceptions listed in Article 5. It does not cover the exception regarding private copying (Article 5.2.):

##### 1.1.2. Enforcement of the private copying exception

In cases of private copying, Member states are not obliged to intervene in case that industry itself does not set up satisfactory measures, but whether the law should be enforced or not is open to every Member State. The according provision reads as follows:

Article 6 paragraph 4 subparagraph 5:

*"A Member State may also take such measures in respect of a beneficiary of an exception provided for in accordance with Article 5(2)b, unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception concerned and in accordance with the provisions of Article 5(2)b and (4), without preventing rightholders from adopting measures regarding the number of reproductions, in accordance with these provisions."*

This concept leaves much uncertainty as to whether the rightholders' measures will be adequate or not. We can assume that, as promoted by the common position, rightholders will agree with technology industries on the use of technological blocks. Agreements will reach from "no copy" to one copy or more. Once such agreements or "voluntary measures" have been put in place, Member States will most likely not feel that they have to intervene to the benefit of users/consumers.

We consider that there is no justified reason why in the case of the exception on private copyright Member States should not also be obliged to intervene if the market does not develop satisfactory solutions by itself.

BEUC therefore asks that this subparagraph be deleted and that the according provision on private copying, namely Article 5. 2. b, be added to the list of other exceptions in the previous paragraph.

## **1.2. Relationship between contracts and exceptions to copyright**

BEUC is most concerned about a provision which was apparently only inserted into the text at the last minute, but nevertheless would have major negative consequences:

In the case of on-line delivery of a work subject to contractual terms rightholders are permitted to prevent any private copying (and other copying) through technological blocks. This clearly means that in the Internet environment the right to make private copies or copies for other public purpose (teaching, science) can be entirely ruled out by industry.

The provision reads as follows:

*"The provisions of Article 6(4), first and second paragraphs, shall not apply to works or other subject matters made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them".*

With the addition of this sentence, the Council gave a blank cheque to industry/right holders to use technical means to prevent any form of copying, particularly in the on-line world. This provision contradicts the whole concept that the Council developed in Article 6.4. The consumer is left without any bargaining power and it is then entirely up to the rightholder to decide what uses are acceptable for what work. Consumer rights would be determined by technology and not by democratic decision making.

Moreover, these contractual agreements have to be seen in combination with electronic copyright management systems, which are a perfect means of enforcing the restrictive clauses incorporated in mass market licenses. In relation to private copying for example, the use of these systems is neither limited nor somehow guided by the proposed legislation.

BEUC therefore asks that

- 1) this provision (Article 6.4. subparagraph 4) be deleted and
- 2) it should be clarified that certain exceptions cannot be overridden by contract law through adding a new Article 5.6.:

"Contractual provisions contrary to the exceptions or limitations provided for in national law in accordance with Article 5.2.a, 2.b, 2.c, 2.d, 2.e, 3.b, 3.n or 3.o shall be null and void."

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