



The European Consumers' Organisation

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***BEUC's comments on the amended proposal
on a Directive on copyright in the Information Society***

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BEUC, the European Consumer organisation, regards the proposed copyright directive as an important piece of EU legislation which will have an essential impact on the further development of the information society and the participation of Europe's citizens/consumers in it. Unfortunately, in its first reading opinion in March 1999 the European Parliament, in an attempt to combat piracy of digital material on the Internet, adopted a number of amendments which changed the proposal for a Directive for the worse in terms of consumer protection.

BEUC is very concerned about the fact that in its new proposal¹, the Commission supported many of the Parliament's amendments, particularly the amendments on private copying and copying for other purposes in the public interest². Our main concerns are on two NEW aspects, which the Commission has introduced following the Parliament's first reading opinion: 1) the priority of technical protection means over exceptions to copyright and 2) the conditional linking together of exemptions for private copying with compensation schemes for right holders. BEUC now calls on Ministers to provide a more balanced solution in their Common position, which would allow consumers to maintain the possibility of copying for purely private, non – commercial use as well as for other purposes in the public interest, and to avoid a situation in which industry/right holders have the power to impede consumers from private copying whilst at the same time making them pay for it.

In particular we call upon the Council to:

- ? **establish a non-exhaustive list of exceptions to copyright** (see p.2)
- ? **limit the use of technical copyright protection systems and ensure that legal exceptions for private copying cannot be nullified by them** (see p. 3-4)
- ? **abstain from harmonising compensation systems** (see p. 2-3)
- ? **clarify that circumvention of technical copyright protection systems on the grounds of legal exceptions is allowed** (see p. 5)

Below we set out what changes should be made to the Commission's amended proposal, for it to become a truly balanced piece of legislation. This position paper focuses on the most important provisions.

Exceptions to the right of reproduction and to the right of communication to the public - Article 5

Article 5 establishes a non-mandatory list of exceptions to copyright, which is exhaustive. Consequently Member States are not allowed to provide for any exceptions other than those enumerated. We consider that this list should be mandatory to guarantee certain exceptions to

¹ Amended 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 180, 25. 6.1999, p. 6

² BEUC shares its concerns about the proposed directive with other user organisations such as EBLIDA on behalf of libraries, EDF on behalf of people with disabilities, EBU on behalf of visually impaired people as well as EACEM on behalf of the consumer electronics industry. We express our common concerns through EFPICC (The European Fair Practice in Copyright Campaign).

copyright and that Member States should be allowed to maintain and to introduce exceptions which they consider necessary – e.g. in the light of further developments of digital techniques - or which they have traditionally. Such an approach would be in line with the WIPO treaties, which allow Member States to develop further exceptions in their national laws³. Furthermore, an open list would not be to the detriment of the aim of having a fully harmonised Single market, since the Commission did not propose a mandatory list of exceptions anyway.

Article 5.1. Exceptions for temporary copies

We welcome the new wording for its clarifying effect.

Article 5.2.

Basically, there are two main new points in this Article which raise concern:

The issue of compensation for rightholders

As regards **private copying** in respect of productions on audio/visual recording, the revised proposal specifies that Member States, if they provide for such an exception, would be obliged to ensure **fair compensation for right-holders**. It is up to Member States to decide the form of such a compensation.

“(...)2. Member States may provide for limitations to the exclusive right of reproduction...in the following cases:

(new Art.5§2.b)

*(...) in respect of reproductions on audio, visual or audio-visual analogue recording media made by a natural person for private and strictly personal use and for non-commercial ends, **on condition that the rightholders receive fair compensation.**”*

With this amendment, the Commission supports the first reading opinion of the Parliament, which had asked for the introduction of a link between private copying and the establishment of a fair compensation system for rightholders. We consider that the requirement of a compensation system for rightholders as a pre-condition for any exception for private copying (as well as for copying for the purpose of teaching/scientific research, see Art. 5.3.a) is not justified for the following reasons:

BEUC has always acknowledged the right for authors in general to receive remuneration for any loss suffered as a result of copying. The Commission already made an attempt to harmonise private copying and its compensation⁴ in 1993. At that time BEUC stated that any compensation system is only justified if and as long as specific market damage has been demonstrated. This also remains our position regarding the digital environment. We must not forget that private copying by its very nature has nothing to do with PIRACY.

Furthermore, we consider that the granting of a right to make private copies constitutes the prerequisite for any compensation paid by consumers. Otherwise consumers would be asked to pay the bill without getting anything in exchange. By contrast the current proposal expressively gives right holders (in addition) full power to use technical measures, which will impede consumers from making any copies (see next point).

³ Article 10 of the WIPO copyright treaty 1996

⁴ Consultation paper on private copying, issued by EC Directorate General XV, 1993

Generally speaking, we question the need for a harmonisation of remuneration for private copying throughout the Community. Even if there would be evidence that copyright holders are losing and how much, any compensation would need to meet relevant requirements such as:

- a clearly identified burden on the industry to prove measurable lost sales of pre-recorded works as a result of private copying;
- the principle of proportionality: the measures should be practical, compensating the rightholders without over-compensating them.
- strict linkage to lost sales. BEUC would oppose any extension to cover cultural subsidies: payments which do not end up with copyright holders are in fact no more than an indirect tax.
- this assessment could lead in some cases or sectors to zero compensation

Special regard has to be given to persons with disabilities, who need to be able to access material (e.g. make copies) through special formats e.g., blind people who have to transform copyrighted work into Braille format. BEUC considers that there should be a general exemption from the payment of compensation to all people with visual or hearing impairment. Specific attention should also be granted to educational institutions.

However, BEUC does not ask that all private copying be free, but we ask for a right to be granted to consumers to make private copies, which – under certain limited circumstances, see above - could be linked to reasonable compensation for rightholders.

Therefore we would like to restate our original proposal (see BEUC position paper on the first proposal for a directive, BEUC/109/98) to introduce a “fair practice” provision in the directive, which would establish criteria for defining in which cases private copying or copying for public interest uses is “fair” and therefore should be covered by exceptions.

The issue of technical copyright protection systems to impede copying

According to the new wording in Article 5.2.b a), in the case of **digital** recording media, rightholders would be able to control any private copying by way of operational, reliable and effective **technical means** to protect their interest. The amended article 5.2. would give priority to **technical blocks** over consumer rights.

*“(Art.5§2.b) bis) (...) in respect of reproductions on audio, visual or audio-visual digital recording media made by a natural person for private and strictly personal use and for non-commercial ends, **without prejudice** to operational, reliable and effective **technical means** capable of protecting the interest of rightholders; for all digital private copying, however, fair compensation for all rightholders must be provided;*

With this provision, copyright holders will be left with far too much power: Under the proposed amendments, the Commission gives a blank cheque to industry and right holders to use technical means to prevent private non-commercial copying. Even if exceptions to copyright would provide consumers/users with reasonable rights to make copies for purely private use, they would not be able to make use of their rights, because of technical blocks. Consumer rights would be determined by technology, and not by democratic decision making.

Furthermore, the Commission requires that fair compensation be ensured for rightholders (see above) as a precondition for any private copying exception. This would mean that consumers are obliged to pay for nothing or, in other words, pay twice. We consider that there is no case

for proceeding with possible levies or compensation in general if technical devices for impeding private copying are used everywhere.

Any development of technical systems of protection should be accompanied by measures to **prevent monopolies**. We fear that if no measures are taken, these protection systems will cause prejudice to consumers with regard to access to multimedia products. Furthermore they could lead to **extra-costs** directly passed on to the consumer.

Finally, the impact on consumers'/users' **privacy** and **data protection** of these technical measures raises strong concerns. Technical protection systems will increase the possibility of observing consumption profiles. Consumers must be protected against unauthorised commercialisation and abuse of such information.

Furthermore, the new wording in Article 5.2. b which defines private copying as “**for strictly personal use**”, and aims at further restricting private copying, does not make sense. It could mean that e.g. the only person who is allowed to listen to a recorded piece of music is the person who made the copy, but not e.g. other people in the same household. We consider therefore that this wording should be deleted.

Article 5.3. a) Library exception

We reject the link between the exception for teaching/research purposes and a compensation system (see comments above)

Article 5.3. b) Disability exception

We welcome the amended wording, because of its broader scope.

Obligations as to technological protection measures - Article 6

BEUC considers that this Article has to be read in the context of Article 5. It must be ensured that if users benefit from exceptions to copyright they can use their right, even if circumvention of protection mechanism would be necessary. Therefore it must be clarified that Article 6 applies only to circumvention which aims at infringing copyright. The current wording should be improved to this purpose.

Relationship between contracts and exceptions to copyright

Recital 29a

“Whereas the exceptions referred to in Article 5. 2) and 3) must not however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders.”

The relation between copyright law and contractual law has to be clarified in the sense that it should not be possible to contract out legal exceptions to copyright, at least not in contracts with consumers.