

FINAL VERSION**GESAC PROPOSALS FOR THE ADEQUATE APPLICATION OF
REMUNERATION SCHEMES FOR PRIVATE COPYING IN THE INTERNAL
MARKET****1. Introduction**

GESAC's ad hoc working group for Private Copy issues, the Private Copy Task Force, has identified some problems in the enforcement of private copying remuneration schemes (PCRS). A significant number of the operators that are liable for the payment of private copying remuneration (manufacturers, importers and distance sellers) seek ways to circumvent this payment. These problems have to be addressed in order to secure the appropriate income of rights holders and to avoid any risk of competitive distortion, which may affect law-abiding importers, manufacturers and retailers that choose to sell legitimate products. Moreover, it is also necessary to address the case of distance sales in order to avoid that liability for the payment of the private copying remuneration be extended to consumers.

While all PCRS consider both manufacturers and importers of recording equipment and/or media as the persons responsible for the payment of the private copying remuneration, this document will mainly focus on the latter and on distance sellers, such as online retailers, since it is the cross-border movement of goods that is Internal Market relevant. Moreover, most manufacturers of hardware and recording equipment and media are located or, at least, have their manufacturing premises, outside the EU anyway.

2. The Existence of different PCRS in the different EU Member States

Today, EU Member States apply different PCRS, or none at all, if they have opted for not implementing the private copy exception, like the UK¹ and Ireland, or are in breach of the Copyright Directive, like Luxembourg, Cyprus or Malta.²

The existence of differences in the way PCRS have been set up obey to a variety of reasons: different legal traditions, different economic developments, differences in consumer behaviour, and sometimes the success of manufacturers limiting the scope of application of the PCRS of some countries to certain products, excluding others that are also capable of making private copies.

The existence of different PCRS (or none at all) in the different EU Member States has been presented as an obstacle to the free movement of goods. GESAC is not aware of any Commission decision or ECJ judgment in that sense.

In any case, GESAC's position is that the existence of different systems in different countries is not a problem in itself, as long as, whenever a product crosses the border, it is subject to the payment of the remuneration applicable in the country of destination.

In order to make this possible, GESAC would like to suggest a number of measures that should be adopted. Since PCRS are set up at national level, most of these measures will have to be adopted at this same level, but this does not preclude the Commission proposing them to Member States. GESAC is open to discuss these measures with manufacturers, importers and distance sellers, since it understands that their cooperation to make the system work is essential. Discussing on specific measures will show the Information Communication and Technology Industry (ICT) true willingness to improve the whole system and eliminate the competitive distortions that an inadequate application of the current PCRS may cause.

3. Proposed Measures

- Declaration of cross-border movements of recording equipment and media

The main problem that private copying remuneration managers (PCRM) are faced with is that it is difficult to control which products subject to the payment of the private copying remuneration are entering each country. PCRM therefore need to be informed whenever these products enter their country.

- ⇒ Proposal No. 1: Member States should ensure that importers be obliged to declare to the PCRM all the products that have crossed the national border and are subject to the payment of the private copy remuneration. Also, payment should be due when the product crosses the national border and not when it is put into circulation.

¹ The UK has indeed a limited private copying exception for time-shifting purposes.

² The situation of Luxembourg, where no system is in place, despite the fact that there is a private copy exception, is particularly relevant, since it affects the application of PCRS in the surrounding countries.

PCRM are aware that some of the stock that some companies introduce in one country is then re exported to another one. Therefore, in order to avoid refund schemes, PCRM could agree to the following commitment:

⇒ Commitment No. 1: If the payment of the private copying remuneration is due when the product crosses the border, PCRM can agree by means of a code of conduct that they will only request payment to debtors when the product is put into circulation.

Such a system would incentivise debtors to cooperate and declare all the products that enter and leave the country, because otherwise they can be subject to the payment of their whole stock, irrespective of it being put into circulation in the country or not.

- Cooperation from customs authorities and VAT Authorities

PCRM would also find it very useful to have access to the information of the VAT and EU customs authorities.

On the one hand, VAT authorities can monitor through the European VAT Information Exchange System (VIAS) the flow of intra-Community trade to detect all kinds of irregularities. Access to that information, in order to check it against the declarations made (or not) when products subject to the payment of private copying remuneration crosses an intra-community border, could facilitate the monitoring by PCRM. The same would be true for information of the EU customs authorities.

On the other hand, national VAT authorities also have information about which products subject to the payment of the private copying remuneration have been marketed in the country where the VAT is due. That information should also be made available to PCRM to improve their monitoring and combat fraud in the payment of private copying remuneration.

It should be stressed that in some countries the private copying remuneration itself is subject to the payment of VAT, and in those countries where it is not, the VAT has to be calculated including the private copying remuneration. Therefore, the exchange of information with VAT authorities would also be beneficial for the latter.

⇒ Proposal No. 2: PCRM should have access to the information of VAT - notably the European VAT Information Exchange System (VIAS)- and EU customs authorities as regards cross-border movement and marketing of products subject to the payment of private copying remuneration.

⇒ Commitment No. 2: If VAT and EU customs authorities grant access to their information on cross-border movement and marketing of products subject to the payment of private copying remuneration, PCRM commit themselves reciprocate as regards the equivalent information that they have.

- Right to audit debtors

Another problem that PCRM's are faced with are the obstacles that they encounter for accessing documents and records of debtors of the private copying remuneration. Access to these documents and records is essential to make sure that debtors are indeed complying with their obligations.

⇒ Proposal No. 3: PCRM's should have the right to audit debtors of the private copying remuneration. If the debtor is located in a Member State other than the Member State where the PCRM operates (i.e.: cases of distance sales), the latter may appoint a sister PCRM to conduct the auditing.

- Liability of operators other than manufacturers and importers

In some countries, like Finland or the Netherlands or Germany, distributors and retailers are subject to secondary liability for the payment of the private copying remuneration. In others, like Italy or Spain, the liability is of joint nature. This makes sure that importers and manufacturers that do not pay the remuneration due do not find an outlet for their products. The same rule should apply to other outlets of products subject to the private copying remuneration. This should include organisers of trade fairs, in which an ever increasing number of foreign traders sell hardware and recording equipment and media without paying the applicable remuneration, and Internet platforms for resellers of these products, such as Ebay.

⇒ Proposal No. 4: Liability for the non-payment by importers or manufacturers of the private copying remuneration should be extended to the outlets of the products. These outlets should include i.a. distributors, retailers, organisers of trade fairs and Internet platforms for resellers of products subject to payment of the private copying remuneration.

- Non-payment of the remuneration as a criminal offence

PCRM's generally fight the non-payment of the private copying remuneration through civil procedures. However, sometimes PCRM's find it difficult to collect adequate evidence. Moreover, it is always desirable to have the support of enforcement authorities. Finally, adequate penalties can have a dissuasive effect.

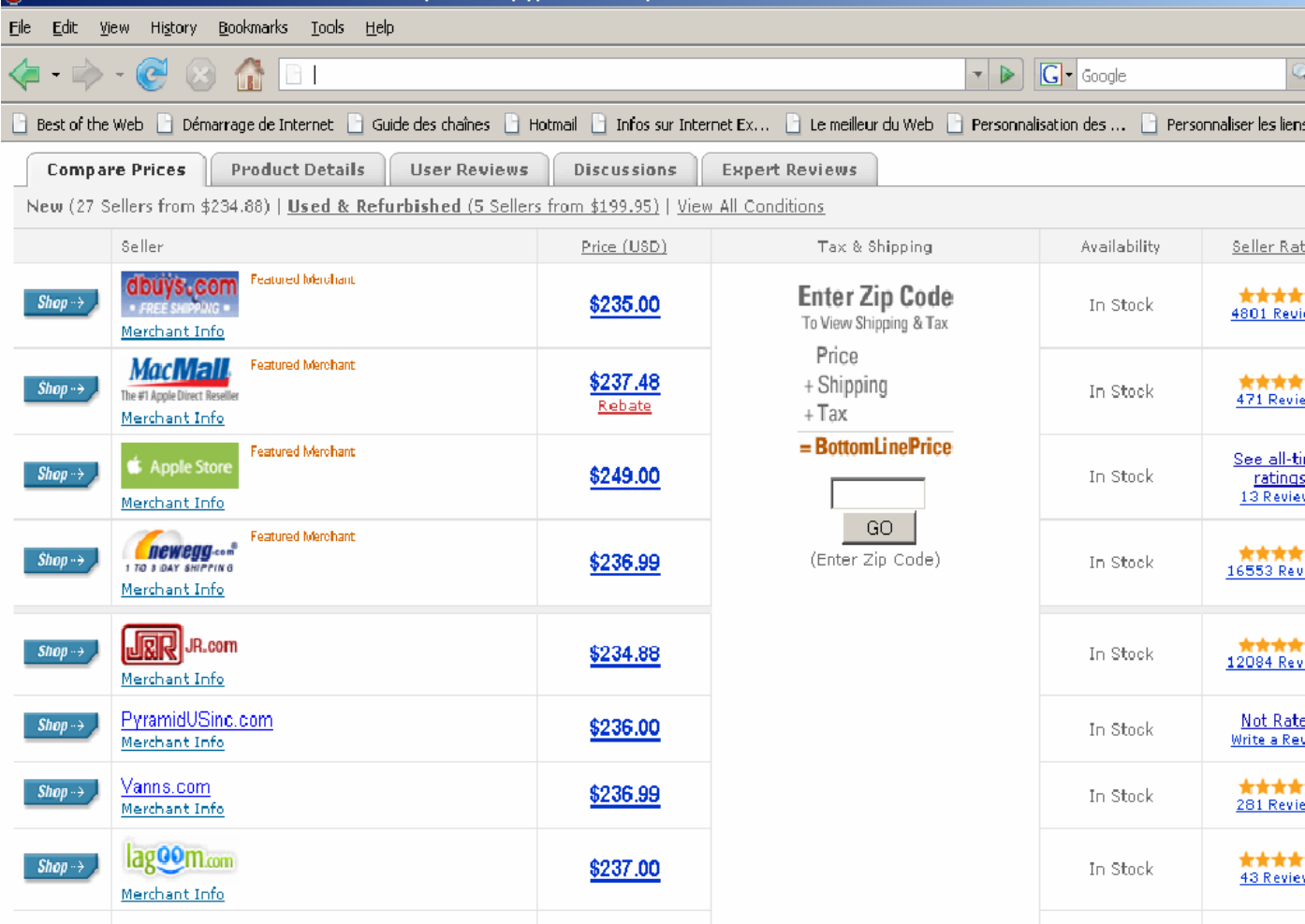
⇒ Proposal No. 5: Member States should consider the non payment of the private copying remuneration as a criminal offence subject to penalties with a true dissuasive effect.

- Distance sales

Cross-border distance sellers, notably online retailers, are increasingly trying to find ways to avoid the payment of the private copying remuneration. As mentioned above, this could affect consumers, who might in some circumstances be considered the importer of the good and thus

liable for the payment of the private copying remuneration. The general point of departure should be that any distance retailer selling goods in a certain country, and not the end consumer, should be subject to the payment of the private copying remuneration applicable in the country where the customer is located.

From a technical point of view, such a scheme is easy to put in place. Distance sellers have to ask customers their country of residence anyway, in order to make the shipments. So, they can give him or her the bottom line price, including the applicable private copying remuneration, once the ZIP Code is introduced. This is often done by websites in the U.S., where online retailers have to apply the sales tax of the state where the consumer is located. This is how it works:



⇒ Proposal No. 6: Member States should ensure that distance sellers, and not consumers, be subject to the payment of the private copying remuneration applicable in the country where the customer is located.

As it has already been pointed out in Proposal No. 1, the distance seller would be obliged to declare the sale and make the payment to the PCRM of the country where the consumer is located when the shipment takes place. In order to alleviate the incumbent formalities on distance sellers, PCRM could agree to the following commitment:

⇒ Commitment No. 3: If the payment of the private copying remuneration is due when the product crosses the border, PCRMs can agree by means of codes of conducts to receive declarations and payments on regular timeframes.

Also, PCRMs need to be able to act against those distance sellers that do not comply with their obligation to declare and make the payment of the private copying remuneration. In order to do that, they have to be able to file the corresponding lawsuit in the country where they operate and not where the distance seller is located. Also, the applicable law should be the law of the country where the PCRM is located. To a certain extent, this could be done by applying existing rules of International Private Law, notably if the non-payment of the private copying remuneration is considered a criminal offence throughout the EU.

Regarding jurisdiction, private copying creates harm where the consumer is located. That should trigger the application of article 5(3) of the Brussels I Regulation.^{3 4}

As regards the applicable law on non-contractual obligations, articles 4(1), 6(1) and 8(1) of the Rome II Regulation,^{5 6} should be applied to distance sales of products subject to the payment of private copy remuneration, when such remuneration has not been paid by the distance seller. This would also be consistent with articles 5(2) of the Berne Convention for the Protection of Literary and Artistic Works.^{7 8}

In addition, as regards electronic commerce in the Internal Market, Directive 2000/31/EC creates a basic legal framework compatible with the implementation of the above provisions in stating that information society services are, in principle, subject to the law of the Member State in which the service provider is established except for matters such as “copyright and neighbouring rights [...]”⁹

³ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴ Article 5(3) of the Brussels I Regulation: “A person domiciled in a Member States may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”

⁵ Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁶ Article 4(1) of the Rome II Regulation: “Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

Article 6(1) of the Rome II Regulation: “The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.”

Article 8(1) of the Rome II Regulation: “The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

⁷ Article 5(2) of the Berne Convention: “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”

⁸ It should be noted that the European Community approved through Decision 94/800 EC the Agreement on Trade-Related Aspects of Intellectual Property Rights, which, in its Art. 9(1), obliges Member States to comply with Arts. 1 – 21 of the Berne Convention.

⁹ Article 3 of the E-Commerce Directive: Internal market

Thus, for countries, like France, where such exception has been included in its legal framework, online services established in another Member State must comply with French copyright regulation.

Concerning recognition and enforcement of judgments, articles 33(1) and 38(1)¹⁰ of the Brussels I Regulation and, in the case of uncontested claims, the rules laid down by Regulation 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, notably articles 3, 4, 5 and 20,¹¹ could also be useful tools for the adequate application of PCRS.

⇒ Proposal No. 7: Articles 5(3), 33(1) and 38(1) of the Brussels I Regulation, articles 3, 4, 5 and 20 of Regulation 805/2004, articles 4(1), 6(1) and 8(1) of the Rome II Regulation, and article 5(2) of the Berne Convention, or the equivalent domestic provisions, should be applied to the non-payment of the private copying

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. [...]

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex. [...]

ANNEX: DEROGATIONS FROM ARTICLE 3 As provided for in Article 3(3), Article 3(1) and (2) do not apply to: copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC(2) as well as industrial property rights [...]

¹⁰ Article 33(1) of the Brussels I Regulation: “A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”

Article 38(1) of the Brussels I Regulation: “A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.”

¹¹ Article 3 of Regulation 805/2004: “1. This Regulation shall apply to judgments, court settlements and authentic instruments on uncontested claims.

A claim shall be regarded as uncontested if:

- (a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or
- (b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or
- (c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or
- (d) the debtor has expressly agreed to it in an authentic

2. This Regulation shall also apply to decisions delivered following challenges to judgments, court settlements or authentic instruments certified as European Enforcement Orders.”

Article 4 (1) and (2) of Regulation 805/2004: “For the purposes of this Regulation, the following definitions shall apply:

- 1. ‘judgment’: any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court;
- 2. ‘claim’: a claim for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or authentic instrument;”

Article 5 of Regulation 805/2004: “A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.”

Article 20 (1) of Regulation 805/2004: “Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement.

A judgment certified as a European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement.

remuneration due in a country other than that where the distance seller is located, if need be by introducing the necessary amendments to these or other EC or national legislations.

This would be in harmony with the ECJ's line described in Recital 57 of the E-Commerce Directive.^{12 13}

Finally, PCRMs need to be able to request that access to online retailers, which continue to sell products without paying the private copying remuneration due in the country where the customer is located, be terminated. That would be in line with article 12 (3) of the E-Commerce Directive.¹⁴

⇒ Proposal No. 8: Member States shall ensure that intermediary service providers do not grant access to Internet sites from which products are being sold without the payment of the private copying remuneration due in the country where the customer is located.

- Cooperation between PCRMs

Cooperation between PCRMs is essential to improve the whole system and has therefore to be enhanced to the extent necessary to secure an adequate application of PCRSs and to reduce costs both for PCRMs and for operators liable for the payment of private copying remuneration.

⇒ Commitment No. 4: PCRMs commit themselves to enhance their cooperation in order to secure an adequate application of PCRSs in the Internal Market. This cooperation can take the form of:

- Exchange of information, notably on cross-border movement of goods subject to the payment of the private copying remuneration.
- Monitoring and auditing of debtors (i.a.: manufacturers, importers and distance sellers of products subject to the declaration and payment of private copy remuneration in the country where the consumer is located), to control that

¹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market.

¹³ Recital 57 of the E-Commerce Directive: "The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State."

Please note that the selling of goods on-line is considered an Information Society Service, as indicated in Recital 18 of the E-Commerce Directive: "Information Society Services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; [...]"

¹⁴ Article 12 (3) of the E-Commerce Directive: "This article (mere conduit save heaven) shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement."

the cross-border movement and marketing of these goods is conducted in accordance with the legal provisions, including the rules of the PCRS, of the latter's territory;

- Filing of lawsuits on behalf of one another when access to records of the debtor has been denied and/or when the debtor has not abided by the rules of the PCRS of the country where it markets its products, in particular the non-payment of the remuneration due.