

# G E S A C

GROUPEMENT  
EUROPÉEN  
DES SOCIÉTÉS  
D'AUTEURS  
ET COMPOSITEURS

Brussels, Novembre 2000

**Common Position adopted by the Council on 28 September 2000  
on the amended proposal for a Directive on  
the harmonisation of certain aspects of copyright  
and related rights in the information society**

***GESAC Position***

An ambitious policy on European content is more necessary than ever now that the main political options of the European Community are emerging with a view to ensuring the competitive development of the information society. What is at stake in relation to strong protection for works and copyright is European identity and culture. Faced with technological developments and the large-scale exploitation of their works, authors need effective protection of their intellectual property rights more than ever, at both European and international levels.

The European Directive on certain aspects of copyright and related rights in the information society is, in this respect, essential. But European authors are disappointed at the Council's common position. This position is far removed from that of the European Parliament, and demonstrates the predominant concern of Member States for the specific interests of users to the detriment of effective, adapted and harmonised copyright.

This concern and the resulting imbalance emerges in a number of essential provisions, to which GESAC would like to draw the European Parliament's attention :

- management of rights
- digital private copying
- fair compensation
- the list of optional exceptions
- the legal protection of technological measures
- technical copying

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## **I. Management of rights**

In a common declaration with the Council the Commission states that it will pursue the examination of the question of rights management in the light of market developments, mindful in particular of digital technologies, and will decide on the appropriate follow-up.

GESAC's authors' societies are quite aware of the important role they will continue to play in future, and of the fact that this confers upon them increased importance in terms of good management, efficiency and transparency, in the interests of both their members and users. Nevertheless, if rights management is to be examined at Community level, this requires an impartial approach, based on a good understanding of management activities and recognition of their special nature.

Yet in the same statement the Council and Commission indicate that it is necessary to lay down adequate and transparent conditions for the exploitation and management of rights in the internal market, which reflect an appropriate balance between all rights and interests, *in particular those of the users concerned*.

This approach to rights management is unacceptable. It is essential to point out here that, with respect to collective management, authors' societies exist only by and for authors who, faced with increasingly intensive and diversified exploitation of their works, and with multiple users, who are very often powerful and very well organised, cannot alone defend their rights. It seems at the very least to be prejudiced to state a priori that the interests of users in particular must be protected without recalling first that what is above all at stake is the interests of the authors themselves.

Therefore GESAC asks the Parliament to restore to the directive, by a compromise amendment, at least the neutrality which is missing and is necessary to ensure a sound approach to rights management at Community level.

## **II. Digital private copying**

GESAC deplors the fact that the European Parliament proposals were not adopted. Parliament's solution was to remove all exceptions to the right of reproduction in cases in which technical protection measures would permit the exercising of this right. Given the exponential possibilities of digital private copying of works, this is the only solution that would in fact enable right holders to obtain fair income generated by this new method of exploiting their works.

The text adopted by the Council is far removed from the opinion given by Parliament. The Council has not considered properly the extent of the growing phenomenon of digital private copying of works, and has not taken sufficiently into account the damage this phenomenon is doing to the normal exploitation of works and to the legitimate economic interests of right holders.

It is a well-known fact that the more consumers copy, the less they buy. Thus digital private copying of musical works has led to a 10% drop in record sales, observed for the first time in Europe in 1999. The book and audiovisual sectors will, unfortunately, experience the same disruption as technological developments emerge.

In this extremely volatile and dangerous context for right holders, GESAC urges the Parliament to re-open a real debate on the advisability of an exclusive reproduction right.

At least, the exception for private copying must be more strictly delimited. The new wording by the Council in effect permits the compiling of private copies by third parties, thus paving the way to processes which, whether online or offline, will further increase the scope of the exception, which is unacceptable. A majority of Member States expressly limit at the moment the scope of private copying exception to the production of private copies by and for the private use of the copier (within the household). It is essential that the level of Community protection should not fall short of these laws.

### **III. Fair compensation**

Recital 35 of the Council's common position states that « in certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter ». By enshrining the principle of fair compensation, the Council followed the opinion of the European Parliament, which is to be welcomed.

GESAC would like to point out that the concept of fair compensation must involve real and effective compensation to right holders for the use of their works. In particular a recent legal interpretation by a WTO panel concerning the 3-steps test (and the concept of economic damage) set down in the TRIPs agreement, as reiterated in Article 5 paragraph 5 of this Directive<sup>1</sup>, has just confirmed that losses of incomes incurred because of an exception to their exclusive right, whether these losses are real (actual) or potential have to be considered.

Unfortunately, there is too much legal insecurity over the interpretation by the Council as far as right holders are concerned since it may in some cases lead to a complete absence of remuneration.

#### Case in which right holders have already received payment in another form

Recital 35 states that « in cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due ».

This is an ambiguous sentence. It could be understood as justifying a lack of remuneration (or compensation) for different acts to those for which the licence was granted, which is certainly not the Council's objective.

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<sup>1</sup> In a recent case the Section 110(5) b) of the US Copyright Act, which provides for an exception to the right of communication to the public of musical works in restaurants, cafés, etc., was condemned by the WTP panel as it was deemed to damage the economic interests of authors.

Only a global licence and remuneration expressly covering the act covered by the exception could justify non-payment for this act without resulting in economic damage. Therefore GESAC asks that the ambiguity of recital 35 be dispelled by amending the sentence in question.

#### « De minimis » cases

The last sentence in recital 35 states « in certain cases where the prejudice to the right holder would be minimal, no obligation for payment may arise ».

Apart from the fact that the concept of « minimal prejudice » is not clear, it is unacceptable that an exception would be adopted if it causes or has the potential to cause a loss of income to right holders.

#### The special case of « time shifting »

In a statement by the Commission concerning recital 35, certain single and temporary acts of copying of broadcast works made for the purpose of viewing or listening to them at a more suitable time could result in non-payment of remuneration. This statement was annexed to the minutes of the Council position to take account of the United Kingdom's will not to amend its legislation, which provides for an exception to the right of reproduction without fair compensation in the context of so-called time-shifting private copying.

First, the words « certain single and temporary acts of copying » pose a problem of verification: how can a check be made to ensure that individuals produce a single copy and that they destroy it after having viewed/listened to it?

Secondly, time-shifting copies constitute a use of protected works, which explains that the legislation of 12 of the European Union Member States provides for remuneration to compensate the private copying exception without making a distinction for time shifting copies.

#### **IV. The list of optional exceptions**

The Council introduced into the Directive 15 new optional exceptions to copyright. In addition some Member States wanted to go further and to keep the possibility of providing for other exceptions. This led to the grandfather clause in Article 5.3.o), limited however to 4 criteria: these exceptions must be « uses in certain other cases of lesser importance », « for which exceptions already exist in national law », « provided that this concerns only analogue use » and lastly « does not affect the free movement of goods and services in the Community ».

As a result of the extension of the list of optional exceptions to copyright combined with this grandfather clause, the harmonisation effect of the Directive is considerably reduced, to the detriment of legal security for rightholders and the efficient functioning of the internal market.

The Council text is attempting to reflect each one of the legal traditions in the Member States by laying down the 20 optional exceptions, but in fact the Directive goes much further than the Member States as it does not take account of the special features of each national system and the specific balances within each system, where each exception is placed in a particular setting and under conditions not specified in the Directive, which on the contrary authorises extremely broad interpretations. The result of the text is that not only can each one of the 15 Member States keep its own system, but it can also extend the scope of the exceptions already laid down, or even apply all 20 exceptions. With this list of exceptions there is obviously a risk of undermining existing balances and lowering the level of protection obtained in most Member States, particularly since some of the exceptions are unacceptable to authors.

GESAC is particularly concerned about the following exceptions:

Article 5.2.c): the exception to the right of reproduction for libraries, educational establishments, museums and archives must be more clearly delimited. The concept of « specific » acts of reproduction is too vague and must be confined to acts of reproduction made for archiving and conservation purposes, as in fact requested by the Parliament during its 1<sup>st</sup> reading.

Article 5.2.d): the exception allowing broadcasting organisations to make ephemeral recordings freely for their own broadcasts is not acceptable to authors. It is completely contrary to the interests of rightholders and disrupts the balance of negotiations in favour of broadcasters. At the very least rightholders should benefit from a fair compensation.

Article 5.3.a): the exception to the rights of reproduction and communication to the public for educational or scientific research purposes must be accompanied by a right to compensation, as in fact requested by the European Parliament.

It is not the responsibility of authors to bear the cost of an education policy. In most EU Member States, the use of works for educational purposes is subject to licensing conditions and remuneration.

Moreover, the use of works (or extracts of works) in the context of scientific research sometimes permits researchers to make discoveries which are themselves protected by a patent where appropriate. There is therefore no reason to justify the free use of works which have led to this result.

Article 5(3.h): this new exception quite unjustifiably undermines the rights of authors of the graphic arts and of photographs. We cannot accept that commercial use is made of works (through the sale of postcards, greeting cards, posters, etc.) without the authorisation of the authors and without granting them remuneration. At the very least this exception must be better delimited by stating that use can only be accessory and concern only works permanently exhibited on public thoroughfare.

Article 5(3.j): the exception to the right of reproduction and communication to the public for the purpose of using works to advertise the public exhibition or sale of artistic works is one of the new exceptions introduced by the Council. It is not acceptable as it stands and must at the very least be clarified.

The exception concerns the use of works only to « advertise » exhibitions or sales. Hence use must be limited in terms of the number of works used and in time.

The reproduction and public communication of all the works to be sold or exhibited would obviously go beyond the objective pursued.

Moreover, a distinction should be made between the sale and public exhibition of artistic works, which are two quite different activities. For sales, the benefit of the exception must be exhausted as soon as the sale is terminated. For exhibitions the exception must not be used to proceed with commercial exploitation of reproductions of works (through the sale of postcards, posters, etc.) during and in the context of the said exhibitions, without fairly remunerating the authors of such works.

Without such explanations, this exception might be interpreted too broadly and have very adverse implications for authors, particularly in the context of the Internet.

Article 5 (3.n): the exception to rights of reproduction and communication to the public of certain types of consultation of works in the premises of educational establishments, publicly-accessible libraries, archives and museums, is a new exception introduced by the Council.

The authors are quite opposed to this provision. In most Member States such acts are in fact covered by licensing agreements between the establishments concerned and the rightholders. At the very least, the reservation whereby the exception covers only works and other protected objects “which are not subject to purchase or licensing terms” must be maintained.

## V. Technological measures to protect works

### *General comments*

Authors are aware of the need to combine in one way or another technological protection measures for works in order to take account of the exceptions provided for in Article 5. However we would criticise the solution chosen by the Council which leaves room for a lot of uncertainty about the treatment Member States will accord to the technological measures used to protect works.

The solution proposed by the Council consists of:

- obliging Member States to take appropriate measures (the nature of which are not known) so that beneficiaries of exceptions can effectively enjoy the freedom to use works in accordance with the Directive.
- Authorise Member States to take such measures in the field of private copying, provided that there is fair compensation and the 3-step test in Article 5.5 is followed.

The text thus provides for specific treatment of the exception for digital private copying compared with other exceptions, a distinction which is to be welcomed.

However the necessary investments for introducing technical measures to protect works obviously require greater legal security.

According to the solution reached by the Council, the validity of the technical measures implemented sometimes at the price of lengthy negotiations between rightholders and manufacturers of electronic devices for the general public and undertakings, could always be called into question by any Member State.

Moreover, the result of this solution is that Member States may take different measures from each other, thus undermining the harmonisation necessary for the functioning of the internal market.

Rightholders and the cultural industry must be able to continue operating in a single market in which it is possible to engage in creative activity, make investments and achieve economies of scale. Yet the Council's solution would permit the formulation of a multitude of national initiatives designed to meet the need to accommodate different exceptions in each Member State. A system of prior notification, like that in the transparency Directive 3052/95/EC, for « appropriate » national measures envisaged, should be introduced to promote a common approach among the Member States and to institutionalise the mechanism of information and prior consultation at Community level.

The measures notified could thus be submitted to the Commission for examination, in co-ordination with the contact committee set up under Article 12 of the Directive, to check for compatibility with the 3-step test of Article 5.5 and with the functioning of the internal market.

#### Special case of works made available to the public online upon request

The importance of a specific provision regarding works made available to the public on networks on demand, must be underlined and supported: the Article 6 paragraph 4.4.

This provision clarifies that the exceptions, including the private copying exception, have not to be accommodated by rightholders regarding “works or other subject-matter 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 chosen by them”. In other terms, rightholders benefit from an exclusive right in the context of on line delivery of works on demand, and remain free to decide how and under which conditions their works will be available on the networks. GESAC strongly supports such a provision, without which the authors could not benefit fully from the new way of exploitation and distribution of their works via electronic commerce. It is regretful that this solution be not extended to other forms of exploitation of works.

## VI. Technical copies

The Council has extended the scope of the compulsory exception to the right of reproduction envisaged under Article 5.1 to acts of proxy caching which consist of automatically reproducing all or part of the content of distant sites in order to facilitate the efficient transmission of the content. This extension of the scope of the exception raises a problem of consistency with the electronic commerce Directive.

The compulsory obligation under Article 5.1 would be acceptable only if, with certainty :

- its effect was not to enlarge the conditions of exemption from liability by technical operators provided for in the recent Directive on electronic commerce (Directive 2000/31/EC concerning certain legal aspects of information society services and, in particular, electronic commerce in the internal market).
- It did not have the effect of reducing the possibilities for court proceedings by rightholders who are victims of piracy on networks.

With regard to proxy caching acts, recital 33 of the copyright directive does not include all the conditions of exemption from liability set down in the directive on electronic commerce. Because of this, the exception could be put forward to prevent rightholders from holding as responsible operators who are negligent in relation to copyright, and undermines the possibility for rightholders to undertake any urgent legal action against them (injunction) to terminate caching and access to pirated content.

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Aware of the difficulty in changing at this stage the main options chosen by the Council, European authors are nevertheless very concerned about the wide margin of manoeuvre left to Member States to incorporate the Directive. Therefore GESAC calls upon the European Parliament to reach the necessary compromises with the Council, without challenging the main lines of the common position, in order to arrive at a European legal framework for copyright that is better balanced, harmonised and adapted to the digital environment.

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