

# G E S A C

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GROUPEMENT  
EUROPÉEN  
DES SOCIÉTÉS  
D'AUTEURS  
ET COMPOSITEURS

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## **RESPONSE TO THE GREEN PAPER ON COMBATING COUNTERFEITING AND PIRACY IN THE SINGLE MARKET**

This document was produced on the basis of contributions by member authors' societies and comments by GESAC, including those by the BIEM -Bureau International de l'Edition Musicale.

### Question 1.

The Commission is to be congratulated for having taken into account the damages that authors suffer as a result of the pirating of their works, in the same way as damages suffered in the area of luxury goods. GESAC approves the Commission's approach to this in its Green Paper, the scope of which appears to cover all acts of counterfeiting and piracy that authors' societies encounter in practice.

With regard to acts that can be described as counterfeiting and piracy, the Commission's attention should be drawn to the problem of piracy in on-line networks. While digital networks, notably the Internet, are mentioned by the Commission as one of the "clandestine channels" of piracy, the volume of illegal transactions on digital networks is likely to increase and the risks and challenges of counterfeiting are considerable in this respect.

Similarly, we would draw the Commission's attention to the question of "*parallel imports*". Article 4 of the proposal for a directive harmonising certain aspects of copyright and related rights in the information society lays down the principle of exhaustion of the right of distribution; this principle is applied on condition that the first sale in the Community is carried out with the consent of the rightholder. This condition is not fulfilled in most cases of parallel imports, which are facilitated even further today by on-line sales.

The renting of a phonographic or video support in a European Union country may constitute an act of piracy although the support was sold with the authorisation of the rightholder in another member of the European Union, since renting constitutes a different kind of exploitation and is not therefore exhausted by the sale (*see judgments of the Court of Justice of the European Communities - 28/4/98, Article 4 of Directive 92/100/EEC*).

Account should also be taken of “bootlegging” (illegal live recordings) within the scope of this Green Paper.

Lastly, counterfeiting in the area of visual and graphic arts essentially concerns the original works of painting and sculpture which result in pirate exploitation in the form of lithographic reproductions, forgeries and merchandising products.

With regard to the sectors of activity, the authors’ societies note that counterfeiting appears above all in the area of illegal reproduction (sound or audiovisual recordings without the authorisation of the rightholder). New areas in which piracy is emerging, via the Internet, comprise the communication to the public on-line of works and their reproduction by users without any permission from rightholders.

The scope of the Green Paper could be extended to the study of the impact on European rightholders of piracy from third countries in order to examine what action should be taken at Community level to reinforce copyright in these countries.

Counterfeiters’ greed for money partly explains counterfeiting, but the success of bootleg records, rare recordings and live performances also reveal a demand by consumers, who are insufficiently aware of the problem of counterfeiting. Moreover, the distribution trade is always looking for “loss leaders” - phonograms or videos - at extremely low prices, and commercial competition thus often becomes a factor in counterfeiting. Some GESAC members have, however, noted a recent, positive awareness of this phenomenon by distribution managers.

With regard to the visual and plastic arts, one cause of piracy is the obscurity of the creative and marketing markets: problems of identification and authentication of works, unreliable expertise, etc.

## Question 2.

Authors’ societies are regularly confronted with the counterfeiting of visual and graphic, sound and audiovisual works, and are equipping themselves by means of investments and human resources to combat this phenomenon. These societies act at national level at the manufacturing stage, at the distribution and importation stage and, for some of them, in relation to on-line publication. In the latter case, it is most often a case of pirate recordings transmitted on the Internet from hosts located in third countries to hosts in the Community.

### Question 3.

All the Community Member States are affected by the phenomenon of counterfeiting, but in the music business, authors' societies are worried by piracy from third countries, notably Eastern European countries, as well as Russia, Singapore, Malaysia, Indonesia, China, Taiwan, India, Japan and Ukraine.

With regard to piracy on the Internet, the countries in question are the European Union Member States, the United States, Canada, Australia, Korea, Russia and the Czech Republic.

With regard to visual and graphic arts, there are many channels of distribution to the European Union: via Scandinavia, the USA and South America, the Mediterranean countries, the Eastern European countries, as well as internal channels in the Union.

### Question 4.

With regard to the author's economic property rights, the rights granted by international conventions and by national laws cover all forms of exploitation: broadcasting, reproduction on mechanical supports, distribution, rental, communication to the public via the Internet, etc. Counterfeiting can in this respect be defined as any act covered by these rights conducted in infringement of the legal provisions governing these rights (exclusive right; right to remuneration).

### Question 5.

The acts of counterfeiting with which authors' societies most often find themselves confronted are carried out at the level of manufacturing of illegal supports, and in most cases are discovered when it comes to distribution.

Most often, in relation to music, it is phonogram producers who have phonograms manufactured without authorisation (or by obtaining authorisation for a smaller amount than manufactured), which are destined for the internal market. This is concentrated in particular in marginal distribution circuits (markets, fairs, discount shops), but may also be found in main distribution channels.

The type of counterfeiting which most damages the interests of authors in terms of sound recordings consists of the importing of products (authenticated copies of original legal phonograms) mainly from Eastern Europe. This type of counterfeiting is very difficult to detect as the products are, at the distribution stage, mixed with legal products.

In relation to videos, the regular lowering of the price of cassettes and the considerable improvement of the professionalism of distributors means that this type of counterfeiting is tending to die out in some countries (particularly in France).

Authors' societies know from experience that counterfeiting is not seasonal, and that new ways of exploiting works result in new types of counterfeiting, for instance video cassettes of karaoke. The new digital recording supports at very low prices are now emerging as a dangerous way of exploiting the repertory of societies without permission. CD recorders enable counterfeiters to produce products that are difficult to detect. With the same means, lending or very low price sales circuits are developing in schools and universities.

The digital networks thus provide a field of activity that is easy for counterfeiters to exploit via the on-line sale of supports produced without authorisation and by downloading protected works without the consent of the rightholders.

While counterfeiting is always linked to other forms of illegal activity (black or undeclared work, tax fraud, delinquency, etc.), it has no a priori systematic links with organised crime. However this is not the case in Eastern Europe where it is clear that close links exist between criminal mafia-type organisations and counterfeiters.

#### Question 6.

Examples: in Denmark counterfeiting of sound recordings accounts for 2% to 5% of total sales; in Switzerland, it is estimated that they represent 2% to 3% of the market for CDS, and for videos, between 10% and 15%.

Piracy of sound supports distributed on the market and on the Internet represent a loss of income for rightholders of EUR 0.15 per work, according to the BIEM. Since approximately 7% of the market in the European Union is illegal, piracy in the music business thus represents a loss of 52 million euros for rightholders.

#### Question 7.

It is very difficult to estimate the economic and social consequences of counterfeiting for undertakings and for the national economy.

However we are aware of the perverse phenomenon caused by the artificially low prices of some counterfeit products which are unfairly competing with legal products, the price of which must cover the cost of the producers' investments and charges. These counterfeit products are disrupting the market and the commercial strategy of the industry, to the detriment of the entire chain - authors, performers, producers, publishers, technicians, distributors and sailors. In the area of visual and graphic arts, counterfeiting is destabilising a market in which confidence is an essential factor.

The considerable losses of income caused by piracy are having adverse effects in terms of investment in new works, new talent, etc. and on culture in general. It is estimated that the number of jobs lost in Europe due to piracy is around 30 000 (source: BUMA/STEMRA). Lastly, the State is also a victim of this kind of criminal activity.

Counterfeiters engage in other illegal activities that have obvious implications for national economies. Counterfeiters are usually involved in tax fraud (lack of or under-estimation of taxable income, non-payment of VAT, failure to respect company law, for instance fraudulent bankruptcies, etc.).

Moreover, while infringement of copyright does not involve any risks for consumers in terms of health and safety, the lower quality of the counterfeit products misleads and in general lowers the value of the products in the consumer's mind.

### Questions 8 to 11

- \* International legislation on combating counterfeiting lays down general principles and rules (part III of the TRIPs Agreements of 15 April 1994; Article 14 of the WIPO treaty on copyright, December 1996) under which the contracting countries must ensure that their laws comprise (sanctioning and prevention) procedures to ensure that the relevant rights are protected.

The TRIPs agreements have improved the protection of intellectual property rights at international level by forcing 117 signatory countries to respect the provisions in the Berne Convention and by penalising this with the dispute settlement regulation in the WTO agreement (resort to "panels" and establishment of the "*council on Trade related to intellectual property aspects*", entrusted in particular with the job of checking that countries fulfil their obligations and facilitate procedures to settle disputes.

- \* At Community level, the adoption of Council Regulation (EC) 3295/94, and of Commission Regulation (EC) 1367/95 which contains the implementing provisions, is contributing to progress regarding legislation in the area of piracy and the application at Community level of certain provisions in the GATT agreements.

These regulations, which now apply to copyright protection (through the concept of pirate merchandise defined as supports containing the reproduction of recordings made without the permission of the authors) essentially comprise practical measures providing the representatives of rightholders, and hence authors' societies, with the possibility of intervening with customs authorities to protect rightholders.

Moreover, some provisions such as those on the harmonisation of protection periods are aimed at reinforcing the fight against piracy.

- \* The third countries that are not signatories of international conventions or are not implementing these conventions properly have lower levels of protection than the EU Member States, thus encouraging cross-border piracy. In this case the problem of ineffective international criminal procedures is very real: this should be a subject for discussion and potential harmonisation.
- \* Some national laws such as the German, French and Dutch laws, appear to be capable of efficiently combating piracy in the internal market. Others (Italian and Scandinavian laws) provide for penalties that are much too soft to act as a disincentive for piracy, while others (Spanish law) involve practical problems of evidence and implementation by the authorities (insufficient police powers, lack of regulation of CD production units preventing identification of sources, etc.), as well as of evaluation of the damages suffered by insufficiently experienced judges.

It is true that not all the Member States have implemented international and/or Community provisions sufficiently and do not look seriously enough upon the importance of the copyright infringements committed (sanctions are not severe enough or inadequately implemented).

We must also underline the lack of knowledge on the part of the authorities, the lack of training of judges and the lack of experience which are all major weaknesses at national level in combating counterfeiting, plus the insufficient cooperation between customs officers themselves.

Lastly, it is unfortunate that some national laws endorse the principle of international exhaustion of the right of distribution; the societies in these countries report that this principle is causing problems for authors.

With regard to piracy on the Internet, laws appear to be inadequate in many cases. For instance:

- the “making available to the public” right must be implemented urgently at Community level;
- the identification of individuals supplying illegal recordings on the Internet must be conducted with certainty, with the cooperation of service providers and the help of rapid and efficient procedures;
- suitable liability systems must be introduced to encourage cooperation between rightholders and on-line operators, rather than leaving these operators totally indifferent to piracy problems;
- strict liability systems must be applied to counterfeiters; sanctions must therefore be reinforced and the element of knowledge must not be taken into account;

- presumptions concerning the existence and ownership of rights must be established in order to alleviate procedures and the burden of proof encumbering rightholders;
- the manufacturing of sound and audiovisual recordings must be properly regulated (without however undermining the legitimate trade) in order to prevent the setting up of pirate factories;
- the possession of pirate products must be penalised in the same way as the possession of stolen goods.

#### Question 12

With regard to parallel imports, the resources granted to rightholders are insufficient. The only way of detecting imports that have not been authorised by the rightholder is to conduct surveillance activity on the ground. A more important role must be given to authors' societies to issue authorisation on behalf of their members.

Proper awareness and training of customs officers would help improve the quality of cooperation between them and authors' societies and would produce better results.

#### Question 14

Most authors' societies set up monitoring systems years ago on a national level, which are based on a regional network and on a team of inspectors specialised in this type of work, and this produces satisfactory results.

These systems require investments in human and financial resources and involve close links with judicial police services and regular contacts with judges and the customs authorities.

Sometimes authors' societies also act in partnership with private organisations (eg. Association française de Lutte contre la Piraterie Audiovisuelle (ALPA) - Association Suisse pour la lutte contre la piraterie (SAFE)), or team up with other rightholders bodies in order to combat piracy. Monitoring systems have also been established to combat piracy in the multimedia sector and/or on the Internet (Denmark, France).

In the Netherlands, the music retail market is regularly monitored by the law enforcement officers from the Department of Criminal Investigation of the authors' society BUMA/STEMRA in cooperation with the Dutch group of the IFPI, and the organisation of sound carrier retailers. This department, which has powers that might be described as police powers, can undertake investigations in consultation with the public prosecutor.

In some countries, authors' societies can also take part in the work of other national professional organisations for combating counterfeiting (for instance, in France: the Comité Anti-Contrefaçon under the aegis of the Secretariat of State for Industry; the Union des Fabricants; the INAC (International Anti-Counterfeiting Association). The societies consider that the establishment of such organisations in the countries where they do not already exist would be extremely valuable.

On an international level, the BIEM (Bureau International de l'Édition Musicale) has a special committee consisting of representatives of authors' societies, mainly European, responsible for combating counterfeiting. The committee is a forum for discussion on the various types of piracy as well as a channel for exchanging information on international issues.

### Question 15

Generally speaking, support by the authorities for professional organisations is desirable. In this respect, a Community initiative to organise public awareness campaigns concerning the problem of counterfeiting could in fact be useful (the luxury industry in France organised such a campaign, essentially by putting up posters in cross border transit areas (airports, stations, etc.) and by broadcasting television documentaries). Such awareness activities should also be aimed at Member States, the tax and customs authorities, and magistrates and judges, particularly in relation to piracy on the Internet.

Similarly, there may be a need for a central database. However, the amalgamation of different organisations engaged in combating counterfeiting but operating in very specific sectors (pharmaceutical industry, car manufacturing, fashion, phonogram production, etc.) is too dispersed to be effective.

The creation of databases for each sector including or improving existing databases (such as MUSYC, REACT and the databases of the World Customs Organisation) and databases currently being developed, such as the one envisaged under the VERDI programme, might be more appropriate.

Community initiatives aiming at encouraging the gathering of professional organisations could improve the fight against piracy.

## Question 16

While reciprocal cooperation and information exchange already exist between the authorities and professional organisations in most Member States, there is no particular procedure for exchanging information with the customs authorities. The current legal principles, the rules of professional secrecy, the obligation of silence and more generally the confidential nature of public services are often an obstacle to the exchange of information (eg. freeing administrative and criminal authorities of their duty to remain silent during investigations in order to provide rightholders with information on the source pirate products and buyers, information which at the moment is only available to them years after the procedures).

In some customs laws (eg. France), the lack of authorisation of holders of copyright is not regarded as a customs offence, whereas the counterfeiting of trade marks is. Taking more account of this type of counterfeiting in customs texts could give rise to greater attention by customs officers to the phenomenon.

No agreements have been concluded between the authorities and authors' societies. However a policy -Memorandum of Understanding- on this might in fact have the advantage of providing better supervision (provided that it is flexible) of the necessary relations already in place between the authorities, thus delimiting the rights and duties of each side.

## Questions 17 to 19

Depending on the country, the possibilities of action and operational intervention open to authors' societies may or may not be sufficient to combat piracy efficiently.

In most countries, these societies have the right to take part in court proceedings to defend the rights for which they are statutorily responsible. Authors' societies can therefore initiate legal proceedings - both civil and criminal - to ensure that copyright is respected.

Civil proceedings have the advantage of permitting the rapid recovery of remunerations, but experience shows that only criminal proceedings will effectively pinpoint the complex chains of "production", pressing and distribution of pirate products. In this respect there are two possibilities (or potential possibilities) for authors, depending on how complex the case is:

- either a direct summons when the perpetrators of the criminal offences have been apprehended and the counterfeiting offences have been clearly identified
- or filing a complaint with or without suing for damages, when it is necessary to find out exactly the identity of the various parties involved and the extent of the counterfeiting act or acts, and therefore to have resort to a preliminary investigation (in the event of the reporting of the offence), or to the initiation of a judicial investigation entrusted to the examining magistrate (in the event of the reporting of the offence plus suing for damages).

Moreover, repressive mechanisms differ from one Member State to another. For instance in France effective provisions state that the publishing, sale, exporting or importing of pirate products are offences and subject to severe, dissuasive penalties, imprisonment and fines (2 years' imprisonment and FF 1 000 000 in fines).

Likewise, the failure to pay the remunerations owed to rightholders in the context of private copying is severely punished (fine of FF 1 000 000 in France).

Courts may in addition impose sanctions such as the confiscation of all or part of the income procured from the infringement and of all the counterfeiting equipment, or even the publishing of the judgment, at the expense of the convicted party, and the advertising of it in the press.

In the event of a recurrence, the sanctions are doubled.

It is also possible for the court to order, on the first offence, the (total or partial) closure, temporarily or definitively, of the counterfeiter's establishment for a period not exceeding five years.

Moreover infringements of counterfeiting are likely to result in corporate entities being held responsible (Article L.121-1 2° of the French Criminal Code).

Lastly, apart from an official police record, the material recording of the infringement may be carried out by sworn officers from authors' societies.

In most authors' societies, these investigators are specially trained in missions consisting essentially of:

- centralising all information relating to counterfeiting;
- recording, in their capacity as sworn officers, the material nature of the counterfeiting, and taking part, as experts, in the seizing of material in the context of requisitions;
- initiating legal proceedings in the relevant court;
- cooperating with the authorities and coordinating their activities with those of organisations also engaged in combating piracy.

These officers work in particular with the tax authorities, the customs authorities and the fraud squad.

In general, it is often the authors' societies which operate most effectively at national level in cooperation with other national societies, and also on an international level in cooperation with other bodies such as the BIEM or occasionally the IFPI.

However, it is regrettable that the professional organisations representing the private sector do not have police powers (except in the Netherlands) in a clearly regulated context.

European authors' societies are also very active in the anti-piracy fight in Eastern European countries and the Russian Federation, via the Phare and Tacis programmes.

### Questions 20 to 23

At the moment, in parallel with techniques being introduced by the industry itself, some authors' societies (Italy, Greece, Switzerland) have developed labelling systems which include a hologram, thus enabling illegal sound supports to be identified in procedures against pirates.

Furthermore many CDS contain a code known as SID, through which the manufacturer can be traced. This code should be used internationally.

In relation to digital processes, the use of technical devices to identify works and the precise information on the relevant system of rights relating to works would be likely to contribute to protecting literary and artistic property rights.

Suitable techniques and processes should permit the tracing of the use of a musical, audiovisual, graphic and literary work in order to check the authenticity of the identity marker by using watermarking.

In the context of the CISAC, the CIS (Common Information System) consisting of the coordinating of developments of information sub-systems regarding rightholders, works and contracts will also be a very important tool in protecting intellectual works against piracy.

The main project in the CIS plan is the “worksnet”, an international data network and platform for electronic copyright management systems (ECMS) also looks promising as a basis for permitting the increased protection of rightholders and authors in the digital era by supplying a “digital fingerprint” to prevent piracy, non-authorised and non-remunerated transmissions.

Anti-copying systems must also be developed to limit the millions of perfect copies made to the detriment of the market. SCMS (Serial Copy Management Systems) must be developed both off-line and on-line.

The aim of technical protection measures will be not only to control the copying of works but also to gain access upstream to these works.

Effective protection of the technical measures implemented by rightholders is essential. A Community provision along the lines of Article 6 of the proposal for a directive harmonising certain aspects of copyright and related rights in the information society is necessary, provided that it is improved and covers all activities, including the manufacturing and distribution of devices, elements and components, and all services or the promotion of illegal services authorising the neutralisation of technical protection measures without the authorisation of rightholders.

Standardisation at international level is also absolutely necessary.

### Questions 24 to 26

Part III of the TRIPs agreement contains important provisions, but the very general scope of these does not seem to be such as to permit further improvements in copyright in the legislation of the European Union Member States.

The current disparities between the Member States have implications for the locating of counterfeiting and piracy activities within the Community. European and even international counterfeiters tend to operate from areas where laws on piracy are weakest. All disparities must therefore be avoided. In this respect, we welcome the recent harmonisation of the protection period in the European Community.

The introduction of sanctions at Community level, aimed at supplementing and harmonising national sanctions, would increase the efficiency of the fight against piracy, provided that the basis is the national law or laws that are the most complete and most repressive.

The closure of the establishment where the piracy act has been committed must, if it is to be effective, be accompanied by the closure of the manufacturing establishment.

#### Question 27

Additional improvements should be made to ensure that intellectual property rights are respected in the internal market as regards the safeguarding of evidence in counterfeiting acts committed with the help of the Internet, when the evidence is located in a Member State other than the one where the piracy was committed.

Furthermore, the confiscation or systematic destruction of counterfeit products has always proven to be effective. Counterfeit products must be systematically excluded from consumer circles. The idea of giving them to charity is perhaps generous, but dangerous, as the risk of seeing these pirate products back on the market again is too great, thus requiring further investigations. This idea should therefore be opposed. The products must in any case be destroyed.

#### Question 28

Authors' societies as a whole are in favour of such a measure. Procedures for recalling at the infringer's expense goods placed on the market should be introduced.

#### Questions 29 and 30

The publication of court judgements is certainly an additional and effective instrument in combating piracy. It is in fact almost systematically requested - and obtained - in the context of piracy cases, subject to penalties and additional reparations (preferably in the specialised press of the sector in which the counterfeiting offence has been committed). The publication of judgments also plays an effective preventive and information role among the public.

The obligation for the infringer to supply the necessary information on the origin of illegal products is also quite desirable in order to stem the flow of piracy at the source.

### Questions 31 to 33

Authors' societies have concluded reciprocal representation agreements with each other whereby each one of the contracting societies entrusts the management of its repertory to the other, on the territory of the other. Thus each one may, in the same way and to the same extent as it does for its own members, initiate and pursue, in relation to the repertory entrusted to it, all legal proceedings against natural and corporate persons responsible for counterfeiting in its territory.

These societies usually have little experience in implementing court decisions concerning the condemnation of foreigners having committed a counterfeiting offence on their territory.

Here, too, any plan to harmonise European laws will certainly reinforce the protection afforded to European authors. The possibility of making national law applicable to acts committed in another country would be likely to improve the effectiveness of the fight against piracy.

### Question 34

A single contact point, of an administrative nature, in each Member State which would act as an interface between business professionals and the departments responsible for prevention and punishment in the other Member States could facilitate information exchanges and the coordination of the different activities.

The function of this contact point might be effective if its mission consisted of ensuring the application of national laws, organising cooperation between the different public services in question, and finally coordinating the necessary relations that must be established between private monitoring bodies and public services.

The contact point might also be responsible for dealing with the memoranda mentioned in question 16.

### Question 35

The cooperation between the national authorities is functioning satisfactorily at present but could be further improved. Administrative cooperation between the national and Community authorities responsible should be reinforced.

However the centralised management of data on all types of counterfeiting and counterfeiting channels concerns data that are too disparate to be easily exploited.

Bodies such as INTERPOL, EUCLAF and EUROPOL do not currently consider the fight against counterfeiting to be a priority, but might have a role to play as central organisations for the reinforcement of the protection of literary and artistic property rights.

The BIEM represents authors' societies managing mechanical reproduction rights within the World Customs Organisation in Brussels.

#### Question 36

The Commission may play an important role in establishing a single contact point in each country (cf. Question 34) and coordinating these national contact points at European level. It could also draw up a real anti-piracy programme in consultation with the parties concerned in third countries where this plague is causing considerable damage in European Union Member States and develop, where appropriate, a sanctions policy against these countries.

#### Question 37

We consider that the proposal mentioned in the second point would be a useful measure.

#### Question 38

It would be useful to establish a mechanism or structure within the Commission to monitor piracy problems closely and to put forward proposals in consultation with interested parties.

#### Question 39

Training programmes for officers responsible for combating counterfeiting (police, customs, magistrates) in the internal market would help to improve this fight (such training is already partly available in some countries - with the Gendarmerie Nationale in France and the customs authorities in the Netherlands).

#### Question 40

Given the specific nature of counterfeiting suffered by authors' society, the enhancing of the training of officials would be likely to improve efficiency. This in fact corresponds to a demand by the authorities themselves, notably the customs and police, as well as magistrates. The regular exchange of personnel between Member States could also help improve matters in this respect.

#### Question 41

A practical guide containing information and awareness campaign, for national authorities could be one way of achieving progress in the fight against piracy.

In fact the planned guide would, because of its official nature, overcome the reluctance which we sometimes still face in marginal cases.

Authors' societies could certainly contribute usefully to the formulation of such a document.

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