

**Eurocopya's contribution  
to the UK Intellectual property consultation  
(Gowers Review)**

***Foreword***

**EUROCOPYA** is the European Association of Audiovisual & Film Producers' collective management societies. EUROCOPYA's statutory members are : **EGEDA (Spain), FILMKOPI (Denmark), G.W.F.F. (Germany), PROCIBEL (Belgium), PROCIREP (France), SEKAM VIDEO (Netherlands), V.A.M. (Austria), F.R.F. VIDEO (Sweden), SUISSIMAGE (Switzerland).**

Other collecting societies or organisations representing audiovisual producers, established in countries in and outside Europe are also associated to EUROCOPYA's activities. They are as of today : **ZAPA (Poland), FILMJUS (Hungary), INTERGRAM (Czech Republic), GEDIPE (Portugal), SAPA (Slovakia), TUOTOS (Finland), COMPACT (United Kingdom), SCREENRIGHTS (Australia), PACC (Canada).**

European Audiovisual & Film producers are remunerated through exclusive rights and - more marginally - through collectively collected remuneration rights (mainly cable retransmission rights & private copy levies).

EUROCOPYA expresses the view of the various European audiovisual & film producers whose rights are administered by their respective national collecting societies, founding members of the association.

Eurocopya's founding members entered into reciprocal agreements whereby they collect and distribute private copy levies in their own market according to their national law to the benefit of international rightholders.

EUROCOPYA's present contribution will focus on Recommendation # 8 of the Gowers Review (*Introduce a limited private copying exception by 2008 for format shifting for works published after the date that the law comes into effect, with no accompanying levies for consumers*), and give also some comments on Recommendations # 2 regarding extensions to Educational Use exceptions & Recommendation # 9 regarding Copying for research and private study.

## **Recommendation 8 - Background**

1. It has first to be stressed here that, thanks to the European Treaty, **British producers are already entitled to – and benefit for years from – private copy remuneration in European Member States where private copy remuneration schemes are implemented.**<sup>1</sup>

A large majority of British producers mandated Compact Collections Lfd to collect such private copy levies on their behalf. Recently, BBC Worldwide joined Compact Collections, which is now one of the major beneficiaries of the private copy remuneration schemes in force on the Continent. Private copy royalties paid out to British audiovisual producers by the member companies of EUROCOPYA (EGEDA-Spain, FILMKOPI-Denmark, G.W.F.F.-Germany, PROCIBEL-Belgium, PROCIREP-France, SEKAM VIDEO-Netherlands, V.A.M.-Austria, F.R.F. VIDEO-Sweden and SUISSIMAGE-Switzerland) represent a **total annual amount of almost 2,5 M€ (2 Million GBP).**

This is to say that this lack of solidarity on the British side towards European rightholders is very unfair and anti-competitive, since beyond the European Treaty **no actual reciprocity can be implemented in the UK.**

2. Eurocopya understands the UK's Government concern to grant consumers legal certainty towards reasonable use of protected works in their private sphere. However, Eurocopya considers that **any private copy exception, would it be the current existing "Time shifting" exception or the proposed new "Format shifting" exception, should come with a fair compensation for rightholders.**

As stated in § (80) of the consultation, it is common place for consumers to copy films – for instance out of broadcasts – to allow playback on different devices. Development of digital TV also brought digital decoders with large capacity hard disc at home. There is therefore a widespread belief that such action is already permissible, and for those who are aware that it is not, current restrictions on copying for personal use appear unfair. This is also because such action is already actually permissible in most of the other EU countries, where a private copying exception has been put in place (21 countries out of the current 27 EU members)<sup>2</sup> ! Therefore also the fact that "many within the copyright industries have accepted that this is reasonable use" (see § (80)). Also true is the fact that "the current law is difficult to enforce in this area" (see § (81)). Should such actions then be authorised without any compensation for rightholders of copied works ? One cannot accept this perspective.

**Any unauthorised copy of protected work is actually creating harm to rightholders, wether through "Time shifting" or the new "Format shifting" exception.**

**Regarding "Time shifting"** : this "exception" to exclusive rights under UK law is already drafted in rather broad terms ([http://www.opsi.gov.uk/acts/acts1988/plain/ukpga\\_19880048\\_en\\_content.htm#pt1-ch2](http://www.opsi.gov.uk/acts/acts1988/plain/ukpga_19880048_en_content.htm#pt1-ch2)) :

The making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or cable programme or in any work included in it.

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<sup>1</sup> Such private copy remuneration also exists outside the European Union : cf. Norway, Switzerland.

<sup>2</sup> Out of the 27 EU members, 3 countries do not have any private copy exception in their law (UK, Ireland and Malta) , and 3 countries have such an exception, but did not implement corresponding compensation, in contradiction with provisions of art. 5.2.b of the Copyright Directive : Cyprus, Luxemburg and Bulgaria.

The consultation paper on the Gowers Review is aware that “on demand services often replace the market for DVD sales” (see § (48)). On demand is therefore a potentially valuable revenue stream that rightholders will naturally be keen to preserve. In our opinion, **“Time shifting” can be compared to an *ad hoc* on demand service of the “time shifted” broadcast.** In both cases, it is the customer who decides which program he is willing to watch - and when - among the various proposals offered by his service provider or broadcaster. The only technical difference is lying in the fact that in the case of broadcasting, it is the broadcaster who is in charge of the programming, where in the case of a Video On Demand (VOD) service, it is the service provider. The difference is today minimal for consumers, except for the fact that “Time shifting” is free of charge under UK legislation (unlike in other EU countries, where it is assimilated to private copying), where VOD constitutes a real additional revenue source for rightholders. Therefore, unremunerated time shifting definitely creates harm for rightholders.

Moreover, time shifting is to a certain extent also impacting on the market value of the TV programs, whose instant & future audience (bases for acquisition of broadcasting rights to rightholders) is going down. In that respect too, time shifting is definitely causing a growing harm to rightholders.

As of today, one can seriously question whether this unremunerated “Time shifting” exception is really in compliance with EU regulation, especially the “three steps test” and the list of exceptions of article 5 of the 2001 European Copyright Directive. In consideration of the above, it can certainly not be included in the “*de minimis*” provisions of said Copyright Directive.

Therefore, in accordance with European law, the “Time shifting” exception should provide for a fair compensation for rightholders. The same goes for “Format shifting”.

**EUROCOPYA therefore challenges the idea that “Time shifting” should continue to be maintained in UK legislation without any compensation for rightholders. The same goes for the new proposed “Format shifting” exception, which is nothing more than an extension of said previously existing “Time shifting” exception.**

**3. Levies have demonstrated their ability to balance the interests at stake.** They are far from being the universal panacea, but the system is working to the satisfaction of consumers, manufacturers of electronic goods, ICT industries, and rightholders : a recent survey prepared by *Econlaw Strategic Consulting* at the request of GESAC concludes that Private Copying Remuneration systems – thus levies – have a sound economic justification, generate positive incentives to the creation of IPR protected work and increase consumers’ welfare & freedom of use of creative works. They provide ancillary revenues to rightholders, and enable respecting the consumers “right to privacy” regarding private uses of copied works.

Unlike what sometimes undermines the consultation, levies are not a barrier to the development of new technologies & electronic goods. A study performed by EUROCOPYA in 2006 regarding development of MP3 Players in 3 key European markets (France, Germany, UK), showed no relation at all between the state of development of said markets and the level of applied levies (see *appendix*). See also above mentioned GESAC / *EconLaw* study.

## **Recommendation 8 – Questions & Answers**

### **THE NEW EXCEPTION :**

- **What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to rightholders and users of copyright works?**

Introduction of a format shifting exception will grant consumers legal certainty towards reasonable use of protected works in their private sphere.

The ICT industry will get a new incentive to sell its numerous devices dedicated to private copy (MP3 players, etc.).

But in the currently proposed option, with no compensation associated to this new exception, rightholders will get nothing except the satisfaction of the latter. Acts of private copying will be encouraged

Unlike what is stated in the Gowers Review (see § (106)), they will actually not be in a position to integrate additional revenue into the selling price of the original work that is later copied, because :

- rightholders cannot implement an additional remuneration based on exclusive rights where the Copyright Directive provides for an exception to said exclusive rights, and
- their recent attempts to do so – if compatible with the Copyright Directive – will most probably be blamed by consumers taking advantage of the new free of charge exception. The recent experience of some companies attaching a file to their CDs/DVDs for format shifting could be ruined by the Government legal initiative.

**Their will be no benefits for rightholders** (and probably even extra costs incurred in order to make consumers actually benefit from their “format shifting” exception ?)

- **Do you agree with the conditions proposed above?**

The more restricted, the more compatible the exception will be with Bern Convention & European Copyright Directive provisions, especially the “three step test” provided by these instruments.

However, EUROCOPYA expresses great reservations about the enforceability of most of the proposed conditions currently envisaged in order to benefit from the “Format shifting” exception, as proposed under § (85) & (86) of the consultation paper, such as the one related to the legal & actual ownership of the original work.

Even more problematic is the fact that the proposed “Format shifting” exception will only extend the pre-existing “Time shifting” exception, that should already be compensated for in order to be in compliance with EU regulation (see our general comments above). We therefore advocate for the implementation of a “win-win” solution whereby consumers & ICT industries on the one hand, and rightholders on the other hand, would each get their fair share of the revenues generated by what could be considered either as the private copying business or as the consumer’s private copying playing field. In other words, a fair compensation should be granted to rightholders in accordance with the European legal framework.

- **Would a requirement to dispose of a format shifted copy if the original was given away or sold or otherwise disposed of, be practicable or enforceable? What alternatives can you suggest to address the problem of original copies going back into circulation after copies have been made?**

Such provision would be neither practicable nor enforceable. Believing the contrary would be naïve not to say dishonest. The “original copies” can be CDs or DVDs, but also files acquired through e-commerce or through VOD. Original copies could as well be time-shifted broadcasts (see § (92)).

The sole alternative would be to stop prevaricating with non enforceable provisions and agreeing on fundamental changes which would put the existing copyright act in line with article 5.2.b of the European Copyright Directive.

- **Should further conditions be imposed? If so, what are these?**

The sole further condition to be imposed would be to provide a fair compensation to the rightholders.

- **Should the non-infringing acts differ depending on the class of work concerned?**

In principle no. Copyright protection (and exceptions to this protection) should remain ubiquitous for any type of creative work.

#### **CLASSES OF WORKS :**

- **Should the proposed format shifting exception be limited to recorded music and film or should it also apply to other works? If so which ones?**

The reason why the Gowers Review mainly focussed on music, and only a little about film, is linked with the fact that “Format shifting” issues actually may play a great role in those sectors where copyright protected works are played back on numerous portable devices. This is clearly the case for music, more questionably the case for films.

But, if appropriately compensated for, the exception should apply to all protected works, except for those sectors where legal EU provisions provide the contrary (such as for games & softwares). The objective should be to legalise a ubiquitous practice.

- **What impact would the introduction of a format shifting exception have on particular sectors of the creative industries?**

As said before, the Format shifting exception combined with the Time shifting exception will have a negative impact on the film industry. See our comments above pursuant to § (48) & (92) of the consultation paper. Those two exceptions without any fair compensation are a serious threat. We all know that private copy in general deprives film & audiovisual industries & creators from exclusive rights revenues such as those arising from DVDs, VOD, pay-TV and even theatrical releases. To recoup its production and distribution costs, a film needs to be exploited chronologically on each window. Private copy to a certain extent impacts the chronology and the related revenues. This was and still is the reasoning behind the necessary fair compensation.

## **FORMAT :**

- **How many format shifts should be allowed?**

The number of shifts is very difficult to control, and those control devices already put in place create great reluctance & resistance on consumers' side. There can be questions whether they can be controlled at all, because of the fundamental right to privacy. People are used to transfer their "personal content" from one old device to the new one(s) they just purchased. Most of the time, the original is lost.

- **Should the exception allow additional format shifts to take account of changing technology?**

Yes, probably, but format shifts should remain an exception and not become a new alleged consumers' right (a so-called "right to interoperability" that would go beyond the 1991 Software Directive provisions<sup>3</sup> and challenge existing provisions of the 2001 Copyright Directive regarding Technical Protection Measures - TPMs). This means that DRMs should keep the possibility to block a format shift.

The exception should not confer any right to circumvent DRMs or TPMs.

- **Should more than one copy be allowed to address the technological process of transferring content?**

Here again, recommendation 8 envisages conditions that will be very difficult to control, and therefore opens the door to illegitimate acts of copying : we all know that ripping a DVD for example is a two steps process through a PC.

## **TIMING :**

- **Should the exception apply to works published after the date the law changes; purchased after the date the law changes; copied after the day the law changes ?**
- **What would be the practical implications of the above options ?**
- **Can you think of any alternatives ?**

The exception will *de facto* apply to all works copied after the date the law changes. It is difficult to believe that consumers will understand and/or be in a position to implement other provisions.

The major difficulty when implementing a so called "Format shifting" exception or, in more general terms, a private copy exception, is to define the boundaries so that acts of piracy cannot be justified by the exception.

## **EUROPEAN LAW / FAIR COMPENSATION :**

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<sup>3</sup> Especially art. 6 of said European Directive.

Unlike what is stated in § (107) of the consultation paper, the existing “Time shifting” exception under UK combined or not with the new proposed “Format shifting” exception actually set up a private copy exception which is not specially narrower than the ones existing in other legislations in the EU.

It goes without saying that the user’s practice does not differ from one market to another. Private copies are to a significant level a substitution for a sale. UK does not differ from France, Spain or Germany in that particular respect.

The harm as stated in recital 35 of the Copyright directive could be a valuable criteria when determining the fair compensation. As far as the film industry is concerned, said harm cannot be denied. To the contrary of recorded music, a film is on the average being watched only 1 to 3 times by the same person. Most of the persons who can watch a private copy of a movie will not purchase corresponding DVD, nor download the file from any VOD service. The Gowers Review is seemingly aware of the Film industry basic business model (see § (48)).

As said before, incorporate additional revenues into the sales price of the original is neither allowed, nor feasible.

This is to say that detailed arrangements to “finance” the fair compensation should be defined. Private copying is a private act which cannot be monitored. Because exclusive rights in the private sphere are not enforceable, the European legislator introduced a private copy exception in the Copyright Directive, together with a compulsory fair compensation. They could take the form of levies or another form. But fair compensation directly related to the exceptions should be paid to rightholders as a distinct income.

### **Conclusion on RECOMMANDATION 8**

Introducing a new “Format shifting” exception in the UK copyright act with no accompanying compensation for rightholders would infringe the European law, as does currently existing “Time shifting” exception.

### ***Recommendation 2 – “Educational exceptions” : extension to distance learning***

The consultation documents highlights the significant investments (252 million pounds) that primary & secondary schools were able to make in 2005 on information and communications technology (cf. (39)). It is therefore very disappointing that when it comes to filling these “pipelines” with copyright protected content, the exception to exclusive rights seems suddenly the only valuable solution ...

Considering more specifically the “Educational exception” provided by Section 35 of the Copyright Designs & Patent Act (CDPA), which allows educational establishments to record and show off-air broadcasts, the consultation document indeed considers necessary that “new licences would be made available to cover the expanded nature to the exception, with higher fees to reflect the broader range of permitted activity” (cf. (54)), but :

- It is not clear to us how such licensing schemes will continue to prevail if an extended “Educational exception” is existing anyway : the exception would not apply to the extent that there is a licensing scheme certified by the Secretary of State (said schemes are operated by ERA), but why conclude such schemes if an exception is already available anyway ?
- Why “protect” some programs under certified licensing schemes, and not the others ?
- If such licensing schemes continue to exist, will ERA finally open its benefit to non-British rightholders, to the contrary of what has been done so far ?
- If said licensing schemes should be concluded “*with higher fees to reflect the broader range of permitted activity*”, why would programs falling outside said scheme – but within the exception – remain unremunerated ?? Why finally not applying the same reasoning to the extension of the “Time shifting” exception, and remunerate it (see our former comments on Recommendation 8) ?

As for Recommendation 8 regarding “Format shifting”, EUROCOPYA advocates for an actual compensation for ALL rightholders of any program that would be concerned by both the existing “Educational exception” as well as its potential extension to on-demand services.

Furthermore, EUROCOPYA expresses great concerns on extending said exception to on-demand services, especially if said exception is not limited to extracts only, because :

- these on-demand services are constituting the main new market for audiovisual works, and
- organising the necessary DRM workaround arrangements in order to make schools benefit from said exception puts an unnecessary burden on rightholders and opens the door for misuses of copyright protected works, which consequences are exceeding the benefits for educational institutions;
- said educational institutions may already get easily access to audiovisual content at specific conditions through other means compliant with IPR protection.

### ***Recommendation 9 – Extension of “Copying for research & Private study” exceptions***

According to the Gowers Review quoted by the consultation paper, it was found that current arrangements regarding the research & private study exception of Section 29 of the CDPA could be causing problems because they do not cover sound recordings and films.

Said paper also indicates that the current UK legislation does not define in detail what copying may be carried out for research and/or for private study (left to court interpretation) (see (121)), nor does it define the terms “research” or “private study” (it specifies however that research must be non-commercial, and private study must not be for direct or indirect commercial purposes) (see (124)).

If those exceptions were to be extended to music & films (especially the “private study” one), and particularly if combined with proposed new exception under recommendation 8 (“format shifting”, itself extending “time shifting”), **UK law will then provide for an extensive field of exceptions to exclusive rights which, once again, cannot any longer remain unremunerated**, as they are clearly creating harm to rightholders of concerned protected works.

Here again, EUROCOPYA expresses great concerns on extending said exceptions to films, especially if said exceptions are not limited to extracts : such limit would indeed limit risks of misuses, and seems reasonable – sufficient – for the goal that is seeked. Such is for instance the case regarding the – remunerated – exception existing in French Copyright law<sup>4</sup>.

If said exceptions were to be extended concerning all works, they should be remunerated, as they would definitely create even more harm to rightholders, as :

- educational institutions are an existing market for audiovisual works; said educational institutions & pupils may already get easily access to audiovisual content at specific conditions through other means compliant with IPR protection;
- organising the necessary DRM workaround arrangements in order to make schools and pupils benefit from said exceptions will put an unnecessary burden on rightholders, and opens the door for misuses of copyright protected works, which consequences are exceeding the benefits for educational institutions.

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*Appendix* : EUROCOPYA 2006 study on MP3 players

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<sup>4</sup> articles L.122-5 e) & L.211-3 3° dernier alinéa du Code de la Propriété Intellectuelle