



GSM Europe

The European interest group of the GSM Association

<http://gsmeurope.gsmworld.com>

London, 2 January 2001

Subject: GSM Europe comments to the proposed Copyright Directive (Article 5.1) - Second Reading

As the debate on the proposed Copyright Directive is entering a crucial stage in the European Parliament second reading, GSME Europe would like to take this opportunity to submit its comments to the text, given the strong impact that this proposal will have on mobile operators' business in Europe.

GSM Europe is the European interest group of the GSM Association, the premier global body for wireless communications. GSM Europe represents 159 operators in 50 regions of Europe and currently serves over 264 million GSM customers.

GSM Europe considers the Copyright Directive to be of utmost importance for the economic growth and related job creation potential of internet-based services in Europe. With the development of GPRS and UMTS, mobile will become a major way of accessing the Internet, rendering the implementation of this Directive an issue of particular importance to GSM Europe. It is expected that the number of Internet-enabled mobile phone users in Western Europe will be approximately 220 million by the end of 2004 – with a penetration rate of 56%.

Enormous investments such as acquiring UMTS licences and deploying subsequent infrastructures are undertaken by mobile operators to make wireless Internet access available to European customers. It is felt that the Copyright Directive could have a serious impact on these investments. GSM Europe is therefore of the opinion that the Copyright Directive should define a clearer exception for temporary technical copies in its article 5.1. This issue of caching (article 5.1 and recital 33), as well as the lack of coherence of this proposal with the e-Commerce Directive raise some serious concerns amongst European mobile operators.

Article 5.1 and Recital 33 of the Common Position (CP) define an exception for temporary technical copies, which are made within a digital network in order to transmit data across the Internet. Some of the copies are made as part of a process known as “*caching*”. The process of caching is an essential technical element that allows for an efficient, cheaper and speedy functioning of access to the Internet. Thanks to caching, networks capacity is better used, hence enabling reduced costs but also higher quality services,

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which in the end benefit the users and provide them with an enhanced mobile experience. If caching were forbidden or such heavy constraints were imposed on caching that they would *de facto* prohibit caching, Internet traffic could slow down by approximately 30 % (source EuroISPA). This would have very strong negative effects on consumers, but also on businesses involved in e-commerce. On the other hand, cached copies made in this way do not represent lost sales for rightholders.

There is also a risk that if the Copyright Directive does not define a solid exception for cached copies, it could establish a legal basis for copyright levies on the Internet similar to those already applied to photocopiers and fax machines in some Member States. Such a move would contradict all efforts to provide European citizens with Internet access at a reasonable price and to stimulate e-Europe developments.

In order to make sure that digitised information can freely flow across the EU, the Commission made Article 5.1 the only mandatory exception. Given the controversial debates during 1st EP Reading (introduction of the “authorised” requirement for cache copies) and at Council level (some Member States supported a deletion of Article 5.1 or the EP’s amendment), GSM Europe would like to stress that this exception needs to be watertight – otherwise, there is a risk of an inconsistent implementation of the Article.

Inclusion of the “authorisation” criterion (EP 1st Reading) or any other changes of the Article which aim to put cache copies outside the scope of the Article will *not* help to fight copyright piracy. GSM Europe wishes to stress that copyright infringements and other illegal content are addressed in the E-Commerce Directive. It should also be reminded that all temporary copies exempted by 5.1 have also to pass the Three Step Test of the WIPO Treaty as stipulated by Article 5.5ⁱⁱ. There is no need to provide an additional basis for legal action by rightholders against cached copies.

The Council CP raises the risk of inconsistent implementation and levies. The number of conditions that must be satisfied for the exception to apply has increased from initially 4 (Commission Proposal) to 10.ⁱⁱⁱ In particular, the word “essential” could be interpreted in such a way, that cached copies are not covered by the exception in 5.1a.

GSM Europe understands however that, given the political circumstances, it is difficult to improve this Article. Nevertheless, GSM Europe would like to make the following points:

- It is absolutely necessary that the reference to “caching and browsing” in Recital 33 is maintained and continues to refer to 5.1a (and not to 5.1b).^{iv}
- Changing an “or” into “and” in the Article should be avoided, as it could put cache copies outside the scope of the exception.

Finally, GSM Europe would like to draw the attention to the risk of imposing an additional burden on operators, which would moreover be contradictory to the E-commerce Directive. Article 8.3^v of the Council CP allows rightholders to obtain an injunction in cases where 5.1 temporary copies facilitate a copyright violation. There are serious concerns that the broad interpretation of Article 8.3 in Recital 58^{vi} could lead to very unspecific and unreasonable injunctions (“*Stop any copyright violation!*”), which in the end would force intermediaries and ISPs to impose filtering and monitoring technologies. This is in total contradiction to the E-Commerce Directive’s strong prohibition of general surveillance.

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ⁱ The systems of Internet Service Providers are typically configured so that, when they detect that certain material is being requested particularly often by local users, the system automatically stores a copy of this material. Thus, the next time the material is requested, it can be supplied locally and it is not necessary to transport data from the site where the material was originally placed on the network. A similar process of temporary storage is carried out on users' terminal equipment for the same reasons. In both cases, cached copies are soon overwritten by new high demand material. The caching process gives users faster access to material. It also allows material to be supplied without occupying capacity in the core network. In sum, caching considerably enhances network efficiency.

ⁱⁱ Article 5.5: The exceptions and limitations provided for in paragraphs 1, 2 and 3 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of rightholders.

Recital 44: When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

ⁱⁱⁱ The Article 5(1) exception as defined by the Council Common Position is far narrower than the Commission's original proposal. 'Essential' is only one of a number of new conditions:

Commission Proposal – COM (97) 628:

Temporary acts of reproduction referred to in Article 2 which are an **integral part of a technological process** for the **sole purpose of enabling use** to be made of a work or other subject matter, and having **no independent economic significance**, shall be exempted from the right set out in Article 2.

Council Common Position:

Temporary acts of reproduction referred to in Article 2, which are **transient or incidental**, which are an **integral and essential part of a technological process**, whose **sole purpose is to enable**:

- a) **a transmission in a network between third parties by an intermediary** or
- b) **a lawful use**

of a work or other subject matter to be made, and which have **no independent economic significance**, shall be exempted from the right set out in Article 2.

^{iv} Recital 33: The exclusive right of reproduction should be subject to an exception to allow for certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process carried out for the sole purpose of enabling either a transmission between third parties by an intermediary, or a lawful use of a work or other subject matter to be made. The act of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function effectively, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law;

^v Article 8.3: Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

^{vi} Recital 58: In particular in the digital environment, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring an end to such infringing activities. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under article 5. The conditions and modalities relating to such injunctions should be left to national law of the member states.