SUMMARY OF PROCEEDINGS

from: Working Party on Intellectual Property (Copyright)

dated: 29 and 30 March 1999

No. prev. doc.: 6723/99 PI 15 CULTURE 17 CODEC 130
No. Cion prop.: 5562/98 PI 4 CULTURE 3 CODEC 37


General remarks

1. At the beginning of the meeting, the Chairman gave a brief indication of how he intended to proceed during the two-day session of the Working Party. He invited the Commission representative to present a synthesis of the written comments submitted by delegations on the exceptions they wished to have included in Article 5(2) and (3) of the draft Directive, together with the Commission's position on these comments. Then, delegations would be given the opportunity to exchange views on the need to take on additional categories of exceptions, apart from those already referred to in Article 5. If time allowed, there would also be a discussion of Article 5(1).

Albeit accepting the above procedure as outlined by the Chairman, the DK, UK and NL delegations reiterated their general reservation of principle as regards the structure of Article 5 (exhaustive list, no flexibility for taking account of developments in digital technology,
subsidiarity concerns, too detailed) and stressed that any comments they would offer on individual exceptions were without prejudice to this reservation.

In response to these delegations, the Commission representative recalled that the European Parliament\(^1\) had raised no objections as regards the structure of Article 5 and expressed the view that a list of exceptions was necessary in order to delineate properly the exact scope of the rights referred to in the draft Directive.

The Chairman took note of the above statements and indicated that a discussion on the general structure of Article 5 would take place at the next meeting, after delegations have had the opportunity to study the new, expanded list of exceptions.

**New categories of exceptions which the Commission could accept**

2. The Commission representative indicated his willingness to add to Article 5 (3) the following categories of optional exceptions to the rights mentioned in Articles 2 and 3 of the draft Directive, which had been requested by several Member States:

   i) incidental use of works located in public places,
   ii) works in public exhibitions or for sale in auctions and/or appearing in sales catalogues,
   iii) speeches, lectures and public addresses (Article 2bis of the Berne Convention),
   iv) caricature, parody and pastiche, and
   v) use of protected works in religious ceremonies.

Without opposing the above mentioned exceptions, the DK, S, IRL, FIN, UK, LUX and NL delegations considered that these were not the only exceptions which should be allowed under the Directive, while not wishing to see too detailed a list of exceptions, which risked even being in contradiction with the subsidiarity principle.

\(^{1}\) The opinion of the European Parliament at first reading is contained in 5756/99 CODEC 57 PI 9 CULTURE 10.
The Commission representative stressed that the intention was to mention broad categories of exceptions rather than giving detailed exceptions. As regards the alleged contradiction with the subsidiarity principle, he took the view that this question could be considered once the full list of exceptions became clear. In response to a question by several delegations, he confirmed that the draft Directive did not touch upon the right of public performance, and that consequently there was no need to provide for exceptions to this right in Article 5; this could be clarified in a recital.

The IT delegation, supported by the LUX and NL delegations, considered that the exceptions should be examined in relation to the digital environment and not in abstract terms.

It was concluded that no delegation objected to the addition of the above mentioned exceptions to Article 5 (3).

**Suggested exceptions which the Commission considered should not be added.**

3. The Commission representative presented to the Working Party a number of exceptions which had been suggested by Member States and which could not be accepted by the Commission for the reasons set out below.

   a) Exceptions which the Commission considered were already covered by Article 5(2) and (3)

4. As regards the use of works in school examinations, the Commission representative considered that this could be covered by the existing exception of Article 5(3)(a).

The majority of delegations endorsed this view.

A large number of delegations, however, raised concerns over the requirement of fair compensation for the rightholder, which had been added to Article 5(3)(a) by the EP. According to the Commission representative, the term "fair" was flexible enough to be able to be interpreted as meaning no compensation at all in cases such as this one. The F delegation did not share this view.

Other delegations stressed the need for a definition of the terms "non-commercial purpose".
According to the Commission representative, these terms referred to the nature of the institutions holding the tests rather than to the tests themselves; the exception thus would apply to public educational establishments but not to private ones. The F, DK and UK delegations entered a reservation on this view.

5. As regards the incidental inclusion of protected material in another work, the Commission representative expressed the view that this should not be subject to authorisation by rightholders; were this to be construed as a potential infringing act, however, it could be covered in any event by the exception of Article 5(3)(c) or by the new exception relating to the incidental use of works located in public places (see above under 2).

The UK, A, IRL, IT, NL and LUX delegations were of the view that such use could not be covered entirely, nor appropriately, by Article 5(3)(c) or by the new exception on incidental use of works located in public places. The D delegation entered a scrutiny reservation. Several delegations considered that an exception would be justified only if incidental use was unintentional.

It was concluded that further reflection was necessary on how to clarify the issue. The Working Party would revert to it at the next meeting, on the basis of draft language to be submitted by the Commission representative, in the form of additional wording in one of the exceptions mentioned above or in a recital.

6. As regards an exception concerning ephemeral fixations by a broadcasting organisation by means of its own facilities and for its own broadcasts, the Commission representative recalled that this had also been requested by the EP (see EP's amendment 39) and had been accepted by the Commission subject to rewording. The F delegation expressed concerns over the lack of a harmonized definition of broadcasting organisations within the Community.

In response to the DK and D delegations, the Commission representative indicated that the above exception would not cover the reproduction by broadcasting organisations of historical recordings for preservation purposes but undertook to consider the issue further, in particular concerning recordings of exceptional documentary character.
7. As regards the recording of radio or television broadcasts by certain institutions (hospitals, prisons, seniors' homes) for time-shifting purposes, the Commission representative expressed the view that this could potentially be covered by the existing exceptions of Article 5(2)(a), 5(2)(b) and 5(3)(b). Another alternative would be for Member States to interpret the term "public" in such a way that an exception would no longer be necessary for such acts.

The S, DK and FIN delegations expressed the view that none of the options suggested above by the Commission representative covered in a satisfactory manner the relevant exceptions in their laws and requested that an explicit exception to this effect be inserted in the future Directive. The UK, IRL, GR and A delegations could accept the addition.

The F delegation suggested that, if taken on board, such an exception should be made conditional upon fair compensation of the rightholder.

The P delegation suggested that such an exception could be confined to non profit-making institutions.

It was concluded that there was broad support for the addition of this exception and that the Working Party would revert to it at a later stage on the basis of a Commission draft.

(b) Suggested exceptions which the Commission considered constituted interpretation of contractual relations rather than exceptions to the rights

8. As regards the use of protected material in connection with the demonstration or repair of audiovisual equipment, the Commission representative expressed the view that this constituted an interpretation of contractual relations (implicit licence) rather than a genuine exception. If necessary, the Commission representative could envisage a clarifying statement in a recital.

9. As regards the use of portraits, the Commission representative expressed the view that this also concerned contractual relations between the person portrayed and the person who made the portrait and consequently it would not be appropriate to be added to the list of Article 5.
All delegations which spoke endorsed the Commission's view and agreed that privacy concerns of the portrayed person as regards reproduction and distribution of the portrait could be safeguarded through this person's moral rights.

10. As regards extended collective licences, the Commission representative considered that these were not genuine exceptions but rather modalities of the management of rights, which were not affected by the Directive. He suggested that, if need be, the issue be clarified in a recital.

Except for the F delegation, which entered a reservation as regards any reference in the Directive to any particular system of management of rights, all other delegations which spoke accepted the principle of some mention of the above licences in the Directive. Opinions diverged however on whether a recital would suffice or not.

It was concluded that the Working Party would revert to this issue at a later stage on the basis of a Commission draft.

(c) Other suggested exceptions

11. As regards the use of protected works in official ceremonies, the Commission representative considered that this could partly be covered by the new exception on religious ceremonies (see 2 above). The public performance of musical works in official ceremonies fell outside the scope of the Directive anyway. Speeches pronounced in such ceremonies could also be covered by the new, broad exception on speeches (see above under 2).

The Working Party endorsed the Commission's view.

12. As regards the use of protected works in connection with charity, it was agreed that this should be dealt with in the context of a new exception on hospitals, prisons, seniors' homes etc (see above under 7).

13. As regards the use of protected material held by public authorities, the Commission representative
distinguished between those documents issued by public authorities, in respect of which copyright protection is optional under Article 2(4) of the Berne Convention, and copyright works created by individuals and deposited with the public authorities in the ordinary course of administrative proceedings. In the latter case, use of these documents could be covered by the existing exception of Article 5(3)(e), as well as Article 5(2)(a) or (b) where appropriate.

The S delegation, supported by the DK and NL delegations, highlighted the political importance of having a specific provision in the Directive which would guarantee the right of free access to documents held by public authorities, including the right to obtain a copy. According to these delegations, the present wording of Article 5(3)(e) did not offer sufficient guarantee of such access. Nor were the exceptions in Article 5(2)(a) and (b) broad enough to cover copies requested by a legal person or provided in electronic form.

The F, UK, IRL and IT delegations, however, agreed with the Commission representative that the above acts were already sufficiently covered by the current Article 5(3)(e) and wondered whether the issue could be clarified by means of a recital.

It was decided to revert to this issue at a later stage on the basis of a draft Commission text.

14. As regards the printing of the lyrics of songs performed during a concert on the concert programme, it was noted that no delegation requested a specific exception to this effect in the Directive.

15. As regards use of protected material in libraries, the Commission representative opposed any broadening of the exception of Article 5(2)(c), as amended by the EP.

The DK, ES, P, UK, S, IRL and NL delegations spoke in favour of a broad exception for libraries, especially as regards the making available by libraries of computer terminals allowing the public to consult electronically works held by the library and to browse the Internet. These delegations also voiced concerns over the restrictions added to the exception of Article 5(2)(c) by EP's amendment 38.

The F delegation spoke in favour of EP's amendment 38 and expressed its preference for
contractual arrangements between libraries and the rightholders rather than an excessively broad exception.

The A delegation expressed the view that the mere putting at the disposal of the public by libraries of computer terminals offering access to the Internet was not a copyright infringement per se.

It was concluded that the Working Party would revert to this issue in the course of discussions of the EP's amendment to Article 5(2)(c).

16. The UK delegation expressed concerns over the restriction added to the exception on research in Article 5(3)(a) by the EP's amendment 44, as well as over the limitation of this exception to non-commercial purposes.

It was noted that the Working Party would revert to this issue in the course of discussions of the EP's amendment to Article 5(3)(a).

17. The D and LUX delegations considered that the exception in Article 5(3)(c) concerning the use of excerpts in connection with the reporting of current events should be made sufficiently broad to cover the reproduction of complete press articles in press reviews.

The IT delegation considered that this provision should be aligned more closely on Article 10bis(1) of the Berne Convention.

It was noted that the Working Party would revert to these questions in the course of discussions of the EP's amendment to Article 5(3)(c).

(d) Other comments on exceptions

18. The UK delegation, supported by the IRL delegation, raised the question of the need for further exceptions with a view to avoiding potential conflicts between copyright and other forms of protection such as industrial designs and typefaces. It also questioned whether exceptions were
needed in respect of the cable operators' so-called "must carry" obligations and the reconstruction of buildings.

On the first point, the Commission representative drew attention to the new recital proposed by the EP in its amendment 11; he reserved his position on the other points.

19. The S delegation requested two additional exceptions concerning the use of minor parts of protected material in composite works for teaching purposes, as well as the use of works of fine art which have been made available to the public accompanied by text in the context of a critical or scientific presentation.

The Commission representative considered that the first of these points was already covered by Article 5(3)(a), and reserved his position on the second.


21. The B delegation requested that a provision be added amending the exceptions in the database Directive 2 in respect of illustration for educational purposes.

The Commission representative expressed reservations in this respect.

22. The Chairman informed the Working Party of his intention to have a new discussion of Article 5(2) and (3) at the next meeting on the basis of an amended text, which would take into account both the EP's amendments and the comments made at the present meeting.

**Article 5(1)**

23. The Working Party had a brief, preliminary exchange of views on the EP's amendment 33 relating

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to the exception of Article 5(1).

The Commission representative reiterated his Institution's opposition to the last phrase of the above amendment, which aimed at restricting the exception of Article 5(1) to authorised uses. He invited the Working Party to consider the possibility of rightholders being given the possibility of seeking injunctive relief, but not of claiming damages, against Internet carriers in respect of unauthorised material carried by them. At the request of the Chairman, he informed delegations of the latest developments in the discussions on service providers' liability in the context of the draft electronic commerce Directive.  

The A and FR delegations spoke in favour of the EP's approach on amendment 33. The UK, IRL, NL and FIN delegations expressed interest in the possibility put forward by the Commission representative.

The DK delegation reiterated its view that transient and incidental acts of reproduction should fall outside the scope of the reproduction right.

Other business

Hearing on combating counterfeiting and piracy in the Single Market

24. The Commission representative gave a brief report on the above hearing, which had been organised jointly by the Commission and the Presidency and had taken place in Munich on 2-3 March 1999.

3 See document 5123/99 ECO 2 CODEC 6.