NOTE

from: Presidency

to: Working Party on Intellectual Property (Copyright)

No. prev. doc.: 8966/99 PI 32 CULTURE 39 CODEC 320
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297

- Consolidated text of Article 5

Delegations will find attached a consolidated text of Article 5 of the above proposal, reflecting discussions of this Article at recent meetings.
Article 5 - Exceptions to the restricted acts set out in Articles 2 and 3

1. [Temporary acts of reproduction referred to in Article 2, such as] transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose sole purpose is to enable use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted from the right set out in Article 2. [Such uses must be authorised by the rightholders or permitted by law.]  

The following sentence is to be added to Article 8(2): "...Rightholders shall be in a position to apply for an injunction against service providers who carry out acts of reproduction exempted by Article 5(1) knowing or having reasonable grounds to know that their activities would entail the infringement of a copyright or related right."

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1 The D, A, S and UK delegations feared this wording would make this exception too broad.
2 The IRL, S and UK delegations expressed doubts on the words "and essential". The Commission representative explained that these words were intended to cover acts which were either technically essential or economically essential. The ES, IT and A delegations questioned the compatibility between "essential" and "facilitate".
3 The A delegation suggested replacing "a work or other subject matter" by "the work or other subject matter reproduced".
4 The F and UK delegations questioned the terms "and which have no independent economic significance".
5 The NL, S and UK delegations questioned the appropriateness of trying to cover in a single provision both browsing and liability of service providers in respect of caching.
6 Text suggested by the European Parliament and supported by the F, IT and UK delegations. Several delegations considered that failure to restrict this exception to authorised use would have the effect not only of protecting service providers but also of excluding the liability of those who uploaded or downloaded unauthorised material.
7 The F delegation supported by the IT delegation, suggested that the following phrase be added at the end of Article 5(1) or as a Recital: "Works or subject matter put on the networks must carry an indication of authorisation by the rightholders or the absence thereof." The D and UK delegations expressed doubts on the need for this addition.
8 The F and A delegations consider that this provision should not be limited to service providers.
9 The DK delegation considers that this provision should not refer to Article 5(1). Several delegations question the possibility of providing for injunctions in respect of acts which are exempted.
10 Rather than adding this sentence to Article 8(2), the IT delegation suggested the following new third paragraph of Article 8:

"3. Each Member State shall ensure that rightholders can apply for an injunction against service providers who carry out acts of reproduction exempted by Article 5(1), even where the service providers do not know, or have no reasonable grounds to know, that their activities would entail the infringement of a copyright or related right."
2. Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in the following cases:

a) in respect of reproductions on paper or any similar medium, with the exception of musical works in published form, effected by the use of any kind of photographic technique or by some other process having similar effects, provided that the rightholders receive fair compensation;

related right."

The DK delegation suggested the following language on paragraph 2: "2. Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in respect of:
(a) reproductions made by or on behalf of a natural person for private purposes;
(b) reproductions on paper or any similar medium for other purposes, effected by the use of any kind of photographic technique or by some other process having similar effects;
(c) reproductions for archival purposes or preservation by establishments which are not operating for direct or indirect economic or commercial advantage, such as libraries and archives."

The A, NL, UK, IRL, DK and LUX delegations entered a reservation regarding the exclusion of sheet music from the scope of the exception.

The F, IT, ES and P delegations were in favour of such an exclusion.

The B, FIN and S delegations entered a scrutiny reservation.

The IRL, LUX and UK delegations entered a general reservation on the "fair compensation" condition, in particular in respect of exceptions which were so narrow as not to harm rightholders in any way.

The DK, FIN and S delegations entered a reservation in respect to this condition being applied to reprography for private and educational purposes.

The B, D, ES, F, IT, A and P delegations were in favour of the fair compensation condition, although the D, F and A delegations considered that it should be referred to as "equitable remuneration" and the P delegation suggested "fair compensatory remuneration".

According to the Commission representative, the term "fair" leaves Member States free to consider the particular circumstances of each case and to judge whether the compensation should take the form of remuneration or some other form which would not necessarily involve a specific payment. This could be clarified by means of a Recital.

The A, F and UK delegations expressed strong doubts as regards the view that "fair" can be interpreted as meaning no compensation at all in some circumstances.

In an effort to clarify the issue, the A delegation proposed that the following language be added to Article 5 as paragraph 4a: "4a. When Member States provide for limitations under Article 5(2)(a), they shall provide for equitable remuneration as far as it is necessary in order to comply with the provision set out in paragraph 4."
b) in respect of reproductions on audio, visual or audio-visual analogue\textsuperscript{14} recording media made by a natural person\textsuperscript{15} for private and strictly personal use\textsuperscript{16} and for non-commercial ends\textsuperscript{17}, on condition that the rightholders receive fair compensation;\textsuperscript{18}

ba)\textsuperscript{19} in respect of reproductions on audio, visual or audiovisual digital recording media made by a natural person for private and strictly personal use and for non-commercial ends, without prejudice to operational, reliable and effective technical means capable of protecting the interests of the rightholders\textsuperscript{20}; for all digital private copying, however, fair compensation for all rightholders must be provided\textsuperscript{21};

\textsuperscript{14} The IRL, A, S and UK delegations expressed doubts about separate provisions for analogue and digital media.

The P delegation considered that it was premature to include separate provisions for digital media; that possibility could be envisaged when the Directive was revised.

\textsuperscript{15} The DK and A delegations expressed reservations on the restriction of this exception to natural persons.

\textsuperscript{16} The A, UK, DK, D, IRL, NL, S, P and LUX delegations requested the deletion of the words "and strictly personal" as too restrictive.

The B, F and ES delegations were in favour of replacing these words by the notion of the family circle.

\textsuperscript{17} The DK, IRL, S, P, D and UK delegations requested that the words "and for non-commercial ends" be deleted.

\textsuperscript{18} Positions expressed in respect of fair compensation in sub-paragraph (a) also apply to this sub-paragraph.

\textsuperscript{19} Positions expressed in respect of sub-paragraph (b) also apply in respect of sub-paragraph (ba).

\textsuperscript{20} The clause beginning "without prejudice ..." will be examined in conjunction with Article 6.

\textsuperscript{21} The A and UK delegations expressed reservations with regard to this clause.

The ES and IT delegations suggested that this clause be clarified in a recital.
c) in respect of specific acts of reproduction made for archiving or conservation purposes by establishments which are not for direct or indirect economic or commercial advantage, such as in particular libraries and archives and other teaching, educational or cultural establishments;

d) in respect of ephemeral fixations made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be permitted.

(22) Reservation by the F delegation, for which this exception is too broad and covers acts which can be dealt with through contractual arrangements.

(23) According to the Commission representative, the exception applies both to analogue and digital reproduction.

(24) Reservation by the UK, D, S, ES, P, NL, IT, IRL, DK, A and FIN delegations, which requested that the phrase "for archiving or conservation purposes" be deleted as being too restrictive.

According to the Commission representative, following the deletion of the phrase "accessible to the public", this phrase was necessary to maintain the balance of interests between users and rightholders. Furthermore, it was wide enough to cover acts of reproduction of copyright protected material done by libraries for security reasons or for purposes of adaptation to new software. Uses such as browsing on the Internet or reproduction for teaching purposes were already covered by other exceptions of Article 5.

The DK delegation, supported by the IT, S, and P delegations, expressed strong doubts as to whether browsing on the Internet or consultation of an Intranet within libraries were covered by the exception of Article 5(1) and requested that these be explicitly exempted under paragraph 3 of this Article.

(25) The IT delegation requested that the phrase "direct or indirect economic or" be deleted and that the phrase "accessible to the public" be reintroduced.

(26) In reply to the P delegation, the Commission representative indicated that Member States were free to define the terms "teaching, educational or cultural establishments".

(27) Reservation by the F delegation, which considers that such acts should be dealt with through contractual arrangements.

(28) According to the DK delegation, a corresponding exception for on-demand broadcasting services should be provided if this provision is maintained.

(29) The UK delegation considered that this provision should not have the effect of limiting the exception for archives under paragraph 2(c).
3. Member States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases:

a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, on condition that the rightholders receive fair compensation;

The DK delegation suggested the following language on paragraph 3:

"3. Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in respect of:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the purpose to be achieved;
(b) use of works in connection with the reporting of current events, as long as wherever practicable the source is indicated, and to the extent justified by the informative purpose;
(c) quotations, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source is indicated, and that their use is in accordance with fair practice, and to the extent justified by the specific purpose;
(d) use for the purposes of public security or for the purposes of the proper performance or reporting of a judicial, parliamentary or administrative procedure and use to ensure the right for members of the public to have access to documents kept by public authorities;
(e) use for the purpose of communication to individual members of the public on the site in establishments referred to in (2)(c) of works and other subject matter contained in their collections;
(f) use for the benefit of people with disabilities, which are directly related to the disability and to the extent justified by the specific purpose.

The S delegation was prepared to accept this exception, provided that the phrase "such as extended collective licences" was added to the wording of Recital 12ter.

The Commission representative was prepared to consider such an addition.

In reply to the DK delegation, the Commission representative confirmed that the present exception covered also distance learning.

The UK, IRL, NL and A delegations entered a reservation as regards the requirement to acknowledge the source in each case. They suggested that this be rendered more flexible, by the addition of "whenever practicable" or a similar phrase.

The DK, UK, IRL, A  and NL delegations requested that the words "non-commercial" be deleted.

For the IT delegation, the "non-commercial purpose" condition should be maintained but only in respect of teaching.

The Commission representative considered that deleting this condition would be incompatible with the so-called "three step test".

Reservation concerning the principle of fair compensation by the DK, UK, IRL, NL and A.

Similar reservation by the ES delegation, which considered that the terms "for the sole purpose of illustration" limited the scope of the exception to such a point that there was no need for a compensation requirement.

The Commission representative reiterated his views on the interpretation of the terms "fair compensation" (see above footnote 13) and the suggestion that the matter be clarified by means of a recital.
b) uses for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature\(^{(36)}\) and to the extent required by the specific disability\(^{(37)}\);

c) use of excerpts\(^{(38)}\) in connection with the reporting of current events, as long as the source and, if possible\(^{(39)}\), the author's name is indicated, and to the extent justified by the informatory purpose and the objective of illustrating the event concerned\(^{(40)}\);

\(^{(36)}\) The DK delegation requested the deletion of the phrase "and of a non-commercial nature".

The Commission representative opposed such deletion, pointing out that this limitation counterbalanced the broadening of the exception through the phrase "the benefit of".

\(^{(37)}\) In reply to a question by the F and IT delegations, the Commission representative indicated that Member States were free to provide for fair compensation of the rightholder even where this was not explicitly provided for in the Directive.

\(^{(38)}\) The UK, LUX, S, NL, IRL, DK and FIN delegations requested that the words "of excerpts" be deleted.

The Commission representative, supported by the F delegation, were against the deletion of these words. Furthermore, the F delegation requested that the words "of short excerpts" be used, as suggested by the European Parliament.

\(^{(39)}\) According to the F delegation, the words "if possible" should be deleted, since it should always be possible to acknowledge the author's name.

The P delegation requested that these words be replaced by "whenever possible".

The UK delegation, supported by the IRL, DK and FIN delegations, suggested the following wording : "as long as, whenever possible, the source, including the author's name, is indicated".

The IT delegation suggested that the reference be to the rightholder's name.

\(^{(40)}\) Reservation by the NL, LUX, P, UK, S, DK, IRL and FIN delegations as regards the words "and the objective of illustrating the event concerned;".
d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which had already been lawfully made available to the public, that the source and, if possible, the author's name is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

e) use for the purposes of public security or to ensure the proper performance or reporting of an administrative, parliamentary or judicial procedure;

f) use of political speeches as well as extracts of public lectures or similar works or subject matter to the extent justified by the informatory purpose and provided that the source is indicated;

g) use during religious celebrations;

h) use by public social institutions pursuing non-commercial purposes such as hospitals or

(41) The P delegation argues that in the case of quotation it should always be possible to indicate the author's name.

The IT and F delegations suggested that the word "author's" be replaced by "rightholder's".

The FIN delegation suggested that a more general clause be used.

(42) The F delegation suggested the following recital: "Whereas the exception for quotation purposes concerns short excerpt from a work or other protected subject matter for the purpose of illustrating the work in which the quotation is included for critical, polemical or scientific purposes;"

(43) With a view to safeguarding the right to allow free access of members of the public to copyright protected material filed with public authorities, the S delegation, supported by the IRL, P, NL and UK delegations, requested that the following phrase be added to the present provision rather than in Recital 2a: "and use to ensure access to public documents as provided for in national law". Alternatively, the S delegation would be prepared to accept a separate provision similar to Article 13 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.96, p. 20).

The F delegation entered a scrutiny reservation as regards the S requests pending discussion on the Commission's Green Paper on public sector information in the Information Society.

The Commission representative expressed his strong preference for mentioning the S concern, which according to his view did not constitute an exception, in the Recitals. He entered a scrutiny reservation as regards the alternative S request.

(44) The UK and IRL delegations requested that the words "or proceedings" be added.

(45) The A delegation requested that the words "extracts of" be deleted.

(46) The F delegation requested that the informatory purpose be related to current events.

The Commission representative indicated his willingness to consider this request.

(47) The DK and NL delegations considered that, in line with the subsidiarity principle, it was not necessary to make specific provision for such an exception in the Directive, since it had no impact on the functioning of the internal market.
prisons\(^{(51)}\) on condition that the rightholders receive fair compensation\(^{(52)}\);  

i)\(^{(53)}\)(\(^{(54)}\)) use of works or other subject matter located permanently in public places provided that they do not constitute the main object of the use and to the extent justified by the informative purpose;  

j)\(^{(55)}\) incidental use of a work or other subject matter;

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(48) Reservation by the F delegation, which considered this exception as too broad.  
(49) The DK delegation, supported by the UK, S and FIN delegation considered that, in line with the subsidiarity principle, it was not necessary to make specific provision for such an exception in the Directive, since it had no impact on the functioning of the internal market.  

Alternatively, the DK and S delegations requested that the scope of the exception be limited to acts of reproduction for time-shifting purposes and that the provision be moved to paragraph 2 of Article 5.  
(50) The P, S and FIN delegations requested the deletion of the word "public".  

The F delegation and the Commission representative opposed this request.  
(51) The GR and P delegations and the Commission representative requested that the words "such as hospitals or prisons" be deleted.  
(52) Reservation by the GR, DK and S delegations as regards the condition of fair compensation.  

The F delegation insisted that this condition be maintained.  
(53) Without questioning the need for such an exception, the DK, UK, D, IRL, P, S and NL delegations expressed the view that this could be covered by a general, catch-all provision dealing with exceptions of minor importance, such as subparagraph (k) below.  
(54) Reservation by the F delegation, which considered that such use should be dealt with by contractual arrangements.  
(55) Without questioning the need for such an exception, several delegations shared the view that this could be covered by a general, catch-all provision dealing with exceptions of minor importance, such as subparagraph (k) below.
use in certain other cases of minor importance where exceptions already exist under national law\(^{(58)}\) provided that they only concern analogue uses\(^{(59)}\) and do not affect the free circulation of goods and services within the Community, without prejudice to the exceptions and limitations contained in this Article.

3a. Where the Member States may provide for an exception to the right of reproduction pursuant to paragraphs 2 and 3 of this Article, they may provide similarly for an exception to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction\(^{(60)}\).

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\(^{(56)}\) Text put forward by the Presidency in an effort to address the concerns of a number of Member States as regards the exhaustive character of the proposed list of exceptions under Article 5. Exceptions which might prove to be necessary in the digital environment would have to be dealt with at Community level in the context of the revision of the Directive provided for in Article 11(2).

The IT, D, B, ES, P and F delegations were prepared to accept the Presidency text as a compromise solution, although some of them wished to see it slightly amended.

The Commission representative indicated that this text was at the limit of what the Commission could consider as a compromise.

The DK, UK, NL, S, FIN, LUX and IRL delegations indicated their preference for the alternative text put forward by the DK delegation (see following footnote) and questioned the need for the conditions contained in the Presidency text (minor importance, already exist nationally, analogue use, not affecting free movement).

\(^{(57)}\) As an alternative to this provision, the DK delegation suggested the following language as new paragraph 4 of Article 5, together with corresponding amendments to a number of the Recitals:

"4. Member States may, without prejudice to paragraphs 2, 3 and 6, provide for other exceptions to the exclusive rights set out in Article 2 and Article 3, including such exceptions which have traditionally been recognised in national law."

This proposal was endorsed by the S, IRL, NL, UK, FIN and LUX delegations,

The Commission representative, as well as the F, IT, P, B, D and ES delegations opposed this text, which in their view led to no harmonisation at Community level. Furthermore, the Commission representative drew delegations' attention to the fact that the "no prejudice" clause in the DK proposal did not apply to Article 5(1).

\(^{(58)}\) Reservation by the F delegation as regards the terms "national law", which the F delegation considers as too vague.

\(^{(59)}\) In addition to those mentioned in footnote 56, the P delegation spoke in favour of deleting the words "only concern analogue uses and".

\(^{(60)}\) The F delegation suggested that the phrase "for the specific use for which the reproduction is permitted" replace the terms "to the extent justified ..........".
4. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 3a shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with the normal exploitation of their work or other subject matter.(61)

(61) The IT delegation having expressed a preference for the wording of Article 5(4) as suggested by the European Parliament in amendment 47, i.e. containing a reference to technical measures, it was agreed to discuss this issue under Article 6.
AMENDMENTS TO RECITALS

2a. Whereas the proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property - including intellectual property - freedom of expression and the public interest; whereas such harmonisation does not affect the access to public documents as provided for in national law\(^{(62)}\);

12ter. Whereas this Directive is without prejudice to modalities, in the Member States, of management of rights, such as extended collective licences\(^{(63)}\);

24a.\(^{(64)}\) Whereas in certain other cases of minor importance, such as use for the purpose of demonstration or repair of equipment\(^{(65)}\), use in connection with public exhibitions or public auction or certain forms of humorous use\(^{(66)}\), Member States may apply exceptions which already exist in their national law to the extent that such application is only in respect to analogue uses and does not affect free circulation of goods and services within the Community;

\(^{(62)}\) See footnote 43 above.
\(^{(63)}\) See footnote 31.
\(^{(64)}\) This Recital would serve as guidance for the interpretation of Article 5(3)(k). Reservations on that provision also apply to this Recital.
\(^{(65)}\) Reservation by the F delegation on including these examples.
\(^{(66)}\) The F delegation requested a specific exception on parody, pastiche and caricature in the main body of the Directive instead of a reference to humorous use in this Recital.