SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)

on: 14 and 15 July 1999

No. prev. doc.: 9734/99 PI 39 CULTURE 50 CODEC 394
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297


A. Examination of the proposal for a Council Decision on the approval by the European Community of the WIPO Copyright/Performances and Phonograms Treaties

1. The results of the discussions in the Working Party as regards this proposal appear in 10275/99 PI 41 CULTURE 57.


2. The Working Party had an exchange of views on Articles 6 to 13 and on recitals 30 to 32 of the above proposal for a Directive.
**Article 6 - General comments**

3. As regards the new structure of Article 6, there was general agreement that this had been improved as compared to the previous one.

4. The A delegation expressed the view that the first two paragraphs of Article 6 could be substantially shortened in view of the definitions contained in the third paragraph. The Commission representative agreed to reflect further on this suggestion.

**Article 6(1)**

5. Presenting the new Article 6(1), which had to be read in conjunction with the definitions contained in Article 6(3), the Commission representative explained that nothing in the draft Directive prevented rightholders from using technological measures to control access to and/or use of their works. What Article 6(1) of the draft Directive actually did was to impose on Member States an obligation to afford legal protection against deliberate acts of circumvention of such measures, except when such circumvention took place in a field covered by an exception or with the authorization of the rightholder. Exceptionally, however, Member States were under an obligation to provide legal protection against acts of circumvention of technological measures controlling digital private copying even when such copying was covered by an exception in national law (see Article 5(2)(b bis)).

As regards the drafting, a large number of delegations observed that the current wording of Article 6(1) did not offer sufficient clarity as to the link between protection of technological measures against circumvention and the exceptions to the rights and requested that this link be further clarified by means of explicit wording in the Article.

On the substance, the A, D, DK, UK, P, S and IRL delegations endorsed the view that acts covered by exceptions or authorized by the rightholder should fall outside the scope of Article 6(1).
Furthermore, the **DK and S delegations** entered a reservation on the different treatment reserved to digital private copying.

The **F and IT delegations** advocated a different approach, according to which Article 6(1) would impose an obligation to afford legal protection against all acts of circumvention, regardless of whether these fell under an exception or not, coupled with obligations imposed upon the rightholders to allow access to and/or use of their works in specific circumstances.

A number of delegations requested that the term "without authority" be replaced by wording making it clear that the intention was to cover acts which are not authorised by the rightholders concerned or permitted by law, as in the corresponding provisions of the WCT and WPPT. In this connection, the **UK and S delegations** considered that the protection provided for in this provision should be limited to circumstances where technological measures were circumvented for the purpose of infringing the rights mentioned, and that the authorisation (by the rightholder or by law) should relate not only to the act of circumvention as such, but also to the use of the protected work or other subject matter. The **German delegation** pointed out in this respect that the protection provided for by this provision should not be limited to cases where the circumvention actually resulted in an infringement of the rights concerned.

In reply to a question from the **A delegation**, the **Commission representative** explained that the beneficiaries of the protection provided for in this Article would be the rightholders or any persons authorised to act on their behalf.

**Article 6(2)**

6. According to the Commission representative, Article 6(2) was a necessary complement to Article 6(1), in cases where it would be difficult to enforce the latter.

The **IT, ES and UK delegations** questioned whether the scope of Article 6(2) coincided with that of Article 6(1) (see point 5 above), expressing the view that, as currently drafted, paragraph 2 provided for an across the board prohibition, having no linkage whatsoever with the exceptions to the rightholder's rights. Furthermore, the **D and S delegations** stressed the practical difficulties of
implementing the obligation to distinguish between licit and illicit circumvention devices.

The D, F, IT and UK delegations observed also that it was not clear what the terms "without authority" meant in this context, since they could not possibly refer to an authorization given by the rightholder.

The ES and S delegations suggested that consideration be given to applying to the activities mentioned in paragraph 2 the approach advocated by the F and IT delegations (see point 5 above).

The DK delegation requested that the knowledge requirement contained in paragraph 1 should also be clearly stated in paragraph 2.

7. The UK delegation expressed the view that the phrase under (b) could be deleted since it could be covered by the phrases under (a) and (c) if these were slightly amended.

The P delegation, supported by the Commission representative, opposed such a deletion, on the ground that this phrase was the only one to cover multi-purpose devices.

The IT delegation expressed the view that the terms "carried out without authority" outlawed all such activities in general and that, consequently, one could delete (a), (b) and (c) all together. The P delegation disagreed with this view.

In reply to a question by the DK delegation, the Commission representative explained that Article 6(2) did not prohibit the private possession of the devices referred to.

**Article 6(3)**

8. As regards the definition of "technological measures" in Article 6(3), the Commission representative drew delegations' attention to the phrase "prevent or inhibit the infringement of", which in his view established the linkage between this Article and the exceptions to the
The A delegation reiterated its appeal to redraft this definition with a view to making explicit reference to this linkage (see also point 5 above).

The UK delegation questioned the appropriateness of making this linkage in Article 6(3), because in this case it would be extended automatically also to the acts contained in Article 6(2), extension to which the UK delegation was opposed. The UK would therefore prefer to make this linkage in Article 6(1).

The F delegation suggested that the above mentioned phrase be replaced by the term "protect", as had been proposed by the European Parliament in amendment 54.

9. As regards the term "effective", the A, IT, DK, UK, IRL, D, NL and P delegations considered that rapid technological developments would soon render any definition thereof obsolete. Furthermore, the terms "operational" and "reliable", contained in this definition, risked creating confusion and limiting excessively the measures to be protected. These delegations requested therefore that the definition of the term "effective" be omitted and that interested parties be left to negotiate an appropriate solution among themselves.

10. With regard to the same definition, the A and P delegations voiced concerns about the use of the term "access", which did not correspond to any specific right in the field of traditional copyright law.

The UK, D, IT and F delegations, supported by the Commission representative, insisted on the need to refer both to access and use control measures.

Recital 30

11. The Working Party noted that this recital, as amended, was intended to clarify the terms "without authority".
Recital 30a

12. The Commission representative explained that this new recital clarified the notions of "playability" and "no mandate", which were already implicit in Article 6(3) of the draft Directive.

The UK and IRL delegations welcomed this clarification, although the IRL delegation would prefer it to be made in Article 6.

The F and IT delegations considered that these notions could not be found anywhere in the main body of the draft Directive and questioned the advisability of mentioning them in a recital. For the F delegation, the "no mandate" clause, as currently drafted, offered less protection than what was required by the WIPO Treaties and risked distorting the balance of negotiating power between rightholders and the consumer electronics industry.

Recital 31

13. The Commission representative indicated that this recital referred to the provisions of Article 1(2) of the draft Directive, which stipulated that, in principle, the *acquis communautaire* prevailed over the provisions of the latter.

In reply to the DK and UK delegations, which requested that Article 6 of the draft Directive be also made applicable to computer programs, the Commission representative reiterated that Article 7 of the Computer Programs Directive\(^1\) would prevail as *lex specialis*. The ES and IRL delegations stressed the need to avoid distorting the delicate balance reached in the Computer Programs Directive with regard to decompilation, and suggested that the full contents of this recital appear in an article.

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Recital 32

14. This recital gave rise to no observations.

Article 7

15. The *UK delegation*, supported by the *A delegation*, pointed out that the omission in the draft Directive of the knowledge requirement regarding the removal or alteration of electronic rights-management information, which is provided by the WIPO Treaties, caused concern to broadcasters, whose normal activities (conversion from analogue to digital broadcasting systems) might inadvertently remove or alter such information.

While not strongly opposed to inserting such a knowledge requirement into the text of Article 7(1) if delegations so wished, the Commission representative preferred that such issues be resolved through contractual arrangements between broadcasters and rightholders. The *F and IRL delegations* agreed with this view, although the *A delegation* questioned whether this solution would be appropriate in respect of neighbouring rights.

16. In response to the *UK, F and IRL delegations*, the Commission representative indicated that he was willing to accept that the term "conceal", which appears in the WIPO Treaties, be inserted into the text of Article 7(1).

17. In response to the *UK and F delegations*, the Commission representative indicated that he agreed to replace the phrase "copies of works" by "works", in accordance with similar changes elsewhere in the draft Directive.

18. The *IT delegation* expressed doubts as to whether the second subparagraph of Article 7(2), as currently drafted, covered rights-management information contained in databases. According to the Commission representative, such information was covered.

19. In response to comments made by several delegations, the Commission representative reiterated his view that it was not necessary to make specific reference to the agreed statements on
The Working Party took note of the remarks made by the P delegation as regards linguistic problems in the Portuguese version of the draft Directive.

It was noted that additions to Article 8 are being considered in connection with Article 5(1) (see 9734/99, page 2, 2nd paragraph and footnote 10).

Article 9

21. The D, DK, F, UK, FIN, P, IRL, S and A delegations entered a reservation on Article 9(4), which in their view departed from established practice. The FIN delegation observed that this provision might pose problems of a constitutional nature.

Furthermore, the D delegation reserved the right to propose draft language which would take into consideration particularities of the German law.

The Commission representative stressed the need for such a provision if one intended to achieve real harmonisation and suggested that an equitable and pragmatic compromise solution be sought and indicated his willingness to consider how this provision could be redrafted.

Article 10

See agreed statements concerning Articles 12 and 19 of the WCT and WPPT respectively.
22. The DK delegation, supported by the UK delegation, requested that all \textit{acquis communautaire} Directives be brought into line with the present draft Directive. In particular, these delegations requested that Articles 4 (Distribution right) and 6 (Obligations as to technological measures) of the latter apply also to these directives.

23. The F delegation spoke against the proposed deletion of Article 7 of Directive 92/100/EEC.

24. As regards Article 10(2), the UK delegation requested a statement which would ensure that the amended provision of Article 3(2) of Directive 93/98/EEC would not result in the revival of protection which had already expired. Attention was drawn in this context to 10748/98, point 22.

\textbf{Article 11}

25. The DK, UK, IRL and LUX delegations entered a reservation on Article 11(4)(a) and (b), on the ground that the Contact Committee could not be seen as a substitute to Member States' freedom to adopt new (or amend their existing) exceptions to the rights to adapt to future technological developments.

26. The S, IRL and LUX delegations considered the timeframe for the transposition of the proposed Directive (30 June 2000) as too short.

\textbf{Conclusions}

27. The Chairman concluded that whilst on Articles 7 to 13 delegations' concerns had somewhat crystallized, there was still much work to be done as regards Article 6 before any conclusions on substance could be drawn. He announced the Presidency's intention to table in the near future a non-paper presenting the main issues to be resolved in Article 6 in a more structured manner, with a view to facilitating further discussions in the future.
C. Other business

28. The P delegation informed the Working Party that the WIPO General Assembly would discuss in September a request that the Portuguese language become a working language within WIPO and called on Member States to support this request in the relevant fora.

29. The Working Party took note of an oral report by the Commission representatives on the outcome of discussions held in two regional meetings, organized by Latin American/Caribbean and Asian countries respectively under the auspices of WIPO, on the legal protection of data bases and broadcasting organisations' rights.