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PRESIDENCY NON-PAPER
from : Presidency
dated : 21 October 1999
to : Working Party on Intellectual Property (Copyright)
No. prev. doc.: 11435/99 PI 49 CULTURE 63 CODEC 520
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297

Delegations will find attached a non-paper of the Presidency on the above mentioned draft Directive as a basis for further discussion in the Working Party.
CHAPTER I

Objective and scope

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the Internal Market, with particular emphasis on the Information Society.

2. Except in the cases referred to in Article 10, this Directive shall leave intact and shall in no way affect [...] existing Community provisions relating to:

   a) the legal protection of computer programs;
   
   b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
   
   c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
   
   d) the term of protection of copyright and certain related rights;
   
   e) the legal protection of databases.

Recital 13 (combination of recital 8bis and 13):


Note: A footnote to be added: full titles and OJ references.
**Article 8 bis**

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

**Recital 36bis:**

Whereas the protection provided under this Directive should be without prejudice to legal provisions in other areas, such as industrial property, data protection, conditional access, and access to public documents;

Note: Recital 36bis replaces the last line of recital 2bis, recital 13bis, and recital 35.
CHAPTER II

Rights and exceptions

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

a) for authors, of their works,
b) for performers, of fixations of their performances;
c) for phonogram producers, of their phonograms;
d) for the producers of the first fixations of films, in respect of the original and copies of their films;
e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Unchanged.
**Article 3**

Right of communication to the public of works and
right of making available to the public of other subject matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public [...] of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
   a) for performers, of fixations of their performances;
   b) for phonogram producers, of their phonograms;
   c) for the producers of the first fixations of films, of the original and copies of their films;
   d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public [...] or making available to the public as set out in this Article [...].

4. Deleted.

**Recital 15**

Whereas this Directive should harmonise the authors' right applicable to the communication to the public of works, where this has not yet been done by existing Community legislation; whereas this right covers any transmission or retransmission of a work [...] to the public, by wire or wireless means, including broadcasting; whereas this right also covers [...] making a work audible or visible to the public by use of a recording or making a broadcast of a work audible or visible to the public [...] ; whereas it does not cover public exhibition or public live performance of a work;
Recital 16

Whereas the legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level; whereas it should be made clear that [...] all rightholders recognised by the Directive have [...] an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions; whereas such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them; [...] 

Recital 17 (unchanged)

Whereas the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive;
Article 4

Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, with the exclusive right to any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original [...] or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Recital 18

Whereas copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article; whereas the first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community; whereas this right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community; whereas distribution right provided for in this Directive shall be without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of Directive 92/100/EEC;

Recital 19

Whereas the question of exhaustion does not arise in the case of services and on-line services in particular; whereas this also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder; whereas, therefore the same applies to rental and lending of the original and copies of works or other subject matter which are services by nature; whereas, unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorisation where the copyright or related right so provides;
Article 5

Exceptions to the restricted acts set out in Articles 2, 3 and 4

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [...], and an integral [...] part of a technological process, [...] 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 rightholders or permitted by law.]

Recital 23

Whereas the exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are [...] transient or incidental reproductions, forming an integral part of [...] a technological process carried out for the sole purpose of enabling the use of a work or other protected subject matter and which have no separate economic value on their own; whereas under these conditions this exception should include acts of caching, including those which facilitate the effective functioning of transmission systems, or browsing;

Recital 33 to be split in two, which would read then as follows:

Recital 33

Whereas technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to better identify the work or other subject matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject matter in order to render easier the management of rights attached to them; whereas rightholders should be encouraged to use markings indicating, in addition to the information referred to above, inter alia their authorisation when putting works or other subject matter on networks;

Recital 33bis

Whereas there is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or
otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public [...] works or other protected subject matter from which such information has been removed without authority; whereas in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonised legal protection against any of these activities;

Article 5(2)

2. Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in the following cases:

Article 5(2)(a)

a) in respect of reproductions on paper or any similar medium, [...] 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;

Note: A new recital 24bis will be added between recital 24 and recital 24bis (consequent change in numbers: recital 24bis -> 24ter, recital 24ter -> 24quarter).

Recital 24bis

Whereas, in certain cases of exceptions, rightholders should receive a fair compensation; whereas, when determining the form of such fair compensation, account should be taken of the particular circumstances of each case; whereas the compensation could therefore take the form of remuneration or some other form, which would not necessarily involve a specific or separate payment;

Article 5(2)(b)

b) in respect of reproductions on audio, visual or audio-visual [...] recording media made by a natural person for private [...] use and for non-commercial ends, [...] on condition that the rightholders receive fair compensation;

b bis) Partially merged with b).
Recital 26

Whereas Member States should be allowed to provide for an exception to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation [...]; whereas this may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders; whereas, although differences between those remuneration schemes affect the functioning of the Internal Market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the Information Society; whereas digital private copying is likely to be more widespread and have a greater economic impact; whereas a distinction should therefore be made in certain respects between digital private copying and analogue private copying [...] ; [...]

Article 5(2)(c)

c) in respect of specific acts of reproduction made [...] by publicly accessible libraries or museums or by archives, which are not for direct or indirect economic or commercial advantage [...] ;

Recital 28

Whereas Member States may provide for an exception for the benefit of certain establishments [...] , such as non-profit making libraries accessible to the public and equivalent institutions; whereas, however, this should be limited to certain special cases covered by the reproduction right; whereas such an exception should not cover uses made in the context of on-line delivery of protected works or other subject matter; whereas this Directive should be without prejudice to Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, as amended by Directive 93/98/EEC; whereas, therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve;

Article 5(2)(d)

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.

Unchanged.
Article 5(3)

3. Member States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases:

Article 5(3)(a)

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;

Unchanged.

Recital 12ter (unchanged)

Whereas this Directive is without prejudice to modalities, in the Member States, of management of rights, such as extended collective licences;

Article 5(3)(b)

b) uses for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;

Unchanged.

Article 5(3)(c)

c) use of excerpts in connection with the reporting of current events, as long as, whenever possible, the source, including [...] the author's name is indicated, and to the extent justified by the informatory purpose [...];

Article 5(3)(d)

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, whenever possible, the source, including [...] 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;
Article 5(3)(e)

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

  
  Unchanged.

  
  Note: See Article 8bis and the note under Recital 36bis.

Article 5(3)(f)

  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, whenever possible, the source including the author's name, is indicated;

  
  Article 5(3)(g)

  g) use during religious celebrations;

  
  Unchanged.

Article 5(3)(h)

  h) use by public social institutions pursuing non-commercial purposes such as hospitals or prisons on condition that the rightholders receive fair compensation;

  
  Unchanged.

Article 5(3)(i)

  i) 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 informatory purpose;

  
  Unchanged.
Article 5(3)(j)

j) incidental use of a work or other subject matter;

Unchanged.

Article 5(3)(k)

k) use in certain other cases of minor importance where exceptions already exist under national law provided that they only concern analogue uses 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.

Unchanged.

3bis. 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 for the specific use for which the reproduction is permitted.

[...]

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.
CHAPTER III
Protection of technological measures and rights-management information

Article 6

Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention [...] of any effective technological measures [...], which the person concerned carries out in the knowledge, or with reasonable grounds to know that he or she pursues that objective.

2. Member States shall provide adequate legal protection against [...] the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services [...] which:

a) are promoted, advertised or marketed for the purpose of circumvention of, or

b) have only a limited commercially significant purpose or use other than to circumvent, or

c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures [...].

3. The expression "technological measures", as used in this Article, means any technology, device or component that, in the normal course of its operation, is designed to [...] restrict acts, in respect of works or other subject matter, which are not authorized by the rightholder of any copyright or any right related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC, or permitted by law.
Technological measures shall be deemed "effective" where the [...] use of a protected work or other subject matter is controlled by the rightholders through application of a protection process, such as an access code or [...] a copy control mechanism, which achieves the protection objective [...] [...]. Such measures may include decryption, descrambling or other transformation of the work or other subject matter.

4. Provisions concerning the relationship between Article 6 and Article 5

Possible general provision of relation of Article 6(1) [and Article 6(2)], and Article 5

Possible provisions on the relation of Article 6(1) and Article 5(2)(b) [any exception for digital private copying is without prejudice to operational, reliable and effective technical means capable of protecting the interests of the rightholders]

Note to Article 6(4): Still under consideration. The text above is in order to indicate a possible structure.

Recital 30

Whereas technological development will allow rightholders to make use of technological measures designed to restrict acts not authorized by the rightholders [...] of any copyright, rights related to copyright or the sui generis right in databases, or [...] permitted by law; whereas the danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures; whereas, in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonised legal protection against [...] circumvention of effective technological measures [...] and against provision of devices and products or services to this effect;

Recital 30bis

Whereas such a legal protection should be provided to technological measures that effectively [...] restrict acts not authorized by the rightholders of any copyright,
rights related to copyright or the *sui generis* right in databases, or permitted by law, without, however, preventing the normal operation of electronic equipment and its technological development; whereas such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6; whereas such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection; whereas, in particular, this protection should not hinder research into cryptography;

**Recital 31** (unchanged)

Whereas such a harmonised legal protection does not affect the specific provisions of protection provided for by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, as amended by Directive 93/98/EEC; whereas in particular, it shall not inhibit decompilation permitted by that Directive;
Article 7

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person [knowingly] performing without authority any of the following acts:

   a) the removal or alteration of any electronic rights-management information;

   b) the distribution, importation for distribution, broadcasting, communication or making available to the public, [...] of works or other subject matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, [...] facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.

2. The expression 'rights-management information', as used in this Article, means any information provided by rightholders which identifies the work or other subject matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information are associated with a copy of, or appear in connection with the communication to the public of, a work or other subject matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC.

Recital 33

Whereas technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to better identify the work or other subject matter, the author or any other rightholder, and to provide information about the
terms and conditions of use of the work or other subject matter in order to render easier the management of rights attached to them; whereas rightholders should be encouraged to use markings indicating, in addition to the information referred to above, *inter alia* their authorisation when putting works or other subject matter on networks;

**Recital 33bis**

Whereas there is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public [...] works or other protected subject matter from which such information has been removed without authority; whereas in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonised legal protection against any of these activities;
CHAPTER IV

Common provisions

Article 8

Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive and act as a deterrent to further infringement.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material.

3. 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] / [that are nevertheless facilitating] infringement by a third party of a copyright or related right or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC.

Recital 36

Whereas Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive; whereas they shall take all the measures necessary to ensure that those sanctions and remedies are applied; whereas the sanctions thus provided for shall be effective, proportionate and dissuasive; whereas rightholders should be able to apply for an injunction in case of an alleged infringement;
Article 9

Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject matter referred to in this Directive which are, by the date referred to in Article 11(1), protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts of exploitation performed before the date referred to in Article 11(1).

3. Deleted.

4. Deleted.
Article 10

Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:

   a) Article 7 is deleted.

   b) Article 10(3) is replaced by the following:

   "3. The limitations may only be applied to certain specific cases and may 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 normal exploitation of their subject matter".

2. Article 3(2) of Directive 93/98/EEC is replaced by the following:

   "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram is lawfully published during this period, the rights shall expire 50 years from the date of the first such publication. If no lawful publication takes place during the period mentioned in the first sentence, and if the phonogram is lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such communication to the public."

Unchanged.

Note: To be considered on the basis of the final content of the substantive Articles of the Directive.
Article 11

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [30 June 2000]. They shall immediately inform the Commission thereof and shall also communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Not later than at the end of the second year after the date referred to in paragraph 1 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8. Where necessary to ensure the functioning of the Internal Market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

3. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

Unchanged.
4a) A Contact Committee shall be set up under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the Chairman or at the request of the delegation of a Member State.

4b) The task of the Committee shall be as follows:

- To facilitate the effective implementation of this Directive by organising regular consultation on all questions deriving from its application;

- To facilitate the exchange of information between the Member States and the Commission on the situation of and developments in regulatory activities in the field of copyright and related rights and sui generis rights, as well as on the relevant developments in the field of technology;

- To examine any developments in the sector for which consultation appears useful.

*Unchanged.*

**Article 12**

**Entry into force**

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Communities.*

*Unchanged.*
Article 13

Addressees

This Directive is addressed to the Member States.

Unchanged.

Done at Brussels,

For the European Parliament
The President

For the Council
The President