SUMMARY OF PROCEEDINGS
from : Working Party on Intellectual Property (Copyright)
dated : 3, 4 and 10 November 1999
No. prev. doc.: 12320/99 PI 57 CULTURE 78 CODEC 615
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297

1. The Working Party completed the examination of the Presidency's non-paper (12166/99 PI 55 CULTURE 71 CODEC 592), on the understanding that all views expressed were only preliminary and subject to a general scrutiny reservation.

It was noted that, on the basis of delegations' remarks, the Presidency would circulate in the week of 22 November 1999 a revised version of the above non-paper for discussion at the December meetings of the Working Party.
Article 5(2)(b)

2. The vast majority of delegations welcomed broadly the new wording and the new structure of Article 5(2)(b) and stressed the need to clarify the relationship between digital private copying and technological measures when discussing Article 6. A number of delegations, however, still had some problems with the wording of Article 5(2)(b).

3. The DK, S, NL, A and D delegations spoke in favour of a broad private copying exception. These delegations and the UK and IRL delegations also questioned the appropriateness of maintaining the terms "on audio, visual or audiovisual media" in the text.

4. Several delegations wondered whether the proposed Article 5(2)(b) covered downloading of literary works from the Internet for private purposes, as well as copies made through the use of scanners or fax machines. Other delegations, however, considered that the current wording of Article 5(2)(a) and (b) was sufficient to cover these cases.

5. The UK delegation considered that there should be a specific exception for copying for the purpose of private study, which would also cover copying by handwriting. The Commission representative indicated that he was open to consider any concrete drafting suggestions to this effect.

6. The ES delegation stressed the need for wording which would ensure that copying done for study or research purposes in libraries or other public research or scientific institutions was covered by Article 5(2)(b). The Commission representative indicated that this was already the case and recalled that the exceptions provided for in paragraphs 2(a) and 3(a) of Article 5 were also relevant to this effect.

7. The B delegation considered that, following the merger of paragraphs (2)(b) and (2)(b bis), a possible reference to the family circle would open up the exception too much and that, therefore, one should use some other concept.

1 See footnote 59 in document 11435/99 PI 49 CULTURE 63 CODEC 520.
8. The **DK, NL and IRL delegations** expressed the view that it was not sufficiently clear whether the current wording of Article 5(2)(b) covered copying made on behalf of a natural person and suggested therefore that the terms "... made by and/or on behalf of a natural person ..." be inserted. According to the **Commission representative**, copying by one natural person on behalf of another natural person was already covered.

9. The **A delegation** requested that the exception be broadened to cover copying done by legal persons too. The **Commission representative** was opposed to this request.

10. The **DK delegation** entered a reservation on the terms "and for non-commercial ends".

11. The **DK, UK, S and LUX delegations** reiterated their general reservation on the requirement of fair compensation.

   The **UK and IRL delegations** also entered a reservation on this requirement applying to their national private copying exceptions, which were very narrowly defined.

   The **GR delegation** indicated that it preferred the terms "equitable remuneration" rather than "fair compensation".

   The **ES and IT delegations** called for further clarification in respect of fair compensation.

   The **S delegation**, supported by the **IRL, P and UK delegations**, expressed the view that there was no need to provide for fair compensation in the digital environment since effective technological measures restricting access to (or the use of) protected material were already at the rightholders' disposal. The **D and F delegations**, supported by the Commission representative, disagreed with this view and pleaded in favour of keeping both the fair compensation requirement and technological measures side by side at this stage.
The NL delegation stressed the need that double levying for the use of the same protected work or other subject matter be avoided.

Recital 26

12. There were no comments on Recital 26 at this stage.

Article 5(2)(c)

13. A large number of delegations saw the proposed wording of the new Article 5(2)(c) as an improvement. The F delegation, however, considered that the new wording went too far and entered a reservation on the inclusion of archives.

The Commission representative drew delegations' attention to the fact that, as the new wording stood, archives did not have to be publicly accessible in order to be covered by the exception.

14. In response to comments made by several delegations, the Commission representative confirmed that libraries of educational establishments, which were accessible to only a limited part of the public, were covered by the terms "publicly accessible".

15. The D delegation considered that it was appropriate that Article 5(2)(c) should concern only specific acts of copying done by libraries or equivalent institutions for their own purposes, provided that Article 5(2)(b) covered copies made in libraries by natural persons for private purposes.

16. The UK, IRL, NL and LUX delegations entered a reservation on the deletion of the explicit reference to educational establishments.
Recital 28

17. There were no comments on Recital 28.

Article 5(2)(d)

18. The **DK delegation** considered that acts covered by this exception should be left to national law since they did not have any effect on the Internal Market.

19. The **F delegation** also entered a reservation on the need for an exception in this field, on the grounds that the matter could best be dealt with through contracts, and that the extension of such an exception to new forms of broadcasting could disturb the balance between the interests of rightholders and those of broadcasting organisations.

20. The **F and A delegations** questioned the use of the term "ephemeral fixations" rather than the term "ephemeral recordings" used in the Berne Convention.

21. The **Commission representative** expressed the view that the term "broadcast" in the proposed Directive should be interpreted as including transmissions done both by wire and by wireless means. Nevertheless, Member States were free to adopt a narrower definition when adopting such an exception. The **F delegation** was of the view that, if this exception were to be maintained, the term "broadcast" should cover only wireless transmissions, in line with the Berne Convention. The **NL delegation** considered that one should avoid any reference to a specific technology in the Directive.

22. The **NL, IRL and UK delegations** entered a reservation on the terms "by means of their own facilities", which they considered as obsolete. The **Commission representative** pleaded in favour of keeping these terms, since they were used in the Berne and Rome Conventions and in Directive 92/100/EEC.
23. The UK delegation reiterated its request that it be made clear that the second sentence of Article 5(2)(d) would not have the effect of limiting the exception in favour of archives under 5(2)(c).

24. The IT, DK and NL delegations expressed the need to reflect further on the advisability of taking on board amendment 48 (old archive material) of the European Parliament. The Commission representative pointed out that the Commission had not identified any need for such a provision so far.

25. The DK delegation reiterated its request for a similar exception regarding on-demand video services. The Commission representative questioned the need for such an exception, on the grounds that authorisation to use a work in the context of such services would necessarily contain a licence covering all necessary reproductions.

Article 5(3)(a)

26. In reply to the IRL delegation, the Commission representative explained that it was left to Member States to define the terms "scientific research". He recalled that the same terms appeared already in the Database Directive\(^2\), Recital 36 of which specified that they were to be interpreted as covering both natural and human sciences.

27. The UK delegation reiterated its request for some flexibility as regards the requirement always to acknowledge the source (see footnote 76 of document 11435/99). As a general remark concerning the whole of Article 5, the F delegation opposed this request and suggested further that the acknowledgement of the rightholder's name be rendered obligatory in all the exceptions. The Commission representative suggested the possibility of aligning the source requirement in this exception on the source requirement in Article 5(3)(c) and (d) of the Presidency non-paper.

28. The UK delegation reiterated its reservation on the terms "non-commercial" (see footnote 77 of document 11435/99).

29. The GR, S, UK, LUX and IRL delegations expressed a reservation on the need of providing for fair compensation in this exception.

**Recital 12ter**

30. Apart from the S delegation, which spoke in favour of it, there were no other comments on Recital 12ter.

**Article 5(3)(b)**

31. There were no comments on Article 5(3)(b), the positions in footnote 79 in 11435/99 remaining unchanged.

**Article 5(3)(c)**

32. The D, NL, UK, A, P and S delegations reiterated their request that the terms "of excerpts" be deleted, so that Article 5(3)(c) reflects adequately Article 10bis of the Berne Convention. On the other hand, the F and B delegations requested that the term "short" be inserted before the word "excerpts", as the European Parliament had suggested in its amendment 43. The Commission representative drew delegations' attention to the differences in the wording between the Berne and the Rome Conventions and raised the possibility of distinguishing between situations where only excerpts would be allowed and situations where the use of whole works would be permissible.

33. The D delegation also questioned the appropriateness of limiting the scope of the exception by using the terms "the reporting of" and suggested that the clause "use in connection with informing about current events" be used instead.
34. The F and B delegations entered a reservation on the deletion of the terms "and the objective of illustrating the event concerned".

Article 5(3)(d)

35. There were no comments on Article 5(3)(d).

Article 5(3)(e)

36. The S delegation indicated that, whilst it maintained at this stage its request for additional language in Article 5(3)(e) as contained in footnote 86 of document 11435/99, it welcomed ad referendum Article 8bis as suggested by the Presidency. It also indicated that it could accept a slightly amended Recital 36bis, which would read as follows: "Whereas the protection provided under this Directive should be without prejudice to other legal provisions in the Member States relevant to the protection given under this Directive, such as provisions concerning industrial property, data protection, conditional access and access to public documents;". The UK, IRL and NL delegations reiterated their support for the S delegation.

Article 5(3)(f)

37. There were no comments on Article 5(3)(f).

Article 5(3)(g)

38. The F delegation requested that a requirement of fair compensation be added to this exception.
**Article 5(3)(h)**

39. As a general remark, the **DK, IRL, UK and S delegations** reiterated the view that the exceptions provided for by Article 5(3)(h), (i) and (j) had no effect on the functioning of the Internal Market and that, according to the subsidiarity principle, they should therefore be dealt with at national level.

40. The **S delegation** suggested that, if exception (h) were to be maintained, its scope should be limited to time-shifting purposes.

41. The **IT, P and F delegations** questioned the appropriateness of the terms "such as hospitals or prisons" and suggested instead that the Directive provide an exhaustive list of establishments which could benefit from the exception of Article 5(3)(h).

42. The **IRL and UK delegations** entered a reservation on the requirement of fair compensation. The **F delegation** suggested that it be amended to "equitable remuneration".

43. The **F, P and S delegations** requested the deletion of the term "public". The **Commission representative** expressed the view that, if "public" were to be deleted, some other criterion would have to be found in order to delimit the scope of this exception.

**Article 5(3)(i)**

44. The **UK, D, IRL and IT delegations** indicated that the need for Article 5(3)(i) and (j) would depend on the final contents of subparagraph (k).

45. The **UK, D, IRL and A delegations** entered a reservation on the terms "provided that they do not constitute the main object of the use and to the extent justified by the informatory purpose". The **UK, IRL and A delegations** also suggested that the scope of the exception be limited to buildings and sculptures.
The **S and B delegations** entered a reservation on the terms "and to the extent justified by the informatory purpose".

The **F and GR delegations and the Commission representative** requested that all existing conditions be maintained if this exception were to be included in the Directive.

**Article 5(3)(j)**

46. The **F and B delegations** entered a reservation on this exception and requested further clarifications as to its scope.

**Article 5(3)(k)**

47. As a general remark, the **IT, F, B and ES delegations** indicated that they could not accept Article 5(3)(k) unless this provision set out clear and transparent criteria as regards the national exceptions which could be maintained. They suggested that Member States be required to provide an exhaustive list of such exceptions by a specific date. The **Commission representative** also maintained a general reservation on this provision.

The **UK, D, IRL and NL delegations** on the other hand stressed the need for a provision such as this subject to their positions on the individual conditions set out in it.

48. The **UK, DK, D, IRL, A, P, GR and NL delegations** entered a reservation on the limitation of this provision to analogue uses. The **IT, ES and F delegations**, however, welcomed this limitation.

49. The **UK, DK, IRL and A delegations** questioned the need for the terms "and do not affect the free ...Community". The **F delegation** insisted on keeping this condition.
50. The **UK, DK, IRL, S, P and NL delegations** reiterated their need for additional flexibility at national level as regards the future adoption of new exceptions or the future adaptation of existing ones in order to take account of developments in the digital environment. The **IT, GR and ES delegations** and the Commission representative, however, considered that such issues could be dealt with more appropriately at Community level, as provided for by Article 11 of the Directive.

51. Finally, the **DK, S and NL delegations** reiterated the need for an additional exception covering consultation in digital form by members of the public in libraries or archives of protected material contained in their collections.

**Article 5(3bis)**

52. The **F and GR delegations** indicated that they preferred the new wording of Article 5(3bis), as suggested by the Presidency, while the **UK, A and NL delegations**, as well as the Commission representative, expressed their preference for the language used in the Commission's amended proposal.

53. Furthermore, the **F delegation** called for an assessment on a case-by-case basis in order to agree which of the exceptions to the right of reproduction would justify an exception to the right of distribution. The **UK delegation** could not agree with this suggestion, as any exceptions to the distribution right would be subject to the conditions of Article 5(4).

**Article 5(4)**

54. The **IT delegation** reiterated its suggestion to take on board the language suggested by the European Parliament in its amendment 47 and entered a scrutiny reservation on Article 5(4) pending discussion of this issue in the context of Article 6.

55. The **UK delegation** observed that both the Berne Convention and the 1996 WIPO Treaties used the term "special" rather than "specific" and suggested that Article 5(4) be amended accordingly.
Article 6(1)

56. While welcoming the amendments to Article 6(1) contained in the Presidency non-paper as a step towards greater clarity, the NL, UK, A, IT and GR delegations requested that the link between this paragraph and infringements be spelled out in a clearer and more straightforward manner. In this respect, some delegations felt that the definition of "technological measures" should be transferred from Article 6(3) to a new paragraph preceding Article 6(1) and (2). For the UK delegation, however, this could not constitute an alternative to a clearer link with infringements under Article 6(1) and possibly (2). The D delegation recalled that the relationship between Article 6(2) and infringements still had to be clarified.

57. The F and B delegations questioned the suggested approach of setting out the relationship between Article 6(1) and Article 5 in a new paragraph 4 of Article 6 and reiterated their preference for an alternative approach, which would outlaw circumvention of technological measures in general, while obliging rightholders to give means of access to their protected subject matter to any person legitimately invoking one of the exceptions to the rights.

According to the Commission representative, the choice of the approach to be followed was clearly a political one.

Article 6(2)

58. The NL, S, DK, IT and P delegations indicated that they could accept the approach of Article 6(2) as proposed by the Presidency.

59. As regards the relationship between Article 6(2) and Article 5, the NL delegation pleaded in favour of precedence being given to the latter. The D and A delegations could not support this suggestion. The UK and S delegations entered a scrutiny reservation on this issue.

60. The UK delegation reiterated its reservation on subparagraph (b) (see footnote 116 of document 11435/99 COR 1).
61. The IT delegation repeated its suggestion that subparagraphs (b) and (c) be merged.

62. The F delegation entered a reservation on the deletion of the terms "... any activities, including ..." and asked confirmation that Member States remained free to prohibit the private possession of circumvention devices. The DK, D, P, NL, S and UK delegations considered that private possession should not be covered by Article 6(2), but should be left to national law as in the case of the Conditional Access Directive; they suggested that a recital corresponding to Recital 21 of that Directive be added. The Commission representative confirmed that the scope of Article 6(2) was intended to correspond to that of Article 4 of the Conditional Access Directive.

**Article 6(3)**

63. As regards the proposed definition of "technological measures", the UK, D and NL delegations could endorse the text put forward by the Presidency.

64. The IT and F delegations expressed some doubts on whether the term "restrict", suggested by the Presidency in accordance with the corresponding provisions of the WIPO Treaties, was broader than the terms "prevent or inhibit" appearing in the amended Commission proposal. The UK and D delegations considered that this term covered both "prevent" and "inhibit".

65. As regards the proposed definition of the term "effective", the F and IT delegations reiterated their reservation on the need for it. The UK delegation, albeit maintaining its general reservation on the use of the term at this stage, welcomed the new definition and the changes to Recitals 30 and 30bis as a step towards greater clarity.

66. It was agreed that the terms "decryption, descrambling" be replaced by "encryption, scrambling", since they served as examples to the terms "technological measures".

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Article 6(4)

67. The Chairman reserved the right to put forward concrete drafting proposals concerning this paragraph at a later stage. Therefore, no discussion took place at this stage.

Recitals 30, 30bis and 31

68. There were no comments on these Recitals.

Article 7

69. The F delegation welcomed the addition of the term "concealing" and wondered whether this term should not also be added to Article 6.

70. The F delegation also entered a scrutiny reservation on the addition of the term "knowingly".

Recitals 33 and 33bis

71. There were no comments on these Recitals.

Article 8

72. It was noted that no delegation objected to the new structure of Article 8. However, the F delegation expressed doubts as regards the effectiveness of injunctive relief in the digital environment. In this respect, the IT delegation stressed the need of establishing bodies capable of dealing promptly with requests for such injunctions. The Commission representative pointed out that the way injunctive relief would operate would be left to national law.

73. The UK and F delegations stressed the link between Articles 8(3) and 5(1) and entered a scrutiny reservation on Article 8(3) until a final solution on Article 5(1) was found.
74. The S, NL, IT and UK delegations pleaded in favour of a horizontal approach regarding the liability of service providers in this Directive and in the proposed electronic commerce Directive and warned against creating a *lex specialis* in this Directive. In this context, the S delegation voiced support for the Recital suggested by the NL delegation (see footnote 129 in document 11435/99 COR 1).

75. The DK delegation reiterated its view, according to which the explicit reference in Article 8(3) to Article 5(1) was superfluous, since what mattered was that an infringement was facilitated, irrespective of whether or not the facilitating act benefited from an exception. The D delegation could not agree with this view.

76. The D delegation questioned the inclusion of the phrase "or the sui generis right … Directive 96/9/EC" in conjunction with the reference to Article 5(1), since Article 5(1) did not appear to be applicable to databases. The Commission representative confirmed that Article 5(1) was not intended to be applicable to databases, as the Database Directive contained a full set of exceptions to the reproduction right. The UK delegation on the other hand considered that if Article 5(1) were to remain, it should also apply to databases.

77. The UK, D, P and NL delegations spoke in favour of including a knowledge requirement in Article 8(3), whilst the IT delegation questioned the need to do so. All these delegations, however, agreed that a simple notification addressed by the rightholder to a service provider, informing the latter that his services are facilitating an infringement by a third party of a copyright or a related right and requiring him to block users' access to a particular site, should be sufficient to satisfy the knowledge requirement.

78. The D and F delegations asked whether the terms "… or having reasonable grounds to know…" did not have the effect of introducing a monitoring obligation for the service provider, in which case Article 8(3) would contradict Article 15 of the proposed electronic commerce Directive. The Commission representative expressed the view that there was no such contradiction.

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79. The A delegation wondered whether a definition of the term "service providers" was not needed in the Directive, if this term was finally maintained.

Recital 36

80. There were no comments on this Recital.

Article 9

81. The P delegation questioned whether Article 9(2) could cover acts of exploitation begun before the date referred to in Article 11(1) and continued after that date, or for which investments had been made before that date.

82. The IT delegation entered a scrutiny reservation as regards the deletion of paragraphs 3 and 4, wondering whether such a deletion would not cause problems in relation to international contracts.

83. The UK delegation, while agreeing with the deletion of paragraph 4, entered a scrutiny reservation as regards the proposed deletion of paragraph 3. The Commission representative pointed out that paragraph 4 was necessary if paragraph 3 were to be maintained.

Article 10

84. It was agreed that this Article be discussed once the Articles of the Directive dealing with substantive issues were finalised.

85. The UK delegation reiterated its request in footnote 135 in 11435/99.
Article 11

86. There were no comments by delegations on the first three paragraphs of this Article.

87. As regards paragraphs 4a and 4b, it was noted that delegations maintained their views, as set out in footnotes 138 to 143 of document 11435/99 + COR 1.

Articles 12 and 13

88. There were no comments on these Articles.