COUNCIL OF THE EUROPEAN UNION

Brussels, 5 November 1999

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CORRIGENDUM TO NOTE

from : Council Secretariat
to : Working Party on Intellectual Property (Copyright)

No. prev. doc.: 10420/99 PI 43 CULTURE 58 CODEC 448
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297


1. In Article 3(2), point c) should read:
   "c) for the producers of the first fixations of films, of the original and copies of their films;"

2. In Article 10(2), the second sentence ("If no lawful … to the public.") should be underlined.

3. The following footnotes replace the ones bearing the same number in document 11435/99:

   (21) The F and B delegations consider that this clause distorts the balance between rightholders and manufacturers and have requested that it be completed by the phrase "so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6."
(45) The D, B, A, IT, F, ES, DK, IRL and UK delegations expressed the view that the inclusion of the phrase "Temporary … such as" would make this exception too broad and requested that it be deleted. The S delegation questioned which temporary acts should be covered other than transient and incidental acts. The Chairman put forward the possibility of replacing “such as transient and incidental acts of reproduction” with “which are transient and incidental”. The D delegation pointed out that this last suggestion would probably exclude caching from the scope of this exception.

(46) Without prejudice to its general reservation on Article 5(1), the UK delegation pointed out that Article 5(1) should be amended in order to make clear that the conditions contained therein apply to all temporary acts and not only to transient and incidental ones. The S delegation pointed out that this could be attained by inserting a comma after the phrase "Temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction".

(52) Text suggested by the European Parliament and supported by the GR, ES, A, B, F and IT delegations. Without prejudice to its general reservation on Article 5(1), the UK delegation would also be prepared to support this text. These delegations feared 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.

The DK, D, P and S delegations, as well as the Commission representative, spoke against the addition of this phrase.

(54) The DK, UK, NL, IRL and S delegations entered a general reservation on the structure of Article 5(2) – (3). Without prejudice to this reservation, the DK delegation … (rest unchanged).

(68) The IT delegation entered a scrutiny reservation on the terms "direct or indirect economic or".

(73) Without prejudice to its general reservation on the structure of Article 5(3) (see footnote 54 above), the DK delegation suggested the following language on paragraph 3:

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

…” (rest unchanged).

(78) Reservation concerning the principle of fair compensation by the DK, UK, IRL, NL LUX, S and A delegations. Similar reservation by the ES and GR delegations, 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 56) and the suggestion that the matter be clarified by means of a recital.
The UK, LUX, S, NL, IRL, DK, D, A and FIN delegations requested that the words … (rest unchanged).

The DK delegation, supported by the UK, IRL, S and FIN 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. Alternatively, the DK and S delegations requested that the scope of the exception be limited to acts of reproduction for time-shifting purposes and the DK delegation requested that the provision be moved to paragraph 2 of Article 5.

Reservation by the GR, DK, IRL, UK and S delegations … (rest unchanged).

In addition to those mentioned in footnote 57, the P delegation spoke in favour of deleting the words "only concern analogue uses and".

The UK, DK, A, P and NL delegations consider the wording of Article 6 to be unnecessarily complex. The UK delegation has submitted alternative drafting (see Annex I).

The UK, NL and IRL delegations requested a Recital which would stipulate that Article 6 applies without prejudice to public policy and public security. The UK has suggested relevant wording (see Annex I).

The A, B, D, DK, UK, P, S, NL, GR, ES and IRL delegations endorse the Commission's approach, i.e. that the exceptions provided for in Article 5 of the draft Directive should fall outside the scope of Article 6(1) and that protection should only be granted when circumvention is carried out with the purpose of infringing a copyright or a related right, but are in favour of stating this approach more clearly. The A, D, P and DK delegations have requested that this principle be extended also to the digital private copying exception.

The IT delegation shares the view that the exceptions provided for in Article 5 of the draft Directive should fall outside the scope of Article 6(1) but cannot accept that in the presence of such exceptions users can be allowed to circumvent technological measures applied by the rightholders. It has suggested therefore that the following language be inserted:

"Article 6(1bis)
The use of the technological measures provided under paragraph 1 of this Article is not allowed in case of limitations to the rights referred to in Articles 2, 3 and 4."

The F and FIN delegations oppose the above mentioned Commission's approach. They support the approach suggested by the European Parliament, according to which the principle of legal protection would be extended to all acts of circumvention, whether covered by an exception or not; right holders, however, would be under an obligation to authorise access to and use of their works in specific circumstances.
The NL, B, UK, D, IT, DK, P, A, ES and GR delegations interpret the term "authority" in Article 6(1) as referring to the law or to the authorisation given by the right holder or his representative and consider that this should be stated more clearly in line with the 1996 WIPO Treaties. According to the UK delegation, one could draft the clause in such a manner that there would be no need to mention the phrase "without authority" (see Annex I). The D, S, A and P delegations requested that the terms "without authority" be attached to acts of use of protected material rather than to the circumvention of technological measures as such.

Reservation by the UK and IT delegation on the use of the term "effective". Although they share concerns about the vagueness of this term, the D, P, GR, F, ES and S delegations consider that, in the light of the 1996 WIPO Treaties, one is bound to maintain it in the Directive, subject to defining it more clearly.

According to the DK, UK and S delegations, it should be made clear that the terms "any activities" do not cover private possession of circumvention devices, as this should be a matter for national law to determine. The F delegation opposed this view.

The IT and UK delegations suggested that the phrases under (b) and (c) be merged with a view to simplifying the current wording of Article 6(2) (see Annex I). The P delegation would prefer to keep the phrase under (b) unchanged.

Reservation by the UK as regards the terms "or use" on the ground that these terms might capture devices never designed for circumvention purposes but used for such purposes in practice, while clearing devices which, although originally designed as multi-purpose ones, are primarily used for circumventing.

The views contained in footnote 109 above apply equally to the use of the term "effective" in Article 6(2).

Reservation by the A, F, S, IT, DK, IRL and D delegations on the need for a definition of the term "effective". The A delegation suggested that some of the elements of this second subparagraph of Article 6(3) could be included in the first subparagraph. Without prejudice to its general reservation as regards the use of the term "effective" in the Directive, the UK delegation stresses the need for a clearer definition of this term if it were to be upheld. The P and NL delegations are not against a definition as such, but they could accept that this be provided in a Recital. The GR and ES delegations share the need for a definition, albeit not necessarily the one proposed by the Commission.
(124) The UK and A delegations requested that an additional knowledge requirement be added in line with the relevant provisions of the WCT and WPPT. Furthermore, the UK delegation requested that the issue of broadcasters, whose normal day-to-day activity might inadvertently cause removal or alteration of electronic rights-management information, be properly addressed. The Commission representative, supported by the F and IRL delegations, expressed the view that this issue could be resolved by contracts.

(127) The IT and UK delegations expressed doubts as to whether Article 7(2) as it stands covers rights-management information contained in databases. According to the Commission representative, such information was covered.

(128) The F delegation considers that this provision should not be limited to service providers.

(129) The DK delegation considers that this provision should not refer to Article 5(1). The UK, GR, DK, A, S, ES and F delegations question the possibility of providing for injunctions in respect of acts which are exempted and have scrutiny reservations on the second sentence of Article 8(2), which seems to leave service providers in a better position than the draft e-commerce Directive.

The NL, LUX and IRL delegations indicated that the above sentence was compatible with their respective national laws.

Furthermore, the NL delegation suggested that the following language be inserted in one of the existing Recitals or as a new Recital: "Article 5(1) is without prejudice to the determination [by law] of liability of service providers in relation to otherwise unauthorised use [by third parties] of a work or other subject matter."

(131) Reservation on paragraph 4 by the D, NL, DK, F, UK, FIN, P, IRL, S and A delegations.

The D delegation reserved the right to propose draft language which would take into account the particularities of German law.

(132) The DK, D, A, NL, S and UK delegations requested that Article 10 be so amended as to provide for broad horizontal harmonisation, in particular as regards the rights of reproduction and distribution, any exceptions to these rights going beyond those already provided by the Community acquis and any new provisions related to technological developments. To this effect, the DK delegation submitted a non-paper containing draft language (see Annex II).

(134) Reservation by the ES and IT delegations as regards the deletion of Article 7(2) of Directive 92/100/EEC.
Reservation by the S, FIN, DK, NL, UK, IRL, A and LUX delegations on Article 11(4a) and (4b) on the ground that they see no need to institutionalise such a Committee.

In reply to concerns expressed by the S, FIN, DK, NL, IRL and LUX delegations, the Commission representative pointed out that the establishment of the Contact Committee, which was of a consultative nature only, was not meant to have any bearing on the discussion concerning the possibility for Member States to adopt new (or to amend their existing) exceptions to the rights to adapt to future technological developments.

The IT, NL and GR delegations requested that it be made clear in a Recital that any statements made by a representative of a Member State in the Contact Committee would not be used against the Member State concerned in an infringement procedure. According to the Commission representative, such a clarification was not necessary.

4. Footnotes 31, 32 and 41 are deleted.

5. A footnote 56a is added:

"(56a) The ES delegation entered a reservation on Article 5(2)(a) on the grounds that the exception provided therein was unnecessarily broad."
NON-PAPER FROM THE UK DELEGATION – ARTICLE 6

Article 6 (Obligations as to technological measures)

1. Member States shall provide adequate legal protection against the circumvention of any technological measure with intent to infringe any copyright or 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.

2. Member States shall provide adequate legal protection against:
   a) the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of any device, product or component which is designed or adapted to enable or facilitate circumvention without the authority of the right holder of any technological measure; and
   b) the performance of any service, including the dissemination of information, which is carried out in the knowledge, or with reason to believe, that the service will enable or facilitate circumvention without the authority of the right holder of any technological measure.

3. The expression "technological measure" as used in this Article, means any device, product or component used by right holders to prevent or inhibit the infringement 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.

New recital

X. Whereas this Directive is without prejudice to national provisions concerned with public policy or public security.
11435/99 COR 1

ANNEX II

4 October 1999

Danish non-paper concerning art. 10
COM(99) 250

Article 10 should be worded in the following way:

**Article 10**
**Technical adaptations**

1. Directive 91/250/EEC is hereby amended as follows:
   a) In Article 4(a) before the word "permanent" the following words shall be inserted:
      "direct or indirect, ".
   b) Article 4(c) shall be replaced by the following text:
      "(c) Member States shall provide authors, in respect of the original computer program or of copies thereof, with the exclusive right to any form of distribution to the public by sale or other transfer of ownership. The distribution right shall not be exhausted within the Community in respect of the original computer program or of copies thereof, 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."  
   c) A new paragraph 4 shall be inserted in Article 5 with a text corresponding to the final text of Article 5(1) of the draft Directive.
   d) Article 7(c) shall be deleted, and a new Article 7A shall be inserted with a text corresponding to Article 6 in the final text of the draft Directive.

2. Directive 92/100/EEC is hereby amended as follows:
   a) Article 3 shall be replaced by the following text:
      "Rental and lending of computer programs
      Article 1, 2(1), 2(4) and Article 5 shall also apply to computer programs."
   b) Article 7 shall be deleted.
   c) Article 9 shall be replaced by the following text:
      "1. Member States shall provide

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1 Subject to agreement on Community exhaustion or international exhaustion.
- for performers, in respect of fixations of their performances,
- for phonogram producers, in respect of their phonograms,
- for producers of the first fixations of films, in respect of the original and copies of their films,
- for broadcasting organizations, in respect of fixations of their broadcasts as set out in Article 6(2),

the exclusive right to make available these objects, including copies thereof, to the public by sale or other transfer of ownership, hereafter referred to as the "distribution right".

2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, 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.\(^2\)

3. The distribution right may be transferred, assigned or subject to the granting of contractual licences.\(^d\)

d) Article 10 shall be replaced by a text corresponding to the final text of Article 5 of the draft Directive.

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

"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."

4. Directive 96/9/EC is hereby amended as follows:

a) In Article 5(a) before the word "temporary" the following words shall be inserted: "direct or indirect,"

b) Article 5(c) shall be replaced by the following text:

"any form of distribution to the public by sale or other transfer of ownership of a database or of copies thereof. The distribution right shall not be exhausted within the Community in respect of the original database or copies thereof, 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.\(^3\)

c) Article 6 paragraph (2)(b)-(d) and paragraph 3 shall be replaced by a text corresponding to the final text of Article 5 of the draft Directive, except Article 5 paragraph 2(a), (b) and (b)(bis).

\(^2\) Subject to agreement on Community exhaustion or international exhaustion.

\(^3\) Subject to agreement on Community exhaustion or international exhaustion.
d) The second sentence in Article 7(2)(b) shall be replaced by the following text:

"The right to control resale of a database or copies thereof within the Community shall not be exhausted, 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."\(^4\)

e) Article 9(b) and (c) shall be replaced by a text corresponding to the final text of Article 5 of the draft Directive, except Article 5 paragraph (2)(a), (b) and (b)(bis).

\(^4\) Subject to agreement on Community exhaustion or international exhaustion.