COUNCIL OF
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LIMITE

PI 3
CULTURE 2
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SUMMARY OF PROCEEDINGS
from: Working Party on Intellectual Property (Copyright)
dated: 1 December 1999
No. prev. doc.: 5117/00 PI 2 CULTURE 1 CODEC 7
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297

1. The Working Party started the examination of a revised version of the Presidency non-paper, as contained in document 12166/1/99 REV 1.

Article 1 (plus Recital 13)

2. The UK delegation reiterated that its acceptance of Article 1 remained subject to finding a satisfactory solution regarding the contents of Article 10.
Article 8bis (plus Recital 36ter)

3. The S and DK delegations entered a reservation on Article 8bis and Recital 36ter, on the grounds that the current wording failed to provide the necessary legal certainty as to the compatibility with the draft Directive of their national provisions granting members of the public free access to documents held by public authorities. The S delegation explained that, under Swedish copyright law, these provisions constituted a statutory limitation to the exclusive right of reproduction and suggested that their relationship with this Directive be further clarified by either amending Recital 36ter\(^1\) or adding a specific exception under Article 5(3)\(^2\).

The NL delegation, while sharing the above concerns and the need for a clear solution, indicated that it could also accept to deal with them in a separate legal instrument, which would focus on the freedom of access to information.

The Commission representative, supported by the IT and F delegations, was of the view that the present wording of Article 8bis and Recital 36ter, as well as - if need be - the exceptions contained in Articles 5(2)(b) and 5(3)(e), could meet the concerns expressed. He explained that the main objective of Article 8bis was to ensure that a number of policy areas outside copyright remained unaffected by the draft Directive. As regards the drafting suggestions on Recital 36ter by the S delegation, the Commission representative entered a scrutiny reservation.

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\(^1\) The S delegation suggested that Recital 36ter read as follows:
"Whereas the protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, which may affect the protection provided under this Directive, such as ...."(rest unchanged)

\(^2\) The DK delegation reiterated its request that the following phrase be added to Article 5(3)(e):
"...and use to ensure the right for members of the public to have access to documents kept by public authorities".
The **UK delegation** entered a scrutiny reservation on Article 8bis and Recital 36ter. While sympathetic to the concerns of the S and DK delegations, that delegation indicated that any amendment to the current text of Article 8bis or Recital 36ter to the effect of singling out the area of access to public documents might oblige the UK delegation to restore its request for a specific exception under Article 5, which would cover its national exception concerning the manufacturing of articles of applied art depicted in drawings.

The **D delegation** indicated that it could accept the additional wording in Recital 36ter, as suggested by the S delegation, but questioned the appropriateness of stating in this Recital that national law provisions would have primacy over those of a Community Directive.

4. The **F delegation** reiterated its request that Recital 36ter contain a reference to the Directive Television without Frontiers\(^3\), and more specifically to the provisions on media chronology contained therein and reserved the right to come forward with concrete drafting suggestions in the near future.

**Article 2**

5. The **IT and D delegations** questioned the appropriateness of using the term "or prohibit" in Articles 2, 3 and 4. The **F delegation** entered a scrutiny reservation in particular with regard to the use of this term in Article 4. The Commission representative, supported by the **GR delegation**, spoke in favour of maintaining this term.

**Article 3**

6. A suggestion by the **Chair** that the title of Article 3 be amended as follows : "Right of communication to the public, **including the right of broadcasting**, of works and right of making available to the public of other subject matter", was welcomed by the **UK and S delegations**.

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7. The **UK delegation** reiterated its request that Article 3(3) be transferred to the Recitals.

8. The **Commission representative** maintained a reservation on the deletion of Article 3(4). The **F delegation** reiterated its support for this deletion.

**Recital 15**

9. The **Chair** explained that the new Recital 15 aimed to make clear that Article 3(1) covered the right of communication to the public, in the sense of Article 8 of the 1996 WIPO Copyright Treaty (WCT), as well as broadcasting; it therefore covered all forms of communication in which the place where the communication originated was at a distance from the place where it was received by members of the public. This meant that all other acts, including placing a computer with Internet connection at the disposal of the public in a cybercafé or a library, were excluded from the scope of Article 3(1).

10. The **IT delegation** observed that it would be more appropriate to transfer the definitions contained in Recital 15 to the body of Article 3.

11. The **IT delegation** also questioned the appropriateness of excluding the acts set out in Article 11bis(1)(iii) of the Berne Convention from the scope of Article 3 of the draft Directive.

12. While broadly endorsing the new proposed wording of Recital 15, the **UK, S, D, NL and DK delegations** requested additional language setting out explicitly which acts fell outside the scope of Article 3(1). The **Commission representative** expressed strong doubts on the appropriateness and/or on the need of providing such a negative definition, which risked being incomplete. He suggested instead that it be clearly stated in Recital 15 that everything not included in the definitions contained therein fell outside the scope of Article 3(1).
Recital 17

13. The D delegation expressed the view that Recital 17 should refer not to communication but to making available to the public. The Commission representative could not agree with this view, as the agreed statement on which it was based referred only to the right of communication under the WCT, not to the right of making available under the WPPT.

Article 4 (plus Recitals 18 and 19)

14. There were no particular comments on this Article and on Recitals 18 and 19.

It was noted that delegations maintained their positions on the issue of exhaustion as set out in footnote 43 of document 11435/99. The B and LUX delegations had not yet reached a final position on this matter.

Article 5(1) (plus Recital 23)

15. The UK delegation indicated that it maintained its positions on Article 5(1) as set out in footnotes 44 and 51 of document 11435/99.

16. The F and ES delegations requested that the text be amended to read: "Temporary acts of reproduction referred to in Article 2, which are transient and incidental ...".

17. The F delegation also indicated that it maintained its position as set out in footnote 53 of 11435/99.

18. The IT, F, A, ES, GR and UK delegations reiterated their support for the sentence "Such uses must be authorised by rightholders or permitted by law". The DK, S, LUX and NL delegations, as well as the Commission representative, on the other hand, reiterated their opposition to this sentence.
19. The Commission representative observed that Article 5(1) dealt with the scope of the right of reproduction rather than with liability issues and considered therefore that there was no overlapping between this provision and the liability provisions of the draft E-commerce Directive.

**Article 5(3bis)**

20. The UK delegation indicated its preference for the terms "... to the extent justified by the purpose of the authorised act of reproduction.", appearing in the Commission's amended proposal, rather than the terms "... for the specific use for which the reproduction is permitted."

**Article 5(4)**

21. The UK delegation welcomed the replacement of "specific" by "special", as in the Berne Convention, the WCT and the WPPT.

**Article 8 (plus Recitals 36 and 36bis)**

22. With the exception of the S delegation, which entered a scrutiny reservation, all delegations which spoke indicated that they could go along with the new wording of Article 8(2). The D delegation requested that mention also be made of the possibility to seek an injunction against the advertisement of devices referred to in Article 6(2) and the ES delegation requested that mention also be made of the possibility to seek an injunction against the other activities referred to in Article 6(2). The NL delegation suggested adding the terms "products or components" after the term "devices". Finally, the UK delegation wondered whether one should not add the word "illicit" before "devices".

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23. As regards Article 8(3) and the new Recital 36bis, there was also broad agreement that the new text constituted an improvement. The D delegation stressed the need to align the wording of this paragraph with that of paragraph 2 and suggested that it be made clear that the terms "to infringe" did not introduce a requirement of intention. The F and ES delegations requested that the explicit mention of Article 5(1) be restored. The NL delegation spoke in favour of restoring the knowledge requirement, as it appeared in document 11435/99, and reiterated its suggestion for a Recital, as set out in footnote 129 of document 11435/99 COR 1. The S and UK delegations entered a scrutiny reservation, stressing the need to ensure that this provision did not preclude the possibility of seeking other forms of relief against service providers. The A delegation questioned whether there might be problems as to which country's law was applicable under this provision.