SUMMARY OF PROCEEDINGS

from: Working Party on Intellectual Property (Copyright)
dated: 16 and 17 December 1999
No. prev. doc.: 5168/00 PI 3 CULTURE 2 CODEC 12
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297


1. The Working Party completed the examination of the revised version of the Presidency non-paper, as contained in documents 12166/1/99 REV 1 and 12166/1/99 REV 1 ADD 1.

General remarks on Article 5(2) and (3) (plus Recital 22)

2. The DK, UK, S, NL and FIN delegations reiterated their general reservation on the structure (exhaustive list) of Article 5(2) and (3), as well as on the current wording of Recital 22, and indicated that their comments on individual provisions contained in these paragraphs were without prejudice to this reservation.

3. The F delegation also entered a general reservation on Article 5(2) and (3), considering that the wording of some of the exceptions contained therein had in the course of the discussions become too vague and too open-ended.
General remarks on the concept of fair compensation (Recital 24bis)

4. The DK, UK, IRL, S, NL, GR and FIN delegations entered a general reservation on Recital 24bis, on the grounds that this still failed to provide the necessary clarity on what exactly the legal obligations imposed upon Member States were with regard to fair compensation.

5. While supporting the concept of fair compensation, the IT and ES delegations broadly shared the above concerns over the lack of clarity of Recital 24bis, and entered a specific reservation on the terms "such as reproductions on paper for private study", which they considered to be unnecessarily broad.

6. The F and D delegations indicated that they preferred the term "equitable remuneration" to "fair compensation". Moreover, the F delegation entered a reservation on the last three sentences of Recital 24bis, in particular as regards the provision stipulating that fair compensation could amount to no specific or separate payment, the provision stipulating that the degree of benefit for the user could be taken into account as the sole criterion when evaluating the circumstances of each case and the use of the term "de minimis", which the F delegation considered as being too vague to serve as a criterion. The D delegation also entered a reservation on the possibility that fair compensation could include no obligation for payment.

Article 5(2)(a)

7. As regards the scope of the exception, the UK, S, NL and IRL delegations welcomed the new text, whereas the IT and F delegations entered a reservation on the non-exclusion of sheet music.

8. As regards the requirement of fair compensation in this exception, the DK, UK, S, FIN and IRL delegations reiterated their strong opposition, in particular as far as photocopying for private use is concerned. The IT and ES delegations spoke in favour of this requirement.
Article 5(2)(b) (plus Recital 26)

9. While the DK, UK, S, A, P, FIN and NL delegations welcomed the new Article 5(2)(b), the F, ES and IT delegations entered a general reservation on this paragraph, on the grounds that it failed to address sufficiently the particularities of digital copying, and reiterated their request that amendments 36 and 37 of the European Parliament be taken on board.

10. The UK, NL and S delegations questioned the need for the terms "on any recording media". The A delegation had a scrutiny reservation on these terms.

11. The DK, A and D delegations requested that the text read "...made by, or on behalf of, a natural person...". While not opposed to this addition, the FIN, UK, NL and S delegations were of the view that the current text already covered copies made on behalf of a third person. The FIN delegation suggested that this point might be clarified in a recital. The F and P delegations and the Commission representative opposed the suggested addition.

12. The A delegation reiterated its reservation on the limitation of this exception to natural persons.

13. The DK and A delegations reiterated their request that the terms "and for non-commercial ends" be deleted. The Commission representative opposed such deletion.

14. The DK, UK, FIN, IRL and S delegations reiterated their reservation on the requirement of fair compensation in this exception. The F delegation considered that fair compensation for private copying should constitute only a transitional solution, pending the conclusion of contractual arrangements between those concerned.

Article 5(2)(c) (plus Recital 28)

15. The F delegation entered a general reservation on the need for this exception, considering that the acts concerned could be dealt with by contract.

16. The GR, D, UK, IT, NL, A and P delegations could accept the new wording of Article 5(2)(c).
17. The **S delegation** entered a scrutiny reservation on the term "specific".

18. The **S delegation** also indicated that it could accept the term "publicly accessible", on the understanding that this covered also establishments which were accessible only to certain categories of the public. It suggested that this might be made clear in a recital.

19. Without prejudice to its general reservation on this exception, the **F delegation** entered a reservation on the inclusion of educational establishments and of archives in the scope of the exception. The **DK and S delegations** entered a scrutiny reservation on the term "educational establishments".

20. As regards Recital 28, the **D delegation** questioned the appropriateness of not covering uses made in the context of on-line delivery.

**Article 5(2)(d)**

21. The **F, IT and UK delegations** questioned the appropriateness of the term "fixations" as opposed to "recordings". The **D delegation and the Commission representative** preferred the term "fixations" for reasons of consistency with the Rental Directive\(^1\). Without expressing any particular preference for any of these terms, the **DK delegation** requested that a single term be used across all Community legal instruments and suggested that this issue be further examined under Article 10.

22. The **NL, S and UK delegations** entered a scrutiny reservation on the terms "by means of their own facilities", which they considered no longer took account of developments in technology and current practices.

23. Finally, the **UK and S delegations** reiterated their request that it be made clear that paragraph (2)(d) of Article 5 would not have the effect of limiting the scope of the exception for archives under paragraph (2)(c).

---

Article 5(2)(e)

24. The majority of delegations welcomed the limitation of this exception to reproductions of broadcasts. On the other hand, the IT delegation questioned this limitation.

25. The DK and S delegations entered a reservation on the need for the terms "pursuing non-commercial activities", on the grounds that the distinction between public and private institutions was not appropriate in this context.

26. The GR and P delegations reiterated their reservation on the words "such as hospitals or prisons".

27. The DK, S, FIN, IRL, GR and UK delegations entered a reservation on the requirement of fair compensation while the D delegation expressed a preference for the deletion of this requirement.

Article 5(3)(a) (plus Recitals 12ter and 28bis)

28. The F delegation questioned the need for this exception, considering that the issues involved should be dealt with by contract.

29. The D delegation requested that it be clarified in the Recitals that university teaching was covered by this exception.

30. The F delegation entered a reservation on the terms "whenever possible". The UK delegation on the other hand would prefer this exception to contain no requirement of source acknowledgement.

31. The DK, A, S, NL and UK delegations reiterated their reservation on the terms "non-commercial".

32. The GR, UK, ES, A, NL, S, FIN, IRL and DK delegations reiterated their reservation on the requirement of fair compensation in this context.
33. Finally, the **DK, S and UK delegations** entered a scrutiny reservation on Recital 28bis.

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

34. The **Commission representative** explained that not only the disabled persons themselves but also non-commercial institutions acting on behalf and for the benefit of the disabled could benefit from this exception. The **F delegation** entered a scrutiny reservation on the scope of this exception.

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

35. The **F and IT delegations** entered a reservation on the deletion of the term "of excerpts" and requested that this be restored. The **UK, NL, D, A and S delegations** welcomed this deletion.

36. The **NL and D delegations** requested that it be made clear that the Directive allowed Member States to maintain their national provisions allowing for free in-house copies of press cuttings. The **FIN delegation** observed that a separate provision along the lines of Article 10bis(1) of the Berne Convention was needed in order to cover press cuttings. The **D, ES and UK delegations** shared this view. The **F delegation**, on the other hand, questioned the need for an exception concerning press cuttings, on the grounds that the latter constituted a commercial activity; it observed, however, that if such an exception were to be introduced, then source acknowledgement would have to be rendered mandatory, in accordance with Article 10bis(1) of the Berne Convention. The **A delegation** expressed the view that national exceptions concerning press cuttings could be covered by Article 5(3)(k).

37. The **Commission representative** confirmed that Member States enjoyed the freedom to attach a condition of fair compensation to any exception, even when this was not explicitly provided by the Directive. The **IT delegation** requested that this be made clear in the Recitals.

**Article 5(3)(d)**

38. There were no comments on this exception.
Article 5(3)(e)

39. The S and DK delegations indicated that they maintained their reservation on this exception until it was made perfectly clear that their concerns regarding free access to public documents could be met through Article 8bis and Recital 36ter.

Article 5(3)(f)

40. There were no comments on this exception.

Article 5(3)(g)

41. The F delegation questioned the need for this exception, considering that it was already covered by Article 5(2)(a). The DK, D and P delegations insisted that this exception be maintained.

Article 5(3)(i) and (j)

42. Without questioning the need for such exceptions at national level, the UK, P, D, S, NL and IT delegations questioned the need for separate provisions in the Directive and were prepared to consider their being covered by Article 5(3)(k), subject to a satisfactory formulation being found for that provision. The F delegation opposed this idea.

43. The UK delegation requested that the scope of Article 5(3)(i) be limited to buildings, works of applied art and sculpture. The F delegation endorsed this request.

44. The D delegation, supported by the A and NL delegations, requested that the terms "provided that ... of the use" of Article 5(3)(i) be transferred to Article 5(3)(j) and that the terms "and to the extent justified by the informatory purpose" be deleted. The UK and S delegations requested that both conditions be deleted from Article 5(3)(i). The F delegation opposed all of these requests.
Requests for additional exceptions under Article 5(3)

45. The DK delegation, supported by the NL delegation, reiterated its request for an additional exception along the following lines: "use, for the purpose of communication to individual members of the public on the spot in establishments referred to in Article 5(2)(c), of works and other subject matter contained in their collections".

46. The F delegation requested an additional exception covering parody, pastiche and caricature.

Article 5(3)(k) (plus Recital 28quater)

47. The DK, UK and S delegations reiterated their general reservation on Article 5(3)(k) and the suggestion that this be replaced by the following provision: "Member States may, without prejudice to paragraphs 2, 3 and 4, provide for other exceptions to the exclusive rights set out in Article 2 and Article 3, including such exceptions which have traditionally been recognised in national law." All comments made by these delegations on the current version of Article 5(3)(k) are without prejudice to this general reservation.

48. The F delegation also entered a general reservation on Article 5(3)(k), on the grounds that this was too vague and too open-ended.

49. The S, UK, DK and NL delegations entered a reservation on the terms "...where exceptions already exist under national law..."

50. The D, A, S, NL, FIN, DK and UK delegations entered a reservation on the restriction of Article 5(3)(k) to analogue uses. The F delegation insisted on keeping this restriction, pointing out that any further exceptions concerning digital uses should be discussed in the Contact Committee and, if appropriate, could be introduced under the review clause (Article 11).

51. The S delegation suggested that the text read "...and do not significantly affect ...".

52. The ES delegation indicated that it could only accept Article 5(3)(k) if all present conditions provided therein were retained.
53. The Commission representative maintained a general scrutiny reservation on Article 5(3)(k).

**Article 6(1)**

54. The UK delegation expressed a general scrutiny reservation on the whole of Article 6 and reserved the right to submit proposals.

55. The UK and F delegations questioned the need for the terms "in the knowledge, or with reasonable grounds to know, that he or she pursues that objective.". The NL delegation suggested that these be replaced by "...for the purpose of infringement or knowing or having reasonable grounds to know that such circumvention will enable infringement." The DK delegation welcomed this suggestion.

56. The UK delegation reiterated its request for a Recital stipulating that Article 6 applied without prejudice to public policy and public security.

**Article 6(2)**

57. Several delegations stressed the need to clarify the relationship between Article 6(2) and the exceptions to the rights. The DK, S and P delegations requested that a clear link be established between Article 6(2) and infringements. The IT and D delegations spoke against such a link, considering that it would be impossible to determine in advance what the final use of these devices would be. The Commission representative entered a scrutiny reservation on this issue, while observing that one had to take into account in this context the impact of each choice on the free circulation of the relevant products and/or services in the Internal Market. The UK delegation reserved its position on the relationship between this paragraph and the exceptions to the rights.

58. The S, DK, F, UK and D delegations requested that it be made clear by means of a Recital that import or possession for private purposes of the products concerned is excluded from the scope of Article 6(2) and that Member States remain free to regulate this issue as they wish.

59. The UK delegation reiterated its reservation on the term "...or use..." in point (b).
60. The NL delegation suggested that the terms "...carried out by a person knowing or having reasonable grounds to know that such devices, products or components or performance of services will be used to enable infringement." be added in the end of Article 6(2). The DK delegation welcomed this suggestion.

**Article 6(3)**

61. The F delegation entered a reservation on the deletion of the reference to access control measures under Article 6(3).

62. The D delegation suggested that consideration be given to ending the first paragraph of Article 6(3) after "subject matter". The DK delegation on the other hand expressed a reservation on the deletion of "or permitted by law", which had appeared in the previous version of this paragraph.

**Article 6(4)**

63. The A, S, D, IT, GR and P delegations and the Commission representative gave a preliminary favourable reaction to clarifying the relationship between Article 6 and the exceptions to the rights in the new Article 6(4). The UK, and F delegations entered a scrutiny reservation on this paragraph.

64. The NL delegation entered a general reservation on the whole of Article 6(4), considering that this would be difficult to implement and that it failed to clarify the relationship between Article 6(1) and 6 (2) and the exceptions. It considered that this relationship should be dealt with explicitly in Article 6 (1) and 6(2) (see points 55 and 60 above).

65. The F delegation spoke in favour of a provision which would impose upon rightholders the obligation to provide beneficiaries of exceptions with means of access to works protected by technological measures.

66. The ES, DK, P and S delegations considered that Article 6(4) should refer not only to paragraph 1, but also to paragraph 2.
67. The F delegation questioned the need for the term "limitation" in Article 6(4)(a) as it considered that "exception" was sufficient.

68. The D delegation questioned whether the reference to Article 5 in Article 6(4)(a) was not too narrow, as it would not cover exceptions provided for in earlier Community Directives on copyright and related rights.

69. The A, D, P and S delegations entered a reservation on Article 6(4)(b), considering that this contained elements which were foreign to copyright law and difficult to transpose into national law. The DK and IT delegations entered a scrutiny reservation on this provision.

70. The A, IRL, DK, P and D delegations entered a reservation on the absolute exclusion of digital private copying from the scope of the exception contained in Article 6(4). The IT, GR and UK delegations entered a scrutiny reservation in this respect. The F and S delegations expressed positive scrutiny reservations. The NL delegation suggested that if any distinction were to be made, it should be between on-line and off-line acts rather than between digital and analogue technologies. The D delegation suggested that consideration be given to replacing this sentence by "This paragraph shall apply to digital private copying as far as national law forbids digital private copying".

**Article 7**

71. The F delegation entered a reservation on the term "knowingly" in the first line of Article 7(1). While insisting on keeping this term, the UK delegation maintained its general reservation on Article 7(1) until it was made clear that the removal or alteration of electronic rights-management information caused inadvertently by broadcasters in the course of their normal day-to-day activity does not fall within the scope of that paragraph.

**Article 9**

72. The UK, F, ES, D and S delegations entered a scrutiny reservation on the deletion of Article 9(3).
73. The ES and D delegation entered also a scrutiny reservation on the deletion of Article 9(4). The Commission representative expressed the view that, if paragraph 3 were to be restored, then paragraph 4 should also be restored.

Article 10

74. While sharing the need to avoid disturbing the balance reached in earlier Directives, the DK, S, UK and NL delegations maintained their request for further horizontal harmonisation as between those Directives and this Directive in particular as regards the definitions of the rights of reproduction and communication to the public and the exceptions to these rights. The DK delegation indicated that it maintained its proposal on Article 10, as contained in Annex II of document 11435/99 COR 1.

75. As regards Article 10(0), a number of delegations reserved their position until Article 6 has been finalised. The F delegation entered a reservation on this provision.

Article 11 (plus Recital 39)

76. The NL delegation entered a reservation on Article 11(1), on the grounds that it did not provide for a sufficiently long time period for the transposition of the Directive.

77. The UK, IRL, D and DK delegations maintained their reservations on the need for institutionalising the Contact Committee referred to in Article 11(4), as well as on the idea that this Committee could function as a review mechanism which would substitute Member States' freedom to adapt their copyright legislation to technological developments as they deem fit. In the event that such a Committee was finally created, however, the UK delegation would prefer to see its remit put under Article 11 rather than in a Recital.

78. In reply to the D delegation, the Commission representative expressed the view that the tasks of the Contact Committee could not be carried out by the Working Party on Intellectual Property.
79. The **F delegation** spoke in favour of a broad remit for the Contact Committee, while the **GR and IT delegations** reiterated their request for a Recital making clear that any statements made by a representative of a Member State in this Committee would not be used against the Member State concerned in an infringement procedure. The **Commission representative** indicated that he was not opposed to such a Recital.