SUMMARY OF PROCEEDINGS
from: Working Party on Intellectual Property (Copyright)
dated: 17 January 2000
No. prev. doc.: 5377/00 PI 5 CULTURE 3 CODEC 36
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297


2. In view of the recent developments regarding the draft E-commerce Directive and of the awaited vote by the European Parliament on the ratification by the Community of the 1996 WIPO Treaties, both the Chairman and the Commission representative stressed the need for rapid progress and appealed to delegations for greater flexibility.

3. In terms of working method, the Chairman suggested that a discussion on the amendments suggested by the Finnish Presidency, as contained in the Annex to document 14238/99, take place only after the Working Party has revisited the main stumbling blocks in the consolidated

---

1COM(1198)586 final of 18.11.1998.
text. It was agreed that any reservations or requests appearing in the footnotes of the consolidated text would be considered as maintained if not expressly withdrawn by the delegations concerned.

Article 1

4. There were no comments on this Article.

Article 2

5. It was noted that the IT and D delegations could now lift their reservations on the use of the term "or prohibit" in Articles 2, 3 and 4 (see footnotes 22, 24, 25 and 28 of document 14238/99). The F delegation could also lift its scrutiny reservations on this term.

Article 3 (plus Recital 15)

6. The S, UK and DK delegations indicated that they could accept the current wording of the title of Article 3. The ES and GR delegations drew attention to the need to align the Spanish and Greek versions of the title on the English version.

7. The UK delegation on the other hand expressed a preference for withdrawing its request that the contents of Article 3(3) be transferred to a Recital following assurances by the Commission representative that Member States were under no obligation to make a similar statement in their national law when transposing the Directive. The NL, D, S and DK delegations also welcomed this assurance.

8. The S, UK, DK and NL delegations indicated that they preferred the new version of Recital 15, as contained in the Annex to document 14238/99, albeit with a slight amendment to its third sentence, which should read "whereas this right covers any such transmission or ...(rest unchanged)". The ES delegation on the other hand expressed a preference for Recital 15 as set out in the consolidated text.
9. The F and IT delegations observed that the current definition of the right of communication to the public in Recital 15 was narrower than the one contained in the Commission's amended proposal and wondered whether this would not have a negative impact on the functioning of the Internal Market. The Commission representative indicated that, in the absence of agreement in the Working Party on a broader scope concerning this right, the Commission could accept the present wording. The IT delegation requested that Recital 15 state explicitly that the right of public performance falls outside the scope of the right of communication to the public for the purposes of this Directive.

Article 4

10. The F delegation maintained its reservation on the use of the term "original" in Article 4 until it is clarified in a Recital that this provision does not affect the French droit de destination nor the author's moral rights.

11. As regards Article 4(2), the B delegation indicated that it preferred the current text, which provides for Community exhaustion, whilst the LUX delegation expressed its preference for international exhaustion.

Article 5(1) (plus Recital 23)

12. The UK, ES and NL delegations questioned the need for Article 5(1) and requested the Commission to explain why this clause was still needed following the political agreement on the draft E-commerce Directive, which provides for the exclusion of the liability of Internet service providers (ISPs). These delegations also questioned the appropriateness and the feasibility of covering both caching and browsing under the same clause as technical copies made by ISPs. Finally, the UK delegation informed the Working Party that discussions were ongoing between rightholders and ISPs in the United Kingdom on Article 5(1) and it reserved the right to table its own proposal on this paragraph in the near future.
The Chairman observed that Article 5(1) was needed to dissipate any doubt as to whether the technical acts described therein are covered by the right of reproduction provided in Article 2.

The Commission representative justified the need for Article 5(1) by indicating that a mandatory exception to the right of reproduction offered more legal certainty to the ISPs than a mere exclusion from liability. He recalled that the European Parliament had endorsed this provision although it knew that the E-commerce Directive would also contain provisions on liability.

13. As regards the sentence "Such uses must be authorised by rightholders or permitted by law.", the D and NL delegations requested that a solution be sought under Article 8(3), with the consequence that this sentence could be deleted. The IT delegation opposed this suggestion, observing that Article 8(3) was a procedural clause, which needed a substantive provision concerning the actual content of the right. It also pointed out that the current wording of Article 8(3) was narrower in scope than Article 5(1). Finally, it wondered whether a compromise could not be found by replacing this phrase by a "non-prejudice" clause along the lines of the non-prejudice clauses in the provisions of the E-commerce Directive relating to liability. If this sentence was retained, however, the IT delegation suggested that the term "uses" be replaced by "use".

14. The F delegation entered a scrutiny reservation on the last part of Recital 23, as it considered "facilitate" much broader than the term "enable" used in Article 5(1) and in the first part of Recital 23.

General remarks on fair compensation (Recital 24bis)

15. The ES, GR, IT, B, A and FIN delegations indicated that they could broadly accept the notion of fair compensation as described in Recital 24bis.

16. The D and F delegations requested that this be replaced by "equitable remuneration" and entered a reservation on the current wording of Recital 24bis.
17. The LUX, UK, DK, S and NL delegations reiterated their general reservation on this notion. If this were to be maintained, however, they requested that Recital 24bis be redrafted in order to provide sufficient clarity and legal certainty for the transposition of the Directive by Member States.

18. The Commission representative spoke in favour of the notion of fair compensation, which he considered as a balanced compromise between largely conflicting views in the Working Party. He drew delegations' attention to the built-in flexibility of this notion, which allowed for a case-by-case assessment. In reply to the IT and F delegations, he confirmed that Member States remained free to impose fair compensation or even equitable remuneration on any exception, regardless of whether this was explicitly provided in the Directive or not. In reply to the S delegation, he expressed the view that the question whether or not a payment of fair compensation would be subject to national treatment obligations was a matter of application of the relevant international conventions, rather than of this Directive. Finally, in an attempt to meet the concerns of the F delegation, which observed that the current text allowed the criterion of benefit for the user to be taken in isolation when assessing the need for compensation, the Commission representative suggested that one possible solution might be the deletion of the word "or" in the third sentence of Recital 24bis.

General remarks on paragraphs 2 and 3 of Article 5

19. The D, F and IT delegations, together with the Commission representative, spoke in favour of an exhaustive list with clearly defined exceptions. The F delegation considered that this list should be more limited than at present. As regards the clause of Article 5(3)(k), the D and IT delegations and the Commission representative indicated that they could accept it in the context of an overall compromise package, but warned against attempts to remove any of the conditions it now contains or to turn it into a general catch-all provision. The F delegation could not accept this clause.
20. The DK, S, NL and UK delegations indicated that they maintained their general reservation on the structure of paragraphs (2) and (3) of Article 5 and requested that Article 5(3)(k) be redrafted with a view to offering greater flexibility; however, their final view on Article 5(3)(k) would depend on the contents of the rest of Article 5(2) and (3). The DK delegation stressed the need for an explicit reference to the subsidiarity principle in this provision.

21. The F delegation requested that the requirement of acknowledging the author's name be rendered mandatory throughout Article 5 and entered a general reservation on all provisions which made such an obligation subject to the terms "whenever possible".

22. The DK delegation indicated that, in the light of Recital 15, it could withdraw its request for an additional exception set out in footnote 68 of document 14238/99, since the acts covered by such an exception now fell outside the scope of the Directive.

Article 5(2)(a)

23. The LUX delegation joined those delegations which had requested that sheet music be excluded from the scope of this exception. The Commission representative shared the need for such an exclusion but indicated that in the absence of agreement in the Working Party the Commission could be flexible.

24. The IT delegation requested clarifications by the Commission on whether legal persons could also benefit from this exception.

Article 5(2)(b)

25. As regards the terms "any recording media", the UK and A delegations indicated that they could lift their reservation contained in footnote 37 of document 14238/99, as they preferred the present wording to the wording in the Annex to 14238/99. The F delegation entered a scrutiny reservation on these terms, preferring the wording of the Commission's proposal.
26. The **DK, D and A delegations** indicated that they could withdraw their drafting suggestion contained in footnote 38 of document 14238/99, provided the matter was clarified by means of a Recital. The **Commission representative** could accept this suggestion.

**Article 5(2)(c)**

27. The **D delegation** entered a reservation on Article 5(2)(c), requesting that it be made clear that the scope of this provision was limited to copies made by the establishments concerned for their own purposes only.

28. The **S delegation** indicated that it could lift its scrutiny reservations concerning the terms "specific" and "educational establishments" in Article 5(2)(c).

29. The **DK delegation** maintained its reservation on the term "educational establishments", which it considered as unnecessarily broad, and suggested that it be replaced by "including libraries in educational establishments". The **Commission representative** could not accept this suggestion.

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

30. It was noted that there was general agreement that the term "fixations" be replaced by "recordings", as proposed in the Annex to document 14238/99.

31. It was also noted that the **UK, S and NL delegations** could lift their reservation on the terms "by means of their own facilities" (see footnote 47 of document 14238/99) provided it was made clear in the Recitals that this exception covered also recordings made by an agent for broadcasting organisations.

**Article 5(2)(e)**

32. The **GR delegation** could lift its reservation on the terms "such as hospitals or prisons" (see footnote 50 of document 14238/99).
33. The IT delegation requested that this exception be transferred to Article 5(3). It also requested that it be limited to public social institutions only and that it contain a list of the institutions covered. The Commission representative considered that the addition of the term "public" might create confusion.

34. The S delegation suggested that the exception be limited to reproductions used within the institutions concerned and within a short time period following the act of reproduction. With regard to the terms "pursuing non-commercial purposes", the S delegation wondered whether a solution could not be found along the lines of Recital 28bis.

35. As regards the need for the requirement of fair compensation in this case, it was noted that the majority of delegations were in favour of its deletion. The UK delegation indicated that it could accept such deletion only if it was also made clear that no compensation would be required for time-shifting for private purposes by national persons under Article 5(2)(b). The F delegation and the Commission representative were opposed to this deletion, considering that the notion of fair compensation was sufficiently flexible to allow Member States to take into account the social aspects of such an exception. The D and FIN delegations also opposed removing the requirement of compensation for time-shifting for private purposes.

**Article 5(3)(a)**

36. The UK delegation entered a reservation on the need for the Directive to provide for an obligation of source acknowledgment. If this obligation were to be retained, however, the UK delegation insisted that the terms "whenever possible" be also kept in the text.

37. In reply to the B delegation, the Commission representative confirmed that distance learning was covered by this exception and indicated his willingness to clarify this by means of a Recital. He also considered it unnecessary to include in Article 10 an amendment of the database Directive\(^2\) in this respect.

Article 5(3)(b)

38. There were no comments on this paragraph.

Article 5(3)(c)

39. The NL delegation indicated that it could withdraw its request in footnote 60 of document 14238/99 provided the new version of Article 5(3)(b), as contained in the Annex to that document, was taken on board.

Article 5(3)(d)

40. There were no specific comments on this paragraph.

Article 5(3)(e)

41. The S and DK delegations indicated that they could lift their reservation on Article 5(3)(e) if Recital 36ter, as contained in the Annex to document 14238/99, was taken on board.

Article 5(3)(f) and (g)

42. There were no comments on these paragraphs.

Article 5(3)(i)

43. The UK, A and S delegations and the Commission representative indicated that they could accept the new wording of this exception, as set out in the Annex to document 14238/99. The F delegation entered a reservation on that wording, considering that sculptures should not be treated in the same manner as works of architecture.
Article 5(3)(j)

44. It was noted that the NL delegation withdrew its request that the terms "provided that it does not constitute the main object of the use" be added to this paragraph, while the F delegation supported the D delegation in making this request.

Article 5(3)(k)

45. The UK, DK and NL delegations reiterated their reservations on the conditions set by Article 5(3)(k), in particular on the ones limiting the scope of this clause to existing exceptions and to analogue uses. The UK delegation reserved the right to request additional exceptions if this clause remained unchanged. The DK delegation requested that exceptions with no effect on the functioning of the internal market be left to Member States. The Commission representative indicated his willingness to consider enhancing the list of exceptions by taking on board additional exceptions, such as an exception for repair purposes or one covering parody, pastiche and caricature, but reiterated his opposition to any further opening of the wording of Article 5(3)(k). The Chairman indicated the willingness of the Presidency to reconsider the wording of this provision.

Article 5(3)(bis)

46. The NL delegation supported the request by the UK delegation that the terms "...for the specific use for which the reproduction is permitted" be replaced by "...to the extent justified by the purpose of the authorised act of reproduction" as in the Commission's amended proposal. The Commission representative indicated that he was flexible on this issue.

Article 5(4)

47. Without entering a reservation, the FIN delegation pointed to differences existing between the wording of this paragraph and the wording of the relevant provisions of the Berne Convention and the WIPO Treaties.