I. INTRODUCTION


The proposal, which is based on Articles 47(2), 55 and 95 of the Treaty, aims to provide a harmonised and appropriate legal framework for copyright and related rights in the Information Society. It adjusts and complements the existing framework so as to ensure the smooth functioning of the Internal Market and bring about a favourable environment which protects and stimulates creativity and innovative activities within the Community. The proposal is also intended to implement the new international obligations resulting from the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty concluded in Geneva on 20 December 1996.

2. The Economic and Social Committee delivered its Opinion on 9 September 1998 \(^1\).

The European Parliament delivered its Opinion at first reading on 10 February 1999 \(^2\).

3. The Commission submitted an amended proposal on 25 May 1999 \(^3\).

4. The Working Party on Intellectual Property (Copyright) has examined the original proposal and the amended proposal intensively under the United Kingdom, Austrian, German and Finnish Presidencies. Although a satisfactory solution has yet to be reached on a number of questions, the Presidency considers that considerable progress has been made on most of the issues raised and that the matter has now reached an appropriate stage to be discussed within the Permanent Representatives Committee.

5. A consolidated text of this proposal is contained in 6652/00 PI 14 CULTURE 11 CODEC 154.

II. MAIN DISPUTED POINTS

A. Article 4(2)

6. This provision enshrines the principle of exhaustion of the exclusive distribution right.

7. In line with previous directives on this matter, the present text enshrines the principle of Community exhaustion, stating that the exclusive distribution right shall not be exhausted except where the work protected, or a copy thereof, has been put up for sale for the first time within the Community by the rightholder or with his consent. This text is approved by the UK/IRL/A/F/ES/I/D/EL and B delegations.

\(^2\) OJ C 150, 28.5.1999, p. 171.
8. In contrast, the DK/P/NL/FIN/S and L delegations preferred international exhaustion, whereby the distribution right is exhausted in any country in which the work, or a copy thereof, has been put up for sale for the first time, provided, of course, that this has been done by the rightholder or with his consent.

9. It should be noted that the problem of exhaustion of rights in the field of trademarks is currently under discussion at technical level within the Council’s Working Party on Intellectual Property (Trademarks).

10. The Presidency suggested retaining the principle of Community exhaustion in this Directive, in line with previous directives on copyright, on the understanding that the matter could be reviewed at a later stage in the context of more general discussions concerning exhaustion of intellectual and industrial property rights.

B. **Article 5(1)**

11. This is the only compulsory exception in the proposed Directive. Its purpose is to exclude certain acts of temporary reproduction carried out within digital networks from the field of reproduction rights. The aim here is to strike the right balance between protecting the legitimate interest of rightholders and not unduly inhibiting the smooth operation of the digital networks.

12. The wording of the consolidated text is a compromise between the position of those delegations which would have preferred to state that the uses to which the acts of reproduction in question are put should be subject to authorisation by the rightholder or by the law, and the position of other delegations which considered that such a requirement would be excessive: the present wording in fact distinguishes between acts permitting a transmission in a network between third parties by an intermediary (for which authorisation is not a condition) and acts permitting lawful use (i.e. use which is authorised or not subject to restrictions under the law).
13. In general, the present text seems capable of meeting with the approval of delegations and of the Commission. Two points of disagreement remain however:

- the F/B/I and ES delegations requested that the words "transient or incidental" be replaced by "transient and incidental". The other delegations preferred the present text, on the grounds that the suggested amendment would make the exception much too narrow;

- the F/B/IT/EL and ES delegations argued for the retention of the words "and essential". The A delegation said that it had an open mind on this question, while the P delegation entered a scrutiny reservation. All the other delegations and the Commission would prefer deletion of these words, on the same grounds as above.

14. The Presidency proposed the adoption of "or" and deletion of "and essential".

C. Fair compensation

15. The expression "fair compensation" was suggested by the European Parliament at first reading and adopted by the Commission in its amended proposal. As this was a new term in intellectual property case-law, the Working Party endeavoured to provide a definition for it in recital 24a.

16. The B/ES/FIN/A and EL delegations gave their agreement on the principle of fair compensation as defined in recital 24a.

17. The F and D delegations preferred the term "equitable remuneration".
18. The DK/L/UK/IRL/S and NL delegations entered reservations on the principle of fair compensation, on the grounds that the present wording of recital 24a did not allow them to assess with certainty or precision the extent of the obligations which this concept would place on Member States in transposing the directive. The DK and NL delegations, however, said that they might review their position if it were made unequivocal in recital 24a that this concept would not entail compelling Member States to introduce charges on data-processing equipment for all downloading via the Internet for private purposes.

19. The European Parliament and the Commission (in its amended proposal) proposed that fair compensation should be a condition for application of exceptions relating to reprography (Article 5(2)(a)), reproduction for private use (Article 5(2)(b)), use for the purpose of illustration for teaching and scientific research (Article 5(3)(a)); the Commission proposed applying this condition also to an exception appended by the Working Party regarding broadcasts made by certain institutions (Article 5(2)(e)). In view of the differing positions of delegations on whether or not to apply this condition of fair compensation to the exceptions concerned, the consolidated text contains a compromise solution whereby the condition is made compulsory solely in relation to reprography and reproduction for private use, on the understanding that Member States including other exceptions permitted by Article 5(2) and (3) in their national law will have the option of attaching this condition to any of the exceptions at national level.

20. The Presidency recommends adhering to this compromise.
D. **Clause allowing a degree of relaxation of the principle of a closed list**

21. The amended Commission proposal does not include any such clause. The clause was drafted by the German Presidency in seeking a compromise between those Member States which argued for an exhaustive list of exceptions (this idea coincides with the Commission proposal), and those which would prefer to preserve their freedom to retain and/or adopt other exceptions not included in the Article 5 list.

22. **Version 1** of the clause, as it stands in the consolidated text, does not contain a limit its scope to analogue uses alone, thus allowing Member States a degree of freedom also with regard to digital uses. It is accompanied by a less lengthy list of exceptions.

23. **Version 2** is accompanied by an extended list of exceptions but contains all the limitations to its scope, including limitation to analogue uses alone.

24. The F/I/B and ES delegations and the Commission would have preferred not to have a clause of this kind in the Directive. However, as part of an overall compromise, they could accept such a clause provided that it took the form of version 2. **The F/I and B delegations**, while accepting the principle of a reasonably extended list of exceptions as part of an overall compromise, entered scrutiny reservations on each of the exceptions contained in Article 5(3), points (k) to (p).

25. The UK/DK/EL/D and A delegations could accept limitation of the scope of the clause to analogue uses alone if the list of exceptions preceding it contained all the exceptions currently accompanying version 2.
26. The S/P/IRL/L/FIN and NL delegations, which entered general reservations on the closed nature of the list of exceptions in Article 5, argued against limitation of the scope of Article 5(3)(p) to analogue uses alone, regardless of the list of exceptions eventually adopted.

27. The UK and NL delegations also requested deletion of the words "where exceptions already exist under national law".

28. The Presidency asked the Permanent Representatives Committee to decide whether version 1 or version 2 should be adopted.

E. Article 6(4)

29. This clause is intended to clarify the relationship between protection of technological measures applied by rightholders to protect their work or other subject matter against a violation, and the various exceptions laid down in Article 5.

30. Concerning version 1 of the clause, the only point of disagreement within the Working Party is the last sentence, which – as a derogation – provides that legal protection of technological measures is to take precedence over the exception concerning digital private copying.

31. The S/F/I/ES and EL delegations and the Commission favoured retaining the sentence.

32. The UK/D/A/NL/L/DK/P/B and IRL delegations entered reservations on the sentence in question.

33. The FIN delegation entered a scrutiny reservation.
34. The object of version 2 is to clarify the fact that even if legal protection against the circumvention of technological measures in cases of private digital copying takes precedence over the exception, Member States will be required to ensure that the means to benefit from that exception are also available to those who are its beneficiaries. Although some delegations expressed favourable initial reactions, this version was not properly put to the test within the Working Party. The UK delegation stated, moreover, that its acceptance of this version would be conditional upon an addition being made to recital 27.

35. The Presidency asks the Permanent Representatives Committee to decide whether version 1 or version 2 should be adopted.

E. Article 10

36. Article 10 as it stands at present is based on the premise that previous Directives on this subject need only a bare minimum of amendment. According to the Commission, those concerned prefer a prudent approach and are against any amendment which might threaten the balance achieved in other fields, particularly where computer programmes are concerned.

37. However, a number of delegations did not share this view.

38. The DK/UK/NL and S delegations accordingly requested that the definition of the right of reproduction in all previous Directives in the field of copyright and related rights should be aligned on the wording of this right as set out in Article 2 of the Directive under discussion.
39. In addition, in the view of the DK/UK/NL/FIN/S and A delegations it would be inconsistent to exclude computer programmes and databases from the scope of Article 5(1), as these circulated via the Internet like any other protected work or subject matter. The delegations therefore said that they could not accept the provision in question unless a provision to the same effect were applied to such categories of work.

40. Finally, the DK delegation requested that a provision to the same effect as Article 6 of the Directive under discussion replace Article 7(1)(c) of the Directive on legal protection of computer programmes for the sake of transparency and the need to bring the Article in question into line with Article 11 of the WIPO Copyright Treaty. The UK/D/A/FIN/NL and S delegations entered scrutiny reservations on this question. Without prejudice to such reservations, the S delegation suggested as a compromise that the need to consider the possibility of such an extension to Article 6 might be explicitly mentioned in the review clause in Article 11(2).

41. The Presidency proposed that the abovementioned additions should not be made to Article 10.

III. OTHER RESERVATIONS

42. Recital 9a: the F delegation asked for this to be worded as follows: "… ensuring that European cultural creativity and production …".

43. Recital 30b: requests by the DK/F and ES delegations for the word "allow" to be replaced by "prohibit".

44. Recital 30b: reservation by the F delegation on the words "which may affect the protection of copyright or related rights".
45. **Article 4(2):** in order to be able to withdraw its reservation on the use of the word "original", the F delegation suggested the following recitals:

- "19a Exhaustion of the distribution right must not have repercussions on the author’s control over public use of copies of the work, nor on the exercising of moral rights."

- "19b Exhaustion of the distribution right shall not affect the first fixation of the work".

46. **Article 5(2) and (3):** general request by the F delegation for all the exceptions contained in the list for these two paragraphs to provide for an obligation to quote the name of the author.

47. **Article 5(2)(a):**

- reservations by the UK/A/L/NL and IRL delegations on the phrase "with the exception of sheet music";

- reservations by the DK/S and FIN delegations on the condition of fair compensation until another solution is found for the wording of recital 24a;

- reservations by the F and D delegations on the words "fair compensation", which they would like to see replaced by "equitable remuneration".

48. **Article 5(2)(b):**

- general reservations by the F and I delegations, which preferred the wording and framing suggested by the European Parliament in its amendments 36 and 37;
- reservations by the F and D delegations on the words "fair compensation", which they would like to see replaced by "equitable remuneration";

- reservations by the UK/DK/FIN/S/NL/L and IRL delegations on the condition of fair compensation until another solution is found for the wording of recital 24a;

- reservations by the UK/FIN/S and NL delegations on the sentence "which takes account … subject matter concerned;", which in their view ought rather to be included in a recital. On this, the FIN delegation suggested that the sentence "on condition that these are eliminated when effective technological measures are introduced" should be added to the end of the second sentence in recital 26;

- reservation by the A delegation on the words "of a natural person and for non-commercial ends".

49. Article 5(2)(c): scrutiny reservation by the D delegation.

50. Article 5(2)(e):

- reservation by the UK delegation, supported by the L/DK/A and IRL delegations, which wanted the text to read "… made for private use or by social institutions …", in order to ensure that the practice of time-shifting was covered by this exception; the F/ES/D/B/I and EL delegations and the Commission were against this suggestion;

- reservations by the S and DK delegations on the words "pursuing non-commercial purposes";

- requests by the F and I delegations, supported by the Commission, to add the sentence "on condition that the rightholders receive fair compensation" at the end of the provision.
51. **Article 5(3)(a):**

- reservations by the S/UK/NL/DK/L and A delegations on the words "non-commercial";

- requests by the B/D and I delegations and by the Commission that this exception be accompanied by the condition of fair compensation (equitable remuneration for the D delegation); scrutiny reservation by the F delegation on this point;

- requests by the D and B delegations for it to be made clear that the word "illustration" refers only to teaching and not to scientific research;

- request by the ES delegation that the wording of recital 28a be aligned on that of this clause.

52. **Article 5(3)(c):**

- reservation by the UK delegation on the sentence "use for informatory purposes …is indicated", on the grounds that this would not be in accordance with the wording of Article 10a(1) of the Bern Convention;

- requests by the F and I delegations for the insertion of the words "of extracts" following "use" in the fifth line.

53. **Article 5(3)(i):**

- general reservations by the F and B delegations on the wording of this clause, which was felt to be too broad; the B delegation suggested adding the sentence "where the main aim is not the use of the work in itself", while the F delegation suggested inserting the word "ancillary" before "use";

- reservation by the F delegation on the word "sculpture".
54. **Article 5(3)(k):** general reservation by the F delegation on this exception, which it considered too broad and unjustifiable.

55. **Article 5(3)(l):** request by the B delegation for the addition of the sentence "on condition that such use is in accordance with honest practices".

56. **Article 5(3)(m):** reservation by the NL delegation on the words "commercial enterprises".

57. **Article 5(3)(n):** reservation by the F delegation on the need for this exception.

58. **Article 5(3)(o):** reservations by the F delegation and the Commission on the need for this exception.

59. **Article 5(4):** requests by the UK/FIN/NL/IRL and A delegations to align the present text on that of the corresponding provisions of the 1996 WIPO Treaties (second option in the consolidated text).

60. **Article 6(1):**

   - requests by the UK and IRL delegations to insert "without permission from the rightholder" after the word "circumvention", in order to make it clear that only unlawful circumvention is meant;

   - request by the FIN delegation for a new recital stipulating that where the law applying to the acts described in Article 6(1) has to be determined, the Member States would be free to set the points of reference; the Commission disputed the need for such a recital.
61. **Article 6(2):**

- requests by the **UK and IRL delegations** to insert "without permission from the rightholder" after the word "circumvention", in order to make it clear that only unlawful neutralisation is meant;

- requests by the **S/A and D delegations** for it to be made clear that imports for private use were not covered by this clause;

- reservation by the **UK delegation** on the wording of subparagraph 2(b), on the grounds that it might lead to unjustifiable discrimination; the **A delegation** also argued for deletion of this subparagraph, believing that it was already covered by the wording of subparagraph 2(c).

62. **Article 7(1):** request by the **F delegation** for the text to be aligned on that of the corresponding Articles of the WIPO Treaties.

63. **Article 8(2):** the **UK delegation** suggested the insertion of the word "unauthorised" before the word "components".

64. **Article 8(3):** the **UK delegation** requested that it be made clear in this provision or in recital 36a that Article 8(3) applies only to cases of transmission by an intermediary.

65. **Article 11(1):** reservation by the **A delegation** on the period of two years, which it found too long.

66. **Article 11(4)(a):** reservation by the **DK delegation**.
67. **Article 11(4)(b):** request by the FIN delegation, supported by the F and UK delegations, for the addition of the following sentence: "to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures".