COUNCIL OF THE EUROPEAN UNION

Brussels, 22 May 2000

8647/00

LIMITE

PI 32
CULTURE 32
CODEC 377

REPORT

from: Presidency
to: Council (Internal Market)

No. prev. doc.: 7179/00 PI 20 CULTURE 17 CODEC 223
No. Cion prop.: 8723/99 PI 29 CULTURE 36 CODEC 297


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.\(^2\)

The European Parliament delivered its Opinion at first reading on 10 February 1999.\(^3\)

3. The Commission submitted an amended proposal on 25 May 1999.\(^4\)

4. The Working Party on Intellectual Property (Copyright) and the Permanent Representatives Committee have examined the original proposal and the amended proposal intensively under the United Kingdom, Austrian, German, Finnish and Portuguese Presidencies. Council is asked to resolve the remaining questions.

5. A Presidency compromise text is contained in 8695/00 PI 33 CULTURE 33 CODEC 381.

II. MAIN OUTSTANDING ISSUES

A. Article 6(4)

6. This clause, together with Recital 31bis, 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 various exceptions to the rights of rightholders. It seeks to ensure that, in spite of the application of technological protection measures, the beneficiaries of certain exceptions which are likely to be the most affected by such measures should, under certain conditions, be able to obtain the means of benefiting from those exceptions, either through voluntary measures taken by rightholders, or as a result of measures taken by Member States in the absence of voluntary measures. In order to prevent any abuse, any technological protection measures applied in implementation of the voluntary measures by rightholders or of measures by Member States should also enjoy the protection provided for in the Directive. Member States are also authorised ("may") to take measures to enable beneficiaries of the private copying exception to benefit from that exception in the absence of voluntary measures by rightholders.

\(^3\) OJ C 150, 28.5.1999, p. 171.
7. Member States are still considering the last sentence of Article 6(4). The B/ES/F and IT delegations consider that measures enabling beneficiaries of the private copying exception to benefit from that exception should be accompanied by guarantees that no more copies are made than are authorised, and that fair compensation is paid in respect of any copies made. The UK and LUX delegations in particular consider that no reference should be made to fair compensation in this provision.

8. The UK delegation suggests adding the exceptions under Article 5(3)(c) and (d) to the list of exceptions in Article 6(4) and the FIN delegation suggests adding the exception under Article 5(3)(o). Other delegations and the Commission are opposed to extending this list, and have reservations on the inclusion of the exception under Article 5(2)(a).

9. The B/F/D and IT delegations and the Commission have scrutiny reservations on the reference in Recital 31bis to public policy.

10. The UK delegation, supported by the DK/IRL/LUX/NL/FIN and S delegations are in favour of the wording in Recital 31bis concerning "time-shifting" in relation to the use of technological protection measures. The D/GR/ES/IT and F delegations are opposed to this wording, as they consider that rightholders should be able to control all private copying, including "time-shifting". The F delegation also considers that the definition of "time-shifting" is too broad. The Commission has suggested that this question could be resolved by replacing this wording in Recital 31bis by a declaration for the Council minutes.5

11. The Presidency invites Council to consider whether it can accept Article 6(4) and Recital 31bis as set out in the Presidency compromise text in 8695/00.

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5 Commission declaration to Recital 31bis
"The Commission is of the view that Member States, when taking measures to ensure that rightholders accommodate achieving the objective of the exception for private copying provided for in Article 5(2)(b), may allow certain acts of copying a broadcast work or other protected subject matter which are undertaken solely for the purpose of enabling it to be viewed and/or listened to at a more convenient time ("time-shifting"), provided that the conditions set out in Article 5(4) of this Directive are met."
B. Article 5(1)

12. 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 scope of the reproduction right. The aim here is to strike the right balance between protecting the legitimate interests of rightholders and not unduly inhibiting the smooth operation of the digital networks.

13. The wording of the Presidency compromise 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).

14. In general, the present text seems capable of meeting with the approval of delegations and of the Commission in the framework of an overall compromise. Two points of disagreement remain however, which also concern the corresponding wording in Recital 23:

- the F/B/IT/D/GR and ES delegations request that the words "transient or incidental" be replaced by "transient and incidental". However, some of these delegations are prepared to reconsider this position in relation to the suggestion under point 15 below.

- the LUX/NL/FIN and S delegations are in favour of the deletion of the words "and essential", or of replacing them by "or essential".
15. The ES delegation, supported by the B/GR and F delegations, has suggested that "transient or incidental" might be acceptable if the words "provided that the intermediary does not select or modify the contents of the transmission" were to be included in Recital 23. The IRL/LUX/NL/FIN/S and UK delegations and the Commission have a reservation on including these words, as they consider that the reference to selection at least would unduly restrict the scope of the exception under Article 5(1). The D delegation has a scrutiny reservation on this point. The S delegation, supported by the F delegation, has suggested as a compromise solution that "select" be qualified by "consciously."

16. The Presidency proposes adhering to its compromise text in Article 5(1) and invites Council to consider whether "select or" should be deleted from Recital 23, or be replaced by "consciously select or".

C. Fair compensation

17. 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 has endeavoured to provide a definition for it in Recital 24bis.

18. The B/ES/FIN/A and GR delegations have given their agreement on the principle of fair compensation as defined in Recital 24bis.

19. The F and D delegations prefer the term "equitable remuneration".
20. The DK/LUX/UK/IRL/S and NL delegations have entered reservations on the principle of fair compensation, on the grounds that the present wording of Recital 24bis does 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 reference to "time-shifting" in Recital 24bis would help some of these delegations to accept this principle; however, the D/ES/F and IT delegations have reservations on this part of this recital. The F delegation in particular considers that if it is to be included in this Recital, "time-shifting" should be defined more narrowly and should be the sole case in which no obligation for payment may arise. The Commission has suggested that the reference to "time-shifting" in this Recital be replaced by a declaration\(^6\). The NL delegation has suggested that this part of this Recital be accompanied by a declaration\(^7\).

21. 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 recordings of 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, or extend it to other exceptions, the Presidency compromise text contains a solution whereby the condition is made compulsory solely in relation to the four exceptions mentioned above, 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 those exceptions at national level. The GR/LUX and UK delegations have reservations on requiring fair compensation in respect of the exceptions under Article 5(2)(e) and (3)(a), and the S delegation in respect of the

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\(^6\) Commission declaration to Recital 24bis
"The Commission is of the view that no obligation for payment may arise regarding certain acts of copying a broadcast work or other subject matter which are undertaken solely for the purpose of enabling it to be viewed and/or listened to at a more convenient time ("time-shifting"), provided that the conditions set out in Article 5(4) of this Directive are met."

\(^7\) Declaration to Recital 24bis proposed by the Netherlands delegation
"The Commission and the Council declare that as regards the implementation of the principle of fair compensation, full account should be taken of the availability of rights management systems enabling the financial compensation among all rightholders involved, whilst unnecessary burdens for users should be avoided."
22. The Presidency recommends adhering to the Presidency compromise text in respect of fair compensation, and invites Council to consider how the question of "time-shifting" can be resolved.

D. List of exceptions in Article 5(2) and (3)

23. Article 5(2) and (3) contain a list of optional exceptions to the rights set out in Articles 2 and 3. The list as it stands in the Presidency compromise text is the result of protracted discussions, although reservations remain in respect of certain exceptions (see Annex) and the GR delegation has a general scrutiny reservation on Article 5(2) and (3). Article 5(3)(o) and (p) give rise to the most important difficulties.

24. Article 5(3)(o) as set out in Variant A has been proposed by the FIN delegation as an exception to the rights under Article 3(1) and (2). On the other hand, the Commission and a number of delegations consider the situation which this exception is intended to cover does not fall under the rights set out in Article 3(1) and (2), and that there is therefore no need to provide for this exception to these rights. The proposed declaration in Variant B is intended to explain why this exception is considered to be unnecessary. The DK/IRL/LUX/NL/FIN/S and UK delegations have expressed a preference for Variant A and the ES/F and IT delegations for Variant B. The Commission has proposed alternative wording for Variant B\(^8\).

25. Council is invited to decide whetherVariant A or Variant B should be adopted.

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\(^8\) Declaration by the Council and the Commission

"The Council and the Commission are of the view that acts performed, for the purpose of research or private study by individual members of the public, through dedicated terminals on the premises of establishments referred to in Article 5(2)(c) of this Directive, concerning works and other subject matter which are contained in their own collections held on those premises, are not affected by this Directive."
26. Article 5(3)(p) allows Member States, under certain conditions, to keep a number of exceptions of minor importance which are not mentioned specifically in Article 5. This clause was drafted as a compromise between those Member States which argued for an exhaustive list of exceptions, as proposed by the Commission, and those which would prefer to preserve their freedom to retain and/or adopt other exceptions. Most delegations can accept this clause in the framework of an overall compromise package. The LUX delegation continues to seek a completely open list of exceptions, while the NL delegation considers that the restriction to exceptions already existing in a Member State should be removed by deleting the words "where exceptions already exist"; this delegation also suggests adding a third indent to Article 11(4b): "- to examine any further exceptions which a Member State intends to introduce in accordance with Article 5(3)(p)."

27. The Presidency recommends adhering to the compromise text.

E. Article 4(2)

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

29. In line with previous directives on this matter, the present text enshrines the principle of Community exhaustion, limiting exhaustion of the exclusive distribution right to cases where the first sale or other transfer of ownership of the work is made in the Community by the rightholder or with his consent. This text is approved by the UK/IRL/A/F/ES/IT/D/GR and B delegations.

30. In contrast, the DK/P/NL/FIN/S and LUX delegations prefer international exhaustion, whereby the distribution right is exhausted by the first sale in any country by the rightholder or with his consent.

31. It should be noted that the problem of exhaustion of rights in the field of trade marks is currently under discussion within the Council (Internal Market).
32. The Presidency suggests 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.

33. The DK and NL delegations have indicated that a declaration by the Commission could help them to accept this solution.

F. Article 10

34. 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 programs are concerned.

35. The DK/NL and S delegations request 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.

36. In addition, in the view of the DK/UK/NL/FIN/S and A delegations it would be inconsistent to exclude computer programs and databases from the scope of Article 5(1), as these circulate via the Internet like any other protected work or subject matter. The delegations have 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.

37. Finally, the DK delegation, supported by the NL delegation, has 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 programs for the sake of transparency and the need to bring the Article in question into line with Article 11 of the WIPO Copyright Treaty.
38. Recital 31 explains why it is not appropriate to accede to this request. The Commission has proposed a declaration\(^9\) which should enable the delegations mentioned in points 35 to 37 to accept Article 10 as it stands.

39. The Presidency proposes that Article 10 be adopted as it stands in the Presidency compromise text.

III. OTHER RESERVATIONS

40. Other reservations are set out in the Annex to this report.

41. The Presidency asks the delegations concerned to lift these reservations in the framework of an overall compromise package.

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\(^9\) Commission declaration on a further adaptation of the existing Directives
"The Commission will closely survey technological and market developments relevant for the protection of copyright and neighbouring rights in the Internal Market and consider preparing adaptations and consolidations of the existing Directives adopted in this area in due course, where appropriate to safeguarding continued coherence, based on the experience gained with the application of this Directive. In this context, it will pay particular attention to the need for an exception to the reproduction right for certain acts of copying as contained in Article 5(1) of this Directive and for the legal protection of technological measures as contained in Article 6 of this Directive to be applied to computer programs."
Other reservations

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

2. **Recital 16bis (new)**: the UK/DK and IRL delegations asked for a new Recital 16bis as follows:

   "With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, in circumstances which do not prejudice the legitime interests of the phonogram producers or conflict with the normal exploitation of the phonograms, collective licensing agreements are to be encouraged in order to facilitate the clearance of rights in phonograms by broadcasters."

3. **Recital 28quater (new)**: the NL delegation asked for a new Recital 28quater as follows (in relation to Article 5(3)(c)):

   "Member States shall remain free to define the notions of press and broadcast works."

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

5. **Recital 30ter**: reservation by the F delegation on the words "which may affect the protection of copyright or related rights".\(^\text{10}\)

\(^{10}\) It might help this delegation to lift this reservation if these terms were to be translated in French as "susceptible d'avoir une incidence sur la protection du droit d'auteur ou des droits voisins.".
6. **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".

7. **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.

8. **Article 5(2)(a):** reservations by the **UK/A/LUX/NL and IRL delegations** on the phrase "with the exception of sheet music";

9. **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 **UK/FIN/S and NL delegations** on the clause "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".

10. **Article 5(2)(c):** scrutiny reservation by the **D delegation**.
11. **Article 5(3)(a):**

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

- 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 28bis be aligned on that of this clause.

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

- scrutiny reservation by the D delegation on this provision (sell also point 3 above);

- request by the FIN delegation that this provision be amended to read: "reproduction by the press, communication to the public of published articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, or making available to the public of other subject matter of the same character, in cases where …" (rest unchanged).

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

14. **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".

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

16. **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).
17. 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 attachment; the Commission disputed the need for such a recital.

18. 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 circumvention 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).

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

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

21. Article 8bis: the UK delegation and the Commission are seeking to clarify the reference to "must carry"; other delegations have a scrutiny reservation on this provision.
22. **Article 11(1):** reservation by the A delegation on the period of two years, which it found too long.

23. **Article 11(4)(a):** reservation by the DK delegation.

24. **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" (see also point 26 in the report).