LEGISLATIVE ACTS AND OTHER INSTRUMENTS

- Draft statement of the Council's reasons
I. INTRODUCTION


2. The Economic and Social Committee delivered its Opinion on 9 September 1998 ².


5. The Council adopted its common position according to Article 251 of the EC Treaty on ...

II. AIM

6. The aim of the Commission's proposal is 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 (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) concluded in Geneva on 20 December 1996.

³ OJ C 150, 28.5.1999, p. 171.
III. COMMON POSITION

Recitals

7. The Council has amended, deleted or merged a number of recitals appearing in the Commission's amended proposal and has adopted a few additional ones. Reference to the main changes in the recitals is made below under the relevant Articles.

Articles

Article 1 (Scope)

8. The Council has taken on board the new wording of this Article, as proposed by the Commission in its amended proposal, apart from the term "specific", which was considered unnecessary and capable of creating confusion as regards the relationship between the provisions of this Directive and those provided by existing Community Directives in the field of copyright or related rights. At the end of recital 20, the Council has adopted additional wording making it clear that, unless otherwise provided in this Directive, provisions in existing Community Directives in the field of copyright or related rights prevail.

Article 2 (Reproduction right)

9. In its amendment 29, the European Parliament had suggested the deletion of the terms "of the original and copies " in Article 2(a). Both the Commission and the Council have accepted this suggestion.
Article 3 (Right of communication to the public of works and right of making available to the public other subject matter)

10. The Council has slightly reworded both the title and paragraph 2 of this Article with a view to making clear that, with respect to subject matter other than works, the present Directive will regulate only the right of making available to the public and not the right of communication to the public, which has already been dealt with in Article 8 of Council Directive 92/100/EEC of 19 November 1992 1.

11. In line with the provision of Article 2(a) (see point 9 above), the Council decided to delete the terms "originals and copies of" in Article 3(1).

12. With its amendment 13, the European Parliament had suggested inter alia that the term "private communication" in recital 16 (now recital 25) be replaced by "direct representation or performance". In its amended proposal, the Commission took on board this suggestion. The Council, however, considered that, in the absence of an accepted Community-wide definition thereof, these terms risked creating legal uncertainty. Therefore, in an attempt to delineate in a clear and positive manner which acts fall within the scope of the rights dealt with in Article 3, the Council preferred to delete these terms and to clarify the issue in recitals 23 and 24.

13. In its amendment 31, the European Parliament had suggested an additional paragraph to Article 3 along the lines of the agreed statement concerning Article 8 of WCT. In its amended proposal the Commission had taken on board this suggestion. Since, however, a corresponding statement already appeared in recital 17 of the Commission's amended proposal, the Council preferred to include this statement in the recitals only (see recital 27), considering that as a clarifying statement this did not belong in the main body of the Directive.

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Article 4 (Distribution right)

14. While accepting in substance Article 4 as set out in the Commission's amended proposal, the Council has amended slightly the wording of the first paragraph of this Article with a view to aligning it with the wording of the definitions contained in Articles 2 and 3, as well as in existing Community Directives in the field of copyright and related rights.

15. The Council has also inserted additional language in recital 28 in order to make clear that the right of distribution for authors, provided for in Article 4(1) of the present Directive, is without prejudice to authors' rental and lending rights, dealt with in Directive 92/100/EEC.

16. Furthermore, the Council specified in recital 29 that the principle of exhaustion, set out in Article 4(2) of the present Directive, would not apply to the rental and lending rights provided for in Directive 92/100/EEC (see also Article 1(4) of that Directive).

Article 5 (Exceptions to Articles 2, 3 and 4)

Paragraph 1

17. Paragraph 1 sets out the only mandatory exception to any of the rights provided for in Articles 2, 3 and 4. In its amended proposal, the Commission had taken on board part of European Parliament's amendment 33 concerning the first paragraph of Article 5. In its common position, the Council has further amended this provision in order to strike a fair balance between the interests of rightholders and those of intermediaries (such as Internet service providers) and users. According to the Council's text, the conditions "transient" and "incidental" are no longer cumulative, but alternative. The Council's provision also distinguishes between purely technical acts, the sole purpose of which is to enable the mere transmission in a network between third parties by an intermediary of a work or other subject matter, irrespective of the use to be made of it by the recipient of the transmission, and acts the sole purpose of which is to enable a use to be made, which must be lawful, of a work or other subject matter. In both cases, the other conditions of this provision must also be fulfilled in order to benefit from the exemption. In
recital 33, the Council has added a definition of the term "lawful use", largely inspired by European Parliament's amendment 33. The Council has also included in recital 33 wording used in the Directive on electronic commerce \(^1\) and has adopted technical adjustments to recital 16 which take into consideration the fact that that Directive has been adopted in the meantime.

**Paragraph 2**

18. Paragraphs 2, 3 and 4 contain optional exceptions to the rights provided for in Articles 2, 3 and 4.

19. With its amendments 34, 36, 37 and 41 the European Parliament had introduced the notion of "fair compensation" as a condition for a number of exceptions. In its amended proposal, the Commission had taken on board the abovementioned amendments, albeit without providing any definition of the term "fair compensation". The Council decided to provide in recital 35 guidance on the application of this new concept. Finally, the Council specified in the new recital 36 that nothing prevented Member States from applying the condition of fair compensation also to exceptions in respect of which this is not explicitly required by the Directive.

20. With its amendment 34, the European Parliament had suggested that sheet music be excluded from the exception for reprographic reproduction and that the latter be made conditional on fair compensation for the rightholders. Both the Commission and the Council have been able to accept these suggestions.

21. The European Parliament had suggested, in its amendments 36 and 37, that analogue and digital private copying be dealt with in two separate subparagraphs. The Commission had followed this suggestion in its amended proposal. The Council, however, considered that such a differentiation between analogue and digital private copying should not be made in Article 5; therefore, it decided to merge subparagraphs b) and b.bis) of Article 5(2) of the Commission's amended proposal in one single subparagraph b), while acknowledging in recitals 38 and 44 the need of distinguishing between analogue and digital private copying in certain respects (see also point 44, second indent, below).

\(^1\) OJ L 178, 17.7.2000, p. 1.
22. With its amendments 36 and 37, the European Parliament further suggested that the exception for private copying be made conditional upon fair compensation for the rightholders. Both the Commission and the Council have accepted this suggestion.

23. With the same amendments, the European Parliament had also suggested the addition to "private use" of the terms "and purely personal". The Commission had accepted to use the terms "and strictly personal" in its amended proposal. The Council deleted these terms, considering that they were either redundant or unduly restrictive.

24. Furthermore, the Council:

- replaced the reference to "audio, visual or audio-visual analogue/digital recording media" in the Commission's amended proposal with "any medium" in order to simplify the wording;

- used the expression "made for the private use of a natural person" to cover not only reproductions made by a natural person but also reproductions made on behalf of such a person;

- provided that Member States, when assessing what compensation would be fair for private copying, should take account of the application or non-application of technological measures referred to in Article 6.

25. With its amendment 38, the European Parliament had suggested specifying in Article 5(2)(c) that only acts of reproduction done for documentation or conservation purposes could be exempted. The Commission took on board this suggestion. The Council, however, preferred a more flexible formulation, which would allow Member States to clear also acts of reproduction made by the establishments concerned for a purpose different from the ones mentioned above, as long as these acts do not confer any economic or commercial advantage.
26. The European Parliament had also suggested, and the Commission had accepted, that Article 5(2)(c) provide an open list of the categories of establishments which could qualify as beneficiaries of the exception concerned. The Council, however, opted for an exhaustive list.

27. The provision of Article 5(2)(d) had been added to the list of exceptions in the Commission's amended proposal following a suggestion from the European Parliament (amendment 39). The Council has replaced "fixations" by "recordings" and has added a second clause to this subparagraph in order to align the wording with Article 11bis of the Berne Convention. The Council also clarified the notion "by means of their own facilities" in the new Recital 41 in order to provide Member States with sufficient flexibility to adapt their law to market changes.

28. The exception contained in Article 5(2)(e) has been added by the Council in order to allow persons resident in certain non-commercial social institutions for health or other equally compelling reasons to watch and/or listen to their favourite programmes even where the latter are broadcast at a time which is not compatible with the smooth functioning of the institutions concerned.

**Paragraph 3**

29. In its amendments 43 and 44, the European Parliament had suggested that the terms "and if possible the author's name" complete the obligation of source acknowledgement in the exceptions of Article 5(3)(c) and (d). The Commission took these suggestions on board in its amended proposal. The Council, in order to harmonise the wording used in various clauses when it comes to source acknowledgement, has decided to use the terms "whenever possible, the source, including the author's name" in Article 5(3)(a), (c), (d) and (f).

30. With its amendment 41, the European Parliament had suggested making the exception of Article 5(3)(a) conditional upon fair compensation. The Commission had taken on board this suggestion. The Council, however, considered that this was not necessary, taking into account the non-commercial purpose of the activities concerned, and the possibility open to Member States of imposing such a condition (see recital 36).
31. As regards Article 5(3)(b), the Council has taken on board practically unchanged the wording of the Commission's amended proposal, which was based on European Parliament's amendment 42.

32. In the Commission's amended proposal (see also European Parliament's amendment 43), Article 5(3)(c) had been inspired by the exception provided for in Article 10bis(2) of the Berne Convention. The Council, however, decided to incorporate in this clause both of the exceptions provided for in Article 10bis of the Berne Convention and to follow more closely the language used in the latter.

33. In Article 5(3)(d), the Council accepted practically unchanged the wording of the Commission's amended proposal, which had followed European Parliament's amendment 44.

34. In Article 5(3)(e), the Council accepted the Commission's amended proposal, which had followed European Parliament's amendment 45.

35. In the provisions (f)-(n) of Article 5(3), the Council has accepted taking on board a number of additional, narrowly-defined exceptions to accommodate requests from Member States.

36. Furthermore, the Council has adopted the new provision of Article 5(3)(o), which allows Member States to maintain exceptions of minor importance, which already exist under their national law at the time the Directive enters into force, provided these exceptions relate to analogue uses only and do not affect the free circulation of goods and services within the Community. This provision, together with the additional exceptions in Article 5(3) (f) – (n), constitutes a reasonable compromise between the positions of those who would have preferred a completely open list of optional exceptions and those who would have preferred a much shorter list of purely mandatory exceptions.

**Paragraph 4**

37. In Article 5(4), the Council accepted unchanged the wording of the Commission's amended proposal, which was based on European Parliament's amendment 46.
Paragraph 5

38. In Article 5(5), the Council preferred aligning the wording with that of Article 10 of the WCT and Article 16 of the WPPT. The additional issue concerning the relationship between exceptions and technological measures, raised in this context by the European Parliament with its amendment 47, has been addressed by the Council in the context of Article 6 (see points 43 and 44 below).

39. The Commission did not include in its amended proposal a provision corresponding to European Parliament amendment 48. The Council has followed the Commission in this respect.

Article 6 (Obligations as to technological measures)

40. The Council has followed the structure of Article 6 proposed in European Parliament amendments 49 to 54 and taken on board by the Commission in its amended proposal.

41. With a view to simplifying the drafting, the Council deleted the terms "designed to protect any copyright or ....Directive 96/9/EC" and "without authority" in the first two paragraphs of Article 6, on the grounds that these were covered by the definition of technological measures provided in paragraph 3.

42. In Article 6(2), the Council preferred to delineate more precisely the scope of the provision by making exhaustive the list of the various activities against which Member States are bound to provide adequate legal protection if the other conditions of this paragraph are met.

43. In its amendment 47, the European Parliament had suggested that it be stipulated in Article 5(4) (current Article 5(5)) that the legal protection of technological measures prevailed over the exceptions listed in Article 5. The Commission had addressed this issue under Article 6(3) of its amended proposal, providing that only technological measures preventing or inhibiting the infringement of copyright were protected under Article 6. This meant that technological measures designed to prevent or inhibit acts allowed by law (e.g. by virtue of an exception) were not protectable under Article 6. In other words, under the Commission's amended
proposal, the exceptions provided for in Article 5 prevailed over the legal protection of technological measures provided for in Article 6.

The Council has taken a different approach, which it considers strikes a reasonable balance between the interests of rightholders and those of beneficiaries of exceptions. It has adopted in Article 6(3) first sentence of its common position a definition of the protectable technological measures which is broader than the one provided for in the Commission's amended proposal or the one set out in European Parliament's amendment 54. The terms "... designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright ..." in the Council's definition make it clear that Article 6(1) protects against circumvention of all technological measures designed to prevent or restrict acts not authorised by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Article 5.

44. On the other hand, the Council has provided safeguards for the protection of the legitimate interests of beneficiaries of exceptions by adding a new paragraph 4 to Article 6, accompanied by new explanatory recitals 51 and 52. In Article 6(4), the Council:

- lays down an obligation on Member States, in the absence of voluntary measures taken by rightholders, to take appropriate measures to ensure that rightholders make available to beneficiaries of the exceptions/limitations listed in subparagraph 1 the means of benefiting from these exceptions or limitations;

- provides Member States with the option, in the absence of voluntary measures taken by rightholders, of taking appropriate measures under certain conditions to ensure that rightholders make available to users the means of benefiting from the exception of private copying (subparagraph 2);

- extends the legal protection provided for in Article 6(1) to technological measures designed to ensure the availability of the means of benefiting from the exceptions/limitations (subparagraph 3);
- provides that agreed contractual terms for on-demand supply of works or other subject matter will prevail over the provisions of subparagraphs 1 and 2 of Article 6(4);

- extends the application of this paragraph to technological measures applied in the context of two of the existing Community Directives in the field of copyright and/or related rights.

45. In Article 6(3) second sentence, the Council deleted the term "access to" considering that questions relating to access to works or other subject matter fell outside the field of copyright. The Council also adopted a number of technical changes to the wording of this paragraph with a view to simplifying it further.

**Article 7 (Obligations concerning rights-management information)**

46. In Article 7(1), the Council has brought the wording closer to that of Article 12(1) of the WCT and Article 19(1) of the WPPT. Furthermore, the Council has split recital 33 of the Commission's amended proposal in two (see recitals 54 and 55), adding at the end of recital 54 a sentence on the use by rightholders of markings indicating their authorisation for the putting of the works or other subject matter concerned on the network.

**Article 8 (Sanctions and remedies)**

47. In Article 8(1), the Council retained the term "dissuasive", which is the term normally used in Community legislation in relation to sanctions and remedies, but deleted the words "act as a deterrent to further infringement", considering that the latter were redundant.

48. In Article 8(2), the Council has added the obligation of Member States to provide for the possibility of seizing the illegal devices, products or components referred to in Article 6(2). The Council has added similar language in recital 57.
49. The Council also added a new paragraph 3 to Article 8, which calls upon Member States to provide for the possibility of rightholders to apply for an injunction against intermediaries carrying third parties' infringements, even where the relevant intermediaries' acts fall under the exception provided for in Article 5(1). This new paragraph is accompanied by new recital 58.

**Article 9 (Continued application of other legal provisions)**

50. The European Parliament had suggested by its amendment 11 a new recital 13a to the effect of excluding the application of the present Directive to designs. In its amended proposal, the Commission had taken on board this suggestion, albeit with a slightly amended wording. For the sake of legal certainty, the Council preferred inserting a broader "without prejudice" clause in the main body of the Directive under the new Article 9, which also covers legal provisions in other areas.

**Article 10 (Application over time)**

51. In Article 10, the Council preferred to merge part of paragraph 3 of Article 9 of the Commission's amended proposal with paragraph 2 and to delete the rest of paragraph 3, as well as the whole of paragraph 4, as it was felt that issues relating to the interpretation of contracts should rather be left to national law.

**Article 11 (Technical adaptations)**

52. In Article 11(1)(b), the Council aligned the wording of Article 10(3) of Directive 92/100/EEC with the new wording of Article 5(5) of the present Directive.
In Article 11(2), the Council modified Article 3(2) of Directive 93/98/EEC by adding:

- to the first subparagraph of that Article a second sentence, aimed at aligning this provision with Article 17 of the WPPT;

- a second subparagraph, which excludes this modification resulting in the revival of protection of phonograms which had fallen into the public domain under the present text of Article 3(2) of Directive 93/98/EEC before this modification took effect.

**Article 12 (Final provisions)**

The Council moved the provisions dealing with implementation issues (Article 11(1) of the Commission's amended proposal) to a new separate Article (see Article 13 below).

In Article 12(1), the Council inserted additional language in the review clause with a view to rendering it more precise and targeted. Thus, the Council has agreed that particular attention should be given to issues such as developments in the digital market or the delicate balance of interests between rightholders and beneficiaries of exceptions during the appraisal of the application of Articles 5, 6 and 8.

In Article 12(2), the Council accepted the wording of Article 11(3) of the Commission's amended proposal, which had been suggested by the European Parliament in amendment 57.

In Article 12(3) and (4), the Council followed the substance of Article 11 (4a) and (4b) of the Commission's amended proposal, while bringing several drafting changes to the text.
Article 13 (Implementation)

58. In Article 13(1), the Council deleted the terms "by 30 June 2000" which had become obsolete and decided that the length of the implementation period should be 2 years from the entry into force of the Directive.

Article 14 (Entry into force)

59. In Article 14, the Council stipulated, in accordance with current practice, that the date of entry into force of the Directive will be the day of its publication in the Official Journal.

Article 15 (Addressees)

60. Article 15 was accepted as in the Commission's amended proposal.

IV. CONCLUSIONS

61. In its common position, the Council has taken over a considerable number of amendments proposed by the European Parliament. Throughout the common position, the Council has sought to strike a reasonable and workable balance between the interests of rightholders and those of other parties concerned. In this context, the Commission is able to accept the Council's common position.