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Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society'

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Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society` () (98/C 407/06)

On 6 February 1998 the Council of the European Union decided to consult the Economic and Social Committee, under Article 100 A of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 July 1998. The rapporteur was Mr Moreland.

At its 357th plenary session (meeting of 9 September 1998), the Economic and Social Committee adopted the following opinion, by 93 votes in favour, 3 votes against and 2 abstentions.

1. Introduction: The Commission Proposal

1.1. This Draft Directive results from the responses to the Commission's Green Paper of 1995 (). However it is the latest in the flow of legislation which has followed the original Green Paper on Copyright and the Information Society of 1988 (). Arguably it is the most important proposal yet.

1.2. There are two fundamental reasons for this Directive: first, to continue the harmonization work on copyright and neighbouring rights following on from the Green Paper and, secondly, to implement in Community law the recent World Intellectual Property Organization (WIPO) treaties on copyright and performances and phonograms, entered into in Geneva in December 1996.

1.3. On the whole, the proposals are generally consistent with the Committee's comments on the Green Paper and with the WIPO treaties. The Commission has adopted a fourfold approach:

1.3.1. to maintain the proper working of the internal market;

1.3.2. to maintain maximum flexibility for the Member States in the context of subsidiarity;

1.3.3. to protect and safeguard intellectual property rights, especially rights in on-line content, and

1.3.4. to balance the need to protect intellectual property rights against the rights of users and of the public at large.

1.4. The central issue for debate is the extent to which certain exceptions to the harmonized copyright and related rights should be left to the interpretation of individual Member States. In other words, Member States are, in the current draft, left a considerable degree of discretion with regard to the precise level of these exceptions. These exceptions cover, inter alia, photocopying, non-commercial uses for the blind and deaf, news reporting and the provision of libraries and similar public information stores. The Commission's approach is essentially to strike a balance between ensuring that there are no barriers to trade on the one hand, and non-interference with different Member States' cultural diversities on the

other.

2. General Comments

2.1. Analysis of the Commission's proposal should be based on the Commission's wish to strike a balance, placing an emphasis on ensuring that the exceptions do not maintain or establish clear barriers to intra-Community trade. In that sense, the Commission's approach is consistent with the Committee's view on the Green Paper of 1995, where the Committee stressed the importance - given the complexities and the differences between the Member States' legislation - of adopting a sense of priority.

2.2. Given the complexities of this subject and the time involved in enacting EU legislation, and given also the commendable approach of the Commission in concentrating on the principal single market barriers, this is a correct approach. However, these difficult issues need to be grasped - as soon as they may become a barrier to trade - and any that appear likely to do so should be dealt with as soon as possible.

2.3. The Committee is not proposing any alteration of those parts of the draft Directive which simply transpose parts of the WIPO Treaty into Community law.

2.4. Consequentially, the Committee generally supports the proposed Directive, but has a number of specific comments. Clearly, Article 5 of the draft Directive is the area which requires the most careful consideration.

3. Specific Articles

3.1. Preamble

3.1.1. There are too many Recitals in the Draft Directive. Those clauses which are mere repetition should be deleted; those which are explanations or amplification of the text should be transferred to the operative clauses of the Directive.

3.2. Article 1 - Point 2

3.2.1. The word 'explicitly' could be inserted after the word 'otherwise', because this will obviate arguments as to whether other clauses overrule earlier enactments by implication only.

3.2.2. The Committee suggests that the Commission issue a consolidating directive, in order that all the legislation on copyright and related rights at Community level should be available in one document, for ease of reference.

3.3. Article 2

This on the whole reflects and is consistent with the Rental Rights Directive (). For many Member States, the key new proposal, so far as the reproduction right is concerned, is the requirement that such a right must apply to temporary or transient reproduction as well as permanent reproduction. This is to be welcomed: the Information Society will only be encouraged if rightholders can control what will ultimately be the only commercial use of their works online, which will largely be through the making and usage of temporary or transient copies.

3.4. It should be noted that no exclusive right is offered for multi-channel broadcasts.

3.5. Article 3

Article 3.1 attempts in a very carefully drafted definition to deal with the right of the copyright holder exclusively to authorize or prohibit any on-line publication of their work, including but not limited to the making available of the work on the World Wide Web. Careful consideration should be given to ensuring

that the definition will stand the test of changing technology, in particular by the use of intelligent agents and by the use of 'push' rather than 'pull' technology - in other words, the proactive use of technology to make available to web-users copies of works without web-users having themselves to request the work through a web-browser.

3.6. Article 4

3.6.1. This deals with the distribution right, namely the right of copyright holders to control the distribution of tangible copies of their works. The principal legal question here is whether this right should be 'exhausted' by a first sale only in the Community or worldwide. In other words, the question is whether the importation from a place outside the Community of a legitimate tangible copy of a work which has been properly licensed for sale in that place should be permitted without the consent of the holder of the equivalent rights inside the Community. This issue is particularly relevant in the case of 'parallel imports' as these importations are called - from the United States of America where, for example, compact disks for use by the consumer are frequently cheaper.

3.6.2. The Committee accepts that in the current state of the market, and in particular given the fact that other major trading jurisdictions have similar rules, the Commission was right to apply Community, rather than international, exhaustion. However, as a drafting point, the Committee recommends that the clause should be amended to put the matter beyond doubt. (Similar wording in the Directive on the Harmonisation of Trade Marks Law, for example, has provoked litigation and confusion, both of which are to be avoided.)

3.6.3. The suggested amendment is as follows:-

add a new Article 4.3 'The distribution right shall not be exhausted by any sale or transfer of ownership outside the Community of the original or any copy of any work, with or without the consent of the rightholder'.

3.6.4. However, the expansion of the area of exhaustion could be considered, but only on a reciprocal basis and through negotiations designed to ensure fair and reciprocal treatment of works and copies of works originating in the Community.

3.7. Article 5

This sets out the exceptions to the exclusive rights referred to in Articles 2 and 3.

3.7.1. Article 5.1

3.7.1.1. The first exception is 'temporary acts of reproduction'. This is designed to ensure that the incidental storage of copies of the work on, for example, intermediate computer servers between a web-server and the computer running a web-browser used by an end-user is exempted. The test is whether the temporary reproduction has no 'independent economic significance': it should perhaps be made clear that the independent economic significance in question is independent economic significance to the use of the work in question, not to its transmission.

3.7.1.2. This clause needs expanding and clarifying. Any reproduction that in effect is consumption of the work, such as the temporary copying of programmes or data into memory in order to use or access such works, for example the act of accessing on-line databases, should only be permitted with the rightholder's authorisation.

3.7.1.3. This Article most closely overlaps with the pending Commission proposal on liability, which will harmonise across the Community issues of liability for on-line activities. The copyright rules are not necessarily the proper approach to resolving service provider liability issues, because they extend wider than intellectual property issues, but the two Directives should be closely associated and it is desirable that the liability Directive be agreed as soon as possible after this one, if the two cannot proceed in

tandem.

3.7.2. Articles 5.2 and 5.3

3.7.2.1. The remaining clauses of the draft Articles set out the precise exceptions to the exclusive reproduction right granted earlier. These exceptions are at the discretion of the Member States. The Committee is, in general, concerned that the extent of the Member States' options in these drafts could continue matters which operate as effective barriers to trade within the Community and feels, accordingly, that the Commission should maintain a careful watch to ensure that the use of these derogations by Member States does not cause such barriers in practice.

3.7.2.2. The most notable exception is in the field of private reproduction of audio, visual or audio-visual works by individuals. The Commission has three options in this regard:

- it may harmonise the law on private copying totally, either by granting an absolute right to authorise or prohibit it;
- it may harmonise in respect of digital copying only; or
- it may leave the matter to the Member States.

3.7.2.3. The Committee supports the Commission's approach as outlined in Article 5, pt. 6 of the explanatory memorandum, namely that the Commission will closely follow market developments in respect of digital private copying and consult interested parties in the second half of 1998. The consultation will rightly focus on technological aspects and a balance of rights and interests. The Committee hopes that it will be consulted in this process. It also hopes that the process of consultation will not be protracted and will lead to a Commission proposal shortly afterwards.

3.7.2.4. In the meantime, the issue of private copying is correctly left to the Member States: the Committee is reluctant to restrict people's activity in the purely private sphere. The Committee has a particular concern where private copying is necessary for the protection of children (where parents will record programmes for watching when children are not there).

3.7.2.5. The limitation in draft Article 5.3(b) for the benefit of the visually - and hearing - impaired should, bearing in mind that the limitation only applies to uses which are of a non-commercial nature, be extended to all persons suffering from a disability. Further, the Council should request the Commission to draft legislation making this exception mandatory.

3.7.2.6. The Committee notes that the exceptions permitted to the Member States enable them either to take such acts out of the scope of copyright protection altogether; or to provide for a system of equitable remuneration in respect of such acts.

3.7.2.7. Lastly, there are many minor exceptions from the general reproduction right in the existing copyright legislation of each Member State - for example, in some Member States, the right to make an incidental copy of a work for inclusion in a broadcast; or the making of a film of a building; or by regulatory bodies to ensure and monitor compliance with media standards. Such minor exceptions should be permitted to continue by means of an addition to Article 5.3 in respect of minor exceptions that do not adversely affect intra-Community trade.

3.8. Article 6

3.8.1. This Article is designed to ensure that Member States provide adequate protection against the manufacture or distribution of devices 'which have only limited commercially significant purpose or use' other than to circumvent technological measures designed to protect rightholders' rights in copyright or, in particular, to inhibit copying.

3.8.2. This draft is inevitably a balance between the desire on the part of the rightholders to control more closely any device which principally or incidentally enables the circumvention of technological measures (an example is dual tape recorders which have many legitimate uses in addition to improper ones), and the consumer's right to the use of such devices for legitimate ends. In the Committee's view the balance has been struck correctly, but the prohibition should also be extended to those devices which are 'promoted, advertised or marketed for the express purpose of such circumvention`.

3.9. Article 7

This Article deals with the provision of adequate legal protection against the removal or alteration of electronic rights management information. The Committee agrees with the comment that has been made that the institution of rights management information schemes should remain voluntary, that is they should not have the effect of imposing formalities which are not permitted under the Berne Convention.

3.10. Article 8

3.10.1. The Committee has previously called for 'remedies` to be included in copyright legislation. This Article obliges Member States to provide 'appropriate sanctions and remedies` in respect of the infringement of the rights which are granted by this Directive. These sanctions should be effective, proportionate and dissuasive. The Committee recommends that a more detailed list of remedies, including effective temporary remedies and including remedies which are cost effective, should be required of the Member States.

3.10.2. The Committee also urges the Commission to maintain a watching brief on the provision of adequate remedies by Member States and should highlight where deficiencies on the part of Member States are apparent.

3.11. Article 10

The Committee recognises that article 10.2 is a transposition of a WIPO treaty provision. Should ambiguities be created by it, these should be resolved by the Commission to the extent compatible with the obligations of this Treaty.

3.12. Article 11

The Committee welcomes the publication of a report every three years by the Commission and its inclusion as an official recipient of the report.

Brussels, 9 September 1998.

The President of the Economic and Social Committee

Tom JENKINS

() OJ C 108, 7.4.1998, p. 6.

() 'Copyright and Related Rights in the Information Society`, COM(95) 382 final of 19 July 1995; OJ C 97, 1.4.1996.

() 'Green Paper on Copyright and the Challenge of Technology - Copyright issues requiring immediate action` COM(88) 172 final of 7 June 1988; OJ C 71, 23.3.1989.

() Council Directive 92/100/EEC on 'Rental right and lending right and on certain rights related to copyright in the field of intellectual property`, OJ L 346, 27.11.1992, p. 61; ESC Opinion 876/91, OJ C 269, 14.10.1991, p. 54.

