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Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information Society /* SEC/2000/1734 final - COD 97/0359 */

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information Society

1. Background

The Commission adopted its proposal for a Directive COM(1997)628 final - 1997/0359 (COD) on 10 December 1997 [1].

[1] OJ C 108, 7.4.1998, p.6.

This proposal was submitted to the European Parliament, the Council and the Economic and Social Committee on 21 January 1998.

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

[2] OJ C 407, 28.12 1998, p.30.

The European Parliament delivered its Opinion at first reading under the co-decision procedure and adopted a legislative resolution approving the Commission's proposal subject to the amendments contained in that resolution and calling on the Commission to amend its proposal accordingly, on 10 February 1999 [3].

[3] OJ C 150, 28.5.1999, p. 171.

The Commission adopted its amended proposal incorporating in whole or in part many of the amendments voted for by the European Parliament in first reading, in accordance with Article 251 of the EC Treaty, on 21 May 1999 [4].

[4] OJ C 180, 25.6.1999, p. 6.

The Council, in accordance with Article 251 of the EC Treaty, adopted its common position on this proposal for a directive, on 28 September 2000.

This Communication sets out the Commission's opinion on the common position of the Council, pursuant to Article 251 EC Treaty.

2. Aim of the Commission proposal

The Commission's proposal aims to ensure an Internal Market in copyright and related rights with particular emphasis on products and services (both on-line and on physical carriers) in the Information Society. It adjusts and complements the existing EU framework on copyright to respond to the new challenges of technology.

In addition, the proposal implements the main provisions of the two new international treaties, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT) concluded on 20 December 1996 in the framework of the World Intellectual Property Organisation (WIPO). The proposal is necessary for the accession of the Community to the new WIPO Treaties (in parallel with ratification by EC Member States).

3. Commentary on the Common Position of the Council

3.1. Summary of the position of the Commission

The Commission welcomes the common position which takes on board the great majority of the amendments proposed by the European Parliament at its first reading, (and which the Commission accepted in its amended proposal). The common position remains close to the Commission's amended proposal, as regards both its structure and content. Certain key revisions introduced by the European Parliament and adopted by the Commission in its amended proposal have been subsequently refined by the Council in its common position. In addition, the common position now contains further key objectives underlying certain of the European Parliament's original amendments which had not been accepted by the Commission in its amended proposal.

In particular, the notion of fair compensation for certain of the exceptions (Article 5(2)), the requirement of lawful use in relation to the mandatory exception for certain technical acts of reproduction (Article 5(1)) and the structure of the provision on the legal protection of technological measures (Article 6) as dealt with in the common position, all reflect amendments first proposed by the European Parliament. The common position presents a proportionate response offering in many instances more subtle and balanced solutions than the amended proposal.

In order to support a rapid adoption of the Directive which is absolutely necessary for the Internal Market and to fulfil the Community's international obligations, the Commission has accepted all the changes made to its amended proposal by the Council.

3.2. Amendments adopted by the European Parliament on first reading

3.2.1. Amendments of the European Parliament

The European Parliament adopted at first reading 56 amendments to the initial proposal of the European Commission.

As a result of the European Parliament's opinion, the Commission introduced several substantive amendments in its amended proposal.

In its amended proposal, the Commission incorporated 44 out of 56 of the European Parliament's amendments, either fully or in part i.e. amendments 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 20, 21, 22, 24, 29, 31, 33, 34, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 57, 58, 82.

3.2.2. Amendments of the European Parliament accepted by the Commission and included in the common position, in whole, in part or in substance

The following amendments, accepted by the Commission in its amended proposal, have been retained by the Council in its common position: amendments 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 16, 17, 18, 20, 21, 22, 24, 29, 33, 34, 36, 37, 38, 39, 42, 44, 45, 46, 49, 50, 51, 52, 53, 54, 57, 58, 82.

Of the amendments that have been retained, there have been minimal or partial adjustments to some, whilst others have been significantly modified, although the underlying objective of the European Parliament's revisions has nevertheless been maintained. Substantive changes will be explained below.

3.2.3. Amendments of the European Parliament accepted by the Commission but not included in the

common position

The following amendments were accepted by the Commission in its amended proposal but not included by the Council in its common position: amendments 13, 31, 41 and 55.

In its amendment 13 which concerned the explanatory recital to the right of communication to the public/making available right, as provided for in Article 3, the European Parliament had suggested clarifying in the relevant recital that this right does not cover "direct representation or performance". This was accepted by the Commission in its amended proposal. Although the Council supported the underlying objective of this amendment in its common position, the Council decided not to refer to these terms, as they could give rise to legal uncertainty in the absence of a Community-wide definition. Instead, the Council clarified the actual scope of the rights covered by Article 3 as harmonised by this directive in recitals 23 and 24 by means of a positive description of the acts covered, emphasising that all other acts should be excluded.

In its amendment 31 which also concerned Article 3, the European Parliament had asked the Commission to introduce in the text of Article 3 a new paragraph on the legal status of "the mere provision of physical facilities", along the lines of the joint declaration of the WCT in relation to Article 8, which the Commission did (cf. Article 3(4) amended proposal). The Council decided that such a paragraph was not necessary and it was deleted, as it was only declaratory in nature and a corresponding statement was already contained in recital 17 of the Commission's amended proposal (now recital 27).

In its amendment 41 to Article 5(3)(a), the European Parliament had suggested that Member States be required to make the exception for illustration teaching and research conditional upon fair compensation for rightholders. This had been accepted by the Commission in its amended proposal. The Council decided not to include such a condition in view of the limited scope of the exception and because there was already a similar exception in the Community acquis in the field of copyright and related rights with no reference to "fair compensation". Nevertheless, the Council clarified in a new recital 36 that nothing prevented Member States from making the application of any of the exceptions or limitations subject to the condition of fair compensation. Against this background, the Commission is able to agree.

In its amendment 55 in relation to Article 8(1) (sanctions and remedies), the European Parliament had suggested adding that any such sanctions or remedies should also act as a deterrent to further infringement. This was adopted by the Commission. The Council decided that such wording was not necessary and it was deleted as the provision already requires that sanctions be effective, proportionate and dissuasive. The Commission can support this deletion given that the particular wording of Article 8(1) has been consistently used in similar Community measures and as the Council has now included similar wording in recital 57.

3.2.4. Differences between the Commission's amended proposal and the Council's common position

Recitals

The Council has added further new recitals and amended many of the existing recitals in order to place greater emphasis on certain key provisions. In particular, the notions of lawful use and fair compensation (Article 5) are explained in the recitals (recital 33 and recitals 35, 36). Furthermore, the mechanism introduced by the Council in Article 6 (the legal protection of technological measures) to ensure that rightholders accommodate the legitimate interests of beneficiaries of certain exceptions or limitations is explained in some detail in two recitals (recitals 51 and 52). The Commission takes the view that the changes to the recitals clarify the text and ensure a better understanding of the delicate balance between the different rights and interests at stake. Reference to the main changes to the recitals is made below under the relevant provisions.

Article 1 (Scope)

The European Parliament had not suggested any amendment to this provision at first reading.

Nevertheless, the Council was of the view that clarification was required with respect to the relationship between the provisions of this Directive and existing Directives in the field of copyright and related rights.

In relation to Article 1(2), the Council adopted the wording of the amended proposal with the exception of the word "specific" which was deleted with the Commission's agreement. The Commission was mindful of the need to clarify the relationship of this Directive with the Community acquis and accepted that the word "specific" could have created doubt. With the inclusion of recital 20, the relationship with the acquis is placed beyond doubt and provisions of existing Directives will apply save where expressly provided (as in Article 11).

Article 3 (Right of communication to the public of works and right of making available to the public other subject matter)

The title of this Article has been reworded in order to clarify the scope of the right of making available to the public which for the purposes of the Directive applies to subject matter other than works. In this regard, it should be distinguished from the right of communication to the public.

Recitals 23 and 24 deal respectively with the scope of the right of communication to the public and the right of making available the subject matter referred to in Article 3(2).

Amendment 13 and amendment 31 of the European Parliament accepted by the Commission in its amended proposal but not by the Council have already been considered under the previous heading.

Article 4 (Distribution Right)

The text of this Article has been reformulated slightly by the Council in order to ensure consistency with the definition contained in Articles 2 and 3, as well as with the Community acquis in the field of copyright and related rights. In addition, there have been additions to recital 28 and recital 29 which clarify the relationship with Directive 92/100/EEC [5]. In particular, as far as Directive 92/100 is concerned, recital 28 provides that the distribution right is without prejudice to the rights of rental and lending and recital 29 provides that the principle of exhaustion does not apply to the rental and lending rights.

[5] OJ L 346, 27.11.92, p. 61.

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

Article 5(1)

Article 5(1) provides the only mandatory exception to the reproduction right for intermediaries and certain others in limited circumstances for particular acts of reproduction. The Commission in its amended proposal incorporated, in part, amendment 33 of the European Parliament. In its common position, the Council has further amended and improved this provision. Several conditions remain to be fulfilled before the exemption applies. The terms "essential", "transient" and "incidental" which were incorporated in the amended proposal as a result of amendment 33 of the European Parliament have been retained. In order to qualify, the acts of reproduction must form an essential part of a technological process and may be either "transient" or in the alternative "incidental". The Council also makes a distinction between those acts, the sole purpose of which is to enable either the transmission in a network between third parties by an intermediary (notwithstanding the use to be made by a recipient of the transmission) or those acts the sole purpose of which is to enable a lawful use of works or other subject matter. The common position now contains a definition in recital 33 of when a use is considered to be lawful. By adopting an approach which takes account of the use to which a work may be put, the common position is now more closely aligned to amendment 33 of the European Parliament. Furthermore, elements have been added to recital 33 from the Directive on electronic commerce [6] and minor textual amendments made to recital 16.

[6] OJ L 178, 17.7.2000, p.1.

Article 5(2) and (3)

In line with the Commission's amended proposal, Article 5 (2) and (3) contains an exhaustive but optional list of exceptions and limitations to the reproduction right and right of communication to the public/making available. However, several new but narrowly drafted exceptions and limitations were added by the Council.

The Council had accepted the European Parliament's amendments (34, 36, 37 and 41) in the Commission's amended proposal, on linking the exercise of certain exceptions or limitations to the application of fair compensation for rightholders. In the amended proposal, there had been no guidance on the term "fair compensation" and this has now been provided in recital 35 by the Council. In addition, a new recital 36 provides that Member States may apply fair compensation to whichever exceptions or limitations they choose even where this is not expressly required by the Directive. This principle now applies to three of the exceptions and limitations, namely reprography (photocopying Article 5(2)(a)), private copying Article 5(2)(b)) and a new exception or limitation introduced by the Council in respect of reproductions of broadcasts made by certain social institutions which pursue non-commercial purposes (Article 5(2)(e)).

Amendments to existing exceptions and limitations by the Council

In its amendments 36 and 37, the European Parliament had proposed that analogue and digital private copying be both made conditional upon fair compensation for rightholders but that they also merited separate consideration. These amendments had been adopted at Article 5(2)(b) and (2)(b)bis of the Commission's amended proposal. Whilst accepting that fair compensation should apply to private copying, the Council was of the view that no distinction should be made between analogue and digital. As a result, Article 5(2)(b) and (b)bis were merged in what has become Article 5(2)(b) where there is now a reference to reproductions "on any medium". However, recitals 38 and 39 recognise that due account should be taken of the differences between analogue and digital private copying. Furthermore, the reference in the amended proposal to private use also being for "strictly personal use" has been deleted by the Council as it considered that it gave too narrow an interpretation to the term "private use". Finally, the expression "made for the private use" was adopted by the Council in order to cover reproductions made by or on behalf of a natural person.

In its amendment 38, the European Parliament had proposed limiting Article 5(2)(c) (regarding libraries and similar establishments) to acts of reproduction for specific purposes only (archiving or conservation) but to allow for flexibility as regards the beneficiaries of the exception. This was adopted by the Commission in its amended proposal. However, in the common position, the Council opted for an exhaustive list of the beneficiaries (publicly accessible libraries, educational establishments, and museums as well as archives) and for more flexibility as regards the purposes of the acts of reproduction which may now also be for purposes other than archiving or conservation provided that there is no economic or commercial advantage.

The Council also accepted the exception or limitation for the benefit of broadcasting organisations (Article 5(2)(d)), as introduced by the Commission as a result of amendment 39 of the European Parliament. However, the Council amended the text in order to align the wording with Article 11bis of the Berne Convention by replacing the word "fixations" with "recordings". New recital 41 also clarified the term "by means of their own facilities" to include those acting on behalf of the broadcasting organisation.

Article 5(3)(c) on the use of protected works or other subject matter, in particular in connection with the reporting of current events has been further amended (inter alia to bring it closer in line with the Berne Convention). The Council, however, maintained the requirement to indicate the source (where possible) which had been introduced by amendment 43.

Article 5(3)(b) based on amendment 42 of the European Parliament and Article 5(3)(e) based on

amendment 45 of the European Parliament have both been accepted practically unchanged in the common position.

Amendment 41 of the European Parliament accepted by the Commission in its amended proposal but not by the Council has already been considered under the previous heading.

New exceptions and limitations

In the case of Article 5(2), paragraph (e) was added by the Council in order to allow certain reproductions of broadcasts to be made so that they could be viewed or listened to by persons resident in certain non-commercial social institutions.

In the case of Article 5(3), the Council has added new exceptions and limitations which relate to the use of political speeches, extracts of public lectures or similar works (Article 5(3)f)); use during religious or official celebrations organised by a public authority (Article 5(3)g)); the use of works made to be located permanently in public places (Article 5(3)h)); incidental inclusion of works or other subject matter in other material (Article 5(3)i)); use for the purpose of advertising the public exhibition or sale of artistic works (Article 5(3)j)); use for the purpose of caricature, parody and pastiche (Article 5(3)k)); use in connection with the demonstration or repair of equipment (Article 5(3)l)); use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building (Article 5(3)m)); certain uses on the premises of public libraries and similar institutions for the purpose of research or private study, provided that they are not subject to purchase or licensing terms (Article 5(3)n)); and finally Member States may continue to apply existing exceptions or limitations in cases of minor importance which already exist in their national law provided that they only concern analogue uses and do not affect the free movement of goods and services, without prejudice to the other exceptions and limitations (Article 5(3)o)).

Article 6 (Obligations as to technological measures)

On Article 6, in line with the Commission's amended proposal, the Council has kept the structure of Article 6 as proposed by the European Parliament in its amendments 49 to 54. The Council has made minimal drafting amendments to the first two paragraphs in order to clarify the text and has deleted the terms "designed to protect any copyright or... Directive 96/9" and "without authority" as they already appear in the definition in paragraph 3.

The relationship between the legal protection of technological measures and the exceptions (Article 5) has been amongst the most political and difficult topics of this Directive. The issue had been addressed by the European Parliament in its amendment 47. In the view of the European Parliament, the legal protection of technological measures should always prevail over the exceptions set out in Article 5. This had not been accepted by the Commission in its amended proposal. The Commission retained the approach of its initial proposal, under which only those technological measures which prevent or inhibit the infringement of copyright were to be protected. In this regard, the Council has achieved a reasonable compromise, midway between amendment 47 of the European Parliament and the Commission's amended proposal and one which seeks to accommodate the interests of rightholders and beneficiaries of exceptions. In certain circumstances, provision is made for intervention on the part of Member States (either obligatory or discretionary) in order to ensure that the beneficiaries of exceptions have the means to benefit from that exception.

In its Article 6(3), the common position provides for a definition of protected technological measures which is broader than the one set out in the Commission's amended proposal. The effect of this definition is two-fold.

Firstly, it implies that Article 6(1) protects against circumvention of all technological measures which the person concerned carries out in the knowledge, or with reasonable grounds to know that he or she pursues such an act.

Secondly, under Article 6(2), consistent with amendment 47 of the European Parliament, Member States are required to provide adequate protection against the relevant circumscribed activities. The effect of this provision is likely to give rightholders significant control over the particular activities specified in Article 6(2). The Commission can support this solution as any other approach would have carried a high risk of abuse and piracy.

As a counterbalance to such broad protection, the Council has added a new paragraph 4 to Article 6, accompanied by new interpretative recitals (51 and 52), which takes account of the rights of rightholders and the legitimate interests of all other parties concerned, notably the interests of beneficiaries of any of the exceptions or limitations, in the context of the protection provided for under Article 6(1).

Article 6(4) subparagraph 1 sets out that rightholders have to provide the beneficiaries of the exceptions and limitations listed in that subparagraph, (Article 5(2)(a),(2)(c),(2)(d),(2)(e), (3)(a),(3)(b) or 3(e)), with the means to benefit from the exception or limitation in question either voluntarily or by way of agreements with other parties. In the absence of voluntary measures taken by rightholders, Member States are obliged to ensure that such means will exist in practice.

Article 6 (4) subparagraph 2, provides for greater protection, as far as private copying is concerned. This is in line with what the Commission had suggested in its amended proposal (under Article 5(2)(b)(bis)) and the European Parliament in its amendment 37, although not in the context of Article 6. In subparagraph 2, once again in the absence of voluntary measures taken by rightholders, Member States, may (but are not obliged to) take appropriate measures to ensure that rightholders enable beneficiaries to engage in certain specific acts of private copying covered by Article 5(2)(b). In view of the detrimental effect private copying and in particular digital private copying may have on rightholders, a reference to Article 5(5), the so-called "three-steps-test", has been added. Furthermore, the text acknowledges that any such measures do not prevent rightholders from adopting measures which limit the number of reproductions.

Article 6(4) subparagraph 4 provides that agreed contractual terms for on-demand making available of works and other subject matter will prevail over the provisions set out under this paragraph. Article 6(4) subparagraph 5 provides that this paragraph shall also apply *mutatis mutandis* to technological measures used in the context of Directives 92/100/EEC and 96/9/EC.

The Commission takes the view that the solutions found in the Council to the difficult issues posed by Article 6 and in particular its relationship to Article 5 represent remarkable progress in the effort to ensure effective and adequate protection of rightholders whilst at the same time not neglecting the legitimate interests of beneficiaries of exceptions. It can therefore support it fully.

Article 7 (Obligations concerning rights-management information)

The drafting of Article 7 has been slightly amended to more closely align the text with the relevant provisions of the WCT and the WPPT.

Article 8 (Sanctions and remedies)

Amendment 55 of the European Parliament which had been accepted by the Commission in its amended proposal but not by the Council has already been considered under the previous heading.

In Article 8(2), the common position clarifies the obligations of Member States in relation to sanctions and remedies, adding the possibility of seizing the illegal devices, products or components referred to in Article 6(2). Similar wording has been added to recital 57.

Article 8 contains a new paragraph 3, which is further explained by a new recital 58. The provision obliges Member States to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by third parties to infringe a copyright or related right. Such a possibility may not be made dependent on the lawfulness of the acts of intermediaries. The Commission

welcomes this useful clarification.

Article 9 (Continued application of other legal provisions)

Following amendment 11 of the European Parliament, the amended proposal contained a new recital 13a on the non-application of the present directive to designs. This has been adopted by the Council although the text has been slightly amended. In the interest of legal certainty, the common position contains a so-called "without prejudice" provision whereby the Directive will apply without prejudice to legal provisions in other areas. In this regard, it is consistent with the Community acquis in the field of copyright and related rights.

Article 10 (Application over time)

The Council has deleted part of Article 9(3) and Article 9(4) in its entirety as the Council took the view that issues relating to contracts should not be harmonised in the context of this Directive. The remainder of Article 9(3) (treatment of acquired rights) of the Commission's amended proposal has been merged with Article 9(2) (on the treatment of concluded acts). The Commission can accept these changes.

Article 11 (Technical adaptations)

In Article 11(2), the common position modifies Article 3(2) of Directive 93/98/EEC further, aligning it more closely with Article 17 of the WPPT by adding a second sentence to the existing paragraph. Furthermore, a second subparagraph has been added which limits the effects of this modification by excluding the revival of protection of phonograms which had fallen into the public domain before this modification takes effect.

Article 12 (Final provisions)

The former paragraph (1) of this provision has become a new separate article (Article 13). The review clause, now Article 12(1), is now more detailed and focused in the aim of rendering the assessment of the application of the Directive more efficient. Finally, drafting changes have been introduced to Article 12(3) and (4), relating to the contact committee.

Article 13 (Implementation)

As regards the implementation deadline, the date "by 30 June 2000" referred to in the Commission's amended proposal, having passed, was no longer relevant. The Council replaced this date by an implementation period of two years. The Commission would have preferred a shorter period of time but can accept this period.

4. Conclusions

In the Commission's view, the common position, which was adopted by consensus with one abstention, is an important compromise in the context of the information society which strikes the right balance amongst all rights and interests involved. At the same time, it reflects most of the amendments of the European Parliament whilst remaining faithful to the structure and substance of the amended proposal of the Commission. The Commission can fully endorse the common position of the Council.