



COMMISSION OF THE EUROPEAN COMMUNITIES

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Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

**on the harmonisation of certain aspects of copyright and related rights in the
Information Society**

(presented by the Commission pursuant to Article 250(2) of the EC Treaty)

EXPLANATORY MEMORANDUM

I. GENERAL

1. On 21 January 1997 the Commission transmitted to the Parliament and the Council a proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society¹. The Economic and Social Committee gave its opinion on that proposal on 9 September 1998². The European Parliament, consulted under the co-decision procedure, examined the proposal in detail in its committees. On 20 January 1999 the Committee on Legal Affairs and Citizens' Rights debated the report drawn up by Mr R. Barzanti on its behalf and the Parliament gave its opinion³ in the plenary session of 10 February 1999 in favour of the proposal as amended. In the present amended proposal for a Directive, the Commission has endeavoured to take Parliament's opinion into account as far as possible.
2. The substantive amendments proposed by Parliament and accepted by the Commission relate to:
 - (1) The principles underlying the amendments relating to private copying. The Commission shares the Parliament's view on the need to distinguish between private analogue copying and private digital copying. It accepts the principle of linking the exercise of this exception in both cases to fair compensation for the rightholders. As regards the relationship between private copying and technical measures, it replaces the expression "without prejudice to the technical means ..." with the expression proposed by the Parliament "where there are no reliable and effective technical means ..." (recital 26, Article 5(2)(b) and (ba) new).
 - (2) Compensation for the rightholders in most of the cases in which the proposal for a Directive provides for a legal exception to the exclusive rights. This is the case with reproduction on paper, private copying and illustration for teaching and scientific research (recital 26; Article 5(2)(a), (b), (ba) new and 5(3)(a)).

¹ COM(97)628 final of 10.12.1997, OJ C 108, 7.4.1998, p. 6.

² OJ C 407, 28.12.1998, p. 30.

³ Opinion of Parliament of 10.2.1999.

- (3) The new wording of the exception to the right of reproduction relating to certain establishments (libraries, archives and other teaching, educational or cultural institutions) for acts of reproduction made for archive or conservation purposes (Article 5(2)(c)).
 - (4) The extension to all persons with disabilities of the exception previously reserved for visually-impaired or hearing-impaired persons (recital 24(a) new; Article 5(3)(b)).
 - (5) The introduction of a new exception concerning parliamentary procedures and reporting (Article 5(3)(e)).
3. The main amendments which the Commission is in a position to accept, subject to modifications generally of a drafting nature, relate to:
- (1) Article 5(1) establishing an exception for temporary copies which are an integral part of a technological process. The Commission incorporates the adjective "essential" to indicate that the act of reproduction must be an integral and essential part of a technological process. It also adds the terms "transient and incidental" to illustrate the word "temporary" (recital 23, Article 5(1)).
 - (2) Certain questions relating to liability for activities in the network environment which are dealt with in the proposal for a Directive on certain legal aspects of electronic commerce (recital 12).
 - (3) The introduction of a new exception for broadcasters relating to so-called ephemeral reproductions (Article 5(2)(d) new).
 - (4) The introduction of an exception to the right of distribution for authorised acts of reproduction (Article 5(3a)).
 - (5) The technical protection measures. Parliament proposes to explicitly forbid circumvention of the technical protection measures and to list the activities carried out with the aim of circumventing the technical protection measures (recital 10a new; Article 6(1), (2) and (3)).
 - (6) The setting-up of a Contact Committee (Article 11(4) new).

The Commission accepts in whole or in part, and in some cases subject to a realignment of the various language versions, 44 of Parliament's 56 amendments.

4. The amendments or parts of amendments not accepted by the Commission for reasons of substance relate to:

- (1) The introduction in Article 5(1) of the condition that the main act of use of a work should be authorised by the rightholders or permitted by the law. The Commission shares the Parliament's concern to ensure that networks do not serve as vectors for the transmission of pirated content. However, it feels that adding this condition is not the most appropriate or commensurate means of achieving that objective and, on the contrary, might jeopardise the proper functioning of the networks. The conditions attached to the exercise of this condition have been strengthened by the above amendments accepted by the Commission. Together with Article 8, they ensure a satisfactory balance between the rights of rightholders and this exception (amendments 16 and 33).
- (2) The introduction of a new exception for broadcasters relating to the digital use of their archived productions. This amendment disturbs the balance between the parties concerned and might cause considerable damage to authors, performing artists or other holders of the rights concerned (amendment 48).
- (3) The introduction of an exception for the analogue use of certain press works. This concern is taken into account, for both analogue and digital use, in Article 5(3)(c) (amendment 40).
- (4) The specific mention in Article 5(4) that the exceptions and limitations to the exclusive rights do not prevent the use of technical protection measures. The link between the technical measures and private copying is set out in Articles 5(2)(b) and 5(2)(ba) and need not be reiterated in Article 5(4). In the case of the other limitations and exceptions, this question is dealt with in Article 6, as amended, relating to technological measures (amendment 47).

II. COMMENTS ON THE RECITALS

Recital 2a

This recital incorporates amendment 1 and reiterates the fundamental principles of the harmonisation of copyright.

Recital 3

This recital incorporates amendment 2, which stresses the importance of providing a high level of protection of intellectual property.

Recital 8a

This recital incorporates amendment 4, which reiterates the *acquis communautaire* in the field of copyright and related rights.

Recital 9

This recital incorporates amendment 5, which draws attention to the importance of an appropriate reward for performing artists as well as producers for the pursuit of creative activity.

Recital 9a

This recital incorporates amendment 6, which stresses the importance of an effective and rigorous system for the protection of copyright and related rights for ensuring the resources needed for European cultural production and safeguarding the independence and dignity of artistic creators.

Recital 10a

This recital incorporates amendment 7 and stresses the importance of technical measures and information on the system of rights referred to, respectively, in Articles 6 and 7 for the implementation of the whole of the Directive.

Recital 10b

This recital incorporates amendment 8 relating to the importance of the protection of copyright and related rights for learning and culture and justifies the existence of restrictions and exceptions.

Recital 12

This recital incorporates part of amendment 9 on the question of liability for activities in the network environment and amends it to point out that this Directive is complementary to the proposal for a Directive on certain legal aspects of electronic commerce.

Recital 12a

This recital incorporates amendment 10 and stresses the importance of collective management of rights in the new digital environment. It calls upon the collecting societies to achieve a higher level of rationalisation and transparency.

Recital 13a

This recital is based on amendment 11 relating to Directive 98/71 on the legal protection of designs.

Recital 14a

This recital incorporates amendment 12 stressing the fight against the counterfeiting and piracy of cultural works.

Recital 16

This recital incorporates amendment 13 and excludes direct representations and communications from the scope of the right to make available to the public. The Commission modifies this amendment to state that private communications are also not covered by this right.

Recital 23

This recital is based on amendment 16.
See the comments on Article 5(1).

Recital 24a

This recital incorporates amendment 17 stressing the importance of the Member States' adopting measures to facilitate access to protected works by persons suffering from a disability.

Recitals 26 and 27

These recitals incorporate amendments 18 and 20 relating to private copying. They correspond to the new wording of Article 5(2)(b) and (ba).

Recital 28

This recital incorporates amendment 21 and encourages the development of contractual arrangements for activities not covered by the exception introduced for the benefit of establishments such as libraries and other cultural establishments.

Recital 29a

This recital incorporates amendment 24. It specifies that the exceptions are limited to certain specific cases and that global solutions must be sought within the framework of the contractual relations between the parties concerned.

Recital 29b

This recital is based on amendments 22 and 82. It calls for the consideration of new legal ways of solving disputes concerning copyright and related rights and asks the Commission to undertake a study on this question.

Recitals 30 and 30a

For reasons of readability, recital 30 is split in two. Clarifications are added in particular with regard to the interaction between protected technical measures and electronic equipment. In this context, particular attention has been paid to maintaining the right balance between all parties and interests concerned and to encourage agreement on market-led solutions.

Recital 31

This amendment reflects the clarification made in Article 1.

III. COMMENTS ON THE ARTICLES

Article 1

This amendment is designed to clarify the existing text without altering its scope.

Article 2(a)

Amendment 29 is technical in nature. It simplifies the text without altering its scope.

Article 3(4)

Amendment 31 incorporates the joint declaration of the 1996 Diplomatic Conference which adopted the WIPO Copyright Treaty in relation to Article 8 of that Treaty. It specifies that the mere provision of physical facilities for enabling or making a communication does in itself constitute an act of communication to the public within the meaning of Article 3 of this Directive.

Article 5(1)

This paragraph incorporates amendment 33 in part. It adds the adjectives “transient” and “incidental” to illustrate the phenomenon of temporary copying as carried out in networks. It takes on board from amendment 33 the condition that such reproductions must be essential for the technological process and be carried out for the sole purpose of enabling use to be made of a protected work or other subject matter. At the same time, it is now explicitly confirmed that this condition is also fulfilled by those copies which make the transmission feasible.

Article 5(2)(a)

This paragraph incorporates amendments 34 and 35. It excludes musical works in published form from the scope of the exception for reproduction on paper and links this exception to the principle of fair compensation for the rightholders.

Article 5(2)(b)

This paragraph incorporates amendment 36 and links the exception for private copying to the principle of fair compensation for the rightholders.

Article 5(2)(ba)

In respect of digital private copying, this new paragraph incorporates the principles of amendment 37 by linking this exception to the principle of fair compensation for rightholders and indicating a link between this exception and the existence of operational, reliable and effective technical means for protecting the interests of rightholders.

Article 5(2)(c)

This paragraph incorporates amendment 38, which adds to the exception introduced for certain establishments a non-restrictive list of the establishments benefiting from that exception, and states that the acts of reproduction concerned may have only two purposes: archiving or conservation.

Article 5(2)(d)

Amendment 39 introduces a new exception for broadcasters. The new wording of paragraph (2)(d) is based on article 15.1 c) of the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

Article 5(3)(a)

This paragraph incorporates amendment 41 and links the exception for the purpose of illustration for teaching or scientific research with the principle of fair compensation for rightholders.

Article 5(3)(b)

This paragraph incorporates amendment 42 and extends this exception to all persons with disabilities.

Article 5(3)(c)

This paragraph incorporates amendment 43 in part. It adds two conditions for applying the exception relating to the use of excerpts in connection with the reporting of current events: indication, if possible, of the author's name, and limitation to the purpose of illustrating the event concerned.

Article 5(3)(d)

This paragraph incorporates amendment 44, which adds to the conditions for applying the exception relating to quotations the mention, if possible, of the author's name.

Article 5(3)(e)

This paragraph incorporates amendment 45, which introduces an exception relating to parliamentary proceedings and their reporting.

Article 5(3a)

This new paragraph is based on amendment 46 and allows Member States, when applying one of the exceptions set out in Article 5(2) and (3), to provide similarly for an exception to the right of distribution.

Article 5(4)

This paragraph is expanded to include the reference to paragraph 3a in order to ensure the internal cohesion of this Article.

Article 6(1)

This paragraph incorporates amendment 49 and relates to acts of circumvention of technological protection measures. The Commission considers it necessary to expand this amendment to include the condition that the person committing such an act is doing so knowingly.

Article 6(2)

This paragraph incorporates amendments 50, 51, 52 and 53 relating to acts preparatory to circumvention. The Commission has added some details, in particular the concept of authorisation, which was already a feature of paragraph 1 of this Article, and the adjective "effective" to describe the technological protection measures set out in paragraph 3.

Article 6(3)

This paragraph is based on and expands amendment 54, in particular with a view to assuring the cohesion of Article 6 in its entirety. To that end, it first defines what are technological measures and then explains what is meant by effectiveness taking due account of the operability and reliability of the protection. It introduces a more restrictive interpretation of the types of process controlling the accessibility or use of a protected work and, within the definition of the technological measures, it reinstates the concept of "infringement of copyright".

Article 8

This Article incorporates amendment 55, which stresses the deterrent nature of the sanctions provided for.

Article 11(3)

This paragraph incorporates amendment 57 and brings its wording into line with the *acquis communautaire*.

Article 11(4)

This paragraph is based on and expands amendment 58, which introduces a Contact Committee. This amended paragraph sets out the composition of the committee, its mode of operation and its tasks, in accordance with the model set out in Article 23a of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

**on the harmonisation of certain aspects of copyright and related rights in the
Information Society**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the European Community, and in particular
Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission⁴,

Having regard to the opinion of the Economic and Social Committee⁵,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁶,

- (1) Whereas the Treaty provides for the establishment of an Internal Market, the removal of barriers to the free movement of goods, the freedom to provide services and the right of establishment and the institution of a system ensuring that competition in the Internal Market is not distorted; whereas harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives;
- (2) Whereas the European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the Information Society in Europe; whereas this requires, inter alia, the existence of an Internal Market for new products and services; whereas important Community legislation to ensure such a regulatory framework is already in place or is well under way; whereas copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content;

⁴ COM(97)628 final of 10.12.1997, OJ C 108, 7.4.1998, p. 6.

⁵ OJ C 407, 28.12.1998, p. 30.

⁶ Opinion of the European Parliament of 10.2.1999.

(2bis) Whereas the proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property - including intellectual property - freedom of expression and the public interest;

- (3) Whereas a harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors; whereas this will safeguard employment and encourage new job creation;
- (4) Whereas technological development has multiplied and diversified the vectors for creation, production and exploitation; whereas, while no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights will have to be adapted and supplemented to adequately respond to economic realities such as new forms of exploitation;
- (5) Whereas, without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the Internal Market and legislative inconsistency; whereas the impact of such legislative differences and uncertainties will become more significant with the further development of the Information Society, which has already greatly increased transborder exploitation of intellectual property; whereas this development will and should further increase; whereas significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights;
- (6) Whereas the Community legal framework for the legal protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the Internal Market; whereas, to that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the Internal Market and the proper development of the Information Society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the Internal Market need not be removed or prevented;
- (7) Whereas the various social, societal and cultural implications of the Information Society require that account be taken of the specific features of the content of products and services;

- (8) Whereas any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation; whereas their protection helps to ensure the maintenance and development of creativity in the interests of authors, performing artists, producers, consumers, culture, industry and the public at large; whereas intellectual property has therefore been recognised as an integral part of property;

(8bis) Whereas this Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Nos. 92/100/EEC of 19 November 1992, 93/98/EEC of 29 October 1993, 91/250/EEC of 14 May 1991, 93/83/EEC of 27 September 1993 and 96/9/EC of 11 March 1996, and whereas it develops those principles and rules and places them in the context of the information society;

- (9) Whereas if authors or performing artists are to continue their creative and artistic work they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this creative work; whereas the investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand' services, is considerable; whereas adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment;

(9bis) Whereas a rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural production receives the necessary resources and of safeguarding the independence and dignity of artistic creators and performers;

- (10) Whereas adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint; whereas Article 151 of the Treaty requires the Community to take cultural aspects into account in its action;

(10bis) Whereas a common search for, and consistent application at European level of, technical measures to protect works and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law;

(10ter) Whereas this Directive must seek to promote learning and culture by protecting creative and artistic works while permitting exceptions in the public interest for the purpose of education and teaching;

- (11) Whereas the Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the 'WIPO Copyright Treaty' and the 'WIPO Performances and Phonograms Treaty', dealing respectively with the protection of authors and the protection of performers and phonogram producers; whereas those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called 'digital agenda', and improve the means to fight piracy world-wide; whereas the Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of

the Treaties by the Community and the Member States is under way; whereas this Directive also serves to implement a number of the new international obligations;

- (12) Whereas liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and will be addressed horizontally in European Parliament and Council Directive .../.../EC on certain legal aspects of electronic commerce in the internal market⁷ which clarifies and harmonises various legal issues relating to Information Society services including electronic commerce; whereas the provisions relating to liability in the context of electronic commerce should come into force within a timescale similar to that of this Directive, since they should provide a harmonised framework of principles and provisions relevant to inter alia important parts of this Directive ;

(12bis) Whereas, especially in the light of the requirements arising out of the digital environment, it is necessary to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules;

- (13) Whereas the provisions of this Directive should be without prejudice to existing Community provisions in the area of copyright and related rights, unless otherwise provided in this Directive;

(13bis) Whereas this Directive applies without prejudice to the legal protection of designs, which is dealt with in European Parliament and Council Directive 98/71/EC⁸ on the legal protection of designs;

- (14) Whereas this Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries; whereas this should be done in conformity with the *acquis communautaire*; whereas a broad definition of these acts is needed to ensure legal certainty within the Internal Market;

(14bis) Whereas the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works;

- (15) Whereas this Directive should harmonise the right applicable to the communication to the public of works, where this has not yet been done by existing Community legislation;

- (16) Whereas the legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level; whereas it should provide all rightholders recognised by the Directive with an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions; whereas such interactive on-demand transmissions are characterised

⁷ COM(1998)586 final of 18.11.1998.

⁸ OJ L 289, 28.10.1998, p.28.

by the fact that members of the public may access them from a place and at a time individually chosen by them; whereas this right does not cover direct representation or performance;

- (17) Whereas the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive;
- (18) Whereas copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article; whereas the first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community; whereas this right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community;
- (19) Whereas the question of exhaustion does not arise in the case of services and on-line services in particular; whereas this also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder; whereas, unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorisation where the copyright or related right so provides;
- (20) Whereas the rights referred to in this Directive may be transferred, assigned or subjected to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights;
- (21) Whereas a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded; whereas the existing exceptions to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment; whereas existing differences in the limitations and exceptions to certain restricted acts have direct negative effects on the functioning of the Internal Market of copyright and related rights; whereas such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities; whereas in order to ensure the proper functioning of the Internal Market, such exceptions should be defined more harmoniously; whereas the degree of their harmonisation should be based on their impact on the smooth functioning of the Internal Market;
- (22) Whereas this Directive provides for an exhaustive enumeration of exceptions to the reproduction right and the right of communication to the public; whereas some exceptions only apply to the reproduction right, where appropriate; whereas this list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning Internal Market; whereas it is desirable that Member States should arrive at a coherent application of these exceptions, which will be assessed when reviewing implementing legislation in the future;

- (23) Whereas the exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, such as transient and incidental reproductions, forming an integral part of and essential to a technological process carried out for the sole purpose of enabling the use of a work or other protected subject matter and which have no separate economic value on their own; whereas under these conditions this exception should include acts of caching or browsing;
- (24) Whereas Member States should be given the option of providing for certain exceptions for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings;
- (24bis) Whereas it is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats;
- (25) Whereas existing national schemes on reprography, where they do exist, do not create major barriers to the Internal Market; whereas Member States should be allowed to provide for an exception in respect of reprography;
- (26) Whereas Member States should be allowed to provide for an exception to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation in certain cases; whereas this may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders; whereas, although differences between those remuneration schemes affect the functioning of the Internal Market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the Information Society; whereas digital private copying is likely to be more widespread and have a greater economic impact; whereas a distinction should therefore be made between digital private copying and analogue private copying and whereas the conditions of application should in both cases be harmonised to a certain extent; whereas it is of particular importance, in the case of digital private copying, that all rightholders receive fair compensation ";
- (27) Whereas, when applying the exception on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available; whereas such exceptions should not inhibit the use of technological measures or their enforcement against circumvention;
- (28) Whereas Member States may provide for an exception for the benefit of establishments accessible to the public, such as non-profit-making libraries and equivalent institutions; whereas, however, this should be limited to certain special cases covered by the reproduction right; whereas such an exception should not cover uses made in the context of on-line delivery of protected works or other

subject matter; whereas this Directive should be without prejudice to Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, as amended by Directive 93/98/EEC; whereas, therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve;

- (29) Whereas, when applying those exceptions, they should be exercised in accordance with international obligations; whereas such exceptions may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter; whereas the provision of such exceptions by Member States should, in particular, duly reflect the increased economic impact that such exceptions may have in the context of the new electronic environment; whereas, therefore, the scope of certain exceptions may have to be even more limited when it comes to certain new uses of copyright works and other subject matter;

(29bis) Whereas the exceptions referred to in Article 5(2) and (3) must not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders;

(29ter) Whereas recourse to mediation could help users and rightholders to settle disputes; whereas the Commission, in co-operation with the Member States within the contact committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights;

- (30) Whereas technological development will allow rightholders to make use of technological measures designed to prevent and inhibit the infringement of any copyright, rights related to copyright or *sui generis* rights provided by law; whereas the danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures; whereas, in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonised legal protection against any activity enabling or facilitating the circumvention without authority, whether granted by the rightholders or conferred by law, of such measures;

(30bis) Whereas such a legal protection should be provided to technological measures that effectively inhibit and/or prevent the infringement of any copyright, rights related to copyright or *sui generis* rights provided by law, without, however, preventing the normal operation of electronic equipment and its technological development; whereas such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures; whereas such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection; whereas, in particular, this protection should not hinder research into cryptography;

- (31) Whereas such a harmonised legal protection does not affect the specific provisions of protection provided for by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs⁹, as amended by Directive 93/98/EEC; whereas in particular, it shall not inhibit decompilation permitted by that Directive;
- (32) Whereas important progress has been made in the international standardisation of technical systems of identification of works and protected subject matter in digital format; whereas, in an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community; whereas compatibility and interoperability of the different systems should be encouraged; whereas it would be highly desirable to encourage the development of global systems;
- (33) Whereas technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to better identify the work or other subject matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject matter in order to render easier the management of rights attached to them; whereas there is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public copies from which such information has been removed without authority; whereas in order to avoid fragmented legal approaches that could potentially hinder the functioning of the Internal Market, there is a need to provide for harmonised legal protection against any of those activities;
- (34) Whereas any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject matter by individuals and allow for tracing of on-line behaviour; whereas these technical means, in their technical functions, should incorporate privacy safeguards in accordance with European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data¹⁰;
- (35) Whereas this Directive is without prejudice to the application of European Parliament and Council Directive .../.../EC concerning the legal protection of services based on, or consisting of, conditional access¹¹;
- (36) Whereas Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive; whereas they shall take all the measures necessary to ensure that those sanctions and remedies

⁹ OJ L 122, 17.5.1991, p. 42.

¹⁰ OJ L 281, 23.11.1995, p. 31.

¹¹ OJ

are applied; whereas the sanctions thus provided for shall be effective, proportionate and dissuasive;

- (37) Whereas, in order to comply with the WIPO Performers and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended;
- (38) Whereas, after a period of two years following the date of implementation of this Directive, the Commission should report on its application; whereas this report should examine in particular whether the conditions set out in the Directive have resulted in ensuring a proper functioning of the Internal Market, and should propose action if necessary,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

Objective and scope

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the Internal Market, with particular emphasis on the Information Society.
2. Except in the cases referred to in Article 10, this Directive shall leave intact and shall in no way affect specific existing Community provisions relating to:
 - a) the legal protection of computer programs;
 - b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
 - c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
 - d) the term of protection of copyright and certain related rights;
 - e) the legal protection of databases.

CHAPTER II

Rights and exceptions

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- a) for authors, of their works,
- b) for performers, of fixations of their performances;
- c) for phonogram producers, of their phonograms;
- d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 3

Right of communication to the public, including the right of making available works or other subject matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of originals and copies of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - a) for performers, of fixations of their performances;
 - b) for phonogram producers, of their phonograms;
 - c) or the producers of the first fixations of films, of the original and copies of their films;
 - d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public of a work and other subject matter as set out in paragraph 2, including their being made available to the public.
4. The mere provision of physical facilities for enabling or making a communication does not in itself amount to an act of communication to the public within the meaning of this Article.

Article 4

Distribution right

1. Member States shall provide authors, in respect of the original of their works or of copies thereof, with the exclusive right to any form of distribution to the public by sale or otherwise.
2. The distribution right shall not be exhausted within the Community in respect of the original of their works or of copies thereof, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5

Exceptions to the restricted acts set out in Articles 2, 3 and 4

1. Temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose sole purpose is to enable use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted from the right set out in Article 2.
2. Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in the following cases:
 - a) in respect of reproductions on paper or any similar medium, with the exception of musical works in published form, effected by the use of any kind of photographic technique or by some other process having similar effects, provided that the rightholders receive fair compensation;
 - b) in respect of reproductions on audio, visual or audio-visual analogue recording media made by a natural person for private and strictly personal use and for non-commercial ends, on condition that the rightholders receive fair compensation;

b) bis. in respect of reproductions on audio, visual or audio-visual digital recording media made by a natural person for private and strictly personal use and for non-commercial ends, without prejudice to operational, reliable and effective technical means capable of protecting the interests of the rightholders; for all digital private copying, however, fair compensation for all rightholders must be provided;

c) in respect of specific acts of reproduction made for archiving or conservation purposes by establishments which are not for direct or indirect economic or commercial advantage, such as, in particular libraries and archives and other teaching, educational or cultural establishments;

d) in respect of ephemeral fixations made by broadcasting organisations by means of their own facilities and for their own broadcasts;

3. Member States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases:

a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, on condition that the rightholders receive fair compensation;

b) uses for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;

c) use of excerpts in connection with the reporting of current events, as long as the source and, if possible, the author's name is indicated, and to the extent justified by the informatory purpose and the objective of illustrating the event concerned;

d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source and, if possible, the author's name is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

e) use for the purposes of public security or to ensure the proper performance or reporting of an administrative, parliamentary or judicial procedure.

3bis. Where the Member States may provide for an exception to the right of reproduction pursuant to paragraphs 2 and 3 of this Article, they may provide similarly for an exception to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction;

4. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 3a shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with the normal exploitation of their works or other subject matter.

CHAPTER III

Protection of technological measures and rights-management information

Article 6

Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention without authority of any effective technological measures designed to protect any copyright or any rights related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC, which the person concerned carries out in the knowledge, or with reasonable grounds to know that he or she pursues that objective.
2. Member States shall provide adequate legal protection against any activities, including the manufacture or distribution of devices, products or components or the provision of services, carried out without authority, which:
 - a) are promoted, advertised or marketed for the purpose of circumvention of,
or
 - b) have only a limited commercially significant purpose or use other than to circumvent, or
 - c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
any effective technological measures designed to protect any copyright or any right related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC.
3. The expression "technological measures", as used in this Article, means any technology, device or component that, in the normal course of its operation, is designed to prevent or inhibit the infringement of any copyright or any right related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC.

Technological measures shall be deemed "effective" where the access to or use of a protected work or other subject matter is controlled through application of an access code or any other type of protection process which achieves the protection objective in an operational and reliable manner with the authority of the rightholders. Such measures may include decryption, descrambling or other transformation of the work or other subject matter.

Article 7

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person performing without authority any of the following acts:
 - a) the removal or alteration of any electronic rights-management information;
 - b) the distribution, importation for distribution, broadcasting, communication or making available to the public, of copies of works or other subject matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling or facilitating an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. The expression 'rights-management information', as used in this Article, means any information provided by rightholders which identifies the work or other subject matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information are associated with a copy of, or appear in connection with the communication to the public of, a work or other subject matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV

Common provisions

Article 8

Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive and act as a deterrent to further infringement.
2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material.

Article 9

Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject matter referred to in this Directive which are, by the date referred to in Article 11(1), protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).
2. This Directive shall apply without prejudice to any acts of exploitation performed before the date referred to in Article 11(1).
3. This Directive shall not affect any contracts concluded or rights acquired before the date of its entry into force.
4. Notwithstanding paragraph 3, contracts concerning the exploitation of works and other subject matter which are in force on the date referred to in Article 11(1) shall be subject to this Directive as from five years after its entry into force if they have not expired before that date.

Article 10

Adaptations techniques

1. Directive 92/100/EEC is hereby amended as follows:

a) Article 7 is deleted.

b) Article 10(3) is replaced by the following:

“3. The limitations may only be applied to certain specific cases and may not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with normal exploitation of their subject matter”.

2. Article 3(2) of Directive 93/98/EEC is replaced by the following:

“2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram is lawfully published during this period, the rights shall expire 50 years from the date of the first such publication.”

Article 11

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2000. They shall immediately inform the Commission thereof and shall also communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Not later than at the end of the second year after the date referred to in paragraph 1 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8. Where necessary to ensure the functioning of the Internal Market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

3. *Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.*

4a) A Contact Committee shall be set up under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the Chairman or at the request of the delegation of a Member State.

4b) The task of the Committee shall be as follows:

- To facilitate the effective implementation of this Directive by organising regular consultation on all questions deriving from its application;
- To facilitate the exchange of information between the Member States and the Commission on the situation of and developments in regulatory activities in the field of copyright and related rights and sui generis rights, as well as on the relevant developments in the field of technology;
- to examine any developments in the sector for which consultation appears useful;

Article 12

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Communities*.

Article 13

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

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