

COMMENTS ON THE AMENDED PROPOSAL FOR 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.

The following comments are related to the version dated 28 March 2000 of the proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the information society (called hereafter “the proposal”).

General remarks:

The directive should be based on an exhaustive list of exceptions

Performers’ organisations share the objectives expressed in whereas 21 and 22 of the proposal, and therefore support the principle of a Directive providing for an exhaustive enumeration of exceptions.

There should be no exceptions that would create new risks of infringement of performers’ rights or would favour inequitable uses.

For instance, such exceptions should certainly not open the door to massive and uncontrolled acts of “preservation of recordings in official archives”; especially since the concepts of “preservation” (which does not correspond to a right) and “archives” (which can be subject to various interpretation) are not defined in the proposal.

The Directive should grant performers the same level of protection as authors

According to whereas 9bis, *a rigorous and effective system for the protection of copyright and related rights is one of the main ways of safeguarding the independence and dignity of artistic creators and performers.* According to whereas 21, *a fair balance of rights and interests between the different categories of rightholders must be safeguarded.*

This principle is going to be contradicted by whereas 15 as it creates formally a discrimination by saying that the Directive should harmonise further only the author’s right applicable to the communication to the public. This whereas is intentionally silent concerning the need of harmonising the performer’s right of communication to the public concerning performances fixed in audio-visuals.

This new context demands reconsideration of the major weakness of the proposal which is that, it although it includes the on demand making available right, it does not grant performers any right of broadcasting and communication to the public of audio-visual fixations.

This is certainly an anomaly as the broadcasting and the various acts of communication to the public (other than the making available) are mainly traditional and more extensive than ever.

A right of broadcasting and communication to the public of audio-visual fixation, in addition to the new making available right, is crucial for the effective protection of performers.

It is also necessary in the context of the decision taken by the General Assembly of WIPO, on April 14, 2000, to convene a Diplomatic Conference in December 2000 to adopt an international instrument on the protection of audio-visual performances. The lack of this right is certainly an anomaly as the broadcasting and most of the various acts of communication to the public are mainly traditional and more extensive than ever.

Performers' organisations strongly advocate that this aspect should be reconsidered before any decision of the Council concerning the proposal.

Recitals

The recital 12bis states:

“Whereas, especially in the light of the requirement 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”

This whereas is based on the arbitrary assumption that a satisfactory level of rationalisation and transparency has not been yet reached by collecting societies. Moreover, it is directly questioning the observance of competition rules by these organisations. Due to the fact that the application of competition rules for collecting societies require further investigations, being planned by the European Commission, we think that a statement is premature.

Performers' organisations propose a more neutral wording of such whereas, as follows:

“Whereas, especially in the light of the requirement arising out of the digital environment, it is necessary to ensure that all collecting societies achieve a high level of efficiency and transparency”

Article 5-1:

“Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral part of a technological process, whose sole purpose is to enable

(a) a transmission between third parties in a network or

(b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the right set out in article 2.”

Whatever the technical arguments for qualifying the reproduction right, it is clearly not acceptable nor, we would hope, intended that the consequence should be to allow illegal or unlawful uses.

Performers' organisations consider that in the digital context, the reproduction right is of major importance to stop illegal uses when such uses are disseminated world wide, including to answer the difficult question of applicable law.

The right of reproduction is of major importance to ensure that the rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a right of making available (see article 8-3 of the proposal).

Especially in the context of the draft directive on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market ("E-commerce Directive"), the wording is far too wide.

According to Article 12 of the E-commerce Directive, the liability of provider for mere conduct is very limited. However, the provider is still liable if he does not meet the requirements in Article 12-1 of the E-commerce Directive.

According to Article 12-2 and Article 12-3 of the E-commerce Directive, there should be a possibility for court actions in order to terminate infringements related to temporary storage.

Therefore, performers' organisations propose the following wording:

*"Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral part of a technological process, whose sole purpose is to enable
(c) a transmission between third parties in a network and
(d) a lawful use
of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the right set out in article 2."*

Article 5-2 b) and whereas 24bis

Article 5-2: "Member States may provide for exceptions to the exclusive right of reproduction provided for in Article 2 in the following cases:

b) in respect of reproductions on any medium made for the private use of a natural person and for non-commercial ends, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;"

The reference in this article to an *exception* “on condition that the rightholders receive fair compensation which takes account of the application or non- application of technological measures referred to in article 6 to the work or other subject matter concerned” does not guarantee that performers would benefit from a rigorous and effective system of protection of their economical interests.

Indeed, the notion of “fair compensation”, as presented in whereas 24bis, means that the principle, the form, the level and the modalities of the remuneration could be reconsidered at any moment due to “*particular circumstances of each case*”; which is certainly unpracticable in the framework of a compulsory licence system.

Therefore, performers’ organisations consider that article 5-2 b) of the Directive should refer to the well known notion of “equitable remuneration”, as interpreted for instance in the context of the implementation of the Rome Convention (article 12) or the WPPT (article 15).

Performers’ organisations also consider that the second, the third and the fourth sentences of whereas 24bis should be deleted.

Moreover, it is obvious that the audio-visual and the phonographic producers, that is to say the employers of the performers, will try to obtain the transfer of such right of remuneration, through individual contracts, notably contracts of employment, if the Directive does not mention formally that such right of remuneration is unwaivable.

Therefore, performers’ organisations request that article 5-2 b) refers to an unwaivable right of remuneration.

Finally, it should be noted that such a mechanism does not ensure that *a fair balance of rights and interests between the different categories of rightholders* would be safeguarded.

Indeed, “technological measures” gives control of the all regime of protection mainly to one category of rightholders: the producers.

Performers’ organisations consider that article 5-2 b) should impose a collective management of such right of remuneration, as it is the only solution that could ensure a fair balance of interests in the implementation of such right.

Therefore, performers’ organisations propose the following wording:

Article 5-2 b): “in respect of reproductions on any medium made for the private use of a natural person and for non-commercial ends, on condition that the rightholders receive an unwaivable equitable remuneration which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned; such right of remuneration being exercised only through a collecting society;”

Whereas 24bis: (to delete sentences 2, 3 and 4)

Article 5-2 d):

Article 5-2: “Member States may provide for exceptions to the exclusive right of reproduction provided for in Article 2 in the following cases:

d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be permitted;”

As stated here above, the result of such exception should not be to open the door to massive and uncontrolled acts of “preservation of recordings in official archives”; especially whether the concept of “preservation” (which does not correspond to a right in the Directive and therefore cannot be subject to an exception) and the concept of “archives” (which can be interpreted in a very extensive way) are not subject to any definition in the proposal.

Due to this lack of definition, the sole actual condition of an exceptional documentary character is not sufficient, as this notion can also be interpreted into various ways.

Moreover, the proposed Article 5-2 d) seems to include an exception which relates to the ephemeral reproduction of fixations by broadcasting organisations.

It appears that this “exception” to the reproduction right is intended to allow the reproduction of existing ephemeral fixations made by broadcasters in accordance with national legislation under Article 10-1 (c) of Directive 92-100 and Article 15 of the Rome Convention (1961).

Such fixations are required to be *made “by a broadcasting organisation by means of its own facilities and for its own broadcasts”* and, as the description “ephemeral” dictates, to have a limited life.

Certain conditions are required for this proposed exception to be compatible with the letter and spirit of e.g. the Rome Convention.

- (1) the ephemeral fixations must have been legally made and preserved;
- (2) the purpose of the reproduction must be compatible with the legal basis on which the fixations were made;
- (3) if reproduction is necessary for the preservation of those specific ephemeral fixations which are agreed to have an “exceptional documentary character”, performers and other rightholders must be protected against any abuse of this extension of the established provisions governing such fixations in national and international law.

Performers’ organisations suggest two options:

Option 1:

to suppress this article 5.2.d), broadcasting organisation being already covered in a satisfactory way by the exception of ephemeral fixation, the purpose of a reproduction being distinct of commercial exploitation that does not justify a general exception to the reproduction right.

Option 2:

to adopt the following provision:

***“d) ephemeral fixations of works lawfully made and retained by broadcasting organisations by means of their own facilities and for their own broadcasts, may be reproduced by these organisations to the extent for necessary preservation, in those cases where they are of exceptional documentary character.*”**

Article 5-3 g):

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

g) use during religious or official celebration;“

Without entering in a debate on the actual justification of such exception, performers’ organisations request that such exception should refer to a strict definition of the notion of “religious or official celebration”.

Indeed, some events named “religious celebration” can be in fact commercial shows before thousands of people.

Moreover, the notion of “official celebration”, which has been newly added, is extremely wide (does such notion cover a World Cup, for instance ?), and therefore can easily open the door to abuses.

Performers’ organisations propose the following provision:

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

g) use during religious celebration, in a permanent religious place, and subject the definition provided at national level of such religious celebration;“

Article 5-3 k):

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

1st variant:

k) use in certain other cases of minor importance where exceptions already exist under national law, provided that they do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article”.

2nd variant:

k) use in connection with the public exhibition or sale of artistic works, to the extent necessary to promote the event”

The 1st variant of this proposal is in contradiction with the purpose of this directive, which is to establish and exhaustive list of the exceptions. The possibility of preserving other existing exceptions in member states means that no harmonisation is made, and that no legal certainty will be organised within the member states.

The 2nd variant of this proposal can be interpreted in a very extensive way, especially in the context of new digital technologies and new means.

Therefore, performers' organisations consider that Article 5-3 k) should be deleted.

Article 5-3bis:

“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”.

Consequently, Member States could extend to the **right of distribution** the exception to the right of reproduction – if this is justified by the *“purpose of the authorised act of reproduction”* – for example in the following cases:

- reproduction on paper or any similar medium with the exception of musical works in published form... (par. 2 a))
- reproduction on audio, visual or audio-visual analogue and digital recording media by a natural person for private and strictly personal use and for non commercial ends (par 2 b)
- reproduction for archiving or conservation purposes which are not for direct or indirect economic or commercial advantage (par. 2 c))
- reproduction of “archives” *“of exceptional documentary character”* (par. 2 d)) (...)

If it can be considered for instance that the distribution of reproduction made *“by a natural person for private and strictly personal use and for non commercial ends”*, could never be *“justified”* by the *“purpose of the authorised act of reproduction”*.

But such exception would certainly danger performers' interests in case of distribution of *“archives of exceptional documentary character”*; especially whether Article 5-2 d) was covering ephemeral “recordings”.

Would it be possible to consider such or such live concert, fixed by a broadcasting organisation, as *“of exceptional documentary character”*?

There is no doubt that most of the concerts from archives (notably in the field of jazz and classical music that have been the ground of extensive pirate publication in the past), will be considered as such by broadcasting organisations.

Therefore, performers' organisations do consider that Article 5-3bis should be deleted, or should refer only to a limited number of exceptions mentioned in paragraph 2 or 3 of article 5, excluding notably 2 b) and 2 c).