

Comment and wording proposals to the Revised Draft Directive on harmonisation of certain aspects of copyright (COM(1999)...final, 97/0359/COD)

and Draft consolidated version of Article 5 (Doc. 9734/99, June 30, 1999)

The Revised Draft Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Doc. 9734/99, by June 30, 1999) has in Art. 5 moved the emphasis in the balance of interests more to the public interest compared with the former version. However the Draft Directive still constrains the libraries to more restrictions as for instance the US „Digital Millenium Copyright Act“ from January 27, 1998 (Sec. 404).

The accordance with international guidelines (Rev. Berne Convention, WIPO) could be maintained, even extended to digital use of works, without reducing the interests of the rightholders. From that point of view we think the article 5 (3)(k) which restricts the exceptions to analogue uses is unsuitable.

For that the following measures are necessary,

- a) the enumeration of exemptions for the member should be open, but together with the restriction to certain cases corresponding to the Three-Step-Test,
- b) a legal provision should regulate that exemptions granted by law must not be overruled by contrary contractual clauses,
- c) a fair remuneration for exemptions should be granted by collective license agreements according to Recital 12a.

Wording proposals:

On behalf of the Federal Union of German Library Associations we give our view to the state of consultation on Art. 5 by June 30, 1999. Our wording proposals quote from single paragraphs of the consolidated version of the Directive and from amendments which were proposed by members of the council (quoted from foot-notes). We are assuming that the contributions to the discussion as a whole reflect all interests; therefore we think it is more pragmatic to refer to the relevant proposed wording than to suggest new own phrasings.

Article 5 – Exceptions to the restricted acts set out in Articles 2, 3 and 4

- (1) 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.
(Source: Adoption from the consolidated version)
- (2) Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in respect of:
 - (a) reproductions made by or on behalf of a natural person for private purposes;

- (b) reproductions on paper or any similar medium for other purposes, effected by the use of any kind of photographic technique or by some other process having similar effects;
- (c) reproductions for archival purposes or preservation by establishments which are not operating for direct or indirect economic or commercial advantage, such as libraries and archives.
(Source: Proposal DK)

(3) Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in respect of:

- (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 purpose to be achieved;
- (b) use of works in connection with the reporting of current events, as long as wherever practicable the source is indicated, and to the extent justified by the informatory purpose;
- (c) quotations, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source is indicated, and that their use is in accordance with fair practice, and to the extent justified by the specific purpose;
- (d) use for the purposes of public security or for the purposes of the proper performance or reporting of a judicial, parliamentary or administrative procedure and use to ensure the right for members of the public to have access to documents kept by public authorities;
- (e) use for the purpose of communication to individual members of the public on the site of establishments referred to in (2)(c) of works and other subject matter contained in their collections;
- (f) [new] Online delivery of unsubstantial parts of a digital work, as far as the access and the use of this work is permitted by a contractual agreement and the delivery is carried out to a restricted part of the public. For the online delivery fair compensation to the rightholders must be provided;
- (g) use for the benefit of people with disabilities, which are directly related to the disability and to the extent justified by the specific purpose.

(Source (excepted paragraph f): Proposal DK, supported by F and the Commission representative declaring to be prepared to consider the proposal)

(4) Member States may, without prejudice to paragraphs 2, 3 and 6, provide for other exceptions to the exclusive rights set out in Article 2 and Article 3, including such exceptions which have traditionally been recognised in national law.

(Source: Proposal DK, supported by S, IRL, NL, UK, FIN and LUX)

(5) *[new]*

- a) The owner of a copy of a digital work, which was marketed by sale with the author's agreement, the otherwise authorised user or the person to

whom a digital work was made accessible on account of a contract, made with the author or with a third party under the author's agreement, is permitted to carry out the previous exceptions.

- b) Contrary contractual provisions are null and avoid, as far as a fair compensation (except Article 5.2.c and 5.3.a) is paid for a legal exception.
- c) Excepted from the provision that the rightholders receive a compensation are specific acts of reproduction made for archiving or conservation purposes by publicly accessible establishments, which are not for direct or indirect economic or commercial advantage, such as libraries or museums or archives and other teaching, educational or cultural establishments.

(Source: Comment and Wording Proposal of the Federal Union of German Library Associations and (c) consolidated version).

Federal Union of German Library Association and Commission on Library Law of the German Libraries Institute

We would be glad to answer your further queries, please contact:

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