

**AMENDED PROPOSAL FOR A DIRECTIVE ON THE HARMONISATION
OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS
IN THE INFORMATION SOCIETY**

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UNICE POSITION PAPER

1. PRELIMINARY REMARKS

UNICE has taken note of the Commission's amended proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the information society and would like to take the opportunity to offer its comments on this document.

First and foremost, UNICE would like to indicate that the views expressed in its previous position paper dated 25 June 1998 remain valid for many aspects of the amended proposal. Nevertheless, the amendments introduced by the Commission prompt UNICE to comment further on some aspects of the proposal.

2. GENERAL REMARKS

UNICE, which represents all sectors which are or will be involved in the new digitalised world created by the information society, sees development of the information society as a powerful means to increase the well-being of society at large. Effective protection of copyright and related rights is one of the essential steps in this process and UNICE welcomes the Commission's intention of implementing the WIPO Copyright Treaties signed in 1996 rapidly.

Protection of intellectual property rights is a key issue in the role that creative content and innovative features will play in the information society and harmonisation of copyright legislation must be based on a high degree of protection. In this context, adequate remuneration of rightholders is indispensable.

At the same time, investment and development of equipment, infrastructure and services for the information society should be encouraged.

3. SPECIFIC COMMENTS

1. On the basis on the above arguments, UNICE would like to welcome efforts by the EU institutions to achieve a fair balance between the many and different interests at stake, without losing sight of the primary objective of the proposed directive.
2. Nevertheless, UNICE is deeply disappointed that the directive aimed at implementing the above-mentioned Treaties does not attempt to harmonise those exceptions to the restricted acts which have an impact on the functioning of the Internal Market. This will affect the functioning of the Internal Market in the digital environment and will not serve the interests of European industry.

UNICE urges the EU institutions to reconsider their approach regarding the non-mandatory nature of the exceptions to the restricted acts that have an impact of the functioning of the Internal Market.

3.1 Reproduction right (Article 2)

1. UNICE would like to reiterate its views that it is essential in the digital environment to avoid having different reproduction rights for different types of work. UNICE therefore recommends that the scope of the reproduction right in this connection is harmonised with the reproduction right provided by the EC Directives on legal protection for computer programs and databases.
2. However, adequate exceptions must be defined for certain special cases and, where appropriate, for the functioning of the internal market, within the framework of Article 10 of the WIPO copyright Treaty and Article 16 of the WIPO performances and phonograms Treaty, in order to take into account the specific interests of rightholders, users, service providers and equipment manufacturers.

3.2 Right of communication to the public, including the right of making available works or other subject matter (Article 3)

1. In principle, UNICE supports the introduction of this right, which is in line with the text of the WIPO Treaties and the EC Directives on computer programs and databases. Nevertheless, UNICE regrets that the amended proposal has not addressed problems identified by industry.
2. For instance, the meaning of “*the public*” is not sufficiently well defined. The specific case of retransmission of works or other subject matter beyond the authorised user should be addressed by this article.
3. This is also true of the wording “*may access them from a place and at a time individually chosen by them*”, which needs to be clarified. This notion which refers to interactivity, i.e. the ability of users to select and access work, should not exclude services that broadcast on a point-to-multipoint basis in order to provide for flexibility of the right in emerging markets.

4. In addition, considering the convergence of infrastructure and of content in the information society, UNICE believes that there should be non-discriminatory treatment in the digital environment regarding exclusive rights granted to content providers (e.g. publishers, software, phonographic or film producers) and article 3 should therefore respect this principle.
5. Even though clarification is needed, all these definitions should remain flexible enough to allow them to evolve with future technological developments¹.

3.3 Exceptions to the restricted acts (Article 5)

3.3.1 General comments

1. UNICE would like to recall that the fundamental requirement for all exceptions both in the directive and national law is adherence to the principles of Article 10 of the WIPO copyright Treaty and Article 16 of the WIPO performances and phonograms Treaty.
2. Even though UNICE notes efforts by the EU Institutions to improve the wording of Article 5, in particular concerning the distinction, which we welcome, made between analog and digital copies in the context of the new provisions on fair compensation, this article remains the weakest part of the proposed directive and its wording needs to be revisited on many aspects.
3. In UNICE's view, the proposal should attempt to harmonise those exceptions to the restricted acts that have an impact on the Internal Market. This is a prerequisite for legal certainty for all interested parties.

3.3.2 Specific comments

1. **Article 5(1)** should deal strictly with reproductions which are primarily the *result of technical responses* to requests made by other acts and do not constitute consumption within the meaning of copyright law. Article 5(1) should not attempt to deal with liability issues. It should merely deal with the aspect of temporary copying which occurs within the limited environment of hardware equipment/transmission media and which is inherent to a technical process.
2. The wording of article 5(1) should be revisited and efforts should be made to clarify its intended scope which should also cover copies incidental to a primary use as occurs within hardware equipment, and which are inherent to the use of a work². It must be made clear that these copies should not survive the intended use of the work concerned, and should not be separately accessible.
3. A majority of UNICE's member federations opposes the provisions of **Article 5.2** of the amended proposal, which maintain the possibility of an exception for unlimited digital private copying even in cases where there are technical measures protecting the interests of rightholders. Uncontrolled private copying represents a direct economic prejudice for rightholders and the

¹ This comment clearly also applies to the definitions of the "other rights" provided for in the Proposal.

² This issue has been adequately addressed by to the definition of "reproduction" as set out in the EC Directives on the legal protection for computer programs and Databases.

existence of an exception creates uncertainty as to whether technical measures controlling private copying can be used efficiently. Such an exception is not compatible with on-line delivery, which consists precisely in authorising individual copying against payment.

4. Since **Article 5.2** does not harmonise the private copying exception, this implies that no harmonisation will be achieved either as regards existing levies on blank recording media and recording equipment. At present, the levels of such levies vary considerably between Member States and this creates serious distortions of competition within the internal market, particularly among manufacturers of hardware equipment. Such distortions of competition can also be seen in the area of reprography. This is detrimental to the interests of European industry and contrary to smooth functioning of the internal market.

UNICE has time and again expressed the view that levies are not the appropriate solution in the digital environment. Given the rapid development of technologies, there are increasing possibilities for direct individual licensing and there is a new wide range of technical mechanisms which can ensure adequate remuneration for rightholders' rights. These are the solutions that are to be promoted in the digital environment.

5. Whereas the above comments regarding levies apply primarily to the new digital environment, UNICE would like to take the offered opportunity to recall that the existing different systems of levies as they apply in the analog environment and the distortions of competition they generate in the internal market should be urgently addressed by the European Commission.

UNICE believes that whatever solution is adopted it should not impose on any Member State introduction in their legislation of a system of levies where none exists today.

6. In UNICE's opinion, providing a special right for certain user groups - such as disabled persons, the education sector, students and researchers, etc. - to have access to copyright works is a complex and controversial issue, particularly in the digital environment. Opinions differ in industry as to how such provisions should be formulated in order to be appropriate and equitable. In any case, it is questionable whether rightholders should bear the burden of financing such social objectives.
7. UNICE is concerned about the possible impact of the new exception to the distribution right introduced by **Article 5.3 bis**. The wording of this article is vague and UNICE is of the opinion that this new article should be deleted. In any case, a careful assessment of its necessity and potential impact is needed.

3.4 Technological measures (Article 6)

1. UNICE welcomes the Commission's attempts to improve the wording of Article 6 and to incorporate most of the elements introduced by amendments 49 to 54 of the European Parliament. Nevertheless, UNICE believes that this Article remains ambiguous on many aspects and believes that it needs to be improved further to ensure a fair balance between all interests at stake.

2. UNICE has made clear on several occasions that nothing in this article should require that the manufacturing of any device, component or service responds to any particular technological measure.
3. UNICE is of the opinion that it should be made clearer that the key criterion for determining liability is that of intent (whether the equipment has been “produced, designed or adapted to circumvent” for illegal purposes). UNICE also believes that the general thrust of recital 30 bis of the directive should appear more clearly in Article 6.
4. UNICE would like to stress that circumvention of technical measures will be possible not only with devices but also with software. UNICE therefore suggests addition of the word *software* after *devices* in article 6.2.

3.5 Link between technological measures and exceptions

1. UNICE regrets that the Commission has not incorporated in the body of the directive amendment 47 adopted by the European Parliament which states clearly that “exceptions and limitations must not prevent the use of technical measures, nor prejudice the protection of those measures”. Reference to this is made in Recital 27 only, whereas this principle should be incorporated in specific articles of the directive.
2. By not doing so, the amended proposal leaves too much uncertainty about the link between protection of technological measures and possible exceptions since it allows technological measures and protects them against circumvention, but at the same time lists a number of exceptions under Articles 5.2 and 5.3, whose wording is confusing.
3. The proposal’s lack of clarity vis-à-vis the link between technological measures and exceptions creates an uncertainty concerning the possible use of circumventing equipment on the justification of an exception which needs to be clarified.

3.6 Liability

1. The liability issue is of utmost importance for users, service providers, equipment manufacturers and content providers alike. Their role in the information society will be greatly influenced by the regime that applies to them. It must be ensured that their responsibility is not engaged unless they are responsible for copyright infringement.
2. UNICE has taken note of the Commission proposal for a directive on legal aspects of electronic commerce, and in particular its provisions on liability. Generally speaking, UNICE welcomes the Commission’s intention of addressing the issue of liability horizontally.
3. Nevertheless, UNICE wonders whether the liability provisions of the electronic commerce directive can address specific problems raised by copyright in the digital environment and it believes that further thoughts should be given to this question.
4. In any case, if liability provisions are dealt with in another directive than the copyright directive, it is necessary that both directives enter into effect at the same time.

3.7 Obligations concerning rights management information (article 7)

1. UNICE fully supports this provision which is complementary to the directive on the legal protection of services based on, or consisting of, conditional access.

3.8 Application over time (Article 9)

1. UNICE would like to reiterate its disagreement with the text of Article 9(3) and 9(4). There is no reason why contracts concluded before the entry into force of this directive could not already be interpreted in accordance with its provisions, if such interpretation is in perfect line with the clear intention of the parties to the contract concerned. In the interest of legal certainty, the interpretation of contracts against the background of this directive should be left to the competent courts.
2. The current wording of Article 9(3) and Article 9(4) fails to take into account the fact that contracts may well have been drafted in such a way as to anticipate future introduction of new rights, as resulting from this directive. This would mean that contracts dealing with transfers of rights concluded before the introduction of such new rights would need to be redrafted. This is clearly contrary to the legal certainty needed by industry. Parties should be allowed to devise their contracts in such a way as to take future developments into account.

3.9 Final provisions (Article 11)

1. UNICE welcomes creation of the contact committee set up by article 11 to facilitate effective implementation of the directive and examine any development in the sector.
2. Nevertheless, UNICE believes that this committee, with the help of the Commission, should also look for possible ways to harmonise the internal market further on this subject.

4. CONCLUSION

- First, and most important, UNICE believes that the global nature of the information society cannot be over-emphasised. The global information infrastructure is intended to cover the whole planet and the business community therefore sees *worldwide cooperation* as absolutely crucial to development of the information society. Consequently, while it acknowledges the need to consider the functioning of the internal market, UNICE urges the European Commission to take an international perspective in this area and to cooperate very closely with the EU's main trading partners.
- UNICE would like to stress once again the importance of the proposed directive ensuring a high level of protection for rightholders in order to support them in investing in the creation of the new and attractive products which are demanded by consumers, without at the same time preventing other parties from investing in the development of the networks that are necessary to create a fast growing information society.

- UNICE is of the opinion that the Commission's proposal is a first commendable step towards achieving such an objective but that the current proposal falls short in the areas addressed above. These are important areas, which need to be revisited, and on which UNICE is willing to provide any needed expertise, in addition to these written comments.
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