

# EUROPEAN PARLIAMENT

1999



2004

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*Session document*

FINAL  
**A5-0043/2001**

6 February 2001

**\*\*\*II**

## **RECOMMENDATION FOR SECOND READING**

on the Council common position for adopting a European Parliament and Council directive on the harmonisation of certain aspects of copyright and related rights in the Information Society  
(9512/1/2000 – C5-0520/2000 – 1997/0359(COD))

Committee on Legal Affairs and the Internal Market

Rapporteur: Enrico Boselli

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

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## PROCEDURAL PAGE

At the sitting of 10 February 1999 Parliament adopted its position at first reading on the proposal for a European Parliament and Council directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(1997) 628 - 1997/0359 (COD)).

At the sitting of 26 October 2000 the President of Parliament announced that the common position had been received and referred to the Committee on Legal Affairs and the Internal Market (9512/1/2000 - C5-0520/2000).

The committee had appointed Enrico Boselli rapporteur at its meeting of 23 September 1999.

It considered the common position and the draft recommendation for second reading at its meetings of 8, 15, 24, 29, 30 and 5 February 2001.

At the last meeting it adopted the draft legislative resolution.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; Willi Rothley, Rainer Wieland and Ward Beysen, vice-chairmen; Enrico Boselli, rapporteur; Maria Berger, Charlotte Cederschiöld, Brian Crowley, Jean-Maurice Dehousse, Willy C.E.H. De Clercq, Raina A. Mercedes Echerer, Francesco Fiori (for Antonio Tajani, pursuant to Rule 153(2)), Janelly Fourtou, Geneviève Fraisse, Marie-Françoise Garaud, Evelyne Gebhardt, Robert Goodwill (for Bert Doorn, pursuant to Rule 153(2)), Gerhard Hager, Malcolm Harbour, Roger Helmer (for Kurt Lechner, pursuant to Rule 153(2)), The Lord Inglewood, Piia-Noora Kauppi (for Guido Viceconte, pursuant to Rule 153(2)), Klaus-Heiner Lehne, Neil MacCormick, Toine Manders, Luís Marinho, Sérgio Marques, Véronique Mathieu, Hans-Peter Mayer, Arlene McCarthy, Manuel Medina Ortega, Angelika Niebler, Ria G.H.C. Oomen-Ruijten, Imelda Mary Read, Astrid Thors, Gary Titley, Felekna Uca, Diana Wallis, Joachim Wuermeling, Matti Wuori and Stefano Zappalà.

The recommendation for second reading was tabled on 6 February 2001.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

## DRAFT LEGISLATIVE RESOLUTION

### **European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (9512/1/2000 – C5-0520/2000 – 1997/0359(COD))**

#### **(Codecision procedure: second reading)**

*The European Parliament,*

- having regard to the Council common position (9512/1/2000 – C5-0520/2000),
  - having regard to its position at first reading<sup>1</sup> on the Commission proposal to Parliament and the Council (COM(1997) 628<sup>2</sup>),
  - having regard to the amendments to the Commission proposal (COM(1999) 250<sup>3</sup>),
  - having regard to Article 251(2) of the EC Treaty,
  - having regard to Rule 80 of its Rules of Procedure,
  - having regard to the recommendation for second reading of the Committee on Legal Affairs and the Internal Market (A5-0043/2001),
1. Amends the common position as follows;
  2. Instructs its President to forward its position to the Council and Commission.

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<sup>1</sup> OJ C 150, 28.5.1999, pp.154, 183

<sup>2</sup> OJ C 108, 7.4.1998, p. 6

<sup>3</sup> OJ C 180, 25.6.1999, p. 6

## (Amendment 1)

## Recital 17

It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a **higher** level of rationalisation and transparency with regard to compliance with competition rules.

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*Justification:*

*Self-explanatory.*

## (Amendment 2)

## Recital 39

When applying the exception or limitation 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. **Such** exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

When applying the exception or limitation 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. **Products to which technological measures referred to in Article 6 are applied should not be subject to any remuneration scheme.** Exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention **as provided in Article 6.**

*Justification:*

*The consumer must not be burdened with paying levies on equipment or recording media when technical measures prevent him from private copying or allow direct payment to rightholders.*

(Amendment 3)  
Recital 52(a) (new)

***(52a) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) do not apply. Other forms of non-interactive online use remain subject to those provisions.***

*Justification:*

*Self-explanatory.*

(Amendment 4)  
Recital 58

In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary ***who carries a third party's infringement of*** a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary ***whose services are used by a third party to infringe*** a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States. ***However, such injunctions must be specific, proportionate, and feasible and***

***relate only to the infringement against which the injunction was applied for, and must in any case respect the principles of free movement of goods and services as well as the principle of freedom of speech.***

*Justification:*

*The Amendment brings the Recital into line with the related Article as well as with the E-Commerce Directive. Injunctions based on Article 8(3) always have to be specific. The Article should not be interpreted in such a way as to enable the imposition of general monitoring and filtering requirements on ISPs and intermediaries, which are in contradiction with Article 15 of the E-Commerce Directive*

(Amendment 5)  
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 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;

In respect of reproductions on any medium made ***by a natural person for private use*** and for ***ends that are neither directly or indirectly commercial***, 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;

*Justification:*

*Self-explanatory.*

(Amendment 6)  
Article 5(3)(a)

use for the sole purpose of illustration for teaching or scientific research, as long as, whenever possible, the source, including the

use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is



author's name, is indicated and to the extent justified by the non-commercial purpose to be achieved;

indicated, ***unless this proves impossible***, and to the extent justified by the non-commercial purpose to be achieved;

*Justification:*

*Self-explanatory.*

(Amendment 7)  
Article 5 (3)(c)

reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as, ***whenever possible*** the source, including the author's name, is indicated;

reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, ***unless this proves impossible***;

*Justification:*

*Self-explanatory.*

(Amendment 8)  
Article 5(3)(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, ***whenever possible***, the source, including the author's name, is indicated, and that their use

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is in accordance with fair practice, and to the extent required by the specific purpose;

that their use is in accordance with fair practice, and to the extent required by the specific purpose;

*Justification:*

*Self-explanatory.*

(Amendment 9)  
Article 5(3)(f)

use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that, **whenever possible**, the source, including the author's name, is indicated;

use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, **except where this proves impossible**;

*Justification:*

*Self-explanatory.*

(Amendment 10)  
Article 5(3)(j)

Use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event;

Use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, **excluding any other commercial use**;

*Justification:*

*Self-explanatory.*

(Amendment 11)

Article 5(3)(q) (new)

***to ensure, by such legal means as a strictly limited non-voluntary licence or a legal presumption, that broadcasting organisations are entitled to use, or to authorise others to use, their own past archive productions produced or commissioned and financed by them under their own editorial control for new broadcasting or 'on-demand' services. Such use shall be subject to payment by the television or radio producer of equitable remuneration, as appropriate, to authors, performers or other rightholders who contributed to the production.***

*Justification:*

*This amendment is a simplified version of an amendment adopted by Parliament on first reading. It is only to be expected that contractual agreements will prove impossible or elusive in this area. Yet European broadcasting organisations maintain extensive archives of their past radio and TV programmes going right back to the first days of broadcasting. Such archives provide a unique view of a country's political, social and cultural life. They should, therefore, be made accessible to the public via the new possibilities of audio-visual communication.*

(Amendment 12)

Article 5, new paragraph

***If a Member State intends to introduce new, or alter existing, systems of ensuring fair compensation, it shall inform the Commission. The latter shall check whether the intended measure is compatible with the Internal Market and issue a recommendation to the Member State in question.***

*Justification:*

*Self-explanatory.*

(Amendment 13)  
Article 6(4)(2)

(Following final sentence to be added:)

***A Member State shall take such measures, provided fair compensation is required for copying (Article 5(2)(b))***

*Justification:*

*If the Member States oblige users to pay a copying levy on equipment or data media (Article 5(2)(b)), the Member States must ensure that users can actually make such copies. Otherwise consumers would be paying for copies that they had no possibility of making because of technical protection measures.*

(Amendment 14)  
Article 12(4)

The tasks of the committee shall be as follows:

(a) to organise consultations on all questions deriving from the application of this Directive,

(b) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments,

(c) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

The tasks of the committee shall be as follows:

(a) to organise consultations on all questions deriving from the application of this Directive,

***(aa) to examine the impact of the Directive on the functioning of the Internal Market, and to highlight any difficulties,***

(b) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments,

(c) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

*Justification:*

*Self-explanatory.*

(Amendment 15)

Article 13

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before ... \*. They shall forthwith inform the Commission thereof. **\*Two years** after the entry into force of this Directive.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before ... \*. They shall forthwith inform the Commission thereof. **\*18 months** after the entry into force of this Directive.

*Justification:*

*To ensure that the legislation can be adapted to the technological changes which will inevitably occur, the notification period should be reduced from two years to 18 months, in line with the procedure followed in the electronic commerce directive.*

## EXPLANATORY STATEMENT

1. On 10 December 1997 the Commission adopted the proposal for a directive<sup>1</sup>, on the basis of Articles 47(2), 55 and 95 of the EC Treaty. The proposal was submitted to the European Parliament on 21 January 1998. On 10 February 1999 Parliament adopted a legislative resolution amending the Commission text<sup>2</sup>. On 21 May 1999 the Commission adopted an amended proposal<sup>3</sup> incorporating, in part and in some cases in full, the amendments adopted at first reading. On 28 September 2000 the Council adopted the text of the common position<sup>4</sup>; it forwarded this text to Parliament on 26 October 2000.

2. At first reading Parliament adopted 56 of the amendments tabled. The text of the common position includes 37 of these, variously in whole and in part, including those relating to the introduction of the principle of 'fair compensation', as proposed and articulated by Parliament at first reading.

3. The aim of the directive is to ensure the existence of an internal market in copyright and related rights, with particular emphasis on products and services (both on-line and on physical supports) of the information society, and to create a legislative framework capable of responding to new technological challenges.

4. The directive is of crucial importance for copyright in the information society, an area which is at present neither regulated nor harmonised at European level. In 1996 the international community agreed on two treaties, under the auspices of the World Intellectual Property Organisation (WIPO). The first concerns copyright; the second concerns performances and phonograms. To come into force these treaties have to be ratified by 30 countries. The EU alone effectively represents 42 countries, thanks to the agreements which link it to the EEA/EFTA countries, the PECO countries and other countries with which it has association agreements. The adoption of this directive is essential, given that it represents the necessary legal basis for ratification of these treaties by the EU and its Member States.

5. The copyright directive must protect the European heritage, which is of absolutely crucial importance, as well as that linked to the world of creativity, in which Europe has a strong tradition to defend, while also promoting new developments within the new digital environment ushered in by the information society. In this process, European creativity and content must be able to benefit from the development of the information society and advanced technologies such as WAP (Wireless Application Protocol), UMTS (Universal Mobile Telephone Systems), broadband, interactive television and the growing convergence of digital and satellite networks, which represent the new frontier for distribution on a global scale. The directive is intended to harmonise the legislative framework for copyright and related rights in Europe, while not disturbing the delicate balance between the often divergent interests at stake: what is required is something similar to the state of affairs created in the US with the adoption of the digital Millennium Copyright Act. With the timely adoption of legislation of this nature, the US has fulfilled its obligation to implement the WIPO treaties, and has also provided its own creative industries and new technology/digital media sectors with the necessary framework for legal security and, consequently, economic stability - a

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<sup>1</sup> OJ C 108, 7.4.1998, p. 6

<sup>2</sup> OJ C 150, 28.5.1999, pp. 154, 183

<sup>3</sup> OJ C 180, 25.6.1999, p. 6

<sup>4</sup> OJ C 344, 1.12.2000, p. 1

circumstance which, as things stand, is favouring transatlantic operators and penalising their European counterparts.

6. The faster and wider dissemination and accessibility of content via the new digital distribution technologies is creating the impression that distances between people, and the associated problems, have been eliminated, within what Marshall McLuhan called the 'global village'. One of the major theorists of the information society, Nicholas Negroponte, has offered a highly perceptive analysis of the effects of the 'global village', which may, for our present purposes, be summarised as follows: 1) local cultures can emerge, thanks to digital information technologies based on interactivity (any consumer of information can also become an information provider); 2) it is far more difficult to exercise control over information in a digital and interactive context, as there is no longer a rigid dividing-line between information providers and information consumers, as was the case in the communications era when analogue television ruled: this entails a transformation of the conception of the role of the regulator, since there is no longer room for centralised, planning-oriented interventions on the lines characteristic of the period when information was distributed by analogue technologies; the directive has inevitably to take due account of these principles; 3) this problem of control is not merely political, but also has economic repercussions: the big companies which now control the greater part of the global economy will no longer be the only ones to attain multinational dimensions, for the Internet enables large numbers of small enterprises which may consist of only two or three people to reach a global market - a phenomenon which in the past was impossible.

In the last three years, the information society has evolved in the direction of ever-more advanced solutions which could scarcely have been imagined in 1997, the year in which the Commission's proposal for a directive was drawn up. It is now possible to access content via digital platforms available on a wider scale (WAP, digital frequencies), and users can now benefit from ever-faster and cheaper means of access to the network (ADSL, CTV). Research has meanwhile resulted in new, consensual means of employing mass-consumption electronics in the service of making digital technologies more rightholder-friendly. There already exist, albeit still at an experimental stage, systems to block the use of illicitly copied DVDs or to limit the use of audio or video files illegally downloaded from the Internet. Technological progress has also brought about changes in social and professional habits, with communication becoming ever faster and more efficient, thanks to email, the World Wide Web and digital cellphones, by means of which a user can be easily reached anywhere and at any time. Content has accordingly become easier to access and circulates faster. It is, therefore, desirable that the directive be adopted as rapidly as possible, since if not it may become prematurely outdated.

7. The main provisions of the directive concern: the right of reproduction (Article 2); the right of communication to the public of works and the right of making other subject-matter available to the public (Article 3); the right of distribution (Article 4); exceptions and limitations (Article 5); private copying (Article 5(2)(b)); technological protection measures (Article 6); and obligations concerning rights-management information (Article 7).

8. Concerning the right of reproduction, the common position provides a legal framework for both authors and the holders of derived rights (performers, phonogram producers, broadcasting organisations). Also covered are the electronics industry, consumers, the academic world, people with disabilities, etc.

9. On the right of communication, the Council's text is acceptable and balanced. It confers on authors, performers, phonogram producers, producers of audiovisual works and broadcasting organisations the exclusive right to authorise or prohibit the communication of their works to the public by wire or wireless means in such a way as to allow the user access at the time and in the place of his choice.

10. With regard to the right of distribution, the Council's Article 4 guarantees this right to the rightholder within the EU. Recital 28 has been reworded in the common position so as to clarify the relationship between this directive and a number of concepts linked to the forms of distribution referred to in Council Directive 92/100/EEC of 19 November 1992, relating to rental rights, lending rights and various other rights related to intellectual property<sup>1</sup>.

11. The common position has extended the list of exceptions, from eight (as indicated in the original Commission proposal; one of them concerns copying for technical purposes) to 20. The mention of so many exceptions in this article may give rise to some perplexity as regards the achievement of the ultimate aim of the directive (to create a legal reference framework and to harmonise copyright and related rights). The list of exceptions is a closed one, and the exceptions are optional: the Member States are free as to their implementation. This provision has been criticised by those who would have preferred a mandatory list of exceptions, on the grounds of the directive's goal of harmonisation. It has to be recognised, indeed, that a mandatory list would prevent legislative variations and would work in the interest of greater harmonisation at European level. However, the fact is that as things stand significant legislative variations already exist in this area (for instance, the levy on private copying is applied on the basis of widely varying percentages between Member States, and does not exist at all in the UK); these variations reflect the need to respect the cultural and legal traditions of each Member State. The limitations set out in Article 5(3) should therefore remain optional if they are to be accepted. This is a necessary compromise between the need for harmonisation and the need to respect those national cultural and legal traditions. The principle of harmonisation, which implies the goal of achieving coherence between derived Community law and national law in order to guarantee the functioning of the internal market (see recital 32), is reflected here. Nonetheless, in the interests of reducing legislative and juridical variation, Member States are not free to add any new exceptions to those listed (see Article 5(3)(n)). The wording of the list of exceptions may be considered acceptable in general terms. However, it is necessary to amend Article 5(3)(j), concerning use for the purpose of advertising the public exhibition or sale of artistic works: it needs to be explicitly stated that there shall be an exclusion for any form of commercial use of reproductions of works

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<sup>1</sup> OJ L 346, 27.11.1992, p. 61



published in the form of information material, e.g. brochures.

12. Concerning private copying, the present wording adequately reflects the spirit of the exception set out in Article 5(2)(b), according to which copying is permitted if it is for the private use of a natural person and is for non-commercial ends. It is desirable to add an explicit provision to the effect that no commercial criterion should be involved, whether it is of a direct or indirect nature, in order to avoid interpretative uncertainties.

13. The fourth paragraph of Article 6(4) is not worded with sufficient clarity, and could lead to interpretative ambiguities and confusion. If this paragraph is to be fully understood, the article has to be read in conjunction with Article 3(2) and recital 25; the latter refers to the 'right to make available to the public (...) works (...) by way of interactive on-demand transmissions'. With respect to the actual scope of this provision, it is not clear whether it concerns on-demand services alone or all other on-line services as well. Interpretative ambiguity could be eliminated by adding a recital to the first part of the directive to provide a more clearly-argued explanation of the intention of the fourth paragraph of Article 6(4), that is, to facilitate the development of on-line services and models of economic relations limited to an on-demand interactive environment which are not covered by the first and second paragraphs of that same Article 6(4).

14. The information society is in constant evolution, and its further developments cannot be predicted at this stage. In order to ensure that the legislation can be adapted to the technological changes which will inevitably occur, the notification period should be reduced from 24 to 18 months, in line with the procedure followed in the electronic commerce directive. The legislation must absolutely be reviewed within two years, so that any changes to the text dictated by implementing experience can be made.

15. The copyright directive is concerned with goods of a particular type, that is, intellectual property goods distributed by means of a virtual system, as typified by the Internet. The specific nature of this field makes it even more necessary that the directive should usher in the legal certainty that is required if there is to be a secure environment for the development of on-line creation. It is to be hoped that this directive on copyright and related rights will be adopted as rapidly as possible, especially as this will enable the EU to ratify the WIPO treaties.