

**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 noted the European Commission proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the information society. It proposes to use this position paper to outline the present state of thinking on the subject within European industry.

All the sectors of activities which UNICE represents are or will be involved in the new digitalised world created by the information society. Their future development prospects in this area will be highly influenced by the legal framework put in place. The issues dealt with by the proposed Directive are of great importance to rightholders, users, service providers and equipment manufacturers. All these players have a specific contribution to make to development of the information society and neglecting any specific interests would run counter to establishment of the harmonious framework needed in the digitalised world.

In this position paper, UNICE voices general views on the proposed Directive with a view to contributing to building a framework for protection of copyright and related rights and the information society which will not hinder the development of any of its participants.

2. GENERAL REMARKS

UNICE sees the 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 many steps

in this process and UNICE therefore welcomes the Commission proposal for a Directive aimed at harmonising this subject within the European Union, thereby implementing the WIPO Copyright Treaties signed in 1996.

UNICE believes that the following basic principles should guide the contents of any legislation governing the information society:

- recognition of the importance of rapid ongoing technical developments in the area of electronic data transmission and information society in general;
- need for a flexible, legislative framework that should encourage and facilitate such new developments;
- need to protect authors and rightholders;
- need to recognise and protect the interests of service providers and equipment manufacturers as regards their investment in new technologies;
- need to recognise and protect reasonable interests of users;
- need to put in place a regulatory framework at international level.

Protection of intellectual property rights is a key issue in the role that the creative content and innovative features will play in the information society. In this context, adequate remuneration of rightholders is indispensable.

One of the most crucial problems in the area of private copying is that of copying from digital medium to digital medium. By doing so, an exact, original quality copy is created that is in fact a master copy, equal in quality to the original and that can in turn be copied or transmitted an infinite number of times, again without loss of quality. The threat to the normal exploitation of works for rightholders is evident. This was clearly recognised in the Directive concerning the Legal Protection of Computer Programs and is also acknowledged in recital 27 of the present proposal. This means that, in the digital environment, the current exceptions as exist under national copyright law need to be re-examined.

UNICE believes that the proposed Directive is a first step in the right direction for the required harmonised approach at EU level. Nevertheless, after a thorough assessment of the proposal, UNICE believes that the proposal has not fully reached its objective on a number of points, as explained below. The following comments are a yardstick to evaluate the current proposal in the light of the interests of all parties involved, which UNICE represents.

3. DETAILED COMMENTS

In UNICE's view, the most important issues raised by the proposed Directive are the following: the scope of rights (articles 2, 3, 4); the exceptions to the rights (article 5); the protection of technological measures (article 6); the issue of liability and the issue of levies.

3.1 Reproduction Right (Article 2)

1. UNICE supports a broad harmonised reproduction right, since this would resolve the current disparities among the EU Members States. In the digital environment it is essential 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 UNICE strongly believes adequate exceptions must be defined for certain special cases and when 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.
2. Nevertheless, UNICE believes that many provisions of this article are far from clear and need to be clarified.

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.

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 *a priori* near-on-demand services which broadcast on a point-to-multipoint basis.

In addition, considering the convergence of infrastructure and of contents in the information society, UNICE believes that there should be equal treatment in the digital environment regarding exclusive rights granted to content providers (e.g. publishers, software, phonographic or film producers) and article 3.2 should therefore respect this principle.

3. 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)

A General comments regarding Article 5

1. For UNICE, the fundamental requirement for all exceptions is adherence to the principles of Article 10 of the WIPO copyright Treaty and Article 16 of the WIPO performances and phonograms Treaty .

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

2. In UNICE's view, it is unacceptable that the proposal does not attempt to harmonise exceptions to the restricted acts when this has an impact on the Internal Market. This is a prerequisite for legal certainty for all interested parties.

In addition, it is not clear from the text of article 5(4) whether any such exceptions could apply without (any) remuneration for the author or rightholder, in other words whether and to what extent the exceptions that Member States would be allowed to provide for would be legal licences, or whether they should be exceptions for which rightholders are to be remunerated.

3. UNICE believes that any exceptions to the restricted acts should be made mandatory and apply on the same basis, in all EU Member States, at least for those exceptions which would have an impact on the functioning of the internal market. This should not, however, preclude future exceptions if technological developments so require, provided that any such adapted or new exceptions follow the same test as under this Directive and provided that they are introduced on a harmonised basis.
4. As regards exceptions, the fundamental question is what criteria will be used in order to judge whether specific exceptions to the restricted acts should be allowed.

B Specific comments on Article 5:

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 issues². 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.

As recital 23 of the proposal correctly sets out, the term "temporary" should be interpreted in this context and not in such a way as to allow users to make copies of a work for any period of time which would exceed the intended use of the work.

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 work³. In this context, the wording of recital 23, should be incorporated in the text of article 5.1. In any case, 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. As currently drafted, Article 5(2) does not harmonise the private copying exception, which implies that neither will harmonisation be achieved as regards existing levies on blank recording media and recording equipment. At present, the levels for 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.

² See comments under 3.4.

³ This issue has been adequately addressed by the definition of "reproduction" as set out in the EC Directives on the legal protection for computer programs and Databases should be made.

UNICE believes 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 right. Imposing levies on blank recording media and recording equipment is no longer the right solution for remunerating rightholders. Instead, such remuneration should be left to the marketplace, provided that the principal rights of rightholders are effectively protected.

4. 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 to introduce in their legislation a system of levies where none exists today.

5. 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 that rightholders should carry the burden of financing such social objectives.

3.4 Liability

1. UNICE has taken note that the Commission has announced that liability for activities in the network environment will be addressed in the context of a forthcoming directive covering, inter alia, electronic commerce. UNICE welcomes the intention to address the issue of liability horizontally. As a general remark, that Directive should avoid imposing undue burdens on intermediaries and service providers in relation to any liability for unauthorised transmission of protected matter over the network.

The liability issue is of utmost importance for companies providing equipment, network infrastructure and services for telecommunications and their role in the information society will be greatly influenced by the regime which will apply to them. They must be ensured that their responsibility will not be engaged unless they are responsible of copyright infringement, in the strict sense.

2. Many provisions of the proposed directive cannot be properly assessed, in particular articles 2 and 3, without knowing what will be the liability regime in the digital environment. UNICE therefore urges the Commission to present this proposal as soon as possible.

3.5 Technological Measures (Article 6)

1. This article is of utmost importance for equipment manufacturers and telecommunications service providers. If they are to survive such enterprises must be able to manufacture and provide state-of-the-art goods and services even after adaptation of the copyright rules, without undue unilateral restrictions. Nothing in this article shall require that the manufacturing of any device, component or service should respond to any particular technological measure.

UNICE supports the principle laid down by article 6 but believes that it should be made clearer that the key criterion that should determine liability is that of intent (whether the equipment has been “produced, designed or adapted to circumvent” for illegal purposes).

2. UNICE agrees that so-called general purpose devices should escape liability pursuant to this provision. By way of example, whereas these devices would not, *as such*, be illegal, the marketing of such devices with the specific and clear aim of promoting illegal copying by using those features of such devices as can be used for such copying (or other illegal acts) should be an illegal act in itself.
3. 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 6.1.

3.6 Obligations concerning rights management information (article 7)

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

3.7 Application over time (Article 9)

1. UNICE disagrees with the text of Article 9(3) and 9(4). These two subsections are contradictory and Article 9(4) is simply wrong. As regards Article 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.

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 supports the Commission’s view that harmonisation of national copyright legislation must be based on a high degree of protection. However, any harmonisation of copyright legislation that is designed to adapt it to the digital environment must be implemented in such a way as to take into

account participation of all parties involved, including users, in development of the 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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