SUMMARY OF PROCEEDINGS

from: Working Party on Intellectual Property (Copyright)
dated: 11 November 1991

No. prev. doc.: 9031/91 PI 65 CULTURE 54
No. Com prop.: 4175/91 PI 4 CULTURE 4 - COM(90) 586 final - SYN 319

Subject: Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright

1. At its meeting on 11 November 1991 the Working Party on Intellectual Property (Copyright) re-examined Articles 1 to 3 and 6 a of the proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright (4175/91 PI 4 CULTURE 4) on the basis of the consolidated text in 9031/91 PI 65 CULTURE 5 + ADD 1. Following this re-examination, the Presidency has issued a revised consolidated text in 9031/1/91 PI 65 CULTURE 54 REV 1.

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1 The Greek and Luxembourg delegations were not represented at this meeting.
2 The summary of the Working Party's proceedings concerning the proposal for a Council Decision concerning the accession of the Member States to the Berne Convention (Paris Act) and the Rome Convention is contained in 9906/91 PI 72 CULTURE 65.
Chapter I

2. The Belgian, Danish, Spanish, French, Irish, Italian and Portuguese delegations reiterated their reservations on the inclusion of lending in the proposed Directive.

3. The German and Netherlands delegations reiterated their reservations on the exclusive nature of the rental and lending right; these delegations would prefer a remuneration right.

Article 1(2)

4. The Working Party preferred the second variant to the first variant.

5. Several delegations expressed dissatisfaction with the terms "for direct or indirect economic advantage". The Danish and United Kingdom delegations in particular feared that where public libraries made a charge of any kind in connection with lending books, their activities would be construed as being for indirect economic advantage, and therefore falling within the definition of rental.

Following suggestions by the United Kingdom delegation that the main criterion for rental should be the commercial nature of the establishment concerned, and by the Portuguese delegation that the purpose of the act should be taken into consideration, the Commission representative suggested the wording "for direct or indirect commercial purposes".

6. The Working Party considered that the making available for reference use was not relevant in relation to rental and should therefore be deleted from paragraph 2.

7. The Danish delegation considered that the making available for public performance should not be excluded, and that therefore the last sentence of paragraph 2 should be deleted.
The United Kingdom delegation considered that the exclusion of the making available for public performance should be limited to the making available of films for cinematic exhibition, as this was the normal means of film distribution. The German delegation questioned whether, if this limitation were to be made, the making available for a broadcast of a work or other subject-matter referred to in Article 2(1) could be considered as rental. The Commission representative pointed out that the terms "making available for use" were intended to refer to use by the end user, and that therefore the cases referred to by the United Kingdom and German delegations would not fall within the definition of rental; he suggested that this point be clarified in a recital.

Article 1(3)

8. The United Kingdom delegation suggested amending the term "establishments accessible to the public" to read "establishments accessible to the general public". The Commission representative was not in favour of this suggestion, as he considered that Member States would be free to define this term in their national law.

9. The Commission representative expressed a scrutiny reservation on the exclusion of making available for reference use from the definition of lending, as he feared that reference use might allow sophisticated forms of piracy. The Danish, German, Netherlands and United Kingdom delegations were in favour of keeping this exclusion.

3 It was noted that in the expression "making available for use", the element "for use" was not reflected in the French language version of either the Commission's proposal or the consolidated text. The French delegation had suggested the wording "making available to the public for private use" ("mise à disposition du public pour un usage privé").
Article 2(1)

10. The United Kingdom delegation, referring to the discussion which had taken place at the Working Party's previous meeting in respect of the corresponding provision of Article 6 (see 8936/91, point 15), withdrew its provisional reservation on the fourth indent of Article 2(1) and on the corresponding provisions of other Articles, on the understanding that these provisions would not prevent the United Kingdom from affording copyright protection to producers of the first fixations of cinematographic works.

The Danish, Irish and Netherlands delegations maintained their provisional reservations.

11. In this connection, the United Kingdom delegation asked those delegations with experience of a rental right for authors and performers to provide information on how such a right was exercised in practice.

It also asked the Commission representative to consider the possibility of specifying in the Directive that Member States might provide for the legal presumption of assignment of rental rights by authors and performers to film producers when they assign their reproduction rights and that Member States might provide that a rental right might be exercised only collectively in respect of some or all of the subject matters mentioned in Article 2(1).

The Commission representative indicated that such possibilities could be examined in the light of the European Parliament's opinion once it was available.

12. The French delegation reiterated its request that a specific reference to videograms be included in the fourth indent of Article 2(1) (see 8936/91 point 14).
Article 2(2)

13. The Danish delegation expressed a reservation on this paragraph, as it considered that literary works, photographic works and works of art should be excluded from the scope of the Directive.


15. The Spanish delegation expressed a provisional reservation on the exclusion of works of applied art from the scope of the Directive.

16. The French delegation considered that in addition to buildings and works of applied art, plastic art works should be excluded from the scope of the Directive.

Article 2(2a)

17. The Working Party agreed to reconsider the drafting of this paragraph.

Article 2a

18. Article 2a did not give rise to any observations.

Article 3

19. The Danish, Irish and United Kingdom delegations maintained their provisional reservation on Article 3; the French delegation also expressed a provisional reservation.

20. The French and United Kingdom delegations in particular considered that this provision would disturb unnecessarily the present system of contracts between producers on the one hand and authors and performers on the other hand.
The United Kingdom delegation also considered that the present wording implied that rental income would be the criterion for determining the adequacy of the part to which each rightholder was entitled, and felt that this was not compatible with lump-sum payments to performers by producers. This delegation also doubted whether there were any barriers to the free movement of goods or services which this provision would remove.

The French delegation also questioned whether the present text determined whether performers and authors would be paid before or after producers had recouped their investment. This delegation also considered that this provision would put Community film producers at a disadvantage in relation to United States film producers, since many films rented in the Community were of United States origin and since the United States did not recognize neighbouring rights.

The Commission representative explained that the intention was that each rightholder should be entitled to an adequate part of the remuneration to be paid for the authorization to rent out or lend the recording, leaving open whether this part was to be a fixed sum, a proportion of that remuneration, or a combination of the two. Nor was it the intention of this provision to determine whether the adequate part should be paid to authors and performers before or after producers had recouped their investment. Moreover, Community film producers would not be placed at a disadvantage in relation to United States film producers, as the law of the State in which the film was exploited would apply.

21. The Italian delegation considered that this provision could not apply in respect of lending, as it considered that there would be no remuneration in respect of lending.
22. The Italian delegation also expressed a reservation on the prohibition on transferring the right to obtain an adequate part of the remuneration; in its view, an absolute prohibition was too strict.

23. In reply to a question by the Netherlands delegation concerning the relationship between Articles 3 and 4, the Commission representative explained that those Member States which opted for a derogation under Article 4 would be free to choose whether or not to apply Article 3 under that derogation.

Article 6a (9031/91 ADD 1)

24. The Commission representative expressed a reservation on the terms "as set out in Article 5(2)" in paragraphs 1 and 3, since the definition of broadcasting in Article 5(2) covered not only wireless broadcasting but also cable transmission, whereas the Commission representative considered that the exclusive rights provided for in Article 6a(1) and (3) should apply to wireless broadcasting but not to cable transmission. He therefore suggested that these terms be replaced by the terms "by wireless means".

The Presidency explained that it had deliberately drafted Article 6a very broadly, as it was not certain exactly what had been intended by those delegations which had requested such a provision. The Presidency noted the reservation expressed by the Commission representative and invited delegations to consider this new Article for the Working Party's next meeting.