NOTE

from: French delegation
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to: Working Party on Intellectual Property (Copyright)

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Subject: Proposal for a Directive on rental right

The French delegation wishes to submit to the Working Party on Intellectual Property its comments on some aspects of the proposal for a Directive on rental right, lending right, and on certain rights related to copyright. It wishes to draw attention to the specific effects of applying the Directive to the audiovisual and book industries and the plastic arts.
1. The difficult situation in the European cinema industry, which is subsidized in almost all Community countries at a level of between 20 and 80% by the State and the regions, makes it necessary to examine very closely the provisions of the proposal for a Directive, particularly as the Bureau européen du cinéma et de l'audiovisuel (European Cinema and Audiovisual Bureau), which includes all European broadcasters, producers and distributors, has come out strongly against several provisions of the proposal for a Directive.

2. As regards books, the proposals for improving the protection of authors cannot be appraised without being set in the context of the various cultural and economic aspects of the book industry.

The links between the exercise of copyright, and more particularly lending right, the medium through which it is exercised and the rules governing the production and distribution of books cannot be altered in this particularly sensitive area of activity without full and careful consideration. The development of the book industry and public reading depends in particular on a balance between networks of good bookshops and networks of private and public libraries each of which has a specific role to play in supporting teaching, research and the dissemination of national cultures.

3. The propagation of artistic works demands genuine protection for the artists, whose producers must find distribution outlets which will ensure their promotion and sale to a specific clientele on an art market the fluctuations of which are particularly uncertain. Here again it is important to avoid confusion between the work and the rights attaching to that medium, which are different types of rights.
The aim of this note is therefore to put forward some proposals for amendments designed to prevent application of the Directive having deleterious effects on the economy of production throughout Community countries and on the dissemination of these cultural products.

ARTICLE 1

In the first place, the French delegation reaffirms its desire to have the provisions relating to lending kept separate.

This is a method of distribution which, on the ground of its effects on intra-Community trade and the operation of the single market, would not seem to require a single set of rules which did not take into account the particular nature of products and their very close links with a cultural development policy.

As regards the book industry, the Directive proposes to harmonize the lending and rental of works and periodicals, mainly on the basis of copyright, although this would not constitute a harmonized legal basis.

The provisions relating to lending will also pose a major problem for public educational and research libraries and municipal libraries to the extent that the financial outlay required of them is likely to militate against the purchase of difficult, less requested works or even the purchase of copies of a work at a time when it is clear that the development of networks of public libraries was having a positive effect on the volume of bookshop purchases.

As regards the plastic arts, the circulation of works in the form of loans or rentals is particularly important in the process leading up to the sale of widely differing types of products, and the balance between purchase, lending and rental is closely related to the nature of the work, its intended audience and the mobility of the clientele.
In this sector, the role of public or private non-profit-making bodies is particularly important, in particular, to obviate the harmful effects of passing fashion or to ensure that young artists have an opportunity to exhibit their work.

Furthermore, as regards, rental right, the French delegation, which supports the second version of this Article, wishes it to be stated, in the interests of greater clarity, that rental implies making available to the public for private use. The main aim of this clarification is to avoid "pay per view", i.e. television broadcasting of a work chosen and paid for by the spectator on a unit basis, being treated as rental.

ARTICLE 2: Rightholders and Subject Matter of Rental and Lending Right

Article 2 lists the holders of the exclusive rental right. This right is granted simultaneously to the author, the performing artist, the phonogram producer and the producer of videograms.

The French delegation wishes to draw the Working Party's attention to the special situation of cinematographic and audiovisual works.

The average cost of a co-production in this sector nowadays amounts to ECU 3 to 4 million. It is the producer of the work alone who bears this financial risk, which is becoming more and more difficult to cover in view of the almost total disappearance of European films from the cinema screens of the rest of the world. Because of the collapse of the "cinema" market, European production now only survives commercially thanks to the emergence of the new markets represented by broadcasting and, in particular, video.
This being the case, the producer of the work can only contemplate the considerable investment necessary if he is at least certain of being able to control all the various modes of commercial exploitation of the work (cinema, pay television, video, land-based and satellite television), through the assignment of rights to him by the performing artists who are paid for their performance on the basis of a contract and who do not take upon themselves the financial risk of the production.

For that reason, the French delegation:

(a) is able to accept Article 2(1) as it stands, including the reference to the producer, provided a recital is introduced enabling the producer to be defined as the person who takes the initiative and the responsibility for the work;

(b) can also accept the current wording of paragraph 2a, provided an addition is made at the end of the paragraph stating that these rights "may also, in the case of an audiovisual work, be presumed to be assigned";

(c) feels that, to ensure that the assignment of the rental right by the performing artist to the producer is also covered, the following additional paragraph is essential:

"In the case of the production of audiovisual and cinematographic works, the signing of the contract concluded between the producer and the performing artist shall be equivalent to authorization to rent out the fixation of the performing artist's performance insofar as the contract provides for specific remuneration in accordance with the conditions laid down in Article 2."

Such a provision should make it possible to guarantee the existence of a contract for the artist, while enabling the producer to exploit the work normally.

(d) considers it preferable for Article 2(2) to be extended to all works of art.
ARTICLE 3: Inalienable right to remuneration

The system introduced by Article 3 overturns the current economic structure of cinematographic audiovisual production and broadcasting throughout Europe.

In fact, the right to remuneration, which is not assigned to the producer because it is "inalienable", implies the collection of additional remuneration for performing artists at the final rental stage, i.e., from the video clubs through societies for the collective administration of performing artists' rights. Logically, the author and the producer should also receive additional remuneration at this stage through collective administration societies.

The major difficulty of the system is that such remuneration is guaranteed from the gross revenue of the video club, i.e., without taking into account the amortization either of the film itself or of the video cassette (production and promotion costs for which may be assessed variously at between FF 0.5 million and FF 5 million). As performing artists have already been paid for their performances, payment of additional remuneration before the costs of producing and promoting the product have even begun to be paid off, is contrary to economic logic.

More fundamentally, the French delegation questions the need for such detailed harmonization by the Directive of existing contractual practices in Europe. The aim in view is to guarantee the performing artist specific remuneration for the video and the French delegation fully supports this. However, the current wording of Article 3 lays down a single, standard method for collecting remuneration throughout Europe, which is unnecessary and probably harmful.
It is for each Member State to define the system suited to its specific national situation.

The French delegation therefore proposes the following wording for Article 3(2):

"Where authorization to rent or lend a sound recording or visual recording, whether or not accompanied by sound, has been given, each of the rightholders set out in Article 2(1) shall retain the right to obtain an adequate part of the remuneration due for the rental. This right to obtain an adequate part of the remuneration cannot be waived."

Moreover, Article 3 should be entitled: "Right to remuneration."

The proposed wording guarantees the right to remuneration and ensures contractual negotiation without entering into the rules on contracts and the details of socio-economic relations, which should be a matter for consultation between the professionals concerned. It also avoids the need to pay additional remuneration before the cassette or the work have even begun to be paid for.

ARTICLE 4: Derogation from exclusive lending right

The French delegation reiterates its opposition to the inclusion of lending in the proposal for a Directive.

If the majority of Member States were in favour of continuing to include lending, it would seem essential to maintain the fundamental principle of copyright, the exclusive right to authorize or prohibit, which is the only effective means of combating piracy. Moreover, this legal basis is widely accepted in the Member States and is not likely to interfere with the rights attached to the work's medium.
In addition, the twofold basis of lending right within the EEC obscures equality of treatment between Community nationals since different bases for negotiating remuneration will be authorized.

In particular, the derogation cannot cover audiovisual works, books and the plastic arts in any one State.

The derogation for audiovisual works is particularly dangerous, in view of the considerable risk which private copies represent for these works.

The French delegation therefore enters a reservation on this Article and proposes that it be replaced by the following:

"Member States may provide for rightholders to grant special financial conditions, for cultural reasons, to certain establishments of general interest."

The proposed amendment makes it possible both to guarantee special lower rates for libraries or establishments of cultural interest and to preserve the exclusive rights of rightholders.

ARTICLE 7: Distribution Right

The French delegation draws the Working Party's attention to paragraph 2 on the exhaustion of the right by sale. This Article, which should be separate, will make it extremely difficult to sell cinematographic works on markets linguistically related to their country of origin.
In fact, in view of the increasingly hazardous nature of cinema distribution (or, more accurately, its unprofitability in most cases), the importer simultaneously acquires all cinema, television and video rights.

Making it impossible to assign the video right to the importer could greatly hamper the distribution in Europe of less commercial films and Article 7a, which repeats the case law of the Court of Justice, does not resolve this difficulty.

It would seem preferable to leave it to the Court of Justice to rule on this problem (which it has not yet considered as regards video cassettes), avoiding the need for the Directive to settle the matter in a way contrary to the interests of the parties.

ARTICLE 8: Limitation of rights related to copyright

As stated above, the existence of rights related to copyright for performing artists must not constitute an obstacle to commercial exploitation of a work, which is necessarily entrusted to the producer who has taken the initiative and the financial risk with the work.

The current wording of Article 8(2), which authorizes only the "same kinds" of limitations on the exclusive rights of performing artists as those granted in relation to copyright, does not guarantee the minimum legal and financial security of exploitation of the work. Limitations on the exclusive rights of performing artists are not in fact necessarily the same as those relating to authors.
The French delegation therefore proposes that the following paragraph 4 be added:

"4. In the case of a contract for audiovisual production, Member States may provide that signature of the contract is equivalent to authorization to communicate the work to the public."

ARTICLE 11: Application in Time

The renegotiation of all contracts currently in force is obviously an unrealistic option, particularly in the case of the thousands of works currently being exploited.

The French delegation therefore proposes that it be stipulated that contracts in force when the Directive is implemented shall be presumed to comply with its provisions. Article 11(1) should be amended accordingly.

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The French delegation hopes that the Working Party on Intellectual Property will be able to take all these amendments into account, since it believes that as it now stands the Directive could very seriously disrupt the already extremely fragile economics of image production in the Community.