**I**

**REPORT**

on the Commission proposal for a Council directive on rental right, lending right, and on certain rights related to copyright

(COM(90) 0586 final - C3-0068/91 - SYN 319 final)

Rapporteur: Mr Georgios ANASTASSOPOULOS
CONTENTS

Procedural page .................................................. 3

A. Amendments to the Commission proposal .................. 4
   DRAFT LEGISLATIVE RESOLUTION ........................... 14

B. EXPLANATORY STATEMENT ....................................
   - Opinion of the Committee on Youth, Culture, Education, the Media
     and Sport ..................................................... 33
   - Opinion of the Committee on Economic and Monetary Affairs and
     Industrial Policy ............................................. 41
By letter of 6 February 1991 the Council consulted the European Parliament, pursuant to Articles 57(2), 66 and 100A of the EEC Treaty, on the Commission proposal for a Council directive on rental right, lending right and on certain rights related to copyright.

At the sitting of 22 February 1991 the President of Parliament announced that he had referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Youth, Culture, Education, the Media and Sport for their opinions.

At its meeting of 27 February 1991 the Committee on Legal Affairs and Citizens' Rights appointed Mr G. ANASTASSOPOULOS rapporteur.

At its meeting of 29, 30 and 31 May 1991 the committee held an initial exchange of views and at its meeting of 25 and 26 September 1991 it considered the Commission's proposal on the basis of the rapporteur's working document. At the latter meeting an exchange of views was also held with experts in the field.

At its meetings of 26 and 27 November 1991 and 20, 21 and 22 January 1992 the Committee on Legal Affairs and Citizens' Rights considered the draft report. At the latter meeting it adopted the draft legislative resolution contained in the report by 22 votes to 1.

The following took part in the vote: Stauffenberg, chairman; Vayssade, Rothley, Casini, vice-chairmen; Anastassopoulos, rapporteur; Bandres Molet, Blak (for Cot), Bontempi, Bru Puron, Defraigne, Falconer, Fontaine, García Amigo, Grund, Hoon, Janssen van Raay, Medina Ortega, Oddy, Salema O Martins, Simpson, van den Brink (for Ferrara), Wettig (for Ferri) and Zavvos.

The opinions of the Committee on Youth, Culture, Education, the Media and Sport and the Committee on Economic and Monetary Affairs and Industrial Policy are annexed to the report.

The report was tabled on 29 January 1992.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.
Commission proposal for a Council directive on rental right, lending right, and on certain rights related to copyright

Commission text

(Amendment No. 1)

Proposal for a Council directive on rental right, lending right, and on certain rights related to copyright.

Amendments

Proposal for a Council directive on rental right, lending right in respect of intellectual property, and on certain rights related to copyright.

(Amendment No. 2)

Third recital

Whereas such differences should therefore be eliminated by 31 December 1992 in accordance with the objective of introducing an area without internal frontiers, as set out in Article 8A of the Treaty;

(Amendment No. 3)

Seventh recital

Whereas such differences should therefore be eliminated by 31 December 1992 in accordance with the objective of introducing an area without internal frontiers, as set out in Article 8A of the Treaty so as to establish, pursuant to Article 3(f) of the EEC Treaty, a scheme for protecting competition within the common market from distortions;

Whereas the creative and artistic work of authors and performing artists necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky and the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection;

Whereas the creative and artistic work of authors and performing artists necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky and the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned.

(Amendment No. 4)

Tenth recital

Whereas, to the extent that these activities constitute services, their provision must equally be facilitated by the establishment in the Community of a uniform legal framework.

(Amendment No. 5)

Fifteenth recital

Whereas the Community's legal framework on the rental and lending right and on certain rights related to copyright can be limited to establishing that certain Member States provide rights with respect to rental and lending for certain groups of right owners and further to establishing the exclusive rights of fixation, reproduction and distribution for certain groups of right owners in the field of related rights protection;
(Amendment No. 6)
Fifteenth recital (new)

Whereas it is necessary clearly to define the groups of rightholders covered by this Directive;

(Amendment No. 7)
Seventeenth recital (new)

Whereas the harmonized legal protection resulting from the implementation of the provisions of this directive will create a new situation in regard to Member States' relations with third countries, taking into account that the former have incorporated into their legislation the fundamental principle enshrined in international treaties of equal treatment of foreign authors and their works on a par with nationals of the country where the relevant protection is required; whereas therefore it will be necessary to step up negotiations and consultations with third countries - within the relevant international organizations - with a view to securing reciprocal legal protection.
For the purposes of this Directive, 'rental' means making available for use, for a limited period of time and for profit-making purposes, without prejudice to paragraph 3.

For the purposes of this Directive, 'rental' means making available for use, for a limited period of time and for profit-making purposes, without prejudice to paragraph 3. 'Rental' within the meaning of this paragraph does not cover making available for the purpose of 'public presentation and performance'.

For the purposes of this Directive, 'lending' means making available for use, for a limited period of time, and not for direct profit-making purposes, if it is made through institutions which are accessible to the public, such as public libraries, research libraries, specialized libraries, school libraries, church libraries, collections of new media or of works of visual art, libraries organized or sponsored by public or private companies, and other collections of subject matter as set out in Article 2(1).

For the purposes of this directive, 'lending' means making available for use, for a limited period of time, and not for (one word deleted) profit-making purposes, if it is made through institutions which are accessible to the public, such as public libraries, research libraries, specialized libraries, school libraries, church libraries, collections of new media or of works of visual art, libraries organized or sponsored by public or private companies, and other collections of subject matter as set out in Article 2(1). 'Lending' within the meaning of this paragraph does not cover making available for 'public presentation and performance'.
Commission text

(Amendment No. 10)
Article 1(4)

The rights referred to in paragraph 1 shall not be affected by any sale, or other act of distribution, of originals and copies of works and other subject matter, as set out in Article 2(1).

Amendments

The rights referred to in paragraph 1 shall not be extinguished by any sale, or other act of distribution, of originals and copies of works and other subject matter, as set out in Article 2(1).

(Amendment No. 11)
Article 2(1)

The right to authorize or prohibit the rental and lending shall belong

- to the author in respect of the original and copies of his work,

- to the performing artist in respect of fixations of his performance,

- to the phonogram producer in respect of his phonograms, and

- to the producer of the first fixations of cinematographic works and moving images in respect of his visual recordings, and visual and sound recordings.

(Changed)

(Changed)

(Changed)

(Changed)
The provisions of this directive shall be without prejudice to any provisions of the Council Directive on the legal protection of computer programmes.


A work contract between performing artists and the producer of a cinematographic work must be concluded in writing. When the performing artist signs a work contract with the producer of a cinematographic work, he shall authorize the transfer of his rental and lending right, without prejudice to the provisions of Article 3 and subject to contractual conditions to the contrary.

In the case of composite and collective or collaborative works created principally for public presentation and performance, any contract for services concluded between the performing artists, on the one hand and the primary or secondary copyright holder or, in respect of a cinematographic or audiovisual work, the producer thereof, on the other hand, shall provide for the granting to the latter of rental and lending licences in respect of the fixations of the works concerned, without prejudice to the provisions of Article 3 of this directive.
Commission text

(Amendment No. 14)

Article 3

If the rightholders authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the rightholders set out in Article 2(1) shall retain the right to obtain an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licences. This right to obtain an adequate part of the payment cannot be waived, but its administration may be assigned.

Amendments

If the rightholders set out in Article 2(1), authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then the said rightholders shall retain the right to enjoy an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licences. The adequate part shall be duly proportional to the contribution to the work and its exploitation. This right to enjoy an adequate part of the payment cannot be waived, but its administration may be assigned, in particular to relevant collective organizations.

(Amendment No. 15)

New paragraph 2

As regards composite and collective or collaborative works principally created for public presentation and performance which for the most part involve particularly complex contractual relations, the Member States shall take appropriate measures under their national laws to ensure that implementation of the provisions of paragraph 1 facilitates or, where applicable, does not impede due promotion and maximum exploitation of these works at national and European level.
Member States may, for cultural or other reasons, derogate from the copyright based exclusive lending right referred to in Article 1(1) for one or several categories of objects, provided that:

- at least authors obtain an equitable remuneration through administering bodies for such lending; and
- such deregulation measures comply with Community law, in particular Article 7 of the EEC Treaty.

Member States may, for clearly defined cultural regions and social reasons, derogate from the copyright based exclusive lending right referred to in Article 1(1) with regard to books, periodicals and educational films provided that:

(Rest unchanged)

Protection of copyright related rights, in respect of which provisions are laid down elsewhere in this directive, shall not prejudice protection of the copyright as such.
(Amendment No. 18)
Article 4b (new)

No changes, cuts or additions may be made to a work by the letter, the hirer, the lender or borrower:

(Amendment No. 19)
Article 6

Member States shall provide the right to authorize the direct or indirect reproduction:

- for performing artists, of fixations of their performances,

- for phonogram producers, of their phonograms,

- for producers of the first fixations of cinematographic works or moving images, of their visual recordings, and visual and sound recordings,

- for broadcasting organizations, for fixations of their broadcasts.

Member States shall provide the right to authorize the direct or indirect reproduction:

- for performing artists, of fixations of their performances, without prejudice to Article 2(3a) above which applies accordingly in this case.

(Unchanged)

(Unchanged)

(Unchanged)
Article 6a (new)

(1) The Member States shall grant performing artists the exclusive right to authorize or prohibit the broadcasting and communication to the public of their performances, unless the performance is itself already a broadcast performance or is made from a fixation.

(2) The Member States shall grant performing artists and phonogram producers the right to payment in order to ensure that a single and fair amount is paid to both by users when a phonogram published for commercial purposes or a reproduction of this phonogram, is used in a broadcast (6 words deleted) or any communication to the public. In the absence of agreement between the performing artists and the phonogram producers, the Member States may set the conditions determining how the payment is to be shared between them.

(3) The Member states shall grant broadcasting companies the exclusive right to authorize or prohibit the broadcasting of their programmes, when this takes place on premises to which the public may be admitted on payment of an entrance fee.

(4) The provisions of this Article shall be without prejudice to the provisions of Council Directive .../EEC on the coordination of certain rules on copyright and related rights applicable to satellite broadcasting and retransmission by cable.
Article 7

1. Member States shall provide:
   - for performing artists, of fixations of their performances,
   - for phonogram producers, of their phonograms,
   - for producers of the first fixations of cinematographic works or moving images, of their visual recordings, and visual and sound recordings,
   - for broadcasting organizations, for fixations of their broadcasts.

2. The exclusive right to make available, for an unlimited period of time, their respective subject matter to the public by sale or otherwise, without prejudice to paragraph 2. If a subject matter referred to in paragraph 1 has been put into circulation within the Community by the right owner or with his consent, then its import into another Member State may not be prohibited by virtue of the right referred to in paragraph 1.

1. As regards the rightholders referred to in Article 6 and on the same conditions as those laid down in the said Article in respect of direct or indirect reproduction, the Member States shall provide the exclusive right to make available to the public, for an unlimited period of time, the respective subject matter of the said rightholders (four words deleted), without prejudice to paragraph 2.
Article 11

The provisions of this Directive shall apply also in respect of all copyright works, performances, phonograms, broadcasts and first fixations of cinematographic works and moving images referred to in this directive which are, on 1 January 1993, still protected by the national legislation in the field of authors' rights and related rights.

The provisions of this Directive shall apply to all copyright works, performances, phonograms, broadcasts and first fixations of cinematographic works and moving images referred to in this directive provided they are subject to contracts settled or acts of production and publication performed after 1 January 1993.
DRAFT LEGISLATIVE RESOLUTION

(Cooperation procedure: first reading)

embodying the opinion of the European Parliament
on the Commission proposal for a Council Directive on rental right, lending right, and on certain rights relating to copyright

The European Parliament,

- having regard to the Commission proposal to the Council (COM(90) 0586 final
  - SYN 319)¹,

- having been consulted by the Council pursuant to Articles 57(2), 66 and 100A
  of the EEC Treaty (C3-0068/91),

- having regard to the report of the Committee on Legal Affairs and Citizen's
  Rights and the opinions of the Committee on Youth, Culture, Education, the
  Media and Sport and the Committee on Economic and Monetary Affairs and
  Industrial Policy (A3-0049/90),

- having regard to the Commission position on the amendments adopted by Parliament,

1. Approves the Commission proposal subject to Parliament's amendments and in accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;

3. Calls for the conciliation procedure to be opened if the Council should intend to depart from the text approved by Parliament;

4. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;

5. Calls on the Council to incorporate Parliament's amendments in the common position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;

6. Instructs its President to forward this opinion to the Council and Commission.


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B.

EXPLANATORY STATEMENT

I. INTRODUCTION

1. From its very inception, it has been felt that intellectual and industrial property rights did not fall within the scope of the Treaty establishing the European Economic Community. This view was based on the usual interpretation given to the provisions of Article 222 of the EEC Treaty ('this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership') and the reservation contained in Article 36 of the same Treaty regarding the implementation of the provisions of Articles 30 to 34 in respect of the protection of industrial and commercial property. The European Parliament was perhaps the first European Community institution to perceive the need for measures to harmonize national legislation as regards copyright. In its resolution of 13 May 1974\(^2\) it requested the Commission of the European Communities to propose measures for the harmonization of the national regulations on the protection of culture and on authors' rights and 'neighbouring rights'\(^3\).

2. The Commission produced a number of communications which dealt, inter alia, with the harmonization of authors' rights and neighbouring rights\(^4\). As part of its preparations for the adoption of the European Single Act, the Commission issued a White Paper on the completion of the internal market. The Commission stated its intention to work out draft solutions to particular problems arising in the field of authors' rights and neighbouring rights in relation to the internal market\(^5\). In particular, the Commission announced that it would propose to the Council 'specific measures to harmonize and improve protection in the Member States and to eliminate trade barriers in the field of authors' rights and neighbouring rights in the light of the negative impact which substantial differences in the laws of the Member States have on intra-Community trade'\(^6\).

The ultimate aim of these measures was to 'enable industry to treat the internal market as a single uniform field of activity'\(^7\). The Commission thus made clear its intention to insert its proposals in respect of the above sectors in its programme for the completion of the internal market before 31 December 1992.

3. The Green Paper on copyright on the challenge of technology\(^8\) constitutes a first step towards realizing the objectives set out in the White Paper. These contain concrete proposals for measures for the harmonization of laws in the field of certain questions of copyright which appeared to be particularly

\(^2\) OJ No. C 62, 30 May 1974
\(^3\) See COM(90) 586 final, Explanatory Memorandum, paragraph 1, p. 2
\(^4\) Ibid, footnote 2
\(^5\) See White Paper, COM(85) 310 final, paragraphs 145 to 149
\(^6\) COM(90) 586 final, Explanatory Memorandum, paragraph 42, p. 24
\(^7\) Ibidem
\(^8\) Green Paper on Copyright and the Challenge of Technology - copyright issues requiring immediate action. Communication from the Commission (COM(88) 172 final)
urgent. Among the main problems identified, the Commission numbered piracy (Chapter II), the distribution right, including its expiry, and the rental right (Chapter IV)\(^9\).

The comments received from interested circles on these issues indicated very widespread support for the Green Paper and the Commission was thus encouraged to broaden the scope of its inquiry. The recent Commission communication of 3 August 1989\(^1\) deals, for example, with the harmonization of the public lending right and of duration.

4. This is the framework adopted by the Commission for the proposal for a directive under discussion which refers to rental right, lending right and certain 'neighbouring rights' related to copyright\(^2\).

II. AIMS OF THE PROPOSED DIRECTIVE

5. The Commission clearly defines the purpose of the proposed directive in its Explanatory Memorandum: namely, to cope with 'the increasing, partially novel and partially illegal use of copyright works and of particular objects of neighbouring rights protection, such as phonograms, by granting a uniform and improved Community-wide legal protection'\(^3\).

6. The main thrust of the Commission's proposal is to protect European artistic creation and performances. It is estimated that copyright and neighbouring rights (the rights of artists and performers, disc producers and radio and television broadcasting companies) are worth between 150 and 250 billion ECU annually, i.e. between 3% and 5% of the GDP of the European Community (see BONTEMPI Report on the accession of the Member States to the Conventions of Berne and Rome – Doc. A3-0292/91). For these conventions see paragraph 13 et seq. in Chapter III below). This is why the Explanatory memorandum discusses copyright, noting in particular that:

'the aim of copyright and neighbouring rights protection is to grant, on the one hand, moral rights to authors and performing artists and, on the other hand, economic rights, in order to recompense authors and performing artists for their creative achievements, to let them participate economically in the subsequent exploitation of their works and performances and thereby to provide them with the financial basis for and the incentive to further creations'.\(^4\)

7. It follows that appropriate legal measures are necessary to protect these rights which – in the present case – means the establishment of the terms and conditions under which works of art may be rented on a commercial basis or lent. This is particularly necessary given the radical differences in national laws and practice in this area which, as the Commission states in its first recital, 'are sources of barriers to trade and distortions of competition which impede the proper functioning of the internal market'\(^5\).

\(^9\) See COM(90) 586 final, Explanatory Memorandum, paragraph 3, p. 3
\(^1\) Commission communication: 'Books and reading: A cultural challenge for Europe' (COM(89) 258 final
\(^2\) OJ No. C 53, 28 February 1991, p. 35
\(^3\) See COM(90) 586 final, paragraph 7, p. 4
\(^4\) Ibidem, pp. 4-5
\(^5\) See first recital of proposal for a directive, COM(90) 586 final, p. 59
8. Commercial rental, particularly of compact discs and video cassettes, has been increasing steadily in the Member States for several years. In particular, compact discs 'are rented mainly in order to make copies for personal use and therefore to avoid making a purchase'.

Given that the technical quality of a compact disc is not impaired even by its frequent use in connection with copying, this trend 'causes substantial losses which have, as a result, negative effects on authors and performing artists as well as on phonogram producers and thereby on the variety of supply of cultural goods and services'.

9. Lending, as opposed to rental, is basically non-commercial and takes place mainly in public libraries. This extends not only to books, but also increasingly to new media such as phonograms and videograms. The Commission points out that:

- authors are not duly compensated for the steady increase in lending by royalties and other benefits they receive,
- persons who borrow from public libraries are not necessarily compelled to buy the works they borrow so that sales fall correspondingly and the authors suffer financial loss.

10. Legal measures to protect authors in connection with commercial rental and lending is the subject of the provisions of the first chapter of the proposal for a directive (Articles 1 to 4).

11. Chapter II (Articles 5 to 8) deals with protection of 'neighbouring rights' and copyright. Its main purpose is the fight against so-called 'piracy' which means not only illegal reproduction and distribution, but also 'false' piracy, i.e. reproduction and distribution, which is done legally only because of the absence of any, or sufficient, protection in a given Member State.

It has been estimated that one in four phonograms on the world market over the last decade has been pirated or illegally distributed as a forged copy. It is also estimated that the gross value of illegally distributed phonograms amounted to approximately 1 billion ECU in 1989.

12. The situation is less confused as regards 'neighbouring rights'. As the Commission says 'the legal situation with respect to the reproduction right and the distribution right of authors is already largely comparable throughout the Member States'. For this reason 'Chapter II is restricted to the harmonization of the rights of neighbouring right owners, which means performing artists, phonogram producers, film producers, and broadcasting organizations'.

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1 COM(90) final, paragraph 8, p. 5
2 Ibidem, p. 7
3 See in this connection (COM(90) 586 final, paragraph 9, p. 6
4 According to the IFPI (International Federation of Phonographic Industry) speaking at the hearing organized by the Committee on Legal Affairs and Citizens' Rights on 26 September 1991.
5 Ibid, paragraph 10, p. 7
III. MAIN PROVISIONS OF THE PROPOSED DIRECTIVE AND CRITICAL APPRAISAL

13. Before proceeding with an analysis of the individual provisions of the proposal for a directive, we should point out that the area covered by the Commission’s proposal has already been the subject of two conventions which most Member States have signed. These are

- the Berne Convention (Act of Paris of 24 July 1971) on the Protection of Literary and Artistic Works, and

- the Rome Convention of 26 October 1961 on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (i.e. neighbouring rights).

In its recent proposal for a Council decision (COM(90) 582 final – SYN 318) the Commission called on the Member States to adhere as individual states to these two conventions1. If this decision is adopted, this will mean that the Member States will be unable to withdraw from either of these two conventions without prior consent from the Community. In this way the Berne and Rome Conventions will provide a minimum basis for Community action. Nevertheless, the Commission considers that these two Conventions do not provide an adequate basis for harmonizing the laws of the Member States in this area and intends substantially to extend this basis through the present Directive.

14. These two conventions contain provisions which establish the basic principle of equality of treatment for foreign authors or works who are protected by the conventions in question and nationals of the state for which protection is requested (‘National Treatment’). Article 5(1) of the Berne Convention states notably that ‘Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.’

The Rome Convention contains similar provisions (although they vary, of course, according to the object being protected (see the provisions of Articles 2, 4, 5 and 6). Your rapporteur considers that this is a particularly important point and must be taken into account when scrutinizing the provisions of the proposal for a directive.

A. Legal basis

15. The Commission bases its proposal on Articles 57(2), 66 and 100a of the EEC Treaty. As stated in the introduction2, it declared its intention to include the proposed measures for the protection of copyright in its programme for the completion of the internal market at a very early stage. This explains the choice of Article 100a as the legal basis: the differences in the legal protection in the Member States − mainly as regards the rental right but also the protection of neighbouring rights − adversely affect the

1 Belgium and Ireland have so far failed to sign the Berne Convention and Belgium, Greece, Holland, Portugal and Spain have so far failed to sign the Rome Convention
2 See paragraph 2 above
proper functioning of the internal market and create considerable distortions in competition.

16. It should be noted that in considering problems arising from the application of different laws in the Member State the European Court of Justice has based its judgments on Articles 30 to 36 of the EEC Treaty (elimination of quantitative restrictions between Member States) (see its judgment of 17 May 1988 in Case No. 158/86, Warner Brothers Incorporated and others v E. V. Christiansen; see also the judgment of 24 January 1989 in Case No. 341/87 in respect of EMI Electrola GmbH v Patricia Im & Exportverwaltungsges mbH and others). In the latter judgment the Court states quite specifically that Community law is characterized by the absence of harmonization or approximation of the laws on the protection of the property in literary and artistic works. The Commission has taken this quotation as a starting point, viewing it as a reminder of the need to harmonize national legislation and thus takes Article 100a of the EEC Treaty as its legal basis.

17. However, one might initially be inclined to doubt whether Article 100A provided a suitable legal basis given that paragraph 2 of this article provides that provisions concerning the rights and interests of employed persons shall be exempt from Article 100A (1). This applies particularly to performing artists, most of whom are employed persons when they contribute to the production of a composite or collective work, such as a work of the theatre or a cinematographic work. Your rapporteur does not accept this view: he considers it would only hold if the proposal for a directive were directly concerned with relationships between people contributing to the creation of an artistic work. This is not the case here since the proposal for a directive under discussion deals with the rights of various rightholders arising from the lending or rental of the fixations of their work, whether individual or collective. In other words, it focuses on the further exploitation of their work and in doing so, inevitably touches on relations between the various rightholders. According to the jurisprudence of the European Court of Justice the legal basis should be determined by the main subject of a legislative act. If secondary provisions were taken into account in choosing the legal basis this would create chaos and adversely affect legislation (see decision-taking procedure by the relevant Community institutions). In the present case it is clear that the harmonization sought by the proposal for a directive seeks primarily to ensure the smooth functioning of the internal market, as mentioned above. The ninth and tenth recitals in the proposal for a directive express the true purpose of this legislation when they state that 'these creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons'. Amendment No. 4 - which refers to the tenth recital - seeks merely fully to reintroduce this idea.

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1 See COM(90) 586 final, paragraph 43 (p. 24) and paragraph 45 (p. 27)
2 Ibid, paragraph 46, p. 28
3 Ibid
4 See in this connection two recent judgments handed down by the European Court of Justice which reach opposite conclusions as regards Article 100A of the EEC Treaty, but in both cases are based on the distinction between the principal and secondary subject of the legislation in question:- Judgment of 11.6.1991 in Bulletin 300/89, the Commission versus the Council - Judgment of 4.10.1991 in Bulletin 70/88 (POST CHERNOBYL), European Parliament versus Council.
B. Article 1 of the proposal for a directive

B1. The Commission proposal

18. This article provides that the rental and lending right shall be an exclusive right: this means that it shall be not merely a statutory right to remuneration for renting and lending, a right which enables the right owner 'to prohibit a third person from renting and lending, or to authorize rental or lending with or without payment'. The Commission considers that the establishment of an exclusive right will strengthen the position of the owner of the rental or lending right since it provides a bargaining position which is necessary to be able to stipulate adequate royalties during licensing negotiations in respect of the exploitation of literary or artistic works.

B2. Critical analysis

19. The significance of Article 1 becomes clear in the light of the provisions of Articles 2 and 3 concerning first owners and the rental and lending right. It should, however, be pointed out that introduction of the principle of the 'exclusive right' of the first owner will make it easier to establish both authors' rights and 'neighbouring rights'. This is because, as is generally known, under the legislation in force in the various Member States it is not easy to define these rights so as to determine the specific legal protection to be granted in each case. Even if practical difficulties cannot be eradicated where numerous owners are involved the 'exclusivity' of the rights of those deemed to be the first owners will now be clearly established. Amendment No. 17 which specifically deals with this matter—introducing a new Article 4a—merely highlights this idea and does not add anything to the provisions of Chapter 1 of the proposal for a directive (Articles 1 to 4). It merely follows the Rome Convention which contains a similar provision in Article 1.

20. We agree with the concepts of lending and rental proposed by the Commission. However, these concepts should not apply solely to private use since the Commission is drawing up a new proposal for a directive dealing specifically with copies for private use. On the other hand, and this is the point of Amendments No. 8 (on rental) and 9 (on lending), they are not appropriate in the case of fixation and presentation. Your rapporteur considers that this would be contrary to the Commission's intentions since the main aim of the Commission's proposal is to combat piracy arising from new forms of exploiting fixation of works covered by copyright. In other words, the two amendments proposed seek to prevent a private person organizing a public presentation or performance of a work which he had recorded through renting or lending.

21. Amendment No. 9 deals with the question of whether 'lending' covers making available for 'public' performances works which generate indirect profits. The Commission text suggests that this might be possible. However, this fails to consider the case of non-profit-making associations which lend books or fixations of various works to the public in return for payment. Lending in this case would not differ very much from rental and the relevant

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1 See COM(90) 586 final 'Second Part: Special provisions' remarks under Article 1 (p. 30).

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provisions in the proposal would be superfluous. For this reason your
rapporteur suggests that making available works 'on a non-profit-making basis'
should be classified as 'lending', as this will ensure a clear distinction
between the two concepts.

22. The last amendment regarding Article 1 refers to paragraph 4 and seeks to
make clearer the exclusive nature of the rights defined in paragraph 1. The
use of the technical term 'extinguished' is perhaps more suitable for this
purpose (see Amendment No. 10).

C. Article 2: First Owner and Subject Matter of Rental and Lending Right

C1. The Commission proposal

23. The provision provides various examples of 'owners' and 'subject matters'
of rental and lending right, without, however, providing a specific
definition of these terms. The Commission relies on those interpretations
given within the framework of the Berne and Rome Conventions. It is, however,
true that a specific definition of the terms employed would probably have
numerous adverse consequences, given the specialized nature of many areas of
copyright where it is particularly difficult to define who is the real 'first
owner' in respect of the subject matter of protection. The example which best
highlights the difficulties involved is the film industry where the many
natural persons who contribute to the production of a film (film directors,
script writers, actors) can claim to be the 'authors of the film'.

C3. Critical analysis

24. Despite the problems which are likely to occur - as a result of the
different interpretations given by each Member State to the concept of first
owner in the proposal for a directive - the Commission has correctly
identified the categories of those persons recognized as having exclusive
rental and lending rights. There is no room for misunderstanding here
especially in the case of works by one person which, by definition, can only
be the subject of one claim. Problems only arise in the case of composite
works by more than one person who, according to the provisions of Article 2(1)
are involved in the creation of these works as exclusive rightholders.

25. The problem is not a new one, nor is it made more complex by the present
proposal. A relatively representative category of composite works, namely
cinematographic works has already been dealt with to some extent under the
Berne Convention. The addition of a new provision - Article 14(a) - added
when it was revised in Stockholm in 1967 (and maintained when further revised
in Paris in 1971) recognizes in principle the competence of national
legislation to determine the owners of copyright in respect of
cinematographic works. Furthermore - and this is the essential point - it
provides that if participants in the creation of a work are recognized as
owners, only the principal persons involved (and specific reference is made to
script writers, composers and the principal authors of a work, i.e. directors)
shall have the exclusive copyright (see Article 14(a) (3)), while all the
rest - unless there is an agreement to the contrary - may not oppose the
reproduction, the distribution, public presentation and performance, radio
broadcasts, the addition of subtitles and the translation of the texts of a
film (see Article, paragraph 2b).
26. These provisions are far from ideal. In fact they pose a number of problems as regards interpretation and implementation. However, the basic approach is correct: a composite production – in this case a cinematographic work has its own particular characteristics and no legislation which fails to make allowances for these can prove viable. The problem is a practical one: what scope is there for creating and exploiting a composite work where the majority of the first owners decide to exercise their exclusive right to approve or prohibit lending and rental granted them under Articles 1 and 2 of the proposal for a decision under discussion? The answer is that an abuse of these exclusive rights can create a number of obstacles. The legislations of all the Member States contain provisions banning the exercise of this right if it is obviously exercised in bad faith and serves no useful social or economic purpose. However, this must be considered a last resort and your rapporteur considers that it would be advantageous immediately to establish the limits within which the exercise of the exclusive rental or lending rights is compatible with the social and economic purpose of this and other exclusive rights which happen to apply in each specific case.

27. Amendments No. 11 and 13 which are closely interrelated have been tabled with this in mind; they concern performing artists in respect of fixations of their performances as first owners (Article 2(a)(3)). The contractual ties between performing artists and the authors or producers of a collective, composite or collaborative work constitute a binding element in respect of the performance and further exploitation of the work in question. Contractual ties therefore exist not only in respect of the authors and producers but also in respect of the other performing artists who contribute to the creation of the work. Your rapporteur considers that his amendments adequately take into account the interests of most of the first owners who contribute to the creation of a composite or collective work. Amendment No. 13, as adopted by the Legal Affairs Committee, specifically states that the producer (of a cinematographic work) shall provide for the granting to (the copyright holder) of rental and lending licences in respect of the fixation of the works concerned 'without prejudice to the provisions of Article 3 and subject to contractual provisions to the contrary'. It should also be noted that Amendment No. 5 of the opinion by the Committee on Youth, Culture, Education, the Media and Sport (see PE 151.043/fin, draftsman: Mr L. Schwartzzenberg) takes the same view.

28. Amendment No. 12 merely takes into account the fact that the directive on the legal protection of computer programmes has already been adopted by the Council (see Directive EEC/91/250,m 14.5.19981, OJ No. L 122, 17.5.1991, p. 42).

D. Article 3: Authorization of rental and lending

D1. The Commission proposal

29. This is a particularly important provision which, however, will give rise to considerable controversy owing to its wording. It introduces the concept of 'an adequate part of the payment' for the first owner referred to in Article 2 (1). Under this article the first owner will be entitled to receive an adequate part of the payment received by a third party whom the original owner has authorized to rent and lend his work in return for remuneration. The Commission considers that this provision is an indispensable adjunct to Article 2(1) above.
30. This provisions raises many questions and, notably, the question of whether total contractual freedom is desirable. The Commission considers that it will fail to produce the desired effect. It would also prove very difficult to interpret and find appropriate criteria for establishing the ‘adequate part of the payment’. As regards this last matter, the Commission seems to rely on the Member States, giving them the freedom ‘to decide how to include the right under Article 3 in their national laws from a theoretical point of view’. However, is this the best way to ensure the harmonization of the provision in question and to avoid distortions of competition?

D2. Critical analysis

31. The area which the Commission seeks to regulate in Article 3 is a complex one. On the one hand the establishment of a system ensuring that the first owner receives ‘an adequate part of the payment’ will undoubtedly benefit artistic creation and intellectual activity in the European Community; authors will receive fair remuneration for creating or contributing to the creation of an artistic work. On the other hand, this system encroaches on an area which is already the subject of legislation in all the Member States at least as regards the first stage of creation: the author is rewarded for authorship, the public performance of a piece of music or for participation in the production of a cinematographic work. National legislation currently in force tries to match remuneration with the nature of the creation or form of exploitation of the work in question. Some legislations provide that the remuneration for an author may be the subject of a voluntary agreement as long as it respects certain minimum levels (the Greek law on authors’ rights in respect of works for the theatre - Article 7 of Law No. 3493 of 1909, as amended by Article 1 of Law No. 988/1943) while other legislations make an author’s remuneration dependent on the form and results of exploitation (French legislation on cinematographic contracts - Law No. 85-660 amending Article 63 (2) of Law No. 57-298 of 11.3.1957, see Journal Officiel of 4.7.1985). The German copyright law of 9.9.1965 as recently amended on 7.3.1990 (BGBl. I, p. 442) provides that the remuneration of the first owner from the reproduction or dissemination of his work through phonograms or videograms shall depend on the nature of the work in question (‘Nach der Art eines Werkes’) and shall be the subject of an agreement between the parties concerned. Although certain minimum standards must be respected (see paragraph 54 of the law in question and the Annex to paragraph 54 (4) of the same).

32. The right introduced by Article 3 of the proposal for a directive is independent of those referred to in the preceding paragraph. It is concerned solely with remuneration for the exploitation of a work through rental or lending of its fixation so that first owners are covered as regards these relatively new forms of exploitation. Your rapporteur accepts the Commission’s argument regarding the advisability of establishing such a right which, if it is proposed, should be inalienable, even if the rental and lending right has been transferred to a third party. Performing artists also enjoy this right: Amendment No. 13 introduces a reservation as regards the absolute right to authorize prohibit lending or rental (see paragraph 27 above). Your rapporteur proposes two amendments to the Commission’s text:

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1 See COM(90) 586 final, paragraph 3.1.1. (p. 44).
2 Idem, paragraph 3.2.1., p. 46.

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- firstly, he seeks to make the term 'an adequate part of the payment' more specific. Bearing in mind the remarks made in the footnote immediately above which is particularly important in the present case - equitable remuneration must mean remuneration proportional to the contribution made by the rightholder to the work and the results of the exploitation of the same (see Amendment No. 14). In order further to define and calculate the 'equitable part' your rapporteur would refer the reader to the remarks made by the Commission which entrusts this matter to the Member States (see paragraph 30 above). Your rapporteur considers that, despite its theoretical nature, the addendum makes the meaning of Article 3 specific enough and restricts the scope for differing and mutually incompatible interpretations when it comes to be implemented;

- secondly, as regard the assignment of the administration of the right to enjoy an adequate part of the payment referred to in Article 3, your rapporteur considers that it should be possible to assign administration to relevant collective organizations (see Amendment No. 14 in fine to the text of Article 3). This addendum is a suggestion and possibility ('in particular') and does not rule out any other solution which is freely agreed on. Your rapporteur considers that the amendment tabled here is broader in scope than Amendment No. 7 tabled by the Committee on Youth, Culture, Education, the Media and Sport (see PE 151.043/final) which states that administration may be entrusted to an administering body under private law.

33. Article 3 is also the subject of an interesting amendment adopted by the Committee on Economic and Monetary Affairs and Industrial Policy (Amendment No. 5, PE 152.364/final, draftsman: Mr K. Wettig). This amendment calls for two remarks:

(a) It is not particularly advisable to extend the scope of application of the provisions of this article to cover the reproduction of a work, bearing in mind that the object of Articles 3 is to regulate the right to remuneration arising from rental or lending. One might consider that both these forms of exploitation constitute a form of reproduction. Reproduction is often interpreted very broadly so that no sharp distinction exists between it and other forms of exploitation. For instance, there are cases in which national courts have found that the showing of a cinematographic work amounted to publication, i.e. duplication and reproduction, rather than a public performance.

(b) The other part of this amendment - which states that only those, who contributed through collaboration to the creation of a work may be counted rightholders entitled to an equitable part of the payment - is interesting because it counterbalances the more controversial provisions (notably the provisions of Article 2(1) and Article 3).

1 It should be pointed out here that the French word 'adéquat' and the English 'adequate' do not properly translate the Greek term 'dikaios' used in the Greek translation of the Commission text. 'Equitable' would be a more suitable rendering and this is the term favoured by the rapporteur in his remarks.

2 A case in Greek jurisprudence Athens Court of the First Instance 5/1969.
b. At first it might appear that if Article 3 was correctly interpreted this amendment would be superfluous. However, since no interpretation has yet been given the purpose of this amendment deserves to be considered. Similar considerations lead your rapporteur to provide a different solution, namely to give a more specific definition of the rightholders in Article 3.

34. Your rapporteur has already drawn attention to the close link between Article 3 and Article 2(1) (see Paragraph 29 above) and the problems caused by the latter provision in determining who really is the 'first owner' in relation to the object of the right in question (see paragraph 23). These problems are further aggravated in the case of composite, collective or collaborative works in which many people are involved: the existence of a number of different first owners, as defined to in Article 2(1) - will probably make it quite difficult correctly to implement Article 3. We should bear in mind here the provisions in force in most European countries regarding the creation and further exploitation of composite and collective works and in particular, cinematographic and theatrical works which require substantial investments and usually involve considerable risks. With the exception of two Community countries where the producer of a cinematographic work is considered the primary copyright holder1 Community countries protect such works by recognizing the producer as the secondary copyright holder or simply assigning to him the rights usually accorded to the primary rightholder.

The favourable treatment accorded to producers by national legislations is justified by the expenditure and risks involved in producing cinematographic works2. In the recitals to its proposal for a directive the Commission has, furthermore, recognized as equally important the contribution by the authors of artistic works and entrepreneurs who by making suitable investments enable production to go ahead (see 7th Recital).

Amendment No. 3 which reinforces the Commission's idea seeks to highlight the need for legal protection for both these categories of rightholder.

35. A further reason for dwelling here on composite, collective and collaborative works is the important role they play in artistic creation throughout the world. Investments - which are, of course, made with the expectation of high returns - help promote international competition. The Community must therefore ensure that works can be exploited as smoothly and effectively as possible and that the high degree of legal protection afforded by the proposal for a directive does not dissuade investments in the European Community Member States. The ideal solution would be to implement reciprocal agreements in this area with third countries. However, your rapporteur would like to recall the remarks made above in connection with the Berne and Rome

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1 The countries in question are the United Kingdom and Ireland.
2 According to information concerning the French film industry in 1989 the total budget for domestic productions or coproductions amounted to FF 2848 million, artistic rights and the rights of composers and artists representing 19% of the total (FF 541 million). The equivalent figures for 1990 are FF 3289 million and FF 562 million (17.1%). Most of the remaining sum is used to pay technical personnel, the studios, film distribution, costumes, technical means, and transport and insurance costs (source: Centre National Du Cinema - CNC).
Conventions: these establish the principal of equal treatment of foreign works and authors protected by these conventions and nationals of the country in respect of which protection is requested ('Traitement National'). In this case the establishment and immediate implementation of rules of reciprocity would have no immediate effect given that the obligation to respect the principle 'national treatment' would make such a provision inoperative. Your rapporteur therefore considers it essential to introduce a safeguard clause not in respect of the implementation of Article 3 — which he considers is already provided — but as regards possible effects leading to a distortion of international competition arising from the full and unbridled implementation of this Article (see Amendment No. 15 which introduces a new paragraph to Article 3).

36. Some people may argue that the solution proposed in Amendment No. 11 will also lead to distortion as regards the harmonization of national legislation which is the object of the present proposal for a directive. Your rapporteur would answer that the proposal needs to establish effective rules of harmonization free of dogma and prejudice. This is in fact in line with the Commission's approach in submitting this proposal. In particular:

a. the Commission hints at a form of harmonization which would be broader in scope than the narrow framework established by the Convention of Berne (see paragraph 13 above). It is aware that it must tread carefully here owing to the obstacles created by national legislation and, above all, the consumer problem of relations with third countries.

b. your rapporteur has already pointed out that the Commission intends to leave the Member States free to decide how they wish to translate the right provided for in Article 3 into national legislation from a theoretical point of view (2). We consider that the addition made by Amendment No. 11 makes the provisions more detailed and may therefore constitute a suitable basis for encouraging the desired approach and harmonizing national legislations.

37. Following these initial remarks concerning the possibility of applying rule of reciprocity with third countries (see paragraph 35 above) and the analysis of the problem posed by the fundamental principle of equal (national) treatment, it would perhaps be appropriate to refer to Amendment No. 7 which proposes a new recital. This calls for a resumption or, to be more accurate, a continuation of negotiations with third countries — principally within GATT — concerned primarily with achieving the reciprocity of provisions covering areas covered by the proposals for a directive. It is important to recognize the problems involved in applying the principle of reciprocity to matters relating to copyright. The scope for implementing a reciprocal arrangement on the basis of the principle of equal treatment in respect of artistic and creative activities which are to a very great extent a product of individual initiatives remains very limited. However, your rapporteur considers that the Commission may be convinced of the benefits of a measure of this kind. In fact, it demonstrates this when it proposed a similar measure in the recent proposal for a directive concerning the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission (see COM(91) 276 final — SYN 358—

1 1. See paragraph 14 above
2. See paragraph 30 and footnote No. 25 and paragraph 32
Recital No. 17). In this case, however, the existence of private and public law radio and television broadcasting companies and the fact that the various retransmissions are subject to a licensing procedure makes it easier to envisage a measure of this kind. As regards a proposal for a directive under discussion the only possibility is to negotiate and your rapporteur considers that the European Parliament will take a favourable view of this.

E. Article 4: Derogation from the exclusive lending right

E1. The Commission proposal

38. The derogations granted in respect of the provisions of Article 3 on lending are justified mainly by the special cultural importance of public libraries. However, the derogations provided by the Member States may not be based on 'discrimination on grounds of nationality' (Article 7 of the EEC Treaty).

E2. Critical analysis

39. It is easy to understand the objective purpose of the provisions of Article 4. However, the provision that derogations may be granted 'for cultural or other reasons' is so sweeping that one is entitled to wonder if it is worthwhile establishing an exclusive lending right at all under these circumstances. Amendment No. 16 seeks to allow this derogation only for clearly defined cultural and social reasons. Your rapporteur is firmly convinced that a general extension of the application of derogations from the lending right would adversely affect this right - which is based above all on copyright - and would create more problems than those which it is designed to solve or at least to avoid. It should be borne in mind that the financial burden which the administering bodies will incur as a result of the obligation to pay an equitable remuneration according to the provisions of Article 4, indent 1 will be particularly heavy. However, the per unit cost of lending the various objects referred to in the same provision will not be so high as to justify broad derogations from national legislation. Your rapporteur considers that, as it stands, the provision is clearly contrary to the objective pursued by the directive. For this reason he proposes that derogations should be restricted to the traditional form of lending which covers books, periodicals and educational films (see Amendment No. 16 in fine).

40. The relevant amendments by the two committees asked for their opinion express the same basic concerns. These are Amendment No. 8 by the Committee on Youth (PE 151.043/final) and Amendment No. 6 by the Committee on Economic and Monetary Affairs and Industrial Policy (PE 152.364/final). The first of these two amendments introduce this complex criteria which, so your rapporteur believes, makes it even more difficult to implement this provision. As regards Amendment No. 4 by the Committee on Youth - which defines lending as making available for use without direct or indirect economic advantage -, it is worth asking what reasons lead to the adoption of the first indent of Amendment No. 8 which states that a derogation from the lending right may only be granted if the lending is made by an institution which is not conducted for commercial purposes. The same amendment provides for a period of time of one year during which the derogation may not be applied to phonograms; both committees agreed that the derogation should not apply to videograms. Your rapporteur considers that by adopting Amendment No. 16, the provision set out in Article 4 will be simpler and more effective.
F. Neighbouring Rights (Articles 5 to 8)

41. The neighbouring rights of reproduction (Article 6) and distribution (Article 7) are dealt with in Amendments No. 19 and 21 respectively regarding performing artists if these are motivated by the same reasons as Amendments 11 and 13 (in relation to Article 2) which were discussed at length above (see paragraph 27). The Committee on Legal Affairs and Citizens’ Rights also adopted an amendment deriving from the provisions of the Treaty of Rome (see paragraph 13 above) which lays down certain guarantees in regard to the broadcasting and communication to the public of performances by performing artists and to the transmission of broadcasts by broadcasting organizations—see Amendment No. 20).

42. Article 8 refers to restrictions that may be established in respect of neighbouring rights. Paragraph 2 of the same article provides that ‘irrespective of paragraph 1, any Member State may provide the same kinds of limitations ... as it provides in connection with the protection of copyright in literary and artistic works’. This provision directly echoes the text of Article 15(2) of the Rome Convention, while the phrase ‘literary and artistic works’ is a reference to Article 2(1) of the Berne Convention which is very broad in scope. This reference is not intended as a criticism but only to show the enormous area and the vast range of activities covered by the present proposal for a directive. It shows what difficulties will accompany any attempt to implement a given regulation. For while rental and lending rights and neighbouring rights may appear objective, self-contained and independent concepts, the fixations to which they refer involve a whole range of works and activities which are governed by specific copyright protection rules which vary from case to case. It is important to understand this in order to grasp the enormous task undertaken by the Commission and to understand the importance of the amendments tabled by your rapporteur as part of this report.

G. Articles 9 and 10: Duration of authors’ rights and duration of related rights

43. No harmonization measures are planned in this area. The Commission’s proposal contents itself, at least for the time being, with providing a minimum duration with reference to the respective provision of the Berne and Rome Conventions. It states that the authors’ rights and neighbouring rights referred to in this Directive shall not expire before the end of the term provided for by the Berne Convention (Article 9) and ‘the rights referred to in this Directive ... shall not expire before the end of the respective terms provided by the Rome Convention’ (Article 10).

H. Article 11: Application in time

44. This article states that ‘the provisions of this Directive shall apply also in respect of all copyright works, performances, phonograms, broadcasts and first fixations of cinematographic works and moving images referred to in this Directive, which are, on 1 January 1993, still protected by the national legislation in the field of authors’ rights and related rights’. This retroactive implementation of the Directive is likely to cause a series of problems in respect of agreements and conventions valid at this date. It should, however, also be stressed that the wording of this Article will prevent agreements being concluded with the aim of circumventing this proposal
on 1 January 1993. This is a particularly delicate matter which brings us back to the Commission's position regarding the desirability of full contractual freedom as regards copyright (see Chapter 3, D1, paragraph 30 above).

45. The question of contractual freedom was dealt with at length in the analysis of the Commission's proposals regarding Articles 2 and 3. There is no point in repeating these remarks here since the positions adopted and the counter-proposals put forward by the rapporteur apply to contractual freedom whatever the context. However, the question of retroactive validity deserves special attention, since it is a fundamental principle in all Member States that legislation may not be retroactive: indeed in most cases this is enshrined in the constitution. Your rapporteur has no intention of making any concessions in this specific case, especially since in a recent proposal on a related matter the Commission elected fully to respect the principle of non-retroactivity. The proposal in question is the proposal for a Council directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission (COM(91) 276 final - SYN 358). Article 9 of this proposal states that: 'Agreements concerning the exploitation of protected works and services, in force on 1 January 1995, shall not be subject to Articles 2 to 8 until 31 December 1997 if they expire after that date'.

46. This prompts the question why the Commission failed to provide a similar provision in the proposal for a directive under discussion. Your rapporteur tabled two amendments suggesting a similar solution: the parties concerned should review the terms of their contracts with a view to bringing them in line with this Directive. The Legal Affairs Committee, however, rejected these amendments by 12 votes to 11. The committee favoured simply implementing the provisions of the directive only in regard to those works whose production and publication are covered by an agreement or other provision after 1 January 1993. Your rapporteur believes that this solution would be particularly detrimental to intellectual and artistic creativity in Europe and is firmly opposed to it. He will therefore re-table the two above-mentioned amendments when the report is considered in plenary.

IV. CONCLUSIONS

47. Your rapporteur submits this draft report to the Committee on Legal Affairs and Citizens' Rights for consideration so that it may be put to the vote and hopes that it may make a positive contribution to the debate on establishing exclusive rights to authorize or prohibit the rental and lending of works protected by copyright. Whether or not his efforts are crowned with success they were undertaken with the following objectives in mind:

a. to encourage and reinforce European artistic creation (safeguarded by the establishment of exclusive rights in respect of new forms of exploitation);

b. to combat piracy - and even 'false' piracy - as effectively as possible (with appropriate adjustments in the definition of rental and lending and with amendments limiting the conditions under which derogations from the exclusive lending right may be permitted);
c. to achieve the optimum preconditions to ensure the best possible exploitation of European artistic and creative works (involving proposals to ensure an appropriate and equitable balance between the first owners and the recommendation that reciprocal arrangements be agreed on with third countries as far as possible);

d. to establish new arrangements affording a high degree of legislative protection while ensuring that certain fundamental rights are protected—these being particularly important for the democratic societies of the Member States—such as the principle of freedom of contract (by introducing proposals aimed at the progressive predominance of the arrangements provided for in the proposal, without these affecting the rights and obligations concluded under legislation currently in force).
OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Youth, Culture, Education, the Media and Sport

for the Committee on Legal Affairs and Citizens' Rights

Draftsman: Mr Léon Schwartzenberg

At its meeting of 19 March 1991, the Committee on Youth, Culture, Education, the Media and Sport appointed Mr Léon SCHWARTZENBERG draftsman.

At its meetings of 24 June and 24 September 1991, it considered the draft opinion.

At the latter meeting it adopted the conclusions as a whole unanimously.

The following took part in the vote: Barzanti, chairman; Simeoni, first vice-chairman; Fayot, second vice-chairman; Banotti, third vice-chairman; Schwartzenberg, draftsman; Barrera i Costa, Barton (for Buchan), Dillon (for Le Pen), Dürrkop Dürrkop, Elliott, Fontaine, Galle, Grüner, Kellett-Bowman (for Stewart-Clark), Maibaum (for Gallo), Oostlander, Pack, Rawlings, Roth and Vecchi (for De Giovanni).
I - INTRODUCTION

In 1988 the Commission published a Green Paper on Copyright and the Challenge of Technology (COM(88) 172 final). This document formed the basis for broad consultation of the circles concerned and culminated in January 1991 in a working programme on authors' rights and 'neighbouring rights' (COM(90) 594 final).

In the annex to this programme, the Commission proposes a whole series of legislative measures to be implemented before 31 December 1991, the most important of which is the ratification by all the Member States of the Berne and Rome Conventions. Parliament is currently being consulted on this proposal (COM(90) 582 final - SYN 318), which the Commission considers to be the minimum basis for any Community action aimed at harmonizing authors' rights.

The above-mentioned proposal represents the first phase of the following stage - the harmonization at a high level of authors' rights in the Community, as indicated by the Commission in its explanatory memorandum.

II - THE PROPOSAL FOR A DIRECTIVE

The proposal is divided into three sections: (1) rental and lending right; (2) protection in the field of rights related to copyright; and (3) the duration of protection. It is aimed at authors, performing artists, producers and broadcasters, whose situation as regards these rights varies considerably from one Member State to another.

(1) Rental and lending right

Legal conditions governing rental rights vary very considerably from one Member State to another. Some recognize an exclusive rental right; the holder of such a right can prohibit or authorize the rental of the work in question, but the people covered by such a right differ from one country to another. Only one state only provides for a right to remuneration. The existence in some countries of a 'droit de destination' linked with the authors' rights implies exclusive rental rights.

The situation is equally diverse as regards the lending right. The situation in countries which recognize the 'droit de destination' is similar to that governing rental rights. Other states grant exclusive lending rights, some grant the right to remuneration and a few do not recognize lending rights.

The proposal for a directive endows authors, performing artists and producers with exclusive rental and lending rights and the right to an appropriate share in remuneration in such cases. The Member States may depart from exclusive lending rights for cultural reasons only and are required, whatever the situation, to pay a share of the remuneration to the owners.

(2) Neighbouring rights

The legal situation with regard to neighbouring rights in the Member States is equally varied. The general term 'neighbouring rights' covers fixation (or recording) rights and reproduction and distribution rights. Certain Member States do not recognize any neighbouring rights; others provide protection,
but this varies according to the owner and does not cover all neighbouring rights.

The proposal for a directive makes provision for a fixation right for performing artists. Reproduction and distribution rights are granted to performing artists, record producers, producers of audio-visual material and broadcasting bodies.

(3) Harmonization of duration

The Commission proposes that rights be harmonized on the basis of the Berne and Rome Conventions, that is, 50 years for authors' rights and 20 years for neighbouring rights.

III - OBSERVATIONS

The Commission proposal has met with considerable approval in the circles concerned as a whole; all those involved recognize that it provides a high level of protection and that it closes certain gaps in the law of certain Member States. Parliament is pleased that this harmonization, which it has been advocating since 1974¹, is now becoming a reality.

However, it is important to note that the Commission has not committed itself to a definition of the author, which varies from one Member State to another. This applies particularly to film producers, who are not recognized as authors in the United Kingdom; the fact that Losey, Lean, Attenborough, Frears, Greenaway and others are not deemed to be authors never ceases to amaze!

Moreover, while it is perfectly legitimate to grant neighbouring rights to performing artists, producers and broadcasters, all of whom play a part in creating a work, it is important to remember that authors' rights take precedence over neighbouring rights, if only to avoid the conflicts of interest which would do nothing but hinder the dissemination of a work.

Renting and lending must be defined in crystal-clear terms so that the two activities can be differentiated from one another.

The Commission is on the right path in taking the view that the Member States may depart from exclusive lending rights for cultural reasons, but these must be justified, and such an arrangement does not free the Member States from the obligation to provide the owners with suitable remuneration to compensate for their loss of income; without authors there would be no libraries!

However, detailed arrangements must be made for the payment of these additional fees, which must not, under any circumstances, fall to the public libraries only.

The above remarks will form the basis for amendments which will be forwarded to the committee responsible, which may decide to incorporate them in its final report, should it so wish.

¹ Resolution of 13.5.1974 - OJ No. C 62, 30.5.1974
The Committee on Youth, Culture, Education, the Media and Sport calls on the Committee on Legal Affairs and Citizens' Rights, as the committee responsible, to incorporate the following amendments in its report:

**Commission text**

(Amendment No. 1)

Fifteenth recital a (new)

*Whereas it is necessary clearly to define the groups of rightholders covered by this Directive;*

(Amendment No. 2)

**Article 1**

1. In accordance with the provisions of this Chapter, Member States shall provide a right to authorize or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 2(1).

   Member States may make no reservations within the meaning of Article 16(1)(a) of the Rome Convention in their relations with other states which are signatories of this Convention.

(Amendment No. 3)

**Article 1(2)**

2. For the purposes of this Directive, 'rental' means making available for use, for a limited period of time and for profit-making purposes, without prejudice to paragraph 3.

2. For the purposes of this Directive, 'rental' means making available for use, for a limited period of time and for direct or indirect economic advantage, without prejudice to paragraph 3.
(Amendment No. 4)

Article 1(3)

For the purposes of this Directive, 'lending' means making available for use, for a limited period of time, and not for direct profit-making purposes, if it is made through institutions which are accessible to the public, such as public libraries, research libraries, specialized libraries, school libraries, church libraries, collections of new media or works of visual art, libraries organized or sponsored by public or private companies, and other collections of subject matter as set out in Article 2(1).

For the purposes of this Directive, 'lending' means making available for use, for a limited period of time, and without direct or indirect economic advantage, if it is made through establishments which are accessible to the public, such as public libraries.
Article 2(1)  
First Owner and Subject Matter of Rental and Lending Right

1. The right to authorize or prohibit the rental and lending shall belong
   - to the author in respect of the original and copies of his work,
   - to the performing artist in respect of fixations of his performance,
   - to the phonogram producer in respect of his phonograms, and
   - to the producer of the first fixations of cinematographic works and moving images in respect of his visual recordings, and visual and sound recordings.

1. The right to authorize or prohibit the rental and lending shall belong
   - to the author in respect of the original and copies of his work,
   - to the performing artist in respect of fixations of his performance. However, unless otherwise specified, the signature of the contract between a performing artist and a producer for the fixation of his performance includes authorization of rental or lending of said fixation, without prejudice to Article 3 of the present Directive,
   - to the phonogram producer in respect of his phonograms, and
   - to the producer of the first fixations of cinematographic works and moving images in respect of his visual recordings, and visual and sound recordings.

Article 2(1a) (new)

For the purposes of this Directive, at least the main director of an audiovisual work shall be deemed to have the status of author.
Article 3
Authorization of rental and lending

If the rightholders authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the rightholders set out in Article 2(1) shall retain the right to obtain an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licences. This right to obtain an adequate part of the payment cannot be waived, but its administration may be assigned.

If the rightholders authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the rightholders set out in Article 2(1) shall retain the right to obtain an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licences. This right to obtain an adequate part of the payment is non-transferable, but its administration may be entrusted to an administering body under private law.
Commission text

(Amendment No. 8)

Article 4
Derogation from exclusive lending right

Member States may, for cultural or other reasons, derogate from the copyright based exclusive lending right referred to in Article 1(1) for one or several categories of objects, provided that
- at least authors obtain an equitable remuneration through administering bodies for such lending; and
- such derogation measures comply with Community law, in particular Article 7 of the EEC Treaty.

Amendment

Member States may, for substantiated cultural or social reasons, derogate from the copyright based exclusive lending right referred to in Article 1(1) for one or several categories of objects, excluding videograms, provided that
- the lending is made by an institution which is not conducted for commercial purposes, and which is owned or operated in the service of the public, by, or on behalf of, the government of a Member State, or by or on behalf of a local government authority within a Member State;
- at least authors obtain an equitable remuneration through administering bodies for such lending; and
- such derogation measures comply with Community law, in particular Article 7 of the EEC Treaty.

In the case of phonograms, the derogation may not be applied until one year after a phonogram has been placed on the market.

(Amendment No. 9)

Chapter II - Protection in the field of rights related to copyright
Article 4a (new)

Rights related to copyright do not affect authors' rights. Consequently, none of the provisions of this chapter may restrict the exercise of copyright by its holders.
OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Economic and Monetary Affairs and Industrial Policy
for the Committee on Legal Affairs and Citizens' Rights

At its meeting of 22 May 1991 the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Wettig draftsman.

At its meetings of 24-26 September and 15-16 October 1991, it considered the draft opinion.

At the meeting of 16 October 1991 it adopted the conclusions by 12 votes to one, with one abstention.

The following took part in the vote: Desmond, vice-chairman; Wettig, draftsman; P. Beazley, Bernard-Reymond, Bofill Abeilhe, Braun-Moser (for Friedrich), Cassidy, Caudron, Cravinho, Hoppenstedt, Mattina, Metten, Patterson and Siso Cruellas.
I. Introduction

With this meticulously justified proposal the Commission seeks to approximate throughout the Community the legal provisions available to those entitled to protection by copyright or performance rights in respect of rental and lending rights in protected works. The intention is both to enhance the competitiveness of European undertakings exploiting copyright commercially and to improve the economic position of artists and performers by giving them a fair return on the use of their works.

Those who stand to benefit from the proposed measures include: copyright holders and performing artists, audiovisual audio media producers, and radio and television undertakings. Their competitiveness will also be improved by the imposition of stricter controls on certain uses of their works so as to ensure a commercial return on their exploitation.

II. Assessment of the Commission proposal

The Commission's proposal is fundamentally welcome since it approximates the rights of performers and artists in anticipation of completion of the internal market. The Committee on Economic and Monetary Affairs and Industrial Policy nevertheless has reservations about the fact that there will continue to be differences in the economic significance of the legal position of copyright holders, performing artists and undertakings commercially exploiting creative works in different parts of the Community even after adoption of the proposal.

Although the proposal for a directive does refer to the right to compensatory payment (Article 3: right to obtain an adequate share of the payment; Article 4: right to obtain an equitable remuneration), rights can only be exercised on that basis in cases where rental or lending arrangements operate within the law.

But in the present state of copying techniques for printed and audiovisual media it is an economically significant and industrially relevant fact that large numbers of works protected by the law of copyright are photocopied or copied onto blank cassettes without the express authorization of the copyright holders.

In recognition of this state of affairs a number of Member States have introduced legislation providing for compensation to be paid by the producers of photocopying machines and blank cassettes.

In Germany the amounts paid in such compensation have been as follows:

- audio and video appliances, revenue 1990: DM 66,279,028
- blank cassettes (audio and video): DM 70,083,474
  Total: DM 136,362,502

In France revenue from levies on private copying in 1989 amounted to:

- SORCOP: FF 114,000,000
- Copie FRANCE: FF 324,000,000
  Total: FF 438,000,000

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These figures for Germany and France show that private copying not authorized by authors is a significant socio-economic factor that must be taken fully into consideration in enacting appropriate legislation to ensure equal treatment of all areas of economic activity.

If there is no compensatory levy on private copying in some Member States the result will be:

- artists and performers in those states will not receive the same remuneration for their work as they do in the other Member States;
- sales of photocopying equipment and blank cassettes will be at a premium in those states because they will retail at a lower price;
- there will be thus be distortions of competition to the disadvantage of the other Member States in which legislation has been enacted to impose a compensatory levy.

III. Amendments

To protect the financial interests of performers and artists from unauthorized private copying and allow them to receive a fair remuneration for their work, the following amendments are considered necessary from an economic standpoint:

- Third and fifteenth recitals:

Article 3(f) of the EEC Treaty stipulates that competition in the Community must be protected from distortions. Such protection can be secured by counter-balancing free access to the means of private reproduction on terms favourable to the consumer by the simultaneous imposition of a compensatory levy. Conditions of competition should be approximated to each other by requiring a compensatory levy to be paid for the reproduction of works protected by copyright in the form of a levy on the sales of photocopying appliances and blank cassettes.

- Article 8(3): To be replaced by a new version stipulating that a compensatory levy shall be payable and fixing the rate of that levy in principle so as to ensure that market operators can exploit their copyright commercially on equivalent terms.

The remaining amendments are intended to clarify the wording of the proposal.
IV. Conclusions

Pursuant to Rule 120(6) of the Rules of Procedure the committee requests the Committee on Legal Affairs and Citizens’ Rights as the committee responsible to consider the following amendments:

**Commission proposal**

(Amendment No. 1)

Third recital

Whereas such differences should therefore be eliminated by 31 December 1992 in accordance with the objective of introducing an area without internal frontiers, as set out in Article 8A of the Treaty;

Whereas such differences should therefore be eliminated by 31 December 1992 in accordance with the objective of introducing an area without internal frontiers, as set out in Article 8A of the Treaty so as to establish, pursuant to Article 3(f) of the EEC Treaty, a scheme for protecting competition within the common market from distortions;

(Amendment No. 2)

Fifteenth recital

Whereas the Community’s legal framework on the rental and lending right and on certain rights related to copyright can be limited to establishing that certain Member States provide rights with respect to rental and lending for certain groups of right owners and further to establishing the exclusive rights of fixation, reproduction and distribution for certain groups of right owners in the field of related rights protection;

Whereas the Community’s legal framework on the rental and lending right and on certain rights related to copyright can be limited to establishing that certain Member States provide rights with respect to rental and lending for certain groups of right owners and further to establishing the exclusive rights of fixation, reproduction and distribution for certain groups of right owners in the field of related rights protection; whereas the exercise of such rights shall entail the liability to pay a compensatory levy;
(Amendment No. 3)

Article 1(2)

For the purposes of this Directive, 'rental' means making available for use, for a limited period of time and for profit-making purposes, without prejudice to paragraph 3.

For the purposes of this Directive, 'rental' means making available for private use by members of the public, for a limited period of time and for profit-making purposes, without prejudice to paragraph 3.

(Amendment No. 4)

Article 2(1), fourth indent

- to the producer of the first fixations of cinematographic works and moving images in respect of his visual recordings, and visual and sound recordings.

- to the producer of visual and sound works in respect of these works.

(Amendment No. 5)

Article 3

If the rightholders authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the rightholders set out in Article 2(1) shall retain the right to obtain an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licences. This right to obtain an adequate part of the payment cannot be waived, but its administration may be assigned.

If the rightholders referred to in Article 2(1) transfer against payment to a third party the right to rent, lend or reproduce the work which they helped produce, each rightholder shall have the right to obtain an adequate payment. This right cannot be waived, but its administration may be assigned.

(Amendment No. 6)

Article 4

Member States may, for cultural or other reasons, derogate from the copyright based exclusive lending right referred to in Article 1(1) for one or several categories of objects, provided that:

Member States may, for cultural or other reasons, derogate from the copyright based exclusive lending right referred to in Article 1(1) for one or several categories of objects, except visual recordings and visual and sound recordings, provided that:
(Amendment No. 7)

Article 8(3) (new)

3. The protection of rights related to copyright provided for in this directive shall not affect the protection of copyright itself.

(Amendment No. 8)

Article 8(3), (4), (5) and (6) (new)

3. Paragraph 1 a) shall be without prejudice to any existing or future legislation on remuneration for reproduction for private use.

(4) If the nature of the work is such that it is reasonable to assume that it may be reproduced by copying onto audiovisual or audio media, the copyright holder (whether creator, performing artist or producer of visual and sound works) shall be entitled to claim from the producers of appliances and audiovisual or audio media suitable for use in such reproduction the payment of an appropriate amount in compensation;

(5) Such compensation shall be at least equal to the average amount payable in compensation in the Member States;

(6) Claims may be submitted only by undertakings engaging in the commercial exploitation of the works concerned.