SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 12 and 13 March 1992

No. prev. doc.: 4301/92 PI 5 CULTURE 4
No. Com. prop.: 4175/91 PI 4 CULTURE 4

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

1. At its meeting on 12 and 13 March 1992 the Working Party on Intellectual Property (Copyright) (1) conducted an initial examination of the amendments the Commission proposes to make to the proposal for a Directive consequent on the Opinion of the European Parliament delivered on 12 February 1992 (4705/92 PE-RESOL 10). This examination was based on a draft amended proposal prepared by the Commission (2). In the course of this examination the Working Party also took account of the consolidated text prepared by the outgoing Presidency at the end of 1991 (9031/2/91 PI 55 CULTURE 54 REV 2) and of a note from the French delegation of 11 December 1991 (10279/91 PI 83 CULTURE 68).

2. Under "Other business" the Working Party also briefly considered the procedure to be followed as regards the discussions of the WIPO Committee of Experts on

(1) The Greek delegation was not represented.
(2) Unnumbered document circulated informally and only translated into a number of languages.
a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works, on the basis of a statement from the Commission representative.

General comments on the draft amended proposal

3. The Commission representative explained that the draft amended proposal for a Directive was based on the European Parliament's Opinion. It therefore concerned only the provisions to which the Parliament proposed to make amendments and did not affect the Commission's position on the improvements to the Commission's original proposal which are set out in the latest consolidated text (9031/2/91 PI 65 CULTURE 54 REV 2) and which had not been incorporated into the European Parliament's amendments.

4. The Member States' delegations said that in view of the fact that they had not long had cognizance of the draft amended proposal they could only give their provisional reactions to the amendments which the Commission proposed to make to the proposal for a Directive.

Title of the Directive

5. Delegations did not comment on the proposed amendment to the title of the Directive.

Article 1(2)

6. The Irish delegation voiced doubts as to the need to harmonize rental right.

7. The Belgian delegation tabled a slight reservation on this paragraph.
8. The French delegation asked that it be made clear that the making available was "to the public for private use" (see 10279/91 PI 83 CULTURE 68, page 4).

9. The French delegation was in favour of the proposed replacement of the words "for profit-making purposes" by "for direct or indirect economic advantage".

The German delegation would have preferred the wording of the original proposal but could agree to the amended text.

The Danish, Portuguese and United Kingdom delegations voiced a preference for the wording of the latest consolidated text (3): "for direct or indirect commercial purposes".

10. The Danish delegation entered a reservation on the last sentence of this paragraph.

The Luxembourg delegation asked that the phrase "public performance" be clarified.

The United Kingdom, German, French and Irish delegations wanted this sentence to specify whether the following forms of rental were excluded from the scope of the Directive: rental of films for showing in a cinema or for broadcasting, rental of phonograms to discotheques, rental of scores to orchestras, and rental of works of art for exhibition purposes.

Article 1(3)

11. The Belgian, Danish, Spanish, French, Irish, Italian and Portuguese delegations reiterated their reservations on the inclusion of lending in the Directive (see also point 30 below on this subject).

(3) 9031/2/91 PI 65 CULTURE 54 REV 2.
12. Several delegations asked that if lending were included in the Directive, the wording of this paragraph be aligned on that of paragraph 2 (see point 9 above).

The Irish delegation reiterated its suggestion to avoid certain acts eluding the definition of both rental and lending and, thereby, the scope of the Directive (see 8435/91 PI 55 CULTURE 38, point 4 and Annex). The German and United Kingdom delegations and the Commission representative opposed this suggestion.

13. The Netherlands and United Kingdom delegations advocated the latest consolidated text rather than the draft amended proposal regarding institutions (establishments) accessible to the public.

14. The German, French, Irish, Netherlands and United Kingdom delegations were in favour of taking over the last sentence in the latest consolidated text which excluded from the scope of the Directive the making available for consultation on the spot and lendings between libraries.

Article 2 - title

15. The United Kingdom delegation preferred the title of Article 2 as given in the latest consolidated text.

Article 2(1)

16. The United Kingdom delegation suggested the following addition to the fourth indent of this paragraph: "insofar as the producer is not regarded as an author of such works and recordings under the legislation of the Member State concerned".
17. In reply to a question from the Netherlands delegation concerning the first and fourth indents of this paragraph, the Commission representative explained that in addition to copyright, as provided for by the first indent (which may be transferred), the fourth indent imposed an obligation to establish a related right on fixation, which could apply not only to fixations of original works but also to fixations of works which were not original; it was therefore possible for the producer to hold both the right referred to in the first indent which was transferred to him by the author and his own related right under the fourth indent.

Article 2(2) (new)

18. The Belgian, Danish, Irish, Netherlands, Portuguese and United Kingdom delegations were against the new paragraph 2 as proposed by the Commission.

The German, Spanish and French delegations were in favour of this paragraph which had been based on an amendment proposed by the European Parliament.

Article 2(3) (former paragraph 2)

19. The French, Danish and Spanish delegations upheld reservations on this paragraph on the grounds that all works of art should be excluded from the scope of Chapter 1 of the Directive in view of the specific nature of the market in works of art.

20. The Danish delegation also upheld its view that literary works should be excluded from a possible lending right and that there was no need to provide for a rental right in respect of such works.
Article 2(5) (new)

21. The great majority of delegations were in favour of the principle whereby a performing artist is presumed to have assigned his rental and lending rights.

22. The Portuguese, Danish, United Kingdom, Irish, Netherlands and German delegations voiced doubts as to the need for the contract to be concluded in writing, with some of the delegations pointing out that this matter came under the law on contracts.

The French delegation and the Commission representative argued, on the other hand, that the presumption should apply only in the case of a contract in writing.

23. The United Kingdom, Irish and Netherlands delegations thought the presumption should apply in respect not only of performing artists but also of authors.

24. The United Kingdom and Irish delegations considered that the presumption ought to apply not only to films but also to sound recordings, including radio programmes.

The French, Belgian and German delegations and the Commission representative, on the other hand, thought that there was no need to extend the presumption to sound recordings in view of the differences in operation of the industries concerned.

25. The French delegation tabled a reservation on the possibility of the contract including provisions to the contrary.

The Commission representative emphasized the need for this condition.
26. The Danish delegation entered a reservation on the condition "subject to the provisions of Article 3".

The French delegation and the Commission representative emphasized the need to provide for fair payment for performing artists.

27. The United Kingdom delegation suggested the following new wording for this paragraph:

"Where authors and performers have consented to the recording or fixation of their works or performances, it shall be presumed in the absence of contractual provisions to the contrary that they have also assigned their rental and lending rights".

Article 3

28. The Luxembourg, Danish, United Kingdom and Irish delegations voiced doubts as to the inclusion of this Article in the Directive on the grounds that the subject of payment was more a matter of contractual relations between the parties.

29. The French delegation preferred a provision to the effect that:

- performers would keep the right to obtain appropriate payment for any form of use or performance of the work, including rental;

- the level of and basis for the appropriate payment would be left to the appreciation of the Member States;
collective bargaining would be possible without being compulsory and could be carried out by collecting societies or trade unions.

Article 4

30. As the European Parliament had not made any amendment to this Article, the Commission left it unchanged.

However, as a number of delegations were opposed to including the lending right in the Directive (see point 11 above), the Chair asked for the delegations' reactions to a suggestion whereby the lending right would remain in the Directive, the possibility of derogation provided for in Article 4 be maintained, but the first indent in that Article would be deleted, which would mean that all reference to lending in Article 3 would also have to be deleted.

The German, Netherlands and United Kingdom delegations were opposed to deleting the first indent of Article 4.

The Belgian, Spanish, Irish, Italian and Portuguese delegations reiterated their opposition in principle to the inclusion of the lending right in the Directive, but indicated their willingness to consider such a solution.

The Danish delegation, backed by the French delegation, thought it preferable not to include the lending right in the Directive at this juncture, but to carry out a study into public lending in the Community in order to assess the possible need for action along these lines at a later date.
Article 4a (new)

31. The great majority of delegations thought this Article superfluous in the light of the provisions of the Berne Convention for the Protection of Literary and Artistic Works.

Chapter II

32. The French delegation tabled a reservation on footnote 12 on page 6 of the latest consolidated text.

Article 6a(1)

33. The United Kingdom delegation suggested that this paragraph apply to broadcasting not only by wireless but also by satellite and to the broadcasting of original programmes by cable. This suggestion also applied to paragraph 3.

34. The French delegation queried the advisability of the last phrase in the paragraph.

Article 6a(2)

35. The United Kingdom delegation, backed by the Irish delegation, asked that it be more clearly specified that the remuneration was one-off, to be paid, while accepting that it must be shared between performers and phonogram producers.

36. The French delegation wondered whether it should be clarified that what was meant here was a phonogram published for commercial purposes.

37. The German, United Kingdom and Irish delegations entered reservations on the obligation to make an additional payment in the event of the simultaneous.
unchanged and complete rebroadcasting by cable of a radio programme when the rebroadcasting took place in the reception area of the original programme.

Article 6a(3)

38. The United Kingdom delegation wondered about the need to mention television programmes.

39. The French delegation asked about the need to include the qualification "against payment of an entrance fee".

Article 7(2) (new)

40. The delegations' reactions to this paragraph were similar to their reactions to the new paragraph 5 of Article 2 (see points 21, 22, 24, 25 and 26 above); as for point 26, the United Kingdom and Irish delegations also voiced doubts about the words "subject to the provisions of Article 3" in Article 7.

41. Several delegations referred to the possibility of providing for a similar presumption in respect of the reproduction right (Article 6).

Article 7(3) (former paragraph 2)

42. The French delegation tabled a reservation on this paragraph (see 10279/91 PI 83 CULTURE 86).
Article 11

43. The German, French and Irish delegations entered general reservations on this Article; the Irish delegation feared in particular the economic impact of the Article in conjunction with the new paragraphs 2 and 5 of Article 2.

Article 11(1)

44. The Netherlands delegation said that this paragraph caused it problems in that Netherlands copyright legislation provided no protection for works produced before 1964.

Article 11(2) (new)

45. On the subject of the first and second sentences of this paragraph, the United Kingdom, French, Irish, Italian, German and Luxembourg delegations had serious doubts about the applicability of the Directive to contracts existing before the date mentioned in Article 12. The Netherlands delegation tabled a scrutiny reservation on this matter.

46. As for the bringing into line of contracts provided for in the second sentence of this paragraph, the French delegation thought the proposed period of three years would be too short.

The German and United Kingdom delegations raised the question of what would happen if the parties failed to bring contracts into line before that period expired.

The question was also put as to what action would be taken if it were not possible to trace certain holders of rights who were parties to existing contracts.
47. The Irish delegation tabled a reservation on the application of the Directive to stocks acquired before the date mentioned in Article 12 (third sentence of paragraph 2): the German delegation entered a scrutiny reservation on the solution proposed by the Commission in that sentence.

The United Kingdom delegation suggested an alternative text for the third sentence:

"Any Member State shall not be obliged to apply the rental and lending provisions of this Directive to any object set out in Article 2(1) to which a rental and lending right did not apply before 11 January 1993 and which was acquired before that date for the purpose of rental or lending."

Article 11a (new)

48. None of the delegations was opposed to including this provision although some delegations had doubts about the need for it.

Article 12

49. Several delegations referred to the need to review the date mentioned in this provision.
Other business - Discussions of the WIPO Committee of Experts on a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works - Procedure

50. The Commission representative recalled that the Committee of Experts of the World Intellectual Property Organization (WIPO) on a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works had already held two sessions from 4 to 8 November 1991 and 10 to 18 February 1992 (4) and that a third session was scheduled for 23 to 27 November 1992. He informed delegations that in preparation for the third session:

- the WIPO International Bureau would be inviting governments and organizations to submit in writing proposals for the provisions of the proposed protocol by 15 June 1992;

- the Director-General of WIPO intended to invite some delegations to informal gatherings;

- on the initiative of the United States delegation, the Swedish delegation was in the process of inviting a number of developed countries to a meeting of "Friends of intellectual property" in Stockholm on 20 and 21 May.

51. The Working Party agreed on the following procedure:

- the Commission departments would be asked to submit a working document for a co-ordination meeting in April 1992, on the nature of the instrument to be concluded and the subject matters which should be included;

(4) The reports of these meetings are given in WIPO documents BCP/CE/1/4 and BCP/CE/1/1/1.
- the Presidency and the Commission should be represented in any informal gatherings convened by the Director-General of WIPO;

- all Member States of the Community which so wished should be invited to take part in the Stockholm meeting;

- the Presidency and the Commission departments would keep delegations informed of any developments in this sphere.