NOTE

from: Presidency

to: Permanent Representatives Committee and Council (Internal Market)

No. prev. doc.: 5371/3/92 PI 29 CULTURE 19 REV 3
No. Cion prop.: 6344/92 PI 49 CULTURE 45

Subject: Amended proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright in the field of intellectual property - Presidency compromise proposal

The Permanent Representatives Committee and the Council (Internal Market) will find attached the Presidency's compromise proposal for the above proposal for a Directive.
Amended proposal for a Council Directive
on rental right, lending right and on certain rights
related to copyright in the field of intellectual property

CHAPTER I  RENTAL AND LENDING RIGHT

Article 1  Object of Harmonization

(1) In accordance with the provisions of this Chapter, Member States shall
provide, subject to the provisions of Article 4, 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).

(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 or
commercial advantage.

(3) For the purposes of this Directive, "lending" means making available for
use, for a limited period of time and not for direct or indirect economic or
commercial advantage, when it is made through establishments which are
accessible to the public, such as public libraries.

+ The following recitals will be added:

"whereas it is desirable, with a view to clarity, to exclude from
rental and lending within the meaning of this Directive certain
forms of making available, as for instance making available
phonograms or films (cinematographic or audiovisual works or moving
images, whether or not accompanied by sound) for the purpose of
public performance or broadcasting, making available for the
purpose of exhibition, or making available for on-the-spot
reference use; whereas lending within the meaning of this Directive
does not include making available between establishments which are
accessible to the public;

whereas, where lending by an establishment accessible to the public
gives rise to a payment the amount of which does not go beyond what
is necessary to cover the operating costs of the establishment,
there is no direct or indirect economic or commercial advantage
within the meaning of this Directive;"

1 Reservation by the Netherlands delegation and scrutiny reservation
by the German delegation on an exclusive rental and lending right;
they would prefer a remuneration right. The Commission considers
that the maintenance of a non-exclusive right would be contrary to
the compromise text in the GATT negotiations on TRIPs. These
delusions indicated that these reservations might be withdrawn
before the Council meeting.
(4) The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 2(1).

**Article 2**

**Rightholders and Subject Matter of Rental and Lending Right**

(1) The exclusive right to authorize or prohibit 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 fixation of a film (cinematographic or audiovisual work or moving images, whether or not accompanied by sound, hereinafter referred to as "films") in respect of the original and copies of his film.

(2) For the purposes of this Directive the principal director of a cinematographic work shall be considered to be its author or one of its authors. Member States may provide for others to be considered to be its co-authors.

+ The following statement will be entered in the Council minutes:

"The Commission considers that the provisions of Article 2(1) fourth indent, Article 6(1) third indent and Article 7(1) third indent do not oblige the Member States to create a separate neighbouring right for film producers where they enjoy in their own right, elsewhere in their national law, the same rights as are introduced by the provisions mentioned."

2 Reservation by the Netherlands delegation on this indent.
3 Reservation by the United Kingdom, Luxembourg and Irish delegations and positive waiting reservation by the Netherlands delegation.
(3) This Directive does not cover rental and lending rights in relation to buildings and to works of applied art.

(4) The rights referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences.

(5) When a contract concerning film production is concluded, individually or collectively, by performing artists with a film producer, the performing artist covered by this contract shall be presumed, subject to contractual provisions to the contrary, to have transferred his rental and lending right, subject to the provisions of Article 3.

(6) Member States may provide for a similar presumption as set out in paragraph 5 with respect to authors.

Article 2a Rental of computer programs


Article 3 Unwaivable right to equitable remuneration

(1) Where an author or performing artist has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, this author or performing artist shall retain the right to obtain an equitable remuneration for the rental.

4 The Commission stated that this paragraph also covers the case of rightholders giving an authorization.

5 Scrutiny reservation by the French and Netherlands delegations on this paragraph.


+ The following recital will be added:

"Whereas the equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract;"

Waiting reservation by the Commission on this recital.
(2) - deleted -

(3) This right to obtain an equitable remuneration for rental cannot be waived by authors or performing artists.

(4) The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performing artists.

(4a) Member States may regulate whether and to what extent collective administration of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

(5) Member States may provide that, as soon as a written contract entailing an equitable remuneration for rental has been concluded between a performing artist and a film producer, the exploitation of the film by the producer under the agreed conditions is authorized and cannot unilaterally be put into question.

(6) Member States may apply the provisions of Article 3 mutatis mutandis to the rights included in Chapter II of this Directive.

+ The following recital will be added:

"whereas the equitable remuneration provided for in Article 3 should take account of the importance of the contribution of the authors and performing artists concerned to the phonogram or film;"

7 Scrutiny reservation by the Spanish delegation on this paragraph.
8 Waiting reservation by the Commission on the last part of this paragraph.
9 Scrutiny reservation by the United Kingdom delegation on this paragraph.
Article 4  Derogation from exclusive public lending right

(1) Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives. Member States may exempt certain categories of establishment from the payment of this remuneration.

(2) The Commission, in cooperation with the Member States, shall draw up before 1 July 1997 a report on public lending in the Community. It shall forward this report to the Council and to the European Parliament.

CHAPTER II  PROTECTION IN THE FIELD OF RIGHTS RELATED TO COPYRIGHT

Article 5  Fixation Right

(1) Member States shall provide for performing artists the exclusive right to authorize or prohibit the fixation of their performances.

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10 Reservation by the Netherlands delegation and scrutiny reservation by the Spanish and Italian delegations.
A statement will be added in the Council minutes as follows:
"The Commission considers that the present Danish law on public lending satisfies the requirements of Article 4(1)."
++ A recital will be added as follows:
"whereas any measures based on Article 4 of this Directive have to comply with Community law, in particular Article 7 of the EEC Treaty."
A statement will be added in the Council minutes as follows:
"The Council and the Commission consider that Member States are free not to apply this derogation to films, computer programs, phonograms or other objects."
+++ A recital will be added as follows:
"whereas the Articles of Chapter II do not prevent Member States from providing for a rebuttable presumption of the authorization of exploitation in respect of the exclusive rights provided for in those Articles;".
(2) Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. The broadcasting organization shall not have this right where it merely retransmits broadcasts of other broadcasting organizations. However, Member States may provide such retransmitting broadcasting organizations with the possibility of preventing the fixation of their retransmissions.

Article 6 Reproduction Right

(1) Member States shall provide the exclusive right to authorize or prohibit 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 films, in respect of the original and copies of their films, and
- for broadcasting organizations, of fixations of their broadcasts, as set out in Article 5(2).

(2) The reproduction right referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences.

11 Positive scrutiny reservation by the Spanish, French, Irish, Luxembourg and United Kingdom delegations on the last sentence of this paragraph.
12 Scrutiny reservation by the Spanish delegation on this Article.
Article 6a Broadcasting and Communication to the public

(1) Member States shall provide for performing artists the exclusive right to authorize or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

(2) Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and that this remuneration is shared between the relevant performers and producers. Member States may, in the absence of agreement between performing artists and phonogram producers, lay down the conditions as to the sharing of this single equitable remuneration between them.

(3) Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

+ A recital will be added as follows:

"Whereas Member States may provide for more far-reaching protection for authors and owners of rights related to copyright than that required by Article 6a of this Directive;".

++ The following statement will be entered in the Council minutes:

"The Council and the Commission agree that the provisions of Article 6a shall be without prejudice to those provisions of Council Directive No .../EEC of ... on the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and retransmission by cable which provide for performing artists and producers of phonograms the right of communication to the public by satellite, and for broadcasting organisations the right of simultaneous retransmission of their broadcasts by satellite."
Article 7  Distribution Right

(1) Member States shall provide

- for performing artists, in respect of fixations of their performances,
- for phonogram producers, in respect of their phonograms,
- for producers of the first fixations of films, in respect of the original and copies of their films,
- for broadcasting organizations, in respect of fixations of their broadcasts, as set out in Article 5(2),
the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise.

(2) This right shall not be exhausted except as mentioned hereafter. The first sale in the Community of an object as referred to in paragraph 1 by the rightholder or with his consent shall exhaust this right within the Community in respect of that object.

(3) The distribution right provided for in the previous paragraphs shall be without prejudice to the specific provisions of Chapter I, in particular Article 1(4).

(4) The distribution right may be transferred, assigned or subject to the granting of contractual licences.

13 Scrutiny reservation by the Spanish delegation on this Article.

+ An addition will be made to the last recital in the Commission’s original proposal, as follows:

"Whereas the harmonized rental and lending rights and the harmonized protection in the field of rights related to copyright should not be exercised in a way which constitutes a disguised restriction on trade between Member States or in a way which is contrary to the case law of the Court of Justice of the European Communities, including in the "Cinéthèque" case.

Positive scrutiny reservation by the French delegation on this addition."
Article 8 Limitations to Rights

(1) Member States may provide limitations to the rights referred to in Chapter II in respect of:

(a) private use;

(b) use of short excerpts in connection with the reporting of current events;

(c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of teaching or scientific research.

(2) Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performing artists, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations).

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

CHAPTER III DURATION

Article 9 Duration of Authors’ Rights

Without prejudice to further harmonization, the authors’ rights referred to in this Directive shall not expire before the end of the term provided by the Berne Convention for the Protection of Literary and Artistic Works.

14 Waiting reservation by the French delegation on this paragraph.
Article 10  
Duration of Related Rights

Without prejudice to further harmonization, the rights referred to in this Directive of performing artists, phonogram producers and broadcasting organizations shall not expire before the end of the respective terms provided by the Rome Convention. The rights referred to in this Directive for producers of the first fixations of films shall not expire before the end of a period of twenty years computed from the end of the year in which the fixation was made.

CHAPTER IV  
COMMON PROVISIONS

Article 11  
Application in Time

(1) The provisions of this Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which are, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or meet the criteria for protection under the provisions of this Directive on that date.

(2) The provisions of this Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

(3) Member States may provide that the rightholders are deemed to have given their authorization to the rental or lending of an object set out in Article 2(1), which is proven to have been made available to third parties for this purpose or to have been acquired before 1 July 1994. However, in particular where such an object is a digital recording, Member States may provide that rightholders shall have a right to obtain an adequate remuneration for the rental or lending of that object.

(4) Member States need opt apply the provisions of Article 2(2) to films created before 1 July 1994.

15 Reservation by the United Kingdom delegation on this paragraph. This reservation is linked to its position in respect of Article 2(2).
(5) This Directive shall, without prejudice to the provisions of paragraph 3 and subject to the provisions of paragraphs 6 and 7, be without prejudice to any contracts concluded before the date of its adoption.

(5a) Member States may provide that when rightholders who acquire new rights under the national provisions adopted in implementation of this Directive have, before 1 July 1994, given their consent for exploitation, they shall be presumed to have transferred the new exclusive rights.

(6) Member States may determine the date as from which the unwaivable right to an equitable remuneration provided for in Article 3 exists, provided that that date is no later than 1 July 1997.

(7) For contracts concluded before 1 July 1994, the unwaivable right to an equitable remuneration provided for in Article 3 shall apply only where authors or performing artists or those representing them have presented a request to that effect before 1 January 1997. In the absence of agreement between rightholders concerning the level of remuneration, Member States may fix the level of equitable remuneration.

Article 11a Relation between Copyright and Related Rights

Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright as such.

16 Positive scrutiny reservation by the Italian and Netherlands delegations on paragraphs 5 and 5a.
17 Scrutiny reservation by the Netherlands delegation on paragraph 6.
18 Reservation by the Netherlands delegation on the last sentence of this paragraph. Positive scrutiny reservation by the Greek, Luxembourg and United Kingdom delegations on this paragraph. Waiting reservation by the French delegation which might be lifted provided that the Commission enters a declaration concerning the renegotiation of the collective agreements of 1990.
Article 12    Final provisions

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 July 1994.

Member States shall forthwith inform the Commission thereof and communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Article 13

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President
EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 13 May 1992

6346/92
ADD 1

RESTREINT
PI 51
CULTURE 47

ADDENDUM TO NOTE

from: Presidency
to: Permanent Representatives Committee and Council (Internal Market)

No. prev. doc.: 5371/3/92 PL 29 CULTURE 19 REV 3
No. Cion prop.: 6344/92 PI 49 CULTURE 45

Subject: Amended proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright in the field of intellectual property
- Presidency compromise proposal

The following changes should be made to document 6346/92 PL 51 CULTURE 47 following the discussion in the Permanent Representatives Committee on 13 May 1992.

1. The following addition should be made to footnote 5 on page 4:

"The Presidency is prepared to propose, in the framework of an overall compromise, that the words "subject to contractual provisions to the contrary" be deleted from Article 2(5), leaving open the legal nature of the presumption."

2. In footnote * on page 4, delete the waiting reservation by the Commission.
3. Article 2(4a) on page 5 is amended to read as follows:

"(4a) Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected."

4. The following addition should be made to footnote 8 on page 5:

"The consequence of the Presidency's proposal in respect of Article 2(5) (see footnote 5) would be the deletion of this paragraph."

5. Article 3(6) on page 5 should be replaced by a recital. The French delegation has a waiting reservation in this respect.

6. The Netherlands delegation has made the following proposals in respect of Article 4 on page 6:

- Add a new paragraph 1a whereby the derogation provided for in paragraph 1 would not apply to computer programs.

- The date of 1 July 1997 in paragraph 2 would be replaced by the date of 1 July 1996.

- A clarification would be made in paragraph 2 to the effect that the report by the Commission would include the question whether derogations are justified for works other than literature.

The Commission indicated its willingness to make the following statements:
"The Commission considers that the categories of establishments which may be exempted under Article 4(1) last sentence include public libraries and educational establishments."

"The Commission agrees that its report will include its position on further possible legislative initiatives regarding public lending."

7. The following addition should be made to footnote ++ on page 6:

"The Luxembourg and Netherlands delegations asked for a clarification to be made to this recital."

8. The following addition should be made to footnote 12 on page 7:

"At the request of the Spanish delegation, the Commission indicated its willingness to make a statement to the effect that the Commission considers that Chapter II of the Directive does not apply to editors of printed works, with the consequence that it does not prevent Member States from providing or maintaining protection of such editors in their national law."

9. Article 11(5a) on page 12 should be amended to read:

"(5a) Member States may provide, subject to the provisions of paragraphs 6 and 7, that when rightholders who acquire new rights under the national provisions adopted in implementation of this Directive have, before 1 July 1994, given their consent for exploitation, they shall be presumed to have transferred the new exclusive rights."
The positive scrutiny reservation by the Netherlands delegation should be deleted from footnote 16.

10. Delete footnote 17 on page 12.

11. Delete the reservation by the Netherlands delegation from footnote 18 on page 12.