NOTE

from: Presidency
to: Permanent Representatives Committee

No. prev. doc.: 6551/92 PI 55 CULTURE 53
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 will find attached the Presidency’s compromise proposal for the above proposal for a Directive, updated following the session of the Council (Internal Market) held on 14 May 1992 and after examination by the relevant Counsellors.

The statements to be entered in the Council minutes appear in the Annex.
Amended proposal for a Council Directive
on rental right and lending right and on certain rights
related to copyright in the field of intellectual property

THE COUNCIL OF THE EUROPEAN COMMUNITIES.

Having regard to the Treaty establishing the European Economic Community
and in particular Articles 57(2), 66 and 100A thereof,

Having regard to the proposal from the Commission,

In co-operation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas differences exist in the legal protection provided by the laws and
practices of the Member States for copyright works and subject matter of
related rights protection as regards rental and lending, and such
differences are sources of barriers to trade and distortions of competition
which impede the proper functioning of the internal market;

Whereas such differences in legal protection could well become greater as
Member States adopt new and different legislation or as national
judges interpret such legislation differently;

Whereas such differences should therefore be eliminated in accordance with
the objective of introducing an area without internal frontiers as set out
in Article 3A of the EEC Treaty so as to establish, pursuant to Article
31(8) of the EEC Treaty, a system ensuring that competition in the common
market is not distorted;

Whereas rental and lending of copyright works and the subject matter of
related rights protection is playing an increasingly important role in
particular for creators, artists and producers of phonograms and films, and
piracy is becoming an increasing threat;

Whereas the adequate protection of copyright works and subject matter of
related rights protection by rental and lending rights as well as the
protection of the subject matter of related rights protection by the
fixation right, reproduction right, distribution right, right to broadcast
and communication to the public can accordingly be considered as being of
fundamental importance for the Community's economic and cultural
development.
Whereas copyright and related rights protection must adapt to new economic developments such as new forms of exploitation;

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;

Whereas these creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons, and the pursuit of such activities must be made easier by providing a harmonized legal protection within the Community;

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

Whereas the legislation of the Member States should be harmonized in such a way so as not to conflict with the existing international conventions on which many Member States' copyright and related rights laws are based;

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 Member States provide rights with respect to rental and lending for certain groups of right owners and further to establishing the rights of fixation, reproduction, distribution, broadcasting and communication to the public for certain groups of right owners in the field of related rights protection;

Whereas it is necessary to define rental and lending in this Directive;

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;

Whereas it is necessary to introduce a regime ensuring that an unwaivable equitable remuneration is obtained by authors and performing artists who must retain the possibility to entrust the administration of this right to collecting societies representing them;

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;

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

Whereas it is also necessary to protect the rights at least of authors as regards public lending by providing for a specific regime; whereas, however, any measures based on Article 4 of this Directive have to comply with Community law, in particular Article 7 of the EEC Treaty;

Whereas the Articles of Chapter II do not prevent Member States from extending the presumption set out in Article 2(5) to the exclusive rights included in that Chapter; whereas furthermore Member States may provide for a rebuttable presumption for the rights of performing artists included in that Chapter which go beyond the rights provided for in the International Convention for the protection of performers, producers of phonograms and broadcasting organizations (hereinafter referred to as the Rome Convention);

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

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 rule of media exploitation chronology, as recognized in the Cinéthèque judgment;

HAS ADOPTED THIS DIRECTIVE:

1 Waiting reservation by the Netherlands delegation on the last part of this recital.
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.

(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).

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2 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 delegations indicated that these reservations might be withdrawn as part of an overall compromise.
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 film 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.

(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) Without prejudice to the provisions of paragraph 7, 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 right, subject to the provisions of Article 3.

3 Reservation by the United Kingdom and Irish delegations and waiting reservation by the Luxembourg delegation on this paragraph.
(6) Member States may provide for a similar presumption as set out in paragraph 5 with respect to authors.

(7) Member States may provide that the signing of a contract concluded between a performing artist and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 3. Member States may also provide that the provisions of this paragraph shall apply mutatis mutandis to the rights included in Chapter II of the present directive.

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.

(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 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 Scrutiny reservation by the Spanish delegation on this paragraph. Waiting reservation by the Commission on the last part of this paragraph, which could be lifted as part of an overall compromise including Article 2(2).
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.

(2) When Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.

(3) Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.

(4) 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.

(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.

(3) A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organizations.
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.

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.
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.
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.
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 not apply the provisions of Article 2(2) to films created before 1 July 1994.

(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.

Reservation by the United Kingdom delegation on this paragraph. This reservation is linked to its position in respect of Article 2(2).
(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.

(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.

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
Statements to be entered in the Council Minutes

Re Articles 2(1), 6(1) and 7(1)

"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."

Re Article 2(4)

"The Commission considers that Article 2(4) also covers the case of rightholders giving an authorization."

Re Article 4

- "The Commission considers that the categories of establishments which may be exempted under Article 4(3) include public libraries, universities and educational establishments."

- "The Commission considers that the present Danish law on public lending satisfies the requirements of Article 4."

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

- "The Commission agrees that its report shall include the question whether derogations are justified for other works than literature."

Re Chapter II

"The Commission states that Chapter II does not apply to publishers of printed works, and that consequently it does not prevent Member States from providing or maintaining in their national law protection of such publishers."

6 Reservation by the United Kingdom delegation on the inclusion of public libraries in this statement.
Re Article 6a

"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."

Re Article 8(2)

"The Commission considers that Article 8(2) is without prejudice to the provisions of Article 2(7)."

Re Article 11(7)

- "The Commission considers that the provisions of Article 11(7) may be satisfied by the extension of the agreement that has existed in France since June 1990, and which is to be renegotiated within five years, to all films which fulfill the criteria for protection under the provisions of the present Directive at that time and provided that this renewed agreement provides for an equitable remuneration within the meaning of Article 3."

- "The Commission considers that, for the implementation of the last sentence of Article 11(7), Member States are free to use their administrative or judicial authorities or both."