REPORT

from: Presidency

to: Internal Market Council

No. prev. doc.: 6834/92 PI 61 CULTURE 60
No. Comm prop.: 6344/92 PI 49 CULTURE 45

Subject: 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

1. Introduction

In a letter of 13 December 1990, the Commission submitted to the Council a proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright (1). That proposal was based on Articles 57(2), 66 and 100a of the Treaty establishing the European Community.

At its meeting on 14 May 1992, the Internal Market Council held an initial discussion on the main issues outstanding and instructed the Permanent Representatives Committee to give further consideration to the few issues still to be resolved with a view to the adoption of a common position at the Council's meeting on 13 and 19 June 1992.

Following the Permanent Representatives Committee's discussions, there remains just one political issue to be resolved, as outlined in 2 below. The text of the amended proposal for a Directive has been edited by the Working Party of Legal/Linguistic Experts under the customary procedure and the result is set out in 6968/92 P1 66 CULTURE 63 PRO-COOP 40.

2. The person considered to be the author of a cinematographic or audiovisual work - Article 2(2)

The European Parliament proposed the addition of a provision whereby, for the purposes of the Directive, the principal director of a cinematographic or audiovisual work is to be considered its author (amendment No 25).

The Commission included that addition in its amended proposal with the stipulation that Member States may provide for others to be considered co-authors (Article 2(2) in 6344/92).

As some delegations entered reservations on the desirability of such a provision, the Presidency endeavoured to make it more acceptable to them by adding to the amended Commission proposal the stipulation that the principal director was to be considered the author or one of the authors (Article 2(2) in 6968/92) and by proposing a paragraph allowing Member States not to apply Article 2(2) to works created before 1 July 1994 (Article 18(b) in 6968/92).
During the latest discussion in the Permanent Representatives Committee, the Presidency was also prepared to go a step further and allow Member States to defer the application of Article 2(2) until three years after the Directive's transposition (Article 13(5) in 6968/92).

The United Kingdom delegation upheld its reservations on the need for Community harmonization in this respect. It argued that, while the principal director of a cinematographic or audiovisual work was considered its author in most Member States, in other Member States the producer was considered its author and that the existence of those different systems alongside one another did not seem to place any obstacles in the way of the internal market's operation. Moreover, it considered that granting rights as author to the principal director in the limited context of rental and lending would give rise to confusion. It proposed that the provision in question be replaced by the following statement for the Council minutes:

"The Council notes the Opinion of the European Parliament regarding the question of film authorship.

The Council considers that this issue should be looked at in the wider context of copyright and neighbouring rights as a whole.

The Council therefore invites the Commission to study the question of film authorship in Europe to establish whether the different treatment in Member States constitutes a barrier to the Single Market, and invites the Commission to make proposals as appropriate in this respect."
While sharing the United Kingdom delegation's view, the Irish and Luxembourg delegations did not rule out the possibility of going along with the Presidency compromise proposals.

The Commission representative said that the Commission could not agree to the replacement of Article 2(2) by the statement proposed by the United Kingdom delegation. He pointed out that, in the absence of that provision, the principal director of a cinematographic or audiovisual work could prohibit its rental and lending in most Member States, but not in those Member States in which rights as author lay with the work's producer alone, which would form an obstacle to the operation of the internal market. Copyright harmonization would be incomplete if rightholders were not the same in all Member States. Even though the provision in question was concerned only with rental and lending under this Directive, the European Parliament had expressed its intention of proposing similar amendments in the other proposals for Directives pending in the field of copyright and related rights. Lastly, he reserved the Commission's position on Article 13(b) as proposed by the Presidency.

The Spanish and French delegations in particular supported the Commission representative's view, pointing out that the Presidency proposals formed a balanced compromise package.

The United Kingdom delegation asked for the Council's Legal Service's views as to whether the lack of harmonization in this respect formed an obstacle to the operation of the internal market (5).

---

(5) The Council's Legal Service's opinion is to appear in an addendum to this report.
3. Other issues

The Spanish delegation and the Commission had scrutiny reservations on Article 4(4) in 6968/92. They linked the withdrawal of those reservations to the adoption of Article 2(2).

The German delegation had a scrutiny reservation on Article 1 in that it provided for an exclusive rental and lending right instead of a right to remuneration. It would be prepared to withdraw it as part of an agreement on the Directive as a whole.

The United Kingdom delegation had a reservation on the inclusion of public libraries in the first Commission statement re Article 5 (Annex II hereto). It would be prepared to withdraw it as part of an agreement on the Directive as a whole.

4. Conclusions

The Presidency would request the Council to:

- adopt its common position on the Directive as set out in 6968/92 Pl 65 CULTURE 63 PRO-COOP 40, for forwarding to the European Parliament;

- agree to the statement by the Council and the Commission set out in Annex I;

- take note of the statements by the Commission set out in Annex II;

- decide to enter those statements in the minutes of its meeting.
Common position with a view to the adoption of a Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Statement by the Council and the Commission

"The Council and the Commission agree that the provisions of Article 8 are without prejudice to those provisions of Council Directive 85/619/EEC of [(7085/92) on the co-ordination 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 organizations the right of simultaneous retransmission of their broadcasts by satellite."

7085/92
(ANNEX 1)
Common position with a view to the adoption of a Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property

- Statements by the Commission

Re Articles 2(1), 7(1) and 9(1)

"The Commission considers that the provisions of Article 2(1), fourth indent, Article 7(1), third indent, and Article 9(1), third indent, do not oblige 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 5

- "The Commission considers that the categories of establishments which may be exempted under Article 5(3) include public libraries, universities and educational establishments."

- "The Commission considers that the present Danish law on public lending satisfies the requirements of Article 5."

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

(6) Reservation by the United Kingdom delegation on the inclusion of public libraries in this statement.
"The Commission agrees that its report is to include the question of whether derogations are justified for works other 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."

Re Article 10(2)

"The Commission considers that Article 10(2) is without prejudice to the provisions of Article 2(7)."

Re Article 13(9)

"The Commission considers that the provisions of Article 13(9) may be satisfied by the extension of the agreement that has existed in France since June 1990, which is to be renegotiated within five years, to all films which fulfil the criteria for protection under the provisions of this Directive at that time, provided that the renewed agreement complies, as from the date set under Article 13(8), with the provisions of Article 4 of this Directive."

"The Commission considers that, for the implementation of the last sentence of Article 13(9), Member States are free to use their administrative or judicial authorities or both."
ADDENDUM TO REPORT

from: Presidency
to: Internal Market Council

Subject: 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 - Contribution of the Council Legal Service to the report

At its meeting on 2 June 1992, the Permanent Representatives Committee asked the Council Legal Service for its opinion as to whether lack of harmonization of the issue of film authorship would constitute an obstacle to the operation of the internal market.

Article 2(2) of the amended proposal for a Directive as it stands in the Presidency's compromise proposal provides that:

"For the purposes of this Directive, the principal director of a cinematographic or audiovisual 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". (1)

(1) 6968/92 PI 65 CULTURE 63 PRO-COOP 40.
This definition does not appear in the Commission's original proposal. It was a European Parliament amendment that the Commission adopted in its amended proposal (2). The Commission states that:

"At least in the context of this Directive, it is guaranteed that these creative persons obtain legal protection as authors throughout the Community and no longer suffer disadvantages in some Member States due to a lack of protection. Without prejudice to a possible overall harmonization of authorship of cinematographic works, it seems therefore useful to include the provision the Parliament has proposed."

The legal situation underlying the question is that there are differences in the laws of the Member States, some of which (3) do not recognize the principal director as the original author of the work while others attribute the original authorship and copyright to the principal director of a cinematographic or audiovisual work.

Not being in a position of certainty as to all the consequences of this situation in specific cases, the Legal Service would point that according to the Court's case law, differences in the rules on copyright and in particular the exercise of exclusive rights resulting therefrom are liable to lead to restrictions on intra-Community trade which may, in certain cases, be justified under Article 36 of the Treaty (4).

On this point, the Court has stated that:

"... in the present state of Community law, which is characterized by a lack of harmonization or approximation of

---

(2) 6344/92 PI 49 CULTURE 45.
(3) According to information available to the Legal Service, these States are Ireland, Luxembourg and the United Kingdom.
legislation governing the protection of literary and artistic property, it is for the national legislatures to determine the conditions and detailed rules for such protection." (5).

The case in point is precisely a situation characterized by a lack of harmonization or approximation of legislation governing such protection in the specific field of copyright in respect of cinematographic or audiovisual works.

Without being able to state with certainty that this situation gives rise at the present time to restrictions in intra-Community trade in the broad sense (sale, rental or loan of film and audiovisual material from one Member State to another) the Legal Service considers that any provision intended to harmonize national laws is, in itself, likely to prevent restrictions arising.

Clearly, it is for the Community legislature to decide, from the point of view of expediting, if and when harmonization measures should be taken, and the scope of such measures. In the case in point, such a decision has consequences as to the degree of harmonization to be achieved, which could be limited to the rules to be adopted on rental right, lending right and certain rights related to copyright if the proposed provision (Article 2(2)) is left out or could be extended to cover, in the field in question, authorship as such if that provision is included.

In conclusion, the Council Legal Service considers that the difference between the national laws on authorship of a cinematographic or audiovisual work may be liable to give rise to obstacles to the operation of the internal market and that, if the Council considers that the scale of such obstacles so requires, it may take appropriate harmonization measures using its power of discretion as to their scope and when they should be taken.