SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 28 February and 1 March 1991

No. prev. doc.: 4526/91 PI 8 CULTURE 5
No. Cion prop.: 4174/91 PI 3 CULTURE 3 - COM(90) 582 final
               4173/91 PI 2 CULTURE 2 - COM(90) 584 final
               4175/91 PI 4 CULTURE 4 - COM(90) 586 final

Subject: - Proposal for a Council Decision concerning the accession of the
Member States to the Berne Convention for the Protection of Literary
and Artistic Works, as revised by the Paris Act of 24 July 1971, and
the International Convention for the Protection of Performers,
Producers of Phonograms and Broadcasting Organizations (Rome
Convention) of 26 October 1961
- Commission communication on the follow-up to the Green Paper -
Working Programme of the Commission in the field of copyright and
neighbouring rights
- Proposal for a Council Directive on rental right, lending right, and
on certain rights related to copyright.

(4174/91 PI 3 CULTURE 3 - COM(90) 582 final - SYN 318)

1. The Working Party examined the points in this proposal which were causing delegations concern. Delegations' main points of concern and the Commission representative's replies are summarized below.

2. With regard to the legal bases proposed by the Commission, some delegations had voiced doubts at the previous meeting (1) about the inclusion of article 57(2) of the EEC Treaty, which referred to Directives without mentioning Decisions.

The Commission representative asserted that this legal basis was appropriate as the proposed Decision would serve to harmonize national provisions.

3. The United Kingdom delegation had queried at the Working Party's previous meeting (1) whether Article 100a of the EEC Treaty could be used as a legal basis with regard to employed creative workers (self-employed work being covered by article 57(2)) in view of paragraph 2 of that Article, which stipulated that the article "shall not apply to those (provisions) relating to the rights and interests of employed persons".

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(1) 4526/91, point 16.
The Commission representative replied that the intention of Article 100a(2) was to exclude that Article from applying to the rights and interests of employed persons within the undertakings employing them, as the present proposal was not concerned with the rights and interests of employed creative workers as parties in industrial relations, the exclusion was not applicable.

4. The Spanish delegation queried Article 100a as a legal basis, arguing that many provisions in the Berne and Rome Conventions did not affect "the establishment and functioning of the internal market"; an instrument based on that Article could not therefore have as its object the harmonization of intellectual property rights generally, but should be confined to the harmonization of provisions required for the establishment and functioning of the internal market.

The Commission representative replied that the references to Article 36 of the Treaty in article 100a(4) and (5) showed clearly that Article 100a could provide a basis for harmonizing matters referred to in Article 36, including intellectual property rights; it had indeed already served as a basis for a number of instruments in that field (2).

5. The German delegation queried the possibility of using Article 100a as a basis for requiring Member States to ratify or accede to and comply with international conventions.

The Commission representative said that this was a moot point, but in this instance Article 100a was cited together with Article 113.

6. The Spanish and Italian delegations had serious doubts about using Article 113, which concerned commercial policy, as a legal basis; they argued that in the field of copyright and neighbouring rights the cultural aspect was often far more important than the commercial aspect.

The Commission representative was insistent that the commercial aspect of such rights could not be disregarded, particularly in acting against pirating.

7. The Working Party asked the Council Legal Service to give an opinion, for its next meeting, on the legal bases proposed by the Commission.

8. With regard to the Community competence entailed by the proposed Decision, the Commission representative explained that the provisions of the Berne and Rome Conventions would form part of Community law and hence disputes regarding them could be referred to the Court of Justice for an interpretation. However, in the case of those provisions in the Conventions which left States some discretion over implementation, the proposed decision could not have the effect of imposing one Member States one interpretation rather than another.

At the German delegation's request, the Commission representative said that he would amplify the recitals of the proposal to make this quite clear.
9. In reply to a question from the Spanish delegation, the Commission representative explained that, if the Commission received a complaint from a group of artists or authors regarding a Member States' application of the Berne Convention or the Rome Convention, it would not be bound to bring proceedings under Article 169 of the EEC Treaty, but would remain free to decide whether this was desirable or not.

10. With regard to the external Community competence entailed by the proposed Decision, the Commission representative explained in reply to questions from a number of delegations (E/F/NL/P/UK) that such competence would be confined to matters governed by the two Conventions; in matters not governed by the Conventions or in which Member States were left some discretion (e.g. term of protection, rental and lending rights, reprography, home copying, reproduction of works under Article 9(2) of the Berne Convention and reservations provided for in Article 16 of the Rome Convention), the Community would be vested with such competence only when it had adopted specific harmonization measures in those fields. Even where such competence existed, participation by the Community as such in international negotiations to extend either of the Conventions to cover one or more such matters would be possible only after the Council had adopted negotiating directives.

The Commission representative added that, as only States could accede to the Conventions in question, the proposed Decision could not, either directly or indirectly, bring about accession to them by the Community as such.
Consequently, as he stated in reply to the United Kingdom delegation, the Community competence entailed by the proposed Decision could not result in the Community replacing the Member States in administrative bodies under the two Conventions, at least not unless the Conventions were amended so as to enable the Community to accede to them.

Several delegations (DK/DE/FR) voiced doubts about the instrument chosen by the Commission.

The Danish and German delegations pointed out that the usual instrument for Community-wide harmonization was a Directive rather than a Decision. The German delegation felt that the Decision proposed by the Commission would deprive national parliaments of their power to decide whether to ratify international conventions and of their customary role in transposing Community Directives. The Portuguese delegation contended that the effects of the proposed Decision would go beyond those of a Directive in that a Directive's effects were normally confined to relations between Member States, whereas this Decision's effects extended to Member States' relations with the other States parties to the Berne and Rome Conventions.

The German and Spanish delegations preferred a less binding instrument than a Decision, with the German delegation suggesting a Recommendation and the Spanish delegation a Resolution. The Italian delegation, however, agreed with a Decision rather than a Recommendation or a Resolution.

The Commission representative referred to the arguments which he had adduced at the Working Party's previous meeting in favour of a Decision rather than a
Directive (see 4526/91, point 12). He added that the inadequacy of a Recommendation or a Resolution was shown by the fact that some Member States were still not parties to the Berne Convention (Paris Act) and the Rome Convention, despite the Resolution of the Representatives of the Governments of the Member States of 24 July 1984 on measures to combat audio-visual pirating (3) and Recommendation No R(88)2 of 18 January 1988 of the Committee of Ministers of the Council of Europe, which appealed to those Member States that had not already done so to ratify the Conventions in question quickly.

12. The Danish, German and United Kingdom delegations asked whether the Commission's aims could not be achieved by requiring Member States to ratify or accede to the Conventions in question, without the requirement to comply with them.

The Commission representative said that the requirement for Member States to comply with the two Conventions needed to be included since it was essential for the proper operation of the internal market that all Member States apply the provisions of the Conventions. He also pointed to the stipulation in Article 25(2) of the Rome Convention that a State must be in a position to apply the Convention at the time of ratification or accession.

13. The United Kingdom delegation asked whether it would not suffice to address the Decision only to those Member States which were not yet parties to the Conventions in question.

The Commission representative emphasized the need to address the Decision to all Member States so as to leave no doubt that all of the provisions harmonized would form part of Community law and so that those Member States already parties to the Conventions would not be able to go back on that.

14. While acknowledging the need for all Member States to be parties to the Rome Convention, the Belgian delegation wondered whether there was a similar need for those Member States parties to the Brussels Act version of the Berne Convention to become parties to the Paris Act version of that Convention.

The Commission representative replied that the differences in protection between the Brussels Act and Paris Act versions of the Berne Convention (as summarized in point 9 of the explanatory memorandum) were liable to impede the operation of the internal market.

II. Commission communication on the follow-up to the Green Paper - Working programme of the Commission in the field of copyright and neighbouring rights (4173/91 PI 2 CULTURE 2 - COM(90) 584 final)

15. Several delegations added to the comments made at the previous meeting (4526/91, points 1 to 9).

16. The French, Netherlands, Portuguese and United Kingdom delegations wanted the Commission to give a measure of priority to the collective management of copyright and neighbouring rights (point II(iv) of the Annex to the Commission communication), with some of them pointing out that this question would arise in connection with the initiative on broadcasting
(point I(vi) of the Annex). The French and Netherlands delegations also stressed the importance which they attached to the exercise of such rights.

While recognizing the importance of the matter, the Commission representative doubted whether it would be possible to give it greater priority in view of the limited resources available to the Commission. Its work was geared more to the content of rights than to the exercise of them.

17. In reply to questions from the German and French delegations, the Commission representative said that work on reprography (point II(ii) of the Annex) was further ahead than that on the other subjects in section II of the Annex to the Commission communication and should produce a legislative proposal in 1992; a hearing of interested circles would be held on 26 and 27 June 1991; however, work on this was not sufficiently advanced for it to be dealt with in conjunction with the proposal on home copying (point I(iii) of the Annex).

18. The Spanish delegation voiced doubts about the degree of priority given to initiatives regarding data bases and authors' moral rights (points I(iv) and II(i) of the Annex), while the Netherlands delegation did not regard resale rights (point II(iii) of the Annex) as a matter of any priority.

The Commission representative replied that the Annex to the communication reflected the priorities of the Commission, which might not coincide with those of individual Member States.
19. The Commission representative said that a hearing of interested circles on the term of protection (point iv) of the Annex would be held on 13 and 14 June 1991.

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

(4175/91 FI 4 CULTURE 4 - COM(90) 586 final - SYN 319)

20. Member States' representatives gave their initial reactions to this proposal, which the Commission representative had presented at the Working Party's previous meeting.

General reactions

21. The Belgian, German and French delegations reacted favourably to the proposal in general, although some specific aspects of it did give rise to difficulties for them. Other delegations had not yet completed their examination of the proposal and could therefore only give preliminary reactions and put questions at this stage.

22. The Danish, Spanish and United Kingdom delegations emphasized that the proposal was a complex and ambitious one.

The Danish delegation felt that its scope was too broad and should be confined to the rental rights of authorities and phonogram producers, to the exclusion of lending rights and the book trade; the protection of neighbouring rights should be dealt with in a separate proposal.
23. The Spanish delegation pointed to the need to strike a proper balance between authors' rights, performing artists' rights and producers' rights.

24. The Netherlands delegation regretted the lack of definitions in the proposal.

Rental and lending rights

25. The German and Netherlands delegations would prefer to see a right to receive payment instead of the exclusive rental and lending rights provided for in Article 1 of the proposal. The German delegation said that, if an exclusive right were decided on, it would request a transitional provision in order to safeguard the interests of rental firms in Germany.

The Danish delegation suggested that the arrangement adopted for rental rights in the Council's common position on the Directive on the legal protection of computer programs (4) should also apply in this proposal.

The Commission representative explained that, in view of the increasing frequency of rental as a means of commercializing some works, there needed to be a system enabling rental right-holders to receive payments separate from those obtained from sales: such separate rental payments were possible with an exclusive right but not with a right to receive payment. Moreover, an exclusive rental right enabled right-holders to prohibit rental of their works under circumstances in which such rental

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(4) 10652/1/90 PI 82 PRO-COOP 148.
might result in them being copied. An exclusive lending right was also needed for similar reasons: however, in view of the cultural and social aspects of some Member States' policies on public lending, Article 4 contained a derogation from the principle of an exclusive lending right (but not from an exclusive rental right). On the problem raised by the German delegation, the Commission would be prepared to examine the possibility of transitional provisions.

With regard to the Danish delegation's suggestion, the Commission representative pointed out that one of the conditions attaching to adoption of the arrangement on rental rights in the Directive on computer programs had been that it remained without prejudice to the arrangement adopted in the instrument now under discussion; the Commission wished to comply with that condition.

26. Several delegations wondered whether the criterion proposed by the Commission for distinguishing between rental and lending, viz. rental being for profit-making purposes and lending not for direct profit-making purposes, was the most appropriate one. The French delegation wondered whether the criterion of service rendered would not be more suitable.

The Commission representative said that the Commission was prepared to consider any proposal for a better definition of the distinction between rental and lending.

27. The Danish and United Kingdom delegations pointed out that, where exclusive rental rights were based on copyright, Member States were required to apply the principle of national treatment under Article 5
of the Berne Convention to nationals of third countries parties to that Convention, which might result in a transfer of funds to the USA and might also influence right-holders in choosing between rental or lending of their works, since lending was not subject to the principle of national treatment. In the Commission representative's view, rental rights were not subject to the principle of national treatment since they were not referred to in the Berne Convention; hence, Member States would be free to apply the criterion of reciprocity to third-country nationals.

28. The French delegation asked whether it would not be advisable to draw a clearer distinction between rental of the work and rental of the medium.

29. The United Kingdom delegation asked whether there were any precedents for a rental right for performing artists, as provided for in Article 2 of the proposal; the Commission representative said that Germany and the Netherlands were planning to introduce such a right.

30. The Netherlands and United Kingdom delegations said that they needed to look more closely at the provisions of Article 3, which were an innovation for them.

31. The Spanish and French delegations requested further information on collective management of rights under Articles 3 and 4 of the proposal.

The Commission representative said that the Commission intended to leave Member States considerable freedom in this area.
32. The French delegation sought further details of the basis for assessing payment under Article 3 of the proposal; the Commission representative explained that the Commission's intention was not to harmonize methods of calculating payment but to ensure that each right-holder received an appropriate share of the payment made.

33. The Greek delegation entered a reservation on the inclusion of a lending right in the proposal.

34. The Spanish, Irish, Netherlands, Portuguese and United Kingdom delegations entered reservations on the budgetary implications of the requirement that authors be paid for the lending-out of their works. The Irish delegation said that applying this requirement to books already held in public libraries would give rise to problems.

The Commission representative pointed to the need for authors to receive fair payment for lending.

Neighbouring rights

35. The Spanish delegation asked whether the reproduction right in Article 6 of the proposal should not be granted to authors.

The Commission representative said he would look into this.

36. The Netherlands delegation considered that the proposal should contain a provision on secondary use of phonograms, along the lines of Article 12 of the Rome Convention.
37. The French delegation suggested that the proposal should prohibit Member States from entering the reservation provided for in Article 16(1)(a) of the Rome Convention in the case of performing artists.

The Commission representative was prepared to amend the proposal accordingly, if that was the Working Party's wish.

Further proceedings

38. The Commission representative asked the Working Party to consider the following points for the next meeting:

(a) Should the book trade be included in the proposal?

(b) Should public lending be included in the proposal?

(c) If public lending is included, should the derogation in Article 4 be confined to books or should it also cover musical and cinematographic works?

(d) Should the proposal cover distribution generally, including distribution right for authors?