RECOMMENDATION

of the Committee on Legal Affairs and Citizens' Rights

on the COMMON POSITION established by the Council 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 (C3-0287/92 - SYN 319)

Rapporteur: Mr Georgios ANASTASSOPOULOS
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At its sitting of 8 July 1992, the President of Parliament announced that the common position had been received and referred to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Culture, Youth, Education and the Media and the Committee on Economic and Monetary Affairs and Industrial Policy for their opinions.

At its meeting of 22, 23 and 24 September 1992 and 5, 6 and 7 October 1992 the Committee on Legal Affairs and Citizens' Rights considered the common position and the draft recommendation.

At the latter meeting it adopted the following recommendation by 7 votes to 1, with 2 abstentions.

The following took part in the vote: Graf Stauffenberg, chairman; Vayssade, vice-chairman; Anastassopoulos, rapporteur; Alber, Bandrés Molet, Bontempi, Fontaine, Garcia Amigo, Grund, Lord Inglewood, Medina Ortega and Zavvos.

The opinion of the Committee on Economic and Monetary Affairs and Industrial Policy is attached.

The recommendation was tabled on 12 October 1992.

The deadline for tabling amendments to the common position or proposals to rejection will appear on the draft agenda for the part-session at which the recommendation is to be considered.
A

RECOMMENDATION

(Cooperation procedure: second reading)

on the common position established by the Council 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 (COM(90)0586¹ and COM(92)0159²)

The Committee on Legal Affairs and Citizens' Rights,

- having regard to the common position of the Council (C3-0287/92),

Recommends that the European Parliament amend the common position as follows:

Common position of the Council

(Amendment No. 1)

Twenty-first recital a (new)

Whereas the harmonized legal protection resulting from the implementation of the provisions of this Directive may create a new situation in regard to Member States' relations with certain third countries; whereas, therefore, it will be necessary to step up negotiations and consultations with such third countries, in particular within the relevant international organizations, with a view to securing at least reciprocal legal protection;

(Amendment No. 2)

Article 2(5)

5. Without prejudice to 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 clauses to the contrary, to have transferred his rental right, subject to Article 4.

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 clauses to the contrary, to have transferred his rental right, subject to Article 4.

¹ OJ No. C 53, 28.2.1991, p. 35
² OJ No. C 128, 20.5.1992, p. 8
(Amendment No. 3)
Article 2(7)

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 authorizing rental, provided that such contract provides for an equitable remuneration within the meaning of Article 4. Member States may also provide that this paragraph shall apply mutatis mutandis to the rights included in Chapter II.

7. Delete
I. INTRODUCTION

1. On 18 June 1992 the Council adopted its common position pursuant to Article 149(2) of the EEC Treaty (C3-0287/92). The common position was adopted with one abstention, which is equivalent to it being adopted unanimously (see Article 148(3) of the EEC Treaty). It should be recalled that, following Parliament's adoption of your rapporteur's report, the Commission presented an amended proposal for a directive pursuant to Article 149(3) of the EEC Treaty.

II. THE COMMISSION'S AMENDED PROPOSAL FOR A DIRECTIVE

2. In its amended proposal for a directive, the Commission incorporated, to a possibly unprecedented extent, most of the amendments adopted by Parliament, in respect of the following points in particular:

(a) the definition of rental and lending (Article 1, paragraphs 2 and 3 respectively);

(b) explicit reference to the 'principal director' as being the author of a 'cinematographic work' (Article 2(2));

(c) the establishment of a rebuttable presumption according to which performing artists are presumed to have assigned to the producer the rights deriving from their collaboration in a cinematographic work (Article 2(2));

(d) the application of this presumption of assignment by analogy to related rights of reproduction (Article 6(2)) and distribution (Article 7(2));

(e) the new provision in Parliament's report concerning the method of determining the 'adequate part' of the payment referred to in Article 3. Here, however, the Commission has not extended this provision by analogy, at least not specifically, to exploitation of the work but has confined itself to mentioning the 'importance' of the contribution of the rightholders to the creation of the work;

(f) provision for an exclusive broadcasting right and a right to remuneration for performing artists and phonogram producers so as to ensure that certain basic provisions of the Rome Convention are complied with in future at Community level (Article 6a);
in addition to the above-mentioned provisions which have direct practical applicability, the reaffirmation of certain fundamental principles of copyright law, such as the predominance of the moral right of the author with regard to communication rights (Article 4a) and the principle that 'protection of copyright-related rights shall in no way affect the protection of copyright as such' (Article 11a).

3. Broadly speaking, it might be somewhat premature to draw conclusions at an interim stage when the text is in the form of an amended Commission proposal. However, it would not be going too far to say that there was not one of Parliament's amendments which did not have some influence — indeed a largely positive influence — on the amended Commission proposal.

III. THE COMMON POSITION OF THE COUNCIL

A. General comments

4. The common position of the Council is, quite rightly, based not merely on the concepts but also on the specific provisions contained in the Commission's amended proposal for a directive. The following three points give a brief outline of the substance of the text:

- although lending is established as an exclusive right (see Article 1(3)), this right is in fact diminished since the basic provisions of the directive make no reference to it (see Article 2(5), (6) and (7) and Articles 4 and 5);

- many of the provisions reflect the attempt that has been made to strike a balance aimed at ensuring that intellectual and artistic creation enjoy adequate protection while at the same time guaranteeing that such works are made available to the public, whatever form this may take. This is reflected particularly in the provisions on the assignment of rental right (Article 2(5), (6) and (7)), the right to 'equitable remuneration' (Article 4), and the possibility of transferring or assigning related reproduction rights (Article 7(2)) and distribution rights (Article 9(4));

- the provisions on application in time (Article 13) are particularly detailed, ensuring that acts of exploitation performed before 1 July 1994 (the date on which the provisions of the directive come into effect) are not affected (Article 13(2)). Moreover, various other exceptions to Article 13(1) are allowed, on the one hand, at reinforcing the non-retroactive nature of certain specific provisions of the directive (see Article 13(3) (first sentence), (4), (6) and (7)) and, on the other hand, at deferring the immediate implementation of certain other provisions (see Article 13(5) and (8)). Here the Council's common position is substantially similar to the position of the European Parliament which, in its amendments to the Commission proposal, proposed that rights and obligations applying prior to the entry into force of the directive should not be affected.

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6 See Amendment No. 35 adding a new paragraph (1a) to Article 11 of the proposal for a directive (OJ No. C 67, 16.3.1992, p. 97)
5. Apart from the question of lending, the common position's approach to the other two subjects coincides with the points that your rapporteur was trying to make from the very start of his report. In that report, it was pointed out on several occasions, particularly when considering Articles 2 and 3 of the proposal for a directive (see COM(90) 586 final - OJ No. C 53, 28.2.1991, pp. 35-38), that achieving the right balance between the interests of most of the first owners who contribute to the creation of a composite and collective or collaborative work was the cornerstone of proper, viable legislation. Even at the stage of the draft report, solutions were put forward which took account of this 'inescapable' reality, while at the same time bearing in mind the need to achieve the Commission's objective goal, namely, to provide protection for and give impetus to intellectual and artistic creation in Europe. It might be concluded that the Council's common position justifies this way of thinking and this approach to the problems created by the proposal for a directive. Of course, in its common position, the Council makes certain changes to specific provisions, opting sometimes for strictness and other times for flexibility. We shall look at this in more detail in the following section.

B. Specific remarks on the provisions of the common position

6. The Council took the following decisions in respect of the points incorporated by the Commission into its amended proposal for a directive, which are referred to above in Section II, paragraph 2:

(a) the exclusion from rental and lending of certain forms of making available for the purpose of public performance or broadcasting is transferred from Article 1 to the thirteenth recital;

(b) the 'principal director of a cinematographic or audiovisual work' is recognized as being its author or at least one of its authors (Article 2(2)). This provision need not be applied 'to cinematographic or audiovisual works created before 1 July 1994' (Article 13(1)) or the application thereof may be delayed until 1 July 1997 (Article 13(5));

(c) assignment of rights: it is recognized that rental and lending rights 'may be transferred, assigned or subject to the granting of contractual licenses' (Article 2(4)). Following on from this, provision is made for a rebuttable presumption according to which performing artists are presumed to have assigned to producers their rights deriving from their contribution to the making of a cinematographic work (Article 2(5)). This accords with the position adopted by the European Parliament (with the exception of the requirement that a contract be drawn up 'in writing', which has been deleted). In addition, the common position introduces two new provisions:

See the report by Mr Anastassopoulos, A3-0049/92, paragraphs 23 to 35 of the explanatory statement, pp. 24 et seq.

COM(92) 159 final - SYN 319 - see also OJ No. C 128, 20.5.1992, pp. 8-17
- the possibility of extending such presumption to authors (Article 2(6)), and

- the possibility of establishing the presumption of assignment in law in the case mentioned in paragraph 5 provided that the contract has been drawn up in writing (Article 2(7)).

In both cases, the right to 'equitable remuneration' referred to in Article 4 is not affected. Your rapporteur believes that these two additions reflect real situation resulting from the provisions of national law. Moreover, he himself had proposed in his draft report (PE 153.340/A, Amendment No. 9) a provision similar to that contained in Article 2(7). However, the Committee on Legal Affairs and Citizens' Rights - and subsequently the European Parliament - did not accept this provision, preferring a rebuttable assignment of rights, subject to contractual conditions to the contrary. In order to ensure consistency with the views expressed by the European Parliament on this point, your rapporteur considers that paragraph 7 of Article 2 should be deleted (see Amendment No. 3 and Amendment No. 2 which supplements it);

(d) Assignment of related rights: provision is made for the possibility of assigning reproduction rights (Article 7(2)) and distribution rights (Article 9(2)). This approach is no different from that of the European Parliament, bearing in mind that the latter had in any case agreed to the principle of rebuttable assignment (by analogy with the provisions relating to rental and lending in Article 2). However, provision is also made for similar application of assignment in law, as provided for in Article 2(7) (see point (c) above);

(e) The right to 'equitable remuneration' is established in Article 4, but only in cases where 'an author or performing artist has transferred or assigned his rental right'. Mention of criteria for determining such 'equitable remuneration' is transferred to the seventeenth recital;

(f) Parliament's proposal to add a new Article 6a (which was accepted by the Commission) was taken up in Article 8 of the common position (with minor changes to the wording);

(g) Application in time: the provisions contained in Article 13 are discussed in detail above (see paragraph 4, third indent). One extra remark should be made: Article 13(1) stipulates that the directive shall also apply in respect of works or first fixations which 'meet the criteria for protection under the provisions of this Directive on (1 July 1994)'. This provision is clearly intended to cover certain cases involving related rights. It might seem initially as though such provisions were intended to have retroactive force, but this interpretation is not borne out if the other provisions of Article 2 (particularly paragraphs 2, 3 (first sentence), 6 and 7) are taken into account;

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9 Amendment No. 13 of A3-0049/92 - see also OJ No. C 67, 16.3.1992, p. 95
(h) Article 14 sets out the principle that protection of copyright-related rights shall in no way affect the protection of copyright. However, the Council preferred not to tackle the question of the moral rights of authors but instead to await the findings of the Commission's study.

7. Two other aspects have yet to be considered: lending and reciprocity in relations with third countries. On the question of lending, the remarks made earlier (see paragraph 4, first indent) apply. It need only be added that Article 5 also provides for exemptions from the still 'diminished' lending right established by the directive. The overall approach to this matter in the common position is unsatisfactory. However, your rapporteur does not propose to table amendments to improve this provision, given that none of the amendments tabled at first reading on the question of lending were adopted by Parliament in plenary sitting.

8. On the question of reciprocity, Parliament had adopted an amendment to the recitals dealing with this question in view of the new situation which the implementation of the provisions of the directive would create with regard to relations with third countries. This is particularly important in view of the fact that the Berne Convention establishes the principle of equal treatment of foreign authors and their works on a par with nationals of the country where the relevant protection is required (the principle of 'national treatment'). It is regrettable that the Council has deleted this recital even though the Commission had incorporated it into its amended proposal (as the nineteenth recital). Your rapporteur has accordingly retabled the amendment in the simpler form in which it was incorporated into the Commission's amended proposal (see amendment No. 1). He believes that it is in the Community's interests to make a clear statement of its intentions concerning the future form of any new framework of regulations in respect of third countries. Moreover, adoption of this recital would not directly alter the structure of the provisions contained in the directive.

IV. CONCLUSIONS

9. The text contained in the Council's common position will obviously constitute the directive governing in the near future the exclusive rights of rental and lending as well as certain rights related to copyright. Largely as a result of the Commission's valuable work, which consisted in proposing far-reaching objectives for harmonizing the protection of intellectual and artistic creation in Europe, we are now moving towards legislation which Parliament has helped to make perhaps less ambitious but more practicable and hence applicable to a particularly complex sector. When drawing up his report, your rapporteur highlighted the principle that 'creative works must be made widely available', and he believes that,

8 See the Council's reasons as set out in its common position - C3-0287/92, paragraph 4, p. 4
9 See amendment No. 7 adding a new sixteenth recital a (OJ No. C 67, 16.3.1992, p. 93)
10 Berne Convention (Act of Paris of 24 July 1971) on the protection of literary and artistic works
despite its shortcomings, the Council's common position takes a 'realistic' approach (given the differences between Member States' national legislation) and achieves the basic aims set out by the Commission. He therefore recommends that the Council's common position be adopted, while at the same time proposing certain amendments to improve the final text.

10. Your rapporteur cannot disguise his satisfaction at the fact that the European Parliament's amendments were not only very largely incorporated by the Commission but also taken up to a significant extent by the Council and that the original proposal for a directive was therefore substantially altered, perhaps to an unprecedented extent. The fact that both the Commission and the Council find it hard to ignore the conclusions arrived at by the European Parliament is highly indicative of the latter's growing influence and its increasing contribution to Community legislation. The Committee on Legal Affairs and Citizens' Rights, which was chiefly responsible for making changes to the text of the Commission's original proposal, and the two committees which delivered opinions thereon (the Committee on Culture and the Committee on Economic and Monetary Affairs), are now in a position to see for themselves the results of all their hard work.
OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Economic and Monetary Affairs and Industrial Policy

for the Committee on Legal Affairs and Citizens' Rights

Draftsman: Mr Klaus WETTIG

At its meeting of 22 May 1991 the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Wettig draftsman.

At its meeting of 23 September 1992 the committee considered the common position and unanimously decided to retable Amendment No. 5, as adopted by Parliament at first reading.

The following took part in the vote: Beumer, chairman; Patterson, vice-chairman; Wettig, draftsman; de la Camara, Fitzgerald (for Lataillade), Friedrich, Geraghty, Herman, Lulling, Mihr (for Hoff), Pierros, Porto (for Cox pursuant to Rule 111(2)), Siso Cruellas, Speciale and Thyssen.
I. Introduction and explanatory statement

In view of the technological possibilities available today for reproducing written works, sound recordings and visual recordings, it is an economically significant fact of relevance to industry that a large number of copyright works are being copied without the express authorization of the rightholders by photocopiers or on blank cassettes.

In view of these circumstances, a number of Member States have passed laws on compulsory compensation, which must be paid by producers of photocopiers and blank cassettes.

Pursuant to Article 3(f) of the EEC Treaty, competition in the common market must be protected from distortion. This protection can be achieved by regulating private copying rights in a consumer-friendly manner and by introducing a concomitant compulsory payment. Competition conditions will be harmonized through the payment of a fixed rate of compensation for the reproduction of copyright works, to be added to the retail price of photocopiers and blank cassettes.

II. Conclusion

Pursuant to Rule 120(6) of the Rules of Procedure, the committee calls on the Committee on Legal Affairs and Citizens' Rights to incorporate the following amendment in its report:

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<th>Common position</th>
<th>Amendment</th>
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<tr>
<td>(Amendment No. 1)</td>
<td>11th recital</td>
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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 establish the exclusive rights of fixation, reproduction and distribution for certain groups of right owners in the field of related rights protection.

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 establish the exclusive rights of fixation, reproduction and distribution for certain groups of right owners in the field of related rights protection, and whereas the use of these rights shall entail compulsory payment.