SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 14 and 15 March 1991

No. prev. doc.: 5163/91 PI 19 CULTURE 8
No. Com. prop.: 4175/91 PI 4 CULTURE 4 - COM(90) 586 final - SYN 319

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

1. At the meeting of the Working Party on Intellectual Property (Copyright) on 14 and 15 March 1991, Member States' delegations replied to the questions put by the Commission representative at the previous meeting (see 5163/91, point 38) and the Working Party began the first reading of the proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright (4175/91 PI 4 CULTURE 4).

1. Questions put by the Commission representative

2. Most delegations said that they were replying to the Commission representative's questions on a provisional basis as internal consultations had not yet been completed and given the short time that had elapsed since the Working Party's previous meeting.
(a) Should the book trade be included in the proposal?

3. The Belgian, German, Spanish, French, Italian, Luxembourg, Netherlands, Portuguese and United Kingdom delegations could agree to the book trade being included in the proposal, subject to the following points:

- the Spanish delegation had reservations on payments to authors for public lending of their books;

- the French delegation felt that the proposal should be flexible and strike a balance between the interests of authors and those of publishers;

- the Italian and Portuguese delegations entered reservations on a public lending right in respect of books;

- the United Kingdom delegation advocated an option between a rental right and a lending right in the case of books.

The Danish and Irish delegations were opposed to the inclusion of the book trade in the proposal.

The Greek delegation reserved its position.

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

4. The German, French, Luxembourg, Netherlands and United Kingdom delegations were in favour of including public lending in the proposal, with the Luxembourg and Netherlands delegations opposing an exclusive lending right
in respect of books and the United Kingdom delegation arguing that the inclusion of public lending would be pointless unless it covered public lending of books.

The Danish, Greek, Spanish, Irish, Italian and Portuguese delegations were opposed to the inclusion of public lending in the proposal.

The Belgian delegation reserved its position.

(c) If public lending is included, should the derogation in Article 4 be confined to books?

5. The German, French, Irish and Italian delegations would be in favour of confining the derogation in Article 4 to books.

The Belgian, Danish, German, Netherlands and Portuguese delegations thought that, assuming such inclusion, it should be possible to apply the derogation in Article 4 to all categories of objects covered by the Directive; the United Kingdom delegation would also be prepared to agree to that possibility.

The Luxembourg delegation could envisage either treating all categories of objects alike or confining the derogation to books on cultural policy grounds.

The Spanish delegation reserved its position.

(d) Should the proposal contain a general distribution right, including one for authors?

6. The Commission representative explained that the Commission was not opposed to the principle of an exclusive distribution right for authors. He
pointed out that the proposal laid down an exclusive distribution right for certain categories of persons; authors were not one of them because the provision in question formed part of Chapter II concerning rights related to copyright.

The Belgian, German, French, Luxembourg, Netherlands and United Kingdom delegations thought it inadvisable to include an exclusive distribution right for authors in the proposal, particularly in view of its structure.

While sharing those delegations' view, the Portuguese delegation would not oppose the inclusion of such a right for authors if a majority emerged in favour of it.

The Italian delegation favoured a general distribution right.

The Danish delegation was in favour of a general distribution right modelled on that in Article 4(c) of the Council's common position on the Directive on the legal protection of computer programs (1).

The Spanish delegation was prepared to go along with the majority of delegations on the inclusion or otherwise of an exclusive distribution right for authors.

The Greek and Irish delegations reserved their positions.

---

(1) 10652/1/90 PI 62, PRO-COOP 148.
II. First reading of the proposal for a Directive

Article 1(1) and (4)

7. The German and Netherlands delegations were opposed to a right to authorize or prohibit rental or lending, proposing that it be replaced by a right to receive payment. They made the point that an exclusive rental or lending right would be extinguished upon the first placing on the market, by the right-holder or with his consent, of the original or the copy in question of a work or other subject-matter, whereas a right to receive payment would not be extinguished and would suffice to ensure that right-holders were remunerated.

The Commission representative and the French and United Kingdom delegations pointed to the need for a right to prohibit (an exclusive right) as a means of combating rental of works and other subject-matter for the purposes of unlawful copying; that aim would not be achieved by means of a mere right to receive payment. The United Kingdom delegation added that an exclusive right would enable the right-holder to place some copies on sale to the public at one price and sell other copies, intended for rental, at a higher price, as the exclusive right would allow him to prohibit rental of the copies placed on sale at the lower price.

As regards extinguishing of the right, the Commission representative and those delegations maintained that the proposal could and must stipulate that the exclusive rental and lending right, unlike other exclusive distribution rights, was not extinguished upon sale or other acts of distribution, by the right-holder or with his consent, of the copy in question.
The Greek, Spanish, Italian and Portuguese delegations were in favour of an exclusive rental right, with the Greek and Portuguese delegations pointing out that they had opposed the inclusion of a lending right in the Directive. The Spanish and Italian delegations entered waiting reservations on an exclusive lending right, pending discussion of the derogation option in Article 4.

Article 1(2)

Several delegations were doubtful as to the criterion "for profit-making purposes" in the proposed definition of rental.

The Danish delegation suggested that the phrase be replaced by "in return for payment".

The United Kingdom delegation considered that the chief criterion should be the commercial purposes served by making available for use for a limited period of time.

The French delegation suggested the wording "economic reward" or "economic benefit". It added that rental should be confined to private use, to the exclusion of collective use.

The Netherlands delegation suggested adding to the definition of rental "or any equivalent acts".

The German delegation preferred the definition proposed by the Commission to the various alternatives put forward.

The Commission representative said he would consider the various suggestions made.
10. A suggested stipulation that the making available be by the right-holder or on his behalf was not agreed to by the Working Party.

11. On the question of whether rental under this Directive should include distance rental, most delegations took the negative view.

12. Most delegations considered that consultation on the spot (e.g. in a library) should not be covered by the definition of rental.

Article 1(3)

13. The positions given in 9, 10 and 12 above apply mutatis mutandis to Article 1(3).

14. The Netherlands and United Kingdom delegations argued that the examples of institutions accessible to the public should be confined to public libraries, while leaving Member States free to treat other establishments in the same way.

15. The Working Party considered that lending within the meaning of this Directive should not include loans from one library to another.

16. At the end of the meeting, the Chairman circulated a proposed redraft of Article 1 for discussion at a forthcoming meeting.
17. The German and Spanish delegations agreed to the principle that the rental and lending right belonged to all the categories of persons listed in Article 2(1).

The Danish delegation, which was opposed to the inclusion of a lending right in the Directive, said that if such a right were included it would have to enter a provisional reservation on granting the right to categories of persons other than authors.

The Irish delegation was dubious about the inclusion of performing artists and artistic works.

The Netherlands delegation suggested the addition of a new indent concerning broadcasting organizations in respect of their broadcasts.

The Commission representative took the view that it would be better not to make any distinction between the various categories of holders and objects of rental and lending rights. As regards the Netherlands delegation's suggestion, he pointed out that rental of a radio or television broadcast was possible only if the broadcast had been recorded; in that event the third or fourth indent would be applicable, as appropriate.

18. Following comments by the Netherlands and United Kingdom delegations regarding the lack of definitions of the various right-holders,

(2) Note: third indent missing in the French version.
the Commission representative explained that it would be unwise to attempt such definitions in a Directive dealing with only one aspect of the copyright and related rights field, while the terms in question were used throughout that field. The definitions should therefore be left to national legislation, subject to the relevant provisions of the Berne and Rome Conventions. Where the definition under national law was broader than that in the Bern or the Rome Convention, there should be no problem, provided that the former did not conflict with the latter.

On the specific problem of film producers (dealt with in 2.1.2 in part two of the explanatory memorandum), the Commission representative pointed out that national law would be free to apply either the first indent or the fourth indent of Article 2(1), depending on the system which it operated.

19. The French, Italian and United Kingdom delegations drew the Working Party's attention to the problems that could arise in exercising rights where more than one category of holders had rights in respect of the same work or other subject-matter. As this was connected with Article 3, the United Kingdom delegation reserved its position on this paragraph, pending discussion of that Article.

The Commission representative explained that Article 2 of the proposal did not attempt to regulate the exercise of rights but left the various right-holders entirely free to determine by contract how the rights were to be exercised and by whom, as in the case of reproduction rights, for instance.
20. The Netherlands delegation suggested referring to copies of the subject-matter in question not just in the first indent but also in the other indents of Article 2(1).

21. The Italian and French delegations suggested adding a reference in the fourth indent to the first fixation of sound in visual and sound recordings.

22. The French delegation raised the question of any rights in respect of a cinematographic work prior to its first fixation: the Commission representative explained that either national legislation provided for copyright in respect of the work and the first indent applied or it provided for a related right in respect of the first fixation and the fourth indent applied.

Article 2(2)

23. Following a question by the Netherlands delegation, the Commission representative suggested rewording this paragraph to the effect that the Directive did not apply to the works in question.

24. Several delegations asked whether this paragraph should cover buildings or architectural works (3). The Spanish and Italian delegations asked whether architectural plans should be excluded from the Directive's scope.

The Commission representative said that he saw no difficulty in stipulating that the Directive did not apply to architectural plans, which were not normally the subject-matter of rental or lending.

(3) There are differences between language versions of the Commission proposal here.
25. The Spanish delegation called for clarification of the reference to works of applied art, particularly as regards industrial designs and models. The Commission representative suggested referring to works of applied art within the meaning of Article 2(7) of the Berne Convention (which also mentioned industrial designs and models), since it was the Commission's intention to exclude industrial designs and models from this Directive in view of the green paper that it was preparing.

26. The United Kingdom delegation sought clarification of the distinction between a copy of a work and a work of applied art for the purposes of this Directive; the Commission representative explained that, for instance, rental of a copy of a picture to a hotel to form part of the furnishings of a hotel room would constitute rental of a copy of a work and be subject to a rental right under Article 2(1), first indent, of the proposal; on the other hand, rental to a customer of the hotel room furnished with the copy of the picture should be regarded as rental of a work of applied art and excluded from the Directive's scope by Article 2(2).

The French delegation sought clarification regarding the provision of music in a hotel room and the Commission representative explained that the right applicable would be that of communication to the public and not rental right.

Article 2(3)

27. The Commission representative raised the possibility of expanding this paragraph to quote the relevant provision of the Directive in question.
28. The Commission representative explained that the intention of this Article was to ensure payment of each right-holder where rental or lending of a sound recording, visual recording or visual and sound recording was authorized in return for payment, while leaving the various holders considerable freedom as regards arrangements for exercising the rental or lending right.

29. The United Kingdom delegation asked whether this provision would enable a holder to challenge the validity of a contract on the grounds that he no longer considered his part of payments under the contract "adequate" in the light of the total payments generated by rental or lending; it felt that such an interpretation would involve excessive interference with contract law.

The Commission representative replied that the "adequate part" must be negotiated when entering into the contract; once the contract was concluded, this provision would not entitle a right-holder to claim that what he had accepted as adequate was no longer so.

30. The United Kingdom, German, Danish and Netherlands delegations raised questions as regards determining an "adequate part".

The Commission representative explained that the criteria for determining an adequate part could be laid down by national legislation, be decided by the courts or emerge from arbitration. He thought it would be proper for the right-holder's part of the payment to be determined in relation to his
contribution to the production of the sound, visual or visual and sound recording; that part could, for instance, be expressed as a percentage of rental or lending income.

31. In reply to a question by the Netherlands delegation on the relationship between assignment or granting licences (first sentence) and waiving of the right (second sentence), the Commission representative explained that the rental or lending right could be assigned or licences granted but the right to obtain an adequate part of the payment for rental or lending could not be waived.

32. The Danish delegation considered that this provision could not apply to lending.

The Commission representative explained that if under Article 4 a Member State derogated from the exclusive lending right, Article 3 would not apply to lending of the categories of subject-matter or works covered by the derogation; however, if a Member State did not opt for such a derogation, Article 3 would remain applicable to both rental and lending.
33. The German delegation wished to consider the implications of this Article for contracts already concluded on the date of entry into force of the Directive. The Italian delegation referred to the desirability of a transitional period for the adjustment of such contracts.

The Commission representative suggested considering the matter under Article 11.

34. Discussion of Article 3 will continue at a forthcoming meeting.

35. The United Kingdom delegation asked the Commission representative to incorporate into the Directive's recitals some of the explanations and clarifications provided at the meeting.