OUTCOME OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 8 April 1991

No. prev. doc.: 5499/91 PI 21 CULTURE 10
No. Cion 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 its meeting on 8 April 1991 the Working Party on Intellectual Property (Copyright) completed its 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) and examined a new draft of Article 1 proposed by the Presidency.

The Greek delegation entered a scrutiny reservation on all the Articles examined at the meeting.

Article 3 - Authorization of rental and lending

2. The Working Party had started examining Article 3 at its previous meeting (5499/91, points 28 to 33).

3. The French, Netherlands and United Kingdom delegations expressed doubts about the need for this provision, particularly in the light of the agreements in
certain countries between performing artists and the producers of phonograms or videograms, but the Commission representative argued that the provision was necessary in order to protect the rights of performing artists, who were often the weaker party in their relations with the producers of phonograms or videograms.

The United Kingdom delegation nevertheless pointed out that the Directive should not undermine the position of producers, who took fairly considerable financial risks.

4. The United Kingdom delegation entered a scrutiny reservation on the whole of this provision, with particular reference to whether the proposed legal bases were adequate for a provision which, in its opinion, had greater consequences for the law of contract than for copyright and neighbouring rights.

The Commission representative replied that there were many precedents for acts based on Article 100 or Article 100a of the EEC Treaty which had implications for the law of contract.

5. The United Kingdom delegation expressed the fear that this provision might affect producers' practice of paying a flat rate sum to certain performing artists for their contribution to a work, in that it would enable such artists to claim additional payment when the work was rented.
The Commission representative considered this fear unfounded, since the adequacy of payments was to be assessed on the basis of the initial contract and not on the basis of any subsequent record of rental revenue.

6. The French delegation requested clarification of the term "third party" and the Commission representative replied that it covered any other person, including any other rightholders.

7. In reply to a question from the Netherlands delegation, the Commission representative stated that this Article was confined to sound recordings, visual recordings and visual and sound recordings because they were the only items where the question of relationships between several categories of rightholder arose.

8. The French delegation requested clarification of the term "retain" and the Commission representative explained that the right of each rightholder to obtain an adequate part of the payment resulting from rental or lending could not be waived in any circumstances: even where administration was assigned or the rental or lending right transferred or assigned the right to adequate payment remained (i.e. was "retained").

9. The French delegation requested further information on the basis for payment and the Commission representative stressed that the Directive remained completely silent on this point, apart from the requirement that Member States should ensure that payment was distributed in an appropriate manner between the various rightholders.
The Netherlands delegation wondered whether the Member States would have the means of checking whether payment was appropriately distributed between the various rightholders. The Commission representative replied that each Member State would have to lay down this requirement of an adequate part of payment in its national legislation; supervision of compliance with this requirement could then be carried out through the courts or other competent authorities.

10. The French and Netherlands delegations considered that the phrase "but its administration may be assigned" was superfluous.

The Commission representative said that this phrase had been included for the sake of clarity, to make sure that the prohibition of waiver of the right to adequate payment was not interpreted as extending to the right to assign administration.

Article 4

11. As delegations had already had an opportunity of commenting on Article 4, particularly in their replies to certain questions put by the Commission representative (see 5499/91, points 2 to 5), the Working Party did not examine this Article any further at this stage.

Chapter II - Protection in the field of rights related to copyright (neighbouring rights)

12. The Commission representative explained that the Commission had confined Chapter II to those neighbouring rights which were the most important in combating piracy (fixation right, reproduction right, distribution right); however, if there was a consensus in favour of including other neighbouring rights, he would not necessarily be opposed to this.
The United Kingdom delegation pointed out that the recitals to the proposal for a Directive mentioned not only piracy but also differences in national legislation which were sources of barriers to trade: in its view, the fact that the legislation of some Member States provided for a broadcasting right for phonograms while the legislation of others did not was likely to create barriers to trade; this question should therefore be dealt with in Chapter II of the Directive.

The Commission representative took note of these comments.

13. The Netherlands delegation wondered whether, in the context of this Chapter, it would not be desirable to harmonize the connecting factors referred to in Articles 4, 5 and 6 of the Rome Convention (1).

The Commission representative stated that this matter was left to national legislation, with due regard to the relevant provisions of the Rome Convention.

Article 5 - Fixation right

14. The Spanish, French, Portuguese and United Kingdom delegations were in favour of the principle behind Article 5, which was based on Article 7(1)(b) of the Rome Convention.

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15. The United Kingdom delegation remarked that, bearing in mind the definition of the term "broadcasting" in Article 3(f) of the Rome Convention, Article 5 of the proposal would not cover the fixation of broadcasts made by cable distribution companies; while this exclusion was justified where the company merely engaged in the simultaneous transmission of broadcasts from other broadcasting organizations, it did not seem justified where it transmitted its own broadcasts.

As several delegations felt that it would be undesirable for the Directive to contain a definition of "broadcasting" which differed from that in the Rome Convention, the Commission representative said that he was prepared to look into other ways of supplementing Article 5 to take account of the problem raised by the United Kingdom delegation.

16. The French delegation requested that the term "exécution" (performance) be supplemented by the term "prestation" (performance), as this latter term was the one used in French legislation. It also wanted to know how the Member States interpreted the term "broadcast" in relation to "work" when applying the Rome Convention.

17. The Netherlands delegation had doubts about an explicit reference to direct or indirect reproduction, since the Rome Convention contained such a reference only in the case of phonograms (Article 10).
18. The United Kingdom delegation pointed out that while the reproduction right granted to performing artists was limited to certain circumstances in the Rome Convention (Article 7(1)(c)), there were no such limitations in Article 6 of the proposal; the Commission representative said that this difference was justified by the fact that the reproduction right which existed in most Member States was not subject to all the limitations provided for in the Rome Convention.

19. The Commission representative stated that the reproduction right granted to the producers of the first fixations of cinematographic works or moving images (third indent of Article 6 of the proposal) was not provided for in the Rome Convention; some Member States granted the producers of such works copyright protection, while others granted them neighbouring right protection. In these circumstances, the Commission had provided for a reproduction right for the producers of such works in Article 6 of its proposal with the intention of obliging Member States to provide for such a right while leaving them free to choose between copyright and neighbouring right.

In the light of comments from several delegations, the Commission representative said that he was prepared to review the wording of this provision or of the title of Chapter II to avoid the impression that the inclusion of this provision in the Chapter entitled "Protection in the field of rights related to copyright" imposed "neighbouring right" protection to the exclusion of copyright protection.
Article 7 - Distribution right

20. The Danish delegation thought that a distribution right should be granted not only in the context of neighbouring rights but also in the context of copyright, and that this right should therefore be included in Chapter 1 of the proposal (2).

The French delegation, on the other hand, considered that there was no automatic parallelism between copyright and neighbouring rights in this respect.

The Commission representative had an open mind on this question.

21. In the same context, the Danish delegation proposed that the definition of distribution right and the provision on exhaustion of that right should be aligned on Article 4(c) of the Council's common position on the Directive on the legal protection of computer programs (3).

As several other delegations had criticized the wording of paragraph 2 of this Article of the proposal, the Commission representative said he would give favourable consideration to such an alignment.

22. The French delegation expressed doubts about laying down the same provisions for phonograms and for cinematographic works, arguing that case law on the exhaustion of rights in respect of the former did not necessarily apply to the latter.

(2) See 5499/91, point 6.
(3) 10652/1/90 PI 82 PRO-COOP 148.
In the Commission representative's view, national exhaustion was independent of Community exhaustion; in the latter case, there were Court of Justice rulings not only with regard to phonograms but also for cinematographic works.

23. The United Kingdom delegation had doubts about the need for a distribution right for performing artists as a weapon against piracy.

The Commission representative replied that that right had been included in the proposal in the interests of harmonization, since a number of Member States were planning to introduce such a right into their national legislation.

Article 8 - Limitations to rights

24. Article 8(1), which corresponds to Article 15(1) of the Rome Convention, did not give rise to any comments.

25. The French and Netherlands delegations pointed out that Article 8(2) corresponded to Article 15(2) of the Rome Convention except that the proposed provision also contained a reference to producers of the first fixations of cinematographic works or moving images. The French delegation expressed doubts about whether videograms could be treated in the same way as phonograms, and proposed to examine the implications of this addition.
26. The Netherlands delegation stated that in the Netherlands producers of cinematographic works were protected by copyright and not by neighbouring rights. Since Netherlands legislation provided for compulsory licences with respect to the cable transmission of cinematographic works, the inclusion of such works in Article 8(2) could cause problems.

The Commission representative replied that the aim of the proposal was to ensure that Member States' legislation offered protection not only under copyright but also under neighbouring rights. As a result, compulsory licences in the context of neighbouring rights were only possible insofar as they were compatible with the Rome Convention.

27. There were no comments on Article 8(3).

**Article 9 - Duration of authors' rights (copyright)**

28. The Netherlands and United Kingdom delegations expressed doubts about the second clause of this Article and the Commission representative explained that in particular cases where the Berne Convention (4) did not specify the duration of protection, Member States could maintain their national legislation.

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(4) Berne Convention for the Protection of Literary and Artistic Works.
Article 10 - Duration of related rights (neighbouring rights)

29. The French, Netherlands and United Kingdom delegations asked for clarification of the second sentence of Article 10 and the Commission representative suggested a redraft of this provision on the basis of Article 14 of the Rome Convention.

30. The Netherlands delegation entered a reservation on the duration of protection for cinematographic works; this reservation was linked to the question of whether these works were protected by copyright or by neighbouring rights.

Article 11 - Application in time

31. The Danish, German, Irish, Netherlands and United Kingdom delegations expressed doubts about making the Directive applicable to all works and all items for which copyright or neighbouring right protection had begun before the Directive became applicable.

The Danish and Netherlands delegations considered that a provision based on Article 9(2) of the Council's common position on the Directive on the legal protection of computer programs (5) would be more appropriate.

The United Kingdom delegation referred in this connection to the transitional provisions in United Kingdom legislation with regard to rental right, which took account of existing stocks of works or items and of contracts entered into in good faith before the legislation came into force.

(5) 10652/1/90 PI 82 PRO-COOP 148.
The Commission representative said he would examine the comments and suggestions made.

Article 12 - Final provisions

32. The Netherlands, Irish and Belgian delegations entered reservations on the date proposed for the entry into force of national provisions implementing the Directive. Given the amount of legislative work required in their countries, the Belgian and Irish delegations thought they would need at least three years from the date of adoption of the Directive in order to transpose it into national law.

The Commission representative took note of these reservations, but pointed out that the date set for completion of the internal market was 1 January 1993.

New draft of Article 1

33. The Working Party examined a new draft of Article 1 proposed by the Presidency (see Annex).

34. The Italian delegation wondered whether a library subscription would be covered by the term "economic advantage" within the meaning of the new draft of this Article.

The French delegation, which had suggested this term at the previous Working Party meeting, stated that a subscription which was intended solely to cover the library's costs would not be covered by the term "economic advantage".
The French delegation also commented that when it had suggested using the expression "for economic advantage" it had meant to supplement not to replace the expression "for profit-making purposes".

The Danish delegation suggested replacing "advantage" by "consideration".

The Danish and Italian delegations expressed the view that lending was of no market significance and therefore should not be covered by the Directive.

The Working party considered whether the making available of books (and possibly other items covered by the Directive) by school or university libraries would be excluded from the scope of the Directive on the grounds that these libraries were not "accessible to the public".

The Irish and United Kingdom delegations considered that at least the lending of books by school libraries should fall outside the scope of the directive.

The Danish delegation felt that it would not be logical to provide for payment for a loan made by a public library but not for a loan made by a library which was not public but was nevertheless accessible to a large number of people (e.g. a university library).

The Commission representative argued as follows:
- if a library made an item available for economic advantage, that act would be covered by the Directive as "rental" within the meaning of Article 1(2);

- if an item was made available for no economic advantage by a library accessible to the public, that act would be covered by the Directive as "lending" within the meaning of Article 1(3);

- as the expression "accessible to the public" was not further defined in the Directive, Member States were free to interpret it; however, he would be inclined to regard university libraries but not school libraries as accessible to the public.

37. The Netherlands delegation requested further definition of the expression "making available to other such establishments" to make it clear that what was meant were loans from one public library to another;
Proposal by the Luxembourg presidency

Article 1

1. Unchanged.

2. For the purposes of this Directive, "rental" means making available for use, for a limited period of time and for economic advantage, without prejudice to paragraph 3. This does not cover the making available for reference use (consultation sur place), or the making available for public performance.

3. For the purposes of this Directive, "lending" means making available for use, for a limited period of time and not for economic advantage, if it is made through establishments which are accessible to the public such as public libraries. This does not cover the making available for reference use (consultation sur place), the making available for public performance or the making available to other such establishments.

4. The rights referred to in paragraph 1 do not exhaust by any sale or other act of distribution, of originals and copies of works and other subject matter, as set out in Article 2(1).