SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 19 and 20 September 1991

No. prev. doc.: 7659/91 JUR 75 PI 45 CULTURE 33 RELEX 36
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 19 and 20 September 1991 the Working Party on Intellectual Property (Copyright) began a second 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) on the basis of the consolidated text in 6360/91 PI 33 CULTURE 24.

A new consolidated text of Articles 1 to 3, which attempts to take account of the observations made during this meeting, is contained in the Annex to this summary of proceedings.


2 The Luxembourg delegation was not represented at this meeting.
2. The German and Netherlands delegations reiterated their preference for a right to remuneration for rental and lending rather than a right to authorize or prohibit rental and lending.

3. The Danish, Spanish, French, Irish, Italian and Portuguese delegations expressed a reservation on the inclusion of lending in the Directive.

   The German and United Kingdom delegations spoke in favour of the inclusion of lending in the Directive.

   The Belgian and Netherlands delegations reserved their position on this question.

   The Commission representative asked those delegations which had expressed a reservation to consider whether the derogation provided for in Article 4 would enable them to accept the inclusion of lending in the Directive, bearing in mind in particular that this derogation would allow Member States to put lending outside copyright law and thus outside the national treatment requirement of the Berne Convention.

Article 1(2) and (3)

4. Several delegations expressed concern that the definitions of rental and lending in paragraphs 2 and 3 were not sufficiently precise to prevent abuse, for example by video rental companies assuming the form of non-profit-making associations with a view to escaping the definition of rental. The Commission representative suggested that this problem might be overcome by using the words "for direct or indirect economic advantage" in relation to rental.
The United Kingdom delegation expressed concern that the terms "economic advantage" might be interpreted as covering fines levied by public libraries on books returned late or charges made by public libraries for reserving books.

The Irish delegation suggested that the danger of certain rental activities falling outside both the definition of rental and the definition of lending, and so falling outside the scope of the Directive altogether, might be overcome by defining rental as not including lending as defined in paragraph 3.

5. A suggestion by the Danish delegation that the words "making available to the public for use" be included in the definition of rental was rejected on the grounds that this definition could be circumvented, for example by video rental companies taking the form of private clubs.

Article 1(4)

6. The French delegation suggested that not only acts of distribution should not exhaust the rights referred to in paragraph 1, but that any act of exploitation should not exhaust them.

7. The Danish delegation expressed fears that this paragraph was too broad.

Article 2(1)

8. The French, Irish, and Netherlands delegations considered that it should be made clear that this provision applies not only to the initial right holder, but also to his successors in title or assignees.
The Commission representative pointed out that the assignment or licensing of the rights referred to in Article 2(1) is provided for in Article 3(1)\(^3\).

9. The Danish, Irish, Netherlands and United Kingdom delegations expressed a provisional reservation on the fourth indent of this paragraph.

The German, Spanish and French delegations and the Commission representative insisted on the need for this provision. The Commission representative emphasized that provision should be made for according to film producers neighbouring right protection as well as copyright protection; neighbouring right protection was particularly necessary where the cinematographic work concerned was not original under the terms of the Berne Convention, and did not therefore qualify for copyright protection.

Article 2(2)

10. The Danish delegation considered that this provision should state that photographic, literary and artistic works are not covered by the Directive.

11. The Spanish delegation expressed doubts with regard to the exclusion of plans of buildings and works of applied art, as Spanish law grants a rental right and a lending right in respect of all works protected by copyright.

12. The United Kingdom delegation expressed doubts whether the rental of works other than books, phonograms and videograms was an activity of sufficient interest to the common market to require harmonization at Community level.

\(^3\) For the sake of clarification, the provision of Article 3(1) has been transferred to Article 2 as a new paragraph 2a in the consolidated text annexed to this summary of proceedings, and the title of Article 2 has been adapted.
Article 2(3)

13. The majority of delegations expressed a preference for not repeating the contents of Article 4(c) of Council Directive No 91/250/EEC.

Article 3(1)

14. For reasons of clarity, the principle stated in this provision had been made the subject of a separate paragraph in the consolidated text contained in 6360/91.

15. The Commission representative suggested that the concept of transfer should be added to those of assignment and licensing, and that it be made clear that these acts were done by contract.

Article 3(2)

16. The Danish, Irish and United Kingdom delegations entered provisional reservations on this provision, reiterating the doubts they had expressed at the first reading.

17. Several other delegations agreed with the principle underlying this provision, but were uncertain as to how it would work in practice, particularly as they considered that the wording was still not clear enough.

4 See also footnote 3 on page 4.
on rental right, lending right, and on certain rights
related to copyright

- Consolidated text of Articles 1 to 3

CHAPTER I RENTAL AND LENDING RIGHT

Article 1 Object of Harmonization

(1) In accordance with the provisions of this Chapter, Member States shall provide a right to authorize or prohibit the rental [and lending]¹ of originals and copies of copyright works, and other subject matter as set out in Article 2(1).

(2) 1st variant:
For the purposes of this Directive, "rental" means making available for use for a limited period of time, without including lending as defined in paragraph 3². This does not cover the making available for reference use (consultation sur place), or the making available for public performance.

(2) 2nd variant:
For the purposes of this Directive, "rental" means making available for use, for a limited period of time and for direct or indirect economic advantage³, 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.

¹ Reservations by the Danish, Spanish, French, Irish, Italian and Portuguese delegations on the inclusion of lending in the Directive.
² Suggestion by the Irish delegation.
³ Suggestion by the Commission representative.
(3) For the purposes of this Directive, "lending" means making available for use, for a limited period of time, and not for direct or indirect economic advantage, when 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 between such establishments which are accessible to the public.

(4) The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of [distribution] [exploitation] of originals and copies of copyright works and other subject matter as set out in Article 2(1).

Article 2 Rightholders and Subject Matter of Rental and Lending Right

(1) The right to authorize or prohibit the rental and lending shall belong

- to the author in respect of the original and copies of his work,

- to the performing artist in respect of fixations of his performance,

- to the phonogram producer in respect of his phonograms, and

- to the producer of the first fixations of cinematographic works and moving images in respect of his visual recordings, whether or not accompanied by sound.

(2) A rental and lending right does not arise in relation to buildings, plans of buildings and to works of applied art.

4 Provisional reservation by the Danish, Irish, Netherlands and United Kingdom delegations on this indent.

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(2a) The rights referred to in paragraph 1 may be contractually transferred, assigned or subject to the granting of licences.

(3) (Transferred to Article 2a)

Article 2a  Rental of computer programs


Article 3  Inalienable right to remuneration

(1) (Transferred to Article 2(2a)).

(2) Where authorization to rent or lend a sound recording or visual recording, whether or not accompanied by sound, has been given, then each of the rightholders set out in Article 2(1) shall retain the right to obtain an adequate part of the remuneration due, by the party who rents out or lends, for the rental or lending. This right to obtain an adequate part of the remuneration cannot be transferred or waived. This right may be administered by a collective administration society.6

6 Provisional reservation by the Danish, Irish and United Kingdom delegations on this provision.