2.5. The Committee urges the Commission and Council to promote ratification of the Rome Convention by as many third countries as possible, in particular all countries which have special relations with the Community under the Lomé Convention or under association agreements such as those being prepared with Hungary, Czechoslovakia and Poland.

2.6. Although some clarification may be required on the legal base, the Committee supports this proposal for a Council Decision.

3. **Further considerations**

Following agreement and implementation of this Proposal, the Committee proposes that there should be a Community initiative to seek revision of the Berne and Rome Conventions (through the mechanism of the World Intellectual Property Organisation) with the aim of strengthening the protection of copyright and 'neighbouring rights'.

Done at Brussels, 3 July 1991.

The Chairman

of the Economic and Social Committee

François STAEDELIN

Opinion on the proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright

(91/C 269/17)

On 5 February 1991 the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 5 June 1991, in the light of the Report by Mr R. Moreland.

At its 288th plenary session (meeting of 3 July 1991), the Economic and Social Committee adopted the following Opinion by a majority vote in favour, 4 against, with 2 abstentions.

1. **Introduction**

1.1. This Draft Directive grants certain rights to authors, performing artists, record producers and film producers. Member States must grant rental and lending rights in respect of literary and musical works, live performances, films and sound recordings. This means that one certain owner of copyright or a neighbouring right in any of these works has the right to prevent others from renting or lending copies of the work to others without his consent.

1.2. The draft also obliges Member States to grant certain 'neighbouring rights'. These include the right to prevent the recording of live performances; to copy sound recordings; to prevent reproduction of and distribution of films; to copy broadcasts.

2. General comments

2.1.1. The Committee commented upon Chapter 4 (distribution right, exhaustion and rental right) of the Commission's Green Paper on 'Copyright and the Challenge of Technology [1].

> 'The conclusion that a rental right is required in the case of sound and video recordings and that a Directive to that effect should be issued is to be welcomed. The question of whether such a right should be a right of control or merely a right to equitable remuneration should undoubtedly be answered in favour of a right of control...'

2.1.2. Consequently the Committee welcomes the provisions of the Draft Directive on sound and video recordings; in particular the proposal to introduce a right of control is to be welcomed. Although Chapter 4 of the Green Paper was directed principally to the rental of sound and video recordings, the Section welcomes the widening of the rental right proposal to all copyright works and the proposals related to lending and other rights, subject to the comments below.

2.2. The Committee suggests that the Articles which will require the most attention by the Council will be Articles 3 and 4 and for this reason highlights them in the General Comments.

2.2.1. Article 3: The right to an 'adequate part' of rental right remuneration

2.2.1.1. The Committee recognizes that this Article is extremely difficult to construe, especially given the nuances of different national methods of legislation and the difficulties of translating those nuances among the different languages of the Community. (Indeed this problem in highlighted by the differences between translations of 'adequate' and 'equitable' in Articles 3 and 4, which are apparently to be understood in different senses, but are rendered by the same word in the German text.)

2.2.1.2. Consequently, the text needs to be examined very carefully to ensure:

— clarity, particularly to ensure that it is understood in all languages, so that the practical effect is the same in all Member States,

— minimal interference in the law of contract consistent with the appropriate level of remuneration and with a fair balance between rightholders,

— the avoidance of a multiplicity of rightholders whose consent is necessary for the ordinary rental and lending of copies of copyright works,

— that the owners of rental and lending rights can assign freely their rights in return for such remuneration as can be freely negotiated.

2.2.2. Article 4: Derogation from exclusive lending right

2.2.2.1. Only 4 Member States have a public lending right and there is a variety of different schemes among those that do. All that the Draft states on the question of harmonization is that authors must receive 'equitable' remuneration (is 'equitable' different from 'adequate'?). The present wording at least implies that the remuneration must be the equivalent of that which could be freely negotiated for a lending licence if this derogation did not exist. If that is not the intention, so as for example to permit the British system, which is much less generous, to continue, then the drafting should be looked at again.

2.2.2.2. Whilst recognizing that it will be a large step to ask not only for all Member States to have a public lending right but also to have a common basis for that system, the Committee must nonetheless conclude that if the current wording of Article 4 is retained, there will be no harmonization of lending right. The main reason for this is that derogation from exclusive lending right is optional. Secondly, because the Member States have different definitions of 'author', the derogation will apply to artists, producers etc. in one Member State but not in another. The practical impact of Article 4 will therefore differ considerably from one Member State to another.

In this connection the Committee asks the Commission to a) consider stipulating that Article 4 does not apply to sound recordings, cinematographic works, visual and audio-visual recordings and b) to replace in Article 4 the words 'at least authors' by 'the rightholders referred to in Article 2(1)'.

2.2.2.3. The Committee would emphasise that the use of a lending right should not prejudice the work of public libraries through the imposition of excessive charges.

2.3. The Draft does not attempt to harmonize the law relating to the term of copyright. The Committee recognizes that this creates difficulties, particularly for those Member States with a term of protection longer than any term proposed by the Commission. The most obvious choice for literary works, fifty years *post mortem auctoris*, would cause problems, for example, for

[1] OJ No C 71, 20. 3. 1989.

Germany, currently seventy years, France, seventy years for musical compositions, and Spain, sixty years. Further, the Committee recognizes that the Commission has stated its intention to propose the harmonization of terms of protection in the near future. Nevertheless the absence of any harmonization has, so far, produced the most litigation and has produced, in practice, the largest number of barriers to intra-Community trade. Consequently, the absence of harmonization of the term of protection considerably weakens the Directive.

2.4. The consequences of implementation of the lending right provisions are bound to have public expenditure implications for the Member States. Those that have no lending right, or restrict it to their own citizens or writers in their own language, will have to increase their expenditure. If the words 'equitable remuneration' in the derogation from Article 4 mean equivalent to a freely negotiated lending licence fee, then even in Member States which do have a relatively non-discriminatory public lending right system there will have to be increases in public expenditure and additional management costs for libraries. The Committee does not believe that this financial consideration should necessarily be a blockage to the passing of the Directive, but should be borne in mind by Member States in their budgeting process.

2.5. *Rights related to copyright*

Chapter II of the draft Directive has no provisions concerning secondary use other than rental and lending already dealt with in Article I. Consideration should be given here *inter alia* to rights related to the (re)broadcasting or dissemination by other means of existing work. The Committee feels that these rights too fall under 'the fundamental ownership of neighbouring rights protection'. The Committee urges the Commission to lose no time in submitting proposals for harmonization on this area too.

3. Specific comments

3.1. *Preamble*

3.1.1. As stated in paragraph 2.1 above, the Committee supports the need for this Directive in general, as being in the Community's interests. Further, it would appear to be within the spirit of the Treaty as amended by the Single European Act that this should be an issue which involves majority voting and the co-operation procudure. Nevertheless, there are some question marks over the legal base. In the Green Paper, the Commission referred solely to Article 100a as a possible legal base. Yet it has added Article 57(2), which relates to self-employed persons but appears to be concerned with rights of establishment, not general provisions for the welfare of the self-employed.

3.1.2. The ninth recital to the Draft reads:

> 'Whereas these creative, artistic and entrepreneurial activities are to a large extent activities of self employed persons.'

Would not analysis of the industry concerned show that a large proportion of those activities are carried out by major corporations? Even artists are not necessarily self employed.

3.2. *Chapter I: Rental and lending right*

3.2.1. Article 1: Object of harmonization

3.2.1.1. 1(2) and 1(3) do not cover situations such as inter-firm and inter-library lending, reference use or lending for public performance.

3.2.1.2. In 1(2), the definition of 'rental' needs careful consideration so as to include 'sales' which are effectively rentals.

3.2.2. Article 2: First owner and subject matter of rental and lending right

3.2.2.1. In 2(1): this should be redrafted to read 'The first owner of the right'. He can assign the rights. The owner of the rental and lending rights in any copyright work covered by this Article may not necessarily be the same person as the copyright owner. The relationship between copyright and the rights granted by the Directive is not clear especially in relation to film producers.

3.2.2.2. In 2(2), 'works of applied art' is used in the Berne Convention but not defined and needs definition here. Does it apply to, for example, ordinary industrial articles? In any event, would it be better to state what works the rental and lending rights do apply to, rather than the reverse?

3.2.2.3. For Article 3, see 2.2.1.

3.2.2.4. For Article 4, see 2.2.2.

3.3. *Chapter II: Protection in related fields*

3.3.1. Article 5

Article 5 could present administrative problems. On the one hand, 'secondary utilisation' could constitute a serious threat to the employment of 'live' performers. On the other hand, minor performers could restrict major broadcasts and other events unreasonably. Where several performers are involved in a performance, one solution would be a provision similar to that enshrined in Article 8 of the Rome Convention which gives the Member States discretion to stipulate how performers are to be represented in the exercise of their rights.

3.3.2. Article 6

Does this apply to Community nationals or also to others? If it applies to others, then which others? On the basis of reciprocity?

3.3.3. Article 7

3.3.3.1. There is a derogation from the general right to prohibit distribution of copies of a work in that once a copy put on the market by or with the agreement of the right owner has been put into circulation within the Community the right is exhausted. This is inconsistent with the Software Directive, which states that first sale of a copy anywhere in the Community exhausts the right.

3.3.3.2. In order to combat piracy effectively, the Committee proposes that the following be added to Article 7(1) after '... to the public by sale,':

'import, export, offer, possession for the purposes of trade, or otherwise'.

3.3.3.3. 7(2) is no more than a codification of judgements of the European Court (see, for example, case 158/86) and could be deleted.

3.3.4. Article 8(3)

What is the purpose of this exclusion?

3.4. *Chapter III: Duration*

3.4.1. See 2.3 above.

3.4.2. Article 10

It is meaningless to talk of the terms provided by the Rome Convention because the terms are minima. Member States provide different terms, some longer than the minima, some not.

3.5. *Chapter IV: Common provisions*

3.5.1. Article 11

Article 11 applies to existing works, and it may be difficult to apply these new provisions to works in respect of which contracts have already been negotiated.

3.5.2. Article 12

This is, of course, not in the list of directives required to be implemented by 1 January 1993. Given the time which will be needed to complete Community consultation procedures, to obtain a Council Decision and to draft very complicated implementing legislation in the Member States, this deadline seems impracticable. However, the Committee stresses the need to avoid unnecessary delay on this proposal.

Done at Brussels, 3 July 1991.

The Chairman

of the Economic and Social Committee

François STAEDELIN