

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(92) 159 final - SYN 319

Brussels, 30 April 1992

Amended proposal for a

COUNCIL DIRECTIVE

ON RENTAL RIGHT AND LENDING RIGHT AND ON CERTAIN
RIGHTS RELATED TO COPYRIGHT IN THE FIELD OF
INTELLECTUAL PROPERTY

(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

On 13 December 1990, the Commission presented to the Council its proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright.

The Economic and Social Committee delivered its opinion on the proposal on 3 July 1991.

The European Parliament, consulted under the cooperation procedure, discussed the proposal in detail in its Committees and on 11 February 1992 debated the report drawn up on behalf of the Committee on Legal Affairs and Citizens' rights by Mr. Anastassopoulos, voting in support of the proposed Directive as amended by Parliament on 12 February 1992.

The amended proposal for a Directive presented by the European Commission is intended to take into account the Opinion of the European Parliament.

The amended proposal contains six major modifications to the original proposal.

- (a) In the definitions of rental and lending, it is explicitly clarified that rental and lending for the purpose of public performance is not covered. Accordingly, in particular the rental of film copies to

cinemas for the purpose of performance, to broadcasting organisations for the purpose of broadcasting, as well as the rental of sheet music for the purpose of performance, remains excluded from the scope of the Directive.

- (b) In the context of the determination of the rightholders, it is stated that at least the principal director of a cinematographic work shall be its author. While this already corresponds to the legal situation in most Member States, it seems useful to take up the proposal of the European Parliament and to safeguard the legal protection for this important group of creative persons in all Member States. This does not prejudice any possible harmonisation of authorship of films but is rather a minimum provision which leaves it to Member States to determine in detail, which other contributors to a film should be considered to be its co-authors under national law.

- (c) On the basis of the proposal of the European Parliament and with respect, in particular, to the concerns of the film industry and to considerations of practicability, the amended proposal provides for a rebuttable presumption of rights in favour of film producers, according to which performing artists are presumed to have assigned their exclusive rental right, lending right, reproduction right and distribution right to film producers in the contract concerning film production. This will considerably facilitate in practice the exploitation of films by film producers. This potential loss of rights for performing artists is compensated to a certain extent, as the presumption of assignment is rebuttable and subject to the right of economic participation in the revenues from exploitation under Article 3 of the proposed Directive.

- (d) Following the Opinion of the European Parliament, the Commission in the new Article 4 bis proposes both a consolidation and, in part, a larger scope of protection, as no changes, cuts or additions may be made to a work by the person making available for rental, the rentor, the lender or the borrower without specific authorization of the author. This amendment concerns some aspects of moral rights which Member States in general recognize as such. This partial harmonisation

of authors' moral rights in the field of rental and lending is not intended to prejudice a possible future harmonisation of moral rights in the Community; it rather constitutes a minimum rule which does not interfere with general national provisions on moral rights. Member States may go beyond this rule also in respect of rental and lending.

- (e) As a supplement to chapter II of the proposed Directive which is mainly dedicated to the fight against piracy, the new Article 6 bis follows the proposal made by the European Parliament and provides an exclusive right of broadcasting and communication to the public for performing artists and broadcasting organisations, as well as a right to remuneration for performing artists and phonogram producers if a phonogram published for commercial purposes is used for broadcasting or communication to the public. In the proposed formulation, these rights largely correspond to the provisions of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations of 1961, but go to some extent beyond the protection provided in this Convention due to the widespread practice of piracy. Here, too, the proposed protection is already implemented in most Member States, with some differences in detail. It therefore seems useful, also in view of the problems caused by piracy, to extend harmonisation for neighbouring right holders to the right of broadcasting and communication to the public. This protection also constitutes a common minimum level which Member States may exceed in their national law, as is already often the case. Article 6 bis paragraph 4 ensures that no divergent legislation is enacted at Community level, by stating that the specifically relevant provisions of the proposed Directive on satellite broadcasting and retransmission by cable, which is at present under consideration, will not be prejudiced.

(f) In order to achieve harmonisation as early as possible, the Commission in its original proposal had provided for an immediate application of the Directive to all protected works and subject matter. Later on, certain groups of users and producers in particular have asked for an explicit transitional period, in order to take better account of acquired rights and obligations. As suggested by the European Parliament, the Commission meets this request in its amended proposal in Article 11 paragraph 2. In particular, under this provision the Directive will in principle apply as of its entry into force, but will not affect existing contractual rights and obligations for a period of three years from its entry into force. Contracting parties are thus given the possibility of adapting their contracts to the provisions of the Directive within a transitional period of three years.

Only two of the amendments proposed by the Parliament were not adopted by the Commission in its amended proposal.

The addition to recital n° 15 which was suggested by the Parliament was connected with a previously proposed amendment concerning a remuneration for private copying, which already had been rejected by the Committee on Legal Affairs and Citizens' rights and was not tabled any more in the Parliament. With the deletion of this previously proposed amendment, the suggested addition to recital n° 15 has lost its function, too, and cannot be adopted by the Commission for reasons of the coherence of the text as a whole.

The proposed amendment n° 36 concerning Article 11 paragraph 1 has not been accepted, as it does not add anything to the original proposal of the Commission and appears to be rather less precise. Instead, the amended proposal contains a different addition of a clarifying character to this provision.

Commentary on the title and the recitals

With respect to the additional or modified provisions of the Directive, the Commission has included additional recitals or additions to existing recitals in its proposal.

Title

In accordance with the Opinion of the European Parliament, the words "in the field of intellectual property" have been added to the title of the proposal. This constitutes a useful clarification, as it explicitly states that the Directive does not cover the rental or lending of housing, cars or the like, which is irrelevant under copyright. However, for this purpose, the addition has to be placed at the end of the title. The second amendment in the title, which is not relevant in all language versions, serves the purpose of clarification. The normally used expression "neighbouring rights" becomes clearer in the formulation "rights related to copyright". This formulation shows that these rights are related to copyright rather than to rental or lending.

Recital n° 3

The additional reference to Article 3f EEC-Treaty serves the purpose of clarification and does not change the purpose of the Directive.

Recital n° 5

In view of the new Article 6 bis, a reference to the right of broadcasting and to the right of communication to the public has been added to this recital.

Recital n° 7

The proposed amendment specifies that an adequate legal protection is necessary for "the first rightholders concerned". This means in the context of the original text of recital n° 7 that creative and artistic persons - authors and performing artists - as well as organisational and economic contributors - producers of phonograms and films, broadcasters - are entitled to legal protection where their works and efforts are concerned by the exploitation.

Recital n° 10

The Commission has accepted the clarifying proposed amendment to recital n° 10, since it duly stresses once again the consideration expressed in recital n° 9. According to this consideration, the activities which the provision of the Directive intends to facilitate, are "to a large extent" self-employed activities or services. Thereby it is clarified at the same time that the Directive does not deal mainly with the rights and interests of employees as such in relation to their employers. Where rightholders are at the same time employees, their relationship to their employers are covered by this directive only as a consequence of its structure.

Recital n° 15

In view of the new Article 6 bis, a reference to the right of broadcasting and to the right of communication to the public has been added to this recital.

Recital n° 15a

This additional recital is also a consequence of the introduction of the new Article 6 bis, as it states that the rights included therein are minimum rights.

Recital n° 15b

As was already evident from the original proposal for a Directive by the Commission and its explanatory memorandum, the Commission holds the view that it would not be useful to define in this Directive which only deals with certain aspects of copyright, the groups of rightholders it covers. This view is now explicitly confirmed in the new recital n° 15b, based on the proposal of the European Parliament. Since the Directive itself intentionally does not contain a definition, the groups of rightholders therefore have to be clearly defined in the national law of the Member States. This is mostly already the case.

Recital n° 16a

The Commission accepts the consideration which is underlying the proposal of the Parliament for the additional recital n° 16a. According to this consideration, Member States should review, after the implementation of this Directive, in certain cases their relations to such third countries where the Directive may create a new situation, with a view to the possible conclusion of agreements on mutual legal protection. The formulation has been modified in the amended proposal for the sake of clarity.

Commentary on the Articles

Article 1 paragraph 2

The Commission accepts the amendments proposed by the Parliament to Article 1 paragraph 2 of the original proposal since they render the definition of rental more precise without changing the substance or the main purpose of the Directive. In the view of the Commission this is true in particular for the first amendment which replaces the term "for profit making purposes" by the formulation "for direct or indirect economic advantage". This sentence which has been added to paragraph 2 is of a clarifying character, too. While already the original proposal intended to cover the frequent exploitation in the form of rental to the "last user", it is now explicitly stated that rental for the purpose of public performance remains outside the scope of the Directive. This concerns in particular the rental of film copies to cinemas or the rental of sheet music for the purpose of performance of music. The language ("public performance") has been adapted to the French version which is correct in substance.

Article 1 paragraph 3

The Parliament's proposal for Article 1 paragraph 3 also includes two amendments : the new second sentence contains the same precision for the definitions of lending for the purpose of public performance as is provided for rental. The Commission accepts this amendment with reference to the comments on Article 1 paragraph 2. Due to the second amendment, the deletion of the word "direct" in the first part of the paragraph, the scope of lending has been limited in favour of rental. Thus, activities in particular of those institutions which act towards users like public libraries but which pursue indirect profit making purposes, are considered to be rental rather than lending. The Commission accepts this amendment since it draws an even clearer distinction between rental and lending.

Article 1 paragraph 4

The Commission has accepted the Parliament's drafting amendment on Article 1 paragraph 4, as it constitutes no change in substance. Like the original text, the new formulation is intended to state that the exclusive rental right and the lending right as referred to in Article 1 paragraph 1, are not affected by any sale or other act of distribution of originals or copies of works or other subject matter, and remain valid.

Article 2 paragraph 2

The Commission has accepted the proposal of the European Parliament that at least the principal director of a cinematographic work shall be considered to be its author. At least in the context of this Directive, it is thereby guaranteed that these creative persons obtain legal protection as authors throughout the Community and no longer suffer disadvantages in some Member States due to a lack of protection. Without prejudice to a possible overall harmonisation of authorship of cinematographic works, it seems therefore useful to include the provision the Parliament has proposed. The formulation of this paragraph has been adjusted in order to state even more clearly the purpose of the provision and to clarify that its application is limited to the scope of this Directive and that it only is a minimum harmonisation.

Article 2 paragraph 4

The proposal for amendment of Article 2 paragraph 4 which has been accepted by the Commission does not change the substance, but only takes into account that the Directive on the legal protection of computer programs was in the meantime adopted by the Council.

Article 2 paragraph 5

The original proposal of the Commission did not contain any specific provisions on the relations between performing artists and producers of cinematographic works, but rather left it to Member States whether and if so how to deal with this relation. The Commission now follows the opinion of the European Parliament pursuant to the request of the film industry to deal with this relation with respect to the exclusive rental and lending right in the framework of this Directive on Community level. This means a major facilitation of the exploitation of films for film producers throughout the Community on equal terms. In order to compensate the performing artist for this potential weakening of his legal position with a minimum protection, the presumption of assignment is rebuttable and subject to a written contract as well as to the economic participation under Article 3. The amended proposal extends the scope of this provision, as compared with the wording proposed by the Parliament, for the benefit of producers beyond work contracts to all contracts, and includes some minor modifications to the formulation in order to safeguard the coherence with the other provisions of this Directive.

Article 3

The Parliament's proposed amendment to the first sentence has been accepted by the Commission to the extent that it constitutes a more precise formulation of the original proposal. The other proposals of the Parliament have been accepted subject to modifications which appear necessary for the sake of clarity.

The amended proposal adopts the idea of the Parliament to further specify in an additional second sentence the part of the revenues which are the object of the right under Article 3, but presents this idea in a slightly modified and, in the view of the Commission, even more precise formulation as compared with the Parliament's proposal. According to this formulation, the importance of the contribution of the rightholders concerned to the sound recording, visual recording or visual and sound recording has to be taken into account for the distribution of the revenues. In conformity with its original proposal and pursuant to the proposal of the Parliament, the Commission presumes that the creative and artistic contributions of authors and performing artists are of major importance for the exploitation of the work, as for instance, they influence the decision of the consumer to rent a particular film.

The amended proposal has adopted the Opinion of the European Parliament on the second part of the third sentence, but has chosen a clearer formulation in accordance with the intended meaning. Accordingly, the right of authors and performing artists to obtain a share may be entrusted to collecting societies, representing the professional categories concerned, as they appear to be particularly qualified for this task. The terminology ("entrusted") has been adapted to the French version which is correct in substance.

Article 4

No amendments were proposed by the European Parliament.

Article 4 bis

Article 4 bis adds aspects of moral rights to the economic aspects of the rental and lending right. The provision which the Commission has incorporated into its amended proposal from the Parliament contains a partial aspect of moral right. Most Member States already provide for a comprehensive protection of moral rights; it therefore seems useful to harmonize at least in respect of rental and lending, without preventing Member States from enacting more far-reaching moral rights in their national laws.

Article 5

No amendments were proposed by the European Parliament.

Article 6

The Commission has followed the proposal of the Parliament to provide, with reference to the new Article 2 paragraph 5, a rebuttable presumption of assignment also for the right of reproduction, in the sense that the performing artist is presumed to have assigned his exclusive right in the written contract to the film producer. This presumption of assignment is rebuttable by contractual provisions to the contrary, and is subject to the economic participation under Article 3 which applies here in its substance. This presumption of assignment accommodates the interest of film producers in a facilitation of the exploitation of films also with respect to the reproduction right, without neglecting a certain minimum protection for performing artists.

Article 6 bis

With minor modifications in the formulation, the amended proposal adopts the proposition of the Parliament to add the basic rights of broadcasting and of communication to the public for certain holders of neighbouring rights to Chapter II of the Directive. Whereas, pursuant to chapter 2 of the Green Paper on Copyright, the original proposal was limited to forms of piracy in connection with material exploitation, the Commission now follows the Opinion of the Parliament and widens the scope of the Directive to the area of piracy connected with non-material exploitation, by inserting a new Article 6 bis. Here, the amended proposal follows to a large extent the minimum provisions of the Rome Convention of 1961, in order to achieve, for the time being, an equal minimum protection in the Community. It is up to the Member States, to maintain or introduce a more far-reaching protection.

Article 6 bis paragraph 1

As a minimum provision, paragraph 1 of the newly added Article 6 bis provides for an exclusive right to broadcast and an exclusive right of communication to the public for performing artists in respect of their live performances.

Article 6 bis paragraph 2

Paragraph 2 provides for a remuneration for performing artists and producers of phonograms, if a phonogram published for commercial purposes was used for broadcasting or for communication to the public. This provision has been implemented in principle by most Member States in their law; it is a minimum provision.

Article 6 bis paragraph 3

Paragraph 3, modelled on Article 13 (a) and (d) of the Rome Convention, provides for an exclusive right of rebroadcasting for broadcasting organisations and, correcting a drafting mistake in the Parliament's proposal, for an exclusive right of communication to the public of television broadcasts under the conditions already mentioned in the Rome Convention.

Article 6 bis paragraph 4

Paragraph 4 states clearly that the provisions of Article 6 bis may only be applied without prejudice to the specifically relevant provisions of the Directive on cable and satellite broadcasting (Proposal for a Council Directive COM (91) 276 final - SYN 358) which has not yet been adopted by the Council. Therefore, these provisions of the cable and satellite Directive prevail over those of Article 6 bis, if they are in contradiction. For the time being, the cable and satellite Directive provides as a minimum protection performing artists with an exclusive right of communication to the public by satellite in respect of their live performances, performing artists and/or producers of phonograms with a remuneration for the communication to the public of a phonogram published for commercial purposes, and broadcasting organisations with the exclusive right of simultaneous rebroadcasting by satellite. Article 6 bis provides for a more far-reaching protection, as it contains in particular the right to broadcast, without limiting it to the broadcasting by satellite, and in addition the remuneration for broadcasting for performing artists and producers of phonograms as well as the right of communication to the public. Since the cable and satellite Directive only constitutes a minimum protection, Article 6 bis in this respect does not create any contradiction.

Article 7

In its amended proposal, the Commission adopts the proposal of the Parliament to apply the presumption of assignment under Article 2 paragraph 5 to the distribution right also. Thus, also in respect of the distribution right, the performing artist is presumed to have assigned his exclusive right to the film producer in their written contract. Here, the same considerations apply as for the application of the presumption to the reproduction right (Article 6).

Article 8

No amendments were proposed by the European Parliament.

Article 9

No amendments were proposed by the European Parliament.

Article 10

No amendments were proposed by the European Parliament.

Article 11 paragraph 1

The amendment n° 36 proposed by the Parliament for Article 11 paragraph 1 (originally the only paragraph of Article 11) intended to render the drafting more concise. It cannot be accepted by the Commission, because it would rather give rise to misunderstandings without adding anything in substance. Instead, the amended proposal includes a supplement to Article 11 paragraph 1, due to the inclusion of the new paragraph 2, which now more clearly defines both paragraphs of Article 11 in their relation to each other.

Article 11 paragraph 2

According to the original proposal, the Directive applied without exception to all subject matter covered therein, which was still protected on 1 January 1993. Since some considered this provision to go too far in its effects, the Commission now follows the proposal made by the Parliament, to grant a transitional period of three years in order to enable contracting parties to adjust their contracts to the new legal situation within this period. At the latest three years after the entry into force of the Directive, the provisions of the Directive would then have to be observed without exception. The Commission considers it useful to complement this transitional period by a provision which states some kind of good faith protection for the continued use of such objects for rental or lending which had already previously been acquired or made available. The last sentence of paragraph 2 takes account of this particular situation.

Article 11 bis

Pursuant to the Opinion of the Parliament, Article 11 bis includes a new provision which corresponds to a generally recognized principle and is already included in its substance in Article 1 of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations. Since most Member States already adhere to this convention or are in the process of adjusting their legislation to this convention, the inclusion of Article 11 bis only serves to clarify that this principle is also valid in the context of this Directive. The provision is of a general character and applies to the whole Directive. It is therefore not placed in the first chapter as proposed by the Parliament, but in Chapter IV (Common Provisions).

Article 12

No amendments were proposed by the European Parliament.

Article 13

No amendments were proposed by the European Parliament.

ORIGINAL PROPOSAL

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PROPOSAL FOR A COUNCIL DIRECTIVE
ON RENTAL RIGHT, LENDING RIGHT, AND
ON CERTAIN RIGHTS RELATED TO
COPYRIGHT

PROPOSAL FOR A COUNCIL DIRECTIVE
ON RENTAL RIGHT AND LENDING RIGHT
AND ON CERTAIN RIGHTS RELATED TO
COPYRIGHT IN THE FIELD OF
INTELLECTUAL PROPERTY

THE COUNCIL OF THE EUROPEAN
COMMUNITIES,

THE COUNCIL OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty
establishing the European Economic
Community and in particular Articles
57 (2), 66 and 100A thereof,

unchanged

Having regard to the proposal from
the Commission,

unchanged

In co-operation with the European
Parliament,

unchanged

Having regard to the opinion of the
Economic and Social Committee,

unchanged

Whereas differences exist in the
legal protection provided by the
laws and practices of the Member
States for copyright works and
subject matter of related rights
protection as regards rental and
lending, and such differences are
sources of barriers to trade and
distortions of competition which
impede the proper functioning of the
internal market;

unchanged

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Whereas such differences in legal protection could well become greater as Member States adopt new and different legislation or as national jurisprudence interpreting such legislation develops differently;

unchanged

Whereas such differences should therefore be eliminated by 31 December 1992 in accordance with the objective of introducing an area without internal frontiers as set out in Article 8A of the Treaty;

Whereas such differences should therefore be eliminated by 31 December 1992 in accordance with the objective of introducing an area without internal frontiers as set out in Article 8A of the Treaty so as to establish, pursuant to Article 3(f) of the EEC Treaty, a system ensuring that competition in the common market is not distorted;

Whereas rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for creators, artists and a broad range of industries, and piracy is becoming an increasing threat;

unchanged

Whereas the adequate protection of copyright works and subject matter of related rights protection by rental and lending rights as well as the protection of the subject matter of related rights protection by the fixation right, reproduction right and distribution right can accordingly be considered as being of fundamental importance for the Community's industrial and cultural development;

Whereas the adequate protection of copyright works and subject matter of related rights protection by rental and lending rights as well as the protection of the subject matter of related rights protection by the fixation right, reproduction right, distribution right, right to broadcast and communication to the public can accordingly be considered as being of fundamental importance for the Community's industrial and cultural development;

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Whereas copyright and related rights protection must adapt to new economic developments such as new forms of exploitation;

unchanged

Whereas the creative and artistic work of authors and performing artists necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky and the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection;

Whereas the creative and artistic work of authors and performing artists necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky and the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the first rightholders concerned;

Whereas without effective and harmonized protection throughout the Member States, such creative and artistic work as well as such investment might decrease or never be made;

unchanged

Whereas these creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons, and the pursuit of such activities must be made easier by providing a uniform legal protection within the Community;

unchanged

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Whereas, to the extent that these activities constitute services, their provision must equally be facilitated by the establishment in the Community of a uniform legal framework;

Whereas, to the extent that these activities principally constitute services, their provision must equally be facilitated by the establishment in the Community of a uniform legal framework;

Whereas protection by rental and lending rights and protection in the field of rights related to copyright by existing legislation, administrative practice, and court jurisprudence does not exist at all in some Member States and, where it exists, is not the same or has different characteristics;

unchanged

Whereas the uncoordinated development in the Community of legal protection in these fields in the Member States could result in the creation of new disincentives to trade to the detriment of further industrial and cultural development and of the completion of the internal market;

unchanged

Whereas existing differences having such effects need to be removed and new ones having a negative impact on the functioning of the common market and the development of trade in cultural goods and services need to be prevented from arising;

unchanged

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Whereas the legislation of the Member States should be harmonized in such a way so as not to conflict with the existing international conventions on which many Member States' copyright and related rights laws are based;

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 establishing the exclusive rights of fixation, reproduction and distribution for certain groups of right owners in the field of related rights protection;

unchanged

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 establishing the exclusive rights of fixation, reproduction, distribution, broadcasting and communication to the public for certain groups of right owners in the field of related rights protection;

Whereas Member States may provide for more far-reaching protection for authors and owners of rights related to copyright than that required by Article 6 bis of this Directive;

Whereas it is necessary for Member States to define clearly the groups of rightholders covered by this Directive;

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Whereas the harmonized rental and lending rights and the harmonized protection in the field of rights related to copyright should not be exercised in a way which constitutes a disguised restriction on trade between Member States;

HAS ADOPTED THIS DIRECTIVE:

AMENDED PROPOSAL

unchanged

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;

HAS ADOPTED THIS DIRECTIVE:

ORIGINAL PROPOSAL

AMENDED PROPOSAL

CHAPTER I RENTAL AND LENDING RIGHT

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Article 1 Object of Harmonization

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 of originals and copies of copyright works, and other subject matter as set out in Article 2 (1).

(1) unchanged

(2) For the purposes of this Directive, "rental" means making available for use, for a limited period of time and for profit-making purposes, without prejudice to paragraph 3.

(2) For the purposes of this Directive, "rental" means making available for use, for a limited period of time and for direct or indirect economic advantage, without prejudice to paragraph 3. "Rental" within the meaning of this paragraph does not cover making available for the purpose of public performance.

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(3) For the purposes of this Directive, "lending" means making available for use, for a limited period of time, and not for direct profit-making purposes, if it is made through institutions which are accessible to the public, such as public libraries, research libraries, specialized libraries, school libraries, church libraries, collections of new media or of works of visual art, libraries organized or sponsored by public or private companies, and other collections of subject matter as set out in Article 2 (1).

(3) For the purposes of this Directive, "lending" means making available for use, for a limited period of time, and not for profit-making purposes, if it is made through institutions which are accessible to the public, such as public libraries, research libraries, specialized libraries, school libraries, church libraries, collections of new media or of works of visual art and other collections of subject matter as set out in Article 2 (1). "Lending" within the meaning of this paragraph does not cover making available for the purpose of public performance.

(4) The rights referred to in paragraph 1 shall not be affected 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).

(4) The rights referred to in paragraph 1 shall not be exhausted 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).

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**Article 2 First Owner and Subject
Matter of Rental and
Lending Right.**

**Article 2 First Owner and Subject
Matter of Rental and
Lending Right.**

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

(1) unchanged

- 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, and visual and sound recordings.

(2) For the purposes of this Directive the principal director of a cinematographic work shall be its author. Member States may provide for others to be its co-authors.

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

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

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(3) The provisions of this Directive shall be without prejudice to any provisions of Council Directive (EEC)N° ... of ... on the Legal Protection of Computer Programs⁽¹⁾.

(4) The provisions of this Directive shall be without prejudice to Article 4 c) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs⁽¹⁾.

(5) Any contract concerning film production between a performing artist and a producer of a film, as set out in paragraph 1 4th indent, must be concluded in writing. When the performing artist signs a contract concerning film production with the film producer as set out in paragraph 1, he shall be presumed, subject to contractual provisions to the contrary, to have assigned his rental and lending right, subject to the provisions of Article 3.

Article 3 Authorization of Rental and Lending

Article 3 Authorization of Rental and Lending

If the rightholders authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the rightholders set out in Article 2 (1) shall retain the right

If the rightholders set out in Article 2 (1) authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the said rightholders shall retain the right

(1) ...

(1) OJ No. L 122, 17.5.1991, P. 42

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to obtain an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licences. This right to obtain an adequate part of the payment cannot be waived, but its administration may be assigned.

Article 4 Derogation from exclusive lending right

Member States may, for cultural or other reasons, derogate from the copyright based exclusive lending right referred to in Article 1 (1) for one or several categories of objects, provided that

- at least authors obtain an equitable remuneration through administering bodies for such lending; and
- such derogation measures comply with Community law, in particular Article 7 of the EEC Treaty.

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to obtain an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licenses. This part shall be adequately proportional to the importance of the contribution of the rightholders concerned to the sound recording, visual recording or visual and sound recording. This right to obtain an adequate part of the payment cannot be waived, but its administration may, for authors and performing artists, be entrusted to collecting societies representing the professional categories concerned.

Article 4 Derogation from exclusive lending right

unchanged

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Article 4 bis Moral Rights

No changes, cuts or additions may be made to a work by the person making it available for rental, the rentor, the lender or the borrower without specific authorization of the author.

CHAPTER II PROTECTION IN THE FIELD OF RIGHTS RELATED TO COPYRIGHT

CHAPTER II PROTECTION IN THE FIELD OF RIGHTS RELATED TO COPYRIGHT

Article 5 Fixation Right

Article 5 Fixation Right

Member States shall provide for performing artists the right to authorize or prohibit the fixation of their performances. Likewise, they shall provide for broadcasting organizations the right to authorize or prohibit the fixation of their broadcasts.

unchanged

Article 6 Reproduction Right

Article 6 Reproduction Right

Member States shall provide the right to authorize or prohibit the direct or indirect reproduction :

(1) unchanged

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- for performing artists, of fixations of their performances,
- for phonogram producers, of their phonograms,
- for producers of the first fixations of cinematographic works or moving images, of their visual recordings, and visual and sound recordings,
- for broadcasting organizations, of fixations of their broadcasts.

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- (2) When the performing artist signs a contract as set out in Article 2 paragraph 5, he shall be presumed, subject to contractual provisions to the contrary, to have assigned his reproduction right, subject to the provisions of Article 3 which apply mutatis mutandis.

**Article 6 bis: Broadcasting and
Communication to the
Public**

- (1) Member States shall provide for performing artists the right to authorize or prohibit the wireless broadcasting and the communication to the public of their performance, unless the performance is itself already a broadcast performance or is made from a fixation.

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- (2) Member States shall provide the right to be paid a single equitable remuneration to both performing artists and phonogram producers by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram is used for wireless broadcasting, or for any communication to the public. In the absence of agreement between the performing artists and the phonogram producers, Member States may fix the conditions determining how the payment is to be shared between them.
- (3) Member States shall provide for broadcasting organisations the right to authorize or prohibit the wireless rebroadcasting of their broadcasts and the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.
- (4) The provisions of this Article shall be without prejudice to those provisions of Council Directive .../EEC on the coordination of certain rules on copyright and related rights applicable to satellite broadcasting and retransmission by cable which provide for

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performing artists and producers of phonograms the right of communication to the public by satellite, and for broadcasting organisations the right of simultaneous retransmission of their broadcasts by satellite.

Article 7 Distribution Right

Article 7 Distribution Right

(1) Member States shall provide

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- for performing artists in respect of fixations of their performances,
- for phonogram producers in respect of their phonograms,
- for producers of the first fixations of cinematographic works and moving images in respect of their visual recordings, and visual and sound recordings,
- for broadcasting organizations in respect of fixations of their broadcasts,

- for performing artists in respect of fixations of their performances,
- for phonogram producers in respect of their phonograms,
- for producers of the first fixations of cinematographic works and moving images in respect of their visual recordings, and visual and sound recordings,
- for broadcasting organizations in respect of fixations of their broadcasts,

the exclusive right to make available, for an unlimited period of time, their respective subject matter to the public by sale or otherwise, without prejudice to paragraph 2.

the exclusive right to make available, for an unlimited period of time, their respective subject matter to the public by sale or otherwise, without prejudice to paragraph 3.

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- (2) If a subject matter referred to in paragraph 1 has been put into circulation within the Community by the right owner or with his consent, then its import into another Member State may not be prohibited by virtue of the right referred to in paragraph 1.
- (2) When the performing artist signs a contract as set out in Article 2 paragraph 5, he shall be presumed, subject to contractual provisions to the contrary, to have assigned his distribution right, subject to the provisions of Article 3 which apply mutatis mutandis.
- (3) unchanged

Article 8 Limitations to Rights

Article 8 Limitations to Rights

- (1) Member States may provide limitations to the rights referred to in Chapter II in respect of:
- (1) unchanged
- (a) private use;
 - (b) use of short excerpts in connection with the reporting of current events;
 - (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
 - (d) use solely for the purposes of teaching or academic research.

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(2) Irrespective of paragraph 1, any Member State may provide the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of cinematographic works and moving images, as it provides in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided only to the extent that they are compatible with the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations).

(2) unchanged

(3) Paragraph 1 a) shall be without prejudice to any existing or future legislation on remuneration for reproduction for private use.

(3) unchanged

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CHAPTER III DURATION

CHAPTER III DURATION

Article 9 Duration of Authors' Rights

Article 9 Duration of Authors' Rights

Until further harmonization, the authors' rights referred to in this Directive shall not expire before the end of the term provided by the Berne Convention for the Protection of Literary and Artistic Works; this shall be without prejudice to the particular terms of protection of authors' rights not explicitly dealt with by that Convention.

unchanged

Article 10 Duration of Related Rights

Article 10 Duration of Related Rights

Until further harmonization, the rights referred to in this Directive of performing artists, phonogram producers and broadcasting organizations shall not expire before the end of the respective terms provided by the Rome Convention. This shall apply mutatis mutandis to the rights referred to in this Directive, of producers of the first fixations of cinematographic works and moving images.

unchanged

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CHAPTER IV COMMON PROVISIONS

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Article 11 Application In Time

Article 11 Application In Time

The provisions of this Directive shall apply also in respect of all copyright works, performances, phonograms, broadcasts and first fixations of cinematographic works and moving images referred to in this Directive which are, on 1 January 1993, still protected by the national legislation in the field of authors' rights and related rights.

(1) The provisions of this Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of cinematographic works and moving images referred to in this Directive which are, on 1 January 1993, still protectable by the national legislation or this Directive in the field of authors' rights and related rights.

(2) Contractual rights and obligations arising from legislation applying prior to the date laid down in Article 12 shall not be affected by this Directive for a period of three (3) years from its entry into force. All parties concerned shall, however, within a period of three (3) years from the entry into force of this Directive, review the terms of their contracts with a view to bringing them into line with the provisions of this Directive. Member States in which no exclusive right within the meaning of Article 1 paragraph 1 existed before 1 January 1993 shall provide that the

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rightholders are deemed to have given their authorization to the rental or lending of an object set out in Article 2 paragraph 1, which is proven to have been made available to third parties for this purpose or to have been acquired before 1 January 1993.

**Article 11 bis Relation between
Copyright and Related
Rights**

Protection of copyright related rights under this Directive shall leave intact and shall in no way affect the protection of copyright as such.

Article 12 Final provisions

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 1993.

Member States shall forthwith inform the Commission thereof and communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 12 Final provisions

unchanged

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When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Article 13

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

Article 13

unchanged

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