

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(90) 582 final - SYN 318

Brussels, 11 January 1991

Proposal for a

COUNCIL DECISION

concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) of 26 October 1961

(presented by the Commission)

EXPLANATORY MEMORANDUM

THE COMMISSION'S APPROACH TOWARDS THE MULTILATERAL CONVENTIONS ON COPYRIGHT AND NEIGHBOURING RIGHTS AND THE NEED FOR COMMUNITY ACTION

1. In view of the increasingly important role played by copyright and neighbouring rights in economic life, their cultural implications - copyright and neighbouring rights being at the root of intellectual creation - and the changes brought about by technology, the Community has stressed in recent years the need to strengthen the protection of such rights.

There is a broad consensus on this point. Not only the business circles concerned but also a great many countries and the relevant international organizations have acknowledged that action should be taken in this sphere as soon as possible.

2. It is the Commission's belief, as expressed in its Green Paper¹, that any Community action should be two-pronged, being carried out both at the internal level with a view to the formation of the single market in 1993, and at the international, multilateral level with a view to the creation of a world environment favourable to copyright and neighbouring rights and affording them an adequate and effective minimum level of protection from which right holders from the Community can then also benefit.

3. As indicated in the Green Paper, "any action at the Community level is to be based on the following considerations. Intellectual and artistic creativity is a precious asset, the source of Europe's cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected: it needs to be given a higher status and it needs to be stimulated."

Such action cannot, however, be effectively implemented without taking account of the harmonization drive being undertaken on the international level, notably by WIPO (World Intellectual Property Organization).

4. At the multilateral level, the Community has always supported such moves, whether made by WIPO or by GATT (TRIPs - Trade Related Intellectual Property Rights), and has been actively involved therein. It is convinced that, owing to the internationalization of copyright issues, for which the new technologies are largely responsible, a solution must be sought first and foremost in the world context, or at least in as wide a context as possible. It should be noted, however,

¹ Green Paper on copyright and the challenge of technology - COM(88)172 final of 7 June 1988.

that within the multilateral framework countries' positions on certain aspects of the matter differ, so that a fair balance has to be struck between the level of protection sought by some countries and the desire of others to afford the freest possible access to information and culture.

For its part, the Community, while it is aware of the legitimate interests of some countries and of the need to arrive at a satisfactory solution, advocates a high level of protection of copyright and neighbouring rights for the benefit of authors and artists, whilst ensuring that copyright and neighbouring rights do not unreasonably prejudice competition. It believes that, in the medium term at least, this will be of benefit to all developed or developing countries and to intellectual creation as a whole.

5. It is in this general context that the Commission considers that Community action on the internal level should be prepared without delay.

In so far as the protection afforded in the international context is adequate, there is no need for the Community to take more detailed measures. It may be, however, that, in striking a balance between countries' positions, the solutions found are not entirely in the interests of creators, authors or artists, or of the Member States of the Community. A situation in which only some of the Member States of the Community adhere to a multilateral convention is also conceivable, with the result that the extent of the protection - or even the subsistence of a right - may differ from one country to another.

It will be recalled that, according to the Single European Act, the Community must adopt, by 31 December 1992, measures with the aim of establishing the internal market, that is to say an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. The implementation at the national level of multilateral conventions - even by the twelve Member States - may not be sufficient to attain this objective, which is specific to the Community and, generally speaking, outside the multilateral sphere.

It is in such cases, notably, that it is the Community's duty to act.

6. In other words, multilateral conventions may constitute a point of departure, a common basis for harmonization on which, owing to the specific interests and particular nature of the Community, additional measures must be worked out with the aim of strengthening the protection of copyright and neighbouring rights and incorporating it in the existing body of Community law.

This approach is entirely in keeping with European cultural traditions and with the letter and spirit of the relevant multilateral conventions, which allow States to come to special arrangements conferring more extensive rights on right holders.

It is therefore conceivable that the Commission may subsequently find it necessary to propose more extensive harmonization on certain particular points. In this respect, such a common basis cannot but facilitate in practice the exercise of those powers stemming from the Treaty of Rome which already permit Community action on specific aspects of copyright and neighbouring rights.

The present proposed Decision does also not preclude that in the future revision of the Berne Convention action can be taken by the Community aimed at improving the ability to afford adequate protection to products covered by copyright, including computer programs, whilst at the same time allowing for competition in the market for such products.

THE ACCESSION OF ALL THE MEMBER STATES OF THE EUROPEAN COMMUNITY TO THE BERNE (PARIS ACT) AND ROME CONVENTIONS

7. In relation to copyright and neighbouring rights, two multilateral conventions play a major role both from the point of view of their content and from that of the number of countries parties thereto, namely the Berne Convention for the Protection of Literary and Artistic Works - to which 84 States were party on 1 March 1990 - and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations - to which 35 States were party on 1 March 1990.

(a) The Berne Convention

8. The Berne Convention, which dates from 1886, has undergone a number of revisions, known by the name of the "... (the place where the diplomatic revision conference was held) Act". In the case of each Act, ratification by States is necessary for its entry into force.

The last two revisions whose substantive provisions (Articles 1 to 21) have entered into force are the Brussels Act of 26 June 1948 and the Paris Act of 24 July 1971.²

9. The latter Act has introduced many improvements, of which the main ones are commented on below.

Article 2

Under the Brussels Act (Article 2(5)), works of applied art were not protected in all signatory countries. Under subsequent Acts, if a State does not protect them by a special law on designs and models, they are to be protected as artistic works.

Articles 3 to 6

These provisions govern the scope of the Convention as far as authors and protected works are concerned. Somewhat muddled in earlier versions, they have been rearranged and are now easier to understand.

² The revision carried out in Stockholm on 14 July 1967 has not entered into force as far as the substantive provisions are concerned, although these were taken over unamended in the Paris Act. Articles 22 and 23 of the Paris Act, concerning the Assembly and the Executive Committee, have had minor changes made to them. These were adopted by the Berne Union Assembly on 2 October 1979 and entered into force on 19 November 1984.

Article 3 lays down the criteria for determining whether or not a work is protected by the Convention. The Paris Act protects all works published by nationals of signatory countries. Works published outside the countries of the Union are also protected, which was not the case under the Brussels Act (Article 6(1)). Moreover, the Paris Act increases the number of authors protected, treating as nationals of the countries of the Union authors who are not from one of those countries but who have their habitual residence in one of them (Article 3(2)). This provision also applies to stateless and refugee authors.

Article 6bis

The Brussels Act obliged States to protect the author's moral rights - the right to claim paternity of the work and to oppose any changes to the work prejudicial to his honour or reputation - only until his death. The new text prolongs protection at least until the expiry of the protection of the author's economic rights. However, States whose law, at the time of their accession to the Paris Act, does not provide for protection of all the prerogatives of the moral right after the death of the author may provide that some of those prerogatives may cease to be maintained after his death.

Article 7

The term of protection of 50 years after the author's death, laid down in the Brussels Act, has not been extended. A recommendation was nevertheless adopted by the Stockholm Conference with a view to the conclusion of a multilateral agreement extending the term of protection.

The Brussels Act did not lay down any minimum term of protection for cinematographic and photographic works and works of applied art, such term being that provided for by the law of the country in which protection was sought (Article 7(3)). Subsequently, the minimum term of protection of cinematographic works was set at 50 years, which may be computed according to two variants from which countries of the Union may choose (paragraph 2). In the case of photographic works and works of applied art, States will have to grant protection for at least 25 years from the making of the work (paragraph 4).

Article 9

According to this provision, the exclusive right of reproduction is included in the minimum protection guaranteed by the Convention; it was incorporated in the Convention as late as at the Stockholm revision. All methods of reproduction are covered by this exclusive right.

Paragraph 2 indicates the possible exceptions. Signatory States may restrict the right of reproduction "in certain special cases". The exceptions provided for by national law must not, however, conflict with either the normal exploitation of the work or the legitimate interests of the author.

Article 14bis

This article governs the rights of authors of cinematographic works. Apart from paragraph 1, which corresponds to Article 14(2) of the Brussels Act, all the other provisions have been taken over from the Stockholm text. The purpose of the rules is to simplify the exploitation of such works at the international level. In the sphere of copyright, the difficulties connected with the exploitation of such works are due mainly to the fact that ownership of the rights varies according to the national laws of the countries of the Union.

10. All the Member States of the Community are parties to the Paris Act of the Berne Convention, with the exception of Belgium and Ireland, which are still bound by the Brussels Act of 1948. It should also be noted that many States with which the Community maintains relations, including the USA, Japan, some EFTA (European Free Trade Association) and central and eastern European countries, are parties to the Convention as revised by the Paris Act. The USSR has also just announced its intention of ratifying the Convention.

(b) The Rome Convention

11. The Rome Convention of 1961 governs in a structured manner the rights commonly known as "neighbouring rights". It seeks to ensure legal protection for interests which are recognized neither by the Berne Convention nor by the Universal Copyright Convention,³ in particular for performers.
12. When the Convention was drawn up in 1961, it was in advance of a large number of national laws. Moreover, Article 26 of the Convention provides that, at the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its national law to give effect to the terms of the Convention itself. This goes some way towards explaining why, until recently, the number of contracting States was limited.

³ The Universal Copyright Convention of 6 September 1952, as revised at Paris on 24 July 1971, was designed to enable a number of States which were not prepared to guarantee the high minimum level of protection of authors provided for by the Berne Convention to accede to a multilateral instrument on copyright. Hence the more limited protection afforded to authors by the Universal Convention compared with the Berne Convention.

13. There have, however, for some time now been signs of increased interest in the Convention. Since 1 January 1987, six States have become parties to it, including two in 1990. It must also be pointed out that among the contracting States to the Convention there are several States with which the Community maintains relations, including most EFTA countries and Japan.
14. Of the Member States of the Community, seven are parties, namely Denmark, France, Germany, Ireland, Italy, Luxembourg and the United Kingdom. Spain and Portugal have passed laws - Act 22/87 of 11 November 1987 and the Code on Copyright and Neighbouring Rights No 45/85 of 17 September 1985 - protecting neighbouring rights. In Belgium and the Netherlands, bills have been laid before Parliament with a view to introducing specific protection for neighbouring rights. The bills should, if they become law, enable those countries also to accede to the Rome Convention.
15. The differences between national laws as regards the minimum level of protection of copyright guaranteed by the Paris Act of the Berne Convention and the conferment of a neighbouring right on performers, producers of phonograms and broadcasting organizations create, as between the Member States, obstacles to the free movement of goods and services and distortions of competition which are prejudicial to the economic and cultural interests of creators, authors, artists, enterprises, States and the Community as a whole.
16. Such a situation is thoroughly inconsistent with the internal market as an area without frontiers in which the free movement of goods, persons, services and capital is ensured. As matters stand, the protection of right holders is determined by national boundaries, depending on whether or not a Member State has acceded to the abovementioned Conventions and hence on whether or not it grants a right.

The Community has to ensure the proper functioning of the internal market. Creators, authors and artists and the enterprises concerned should be able as far as possible to treat the Community as one and the same domestic market. This calls for the elimination of legislative disparities which disturb the functioning of the market by hindering or adversely affecting cross-border trade in goods and services or by distorting competition.

17. The accession of all the Member States to the Berne (Paris Act) and Rome Conventions would provide a "common basis for harmonization" on which to pursue the construction of the Community edifice as regards copyright and neighbouring rights. In the absence of such a common basis, any future harmonization aimed at strengthening the rights in question which the Community might undertake would be impeded or, at all events, delayed by the different levels of minimum rules recognized by the Member States.

18. Nor must it be overlooked that the position of the Member States and of the Community would give an example, an "impetus" capable of bringing about greater international support for the Berne (Paris Act) and Rome Conventions. The influence of European culture would be increased. Intellectual creation would receive a major stimulus, of benefit not only to creators, authors and artists, but also to enterprises, the public, the Member States and the international community.
19. The Commission would stress that this proposal fits fully into the wider pattern of measures taken by the Community and by other international organizations.
20. Thus, in June 1984, the Ministers for cultural affairs devoted a considerable part of their first formal meeting at Community level to preparing a Resolution on measures to combat audio-visual piracy. The Resolution was adopted on 24 July 1984 by the representatives of the Governments of the Member States.⁴ Its first provision states that "the Member States will endeavour to ratify, quickly, if they have not yet done so, those international Conventions which they consider likely, by the reciprocal provisions which they contain, to facilitate the initiation of procedures against acts of audio-visual pirating". In the sixth recital mention is made of the Rome Convention and of the action taken by the international Copyright Committees of the Berne Convention.

Following the example of the abovementioned Resolution and in the light of its Green Paper on copyright,⁵ the Commission considers that the accession of all the Member States of the Community to the Berne and Rome Conventions would provide a firm legal basis on which to combat piracy, in particular audio-visual piracy, more effectively.

This is an additional - but far from unimportant - factor underlying the Commission's proposal.

21. Under Article 1 of the draft TRIPS Agreement which the Community recently submitted at the Uruguay Round to GATT,⁶ contracting parties are required to comply with the fundamental provisions of the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris in 1971. Likewise, in Part Two, specific provisions reproducing the terms of the Rome Convention are laid down in respect of performers, producers of phonograms and broadcasting organizations.
22. Accession to the Berne (Paris Act) and Rome Conventions has also been advocated by other international organizations.

4 OJ No C 204, 3.8.1984, p. 1.

5 Green Paper on copyright and the challenge of technology - COM(88)172 final of 7 June 1988, Chapter 2.

6 Document MTN, GNG/NG11/W/68 of 29 March 1990.

Thus, in its Recommendation No R(88)2 of 18 January 1988, the Committee of Ministers of the Council of Europe advises Member States' Governments to take the necessary measures to combat piracy in the field of copyright and neighbouring rights. These measures include the ratification of treaties; in particular, States are called upon to consider carefully the possibility of becoming parties, if they have not already done so, to:

- the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 1971;
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961).

23. As is well known, WIPO has constantly endeavoured to secure the accession of States to the abovementioned Conventions. Witness the work of the International Copyright Committees and the Colloquia held in March 1981 and March 1983, referred to in the Resolution of the Representatives of the Governments of the Member States (of the Community) of 24 July 1984. The Commission would stress the importance it attaches to WIPO's work, in view both of its quality and of its representativeness at world level.

Within WIPO, a committee of experts will meet in Geneva in 1991 to consider the drawing-up of a Protocol to the Berne Convention. The Commission is of the opinion that the accession of all the Member States of the Community to the Berne (Paris Act) Convention might make a useful contribution to the success of this work, aimed as it is at strengthening the universal protection of copyright.

24. Throughout the above exposition, the Commission has put forward the reasons underlying its proposal and shown how it dovetails with the work of other international organizations of a European and universal dimension.

It should also be made clear that in the light of developments on the Community level, the Community as such could be in a position to adhere to these conventions. The present proposal is totally without prejudice to any other initiatives which may envisage the adherence of the Community as such to the Berne (Paris Act) or Rome Conventions.

One last aspect still needs to be mentioned, namely the date by which all the Member States of the Community must become parties to the Berne (Paris Act) and Rome Conventions.

Since by virtue of Article 36 of the Berne Convention and Article 26 of the Rome Convention, at the time of deposit of the instrument of ratification, acceptance or accession, each State must be in a position to give effect to or apply those Conventions and since, as a result, legislation will be needed in some Member States, the Commission considers that the date by which all twelve Member States should be parties to the Conventions must be set at 31 December 1992, the deadline for completion of the internal market.

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57, paragraph 2, 66, 100a and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

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

Whereas the Berne Convention (Paris Act) and the Rome Convention guarantee a minimum level of protection for authors and for performers, producers of phonograms and broadcasting organizations respectively; whereas, owing to their content, these conventions enjoy broad international support;

Whereas ten Member States are already parties to the Berne Convention, as revised by the Paris Act, the other two being bound still by the Brussels Act of 26 June 1948; whereas only a majority of Member States have acceded to the Rome Convention concerning "neighbouring rights";

Whereas the differences between national laws as regards the minimum level of protection of copyright guaranteed by the Paris Act and the conferment of rights on performers, producers of phonograms and broadcasting organizations create obstacles to the free movement of goods and services and distortions of competition prejudicial to the economic and cultural interests of creators, authors, artists and the enterprises concerned; whereas this state of affairs is incompatible with the establishment and functioning of the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured, as provided for in Article 8a of the Treaty;

Whereas the accession of all the Member States to the Berne Convention (Paris Act) and the Rome Convention is capable of making a significant contribution to the campaign against the pirating of audio-visual works, as is clear from the Resolution of the representatives of the Governments of the Member States of 24 July 1984 on measures to combat audio-visual piracy;¹

Whereas the accession of all the Member States to the Berne Convention (Paris Act) and the Rome Convention will provide a common basis for harmonization on which to pursue more easily the construction of the Community edifice as regards copyright and neighbouring rights;

Whereas owing to the internationalization of the problems connected with copyright and neighbouring rights, it is necessary to seek to provide better protection of those rights at the international level; whereas the accession of all the Member States to the Berne Convention (Paris Act) and the Rome Convention is likely to encourage other States to accede thereto; whereas this Decision fits fully into the wider pattern of measures taken by other international organizations, in particular WIPO, GATT and the Council of Europe;

1 OJ No C 204, 3.8.1984, p. 1.

Whereas the subject matter of the Berne Convention (Paris Act) and the Rome Convention falls within the competence of the Community; whereas at present the accession of the Community as such to these Instruments is not possible without a prior modification allowing the accession of international organisations as such; whereas in view of developments at Community level, the Community as such could be in a position to adhere to the Berne Convention (Paris Act) and the Rome Convention; whereas the present Decision is without prejudice to any such accession for which, in due time, appropriate proposals will be submitted to the Council; whereas in the meantime it is appropriate that the Council decide that Member States adhere to the said conventions;

Whereas a date must be set by which all the Member States should be parties to the Berne Convention (Paris Act) and the Rome Convention; whereas since legislation will be needed in some Member States, that date should be 31 December 1992, the deadline for completion of the internal market,

HAS ADOPTED THIS DECISION:

Article 1

The Member States shall, by 31 December 1992, ratify or accede to and comply with the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) of 26 October 1961.

Article 2

This Decision is addressed to the Member States.

Done at Brussels,

For the Council

The President

NOTE ON FINANCIAL IMPACT

The present proposal does not have budgetary consequences for the Community. Should any budgetary need occur it would be borne by existing resources of DG III.

NOTE ON S.M.E.'s

The present proposal has no impact on S.M.E.'s and does not contain specific measures for S.M.E.'s.

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