COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DIRECTIVE

on rental right, lending right, and on certain rights related to copyright

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(presented by the Commission)

EXPLANATORY MEMORANDUM

CONTENTS

EXPLANATORY MEMORANDUM

PART ONE: GENERAL

INTRODUCTION

1. The European Parliament stated as long ago as 1974 that measures for the harmonization of laws are necessary in the copyright field. In the resolution of May 13 1974(1), the European Parliament requested the European Commission to propose measures for the harmonization of the national regulations on the protection of culture and on authors' rights and "neighbouring rights". Consequently, the Commission produced three communications which, inter alia, dealt with the harmonization of authors' rights and neighbouring rights(2). Here already it was regarded as necessary that an industry of cultural products, which would be competitive throughout the Community and throughout the world, should be created.

   With regard to the completion of the internal Market, new incentives for Community action in this field - which includes copyright - would be politically necessary and required for social and economic reasons.

2. On October 24, 1980, the Commission organized a hearing in Brussels on the harmonization of the duration of copyright as the first step of a lengthy procedure of harmonization(3).

3. In its Green Paper on Copyright and the Challenge of Technology of 1988(4), the Commission submitted concrete proposals for measures for the harmonization of laws in the field of certain questions of copyright which

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(1) OJ No C 62, 30.05.1974

(2) 1977: "Community action in the cultural sector. Commission Communication to the Council, sent on 22 November 1977", Bulletin of the European Communities, Supplement 6/77
1982: "Stronger Community action in the cultural sector. Communication from the Commission to the Council and Parliament, transmitted on 12 October 1982", Bulletin of the European Communities, Supplement 6/82.
1987: "A fresh boost for culture in the European Community. Commission Communication to the Council and Parliament, transmitted in December 1987 (COM(87) 603 final)", Bulletin of the European Communities, Supplement 4/87. With regard to audiovisual media see "Communication from the Commission to the Council and Parliament on Audiovisual Policy", COM(90) 78 final.

(3) Cf. in this respect the report in GRUR Int. 1980, 767.

(4) Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action. Communication from the Commission, COM(88) 172 final.

appeared to be particularly urgent. Among the main problems identified, the Commission numbered piracy (Chapter 2), the distribution right, including its exhaustion, and the rental right (Chapter 4). The numerous comments received and a hearing held for interested circles on these issues in Brussels showed a broad support for the initiatives of the Green Paper. Moreover, the Commission was asked to go, in certain aspects, beyond the positions taken in the Green Paper.

4. Such aspects going beyond the Green Paper, and in particular the harmonization of the public lending right and of duration, are among the matters dealt with in, among other things, the latest Communication from the Commission of August 3, 1989(5). In this Communication, the Commission stated that copyright is a basic instrument of cultural policy, as there is a vital commercial component in the aims it pursues and the ways in which it is applied. The primary purpose of copyright is to guarantee the originators of creative literary work a living from their intellectual activity by giving them an exclusive right to the use made of their work and a right to a fair share in the income which others, particularly publishers, derive from it, thereby encouraging literary production and protecting authors. In relation to cultural workers, the Commission considers this aim as one which can be achieved by means of copyright protection. In the view of the Commission, if it is desired to give copyright protection but, at the same time, allow the free circulation of goods and services, it is necessary to find solutions to important problems such as the public lending right and the term of protection.

5. Accordingly, the present Directive includes, in addition to those proposals which are based on the Green Paper (Chapter 2 and 4), preliminary proposals for the harmonization of the public lending right and the term of protection.

6. The Directive consists of three linked parts. Chapter I deals with the rental and public lending of objects - such as phonograms - which incorporate protected works or performances. Since the Commission distinguishes in its proposal between the rental and lending of such objects, these different uses have to be defined.

(5) "Books and Reading: A Cultural Challenge for Europe", COM (89) 258 final.

With respect to competition, rental and lending are economically connected: nowadays, commercial rental shops and public libraries compete with each other and this competition will certainly grow in the future. The establishment of non-commercial public lending libraries at the beginning of this century resulted in the field of books in the virtual disappearance of the then prospering commercial rental libraries. A similar development in relation to the new media, which are to an increasing extent lent out in public libraries, cannot be excluded.

There is a close connection between the first and second Chapters. Chapter I provides that right owners are, in addition to authors, the performing artists, phonogram producers and film producers. However, these neighbouring rights owners do not yet enjoy any protection in some Member States. It would not be reasonable to harmonize particular rights, such as the rental and lending right, for these groups of neighbouring rights owners, while they do not even enjoy the fundamental ownership rights of neighbouring rights protection, such as the reproduction right, in some Member States. Therefore, following Chapter 2 of the Green Paper, Chapter II deals with the harmonization of such rights.

Chapter III is linked with the first two Chapters through the need for uniform terms of protection: the duration of protection is always applicable to all rights of a particular group of right owners such as performing artists or phonogram producers. Therefore, the terms of protection which have been provided in Chapter III pending a further harmonization proposal to be presented by the Commission, have to be applied equally to the rights provided in Chapter I and II.

THE PURPOSE OF THE PROPOSED DIRECTIVE

7. These three Chapters of the proposed Directive have the common aim of coping with the increasing, partially novel and partially illegal use of copyright works and of particular objects of neighbouring rights protection, such as phonograms, by granting a uniform and improved Community-wide legal protection.

The aim of copyright and neighbouring rights protection is to grant, on the one hand, moral rights to authors and performing artists and, on the other hand, economic rights, in order to recompense authors and performing artists

for their creative achievements, to let them participate economically in the subsequent exploitation of their works and performances and thereby to provide them with the financial basis for and the incentive to further creations.

With regard to the economic rights, the above applies similarly to the organizational, technical and economic achievements of phonogram producers, film producers and broadcasting organizations. Their large-scale investments have to be protected, not least to enable them to contribute to the protection of authors and performing artists. Only if such investment is protected, will producers et al. be able to invest not only in productions which are oriented towards pure commercial success and which would therefore guarantee a certain income, but also in such productions which are novel, particularly demanding or unusual in any respect and therefore less likely to be financially rewarding, but which still represent a necessary contribution to the increasingly threatened diversity of culture. Finally, a sufficient protection is a precondition for a situation in which producers may risk investing in recordings with still unknown, young performing artists, or in works of unknown composers, or in compositions which are important from a cultural point of view, but which are not very popular.

Consequently, the legal protection provided in the Directive will be, at the end of the day, to the benefit not only of the right owners themselves, but also of the consumers, to whom thereby a broad cultural supply will be made available.

The matters dealt with in this Directive have in addition the following particular aims:

8. The commercial rental dealt with in Chapter I, particularly of compact discs and video cassettes, has been increasing steadily in the Member States for several years. In particular, compact discs are rented mainly in order to make copies for personal use and thereby to avoid making a purchase. The technical quality of a compact disc is not impaired even by its frequent use, so that rental in connection with copying is more than just financially attractive for the consumer.

Since phonogram production is targeted at the sales market, rental as such, but even more so in connection with copying, causes substantial losses which

have, as a result, negative effects on authors and performing artists as well as on phonogram producers, and thereby on the variety of supply of cultural goods and services.

Rented video-cassettes are also used to make copies, even if this is currently done to a lesser extent than in the case of compact discs. The arrival of new digital recording media such as the video-CD will undoubtedly have the effect of increasing this phenomenon. Moreover, rental in the video sector represents a new, independent form of use which has substantial economic effects on the forms of use prevailing up to now (cinema, television, sell-through) and for which a particular right is necessary in order to make possible a sufficient and flexible market oriented exploitation of videograms.

9. Lending, which is also dealt with in Chapter I and which, as opposed to rental, is non-commercial and takes place mainly in public libraries, already represents in most of the Member States today a significant additional use both in terms of quantity and economically. This use, which should not be underestimated, cannot in general be duly compensated by authors' royalties alone. This extends not only to books, but also increasingly to new media such as phonograms and videograms. Along with the Community-wide development of library systems(6), this tendency will grow in future. As a matter of principle, authors and neighbouring right owners should be able to participate economically in such a considerable use of their copyright works and protected subject matter, because it is a separate kind of use. Moreover, the availability of material in public libraries results in displacement of sales and therefore in losses. To this extent, the economic situation in the case of lending is therefore comparable to that of rental. Accordingly, measures concerning lending right represent a necessary complement to the regulation of rental right.

If a Member State decides to make available the products of cultural creators to its citizens at no charge or for a low fee, then, as a matter of consistency, it will have to pay all those who contribute to the functioning

(6) Cf. the Commission's communication "Books and Reading" (Note 5), p. 13 et seq.

of the library. This means not only, for example, the library staff, but also, and more importantly, those who make the essential, being the creative, contribution to the functioning of a library. Last but not least, measures concerning public lending, which ensure an equitable income to authors for this considerable use of their works, are a necessary means to maintain and support European culture in its variety.

10. Chapter II of this Directive is based broadly on Chapter 2 of the Green Paper on Copyright. Its main purpose is the fight against so-called "piracy" which is in particular illegal reproduction and distribution, and also against "false" piracy i.e., reproduction and distribution which is done legally only because of the absence of any, or sufficient, protection in a given Member State. This causes considerable losses for the authors and neigbouring right owners, including in particular performing artists.

Since the legal situation with respect to the reproduction right and the distribution right of authors is already largely comparable throughout the Member States, Chapter II is restricted to the harmonization of the rights of neighbouring right owners, which means performing artists, phonogram producers, film producers, and broadcasting organizations.

Chapter II does not intend thereby to result in a total harmonization of all rights of all neighbouring right owners - one could think, for example, of the right of public communication, and of the rights in simple photographs etc. Instead, it concentrates deliberately on the rights of fixation, reproduction and distribution, which are particularly important for the purpose of the fight against piracy, and on those groups of neighbouring right owners which are most affected by piracy.

One of the main reasons for piracy is the fact that some Member States do not provide any, or sufficient, neighbouring rights protection. To take an example, phonograms, which enjoy no protection in certain Member States, may be reproduced legally there without consent of the performing artist or the producer. This alone produces important economic losses for the parties concerned, namely the performing artist and the phonogram producer. In international cases this may even, in a particular case and according to the

actual situation of facts and of international law, lead to a result where neighbouring rights protection in another Member State, which normally grants neighbouring rights protection, is not ensured(7).

Performing artists, phonogram and film producers as well as broadcasting organizations need exclusive rights to be able to fight against bootlegging and unauthorized reproduction and distribution. In order to make use of the Community as a single market, this legal protection not only has to be ensured in all Member States, but it also has to be provided on a safe and similar legal basis.

One aspect of this is that duration of protection should be equal throughout the Community; it is detrimental to an effective fight against piracy, if right owners first have to establish whether their product is still protected in a particular Member State. Different terms of protection for the same product cannot be tolerated in a single internal Market. A further harmonization proposal is therefore needed to deal with this issue.

The term "rights related to copyright" which has been used in the title of Chapter II is used synonymously with the terms "related rights" and "neighbouring rights" and means, for the purpose of this Directive and its explanatory memorandum, "rights of performing artists, phonogram producers, film producers, and broadcasting organizations". This Directive is without prejudice to the possibility that the Member States may grant these rights under the heading of "copyright".

THE NEED FOR HARMONIZATION AT THE COMMUNITY LEVEL

(i) The Existing Protection in the Member States and According to International Law

a)

11. The legal situation with respect to <u>rental right</u> in the Member States varies considerably. Some Member States provide an exclusive rental right, which means the right to authorize or prohibit rental. In some of these Member States, however, the right is given only to particular groups of right owners, or it is not realized in practice, or both. One Member State

(7) Cf., for example, the case Bob Dylan, BGH, November 4, 1985, GRUR Int. 1986, 414.

provides a remuneration right, which is given only to authors, scientific editors and photographers. In other Member States, a rental right is not provided at all. In the Member States in which the copyright concept of "droit de destination" exists, despite the fact that the exclusive right to authorize or prohibit rental is inherent to this legal concept, it seems scarcely to be realized in practice.

12. The legal situation in detail is as follows:

In Denmark, an exclusive rental right exists for authors in respect of copies of works of music, be it in the form of sheet music, phonograms or some other form. No rental right is granted to phonogram producers (Section 23(2)(1) Copyright Act (CA)). Authors of cinematographic works and of computer programs also enjoy an exclusive rental right (Section 23(3)/(2)(2) CA). From a point of view of legal construction, it is to be seen as a limitation to the exhaustion of the distribution right. Consequently, authors of musical works, cinematographic works, and computer programs can prohibit the rental of their works even after publication.

13. In Spain, Art. 19 CA provides a distribution right which explicitly includes, in addition to sale, distribution by rental or lending. Art. 19(2) CA mentions, with respect to the exhaustion of the distribution right, only distribution by sale. Hence, it can be concluded that the author has the right to prohibit distribution by rental and lending even after the first sale, which means that he has an exclusive rental and lending right. This is also applicable to producers of phonograms and videograms (cf. Art. 109(1), 113, 122 CA). Consequently, it may be supposed that authors and producers of phonograms and videograms in Spain enjoy an exclusive rental right, although this is at present still very controversial in the Spanish legal literature. Moreover, since the Copyright Act 1987 came into force, no practice with respect to rental right has been established up to now.

14. In Portugal, Art. 68(2)(f) CA provides for authors an exclusive right to sell and rent copies of their works; this is also applicable to producers of phonograms and videograms. This right is not restricted in any way, in particular it is not restricted to the first sale of copies of works, and hence no exhaustion is provided. Therefore, it may be concluded that even the further distribution, which means in particular rental after the first putting into circulation, remains subject to the consent of the authors and

the producers of phonograms and videograms. According to this interpretation one can speak of an exclusive rental right for the right owners mentioned above. However, this interpretation is not the only possible one, and therefore, in the case of Portugal, the starting point is a legal situation which does not seem to be totally clear.

15. In the United Kingdom, Section 18(2) CA 1988 grants an exclusive rental right to authors of computer programs and producers of phonograms and films. However, this right is not granted to authors such as composers or film directors, nor to performing artists, even though it is their particular contributions which serve to make the product "phonogram" and "film" unique. The exclusive rental right is restricted at least theoretically by Section 66 CA, which may have, in certain cases, the effect of a compulsory license.

16. In Italy, an exclusive rental right is provided only for authors whose works have been recorded "on phonograph records, cinematographic films, metal tapes, or any analogous material or mechanical contrivance for reproducing sounds or voices", with respect to the works recorded in this way (Art. 61(1)(2) CA).

17. In Belgium, Greece, France, and Luxembourg, the concept of "droit de destination" exists. It was developed and differently shaped by jurisprudence on the basis of the reproduction right and of provisions of contract law.

    According to this concept, the author can, on the basis of his exclusive right, control the exploitation of his work even after it has been first put into circulation; at least in theory therefore, he has, even after the first sale, the right to authorize or prohibit the rental of his work.

    The fact that the French legislator explicitly included an exclusive rental right for phonogram producers and videogram producers (Art. 21(2) & 26(2), Law No. 85 - 660 of July 3, 1985) shows that this legislator considered clarification to be necessary. The exclusive rental right is scarcely exercised in practice in the case where it is based on the concept of "droit de destination".

18. In Germany, authors, scientific editors and photographers enjoy, according to Section 27 CA (as extended by Sections 70-72 CA), the right to

remuneration for the rental of their works. Accordingly, they have no exclusive right and cannot therefore authorize or prohibit rental. At present, the extension of this remuneration right to performing artists, producers of phonograms and of films is being considered.

19. In the Netherlands, where a rental right does not exist, consideration is currently being given to the introduction of a concept similar to the German approach. Under this proposal, in the first instance an exclusive rental right would exist, although the right owner would no longer be entitled to prohibit the rental, if an equitable remuneration is paid. This right would be vested in authors as well as in performing artists, phonogram producers, and broadcasting organizations.

20. In Ireland, a rental right does not yet exist.

b)

21. The legal situation with respect to lending right also differs between the Member States. In some Member States an exclusive lending right exists.

In four Member States, Denmark, Germany, Netherlands and the United Kingdom, a lending right exists in the form of a right to remuneration and, in this form, is called "public lending right". This public lending right is included in the Copyright Act only in Germany, and is placed outside the Copyright Acts in the other three Member States. The provisions in these four Member States differ in several other respects, for example in relation to the right owners, the media and libraries, and the administering organizations.

With respect to Member States which have the concept of "droit de destination", reference should be made to the above comments on the legal situation in the case of rental right. In other Member States lending right does not exist at all, either as an exclusive right or as a right to remuneration.

22. The legal situation in detail is as follows:

In Denmark, an exclusive lending right exists for authors of cinematographic works and computer programs. Since the lending of films and computer

programs, for example in public libraries, has up to now not occurred on a large scale, the effects of this right cannot be ascertained.

Pursuant to a specific law on public lending right (Law No. 307 of June 9, 1982, with later amendments (cf. lovbekendtgorelse No. 455 of June 23, 1989)), authors of all descriptions, and performing artists obtain remuneration for the lending of their works in public and other libraries, excluding research libraries. This is granted only for works in printed form and for works on phonograms as well as for particular kinds of works of art. The money is distributed, as far as possible (this means for printed works and for literary works on phonograms) on the basis of an annual census of the total stock of works in all qualifying libraries; for the rest, the money is distributed on the basis of an estimation of the stock of works.

The right to remuneration is not assignable, and publishers in Denmark do not therefore participate in any way. Nor can it be transmitted on death; instead, surviving dependents, who are explicitly designated in the law, are granted a public lending right of their own for the whole period of their life. This represents an essential difference to general copyright principles.

The public lending right is administered by a particular body which is responsible to the Ministry of Culture. The proceeds are distributed only individually, and no social or cultural funds for the purpose of collective distribution exist. However, a "social adjustment" is made which has the effect that in the case of the individual distribution, the amount of remuneration per volume falls as the number of an author's volumes which are available in libraries increases.

Foreign authors participate in the public lending right if they are Danish speaking inhabitants of South-Schleswig or if they have a particular and permanent relation to Denmark. Such a relation is regarded as existing in particular in the case of authors who have their residence or place of work in Denmark, who write in the Danish language, who have been educated in Denmark, who have first published their work in a Danish publishing house or who were once Danish citizens.

23. The above mentioned provision on rental right in the United Kingdom has by Section 8 of Schedule 7 to CA 1988 been applied to lending in public libraries, so that authors of computer programs, producers of phonograms and films enjoy, subject to Section 66 CA, an exclusive lending right.

Apart from this, a public lending right exists on the basis of a special law(8) for writers, adaptors, illustrators, photographers, translators, and editors, but not for composers and performing artists. Although this right can be assigned, to date, publishers have not participated to a significant extent. The right can also be transmitted on death, and expires, consistent with the general duration of copyright, 50 years after the death of the author.

In the framework of this special law, remuneration is paid for the lending only of books. Only lending in general public libraries is included and the scheme does not therefore cover in particular research libraries, school libraries, and libraries organized or sponsored by public or private companies. It is the State's duty to pay for the public lending right. This right is administered by a particular State institution.

The basis for distribution is the number of lendings, which are ascertained by sampling procedures. There is a maximum payment limit, with a redistribution effect for authors whose works are lent out less frequently. Social or cultural funds do not exist in the framework of the British regulation. Only those authors, who, at the time of application, have their only or their principal home in the United Kingdom or in Germany, or who have been present in one of these States for at least 12 months within the past 24 months, qualify for the British public lending right.

24. With respect to the legal situation in Spain and Portugal, reference is made to the above comments on the rental right. Accordingly, it could be argued that an exclusive lending right for authors, producers of phonograms and videograms in Spain and Portugal already exists. However, this interpretation of the law is subject to the fact that the provisions

(8) Public Lending Right Act 1979 c. 10 with Public Lending Right Scheme 1982, Commencement order 1982 No. 719 and numerous Amendment Orders.

of the laws themselves, in particular in the case of Portugal, also admit, as a result of the terms employed and their context, a different interpretation. Moreover, the Spanish legislature has, for financial reasons, voted against the payment of a public lending right. Thus, the legal situation is not completely clear. In any case, lending rights in neither of these Member States are exercised in practice.

25. For Belgium, Greece, France and Luxembourg it may be supposed that authors enjoy on the basis of the concept of "droit de destination" (cf. the above comments on the rental right) an exclusive lending right. However, this right does not seem to be exercised in practice.

26. In Germany, authors enjoy, pursuant to Section 27 CA - thus on the basis of the copyright act, not of a special law - a right to remuneration for the lending of their works. Among the group of neighbouring right owners, it is only scientific editors (editors of scientific editions of works or texts which are not protected by copyright and editors of posthumous works) and makers of simple photographs who are entitled to public lending right (cf. Sections 70, 71, 72 CA). The extension to other neighbouring right owners is being considered.

Public lending right is assignable, and publishers participate in the public lending right according to the practice of the relevant competent collecting society. The right can be transmitted on death and exists according to the regular term of protection of authors' rights or neighbouring rights. In principle, the public lending right is paid for the lending of works of all kinds, without regard to the physical support. However, in practice, the distribution of money in some cases, such as sheet music and phonograms, is still causing problems.

The range of libraries covered is very wide, encompassing all institutions which systematically collect copies of works and lend them to the public. Included, therefore, in addition to general public libraries, are in particular research, school and church libraries and also libraries organized or sponsored by public or private companies.

Although the libraries themselves are, according to the Copyright Act, obliged to pay for public lending right, the Länder have assumed these duties of the libraries of local authorities and of Provinces (90%), in the same way as the federal government has assumed the duty of the national libraries. Pursuant to a collective agreement between the Länder, the federal government and the collecting societies (supplementary agreements were concluded with the church libraries and the libraries organized or sponsored by companies), a lump sum is paid annually to the collecting societies, which are exclusively competent for the administration of public lending right.

In the most important field (literary works), the money is distributed on the basis of sampling procedures referring to the number of lendings. For scientific works, the money is distributed only once, upon notification of publication, and on the basis of the fact of publication only. In the case of other kinds of works, the money is distributed pursuant to other criteria according to the practice of the respective collecting societies.

Substantial proportions of the remuneration for public lending are used within the competent collecting societies, for various social or cultural funds. For example, 10 per cent of the amount paid for literary authors whose works are lent in general public libraries is given to a social fund for needy authors; 45 per cent is paid to a fund which supports authors by paying half of their old-age pension scheme, and only the remaining 45 per cent is paid individually, on the basis of the number of lendings, to authors and publishers in the ratio of 70:30.

For social reasons this individual distribution is made on the basis of particular payment categories. Authors with very high lending figures therefore obtain a lower amount per lending than authors with lower lending figures. Also an upper limit is provided for this group of authors.

Foreign authors participate in principle in the individually distributed shares of the remuneration for public lending. However, in practice, in the sector dealing with literary works, reciprocal agreements have been concluded only with corresponding collecting societies in the United Kingdom, Switzerland and Austria; individual contracts with foreign authors so far have been concluded only to a limited extent as regards the sector "general public libraries", and more often as regards the sector "research libraries".

27. In the Netherlands, on the basis of a special law(9), the most important groups of authors (writers, adaptors, translators, editors, composers, photographers, and illustrators), as well as publishers in their own right (this is a particularity of the Dutch system) enjoy the public lending right. This right to remuneration, unlike rights in the field of copyright, cannot be transmitted on death, but expires with the death of the author or with the end of activity of the publisher.

The public lending right is paid only for works in printed form. Only public libraries, which are destined for and accessible to the general public and which are financed and maintained mainly by the State, a Province or local authority, together with church libraries are covered. Not covered, however, are research libraries and special libraries. Since 1987, the libraries themselves have had, in addition to the State, the duty to pay. This is unique to the Dutch system. The proportion they contribute has been increasing since then.

The public lending right is administered by a department within the Ministry of Culture. The remuneration for public lending is distributed individually, on the basis of the number of lendings, which is ascertained by sampling procedures; no share is given to social or cultural funds. For social reasons, a maximum payment limit is provided for authors. Amounts which exceed this limit are redistributed to those authors who are entitled to public lending right.

Foreign authors are entitled only if they have their residence in the Netherlands; publishing houses have to exercise their activity in the Netherlands. In all cases, a work qualifies for public lending right only if the text which is contained in the work is written in the Dutch or Frisian language. On the grounds of a legal mandate for the revision of the current Dutch system, a new copyright based proposal is being prepared at present.

28. In Italy and Ireland, neither an exclusive lending right nor a right to remuneration for lending exists.

(9) Regelen ten aanzien van de beleidsvorming en de uitvoering en bekostiging van voorzienigen op het terrein van het maatschappelijke en sociaal-culturele welzijn (Welzijnswet), Wet van 14.2.1987, Staatsblad 1987, 73.

29. Exclusive lending rights resulting from the laws of the Member States have, up to now, been exercised in practice only in the United Kingdom. With respect to the four existing systems of public lending right, numerous differences in detail can be seen.

c)

30. The legal situation in the Member States in the field of neighbouring rights also shows a number of considerable differences. Thus, there are some Member States which do not grant any neighbouring rights protection. Other Member States provide a neighbouring rights protection only for particular groups of right owners.

The remaining Member States in principle have a neighbouring rights protection, at least for performing artists, phonogram producers, and broadcasting organizations. However, the actual rights provided are different. For example, a performing artist in Italy has, with respect to the reproduction of the fixation of his performance, only a right to remuneration, but not, as is the case in the other Member States which provide a neighbouring rights protection, an exclusive right.

Furthermore, a distribution right in particular for performing artists and broadcasting organizations does not yet exist in many Member States. Film producers do not in all Member States enjoy original rights; nevertheless a tendency towards the recognition of independent rights for film producers can be seen in the most recent legislation in the Member States.

31. The legal situation in detail is as follows:

In the Netherlands and Belgium, there exist to date only draft bills in the field of neighbouring rights protection.(10) In Greece, there is a law on the protection of performing artists. However, the regulations implementing

(10) Cf. for the Netherlands : Draft bill on neighbouring rights, submitted by the Government in August 1989, TK 21244, Staatscourant 1989, N° 148 (Regelen inzake de bescherming van uitvoerende kunstenaars, producenten van fonogrammen en omroeporganisaties en wijziging van de Auteurswet 1912 (Wet op de naburige rechten). For Belgium, cf. Proposition de loi relative au droit d'auteur, aux droits voisins et à la copie privée d'oeuvres sonores et audiovisuelles (10 juin 1988), Sénat de Belgique, 329-1 (S.E. 1988).

the law (cf. Art. 12(2) of the Law) have never been adopted.(11) This situation is unlikely to change while the Community does not take the initiative by way of harmonization.

With respect to the rights which are dealt with in this Directive, the situation is as follows:

32. The fixation right within the meaning of Art. 5 of the Directive at present is vested in performing artists only in Portugal, France, Denmark, Germany, the United Kingdom, and Luxembourg. The Spanish law is not completely clear in this respect, the Greek law is in practice, in the absence of any implementing regulations, without effect. Italy knows only a right to remuneration for the first fixation - a legal situation, the compatibility of which with the Rome Convention is unclear. Broadcasting organizations enjoy a fixation right in Portugal, Spain, Germany, Denmark, Italy, Luxembourg, and Ireland.

33. The reproduction right within the meaning of Art. 6 of this Directive is vested in performing artists in Portugal, Spain, France, Germany, and Denmark. In Luxembourg it exists in a reduced form, in Greece, again, the implementing regulations are missing and in Italy, the reproduction right is shaped only as a right to remuneration.

Broadcasting organizations enjoy the reproduction right in Spain, France, the United Kingdom, Ireland, Germany, Denmark, Italy, Luxembourg and, in a reduced form, in Portugal.

Phonogram producers enjoy the reproduction right in Portugal, Spain, France, the United Kingdom, Ireland, Denmark, Germany, Italy, and Luxembourg.

Film producers in the United Kingdom and Ireland enjoy a reproduction right on the basis of copyright protection. Spain, France, and Germany grant to film producers an independent neighbouring right, which exists alongside the protection for the film authors themselves (the copyright systems do not provide a separate neighbouring right protection for film authors as such). In Portugal, the legal situation is not completely clear in this respect.

(11) Law 1075/1980, Official Gazette of the Government of the Hellenic Republic N° 218 of September 25, 1980.

34. A distribution right within the meaning of Art. 7 of this Directive is vested in performing artists only in Greece - however, in the absence of an implementing regulation it does not have any effect. In other Member States, only elements of the distribution right are regulated, mostly by provisions of criminal law, but not in the form of an exclusive ownership right. The distribution right for phonogram producers is provided in various forms in Portugal, Spain, France, the United Kingdom, Italy, Luxembourg, and Germany. Also, in different forms, it exists for broadcasting organizations in France and the United Kingdom. Film producers enjoy an independent distribution right on the basis of copyright protection in the United Kingdom and, as neighbouring right owners alongside the film authors, in Spain, France and Germany.

35. Considerable differences in the laws of the Member States exist with respect to the terms of protection.

Performing artists enjoy protection in Luxembourg only for 20 years from performance/fixation, in Italy 20 years from performance and, in particular cases, 30 years from deposit or 40 years from the making of the fixation; 40 years from performance are effective in Portugal and 40 years from performance or publication of the fixation are effective in Spain. A term of protection of 50 years is effective from performance in Denmark and the United Kingdom, from the first communication of the interpretation to the public in France and from either publication of the fixation or the making of the performance/fixation in Greece and Germany.

The legal situation with respect to phonogram producers is as follows: in Luxembourg, the term of protection is only 20 years from fixation, in Portugal 25 years from fixation, and in Germany 25 years from publication of the fixation or from its production. Italy provides a duration of 30 years from deposit or 40 years from production. In Spain, a duration of 40 years from publication or production is effective, and 50 years are provided in Denmark (from fixation), France (from first communication of the fixation to the public), the United Kingdom (from production/release (i.e. first publication, broadcast or inclusion in a cable program service)) and in Ireland (from first publication).

Broadcasting organizations are protected in Luxembourg and Portugal for 20 years from emission of the broadcast, in Germany 25 years, in Spain 40 years, and in Denmark, France, the United Kingdom, and Ireland 50 years from emission of the broadcast.

The neighbouring right of film producers lasts in Germany 25 years from publication of the recording or from its production, in Portugal 25 years from fixation, in Spain 40 years from publication/production and in France 50 years from the first communication of the recording to the public. The copyright of the film producer lasts in Ireland 50 years from first publication and in the United Kingdom 50 years from production or release.

Thus, the duration of the protection as well as the beginning of the term both vary greatly between the Member States.

d)

36. The international conventions in the field of authors' rights and neighbouring rights alone do not produce sufficient harmonization within the Community with respect to the rental and lending right and, in particular in the light of the problem of piracy, with respect to neighbouring rights.

37. The rental and lending right and public lending right are not included as so-called minimum rights either in the Revised Berne Convention for the Protection of Literary and Artistic Works, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), or the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Phonograms Convention).

Whereas the principle of national treatment which is incorporated in the Berne Convention and the Rome Convention applies at least also to the rental right, this does not seem to be completly clear with respect to public lending right. Most of the states which provide a public lending right - including those outside the Community - apply the principle of national

treatment only to a very limited extent, if at all. The main reasons for this are to be found in the special features and aims of the right which have been influenced by numerous social and cultural elements, and the substantial differences between this right and authors' rights provisions.

The World Intellectual Property Organization (WIPO) plans to tackle this question possibly in the context of work on a future protocol to the Berne Convention, presumably during 1991.

38. In the field of neighbouring rights protection, the Rome Convention in particular does not provide a distribution right as a minimum right for performing artists, phonogram producers and broadcasting organizations. The distribution right under Art. 7 of this Directive would, however, be covered by the principle of national treatment under the Rome Convention (cf. Art. 2).

Another respect in which the Rome Convention gives less protection than the Directive is that the Rome Convention does not provide minimum rights for performing artists at all, but simply indicates the aim of protection and gives free rein to the manner of its realization. Moreover, film producers are not covered by the Rome Convention.

The Geneva Phonograms Convention does not provide minimum rights, but permits a wide range of protection measures. The Netherlands, Belgium, Greece, Spain, and Portugal are not yet members of the Rome Convention. The Netherlands, Belgium, Greece, Portugal, and Ireland are not yet members of the Geneva Phonograms Convention.

(ii) The Need for Action at Community Level

39. As has been explored above, there are considerable differences in the laws of the Member States in relation to the three fields of rental right, lending right and neighbouring rights. In many cases no protection exists or is, in view of the intensive use of material protected by authors' rights and neighbouring rights, insufficient.

The harmonization of legal protection at a high level, as envisaged by the Community in Art. 100A (3) of the SEA is necessary in order to proceed to the elimination of trade barriers created by differences in protection and to the elimination of the consequential distortions of competition, and thereby to the establishment of the internal Market.

Furthermore, the harmonization of laws at a high level of protection within the Community is necessary in order to avoid further negative effects of insufficient protection, and also to take into account, by appropriate protection, the increasing exploitation in this sector, and thereby to secure the economic basis for continuing creation in the field of European culture, which is highly deserving of protection. The variety of European culture is not only deserving of protection, but is also in need of a high level of protection for the maintenance of its identity.

40. It has also been recognized on the international level that the rental and lending of copies of works represent economically more and more important and extensive forms of use. Thus, WIPO has included an exclusive rental right and, be it at present only as an option, public lending right in its draft model provisions in the field of copyright which are currently under discussion(12).

THE CONCEPT OF HARMONIZATION

41. The concept of harmonization in this Directive has been derived from the Green Paper. In the same way as the Green Paper does not aim for a total harmonization of authors' rights and neighbouring rights but only for harmonization in the fields which are currently of particular importance, this Directive is not only restricted to two of the fields which have been dealt with in the Green Paper, but even within these fields it provides a harmonization only to the extent that is considered to be absolutely necessary.

(12) Cf. for example WIPO-Doc CE/MPC/I/2-II : Committee of Experts on Model Provisions for Legislation in the Field of Copyright Law, Memorandum prepared by the International Bureau of the World Intellectual Property Organization (WIPO), Sec. 8(iv), 19, 25.

Thus, as an example, it is possible not to define specifically the right owners and subject matter since the international law of the Conventions has already indirectly produced a certain degree of harmonization. Even states which want to introduce national neighbouring rights protection are in general guided by the law of the international conventions.

Moreover, any attempt to define the right owners and the subject matter for the whole Community in the framework of this Directive would create contradictions and inconsistencies within the national laws of the Member States. This is because in particular the question of ownership and subject matter is relevant to the law of copyright and related rights as a whole. Therefore, it cannot be regulated only for specific rights without adversely affecting the coherence of legal systems as well as legal practice. By way of example, the harmonization of the ownership of rights, if it is done only in the framework of this Directive, would result in the situation wherein the question as to who is the author of a film would have to be answered within one Member State differently, depending on which right - the rental right or another right, such as the broadcasting right - is claimed.

This Directive in general attempts, as far as possible, not to affect adversely the copyright concepts existing in the national laws of the Member States. For example, it is guaranteed that the rental and lending right as well as the distribution right provided in Chapter II can be implemented in Member States which know the concept of droit de destination, as well as in Member States which know the concept of the distribution right together with its exhaustion.

In order to avoid the creation of new trade barriers via the provisions of this Directive, the principles which the Court of Justice of the European Communities has developed in its jurisdiction on the Community-wide exhaustion of the distribution right on the grounds of Community law are included in the text of the Directive.

THE LEGAL BASIS

42. In its White Paper on the completion of the internal Market, the Commission stated its intention to work out draft solutions to particular problems which arise as issues of urgency in the field of authors' rights and

neighbouring rights in relation to the internal Market. The Commission announced it would propose to the Council specific measures to harmonize and improve protection in the Member States and to eliminate trade barriers in the field of authors' rights and neighbouring rights in the light of the negative impact which substantial differences in the laws of the Member States have on intra-Community trade, and in order to enable industry to treat the internal Market as a single uniform field of activity. The present proposal therefore forms part of the Commission's programme for the completion of the internal Market before December 31, 1992.

For the achievement of the internal Market before December 31, 1992, Art. 100A para. 1 sentence 2 provides by way of derogation from Art. 100:

> "The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal Market."

Art. 8A para. 2 defines the internal Market as comprising "an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."

Article 8A (2) refers explicitly to Article 57 (2) as a basis for measures to be taken for the achievement of the internal Market by December 31, 1992. In Article 57 (2) provision is made for the "coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons". Article 66 renders Article 57 applicable to services.

Authors creating novels or music, and artists performing theatrical plays or musical works are normally acting as self-employed persons, and often their activities are in the nature of services. Furthermore, both natural and legal persons may engage in producing sound recordings and films and in broadcasting radio and television programmes in the Member States. All these activities are independent, business activities. Under Article 57 (2) or

(5)

Article 66 it is sufficient, apart from the cross frontier element, that a situation involves , respectively, activities which are exercised by a self-employed person or by a person providing services. It does not matter whether an activity is a trade, commerce, craft or any other form of activity and whether it is in the field of economics, law, technology or intellectual pursuits such as culture.

The question then is, whether the proposed Directive involves "provisions ... concerning the pursuit of activities as self-employed persons" or the provision of services. Copyright is a general prerequisite for the freedom to pursue the activity protected by it. Furthermore, the provisions incorporated in this Directive govern special situations for which certain rights such as the right to control rental of copyright material are provided. These rights are special means to enable or make easier the activities of authors, performers, producers and broadcasters by securing the possibility of better exploiting the outcome of their activities and to obtain an income therefrom.

Furthermore, Article 57 (2) must not be construed too narrowly, but must be interpreted in the light of its objective, which is "to make it easier for persons to take up and pursue activities as self-employed persons." In accordance with the established practice of the Commission, Parliament and the Council in areas such as insurance and banking, the provision also includes the coordination of sectoral rules and regulations regarding the individual areas in which people pursue activities as self-employed persons in their own interests and in the interests of others. These include the copyright and related rights provisions incorporated in the proposed Directive.

43. Differences in the legal situation with respect to the <u>rental right</u> within the meaning of Chapter I of this Directive affect adversely the proper functioning of the Internal Market. In particular, the free circulation of goods may be affected. If authors and/or neighbouring right owners in one Member State enjoy the exclusive right to prohibit the rental of particular objects, for example video cassettes, whereas this right does not exist in another Member State, then this may lead to a situation in which merchants lose interest in the export into this first Member State because of fear that the exploitation by rental will be prohibited there. This is true at least for goods which are put into circulation to a considerable extent by way of rental.

Accordingly, the European Court explicitly stated in its decision of May 17, 1988 in the case Warner Bros. Inc. et al. v. E. V. Christiansen[13] :

> "However, video cassettes are put into circulation not only by sale, but increasingly also by rental to private persons who own video equipment. Therefore, the right to prohibit rental in a Member State may affect the trade with video cassettes and thereby indirectly the intra-Community trade with these products. Therefore, such provisions as underlying the initial procedure must be considered, according to the established practice of the Court, a measure with an effect equivalent to a quantitative restriction forbidden by Article 30 of the Treaty".

The provisions referred to were the right, based on Danish authors' rights legislation, of the author of a musical work or a cinematographic work to authorize or to prohibit the rental of these works; the right owner in Denmark had prohibited the rental of the respective video cassette in Denmark. However, the European Court accepted, during the further development of its reasons, the rental right as justified in compliance with Art. 36 EEC. This is nevertheless, according to the European Court, without prejudice to the fact that the differing legislation in the Member States with respect to rental right is likely to affect indirectly intra-Community trade. Thus the harmonization of laws by Member States' provisions on rental right is necessary for the functioning of the internal Market, in particular in relation to the free provision of goods and services.

Furthermore, an exclusive rental right enables the right owners to use their products effectively in different market segments and provides new ways of exploitation. At the same time, by an exclusive rental right one can obtain a higher income. Thus, in the Member States which provide an exclusive rental right, the conditions of competition are better than in Member States without such a rental right. The right holders and thereby the economy there are, as a consequence of the better legal protection, in a

(13) Case N° 158/86.

more favorable position. In so far as the right holders' creative, artistic and entrepreneurial activities are activities of self-employed persons or also services, these differences in legal protection and, thereby, in the conditions for pursuing such activities, have to be eliminated in order to make easier the pursuit of such activities and the performance of such services.

The Directive will ensure a similar legal protection in the field of marketing of cultural goods by their rental. In this way, it will produce similar legal structures on which industry throughout the Community may rely and be based. Thus, industry will be able to treat the Community as a single internal Market. At the same time, the protection is fixed at a sufficiently high level for the maintenance and the encouragement of a sector which is increasingly threatened by negative market developments.

44. The lending of media in public libraries is closely connected to rental by commercial rental shops. Lending is an exploitation comparable to rental. The main difference is that public lending is generally made by publicly financed and managed libraries. In addition, the users of such libraries, unlike in the case of rental shops, do not have to pay any fee or pay only a very low fee for the service.

To the extent that the field of activity of rental shops and public libraries is similar, those institutions are competing with each other. Given the lower lending fees, public libraries should, in general, be far more attractive. Indeed, the development of the public library system at the beginning of this century resulted in the elimination of a large number of the commercial book rental shops existing at that time. Since public libraries increasingly lend not only books but also other media, in particular phonograms and videograms, which up to now have been available mainly in rental shops, a similar evolution for these media as was the case with books cannot be excluded.

Thus, if only rental were to be regulated but not lending, there would be a risk that such a legislation would be negated to the extent that rental would in fact be replaced by lending. Moreover, since the activity of public libraries has, by its very nature, more of a cultural dimension than that of commercial rental shops, regulating only the rental right would amount to an unjustifiable disregard of the economic situation of the

creators of particularly valuable cultural goods and the broader situation in this field of such services. Thus, a rental right cannot be dealt with in a comprehensive way without also dealing with lending right.

In addition, the fact that public lending right at present exists only in four Member States creates distortions of competition between authors and neighbouring right owners from the different Member States. They must be able to base their acitivites and services on uniform conditions throughout the Community. Moreover, in principle, similar economic and social conditions have to be created for authors and neighbouring right owners. In the internal Market, it cannot be accepted that authors and neighbouring right owners obtain a remuneration for the use of their works and achievements in one part of the market, for example in one Member State, and that they are thereby provided with a certain economic basis for further creation, whereas this is not the case in other parts of this market.

45. The provisions of Chapter II of this Directive are also based on Art. 57 (2), 66 and 100A EEC. The differences in the legal protection in the Member States in the field of neighbouring rights, in particular the partial lack of such a protection, adversely affect the proper functioning of the internal Market and create considerable distortions of competition. Different levels of protection, mainly the lack of any protection in some Member States, further piracy and prejudice industry to an extent which cannot be tolerated.

Cultural goods, in particular works protected by authors' rights and artistic performances which are, for example, incorporated in phonograms and videograms, require legal protection if a market for these goods is to develop at all. Performing artists need, in view of the vulnerability of intellectual property and in view of the numerous and various possibilities of exploitation of fixations of their artistic performances, legal protection which enables them in particular to control better the economic exploitation of their performances and which thereby secures for them an economic basis for further cultural creative work. Producers of phonograms and videograms need such a protection for their economic and technical achievements in order to be able to amortize their often high investments.

This necessity is reflected in the jurisdiction of the European Court which has recognized intellectual property as an object worthy of protection in Art. 36 EEC. If the Community is to complete its internal Market, it has to be secured at least, that performing artists, phonogram producers, film producers and broadcasting organizations enjoy the fundamental ownership rights which represent a precondition for the development of such a market, as is already the case for authors in the Community.

The Directive will result in the establishment of the fundamental rights of fixation, reproduction and distribution for the mentioned groups of right owners in all Member States and thereby in the creation of basic conditions for the proper functioning of the internal Market. Likewise, it will result in the elimination of the existing distortions of competition which are caused by fundamentally different national protection measures.

In addition, a uniform legal protection will provide similar conditions for right holders to pursue their activities as self-employed persons and perform their services.

46. In addition to the harmonization of certain fundamental rights for neighbouring right owners it is also necessary to provide uniform duration of these rights within the Community. The reason is that the existing terms of protection in particular in the neighbouring rights provisions of the Member States are very different and thereby cause intolerable distortions of competition and substantially affect the free circulation of goods.

Thus, it is possible, for example, to imagine a situation, in which a phonogram, which has been legally produced after the expiration of the respective term of protection in one Member State, cannot be exported into another Member State without the consent of the right owner, if the term of protection which is effective there has not yet expired. Moreover, differences in strength and length of protection create divergent conditions of competition within the Community. The European Court stated in its decision EMI Electrola GmbH v. Patricia Im- & Exportverwaltungsges.mbH u.a. of January 24, 1989(14) that possible trade

(14) Case N° 341/87.

restrictions on grounds of different terms of protection are justified by virtue of Art. 36 EEC.

In the following quotation from this judgement, an indication to the Community for the necessity of harmonization of laws is to be seen:

> "In this respect, it has to be stated that, given the actual status of Community law, which is characterized by the absence of harmonization or approximation of the laws on the protection of the property in literary and artistic works, it is a matter for the national legislators to fix the terms and modalities of this protection".

The Commission has, in an answer to a question from the European Parlament, given notice of its intention to proceed first to the harmonization of the terms of protection in the field of neighbouring rights protection granted by the Member States, because neighbouring rights are more divergent in this respect than the authors' rights provisions of the Member States(15). A further harmonization proposal will therefore have to be presented on this issue.

In the preparation of this Directive, the Commission has taken into account the requirements of Art. 8C EEC and has concluded that no special provisions or derogations seem warranted or justified at this stage.

(15) Written Question n° 1479/88.

PART TWO: PARTICULAR PROVISIONS

CHAPTER I (RENTAL AND LENDING RIGHT)

Article 1: Object of Harmonization

1.1 Paragraph 1 deals with the nature of the rental and lending right: it is to be not a mere statutory right to remuneration for rental and lending but an exclusive right, that is, a right which enables the right owner to prohibit a third person from renting and lending, or to authorize rental and lending with or without payment.

In relation to the lending right, however, Article 4 provides, in order to take account of the special circumstances existing in the field of public lending, a possibility to derogate from the exclusive right. Therefore, further explanations as to the nature of the lending right are made in the context of the comments on Article 4.

The question of who shall be the owner of the rental and lending right and to which subject matter this right shall refer is dealt with exclusively in Article 2, to which Article 1 paragraph 1 refers.

The exclusive nature of the right does not only reflect the classical nature of exploitation rights in the field of copyright in general, but it is also the most effective and efficient form of protection in the particular case of rental. Rental, without the possibility of prohibition would, for example in the field of phonograms, continue to result in extensive copying and therefore in a corresponding decrease of sales.

As practical experience in Germany shows (where, from an economic point of view, 50 rentals are equal to one sale), even a right to remuneration would not suffice to compensate the deficit of returns from sales which results from rental and copying. Therefore, if the amortization of investment will in the long run be increasingly difficult as a result of such large scale and inadequately remunerated use, phonogram producers will tend to concentrate more on promising

music and on the most successful musicians, and the variety of material will decrease - to the detriment of consumers as well as young and unknown musicians and composers.

Moreover, an exclusive right provides a bargaining position which is necessary to be able to stipulate adequate royalties during licensing negotiations. In contrast, the existence of only a statutory right to remuneration normally results in drawn-out negotiations and in the payment of low royalties while use continues unhindered.

1.2 In paragraph 2, "rental" is defined for the purposes of this Directive. It is defined as being distinct from both the making available for use for an unlimited period of time and from lending.

The expression "for a limited period of time" means that the object has to be returned after a certain time. This is distinct from sale or gift, for example, being forms of making available for use for an unlimited period of time. The definition also includes any acts by which the provisions of Article 1 are circumvented or intended to be circumvented, such as the sale with option of repurchase at a price which is lower than the selling price, because such acts are intended to have the same result as acts of rental.

For the purpose of defining rental as being distinct from lending, the proposed Directive states that the act of making available for use has to serve "profit-making purposes". It is necessary to provide a definition of rental as distinct from lending because the Directive deals differently with rental and lending by providing the possibility of derogation under Article 4 only for lending. The expression "for profit-making purposes" means that acts of making available for use serve the economic interests of rental businesses. The main examples for "rental" within the meaning of Art. 1 paragraph 2 are rentals of video-cassettes and phonograms by so-called "videoshops".

Rental in paragraph 2 is defined "without prejudice to paragraph 3". This refers to the definition of "lending", in particular insofar as it includes acts of making available for use which do not serve "direct profit-making purposes". This means that making available for use for indirect profit-making purposes represents a case of lending, and not of rental.

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This case refers to public lending by libraries organized or sponsored by public or private companies. Such libraries do not exist in all Member States. They are mostly libraries of major business companies. Typically, access to such libraries is restricted at certain times of the day to employees, whereas at other times the libraries are accessible to the general public in the same way as public libraries. Hence, insofar as their activity is comparable to that of public libraries, there is no reason for different treatment.

Accordingly, rental as opposed to lending includes every act of making available for use for direct profit-making purposes.

Rental could also have been defined as being distinct from lending by the terms of making available "against payment/gratuitously". However, this alternative has not been chosen. This is because many public libraries in the Member States charge their users some kind of fee - be it an annual fee or, commonly in the case of video or audio materials, a fee per item. Thus, they make the media available for use against payment. If rental and lending were to be defined by the criterion "against payment/gratuitously", public libraries would "rent" and therefore not be covered by the possibility of derogation under Article 4 even though this provision was aimed specifically at the very special circumstances of public libraries.

Accordingly, to the extent that public libraries do not act for direct profit-making purposes, which means that they do not directly follow their own economic interests by lending, and in particular as far as the fees charged do not exceed the administrative cost, their activity is not covered by the definition of rental.

The making available for use within the meaning of paragraph 2 always refers to material objects only; this result is sufficiently supported by Article 2 paragraph 1. Therefore, the making available for use of, for example, a film by way of electronic data transmission (downloading) is not covered by this Directive.

One could imagine that in future, for example, video films will no longer be rented by way of making cassettes available but that instead it will be possible to transmit them electronically for reproduction on the screen of a private household.

This form of copyright exploitation is in most Member States considered to be a public performance, and thus a form of immaterial exploitation; however, this question is not yet answered in the same way throughout the Member States. If this particular case of an immaterial copyright exploitation, which represents only one aspect of the right of public performance and only one aspect of the range of copyright questions related to electronic data transmission were to be singled out in the framework of this Directive, undesirable inconsistencies would be created within every national copyright law of the Member States. Therefore, acts of making available for use by way of electronic data transmission have been excluded from the scope of this Directive.

1.3 In paragraph 3 the term "lending" is defined. In relation to the first part of the definition, that is, up to the words "... not for direct profit-making purposes", the reader is referred to the above comments on paragraph 2.

According to the second part of the definition, lending is "made through institutions which are accessible to the public"; what follows is a list of examples only and is not an exhaustive enumeration. The most important case of institutions which are accessible to the public is the case of general public libraries which are mostly, although not always, organized by a local or regional authority.

The term "institution" has been employed as a very general, broad term. In particular the form in which the institution has been organized is irrelevant. However, in all cases it must be an institution in which originals and copies of works and subject matter as set out in Article 2 paragraph 1 are systematically collected and made available to users. The institutions may have collections including all kinds of media or even collections including only certain kinds of media such as books, works of art or phono- and videograms.

Moreover, the institution is qualified by its "accessibility to the public". "Accessible" in this context does not mean that the institution would have to be accessible free of charge.

The term "public" is to have a very broad meaning: only such institutions which lend only to a limited group of persons who are

either personally connected by mutual relations or personally connected to the organizer of the institution have to be regarded as not accessible to the public. For example, even if libraries of university institutes are accessible only to specified groups of students, there will mostly not be such personal connections so that in general also these libraries for the purpose of granting a lending right under this Directive have to be regarded as accessible to the public.

1.4 Paragraph 4 has been included for purposes of clarification: in some Member States an exclusive distribution right exists which is exhausted in relation to, for example, a certain copy of a work, when it is first put into circulation. As a result of this, every act of distribution which follows the first act of putting into circulation by way of sale, is no longer subject to the exclusive right of the author. The purpose of paragraph 4 is to clarify that the rental and lending right must not be affected by this exhaustion of the distribution right which is provided in the laws of some Member States and that therefore it shall subsist even after the act of first putting into circulation of, for example, the copy of the work.

The Directive allows many different possibilities of implementing a rental and lending right from a point of view of legal techniques. Thus, Member States in which the copyright concept of "droit de destination" exists - a concept in which an exclusive rental and lending right is inherent - may either ensure that this rental and lending right can be exercised also in practice, or include in their law, for purposes of clarification, a respective explicit provision.

Member States which provide a distribution right may, for example, explicitly exempt rental and lending from the exhaustion of the distribution right. Alternatively, they can define the distribution right narrowly, for example, only as a right to first put into circulation by way of disposal of copies (thereby covering acts of making available for an unlimited period of time) and in addition introduce a separate rental and lending right (thereby covering acts of making available for a limited period of time).

The words "originals and copies of works and other subject matter" in paragraph 4 have the meaning of originals and copies of copyright works and fixations of performances by performing artists, phonograms, visual recordings and visual and sound recordings (the subject matter set out in Article 2 paragraph 2).

Article 2: First Owner and Subject Matter of Rental and Lending Right

2.1/

2.1.1 Neither "owner" nor "subject matter" of rental and lending right as set out in Article 2 paragraph 1 is specifically defined (compare, however, for film producers, hereunder 2.2). The employed terms are fundamental in the field of copyright and related rights and their meaning has become indirectly harmonized to a large extent in the laws of most Member States via the Berne Convention for the Protection of Literary and Artistic Works (BC) and the Rome Convention on the Protection of Performing Artists, Phonogram Producers and Broadcasting Organizations.

For the purposes of this Directive reference is made to the Berne Convention and the Rome Convention in so far as the terms which have been employed in Article 2 paragraph 1 in respect of the owners and subject matter of rental and lending right have to be interpreted in line with these Conventions. Thus, for example, an author is the creator of a work within the meaning of Article 2 BC. To the extent that the national laws of the Member States are in conformity with the Conventions, this reference to the law of the Conventions therefore is equivalent to a reference to national law.

A detailed definition of the employed terms is not only inappropriate in the framework of this Directive but would also have numerous negative consequences. Any regulation in the framework of a Directive which is concerned only with the harmonization of certain specified rights, of such very general questions of relevance to all rights as who is the right owner and what is the subject matter of protection, would lead to unacceptable distortions and inconsistencies within the national copyright laws.

Thus, for example, the question of whether a musical composition has reached the necessary degree of originality would have to be answered differently within the national law of a particular Member State, depending on whether a rental and lending right or another right is at stake. Likewise the question who is considered the original right owner in the case of an employed author (the author or the employer) would lead to different results within a national system of law, again depending on whether a rental and lending right or another right is at stake.

In short, the issues of ownership and subject matter of protection are best harmonized not in relation to particular rights but in a uniform way which means in relation to all national copyright provisions.

2.1.2 In the field of films, particular problems exist on which more detailed comments are necessary. Specifically, the questions of who is the right owner and what is the subject matter of protection are answered very differently in the Member States. Moreover, terms are given different meanings.

2.1.2.1 Thus, the term "author of a film" is employed by most Member States to define the natural persons who contribute to the production of a film. In this context, differences in detail exist with respect to the persons (film directors, script writers et al.) who can be the authors of a film.

Different legal concepts, such as legal presumptions for the assignment of rights to the benefit of producers, lead to a result which is, from an economic point of view, similar but not equal to the result in systems which protect only the film producer.

Some of the Member States of this group provide, in addition to this protection for film authors, a specific neighbouring rights protection for film producers.

The term "author of a film" is employed by other Member States to define the film producer. There, he alone enjoys a "copyright" protection. In contrast, the natural persons who make creative contributions to a film, such as film directors and script writers, hardly enjoy any copyright protection, or none at all.

The question as to who is the author of a film is also a general copyright related question which, for the reasons given above, cannot be answered differently for specific rights and therefore cannot be regulated in the framework of this Directive without creating unacceptable inconsistencies within each national system of law. Consequently, this question must continue to be answered by national law for the purpose of this Directive.

As Article 2 paragraph 1 mentions the author of a work as well as the producer of fixations of cinematographic works and moving images, this means accordingly that for the first group of Member States the rental and lending right shall be vested in the natural persons who are, according to the national law, regarded as the film authors and, in addition - be it in the framework of a neighbouring rights protection - in the producers.

Film producers do not yet enjoy in all Member States original rights. However, chapter I has to be regarded in the context of chapter II which aims at harmonization of the basic rights of reproduction and distribution inter alia for film producers. The Member States are free to provide further rights for this group of right owners.

From the latest amendments of copyright laws in the Community one can detect a tendency towards providing a specific right of their own for film producers. This tendency will be followed because film producers' achievements are comparable in particular to those of phonogram producers. Likewise, the contractual situation in practice is not fundamentally different: whereas phonogram producers cause authors and performing artists to assign their rights to a great extent, film producers in general enjoy presumptions for the assignment of rights for their benefit.

Such presumptions are mostly of limited scope. Moreover, the possibility cannot be excluded that in future strong unions of authors and performing artists will arise in the field of films, that they will cause the legal presumptions for assignment of rights to be restricted in their effect in practice and that therefore the film producers will have to rely on rights vesting directly in them more than up to now.

For the second group of Member States the implicit reference in Article 2 paragraph 1 to national law means that only the producer within the meaning of national law (he is mostly called "author") is the owner of the rental and lending right. Although also the protection of creators of works, such as film directors, is desirable and has been achieved, as a first step, by sec. 77 of the U.K. Copyright Act 1988, it cannot be harmonized in the framework of this Directive, because it represents a general problem in the field of copyright law.

2.1.2.2 Since the Rome Convention does not cover the protection of film producers and therefore does not provide a definition of "film producers", and since therefore one cannot, unlike in the case of performing artists, phonogram producers and broadcasting organizations, have recourse to such an internationally accepted definition, the film producer has been defined more specifically in Article 2 paragraph 1, namely as "producer of the first fixations of cinematographic works and moving images". In this context, cinematographic works are films which attain the degree of originality which is necessary according to national law, whereas in the case of moving images such degree of originality is not attained.

The limitation to "first fixations" is provided in accordance with the definition of phonogram producers in the Rome Convention which covers only those who "first fix" sounds (cf. Article 3 c RC). In particular, by this specification producers of simple copies of films shall be excluded from protection; this applies, for example, to copies made from cinema films and adapted for video distribution. The underlying philosophy according to which such an activity has insufficient merit to warrant protection can be seen, e.g., in sec. 5 (2) of the U.K. Copyright Act 1988.

It does not seem appropriate to provide a more specific definition of "film producer" because such a definition would create distortions within existing national laws. Moreover, such a definition is not necessary for the purpose of harmonization in the framework of this Directive since a certain basic consensus exists in the Member States. Some of the most important criteria which indicate the quality of a film producer are: organization, taking of economic risks, financing and contractual responsibility.

2.1.2.3 The terms "visual recordings" and "visual and sound recordings"/"videograms" which are employed in this Directive and the Explanatory Memorandum refer to means for repeated reproduction of sequences of images and sequences of images and sounds.

2.1.3 Paragraph 1 covers all of the main groups of right owners whose works and protected subject matter are rented and lent. Even if, for example, phonograms and videograms are generally marketed or at least prepared for marketing by their producers, there is no justification for not providing the creators of works and performing artists with their own rental and lending rights, since their personal contributions are crucial to the success of a phonogram or videogram with the consumers.

It would be misplaced to neglect, in contrast to producers, creators and performing artists and thereby those who hold the key to the cultural "production" in the Community because they "supply" the "contents" of the work supports. Moreover, modern copyright always aims at a balance between the several groups of right owners and this should not, as a matter of principle, be called into question to the detriment of creators of works and performing artists.

Moreover, the recognition of a rental and lending right specifically for authors and performing artists is in accordance with the Universal Declaration of Human Rights which has been signed by all Member States and which guarantees explicitly in its Article 27 the intellectual property of creators in their works.

There is no foundation for the concern that almost intractable conflicts of interests will arise in practice when each of the contributors - for example the phonogram producer, the composer and the performing artist - is given his own right to prohibit rental and lending. This situation occurs every day in relation to other rights such as the reproduction right, and does not cause any problems in reality, given established contractual practice. In the same way as it is reasonable to expect the producer to acquire the reproduction right from the author and performing artist, it is reasonable to expect him to acquire, for example, the rental right - be it from the author or performing artist himself or from a collecting society to which they have assigned their rights.

There is no indication that producers would be unduly hindered in their exploitation by rental or lending. If they want to prohibit the rental by third persons, they can do so by virtue of their own right. This is because even if the author or performing artist authorizes the rental by this third person, a license still is valid only if all persons involved agree by virtue of their respective rights.

If, on the contrary, the producers want to authorize rental, they have to acquire the rights of the involved authors and performing artists. This will mostly not be a problem for them since they are generally the stronger contracting party. Even if, for example, a performing artist is exceptionally able to retain and not to assign his rental and lending right to the producer, this simply represents normal proceedings within a market economy.

Mostly, however, the performing artist himself also has an interest in exploitation by way of rental. Thus, he will generally assign his right in his best interest. If he assigns his right to a different producer who pays him a higher amount of money, this situation represents a classical case of beneficial competition between several producers.

2.1.4 The wording of paragraph 1 does not prevent Member States from extending the rental and lending right to further groups of neighbouring right owners such as owners of a right in simple photographs. This is in order to have regard to national particularities in the field of copyright and thereby not to create inconsistencies within national laws. Since the cases in question are of minor economic importance as regards rental and lending, the harmonization effect thereby is not threatened.

2.2 The exclusion of buildings in paragraph 2 is mainly for social reasons. In particular, an architect should not have the possibility of prohibiting the rental of living space by the owner of the building. Moreover, an architect would not have a justified interest in a rental right because he knows that the building will be used in a certain way - be it by the owner or the tenant - and he can take this into account on the occasion of the first exploitation of his work.

Works of applied art generally are protected to a lesser extent than other works. Thus, for example, works of applied art are usually excluded from droit de suite. Likewise, they should be excluded from the rental and lending right which is not of fundamental importance for works of applied art. With a view to a proper balance of the interests of the general public and the right owners additional cases which are close to those under paragraph 2 will not be covered by this Directive. Thus, the Directive does not aim to cover cases in which rental of the protected subject matter is of minor importance, such as the case of an artistic work which is rented only as part of the equipment of a hotel room.

Paragraph 2 purposely does not exclude from paragraph 1 copyright works which are incorporated in books or otherwise exist in printed form, even if this would be imaginable in relation to rental. Even if books at present are not rented to the same extent as phonograms and videograms, there is at least in certain cases a growing tendency towards commercial rental of books. In the face of the activities of public libraries there are market gaps which increasingly appear and from which commercial rental libraries benefit.

Public libraries are increasingly suffering from budget cuts. At the same time the number of new publications of books is increasing. Moreover, public libraries are employing increasingly greater shares of their purchase budgets for the purchase of phonograms and videograms in order to remain attractive. Thus, they have increasing problems in covering the whole range of books which are on the market. Therefore, in particular for specific kinds of books which are rarely offered by public libraries, a market gap exists which can be exploited by commercial rental libraries.

Furthermore, new book titles are often available for lending in public libraries only some time after publication, whereas the demand to read the very latest titles immediately after publication is continuously growing as a consequence of the modern, often aggressive, marketing style of books (e.g. in the case of the "book of the film").

As public libraries in general have difficulties in satisfying this demand, a field of activities is left to the commercial rental libraries, particularly since the rental of a book is still more profitable for a consumer than its purchase.

Even if books at present are only rented to a limited extent, it would not be appropriate to provide a rental right for authors in respect of sound recordings or videograms only but not in respect of books, since rentals of such objects represent equal acts of copyright use. Moreover, this would result in a discrimination of writers and other authors, as opposed to producers, and would not be consistent with general considerations of justice.

A further consideration is that as a matter of principle, in the field of copyright all uses of a certain kind such as rental are covered and no distinctions according to work supports or descriptions of works are made without imperative necessity. Section 27 of the German Copyright Act can serve as an example and moreover shows the advantages of a comprehensive solution. The remuneration for rental of all descriptions of works without any distinction according to the work supports was introduced at a time when only books but rarely phonograms and videograms were rented. When later on rental of phonograms and videograms increased sharply, this use could be remunerated by virtue of the existing provisions of law without any of the delay which would have been caused by lengthy legislative procedures.

Moreover, since the Directive also covers for the same considerations of justice phonograms and videograms in relation to lending even though such lending at present is of minor (but increasing) importance compared to the lending of books, it is simply consequent and also far-sighted to deal in the same way with the comparable situations of rental of books on the one hand and lending of phonograms and videograms on the other, which means including them in this Directive.

2.3 Since the Directive proposed by the Commission on the protection of computer programs which is being debated at present deals comprehensively with the subject, the present proposal has to be without prejudice to that proposed Directive.

Article 3: Authorization of Rental and Lending

3.1 Article 3 is necessarily linked to Article 2 paragraph 1. It relates only to the case in which the right owners (i.e. all those who are qualified according to Article 2 paragraph 1 in a particular case) authorize rental or lending by a third person which means that they exercise their rental and lending right for the purpose of exploitation. Accordingly, Article 3 does not relate to the case in which the right owners exercise the rental and lending right by prohibiting rental and lending.

3.1.1 The purpose of Article 3 is to render Article 2 paragraph 1 efficient as far as the ownership of rights is concerned. In particular, Article 3 achieves the principle which is expressed in Article 2 paragraph 1, i.e. the principle of balance between the several groups of right owners.

The background to Article 3 is the following situation: in practice, producers of sound recordings, visual and visual and sound recordings obtain most of the exploitation rights by way of assignment from authors and performing artists; in the field of films, producers mostly enjoy legal presumptions for the assignment of rights. These assignments are necessary for exploitation because in every case all right owners have to authorize the exploitation by third persons.

However, authors and performing artists generally do not obtain separate remuneration for every assigned exploitation right, although they should, according to a general principle of copyright, participate in every exploitation of their works and performances. In general, remuneration on a flat-rate basis and at very low percentages are paid. Not least this is a consequence of the fact that contract law in the field of copyright is mostly regulated in the Member States only as far as the basics are concerned, if it is regulated at all, so that the economically stronger party to a contract, normally the producer, can dictate his terms.

As in other fields of law, in the field of copyright law there is a need for a certain protection of the party to a contract which is generally the weaker party, so that copyright can fulfil its main

purpose. This purpose is to provide an economic basis for further creation in particular for those natural persons who create or perform copyright works (authors and performing artists).

With regard to the existing situation, total contractual freedom is not acceptable. This freedom cannot take into account the above mentioned purpose of copyright. Judging from past experience it is to be expected that a new right such as rental right will fail to produce the intended economic effects for authors and performing artists if it is fully assignable to producers and thereafter licensed to third persons.

Moreover, it cannot be expected that legislation on contract law in the field of copyright in the Member States will make satisfactory progress in the near future. This field of law needs to be regulated in the Member States as has been recognized for a long time in particular by experts and the interested circles themselves. However, only very few efforts to improve this situation have been made.

Given this situation it seems necessary to provide, in respect of the economic exploitation by way of authorization of rental and lending to a third person, a provision which guarantees that all first right owners adequately participate in this economic exploitation. This represents the purpose of Article 3.

Without Article 3, Article 2 paragraph 1 would be inconsistent and self-contradictory in so far as authors and performing artists are set out in Article 2 paragraph 1 as right owners, whereas in practice they would hardly benefit from these rights. In this respect, Article 2 paragraph 1 would therefore to a large extent be nullified. This means, that Article 3 is necessary to give Article 2 paragraph 1 its intended effect.

Moreover, authors and performing artists being normally the weaker parties to contracts have to be strongly protected also for the reason that one of the main purposes of copyright consists in protecting in particular creative persons in order to secure for them an equitable income from the exploitation of their works and performances and thereby to enable further creative work. Not least because of the need to protect culture in Europe, the protection in particular of authors and performing artists must not be neglected.

A parallel can be drawn, for example, with the Commission's program for the promotion of the European film production[16]. The Commission is dealing on the same footing by proposing, in Article 3, to guarantee that authors and performing artists, whose works and performances characterize, in particular in the view of consumers, the finished product such as the sound recording, shall obtain, when compared to the producers, an adequate, at least equal part of the total proceeds from rental and lending. Article 3 is the means by which the Commission constructively takes into account the main criticism which has been expressed in many submissions relating to the Green Paper.

In relation to existing contracts, too, the purpose of Article 3 must not be defeated or circumvented. Therefore, in cases of doubt, which means in the absence of contractual provisions providing otherwise, it has to be presumed that the rental and lending rights have not yet been assigned. This applies in particular to the case where a distribution right which includes rental and lending has been assigned. This is because rental and lending at least of sound recordings and videograms represent novel and independent forms of use so that it cannot be presumed that a right owner who assigned the distribution right also wanted to assign the exclusive rental and lending right, not least because in most cases such a right did not even exist because of the exhaustion of the distribution right.

Theoretical questions alone such as the question of whether the rental and lending right is a part of the distribution right, the exhaustion of which is limited, or whether it is an independent right in addition to a distribution right narrowly defined (cf. paragraph 1.4 above) cannot be decisive for the interpretation of a contract.

3.1.2 For these reasons, Article 3 provides that in cases where all right owners authorize against payment the rental or lending by a third person every right owner retains a right to obtain an adequate part of the payment. Therefore, if for example an author or a performing artist has assigned his rental right to the producer who authorizes the rental by a third person, such as a videoshop, against payment, the author and performing artist retain a right to obtain an adequate part of this payment. According to the second sentence, this right which is

(16) "Action programme for the European audio-visual media products industry", communication from the Commission to the Council, COM(86) 255 final, cf. also later communications COM(90) 78 final and COM(90) 132 final.

different from the exclusive rental right itself cannot be waived and its administration only can be transmitted. This is simply a consequence of the above considerations. It will guarantee that at the end of the day authors and performing artists actually obtain an adequate share.

3.2/

3.2.1 Member States are free to decide how to include the right under Article 3 in their national laws from a theoretical point of view. Thus, for example, it is possible to consider this right as a remainder of the rental and lending right itself - a remainder which is neither affected by the assignment of the rental and lending right nor the respective granting of licenses, which means that it does not pass to the purchaser of right on the occasion of such assignment/granting of licenses. Accordingly, in such a case only the power to prohibit or authorize rental and lending would be assignable or licensable.

Alternatively, Member States may implement Article 3 by imperative provisions in the field of contract law. Thus, they may for example provide that the remuneration for authors and performing artists, and thereby the right to obtain an adequate part of the payment within the meaning of Art. 3, has to be stipulated separately for rental and lending in any contract with producers. Member States may provide in their law criteria for the adequacy of, or minimum percentages in relation to, the payment, and the producers' duty to regularly deliver lists of the payments for rental and lending, including evidence, to authors and artists, such as can be seen from the model given by the French legislator in Article 63-1 et seq. French Copyright Act.

3.2.2 Article 3 leaves the Member States the greatest possible freedom not only with a view to theoretical questions in respect of national law but also in respect of how they may shape the right under Article 3.

In relation to the case where authors and performing artists assign their rental and lending rights to the producer and thereafter the producer authorizes rental or lending by a third person, a case at which Article 3 is primarily aimed, the following possibilities in particular exist.

Since every right owner has a right to obtain an adequate part of the payment under Article 3, it is possible that the third person (e.g. licensee, rental shop) directly pays to every right owner his respective adequate part. However, it would be easier and less expensive if the licensee were simply to pay the whole amount only to one or several collecting societies or similar organizations which thereafter could satisfy by way of distribution the individual claims to obtain such adequate part. However, if the producer, for example, is not a member of a collecting society, the licensee may possibly also directly pay the respective shares to the producer on the one hand and to the collecting societies of authors and performing artists on the other hand.

These cases involve directing the right to an adequate part of the payment directly against a third person/licensee. Alternatively, Member States may direct this right against those right owners who receive the whole payment from the third person. For example, it is possible that authors and performing artists, perhaps through their collecting societies, receive the whole payment and that producers enjoy the right to obtain an adequate part of this payment from authors and performing artists, as in the comparable case of Section 86 German Copyright Act.

On the other hand, it is possible that producers receive the whole payment and authors and artists, perhaps through their collecting societies, enjoy a right to obtain an adequate part of this payment from the producers. This possibility, however, is probably less apt to realize the purpose of Article 3. There is a danger of a producer's bankruptcy, which is not unrealistic in the risky film business and which would be to the detriment of the claims of authors and artists. As well, it does not seem appropriate to reintroduce into the relationship between the producer and the author/artist, in which usually the producer is already the stronger party, the payment of the adequate part by the producer. In practice, the possibility of the weaker party to a contract to inspect the total amounts of payment by the licensees, and to actually enforce the right to obtain an adequate part of the payment, would be limited.

Although Article 3 is primarily aimed at the case where authors and performing artists assign their rental and lending right to producers

for further exploitation, Article 3 does not affect the possibility that authors and artists assign this right (being distinct from the claim for payment under Article 3) for the purpose of its exercise to a collecting society. By way of this exercise of rights they will obtain an adequate part of the payment and thereby their claim under Article 3 will be satisfied.

3.3 Article 3 only covers the case of exploitation of sound recordings, visual recordings and visual and sound recordings, however not of other media such as books. The reason is that rental of other media in practice does not occur nearly so often, and that in relation to lending in particular of books the derogation under Article 4 will mostly be applied. Moreover, contract law in the field of copyright as regards publishing contracts, as well as the relations between publishers and authors, do not seem to necessitate regulation in the context of Article 3. However, Member States will not be prevented by this Directive from extending the implementation of Article 3 into national law to objects of rental and lending other than those covered by Article 3.

The expression "the right holders authorize" implies that all right holders concerned have to give their authorization. Such authorization can for example be given directly to the third person, or in part indirectly to the third person by producers to whom authors and performing artists have previously (either directly or indirectly by collecting societies) assigned their rental and lending rights.

The provision according to which the right to obtain an adequate part of the payment exists "notwithstanding" any assignment of the rental or lending right or granting of licenses clarifies that this right remains with the first right owners and is not affected by the assignment of the rental and lending right or granting of respective licenses.

The part of the payment within the meaning of Article 3 is qualified only by the word "adequate". As the experience on the national level has already shown, an agreement on the specified percentages with which to replace the word "adequate" would be very difficult to achieve. Therefore, only criteria for determining what is "adequate" will be given.

The expression "adequate" is related to the contribution which the right owner has made to the rented or lent object such as the sound recording. However, in the framework of an efficient administration of rights it will not normally be possible to evaluate the individual contributions. Therefore, the expression "adequate" must be related to the distribution among the several groups of right owners. Thus, for example in the case of sound recordings, one has to take into account the fact that authors such as composers together with performing artists generally create the consumer demand for rental and lending of

the sound recording. In addition, it must be taken into account in favour of authors and performing artists that it is these two groups which make the creative contributions to the finished product - in contrast to the producers, whose economic, technical and organizational contributions must nevertheless not be ignored.

In many cases it is advisable to apply quotas such as those practised e.g. in collecting societies in the Member States, or as those legally prescribed. The solution adopted by the French legislator in relation to private reproduction of sound recordings and visual and sound recordings in Article 36 of the law of July 3, 1985 could also serve as a model.

Article 4: Derogation from Exclusive Lending Right

4.1 Article 4 gives to Member States the possibility of derogating from the copyright-based exclusive nature of the lending right under Article 1 paragraph 1 for one or several categories of objects.

Unlike rental, public lending touches in particular upon lending by public libraries. The experience of many countries in the world has been that national legislators are often not prepared to give to authors and owners of neighbouring rights the right to authorize or prohibit lending of objects by public libraries. It is argued that the availability and accessibility of , for example, books in public libraries, must be guaranteed for cultural reasons, and in particular for the purpose of popular education. This could not be guaranteed in the case of an exclusive lending right which always includes the power to prohibit lending.

Given this background, it seems advisable to grant Member States the possibility of providing in place of the exclusive right within the meaning of Article 1 paragraph 1, measures for remuneration at least of authors for the intensive use of works in libraries. In order to achieve this objective it will not be necessary to base such measures for remuneration on copyright provisions.

Member States will have the greatest possible freedom in respect of shaping the measures. For example, they may provide a remuneration which is distributed other than according to the extent of use. Likewise, they are free to decide to which categories of objects - e.g. books, sound recordings, video-cassettes, or even for all categories - the derogation measures under Article 4 shall apply, thus for which categories the exclusive right shall be replaced with the remuneration, and whether this remuneration shall be vested only in authors or, in addition, in owners of neighbouring rights, in particular in performing artists. Thus, it is possible to apply Article 4 in respect of sound recordings and to grant the remuneration only to authors, such as composers. Likewise, Member States are free to decide whether heirs or certain surviving dependants specified in the law shall obtain the remuneration.

These broad possibilities given by Article 4 enable the Member States to provide the necessary measures for remuneration at least in principle without being faced by practical problems which might exist at least in some Member States. In particular, the public lending right schemes which are already successfully working within the Community will not be affected in their essential substance by this Directive.

However, for a derogation measure under Article 4 to be permissible, the conditions specified have to be fulfilled so that its aims may be realized.

The remuneration has to be distributed by administering bodies. The very broad term "administering body" includes all organizations or bodies which centrally collect and distribute the remuneration. In this context, the pattern of organization is irrelevant; therefore collecting societies in the field of copyright would be just as appropriate as official agencies. In all cases the body should be supervised by an independant body in relation to its activity, in particular to ensure that the remuneration is distributed in an equitable matter. It does not matter whether the distribution is made by one institution, or by several institutions which distribute the respective parts of the total remuneration.

The fact that the remuneration has to be "equitable" means on the one hand that the total remuneration must correspond to the extent of the total use, thus to the extent of lending in the specified libraries, and on the other hand, that the distribution is "equitable" as between the individual right owners or groups of right owners such as authors, translators, performing artists or phonogram producers. The remuneration has to be adequate regarding the creative, artistic or other contribution which the right owners have made to the lent object. The legislator or the administering body may determine in general, for example by way of fixing percentages for the individual groups of right owners, what has to be regarded as equitable.

The reference to Community law, in particular Article 7 EEC clarifies that the derogation measures under Article 4 have in any case to be in compliance with Community law and in particular that they must not be discriminatory within the meaning of Article 7 EEC.

CHAPTER II (PROTECTION IN THE FIELD OF RIGHTS RELATED TO COPYRIGHT)

Article 5: Fixation Right

5.1 Personal performances by performing artists and live broadcasts have a life for a long time and thereby become subject to further exploitation only if they are fixed. The fixation of a personal performance or a live broadcast represents its first reproduction and the precondition for all of the following acts of exploitation. Accordingly, it appears to be very important, particularly for the purpose of combatting piracy, to make fixation an object of an exclusive right for performing artists and broadcasting organizations. Most Member States already provide such a right.

5.2 In accordance with the purpose of the fixation right, fixation of a performance means its first fixation on a device from which the performance can repeatedly be reproduced for perception such as a phonogram or a visual recording with or without an associated soundtrack. Since the fixation right refers only to first fixations, by definition it relates only to unfixed (personal) performances and (live) broadcasts.

In relation to the terms "performing artists", "performances", "broadcasting organizations" and "broadcasts" reference is again made to their use in the Rome Convention (cf. in this respect also the comments under 2.1). Only in relation to broadcasts does it appear to be necessary to clarify whether broadcasts made by cable services and satellites shall also be covered by the Directive, since this question is disputed in relation to the Rome Convention, notwithstanding its Article 3 (f).

The protection of broadcasts in general is - and also was in the framework of the preparatory work for the Rome Convention - justified by the high organizational, technical and economic expenditure which is necessary for broadcasting. The neighbouring right for broadcasting organizations provides protection against easy exploitation of this effort by third persons. Therefore, for the justification and necessity of protection it is irrelevant whether a broadcast is made by wireless means, by cable or directly by satellite. Rather on the contrary, it is relevant whether a broadcast, as in the case of wireless broadcasts, is made by means of a considerable organizational, technical and economic expenditure.

Accordingly, to the extent that services such as cable program services only make an unaltered and simultaneous retransmission of received broadcasts they are not covered by this Directive. However, should they make their own broadcasts or programs in the same way as traditional broadcasting organizations, there is no reason to treat them differently. Therefore, this Directive covers not only organizers of wireless broadcasts but also organizers of broadcasts by cable and satellite, if the latter use not only broadcasts which have been made by others but make their own broadcasts.

Article 6: **Reproduction Right**

Reproduction of fixed performances and of the other subject matter set out in Article 6 represents the basic form of material exploitation and a precondition for material distribution. Since piracy is most important in the fields of reproduction and distribution, it is

essential for the purpose of combatting piracy that all Member States provide an exclusive reproduction right (cf. for the distribution right see comments under Article 7).

In relation to the right owners and subject matter reference is again made to the comments under 2.1 and, as far as broadcasting organizations/broadcasts are concerned, to the comments under 5.2.

"Direct reproduction" means reproducing a recording onto the same or a different medium - such as reproducing on one film a performance recorded on another film, or re-pressing a phonogram. "Indirect reproduction" means the recording of a broadcast which has been made, e.g., on the basis of a phonogram.

Reproduction of any subject matter of protection set out in Article 6 includes the reproduction of a part thereof such as a part of a fixed performance.

Article 7: Distribution Right

7.1 Experience gained in states which know only a reproduction right but not a distribution right shows that a reproduction right alone does not usually suffice to combat piracy efficiently. In practice, it is difficult to get hold of illegal producers; only the distribution right provides the possibility to get hold of counterfeited goods which are on the market. Therefore, it appears necessary to provide an exclusive distribution right for all right holders.

In relation to the right owners and subject matter of protection, reference is again made to the comments under 2.1 and 5.2.

The expression "exclusive right" is employed, in accordance with the internationally used terminology, synonymously with the expression "the right to authorize or prohibit".

The word "public" has a very broad meaning; it excludes only such acts of distribution which are made within a group of personally connected persons such as friends, e.g. private gifts.

The typical, although not the only case of distribution within the meaning of Article 7 is sale. The words "make available ... for an unlimited period of time" operate to exclude the other forms of distribution which are covered by chapter I and therefore not by Article 7, namely rental and lending. These forms of distribution are characterized by the fact that objects are made available for use for a limited period of time and therefore must be given back after a certain time, whereas under Article 7 they are made available forever, thus without the limitation to a certain time and without limitation as to mere use.

In this context Member States are free to decide how to implement the distribution right in relation to the rights under chapter I in their national laws. Thus, it is in particular possible to frame the distribution right so broadly that it includes rental and lending and to provide at the same time that the exhaustion of the distribution right does in any case not extend to rental and lending.

Likewise it is possible to provide, on the one hand, a distribution right with a narrow definition as in Article 7 and, on the other hand, a rental and a lending right as independent rights. In this case, it is not necessary to limit this distribution right with a narrow definition to the first act of "making available", as defined in paragraph 1. In any case paragraph 2 secures that the free movement of goods within the Community is not affected. Moreover, it is not necessary for the purpose of harmonization to prescribe how Member States shape the legal structure of the right under Article 7.

7.2 The exhaustion of the distribution right on the basis of national neighbouring rights protection has to be distinguished from the exhaustion on the basis of Article 30 et seq., 36 EEC. The exhaustion in the first case is governed by national law and mostly has as its only consequence that further acts of distribution in the home country which are following the first putting into circulation in this country are no longer covered by the exclusive right of distribution. In contrast, the exhaustion on the basis of Community law relates only to the intra-Community distribution and resolves the conflict between the national, exclusive right on the one hand, and the aim of the free movement of goods within the Community on the other.

According to the established jurisprudence of the Court of Justice of the European Communities the first putting into circulation of copies of works within the Community by the right owner or with his consent results in the Community-wide exhaustion of the distribution right. This applies also to the acts of putting into circulation of subject matter protected by neighbouring rights. The purpose of paragraph 2 is to secure this rule in the framework of the proposed Directive.

Accordingly, although the Directive does not require the Member States to provide an exhaustion of the distribution right narrowly defined in paragraph 1 based on national law, paragraph 2 guarantees, in line with the jurisprudence of the Court of Justice, the - in its nature different - exhaustion of the distribution right based on Article 30 et seq., 36 EEC. Thereby it is guaranteed that the distribution right under Article 7 paragraph 1 will not create new barriers to trade in the internal market.

Article 8: Limitations to Rights

8.1 The limitations to neighbouring rights in the laws of the Member States have been subject to certain harmonization effects via the Rome Convention and also indirectly via the Berne Convention. However, in detail numerous differences still exist.

The limitations to the neighbouring rights in most Member States are regulated by way of a partial or complete reference to the respective provisions in the field of authors' rights. Article 15 (2) RC also provides such a reference.

A detailed harmonization of the limitations on neighbouring rights for the purpose of this Directive would adversely affect this system of reference and would to some extent result in a broader protection for neighbouring right owners than for authors. This again would be contrary to the concept of protection in the field of authors' rights and neighbouring rights in most Member States.

Accordingly, the limitations are deliberately not dealt with in detail in the framework of this Directive. Therefore, Article 8 follows

Article 15 RC, inter alia in setting the boundaries for the limitations permitted under the Directive. This means that broader limitations in favour of the general public are not permitted. This is however without prejudice to the possibility of further harmonization of such limitations at Community level.

The expression "literary and artistic works" in paragraph 2 first sentence is to be interpreted, in line with Article 15 (2) RC, within the meaning of Article 2 (1) BC; it means all works protected by authors' rights.

8.2 Paragraph 3 clarifies that the possibility to provide a limitation to the exclusive reproduction right in respect of private use is without prejudice to the possibility to provide, in order to give a compensation for the limitation to this right, a right to remuneration for private reproduction. By citing only the case of private reproduction, paragraph 3 draws attention to the great importance of this case for which a right to remuneration by way of compensation for the right owners should be sought in view of the high intensity of this kind of use.

However, it does not follow from paragraph 3 that Member States are free to provide rights to remuneration as compensation only in the case referred to in paragraph 3, but not in the case of the other limitations permitted by Article 8.

CHAPTER III (DURATION)

Article 9: Duration of Authors' Rights

9.1 In the framework of this Directive on the harmonization of rental and lending right it is not appropriate to harmonize comprehensively the duration of authors' rights. Thus, Article 9 for the time being provides only a minimum duration by reference to the respective provisions of the Berne Convention.

This means that the general term of protection shall be, in accordance with Article 7 (1) BC, at least the life of the author and 50 years after his death. In respect of cinematographic works, anonymous and pseudonymous works as well as photographic works and works of applied art in so far as they are protected as artistic works, reference is made to the particular terms of protection according to Article 7 (2) - 7 (4) BC which are to be understood as minimum terms.

Article 9 second sentence refers to further particular terms of protection which exist in some Member States for example in respect of posthumous works, collective works and also official publications. These continue to be governed by national law.

The words "until further harmonization" in the first sentence indicate that the Commission intends to submit a proposal for the harmonization of the general and particular terms of protection in the field of authors' rights in the very near future.

Article 10: **Duration of Related Rights**

As in the field of authors' rights, harmonization of duration in the field of related rights appears to be necessary for the completion of the internal Market. However, also in this case the full harmonization in the framework of this Directive is not appropriate because the duration of protection is connected with the subject matter such as the performance of the performing artist and therefore applies to all rights and not only those provided in this Directive.

Accordingly, Article 10 also provides, for the time being, only a minimum duration by way of reference to the terms of protection provided in Article 14 RC.

According to the second sentence of Article 10 the duration of the rights of film producers within the meaning of the Directive is to be, like the rights of phonogram producers (cf. Article 14 (a) RC) at least 20 years from the end of the year in which the fixation was made.

The words "until further harmonization" have the same background as in Article 9 (cf. the comments on Art. 9).

Proposal for a

COUNCIL DIRECTIVE

on rental right, lending right, and on certain rights related to copyright

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,

Having regard to the proposal from the Commission,

In co-operation with the European Parliament,

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

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;

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;

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 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;

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

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 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;

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 protecion within the Community;

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 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 caracteristics;

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;

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;

Whereas the legislation of the Member States should be harmonized in such a way 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;

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:

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

(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.

(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).

(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).

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

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

(3) The provisions of this Directive shall be without prejudice to any provisions of Council Directive (EEC) No ....of .... on the Legal Protection of Computer Programs.

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 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

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- such derogation measures comply with Community law, in particular Article 7 of the EEC Treaty.

CHAPTER II PROTECTION IN THE FIELD OF RIGHTS RELATED TO COPYRIGHT

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.

Article 6 Reproduction Right

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

- 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.

Article 7 Distribution Right

(1) Member States shall provide

- 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.

(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.

Article 8 Limitations to Rights

(1) Member States may provide limitations to the rights referred to in Chapter II in respect of:

(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.

(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).

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

CHAPTER III DURATION

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.

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.

CHAPTER IV COMMON PROVISIONS

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.

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.

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

NOTE ON FINANCIAL IMPACT

The present proposal does not have budgetary consequences for the Community.

Effect on competitiveness and employment

I. What is the main justification for the measure ?

- proper function of the internal market
- increased competitiveness of the European copyright based industry on the world market
- strengthening of the position of European culture by the provision of remuneration to those involved in the production and dissemination of cultural material.

II. Characteristics of the enterprises concerned

The proposal affects firms of all descriptions. Film producers, phonogram producers and broadcasters vary from multinationals to medium sized national companies. Authors and performers normally conduct business as private individuals or as small companies.

The proposal will also affect businesses which are concerned with the rental of all forms of protected work. These include video and record rental shops and vary in size from small businesses operating a single outlet to national chains.

III. What obligations are imposed directly on enterprises ?

Enterprises which deal in the rental of protected works will have to respect the right of authors, performers and producers of phonograms and films to refuse to authorise rental of their material. This will normally be exercised by requiring payment of royalties in consideration for granting such authorisation.

IV. What obligations may be imposed indirectly on enterprises by local authorities ?

None.

V. Are there any special measures for SMEs ?

No.

VI. What foreseeable effects are there

(a) on the competitiveness of enterprises ?

Rightholders will benefit from the direct effect of receiving remuneration for the use of their material. Moreover, their competitiveness will be enhanced by the increased control over certain types of unauthorised use of their material which have hitherto interfered with and impeded their own efforts at commercial exploitation.

Existing rental businesses will need to adapt to the new environment, but their overall competitiveness should not be significantly damaged, since their only effective competition (public-sector lending libraries) will also be subject to restrictions under this Directive.

The exercise of the rental right is likely to be used by phonogram producers to prohibit absolutely rental in the special case of compact discs, but since such a practice hardly exists at this time in the Community, there will be no significant effect.

(b) or employment ?

The improvement in the financial position of businesses exercising the new rights should result in a positive effect on employment.

VII. What consultations have there been on this proposal ?

Proposals for Community action in the field of neighbouring rights, as well as rental and lending of copyright and other protected material, were published in the Commission's Green Paper "Copyright and the Challenge of Technology" in June 1988. Numerous submissions were subsequently received, and on the basis of these submissions, interested parties were invited to a hearing in Brussels on 18 and 19 September 1989.

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