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**I

R E P O R T

of the Committee on Legal Affairs and Citizens' Rights

on the Commission proposal for a Council decision concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961
(COM(90) 0582 final - C3-0039/91 - SYN 318)

Rapporteur: Mr Rinaldo BONTEMPI

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A Series: Reports - B Series: Motions for Resolutions, Oral Questions - C Series: Documents received from other Institutions (e.g. Consultations)

*	= *Consultation procedure requiring a single reading*	**II	= *Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment*
**I	= *Cooperation procedure (first reading)*	***	= *Parliamentary assent which requires the votes of a majority of the current Members of Parliament*

CONTENTS

By letter of 30 January 1991 the Council consulted the European Parliament, pursuant to Articles 100a, 66, 113 and 57 of the EEC Treaty, on the Commission proposal for a Council decision on the accession of the Member States to the Berne and Rome international conventions on copyright and neighbouring rights.

At the sitting of 18 February 1991 the President of Parliament announced that he had referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Youth, Culture, Education, the Media and Sport for its opinion.

At its meeting of 27 February 1991 the Committee on Legal Affairs and Citizens' Rights appointed Mr Bontempi rapporteur.

At its meetings of 25 and 26 September and 29, 30 and 31 October 1991 it considered the Commission proposal and draft report.

At the latter meeting it adopted the draft legislative resolution unopposed, with 1 abstention.

The following took part in the vote: Stauffenberg, chairman; Vayssade and Simeoni, vice-chairmen; Bontempi, rapporteur; Falconer, Garcia Amigo, Grund, Inglewood, Janssen van Raay, Marinho, Medina Ortega, Oddy, Salema, Alvarez de Paz (for Bru Puron) and Elliot (for Mebrak-Zaïdi, pursuant to Rule 111(2)).

The opinion of the Committee on Youth, Culture, Education, the Media and Sport is attached.

The report was tabled on 31 October 1991.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.

A

AMENDMENTS

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

Commission text[1]	Amendments
(Amendment No. 1) in the title and text of the proposal	
Proposal for a Council decision	Proposal for a Council directive
(Amendment No. 2) Before the sole paragraph of Article 1, new paragraph 1	
	In the exercise of its powers concerning copyright and neighbouring rights, the Community shall be guided by the principles and act in accordance with the provisions of the international conventions, that of Berne for the protection of literary and artistic works, as revised by the Paris Act of 24 July 1971, and that of Rome for the protection of performers, producers of phonograms and broadcasting organizations of 26 October 1961, as set out in the text annexed to this directive.
(Amendment No. 3) Article 1, second paragraph (new)	
	The Member States may not enforce or apply any reservation within the meaning of Article 16((1)(A)(i) or (ii) of the Rome Convention in respect of copyright-holders who are nationals of a Community Member State.

[1] For full text see COM(90) 0582 final - OJ No. C 024, 31.1.1991, p. 5

DRAFT LEGISLATIVE RESOLUTION

embodying the opinion of the European Parliament on the Commission proposal for a Council decision concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961

The European Parliament,

- having regard to the Commission proposal to the Council (COM(90) 0582 final - SYN 318)[1],

- having been consulted by the Council pursuant to Articles 100a, 66, 113 and 57 of the EEC Treaty (C3-0039/91),

- having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinion of the Committee on Youth, Culture, Education, the Media and Sport (A3-0293/91),

1. Approves the Commission proposal subject to Parliament's amendments and in accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;

3. Calls for the conciliation procedure to be opened if the Council should intend to depart from the text approved by Parliament;

4. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;

5. Calls on the Council to incorporate Parliament's amendments in the common position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;

6. Instructs its President to forward this opinion to the Council and Commission.

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[1]OJ No. C 204, 31.1.1991, p. 5

B

EXPLANATORY STATEMENT

1. Copyright and neighbouring rights (i.e. the rights of performers, record producers, radio and television organizations, etc.) represent a turnover of the order of ECU 150 to 250 billion per year, equal to around 3 to 5% of the European Community's gross domestic product. This explains the Community's very great interest in ensuring the gradual integration of this great complex of economic relationships in the completion of the internal market. This requires gradual harmonization to ensure:

- respect for authors' exclusive and legitimate rights;
- free movement of 'products', currently hampered by the very different levels of protection in the various Member States;
- freedom to provide services, to enable the individuals or bodies concerned to carry on their work without the constraints created by differing national systems of rules.

Even the Court of Justice has stated on several occasions that the disparity between national legislations in this area was likely to create restrictions on the free movement of goods under Article 36 of the EEC Treaty and restrictions on the free movement of services justified in the general interest, namely for the protection of intellectual property[1].

2. Alongside these economic considerations, the Community's interest in copyright is linked to the fact that a clear and effective system of rules is a precondition for the implementation of any policy to preserve and assert European cultural identity within the Member States, but particularly in relation to third countries.

Even though cultural policy is currently within the sphere of the Member States, the Community itself has an interest in supporting (subject to the subsidiarity principle), any event or initiative likely to promote culture as was the case in the 'TV without frontiers' directive (Directive 89/552 EEC-OJ No. L 298, 17.10.1989).

3. With this in mind, the Commission has for several years carried on discussions with Parliament and the Council, very clearly set out in its strategic documents[2] by which it has gradually unfolded its strategy. There is need to recall here the content of these documents or the many resolutions which Parliament has adopted on this subject.

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1 Judgment of 10 March 1980, Case 62/79, Coditel; judgment of 9 April 1987, Case 402/85, Basset; judgment of 17 May 1988, Case 158/86, Warner Bros; judgment of 24 January 1989, Case 341/87, EMI Electrola

2 COM(88) 172: Green paper on copyright
COM(90) 584: Working programme on copyright

4. Under Community law as it stands at present, the Community intervenes only to cushion the effect of certain national applications of copyright[3], which is governed by national law, and in such cases it endeavours to define by interpretation of the case law the substance and purpose of the copyright. The Court has done its best to examine, case by case, any conflicts between the interests of authors and those of the opening up of the market. The resulting case law shows clearly that these issues can no longer be resolved solely by judicial decisions but require explicit intervention by the Community's legislature.

5. Community intervention is justified by the fact that, although the existence of intellectual property right falls within the scope of national legislation, the Community may make rules governing the conditions in which such rights are exercised to prevent improper restrictions on the movement of goods and the provision of services[4]. From a practical point of view this is a very important responsibility in view of its legal and economic repercussions on the market.

Given the complex way in which copyright has evolved since the adoption of the first Berne Convention in 1886, it would be sensible for future Community rules to be aligned with those of the rest of the world. Hence the need for the Community, in the initial stages, to do as the Commission proposes and take over the current multilateral provisions in the field of copyright and neighbouring rights as defined by the Berne and Rome conventions.

The incorporation in Community law of the substance of these conventions would have several advantages:

- it would place all Member States on an equal footing, whether or not they have acceded to these conventions in the form currently in force;

- it would enable the Community to negotiate with third countries on matters relating to the application of these conventions with a much greater contractual clout than each Member State would have acting individually, and would in particular ensure more effective protection for European operators in third countries.

The desire that all Member States should accede to the conventions in question is also shared to a great extent by the interested groups, as is clear from several hearings held by the Commission on the general strategy to be followed and on priorities in the most sensitive areas in this sector.

For a legal basis on which to base its action, the Community has a choice of several EEC Treaty articles:

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3 Particularly in cases where the holder of an intellectual property right is prohibited from invoking national legislation protecting this right to prevent the import of a product legally placed on the market in another Member State with his consent (see in particular the judgments of 8 June 1971, Case 78/70, Deutsche Grammophon, and 20 January 1981, Joint Cases 55 and 57/80, Musik-Vertrieb Membran).

4 On the Member States' right to define the rules on the existence of intellectual property rights, see the Court's judgment of 30 June 1988, Case 35/87, Thetford Corporation v. Fiamma SpA

- Article 100A, since the subject of these rules relates to the establishment of the single market, particularly as regards the free movement of goods[5];
- Article 66 (referring to Article 57) on provisions concerning the freedom to provide services[6];
- Article 57(2) on the right of establishment and the pursuit of activities as self-employed persons by phonogram and film producers, radio stations, publishers, hire firms, performers, etc.;
- Article 113, to the extent that this area is the subject of international negotiations, particularly in the GATT Uruguay Round and specific negotiations on this subject (TRIPS: 'Trade related intellectual property rights').

6. Problems may, however, arise:

I. regarding content and the level of harmonization necessary;
II. regarding the consequences of such harmonization for relations among Member States, between Member States and the Community, with third countries and for individuals;
III. regarding the means by which this harmonization should be achieved.

I. Content and level of harmonization to be achieved

7. The content of the Rome and Berne international conventions is summed up in the explanatory memorandum to the Commission's proposal. These conventions must be read in the light of their evolution and of the various acts extending and bringing up to date the rights concerned. By way of example, one need only took at the differences between the Paris Act (1971) and the Brussels Act (1948) of the Berne Convention regarding the length of

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5 The Council has already adopted three directives concerning intellectual property on this basis:

- Council Directive 87/54 of 16 December 1986 on the legal protection of topographies of semi-conductor products (OJ No. L 24/1987, p. 36) (adopted on the basis of Article 100 EEC before the entry into force of the Single European Act);
- first Council Directive 89/104 of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ No. L 40/1989, p. 1);
- Council Directive 91/250 of 14 May 1991 on the legal protection of computer programmes (OJ No. L 122/1991, p. 42)

In view of the fact that the Court of Justice applies the same principles to all forms of intellectual property when it is called upon to interpret Article 36 EEC, there is no reason for the harmonization of copyright and neighbouring rights to have any other legal basis than that judged appropriate in other fields of intellectual property.

6 The exclusive rights conferred by copyright and neighbouring rights is exploited not only in the form of placing goods (books, audiovisual media) on the market, but also by services provided for remuneration (broadcasting, recording and, reproduction licences, etc.)

protection for cinematographic and photographic works and applied arts, or the exclusive reproduction rights or rights of authors of cinematographic works.

As regards the level of harmonization, the Commission suggests that for the moment the level chosen should be the same as that created by the abovementioned international conventions, since it would be inadvisable directly or indirectly to call into question the achievements of negotiations carried on for decades, particularly by the WIPO (World Intellectual Property Organization) with a large degree of international acceptance.

It should also be noted that, even under these conventions, a higher level of harmonization is possible, particularly in fields where they allow the Member States the right to reserve their positions (Article 19 of the Berne Convention - Articles 1 and 21 of the Rome Convention, allowing for a higher degree of protection at national level). The following specific provisions should also be recalled:

- those restricting particular subjects to national legislation (e.g. Articles 2(2), 2a, 7(4), 9(2), 10(2), 10a(2), 13(1), 14a(2), 14b(2) of the Berne Convention),

- those referring to national law (e.g. Articles 6a(3), 14b(3), 16(3) of the Berne Convention), and

- those allowing for reservations (e.g. Article 30 of the Berne Convention and Articles 5(3), 6(2), 16 and 17 of the Rome Convention).

A restatement of the substance of these international conventions is thus only the first step towards a possible subsequent harmonization at Community level which could:

- adopt more precise rules where the conventions are not explicit - this has already been done, inter alia, by the adoption of the directive on the protection of computer programmes (Council Directive 91/250 OJ No. L 122/991) - which restates by analogy several provisions of the Berne Convention;

- adopt directives to cover rights which the international conventions leave to the Member States' discretion.
  Since this is the subject of specific proposals, these questions can be considered when these proposals are debated.

II. Consequences of the proposed harmonization

- for relations among Member States

It is clear that national administrations would in future need to base their actions on the principles of the conventions as Community provisions. This implies the elimination of any discrimination, as referred to in Article 7 of the EEC Treaty.

- for relations between Member States and the Community

It is clear that the adoption of this measure would result in a large area of relations between Member States being brought under Community law. These relations would be governed by the ordinary rules of the Treaty, in

particular those relating to powers of the Commission (Article 169) and to the competence of the Court of Justice. In both cases, however, the two institutions will be aware that these provisions must have the same value, or at least the same interpretation, at Community and international level. With this in mind, the Commission will need to refrain from applying these provisions in a way prejudicial to Community authors as opposed to third country authors. Similarly, the Court will need to take account of the fact that, even in the absence of an official body responsible for interpreting these conventions, the World Intellectual Property Organization (WIPO) has informally defined interpretations which have been accepted by most member countries. This will constitute an 'implicit limit' on the powers of these two institutions, since this is not a matter covered exclusively by Community law.

- for the Community's relations with third countries and international organizations

Normally it is the Community's responsibility to enter into commitments with third countries; however, in the absence of a 'Community clause' in the Berne and Rome Conventions, the Community is not at present able to do this (the Conventions are open only to accession by States - Articles 1 and 29 of the Berne Convention, Article 24 of the Rome Convention), and the Member States would exercise a delegated power in the areas for which the Community was responsible. Consequently, since the Community would be unable to exercise full external powers, the Member States would be obliged to conduct an external policy which also protected the interests of the Community.

- for relations with authors and performers

Since this would be a Community measure with no direct effect on individuals, it would not be possible for individual authors and performers to rely upon it before the Member States' courts in the absence of national rules incorporating the conventions into the national legal systems.

III. Means of implementing harmonization

In theory, for the implementation of this harmonization at Community level, several options are open:

a) incorporation in a Community text of the provisions of the international conventions;

b) a specific reference to the contents of those conventions.

Incorporation of the text of the two conventions in the form of Community directives would seem to be the simplest and most direct approach. However, this would inevitably lead to the Community publishing a kind of codified version of these texts which would not only duplicate the original conventions but would also entail obvious problems of dialogue with the third countries which have acceded to those conventions. The resulting confusion would make it even harder for the parties to refer to the various aspects of the rights which concerned them. Since the essential aim is not to reformulate or restructure the existing texts, it is perhaps more prudent to retain them as they are.

This option, which is also the Commission's choice, could take the form of adopting an act stating explicitly that the Community has competence in this area and referring to the content of the abovementioned international conventions. With this in mind, the text of the proposal should contain an explicit declaration to this effect, and, for reasons of transparency, should relegate the text of the conventions to an annex. The Commission's services might argue that such competence results directly from their proposals on the basis of the treaty and the case law of the Court of Justice. Unfortunately, knowledge of Community law is not sufficiently widespread to entitle the Community to expect everybody, and not merely public administrations, to be aware of the 'Community' implications of the obligations set out in the text proposed by the Commission. This is the justification for tabling two connected amendments in the operative part and in the recitals of the proposal.

A second problem is the choice of legal bases for the proposed Community act. Your rapporteur considers that this would be one of the rare cases in which all the above-mentioned legal bases should be used, in view of the scope of the field under consideration and the aims pursued by the provisions of the two conventions. Having said that, as is clear from the Court's case law on this subject[7], it is clear that Article 100a has precedence over the other legal bases and that the cooperation procedure applies.

The third possible problem is the type of act to be used, in view of the fact that the Commission has proposed a decision, whereas the effect of adopting this proposal would bear more resemblance to that of a Community directive. In fact, while on the one hand the requirement of acceding to or conforming with international conventions is a precise obligation which offers no choice to the national legislatures, the ratification of these conventions permits Member States to adopt different solutions, particularly in those fields where conventions allow for reservations and the Community has not curtailed this right. For this reason, your rapporteur proposes the adoption of an amendment converting the proposal for a decision into a proposal for a directive.

Finally, it would be advisable to eliminate certain wide disparities in the laws of the Member States in respect of artists' rights. These concern, in particular, reservations pursuant to Article 16(A) (i) and (ii).

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[7] Judgment of the Court of Justice of 11 June 1991? in Case 300/89, 'Titanium Dioxide' (not yet published).

OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Youth, Culture, Education, the Media and Sport
for the Committee on Legal Affairs and Citizens' Rights

Draftsman: Mrs Birgit BJØRNVIG

At its meeting of 19 March 1991 the Committee on Youth, Culture, Education, the Media and Sport appointed Mrs Bjørnvig draftsman.

At its meeting of 3 May 1991 it considered the draft opinion.

At its meeting of 24 September 1991 it adopted the conclusions as a whole unanimously.

The following took part in the vote: Barzanti, chairman; Simeoni, first vice-chairman, for Bjornvig, rapporteur; Fayot, second vice-chairman; Banotti, third vice-chairman; Barrera I Costa, Barton (for Buchan), Dührkop-Dührkop, Elliott, Maibaum (for Galle), Gröner, Hermans, Kellett-Bowman (for Stewart-Clark), Oostlander, Rawlings and Roth.

In 1988 the Commission published a Green Paper on copyright and the challenge of technology (COM(88) 172 final). This was a consultative document designed to open up as wide a debate as possible with professional circles both at Community and international level on the problem of copyright. The Commission considered it necessary, before putting forward specific proposals in this area, to seek the opinions of all the people and sectors concerned in order to be able to consider the interests at stake, i.e. the interests of authors, creators, artists, cultural industries and consumers, and to pinpoint the areas where priority action is needed.

In January 1991, as a follow-up to this Green Paper, the Commission submitted a working programme in the field of copyright and neighbouring rights (COM(90) 584 final).

In the annex to this working programme, the Commission proposes a series of legislative measures to take effect by 31 December 1991. The above proposal is the first measure on this list.

In view of the increasingly important role played by copyright and neighbouring rights, and in view of the disparities in national legislation in this area, the above Commission proposal aims both to provide a minimum level of copyright protection and to recognize the rights of performing artists. It should:

- in view of the 1993 single market, remove the existing obstacles to the free movement of goods and avoid distortions of competition prejudicial to the economic and cultural interests involved;

- help to combat audio-visual piracy;

- create a common basis for harmonization on which to 'pursue more easily the construction of the Community edifice as regards copyright and neighbouring rights'.

The committee shares the Commission's view that, in the light of the internationalization of problems related to copyright and neighbouring rights, greater protection of these rights must be sought at international level. The accession of all the Member States to the Berne and Rome Conventions is likely to achieve this end. The deadline for accession by the Member States to the two conventions must be 31 December 1992, the date scheduled for the completion of the internal market.