



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on rental right and lending right and on certain rights related to copyright in the field of
intellectual property**

(Codified version)

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. In the context of a people's Europe, the Commission attaches great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him.

This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules.

For this reason a codification of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

2. On 1 April 1987 the Commission therefore decided¹ to instruct its staff that all legislative acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they are responsible, to ensure that the Community rules are clear and readily understandable.

3. The Conclusions of the Presidency of the Edinburgh European Council (December 1992) confirmed this², stressing the importance of codification as it offers certainty as to the law applicable to a given matter at a given time.

Codification must be undertaken in full compliance with the normal Community legislative procedure.

Given that no changes of substance may be made to the instruments affected by codification, the European Parliament, the Council and the Commission have agreed, by an interinstitutional agreement dated 20 December 1994, that an accelerated procedure may be used for the fast-track adoption of codification instruments.

4. The purpose of this proposal is to undertake a codification of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property³. The new Directive will supersede the various acts incorporated in it⁴; this proposal fully preserves the content of the acts being codified and hence does no more than bring them together with only such formal amendments as are required by the codification exercise itself.

¹ COM(87) 868 PV.

² See Annex 3 to Part A of the Conclusions.

³ Carried out pursuant to the Communication from the Commission to the European Parliament and the Council – Codification of the Acquis communautaire, COM(2001) 645 final.

⁴ See Annex I, Part A of this proposal.

5. The codification proposal was drawn up on the basis of a preliminary consolidation, in all official languages, of Directive 92/100/EEC and the instruments amending it, carried out by the Office for Official Publications of the European Communities, by means of a data-processing system. Where the Articles have been given new numbers, the correlation between the old and the new numbers is shown in a table contained in Annex II to the codified Directive.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on rental right and lending right and on certain rights related to copyright in the field of intellectual property

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47 (2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee⁵,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁶,

Whereas:



- (1) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property⁷ has been substantially amended several times⁸. In the interests of clarity and rationality the said Directive should be codified.

↓ 92/100/EEC Recital 4

- (2) Rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films. Piracy is becoming an increasing threat.

⁵ OJ C , , p. .

⁶ OJ C , , p. .

⁷ OJ L 346, 27.11.1992, p. 61. Directive as last amended by Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10).

⁸ See Annex I, Part A.

↓ 92/100/EEC Recital 5 (adapted)

- (3) 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, distribution right, right to broadcast and communication to the public can accordingly be considered as being of fundamental importance for the economic and cultural development ☒ of the Community ☒ .

↓ 92/100/EEC Recital 6

- (4) Copyright and related rights protection must adapt to new economic developments such as new forms of exploitation.

↓ 92/100/EEC Recital 7

- (5) The creative and artistic work of authors and performers 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. The possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned.

↓ 92/100/EEC Recitals 8 and 9 (adapted)

- (6) These creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons. ☒ To the extent that these activities principally constitute services, their provision and their ☒ pursuit ☒ should ☒ be made easier by providing harmonised legal protection within the Community.

↓ 92/100/EEC Recital 10

- (7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

↓ 92/100/EEC Recital 11 (adapted)

- (8) The legal framework of the Community on the rental right 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 rightholders and further to establishing the rights of fixation, distribution, broadcasting and communication to the public for certain groups of rightholders in the field of related rights protection.

↓ 92/100/EEC Recital 12

- (9) It is necessary to define the concepts of rental and lending for the purposes of this Directive.
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↓ 92/100/EEC Recital 13
(adapted)

- (10) It is desirable, with a view to clarity, to exclude from rental and lending within the meaning of this Directive certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use. Lending within the meaning of this Directive ☒ should ☒ not include making available between establishments which are accessible to the public.
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↓ 92/100/EEC Recital 14

- (11) Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive.
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↓ 92/100/EEC Recital 15

- (12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must retain the possibility to entrust the administration of this right to collecting societies representing them.
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↓ 92/100/EEC Recitals 16 and 17
(adapted)

- (13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. ☒ It should ☒ take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.

↓ 92/100/EEC Recital 18
(adapted)

- (14) It is also necessary to protect the rights at least of authors as regards public lending by providing for specific arrangements. However, any measures ☒ taken by derogation from the exclusive public lending right should ☒ comply in particular with Article ☒ 12 ☒ of the Treaty.

↓ 92/100/EEC Recital 19
(adapted)

- (15) The provisions ☒ laid down in this Directive as to rights related to copyright should ☒ not prevent Member States from extending ☒ to those exclusive rights ☒ the presumption ☒ provided for in this Directive with regard to contracts concerning film production concluded individually or collectively by performers with a film producer. ☒ r. Furthermore ☒ those ☒ provisions ☒ should ☒ not prevent Member States from providing for a rebuttable presumption of the authorisation of exploitation in respect of the exclusive rights of performers provided for ☒ in the relevant provisions of this Directive ☒ , in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter referred to as the Rome Convention).

↓ 92/100/EEC Recital 20
(adapted)

- (16) Member States ☒ should be able to ☒ provide for more far-reaching protection for owners of rights related to copyright than that required by ☒ the provisions laid down in ☒ this Directive ☒ in respect of broadcasting and communication to the public ☒ .

↓ 92/100/EEC Recital 21

- (17) The harmonised rental and lending rights and the harmonised 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 or in a way which is contrary to the rule of media exploitation chronology, as recognised in the judgment handed down in *Société Cinéthèque v. FNCF*⁹.

⁹ Cases 60/84 and 61/84 [1985] ECR 2605.



- (18) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B,
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↓ 92/100/EEC

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

RENTAL AND LENDING RIGHT

Article 1

Object of harmonisation

1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).

↓ 92/100/EEC (adapted)

⊗ 2. The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 3(1). ⊗

⊗ *Article 2* ⊗

⊗ **Definitions** ⊗

1. For the purposes of this Directive ⊗ the following definitions shall apply: ⊗

- ⊗ (a) ⊗ “rental” means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage;
- ⊗ (b) ⊗ “lending” means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public;
- ⊗ (c) “film” means a cinematographic or audiovisual work or moving images, whether or not accompanied by sound. ⊗

↓ 92/100/EEC Art. 2(2) (adapted)

⊗ 2. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors. ⊗

↓ 92/100/EEC (adapted)

Article 3

Rightholders and subject matter of rental and lending right

1. The exclusive right to authorise or prohibit rental and lending shall belong ⊗ to the following ⊗ :

- (a) the author in respect of the original and copies of his work;
- (b) the performer in respect of fixations of his performance;
- (c) the phonogram producer in respect of his phonograms;
- (d) the producer of the first fixation of a film in respect of the original and copies of his film.

2. This Directive ⊗ shall ⊗ not cover rental and lending rights in relation to buildings and to works of applied art.

↓ 92/100/EEC

3. The rights referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences.

4. Without prejudice to paragraph 6, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 5.

5. Member States may provide for a similar presumption as set out in paragraph 4 with respect to authors.

6. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 5. Member States may also provide that this paragraph shall apply *mutatis mutandis* to the rights included in Chapter II.

Article 4

Rental of computer programs

↓ 92/100/EEC (adapted)

This Directive shall be without prejudice to Article 4(c) of Council Directive 91/250/EEC¹⁰.

↓ 92/100/EEC

Article 5

Unwaivable right to equitable remuneration

1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.
2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.
3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.
4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

Article 6

Derogation from the exclusive public lending right

1. Member States may derogate from the exclusive right provided for in Article 1(1) in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.
2. Where Member States do not apply the exclusive lending right provided for in Article 1(1) as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.
3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.

¹⁰ OJ L 122, 17.5.1991, p. 42.

CHAPTER II

RIGHTS RELATED TO COPYRIGHT

Article 7

Fixation right

1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances.
2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.

Article 8

Broadcasting and communication to the public

1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.
2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.
3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Article 9

Distribution right

↓ 92/100/EEC (adapted)

1. Member States shall provide ☒ the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter “the distribution right”: ☒

- (a) for performers, in respect of fixations of their performances;
 - (b) for phonogram producers, in respect of their phonograms;
 - (c) for producers of the first fixations of films, in respect of the original and copies of their films;
 - (d) for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2).
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↓ 92/100/EEC

2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.

3. The distribution right shall be without prejudice to the specific provisions of Chapter I, in particular Article 1(2).

4. The distribution right may be transferred, assigned or subject to the granting of contractual licences.

Article 10

Limitations to rights

↓ 92/100/EEC

1. Member States may provide for limitations to the rights referred to in this Chapter 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 organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

↓ 2001/29/EC Art. 11(1)(b)
(adapted)

3. The limitations ☒ referred to in paragraphs 1 and 2 ☒ shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

↓ 92/100/EEC (adapted)

CHAPTER III

COMMON PROVISIONS

Article 11

Application in time

1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to ☒ herein ☒ which ☒ were ☒ , on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or ☒ which ☒ ☒ met ☒ the criteria for protection under ☒ this Directive ☒ on that date.

↓ 92/100/EEC

2. This Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

↓ 92/100/EEC (adapted)

3. Member States may provide that the rightholders are deemed to have given their authorisation to the rental or lending of an object referred to in ☒ points (a) to (d) of ☒ Article 3(1) which is proven to have been made available to third parties for this purpose or to have been acquired before 1 July 1994.

↓ 92/100/EEC

However, in particular where such an object is a digital recording, Member States may provide that rightholders shall have a right to obtain an adequate remuneration for the rental or lending of that object.

↓ 92/100/EEC (adapted)

4. Member States ☒ may ☒ not apply the provisions of Article 2(2) to cinematographic or audiovisual works created before 1 July 1994.

5. This Directive shall, without prejudice to paragraph 3 and subject to paragraph 7, not affect any contracts concluded before ☒ 19 November 1992 ☒.

↓ 92/100/EEC

6. Member States may provide, subject to the provisions of paragraph 7, that when rightholders who acquire new rights under the national provisions adopted in implementation of this Directive have, before 1 July 1994, given their consent for exploitation, they shall be presumed to have transferred the new exclusive rights.

↓ 92/100/EEC

7. For contracts concluded before 1 July 1994, the unwaivable right to an equitable remuneration provided for in Article 5 shall apply only where authors or performers or those representing them have submitted a request to that effect before 1 January 1997. In the absence of agreement between rightholders concerning the level of remuneration, Member States may fix the level of equitable remuneration.

Article 12

Relation between copyright and related rights

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

↓ 92/100/EEC (adapted)

Article 13

⊠ Communication ⊠

Member States shall communicate to the Commission the main provisions of ⊠ national ⊠ law ⊠ adopted ⊠ in the field covered by this Directive.

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Article 14

Repeal

Directive 92/100/EEC, as amended by the Directives listed in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 15

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

↓ 92/100/EEC (adapted)

Article 16

⊠ Addressees ⊠

↓ 92/100/EEC

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President



ANNEX I

Part A

Repealed Directive with its successive amendments (referred to in Article 14)

Council Directive 92/100/EEC
(OJ L 346, 27.11.1992, p. 61)

Council Directive 93/98/EEC
(OJ L 290, 24.11.1993, p. 9)

Article 11(2) only

Directive 2001/29/EC of the European
Parliament and of the Council
(OJ L 167, 22.6.2001, p. 10)

Article 11(1) only

Part B

List of time-limits for transposition into national law (referred to in Article 14)

Directive	Time-limit for transposition
92/100/EEC	1 July 1994
93/98/EEC	1 July 1995
2001/29/EC	22 December 2002

ANNEX II
CORRELATION TABLE

Directive 92/100/EEC	This Directive
Article 1(1)	Article 1(1)
Article 1(2)	Article 2(1), introductory words and point (a)
Article 1(3)	Article 2(1), point (b)
Article 1(4)	Article 1(2)
Article 2(1), introductory words	Article 3(1), introductory words
Article 2(1), first indent	Article 3(1)(a)
Article 2(1), second indent	Article 3(1)(b)
Article 2(1), third indent	Article 3(1)(c)
Article 2(1), fourth indent, first sentence	Article 3(1)(d)
Article 2(1), fourth indent, second sentence	Article 2(1), point (c)
Article 2(2)	Article 2 (2)
Article 2(3)	Article 3(2)
Article 2(4)	Article 2(3)
Article 2(5)	Article 2(4)
Article 2(6)	Article 2(5)
Article 2(7)	Article 2(6)
Article 3	Article 4
Article 4	Article 5
Article 5(1) to (3)	Article 6(1) to (3)
Article 5(4)	-
Article 6	Article 7
Article 8	Article 8
Article 9(1), introductory words and final words	Article 9(1), introductory words
Article 9(1), first indent	Article 9(1)(a)
Article 9(1), second indent	Article 9(1)(b)
Article 9(1), third indent	Article 9(1)(c)
Article 9(1), fourth indent	Article 9(1)(d)

Article 9(2), (3) and (4)	Article 9(2), (3) and (4)
Article 10(1)	Article 10(1)
Article 10(2), first sentence	Article 10(2), first subparagraph
Article 10(2), second sentence	Article 10(2), second subparagraph
Article 10(3)	Article 10(3)
Article 13(1) and (2)	Article 11(1) and (2)
Article 13(3), first sentence	Article 11(3), first subparagraph
Article 13(3), second sentence	Article 11(3), second subparagraph
Article 13(4)	Article 11(4)
Article 13(5)	-
Article 13(6)	Article 11(5)
Article 13(7)	Article 11(6)
Article 13(8)	-
Article 13(9)	Article 11(7)
Article 14	Article 12
Article 15(1)	-
Article 15(2)	Article 13
-	Article 14
-	Article 15
Article 16	Article 16
-	Annex I
-	Annex II
