REPORT

from : Presidency

to : Permanent Representatives Committee

No. prev. doc.: 9469/92 PI 104 CULTURE 103
No. Cion prop.: 5509/92 PI 33 CULTURE 21

Subject: Proposal for a Council Directive harmonizing the term of protection of copyright and of certain related rights

A. Introduction

1. Under cover of a letter dated 23 March 1992, the Commission submitted to the Council a proposal for a Council Directive harmonizing the term of protection of copyright and of certain related rights. The proposal is based on Articles 57(2), 66, 100a and 113 of the Treaty establishing the European Economic Community.

2. The Economic and Social Committee gave its opinion on the proposal on 2 July 1992. The European Parliament has not yet given its opinion.

3. The Working Party on Intellectual Property (Copyright) has examined the Commission's proposal at several meetings. Following this examination, the Presidency has identified four
key problems on which agreement has not yet been reached and which it submits to the Permanent Representatives Committee with suggested compromise solutions.

B. Term of protection of copyright and of certain related rights

4. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) provides that the term of copyright protection is to be 50 years "post mortem auctoris" (p.m.a.), i.e. the life of the author and 50 years after his death, while allowing the parties to the Convention to grant a longer term of protection. Of the Community Member States, Germany grants a term of protection of 70 years p.m.a., Spain has recently (1987) reduced its term of protection from 80 to 60 years p.m.a. and France grants a term of protection of 70 years p.m.a. for musical works but 50 years p.m.a. for other categories of works. The other Member States grant the Berne Convention minimum of 50 years p.m.a., although Belgium, France and Italy have introduced extensions in order to offset the effects of two world wars on the exploitation of authors' works. These differences between terms of protection give rise to barriers to trade and distortions of competition which the proposal for a Directive seeks to eliminate with a view to the completion of the internal market.

5. Although the basic term at present applied in the majority of Member States is 50 years p.m.a., a harmonized term of 50 years p.m.a. throughout the Community would require transitional arrangements in those Member States which at present grant longer terms, in order not to affect the acquired rights of authors and their heirs for whom terms of protection are currently running. The Commission has pointed out that these acquired rights must be maintained according to the case law of the Court of Justice. Such transitional arrangements could continue for as long as 70 years or more. In order to avoid such a long transitional period, during which barriers to trade would continue to exist, the Commission's proposal provides that the
The term of protection is to be harmonized at the length of the longest term at present applied in the Community, namely 70 years p.m.a.

6. With regard to related rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) provides for a minimum term of protection of 20 years for performers, producers of phonograms and broadcasting organizations. The terms of protection granted to these categories of rightholders in the Member States vary considerably, ranging from 20 to 50 years in those Member States which are parties to the Rome Convention, while other Member States which are not yet parties to that Convention give no protection at present to some or all of these categories of rightholders. Some Member States also grant a related right to film producers, whose term varies from 25 to 50 years. However, the substance of these related rights will be harmonized by the Directive on rental right and lending right and on certain rights relating to copyright in the field of intellectual property (rental Directive).

7. The Commission's proposal provides that the term of protection for all the related rights referred to above will be harmonized at the length of the longest term at present applied in the Community, namely 50 years, for practically the same reasons as set out in point 5 above in relation to copyright.

8. In the light of the considerations set out under point 5 above, the Presidency suggests that the package proposed by the Commission - a term of 70 years p.m.a. for copyright and a term of 50 years for the holders of the related rights mentioned - constitutes the most reasonable solution for Community harmonization.
C. Works first made available to the public after the expiry of copyright protection

9. The Berne Convention does not contain any specific provision concerning works first made available to the public after the death of the author (commonly known as "posthumous works"). Some Member States provide for a specific term of protection for such works irrespective of how many years have elapsed since the author's death. One Member State provides for a specific term of protection, provided that the work is first made available to the public within twenty years of the author's death. Other Member States exclude any protection once normal copyright protection has expired.

10. Under the Commission's proposal, the normal term of copyright protection (70 years p.m.a.) would apply where the work is made available to the public before the expiry of that term, but no provision is made for protection if the work is first made available to the public after the expiry of that term.

11. In the light of the positions taken by the various delegations, the Presidency suggests a compromise solution with the following elements:

(a) a provision for protection of works first made available to the public after the expiry of normal copyright protection would be included in the Directive;

(b) this provision would apply only where the work was first lawfully made available to the public within 50 years after the expiry of normal copyright protection (this limitation is intended to make the provision more acceptable to those delegations which have reservations on such a provision);
(c) the protection granted would not be copyright protection, but would be equivalent to the economic rights of copyright;

(d) the term of this protection would be 50 years from the date when the work was first lawfully made available to the public (corresponding to the longest term at present applied by any Member State in such circumstances);

(e) the first owner of the right would be the person who first lawfully made the work available to the public.

This provision could be worded as follows:

"Works which are lawfully made available to the public within 50 years after the expiry of copyright in accordance with the provisions of Article 1 and which have not previously been made available to the public shall receive a protection equivalent to the economic rights of copyright. That protection shall begin on the date on which the work is lawfully made available to the public and shall end 50 years after that date. The first owner of these rights shall be the person who made the work lawfully available to the public."

D. Photographs

12. The Berne Convention provides for a minimum term of protection of 25 years from the making of a photographic work. Some Member States have a term of protection for photographic works equivalent to the normal term of copyright protection and a shorter term for "ordinary" photographs; other Member States have a term of protection for photographic works equivalent to the normal term of copyright protection but no protection for 2 France applies a longer term (70 years) to musical works only, but account would be taken of this in a provision ensuring that the Directive would not have the effect of shortening terms of protection already running.

9636/92
"ordinary" photographs; and other Member States make no distinction between photographic works and "ordinary" photographs, applying the normal term of copyright protection.

13. In the light of these differences, the Commission's proposal provides that all photographs protected under the laws of the Member States, however protected, should have the normal term of copyright protection: this would allow Member States to continue to determine whether or not they distinguish between photographic works and "ordinary" photographs for purposes other than term of protection, and would ensure that a single term applied throughout the Community.

14. However, opinion is divided on this solution, and it has been pointed out that it has the disadvantage that it would allow some Member States to continue not to protect "ordinary" photographs, which are protected in other Member States.

15. In the light of the various positions of the Member States, the Presidency suggests the following compromise solution:

(a) the term of protection for protected photographs would be the normal term of copyright protection;

(b) those Member States which do not at present protect ordinary photographs would be obliged to introduce protection for them.

Any other solution would either have the disadvantage referred to in point 14 above, or would involve a reduction in the term of protection for "ordinary" photographs in those Member States which at present apply the normal term of copyright protection to them, with the need for a long transitional period as pointed out under point 5 above.
The corresponding provision could be worded as follows:

"Protected photographs shall have the term of protection provided for in Article 1. Member States which, on the date of adoption of the present Directive do not protect ordinary photographs shall introduce such a protection".

E. Application in time

16. Under the Commission's proposal, the Directive will apply to rights which have not expired on or before 31 December 1994.

17. However, several delegations have requested that consideration be given to the possibility of reviving protection which has expired in one or more Member States in cases where that protection would not have expired had the Directive already been in force. These delegations have pointed out that, in the absence of such revival of protection, there would be a long transitional period during which particular works and other subject matter would continue to be protected in one or more Member States, but would no longer be protected in other Member States as a result of expiry of protection before 31 December 1994. The internal market would be subject to distortions during this transitional period.

Other delegations have expressed reservations on the possibility of reviving rights which have expired.

18. The Presidency considers that, if harmonization of the term of protection of copyright and of the related rights covered by the Directive, with the resulting removal of barriers to trade within the Community, is to be achieved reasonably rapidly, account should be taken of the above request. A provision should therefore be included in the Directive to ensure that the protection resulting from this Directive, as well as that resulting from the rental Directive, will apply throughout the Community as from the date of transposition, irrespective of any shorter terms of protection.
that have expired. This provision would not retrospectively make illegal any acts carried out before the Directive took effect.

The corresponding provision could be drafted as follows:

"This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films which on [1 July 1994] would have been in protection had the present Directive and Directive .../.../EEC (Rental) been in force".

Provisions concerning the safeguard of acquired rights of third parties who have acted in good faith on the assumption that particular works would remain in or come into the public domain will be prepared at Working Party level.

F. Conclusions

19. The Permanent Representatives Committee is invited to examine and pronounce on the compromise solutions set out in points 8, 11, 15 and 18 above, in preparation for the policy debate envisaged at the session of the Council (Internal Market) on 10 November 1992.

---

3 Proposed date of transposition of the rental Directive and likely date of transposition of this Directive.