REPORT

from : Presidency

to : Council

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No. Com 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 Commission's proposal has been examined by the Working Party on Intellectual Property (Copyright) at several meetings and by the Permanent Representatives Committee. Following this examination, the Presidency has identified four key issues on
which agreement has not yet been reached and which it submits to
the Council, together with suggested compromise solutions, for a
policy debate. Although there are other significant questions on
which agreement has not yet been reached, the Presidency
considers that it would be premature to bring them before
Council at this stage.

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

4.1. 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.

4.2. 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).

5. Although the basic term of protection for copyright 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 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.

The Commission’s proposal also provides that the term of protection for all the related rights referred to under point 4.2. 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 above in relation to copyright.

The Commission has informed the Permanent Representatives Committee that the European Parliament’s Legal Affairs Committee will recommend this solution of 70 years p.m.a. for copyright and 50 years for related rights to the Plenary.
6. Delegations are divided between the Commission's proposal and minimum harmonization for copyright at 50 years p.m.a., with the possibility for Member States to maintain or introduce a longer term.

7. The Presidency recognizes that an ideal solution is hard to find. However, it considers that a minimum harmonization proposal would achieve nothing, since it would merely perpetuate the present situation, which the Directive is intended to remedy. In the light of the considerations set out 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 more reasonable solution from the point of view of the internal market.

C. Works first made available to the public after the expiry of copyright protection

8. 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.

9. 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.
10. Some delegations are in favour of providing for protection for such works irrespective of how many years have elapsed since the expiry of normal copyright protection; other delegations are opposed to such protection; other delegations, while preferring not to provide for such protection, would have less difficulty in accepting it if it were to be limited to works first made available to the public within a specified number of years after the expiry of normal copyright protection.

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;

(c) the protection granted would not be copyright protection, but would be a related right 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.

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.
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."

The Commission has informed the Permanent Representatives Committee that the European Parliament's Legal Affairs Committee will propose a similar amendment to the Plenary.

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 "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, and of the difficulty of finding an objective criterion that could easily be applied for distinguishing between photographic works and "ordinary" photographs, 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.
The Commission has informed the Permanent Representatives Committee that the European Parliament's Legal Affairs Committee has not proposed any amendment to this proposal.

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.

The Presidency recognizes that for some Member States this is not an ideal solution. However, 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".

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E. Application in time

16. In view of the different terms applicable at present in Member States, when the Directive comes into force certain works will still be in copyright or related rights protection in one or more Member States, while in the other Member States that protection will already have expired. Since it is proposed that the terms be harmonized at the length of the longest terms at present applied in the Community, several delegations have suggested that provision be made for reviving the protection that has already expired in such cases. 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 the transposition of the Directive. 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.

17. 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, serious consideration should be given to the inclusion in the Directive of a provision providing for the revival of protection in such cases. This provision would not retrospectively make illegal any acts carried out before the Directive took effect, and it is accepted that 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.
The Commission has informed the Permanent Representatives Committee that the European Parliament's Legal Affairs Committee will propose an amendment to this effect to the Plenary.

F. Conclusions

18. The Council is invited to examine the issues set out in sections B to E above and consider the compromise solutions put forward in points 7, 11, 15 and 17 above, with a view to facilitating the adoption of a common position at the earliest possible date once the European Parliament has given its opinion.