SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 15 January 1993

No. prev. doc.: 4483/93 PI 9 CULTURE 8
No. Com. prop.: 4483/93 PI 9 CULTURE 8

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

1. At its meeting held on 15 January 1993, the Working Party on Intellectual Property (Copyright) examined Articles 2 to 6 of the above proposal on the basis of the consolidated text contained in 4398/93 PI 7 CULTURE 6, Annex I.

2. The Commission services also made available advance copies of the Commission's amended proposal, which has since been circulated under reference 4483/93 PI 9 CULTURE 8. The Commission representative pointed out that the stage reached in the Working Party's discussions on a number of points was reflected more accurately in the consolidated text than in the Commission's amended proposal, since the European Parliament had not proposed amendments corresponding to the consolidated text on these points; however, this would not prevent the Commission services from continuing to negotiate.
on the basis of the consolidated text, with a view to the adoption by the Council of a common position as soon as possible.

**Article 2(1)**

3. The Working Party noted that several words had been omitted from the English-language version of this provision in the Commission's amended proposal.

4. Following questions by the Belgian delegation as to the difference between the terms "the first lawful publication of the fixation of the performance" and "the first lawful communication to the public of the performance" in the consolidated text, the Commission representative was invited to prepare a recital explaining these terms. The Belgian and Portuguese delegations expressed scrutiny reservations on paragraph 1 pending examination of that recital; the scrutiny reservation of the Portuguese delegation also extended to paragraph 2.

5. The French delegation asked whether the term of protection provided for in Article 2(1) would apply where a performance took place in a third country and a fixation of that performance was made and published in that third country. The Commission representative replied that in the case of a performer who was a Community national, Article 2(1) would apply irrespective of whether the events concerned took place in the Community or in a third country; in the case of a performer who was not a Community national, the application of Article 2(1) would depend upon the conditions of Article 4(3) being met.

6. The United Kingdom delegation drew attention to an anomaly resulting from Article 2(1) and (2): in the event of a fixation of a performance being broadcast before that
fixation was published, the rights of the performers would expire under Article 2(1) before the expiry of the rights of the producer of the same fixation under Article 2(2). The Commission representative was invited to consider the possibility of an additional provision which would prolong the rights of the performers until the expiry of the rights of the phonogram producer in such a case.

Article 2(3)

7. The United Kingdom and Irish delegations expressed reservations on this paragraph pending discussion of Article 1bis (Cinematographic or audiovisual works).

Article 2bis

8. The Commission representative explained that the consolidated text of this provision in Annex I of 4398/93, which had been drawn up following the discussion in the Internal Market Council on 10 November 1992 and following the adoption of the European Parliament's opinion on 19 November 1992, and which corresponded to the Commission's amended proposal, contained the following changes in relation to the previous non-paper (Annex I of 4196/93):

- this provision had been moved from Article 1bis to Article 2bis, making it clear that the protection provided for was not copyright protection, but that of a related right; in this respect, the Commission had accepted the substance of amendment No. 9 proposed by the European Parliament, but not that of amendment No. 7;

- the term of protection now proposed was 25 years, as proposed by the European Parliament in amendment No. 9.

A possible provision to this effect appears as Article 2(5) in 4465/93 PI 8 CULTURE 7.
9. The Netherlands and Portuguese delegations expressed reservations on the need for a provision of this nature.

10. The Luxembourg delegation considered that this provision was too general, and that its scope should be limited.

11. Following a question from the Greek delegation as to the relationship between this provision and Article 1(1), the Commission representative explained that where a work was first lawfully made available to the public in the seventy years which followed the death of the author, Article 1(1) would apply; where a work was first lawfully made available to the public after the expiry of this seventy-year period from the death of the author, Article 2bis would apply.

12. The French delegation, supported by the Belgian and Irish delegations, considered that the combination of Articles 1(1) and 2bis would mean that a work first lawfully made available to the public shortly before the expiry of the seventy-year period from the death of the author would enjoy a shorter term of protection than if it were not published until after the expiry of that period; thus a work first published 65 years after the death of the author would enjoy a term of protection of only five years, while a work first published 75 years after the death of the author would enjoy a term of protection of 25 years. These delegations considered that a provision should be added to ensure that works first lawfully made available to the public shortly before the expiry of the 70-year period set out in Article 1(1) did not receive a shorter period of protection than works covered by Article 2bis. The Belgian delegation reserved the right to submit a written proposal to this effect.
The German delegation was prepared to consider a proposal of this nature if it were supported by a majority of delegations.

The Commission representative pointed out that the purposes of Article 1(1) and Article 2bis were different: the purpose of Article 1(1) was to safeguard the interests of the author and his heirs during his lifetime and for a certain period after his death; once that period had expired, the main interest to be taken into consideration was the interest of the public in the publication of newly-discovered works, which Article 2bis was intended to encourage. He also pointed out that the Directive would have the effect of increasing the term of copyright protection in most Member States from 50 to 70 years after the death of the author, and therefore saw no need to provide for an additional term of protection for works first published towards the end of this term. This view was shared by the Danish, Netherlands, Portuguese and United Kingdom delegations.

13. The United Kingdom delegation noted that the condition, which had been included in the compromise solution put to the Internal Market Council by the United Kingdom Presidency (9836/92 PI 114 CULTURE 114, point 11), that 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, did not appear in the consolidated text or the Commission's amended proposal. This delegation and the Danish delegation entered a reservation on the absence of this condition, considering that without it Article 2bis would imply latent copyright protection for an indefinite period.
The Commission representative stated that this condition had not been included in the consolidated text or in the Commission's amended proposal in the light of the objections made to it in the Internal Market Council. Moreover, it had been made clear that the right conferred by Article 2bis was not copyright, but a related right. It should also be borne in mind that the term now proposed was 25 years, not 50 or 70 years as envisaged earlier.

14. The French delegation expressed a reservation on the nature of the protection conferred by Article 2bis, considering that it should be copyright protection rather than a related right. It feared in particular that in the event of infringement of this right, the sanctions available for copyright infringement could not be applied.

The Commission representative drew attention to the purpose of Article 2bis (see point 12 above), which justified a related right rather than copyright. He also indicated that, since this provision specified that the protection would be "equivalent to the economic rights of the author", the sanctions available for copyright infringement could be applied.

15. The Belgian delegation withdrew the reservation which it had made in the Internal Market Council in respect of the protection under this provision being equivalent to the economic rights of the author.

16. The Italian delegation, while welcoming the fact that it had now been made clear that the right conferred by this provision was a related right, considered it unnecessary to specify that the protection was "equivalent to the economic rights of the author" and expressed a reservation in this respect.
The Commission representative pointed out that without this element, Member States would be free to determine the contents of this right, with the danger that different contents in different Member States could disrupt the free flow of the works concerned within the Community.

17. The French, Greek and Irish delegations expressed a reservation with regard to the term of 25 years proposed, considering that the term should be at least 50 years.

The German and Italian delegations were prepared to consider a term of 50 years, but could accept a term of 25 years.

The Belgian, Danish and United Kingdom delegations were prepared to accept a term of 25 years as a reasonable compromise between the position of those who considered a provision of this nature to be unnecessary and the position of those who advocated a term of 50 years or more.

18. The Italian delegation asked whether the category of works known under Italian law as "critical works" would fall under this provision. The Commission representative considered that this category of works would be covered by the concept of collections of works as provided for in Article 2(5) of the Berne Convention, and therefore was more likely to fall under Article 1 of the Directive.

19. In this context, the German delegation considered that the category of works known under German law as "scientific works", which were protected by a related right, were not covered by this Directive. The Commission representative stated that if Article 2bis were adopted, all Member States would have to adopt a provision covering all works,
including scientific works, which were first lawfully made available to the public after the expiry of copyright protection.

20. The United Kingdom delegation asked for confirmation that the Directive would not affect the United Kingdom’s “published edition right”. The Commission representative stated that the United Kingdom would have to provide for protection under Article 2bis of the Directive; to the extent that the "published edition right" overlapped the right provided for under Article 2bis, the latter would prevail; to the extent that it did not overlap, it could be maintained in United Kingdom law.

21. In the light of the discussion of this Article, the Chairman appealed to delegations to consider the consolidated text as a reasonable compromise between the various positions.

Article 3

22. The Danish, German, French and United Kingdom delegations considered that this provision, which was unchanged from the Commission’s original proposal, was insufficient, since it would allow some Member States to continue to protect photographic works only, to the exclusion of "ordinary" photographs, which are protected in other Member States. Attention was drawn to the compromise solution put forward by the United Kingdom Presidency, whereby a sentence would be added obliging those Member States which do not at present protect "ordinary" photographs to introduce protection for them (9836/92 PI 114 CULTURE 114, point 15).
The Commission representative pointed out that the solution put forward by the United Kingdom Presidency had not been included in either the consolidated text or the Commission's amended proposal since there had been insufficient consensus in favour of it at the Internal Market Council, and since the European Parliament had made no proposal to this effect.

The Italian, Netherlands and Portuguese delegations expressed a preference for the Commission's proposal, considering that there was no need to harmonize the categories of photographs to be protected. The Greek delegation was also not in favour of protecting "ordinary" photographs.

The Belgian delegation considered that both the Commission's proposal and the United Kingdom Presidency solution had the disadvantage of not distinguishing between copyright protection and protection by rights related to copyright.

23. The Danish delegation suggested orally an alternative solution for this Article. Other delegations reserved their positions on this alternative solution until they had seen it in writing.

Article 4(1)

24. The Danish, German, French, Irish, Netherlands and United Kingdom delegations expressed scrutiny reservations on the need for this paragraph, considering that it would be unnecessary if Articles 1 to 3 made it clear when the terms concerned began to run, and pointing out that the Commission services had been invited to provide written

\[\text{This alternative solution has since been submitted in writing, and has been incorporated in 4465/93 PI 8 CULTURE 7 as Variant 2 of Article 3.}\]
explanations of how Article 4(1) was intended to operate in relation to those Articles (4196/93 PI 3 CULTURE 1, point 30).

The Commission representative stated that the Commission services could not provide such written explanations until a consensus had been reached on the contents of Articles 1 to 3.

**Article 4(2), (3) and (4)**


The Commission representative considered that Article 113 was necessary as a legal basis for the external aspects covered in Article 4(2), (3) and (4).

The representative of the Council Legal Service considered that there were no elements in the proposed Directive, including Article 4, that concerned exchanges of goods with third countries, and that therefore Article 113 was not necessary as a legal basis.

In the light of this statement, all delegations considered that Article 113 should be deleted from the legal basis for the Directive.

The Commission representative expressed a reservation on this deletion.
Article 5

26. The French delegation expressed a preference for the Commission's amended proposal, based on an amendment proposed by the European Parliament, over the consolidated text. It feared that the consolidated text could be interpreted as meaning that there were be no protection between the date of the event which gave rise to a term of protection and 1 January of the following year.

The Working Party took note of this preference.

Article 6

27. The Irish and United Kingdom delegations maintained their reservation on the inclusion of a provision concerning moral rights in the Directive, pointing out that the Commission was still considering whether or not there was a need for Community action on moral rights in general. They considered that no evidence had been provided that any substantial problem had arisen in the field of moral rights with an effect on the operation of the internal market, and that inclusion of a provision of this nature in this Directive would be seen as a precedent for the Council accepting the need for Community action on moral rights.

The French delegation also maintained its reservation on the inclusion of a provision concerning moral rights in this Directive. Unlike the Irish and United Kingdom delegations, it was in favour of harmonization of the term of protection of moral rights, but considered that this should be done in an instrument covering all aspects of moral rights, rather than dealing with the term of moral rights in this Directive in isolation from the other aspects of moral rights.
The Portuguese delegation also expressed a reservation on this Article.

In the light of these reservations, the Commission representative put forward an oral suggestion for an alternative solution for this Article, which could take the form of either an operative provision or a recital.

The Working Party agreed to continue discussion of this Article at its next meeting when delegations would have had the opportunity to examine this alternative solution.

Other business

28. The Chairman invited delegations which wished to make written contributions to be considered at the Working Party's next meeting to forward them to the Secretariat as soon as possible.

29. It was agreed that the Secretariat would prepare a revised edition of the consolidated text, incorporating the reservations expressed at this meeting.

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This alternative solution has since been submitted in writing and has been incorporated in 4465/93 PI 8 CULTURE 7 as Variant 2 of Article 6.

This consolidated text has been circulated under reference 4465/93 PI 8 CULTURE 7.