TRANSLATION OF LETTER

from: Commission of the European Communities, signed by Mr Martin BANGEMANN

dated: 7 January 1993

to: Mr Uffe ELLEMAN JENSEN, President of the Council of the European Communities

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

Sir,

I would inform you that, in response to the European Parliament's Opinion, the Commission has decided, under Article 149(3) of the Treaty establishing the European Economic Community, to amend the proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, which it submitted to the Council on 23 March 1992 (COM(92) 33 final SYN 395).

The text of the amended proposal is enclosed.

(Complimentary close).

(s.) Martin BANGEMANN

Encl.: COM(92) 602 final SYN 395
COMMISSION OF THE EUROPEAN COMMUNITIES

Amended proposal for a

COUNCIL DIRECTIVE

HARMONIZING THE TERM OF PROTECTION
OF COPYRIGHT AND CERTAIN RELATED RIGHTS

(presented by the Commission pursuant to Article 149(3) of the EEC-Treaty)
EXPLANATORY MEMORANDUM


The Economic and Social Committee delivered its opinion on the proposal on 1 July 1992.

The European Parliament, consulted under the cooperation procedure, discussed the proposal in detail in its Committees. On 17 November 1992, it debated the report drawn up on behalf of the Committee on Legal Affairs and Citizen's rights by Mr. Bru Purón, voting in support of the proposed Directive as amended by Parliament on 19 November 1992.

The amended proposal for a Directive presented by the European Commission is intended to take into account the Opinion of the European Parliament. It contains three major modifications to the original proposal.

a) The copyright owners of cinematographic or audiovisual works are defined in a precise manner. Hence the ownership of such works is subject to total harmonization in conformity to the amendment of Parliament.

b) The protection of posthumous works is subject to a specific provision. As proposed by the amendment of Parliament a new related right is introduced in the proposal.

c) As regards the application in time, the Commission largely follows the amendment of Parliament and proposes that the provisions of the Directive receive a more immediate application. Acquired rights of third parties are however safeguarded.

The Commission accepts, in totality or in part, 11 out of 14 amendments of Parliament.

The three amendments which were not adopted by the Commission are in relation to Article 1:

a) Parliament proposes to add to paragraph 4 of Article 1 a provision allowing Member States to establish that certain court decisions shall be considered as presumptions of death. The very fact that such a provision is optional has the consequence of weakening the harmonizing effect of the whole paragraph. Furthermore, some Member States which do not have such presumptions would therefore not introduce them into their law.
b) Parliament proposes to introduce a derogation to the calculation of the term of protection for works published in volumes, parts, instalments, issues or episodes for which the term of protection is not calculated after the death of the author. Such a provision can only be applied in a limited number of cases and does not appear justified because the directive has the consequence that the term of protection will be longer in most of the Member States.

c) Parliament proposes two amendments concerning posthumous works. The first one states that a term of protection of 70 years after the publication shall be granted if the publication takes place before the end of the normal copyright term. This provision thus aims at prolonging the term of protection of copyright. Such a prolongation does not seem to be justified because if the heirs of an author have not taken the measures to ensure the publication of the work of their parent within a reasonable period of time, which would allow them to enjoy a long term of protection, it is not advisable to grant them additional protection. The Commission, however, accepts the other amendment which seeks to grant protection for 25 years after the end of copyright for those who make unpublished works lawfully available to the public. Thus the Commission accepts a major modification to its proposal as regards posthumous works.
Commentary on the recitals

Recital n° 2 bis

This recital explains the reason for which it is necessary to harmonise authorship in cinematographic or audiovisual work. The text of the amendment is accepted as it is.

Recital n° 13

The title of the Directive of the Council on rental right and lending right and on certain rights related to copyright in the field of intellectual property having changed, this recital has to be updated.

Recital n° 20

This recital corresponds to the new article 6 bis. The text of the amendment is accepted as it is.
Commentary on the articles

Article 1. paragraph 6

The amendment of Parliament relates to the wording. It notably specifies that the determining factor is the act of making a work lawfully available to the public. This is accepted by the Commission.

Article 1 bis

The Commission accepts most of the amendment of Parliament. It must, however, change its wording and complete it.

Paragraph 1 is the text of Parliament.

Paragraph 2 specifies that the principal director is an author. This conforms to article 2(2) of the Council Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

Paragraph 3 allows Member States to introduce rebuttable presumptions of transfer of rights from the authors to the producers. Such presumptions are indeed essential for a better exploitation of works.

Thus, total harmonization of authorship and in turn of the term of protection for cinematographic or audiovisual works is achieved. This is not to the detriment of producers, as these enjoy their own exclusive rights under the rental directive and can benefit from rebuttable presumptions of transfer of rights.

Article 2. paragraph 1

The amendment of Parliament relates to the wording. It specifies that only a lawful act triggers the running of the term of protection. This useful precision is accepted by the Commission even if the term "publication" is maintained in order to keep the parallel with the term of protection of phonogram producers. Also the term "communication to the public" is used rather than "dissemination" because it is broader and more in line with the rental directive.
Article 2 bis

The amendment of Parliament seeks to introduce an exclusive related right for persons who, for the first time, make available to the public posthumous works of which the copyright has expired. This right is accepted by the Commission. Only the wording is changed.

Article 3

No amendments were proposed by Parliament.

Article 4, paragraph 3

The addition proposed by Parliament is accepted.

Article 5

The amendment of Parliament is accepted but it is necessary to keep more closely to the wording of the Berne Convention in order not to cast any doubt on the fact that the author is also protected during his or her lifetime.

Article 6 bis

The amendment of Parliament on the application in time is for a large part accepted but has to be adapted to the Council Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property and to other amendments of Parliament. Some rewording was felt necessary. The complexity of these provisions justifies their presentation in a new and separate Article 6 bis.

Paragraph 1 states that this Directive shall not have the effect of shortening terms of protection which are already running in the Member States. It thus protects the acquired right of rightowners. It also states that acts of exploitation carried out before the date of transposition remain unaffected. This provision excludes any retroactive effect of the Directive.

Paragraph 2 corresponds to the amendment of Parliament as to which rights the Directive applies with two modification or additions. Firstly the date of adoption of the Directive is prefered to the date of transposition in order to avoid that rightowners see their rights ending between these two dates. This allows a more immediate application in time and seems more equitable as regards the above-mentioned persons. It was also felt necessary to create a linkage with the rental right Directive in order to enable a more uniform application in the entire Community.
Paragraph 3 states that the Member States take the necessary measures in order to safeguard the rights of third parties who have exploited works or objects which are in the public domain or who have made investments linked to such works. Indeed, it seems difficult to define Community measures where the legal traditions of the members States are so divergent. Furthermore, the situations covered are complex and differ according to whether Member States already have long terms of protection or not.

Paragraph 4 reserves the application of the provisions on application in time of the rental right Directive.

Paragraph 5 constitutes a parallel provision to Article 13 (5) of the rental right Directive. It is necessary because of the new Article 1 bis.

**Article 7**

No amendments were proposed by Parliament.

**Article 8**

The Commission accepts the deletion of paragraph 2 as proposed by Parliament.

**Article 9**

No amendments were proposed by Parliament.

**Article 10**

The Commission accepts the new date of transposition of the Directive proposed by Parliament.

**Article 11**

No amendments were proposed by Parliament.
Amended proposal for a

COUNCIL DIRECTIVE

harmonizing the term of protection
of copyright and certain related rights

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2), 66, 100a and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

1. Whereas the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations lay down only minimum terms of protection of the rights they refer to, leaving the contracting states free to grant longer terms; whereas certain Member States
have exercised this entitlement; whereas in addition certain Member States have not become party to the Rome Convention;

2. Whereas there are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas, therefore, with a view to the establishment of the internal market and its operation thereafter, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community;

2 bis
Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which each term of protection is calculated; whereas therefore it is necessary to harmonize the definition of authorship of a cinematographic or audiovisual work;
3. Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and fifty years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations;

4. Whereas certain Member States have granted a term longer than fifty years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works;

5. Whereas at the 1967 Stockholm conference for the revision of the Berne Convention certain Member States' delegations approved a resolution asking the contracting states to extend the term of copyright protection; whereas in the discussions which have taken place within the World Intellectual Property Organization (WIPO) in preparation for a possible Protocol to the Berne Convention this question has been put on the agenda;
6. Whereas for the protection of related rights certain Member States have introduced a term of fifty years after publication or dissemination; whereas in other Member States which are currently preparing legislation on the subject the term of protection chosen is likewise fifty years;

7. Whereas the Community proposals for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) provide for a term of protection for producers of phonograms of fifty years after first publication;

8. Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to begin
operating in practice on 31 December 1992, the harmonization of the term of protection should take place on the basis of a long term;

9. Whereas in its Communication of 17 January 1991 "Follow-up to the Green Paper - Working Programme of the Commission in the field of Copyright and neighbouring rights"(1), the Commission stresses the need to harmonize copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation and their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole;

10. Whereas in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonized at seventy years

(1) COM(90) 584 final.
after the death of the author or seventy years after the work is lawfully made available to the public, and for related rights at fifty years after the event which sets the term running.

11. Whereas these terms should be unchanged calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions;

12. Whereas Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes provides that Member States are to protect computer programmes, by copyright, as literary works within the meaning of the Berne Convention (Paris Act - 1971); whereas the present Directive harmonizes the term of protection of literary works in the Community; whereas Article 8 of Directive 91/250/EEC, which merely makes provisional arrangements governing the term of protection of computer programmes, should accordingly be repealed;

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(2) OJ No L 122, 17.5.1991, p. 42.
13. Whereas Articles 9 and 10 of Council Directive ..., on rental right, lending right, and on certain rights related to copyright(3) make provision for minimum terms of protection only, subject to any later harmonization; whereas these Articles should be repealed, in order to align the terms of protection of those rights on the terms laid down in this Directive;

14. Whereas under the Berne Convention photographic works qualify for a minimum term of protection of only twenty-five years from their making; whereas, moreover, certain Member States have a composite system for the protection of photographic works, which are protected by copyright if they are considered to be artistic works within the meaning of the Berne Convention and protected under one or more other arrangements if they are not so considered; whereas provision should be made for the complete harmonization of these differing terms of protection;

(3) OJ No L 346, 27.11.1992, p. 61.
15. Whereas in order to avoid unchanged differences in the term of protection it is necessary that when a term of protection begins to run in one Member State it should begin to run throughout the Community;

16. Whereas Article 6bis(2) of the Berne Convention provides that the moral rights of the author are to be maintained after his death at least until the expiry of the economic rights; whereas that provision can usefully be taken over in this Directive, without prejudice to any possible later harmonization of moral rights;

17. Whereas the terms of protection laid down in this Directive should also apply to literary and artistic works whose country of origin within the meaning of the Berne Convention is a third country, but protection should not exceed that fixed in the country of origin of the work;

18. Whereas where a rightholder who is not a Community national qualifies for protection under an international agreement the term of protection of related rights should be the same as
that laid down in this Directive, except that it should not exceed that fixed in the country of which the rightholder is a national;

19. Whereas this provision must not be allowed to bring Member States into conflict with their international obligations; whereas international obligations may require the Member States to accord different treatment to third-country nationals and their works, and this may lead to disturbances on the Community market; whereas a procedure should therefore be laid down which enables such difficulties to be remedied;

20. Whereas rightholders should be able to enjoy the longer terms of protection introduced by this Directive equally throughout the Community provided their rights have not yet expired on 31 December 1994.

HAS ADOPTED THIS DIRECTIVE:  

Article 1

1. The rights of an author of a literary or artistic work within

unchanged

20. Whereas, for the smooth functioning of the single market, this Directive must be applied immediately it enters into force, while ensuring that rights legitimately acquired by third parties are safeguarded,

HAS ADOPTED THIS DIRECTIVE:  

Article 1
the meaning of Article 2 of the
Berne Convention shall run for
the life of the author and for
seventy years after his death,
irrespective of the date when
the work is lawfully made
available to the public.

2. In the case of a work of joint unchanged
authorship the term referred to
in paragraph 1 shall be
calculated from the death of the
last surviving author.

3. In the case of anonymous or unchanged pseudonymous works, of works
considered under the legislation
of a Member State to have been
created by a legal person and of
collective works, the term of
protection shall run for seventy
years after the work is lawfully
made available to the public.
However, when the pseudonym
adopted by the author leaves no
doubt as to his identity, or if
the author discloses his
identity during the period
referred to in the first
sentence, the term of protection
applicable shall be that laid
down in paragraph 1.

4. Anonymous or pseudonymous works unchanged
shall not be protected if it is
reasonable to presume that their
author has been dead for seventy
years.
5. Where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.

6. In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

6. In the case of collective works or works created by a legal person which have not been made lawfully available to the public within 70 years from their creation, the protection expires.

**Article 1 bis**

1. The authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work.

2. The principal director shall be considered as one of its authors.
Article 2

1. The rights of performers shall run for fifty years from the first publication of the fixation of the performance or if there has been no publication of the fixation, from the first dissemination of the performance. However, they shall expire fifty years after the performance if there has been no publication or dissemination during that time.

3. The Member States may provide, without prejudice to Article 2, paragraph 6 of Directive 92/100/EEC, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work.

Article 2

1. The rights of performers shall run for fifty years from the point at which the fixation of a performance is lawfully published for the first time or, if this has not occurred, after the first lawful communication to the public of the performance if neither of the above has taken place during that time.
2. The rights of producers of phonograms shall run for fifty years from the first publication of the phonogram. However, they shall expire fifty years after the fixation was made if the phonogram has not been published during that time.

3. The rights of producers of the first fixations of cinematographic works and of sequences of moving images, whether or not accompanied by sound, shall expire fifty years after the first publication. However, they shall expire fifty years after the fixation was made if the work or sequence of moving images has not been published during that time.

4. The rights of broadcasting organizations shall run for fifty years from the first transmission of a broadcast.

Article 2 bis

Any person who for the first time makes lawfully available to the public a work, the copyright protection of which has expired, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.
Article 3

Protected photographs shall have the term of protection provided for in Article 1.

Article 4

1. When any of the terms referred to in Articles 1 to 3 begins to run in a Member State it shall be considered to begin to run throughout the Community.

2. Where the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.

3. The terms of protection laid down in Article 2 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, the term of protection granted by Member States shall expire no later than the date of expiry of the
later than the date of expiry of the protection granted in the country of which the rightholder is a national.

4. Pending the conclusion of any future international agreements on the term of protection by copyright or related rights, the decision may be taken by means of the procedure set out in Article 9:

(a) to waive or to vary the rule requiring a comparison of the terms of protection in certain third countries which is laid down in paragraphs 2 and 3, particularly in order to prevent Member States from being brought into conflict with their international obligations; in any event, however, the term granted may not exceed that laid down in Articles 1 and 2;

(b) to take appropriate measures where protection is granted to third-country nationals by some Member States only, and this fact causes appreciable distortion of competition or deflection of trade in the Community market.
Article 5

The terms laid down in this Directive shall run from the first day of January of the year following the event which gives rise to them.

Article 6

1. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

2. The moral rights granted to the author shall be maintained at least until the expiry of the economic rights.

Article 5

The terms of protection subsequent to the death of the author and the terms provided by Article 1 paragraphs 3 to 6 and Articles 2 and 2 bis shall run from the event which gives rise to them in each particular case. However, the length of these terms shall be calculated only from the first day of January of the year following the death or the event which gives rise to them.

Article 6 bis

1. This Directive shall not have the effect of shortening terms of protection which under the laws of the Member States are already running.
It shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

2. This Directive shall apply to all works and objects which are protected at least in one Member State, on the date of adoption of the present Directive, under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.

3. Member States shall adopt the necessary provisions which need to be taken by virtue of Community law and national law in order to protect acquired rights and legitimate expectations of third parties.

4. The present Article is without prejudice to Article 13 of Directive 92/100/EEC.

5. Member States may determine the date from which Article 1 bis shall apply, provided that that date is no later than 1 July 1997.
**Article 7**

1. Article 8 of Directive 91/250/EEC is hereby deleted.

2. Articles 9 and 10 of Directive ... are hereby deleted.

**Article 8**

1. Member States shall immediately notify the Commission of any plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.
**Article 9**

The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

**Article 10**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 1 July 1994.
When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

2. Member States shall apply Article 8 from the date on which this Directive takes effect.

Article 11

This Directive is addressed to the Member States.