SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 18 and 19 February 1993

No. prev. doc.: 4735/93 PI 11 CULTURE 11
No. Cion 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 18 and 19 February 1993, the Working Party on Intellectual Property (Copyright) examined Articles 6 to 11, 1 and 1bis of the above proposal on the basis of the consolidated text contained in 4465/93 PI 8 CULTURE 7. Its discussions also took into account the Commission's amended proposal (4483/93 PI 9 CULTURE 8), a non-paper from the United Kingdom delegation (4345/93 PI 6 CULTURE 5 + COR 1(f)), working document № 1/93 from the Netherlands delegation (SN 1207/93) and working document № 2/93 from the Belgian delegation (SN 1208/93).

Article 6

2. The representative of the Council Legal Service, who was consulted on this Article, expressed the views set out in the Annex.
The Commission representative did not share these views. He considered that the opinion of the Council Legal Service in 9290/91 needed to be reviewed in the light of the specific contents of this proposal for a Directive, which concerned the term of protection of copyright and certain related rights. He pointed out that the substance of both the moral rights and the economic rights of authors differed from one Member State to another, yet no delegation disputed the need to harmonize the term of protection of the economic rights of authors. Moreover, it was impossible in many cases to separate the economic rights of an author from his moral rights: for instance, it was impossible to separate the economic and moral aspects of the right of disclosure (a moral right), while the right of adaptation (an economic right) was very close to the moral right to the integrity of a work. He also indicated that the "economic nature of the rights" was not a relevant criterion under Community law. There was no doubt that the exercise of moral rights could have the consequence of hindering the free circulation of goods and that that criterion was sufficient to establish that the Community was competent to harmonize this aspect of copyright on the basis of Article 100a. Explicit reference was made to the Dassonville judgment in which the Court of Justice had stated that even measures which could have a potential effect on intra-Community trade constituted measures having an effect equivalent to quantitative restrictions. He therefore did not agree that harmonization of moral rights required the use of Article 235 as a legal basis.

Several delegations and the Commission representative invited the Council Legal Service to set out its views in writing. The Irish delegation requested that this written opinion should make clear the practical application to this specific proposal for a Directive of the opinion set out in 9290/91. The Irish delegation also invited the Commission to set out in
writing the reasons why it considered harmonization of the term of protection of moral rights to be necessary, to demonstrate how the absence of such harmonization affected the internal market, and to provide evidence that any disruption of the internal market resulting from this absence of harmonization was significant.

3. In the light of the conflicting views expressed by the Council Legal Service and the Commission representative, the Portuguese delegation considered that the Council should be invited to take a political decision on the legal basis of the proposal for a Directive.

The Irish delegation reserved its position on the appropriateness of Article 235 as a legal basis in respect of moral rights.

4. The Belgian, Spanish and Italian delegations considered that moral rights had economic aspects and could create obstacles to the free movement of copyright works within the internal market, and that therefore there was a need to harmonize their term of protection.

The French delegation on the other hand considered that moral rights were different in nature from the author's economic rights and were not primarily economic. This delegation, together with the Danish, Netherlands and United Kingdom delegations considered that the whole question of moral rights and their possible effect on the internal market should be studied thoroughly by the Commission before any action was proposed in respect of any aspect of moral rights, such as their duration.
The French and Netherlands delegations pointed out furthermore that Article 6 as proposed by the Commission would not harmonize the term of protection of moral rights, but merely impose a minimum term.

The Irish, Netherlands and United Kingdom delegations were opposed to both variants of Article 6. The French delegation was opposed to variant 1, since it implied that the normal rule was that moral rights should be given the same term of protection as economic rights, while this delegation considered that they should be protected in perpetuity; it expressed a scrutiny reservation in respect of variant 2.

In the light of the above positions, the Danish, German, French, Irish, Netherlands, Portuguese and United Kingdom delegations were in favour of deleting Article 6 and replacing it by either a provision or a recital to the effect that moral rights were outside the scope of the Directive and therefore not affected by it. The Italian delegation could accept deletion of Article 6 on the express condition that it would be replaced by such a provision.

The German delegation asked whether, in the view of the Council Legal Service, a provision excluding moral rights from the scope of the Directive would require use of Article 235 as a legal basis.

The representative of the Council Legal Service replied that if moral rights were to be excluded from the scope of the Directive, the most appropriate means would be an explicit provision to this effect. This could be done either by drafting Article 1 in such a way that moral rights were excluded, or by
replacing Article 6 by a provision to the effect that moral rights were excluded from the scope of the Directive. In either case, the legal basis proposed would be sufficient.

6. The Commission representative reserved his position on the solution advocated by the majority of delegations, indicating that he would report to his authorities on the positions expressed.

Article 6 bis

7. The Belgian and Netherlands delegations expressed a scrutiny reservation in respect of the whole of Article 6 bis.

Article 6 bis (1)

8. The French delegation asked whether the first sentence of Article 6 bis (1) would allow France to maintain its 1951 law which provided for an extension of copyright protection for thirty years for the benefit of the descendants of authors killed in action in past or future military conflicts.

The United Kingdom delegation and the Commission representative replied that this provision applied only in respect of terms of protection which were already running for individual works under the laws of a Member State on the date of transposition of the Directive, but did not allow Member States to keep laws which provided for longer terms of protection than the corresponding terms under the Directive.

9. The Italian delegation asked which Member States had laws which would allow copyright protection of longer than 70 years after the author's death, pointing out that the provisions in Italy on extensions to offset the effects of wars would not have
such a result, as they provided for an extension of only 12 years to the normal term of 50 years after the author's death.

The Commission representative cited the following cases:

- terms of protection already running in Spain for works of authors who died before the law reducing the term of copyright protection from 80 to 60 years post mortem auctoris entered into force;

- the thirty-year extension in France already mentioned;

- perpetual protection for "Peter Pan" under United Kingdom law.

In addition, the Commission representative indicated that there was a possibility that the provisions of the Directive on cinematographic and audiovisual works and on photographs, which were still under discussion, might result in the terms of protection for those works under the Directive being shorter than the present terms in some national laws.

10. The French delegation asked whether terms already running in respect of works covered by Article 1(3a) of the Directive would be affected by the first sentence of Article 6 bis (1).

The Commission representative indicated that this depended on the solution finally adopted for Article 1(3a), but that if the term under that provision were to be longer than the term provided for under present national law, the term of Article 1(3a) would apply.

11. In reply to questions from the Netherlands and Italian delegations, the Commission representative explained that the first sentence of Article 6 bis (1) was applicable only to those Member States whose present laws provided for longer terms of
protection than the corresponding terms under the Directive; other Member States were not required to extend protection until the expiry of these longer terms. It was agreed that the text of this sentence would be clarified.\(^{(1)}\)

12. **The German delegation**, supported by several other delegations, expressed a reservation on the date mentioned in the second sentence of Article 6 bis (1) and in Article 10(1).

13. **The Netherlands delegation** suggested a clarification to the wording of the second sentence of Article 6 bis (1),\(^{(2)}\) and **the Danish delegation**, supported by **the Italian delegation**, suggested transferring this sentence to Article 6 bis (3).

**The Commission representative** agreed with both suggestions.

**Article 6 bis (2)**

14. **The Commission representative** explained that Article 6 bis (2) as now proposed represented a fundamental change of approach from the Commission's original proposal (Article 6(1) in 5509/92 PI 33 CULTURE 21), whereby the Directive would have applied to rights which had not expired on or before 31 December 1994, but protection of works or other subject matter which had fallen into the public domain would not have been revived. Following requests from several delegations that consideration be given to the possibility of reviving protection which had expired in one or more Member States in cases where that protection would not have expired had the Directive already been in force, the United Kingdom Presidency had proposed a text to this effect.\(^{(3)}\) However, that text would have had the consequence that

\(^{(1)}\) See revised version of the consolidated text in working document N\^2 4/93 (SN 1210/93).
\(^{(2)}\) See SN 1208/93.
\(^{(3)}\) 9636/92 PI 108 CULTURE 108, point 18.
protection could be revived even where the work or subject matter concerned was no longer protected in any Member State. The Commission's amended proposal and the consolidated text in 4465/93 took over the principle of revival of protection, but included the criterion proposed by the European Parliament that the works or subject matter concerned be protected in at least one Member State, since there would be no obstacles to their free movement within the Community if they were in the public domain in all Member States.

15. The German and United Kingdom delegations agreed in principle with this provision. The United Kingdom delegation could also accept the text proposed by the United Kingdom Presidency.

The Spanish, Luxembourg, Netherlands and Portuguese delegations were opposed to the principle of revival of rights which had already expired. The Spanish and Belgian delegations, supported by the Portuguese delegation proposed that this paragraph be replaced by a provision to the effect that where a work was still protected in one Member State but was in the public domain in the other Member States, protection should continue in that Member State until the expiry of the term resulting from the Directive, but the work should remain in the public domain in the other Member States.

The Commission representative rejected this proposal, which corresponded to the Commission's original proposal, on the grounds that it would result in a long transitional period during which the internal market would be subject to distortions.

A proposal by the Spanish delegation to delete Article 6 bis (2) was opposed by the United Kingdom delegation on the same grounds.
16. The German delegation considered that the date mentioned in this paragraph should not be the date of adoption of the Directive, since this would mean that when the Directive was transposed into national law, this paragraph would have to be applied retroactively. It therefore considered that the date of transposition was more appropriate.

17. With a view to establishing the practical implications of Article 6 bis (2), the United Kingdom delegation asked whether those Member States which at present had copyright terms of longer than 50 years post mortem auctoris (pma) applied the principle of "comparison of terms" set out in Article 7(8) of the Berne Convention for the Protection of Literary and Artistic Works.\(^4\)

It was explained that this principle was applied in France. In Germany, a work of a foreign author which was translated into German was given the same term of protection (70 years pma) as a work of a German author. In addition, a work of a foreign author was given this same term of protection if it was published in Germany not later than 30 days after being published in the country of origin. Otherwise, if the term of protection in the country of origin was shorter than 70 years pma, the principle of "comparison of terms" was applied.

It was pointed out that in these circumstances, Article 6 bis (2), which, as far as copyright works were concerned, would have a bearing only on works whose authors had died between 50 and 70 years before the relevant date, would in general have the following effect:

\(^{4}\) "In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."
- if the work originated in a Member State which at present had a term of copyright protection of longer than 50 years pma, the work would be protected throughout the Community until the expiry of 70 years pma, involving revival of protection in those Member States in which it had already expired;

- if the work originated in a Member State which at present had a term of copyright protection of 50 years pma, it would remain in the public domain throughout the Community.

Several delegations considered that such a result would be discriminatory.

The German delegation pointed out that, while it could be considered that Article 6 bis (2) would operate in favour of copyright works originating in Germany, it could also be considered that it would operate to the disadvantage of subject matter protected by related rights in Germany for which the present terms of protection were shorter than those provided for in the Directive and applied at present by a number of other Member States. The United Kingdom delegation agreed that this provision should be considered not only in relation to copyright but also in relation to related rights.

18. In addition to the reservations on the principle of this paragraph, the Belgian, Danish, Spanish, Irish, Italian, Netherlands and Portuguese delegations expressed scrutiny reservations on the wording, which they considered to be in need of clarification. The Italian delegation suggested a redraft which was intended to make the necessary clarifications and would combine Article 6 bis (2) and (3).\(^{(5)}\)

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\(^{(5)}\) See Annex to SN 1210/93.
Article 6 bis (3)

19. The Spanish delegation expressed a reservation on this paragraph. This reservation was linked to its reservation on the revival of rights under paragraph 2 and was based on a ruling by the Spanish Constitutional Court that legitimate expectations could not give rise to claims for compensation. It was invited to set out its position in writing.

20. The Portuguese delegation also expressed a reservation which was linked to its reservation on paragraph 2.

21. The German and United Kingdom delegations, while agreeing with the principle that Member States should be given flexibility as to the measures to be taken to protect the acquired rights and legitimate expectations of third parties affected by the revival of protection which had previously expired, considered that the wording proposed was too narrow; they considered in particular that Member States should also be permitted to regulate what effect the revival of protection should have on contracts which had been concluded for the original term of protection. The German delegation also suggested that this paragraph be made optional.

22. The Belgian and Netherlands delegations also expressed scrutiny reservations on this paragraph.

Article 6 bis (4)

23. The Netherlands delegation considered that this paragraph was unnecessary.
Article 6 bis (5)

24. Discussion of this paragraph was postponed until further progress had been made on the contents of Article 1 bis.

Article 8

25. The French delegation expressed a scrutiny reservation on this Article in connection with its reservations on Article 2 bis. It also considered that it would be useful if Member States were to notify the Commission of existing related rights.

26. The Irish delegation expressed a scrutiny reservation on this Article, pointing out that the creation of new related rights would result in further obstacles to the free movement of goods within the Community.

27. The French, Irish, Italian, Portuguese and United Kingdom delegations also expressed scrutiny reservations on the wording of this provision.

The French delegation queried the word "immediately", which the Irish delegation suggested be replaced by the words "at an early stage".

The Portuguese, United Kingdom and Italian delegations queried the words "any plan to grant new related rights". The United Kingdom delegation suggested replacing "plan" by "intentions", and the Italian delegation suggested referring to initiatives taken by the Governments of Member States (as opposed to Parliaments or other bodies) with a view to the creation of new related rights.
Article 10

28. The reservations expressed in relation to the date mentioned in the second sentence of Article 6 bis (1) (see point 12 above) also applied to the date mentioned in the first sentence of Article 10(1). The general feeling was that this date should be placed in square brackets for the present.

Article 1 (3a)

29. The Netherlands delegation stated that the changes made in this provision in 4465/93 in relation to the previous consolidated text (Annex I to 4398/93) did not remove its reservation on the approach adopted in this paragraph.\(^6\)

30. The Italian delegation, supported by the Spanish delegation stated that its reservation on this provision could be overcome if the words "who are impossible to identify" were to be deleted from the second indent.

The Irish delegation opposed the deletion of these words. It was prepared to support the text in 4465/93, provided that it was clear that it meant that the human authors who created the work would be protected unless it was impossible to identify them.

31. The United Kingdom and German delegations stated that they had not considered it necessary to include a provision of this nature in the Directive, but were prepared to accept it if the majority of delegations were in favour of its inclusion, and

\(^6\) The objections of the Netherlands delegation are set out in working document No 1/93 (SN 1207/93) and working document No 5/93 (SN 1211/93).
provided that it was clear and consistent with the Berne Convention. They considered the present text to be consistent with the Berne Convention, but lacking in clarity, and therefore expressed a scrutiny reservation on the wording.

**Article 1bis**

32. In addition to the consolidated text in 4465/93, which corresponded to the Commission's amended proposal (4483/93), alternative proposals for this Article were contained in the non-paper from the United Kingdom delegation (4345/93 + COR 1(f)) and in working document № 2/93 from the Belgian delegation (SN 1208/93). The Belgian delegation pointed out that the words "50 years after the death of the director" in its proposal should read "70 years after the death of the principal director".

33. The Greek delegation expressed a scrutiny reservation in respect of the whole Article.

34. The Danish, German, Irish, Netherlands, Portuguese and United Kingdom delegations questioned the need to harmonize film authorship, considering that there was no evidence that the coexistence of different systems in different Member States had created any distortion within the Community. The Irish delegation questioned whether the Community was competent to propose such harmonization in the absence of any significant practical disruption of the internal market resulting from the present situation. While not accepting the harmonization proposed by the Commission in paragraphs 1 and 2 of its amended proposal, these delegations were prepared, in a spirit of compromise, to accept the general application of the partial
harmonization achieved in Article 2(2) of the rental Directive,\(^7\) as proposed in paragraph 1 in the United Kingdom's non-paper.

The French and Italian delegations and the Commission representative supported the Commission's amended proposal for paragraphs 1 and 2, considering that the term of protection of cinematographic and audiovisual works could not be separated from the question of their authorship. The Commission representative considered that harmonization of film authorship was within the Community's competence, since the economic considerations involved were sufficient to distort competition within the Community to a degree justifying Community action.

The Belgian delegation, while preferring the Commission's amended proposal, was prepared to consider positively the United Kingdom delegation's proposal.

35. The Italian delegation considered that the solution proposed by the Commission had the advantage of specifying that the authors of these works were natural persons. It suggested that the text proposed by the United Kingdom delegation be clarified on this point.

The United Kingdom delegation, supported by the German and Netherlands delegations, preferred not to depart from the wording of Article 2(2) of the rental Directive, which did not limit the possible co-authors of such works to natural persons.

36. The United Kingdom delegation, while preferring that the term of protection of a cinematographic or audiovisual work be a

fixed term calculated from the publication of the work, was prepared to propose, as a compromise solution between its preferred solution and the solution proposed by the Commission, that this term be the life of the principal director plus 50 or 70 years (whichever was finally adopted in Article 1). It considered that under this solution it would be clear when the term of protection expired, whereas under the Commission's amended proposal there would be a great deal of uncertainty as to who were the authors of a particular cinematographic or audiovisual work, and consequently as to the expiry of the term of protection, which would be calculated from the death of the last surviving author in accordance with Article 1(2) of the Directive. The German, Irish, Netherlands and Portuguese delegations agreed that the United Kingdom delegation's proposal would give greater legal certainty as to the expiry of the term of protection than would the Commission's amended proposal.

The French delegation and the Commission representative did not agree that the Commission's amended proposal would give rise to legal uncertainty.

37. The Belgian delegation drew attention to the fact that the United Kingdom delegation's proposal for paragraph 2 was limited to cinematographic or audiovisual works considered under the laws of a Member State to be works of joint authorship, leaving unresolved the term of protection for cinematographic or audiovisual works which did not meet this criterion. Moreover, this proposal had the disadvantage of providing that cinematographic or audiovisual works which were considered to be works of joint authorship should have a different term of protection from that normally accorded to works of joint authorship in accordance with Article 1(2) of the Directive and Article 7 bis of the Berne Convention. The Belgian delegation
therefore considered that its proposal for paragraph 2, which did not refer to works of joint authorship, was more appropriate.

The United Kingdom delegation accepted this criticism and withdrew its proposal for paragraph 2 in favour of the proposal by the Belgian delegation with the corrections indicated under point 32 above. The Danish, German, Italian, Netherlands and Portuguese delegations also supported this proposal by the Belgian delegation.

38. The French delegation and the Commission representative pointed out that the proposal by the Belgian delegation would have the consequence of reducing the term of protection in cases where a co-author other than the principal director was the last surviving co-author in Member States in which cinematographic and audiovisual works were considered at present to be works of joint authorship. The French delegation expressed a reservation on this proposal in this respect.

The United Kingdom and Irish delegations considered that in practice there would be little difference between a term of protection expiring 70 years after the death of the principal director and the present term in such Member States, which expired 50 years after the death of the last surviving author. They pointed out that in those cases where the term of protection resulting from the proposal by the Belgian delegation would be shorter, this reduction was likely to be less than the increase in protection which would have to be accorded by those Member States which at present had a term of 50 years from the publication of the cinematographic or audiovisual work.
39. The Irish, Netherlands and United Kingdom delegations pointed out that the provisions in Article 6 bis on application in time would have to be reviewed in the light of the solution adopted in Article 1 bis.

40. The Belgian, Danish, Spanish, French and Netherlands delegations considered that the wording of Article 1 bis (3) would have to be examined carefully.

41. The Chairman concluded that, in the light of the discussion, the next consolidated text\(^{(8)}\) would contain:

- a paragraph 1 generalizing the solution adopted in Article 2(2) of the rental Directive, as proposed by the United Kingdom delegation,

- a paragraph 2 as proposed by the Belgian delegation, with the corrections indicated under point 32 above,

- a paragraph 3 as set out in the present consolidated text, which would have to be examined at the Working Party's next meeting.

42. The Commission representative stated that he would report to his authorities on the positions expressed by the delegations.

\(^{(8)}\) See working document № 4/93 (SN 1210/93).
CONTRIBUTION FROM THE LEGAL SERVICE to the report of the Working Party on Intellectual Property on 18 and 19 February 1993 (doc. 5243/93 PI 16 CULTURE 14)

Subject: Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights
No. Cion prop. 5509/92 PI 33 CULTURE 21
doc. 4465/93 PI 8 CULTURE 7

Having been invited to give its views on the provisions of Article 6 of the present proposal under examination by the Working Party, the representative of the Council Legal Service put forward the following considerations:

1. The proposal provides - at the present stage - in Article 6 of the proposal that

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

There is no definition of the moral rights of the author in the proposal. Since this provision is based on Article 6 bis (2) of the Berne Convention, the only definition of moral rights that can be invoked is that of the Berne Convention; it would be appropriate to

(9) Doe. 4465/93 PI 8 CULTURE 7, variant 1.
(10) Cf. the 16th recital of the proposal.
clarify this point in the Directive in the interests of greater clarity and legal certainty.

It can be seen from Article 6 bis of the Berne Convention that independently of his "economic rights", the author has "the right to claim authorship of the work and to object to any distortion, mutilation ... which would be prejudicial to his honour or reputation".

The economic nature of this right is not obvious and in any case is not exclusive, in spite of the fact that present practice would seem to show that it can give rise - in certain cases - to remuneration, as is proved by the example of "colouring" cinematographic films originally made in black and white. Consequently, even if it can be considered that this right may fall under Community competence, it does not seem possible to base the legislative provision concerned on Articles 57 and 100a of the Treaty. It would also appear difficult to consider this to be an accessory or ancillary provision within the meaning of the case law of the Court of Justice. Indeed, these are "separable" provisions which pursue objectives of their own.

As no other Treaty Article specifically empowers the Community to act in pursuit of such objectives, the Council Legal Service considers that only Article 235 of the Treaty could be used to justify the provision in question, if the Council considers that action by the Community is necessary to attain, in the course of the operation of the common market, one of the objectives of the Community.\(^{(11)}\)

Should the Council consider it necessary to act in this respect,

\(^{(11)}\) Cf. opinion of the Council Legal Service on the proposal for a Council Decision concerning the accession of the Member States to the Berne and Rome Conventions, 9290/91.
Treaty Articles providing for different adoption procedures (qualified majority decision in cooperation with the European Parliament in the case of Articles 57(2) first and third sentences and 100a, unanimous decision after consulting the European Parliament in that of Article 235) would have to be used simultaneously. However, under the case law of the Court\(^{(12)}\), the use of that combined legal basis is not possible since it would "undermine" the conduct of the cooperation procedure. Hence the proposal in question would have to be adopted by means of two different acts.

2. With regard to the second variant of this Article \(^{(13)}\) as proposed by the Commission at the Working Party's meeting on 15 January 1993 providing that:

"This Directive shall not prevent Member States from providing for or maintaining terms of protection for moral rights which are longer than those provided for by this Directive",

the same observations apply as for the first variant. It is true that such a provision would allow the Member States to introduce a longer term of protection for moral rights than that provided for by the Directive. However, the Community would then create an obligation on the Member States to provide for a term of protection for moral rights at least as long as that provided for by the Directive. Under these circumstances, the Community would assert its competence and the difficulties of maintaining the legal basis of Articles 57 and 100a in this respect would be the same as those mentioned above.

3. The Council Legal Service considers that under a third option the Council could legislate on the same legal basis as that proposed

\(^{(13)}\) Article 6, variant 2, in 4465/93 PI 8 CULTURE 7.
for the adoption of this Directive to provide in the context of the application of this Directive, and without legislating on the scope and substance of moral rights, a term of protection of these rights to the extent that they have an economic scope. The Legal Service is prepared to suggest such an option if the Working Party so wishes.