EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 19 March 1993

5494/93

REPORT

from: Presidency
to: Permanent Representatives Committee

No. prev. doc.: 5143/93 PI 16 CULTURE 14
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

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 certain related rights. The proposal is based on Articles 57(2), 66, 100a and 113 of the Treaty establishing the European Economic Community.


(2) OJ No C 287, 4.11.1992, p. 53.
(3) Not yet published in the Official Journal.
3. The Council (Internal Market) has already held a policy debate on a number of aspects of this proposal at its session on 10 November 1992. It instructed the Permanent Representatives Committee to continue work in the light of the European Parliament's opinion when given, with a view to enabling the Council to adopt its common position at the earliest possible opportunity.

4. Examination of the proposal, amended in the light of the European Parliament's opinion, has continued at Working Party level. The Presidency now submits the main unresolved issues to the Permanent Representatives Committee, with a view to enabling the Council to seek a common position at its session on 5 April 1993. Although other questions remain open, the Presidency considers that their resolution will be facilitated by agreement on a package covering the main unresolved issues set out in this report.

B. Term of protection of copyright and of certain related rights; application in time of the Directive

5.1. 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. Some of the Community Member States have taken advantage of this option of granting a longer term of protection, while the other Member States grant the Berne Convention minimum of 50 years p.m.a. These differences between terms of protection give rise to barriers to trade and distortions of competition which the proposal for a Directive seeks to eliminate with a view to the completion of the internal market.

(5) 9929/92 PV/CONS 65, point 7.
5.2. 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 has been harmonized by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (rental Directive).

6.1. 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.

6.2. The Commission's proposal also provides that the term of protection for all the related rights referred to under point 5.2. 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.

6.3. The European Parliament agrees to this solution of 70 years p.m.a. for copyright and 50 years for related rights.

7. The Irish, Luxembourg and Netherlands delegations have expressed a reservation on the need to harmonize the term of protection of copyright; they also consider that a term of 50 years p.m.a. is sufficient for copyright.

The Danish, Portuguese and United Kingdom delegations have entered a scrutiny reservation on the term of 70 years p.m.a. for copyright, pending satisfactory solutions being found for other provisions of the Directive.

8. For the reasons set out under point 6 above, the Presidency considers that the Commission's proposals in this respect should form part of an overall package.

9. The application in time of the Directive is closely related to the fundamental option of harmonizing the term of copyright at 70 years p.m.a. and the term of related rights at 50 years.

10. The Commission's original proposal contained the principle that where a longer term of protection than that resulting from the Directive was already running in a Member State when the Directive took effect, the Directive would not have the effect of shortening that term in that Member State. This principle as such is accepted by all delegations, but the French delegation

(7) See Annex I, Article 6a (1).
has a reservation to the extent that those Member States which have such longer terms of protection would not be allowed to maintain them for works produced after the Directive takes effect.

11. The Commission's original proposal also contained the principle that the Directive would apply solely to rights which had not yet expired when the Directive took effect. A number of delegations have pointed out that under this approach, there would be a long transitional period during which particular works and other subject matter would continue to be protected in those Member States where the present term of protection is longer than the minimum under the Berne Convention or the Rome Convention, but would no longer be protected in other Member States, with the result that the internal market would be subject to distortions during that time. Following requests from these delegations that consideration be given to the possibility of overcoming this difficulty by providing for the revival of protection in such cases and following a similar proposal for amendment from the European Parliament, the Commission has amended its proposal to the effect that where works or subject matter are protected in at least one Member State, on the date of adoption of the Directive, protection will have to be revived or introduced in the other Member States until the expiry of the term provided for by the Directive, with Member States taking any necessary measures to protect any rights acquired or legitimate preparations made by third parties to exploit such works or subject matter before protection was revived or introduced. 

(8) French law provides 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. Other cases are the perpetual protection for "Peter Pan" under United Kingdom law and the terms of protection already running in Spain for works of authors who died before the law reducing the term of copyright protection in Spain from 80 to 60 years p.m.a. entered into force.

(9) See Annex I, Article 6a (2), Variant 1 and (3).
The Belgian, Danish, Spanish, Luxembourg, Netherlands and Portuguese delegations have entered reservations on this revival of protection. Their reservations are based partly on an objection in principle to the revival of protection, partly on the opposition of some of these delegations to the harmonization of the term of copyright protection at 70 years p.m.a., and partly on the fact that they consider that the Commission's amended proposal would have a discriminatory effect in respect of works whose authors had died between 50 and 70 years before the date of adoption of the Directive: such a work originating in a Member State which had a term of copyright protection of longer than 50 years p.m.a. would be protected throughout the Community until the expiry of 70 years p.m.a., involving revival of protection in those Member States in which it had already expired; whereas such a work originating in a Member State which had a term of copyright protection of 50 years p.m.a. would remain in the public domain throughout the Community.

The Danish delegation has requested that further consideration be given to a proposal made by the United Kingdom Presidency whereby protection would be revived in respect of all works or subject matter which would have been in protection on the date of transposition of this Directive if this Directive and the rental Directive had already been in force.\(^{(10)}\) This would not have the discriminatory effect referred to above, but the Commission representative has pointed out that it would have the effect that protection could be revived even where the work or subject matter was no longer protected in any Member State, in which case there would be no obstacle to its free movement within the Community.

\(^{(10)}\) See Annex I, Article 6a (2), Variant 2.
Views are also divided on the question whether the reference date should be that of the adoption of the Directive or the deadline for its transposition.

12. The Presidency invites the Permanent Representatives Committee to examine the respective advantages and disadvantages of the two variants of Article 6a (2) as set out in Annex I, as well as the two dates, and to decide which is more appropriate.

C. Collective works

13. The laws of a number of Member States make provision for what are known as "collective works", a concept which does not appear in the Berne Convention. Under the Commission's original proposal, the term of protection for these collective works would be seventy years after the work is lawfully made available to the public, as in the case of anonymous or pseudonymous works. Since the European Parliament did not propose any amendment in this respect, the Commission's amended proposal also remains unchanged on this point (Article 1(3)).

14. However, in the course of the Working Party's discussions it emerged that the solution proposed would not be in conformity with the Berne Convention in cases where the authors of such works were identified. The normal rule of the Berne Convention is that the term of copyright protection is the life of the author (or the last surviving author in the case of a work of joint authorship) and a number of years after his death (Articles 7(1) and 7bis). The only exceptions allowed from this general rule concern cinematographic works (Article 7(2)), anonymous or pseudonymous works (Article 7(3)) and photographic works and works of applied art (Article 7(4)). A provision has therefore been drawn up whereby collective works would have the

(11) However, Italy uses this term of "collective works" in respect of "collections of literary or artistic works", which are regulated by Article 2(5) of the Berne Convention.
same term of protection as anonymous or pseudonymous works where their authors are not identified, but would be subject to the normal rule of the Berne Convention where their author or authors are identified. This provision would oblige those Member States whose laws provide for collective works but do not fully respect these rules to bring their laws into line with the Berne Convention.

15. The Spanish, French, Italian, Netherlands and Portuguese delegations have reservations on this provision, which they consider to be unclear. The Spanish, Italian and Netherlands delegations would prefer to revert to the Commission's proposal. The Netherlands delegation considers that the new provision does not take account of the situation in the Netherlands where a legal entity can be deemed to be the author of a collective work, whereas the Commission's proposal would cover this situation.

16. Since the new provision does not deal with authorship and fits in with the requirement of the Berne Convention while the Commission's proposal does not, the Presidency considers that Article 1(3a) as set out in Annex II should form part of an overall package.

D. Cinematographic and audiovisual works

17. In the United Kingdom and Ireland, the producer of a cinematographic or audiovisual work is considered to be its author, and the term of protection of such a work is 50 years from the date when it is first lawfully made available to the public. In the other Member States, the principal director and other creative contributors are considered to be the authors of a cinematographic or audiovisual work, and its term of protection is calculated in relation to the death of the last surviving author.

(12) Article 1(3a) as set out in Annex II to this report.
18. Whereas the Commission's original proposal did not contain any provisions concerning harmonization of the term of protection of cinematographic or audiovisual works, the European Parliament proposed an amendment which would harmonize the authorship of such works and which was based on the principle of the term of protection being calculated in relation to the death of the last surviving author. The Commission's amended proposal contains a provision based on the European Parliament's amendment, whereby the principal director and the other natural persons who made the intellectual creation of the work would be its authors.\(^{(13)}\)

19. A number of delegations consider that it is not necessary to harmonize the authorship of cinematographic and audiovisual works in a Directive concerning the term of protection; however, in a spirit of compromise, they are prepared to generalize in this Directive the provision contained in Article 2(2) of the rental Directive.\(^{(14)}\)

20. Several delegations have also drawn attention to the difficulty of determining the date of expiry of the term of protection of a particular cinematographic or audiovisual work where that term is calculated in relation to the death of the last surviving author and when criteria for determining who are the authors of that particular work may vary from one Member State to another. With a view to achieving greater legal certainty in this respect, it has been proposed that the term of protection be calculated instead in relation to the death of the principal director.

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\(^{(13)}\) Article 1a as set out in Annex III to this report.

\(^{(14)}\) "For the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors".
21. **The great majority of delegations** are prepared to accept a compromise solution containing the elements mentioned in points 19 and 20 above.\(^{(5)}\)

22. **The French delegation and the Commission representative** remain in favour of the Commission's amended proposal for Article 1a, since the solution acceptable to the majority of delegations 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 the term of protection is at present calculated in relation to the death of the last surviving author.

Other delegations have pointed out that in practice there would be relatively few cases where a term of protection of 70 years after the death of the principal director would expire earlier than the present term of 50 years after the death of the last surviving author.

23. **The Presidency considers that Article 1a (1) and (2) as set out in Annex IV to this report should form part of an overall package.** (Paragraph 3 requires further consideration at Working Party level).

E. **Works published after the expiry of copyright protection**

24. **The Commission's original proposal** did not contain any proposal in respect of protection of works first published after the expiry of copyright protection. A number of Member States which have provisions in this respect advocated the inclusion of a provision on this subject in the Directive, while other Member States were opposed to the inclusion of such a provision. Following proposals for amendment on this subject by the European Parliament, the Commission's amended proposal included

(15) Article 1a (1) and (2) as set out in Annex IV to this report.
a provision\(^{(16)}\), which was intended to constitute a compromise solution between the positions of the various delegations, with the following elements:

(a) the protection granted in respect of such works would not be copyright protection, but a related right equivalent to an author's economic rights;

(b) the beneficiary of such protection would be the person who for the first time makes the work lawfully available to the public;

(c) the term of protection would be 25 years.

25. The Netherlands and Portuguese delegations have a reservation on the need for a provision of this nature.

The French delegation considers that the protection granted should be full copyright protection, and the Italian delegation has a reservation on the protection being "equivalent to the economic rights of the author".

The Greek, French and Irish delegations consider that the term of protection should be at least 50 years.

The other delegations consider that this provision constitutes an acceptable compromise.

26. The Belgian delegation, supported by the French and Irish delegations, has proposed an amendment to this provision with the intention of ensuring that a work first lawfully made available to the public in the last few years before the expiry of the 70-year copyright term from the death of the author would not receive a shorter term of protection than it would receive under Article 2a if it were first published shortly after the

\(^{(16)}\) Article 2a as set out in Annex V to this report.
expiry of copyright protection. This proposal is set out in Annex VI to this report.

27. The Italian delegation has proposed an additional paragraph to Article 2a with the intention of taking account of "critical or scientific works". This proposal is set out in Annex VII to this report.

28. The Presidency considers that Article 2a as set out in Annex V to this report represents a balanced compromise and should form part of an overall package. It considers that the proposals set out in Annexes VI and VII have not obtained enough support to be included in an overall package.

F. Photographs

29. The Commission's original proposal was that "protected photographs shall have the term of protection provided for in Article 1" (70 years p.m.a.). The European Parliament has proposed no amendment and the Commission's amended proposal remains unchanged on this point.

30. However, a number of delegations considered that this would lead to insufficient harmonization, since some Member States accord different forms and/or different terms of protection to photographs which are considered to be photographic works and other photographs, while other Member States protect all original photographs without making such a distinction, and other Member States protect photographic works but do not protect other photographs. The Commission's proposal would therefore have the effect that photographs other than photographic works would remain protected in some Member States but not in others, with consequent distortions to the internal market.

31. Various alternatives proposals have been considered by the Working Party. The proposal which has come nearest to achieving
a consensus is set out in Annex VIII to this report, although there are still a number of scrutiny reservations. This proposal by the Netherlands delegation is based on Article 1(3) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

32. The Presidency considers that Article 3 as set out in Annex VIII to this report should form part of an overall package.

G. Moral rights

33. The Commission's original and amended proposals contained a provision to the effect that "the moral rights granted to the author shall be maintained at least until the expiry of the economic rights".

34. Since the Commission is considering the whole area of moral rights, the great majority of delegations takes the view that harmonization of the term of protection of moral rights should not be considered in isolation from the other aspects of moral rights. Moreover, the Council Legal Service considers that the provision proposed by the Commission could not be based on Articles 57 and 100a of the EEC Treaty, but would have to be based on Article 235; since Article 235 requires a different adoption procedure from that required by Articles 57 and 100a, such a provision would have to be adopted in a separate act.

35. In the light of all these considerations, the great majority of delegations is in favour of replacing this provision by the following provision:

"This Directive shall be without prejudice to the provisions of the Member States regulating moral rights".

(17) OJ No L 122, 17.5.1991, p. 42
(18) See Annex to 5143/93 PI 16 CULTURE 14.
36. The Belgian delegation and the Commission representative have a scrutiny reservation on this solution.

37. The Presidency considers that Article 6 as set out in point 35 above should form part of an overall package.

H. Conclusion

38. The Presidency invites the Permanent Representatives Committee to pronounce on an overall package comprising:

(a) terms of protection of 70 years p.m.a. for copyright and 50 years for related rights, together with the provisions on application in time as set out in Article 6a in Annex I; a decision on which of the variants in Article 6a (2) is more appropriate is also invited;

(b) Article 1(3a) on collective works as set out in Annex II;

(c) Article 1a (1) and (2) on cinematographic and audiovisual works as set out in Annex IV;

(d) Article 2a on works first published after the expiry of copyright protection, as set out in Annex V;

(e) Article 3 on photographs as set out in Annex VIII;

(f) Article 6 on moral rights as set out in point 35 above.
ANNEX I

Article 6a
Application in time

1. Where a term of protection, which is longer than the corresponding term provided for by this Directive, is already running in a Member State on the date referred to in Article 10(1), this Directive shall not have the effect of shortening that term of protection in that Member State.

2. [Variant 1
The term of protection provided for in this Directive shall apply to all works and subject matters which are protected in at least one Member State, [on the date of adoption of this Directive] [on the date referred to in Article 10(1)], 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.]

[Variant 2
The terms of protection provided for in this Directive shall apply to all works and subject matter which would have been in protection [on the date of adoption of this Directive] [on the date referred to in Article 10(1)], had this Directive and Council Directive 92/100/EEC already been in force.]

3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in Article 10(1). Member States may adopt the necessary provisions to protect acquired rights and legitimate expectations of third parties.

[4. Member States may determine the date from which Article 1a shall apply, provided that that date is not later than 1 July 1997].
ANNEX II

Article 1 (3a)

3a. In the case where a work:

- is created by several physical authors on the initiative and under the direction of a physical person or legal entity, on the understanding that it will be disclosed only by - and under the name of - that person or entity, and

- consists of contributions of several authors who are not identified

the duration shall be calculated for this work as such as provided for in paragraph 3 for anonymous or pseudonymous works.

This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, for which contributions paragraph 1 or 2 shall apply.
ANNEX III

Article 1a - Commission's amended proposal

Article 1a

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.

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 1a - compromise solution

Article 1a
Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the principal director.

[3. The Member States may provide, without prejudice to Article 2(6) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 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]^{19}.

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(19) Paragraph 3 requires further consideration by the Working Party.
Article 2a
Protection of unpublished works

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 2a as proposed by the Belgian delegation

Article 2a

Where a work has for the first time been lawfully made available to the public after the expiry of the protection provided for in Article 1, it shall benefit from protection for 25 years, equivalent to the economic rights of the author, from the time when the work was first lawfully made available to the public.

However, if the work has for the first time been lawfully made available to the public in the 25 years preceding the expiry of the term of protection, it shall in all cases enjoy copyright protection for the remaining term as well as protection for 25 years within the meaning of paragraph 1, from the time when the work was first lawfully made available to the public.
Addition to Article 2a
proposed by the Italian delegation

Any person who produces a critical edition which is the result of scientific research and studies to reconstruct the text of a literary, dramatic or musical work, or to restore a cinematographic work in its original forms, shall have the exclusive right to its exploitation for a term of thirty years from the year of publication, whatever form such publication takes.
Article 3 - Compromise solution

Protection of photographs

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected according to Article 1. No other criteria shall be applied to determine their eligibility for protection.