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.


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 in accordance with these instructions. The Presidency now submits three key issues to the Council for a policy debate.

B. Term of protection of copyright and of certain related rights (Articles 1 and 2)

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.

5.2. 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 100 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 Danish, Irish, Luxembourg, Netherlands and Portuguese 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 United Kingdom delegation has 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.

The Netherlands delegation considers that rather than harmonizing the term of protection of copyright, it would be preferable to adopt a system of mutual recognition, whereby each Member State would accord to a copyright work the term of protection provided for by the national law of the country of origin of the work. It has reserved the right to submit to the Council a paper setting out its position in this respect.

8. The Council is invited to consider whether the term of copyright and related rights should be harmonized at 70 years p.m.a. and 50 years respectively as proposed by the Commission, or whether a system of mutual recognition should be applied as proposed by the Netherlands delegation.

C. Cinematographic and audiovisual works (Article 1a)

9. In the United Kingdom, Ireland and Luxembourg, 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 most of 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.
10. 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.(7)

11. 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.(8)

12. 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.

(7) Article 1a as set out in Annex I to this report.
(8) "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."
13. The great majority of delegations are prepared to accept a compromise solution containing the elements mentioned in points 11 and 12 above.\(^9\)

14. 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. In addition, the French and Italian delegations are in favour of it being stated expressly that only natural persons may be considered to be authors of a cinematographic or audiovisual work: this is stated in the Commission's amended proposal, while the compromise solution leaves open the possibility of both natural and legal persons being considered to be authors of such works.

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. They have also pointed out that Article 2(2) of the rental Directive also leaves open the possibility of both natural and legal persons being considered to be authors of such works. The Irish, Luxembourg and United Kingdom delegations would be opposed to limiting this possibility to natural persons.

15. The Council is invited to consider whether paragraphs 1 and 2 of the Commission's amended proposal (Annex I) or paragraphs 1 and 2 of the compromise solution (Annex II) constitute the

\(^9\) Article 1a (1) and (2) as set out in Annex II to this report. Paragraph 3 requires further consideration at Working Party level.
appropriate approach to the term of protection of cinematographic or audiovisual works.

D. Moral rights (Article 6)

16. 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".

17. 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. It has also been pointed out that the Commission's proposal would achieve only partial harmonization, as Member States would remain free either to provide for the same term of protection for moral rights as for economic rights, or to provide for a longer term, even perpetuity, for moral rights. Moreover, the Council Legal Service(10) 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.

18. In the light of all these considerations, the great majority of delegations is in favour of removing moral rights from the scope of the Directive by replacing this provision by the following provision:

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

(10) See Annex to 5143/93 PI 16 CULTURE 14.
19. The Commission representative has a scrutiny reservation on this solution.

20. The Council is invited to confirm that moral rights should be excluded from the scope of the Directive.
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.]

(11) Paragraph 3 requires further consideration by the Working Party.