NOTE

from: the Netherlands delegation

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to: Working Party on Intellectual Property (Copyright)

No. prev. doc.: 5702/93 PI 25 CULTURE 22
No. Comp. 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

- Duration of protection of authors' rights: full or partial harmonization?

Full harmonization on a period of 70 years, as proposed by the Commission, has significant economic and legal consequences in the 10 Member States that apply a shorter period so far.

- It shifts the balance of interests between authors/users towards the former;

- It creates legal uncertainties in providing for revival of expired rights;

- It adds complications to the relations with third countries (accession; GATT);

- It lacks a financial/economic analysis of advantages and disadvantages.

Mutual recognition of protection periods might provide a possible solution which is slightly less clear-cut, but still workable and avoiding most of the aforementioned inconveniences. It represents a familiar technique on which most modern Internal Market legislation has been based. It shows more respect for existing
national practices and is more proportional, it would seem, to the objective. It therefore merits further scrutiny.

Mutual recognition might be inspired by the rules of origin as foreseen in the Berne Convention, Article 5(4), and based on the following ingredients:

1. A given work is protected in the entire Community for the duration applicable in the Member State where the work was first published (50 or 70 years).

2. In case of simultaneous publication in several Member States the period concerned is the term of the country with the shortest protection period.

3. If first publication occurs in a Member State with a longer protection period than the country of which the author is a national, without such publication occurring simultaneously in his own country, the duration of the author's national legislation applies.

For comparison is added the relevant text of the Berne Convention (Article 5). In particular, for filmmakers or architects another criterion than national law might be considered (country of habitual residence, place of the work, etc.). A rule along these lines is relevant, however, to prevent undue exploitation of a situation of co-existence of different terms of protection.
Article 5

(Rights Guaranteed: 1. and 2. Outside the country of origin; 3. In the country of origin; 4. "Country of origin")

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.