SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 23 April 1993

No. prev. doc.: 5895/93 PI 26 CULTURE 26
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 23 April 1993, the Working Party on Intellectual Property (Copyright)\(^{(1)}\) examined a note from the Netherlands delegation (5895/93 PI 26 CULTURE 26) and continued its consideration of Article 1(3a) and Article 1a of the above proposal.

Note from the Netherlands delegation

2. At the Council session (Internal Market) held on 5 April 1993, the Netherlands delegation had tabled a note (5895/93 PI 26 CULTURE 26) proposing that harmonization of the term of protection of copyright at 70 years post mortem auctoris (p.m.a.), as proposed by the Commission, be replaced by a system of mutual recognition of the terms of protection existing in the Member States.

3. The Netherlands delegation explained that its note first set out this delegation's objections to harmonization of the term of protection of copyright at 70 years p.m.a. (it did not object to harmonization of the term of protection of related rights at 50 years), and then outlined a system of mutual recognition of

\(^{(1)}\) The Luxembourg delegation was not represented at this meeting.
terms of protection based on Article 5(4) of the Berne Convention for the Protection of Literary and Artistic Works.

4. The Commission representative pointed out that the trend in Europe was towards a term of protection of copyright of 70 years p.m.a.: two Member States and two other European States already accorded this term for all works protected by copyright, at least one Member State had proposed legislation to this effect, and a further Member State accorded this term of protection for musical works. The Commission was not aware that lengthening the term of protection to 70 years p.m.a. had given rise to any problems; on the other hand, harmonization at a shorter term would require a lengthy transitional period. Moreover, the discussion in Council on 5 April had shown a political majority of the Member States in favour of harmonization at this term. He did not accept the argument that such harmonization would shift the balance of interests between authors and users towards the former, pointing out that in many cases strong copyright protection was a prerequisite for ensuring that works were made available to the public. With regard to the argument that the Commission proposal would create legal uncertainties in providing for revival of expired rights, the Commission representative considered that these uncertainties would be even greater under the system proposed by the Netherlands delegation, in particular in situations where the protection of a given work had already expired in a Member State which had to recognize a longer term of protection which had not yet expired in the Member State where that work was first published. The Commission representative did not agree that the harmonization proposed would add complications to the relations with third countries; indeed, two States which were seeking accession to the Community already had a term of 70 years p.m.a.. He doubted the feasibility of carrying out a financial/economic analysis of advantages and disadvantages of harmonization at 70 years p.m.a., but pointed out that a clear majority of the interested circles consulted had been in favour of the proposed harmonization. As for the system of mutual recognition proposed by the Netherlands delegation, the Commission representative considered that it would create serious
distortions of competition and pointed out that the rule proposed in point 3 of the note by the Netherlands delegation would be contrary to Article 7 of the EEC Treaty, as well as Article 5(3) of the Berne Convention. Moreover, the co-existence of more than one term of protection within the Community would complicate the application of the rule of comparison of terms in relation to third countries (Article 4(2) of the proposal for a Directive). Furthermore, the majority of delegations had opposed the principle of mutual recognition when it had been suggested in respect of collective works.

5. The Belgian, German, Greek, Spanish and French delegations remained strongly in favour of harmonization of the term of copyright protection at 70 years p.m.a. The United Kingdom delegation, whose acceptance of such harmonization would depend upon the final contents of the overall package, did not consider that the system proposed by the Netherlands delegation constituted a serious alternative to the Commission's proposal. For the German, Italian and United Kingdom delegations, the main objection to the system proposed by the Netherlands delegation was that it would lead to serious distortions of competition.

6. The Irish and Portuguese delegations remained opposed to harmonization of the term of copyright protection at 70 years p.m.a., the Portuguese delegation considering that there were no positive arguments in its favour. However, the Irish delegation also had serious misgivings about the system of mutual recognition proposed by the Netherlands delegation.
7. **The Netherlands delegation**, taking note of the reactions of the other delegations to its proposal, asked the Commission to give serious consideration to harmonization of the term of copyright protection at 50 instead of 70 years p.m.a., with the possibility of allowing those Member States which already had longer terms to maintain them. **The Irish delegation** endorsed this request.

**The Belgian, German, Greek, Spanish, French and Italian delegations** emphasized the need to maintain clear distinctions between copyright and related rights, including in respect of terms of protection. Since there was general agreement that the term of protection for the related rights covered by Article 2 of the proposal for a Directive should be harmonized at 50 years, these delegations insisted on harmonization of the term of copyright protection at the longer term of 70 years p.m.a..

8. **The Chairman** concluded that the system of mutual recognition proposed by the Netherlands delegation had found very little support, and that a considerable majority of delegations continued to support harmonization of terms of protection at 70 years p.m.a. for copyright and 50 years for related rights.

**Article 1(3a)**

9. Since no agreement had been reached on the various drafts of this provision which had been discussed previously, delegations were invited to consider the following new draft:

"In the case of collective works or works for which a legal entity is considered to be the first owner of copyright under the legislation of a Member State, the term of protection shall be calculated according to the provisions"
of paragraph 3 above, except if the authors who are the physical persons who have created the work are identified as such in the versions of the work which are made available to the public."

10. The initial reaction of the Belgian, Greek, Spanish, French, Italian and Netherlands delegations to this new draft was positive, subject to certain improvements being made. The United Kingdom delegation was willing to give it positive consideration.

The Irish delegation stated a preference for the draft of this provision contained in SN 1210/93.

The Portuguese delegation entered a reservation on this draft, as it considered that it did not make a sufficient distinction between the compilers of works of this nature and the authors whose contributions were included in these works.

11. The German delegation proposed an amendment to this draft with a view to making it clear that Member States which did not at present make provision for collective works in their national law would not be obliged to introduce them as a result of this provision. It proposed that the beginning of this provision be redrafted as follows:

"Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal entity to be considered the first owner of copyright, the term of protection ... ."

12. The Belgian delegation, supported by the German delegation, considered that the words "the authors" should read "at least one of the authors".

13. The United Kingdom delegation, supported by the French and Italian delegations, suggested the clarification ".. who have created the work as such are ...".
14. The Belgian delegation supported by the Irish delegation, considered that "identified" should be replaced by "identifiable".

15. The Netherlands delegation suggested replacing "versions" by "copies".

The Commission representative considered that the word "copies" would not be appropriate in cases where the works were made available to the public by electronic means.

16. The United Kingdom and German delegations considered that where the author or authors were identified subsequently, the term of protection should be calculated in accordance with Article 1(1) or (2).

17. Following a suggestion by the Italian delegation, it was agreed that the following sentence be added:

"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."²

18. The Chairman concluded that consideration of this provision would continue at the next meeting.

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(2) This sentence had been included in earlier drafts, including that in SN 1210/93.
Article 1a

19. In the light of the majority which had emerged at the Council session on 5 April 1993 in favour of the Presidency compromise solution for paragraphs 1 and 2 of this Article, the Working Party limited its discussions to paragraph 3 as set out in Annex II to 5702/93.

20. The Netherlands delegation questioned the need for this paragraph.

The French delegation considered that this paragraph was a necessary part of this Article as proposed in the Commission's amended proposal, but doubted its relevance in relation to the Presidency solution for paragraphs 1 and 2.

The Commission representative, while confirming that this paragraph had been conceived as an integral part of Article 1a of his Institution's amended proposal, considered that it would still be useful in the context of the Presidency solution, in particular for those Member States which would have to change their law as a result of that solution.

21. The United Kingdom and the Irish delegations were prepared to consider this provision either as an optional provision or as a compulsory provision.

The German delegation and the Commission representative considered that it should not be compulsory.

22. The French, Greek and Netherlands delegations considered that the terms "authorized the exploitation of their work" were too broad.
The Irish and Netherlands delegations could support a suggestion by the United Kingdom delegation that it would be more appropriate to refer to transfer of rights rather than to authorization of exploitation.

The French delegation considered that the presumption of authorization should not be so broad as to cover any means of exploitation but should be limited to the means of exploitation provided for in the contract.

23. The Chairman concluded that consideration of this provision would continue at the next meeting.