The Permanent Representatives Committee considered a report from the Presidency\(^{(1)}\) on this proposal on 25 March 1993. It forwarded\(^{(2)}\) three issues to the Council (Internal Market) for a policy debate on 5 April 1993, and instructed the Working Party to pursue its examination of the other issues mentioned in the report. Following this further examination it has still not been possible to reach complete agreement. However, the Presidency has prepared a consolidated text of the proposal in 6613/93 PI 37 CULTURE 52, which seeks to present an overall compromise package. The present report describes the progress made since this proposal was last examined by the Permanent Representatives Committee.

B. Term of protection of copyright and of certain related rights

2. It emerged from the policy debate held by the Council on 5 April 1993 that there was a consensus in favour of a term of 50 years for related rights, with a reservation by the

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\(^{(1)}\) 5494/93 PI 10 CULTURE 17.
\(^{(2)}\) 5702/93 PI 25 CULTURE 22.
Luxembourg delegation. With regard to the term of protection of copyright, six delegations supported the Commission's proposal for harmonizing at 70 years post mortem auctoris (p.m.a.), two delegations were prepared to give favourable consideration to this proposal as part of an overall package, and four delegations remained opposed to it. Interest was expressed in examining a proposal by the Netherlands delegation that harmonization of the term of protection of copyright be abandoned in favour of a system of mutual recognition.

3. Examination by the Working Party of the proposal by the Netherlands delegation revealed that there was no support for a system of mutual recognition. The Belgian, German, Greek, Spanish, French and Italian delegations continued to support harmonization at 70 years p.m.a., the Danish and United Kingdom delegations maintained their position that they would be able to give favourable consideration to this solution on condition that a satisfactory overall package were concluded, while the Irish, Luxembourg, Netherlands and Portuguese delegations continued to oppose this solution, advocating harmonization at 50 years p.m.a.

4. The Presidency recommends that harmonization of the term of copyright at 70 years p.m.a. and harmonization of the term of related rights at 50 years form part of the overall package.

C. Application in time of the Directive (Article 6a)

5. 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.

6. The Commission's original proposal contained the principle that the Directive would apply solely to rights which had not yet expired when the Directive took effect. A

(3) 5895/93 PI 26 CULTURE 26.
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 still protected in at least one Member State, 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\(^4\).

7. The Irish, Luxembourg, Netherlands and Portuguese delegations, which are opposed to the harmonization of the term of copyright protection at 70 years p.m.a., are also opposed in principle to the revival of protection which has expired. The Belgian delegation also has a scrutiny reservation in this respect.

8. Consideration has also been given to a variant put forward by the United Kingdom Presidency\(^5\) 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 Directive 92/100/EEC had already been in force, since a number of delegations 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

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\(^4\) Article 6a (2) (Variant 1) and (3) in the consolidated text.

\(^5\) Article 6a (2) (Variant 2) in the consolidated text.
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 Belgian, German, Greek, Spanish, French, Italian and United Kingdom delegations prefer the Commission's amended proposal, since the other variant 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. The Danish, Irish, Luxembourg, Netherlands and Portuguese delegations are opposed to the Commission's amended proposal because of its discriminatory effect and would prefer the other variant as the lesser evil.

9. Under the Commission's amended proposal, the reference date for the revival of protection would be the date of adoption of the Directive. However, the Belgian, Danish, German, Greek, Irish, Italian and Luxembourg delegations have expressed a preference for the reference date being the deadline for transposition of the Directive, and those delegations which would prefer the date of adoption would not be opposed to the date of transposition. The Commission remains in favour of the date of adoption.

10. The Presidency recommends that:

(a) the overall package should include the revival of protection;

(b) although there is a clear majority in favour of Variant 1, the Permanent Representatives Committee should also consider Variant 2, since adoption of Variant 1 would increase the difficulties of those delegations which have
fundamental reservations on harmonization of the term of copyright protection at 70 years p.m.a.;

(c) the reference date should be the deadline for transposition of the Directive.

D. Collective works (Article 1(3a))

11. Further consideration has been given to the question of collective works, and agreement has been reached on a compromise text,\(^6\) only the Portuguese delegation maintaining a scrutiny reservation. The Presidency recommends that this provision be included in the overall compromise package.

E. Cinematographic and audiovisual works (Article 1a)

12. It emerged from the policy debate at the Council session on 5 April 1993 that the great majority of delegations were in favour of the Presidency compromise solution, with the French delegation and the Commission maintaining reservations above all on the calculation of the term of protection from the death of the principal director. The Italian delegation considered that only natural persons could be considered co-authors, and the Irish delegation expressed a reservation on the term of 70 years.

13. The Working Party has reconsidered the paragraph on presumptions and decided to replace it by a recital, the French and Portuguese delegations and the Commission expressing scrutiny reservations on this solution.

14. The Presidency recommends that Article 1a as set out in the consolidated text form part of the overall package.

(6) Article 1(3a) and the accompanying recitals in the consolidated text.
F. Works first published after the expiry of copyright protection (Article 2a)

15. The great majority of delegations are prepared to accept the provision on works first published after the expiry of copyright protection as a compromise solution and as part of an overall package. The Netherlands and Portuguese delegations maintain a reservation on the need for such a provision, while the Greek, French and Irish delegations have a reservation on the term of protection, preferring 50 to 25 years.

The Presidency recommends that Article 2a as set out in the consolidated text be included in the overall package.

16. Further consideration has been given to the proposal by the Belgian delegation\(^7\) to add to Article 2a a further paragraph seeking to ensure that a work first lawfully made available to the public in the last few years before the expiry of the 70-year copyright term would not receive a shorter term of protection than it would receive under Article 2a if it were first published shortly after the expiry of copyright protection.

The Belgian, Spanish, French and Irish delegations were in favour of this proposal. Other delegations expressed interest in this proposal, but were concerned that it would invoke overlapping of copyright and a related right, and doubted whether the number of works likely to benefit from such a provision would justify the complications it would entail. The Netherlands and Portuguese delegations opposed it for the same reasons as they opposed Article 2a.

The Presidency recommends that this proposal should not be included in the overall package, as it considers that it does not command sufficient support.

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\(^7\) Annex VI to 5494/93.
17. Consideration was also given to a proposal made by the German delegation in an attempt to meet the criticism made of the proposal by the Belgian delegation. This would consist of adding to Article 1 a paragraph to the effect that if a work was first published in the last ten years before expiry of copyright protection, copyright protection would be prolonged until ten years after publication.

The Presidency recommends that this proposal should not be included in the overall package, as it considers that it does not command sufficient support.

18. Further consideration has also been given to the proposal by the Italian delegation to add to Article 2a a further paragraph concerning critical or scientific works.

This proposal was supported by several delegations, while other delegations were reluctant to agree to introduce such a provision into the Directive without examining it in greater depth. Fears were also expressed that inclusion of this proposal might encourage requests for other related rights to be harmonized at Community level.

The Italian delegation agreed to withdraw its proposal, on the understanding that it would be made clear in the appropriate way that the Directive does not prevent Member States from maintaining or introducing in their national laws provisions corresponding to that proposed by the Italian delegation.

The Presidency recommends that the proposal should not be included in the overall package in the light of the above.

G. Photographs (Article 3)

19. Further consideration has been given to the question of photographs. In addition to the proposal by the Netherlands delegation, which was submitted to the Permanent

(8) Annex VII to 5494/93.
Representatives Committee in March, the French delegation has put forward an alternative proposal. These proposals are contained in the consolidated text as Variant 1 and Variant 2 of Article 3; recitals have also been proposed to accompany them.

Variant 1 is supported by the German, Spanish, Irish, Netherlands, Portuguese and United Kingdom delegations. They consider that this provision has the advantage of using the definition of originality contained in Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. They consider that a reference to Article 2 of the Berne Convention is insufficient, since that provision is interpreted in different ways by Member States in respect of photographs.

Variant 2 is supported by the Belgian, Greek, French and Italian delegations. They consider that the definition of originality contained in Directive 91/250/EEC in respect of computer programs is not necessarily appropriate for determining the originality of photographs.

The Presidency recommends that the Permanent Representatives Committee consider these two variants.

H. Moral rights (Article 6)

20. At the Council session on 5 April 1993 a consensus was reached on the text proposed by the Presidency in respect of moral rights. The Commission maintained a reservation on this text.

The Presidency recommends the inclusion of this text in the overall package.
I. Legal basis

21. The Commission proposed that the Directive be based on Articles 57(2), 66, 100a and 113 of the EEC Treaty.

All delegations and the Council Legal Service consider that Article 113 is not necessary as a legal basis. The Commission has a reservation on removing Article 113 from the legal basis.

The Presidency recommends that Article 113 be removed from the legal basis.

J. Other questions

22. It will be seen from the footnotes in the consolidated text that there are a few reservations and scrutiny reservations on other points.

The Presidency invites the Permanent Representatives Committee to seek the lifting of these reservations and scrutiny reservations.

K. Conclusions

23. The Presidency invites the Permanent Representatives Committee to:

(a) consider and pronounce on the variants included in the consolidated text in respect of revival of protection (section C above) and photographs (section G above);
(b) approve an overall compromise package as set out in the consolidated text and containing the elements described in this report;

(c) forward this overall compromise package to the Council for the adoption of a common position.