A. Introduction

1. The Permanent Representatives Committee considered a Presidency report on the proposal (6614/93 PI 38 CULTURE 53) together with a consolidated text (6613/93 PI 37 CULTURE 52) at its meeting on 28 May 1993 and instructed the Attachés responsible for intellectual property matters (Copyright) to examine a number of aspects of this proposal(1).

The present report describes the progress made by the Attachés at their meeting on 3 June 1993.

(1) The Permanent Representatives Committee's discussions on this point are summarized in 6978/1/93 PI 47 CULTURE 58 REV 1.
B. **Cinematographic and audiovisual works** (Article 1a)

2. In its previous report to the Permanent Representatives Committee (6614/93 PI 38 CULTURE 53, points 12 to 14), the Presidency recommended that Article 1a as set out in the consolidated text (6613/93 PI 37 CULTURE 52) form part of the overall package.

3. At the Permanent Representatives Committee's discussions on 28 May 1993, the French delegation stressed that the inclusion of Article 1a in that form would result in the French delegation opposing the Directive as a whole. Its main criticisms were:

- that while it allowed Member States the freedom to determine who were the co-authors of a cinematographic or audiovisual work, it related the term of protection to the death of the principal director alone;

- that it would have the consequence, in cases where the principal director died young, that the term of protection would be reduced considerably in those Member States in which the term of protection was calculated at present in relation to the death of the last surviving co-author.

4. The French delegation had therefore proposed an alternative version of this Article (Annex I to this report) which sought to achieve a compromise between the position of the French delegation and the positions of the other delegations. The first element of this proposal was that it abandoned the provision harmonizing the authorship of cinematographic or audiovisual works (Article 1a(1) of the consolidated text), since the majority of delegations did not accept the solution advocated by the Commission and the French delegation; the French delegation was prepared to add a recital to
the effect that the absence from this Directive of a provision harmonizing the authorship of cinematographic or audiovisual works was without prejudice to both the systems of authorship in the Member States and the provisions on this subject in previous Community directives\(^2\). The second element of the proposal by the French delegation was that it left Member States free to determine whether the term of protection of a cinematographic or audiovisual work was calculated in relation to the death of the principal director or the death of the last surviving author. The choice involved in this second element would require the retention of Article 4(1) of the proposal. This proposal would still achieve a considerable degree of harmonization: the term of protection of all cinematographic or audiovisual works would expire 70 years after the death of an author, and there would be a single point of departure throughout the Community for calculating this term for any given film.

5. At the Attachés' meeting, the Commission representative pointed out that the Commission still had a reservation on Article 1a of the consolidated text, which could be reconsidered in the light of the final overall package. With regard to film authorship, the Commission's original proposal had not contained any specific provision in this respect, but the adoption of Council Directive 92/100/EEC, with a provision harmonizing film authorship for the purposes of that Directive, had led the Commission to include a provision on this subject in its amended proposal. The Commission

considered that the harmonization achieved in this respect in that Directive and in the common position adopted on 10 May 1993 needed to be consolidated in the present directive, and was therefore opposed to the delation of Article 1a(1). While sharing the French delegation's concern as to the reduction of protection resulting in certain cases from relating the term to the death of the principal director alone, the Commission representative considered that leaving Member States the option whether the term of protection of cinematographic or audiovisual works would be calculated in relation to death of the principal director or the death of the last surviving author would not achieve sufficient harmonization of the term of protection.

6. The German, Luxembourg, Portuguese and United Kingdom delegations continued to support the consolidated text(3) and considered the proposal by the French delegation unacceptable for the reasons put forward by the Commission representative.

The Irish delegation also continued to support the consolidated text(4). While reserving its position on the proposal by the French delegation, its initial reaction to this proposal was negative.

The Spanish delegation was in favour of maintaining paragraph 1 of Article 1a (on film authorship) as in the consolidated text and was prepared to seek a reasonable solution for the calculation of the term of protection of cinematographic or audiovisual works.

(3) The Luxembourg delegation maintained a reservation on the term of 70 years.
(4) The Irish delegation maintained a reservation on the term of 70 years.
The Italian delegation was prepared to give further consideration to both the consolidated text and the proposal by the French delegation.

The Netherlands delegation was prepared to seek a middle way between the consolidated text and the proposal by the French delegation.

7. In the light of the reactions of the other delegations and the Commission representative, the French delegation stressed that the most unacceptable aspect of Article 1a of the consolidated text was paragraph 2, relating the term of protection to the death of the principal director alone. If the price to be paid for the adoption of the proposal made by the French delegation was the retention of Article 1a(1) of the consolidated text, the French representative was prepared, in a personal capacity, to recommend this solution to his authorities, on the understanding that Article 4(1) would also be retained.

8. The Commission representative, also speaking in a personal capacity, suggested a further compromise solution. This would consist of maintaining Article 1a(1) as in the consolidated text and of adding to Article 1a(2) of the consolidated text a "safety net" intended to minimize any reduction of the term of protection in those Member States in which the term is calculated at present in relation to the death of the principal director: this would be achieved by adding the following sentence to Article 1a(2): "However, this term shall not be shorter than 100 years after the creation of the work."

9. All delegations agreed to submit the suggestions described under points 7 and 8 above to their authorities.
10. The Presidency considers that the suggestion set out under point 8 above constitutes a reasonable compromise solution and recommends that the Permanent Representatives Committee give serious consideration to its inclusion in the overall package.

C. Works first published after the expiry of copyright protection (Article 2a) and critical works

11. During the Permanent Representatives Committee's discussions on 28 May 1993, the Italian delegation requested that further consideration be given to its proposal to include a provision concerning critical works (see 6614/93 point 18), and presented an explanatory memorandum on this subject.

12. At the Attachés' meeting, it was agreed that the Commission and the Italian delegation would cooperate in preparing a recital which would make it clear that Member States were free to introduce new rights related to copyright the duration of which was not harmonized by this Directive, provided that they notified the Commission in accordance with Article 8. The Commission was also invited to prepare a statement for the Council minutes in which it would undertake to study the appropriateness of proposing Community harmonization of the protection of critical works.

The Presidency recommends that the Permanent Representatives Committee approve the solution set out above in respect of critical works.

13. At the meeting of the Permanent Representatives Committee on 28 May 1993, the Belgian delegation presented a proposal to add a paragraph 2 to Article 2a (Annex II to this report). The German delegation also indicated that it maintained its proposal mentioned in the penultimate paragraph of point 17 of 6614/93
(Annex III to this report) as a compromise solution between the consolidated text of Article 2a and the proposal by the Belgian delegation.

14. At the Attachés' meeting, the French and Spanish delegations supported the proposal by the Belgian delegation(5), the Spanish delegation indicating that it could accept the proposal by the German delegation as a fallback position in the event of the former not being adopted.

The Italian and Luxembourg delegations expressed positive initial reactions to the proposal by the Belgian delegation, but maintained scrutiny reservations.

The Danish, Greek, Netherlands and Portuguese delegations opposed both proposals(6).

The United Kingdom delegation opposed the proposal by the Belgian delegation but was prepared to give further consideration to the proposal by the German delegation in a spirit of compromise.

The Irish delegation reserved its position on both proposals.

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(5) The French delegation considered that the term should be 50 years, both in this proposal and in Article 2a as set out in the consolidated text.

(6) The Netherlands and Portuguese delegations also reiterated their opposition to Article 2a as set out in the consolidated text. The Greek delegation considered that the term in Article 2a as set out in the consolidated text should be 50 years, and that the wording should be improved to make clear that the right concerned is a right related to copyright.
The Commission representative did not oppose either proposal, but expressed doubts as to their usefulness in view of the small number of works likely to be affected.

In the light of the number of delegations which oppose these proposals, the Presidency recommends that neither of them be included in the compromise package.

D. Photographs (Article 3)

15. At the meeting of the Permanent Representatives Committee on 28 May, the two variants of Article 3 remained on the table and the French delegation questioned the Commission on the practical consequences of the two variants (6978/1/93, point 4).

16. At the Attachés' meeting, the Commission representative explained that Variant 1 would cover all the categories of photographs mentioned by the French delegation with the exception of photographs taken by satellite; while Variant 2 would probably cover the same categories in some Member States but not in others.

17. After discussion, the French delegation put forward the following suggestion as a compromise solution between the two variants(7):

"Photographs which are original in the sense that they bear the personal mark of the author shall be protected according to Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for a different system of protection for other photographs."

The Netherlands delegation expressed a scrutiny reservation on this suggestion, considering that it would

(7) The wording of the accompanying recital would have to be reconsidered if this solution were adopted.
give a lower level of originality than that resulting from the terms "intellectual creation" in Variant 1.

The Presidency recommends that serious consideration be given to the above suggestion as a compromise solution between the two Variants in the consolidated text.

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

18. At the meeting of the Permanent Representatives Committee on 28 April, the Netherlands delegation requested an opinion from the Council Legal Service on the revival of protection proposed in Article 6a(2).

19. At the meeting of the Attachés, the representative of the Council Legal Service gave an initial reply. Following requests by several delegations that the views of the Council Legal Service be given in writing, these views will be set out in an Addendum to the present report.

20. The Netherlands delegation requested that the Commission's original proposal(8) be included in the consolidated text as a third Variant. The Commission representative pointed out that the Commission's original proposal was no longer on the table, as it had been replaced by the Commission's amended proposal (4483/93 PI 9 CULTURE 8). The German and United Kingdom delegations also expressed a strong reservation on reverting to the Commission's original proposal.

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(8) "This Directive shall apply to rights which have not expired on or before 31 December 1994." (Article 6(1), first sentence, in 5509/92 PI 33 CULTURE 21).
21. The positions of the delegations with regard to Article 6a(2) can be summarized as follows:

(a) the Belgian, German, Greek, Spanish, French, Italian and United Kingdom delegations and the Commission representative expressed a preference for Variant 1; the Belgian delegation specified that Variant 1 would have to be accompanied by clearer safeguards in paragraph 3 (see points 22 and 23 below); the Italian delegation indicated that it could also accept Variant 2 if there were a consensus in favour of it;

(b) the Danish, Irish, Luxembourg, Netherlands and Portuguese delegations still expressed a preference for the Commission's original proposal; if this were no longer on the table, the Danish delegation would prefer Variant 2, while the Irish and Luxembourg delegations found Variant 1 less unacceptable than Variant 2.

In the light of these positions, the Presidency recommends that Variant 1 of Article 6a(2) be included in the overall package.

22. At the meeting of the Permanent representatives Committee on 28 May 1993, the Belgian delegation presented an alternative proposal for Article 6a(3), accompanied by a new recital (Annex IV to this report).

23. At the Attachés' meeting, the Commission representative pointed out that the addition proposed by the Belgian delegation to Article 6a(3) would have the effect of restricting the safeguards provided by this paragraph, and suggested that the recital proposed by the Belgian delegation be redrafted with a view to reinforcing those safeguards. This view was supported by the majority of delegations.
After discussion, the majority of delegations agreed to give favourable consideration to the recital set out in Annex V to this report, which would replace the second of the two recitals contained in footnote 20 on page 10 of the consolidated text.

The Netherlands delegation expressed a reservation on this recital.

The Presidency recommends that the recital in Annex V be included in the overall package.

F. Conclusions

24. The Permanent Representatives Committee is invited to:

(a) approve the recommendations made by the Presidency in Sections B to E above;

(b) take note of the results of the Attachés' examination of other outstanding reservations and scrutiny reservations as summarized in Annex VI to this report;

(c) refer the resulting package to the Council with the view to the adoption of a common position.
Article 1a - Proposal by the French delegation

The term of protection of a cinematographic or audiovisual work shall expire 70 years after either the death of the principal director or the death of the last of the co-authors.
Article 2a - Proposal by the Belgian delegation

Add a paragraph 2 as follows:

"However, if the work has for the first time been 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) (protection within the meaning of paragraph 1) for 25 years from the time when the work was first lawfully made available to the public."
Additional paragraph to be added to Article 1: Proposal by the German delegation

If a posthumous work is published after expiration of sixty years and before expiration of seventy years after the death of the author, the protection ends ten years after the publication.
Article 6a: Proposal by the Belgian delegation

1. Reword paragraph 3 as follows:

"This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in Article 10(1). In order to protect acquired rights and legitimate expectations of third parties, Member States may adopt necessary provisions. They may provide in particular that in certain circumstances, such as danger of bankruptcy or danger of substantial financial loss, the copyright and related rights which are revived in application of this Directive may not give rise to the payment of such rights by persons who undertook in good faith the exploitation of the works at the time when such works were in the public domain and to the extent that such persons perform acts which are subject to the payment of rights and which are necessary for the exploitation as undertaken before the adoption of the Directive."

2. Add the following recital:

"Whereas the protection of acquired rights and legitimate expectations of third parties is a principle of the Community legal order, in application of Article 6a(3) Member States may provide in particular that in certain circumstances, such as danger of bankruptcy or danger of substantial financial loss, the copyright and related rights which are revived in application of this Directive may not give rise to the payment of such rights by persons who undertook in good faith the exploitation of the works at the time when such works were in the public domain. The measure suspending the payment of rights is applicable only to those acts which are necessary for the exploitation as undertaken before the adoption of the Directive."
Recital concerning Article 6a(3)\(^{(9)}\)

Whereas acquired rights and legitimate expectations of third parties are subject to protection\(^{(10)}\) in the Community legal order; whereas in application of Article 6a(3) Member States may provide in particular that in certain circumstances the copyright and related rights which are revived in application of this Directive may not give rise to payments by persons who undertook\(^{(11)}\) the exploitation of the works at the time when such works were in the public domain.

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\(^{(9)}\) Reservation by the Netherlands delegation on this recital.
\(^{(10)}\) The Spanish delegation would prefer to replace the words "are subject to protection" by the words "are respected".
\(^{(11)}\) Scrutiny reservation by the Commission representative on the omission of the words "in good faith" at this point.
Other matters considered by the Attachés

1. Article 1(3a)

The Greek delegation withdrew the suggestion made in the Permanent Representatives Committee on 28 May (6978/1/93, second indent) in the light of the wording of the second recital in footnote 3 on page 3 of the consolidated text.

2. Article 2

2.1. The German delegation withdrew its scrutiny reservation on the wording of Article 2.

2.2. The Commission representative reserved his position on the statement requested by the United Kingdom delegation in relation to Article 2(3) until Article 1a was resolved.

2.3. A request by the Irish delegation to amend the beginning of Article 2(3) to read: "The rights of producers of the first fixation of a film other than a right granted under Article 1a(1) shall expire ..." was postponed until Article 1a was resolved.

2.4. A request by the Luxembourg delegation to amend Article 2(4) was referred to bilateral discussions between the Luxembourg delegation and the Commission representative.

2.5. A request by the Greek delegation to clarify certain expressions used in Article 2 was referred to bilateral discussions between the Greek delegation and the Commission representative.
3. **Article 4(1)**

The deletion or retention of Article 4(1) was postponed until Article 1a was resolved.

4. **Article 6**

The joint statement proposed by the French delegation at the meeting of the Permanent Representatives Committee on 28 May 1993 (Annex VII to this report) was approved by all delegations. The Commission representative indicated that the Commission still had a reservation on Article 6 as set out in the consolidated test, which could be reconsidered in the light of the final overall package; this statement would be included in that reconsideration.

5. **Article 6a(4)**

The Irish delegation undertook to re-examine its request made at the meeting of the Permanent Representatives Committee on 28 May 1993 (6978/1/93, point 5, last indent).

6. **Article 8**

The Irish delegation agreed to give favourable consideration to the following rewording of this provision:

"Member States shall immediately notify the Commission of any governmental plan to grant new related rights, including the basic reasons for their introduction and the term of protection envisaged."

The Portuguese delegation maintained a scrutiny reservation on the need for the words "the basic reasons for their introduction and".
7. **Article 10(1)**

The Commission representative suggested that the date in the first paragraph be 28 December 1994.

There was general agreement that this date could not be fixed until the Council's common position was ready for adoption.
Article 6: Proposal by the French delegation

Add the following joint statement by the Council and the Commission:

The Council and the Commission confirm that the wording of Article 6 of this Directive has the effect that moral rights are excluded from its field of applications.