LEGAL SERVICE OPINION

Subject: Amended proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights - legal issues regarding Article 6a(2)

No. doc.: 6613/93 PI 37 CULTURE 52
No. Cion prop.: 4483/93 PI 9 CULTURE 8

At its meeting on 28 May 1993, the Permanent Representatives Committee asked the Council Legal Service for its opinion on the effects of the provision in Article 6a(2) of the above proposal (1).

1. Article 6a ("Application in time") sets out, in paragraph 2 as it stands at present, two alternatives (2), both of which would affect the application of the proposed Directive differently from the original Commission proposal (3).

2. Article 6(1), first sentence, of the original Commission proposal

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(1) 6613/93 PI 37 CULTURE 52, p. 9 and 6978/1/93 REV 1 (f) PI 47 CULTURE 58, p. 2.
(2) 6613/93, pp. 9 and 10.
(3) 5509/92 PI 33 CULTURE 21 - COM(92) 33 final - SYN 395.
stipulated that:

"This Directive shall apply to rights which have not expired on or before 31 December 1994." (4).

The effect of this would be to make the Directive applicable to works protected under a Member State's legislation as at 31 December 1994, with such protection being extended only in the Member State in which it obtained on that date. If protection for the same work had already expired in another Member State by 31 December 1994, that work would continue to be protected in the first Member State and remain in the public domain in the second. The result of such differing protection for the same work in individual Member States, as is already entailed at present by the discrepancies between national laws regarding the term of protection and recognition of some classes of rights, would be to postpone for a time the effects of harmonization of the term of protection under the Directive in all Member States.

For the time in question, that state of affairs would involve the same risks for the operation of the internal market as the present unharmonized situation. It should be noted that in its judgment of 24 January 1989 (5) the Court of Justice stated that:

"Insofar as the disparity between national laws may give rise to restrictions on intra-Community trade in sound recordings, such restrictions are justified under

(4) Ibid., p. 53.
Article 36 of the Treaty if they are the result of differences between the rules governing the period of protection and this is inseparably linked to the very existence of the exclusive rights.

3. To alleviate the difficulties arising from such a situation for the proper operation of the internal market, the Commission envisaged a different application rule in its amended proposal, in response to a European Parliament amendment.

That rule forms the first alternative for Article 6a(2) in the consolidated text (6):

"The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State, on the date referred to in Article 10(1) (7), under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC".

The effect of this would be to apply the terms of protection laid down by the Directive not just in those Member States in which works continue to be protected under national legislation but also in those Member States in which protection has ceased and works have entered the public domain. In the latter States, the fact that the work is protected in another Member State would revive the economic rights of rightholders until such

(6) 6613/93 PI 37 CULTURE 52.
(7) Deadline for transposition of the Directive by the Member States.
time as the term of protection has expired throughout the Community.

This rule on application in time is designed to remedy the difficulties arising from the system originally proposed by the Commission. It would eliminate the risk of barriers to intra-Community trade since the work would be protected throughout the Community for the same term.

The question put to the Legal Service is whether the provision in question would be likely to call into question certain rights of individuals. It should be pointed out that, in general terms, the adoption of provisions designed to govern legal situations is, by definition, likely to call into question certain rights. However, in exercising its powers, the Community legislative authority is required, under the Court’s case law, to act in compliance with the principles of the Treaty and in particular the principle of proportionality. It should therefore be considered whether application of the Directive’s provisions as envisaged in that alternative might disproportionately prejudice the rights of individuals exploiting works which have already entered the public domain in one or more Member States.

It should first be pointed out that, under Article 6a(3), first sentence, those exploiting works protected by copyright or related rights could not be required to pay any fees to the rightholders for acts of exploitation performed before the deadline for implementing the Directive. With regard to future acts of exploitation, the situation would be altered
after that date. Payment of fees to intellectual property rightholders would become a factor again in economic calculations for future operations.

Insofar as the rule introduced by the first alternative applied without prejudice to past acts of exploitation and was accompanied by appropriate transitional provisions, it would seem possible to keep the effect of that alternative within the bounds of compliance with the principle of proportionality. The Legal Service notes that the second sentence of Article 6a(3) reads as follows:

"Member States may adopt the necessary provisions to protect acquired rights and legitimate expectations of third parties."

In order for Community legislation to ensure such protection, the Council Legal Service considers that this provision should entail an obligation and not merely an option for the Member States.

4. The second alternative for Article 6a(2) states that:

"The terms of protection provided for in this Directive shall apply to all works and subject matter which would have been in protection on the date referred to in Article 10(1), had this Directive and Council Directive 92/100/EEC already been in force."

The effect of this alternative would be to revive protection for works no longer protected in the Community on the date for implementing the Directive. It would therefore be difficult to justify applying it as a measure aimed at the establishment and operation of the internal market. The true purpose of the provision would be not
the elimination of barriers resulting from the discrepancies between national laws on the term of protection, but more proper protection for holders of copyright or related rights. That being so, Article 100a would not be the correct legal basis. If the Permanent Representatives Committee so wishes, the Legal Service is prepared to consider on what legal basis EEC competence could be exercised.

CONCLUSIONS

In conclusion, the Council Legal Service is of the opinion that:

- The rule on the Directive's application in time laid down in the first alternative for Article 6a(2) in the consolidated text would not run counter to the principles of Community law inasmuch as:

  = the object of the exercise is to eliminate the risk of barriers to intra-Community trade resulting from the discrepancies between national laws on the term of protection;
  
  = that rule is accompanied by paragraph 3 of the same Article, the second sentence of which should be couched in compulsory terms.

- The rule on application in time laid down by the second alternative for Article 6a(2) could not be based on Article 100a of the EEC Treaty.