NOTE
from: Presidency

to: Council (Internal Market)

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Subject: Amended proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights - Overall compromise proposal

Delegations will find attached an overall compromise proposal drawn up by the Presidency.
AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE
HARMONIZING THE TERM OF PROTECTION
OF COPYRIGHT AND CERTAIN RELATED RIGHTS

Article 1
Duration of authors' rights

1. The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for seventy years after his death, irrespective of the date when the work is lawfully made available to the public.\(^{(1)}\)

2. In the case of a work of joint authorship the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.

3. In the case of anonymous or pseudonymous works, the term of protection shall run for seventy years\(^{(2)}\) after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.

3.a Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3 above, except if the natural persons who have created the work as such are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights

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\(^{(1)}\) Reservations by the Irish, Luxembourg, Netherlands and Portuguese delegations and waiting reservations by the Danish and United Kingdom delegations on the proposed term of 70 years post mortem auctoris.

\(^{(2)}\) The reservations and waiting reservations mentioned in footnote 1 also apply to this term.
of identified authors whose identifiable contributions are included in such works, for which contributions paragraph 1 or 2 shall apply.

4. deleted.

5. Where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.

6. In the case of works for which the term of protection is not calculated after the death of the author or authors and which have not been lawfully made available to the public within 70 years from their creation, the protection shall terminate.

(3) Scrutiny reservation by the Portuguese delegation on this paragraph. This paragraph would be accompanied by the following recitals:

"Whereas collections are protected according to Article 2(5) of the Berne Convention when, by reason of the selection and arrangement of their content, they constitute intellectual creations; whereas those works are protected as such, without prejudice to the copyright in each of the works forming part of such collections; whereas in consequence specific terms of protection may apply to works included in collections;

Whereas in all cases where one or more physical persons are identified as authors the term of protection is calculated after their death; whereas the question of authorship in the whole or a part of a work is a question of fact which the national courts may have to decide;"
Article 1a  

Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.

2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.

3. deleted.

Article 2

Duration of related rights

1. The rights of performers shall expire fifty years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire fifty years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

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(4) Positive scrutiny reservations by several delegations and the Commission on this Article.

(5) The reservations and waiting reservations mentioned in footnote 1 also apply to this term.

(6) This paragraph would be replaced by the following recital:

"whereas the provisions of this Directive do not affect the application by the Member States of the provisions of Article 14bis(2) (b), (c) and (d) and (3) of the Berne Convention;"
2. The rights of producers of phonograms shall expire fifty years after the fixation is made. However if the phonogram is lawfully published or lawfully communicated to the public during this period, the rights shall expire fifty years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

3. The rights of producers of the first fixation of a film shall expire fifty years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire fifty years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.  

(7) This paragraph would be accompanied by the following statement to be recorded in the Council minutes:

"The Commission considers that the provision of Article 2(3) is without prejudice to the term of protection of Article 1a(2) granted to authors of cinematographic or audiovisual works as defined by the legislation of the Member States in accordance with Article 1a(1)."
4. The rights of broadcasting organizations shall expire fifty years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.\(^{(8)}\)

(8) This paragraph would be accompanied by the following recital:

"whereas the rights of broadcasting organizations in their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite, should not be perpetual; whereas it is therefore necessary to have the term of protection running from the first transmission of a particular broadcast only; whereas this provision is understood to avoid a new term running in cases where a broadcast is identical to a previous one;".

This Article would be accompanied by the following recital, which would replace the 16th recital in the Commission's amended proposal:

"Whereas, in order to avoid differences in the term of protection as regards related rights it is necessary to provide the same starting point for the calculation of the term in the whole Community; whereas the performance, fixation, transmission, lawful publication, and lawful communication to the public, that is to say the means of making a subject of a related right perceptible in all appropriate ways to persons in general, are taken into account for the calculation of the term of protection regardless of the country where this performance, fixation, transmission, lawful publication, or lawful communication to the public takes place;".
Article 2a
Protection of previously unpublished works

Any person who, after the expiry of copyright protection, for the first time makes lawfully available to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.\(^{(9)}\)

\(^{(9)}\) Reservation by the Netherlands and Portuguese delegations on the need for this provision. Reservation by the French, Irish and Greek delegations on the duration of the protection. The Commission will reflect on the possibility of proposing an alternative version of this Article based on the principle of mutual recognition.

This Article in its present form would be accompanied by the following recital and statement:

"Whereas the Member States remain free to maintain or introduce rights related to copyright which are not covered by this Directive, in particular in relation to the protection of critical and scientific works; whereas, in order to ensure transparency at Community level, it is however necessary for Member States which introduce new related rights to notify the Commission;"

"The Commission has taken due note of the request by the Italian delegation that the introduction of a right protecting critical and scientific works in the Community be studied in depth. The Commission undertakes to study the feasibility and desirability of such harmonization and to make appropriate proposals if necessary."
Article 3
Protection of photographs

Photographs which are original in the sense that they are the author's own intellectual creation 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.\(^{(10)}\)

Article 4
Protection vis-à-vis third countries\(^{(11)}\)

1. - deleted -

2. Where the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.

3. The terms of protection laid down in Article 2 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the international obligations of the Member States, the term of protection granted by

(10) This Article would be accompanied by the following recital:

"Whereas the protection of photographs in the Member States is the subject of varying régimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in the present Directive; whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs can be left to national law;". (11) Reservation by the Commission on the deletion of Article 113 from the legal basis of the Directive.
Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 2 or 2a.

4. Member States which, at the date of adoption of this Directive, in particular pursuant to their international obligations, granted a longer term of protection than that which would result from the above mentioned provisions, may maintain this protection until the conclusion of international agreements on the term of protection by copyright or related rights.

Article 5
Calculation of terms

The terms laid down in this Directive are calculated from the first day of January of the year following the event which gives rise to them.

Article 6
Moral rights

1. Deleted.

2. This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.\(^{(12)}\)

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(12) Reservation by the Commission on this provision. This provision would be accompanied by the following statement in the Council minutes:

"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 application."

The French delegation would prefer Article 6 to read:

"Moral rights are excluded from the field of application of this Directive" and to dispense with the statement.
Article 6a
Application in time\(^{(13)}\)

1. Where a term of protection, which is longer than the corresponding term provided for by this Directive, is already running in a Member State on the date referred to in Article 10(1), this Directive shall not have the effect of shortening that term of protection in that Member State.

2. 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), 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.\(^{(14)}\)

3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in Article 10(1). Member States shall adopt the necessary provisions to protect acquired rights and legitimate expectations of third parties.\(^{(15)}\)

\(^{(13)}\) Reservation by the Netherlands delegation on the whole of this Article.

\(^{(14)}\) Reservations by the Danish, Irish, Luxembourg, Netherlands and Portuguese delegations on this paragraph.

\(^{(15)}\) This paragraph would be accompanied by the following recitals:

"Whereas Member States are free to adopt provisions on the interpretation, adaptation and further execution of contracts on the exploitation of protected works and other subject matter which were concluded before the extension of the term of protection resulting from this Directive;"

"Whereas respect of acquired rights and legitimate expectations is part of 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 in good faith the exploitation of the works at the time when such works were in the public domain;"

The Netherlands delegation has a reservation on the latter recital.
4. Member States need not apply the provisions of Article 1a(1) to cinematographic or audiovisual works created before 1 July 1994.\(^{(16)}\)

5. Member States may determine the date as from which Article 1a(1) shall apply, provided that that date is no later than 1 July 1997.

**Article 7**

**Technical adaptation**


**Article 8**

**Notification procedure**

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.\(^{(18)}\)

**Article 9**

Deleted.

\(^{(16)}\) Scrutiny reservation by the Irish delegation on this date.

\(^{(17)}\) OJ No L 122 of 17.5.1991, p. 42.

\(^{(18)}\) Scrutiny reservation by the Portuguese delegation on the wording of this provision.
Article 10
General provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by [28 December 1994.]

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

2. Member States shall apply Article 8 from the date on which this Directive takes effect.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, For the Council
The President

(19) This date will be decided when the Council's common position is adopted.