SUMMARY OF PROCEEDINGS

of the Working Party on Intellectual Property (Copyright)
on 22 and 23 June 1992

No. Cion prop.: 5509/92 PI 33 CULTURE 21

Subject: Proposal for a Council Directive harmonizing the term of
protection of copyright and certain related rights

1. At its meeting held on 22 and 23 June 1992, the Working
Party on Intellectual Property (Copyright)\(^1\) held an initial
harmonizing the term of protection of copyright and certain
related rights (5509/92 PI 33 CULTURE 21 – COM(92) 33 final –
SYN 395).

General discussion

2. In presenting their proposal, the Commission
representatives stressed the need to harmonize the term of
protection of copyright and certain related rights within the

\(^1\) At this meeting the Working Party also coordinated the views of the
Member States and the Commission with regard to work in the WIPO on
a possible Protocol to the Berne Convention for the Protection of
Literary and Artistic Works and held an initial exchange of views on
the proposal for a Council Directive on the legal protection of
databases (6919/92 PI 64 CULTURE 61). These proceedings are
summarized in 7740/92 PI 74 CULTURE 79 and 8305/92 PI 83 CULTURE 84
respectively.

The Luxembourg delegation was not represented at this meeting.
Community. The Commission had chosen long terms of protection for both copyright (70 years post mortem auctoris) and related rights (50 years), since long transitional periods would have been necessary if the terms proposed had been shorter than the present terms in some Member States, in the light of the case-law of the Court of Justice requiring account to be taken of existing rights. Moreover, the interested circles had expressed considerable support for the terms proposed by the Commission. While this meant that the terms of protection would be lengthened in several Member States, the proposal would not entail renewed protection for works which were already in the public domain. The proposal left it to the Member States to determine who were the holders of copyright and related rights.

With regard to rightholders who were not Community nationals, the method chosen for determining the term of protection in the Community was that of comparison of the term in the Community with the term of protection in the third country concerned; this method was intended to encourage third countries to lengthen their terms to correspond to those proposed for the Community. A further feature of the proposal was that it included a procedure for Member States intending to introduce new related rights to notify the Commission of these intentions, in order to avoid differences developing between related rights in the various Member States.

3. All delegations expressed a favourable reaction to the Commission’s proposal as a whole, with the Belgian, Irish and Netherlands delegations stating that their internal consultation procedures had not yet been completed.

4. The Danish, Irish and Netherlands delegations expressed doubts on the need to increase the term of copyright protection to 70 years post mortem auctoris, and the Spanish and United Kingdom delegations considered that the starting points for protection proposed by the Commission needed to be considered carefully.
5. The French and United Kingdom delegations considered that further consideration should be given to the question whether or not the proposed directive should have the effect of allowing works protected in some Member States to remain in the public domain in other Member States.

6. The Italian delegation was in favour of the solution proposed by the Commission with regard to third countries, while the French, Irish and United Kingdom delegations considered that it needed further examination.

7. The French, Irish and Italian delegations expressed doubts as to the inclusion of Article 113 among the legal bases of the proposal, and the Irish delegation invited the Council Legal Service to give its views on this matter.

8. The French delegation expressed reservations with regard to the provisions proposed in respect of posthumous works, moral rights and the notification of plans to introduce new related rights.

9. The United Kingdom delegation considered that the provisions concerning an advisory committee required further examination.

Article 1

10. The Netherlands delegation expressed a reservation on the term of protection of 70 years post mortem auctoris provided for in Article 1(1), which is based on Article 7(1) and (6) of the Berne Convention for the Protection of Literary and Artistic Works.

11. The Commission representatives explained that the Berne Convention did not regulate specifically the term of protection of works published posthumously, with the result that different solutions had been adopted in different Member States. The wording "irrespective of the date when the work is lawfully
made available to the public" in Article 1(1) was intended to ensure that the term of protection for such works was the same as if they had been published during the author's lifetime and was not affected by the date of their publication.

The French delegation, whose law provides for protection for the publisher from the date of publication in the case of works published posthumously, considered that the Commission's proposal needed careful examination in this respect, particularly as regards literary and cinematographic works.

The United Kingdom delegation requested the French delegation to prepare a note explaining the French law on this subject.

12. In reply to a question from the French delegation on the meaning of the terms "lawfully made available to the public" in Article 1(1), the Commission representatives explained that they had deliberately chosen a neutral term, which was also used in Article 7(3) of the Berne Convention.

13. The Italian delegation asked whether it should be stated specifically whether or not Member States would have the option of extending the term of protection provided for in Article 1(1) in exceptional cases, for example in the case of war.

14. The Belgian, French and United Kingdom delegations considered that careful consideration should be given to what was meant by "collective works" in Article 1(3) and (6).

The French delegation drew attention to the need for all Member States to agree, for example whether or not this term included cinematographic or audiovisual coproductions, in order to avoid a situation where they would enjoy the term of protection provided for under paragraph 3 in some Member States, but that provided for under paragraph 1 in others. The United Kingdom delegation also drew attention to the danger of a conflict between the term of protection for collective works
provided for in Article 1(3) and the term of protection for collections of literary or artistic works provided for under Article 2(5) of the Berne Convention.

15. The United Kingdom delegation also drew attention to the possibility that certain works could be considered under the legislation of some Member States to have been created by a legal person, but not under the legislation of other Member States; in the first set of Member States they would enjoy the term of protection provided for in Article 1(3), whereas in the other set they would enjoy that provided for in Article 1(1).

16. The United Kingdom delegation considered that it would be useful to define the terms "lawfully made available to the public" in Article 1(3), in order to avoid the term of protection beginning to run at different times in different Member States.

17. The Netherlands delegation expressed doubts with regard to collective works being treated in the same way as anonymous or pseudonymous works.

18. The Belgian delegation expressed the view that careful consideration would have to be given to how Article 1(3) and (4) would be applied in practice.

19. The Italian and Portuguese delegations expressed doubts as to the need for Article 1(4).

20. The United Kingdom delegation agreed with the approach taken by the Commission in Article 1(5). The French and Netherlands delegations on the other hand doubted whether this approach could be applied in the same way to parts of a book and to episodes of a television series; these delegations considered that in the case of collective literary works, the term of protection should be considered in relation to the work concerned as a whole, not to its constituent parts.
21. The United Kingdom delegation supported the general principle of providing for a term of protection of fifty years for all the categories of rightholders referred to in Article 2.

The German delegation, while favouring a term of fifty years for performers and twenty-five years for the other categories of rightholders covered by this Article, was prepared to consider the Commission's proposal.

The French delegation pointed out that, while the term of protection provided for under Article 2 was the same number of years for all the categories of rightholders covered by that Article, it was not the same number of years as provided for authors under Article 1. This delegation also considered that the multiplicity of starting points for protection under Article 2 would lead to confusion.

22. In reply to a question from the German delegation as to how existing contracts would be affected by the fact that this Article would result in the term of protection of the rights concerned being lengthened in many Member States, the Commission representatives replied that the parties concerned would be free to decide whether or not to adapt their contracts.

23. The Netherlands, Irish and United Kingdom delegations pointed out that the term of protection for producers of cinematographic or audiostream works would not be the same throughout the Community, as in some Member States these producers enjoyed copyright protection, whereas in other Member States they would enjoy protection under Article 2(3).
The Commission representatives indicated that they were aware of this problem, but preferred to await the opinion of the European Parliament before proposing any particular solution.

24. The United Kingdom delegation considered that a number of concepts used in Article 2 should be harmonized, otherwise the harmonizing effect of the proposed directive would be reduced.

25. The United Kingdom delegation asked whether Article 2(4) was intended to cover solely broadcasts by wireless or also broadcasts by cable. The Commission representatives replied that this provision should be aligned on the corresponding provision in the rental Directive 2.

26. The Commission representatives invited the views of the Member States on the desirability of adding to Article 2 a provision concerning the term of protection of rights of book publishers, as such rights existed in some but not all Member States.

The United Kingdom delegation was prepared to accept the inclusion of such a provision if it did not cause too many difficulties for other Member States.

The German and Netherlands delegations considered that the term of protection of these rights should not be harmonized in the absence of harmonization of the rights themselves.

The Spanish delegation considered that this question could be dealt with by a minutes statement, as in the case of the rental directive.

---

2 Common position adopted by the Council on 18 June 1992 with a view to adopting a Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property (doc. 6968/1/92 REV 1 PI 65 CULTURE 63 PRO-COOP 40).
Article 3

27. The Commission representatives pointed out that the Member States had widely differing provisions governing the protection of photographs, some protecting all photographs by means of copyright, others protecting only those photographs considered to be artistic works, and others affording copyright protection to those considered to be artistic works while giving a related right of shorter duration to "ordinary" photographs. They emphasized that the intention of Article 3 was not to attempt to harmonize the substantive protection granted, but merely to provide that photographs protected by any means in the Member States were to have the term of protection provided for in Article 1.

The United Kingdom delegation supported the Commission's approach.

The French, Italian, Spanish and German delegations considered that this proposal needed careful consideration, as it would amount to eliminating the difference recognized by some Member States between "artistic" or "original" photographs and "ordinary" photographs.

Articles 4 and 9

28. The Commission representatives explained that the intention of Article 4(2) and (3) was to encourage third countries to grant terms of protection as long as those provided for in Articles 1 and 2 of this proposal; this encouragement consisted in making the term of protection granted to nationals of a third country dependent upon the term of protection granted by that country. Where Member States already had bilateral agreements with third countries which were incompatible with Article 4(2) or (3), Article 4(4) allowed provisional measures to be taken under the procedure set out in Article 9 pending the negotiation of new agreements.
29. Several delegations considered that these provisions required careful examination.

30. The United Kingdom delegation felt that special consideration should be given to the question whether the provisions of Article 4(3) and (4) were equally appropriate in relation to third countries which were parties to the Rome Convention\(^3\) and third countries which were not parties to that Convention.

31. The Italian delegation felt that Article 4(4) would be clearer if it stated expressly that the decision was be taken by the Commission.

32. The Spanish, United Kingdom, French, Italian, German and Irish delegations expressed the view that careful consideration should be given to the procedure proposed in Article 9. The Spanish, United Kingdom and French delegations felt that it should be examined more closely whether this procedure should apply in relation to Article 4(4) or in other respects. The German delegation considered that it should be examined whether other "comitology" procedures than the one proposed might not be more appropriate.

33. In reply to suggestions that Article 9 would give to the Commission powers held by the Member States, the Commission representatives pointed out that the Community already had competence in this respect under Articles 113 and 238 of the EEC Treaty. In the absence of Article 9, they indicated that the procedure of the Article 113 Committee would apply; they considered, however, that an advisory committee which specialized in questions of copyright and related rights might be more appropriate than the Article 113 Committee for advising on the measures to be taken under Article 4(4).

---

\(^3\) International Convention for the protection of performers, producers of phonograms and broadcasting organizations.
34. The Irish delegation suggested that the Council Legal Service be consulted on the appropriateness of Article 9.

Article 5

35. The Commission representatives explained that this provision was based on Article 7(8) of the Berne Convention and Article 14 of the Rome Convention.

Article 6

36. The Italian delegation agreed with the principle contained in Article 6(1) that works which had fallen into the public domain should not become protected once again as a result of the proposed directive, but considered that the reference date was open to discussion.

37. The French and United Kingdom delegations considered that Article 6(1) was likely to cause difficulties, particularly with regard to music and films.

The Commission representatives indicated that they were prepared to reconsider this provision in this respect.

38. With regard to Article 6(2), the French, Italian and United Kingdom delegations considered that it was unnecessary to deal with moral rights in this proposal. The United Kingdom delegation considered that this provision was premature as the Commission was studying all aspects of moral rights, and the French and Italian delegations considered that moral rights should be perpetual.

The Commission representatives pointed out that this provision did not prevent Member States from maintaining perpetual protection for moral rights, it merely ensured that they could not expire before the expiry of economic rights.
Article 7

39. The Commission representatives explained that Article 7(2) referred to the rental directive.

Article 8

40. The United Kingdom delegation questioned why Article 8 did not cover copyright as well as related rights. The Commission representatives explained that if a Member State introduced a new element of copyright, its term would automatically be governed by Article 1, whereas Article 2 covered only four categories of related rights, leaving open the possibility of different terms applying to other categories of related rights.

41. The Italian, Portuguese, French, United Kingdom, Spanish, Irish and Netherlands delegations considered that Article 8(2) raised serious problems, as it appeared to enable the Commission to interfere in the internal law-making process of the Member States. The Belgian and Irish delegations invited the Council Legal Service to give its views on this provision. The Belgian delegation also questioned whether there was any precedent in Community law for a provision of this nature.

4 See footnote 2 on page 7. The provisions concerned have been renumbered Articles 11 and 12 since the Commission's proposal on term of protection was made.
The German delegation's initial reaction to this provision was that it appeared to be logical and reasonable.

The Commission representatives pointed out that this provision did not enable the Commission to prevent Member States adopting national laws introducing new related rights, it merely obliged Member States to defer their adoption for three or twelve months as the case may be. They also drew attention to the precedent of Directive 83/189/EEC.  

---