SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 14 and 15 September 1992

No. prev. doc.: 8351/92 PI 85 CULTURE 85
No. Com 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 14 and 15 September 1992, the Working Party on Intellectual Property (Copyright) completed its first reading, begun on 14 and 15 July (see 8351/92 PI 85 CULTURE 85), of the proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights (5509/92 PI 33 CULTURE 21) and began a second reading on the basis of a non-paper drawn up following its discussions of Articles 1 and 2 at its previous meeting.

A. Completion of the first reading

Articles 4(4) and 9

2. The Danish, French, Irish and Netherlands delegations expressed scrutiny reservations with regard to Articles 4(4) and 9.

3. The German, Spanish, Irish, Italian and Netherlands delegations considered that the procedure proposed under Article 9 was weighted too much in favour of the Commission, and favoured seeking a solution which would give more...
decision-making power to the Council. The German delegation proposed replacing the proposed procedure by procedure III(b) under Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission. The Italian delegation suggested substituting a solution whereby the Commission would be authorized to negotiate on behalf of the Member States, subject to their approval of the results of the negotiation. The United Kingdom delegation reserved its position on the procedure to be followed.

The Commission representative stated that, since the proposed Directive was based on Article 100A of the EEC Treaty, and in the light of the Declaration on the powers of implementation of the Commission, annexed to the Single European Act, his Institution considered that the only appropriate procedure under Council Decision 87/373/EEC was the advisory committee procedure (procedure I), as proposed in Article 9; the Commission could therefore not accept replacing it with procedure III(b). Moreover, since the decisions to be taken under Article 4(4) concerned transitional measures to be taken pending the conclusion of international agreements, he considered that a more heavyweight procedure than procedure I would not be appropriate. If the Member States were opposed to the advisory committee procedure, the only other solution the Commission services were prepared to consider would be the deletion of Article 4(4) and 9, with the result that the normal rules would apply; the suggestion by the Italian delegation corresponded to these normal rules.

4. The Danish, Irish, Italian and United Kingdom delegations expressed concern at the possible implications of Article 4(4) on Member States’ obligations under the Rome Convention.  

1 OJ No L 197, 18.7.1987, p.33.
2 International Convention for the protection of performers, producers of phonograms and broadcasting organizations.
In reply to fears expressed by a number of these delegations that the combination of Article 4(4)(a) and Article 9 would allow the Commission, even if the advisory committee gave an opinion to the contrary, to suspend existing agreements between Member States and third countries where these agreements did not meet the requirements of Article 4(2) or (3), the Commission representative stressed that the intention of Article 4(4)(a) was not to suspend such agreements, but to make it possible to continue provisionally to apply them despite the requirements of Article 4(2) and (3).

5. The Netherlands delegation asked whether Article 4(4) would prevent it from making the reservation provided for under Article 16(1)(a)(iii) of the Rome Convention in respect of a third country when ratifying that Convention.

The Commission representative replied that if the Netherlands ratified the Rome Convention before the entry into force of the proposed Directive, it would be free to decide whether or not to make that reservation in respect of a third country, although in taking that decision it should take account of what was being done in this field at Community level. If the Netherlands ratified the Rome Convention after the entry into force of the proposed Directive, it would have to apply the reciprocity rule under Article 4(3).

6. The Danish, German, Irish, Netherlands and United Kingdom delegations considered that the wording of Article 4(4)(b) was vague and required clarification, drawing attention to the fact that the reference to "protection", rather than to the term of protection, made the scope of this provision extremely broad. They also asked for clarification of the terms "appropriate measures".

The Commission representative replied that the intention of this provision was that it should be possible to take action where appreciable distortion of competition or deflection of trade in the Community market resulted from the protection
granted to third-country nationals by Member States differing as a result of Member States applying different terms of protection. For example, it was possible that one Member State might have a bilateral agreement with a third country granting a term of protection of 50 years to phonograms produced in that country, while another Member State, by virtue of Article 16(1)(a)(iv) of the Rome Convention, might grant only the minimum term of 20 years under that Convention to phonograms produced in the same third country; if this situation resulted in a distortion of the Community's internal market, it should be possible to take measures to remove this distortion. The Commission representative pointed out that the measures to be taken would be similar to those provided for under Article 115 of the EEC Treaty, but considered that the nature of the measures could not be specified more clearly in Article 4(4)(b), as they would have to be decided in the light of the circumstances of each individual case.

7. The United Kingdom delegation questioned whether it would be appropriate to specify in Article 9 that the procedure set out in that Article was to be applied only in respect of Article 4(4). The Commission representative replied that where provision was made for one of the procedures under Council Decision 87/373/EEC, it was normal practice that the provision to which the procedure was to apply should contain a reference to the article setting out the procedure, rather than vice versa.

Article 5

8. Following observations by the United Kingdom and Italian delegations on the text in their respective languages, the Working Party invited the Commission to look carefully at the drafting of this Article in the various language versions.
Article 6(1)

9. This provision was discussed at the Working Party's previous meeting (see 8351/92 PI 85 CULTURE 85, points 44 and 45).

Article 6(2)

10. The Belgian, German, French, Irish, Netherlands and United Kingdom delegations expressed doubts on the need for the inclusion of this provision in the Directive. The Belgian delegation feared that its inclusion might prejudice the outcome of the Commission's consultations on the need for harmonization of moral rights.

The Italian delegation was in favour of the inclusion of this provision in the light of Article 6bis(2) of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). It also considered that protection of moral rights should be perpetual.

The Commission representative considered that this provision was necessary, as the functioning of the internal market could be disrupted if the moral rights granted to the author expired in some Member States but not in others before the expiry of the corresponding economic rights.

In the light of these explanations, the German and French delegations were prepared to consider this provision more favourably.

11. Following a suggestion by the German delegation, the Commission representative agreed that this provision should read: "The moral rights granted to the author shall be maintained at least until the expiry of the economic rights of the author."
12. In reply to a question from the Netherlands delegation, the Commission representative confirmed that it was not intended that this provision should include moral rights of performers.

13. The Netherlands delegation asked whether the term of protection of moral rights granted by the Member States to third countries should be subject to the principle of comparison of terms set out in Article 4(2). The Commission representative agreed to reflect on this question.

Article 7

14. This Article gave rise to no observations.

Article 8

15. The Danish, German, Greek, Spanish, French, Irish, Portuguese and United Kingdom delegations shared the reservations with regard to Article 8(2) set out in the note from the Italian delegation (7831/92 PI 75 CULTURE 80).

The Commission representative took note of these reservations.

Article 10

16. The Commission representative indicated that it would be logical to align the date proposed in Article 10(1) on the date for transposing the rental directive into national law.

The Netherlands delegation suggested that this date be left open for the present.

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3 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 (6968/1/92).
The Italian delegation suggested that, since Article 10(2) required Member States to apply Article 8 from a date earlier than the date for transposing Articles 1 to 7, a notice be published in the Official Journal drawing attention to the date from which Article 10(2) had to be applied.

The Commission representative took note of this suggestion:

B. Beginning of the second reading

18. Following the Working Party's discussion of Articles 1 and 2 at its previous meeting, a non-paper had been drawn up containing a redraft of these Articles in the light of that discussion. This non-paper is reproduced in the Annex.

Article 1(1)

19. In the non-paper, the question of term of protection for works published posthumously had been transferred from Article 1(1) to a new Article 1bis. The remainder of Article 1(1) was not discussed at this meeting.

Article 1(2)

20. Article 1(2) was not discussed at this meeting.

Article 1(3)

21. In the non-paper, the questions of collective works and works considered to have been created by a legal person had been transferred from Article 1(3) to new paragraphs 3bis and 3ter. The remainder of Article 1(3) was not discussed at this meeting.
Article 1(3bis)

22. The non-paper contained three alternative provisions for the question of collective works, corresponding to the three possible approaches identified at the Working Party's previous meeting: mutual recognition of Member States' laws (alternative 1), an obligation on all Member States to make provision for collective works (alternative 2) and a requirement that no Member State make provision for collective works (alternative 3).

23. The German and Portuguese delegations expressed a preference for alternative 1 (mutual recognition).

The Danish and United Kingdom delegations pointed out that the disadvantages of this alternative were that it would not lead to harmonization and that the national laws of all the Member States would have to be considered in order to determine the term of protection of a given collective work.

24. The French, Italian and Spanish delegations expressed a preference in principle for alternative 2. However, the Italian and Spanish delegations did not agree with the definition of collective works contained in the non-paper to the extent that they considered that the contributions of the various authors would be distinguishable; for these delegations, as well as the Portuguese delegation, the difference between collective works and works of joint authorship (Article 1(2)) was that the initiative to create a collective work was taken by a legal person.

The Danish, German, Netherlands and United Kingdom delegations expressed objections to alternative 2. The Danish delegation doubted whether it would be possible to reach agreement on a definition of collective works. The German and Netherlands delegations considered that it was not necessary to attempt to harmonize the concept of collective works within the
structure of this Directive. The United Kingdom delegation doubted whether this alternative would be compatible with the Berne Convention.

25. The Danish, Irish, Netherlands and United Kingdom delegations expressed a preference for alternative 3. After hearing the observations of the Danish and United Kingdom delegations in respect of alternative 1, the German delegation transferred its preference to alternative 3.

The Chairman of the Working Party observed that in his view alternative 3 meant that Member States would not be allowed to provide for a term of protection for collective works which derogated from the term provided for in Article 1 of the Directive, but would not prevent Member States from making provision in their law for collective works in other respects.

26. In the light of the discussion, the Commission representative was prepared to reflect on a solution corresponding to alternative 3.

Article 1(3 ter)

27. The non-paper contained two alternatives for the situation where works are considered under the legislation of a Member State to have been created by a legal person: mutual recognition of Member States' laws (alternative 1) and a requirement that there be no such provision (alternative 2).

28. The Spanish, Italian and Netherlands delegations expressed a preference for alternative 1. However, the Spanish delegation considered that this provision should also cover the case where the national law confers the same protection on a legal person as on a physical author; the Italian delegation considered that a legal person could be deemed to be the first owner of copyright but could not be deemed to be an author; and the Italian and Netherlands delegations expressed doubts with
regard to subparagraph (b) of alternative 1. The Italian delegation querying whether a Member State could be obliged to apply the law of another Member State.

The German and Irish delegations expressed a scrutiny reservation with regard to alternative 1, the German delegation expressing doubts as to the meaning of subparagraph (b).

The United Kingdom delegation considered that the objections raised in respect of alternative 1 of Article 1 (3bis) were also applicable to alternative 1 of Article 1 (3ter). Moreover, it pointed out that United Kingdom law did not determine that legal persons were to be considered as authors, but situations could arise where the author of a work was a legal person, and consequently it did not consider it satisfactory to provide for different terms of protection according to whether the author was a natural or legal person.

29. The German delegation expressed a preference for alternative 2.

The Irish, Netherlands and United Kingdom delegations could not accept alternative 2, as they could not accept that Member States should be prohibited from having provisions of this nature in their national law. The Netherlands delegation also considered that such a prohibition would be in contradiction with Article 2(1) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

30. The Commission representative noted that Member States were not satisfied with either alternative and indicated that the Commission services would continue to reflect on this question.

4 OJ No L 122, 17.5.1991, p. 42.
The non-paper contained three alternatives for Article 1(4): maintaining the Commission proposal, which would oblige the Member States to avail themselves of the option provided for in the last sentence of Article 7(3) of the Berne Convention (alternative 1); the draft text put forward by the United Kingdom delegation in 8375/92 PI 88 CULTURE 88 (alternative 2); and deletion of this provision (alternative 3).

The Working Party agreed unanimously to delete this provision. There was also general agreement that the problem raised by the United Kingdom delegation in 8375/92 did not relate to the term of protection of anonymous or pseudonymous works.

Article 1(5)

Article 1(5) was not discussed at this meeting.

Article 1(6)

Since the discussions on Article 1(3bis) and (3ter) had not been particularly conclusive, the Working Party did not discuss Article 1(6) at this meeting.

Article 1bis

The non-paper contained a draft of a provision concerning the term of protection for works first published after the death of the author, on the basis of the possible solution outlined at the Working Party's previous meeting (8351/92 PI 85 CULTURE 85, point 3).

The German, Irish and Italian delegations spoke in favour of this solution, subject to reconsideration of specific aspects of it.
The Danish, Netherlands, Portuguese and United Kingdom delegations expressed considerable doubts on the desirability of according special protection to works published posthumously. They considered that a revival of protection for such works after the expiry of normal copyright protection could create uncertainty as to whether or not a particular work was in the public domain, could create an undue obstacle to scholarly research and could encourage the owner of such a work to delay publication until after the expiry of normal copyright protection. They were not persuaded by the argument that such a provision was necessary to encourage the publication of works discovered after the death of the author. In the view of the United Kingdom delegation in particular, there was no need for further protection beyond the present term of 50 years post mortem auctoris, or beyond the proposed term of 70 years post mortem auctoris if it were to be adopted.

The Italian delegation suggested that the proposed protection for posthumous works should apply only if the work concerned was published within twenty years of the death of the author, thus ensuring that protection did not extend beyond the expiry of normal copyright protection.

The United Kingdom delegation considered that this suggestion had the merit of ensuring that copyright protection would not be open-ended.

The Commission representative was prepared to consider whether the proposed provision should apply only if the work was published within a certain number of years after the death of the author.

The German, Netherlands and United Kingdom delegations expressed reservations on the protection proposed being equivalent to copyright. The German delegation suggested that it should rather be neighbouring rights protection. The United Kingdom delegation considered that if neighbouring rights protection were to be envisaged, a shorter term than the
proposed 50 years should be considered. The Netherlands delegation considered that copyright protection was not appropriate, since normal copyright protection would already have expired, and that the granting of neighbouring rights protection for works published posthumously would encourage publishers to seek neighbouring rights protection whenever they published a work which was in the public domain. The Italian delegation considered that the protection to be accorded to works published posthumously should be copyright protection, as under its suggestion (point 38 above) this protection would not extend beyond the normal term of copyright protection. The Commission representative pointed out that what was proposed in the non-paper was not copyright protection, but a separate specific right, entailing economic rights rather than moral rights; with regard to the term of protection proposed, he could not accept a shorter term than 50 years, as this corresponded to the term of protection applied by two Member States at present to works published posthumously, and the inclusion of a shorter term in the Directive would require transitional solutions to be found.

The Danish, German, Irish, Italian and United Kingdom delegations expressed doubts whether the first owner of the right should be the owner of the work, as proposed in the non-paper. The Danish, German and United Kingdom delegations did not consider that the right should be accorded to a person who had not done anything to deserve it; in this context, the German delegation preferred that the right should be granted to the publisher of the work. The Irish and United Kingdom delegations pointed out that there might be difficulties in determining who was the owner of a work. The Italian delegation suggested that it be specified that the first owner of the right should be the legitimate owner of the work. The Commission representative indicated that the Commission services would continue to reflect whether the proposed right should be granted to the owner of the right or to the publisher.
Article 2

41. The non-paper contained a redraft of Article 2 which sought to take account of the drafting comments made at the Working Party's previous meeting (8351/92 PI 85 CULTURE 85, points 24 to 34).

42. The Working Party agreed to give particular consideration at its next meeting to the question raised in relation to Article 2(4) whether protection should be limited to the first transmission of a broadcast, or whether each transmission should give rise to a new period of protection (8351/92, point 34).
Article 1

DURATION OF AUTHOR’S 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.

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 [whose identity is known].

3. In the case of anonymous or pseudonymous works, the term of protection shall run for seventy years 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.

3bis. Collective works

Alternative 1

a) Where the legislation of a Member State which is the country of origin of the work according to the dispositions of the Berne Convention defines a work as a collective work, the term of protection in the entire Community shall run for seventy years after the work is lawfully made available to the public.

b) Member States, the legislation of which provides for situations under a) shall, however, if they are not the country of origin of the work according to the dispositions of the Berne Convention, grant the longer term of protection provided for by the legislation of the other Member States.

Alternative 2

In the case of collective works, the term of protection shall run for seventy years after the work is lawfully made available to the public.

A collective work is a work that is created by several authors on the initiative, and under the direction of a physical person or legal entity, with the understanding that it will be disclosed by that person or entity, and where the
contributions of the authors are merged in the totality of the work so that it is impossible to identify the various contributions and authors thereof.

(Audiovisual works shall not be considered to be collective works.)

(The physical person or legal entity who discloses the work shall be deemed to be the author.)

Alternative 3

(p.m. no collective works are allowed)

3ler. Legal persons

Alternative 1

a) Where the legislation of a Member State which is the country of origin of the work according to the dispositions of the Berne Convention determines that a legal person shall be taken to be the author [or first owner of copyright], the term of protection in the entire Community shall run for seventy years after the work is lawfully made available to the public.

b) Member States, the legislation of which provides for situations under a) shall, however, if they are not the country of origin of the work according to the dispositions of the Berne Convention, grant the longer term of protection provided for by the legislation of the other Member States.

Alternative 2

(p.m. authorship or first ownership of copyright for legal persons not allowed)

4. Alternative 1

Commission proposal)

Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for seventy years.

Alternative 2

(UE draft text)
Alternative 3
(paragraph 4 is 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 [collective works] or [works created by a legal person] or [works for which a legal person shall be taken to be the first owner of copyright] which have not been lawfully made available to the public within 70 years from their creation, the protection shall terminate.

Article 1bis

POSTHUMOUS WORKS

Posthumous works, the copyright of which has elapsed according to the provisions of Article 1, shall receive a protection equivalent to copyright for a term of fifty years after the work is lawfully made available to the public. The first owner of this right shall be the owner of the work.

Article 2

DURATION OF RELATED RIGHTS

1. The rights of performers shall expire fifty years after the first lawful publication of the fixation of the performance or if there has been no publication of the fixation, after the first lawful communication to the public of the performance. However, they shall expire fifty years after the performance if there has been no lawful publication or communication to the public during that time.

2. The rights of producers of phonograms shall expire fifty years after the first lawful publication of the phonogram. However, they shall expire fifty years after the fixation was made if the phonogram has not been lawfully published during that time.

3. The rights of producers of the first fixation of a film shall expire fifty years after the first lawful communication to the public. However, they shall expire fifty years after the fixation was made if the film has not been lawfully communicated to the public during that time.

4. The rights of broadcasting organizations shall expire fifty years after the first transmission of a broadcast.