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SUMMARY OF PROCEEDINGS

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

No. prev. doc.: 8270/92 PI 82 CULTURE 82
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 14 and 15 July 1992, the Working Party on Intellectual Property (Copyright) held a first reading of Articles 1 to 4(3) and 6(1) of the proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights (5509/92 PI 33 CULTURE 21 - COM(92)33 final - SYN 395).

Article 1(1)

2. The Belgian, German, Greek, Spanish and Italian delegations were prepared to accept the Commission’s proposal that the rights of an author should run for the life of the author and for 70 years after his death.

1 At this meeting the Working Party also reviewed the situation with regard to work in the WIPO on a possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works; these proceedings are summarized in 8352/92 PI 86 CULTURE 86. The Luxembourg delegation was not represented on 14 July.
The Irish, Netherlands and Portuguese delegations expressed reservations with regard to this proposal, preferring the term to be the life of the author and 50 years after his death. The reasons put forward for not accepting the Commission’s proposal were that an extension to 70 years post mortem auctoritis would be of less benefit to authors and their heirs than to publishers of their works; that most works were not of sufficient interest to merit such long protection; that longer protection would not necessarily promote creativity in authors; that longer protection could impede access by the public to works; that harmonization need not always be upwards; and that a more effective means of taking account of the disruption caused by two World Wars would be to leave the normal term of copyright protection at 50 years post mortem auctoritis, while allowing Member States the option of providing for an additional period of twenty years to compensate for such disruption.

The French delegation stated that it was prepared to examine the Commission’s proposal, but feared that it would disturb the present balance between copyright and related rights.

The United Kingdom delegation stated that it was not convinced by the Commission’s reasons for proposing a term of 70 years post mortem auctoritis and would like serious consideration to be given to a term of 50 years post mortem auctoritis.

The Danish delegation indicated that while it was in favour of harmonizing the term of protection of copyright, the term proposed by the Commission was still under consideration. It asked whether a term of 50 years post mortem auctoritis would pose major problems for those Member States which had longer terms.

The German delegation, which has a term of 70 years post mortem auctoritis, considered that a reduction to 50 years post mortem auctoritis would pose more problems than would an increase from 50 to 70 years post mortem auctoritis for other Member
States; in particular, it would require a longer transitional period. This view was supported by the Commission representative.

The Commission representative added that the main purpose of the proposal was not to increase the term of protection, but to harmonize it across the Community; however, in view of the difficulties involved in reducing the term, the most effective solution was to harmonize at the longest term existing in any Member State.

3. The Danish, German, Netherlands, Portuguese and United Kingdom delegations were prepared to accept the Commission's proposal that the term of protection of copyright should not be affected by the date when the work was lawfully made available to the public; this meant in particular that there should be no separate term of copyright protection for works first published after the death of the author. The German and United Kingdom delegations pointed out, however, that this should not preclude the possibility of Member States providing for related rights with a shorter term for publishers of works first published after the author's death.

The Belgian, Greek, Spanish, French, Irish and Italian delegations on the other hand considered that copyright in works first published after the author's death should run from the date of publication.

The Commission representative stated that his Institution had proposed that the term of protection for works published posthumously should be the same as if they had been published during the author's lifetime, since the Berne Convention did not regulate specifically this matter, and since the Member States had adopted such different rules that any proposal based on the national law of any one Member State would have required a change in the law of all the other Member States. However, if

a majority of Member States pressed for a separate term of protection for works published posthumously, the following solution could be envisaged:

- the beneficiary of protection would be the possessor of the manuscript (rather than the heirs of the author or the publishers);

- the term of protection would be 50 years from the publication of the work;

- this protection would apply only if publication took place more than 70 years after the death of the author;

- the scope of this protection would be the same as that of normal copyright protection.

The Belgian, Greek and Irish delegations stated that they could accept such a solution and the German, French and United Kingdom delegations were prepared to give it favourable consideration.

The Commission representative indicated that the Commission services were prepared to cooperate with the Presidency in drawing up a provision to this effect, without committing the Commission to such a solution.

4. In reply to a question from the Italian delegation whether it was necessary to use the terms "lawfully made available to the public" in Article 1(1), the Commission representative pointed out that these terms were used in Article 7(3) of the Berne Convention.
Article 1(2)

5. The United Kingdom delegation suggested that the wording of this paragraph be changed to refer to the death of the last known surviving author, to take account of the situation where the identity of some but not all of the joint authors was known.

6. In reply to a question from the Belgian delegation whether this provision was applicable in the case of joint authors creating a work under an employment contract, the Commission representative indicated that this provision would still be applicable in that case, as it concerned the term of protection, not the ownership of copyright.

Article 1(3)

7. The Commission representative pointed out that the term of protection of anonymous and pseudonymous works was governed by Article 7(3) of the Berne Convention, whereas that Convention did not have provisions concerning works considered under the law of a Member State to have been created by a legal person or collective works; those Member States which did provide for the last two categories of works treated them in the same way as anonymous or pseudonymous works. Article 1(3) harmonized the term of protection for these various categories of works.

8. In reply to a question from the Netherlands delegation concerning the difference between works of joint authorship referred to in Article 1(2) and collective works referred to in Article 1(3) and (6), the Commission representative explained that works of joint authorship were works which had been created jointly by two or more authors, the contribution of each author being distinguishable from that of the others, the most common example being a film; in the case of collective works, it was not possible to identify the contributions of the individual contributors, an example of a collective work being a dictionary.
The Greek, Italian and United Kingdom delegations invited the Commission to include a definition of collective works in Article 1(3), the United Kingdom delegation stressing the need to ensure that this term did not include collections of works within the meaning of Article 2(5) of the Berne Convention.

9. In reply to questions from a number of delegations, the Commission representative stated that Article 1(3) did not oblige those Member States whose laws did not provide for collective works or did not provide that certain works were to be considered as created by a legal person to introduce provisions to that effect; however, in the light of Article 4(1) of the proposal such Member States would have to take account, when applying the Directive, of the existence of such provisions in the laws of other Member States.

Several delegations having drawn attention to the difficulties involved in having to take account of different systems of protection in different Member States and the resulting terms of protection, the Commission representative stated that the alternatives to mutual recognition of Member States' laws were to oblige all Member States to introduce collective works and works considered to be created by a legal person, or to require Member States which had these categories of works to remove them from their laws; in the Commission's view, mutual recognition would cause fewer difficulties than either of those alternatives.

Following requests for further clarification in respect of the principle of mutual recognition, the Commission representative explained that where different laws in different Member States led to different terms of protection, the term which expired the latest would have to be recognized throughout the Community.
10. The Commission services were requested to redraft Article 1(3) in the light of the discussion.

11. The French delegation considered that the term of protection under Article 1(3) should run not from the date when the work was lawfully made available to the public, but from the date of publication of the work.

The Commission representative pointed out that, since different Member States used different terminology in this respect, the Commission had chosen the terminology of Article 7(3) of the Berne Convention, which was slightly broader in scope than that suggested by the French delegation. He also considered that this terminology should be used by all Member States when transposing the Directive.

12. The French delegation considered that it was not necessary for the second sentence of Article 1(3) to mention both the case where the pseudonym leaves no doubt as to the identity of the author and the case where the author discloses his identity: in its view, one of these cases would be sufficient.

The Commission representative pointed out that this provision followed Article 7(3) of the Berne Convention in this regard.

13. The Spanish delegation pointed out that Spanish courts had interpreted Article 7(3) of the Berne Convention as allowing application of the term of protection under Article 7(1) not only where the author disclosed his identity during the period mentioned in the first sentence of Article 7(3), but also where the identity of the author was disclosed between the expiry of that period and the expiry of the term of protection under Article 7(1). The Spanish delegation therefore expressed a reservation on the restriction in the second sentence of Article 1(3) of the proposal to disclosure during the period referred to in the first sentence of that paragraph.
The Commission representative considered that this interpretation was not compatible with the wording of Article 7(3) of the Berne Convention, and could not be maintained.

Article 1(4)

14. The Belgian, Danish, French, Italian and Netherlands delegations considered that Article 1(4) was unnecessary. They pointed out that it corresponded to a provision of the Berne Convention which was optional, and which had not been used by many States.

The Commission representative pointed out that this provision was intended to prevent the effect of publication under a pseudonym of a previously unpublished work several years after the death of an author being that copyright protection would go beyond the normal term of 70 years post mortem auctoris.

The German delegation reserved its position on this question.

15. The United Kingdom delegation, supported by the Irish delegation, considered that the wording of this paragraph implied that the first restricted act which was performed on the assumption that the author of an anonymous or pseudonymous work had been dead for at least 70 years would bring to an end copyright protection of that work; it suggested that the wording be amended to make clear that such an act would not infringe copyright in the work if it was reasonable to assume that the author had been dead for at least 70 years.
Article 1(5)

16. The French delegation considered that Article 1(5) was not appropriate in respect of all categories of works. It considered that in the case of collective literary works which were published in parts over a period of time, the term of protection should be considered in relation to the work concerned as a whole, not to its constituent parts.

The Danish, German, Spanish and Netherlands delegations also expressed reservations on the Commission's proposal.

The Belgian, Irish, Italian, Portuguese and United Kingdom delegations were prepared to accept the Commission's proposal.

The Commission representative considered that making the term of protection run only from the date of publication of the last part of the works referred to in this paragraph would have the disadvantages that in many instances it would be difficult to determine with certainty whether or not an item was part of a greater whole or whether or not it was the last part of the work; moreover, there was the danger that publication of the last part might be delayed deliberately in order to lengthen the period of protection of the earlier parts. In the light of these disadvantages and of the term of protection given by the proposed Directive (70 years from the time when the work was lawfully made available to the public), a separate term of protection for each item seemed more appropriate.

Article 1(6)

17. The United Kingdom delegation agreed with the principle of this paragraph, in order to avoid perpetual protection for collective works or works considered to be created by a legal person which were not published.
18. In reply to a question from the German delegation whether this provision should not apply to anonymous and pseudonymous works too, the Commission representative pointed out that Article 1(4) provided the corresponding solution.

19. The Italian delegation drew attention to the anomaly that publication of works in these categories just before or just after 70 years from their creation could result in a term of 139 years or 70 years respectively.

20. In reply to a question from the German delegation as to the significance of this provision for those Member States whose laws did not provide for collective works or works considered to be created by a legal person, the Commission representative indicated that they would have to take account of the laws of those Member States which did provide for these categories of works, as in the case of Article 1(3).

21. The Irish delegation considered that this paragraph and Article 1(3) should not affect the situation where a work was created under a contract of employment, the author being a natural person but the rights being owned by the legal person who employed him.

22. Several delegations drew attention to the need to improve the drafting of this paragraph.

23. The Commission representative suggested that, as this paragraph was based on a provision in the draft GATT TRIPs text, examination of it could be postponed until the result of the GATT negotiations was known.

The Chairman suggested that this paragraph be reconsidered when Article 1(3) was reconsidered.
24. The Belgian, Danish, German, Netherlands and United Kingdom delegations were prepared to accept the term of 50 years proposed for performers' rights, and the Italian delegation was prepared to consider it in a positive spirit.

The French delegation pointed out that performers' rights were already protected for a term of 50 years in France, but the extension of authors' rights to 70 years proposed by the Commission would disturb the present balance between authors' rights and performers' rights.

The Greek and Irish delegations stated that they would prefer protection of performers' rights for the lifetime of the performer. The French delegation considered that the advantages and disadvantages of such a solution should be examined.

25. With regard to the events from which the period of 50 years would be calculated, the French delegation considered that the number of possibilities proposed would lead to confusion.

The Greek delegation also expressed doubts in this respect.

The Belgian delegation suggested that this period be calculated from the date of the first fixation of the performance, or, in the absence of a fixation, from the first communication to the public of a performance.

The Commission representative explained that the solution suggested by the Belgian delegation had not been chosen, as it would have resulted in this period beginning and ending earlier than under the Commission's proposal.
The United Kingdom delegation pointed out in this context that protection would in fact begin at the time of the performance, even though the period of 50 years was calculated from a later date. It proposed therefore that the wording be adapted accordingly.\(^3\)

26. The French delegation questioned the need for the second sentence of this paragraph.

The Commission representative explained that this sentence was necessary to avoid the possibility of perpetual protection of a performance.

27. The United Kingdom delegation explained that it had a provision in its national law which gave a right of the same duration as performers' rights to persons holding exclusive recording contracts with performers; this right enabled the persons concerned to take action against infringement of the recordings. The United Kingdom delegation did not wish to see such a right included in the Directive, but requested that a statement be made allowing those Member States which had such a right to maintain it with the same duration as performers' rights.

The Commission representative agreed to examine this request, indicating that the compatibility of such a right with the common position on the rental Directive\(^4\) should also be considered.

\(^3\) Following this and other drafting suggestions, this paragraph could read as follows:

"The rights of performers shall expire 50 years after the first lawful publication of the fixation of the performance or if there has been no lawful publication of the fixation, from the first lawful communication to the public of the performance. However, they shall expire 50 years after the performance if there has been no lawful publication or communication to the public during that time."

\(^4\) 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 PI 65 CULTURE 63 PRO-COO P 40.
28. The German delegation expressed a reservation on the term of 50 years proposed for the rights of producers of phonograms, since German law provided for a shorter term of protection for these rights than for performers' rights. It indicated that its final position would depend on the overall contents of the Directive to be adopted by the Council, in particular whether the proposed term of 70 years for authors was adopted.  

29. The Belgian and Greek delegations stated that they had to give further examination to the events from which the period of 50 years was to be calculated.  

30. Several delegations considered that the wording of this paragraph could be improved.  

31. The Netherlands and German delegations pointed out that the term of protection for producers of cinematographic works would not be the same throughout the Community, as in some Member States these producers would enjoy protection as authors under Article 1, whereas in other Member States they would enjoy protection under Article 2(3).  

The United Kingdom, French and German delegations considered that the whole question of authorship should be examined by the Commission.  

The Commission representative reserved the position of his Institution on this question pending the opinion of the European Parliament.  

5 This reservation also covers Article 2(3) and (4).
32. The Irish delegation considered that it should be made clear that Article 2(3) was applicable only in those Member States which did not recognize producers of cinematographic works as authors.

The Commission representative considered that this could be done in a recital, in a statement, or by adding titles to the articles.

33. The Italian delegation considered that the second sentence might be difficult to apply as it might not be easy to establish the date when a fixation of a cinematographic work had been made if the work had not been published.

Article 2(4)

34. The Danish and Irish delegations considered that this paragraph should not be limited to the first transmission of a broadcast, but that each transmission should give rise to a new period of protection.

The French and Greek delegations agreed with the Commission's proposal.

Article 3

35. The Commission representative explained that his Institution had chosen not to propose any harmonization in this Directive of the substantive protection as regards photographs, but merely to harmonize the term of protection for photographs protected in the Member States, irrespective whether they were protected by copyright, related rights or a combination of the two.

The Portuguese and United Kingdom delegations were prepared to accept this approach.
The French and Belgian delegations considered that lack of harmonization of the substantive protection accorded to photographs could cause distortions in the internal market.

The Danish delegation was prepared to consider according the term of protection provided for in Article 1 to photographs which were artistic works, but considered that this term was too long for "ordinary" photographs.

The Spanish and Italian delegation entered a study reservation on this Article, as it did not distinguish between different categories of photographs.

The Greek and Irish delegations also entered a study reservation.

The German delegation expressed a preference for a solution which would distinguish between photographs which were considered to be artistic works and "ordinary" photographs. It put forward for consideration a solution whereby photographs which were considered to be artistic works would have the term of protection provided for in Article 1, while "ordinary" photographs would have the same term of protection as cinematographic works (Article 2(3)).

The initial reaction of the Danish and Irish delegations was favourable.

The United Kingdom delegation entered a reservation on this suggestion, as it considered that it would entail a reduction of protection in the United Kingdom for photographs which were not considered to be artistic works, the sole criterion for copyright protection for photographs in the United Kingdom being that they were original.

The Commission representative reserved the position of his Institution on this suggestion and invited the German delegation to table a written proposal.
Article 4(1)

36. See point 9 above.

Article 4(2)

37. The Irish and United Kingdom delegations stated that they were still examining this provision. The Irish delegation indicated that it would consider it positively on the hypothesis that the term of protection under Article 1 would be 70 years; if it were to be 50 years, it considered that this provision would not be necessary.

38. The Danish delegation asked which term of protection would be applied where the country of origin of a work was a third country and the author of the work was a Community national.

The Commission representative stated that the term of protection provided for in Article 1 would apply in such a case.

The Danish delegation asked the Commission representative to provide examples of how this would work in practice.

39. In reply to a question from the Danish delegation whether a legal person could be considered to be a Community national, the Commission representative drew attention to Article 58 of the EEC Treaty.

40. In reply to a question from the French delegation as to which term of protection would be applied in the case of a work of joint authorship of which one joint author was a Community national and the other joint author was a national of a third country, the Commission representative replied that the rights of a Community national could not be reduced by Article 4(2), and that therefore the term laid down in Article 1 would apply.
41. The Belgian delegation asked whether a national provision providing for a comparison of laws and imposing a condition of reciprocity would pose problems in relation to Article 4(2).

The Commission representative considered that the existence of such a provision would not pose problems, but that it could not be exercised in a way which was not in the Community interest.

42. The French delegation stated that the French law on droit de suite was based on the principle of reciprocity, but contained an exception allowing national treatment where the author had contributed to artistic life on French territory. It asked whether this exception would have to be removed once the Directive was adopted.

The Commission representative replied that in principle this exception would have to be removed as a result of Article 4(2), but Article 4(4) allowed provisional measures to be taken in cases of this nature.

Article 4(3)

43. The Commission representative explained that Article 4(3) applied the basic principle of Article 4(2) in respect of the related rights provided for under Article 2, but in a slightly different manner, since the situation under the Rome Convention was more complicated than that under the Berne Convention.

The Danish, German and United Kingdom delegations expressed doubts whether this provision was compatible with Member States' commitments under the Rome Convention. They also considered that in cases where Member States had granted national treatment to third countries in respect of related rights, it was not appropriate that they should be obliged as a

6 International Convention for the protection of performers, producers of phonograms and broadcasting organizations.
result of this provision to grant shorter terms of protection to rightholders who were nationals of third countries which applied shorter terms.

The Commission representative stated that in addition to the safeguards provided in Article 234 of the EEC Treaty, Article 4(4) of this proposal provided the means of allowing Member States to continue to respect their international commitments and to maintain national treatment with regard to third countries until such time as another solution had been negotiated. However, once the Directive was in force, Member States would not be able to grant national treatment to third countries to which they had not already granted it.

Article 6(1)

44. The Commission representative stated that other solutions than the one proposed in this paragraph could be considered in order to take account of the various interests involved.

The Spanish and Danish delegations expressed support for this proposal, and the Italian delegation agreed with the principle that works which had fallen into the public domain should not become protected once again. However, the Italian delegation considered that the date in this paragraph could not be later than the date in Article 10(1), as from the latter date Member States would be obliged to observe the terms of protection provided for in Articles 1 to 3. The Irish delegation also expressed a reservation on the date proposed in this paragraph.

The United Kingdom and Irish delegations considered that this proposal required careful examination, since it would mean, in view of the present considerable differences between Member States' laws in respect of related rights in particular, that complete harmonization of term of protection would not be achieved for a considerable time.
45. An alternative solution was mentioned which would be based on the principles of Article 13(1) to (3) of the common position on the rental Directive. Under this alternative solution, the Directive would apply to rights which were still protected in the Community on the relevant date, with the safeguard that any copies lawfully acquired or actions lawfully undertaken before the date of transposition of the Directive would not be affected.

The German, French, Italian, Portuguese and United Kingdom delegations expressed interest in a solution along these lines.

The Danish and Belgian delegations expressed reservations on such a solution, as they considered that it would be difficult to establish which term of protection would apply to any given work, as the laws of all the Member States would have to be taken into account, including any transitional provisions in the laws of those Member States which had recently amended the term of protection of copyright and related rights.