SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 12 and 13 October 1992

No. prav. doc.: 9130/92 PI 99 CULTURE 97
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 12 and 13 October 1992, the Working Party on Intellectual Property (Copyright) completed its second reading, beginning at Article 2, 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 re-examined Articles 1 and 1 bis. Its work on Articles 1 to 6 bis was based on a non-paper which is reproduced in Annex I.

Article 2(1)

2. The Belgian delegation expressed a scrutiny reservation on this paragraph, as the draft Belgian law provided for protection to begin at the date of the first fixation of the performance, rather than at the date of the first lawful publication of the fixation of the performance. The Commission representative explained that Article 2(1) had to be considered in conjunction with Article 5. These provisions did not seek to harmonize the date on which...
protection would begin, but to establish a reference date for calculating the expiry of the term of protection. Consequently, it would be possible for Belgian law to provide that protection would begin on a date which differed from those of the events mentioned in Article 2(1), provided that the reference date for calculating the expiry of the term of protection corresponded to the reference date resulting from the application of Articles 2(1) and 5. The Belgian delegation agreed to examine whether it could lift its scrutiny reservation in the light of these explanations.

3. The United Kingdom delegation invited the Commission to propose definitions of the terms "lawful publication" and "lawful communication to the public" with a view to achieving a greater degree of harmonization. The Commission representative considered that the meaning of these terms was sufficiently clear for it to be unnecessary to provide a definition of them in the Directive.

Article 2(2), (3) and (4)

4. The German delegation maintained its reservation expressed at the July meeting of the Working Party (8351/92 Pt 85 CULTURE 85, point 28).

Article 2(3)

5. The Working Party agreed that it should be made clear that the term "film" was to be understood as defined in Article 2(1) fourth indent of the common position on the rental Directive.

1 6968/1/92 PI 65 CULTURE 63 PRO-COOP 40.
Article 2(4)

6. At the Working Party's meeting in July, the Danish and Greek delegations had expressed the view that each transmission of a broadcast should give rise to a new period of protection, while the French and Greek delegations had agreed with the Commission's proposal. In the meantime, the Presidency had circulated a submission from the European Broadcasting Union (EBU) on this subject in the form of an extract from a paper on the neighbouring rights protection of broadcasting organizations by Dr Werner RUMPHORST, Director of the EBU Legal Affairs Department (reproduced in Annex II).

The Commission representative considered that a distinction should be drawn between a new transmission of a broadcast incorporating changes to the original broadcast and a repeat of the broadcast in which no changes were made; in the first case, the new transmission would constitute a new broadcast and would give rise to a new period of protection, while in the second case the repeat would not attract separate protection. He suggested that Article 2(4) should remain unchanged, while the above distinction should be set out in a recital.

The Irish delegation expressed a scrutiny reservation on this solution.

7. The United Kingdom delegation suggested that Article 2 should contain a provision whereby the rights of cable distributors in broadcasts by cable which were not mere retransmissions by cable of the broadcasts of other broadcasting organizations should be protected for fifty years.
The Commission representative considered that such rights were already covered by Article 2(4), and suggested that the wording of this provision might be adjusted to make it clear that "broadcast" was to be understood in the same way as in Article 6(2) and (3) of the common position on the rental Directive.

Article 3

8. Discussion of this Article hinged on the question whether any distinction should be made in this Article between photographic works and other photographs.

The Danish, German, Greek, Spanish and Netherlands delegations considered that such a distinction should be made, while the Italian delegation considered that in the light of the Berne Convention, this Article had to be interpreted as covering only photographic works.

The United Kingdom delegation and the Commission representative were opposed to making such a distinction, as they considered that the criterion whether or not a photograph had artistic merit was subjective and since it would result in reducing the term of protection for photographs other than photographic works in Member States whose present national law did not make this distinction.

9. The Belgian delegation asked what effect the lack of harmonization of what constituted "protected photographs" would have on the operation of the internal market. The Commission representative replied that in practice his Institution's proposal would result in hardly any distortion of the internal market: although some Member States set a low criterion for according copyright protection to

Berne Convention for the Protection of Literary and Artistic Works.
photographs, while other Member States set a high criterion for according this protection, many of the second group of States made provision for rights related to copyright to be enjoyed by photographs which did not meet the criterion for copyright protection, with the result that the range of photographs protected in the two groups of Member States was almost identical, even if the type of protection granted differed. As the Commission proposed a single term of protection for protected photographs, the type of protection granted in the Member States would not affect the term of protection resulting from the Directive.

10. The German delegation considered that the weakness of the Commission's proposal was that there would be gaps in the protection resulting from this Article, since photographs other than photographic works were not protected in any way in some Member States. In the light of this observation, the Commission representative asked whether delegations would be prepared to accept the deletion of the word "protected" from its proposal, with the result that all photographs would have the term of protection provided for in Article 1, irrespective of whether they qualified for protection under the present law of Member States. However, the Greek, Italian, Netherlands, Portuguese and United Kingdom delegations were opposed to such a solution.

The German delegation suggested adding to the Commission's proposal a provision whereby photographs which were not protected under the law of Member States would have a term of protection of at least 50 years. The Commission representative objected that this suggestion would be contrary to the aim of fixing a single term of protection which would be applicable throughout the Community.
11. The Spanish delegation suggested that Article 3 of the Commission's proposal should be applicable to photographs taken by humans, and that a different term of protection be considered for photographs taken by machines (for example, by artificial satellites). The Commission representative observed that photographs taken by machines could be considered to be covered by Article 1(3)(b) as set out in the non-paper.

12. The Commission representative accepted a suggestion by the Italian delegation that Article 3 read: "Photographs protected by national law shall have the term of protection provided for in Article 1."

13. The Chairman invited delegations to continue their examination of the Commission's proposal for this Article, bearing in mind that it constituted a compromise between protecting all photographs and attempting to harmonize the criteria for protecting photographs.

Article 4(1)

14. This provision was discussed in conjunction with Article 1 (see point 41 below).

Article 4(2)

15. This provision was not discussed at this meeting.

Articles 4(3), 4(4) and 9

16. The new text of Article 4(3) and (4) in the non-paper sought to take account of observations made by delegations at the Working Party's meetings in July and September (8351/92 PI 85 CULTURE 85, point 43 and 9130/92 PI 99 CULTURE 97, points 2 to 7).
The United Kingdom delegation expressed reservations as to whether reciprocity was the best policy to be applied in Article 4(2) and (3). The Commission representative pointed out that this was the most effective means of persuading third countries to grant the same level of protection to Community rightholders as was granted by the Community.

In reply to a question from the United Kingdom delegation, the Commission representative explained that the term "international obligations" in Article 4(3) was intended to cover not only obligations arising from international conventions, but also obligations arising from bilateral agreements between a Member State and a third country.

The Netherlands and United Kingdom delegations questioned the need for the first sentence of Article 4(4) in the non-paper in the light of the addition to Article 4(3) of the words "without prejudice to the international obligations of the Member States".

The Commission representative explained that this sentence was necessary to cover the situation where a Member State granted a longer term of protection to rightholders who were not Community rightholders on the basis not of an international obligation but of a provision of the national law of that Member State.

In order to make it clear that the possibility of maintaining the longer term of protection under the first sentence of Article 4(4) in the non-paper resulted directly from this provision and not from a specific authorization, it was agreed to replace the words "shall be authorized to maintain" by the words "may maintain". It was also agreed to make it clear that this protection could be maintained.
"until the conclusion by the Community of international agreements on the term of protection by copyright or related rights".

21. In reply to questions from a number of delegations as to the nature of the decisions referred to in the second sentence of Article 4(4), the Commission representative stated that for example where the application of Article 4(3) or of the first sentence of Article 4(4) led to one Member State granting a longer term of protection than was granted by the other Member States to rightholders who were nationals of the third country, with the result that the free movement within the Community of goods incorporating the works or performances of those rightholders was impeded, it could be decided, in the light of the progress of negotiations with the third country concerned with a view to concluding an international agreement, to allow all Member States to grant provisionally the longer term of protection to rightholders from that third country pending the conclusion of the international agreement.

22. The Netherlands delegation considered that the new version of Article 4(4), and in particular of the second sentence, did not constitute a sufficient improvement to allow it to lift its reservation on this provision.

The Danish, German, Spanish and Italian delegations considered that the acceptability of Article 4(4) depended on the type of committee procedure provided for in Article 9: in their view, a stronger role for the Council in the decision-making procedure would make Article 4(4) more acceptable. For the Italian delegation, Articles 4(4) and 9 would be acceptable if the decisions to be taken were of an administrative nature, but not if they were of a legislative nature. This delegation repeated its suggestion
that the Council mandate the Commission to negotiate, with a view to the Council adopting the decisions provided for in the second sentence of Article 4(4).

The Irish delegation pointed out that it had suggested that the Council Legal Service be consulted on Articles 4(4) and 9.

The Commission representative indicated that, although his Institution would prefer to maintain Article 4(4), the Commission could live with the deletion of the second sentence if there was a consensus in favour of such a solution, which would also imply the deletion of Article 9. The initial reaction of the Greek, Netherlands and United Kingdom delegations was that they could accept the deletion of the second sentence of Article 4(4) and Article 9.

The United Kingdom delegation asked whether the deletion of these provisions would result in Article 113 being deleted from the legal basis of the Directive. The Commission representative replied that this would not be the case, as Article 113 was also the legal basis for Article 4(2) and (3).

Article 5

23. This Article was not discussed at this meeting.

Article 6(1)

24. In the non-paper, Article 6(1) had been replaced by the new Article 6 bis (see points 26 to 29 below).
Article 6(2)

25. The Portuguese delegation joined those delegations which had previously expressed doubts on the need for the inclusion of this provision in the Directive (9130/92, point 10).

The Commission representative pointed out that if Article 6(2) were to be deleted, the term of moral rights would be governed by Article 1 and would therefore expire at the same time as the economic rights of the author; it would no longer be possible for Member States to provide for the perpetual protection of moral rights.

The Irish delegation, supported by the United Kingdom delegation, suggested in this context that Article 1(1) be amended to refer only to the economic rights of an author.

The Commission representative opposed this suggested amendment.

Article 6 bis

26. The new Article 6 bis contained in the non-paper developed the alternative solution for Article 6(1) mentioned at the meeting of the Working Party held in July (8351/92, point 45).

27. The initial reaction of the German, French, Netherlands, Portuguese and United Kingdom delegations was that the new Article 6 bis went in the right direction; no delegation expressed the view that it went in the wrong direction.
28. In reply to questions concerning the effects of this Article on contracts in force when the Directive took effect, the Commission representative stated that this Article was silent on this matter; that where contracts were limited to the term of copyright or neighbouring rights applicable before the Directive took effect, the parties concerned would be free to adapt their duration to the new term resulting from the Directive if they so wished, and that Member States would be free to regulate this aspect if they so wished.

29. The German delegation also asked whether paragraph 3b might not lead to third parties making investments (which they would not otherwise have made) in order to benefit from this provision. The Commission representative explained that one safeguard against such a possibility was the condition that the investments be "made in good faith", and that another possible safeguard would be to bring forward the reference date for such investments, for example to the date of adoption of the Directive. The Chairman pointed out that paragraph 3c should be borne in mind when considering paragraph 3b.

Articles 7 and 8

30. These Articles were not discussed at this meeting.

Article 10

31. At the Working Party's September meeting, the Commission representative had suggested aligning the date proposed in Article 10(1) on the date for transposing the rental directive into national law (1 July 1994). The general feeling of the Working Party was that this date was the earliest possible date for transposing the present
Directive, but that it could not be decided until the adoption of the Directive whether or not it was a realistic date.

Article 1(1)

32. This paragraph was not discussed at this meeting.

Article 1(2)

33. Several delegations expressed doubts as to the need for the addition of the words "whose identity is known" which appeared in the non-paper, particularly as these words are not included in Article 7 bis of the Berne Convention.

The Portuguese delegation considered that if these words were to be included in this provision, it would be necessary to add a clause to ensure that, in the event of the identity of one of the joint authors of a work of joint authorship becoming known more than seventy years after the death of the last of the joint authors previously known, the work would not once more become subject to copyright protection.

The Commission representative considered that, whether or not these words were included, both Article 7 bis of the Berne Convention and Article 1(2) of this Directive had to be interpreted as if they were included.

Article 1(3)

34. Following the discussion at the Working Party's previous meeting of Article 1(3bis) and (3ter) on collective works and works considered under the legislation of a Member State to have been created by a legal person (9130/92, points 22 to 30), the Commission services
suggested a different approach to these questions. They pointed out that the general rule of the Berne Convention was that the term of copyright protection should be calculated from the death of the author of the work; only in the case of anonymous or pseudonymous works, where it was impossible to determine the date of the death of the author, did the Berne Convention provide for the term of protection to be calculated from the date when the work was lawfully made available to the public. Therefore, rather than attempt to draw up rules for determining the term of protection to be applied to collective works and to works considered under the legislation of a Member State to have been created by a legal person, which were not provided for in the Berne Convention, the Commission services suggested that works of this nature, whose distinguishing feature was that the contributions of the various contributors were merged in such a way that it was impossible to identify the various contributions and their authors, should be considered to be anonymous or pseudonymous works and protected as such. This approach was reflected in Article 1(3)(b) of the new non-paper, while Article 1(3)(a) set out the general rule for anonymous or pseudonymous works as contained in Article 1(3) of the previous non-paper (Annex to 9130/92).

35. The Danish, German, French and Italian delegations considered that this new approach went in the right direction.

36. The Danish, German, Italian and United Kingdom delegations considered that the wording contained in the non-paper would cover not only the case where it was impossible to identify the authors of the works concerned, but also the case where the authors were known but it was not possible to distinguish between the contributions of
the various authors; in the latter case, the term of protection of Article 1(2) should apply, not the term of protection of Article 1(3)(a).

The Commission representative agreed that this provision should apply only where none of the authors could be identified, and suggested that the two indents of Article 1(3)(b) be amended to read:

"- 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 only - and under the name of - that person or entity, and

- where this work consists of contributions of authors which are merged in the work so that it is impossible to identify the authors thereof."

He also suggested that the last sentence of Article 1(3)(b) be amended to read:

"This paragraph is without prejudice to the rights of identified authors whose contributions are included in such works."

37. The Italian delegation considered that, rather than referring to the impossibility of identifying the contributions of the various authors, the second indent of Article 1(3)(b) should be aligned on Article 2(5) of the Berne Convention, and suggested the following wording:

"- where this work consists of contributions of authors which are merged in the work so that it has to be considered as such."

The Commission representative pointed out that this wording would be too narrow, as the intention of Article 1(3)(b) was to cover not only the collections of
works referred to in Article 2(5) of the Berne Convention, but all works by more than one author where none of the authors could be identified.

38. The German, Italian, Netherlands and Portuguese delegations expressed doubts whether the works covered by Article 1(3)(b) should "be considered to be" anonymous or pseudonymous works, suggesting instead that these works be dealt with in the same way as anonymous or pseudonymous works, or that the term of protection applicable to such works be that laid down in Article 1(3)(a).

The Commission representative explained that the intention of Article 1(3)(b) was to harmonize at Community level the notion of anonymous or pseudonymous works as including works of this nature; it was therefore necessary to keep words "the work shall be considered to be an anonymous or pseudonymous work", and for the sake of greater clarity he suggested adding "so that the duration shall be calculated as provided for hereabove under (a).".

39. The German delegation expressed a reservation in respect of Article 1(3)(c), as it considered that there was no reason for treating audiovisual works in a different way from other categories of works.

The French delegation considered that Article 1(3)(b) should not apply to audiovisual works, and that therefore Article 1(3)(c) should be maintained.

The Commission representative expressed doubts whether Article 1(3)(c) was necessary, since in most cases the authors of audiovisual works were identified in the credits, with the result that Article 1(3)(b) would not be applicable.
40. The Netherlands delegation expressed a scrutiny reservation on Article 1(3) to the extent that it no longer contained a reference to "works considered under the legislation of a Member State to have been created by a legal person". It considered that the absence of such a reference could create difficulties in relation to Article 2 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.³

The Commission representative pointed out that the normal rule was that the term of copyright protection was to be calculated from the death of the author; only in the cases covered by Article 1(3)(a) and (b), where the author or none of the authors could be identified, could the term be calculated from a date other than that of the death of the author or of the last surviving author.

41. With regard to the effect of Article 4(1) on Article 1(3), the Commission representative explained that the result was that when a work covered by Article 1(3)(a) or (b) was lawfully made available to the public in a Member State, the calculation of the term of protection of that work throughout the Community would begin. Since Article 1(3)(a) and (b) provided total harmonization, Article 4(1) would no longer imply the need for mutual recognition of Member States' internal laws.

Various proposals had been made in the European Parliament Committees for inserting in the Directive a provision relating to the authorship of cinematographic and audiovisual works; if any of these proposals were to be adopted, its relationship with Article 4(1) would have to be examined.

Article 1(4)

42. In the light of the discussion held at the Working Party's previous meeting (9130/92, points 31 and 32), Article 1(4) had been deleted from the non-paper.

Article 1(5) and (6)

43. These paragraphs were not discussed at this meeting. The wording of paragraph 6 had been adapted in the light of the new approach in Article 1(3).

Article 1 bis

44. Following the discussion of this provision at the Working Party's previous meeting (9130/92, points 35 to 40), the following changes had been made in the non-paper:

- the words "for less than 20 years" had been added in square brackets;

- the protection to be received had been qualified as being "equivalent to the economic rights of copyright";

- the owner of the work had been replaced by the legitimate publisher of the work as the first owner of the right.

45. The German, Greek, French, Irish and Italian delegations supported the principle of this provision.

The Danish, Netherlands, Portuguese and United Kingdom delegations continued to express considerable doubts on the desirability of according special protection to works first published after the expiry of normal copyright protection, for the reasons set out in 9130/92, point 37.
46. The German, French and Irish delegations were in favour of deleting the contents of the square brackets, as they considered that this provision should apply irrespective of the length of time which had elapsed since the expiry of copyright protection under Article 1.

The Danish, Netherlands, Portuguese and United Kingdom delegations considered that if a provision of the nature of Article 1 bis were to be adopted, it would be more acceptable if it included the limitation contained in the square brackets, as this would reduce uncertainty whether or not a particular work was in the public domain. The Italian delegation was also in favour of keeping the contents of the square brackets, as it had made a similar proposal at the Working Party’s previous meeting.

47. The Italian delegation questioned why the protection resulting from this provision should be equivalent to the economic rights of copyright.

The Commission representative pointed out that, since the protection proposed was not copyright protection, which would already have expired, but a separate specific right, it was appropriate that it should be limited to economic rights, to the exclusion of moral rights.

The United Kingdom delegation, supported by the Danish and Netherlands delegations, considered that this specific protection should not consist of a monopoly over all modes of exploitation of the work, as would be the case if it were equivalent to the economic rights of copyright, but should be limited to protection of the investment made in making the work available to the public.
48. The Danish, Netherlands and United Kingdom delegations considered that 50 years was too long for a specific right of this nature.

The Commission representative pointed out that 50 years was the present term of protection for works published posthumously under French and Irish law, and any shorter term under the Directive would require transitional arrangements.

The French delegation expressed a preference for a term of 70 years for this provision, pointing out that this corresponded to the term of protection under French law for musical compositions, with or without words, published posthumously. The Greek and Spanish delegations supported this view.

49. The Italian and Portuguese delegations considered that the first owner of the right should be the legitimate owner of the work, rather than the publisher.

The Danish, Netherlands and United Kingdom delegations on the other hand agreed that the publisher should hold this right, as by publishing the work he had done something which could justify protection.

The German delegation suggested that the reference to the legitimate publisher be replaced by a reference to the person who lawfully made the work available to the public. The Commission representative agreed with this suggestion.

50. The United Kingdom delegation considered that if a compromise solution were to be found in respect of works published posthumously, concessions would have to be made not only by those delegations which were not in favour of any protection being granted after the expiry of normal
copyright protection, but also by those delegations which were in favour of such protection with a long term. It considered that willingness by the latter group of delegations to consider a term of protection shorter than 50 years, for example on the basis of present German law, as well as the limitation contained in square brackets, would help the former group of delegations to accept such a compromise solution.

**Further procedure**

51. The Chairman confirmed that the next meeting of the Working Party on this subject would be held on 25 and 27 October 1992.

52. The Commission representative requested the Presidency to include a policy debate on this Directive on the agenda of the session of the Council (Internal Market) to be held on 10 November 1992, with a view to preparing the adoption of a common position at the session of the Council (Internal Market) to be held on 17 and 18 December 1992. He considered that the matters to be debated on 10 November would depend on the outcome of the Working Party meeting on 26 and 27 October, but indicated that possible subjects for that policy debate could be works published posthumously, photographs and photographic works, and the application in time of the Directive.

The German and Netherlands delegations expressed doubts whether 10 November might not be too early for a policy debate on this Directive.
Other business


54. The Commission representative confirmed that his Institution would be holding a hearing on moral rights on 30 November and 1 December 1992.

55. The Commission representative informed the Working Party that his Institution intended to make a proposal before the end of the year to extend the period laid down in Council Decision 90/511/EEC of 9 October 1990 on the extension of the legal protection of topographies of semiconductor products to persons from certain countries and territories.4

56. The Commission representative informed the Working Party of the decisions taken at the 1992 series of meetings of the governing bodies of the World Intellectual Property Organization (WIPO) concerning work in WIPO relating to copyright and related rights, and announced that a meeting of the "Stockholm Group" would be held in this connection in London on 7 and 8 December. It was agreed that coordination of the positions of the Member States and of the Commission in preparation for that meeting would be included on the agenda of the Working Party's meeting to be held on 26 and 27 October.

4 OJ No. L 285 of 17.10.90, p. 31.
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.

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. a) 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.

b) In the case where a work:

- 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 - and under the name of - that person or entity, and

- where this work consists of contributions of authors which are merged in the work so that it is impossible to identify the various contributions and authors thereof,

the work shall be considered to be an anonymous or pseudonymous work.

This paragraph is without prejudice to the rights of the authors of identified contributions included in such works.

[c] Audiovisual works are not covered by the dispositions of paragraph b).

3bis. deleted.

3ter. deleted.

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.

**Article 1 bis**

**PROTECTION OF POSTHUMOUS WORKS**

Posthumous works, the copyright of which has elapsed [for less than 20 years] according to the provisions of article 1, shall receive a protection equivalent to the economic rights of copyright for a term of 50 years after the work is lawfully made available to the public. The first owner of this right shall be the legitimate publisher 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.
Article 3

Protected photographs shall have the term of protection provided for in Article 1.

Article 4

1. When any of the terms referred to in Articles 1 to 3 begins to run in a Member State it shall be considered to begin to run throughout the Community.

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 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.

4. Member States which granted, at the date of adoption of this Directive, to rightholders which are not Community nationals, a longer term of protection than that which would result from the above mentioned provisions, shall be authorized to maintain this protection until the conclusion of international agreements on the term of protection by copyright or related rights. Pending the conclusion of any future international agreements on the term of protection by copyright or related rights, decisions concerning the effects on the functioning of the internal market resulting from such differentiated protection may be taken by means of the procedure set out in Article 9.

Article 5

The terms laid down in this Directive shall run from the first day of January of the year following the event which gives rise to them.
Article 6

1. deleted.

2. The moral rights granted to the author shall be maintained at least until the expiry of the economic rights of the author.

Article 6 bis

1. This Directive shall not have the effect of shortening terms of protection which under the laws of the Member States are already running. It shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

2. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films which are on 1 July 1994, still protected by the legislation of at least one Member State or meet the criteria for protection under the provisions of Directive / /EEC (Rental) on that date.

3a. Where, further to the application of the provisions of paragraph 2, works or other subject matter are recalled to protection in certain Member States, the rightholders are fully reinvested with their rights.

b. Rightholders may, however, not prohibit the sale or other acts of exploitation of objects embodying works or other protected subject matters which have been produced or acquired lawfully before 1 July 1994 or which result from investments made in good faith by third parties before 1 July 1994 in preparation of a publication in anticipation of the end of protection that would have occurred had the present directive not entered into force.

c. Member States may provide that rightholders shall have a right to obtain an adequate remuneration for the acts of exploitation referred to in paragraph b).

4. The provisions of the present article are without prejudice to article 13 of Directive / /EEC (Rental).
Neighbouring Rights Protection of Broadcasting Organizations

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The Rome Convention perfectly reflects this historical situation. By the same token, it has no reply to the developments which have occurred in the world of broadcasting since 1961, and provides broadcasters with virtually no protection where they need it today. Furthermore, even from a 1961 standpoint the drafting of the relevant parts of the Convention is not entirely satisfactory.

To begin with the definitions in Article 3:

There is a definition of "broadcasting", but not of "broadcasts". However, under Article 13 broadcasting organizations enjoy protection with regard to their broadcasts. What precisely are these broadcasts?

The WIPO Guide to the Rome Convention² is silent on this question. To give a meaningful answer, it is necessary to identify the legislative purpose of the protection of broadcasting organizations.

The operation of a broadcasting service is a costly organizational and technical undertaking. The daily programme output needs to be planned, produced and/or acquired, scheduled and transmitted. It is this combined effort of the broadcasting organization which results in the listener's and viewer's ability to receive the programme service, which merits protection against unauthorized appropriation by third parties.³ "Broadcast" is therefore to be understood as the programme output as assembled and broadcast by or on behalf of the broadcasting organization.⁴ "Broadcasting organization" (likewise not defined under the Rome Convention) is the organization which engages in the said activity.

This has a number of practical consequences:

- it is irrelevant whether the broadcasting organization uses its own transmitters or whether it has its programmes transmitted by a transmission organization (PTT);

- it is irrelevant whether or not the programme material is protected under copyright and/or other neighbouring rights;

² Guide to the Rome Convention and to the Phonograms Convention, WIPO 1981.

³ For a recent Supreme Court confirmation, see Beschluss des Österreichischen Obersten Gerichtshof (6.11.90), ZUM 1992, p.31.

it is irrelevant whether the programme material exists in pre-recorded form or whether it is received by the broadcasting organization via direct relay ("live") from another source, including another country. For instance, live transmission in the United Kingdom by the BBC of a football match played in Italy or Brazil constitutes a "broadcast" regarding which the BBC would be protected under Article 13;

- a modification of the frequency of the programme-carrying signals is as irrelevant as the ultimate delivery of the broadcast to the consumer via a community aerial or cable system, as long as the consumer receives the broadcast simultaneously and unchanged;

- in the case of "rebroadcasting" (as defined in Article 3(g)), both the original broadcasting organization and the one that carries out the rebroadcasting are protected under Article 13 with regard to acts affecting the rebroadcast;

- since the content of the broadcast is irrelevant, the period of protection must be established with regard to each individual broadcast. Thus, if a broadcasting organization broadcast a given production in 1980, and repeated the broadcast in 1990, then each such broadcast enjoys its own separate protection.

To return briefly to the definition of "broadcasting" in Article 3(f), the English version erroneously speaks of "public reception" (whereas the French version correctly speaks of "réception par le public"). "Public reception" is generally used to describe a reception in a public place (such as a hotel lobby, a bar or a theatre with a large screen), as opposed to private reception at home. The correct wording should therefore be "reception by the public".

5. The opposite view, which mainly for reasons of assumed convenience would limit the right to the original broadcasting organization and deny it to the relaying organization (see in particular the commentary referred to under footnote 4 above, p.990), does not appear to be compatible with the legislative purpose of Article 13 and the meaning of "broadcast" as described above. Furthermore, precisely for practical reasons the relaying organization is much closer to an infringement of its own right in its own country than the foreign original broadcasting organization, which normally would neither be aware of the infringement nor be particularly concerned about it.