II

(Preparatory Acts)

COMMISSION

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

(92/C 92/06)

COM(92) 33 final — SYN 395

(Submitted by the Commission on 23 March 1992)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Articles 57 (2), 66, 100a and 113 thereof,

Having regard to the proposal from the Commission, in cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations;

Whereas certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the World Wars on the exploitation of authors’ works;

Whereas at the 1967 Stockholm conference for the revision of the Berne Convention certain Member States’ delegations approved a resolution asking the contracting states to extend the term of copyright protection; whereas in the discussions which have taken place within the World Intellectual Property Organization (WIPO) in preparation for a possible Protocol to the Berne Convention this question has been put on the agenda;

Whereas for the protection of related rights certain Member States have introduced a term of 50 years after publication or dissemination; whereas in other Member States which are currently preparing legislation on the subject the term of protection chosen is likewise 50 years;

Whereas the Community proposals for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) provide for a term of protection for producers of phonograms of 50 years after first publication;

Whereas there are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas, therefore, with a view to the establishment of the internal market and its operation thereafter, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community;
Whereas due regard for established rights is one of the
general principles of law protected by the Community
legal order; whereas, therefore, a harmonization of the
terms of protection of copyright and related rights
cannot have the effect of reducing the protection
currently enjoyed by rightholders in the Community;
whereas in order to keep the effects of transitional
measures to a minimum and to allow the internal market
to begin operating in practice on 31 December 1992, the
harmonization of the term of protection should take
place on the basis of a long term;

Whereas in its communication of 17 January 1991,
'Follow-up to the Green Paper — Working programme
of the Commission in the field of copyright and neigh­
bouring rights' (1), the Commission stresses the need to
harmonize copyright and neighbouring rights at a high
level of protection since these rights are fundamental to
intellectual creation and their protection ensures the
maintenance and development of creativity in the interest
of authors, cultural industries, consumers and society as
a whole;

Whereas in order to establish a high level of protection
which at the same time meets the requirements of the
internal market and the need to establish a legal
environment conducive to the harmonious development
of literary and artistic creation in the Community, the
term of protection for copyright should be harmonized
at 70 years after the death of the author or 70 years after
the work is lawfully made available to the public, and for
related rights at 50 years after the event which sets the
term running;

Whereas these terms should be calculated from the first
day of January of the year following the relevant event,
as they are in the Berne and Rome Conventions;

14 May 1991 on the legal protection of computer
programs (2) provides that Member States are to protect
computer programs, by copyright, as literary works
within the meaning of the Berne Convention (Paris Act,
1971); whereas the present Directive harmonizes the
term of protection of literary works in the Community;
whereas Article 8 of Directive 91/250/EEC, which
merely makes provisional arrangements governing the
term of protection of computer programs, should
accordingly be repealed;

Whereas Articles 9 and 10 of Council Directive . . . on
rental right, lending right, and on certain rights related
to copyright make provision for minimum terms of
protection only, subject to any later harmonization;
whereas these Articles should be repealed, in order to
align the terms of protection of those rights on the terms
laid down in this Directive;

Whereas under the Berne Convention photographic
works qualify for a minimum term of protection of only
25 years from their making; whereas, moreover, certain
Member States have a composite system for the
protection of photographic works, which are protected
by copyright if they are considered to be artistic works
within the meaning of the Berne Convention and
protected under one or more other arrangements if they
are not so considered; whereas provision should be made
for the complete harmonization of these differing terms
of protection;

Whereas in order to avoid differences in the term of
protection it is necessary that when a term of protection
begins to run in one Member State it should begin to run
throughout the Community;

Whereas Article 6a (2) of the Berne Convention provides
that the moral rights of the author are to be maintained
after his death at least until the expiry of the economic
rights; whereas that provision can usefully be taken over
in this Directive, without prejudice to any possible later
harmonization of moral rights;

Whereas the terms of protection laid down in this
Directive should also apply to literary and artistic works
whose country of origin within the meaning of the Berne
Convention is a third country, but protection should not
exceed that fixed in the country of origin of the work;

Whereas, where a rightholder who is not a Community
national qualifies for protection under an international
agreement, the term of protection of related rights
should be the same as that laid down in this Directive,
except that it should not exceed that fixed in the country
of which the rightholder is a national;

Whereas this provision must not be allowed to bring
Member States into conflict with their international obli­
gations; whereas international obligations may require
the Member States to accord different treatment to
third-country nationals and their works, and this may
lead to disturbances on the Community market; whereas
a procedure should therefore be laid down which enables
such difficulties to be remedied;

(1) COM(90) 584 final.
(2) OJ No L 122, 17. 5. 1991, p. 42.
Whereas rightholders should be able to enjoy the longer terms of protection introduced by this Directive equally throughout the Community provided their rights have not yet expired on 31 December 1994,

HAS ADOPTED THIS DIRECTIVE:

**Article 1**

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 70 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.

3. In the case of anonymous or pseudonymous works, of works considered under the legislation of a Member State to have been created by a legal person and of collective works, the term of protection shall run for 70 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.

4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for 70 years.

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, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

**Article 2**

1. The rights of performers shall run for 50 years from the first publication of the fixation of the performance or if there has been no publication of the fixation, from the first dissemination of the performance. However, they shall expire 50 years after the performance if there has been no publication or dissemination during that time.

2. The rights of producers of phonograms shall run for 50 years from the first publication of the phonogram. However, they shall expire 50 years after the fixation was made if the phonogram has not been published during that time.

3. The rights of producers of the first fixations of cinematographic works and of sequences of moving images, whether or not accompanied by sound, shall expire 50 years after the first publication. However, they shall expire 50 years after the fixation was made if the work or sequence of moving images has not been published during that time.

4. The rights of broadcasting organizations shall run for 50 years from 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, 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.

4. Pending the conclusion of any future international agreements on the term of protection by copyright or related rights, the decision may be taken by means of the procedure set out in Article 9:

(a) to waive or to vary the rule requiring a comparison of the terms of protection in certain third countries which is laid down in paragraphs 2 and 3, particularly in order to prevent Member States from being brought into conflict with their international obligations; in any event, however, the term granted may not exceed that laid down in Articles 1 and 2;
(b) to take appropriate measures where protection is granted to third-country nationals by some Member States only, and this fact causes appreciable distortion of competition or deflection of trade in the Community market.

**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. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

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

**Article 7**

1. Article 8 of Directive 91/250/EEC is hereby deleted.

2. Articles 9 and 10 of Directive ... are hereby deleted.

**Article 8**

1. Member States shall immediately notify the Commission of any plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to 12 months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

**Article 9**

The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

**Article 10**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

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

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

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

**Article 11**

This Directive is addressed to the Member States.
TRANSLATION OF LETTER

from: Commission of the European Communities, signed by Mr Martin BANGEMANN, Vice-President

dated: 23 March 1992

to: Mr João de Deus PINHEIRO, President of the Council of the European Communities

Subject: Proposal for a Council Directive harmonizing the duration of copyright protection and protection of certain neighbouring rights

Sir,

I enclose a proposal for a Council Directive harmonizing the duration of copyright protection and protection of certain neighbouring rights.

The purpose of the proposal, which follows up the Commission's undertaking in its 1991 working programme (COM(90) 584 final), is to harmonize the duration of copyright protection and protection of certain neighbouring rights throughout the Community. It is based on the principles of the Berne and Rome Conventions protecting literary and artistic works and neighbouring rights.

Since the proposal is based, in particular, on Articles 57(2) and 100a of the Treaty establishing the European Economic Community, co-operation with the European Parliament and consultation of the Economic and Social Committee are mandatory.


(Complimentary close).

(s.) Martin BANGEMANN
Vice-President of the Commission

Encl.: COM(92) 33 final - SYN 395
COMMISSION OF THE EUROPEAN COMMUNITIES

COM(92) 33 final - SYN 395
Brussels, 23 March 1992

Proposal for a
COUNCIL DIRECTIVE
harmonizing the term of protection
of copyright and certain related rights

(presented by the Commission)
EXPLANATORY MEMORANDUM

CONTENTS

INTRODUCTION

PART ONE: General considerations

I. Member States' laws and international conventions governing the term of protection
   A. Duration of copyright
   B. Duration of related rights

II. The Internal market and terms of protection

III. Legal framework and harmonization options
   A. Legal framework
   B. Legal bases
   C. Harmonization options
   D. Other considerations

PART TWO: Commentary on the articles
Introduction

Copyright and related rights are items of intellectual property and their terms of protection are limited. Hence, unlike conventional property rights, which are not limited in time, these exclusive rights expire after a certain period and the protected works or objects fall into the public domain.

The term of protection is therefore an essential element of intellectual property rights. However, the international conventions governing copyright and related rights do not lay down fixed terms of protection. This has led to considerable divergences in some cases between the laws of the Member States of the Community. These differences between terms of protection give rise to barriers to trade and distortions of competition and must therefore be eliminated if the internal market is to be brought about.
PART ONE: General considerations

1. Member States' laws and international conventions governing the term of protection

A. Duration of copyright

1. Under the Berne Convention for the Protection of Literary and Artistic Works, as revised by the 1971 Paris Act, there is a general term of protection of copyright and special terms for certain types of work. The Convention contains rules on the country of origin of a work, such rules being essential in order to determine the term of protection for each work, notably with a view to their comparison.

(a) General duration

2. Article 7(1) of the Berne Convention provides that the term of protection is to be the life of the author and fifty years after his death. Article 7(6) states that the countries of the Berne Union may grant a term of protection in excess of that provided for by the Convention. The term of fifty years post mortem auctoris (pma) is therefore a minimum.
Ten of the twelve Member States have adopted the minimum term of the Berne Convention with certain specific extensions. However, Germany protects all works for seventy years pma and Spain for sixty years pma. France grants a general term of fifty years pma, but a term of seventy years pma for "musical compositions with or without words".

3. In addition to this general term, three Member States have introduced extensions thereto in order to offset the effects of two world wars on the exploitation of authors' works:

- extension of ten years in Belgium (Law of 25 June 1921);
- extension of twelve years in Italy (Legislative Decree of 20 July 1945 and Law of 19 December 1956);
- extension of six years (Law of 3 February 1919) and of eight years (Law of 21 September 1951) in France. In addition, the 1951 Law introduced an exceptional extension of thirty years for the benefit of the descendants of authors killed in action.

4. The 1879 Spanish Copyright Act provided for a term of protection of eighty years pma. The Law of 11 November 1987 reduced that term to sixty years pma. However, so as to safeguard established rights, a transitional provision provides that rights over the exploitation of the works of authors who died before the new law entered into force will benefit from the term of protection provided for in the earlier law.

(b) Special terms provided for by the Berne Convention

5. The Berne Convention contains separate provisions on cinematographic works (Article 7(2)), anonymous or pseudonymous works (Article 7(3)), photographic works and works of applied art (Article 7(4)), and works of joint authorship (Article 7bis).
6. Cinematographic works

Under the Berne Convention, countries "may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making". (Article 7(2)).

Ireland, Italy, Luxembourg, Portugal and the United Kingdom have availed themselves of this possibility. In the other Member States, the term is therefore calculated from the death of the author or co-authors of the film. The term of protection is thus fifty years pma, except in Spain (sixty years pma), Germany (seventy years pma) and, in respect of the music used on the sound track, France (seventy years pma).

7. Anonymous or pseudonymous works

Under Article 7(3) such works are to be protected for fifty years after the work has been lawfully made available to the public, except where the pseudonym adopted by the author leaves no doubt as to his identity or where he discloses his identity during the fifty-year period. In that event, the term is to be calculated in the normal manner, that is to say from the death of the author.

The last sentence of Article 7(3) states that the countries of the Union are not required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years. This covers the case where the identity of the author has not been disclosed but the presumption can be made that he has been dead for more than fifty years.
The reasoning behind this provision is that the date on which the author died cannot be known if his identity has not been disclosed. It is therefore necessary to choose another event for calculating the term, but the fifty years are retained.

The Member States have incorporated these provisions concerning the relevant event in their laws, but they have also incorporated the normal term of protection. As a result, terms of seventy years from the date on which the work was made available to the public exist in France (musical works) and Germany, and the term in Spain is sixty years.

8. Photographic works and works of applied art

Article 7(4) of the Berne Convention provides only for a minimum term of protection of twenty-five years from the making of a photographic work or a work of applied art.

In the case of these two types of work, the differences between terms of protection from one Member State to another are considerable.

9. As regards photographs, Germany, Spain and Italy have a multiple protection system. Photographs which are considered to be artistic works qualify for a term of protection equal to that of other artistic works, that is to say seventy, sixty and fifty years respectively. However, these Member States also have a system of specific protection for ordinary photographs, that is to say photographs whose artistic value is not considered sufficient for the copyright arrangements to apply. In this case, the term of protection in Germany is fifty years from publication for photographs with a historic value, and twenty-five years for other ordinary photographs. In Spain, the corresponding term is twenty-five years from the date of making, and in Italy, twenty years.
The other Member States apply the normal term of protection to photographs.

10. Works of applied art are protected for the same period as other works in most Member States. However, Portugal provides for a term of only twenty-five years from the making of the work.

11. Works of joint authorship

Article 7 bis of the Berne Convention provides that, in the case of a work of joint authorship, the terms measured from the death of the author are to be calculated from the death of the last surviving author.

The Member States have adopted this provision. Differences between terms therefore exist in this case, also inasmuch as the normal terms are different (e.g., fifty, sixty or seventy years; see).

(c) Particular terms not provided for in the Berne Convention

12. The Member States have enacted a whole series of provisions on the term of protection to deal with cases not covered by the Berne Convention: posthumous works, collective works, works published in volumes or parts, and works of public authorities or international organizations.
13. Posthumous works

The national provisions on the subject are highly divergent, each Member State having its own rule. Three examples will serve to illustrate this point:

- France provides for a term of protection of fifty or seventy years (musical works) irrespective of when the work is published. In practice, protection can therefore be perpetual;
- Italy provides for a term of protection of fifty years after publication provided that this takes place within twenty years of the author's death;
- the United Kingdom provides that the protection of the work expires in any event fifty years after the author's death.

14. Collective works

This concept is not included in the Berne Convention and has been introduced only in France, Italy, Portugal and Spain.

The term of protection for collective works is the same as that for anonymous works.

15. Works published in volumes, parts, etc.

Special provisions are laid down by Danish, Dutch, French, German, Greek, Italian, Portuguese and Spanish law. While the Italian and Portuguese provisions stipulate that the term is to be calculated for each volume or instalment which corresponds to the application of the general provisions on works for which the date of publication is the relevant event as far as the beginning of the term is concerned, the other laws contain exceptional provisions in such cases. In substance, these other laws tend to make the term run only from the date of publication of the last instalment.
The instalments published earlier will thus in fact have a longer term of protection than the normal term. A feature peculiar to the Greek legislation is that it provides, in the case of works published in instalments, for a term of protection of only ten years after publication of the last instalment.

16. Works of public authorities or international organizations

These special provisions, which do not exist in some Member States, are mentioned only for the record as they are not harmonized by this Directive. The difference of treatment from one Member State to another is due to their different legal traditions.

While in some Member States parliamentary debates, laws, judicial decisions, etc. are essentially public and cannot be subject to copyright, in others such works, or at least some of them, attract copyright protection. This right sometimes runs for a specific term. For example, crown copyright in the United Kingdom lasts one hundred and twenty-five years from the date of making, whereas that of Parliament and of international organizations is fifty years from the date of making. This type of provision exists in Belgium, Ireland and Italy.

(d) The provisions of the Berne Convention on the country of origin of a work and the comparison of terms of protection
17. Comparison of terms

Article 7(8) of the Berne Convention provides that the term of protection granted is to be determined by the country where protection is claimed. However, that term must not exceed the term fixed in the country of origin of the work. This clause provides, therefore, for a comparison of the term of protection of the country where it is sought with the term of protection of the country of origin of the work. It also provides that countries are free not to make such a comparison, but no Member State has availed itself of this exception.

18. Country of origin of a work

It is apparent from the provisions on the comparison of terms of protection that the law of the country of origin of the work may determine the term of protection granted. These provisions on origin are also essential in order to determine whether or not a work is protected under the Berne Convention, but this second aspect does not need to be studied in the present context.

The important rule, in this context, on the determination of the country of origin is to be found in Article 5(4) of the Berne Convention. The place of first publication of a work determines its origin. In the case, however, of simultaneous publication in several countries of the Union (i.e. publication in several countries within thirty days) which grant different terms of protection, the country of origin will be that whose legislation grants the shortest term of protection.
B. Duration of related rights

19. The differences between the terms of protection of related rights, where provision is made for such protection in the Member States, are considerable. One of the main reasons for this is that the relevant provisions of the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations are much more succinct than those of the Berne Convention; moreover, the minimum term of protection the Rome Convention introduces is very short. Certain related rights not covered by the Rome Convention will also have to be harmonized by this Directive.

(a) The Rome Convention

20. Article 14 of the Rome Convention specifies a minimum term of protection of twenty years from the end of the year in which:

- the fixation was made – for phonograms and for performances incorporated therein;
- the performance was given – for performances not incorporated in phonograms;
- the broadcast took place – for broadcasts.

(b) Member States’ laws

21. With regard to performers, in Luxembourg the term of protection is twenty years from the date of the performance or its fixation, and in Italy twenty years from the date of the performance or, in some cases, thirty years from the date of filing or forty years from the date of fixation. In Spain the corresponding term is in practice forty years from the date of the performance or of publication of the fixation.
Lastly, a term of protection of fifty years is applied in Denmark and
the United Kingdom from the date of the performance, in France from
first communication to the public, in Germany and Greece either from
publication of the fixation or from the date of the performance or its
fixation, and in Portugal after the relevant event.

22. The position with regard to producers of phonograms is as follows: in
Luxembourg, the term of protection is only twenty years from fixation
and in Germany twenty-five years from publication of the fixation or
from its production. Italy grants a term of thirty years from the
date of filing or forty years from the date of production.

Spain grants a term of protection of forty years from the date of
publication or production, while Denmark, France, Portugal, the
United Kingdom and Ireland grant a term of fifty years from fixation,
from first communication to the public of the fixation, from
production/dissemination (first publication, broadcasting or cable
retransmission) or from first publication.

23. With regard to broadcasting organizations, the term of protection is
calculated from the date of transmission of the broadcast. It is
twenty years in Italy and Luxembourg, twenty-five years in Germany,
forty years in Spain and fifty years in Denmark, France, Ireland,
Portugal and the United Kingdom.

24. Some Member States also grant a related right to film producers which
is not provided for in the Rome Convention. In Germany the right
lasts twenty-five years from publication of the recording or from its
production, in Spain forty years from publication/production and in
France fifty years from first communication to the public of the
recording. In Portugal, the term is 50 years from the date of
fixation.
25. The Rome Convention does not lay down a system of comparison of terms of protection, comparison being provided for only in respect of the secondary use of phonograms (Article 16(1a) (IV)).

11 The internal market and terms of protection

26. The differences between terms of protection referred to above are considerable in some cases. As a result, works or objects such as phonograms may be protected in some Member States and not in others, the shorter term of protection having expired.

The Court of Justice heard such a case in 1989 (Case 341/87 EMI Electrola GmbH v Patricia Im-und Export and Others [1989] ECR 79, hereinafter called Patricia). It involved the importation of phonograms into Germany, where an exclusive right still existed, from Denmark, where the protection period had expired.

27. The Court held as follows:

Ground 10: "...the fact that the sound recordings were lawfully marketed in another Member State is due, not to an act or the consent of the copyright owner or his licensee, but to the expiry of the protection period provided for by the legislation of that Member State. The problem arising thus stems from the differences between national legislation regarding the period of protection afforded by copyright and by related rights, those differences concerning either the duration of the protection itself or the details thereof, such as the time when the protection period begins to run".
Ground 11: "In that regard, it should be noted that in the present state of Community law, which is characterized by a lack of harmonization or approximation of legislation governing the protection of literary and artistic property, it is for the national legislatures to determine the conditions and detailed rules for such protection."

Ground 12: "In so far as the disparity between national laws may give rise to restrictions on intra-Community trade in sound recordings, such restrictions are justified under Article 36 of the Treaty if they are the result of differences between the rules governing the period of protection and this is inseparably linked to the very existence of the exclusive rights."

28. It is clear from this judgment that the differences between terms of protection in the Member States are such that the internal market in literary and artistic works and in cultural goods and services will not be brought about unless those terms are harmonized. The Court went so far as to state that the harmonization should concern not only the duration of the protection itself but also certain details thereof, such as the time from which the protection period is calculated.

It follows from the Court's analysis that the harmonization of terms of protection must be total if the internal market is to be created. It will not be sufficient simply to specify the term for each type of protected work or object: steps must also be taken to ensure that the term starts to run and expires at the same time in every Member State.
The differences between terms of protection from one Member State to another may give rise not only to barriers to the free movement of goods and services but also to distortions of competition between Member States and barriers to freedom of establishment. As the Court has indicated, the term of protection is one of the essential components in an exclusive right. Hence in those Member States which have short terms of protection, economic operators are placed at a disadvantage compared with those from other Member States.

29. Lastly, at the hearing held by the Commission on 13 and 14 June 1991, the interested circles, the great majority of which considered harmonization of the terms of protection of copyright and related rights to be necessary, pointed out that, in addition to the reasons given above, harmonization is justified by the fact that it satisfies the need for legal certainty and eases the management of the rights in question. It will also lead to more effective action against piracy and the importation of illicit products from third countries. A harmonized environment is an essential factor as regards future investment in the sector of creativity in the Community.

III. Legal framework and harmonization options

30. The need for harmonization of the terms of protection of copyright and related rights in the Community having been established, a description of the international, national and Community legal environment in which the harmonization question arises is called for, as is an indication of the reasons underlying the choices that have been made.
A. Legal framework

31. The international conventions

The multilateral international conventions on copyright and related rights are four in number. They are the Berne and Rome Conventions referred to above, the Universal Copyright Convention (adopted in Geneva in 1952 and revised in Paris in 1971) and the Convention for the Protection of Producers against Unauthorized Duplication of their Phonograms (Geneva, 1971).

The last two conventions have not been mentioned so far because the protection they confer is less extensive than that of the Berne and Rome Conventions. As a result, provisions compatible with the Berne and Rome Conventions will also be compatible with the Universal Copyright Convention and the Geneva Convention for the Protection of Phonograms. The existence of these conventions is, therefore, mentioned mainly for the record without there being any need to describe them in detail.

In line with its proposal for a Decision concerning the accession of the Member States to the Berne and Rome Conventions, (1) in which the Commission makes clear its commitment to these two international instruments, the present proposal cannot but reflect their provisions. Both conventions are designed to ensure effective protection of copyright and related rights at world level. This is to be encouraged in the interest of the Community, although there is nothing to prevent the Community from granting even better protection in its territory.

---

32. Article 234 of the EEC Treaty provides that the obligations arising from agreements concluded by Member States before the entry into force of the Treaty are not affected by the Treaty. The Commission intends to take account of Member States' obligations under such agreements.

33. Due regard for established rights

Due regard for established rights is one of the general principles of law protected by the Community legal order. The Court of Justice has held that "the retroactive withdrawal of a legal measure which has conferred individual rights or similar benefits is contrary to the general principles of law" (Case 159/82 Verli-Wallace v Commission [1983] ECR 2711) and that "for reasons of legal certainty and taking special account of the established rights [...] the annulment must be restricted to the specific decision ..." (Case 92/78 Simmenthal v Commission [1979] ECR 777).

It is clear, therefore, that a Community directive harmonizing the terms of protection of copyright and related rights must, inasmuch as it has the effect of modifying the scope of individual rights, take account of existing rights vested in Community nationals or enterprises. If, therefore, the directive were to have the effect of shortening terms of protection in general, transitional measures concerning the duration of pre-existing rights would have to be laid down. The resulting transition periods would necessarily be long and would lead to a corresponding delay in the actual creation of the internal market.

Terms of protection have been shortened in at least two Member States in the past.
34. In Germany, the Law of 9 September 1965 reduced the protection of performers in respect of the fixation of their performances from fifty years pma to twenty-five years after publication or twenty-five years from the date of fixation if publication does not take place within that period. A similar reduction was made in respect of ordinary photographs.

Article 135 of the Law stated that the new rules were to apply to existing fixations. In a judgment which it delivered in 1971, the Federal Constitutional Court held that, although the German legislature was entitled to modify existing rights and their duration for reasons of consistency, certain consequences of those modifications were unconstitutional and therefore unacceptable. The new rules could not have the effect of making protected objects fall into the public domain immediately upon their entry into force when under the old rules those objects would still have been protected.¹

35. In Spain, the Law of 11 November 1987 reduced the term of copyright protection from eighty years pma to sixty years pma. Transitional measures were adopted to protect established rights.

These stipulate that amendments introduced by the Law which affect rights acquired under the old law will not have retroactive effect. Rights in the exploitation of works created by authors who died before the Law entered into force qualify for the term of protection laid down by the old law, and legal persons who acquired rights previously may exercise them for eighty years after publication. The Spanish legislator has thus maintained established rights in full.

¹ GRUR 1972, vol. 8, pp. 941 et seq.
36. If copyright were to be harmonized on the basis of a term of protection of fifty years pma, the application of transitional measures such as those adopted in Spain would mean that some works would still be protected seventy years after the entry into force of the new provisions in some Member States, but would fall into the public domain twenty years earlier in others. The harmonization would therefore be effective in seventy years' time at the earliest. This is the best possible scenario in the event of harmonization on the basis of fifty years pma. Living authors could also be considered as holding established rights in those of their works that had already been published. It is therefore entirely feasible that the harmonization would not be effective until well beyond the seventy-year mark. Moreover, the position would be extremely complex as the works of the same author would qualify for different terms of protection in the Community.

37. The Commission does not wish rights for which the protection is still in force to be impaired. On the contrary, it considers that they must be scrupulously respected. Nor does it wish, through the application of strict legal reasoning as to the existence or otherwise of established rights, to arrive at over-complex legal solutions which would necessarily lead to uncertainty in practice.

38. It is clear, therefore, that harmonization on the basis of short terms of protection presupposes long transition periods. However, these would fly in the face of the primary political objective, namely the completion of an internal market called for by the Single Act and spelt out in Article 8a of the EEC Treaty. This solution would therefore be acceptable only if higher-ranking considerations dictated the need for short terms. That is not the case.
B. Legal bases

39. The legal bases proposed by the Commission are Articles 57(2), 66, 100a and 113 of the EC Treaty.

The disparities between national laws on the terms of protection of copyright and related rights constitute obstacles to the free movement of goods and services, obstacles to freedom of establishment and distortions of competition in the internal market.

The judgment of the Court of Justice in Patricia indicates clearly the barriers to the free movement of goods and the distortions of competition that result from differences between terms of protection. Article 100a must therefore be taken as a legal basis for the proposal for a Directive.

41. A similar line of argument can be used where the works or services are not borne on a physical medium. It is clear from the judgments of the Court of Justice that the broadcasting and retransmission of radio and television signals must be considered a service and not a good (cf. Sacchì\(^1\) and Debauve\(^2\)).

The barriers to which the differences between terms of protection may give rise in relation to broadcasting and retransmission fall, therefore, within the scope of the Treaty provisions on freedom to provide services; hence the recourse to Article 66 as an additional legal basis, which refers back particularly to Article 57.

---

42. Lastly, these disparities constitute obstacles to freedom of establishment in the Community. The proposal is designed to facilitate business activity in the sectors concerned. For example, the fact that works or objects are still protected in some Member States whereas they are in the public domain in others means that certain activities may or may not be authorized (e.g. the manufacture by a third party of objects protected in the Member State where there is protection constitutes an infringement even if the objects are intended for export to a country where they are not protected). Article 57(2) must therefore also be taken as a legal basis for the proposal.

43. It should be recalled that these three articles of the Treaty were selected as legal bases for the proposal for a Directive on rental right, lending right, and on certain rights related to copyright. The present proposal seeks inter alia to amend that Directive as far as terms of protection are concerned and covers the same activities. For the sake of consistency, recourse should therefore be had to the same legal bases.

44. As the length of protection of copyright and related rights within the Community is also, amongst other reasons, determined by the international obligations of the Member States, the Community will need to harmonize its relations with third countries and conclude agreements with them notably in cases where only certain Member States give protection to nationals of third countries. It is therefore necessary to take Article 113 as a legal basis also.
C. Harmonization options

45. There is necessarily something arbitrary about the choice of term of protection for copyright and related rights. It is impossible to say that a particular term of protection for a particular type of right is the only one which is justified in an ideal world, or even that it is the best.

However, the special requirements of Community law and of the completion of the internal market limit the number of possible choices. It is clear from what was stated in point 38 that, if the internal market is to be created in this sphere in the not-too-distant future, long terms must be chosen so as to avoid transition periods whose effects would still be felt around the middle of the next century.

46. For these reasons the Commission has rejected a harmonization of the duration of copyright at fifty years from the relevant event, despite the fact that ten of the twelve Member States grant such a term. However, the term of protection chosen, namely seventy years from the relevant event, is also justified for a number of other reasons.

47. At the above-mentioned hearing of interested parties, which brought together representatives not only of rightholders but also of users, the large majority of participants were in favour of, or at least not opposed to, a term of protection of seventy years. It is clear, therefore, that this term meets the needs of the Community circles concerned, who put forward a whole series of arguments in support of their case.
48. The term of fifty years pma became the compulsory minimum under the Berne Convention when it was revised at the Brussels Conference in 1948.

The term of fifty years pma was not chosen at random. The record shows that most countries considered it only right and proper that protection should last long enough for the author and his direct descendants to enjoy fully the fruits of the creation. The aim was to cover the lifetime of the author himself and of the next two generations. However as the average lifespan within the Community has increased, the period of 50 years pma is no longer sufficient to cover two generations.

Discussions within WIPO on the preparation of a possible Protocol to the Berne Convention have also led to the inclusion of this point on the agenda. The proposed period of protection is 70 years pma.

49. Other arguments also militate in favour of the choice of seventy years pma.

A lengthening of the term of protection, even after the author's death, lays the foundations for a better remuneration of the author during his lifetime as it will strengthen his position when he negotiates the assignment of his rights. It corresponds, therefore, to a high level of protection for authors.

Such a term of protection is also necessary in certain sectors in which the publication or creation of works calls for substantial investment without the prospect of an immediate return. Such is the case, for example, with the publishing of so-called difficult or serious musical works. It is for that reason, moreover, that the French legislator has increased the term to seventy years pma in the case of "musical compositions with or without words".
Experience in the Member States has shown that such a lengthening does not pose any major problems in most of the sectors as far as existing rights are concerned.

50. The terms of protection for related rights differ markedly from one Member State to another. This is due mainly to the fact that the minimum terms laid down by the international conventions (i.e. twenty years from the date of fixation) are very short and have therefore been deemed insufficient by the Member States. In many cases the Member States have introduced longer terms, but each one has gone its own way about it.

51. When it comes to fixing the term in the case of related rights, two choices have to be made, namely:

- that of the term as such,
- and that of the event which gives rise to it.

52. The terms chosen by the Member States are indicated in points 21 et seq. There is a clear tendency for them to opt for a term based on a fifty-year period. This is confirmed by the preparatory work in those Member States which have not yet introduced protection for related rights in their law; here, too, the preference is for a term of fifty years.

Moreover, fifty years was the term suggested by the Community in the position it submitted regarding producers of phonograms in the course of the GATT Uruguay Round negotiations on TRIPS (trade-related aspects of intellectual property rights).

A term of fifty years is therefore the obvious choice for Community harmonization.
53. With regard to the event giving rise to the term of protection, the specific nature of each related right must be taken into account.

In the case of performers' rights, the relevant event may be either the date of fixation or of the performance, or the date of publication or dissemination, as the case may be.

The choice of the relevant event is dictated above all by considerations of certainty. Publication and dissemination are events whose occurrence is much easier to establish than the date of the performance or of the fixation. The latter events may take place over long periods or over a period punctuated by periods of inactivity (e.g. if the recording of a gramophone record extends over several months, at what precise moment does the period start to run?).

Moreover, since publication or dissemination is the final stage in the making of a fixation or of a broadcast, taking them as point of departure of the term of protection will make that term as long as possible.

With regard to producers of phonograms and producers of the first fixations of cinematographic works and of moving images, whether or not accompanied by sound, the above considerations point to publication being the obvious choice for the relevant event.

In the case of broadcasting organizations, dissemination is always considered the relevant event.
D. Other considerations

54. The choice of basic term of protection for copyright and related rights is a choice which has to be made in the harmonization process, but it is not the only one. A whole series of other considerations must be taken into account in order to achieve the desired end, namely total harmonization. Since the term of protection is closely bound up with the rights in question, one should also be clear as to how far harmonization in relation to term should go.

55. Absence of effect on the ownership or substance of rights

National law determines who owns rights, whether they be in the nature of copyright or of related rights. In most cases the laws of the Member States draw the same conclusion, which means that the author or the owner of a related right is the same natural or legal person in every Member State. In some cases, however, the conclusions they come to may be different. The prime example is that of cinematographic productions, in respect of which some Member States confer ownership on the director and others who have made the film, whereas other Member States provide that the producer is the author of the film.

This difference of ownership has an effect on the term of protection. If the work is considered to be a work of joint authorship, the term is computed from the death of the last surviving author, whereas if the producer is deemed to be the sole author, the term is computed either from his death, if he is a natural person, or from the time when the work was lawfully made available to the public, if he is a legal person.

The term of protection may therefore vary according to whether, under the law of the Member State concerned, it is the director and the other participants or the producer who is deemed to be the author.
While it has implications as far as the term of protection is concerned, the question of copyright ownership has further ramifications. If necessary, it will be dealt with separately. The present proposal cannot, therefore, hope to solve the problems it poses in relation to the term of protection.

The proposal also has its limits as far as the substance of rights is concerned. None of its provisions seeks to introduce protection where Member States' laws do not grant it. If one Member State provides for protection whereas another does not, this situation will continue to obtain (e.g. a work may be protected in one Member State whereas another considers it does not fulfill the originality criterion). On the other hand, in the Member State granting protection the term thereof must be that laid down in the Directive.

56. Rights not covered by the proposal

The object of the proposal is to achieve total harmonization of terms of protection over as broad a range as possible. However, Member States' laws contain isolated provisions whose impact on the internal market is negligible and whose harmonization is therefore unnecessary. This is the case, for example, with national provisions on the copyright of government departments or of the state, which owe their origin to different legal traditions. Here the influence of different terms of protection is marginal. If there is a problem, it is that of the existence or otherwise of protection. The same goes for the few national provisions granting a related right to publishers in certain cases (e.g. the publication of posthumous works).

Since this proposal does not aim to modify the substance of rights, it would not have been worthwhile harmonizing the term of a right existing only in one or two Member States.
57. Differentiation between works and between rights

Two questions arise, namely whether it is necessary to differentiate between the term of protection granted to different types of work or related right, and whether it is necessary to differentiate between copyright and related rights.

58. As regards differentiating between the term of protection according to the type of work or related right, it is felt that this would be in principle inappropriate. This was confirmed at the hearing by the interested circles.

The argument against differentiating between works is that it is unjustified from the point of view of copyright as it would imply an uncalled-for hierarchy of creation and would give rise to problems of definition of types of work and of the exercise of rights.

Nor does a differentiation seem appropriate from the point of view of related rights. It is in the interest of rightholders that, where they relate to the same object, their rights should have the same duration. For example, it is in the interest of performers that producers of phonograms should enjoy the same term of protection in respect of a phonogram as experience shows that they are the best equipped to combat piracy. If the protection of producers were to expire before that of performers, producers would no longer have anything to gain from taking action against infringers.

59. A minority of interested parties consider that the duration of related rights should be strictly aligned on that of copyright. Others consider that there is a hierarchy between the two, copyright being the higher ranking.
There is no need to become involved in such a debate. Suffice it to say that, since the duration of copyright is calculated, with certain exceptions, from the death of the author, whereas that is not the case with related rights, it would be unrealistic to try to align the two terms.

60. Comparison of terms of protection

The term of protection of works and objects originating in third countries is an important aspect of the problem.

There are two possible ways of dealing with it:

- either the Community grants works and rightholders from third countries the same term of protection as that which it grants Community nationals (national treatment);

- or it grants in its territory only a term equal to that granted by the country in which the work originates or of which the rightholder is a national (comparison of terms).

Preference must go to the principle of the comparison of terms of protection. It is only natural that “foreign” works and third-country nationals should not be protected for a period longer than is considered appropriate by their own country. Moreover, since Community works and nationals are not protected for as long a period in those countries as they are in the Community, comparing terms of protection is a way of ensuring reciprocity.
It was stated in the Commission's working programme on copyright and certain related rights -follow-up to the Green Paper(1) that one of the primary objective is to ensure that the level of protection is as high as possible in the Community and in third countries. If third countries are to be induced to improve their protection from the point of view of its duration, one should avoid granting them the long Community term unilaterally. The introduction of a comparison system will therefore act as an incentive to third countries to prolong their term of protection.

61. The need to avoid creating new divergences prejudicial to the internal market

As indicated in point 56, some aspects of Member States' laws are not covered by the proposal as they have no harmful effects or, being isolated provisions, only a limited impact on the functioning of the internal market. However, a generalization or the uncoordinated introduction of such provisions by the Member States would give rise to new barriers prejudicial to the internal market.

In order to avoid this pitfall and ensure a harmonious future development of Member States' laws on the subject, a procedure for the notification of draft national measures must be introduced. Such a procedure would be enough to prevent the creation of new barriers without, however, prohibiting Member States from legislating in this field. It is therefore a simple mechanism which respects the prerogatives of national legislatures.

(1) COM(90) 584 final, 17.1.1991.
PART TWO: Commentary on the articles

1. Article 1

Article 1 harmonizes the term of protection of copyright.

1.1. Paragraph 1 lays down a term of protection of seventy years after the death of the author for all literary or artistic works within the scope of Article 2 of the Berne Convention.

Article 2 of the Convention states that the expression "literary and artistic works" is to include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." There follows a non-exhaustive list of types of work which are protected.

This paragraph of the Directive is thus a general rule applying to all the works referred to, provided the author is a natural person whose identity is known. Even where the Berne Convention does make exceptions and provides for shorter periods (for photographic works, cinematographic works and works of applied art), the term required by the Directive is to be seventy years post mortem auctoris.

The case of cinematographic works deserves special mention. The Berne Convention leaves it to the countries party to it to determine who is the author of a film. A country may therefore choose to regard the director or another natural person who took part in the making of the film as the author, or it may prefer to award copyright to the producer. The producer of a film may be a natural person or a legal person. Paragraph 1 would apply where the law of a Member State considers the producer to be the author of a film. But if the producer is not a natural person the term cannot be calculated from the death of the author. In that case paragraph 3 will apply.
Paragraph 1 states that copyright expires seventy years after the death of the author "irrespective of the time when the work is lawfully made available to the public."

Thus the special rules which in some Member States apply to works published posthumously will have to be abandoned. This will be an incentive to publish such works as rapidly as possible. It will also make for simplification, by aligning the treatment of posthumous works on the normal term of protection.

This paragraph, like the other provisions of the proposal, does not affect national legislation on other aspects of copyright. It is national legislation which will determine whether there is copyright, and who is the copyright holder. National legislation will likewise determine the effect of copyright. But once it is accepted that there is copyright, the Member State will have no choice as to its duration. The term of protection must be that laid down in the Directive.

1.2. Paragraph 2 reproduces Article 7 bis of the Berne Convention, which is applied in the law of the Member States. The paragraph incorporates into Community law the copyright rules on the calculation of the term of protection of works of joint authorship.

1.3. Paragraph 3 defines the term of protection of anonymous or pseudonymous works, of works created by legal persons and of collective works. Here the term is to be seventy years after the work is lawfully made available to the public. The relevant event chosen for anonymous or pseudonymous works is the same as that in Article 7(3) of the Berne Convention. The Article thus incorporates this term into Community law, and raises it to seventy years.
As we saw in point 14, the concept of a "collective work" is not employed in the Berne Convention. The Member States who make use of the concept apply the same term of protection as for anonymous works, collective works being treated in the same way as anonymous works. This paragraph brings the arrangement into Community law; an additional reason for doing so is that Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes does make reference to collective works.¹

Furthermore, this provision will apply where the law of the Member State designates a legal person. A term running from the death of the author could not apply here.

1.4. Paragraph 4 reproduces the last sentence of Article 7(3) of the Berne Convention, but makes it stronger. Article 7(3) of the Convention provides that states "shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years," so that states retain a margin of discretion; but the Directive imposes an obligation here. This is necessary in order to ensure that there is harmonization at Community level, as works might otherwise be protected in some Member States and not in others.

1.5. Attention was drawn in point 15 to the fact that in some Member States special rules apply where a work is published in volumes or parts, while in others the ordinary rules apply and the term of protection runs from the date of publication of each such instalment. Paragraph 5 requires the Member States to follow the ordinary rule here.

1.6. This paragraph provides that works created by a physical person and collective works fall into the public domain if they have not been published during the 70 years following their creation. This provision is intended to prevent works from benefiting from perpetual protection.

¹ OJ No L 122, 17.5.1991, p. 42.
2. Article 2

Article 2 is concerned with the harmonization of the term of protection of related rights. It requires a term of fifty years, the term to run from publication or dissemination as the case may be. To avoid what might become perpetual protection, however, this fifty-year period is to apply only if publication or dissemination takes place within fifty years of a fixation.

2.1. There are two ways in which use can be made of a performance. The performance may be "fixed" as a "phonogram" or in an audiovisual medium, or it may be disseminated direct.

Paragraph 1 provides that the publication of a fixation of a performance or the dissemination of a performance are to start the fifty-year period running. This arrangement has several advantages:

- It allows the term of protection to be calculated from events which are easy to determine;

- It ensures a genuine period of protection, since it is only once the performance has been made accessible to the public that protection is really necessary;

- It aligns the term of protection of performers' rights on that applying to the other related rights referred to in the succeeding paragraphs, which is important particularly in connection with efforts to combat piracy.

2.2. Paragraph 2 deals with the term of protection of producers of phonograms. The same considerations apply.
2.3. Some Member States have a specific related right for the producers of the first fixations of cinematographic works and sequences of moving images, whether or not accompanied by sound. The proposal for a Directive on rental right, lending right, and on certain rights related to copyright also provides for specific rights for producers (fourth indent of Article 2(1), third indent of Article 6, and third indent of Article 7(1)).

Paragraph 3 governs the term of protection of rights of this kind. The term to be granted is fifty years from publication, provided publication takes place within fifty years of the fixation. The term is thus the same as in the preceding paragraphs.

2.4. The term of the rights of broadcasting organizations is fifty years from the first transmission of a broadcast. Since the first transmission of a broadcast starts the period of protection running, it is evident that a subsequent further transmission of a broadcast does not start a new period of protection running.

3. Article 3

The rules governing photographs constitute a special branch of copyright law. The wide variation in the rules governing photographs has been described at point 9. The differences are particularly striking in the case of the term of protection granted.

To secure proper harmonization of the term of protection, Article 3 provides that the term for photographic works is always to be seventy years, even though the actual substance of the right may be different, notably in Member States where there are different rules for different categories of photograph.

Of course if the photograph is not protected under the law of the Member State in which the protection is claimed this paragraph will have no effect, as the substance of copyright entitlements is outside the scope of the Directive.

4. Article 4

4.1. Paragraph 1 lays down the rule that the term of protection for copyright and related rights is to begin running at the same time in all Member States. Of course this rule serves no purpose where the term is calculated from the death of the author, as that date can almost always be determined without any doubt.

The rule is necessary, however, where the point of departure for the term of protection is the date of publication of a work or of a phonogram or videogram or the date of dissemination. Thus if a work or other item is considered to have been published in a Member State, even if the same act would not have been held to constitute publication in another Member State, the term of protection will start to run throughout the Community. The same applies in the case of a dissemination.

This rule is a logical consequence of the concept of a single market. It also makes it unnecessary to harmonize the definitions of the terms "lawfully made available to the public," "publication" and "dissemination" in order to calculate the term of protection from a single event.

4.2. Paragraph 2 sets out the rule requiring a comparison of the term of protection for literary and artistic works. It corresponds to Article 7 paragraph 8 of the Berne Convention, which states: "In any case, the term shall be governed by the legislation of the country where protection is claimed; however, [...], the term shall not exceed the term fixed in the country of origin of the work". This provision of the Berne Convention is applied by all the Member States, and is here incorporated into Community law.
Consequently, where a work originates in a third country it will be protected for seventy years in the Community provided it is protected for at least seventy years in the third country. But if the term of protection in the third country is shorter, protection in the Community will end at the same time as the term in the third country. This rule only applies if the author is not a Community national. If the author is a Community national the rule of comparison of terms does not apply.

4.3. Paragraph 3 lays down the rule requiring comparison of terms of protection for related rights. The rationale is the same as that of paragraph 2. But the concept of a country of origin cannot be carried over into the field of related rights. The Rome Convention sets out a complex system of connecting factors for the three categories of rightholders which it sets out to protect.

The introduction of a system of comparison consequently runs into the difficulty of the choice of the relevant connecting factors. The choice has fallen on the country of which the rightholder is a national. If the law of a Member State grants protection to performances, phonograms, videograms or broadcasts originating in third countries, the term of protection will therefore be equal to that of the country of which the rightholder is a national. This provision leaves Member States free to determine the third countries to whose nationals they will grant protection, in accordance with their international obligations. But the term of protection granted must comply with paragraph 3.

4.4. Paragraph 4 lays down a procedure by which the Commission may take decisions aimed at resolving difficulties which may arise out of the application of the comparison of terms of protection required by paragraphs 2 and 3, or disturbances on the single market due to the protection or lack of it of nationals of particular third countries. These measures are only provisional pending the negotiation of agreements with the third countries in question.
4.4.1. Subparagraph (a) is intended to take account of the Member States' international obligations with reference to the comparison itself, or the way in which it is to apply. Member States may have entered into bilateral commitments which are incompatible with the comparability system laid down here. It has been pointed out, too, that the Rome Convention makes no general provision for such a system. The Commission would therefore be able to decide, either to waive the comparability rule in their case or to vary the way in which it is applied. It might for example choose connecting factors different from those in paragraphs 2 and 3. But if a comparison is to be made on the basis of criteria other than those laid down it must not have the consequence that the term of protection granted to third-country nationals becomes longer than that which applies in the Community.

4.4.2. Subparagraph (b) addresses the more fundamental difficulty which may arise if the operation of the single market is obstructed because third-country nationals are protected in some Member States but not in others. This is no longer just a question of comparing terms of protection; the question is whether or not there is protection at all. Distortions of this kind will have to be remedied temporarily. A permanent solution presupposes prior negotiation between the Community and the third country concerned. The outcome will depend in particular on whether or not the country agrees to extend protection on its own territory to all Community nationals.
5. Article 5

This Article incorporates into Community law the rule applied in the law of the Member States and in the international conventions (Article 14 of the Rome Convention and Article 7(5) of the Berne Convention) according to which, for simplicity's sake, terms of protection are always calculated in calendar years.

6. Article 6

6.1. Article 6(1) is concerned with the application of the Directive and its effects on existing situations.

6.1.1. The first sentence states that the terms of protection here introduced are to apply to all rights which have not expired on or before 31 December 1994. The date has been chosen so that all interested circles can prepare themselves for the changes which the Directive will bring about. The Directive ought to take effect on the same day in all Member States, and this date will allow it to do so. The provision is also intended to have direct effect, in that it will operate to the benefit of rightholders even if a Member State fails to transpose the Directive into national law within the time allowed. The provision will affect existing situations in two ways:

- the proposal represents an upward harmonization, and its application will benefit rightholders. However, the date of application chosen also allows works not to have a longer period of protection where third parties have made investments with a view to publishing such works once they fall into the public domain;
In accordance with the principle of legal certainty, works or things which have fallen into the public domain will not now become protected once again; any investments made by outsiders in unprotected works will be safe, and legal and factual situations which have been allowed to arise in good faith will not now be called into question.

6.1.2. The second sentence of paragraph 1 ensures that established rights in respect of periods of protection already running are maintained. The Directive is not to apply in those exceptional cases where it might have the effect of shortening such terms of protection.

6.1.3. These two principles will have the effect that in some exceptional cases there will in practice be a transitional period. In other words the single market will not be brought about in full straight away in a limited number of cases, which involve:

- works which were hitherto protected for eighty years under Spanish law, and works which still qualify for extended terms of protection granted to take account of periods of war;

- works protected by copyright, and other items protected by related rights, which have fallen into the public domain in certain Member States but are still protected in others.

6.2. Article 6 paragraph 2 concerns the duration of the author's moral rights. Member States have different rules here: in some of them moral rights are limited in time (D, IRL, L, NL, UK), while in others it is expressly laid down that moral rights are perpetual (B, DK, E, F, I and P).

The harmonization measure chosen is the minimum solution in Article 6 bis paragraph 2 of the Berne Convention, which is thus now incorporated into Community law. It does not represent full scale harmonization. The Commission reserves the right to return to this question if necessary.
7. Article 7

7.1. Article 1 of the Directive provides that all literary and artistic works within the meaning of the Berne Convention are to be protected for the term which it lays down. Article 1 of Directive 91/250/EEC provides that computer programs are to be protected as literary works within the meaning of the Convention, and the present Directive will consequently apply to them. Article 7 paragraph 1 of the present Directive draws the appropriate conclusions and repeals Article 8 of Directive 91/250/EEC, which harmonized the term of protection of computer programs on a provisional basis.

7.2. Paragraph 2 repeals the provisional arrangements in Articles 9 and 10 of the proposed Directive on rental right, lending right, and on certain rights related to copyright.

8. Article 8

Article 8 introduces a procedure whereby Member States are to notify the Commission of plans in the field of related rights. The procedure is largely based on that in Directive 83/189/EEC (1). Its purpose is the same: it is intended to prevent fresh barriers being created as Member States legislate on the subject.

8.1. Paragraph 1 lays down the obligation to notify. It is confined to related rights. The term "related rights" is to be understood in a broad sense, as including any right distinct from copyright itself which is intended to protect persons active in the cultural sphere by conferring on them either an exclusive entitlement or an entitlement to remuneration. Obviously the term of protection is only one component of such a right. But it cannot be separated from the right itself, so that the obligation to notify has to apply to the planned measure as a whole.

8.2. Paragraph 2 describes the procedure. First, Member States are to defer adoption of the plan for three months from the date of notification. During that period the Commission will study the measure in order to evaluate its scope and any implications for the single market. If the Commission finds that taken in an isolated fashion by one Member State the measure might have a negative effect on the single market, it is to inform the Member States that it intends to propose a harmonization measure. The Member State must then suspend adoption for a year. During this period the Commission will prepare its harmonization proposal.

Once the year has expired the Member State is free to adopt the projected measure, subject of course to Article 5 of the EEC Treaty in the light of the proposal which the Commission has made.

In effect, therefore, the procedure in Article 8 requires cooperation between the Member States and the Commission aimed at ensuring that Member States will not find themselves following conflicting courses. The only restriction imposed is a period of suspension. Member States do not forgo their freedom to legislate here.

9. Article 9

This Article repeats the procedure 1 of Article 2 of the Decision of the Council No.87/377/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission(1).

(1) OJ No L 197, 18.7.1987, p. 33.
10. Article 10

Article 10 essentially repeats the usual provisions, except in paragraph 2, which provides that the obligation to notify laid down in Article 8 is to be applied from the date on which the Directive takes effect. This is because Article 9 does not require legislation in the Member States; and cooperation with the Member States must be established as rapidly as possible in order to prevent any additional divergences arising between national laws.
### Terms of protection in some non-Community countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Performers</th>
<th>Producers of phonograms</th>
<th>Broadcasters</th>
<th>Copyright</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>50 from performance</td>
<td>50 from recording</td>
<td>30 from broadcast</td>
<td>70 pma/from publication</td>
</tr>
<tr>
<td>Cyprus</td>
<td>-</td>
<td>20 from recording</td>
<td>20 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>50 from recording</td>
<td>50 from recording</td>
<td>50 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Finland</td>
<td>50 from recording</td>
<td>50 from recording</td>
<td>50 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Hungary</td>
<td>-</td>
<td>20 from recording</td>
<td>-</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Iceland</td>
<td>25 from recording</td>
<td>25 from recording</td>
<td>25 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Malta</td>
<td>-</td>
<td>25 from recording</td>
<td>25 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Norway</td>
<td>50 from performance</td>
<td>50 from recording</td>
<td>50 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Sweden</td>
<td>50 from recording</td>
<td>50 from recording</td>
<td>50 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Switzerland</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>USA</td>
<td>-</td>
<td>75 from publication</td>
<td>-</td>
<td>50 pma/75 from publication</td>
</tr>
<tr>
<td>Japan</td>
<td>30 from performance</td>
<td>30 from recording</td>
<td>30 from broadcast</td>
<td>50 pma/from publication</td>
</tr>
<tr>
<td>Canada</td>
<td>-</td>
<td>50 from recording</td>
<td>-</td>
<td>50 pma/from publication</td>
</tr>
</tbody>
</table>
Draft legislation and draft international agreements

<table>
<thead>
<tr>
<th></th>
<th>Copyright</th>
<th>Related rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>70 pma</td>
<td>50</td>
</tr>
<tr>
<td>NL</td>
<td>70 pma</td>
<td>50</td>
</tr>
<tr>
<td>GR</td>
<td>70 pma</td>
<td>50</td>
</tr>
<tr>
<td>CH</td>
<td>70 pma</td>
<td>50</td>
</tr>
<tr>
<td>WIPO</td>
<td>70 pma</td>
<td>50</td>
</tr>
<tr>
<td>GATT</td>
<td>50 pma</td>
<td>50 (broadcasters 20)</td>
</tr>
</tbody>
</table>
Proposal for a
COUNCIL DIRECTIVE
harmonizing the term of protection
of copyright and certain related rights

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,
and in particular Articles 57(2), 66, 100a and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations lay down only minimum terms of protection of the rights they refer to, leaving the contracting states free to grant longer terms; whereas certain Member States have exercised this entitlement; whereas in addition certain Member States have not become party to the Rome Convention;

Whereas there are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas, therefore, with a view to the establishment of the internal market and its operation thereafter, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community;
 Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and fifty years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations;

Whereas certain Member States have granted a term longer than fifty years after the death of the author in order to offset the effects of the world wars on the exploitation of authors’ works;

Whereas at the 1967 Stockholm conference for the revision of the Berne Convention certain Member States’ delegations approved a resolution asking the contracting states to extend the term of copyright protection; whereas in the discussions which have taken place within the World Intellectual Property Organization (WIPO) in preparation for a possible Protocol to the Berne Convention this question has been put on the agenda;

Whereas for the protection of related rights certain Member States have introduced a term of fifty years after publication or dissemination; whereas in other Member States which are currently preparing legislation on the subject the term of protection chosen is likewise fifty years;

Whereas the Community proposals for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) provide for a term of protection for producers of phonograms of fifty years after first publication;

Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to begin operating in practice on 31 December 1992, the harmonization of the term of protection should take place on the basis of a long term;
Whereas in its Communication of 17 January 1991 "Follow-up to the Green Paper - Working Programme of the Commission in the field of Copyright and neighbouring rights"(1), the Commission stresses the need to harmonize copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation and their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole;

Whereas in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonized at seventy years after the death of the author or seventy years after the work is lawfully made available to the public, and for related rights at fifty years after the event which sets the term running;

Whereas these terms should be calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions;

Whereas Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes(2) provides that Member States are to protect computer programmes, by copyright, as literary works within the meaning of the Berne Convention (Paris Act – 1971); whereas the present Directive harmonizes the term of protection of literary works in the Community; whereas Article 8 of Directive 91/250/EEC, which merely makes provisional arrangements governing the term of protection of computer programmes, should accordingly be repealed;

Whereas Articles 9 and 10 of Council Directive .... on rental right, lending right, and on certain rights related to copyright(3) make provision for minimum terms of protection only, subject to any later harmonization; whereas these Articles should be repealed, in order to align the terms of protection of those rights on the terms laid down in this Directive;

(1) COM(90) 584 final.
(2) OJ No L 122, 17.5.1991, p. 42.
(3)
Whereas under the Berne Convention photographic works qualify for a minimum term of protection of only twenty-five years from their making; whereas, moreover, certain Member States have a composite system for the protection of photographic works, which are protected by copyright if they are considered to be artistic works within the meaning of the Berne Convention and protected under one or more other arrangements if they are not so considered; whereas provision should be made for the complete harmonization of these differing terms of protection;

Whereas in order to avoid differences in the term of protection it is necessary that when a term of protection begins to run in one Member State it should begin to run throughout the Community;

Whereas Article 6bis(2) of the Berne Convention provides that the moral rights of the author are to be maintained after his death at least until the expiry of the economic rights; whereas that provision can usefully be taken over in this Directive, without prejudice to any possible later harmonization of moral rights;

Whereas the terms of protection laid down in this Directive should also apply to literary and artistic works whose country of origin within the meaning of the Berne Convention is a third country, but protection should not exceed that fixed in the country of origin of the work;

Whereas where a rightholder who is not a Community national qualifies for protection under an international agreement the term of protection of related rights should be the same as that laid down in this Directive, except that it should not exceed that fixed in the country of which the rightholder is a national;

Whereas this provision must not be allowed to bring Member States into conflict with their international obligations; whereas international obligations may require the Member States to accord different treatment to third-country nationals and their works, and this may lead to disturbances on the Community market; whereas a procedure should therefore be laid down which enables such difficulties to be remedied;
Whereas rightholders should be able to enjoy the longer terms of protection introduced by this Directive equally throughout the Community provided their rights have not yet expired on 31 December 1994,

HAS ADOPTED THIS DIRECTIVE:

Article 1

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.

3. In the case of anonymous or pseudonymous works, or works considered under the legislation of a Member State to have been created by a legal person and of collective 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.

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

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, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.
Article 2

1. The rights of performers shall run for fifty years from the first publication of the fixation of the performance or if there has been no publication of the fixation, from the first dissemination of the performance. However, they shall expire fifty years after the performance if there has been no publication or dissemination during that time.

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

3. The rights of producers of the first fixations of cinematographic works and of sequences of moving images, whether or not accompanied by sound, shall expire fifty years after the first publication. However, they shall expire fifty years after the fixation was made if the work or sequence of moving images has not been published during that time.

4. The rights of broadcasting organizations shall run for fifty years from 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, 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.

4. Pending the conclusion of any future international agreements on the term of protection by copyright or related rights, the decision may be taken by means of the procedure set out in Article 9:

(a) to waive or to vary the rule requiring a comparison of the terms of protection in certain third countries which is laid down in paragraphs 2 and 3, particularly in order to prevent Member States from being brought into conflict with their international obligations; in any event, however, the term granted may not exceed that laid down in Articles 1 and 2;

(b) to take appropriate measures where protection is granted to third-country nationals by some Member States only, and this fact causes appreciable distortion of competition or deflection of trade in the Community market.

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. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

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

Article 7

1. Article 8 of Directive 91/250/EEC is hereby deleted.

2. Articles 9 and 10 of Directive ... are hereby deleted.

Article 8

1. Member States shall immediately notify the Commission of any plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

Article 9

The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by the representative of the Commission.
The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

**Article 10**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

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

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

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

**Article 11**

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President
Financial statement

Section 1: financial implications

1. Title of operation
   Proposal for a Council Directive on the harmonisation of the term of
   protection of copyright and certain neighbouring rights.

2. Budget heading involved
   Line A 25 10 : expenses in connection with meetings of committees to be
   consulted obligatorily according to the procedures for the conclusion
   of Community Instruments (Group 3).

3. Legal basis
   - Article 57(2), 66, 100A and 113 EEC.
   - Article 145 3rd subparagraph EEC:
     Procedure 1 of Article 2 of Council Decision 87/373/EEC of
     13 July 1987, laying down the procedures for the exercise of
     implementing powers conferred on the Commission (OJ N° L197 of
     18/7/87 p 33).

4. Description of operation
   The proposal for a Directive is a measure which is essential to the
   functioning of the Internal Market (cf Decision of the Court of Justice
   in case N° 341/87 of 24/1/89). The harmonisation achieved by means of
   the Directive will allow obstacles to the freedom of circulation of
   protected works and objects of Community origin to be eliminated.
   However as regards works and objects coming from third countries,
   differences in the term of protection will continue to apply, notably
   because of the differing international obligations incurred by Member
   States.

   Until such time as relations with third countries have been brought
   more within the competence of the Community, provisional measures are
   required. These fall within the competence of the Commission, which
   must nevertheless be assisted by a Consultative Committee.

   This committee will be called upon, in particular, to giving opinions
   on the application of the comparison of the term of protection to third
   countries and the procedures for such application, as well as the
   measures to be taken by the Commission to alleviate any difficulties in
   connection with the Internal Market arising from different treatment of
   protected works and objects coming from third countries.

   It can be expected that this committee will be called upon to sit for a
   period of four years following the transposition of the Directive (ie
   years 1993 to 1996).

5. Classification of expenditure
   NCE
   NDE

6. Type of expenditure?
   Meeting expenses for consultative committee set up under Article 9 of
   the Directive.

7. Financial impact on appropriations for operations (Part 3 of the
   budget).
   NIl.

8. What anti-fraud measures are planned in the proposal for the operation.
   No particular measure foreseen.
Section II: Administrative expenditure

(part 1 of the budget)

1. Will the proposed operation involve an increase in the number of Commission staff?

No.

2. Indicate the amount of staff and administrative expenditure involved in the proposed operation.

Meeting expenses at 6 meetings per year and 2 experts per Member State. Average cost 480 ECU per expert per meeting

Cost per financial year 70,000 ECU for the years 1993 to 1996.
Section III: elements of cost-effectiveness analysis

1. Objective and coherence with financial programming.

The operation falls within the framework of the completion and functioning of the single market. It was announced in the Communication of the Commission "Follow up to the Green Paper – working programme of the Commission in the field of copyright and neighbouring rights" of 17 January 1991 (COM(90)584 final).

The operation was incorporated in the financial programming of the Directorate-General for the Internal Market and Industrial Affairs.

2. Grounds for the operation.

The creation of a committee falls within the implementing powers conferred on the Commission. Its function will be to give opinions on measures proposed by the Commission in order to avoid problems arising in the functioning of the Internal Market from the fact that differences exist in the treatment by the Member States of protected works and objects from third countries.

3. Monitoring and evaluation of the operation.

The activities of the consultative committee will largely depend on problems arising in the context of the Internal Market. The programming of meetings is flexible and can be varied according to the importance and urgency of points to be discussed.
SUMMARY OF PROCEEDINGS

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

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

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

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

General discussion

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

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

The Luxembourg delegation was not represented at this meeting.
Community. The Commission had chosen long terms of protection for both copyright (70 years post mortem auctoris) and related rights (50 years), since long transitional periods would have been necessary if the terms proposed had been shorter than the present terms in some Member States, in the light of the case-law of the Court of Justice requiring account to be taken of existing rights. Moreover, the interested circles had expressed considerable support for the terms proposed by the Commission. While this meant that the terms of protection would be lengthened in several Member States, the proposal would not entail renewed protection for works which were already in the public domain. The proposal left it to the Member States to determine who were the holders of copyright and related rights. With regard to rightholders who were not Community nationals, the method chosen for determining the term of protection in the Community was that of comparison of the term in the Community with the term of protection in the third country concerned; this method was intended to encourage third countries to lengthen their terms to correspond to those proposed for the Community. A further feature of the proposal was that it included a procedure for Member States intending to introduce new related rights to notify the Commission of these intentions, in order to avoid differences developing between related rights in the various Member States.

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

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

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

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

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

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

**Article 1**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

The United Kingdom delegation supported the Commission’s approach.

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

Articles 4 and 9

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

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

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

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

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

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

Article 5

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

Article 6

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

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

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

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

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

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

Article 8

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

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

---

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

The Commission representatives pointed out that this provision did not enable the Commission to prevent Member States adopting national laws introducing new related rights, it merely obliged Member States to defer their adoption for three or twelve months as the case may be. They also drew attention to the precedent of Directive 83/189/EEC5.

5. The Role of Small Firms and the Self-Employed

Small and medium-sized firms and the self-employed, particularly the crafts sector, play an important role in the labour market in all EC Member States. Their contribution to countries' national product is still extraordinarily high. Above all they play a special role in the training of young people and shoulder the main vocational training burden in many Member States. The ESC is currently preparing an own-initiative Opinion on the role of small and medium-sized enterprises (SMEs) in which their importance as employers and their role in vocational training will be thoroughly examined.


The Chairman
of the Economic and Social Committee
Michael GEUENICH

6. Environmental Protection and Labour Market Policy

Environmental protection is today in the minds of all sections of the population. Environmental compatibility and consumer friendliness are today an integral part of a product's quality. Industries active in environmental protection are sectors of innovation with progressive technology in all countries of the Community. They are helping more and more to create new jobs and, above all, jobs with a future.

Another important sector for the labour market is waste recycling, which the ESC thinks should be given greater attention. Nor should one overlook the growing importance of sectors dealing with energy-saving.

Opinion on the proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights

(92/C 287/14)

On 23 March 1992 the Council decided to consult the Economic and Social Committee, under Article 100A of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 10 June 1992. The Rapporteur was Mr Pardon.

At its 298th Plenary Session (meeting of 1 July 1992), the Economic and Social Committee adopted by a majority, with 17 dissenting votes and 6 abstentions, the following Opinion.

1. General comments

1.1. The aim of the proposed Directive — to harmonize the term of protection of copyright and certain related rights — reflects the concern voiced by the Committee on many occasions.

1.1.1. For instance, in its Opinion (2) of 25 January 1989 on the Green Paper on Copyright and the challenge of technology — Copyright issues requiring immediate action, the Committee regretted (point 2.6) the 'lack of uniformity in the content of copyright and the term of copyright'. It called (point 3.1.2.3) for an urgent study of the term of copyright: formulae must be found 'for...
bringing about harmonization of the protection periods for the various categories of works and other products; which is increasingly necessary if the internal market of the Community is to operate at optimum efficiency.

1.1.2. The Committee therefore welcomes the Commission's proposal.

1.2. The Commission justifies the need to undertake such harmonization primarily on the following grounds: the proposed harmonization and reinforcement of copyright protection will

— be conducive to innovation and creation within this sphere;

— help dismantle barriers within the EC and solve problems connected with free movement of goods;

— check distortion of competition and be a practical contribution towards furthering the right of establishment and free provision of services;

— ensure greater legal certainty and facilitate management of the relevant intellectual property rights;

— promote effective action to curb piracy and unlawful imports from non-EC countries;

— be a key factor in boosting investment in the cultural, scientific and creative spheres within the Community.

1.3. The Council Resolution of 14 May 1992, which aims to improve protection of copyright and related rights, has the Committee's full approval.

1.3.1. Like the Council, the Committee takes the view that technological developments have facilitated exploitation of works on an international scale; hence it is important to consolidate protection of copyright and related rights at national, Community and international levels.

1.3.2. In view of the degree of protection their provisions ensure for literary and artistic works and the rights of performers, producers of phonograms and broadcasting organizations, the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971 (Paris Act of the Berne Convention), and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961 (Rome Convention) have enlisted wide international accept-

ance and the number of signatory states is still expanding. It is vital that all Member States accede.

1.3.3. Confronted with the problem of piracy, it is in the interests of Community rights holders protected by these instruments that the minimum level of protection ensured should be guaranteed in as many non-EC countries as possible, without prejudice to the more detailed provisions of bilateral or multilateral agreements. It is desirable that non-EC countries should become party to these instruments.

1.3.4. With this in mind, the Committee welcomes the Member States' undertaking to accede to the Paris Act of the Berne Convention and to the Rome Convention by 1 January 1995, if they have not already done so, and to ensure effective compliance under their national legal systems.

1.3.5. The Committee considers that it is in the interests of Community holders of copyright and related rights that non-EC countries should ratify or accede to the Paris Act of the Berne Convention and the Rome Convention.

1.3.6. The Committee joins with the Council in calling on the Commission, when negotiating agreements between the Community and non-EC countries, to place particular emphasis on the ratification of, or accession to, these instruments by the non-EC countries concerned as well as on effective compliance with their provisions.

2. Specific comments

2.1. The term of protection varies from one Member State to another.

2.1.1. In the case of copyright, ten of the Twelve have opted for the minimum 50 years' period provided for in the Berne Convention, while three apply special wartime extensions. However, France grants 70 years' protection post mortem auctoris for 'musical compositions with or without words'.

2.1.2. All works are protected for 70 years p.m.a. in Germany and for 60 years p.m.a. in Spain.

2.1.3. The trend in draft legislation and international agreements is to extend the term of protection: in future copyright protection is to be 70 years p.m.a. in Belgium and Greece. The work of the World Intellectual Property Organization is following the same lines.
2.1.4. The term of protection of related rights differs substantially from country to country (0, 20, 25, 30, 40 and 50 years). Here again draft legislation tends to favour an extension (50 years in Belgium, Netherlands and Greece).

2.2. The Commission is proposing that copyright should be protected throughout the author's life and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public (1).

2.2.1. The Commission motivates this proposal mainly on the following grounds:

- harmonization must not compromise rights acquired under existing national laws; as two Member States apply a term of protection lasting 70 years p.m.a. in one case and 60 years p.m.a. in the other, and in other Member States this 50 years' period is extended in certain circumstances, Community harmonization should be aligned on this 70 years' term to avoid recourse to lengthy transition periods which would delay the effective attainment of the internal market accordingly;

- the purpose of posthumous protection is to enable the author, and two generations of his direct descendants, to benefit legitimately from the fruits of his creation; in view of increased life expectation, the minimum duration of 50 years p.m.a. provided for in the Berne Convention should be extended;

- a long term of Community protection provides a high level of protection for authors and their rightholders and plays a key part in strengthening copyright protection;

- such a term of protection is a sine qua non in certain sectors where the publication or creation of works necessitates substantial investments with lengthy amortization periods.

2.2.2. The Committee, while taking into consideration the reasoning contained in point 2.2.1 with which the Commission justifies its proposals, has nevertheless considered the following arguments:

- the present world situation in which 90% of the Berne Convention's signatory States have opted for a duration of 50 years, underlines the necessity for harmonization at a world, and not just at Community level, if barriers are not to be created for third countries;

- the advantages of ever greater protection of the consumer and the facilitation of access to our literary heritage at affordable prices, especially in the developing world, would not be assisted by the unilateral extension of the duration of protection by the Community;

- in case of harmonization at a level of 50 years, the safeguarding of acquired rights in Member States with protection rights of more than 50 years is not a serious problem as the example of Spain, which has already introduced an analogous reduction, clearly demonstrates;

- an extension of the period of protection, with the subsequent increase in the patrimony under protection, could result not in a reduction but indeed in an increase in the phenomenon of piracy.

2.3. In specific cases where the term of protection only starts to run after the author's death, the criterion determining the start of this period is the date when the work is lawfully made available to the public.

2.3.1. Related rights of performers run for 50 years from the first publication of the fixation of the performance or, if there has been no such publication, from the first dissemination of the performance.

2.3.2. Related rights of producers of phonograms run for 50 years from the first publication of the phonogram.

2.3.3. Related rights of producers of the first fixations of cinematographic works and of sequences of moving images expire 50 years after the first publication.

2.3.4. Related rights of broadcasting organizations run for 50 years from the first transmission of a broadcast.

2.3.5. As in the case of copyright, the harmonization proposed for related rights cannot compromise rights acquired under existing national laws.

3. Conclusions

3.1. In the Committee's view, it is essential that protection of copyright and related rights, in particular the term of protection, should be harmonized throughout the Community.

3.1.1. The Commission must endeavour to ensure that non-EC countries respect these rights.

3.2. The Commission's proposal for a term of protection of 70 years after the death of the author

(1) Article 1 (1) of the proposed Directive. For specific cases, see Article 1 (2) to (6).
is consistent with the current law of only one Member State. The majority of Member States have no longer than 50 years after the death of the author. Further a Community agreement on 50 years may be a more useful base to facilitate international agreement on the term of protection. In these circumstances the Council should give serious consideration to adoption of 50 years after the death of the author rather than 70 years.

3.2.1. Whatever differences of opinion may exist on this point, the Committee would stress that the crux of the matter is that this term of protection should be exactly the same in all Member States.

Done at Brussels, 1 July 1992.

The Chairman
of the Economic and Social Committee
Michael GEUENICH
EUROPEAN PARLIAMENT

COMMITTEE ON LEGAL AFFAIRS AND CITIZENS' RIGHTS

MINUTES

of the meeting
of Tuesday, 26 May 1992
and Wednesday, 27 May 1992

BRUSSELS

Tuesday, 26 May 1992

1. Adoption of draft agenda (PE 200.285) ................. 3

   In the presence of the Council and Commission

2. (179/90- T01101)
   * Community plant variety rights
     (COM(90) 0347 - C3-0303/90 - A3-0027/92)
     Rapporteur: Mr BANDRES MOLET
     Exchange of views ..................... 3

3. (40/92- T02253)
   Application of Community law (Ninth report)
   (COM(92) 0136 - C3-0186/92)
   Rapporteur: Mr BONTEMPI
   Exchange of views ..................... 3

4. (83/91) - T01647)
   Copyright and neighbouring rights: duration of protection
   Rapporteur: Mr BRU PURON
   Exchange of views ..................... 3

5. (19/92 - T02191)
   * Extending the jurisdiction of the Court of First Instance
     (Doc. No. 9286 JUR 111 TRIBUNAL 15 = C3-0055/92 and SEC(92) 0495)
     Rapporteur: Mrs VAYSSADE (PE 200.279) ............. 3

6. (80/91 - T01559)
   ** I Funds held by institutions for retirement provision
     (C3-0431/91 - COM(91) 0301 - SYN 0363)
     Co-rapporteurs: Mr JANSSEN van RAAY and Mr ZAVVOS .... 3

16 July 1992

DOC_EN\PV\207\207126 PE 201.015
Wednesday, 27 May 1992

7. (155/90 - T00990)
Third Directive on direct life assurance amending Directives
79/267/EEC and 90/619/EEC
(COM/91 0057 - C3-0195/91 - SYN 0329 - A3-0173/92)
Rapporteur: Mr GARCIA AMIGO
Decision on procedure to be followed .................................. 3

8. (115/89 - T00867)
Charter for ethnic groups
(B3-0177/89 - B3-0690/90 - B3-0478/90)
Rapporteur: Mr STAUFFENBERG
Consideration of draft report and exchange of views
(PE 156.208) ................................................................. 4
Opinion: CULT (SIMEONI - PE 148.494/fin.) ............................ 4

9. Other business ............................................................ 4

10. Date and place of next meeting ........................................ 4

ANNEX I: Record of attendance
The meeting opened at 3.7 p.m. with Mr Rothley in the chair.

***

1. The acting chairman, Mr Rothley, informed the meeting of the changes to the order of the items on the agenda. In particular, the report by Mr Garcia Amigo on the third directive on direct life assurance, which had been referred back to committee at the last part-session, would be considered at this meeting. The agenda, thus modified, was adopted.

2. The rapporteur, Mr Bandrés Molet, pointed out the divergences between the proposal for a directive on plant variety rights and that concerning biotechnological inventions, with regard to the definition of what was commonly known as 'the farmer's privilege'. The following spoke: Garcia Amigo, Bontempi and Medina Ortega; Mr Lau, for the Commission; and the chairman.

The committee agreed on a proposal by the rapporteur, to invite Commissioner MacSharry to clarify this point at a forthcoming meeting.

3. The rapporteur, Mr Bontempi, outlined some of the main points of his report. On one of the points raised, the committee agreed that a working party should be set up on the implementation of Community law. The matter would be further discussed at the meeting of the committee to be held from 22 to 24 September 1992. It was also decided that the committees of the European Parliament and the national parliaments would be asked for their opinions on the contents of the ninth report.

The following spoke: Medina Ortega, Salema, Bandrés Molet and the chairman.

Mr Bontempi would submit a draft report to the next meeting.

4. The rapporteur, Mr Bru Purón, outlined the problems raised by the proposal for a directive. The following spoke: Salema and Garcia Amigo; Mr Verstrynge, for the Commission; and the chairman. The debate concerned, inter alia, the question of the legal basis proposed by the Commission. The matter would be further discussed at a forthcoming meeting.

5. This item was held over to the next meeting (15-17 June 1992).

6. This item was held over to the next meeting (15-17 June 1992).

The meeting adjourned at 5 p.m. and resumed at 9.10 a.m. the next day, with Mr Stauffenberg in the chair.

***

7. The rapporteur, Mr García Amigo, read out the letter he had received from Commissioner Brittan. In view of this letter, he recommended that the report should be unblocked and included in the agenda for the forthcoming part-session. He considered that the legislative resolution should be adopted, provided the Commission was willing to maintain the favourable attitude to Parliament's amendments shown by Sir Leon Brittan in his letter.
The following spoke: Janssen van Raay and the chairman.

8. The chairman, Mr Stauffenberg, outlined the main points of his draft report. He stressed the importance of reaching a consensus on the definitions included in the draft report, and accordingly requested the collaboration of the members of the committee, particularly with regard to the terminology to be used in defining 'ethnic minorities'. The following spoke: Medina Ortega, Grund, Gollnisch, Glinne and Garcia Amigo. The matter would be further discussed at the next meeting (23-25 June 1992).

9. There was no other business.

10. The next meeting would be held on 15, 16 and 17 June 1992 in Brussels.

* * *

The meeting closed at 12.10 p.m.
<table>
<thead>
<tr>
<th>Till stede</th>
<th>Anwesend</th>
<th>Anwesend am 26.05.1992</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formandskabet/Vorstand/Npoc6poc/Bureau/Ufficio di Presidenza/Hesa: (*)</td>
<td>STAUFFENBERG (P) (2), ROTHLEY (VP) (1)</td>
<td></td>
</tr>
<tr>
<td>Medlemmer/Mitglieder/Ml6n/Members/Diputados/Députés/Deputatı/Leden/Deputados:</td>
<td>BANDRES MOLET (1), BONTEMPI, BRU PURON, GARCIA AMIGO, GOLLNISCH (2), GRUND, HOON (1), Lord INGLEWOOD, JANSSEN VAN RAAY, MALANGRE, MEDINA ORTEGA, SALEMA O.MARTINS</td>
<td></td>
</tr>
<tr>
<td>Stedfortrædere/Stallvertreter/Avvstform/Supplënts/Suppléants/Membri supplenti:/Plaatsvervangers/Hombres suplentes:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DEFRAIGNE, FALCONER, FONTAINE (1), GLINNE, ZAVVOS (2)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Art. 111,2 | |
| Art. 124,4 | |

| Endv. deltog/Weitere Teiln./Impeccave enlncp/A1so present/Participaron igualmente/Participliant également/Hanno partecipato altres'/Andere deelnemers/Outros participantes/ | |
| (Dagsorden/Tagesordnung/| |
| Hυχρoσυν αρνησεως/| |
| Orden do dia-Pkt./| |
| Punto/Punt/Punto): | |

(*) (P) = Formand/Vorsitz./Npoc6poc/Chairman/Prés./Presidente/Voorzitter/Presidente (VP) = Næstform./Stallv. Vorsitz./Avvstform/Vice-Ch./Vice-Prés./Vicepres./ONDervoorz./Vice-Prés./Vicepres.

Till stede den/Anwesend am/Pap6v o1z/Present on/Présent la/Presente 1/Aanwezig op/Presente en/Presente el
(1) 26.05.1992
(2) 27.05.1992
(3)
Efter indbydelse fra formanden/Auf Einladung d. Vorsitzenden/Με πρόσκλησή του Προέδρου/
At the invitation of the Chairman/Por invitación del presidente/Sur l’invitation du président/Su invito del presidente/Op uitnodiging van de voorzitter/A convite do presidente/
Rådet/Rat/Συμβούλιο/Council/Consejo/Conseil/Conselho/ (*)

Kommissionen/Kommission/Εντατόν/Commission/Comisión/Commissione/Comissão: (*)

LAU, VERSTRYNGE

Cour des comptes:

C.E.S.

Andre deltagere
Andere Teilnehmer
Ενέργεια καθηγητών
Also present
Otros participantes
Autres participants
Altri partecipanti
Andere aanwezigen
Outros participantes

Gruppernes sekretariat
Sekretariat der Fraktionen
Γραμματεία των Ολομέλειών
Secretariat of pol. groups
Secr. de los grupos políticos
Secr. des gr. politiques
Sggr. dei gruppi politici
Secr. van de fracties
Secr. dos grupos políticos

Andere aanwezigen

Cab. du Président

Cab. du Secr. Gén.

Generaldirektorat
Generaldirektion
Γενική Διεύθυνση
Directorate-General
Dirección general
Direzione generale
Direcció general
Contrôle financier
Service juridique

Udvalgsssekretariatet
Ausschußsekretariat
Γραμματεία Εντατόν
Committee secretariat
Secretaria da comisión
Secrétariat de la commissie
Segretariato della commissione
Commessia secretariat
Secrétariat da comissão

Assist./Bønderc
BOURSEAU

*) (P) = Formand/Präsident/Πρόεδρος/Chairman/Prés./Pres./Voorzitter
(VP) = Nestform./Vize-Präsident/Αντι-Πρόεδρος/Vice-Ch./Vice-Prés./Ondervoorz./Vice-pres.
(M) = Medlem/Mitglied/Μέλος/Member/Membre/Membro/Lid/Membro
(F) = Tjenestemand/Beantand/Υπάλληλος/Official/Funcionario/Fonctionnaire/Funcionario/Ambtenaar/
Functionário.
NOTE

from: Italian delegation

to : Working Party on Intellectual Property (Copyright)

No. prev. doc.: 5509/92 PI 33 CULTURE 21

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

As intimated at the ad hoc Working Party's first meeting on 22 June 1992, the Italian delegation is here submitting a number of comments on Articles 8 and 9 of the above proposal.

Under Article 8(1) Member States are required to notify the Commission of any draft national legislation introducing new related rights. The purpose of this provision - as in a similar case (Directive 83/189/EEC) - is clearly to avoid the adoption of national laws at variance with the approach of the draft Directive under discussion which could lead to disruption of the internal market. The notification requirement is one of the forms of collaboration incumbent on the Member States under the Treaty (Article 5 in particular): the proposal on this point can be regarded as necessary and perfectly legitimate save that the
requirement needs to be clarified (i.e. whether notification concerns only that part of the draft legislation dealing with the term of the new related rights, or all the rules governing such rights, and so on).

Article 8(2) requires Member States to refrain from adopting legislation on new related rights once the Commission has been notified under paragraph 1.

The minimum stay on adopting legislation is three months from the date of notification, and the maximum is twelve months, where the Commission informs the Member State that it intends to propose a Directive on the subject.

This provision reproduces Article 9 of Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations; that Article requires Member States to refrain from adopting technical regulations during the said period, i.e. "technical specifications (...) the observance of which is compulsory (...) in the case of marketing or use [of goods] in a Member State" (Article 1(5) of Directive 83/189/EEC). That provision applies then to the adoption stage of highly technical, detailed rules, which may be simple administrative acts and may not necessarily be enacted as formal laws.

The proposed Article 8(2) on the other hand opens the way to unacceptable interference in the legislative process, the procedures of which are the sole prerogative of national parliaments.
In substance, a condition is being placed on the national legislative process (advance notification of the Commission, requirement to await the expiry of the period for the Commission to reply); any failure to comply with that condition could automatically invalidate the law in question, even though it conformed in every respect with current Community rules and with those which the Commission had at that stage merely announced.

Article 8(2), by being so categorical, could also result in the "premature" removal from the national legislator's sphere of competence (a competence deriving from Article 36 of the Treaty and repeatedly confirmed by Court of Justice case-law, to which the Court of First Instance recently referred in its ruling in Case 69/89 of 10 July 1991) of a subject on which the Community legislator has not yet taken a decision. This is a further reason for considering Article 8(2) unacceptable.

Admittedly, under Article 5 of the Treaty the obligations arising out of a Directive apply to all the organs of the Member States (for a recent example of a Court of Justice ruling in this sense, see Judgment in Case 31/87, dealing specifically with the obligations of national courts) and consequently to the body designated by the constitution to produce legislation, nevertheless, the obligation concerns the result to be achieved by the Directive and not the way in which that result is to be achieved under national procedures, especially if the procedures involve the exercise of sovereign functions of the individual Member States.
The Commission's aim is to avoid discrepancies in legislation on related rights as it develops hereafter and also to pre-empt conflict with future Community measures which have yet to reach the stage of actual proposals; while this is understandable in itself, it seems here to produce something of an overkill effect by introducing a blocking mechanism on the basis of no more than the Commission's stated intention of proposing a Directive on the subject.

That aim could be more easily achieved through the effective use of the reciprocal information procedure provided for in Article 8(1).

Moreover, the difficulties foreseen by the Commission can be solved through common measures provided for in the Treaty and even by national judges refraining from applying internal laws which are incompatible with a Community Directive covering the same subject.

With regard to Article 9, the Italian delegation reiterates its concern at seeing the Commission, instead of the Member States, vested with substantial powers to negotiate with third countries on the matters and terms set out in Article 4(4), through a dubious reference to Article 113 of the Treaty, which concerns commercial policy.

This point needs to be looked at more closely by all delegations.
EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 12 August 1992

8351/92
RESTREINT
PI 85
CULTURE 85

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)¹ 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 auctoris 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 auctoris, 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 auctoris and would like serious consideration to be given to a term of 50 years post mortem auctoris.

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 auctoris would pose major problems for those Member States which had longer terms.

The German delegation, which has a term of 70 years post mortem auctoris, considered that a reduction to 50 years post mortem auctoris would pose more problems than would an increase from 50 to 70 years post mortem auctoris 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.
Article 2(1)

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-COOP 40.
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.

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.

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

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)

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.
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.
An alteration in solution was maintained which was made to parallel the behavior of the practical device. Under these conditions, the device would only be relevant to the community to the extent that it might be selected for its capacity to provide a family service or some service family and the case for the use of triangulation of the device was made.
NOTE

from the United Kingdom delegation
dated 19 August 1992
to Working Party on Intellectual Property (Copyright)

No. prev. doc.: 8351/92 PI 85 CULTURE 85
No. Cion prop.: 5509/92 PI 33 CULTURE 21


1. At the meeting of the Working Group on 14 and 15 July, the United Kingdom delegation expressed the view that Article 1(4) of the directive could unreasonably prejudice the interests of the author in certain circumstances, and agreed to submit an alternative proposal.

2. The United Kingdom continues to feel that a provision which brings copyright to an end because of the actions of a third party cannot be justified, even when that third party has presumed on reasonable grounds that the author died more than seventy years earlier. The provision would also be difficult to administer at the Community level since the subsistence of copyright in, say, the Member State of which the author is a national could depend on whether third parties in another Member State, possibly remote from that of the author, had acted on a reasonable presumption of the latter's death.
3 The United Kingdom therefore proposes that Article 1(4) should be deleted. If anything is needed to replace it, then we would suggest a provision which would safeguard the person who has acted on a reasonable presumption against an action for infringement. The following text is put forward for consideration:

"The rights of authors of anonymous or pseudonymous works are not infringed by any acts performed by a person who presumed on reasonable grounds that the author of such works has been dead for seventy years."

4 The Working Group may however consider that a provision of this kind is unnecessary since it does not relate to the term of protection of anonymous or pseudonymous works, and can be left to Member States' national laws along with other exceptions to authors' rights not subject to Community law.
EUROPEAN COMMUNITIES

THE COUNCIL

Brussels, 23 October 1992

9469/92
RESTREINT
PI 104
CULTURE 103

SUMMARY OF PROCEEDINGS

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

No. prev. 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 PI 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

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

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).
17. 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.

18. 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.

19. 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.

20. 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 7bis 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 7bis 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.

9469/92 mg EN - 21 -
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
Werner RUMPHORST, Dr jur., M.C.L., GENEVA

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 Convention 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. "Broadcast" is therefore to be understood as the programme output as assembled and broadcast by or on behalf of the broadcasting organization. "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;


3. For a recent Supreme Court confirmation, see Beschluss des österreichischen Obersten Gerichtshofs (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.
Summary of proceedings
of: Working Party on Intellectual Property (Copyright)
on: 26 and 27 October 1992

No. prev. doc.: 9836/92 PI 114 CULTURE 114
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 26 and 27 October 1992, the Working Party on Intellectual Property (Copyright)\(^1\) re-examined Articles 1 to 6 bis, 8 and 9 of the above proposal on the basis of a non-paper which is reproduced in Annex I.

Article 1(1), (2) and (3)(a)

2. These provisions were not discussed at this meeting.

Article 1(3)(b)

3. Following discussion of this provision at the Working Party's previous meeting (9469/92 PI 104 CULTURE 103, points 34 to 41), the new non-paper contained drafting changes in relation to the text which had been discussed at that meeting.

4. The Spanish delegation was opposed to the inclusion of the word "only" in the first indent, as it considered that the type of work covered by this provision would normally disclose the names of the authors.

\(^1\) The Luxembourg delegation was not represented at this meeting.
The Commission representative pointed out that the inclusion of the word "only" was necessary, as where the identity of at least one of the authors was known, the term of protection would have to be that provided for under Article 1(1) or (2); any other term of protection, including that of Article 1(3)(b), would not be compatible with the Berne Convention in the case of one or more authors being known.

5. The Irish delegation expressed a scrutiny reservation with regard to the second indent of this provision, considering that the merging of the contributions of the authors in the work would not necessarily make it impossible to identify the authors.

6. The Netherlands delegation expressed a scrutiny reservation on paragraph 3(b) as a whole. It considered that provision should be made for giving protection to the person on whose initiative the work was created, independently of the protection given to identified contributors to the work.

7. The Spanish and Irish delegations expressed reservations with regard to a work of this nature being "considered to be an anonymous or pseudonymous work". The Portuguese delegation considered that it was preferable to add the qualification that it was considered to be an anonymous or pseudonymous work for the purpose of calculating the term of protection, while the Italian delegation considered that it would be sufficient to indicate that the term of protection for such works was the term provided for in Article 1(3)(a).

8. The Commission representative emphasized that under the Berne Convention, the term of protection had to be the term resulting from Article 1(1) or (2) where at least one of the authors was identified, irrespective of whether or not the various contributions to the work could be attributed to individual authors. Article 1(3)(b) could therefore apply only where none of the authors of the work could be identified. The
solution proposed in this provision did not correspond to the national laws of any Member State with regard to collective works or works considered to have been created by a legal person, but in the view of the Commission services was the only solution compatible with the Berne Convention. In the light of these explanations and of a number of observations made by delegations, the Commission representative proposed drafting changes to Article 1(3)(b), which are reproduced in Annex II.

The German, Irish and Netherlands delegations entered scrutiny reservations on the new drafting of this provision, while expressing a favourable initial reaction to it.

9. The French delegation considered that paragraph 3(c), which had been included in the previous non-paper (Annex I to 9469/92), should be maintained, at least until the outcome of the proposals put forward in the European Parliament concerning the authorship of cinematographic and audiovisual works had been determined (see point 52 below).

Article 1(5)

10. The French delegation considered that in the case of a television serial (but not in the case of a television series), the term of protection for the whole serial should be calculated from the time when the last episode was lawfully made available to the public, provided that it was stipulated in the contract that the work was not to be considered complete until the last episode was screened.

The German and Netherlands delegations also considered that where it was clear that a work was not complete, the term of protection should be calculated from the time when the last part was lawfully made available to the public.

The Danish delegation considered that where there was a link between the parts of a work, the term of protection should
previous non-paper (Annex I to 9469/92) made it even more difficult for them to accept this provision.

13. The German delegation suggested that this provision should apply not only in respect of works by a known author, but also in respect of anonymous or pseudonymous works. It therefore suggested that the word "posthumous" be deleted.

14. The Italian delegation considered that it should be made clear that this provision would not apply in respect of works which were first lawfully made available to the public in the seventy years which followed the death of the author, as the term of protection provided for in Article 1(1) would apply to such works.

The Commission representative stated his willingness to make this clear in a recital.

15. The Italian delegation considered that since the protection resulting from this provision was not copyright protection but a related right equivalent to the economic rights of copyright, this provision should follow rather than precede Article 2.

The Commission representative stated his willingness to reconsider the position of this provision in the Directive.

The Spanish delegation considered that the protection resulting from this provision should be full copyright protection.

16. With regard to the term of the protection provided for in this provision, the Commission representative noted that the longest term of protection at present in national law for works published posthumously was 50 years, with the exception of a 70-year term for musical compositions under French law. He

2 Under the Greek draft law, a term of 70 years is foreseen.
therefore proposed that the term of protection under this provision of the Directive should be 50 years, since musical compositions for which the term of 70 years was already running in France at the date of transposition of the Directive would benefit from the first sentence of Article 6 bis (1) as set out in the non-paper.

The Spanish delegation considered that the term of protection under this provision should be 70 years, as for copyright protection.

The German delegation, while considering that 50 years was a long term for protection for such works, was prepared to accept it as a compromise.

17. The Irish delegation considered that where the heir of the author of the work could be identified, he should be the first owner of the right provided for in this provision; where the heir could not be identified, the first owner of the right should be the person who made the work lawfully available to the public, as proposed in the non-paper.

18. In the light of the diverging positions of the various delegations concerning this provision, the Chairman stated that he would consider submitting a compromise proposal for the policy debate to be held in Council on 10 November.

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

19. The German delegation maintained its reservation on the term of 50 years in Article 2(2), (3) and (4), indicating that it would consider lifting this reservation if the overall contents of the Directive were acceptable.
Article 2(3)

20. The Irish and United Kingdom delegations entered scrutiny reservations on Article 2(3) pending the outcome of discussions on film authorship (see point 52 below).

Article 2(4)

21. The Irish delegation withdrew its scrutiny reservation on this provision, but expressed doubts as to the need for the accompanying recital.

Article 3

22. The French and Portuguese delegations expressed their willingness to accept the Commission's proposal, although the Portuguese delegation considered that the term proposed was too long.

The Belgian delegation stated that, in the light of the explanations given by the Commission representative at the previous meeting (9469/92, point 9), it too was prepared to accept the Commission's proposal.

23. The Italian and Spanish delegations maintained their reservations on this Article, as they considered that the term of protection of photographic works only should be covered by this Directive.

24. The German and Danish delegations expressed reservations on this Article, since it would maintain the present situation whereby "simple" photographs (photographs other than photographic works) would be protected in some Member States but not in others.
25. The Commission representative put forward the idea of adding a second sentence as follows: "Member States which, on the date of adoption of the present Directive, do not protect simple photographs shall introduce such a protection."

The German and Danish delegations considered that this addition substantially improved the Commission's proposal.

The French delegation, while having doubts as to the word "simple", was prepared to accept this addition as a compromise solution.

The Greek, Spanish, Italian and Portuguese delegations expressed reservations on this addition. The Netherlands delegation also expressed doubts.

26. The Chairman announced the Presidency's intention of referring this provision to the Permanent Representatives Committee and the Council.

Article 4(1)

27. The Commission representative explained that the purpose of this provision was to avoid a situation where the term of protection for a particular work or other subject-matter could begin and end at different times in different Member States, thus creating problems for the functioning of the internal market. This provision was particularly relevant where the term of protection was calculated from the time when the work or subject matter was lawfully made available to the public (Articles 1(3)(a) and (b), (5), 1 bis and 2). The question whether or not the beginning of a term of protection in a third country would result in a term of protection beginning in the Community was not settled in this Directive, but was left to agreements to be concluded with third countries; however, the Directive did not affect provisions in the laws of a Member
State whereby publication of a work or other subject matter in a third country resulted in the beginning of protection in that Member State.

28. The Danish delegation expressed a preference for deleting Article 4(1), provided that the length of protection and the starting point of protection was harmonized throughout the Community.

The Commission representative replied that since the Directive did not harmonize aspects such as the place at which the beginning of a term of protection was triggered, Article 4(1) remained necessary.

29. The Danish and German delegations considered that the application of Article 4(1) in respect of the term of protection of films could give rise to problems, as in some Member States this term would be calculated in relation to the death of the author (or last surviving author) of the film, whereas in other Member States it would be calculated in relation to the first lawful communication to the public of the film.

30. The Commission services were invited to provide written explanations of how Article 4(1) operated in relation to other provisions of the Directive.

Article 4(2)

31. This provision was not discussed at this meeting.

Article 4(3) and (4)

32. Asked to give her views on these provisions, the representative of the Council Legal Service, stated that the wording of these provisions in the non-paper raised problems in relation to Article 234 of the EEC Treaty, which was to be interpreted as meaning that the rights and obligations
contracted by Member States before the entry into force of the Directive would not be affected by the provisions of the Directive, but that the Member States should take all appropriate steps to eliminate any incompatibilities between those obligations and the Directive; such steps could go as far as renegotiation or denunciation of the agreement giving rise to the obligations.

33. With regard to Article 4(3), the representative of the Council Legal Service suggested that the difficulty in relation to Article 234 of the EEC Treaty could be removed if the phrase "without prejudice to the international obligations of the Member States" were to read: "without prejudice to the international obligations of the Member States existing at the time of the adoption of this Directive".

The Working Party agreed to amend Article 4(3) in this way.

34. The representative of the Council Legal Service pointed out that the duration of the derogation under Article 4(4) was uncertain. She added that such a derogation would cause further problems if the source of the longer term of protection granted by a Member State was not an international obligation.

The Commission representative suggested that the last-mentioned difficulty be overcome by redrafting this provision to refer to a longer term of a protection resulting in particular from international obligations.

35. The French delegation asked whether, under Article 4(4), it would be possible to keep present French provisions on resale right (droit de suite) in relation to third countries.

The Commission representative replied that this would be possible under the present wording of Article 4(4).
Articles 4(5) and 9

36. Asked to give her views on Articles 4(5) and 9, the representative of the Council Legal Service considered that the delegation of powers contained in Article 4(5) was too imprecise and discretionary and failed to set out the criteria to be respected and the objectives to be pursued in taking the decisions referred to.

In the light of these observations, the Working Party agreed to delete Article 4(5), as well as Article 9 which could not remain in the absence of Article 4(5).

Article 5

37. The Working Party took note of and approved the new drafting of this Article in several language versions.

Article 6(2)

38. The French delegation considered that this provision should be deleted, as it interpreted the opinion given by the Council Legal Service on the proposal for a Council Decision concerning the accession of the Member States to the Berne and Rome Conventions as meaning that the Community had no competence in respect of moral rights.

The Commission representative considered that the Community did have competence in respect of moral rights where they affected the functioning of the internal market. He also pointed out that once the Maastricht Treaty was in force, the Community would be obliged to take account of cultural aspects under the new Article 128.

---

3 9290/91 JUR 112 PI 67 CULTURE 61.

4196/93 prk EN
The French delegation reserved its position pending consultation of the Council Legal Service.

39. The Irish and United Kingdom delegations maintained their reservations in respect of this provision and advocated its deletion.

The Netherlands delegation was also prepared to accept its deletion.

The Danish delegation stated that it could live with this provision, but could also accept its deletion.

The German, Spanish and Italian delegations were in favour of maintaining this provision, and the Portuguese delegation had no substantive objection to maintaining it.

The Commission representative stated that the effect of deleting this provision would be that the term of protection of moral rights granted to the author would be harmonized at the term laid down in Article 1; however, Member States would remain free to provide that after the expiry of that term moral rights could be exercised by the State. Member States would also remain free to decide whether or not to grant moral rights to performers.

The Italian delegation on the other hand considered that the effect of deletion of Article 6(2) would be that moral rights would not be covered by the Directive, and therefore there would be no harmonization of the term of protection of such rights.
The Chairman invited those delegations with reservations on this provision to reconsider their position, in order to avoid lengthy discussions on the effects of its deletion.

Article 6 bis

40. The Commission representative informed the Working Party that amendments along the lines of Article 6 bis of the non-paper had been put forward in the European Parliament.

41. The German, Irish and Netherlands delegations expressed a scrutiny reservation on this Article, although the German delegation agreed with the principles contained in it.

Article 6 bis (1)

42. Following questions concerning the effects of the first sentence of Article 6 bis (1), it was noted that where, on the date of transposition of the Directive, a term of protection was running in a Member State which was longer than the term provided for in Articles 1 to 3 of the Directive, the term running would not be shortened to the length provided for in Articles 1 to 3. Examples of such longer terms were terms which had been extended to offset the effects of war; terms which had already been running in Spain at the time when the term of protection of copyright in that country had been reduced from 80 years post mortem authoris (pma) to 60 years pma; and terms of protection in Germany for posthumous works published between 60 and 70 years pma which had been extended by ten years.

Article 6 bis (2)

43. The German delegation questioned whether the words "still protected by the legislation of at least one Member State" were appropriate, as these words would include the situations referred to in point 42 above.
The Chairman suggested replacing these words by a reference to works and subject-matter which, on the date of transposition of the Directive, would have been in protection if the Directive had already been in force.

**Article 6 bis (3a)**

44. The Italian and Portuguese delegations expressed reservations in respect of reviving protection for works or other subject matter which were already in the public domain. The Danish and Netherlands delegations also expressed scrutiny reservations in this respect.

The Commission representative and the Chairman pointed out that Article 6 bis (3a) was not retroactive in the sense that it did not affect anything that had been done before the transposition of the Directive; it merely revived protection which had expired in certain Member States in cases where the same works or other subject matter were still in protection in at least one other Member State. They considered that reviving protection which had already expired was not fundamentally different from creating new rights, particularly when accompanied by adequate safeguards such as those contained in paragraphs 3b and 3c of this Article.

**Article 6 bis (3b)**

45. The Italian and United Kingdom delegations and the Commission representative expressed a preference for the reference date in this provision being the date of adoption of the Directive rather than 1 July 1994, as they considered that the former date would give less scope for abuse.

46. In reply to a question from the Netherlands delegation, the Commission representative explained that the terms "sale or other acts of exploitation" would not include all forms of exploitation; for instance, they would not cover a broadcast.
47. The Spanish and Netherlands delegations expressed doubts in respect of the second half of this provision. The Commission representative suggested that this part of paragraph 3b could be made optional, or left to the discretion of the Member States.

Article 6 bis (3c)

48. The Danish delegation questioned whether this provision was not equivalent to a compulsory licence.

The Commission representative pointed out that since this provision was optional, there was no obligation on Denmark to apply it.

49. The Netherlands delegation asked that it be made clear how existing contracts would be affected by Article 6 bis (3a), (3b) and (3c).

The Commission representative was prepared to add a recital or a statement to the effect that Member States were free to regulate the effects of these provisions on contracts.

50. The Chairman informed the Working Party that the question of reviving terms of protection which had already expired (point 44 above) would be referred to the Permanent Representatives Committee and Council.

Article 8

51. Asked for her views on this Article, the representative of the Council Legal Service pointed out that Article 8(2) would impose obligations upon Member States which could delay national legislative procedures in areas in which the Community had not yet legislated. From the point of view of proportionality, this provision could be considered to be disproportionate to the purpose to be achieved.
The Working Party was in favour of deleting Article 8(2).

Film authorship

52. The Working Party was informed that the European Parliament was considering two proposals for amending the Directive to include the question of authorship of cinematographic and audiovisual works: one proposal was for a provision corresponding to Article 2(2)4 of Council Directive 92/100/EEC 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; the other proposal, known as the Schwartzenberg amendment, would achieve a greater degree of harmonization of authorship of such works.6 The Working Party held an initial exchange of views on the questions whether or not the Directive should harmonize authorship of cinematographic and audiovisual works and, if so, how this should be done.

The Commission representative stated that if the European Parliament were to adopt an amendment harmonizing the authorship of cinematographic and audiovisual works, his Institution would include a corresponding provision in its amended proposal. He considered that the Commission would be able to accept the substance of the Schwartzenberg amendment, if it were to be

4 "For the purposes of this Directive the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors."

5 OJ No L 346 of 27.11.92, p. 61.

6 "The author(s) of an audiovisual work shall be the natural person(s) responsible for the creation of the work. In the absence of evidence to the contrary, the following shall be presumed to be the authors: the director, script-writer, dialogue-writer, adaptor and the composer of music with or without words which has been specially written for that work."
adopted by the Plenary of the European Parliament. He also considered that such a provision would have to be supplemented by an option for Member States to provide for a presumption as laid down in Article 14 bis (2)(b) of the Berne Convention.

The German, Spanish, French and Portuguese delegations indicated that they would be prepared to accept a provision corresponding to the Schwartzenberg amendment.

The United Kingdom and Irish delegations stated that their first preference would be to harmonize the term of protection of cinematographic and audiovisual works on the basis of a fixed term calculated from the first lawful communication of the work to the public. Any proposal to harmonize the authorship of such works would have to be given careful consideration. These delegations were not familiar with the approach represented by the Schwartzenberg amendment, which raised a number of problems. It was not clear to these delegations why it was necessary to include all the categories of contributors listed in that proposal, nor why the producer, who also made a creative contribution to the work, was not mentioned. Moreover, since the list included in the Schwartzenberg amendment was not exhaustive, this proposal did not result in total harmonization of film authorship, so that different people could be considered to be authors of the same work in different Member States, with the possible consequence that the term of protection expired at different dates in different Member States.

The Netherlands delegation shared a number of the doubts expressed by the United Kingdom and Irish delegations in respect of the Schwartzenberg amendment. It considered that it would be sufficient if the natural persons who had made a substantial contribution to a cinematographic or audiovisual work were to be considered to be its authors.
The Commission representative pointed out that although the Schwartzenberg amendment did not specifically mention the producer of a cinematographic or audiovisual work, it did not rule out the possibility of him being considered as one of the authors where he had made a creative contribution to the work.
HAS ADOPTED THIS DIRECTIVE:

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.

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 only 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 authors thereof,

the work shall be considered to be an anonymous or pseudonymous work, so that the duration shall be calculated as provided for hereabove under a).

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

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.

4196/93
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 according to the provisions of article 1, shall receive a protection equivalent to the economic rights of copyright for a term of [50] [70] years after the work is lawfully made available to the public. The first owner of this right shall be the person who made the work lawfully available to the public.

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. The term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

4. The rights of broadcasting organizations shall expire fifty years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.

additional whereas clause

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

5. Pending the conclusion by the European Community 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 a differentiated duration of protection may be taken by means of the procedure set out in Article 9.

Article 5

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

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 [the adoption of the present directive] [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).

Article 7

1. Article 8 of Directive 91/250/EEC is hereby deleted.

2. Articles 9 and 10 of Directive ... are hereby deleted.
**Article 8**

1. Member States shall immediately notify the Commission of any plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.

[2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.]

**Article 9**

The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

**Article 10**

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

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

Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.
2. Member States shall apply Article 8 from the date on which this Directive takes effect.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 

For the Council

The President
Revised text of Article 1(3)(b) proposed by the Commission services on 27 October 1992

3. 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 only by - and under the name of - that person or entity, and

- where this work consists of contributions of authors who are impossible to identify,

the duration shall be calculated as provided for hereabove under a) for anonymous or pseudonymous works.

This paragraph is without prejudice to the rights of identified authors whose contributions are included in such works, in which case paragraph 1 or 2 shall apply.

Texte révisé de l'article 1 paragraphe 3 lettre b) proposé par les services de la Commission le 27 octobre 1992

3. b) Pour les œuvres :

- qui sont créées par plusieurs auteurs sur l'initiative et sous la direction d'une personne physique ou morale, dont il est entendu qu'elles seront divulguées uniquement par cette personne et sous son nom, et

- qui consistent en contributions d'auteurs impossibles à identifier,

la durée est calculée conformément aux dispositions du paragraphe a) ci-dessus relatif aux œuvres anonymes ou pseudonymes.

Ce paragraphe est sans préjudice des droits des auteurs identifiés dont les contributions sont incluses dans de telles œuvres, auquel cas les paragraphes 1 ou 2 s'appliquent.
REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 9469/92 PI 104 CULTURE 103
No. Cion prop.: 5509/92 PI 33 CULTURE 21

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

A. Introduction

1. Under cover of a letter dated 23 March 1992, the Commission submitted to the Council a proposal for a Council Directive harmonizing the term of protection of copyright and of certain related rights. The proposal is based on Articles 57(2), 66, 100a and 113 of the Treaty establishing the European Economic Community.

2. The Economic and Social Committee gave its opinion on the proposal on 2 July 1992. The European Parliament has not yet given its opinion.

3. The Working Party on Intellectual Property (Copyright) has examined the Commission's proposal at several meetings. Following this examination, the Presidency has identified four

key problems on which agreement has not yet been reached and
which it submits to the Permanent Representatives Committee with
suggested compromise solutions.

B. Term of protection of copyright and of certain related rights

4. The Berne Convention for the Protection of Literary and
   Artistic Works (Berne Convention) provides that the term of
   copyright protection is to be 50 years "post mortem auctoris"
   (p.m.a.), i.e. the life of the author and 50 years after his
death, while allowing the parties to the Convention to grant a
longer term of protection. Of the Community Member States,
Germany grants a term of protection of 70 years p.m.a., Spain
has recently (1987) reduced its term of protection from 80 to 60
years p.m.a. and France grants a term of protection of 70 years
p.m.a. for musical works but 50 years p.m.a. for other
categories of works. The other Member States grant the Berne
Convention minimum of 50 years p.m.a., although Belgium, France
and Italy have introduced extensions in order to offset the
effects of two world wars on the exploitation of authors' works.
These differences between terms of protection give rise to
barriers to trade and distortions of competition which the
proposal for a Directive seeks to eliminate with a view to the
completion of the internal market.

5. Although the basic term at present applied in the majority
of Member States is 50 years p.m.a., a harmonized term of 50
years p.m.a. throughout the Community would require transitional
arrangements in those Member States which at present grant
longer terms, in order not to affect the acquired rights of
authors and their heirs for whom terms of protection are
currently running. The Commission has pointed out that these
acquired rights must be maintained according to the case law of
the Court of Justice. Such transitional arrangements could
continue for as long as 70 years or more. In order to avoid such
a long transitional period, during which barriers to trade would
continue to exist, the Commission's proposal provides that the
term of protection is to be harmonized at the length of the longest term at present applied in the Community, namely 70 years p.m.a.

6. With regard to related rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) provides for a minimum term of protection of 20 years for performers, producers of phonograms and broadcasting organizations. The terms of protection granted to these categories of rightholders in the Member States vary considerably, ranging from 20 to 50 years in those Member States which are parties to the Rome Convention, while other Member States which are not yet parties to that Convention give no protection at present to some or all of these categories of rightholders. Some Member States also grant a related right to film producers, whose term varies from 25 to 50 years. However, the substance of these related rights will be harmonized by the Directive on rental right and lending right and on certain rights relating to copyright in the field of intellectual property (rental Directive).

7. The Commission’s proposal provides that the term of protection for all the related rights referred to above will be harmonized at the length of the longest term at present applied in the Community, namely 50 years, for practically the same reasons as set out in point 5 above in relation to copyright.

8. In the light of the considerations set out under point 5 above, the Presidency suggests that the package proposed by the Commission – a term of 70 years p.m.a. for copyright and a term of 50 years for the holders of the related rights mentioned – constitutes the most reasonable solution for Community harmonization.
C. Works first made available to the public after the expiry of copyright protection

9. The Berne Convention does not contain any specific provision concerning works first made available to the public after the death of the author (commonly known as "posthumous works"). Some Member States provide for a specific term of protection for such works irrespective of how many years have elapsed since the author's death. One Member State provides for a specific term of protection, provided that the work is first made available to the public within twenty years of the author's death. Other Member States exclude any protection once normal copyright protection has expired.

10. Under the Commission's proposal, the normal term of copyright protection (70 years p.m.a.) would apply where the work is made available to the public before the expiry of that term, but no provision is made for protection if the work is first made available to the public after the expiry of that term.

11. In the light of the positions taken by the various delegations, the Presidency suggests a compromise solution with the following elements:

(a) a provision for protection of works first made available to the public after the expiry of normal copyright protection would be included in the Directive;

(b) this provision would apply only where the work was first lawfully made available to the public within 50 years after the expiry of normal copyright protection (this limitation is intended to make the provision more acceptable to those delegations which have reservations on such a provision);
(c) the protection granted would not be copyright protection, but would be equivalent to the economic rights of copyright;

(d) the term of this protection would be 50 years from the date when the work was first lawfully made available to the public (corresponding to the longest term at present applied by any Member State in such circumstances);

(e) the first owner of the right would be the person who first lawfully made the work available to the public.

This provision could be worded as follows:

"Works which are lawfully made available to the public within 50 years after the expiry of copyright in accordance with the provisions of Article 1 and which have not previously been made available to the public shall receive a protection equivalent to the economic rights of copyright. That protection shall begin on the date on which the work is lawfully made available to the public and shall end 50 years after that date. The first owner of these rights shall be the person who made the work lawfully available to the public."

D. Photographs

12. The Berne Convention provides for a minimum term of protection of 25 years from the making of a photographic work. Some Member States have a term of protection for photographic works equivalent to the normal term of copyright protection and a shorter term for "ordinary" photographs; other Member States have a term of protection for photographic works equivalent to the normal term of copyright protection but no protection for

---

2 France applies a longer term (70 years) to musical works only, but account would be taken of this in a provision ensuring that the Directive would not have the effect of shortening terms of protection already running.
"ordinary" photographs; and other Member States make no distinction between photographic works and "ordinary" photographs, applying the normal term of copyright protection.

13. In the light of these differences, the Commission's proposal provides that all photographs protected under the laws of the Member States, however protected, should have the normal term of copyright protection: this would allow Member States to continue to determine whether or not they distinguish between photographic works and "ordinary" photographs for purposes other than term of protection, and would ensure that a single term applied throughout the Community.

14. However, opinion is divided on this solution, and it has been pointed out that it has the disadvantage that it would allow some Member States to continue not to protect "ordinary" photographs, which are protected in other Member States.

15. In the light of the various positions of the Member States, the Presidency suggests the following compromise solution:

(a) the term of protection for protected photographs would be the normal term of copyright protection;

(b) those Member States which do not at present protect ordinary photographs would be obliged to introduce protection for them.

Any other solution would either have the disadvantage referred to in point 14 above, or would involve a reduction in the term of protection for "ordinary" photographs in those Member States which at present apply the normal term of copyright protection to them, with the need for a long transitional period as pointed out under point 5 above.
The corresponding provision could be worded as follows:

"Protected photographs shall have the term of protection provided for in Article 1. Member States which, on the date of adoption of the present Directive do not protect ordinary photographs shall introduce such a protection".

E. Application in time

16. Under the Commission's proposal, the Directive will apply to rights which have not expired on or before 31 December 1994.

17. However, several delegations have requested that consideration be given to the possibility of reviving protection which has expired in one or more Member States in cases where that protection would not have expired had the Directive already been in force. These delegations have pointed out that, in the absence of such revival of protection, there would be a long transitional period during which particular works and other subject matter would continue to be protected in one or more Member States, but would no longer be protected in other Member States as a result of expiry of protection before 31 December 1994. The internal market would be subject to distortions during this transitional period.

Other delegations have expressed reservations on the possibility of reviving rights which have expired.

18. The Presidency considers that, if harmonization of the term of protection of copyright and of the related rights covered by the Directive, with the resulting removal of barriers to trade within the Community, is to be achieved reasonably rapidly, account should be taken of the above request. A provision should therefore be included in the Directive to ensure that the protection resulting from this Directive, as well as that resulting from the rental Directive, will apply throughout the Community as from the date of transposition, irrespective of any shorter terms of protection.
that have expired. This provision would not retrospectively make illegal any acts carried out before the Directive took effect.

The corresponding provision could be drafted as follows:

"This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films which on [1 July 1994] would have been in protection had the present Directive and Directive .../.../EEC (Rental) been in force".

Provisions concerning the safeguard of acquired rights of third parties who have acted in good faith on the assumption that particular works would remain in or come into the public domain will be prepared at Working Party level.

F. Conclusions

19. The Permanent Representatives Committee is invited to examine and pronounce on the compromise solutions set out in points 8, 11, 15 and 18 above, in preparation for the policy debate envisaged at the session of the Council (Internal Market) on 10 November 1992.

3 Proposed date of transposition of the rental Directive and likely date of transposition of this Directive.

9636/92
EUROPEAN PARLIAMENT
PE/VII/PV/19-92

COMMITTEE ON LEGAL AFFAIRS AND CITIZENS RIGHTS

MINUTES

of the meeting of
Tuesday, 3 November 1992
and Wednesday, 4 November 1992

BRUSSELS

CONTENTS

Tuesday, 3 November 1992 at 9 a.m.

1. Adoption of draft agenda (PE 202.404) .......... 4

2. (80/91)
   Funds held by institutions for retirement provision (SYN 0363 -
   COM(91) 0301 - C3-0431/91)
   Co-rapporteurs: Mr JANSSEN VAN RAAY
   Mr ZAVVOS
   - Speech by Mr JANSSEN VAN RAAY .......... 4

Tuesday, 3 November 1992 at 3 p.m.

3. (113/90)
   Own funds of investment firms and credit institutions
   (SYN0257 - COM(90)0141 - C3-0184/90)
   (SYN0257 - COM(92)0013)
   (SYN0257 - A3-0298/91)
   (SYN0257 - C3-0361/92)
   Rapporteur: Mr ZAVVOS
   - Adoption of draft recommendation
     (see PE 202.402 and PE 201.088/CM) .......... 5

4. (156/90)
   Deposit - guarantee schemes (SYN 0415 -
   COM(92)0188 - C3-0281/92)
   Rapporteur: Mrs VAYSSADE
   - Consideration of draft report (PE 202.403)
   - Decision on procedure to be followed ......... 5

14 January 1993

DOC_EN\PV\214\214700 PE 202.638
5. (86/91)
Statute for a European cooperative society, a European mutual society and a European association
(SYN0386 - COM(91)0273 - C3-0120/92)
(SYN0387 - COM(91)0273 - C3-0121/92)
(SYN0388 - COM(91)0273 - C3-0122/92)
(SYN0389 - COM(91)0273 - C3-0123/92)
(SYN0390 - COM(91)0273 - C3-0124/92)
(SYN0391 - COM(91)0273 - C3-0125/92)
Rapporteur: Mrs VAYSSADE
- Consideration of amendments, in particular compromise amendments
  (PE 201.009/Am. 1 et seq. and PE 201.009/AC.), to draft
  report (PE 201.009/A and PE 201.009/B) .................. 5

6. (22/91)
Liability of suppliers of services
Rapporteur: Mr ALVAREZ DE PAZ
- Consideration of amendments tabled (PE 153.344 and
  PE 153.344/Am. 1 et seq.) .............................. 5

Wednesday, 4 November 1992 at 9 a.m.

7. (80/91)
Funds held by institutions for retirement provision (continued)
Co-rapporteurs: Mr JANSSEN VAN RAAY
  Mr ZAVVOS
- Adoption of draft report (PE 156.259,
  PE 156.259/Am. 1 et seq., PE 201.972 DT) .................. 6

8. (83/91)
Copyright and neighbouring rights: duration of protection
(SYN0395 - COM(92)0033 - C3-0189/92)
Rapporteur: Mr BRU PURON
- Adoption of draft report (PE 201.082/A, PE 201.082/B
  and PE 201.082/Am. 1 et seq.) .......................... 6

9. (150/90)
Unfair clauses in contracts (second report)
(SYN0285 - COM(90)0322 - C3-0319/90)
(SYN0285 - COM(92)0066)
(SYN0285 - A3-0091/91)
(SYN0285 - A3-0295/91)
(SYN0285 - C3-0409/92)
Rapporteur: Mr Hoon
- Exchange of views on the common position of the Council
  (C3-409/92) .................................. 6

10. Consideration of the legal bases of:
  A. (89/92) Proposal for a regulation on the distribution of
      rights of transit (ecopoints) for vehicles (over 7.5
      tonnes) transiting through Austria (COM(92)0343 - C3-0382/92);
  B. (91/92) Proposal for a decision on an agreement between
      the Community and Hungary concerning transit and road
      transport infrastructure (COM(92)203 - C3-296/92);
C. (92/92) Proposal for a decision on the agreement between the Community and Czechoslovakia on transit and road transport infrastructure (COM(92)202 - C3-297/92)
Rapporteur: Mr PERREAU DE PINNINCK DOMENECH
- statement by draftsman, exchange of views and decision 6

11. Other business
A. Calendar of meetings of the Committee on Legal Affairs and Citizens' Rights (see Notice to members No. 29/92, PE 202.645) 6

B. (115/89) Charter for ethnic groups (see draft report drawn up by Mr STAUFFENBERG, PE 156.208, PE 156.208/Am. 1 et seq.) 7

12. Date and place of next meeting 7

Annex I: Record of attendance
Annex II: Results of the vote on the proposal for a directive on Funds held by institutions for retirement provision
Annex III: Results of the vote on the proposal for a directive on the duration of protection of copyright and neighbouring rights
The meeting opened at 9.15 a.m. with Mr Rothley, vice-chairman, in the chair.

* * *

The chairman submitted requests to attend the meeting from the following:
- Mr Axel Klaus Jung, 'Arbeitsgemeinschaft, Bau & Ausbau Gewerbe';
- Mr Tony Lockett, 'Douglas Herbison';
- Mrs Laurence Bonsom, 'G.E.S.A.C.';
- Mrs Catherine Stewart, 'Cabinet Stewart';
- Mrs Anne Tahon, 'G.E.S.A.C.';
- Mr Ivo Ilic, journalist, 'Channel 4';
- Mr Robert Priester, 'European Savings Bank Group';
- Mr Peter Rieger, 'Austrian Savings bank Federation';
- Mrs Lydie Flom-Sadaune, 'Association Francaise des Banques'.

The committee granted authorization.

* * *

1. The chairman outlined the items which would be considered during the meeting.

Mr Janssen van Raay spoke on Item 4 (Funds held by institutions for retirement provision) and Mr Tomlinson spoke on Item 5 (Statute for a European cooperative society, a European mutual society and a European association).

Mrs Fontaine spoke on the organization of the meeting. The chairman spoke.

With these changes, the draft agenda was adopted subject to any changes in the order of items decided on during the meeting.

2. Mr Janssen van Raay, co-rapporteur with Mr Zavvos, expressed his views on the amendments as a whole and submitted his compromise amendments (PE 156.259/AC 1-5).

The vote would be taken in the presence of the other co-rapporteur and the draftsman of the opinion of the Committee on Social Affairs, Mrs Oddy, in theory during the afternoon sitting.

* * *

After Mr Defraigne had spoken on Item 6 (liability of suppliers of services), the chairman, noting the absence of the rapporteurs for the items due to be considered at that sitting, adjourned the meeting until 3 p.m.

* * *

The meeting resumed at 3.05 p.m. with Mrs Vayssade, first vice-chairman, in the chair.

* * *

DOC_EN\PV\214\214700 - 4 - PE 202.638
Mr Janssen van Raay and Mr Zavvos, co-rapporteurs on Item 4, and Mrs Oddy requested that the vote on the report in question be held over to the following morning. It was so decided.

Mr Garcia Amigo spoke on Item 3 (unfair clauses in contracts).

* * *

3. Mr Zavvos, rapporteur, proposed that he table an oral amendment on the provisions relating to comitology. The acting chairman and Mr Lau from the Commission spoke. As nobody had objected to the procedure, the committee adopted the amendment in question and approved the common position of the Council unanimously (11-0-0).

4. Mrs Vayssade, chairman and rapporteur, spoke on the basis of her draft report (PE 202.403). She also proposed that an exchange of views involving a number of experts be held at the next meeting. In this connection she put forward the names of the organizations which might be represented at it.

The following then spoke: Merz, Zavvos, Salema, the rapporteur, Dusseaux for the Commission and Garcia Amigo.

On a proposal from the chairman, the deadline for tabling amendments would be 12 noon on 9 December 1992.

Consideration of the matter would be resumed at the meeting on 23, 24 and 25 November 1992.

5. Mrs Vayssade, chairman and rapporteur, explained her compromise amendments (PE 201.009/AC. 1 et seq.). In the light of these compromise amendments, she also discussed all the amendments tabled. The following spoke: Thyssen, draftsman of the opinion of the Committee on Economic and Monetary Affairs and Industrial Policy, Defraigne, Fontaine and the rapporteur.

Consideration of the matter would be resumed at the meeting on 23, 24 and 25 November 1992.

6. Mr Alvarez De Paz, rapporteur, gave his position on the amendments tabled (PE 153.344/Am. 16-143). The following spoke: Fontaine, Rothley, Garcia Amigo, Defraigne, Inglewood, Bernard for the Commission and the rapporteur.

Consideration of the matter would be resumed at the meeting on 23, 24 and 25 November 1992, with a view to voting on and adopting the report at the meeting on 2, 3 and 4 December 1992.

* * *

The meeting adjourned at 6.30 p.m. and resumed the following day at 9.05 a.m. with Mrs Vayssade in the chair.

* * *
7. The chairman, Janssen van Raay and Zavvos, co-rapporteurs, Oddy and Inglewood spoke. The committee then voted on the proposal for a directive and the amendments thereto (PE 156.259, PE 156.259/Am. 4-34 and PE 156.259/AC 1-5).

The results of the vote are set out in Annex II to the minutes.

Thus amended, the proposal was approved by 14 votes to 1.

Mrs Grund gave an explanation of vote. The chairman spoke.

The draft legislative resolution was adopted by 14 votes to 1.

8. Mr Bru Puron, rapporteur, gave his views on the amendments tabled (PE 201.082/A, PE 201.082/Am. 13-26). Regarding amendment No. 2 in the opinion of the Committee on Culture (PE 201.155/fin.), rapporteur considered that it should be put to the vote first (report 1 with Amendment No. 2 in the draft report PE 201.082/A). The following spoke: Salema, Schwarzenberg, Rothley, Garcia Amigo, Verstrynge for the Commission, who requested that the report once adopted in committee, be entered on the agenda for the November part-session, the chairman, Anastassopoulos and the rapporteur.

The committee then voted on the proposal for a directive and the amendments thereto. The results of the vote are set out in Annex III to these minutes.

Thus amended, the proposal for a directive and the draft legislative resolution were adopted by 16 votes to 0 with 1 abstention.

9. Mr Hoon, rapporteur, gave his views on the common position of the Council (C3-0409/92). He intended to submit a draft recommendation with amendments. The following spoke: Garcia Amigo, the chairman, Tenreiro for the Commission, Simpson, the rapporteur and Gollnisch.

Consideration of the matter would be resumed at the meeting on 23, 24 and 25 November 1992, on the basis of a draft recommendation to be drawn up by the rapporteur (PE 202.643).

10. Mr Perreau De Pinninck Domenech, rapporteur on legal bases, considered the three proposals submitted by the Commission; he thought that the Committee on Transport was correct to propose that, for these three proposals, Article 75 should be substituted for Article 113, which had been proposed as the legal basis by the Commission.

The following spoke: Gollnisch, Rothley, Di Bucci of the Commission's Legal Service, the rapporteur and the chairman.

The committee approved the rapporteur's positions:
- unanimously (11-0-0) for the proposal for a regulation listed in the contents under A;
- by 9 votes to 0 with 2 abstentions for the proposals for decisions listed in the contents pages under B and C.

11. A. Mr Janssen van Raay, Mr Simpson and the chairman spoke on the calendar of committee meetings for 1993 (see notice to members No. 29/92, PE 202.645).
B. The following spoke on the report of the Charter for ethnic groups (PE 156.208): Landa Mendibe, Janssen van Raay, Gollnisch, the chairman and Bru Puron. The chairman said that there was no need to set a new deadline for tabling amendments. It was so decided.

12. The next meeting would be held in Brussels on Monday, 23 November 1992 at 3 p.m., Tuesday, 24 November 1992 at 9 a.m. and 3 p.m. and Wednesday, 25 November 1992 at 9 a.m.

* * *

The meeting closed at 12.05 p.m.
<table>
<thead>
<tr>
<th>Til stede</th>
<th>Formandshuset/Vorstand/Postbox/Bureau/Ufficio di Presidenza/Mesa: (*a)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>VAYSSADE (VP) - ROTHLEY (VP) - CASINI (VP) (1)</td>
</tr>
</tbody>
</table>

**Anwesend**

<table>
<thead>
<tr>
<th>Medlemmer/Mitglieder/Membres/Members/Diputados/Députés/Deputati/Leden/Deputados:</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANASTASSOPOULOS - BANDRES MOLET (1) - BONTEMPI - BRU PURON (2) - GARCIA AMIGO -</td>
</tr>
<tr>
<td>GOLLNISCH (2) - GRUND - HOON (2) - LORD INGLEWOOD - JANSSEN VAN RAAY - MALANGRE -</td>
</tr>
<tr>
<td>ODDY - REYMAN (1) - SALEMA O. MARTINS - SIMPSON - UKIEWE</td>
</tr>
</tbody>
</table>

**Napóvte**

| Stedfortrædere/Stellvertreter/Avantposten/Substitutes/Suplentes/Suppléants/ |
| Membri supplenti/Plaatsvervangers/Membros suplentes:                           |
| ALBER - ALVAREZ DE PAZ (1) - DEGRAINE - FONTAINE - LANDA MENDIBE - HERZ - NEUBAER |
| (1) - PERREAU DE PINNICK - RISKER PEDERSEN (1) - TOMLINSON (1) - ZAVVOS          |
|                                                                                   |

**Til stede**

<table>
<thead>
<tr>
<th>FORMANDSSTED/STELLVERTRETER/AVANTPOSTE/SUBSTITUTES/REPLACEMENTS/PLAATSVERVANGERS/MEMBRI SUPPLENTI/PLAATSVERVANGERS/MEMBROS SUPLENTES:</th>
</tr>
</thead>
<tbody>
<tr>
<td>ART. 111, 2 HERVE (2) - SCHWARTZENBERG (2)</td>
</tr>
<tr>
<td>ART. 124, 4 PORTO (1) - THYSSEN (1) - WIJSENBEEK (1)</td>
</tr>
</tbody>
</table>

Endv. Delto/Weitere Teil./Participaron igualmente/Participant également/Hanno partecipato altres'/Andere deelnemers/Outros participantes/

<table>
<thead>
<tr>
<th>(Oagsorden/Tagesordnung/Hṣηηφηη δηδςηη/Ordem do dia/Pkt./Iniclo/Point/Punto/Punt/Punto):</th>
</tr>
</thead>
<tbody>
<tr>
<td>TILICH (observateur) (1)</td>
</tr>
</tbody>
</table>

* (P) = Formand/Vorsitzender/Postbox/Chairman/Président/President/Vorstand/Presidente
  (VP) = Næstform./Stellv. Vorstand/Avantposto/Vice-Chairman/Vice-Président/Vicepresidente/
  Ondervoorz./Vice-Prés./Vicepres.

Til stede den/Anwesend am/Napóv sôtc/Present on/Présent le/Presente il/Aanwezig op/Presente em/Presente el

(1) 03.11.92
(2) 04.11.92
(3)
Efter indbydelse fra formanden/Auf Einladung des Vorsitzenden/Mc np6oxi~o~ TOU npot6pou/At the invitation of the Chairman/Por invitación del presidente/Sur l’invitation du président/Su invito del presidente/Op uitnodiging van de voorzitter/A convite do presidente:

Radet/Rat/Συμβουλιο/Council/Consejo/Conselgio/Raad/Conselho: (*)

Kommissionen/Kommission/Entspon/Commission/Comisión/Commissione/Commissione/Commission: (*)

BERNARD - DI BUCCI - DUSSEAU - LAU - TENREIRO

Cour des comptes:

C.E.S.: HEIDEN - LEINER

<table>
<thead>
<tr>
<th>Gruppernes sekretariat</th>
<th>SGÖ</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sekretariat der Fraktionen</td>
<td>LDR</td>
</tr>
<tr>
<td>Γραμματεία του Συν. Ομάδας</td>
<td>COLEIRA/GARZON</td>
</tr>
<tr>
<td>Secretariat of the groups</td>
<td>Verts</td>
</tr>
<tr>
<td>Secretaire des politiques</td>
<td>SAILIS</td>
</tr>
<tr>
<td>Secr. de los grupos politicos</td>
<td>ROD</td>
</tr>
<tr>
<td>Secr. dei gruppi politici</td>
<td>MEHRING</td>
</tr>
<tr>
<td>Secr. van de fracties</td>
<td>ARC</td>
</tr>
<tr>
<td>Secr. dos grupos políticos</td>
<td>PRETA</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cab. du Président</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generaldirektorat</td>
</tr>
<tr>
<td>Γενική Διεύθυνση</td>
</tr>
<tr>
<td>Γενералдиректорат</td>
</tr>
<tr>
<td>Directorate-General</td>
</tr>
<tr>
<td>Dirección general</td>
</tr>
<tr>
<td>Direcção general</td>
</tr>
<tr>
<td>Dirección general</td>
</tr>
<tr>
<td>Dirección general</td>
</tr>
<tr>
<td>Secretariat of the commission</td>
</tr>
<tr>
<td>Secretaria de la comisión</td>
</tr>
<tr>
<td>Секретариат de la comisión</td>
</tr>
<tr>
<td>Secretariato della commissione</td>
</tr>
<tr>
<td>Comissie-secretariaat</td>
</tr>
<tr>
<td>Secretaria de la comisión</td>
</tr>
<tr>
<td>Assist./Boufbee</td>
</tr>
</tbody>
</table>

* (P) = Formand/Pras./Πρόεδρος/Chairman/Président/Voorzitter
(VP) = Nestform./Vize-Pras./Avtimp6c6poc/Vice-Chairman/Vice-Président/Ondervoorz./Vice-pres.
(M) = Medlem./Mitglied/Miembro/Membro/Membre/Lid/Membro
(F) = Tjenestemand/Beamter/Yndlæg/Official/Funcionario/Fonctionnaire/Functionario/Ambtenaar/Functionário.
ORDRE DE VOTE

sur
la proposition de la Commission au Conseil relative à une
directive concernant la liberté de gestion et d'investissement
des fonds collectés par les institutions de retraite
(doc. C3-431/91 - COM(91) 301 final)
Rapporteur : M. J. JANSSEN VAN RAAY et M. G. ZAVVOS.

<table>
<thead>
<tr>
<th>Partie du texte en considération</th>
<th>Objet du vote</th>
<th>Commentaires</th>
<th>Résultat du vote</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PREAMBULE</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Considérant 3</td>
<td>Am. 1 ASOC</td>
<td>Adopté</td>
<td>8/1/0</td>
</tr>
<tr>
<td>Considérant 5</td>
<td>Am. 1 ECON</td>
<td>Adopté</td>
<td>10/3/0</td>
</tr>
<tr>
<td>Considérant 5 bis (nouveau)</td>
<td>Am. 2 ECON</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 9</td>
<td>Am. 3 ECON</td>
<td>Adopté</td>
<td>10/2/0</td>
</tr>
<tr>
<td><strong>Première partie</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deuxième partie</td>
<td>Am. 4 ECON</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 7 bis (nouveau)</td>
<td>Am. 5 ECON</td>
<td>Rejeté</td>
<td>2/12/0</td>
</tr>
<tr>
<td>Considérant 7 ter (nouveau)</td>
<td>Am. Comp. n°1</td>
<td>Adopté</td>
<td>12/3/0</td>
</tr>
<tr>
<td>Am. 4 FALCONER</td>
<td>Caduc</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Considérant 7 quater (nouveau)</td>
<td>Am. 2 ASOC</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 7 quinto (nouveau)</td>
<td>Am. 3 ASOC</td>
<td>Adopté</td>
<td>unanimité</td>
</tr>
<tr>
<td>Considérant 7 sextio (nouveau)</td>
<td>Am. 4 ASOC</td>
<td>Adopté</td>
<td>unanimité</td>
</tr>
<tr>
<td>Partie du texte en considération</td>
<td>Objet du vote</td>
<td>Commentaires</td>
<td>Résultat du vote</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------</td>
<td>--------------</td>
<td>------------------</td>
</tr>
<tr>
<td>ARTICLE 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1</td>
<td>Am. 5 ZAVVOS</td>
<td>Rejeté</td>
<td>1/8/0</td>
</tr>
<tr>
<td>ARTICLE 2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alinea (a)</td>
<td>Am. 6 ZAVVOS</td>
<td>Rejeté</td>
<td>1/10/0</td>
</tr>
<tr>
<td>&quot; (a) bis</td>
<td>Am. 5 ASOC</td>
<td>Adopté</td>
<td>10/1/0</td>
</tr>
<tr>
<td>&quot; (a) ter</td>
<td>Am. 6 ECON</td>
<td>Rejeté</td>
<td>0/12/0</td>
</tr>
<tr>
<td>&quot; (a) quater</td>
<td>Am. 7 ZAVVOS</td>
<td>Rejeté</td>
<td>1/10/0</td>
</tr>
<tr>
<td>&quot; (c)</td>
<td>Am. 8 ZAVVOS</td>
<td>Rejeté</td>
<td>1/10/0</td>
</tr>
<tr>
<td>&quot; (d) (nouv)</td>
<td>Am. 9 ZAVVOS</td>
<td>Rejeté</td>
<td>1/10/0</td>
</tr>
<tr>
<td>&quot; (e) (nouv)</td>
<td>Am. 10 ZAVVOS</td>
<td>Rejeté</td>
<td>1/10/0</td>
</tr>
<tr>
<td>&quot; (f) (nouv)</td>
<td>Am. 11 ZAVVOS</td>
<td>Rejeté</td>
<td>1/10/0</td>
</tr>
<tr>
<td>ARTICLE 2 bis (nouveau)</td>
<td>Am. 6 ASOC</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1ère partie</td>
<td>Adopté</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2ème partie</td>
<td>Adopté</td>
</tr>
<tr>
<td>ARTICLE 3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1</td>
<td>Am. 12 ZAVVOS</td>
<td>Rejeté</td>
<td>1/11/0</td>
</tr>
<tr>
<td>Paragraphe 1 bis (nouveau)</td>
<td>Am. 7 ASOC</td>
<td>Adopté</td>
<td>unanimité</td>
</tr>
<tr>
<td>Paragraphe 1 ter (nouveau)</td>
<td>Am. 13 ZAVVOS</td>
<td>Rejeté</td>
<td>1/11/0</td>
</tr>
<tr>
<td>Paragraphe 2</td>
<td>Am. 14 ZAVVOS</td>
<td>Rejeté</td>
<td>1/11/0</td>
</tr>
<tr>
<td>Paragraphe 3</td>
<td>Am. 8 ASOC</td>
<td>Adopté</td>
<td>10/1/0</td>
</tr>
<tr>
<td>Paragraphe 4 (nouveau)</td>
<td>Am. 15 ZAVVOS</td>
<td>Rejeté</td>
<td>1/11/0</td>
</tr>
<tr>
<td></td>
<td>Am. 16 ZAVVOS</td>
<td>Rejeté</td>
<td>1/11/0</td>
</tr>
<tr>
<td>ARTICLE 3 (bis) (nouveau)</td>
<td>Am. 3 proj.</td>
<td>Retiré</td>
<td></td>
</tr>
<tr>
<td>Partie du texte en considération</td>
<td>Objet du vote</td>
<td>Commentaires</td>
<td>Résultat du vote</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-------------</td>
<td>--------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>ARTICLE 4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1 (a)</td>
<td>Am. 7 ECON</td>
<td>Adopté</td>
<td>8/0/1</td>
</tr>
<tr>
<td></td>
<td>Am.17 INGLEWOOD</td>
<td>Retiré</td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1 (c)</td>
<td>Am. 19 ZAVVOS</td>
<td>Rejeté</td>
<td>1/11/0</td>
</tr>
<tr>
<td></td>
<td>Am. 2 projet rapport</td>
<td>Adopté</td>
<td>10/2/0</td>
</tr>
<tr>
<td></td>
<td>Am. 9 ASOC</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 8 ECON</td>
<td>Rejeté</td>
<td>unanimité</td>
</tr>
<tr>
<td>Paragraphe 1 (d)</td>
<td>Am. 20 FALCONER</td>
<td>Rejeté</td>
<td>2/8/1</td>
</tr>
<tr>
<td>(nouveau)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1 (d)</td>
<td>Am. 10 ASOC</td>
<td>Adopté</td>
<td>unanimité</td>
</tr>
<tr>
<td>(nouveau)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1 (d)</td>
<td>Am. 9 ECON</td>
<td>Rejeté</td>
<td>unanimité</td>
</tr>
<tr>
<td>ter (nouveau)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1</td>
<td>Am. 21 ZAVVOS</td>
<td>Rejeté</td>
<td>1/10/0</td>
</tr>
<tr>
<td>fin du texte</td>
<td>Am. 11 ASOC</td>
<td>Adopté</td>
<td>unanimité</td>
</tr>
<tr>
<td>Paragraphe 1 bis</td>
<td>Am.18 INGLEWOOD</td>
<td>Adopté</td>
<td>unanimité</td>
</tr>
<tr>
<td>(nouveau)</td>
<td>Am. 1</td>
<td>Retiré</td>
<td></td>
</tr>
<tr>
<td>Paragraphe 2</td>
<td>Am.22 INGLEWOOD</td>
<td>Adopté</td>
<td>unanimité</td>
</tr>
<tr>
<td></td>
<td>Am. 23 PRICE</td>
<td>Retiré</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 12 ASOC</td>
<td>Rejeté</td>
<td>3/9/2</td>
</tr>
<tr>
<td></td>
<td>Am. Compr. n° 2</td>
<td>Adopté</td>
<td>10/3/0</td>
</tr>
<tr>
<td></td>
<td>Am. Compr. n° 3</td>
<td>Adopté</td>
<td>12/2/0</td>
</tr>
<tr>
<td>Paragraphe 3</td>
<td>Am.25 INGLEWOOD</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am.26 ZAVVOS</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Paragraphe 3</td>
<td>Am.27 INGLEWOOD</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 10 ECON</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Partie du texte en considération</td>
<td>Objet du vote</td>
<td>Commentaires</td>
<td>Résultat du vote</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------</td>
<td>--------------</td>
<td>------------------</td>
</tr>
<tr>
<td>Paragraphe 3 ter (nouveau)</td>
<td>Am. 28 INGLEWOOD</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Paragraphe 4</td>
<td>Am. 11 ECON</td>
<td>Rejeté</td>
<td>1/13/1</td>
</tr>
<tr>
<td>Paragraphe 4 bis (nouveau)</td>
<td>Am. Compr. n° 4</td>
<td>Adopté</td>
<td>12/2/0</td>
</tr>
<tr>
<td>Paragraphe 4 ter (nouveau)</td>
<td>Am. 13 ASOC</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Paragraphe 4 quater (nouveau)</td>
<td>Am. Compr. n° 5</td>
<td>Adopté</td>
<td>14/2/0</td>
</tr>
<tr>
<td></td>
<td>Am. 14 ASOC</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 15 ASOC</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 11 Révisé - ASOC</td>
<td>Adopté</td>
<td>15/0/0</td>
</tr>
<tr>
<td>ARTICLE 7 (nouveau)</td>
<td>Am. 29 ZAVVOS</td>
<td>Rejeté</td>
<td>2/11/0</td>
</tr>
<tr>
<td>ARTICLE 8 (nouveau)</td>
<td>Am. 30 ZAVVOS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Première partie</td>
<td>Paragraphe 1</td>
<td>Rejeté</td>
<td>2/12/0</td>
</tr>
<tr>
<td></td>
<td>Paragraphe 2</td>
<td>Rejeté</td>
<td>2/10/0</td>
</tr>
<tr>
<td></td>
<td>Paragraphes 3, 4 et 5</td>
<td>Rejeté</td>
<td>4/12/0</td>
</tr>
<tr>
<td></td>
<td>Am. 31 ZAVVOS</td>
<td>Rejeté</td>
<td>2/13/0</td>
</tr>
<tr>
<td></td>
<td>Am. 32 ZAVVOS</td>
<td>Rejeté</td>
<td>3/12/0</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ENSEMBLE DE LA PROPOSITION TELLE QUE MODIFIÉE</td>
<td></td>
<td>Adopté</td>
<td>14/1/0</td>
</tr>
<tr>
<td>RESOLUTION LEGISLATIVE</td>
<td></td>
<td>Adopté</td>
<td>14/1/0</td>
</tr>
</tbody>
</table>
**ORDRE DE VOTE**

sur

la proposition de la Commission au Conseil relative à une directive relative à l'harmonisation de la durée de protection du droit d'auteur et de certains droits voisins (doc. C3-0189/92 - COM(92) 33 final - SYN 395).

Rapporteur : M. BRU PURON, PE 201.082/A+B

<table>
<thead>
<tr>
<th>Partie du texte en considération</th>
<th>Objet du vote</th>
<th>Commentaires</th>
<th>Résultat du vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Considérant 2 bis (nouveau)</td>
<td>Am. 1 comm. CULTURE</td>
<td>Adopté</td>
<td></td>
</tr>
<tr>
<td>Considérant 3</td>
<td>Am. 13 MUSCARDINI</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 4 bis (nouveau)</td>
<td>Am. 14 MUSCARDINI</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 7 bis (nouveau)</td>
<td>Am. 15 MUSCARDINI</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 10</td>
<td>Am. 16 SALEMA</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 11 bis (nouveau)</td>
<td>Am. 17 MUSCARDINI</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Considérant 20</td>
<td>Am. 1 Proj. rapport</td>
<td>Adopté</td>
<td>15/2/0</td>
</tr>
</tbody>
</table>

**ARTICLE 1**

**Paragraphe 1**

<table>
<thead>
<tr>
<th>Objet du vote</th>
<th>Commentaires</th>
<th>Résultat du vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Am. 1 ECON</td>
<td>Rejeté</td>
<td>1/13/0</td>
</tr>
<tr>
<td>Am. 18 SALEMA</td>
<td>Rejeté</td>
<td>2/13/0</td>
</tr>
</tbody>
</table>

**Paragraphe 2 bis (nouveau)**

<table>
<thead>
<tr>
<th>Objet du vote</th>
<th>Commentaires</th>
<th>Résultat du vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Am. 2 comm. CULTURE</td>
<td>Adopté</td>
<td>12/3/0</td>
</tr>
</tbody>
</table>

**Paragraphe 1 bis (nouveau)**

<table>
<thead>
<tr>
<th>Objet du vote</th>
<th>Commentaires</th>
<th>Résultat du vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Am. 2 proj. rapp.</td>
<td>Caduc</td>
<td></td>
</tr>
<tr>
<td>Partie du texte en considération</td>
<td>Objet du vote</td>
<td>Commentaires</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Paragraphe 3</td>
<td>Am. 2 ECON (1ère partie)</td>
<td>Rejeté</td>
</tr>
<tr>
<td></td>
<td>Am. 19 SALEMA</td>
<td>Rejeté</td>
</tr>
<tr>
<td></td>
<td>Am. 3 CULTURE</td>
<td>Rejeté</td>
</tr>
<tr>
<td></td>
<td>Am. 2 ECON (2ème partie)</td>
<td>Rejeté</td>
</tr>
<tr>
<td>Paragraphe 4</td>
<td>Am. 3 ECON</td>
<td>Caduc</td>
</tr>
<tr>
<td></td>
<td>Am. 20 SALEMA</td>
<td>Caduc</td>
</tr>
<tr>
<td></td>
<td>Am. 3 proj. rapport</td>
<td>Adopté</td>
</tr>
<tr>
<td>Paragraphe 4 bis (nouveau)</td>
<td>Am. 4 CULTURE</td>
<td>Rejeté</td>
</tr>
<tr>
<td>Paragraphe 4 bis ou ter (nouveau)</td>
<td>Am. 5 CULTURE</td>
<td>Rejeté</td>
</tr>
<tr>
<td>Paragraphe 5</td>
<td>Am. 4 Proj. Rapport</td>
<td>Adopté</td>
</tr>
<tr>
<td>Paragraphe 6</td>
<td>Am. 4 ECON</td>
<td>Caduc</td>
</tr>
<tr>
<td></td>
<td>Am. 21 SALEMA</td>
<td>Caduc</td>
</tr>
<tr>
<td></td>
<td>Am. 5 Proj. Rapport</td>
<td>Adopté</td>
</tr>
<tr>
<td>Paragraphe 6 bis (nouveau)</td>
<td>Am. 23 GARCIA AMIGO</td>
<td>RETIRE</td>
</tr>
<tr>
<td></td>
<td>Am. 22 SALEMA</td>
<td>RETIRE</td>
</tr>
<tr>
<td></td>
<td>Am. 6 Proj. Rapport</td>
<td>Adopté</td>
</tr>
<tr>
<td>ARTICL 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1</td>
<td>Am. 7 Proj. Rapport</td>
<td>Adopté</td>
</tr>
<tr>
<td>Paragraphe 5 (nouveau)</td>
<td>Am. 24 BRU PURON</td>
<td>Adopté</td>
</tr>
<tr>
<td>Partie du texte en considération</td>
<td>Objet du vote</td>
<td>Commentaires</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td><strong>ARTICLE 4</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 3</td>
<td>Am. 8 Proj.</td>
<td>Adopté</td>
</tr>
<tr>
<td></td>
<td>Rapport</td>
<td></td>
</tr>
<tr>
<td><strong>ARTICLE 5</strong></td>
<td>Am. 9 Proj.</td>
<td>Adopté</td>
</tr>
<tr>
<td></td>
<td>Rapport</td>
<td></td>
</tr>
<tr>
<td><strong>ARTICLE 6</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 1 (et s.)</td>
<td>Am. 10 Proj.</td>
<td>Adopté</td>
</tr>
<tr>
<td></td>
<td>Rapport *</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 6 CULTURE</td>
<td>Caduc</td>
</tr>
<tr>
<td></td>
<td>Am. 25 BRU PURON *</td>
<td>Adopté</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>* Aménagement à établir par le rapporteur</td>
<td></td>
</tr>
<tr>
<td>Paragraphe 2</td>
<td>Am. 7 CULTURE</td>
<td>Rejeté</td>
</tr>
<tr>
<td><strong>ARTICLE 8</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paragraphe 2</td>
<td>Am. 11 Proj.</td>
<td>Adopté</td>
</tr>
<tr>
<td></td>
<td>Rapport</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 8 CULTURE</td>
<td>Caduc</td>
</tr>
<tr>
<td><strong>ARTICLE 10</strong></td>
<td>Am. 26 BRU PURON</td>
<td>Adopté</td>
</tr>
<tr>
<td></td>
<td>Am. 12 Proj.</td>
<td>Caduc</td>
</tr>
<tr>
<td></td>
<td>Rapport</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Am. 9 CULTURE</td>
<td>Caduc</td>
</tr>
<tr>
<td>ENSEMBLE PROP. DIRECTIVE AINSI MODIFIEE</td>
<td></td>
<td>Adopté</td>
</tr>
<tr>
<td>PROP. RESOLUTION LEGISLATIVE</td>
<td></td>
<td>Adopté</td>
</tr>
</tbody>
</table>
REPORT

of the Committee on Legal Affairs and Citizens' Rights

on the Commission proposal for a Council directive harmonizing the term of protection of copyright and certain related rights

(COM(92) 33 final - SYN 395 - C3-0189/92)

Rapporteur: Mr Carlos María BRU PURON
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural page</td>
<td>3</td>
</tr>
<tr>
<td>A. Amendments to the Commission proposal</td>
<td>4</td>
</tr>
<tr>
<td>LEGISLATIVE RESOLUTION</td>
<td>9</td>
</tr>
<tr>
<td>B. EXPLANATORY STATEMENT</td>
<td>10</td>
</tr>
<tr>
<td><strong>Annex:</strong></td>
<td></td>
</tr>
<tr>
<td>Opinion of the Committee on Economic and Monetary Affairs and Industrial Policy</td>
<td>19</td>
</tr>
<tr>
<td>Opinion of the Committee on Culture, Youth, Education and the Media</td>
<td>23</td>
</tr>
</tbody>
</table>
By letter of 24 April 1992 the Council consulted the European Parliament, pursuant to Articles 57(2), 66, 100a and 113 of the EEC Treaty, on the Commission proposal for a Council directive harmonizing the term of protection of copyright and certain related rights.

At the sitting of 11 May 1992, the President of Parliament announced that he had referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media for their opinions.

At its meeting of 20 February 1992 the Committee on Legal Affairs and Citizens' Rights had appointed Mr Bru Puron rapporteur.

At the meetings of 26 May 1992, 23 September 1992 and 4 November 1992 the committee considered the Commission proposal and the draft report.

At the last of these meetings it adopted the draft legislative resolution by 16 to 0, with 1 abstention.

The following were present for the vote: Vayssade, acting chairman; Rothley, vice-chairman; Bru Purón, rapporteur; Alber, Anastassopoulos, Bontempi, Defraigne, Fontaine, García Amigo, Grund, Hervé (for Medina Ortega), Hoon, Janssen van Raay, Oddy, Perreau de Pinninck Domenech (pursuant to Rule 124(4) of the Rules of Procedure), Salema O. Martins, Schwartzzenberg (for Cot), Simpson and Ukeiwé.

The opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media are attached.

The report was tabled on 5 November 1992.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.
Commission proposal for a Council directive harmonizing the term of protection of copyright and certain related rights

(Amendment No. 1)
Recital 2a (new)

Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which the term of protection is calculated; whereas therefore it is necessary to harmonize the definition of authorship of a cinematographic or televiual work;

(Amendment No. 2)
Twentieth recital

Whereas rightholders should be able to enjoy the longer terms of protection introduced by this Directive equally throughout the Community provided their rights have not yet expired on 31 December 1994.

(Amendment No. 3)
Article 1(2)a (new)

The author(s) of an audiovisual work shall be the natural person(s) responsible for the creation of the work. In the absence of evidence to the contrary, the following shall be presumed to be the authors: the director, script writer, dialogue writer, adaptor and the composer of music with or without words which has been specially written for that work.

1 For full text, see COM(92) 33 final - SYN 395, OJ No. C 92, 11.4.1992, p.6
4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for seventy years.

Amendments

4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for seventy years. Member States may lay down that a judicial ruling that a person is declared missing, the validity of which has not expired by the end of a period established under their own legislation, shall constitute a presumption of death for the purposes of this provision.

(Amendment No. 5)

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.

5. Where a work is published in volumes, parts, instalments, issues or episodes which are not independent and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection of the work shall be calculated from the publication of the last volume, part, instalment, issue or episode. Appendices, year books and other supplements to a work shall be considered to be independent of the latter.

(Amendment No. 6)

6. In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

6. Where collective works or works created by a legal person have not been lawfully made available to the public pursuant to paragraph 3, they shall be protected for 70 years from their creation.

(Amendment No. 7)

6a. In the case of posthumous works, and by way of exception to the first paragraph of this article, the period of protection shall be 70 years from the date on which the work was lawfully made available to the public, provided this occurs within 70 years after the death of the author.
Commission text

(Amendment No. 8)
Article 2(1)

1. The rights of performers shall run for fifty years from the first publication of the fixation of the performance or if there has been no publication of the fixation, from the first dissemination of the performance. However, they shall expire fifty years after the performance if there has been no publication or dissemination during that time.

(Amendment No. 9)
Article 2(5) (new)

5. Any person who lawfully makes available to the public a work which is in the public domain, or causes it to be made available, shall have the same rights of exploitation relating thereto as would have fallen to the author. The term of protection of such rights shall be 25 years from the time when the work was first made available to the public.

(Amendment No. 10)
Article 4(3)

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, 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 right-holder is a national.

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, 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 right-holder is a national and may not exceed the term laid down in Article 2.
Commission text

(Amendment No. 11)

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.

(Amendment No. 12)

Article 6(1) and (1a), (1b) and (1c) (new)

1. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

1a. The provisions of the preceding paragraph shall apply without prejudice to acts of exploitation lawfully carried out before 1 July 1994.

1b. Holders of copyright or related rights shall not be entitled to oppose the continuance of such acts of exploitation as a direct consequence of investment made in good faith before the provisions of this Directive had taken effect. Continuance of the act of exploitation shall include neither the assignment of rights nor other acts of exploitation distinct from the initial act.

The terms of protection laid down in this Directive shall run from the event which gives rise to them, as specified for each case referred to in Articles 1 and 2. However, the length of these terms shall be calculated only from the first day of January of the year following the event which gives rise to them.
1c. The Member States shall provide for the payment to rightholders of adequate remuneration for the acts of exploitation referred to in the preceding paragraph, with effect from the date on which the provisions of this Directive enter into force. The Member States shall ensure that such remuneration is settled where the parties do not reach agreement.

(Amendment No. 13)
Article 8(2)

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

(Amendment No. 14)
Article 10(1), first subparagraph

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 1 July 1994.
DRAFT LEGISLATIVE RESOLUTION

embodying the opinion of the European Parliament
on the Commission proposal for a Council directive
harmonizing the term of protection of copyright and certain
related rights

The European Parliament,

- having regard to the Commission proposal to the Council (COM(92) 0033 final -
SYN 395),

- having been consulted by the Council pursuant to Articles 57(2), 66, 100a and
113 of the EEC Treaty (C3-0189/92),

- having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media (A3-0348/92),

- having regard to the Commission position on the amendments adopted by Parliament,

1. Approves the Commission proposal subject to Parliament's amendments and in accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;

3. Calls for the conciliation procedure to be opened if the Council should intend to depart from the text approved by Parliament;

4. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;

5. Calls on the Council to incorporate Parliament's amendments in the common position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;

6. Instructs its President to forward this opinion to the Council and Commission.

1 OJ No. C 0092, 11.4.1992, p. 6
EXPLANATORY STATEMENT

1. THE PROPOSAL

The purpose of this proposal for a directive is the harmonization of the term of protection afforded by the Member States of the EC to copyright on literary and artistic works and to certain related rights (interpreting or performing artists, producers of phonograms, producers of audiovisual recordings and broadcasting organizations).

The difference in the period of protection laid down by the different national legislations constitute an obstacle to the completion of the internal market, especially as regards the freedom of movement of goods and provision of services, quite apart from the effect that it has on free competition and freedom of establishment.

As far as copyright is concerned, these differences exist despite the fact that all the Member States are party to the Berne Convention on the protection of literary and artistic works (although in different versions). The convention lays down a period of protection of 50 years, but the Berne Convention countries have the option of recognizing a longer term of protection, and Germany, France and Spain have done so.

With regard to related rights of protection, differences are still greater. Only eight Member States are party to the Rome Convention regulating the protection of related rights, and again, the term of protection laid down here (20 years) may be extended. For that reason we find some countries adhering to the minimum 20 years laid down by the Convention, others which have established a longer term and yet others in which the related rights, or certain categories thereof, have no guaranteed term of protection since they are not recognized as exclusive rights.

The Commission proposes total harmonization of all aspects of protection, dealing not only with the establishment of the term of protection but also the event from which the term of protection is to be calculated in a standard manner for all the Member States. The objective of the Directive is not to harmonize copyright and related rights with regard to content or questions of ownership.

Before describing the content of the proposal, we should point out that there is an undeniable need for harmonization in the last-mentioned field, and all the sectors involved, from authors, to the public, producers and broadcasters have said so. A broad consensus also appears to exist with regard to the term of the provisions proposed by the Commission.

Main points of the Directive

The term established is:

* 70 years for author's copyright,
  - from the death of the author in the case of a natural person.
  - from the date of publication (when the work is lawfully made available to the public) in the case of anonymous or pseudonymous works, works created by legal persons and collective works.
* 50 years for related rights, from:
  - the publication (in the case of a fixation) or the broadcast (where there is no fixation) or the interpretation or performance of the interpreting artist,
  - the publication of phonograms or audiovisual works,
  - the broadcasting of works by broadcasting organizations.

The Commission has opted for an extensive term of protection for various reasons, including:
  - the fact that in order to complete the internal market in this field, it is necessary to establish a long deadline so as to avoid transitional periods;
  - general agreement of the sectors affected;
  - the average lifespan within the Community is getting longer, and so the term of protection needs to be extended;
  - the desire to provide authors with a higher level of protection;
  - the desire to keep in line with developments within WIPO.

With regard to the treatment of existing rights, it has been decided that as a general principle, the fixed terms of protection shall apply to all rights which have not expired by 31 December 1994. However, it shall not have the effect of shortening terms of protection which under the laws of the Member States are already running. Such cases are extremely exceptional (it would apply in countries which have introduced extensions in order to offset the effects of war, for example France, or Spain with regard to those rights whose term of protection is 80 years, as laid down by the 1879 Copyright Act).

With regard to third countries, the possibility laid down in Article 7(8) of the Berne Convention has been selected; with regard to copyright, within the Community a term of protection equal to that of the work's or copyright holder's country of origin shall apply, and this term shall not exceed the term granted to works of Community origin. With regard to related rights whose holders are nationals of a third country, the same rule shall apply, provided that the Member State grants protection to the category of related rights in question.

2. AMENDMENTS

For the purpose of considering the amendments tabled by the Committee on Legal Affairs, they may be grouped according to subject:

A. Rights to cinematographic or audiovisual works

Amendment No. 3 to Article 1(2)a (new)

In countries which follow the Anglo-Saxon legal tradition, copyright is not held by the director of a cinematographic work but by the producer: he is the holder of any copyright which exists for the work. This fundamental difference between the system used in 'copyright' countries and the continental tradition is a major obstacle to the Commission's harmonization of copyright.

Parliament came up against this problem when considering the proposal for a directive on rental right and lending right on certain rights related to
Copyright (Anastassopoulos report) and the proposal on copyright and neighboring rights applicable to satellite broadcasting and cable retransmission (Medina Ortega report). On both occasions, Parliament opted to recognize the director of the cinematographic or audiovisual work as author; and in the case of the former proposal (Anastassopoulos report), Parliament's position was incorporated in the Council's common position (Article 2.2).

The Committee on Legal Affairs has decided to take the same approach with regard to the present proposal for a directive, not only in order to adhere to the EP's stance, but also because he is convinced that no harmonization of the term of protection of cinematographic and audiovisual works can be achieved without harmonizing the rights concerned, because the rights to a work have a direct effect on establishing the point at which the term of protection begins. If this harmonization does not take place, it is possible that in some Member States, e.g., the UK, the 70 years' protection would, following approval of the Directive, fall to the producer of the cinematographic work; and if the producer is a legal person in most cases, the term of protection would be calculated from the date of publication. In France, on the other hand, the term of protection would be 70 years from the death of the last of the natural persons held to be the author. How could Article 4(1) of the proposal apply to situations of this type, assuming as it does that when the term of protection begins to run in one Member State it shall be considered to begin to run throughout the Community?

Recognition of the main director of a cinematographic work as the author thereof is very important but it still remains a minimal degree of harmonization since Member States may lay down that other persons may be considered as joint authors. The need has been demonstrated for more complete harmonization of the rights to cinematographic works since this is the only possible way of achieving the same term of protection in all the Member States. The importance of the sector within the internal market must not be forgotten either.

The Committee on Legal Affairs has adopted the amendment contained in the opinion of the Committee on Culture, which contains a comprehensive harmonization of the rightholders of cinematographic works.

B. Works published in volumes

Amendment No. 5 to Article 1(5)

Article 1(5) lays down the arrangements for works published in volumes, parts, installments, issues or episodes whose author is a legal person. This problem is tackled in various ways in the legislation of the Member States, with solutions ranging from calculating the term of protection from the date of publication of the final volume to calculating the term of protection for each volume separately from the date of its publication. The Commission proposes the latter solution which, whilst it is laudably simple, does not strike your rapporteur as particularly well-balanced.

---

3 COM(91) 276 final – C3-0345/91 – SYN 358.
4 Common position of the Council of 18 June 1992, SYN 319 – C3-0287/92
There are positions which place a more nuanced interpretation on one or the other option. The solution contained in Article 22(2) of the French law of 1957 on copyright protects a work in volumes from the date of publication of the final volume, provided publication takes place within 20 years of the issuing of the first volume of the same work. If the time lapse is longer, the term of protection is calculated separately, from the date of publication of each of the volumes.

The solution proposed in the amendment, however, is derived from Article 29 of the 1986 Spanish law on copyright. This system takes greater account of the fundamental unity of the work than of the fact of its being published in volumes. The criterion used is whether the volumes constituting the work are independent or interdependent. In the latter case, the term of protection is to be calculated from the date of the publication of the final volume, but in the former case, where volumes published within a series may nonetheless be considered as independent works, they will be protected separately. Specific provisions are also made allowing appendices, yearbooks and other supplements to a work to be considered as independent thereof, thus avoiding the danger that the later publication of such supplements might artificially postpone the beginning of the term of protection of the work.

C. Posthumous works

Amendment No. 7: Article 1(6)a (now)

This amendment deals with the protection of posthumous works, an issue on which the proposal for a directive remains silent. For that very reason, given the simple and rigorous wording of Article 1(1), the only possible interpretation is that the Commission provides protection for posthumous works only if they are published within 70 years of the death of the author and only for the period between that date of publication and the 70th anniversary of the author's death.

Again, the Commission has opted for the most easily applicable solution. Nevertheless, this solution is the one least likely to encourage the publication of posthumous works either by those holding the copyright or others who possess an original, particularly when the 70-year term of protection has already expired or is about to expire.

Treatment of posthumous works differs from one Member State to another. Highly protective approaches are to be found, e.g. in French law, which recognizes the total term of protection as beginning when the work is published, irrespective of when that event takes place. If publication occurs during the term of protection following the death of the author, those holding the rights enjoy the copyright. If publication takes place after this period has expired, copyright belongs to the owners of the work responsible for publishing it or having it published (Article 23 of Law No. 57-298 of 11 March 1957 on literary and artistic property).

An intermediate solution is to be found in Italian law (Article 31 of the Law of 1941 on copyright) and Spanish law (Article 27 of the Law on Copyright of

---

4 In works published for the first time after the death of the author, the term of the exclusive rights to economic benefit shall be 50 years from the date of the first publication, irrespective of the place and form in which this publication has taken place, provided that publication occurs within 20 years.
1987), which offer protection for posthumous works provided that they are published within a specific period following the death of the author.

My amendment is based on this intermediate criterion, and seeks to avoid both penalizing the publication of a work at the end of the term of protection following the death of the author, and the possibility of everlasting protection.

D. Temporal application of the Directive

Amendment No. 12 to Article 6(1)

This amendment is essential to the Directive's objectives, laying down the immediate effect of harmonization of terms of protection.

Article 6(1) of the Commission's proposal lays down that the Directive shall apply to rights which have not expired on 31 December 1984. The Commission’s proposed system therefore extends the period of protection only for such works as are protected, as of 31 December 1994, by the legislation of a Member State, and solely in the Member State where such protection is still in force.

This system, which has the advantage of simplicity, also has one major drawback: the effect of harmonization of the term of protection throughout the Member States is postponed in no uncertain terms. This problem will be more serious in those areas where the protection offered by the Member States is at its most uneven, i.e. with regard to cinematographic and audiovisual works, photographs and the protection of performing artists, phonogram producers and broadcasting organizations.

If we take the example of a cinematographic work published in the UK (or Portugal, Ireland, Luxembourg or Italy) in 1939, this work will, in 1994, be in the public domain. Let us suppose that the work is of French origin and that the director (or any of the other natural persons who qualify as author according to the legislation of the seven remaining Member States) died only 30 years ago; in that case the work would still be protected in the other seven Member States (the terms in question varying between 50 and 70 years p.m.a.). When the provisions of the Directive are applied in seven of the Member States, the term of protection would automatically be extended to 70 years p.m.a., whilst in five Member States, the work would remain in the public domain. This example shows us that harmonization would arrive only 40 years after the adoption of the Directive. Similar situations could arise, for example, in the case of phonograms, where differences are even greater, since three Member States (Belgium, Holland and Greece) have not yet recognized the related rights of producers of phonograms.

It is therefore clear that the differences in the terms of protection guaranteed by the Member States and the fact that certain types of rights are not recognized in some Member States will mean that the harmonization sought by the Directive will be neither complete nor effective for many, many years.

---

1 Copyright on a work published after the death of the author shall last 60 years from the date of publication, provided that this takes place in the 60 years following the author's death.
The consequences for the internal market and the need to regulate copyright within the internal market are highly significant:

- with regard to the freedom of movement of goods (books, phonograms, etc.):

One of the fundamental limitations allowed by the Treaty with regard to the freedom of movement of goods is to be found in Article 36, which allows prohibitions or restrictions on imports, exports or goods in transit justified, inter alia, on grounds of protection of industrial and commercial property. Such protection also includes intellectual property. The case-law of the Court of Justice has significantly defined the substance of copyright as protected by Article 36 and the limits of this protection; the subject of the term of protection of copyright was specifically dealt with by the Court in the ruling on the Patricia case. The Court examined the effects of disparities in terms of protection between different Member States on the free movement of goods. Paragraph 12 of the judgment states: 'In so far as the disparity between national laws may give rise to restrictions on intra-Community trade in sound recordings, such restrictions are justified under Article 36 of the Treaty if they are the result of differences between the rules governing the period of protection and this is inseparably linked to the very existence of the exclusive rights'.

An examination of the Patricia case, and others such as the GEMA or the Hag case (where the Court stressed the importance of the consent of the copyright holder in the matter of putting the protected goods into circulation; consent is no longer required when the goods are put into circulation as a result of the end of the term of protection in a Member State), does not answer the question of possible restrictions on the free movement of goods protected by copyright or related rights until such time as the harmonization of the term of protection of these rights is complete. The legal doubt raised by this question and its consequences for the free movement of books or phonograms, for example, is very considerable.

- with regard to the free movement of services, the effects are most significant in the area of cross-border satellite broadcasting.

The Commission proposal for a directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission lays down the principle that broadcasting shall be regulated solely on the basis of the copyright rules which apply in the Member State in which the broadcasting takes place, independently of the legislation of the Member States being broadcast to. If this Directive comes into force without any effective harmonization of the term of protection of copyright and related rights, it may produce serious distortions, for example when a work is broadcast from a Member State in which it is in the public domain to one or more Member States in which that work is

---

6 EMI Electrola versus Patricia Im-und Export and others, Case 341/87, 24 January 1989: ECR 1142
7 Cases 55 and 57/80 Musik-Vertrieb Nembrum v. GEMA (1981)
9 COM(91) 0276 final - C3-0345/91 - SYN 358
still protected. This would negate the protection afforded to the work in question in the Member States receiving the broadcast. This situation will persist as long as the term of protection is not completely harmonized.

In order to avoid the problems which this situation may raise with regard both to the operation of the internal market and to the legal doubt which will persist until terms of protection are effectively harmonized, your rapporteur proposed that the provisions of the Directive be applied immediately. This could be achieved by applying the new proposed term of protection to works protected on the date on which the Directive comes into force, not only in those Member States where these works are still protected, but also in the other Member States where, owing to a shorter term of protection, they are already in the public domain. A consequence would be that a significant number of works currently in the public domain in certain Member States would, from the moment at which the Directive came into force, become copyright again.

Works have been recovered from the public domain on previous occasions, both in the Member States and at Community level.

With regard to the Member States, special mention should be made of the extension of the term of protection guaranteed for works originating in the DDR (from 50 to 70 years) which took place on its unification with the FRG and was applied to works already in the public domain. We could also mention the 1989 'Order in Council' adopted by the UK when the USA joined the Berne Convention; this granted protection within the UK to works previously unprotected.

In the field of Community legislation, there have been previous instances of the application of measures with immediate effect. We would cite two recent instances in the field of intellectual property. First, Article 9(2) of the Directive on the protection of computer programs states:

'The provisions of this Directive shall apply also to programs created before 1 January 1993 without prejudice to any acts concluded and rights acquired before that date'.

Secondly, Article 13(1) and (2) of the Council's common position on the draft directive on rental right, lending right and on certain rights relating to copyright, states:

'1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which are, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or meet the criteria for protection under the provisions of this Directive on that date.

2. This Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.'

10 Unification Treaty, Annex 1, Chapter III, E.2
As stated earlier, there is a clear need for the provisions of the Directive to be applied immediately and for the solution adopted to be a viable one. The unresolved issue is that of respect for rights acquired before the date on which the Directive's provisions come into force.

The amendment adopted by the Committee on Legal Affairs specifies that at no point will the regulation have a retroactive effect: 'The previous paragraph shall be without prejudice to acts of exploitation legally carried out before 1 July 1994.'

Secondly, a system is established with the aim of ensuring respect for acquired rights. Those responsible for a legal act of exploitation (or investment directly linked to such acts), in good faith and prior to the date of the entry into force of the Directive are guaranteed the opportunity of continuing such acts. An equitable remuneration must, however, be paid to the rightholder for any such continuation. Solutions of this kind, equivalent to a legal licence, have been used on other occasions, e.g. in the case of the German Unification Treaty referred to above.

E. Amendments to the Commission's wording

Some of the amendments adopted agree with the substance of the Commission's proposal, and are simply intended to clarify the terms used or employ technically more correct forms of expression.

Amendment No. 10 to Article 4(3)

This is an amendment of the wording intended to clarify the requirements of the application of the principle of reciprocity in the sphere of related rights.

Amendment No. 11 to Article 5

This is intended to clarify the terms of Article 5 of the proposal for a directive, using the same wording as Article 7(5) of the Berne Convention.

Amendment No. 6 to Article 1(6) and Amendment No. 8 to Article 2(1)

These two amendments are intended merely to improve the wording of the articles. 'Publication' is replaced by a formulation involving the words 'lawfully made available to the public' thus using terminology in keeping with the rest of the Directive and with the terminology used in the Berne Convention on the protection of literary and artistic works.
F. Procedure for notification of plans to grant new related rights

Amendment No. 13 to Article 8(2)

The second paragraph of this article is deleted, because the Committee on Legal Rights accepts the obligation laid down in the first paragraph for Member States to notify the Commission of any plan to grant new related rights, but he does not believe it necessary to go any further in this connection. The system proposed by the Commission in its second paragraph places major restrictions on the legislative responsibility of the Member States in this area, and is of questionable effectiveness. The deletion does not, in any case, stand in the way of new initiatives or other directives which the Commission may wish to propose if technical, technological and even legislative developments in the Member States with regard to this subject justify such measures in the short, medium or long term.

G. Amendment No. 4 to Article 1(4)

Article 1(4) deals with the issue of anonymous or pseudonymous works which are not to be protected 'if it is reasonable to presume that their author has been dead for 70 years'. The amendment adopted is specifically intended to provide a means of establishing this presumption. In the civil law of several Member States, there is a system for declaring a person missing and such a declaration could usefully be considered as a presumption of death as far as the application of this provision and the conditions it imposes are concerned. Its optional application takes account of the fact that this system for declaring a person missing is not recognized in all Member States.

H. Entry into force of the Directive

Amendment No. 14 to Article 10(1), first subparagraph

The date 31 December 1992 proposed by the Commission has to be changed for obvious reasons. The Committee on Legal Affairs has chosen the date of 1 July 1994.

---

12 See, for example:
Articles 112 to 132 of the French 'Code Civil', in particular Article 128
Articles 181-198 of the Spanish 'Código Civil'
Articles 48-73 of the Italian 'Codice Civile', and
Article 40 et seq. of the Hellenic Civil Code
ANNEX I

OPINION
(Rule 120 of the Rules of Procedure)

of the Committee on Economic and Monetary Affairs and Industrial Policy
for the Committee on Legal Affairs and Citizens' Rights
Draftsman: Mr Karsten HOPPENSTEDT

At its meeting of 27 May 1992 the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Hoppenstedt draftsman.

At its meetings of 16-17 June and 28-30 September 1992 it discussed the Commission proposal. It considered the draft opinion on 29 September 1992 and adopted the conclusions as a whole by 16 votes to 1.

The following took part in the vote: Beumer, chairman; Hoppenstedt, draftsman, Cassidy (for Peter Beazley), Cox, Friedrich, Gasoliba i Böhm, Harrison, Herman, Christopher Jackson, Linkohr (for Hoff), Metten, Read, Ribeiro, Rikard Pederson, Roumeliotis, Wettig and von Wogau.
I. INTRODUCTION

The purpose of the proposal for a directive is to harmonize the term of protection in the Member States for copyright and certain related rights.

Technological developments in the duplication and transmission of copyright works and performances encourage their dissemination within the Community and internationally. Consequently, copyright and related rights should be harmonized within the Community in respect of the length of protection provided, in such a way as to ensure that the interests of the authors and artists as well as those of the users of copyright works and performances are taken into account.

II. ASSESSMENT OF THE PROPOSAL

As a matter of principle, the proposal's attempt to standardize the term of protection provided by copyright and related rights throughout the Community and, by agreement with third countries, worldwide, is to be welcomed.

As far as the term of protection is concerned, the Commission comes out in favour of a period of 70 years, covering two generations (in view of the increase in life expectancy). Until now, only one Member State has provided this term of protection.

On page 45 of its proposal, the Commission compares the main terms of protection in the Member States. This survey shows that, under the laws currently in force, the term of protection is 50 years in 10 Member States, 50 or 70 years in the case of works of music in France; only in Germany is the general term of protection set at 70 years.

The list of the terms of protection in some non-Community countries on page 46 of the proposal shows that copyright is normally protected for 50 years.

In its opinion of 1 July 1992 - CES 813/92 - the European Community's Economic and Social Committee also expressed its support for a copyright protection term of 50 years, stating in its conclusions (3.2):

The Commission's proposal for a term of protection of 70 years after the death of the author is consistent with the current law of only one Member State. The majority of Member States have no longer than 50 years after the death of the author. Further, a Community agreement on 50 years may be a more useful base to facilitate international agreement on the term of protection. In these circumstances the Council should give serious consideration to adoption of 50 years after the death of the author rather than 70 years.

The draftsman supports this view. The new rules must take account of the interests of authors and of the owners of related rights as well as those of investors and consumers.

As far as authors and copyright holders are concerned, their works must be protected, particularly during their lifetimes. Their labours result in works or performances which culturally enrich their audiences. If an author publishes a work in his or her 40th year and, thanks to increased life expectancy, lives to be 80, a term of protection of 70 years after the author's death would protect the work for 110 years, or well over a century! This seems inappropriate; copyright protection that lasts for two generations clearly makes the dissemination of our cultural heritage expensive. Authors and performing artists
mainly seek to spread their works amongst their contemporaries, who then pass
them on – if the artists are successful – to the next generation. Experience
indicates that concern for their heirs, particularly the second generation, is
not one of the motives behind their creative activity, which in any event is
not worthy of protection from an economic point of view.

If, during the author's lifetime, the protection if his works is legally and
economically successful, the inheritance is generally a satisfactory one for the
first generation. As far as the second generation is concerned, priority should
be given to the interests of authors and consumers by making the work available
to a broader public at reasonable cost.

Thus, particularly in view of the increase in the life expectancy of authors and
the owners of related rights – Beethoven died at the age of 57, while Marlene
Dietrich lived to over 90 – a term of protection of 50 years seems appropriate.

III. CONCLUSIONS

The Committee on Economic and Monetary Affairs and Industrial Policy asks the
Committee on Legal Affairs and Citizens' Rights, as the committee responsible,
to take the following amendments into account when voting on the report, pursuant
to Rule 120(4) of the Rules of Procedure:

(Amendment No. 1)
Article 1(1)

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 70 years after his
death, irrespective of the date when
the work is lawfully made available
to the public.

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 50 years after his
death, irrespective of the date when
the work is lawfully made available
to the public.

(Amendment No. 2)
Article 1(3)

3. In the case of anonymous or
pseudonymous works, of works
considered under the legislation of
another Member State to have been
created by a legal person and of
collective works, the term of
protection shall run for 70 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
should be that laid down in paragraph
1.

3. 3. In the case of anonymous or
pseudonymous works, of works
considered under the legislation of
another Member State to have been
created by a legal person and of
collective works, the term of
protection shall run for 50 years
after the work is lawfully made
available to the public.

2nd sentence deleted
(Amendment No. 3)
Article 1(4)

4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for 70 years.

(Amendment No. 4)
Article 1(6)

6. In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

The recitals of the Commission proposal should be amended accordingly.
OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Culture, Youth, Education and the Media

for the Committee on Legal Affairs and Citizens' Rights

Draftsman: Mr MENDES BOTA

At its meeting of 16 July 1991 the Committee on Culture, Youth, Education and the Media appointed Mr Mendes Bota draftsman.

At its meeting of 15 October 1992 it considered the draft opinion and it adopted the conclusions as a whole.

The following were present for the vote: Banotti, chairman; André (for Mendes Bota, draftsman); Barrera I Casta, Canavarro (for Simeoni), Coimbra Martins, Denys, Dillen, Elliott, Fremion, Galle, Guidolin (for Michelini), Maibaum Oostlander, Pack, Plumb (for Stewart-Clark), Rawlings and Schwartzemberg (for Rubert De Ventós).
1. THE SITUATION IN THE COMMUNITY AT PRESENT

Copyright and related rights are items of intellectual property and, unlike conventional property rights, their terms of protection are limited in time. The term of protection is therefore an essential element in intellectual property rights. There are considerable differences in the terms of protection for some categories of copyright and related rights laid down by the laws of the Member States. These differences could give rise to trade barriers or even distortions of competition in the Community.

Terms of protection are also governed by a number of international conventions:

- the Berne Convention, as revised by the 1971 Paris Act, which provides for a general term of protection of copyright and special terms for certain types of work. The general term of protection of copyright covers the lifetime of the author and 50 years after his death. This is a minimum term. The Convention also provides for a comparison between the term of protection in the country where it is sought and the term of protection in the work's country of origin. It also determines the country of origin of a work, namely the country in which it was first published.

- the Rome Convention, which specifies a minimum term of protection for related rights of twenty years from the end of the year of fixation or performance.

The differences between the terms of protection referred to above are considerable. In some cases they lead to a situation where works or other objects may be protected in some Member States and not in others, the shorter term of protection having already expired.

The case law of the Court of Justice states that 'the problem arising thus stems from the differences between national legislation regarding the period of protection afforded by copyright and by related rights, those differences concerning either the duration of the protection itself or the details thereof, such as the time when the protection period begins to run'. It is clear from this judgment that the differences between terms of protection in the Member States are such that the internal market in literary and artistic works and in cultural goods and services will not be brought about unless those terms are harmonized. The Court even went so far as to state that the harmonization should concern not only the duration of the protection itself but also certain details relating to it, such as the time from which the protection period is calculated.

It follows from the Court's analysis that, if the internal market is to come into being, the Community must find a way of harmonizing the different terms of protection so that all trade barriers have been eliminated by the time the market is established.

Harmonization is justified by the fact that it satisfies the need for legal certainty and eases the management of the rights in question. It will also lead to more effective action against piracy and the importation of illicit products from third countries. A harmonized environment is an essential factor as regards future investment in the sector of creativity in the Community.

Copyright and related rights are of cultural as well as economic significance, and culture cannot be treated as a commodity like any other. The Community cannot afford to remain uninvolved in the area of copyright and related rights,
which are essential to European integration. There is no doubt that copyright and related rights are under threat and that it is incumbent upon the Community to protect them and harmonize protection in an upward direction.

2. THE PROPOSAL FOR A DIRECTIVE

The rapporteur would like to stress that the proposal for a directive presented by the Commission

(a) is consistent with the international conventions referred to above, and the Berne and Rome Conventions in particular;
(b) ensures that rights acquired under national law are maintained;
(c) provides for entitlement to copyright and related rights to continue to be governed by national law;
(d) does not affect the substance of the rights in question;
(e) provides that
  - the term of protection in the case of copyright is to be the lifetime of the author and seventy years after his death,
  - the term of protection in the case of related rights is to be fifty years from the first publication or fixation.

The rapporteur considers that the directive is the best choice of legal instrument to guarantee as high a level of protection as possible in order to ensure the smooth running of the internal market.

The rapporteur also approves the Commission's choice of legal bases.
3. **GENERAL ARGUMENTS IN FAVOUR OF THE COMMISSION PROPOSAL**

1. The judgment of the Court of Justice of 24 January 1989 made it evident that the divergences in national law in this area constitute serious obstacles to the free movement of cultural goods, causing marked distortions in the competition rules as between the Member States, in the context of the internal market.

Copyright owners can prevent imports into a Member State where the work in question is still protected of copies which are in circulation in another Member State where the work is no longer protected.

If the term of protection were at least 70 years, respect for the rights acquired in the Member States would mean that the single market would only become reality in the sector 70 years after the entry into force of the present directive.

2. Harmonization should be carried out upwards to universalize the highest existing level of protection, so as to avoid offending existing rights or creating a transition period in which the perverse effects of the present disparity in periods would be accentuated.

3. The 50-year limit was introduced at the Berne Convention in 1908; the evolution in average life expectancy since then would now justify a 70-year protection limit. This would help to improve the economic situation of creators and cultural investors, compensating them for the unequal treatment of literary and artistic copyright vis-à-vis other property rights which are not subject to a time limit.

4. The existing disparities in duration of protection could induce creators to take up residence in Member States where works enjoyed a longer protection period.

5. The 70-year limit would also benefit economic operators who are copyright owners (publishers and producers).

6. It would also be crucial for the profitability of certain works such as symphonies or operas which require substantial investment.

7. A 70-year limit would have no effect on the prices of cultural products.

While approving the proposal as a whole, the rapporteur would like to make a number of changes to the text.
The Committee on Culture, Youth, Education and the Media calls on the Committee on Legal Affairs and Citizens' Rights to incorporate the following amendments in its report:

**Commission text**

**(Amendment No. 1)**

*Recital 2a (new)*

Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which the term of protection is calculated: whereas therefore it is necessary to harmonize the definition of authorship of a cinematographic or televiual work:

**(Amendment No. 2)**

*Article 1(2)(new)*

The author(s) of an audiovisual work shall be the natural person(s) responsible for the creation of the work. In the absence of evidence to the contrary, the following shall be presumed to be the authors: the director, script writer, dialogue writer, adaptor and the composer of music with or without words which has been specially written for that work.

**(Amendment No. 3)**

*Article 1(3)*

3. In the case of anonymous or pseudonymous works, of works considered under the legislation of the Member State to have been created by a legal person and of collective works, the term of protection shall run for 70 years after the work is lawfully made available to the public.

3. In the case of anonymous or pseudonymous works, of works considered under the legislation of the Member State to have been created by a legal person and of collective works, the term of protection shall run for 70 years after the publication or, failing that, the creation of the work.
(Amendment No. 4)
Article 1(4a) (new)

4a. In the case of posthumous works, the term of protection shall run from the date when the work was made available to the public.

(Amendment No. 5)
(Article 2(4a) (new)

4a. The related rights shall under no circumstances jeopardize authors' copyright, nor shall this article be interpreted in any sense tending to limit the exercise of copyright by its holders.

(Amendment No. 6)
Article 6(1)

1. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running. This Directive shall come into force on 31 December 1993 and apply to all works, performances, phonograms, broadcasts and first fixations of cinematographic works and sequences of moving images even if, by that date, such works or objects have already entered the public domain by virtue of Member States' legislation.

Exploitation of a work or object as specified above which has entered the public domain before this Directive comes into force may continue, if begun before this Directive comes into force, without the consent of the owner or owners of the rights to the work or object.

A fair remuneration shall be paid to the owners of the rights for such exploitation. This Directive shall not have the effect of shortening terms of protection guaranteed under the laws of the Member States.
Commission text

(Amendment No. 7)

Article 6(2)

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

2. The moral rights granted to the author shall have unlimited duration.

(Amendment No. 8)

Article 8(2)

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to add to this proposal for a directive.

(Amendment No. 9)

Article 10(1)

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 June 1993.
REPORT

from : Presidency  
to : Council

No. prev. doc.: 9836/92 PI 108 CULTURE 108
No. Cion prop.: 5509/92 PI 33 CULTURE 21

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

A. Introduction

1. Under cover of a letter dated 23 March 1992, the Commission submitted to the Council a proposal for a Council Directive harmonizing the term of protection of copyright and of certain related rights. The proposal is based on Articles 57(2), 66, 100a and 113 of the Treaty establishing the European Economic Community.

2. The Economic and Social Committee gave its opinion on the proposal on 2 July 1992. The European Parliament has not yet given its opinion.

3. The Commission's proposal has been examined by the Working Party on Intellectual Property (Copyright) at several meetings and by the Permanent Representatives Committee. Following this examination, the Presidency has identified four key issues on


9836/92 prk - 1 - EN
which agreement has not yet been reached and which it submits to the Council, together with suggested compromise solutions, for a policy debate. Although there are other significant questions on which agreement has not yet been reached, the Presidency considers that it would be premature to bring them before Council at this stage.

B. Term of protection of copyright and of certain related rights

4.1. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) provides that the term of copyright protection is to be 50 years "post mortem auctoris" (p.m.a.), i.e. the life of the author and 50 years after his death, while allowing the parties to the Convention to grant a longer term of protection. Of the Community Member States, Germany grants a term of protection of 70 years p.m.a., Spain has recently (1987) reduced its term of protection from 80 to 60 years p.m.a., and France grants a term of protection of 70 years p.m.a. for musical works but 50 years p.m.a. for other categories of works. The other Member States grant the Berne Convention minimum of 50 years p.m.a., although Belgium, France and Italy have introduced extensions in order to offset the effects of two world wars on the exploitation of authors' works. These differences between terms of protection give rise to barriers to trade and distortions of competition which the proposal for a Directive seeks to eliminate with a view to the completion of the internal market.

4.2. With regard to related rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) provides for a minimum term of protection of 20 years for performers, producers of phonograms and broadcasting organizations. The terms of protection granted to these categories of rightholders in the Member States vary considerably, ranging from 20 to 50 years in those Member States which are parties to the Rome Convention, while other Member States which are not yet parties to that Convention
give no protection at present to some or all of these categories of rightholders. Some Member States also grant a related right to film producers, whose term varies from 25 to 50 years. However, the substance of these related rights will be harmonized by the Directive on rental right and lending right and on certain rights relating to copyright in the field of intellectual property (rental Directive).

5. Although the basic term of protection for copyright at present applied in the majority of Member States is 50 years p.m.a., a harmonized term of 50 years p.m.a. throughout the Community would require transitional arrangements in those Member States which at present grant longer terms, in order not to affect the acquired rights of authors and their heirs for whom terms of protection are currently running. The Commission has pointed out that these acquired rights must be maintained according to the case law of the Court of Justice. Such transitional arrangements could continue for as long as 70 years or more. In order to avoid such a long transitional period, during which barriers to trade would continue to exist, the Commission’s proposal provides that the term of protection is to be harmonized at the length of the longest term at present applied in the Community, namely 70 years p.m.a.

The Commission’s proposal also provides that the term of protection for all the related rights referred to under point 4.2. above will be harmonized at the length of the longest term at present applied in the Community, namely 50 years, for practically the same reasons as set out above in relation to copyright.

The Commission has informed the Permanent Representatives Committee that the European Parliament’s Legal Affairs Committee will recommend this solution of 70 years p.m.a. for copyright and 50 years for related rights to the Plenary.
6. Delegations are divided between the Commission's proposal and minimum harmonization for copyright at 50 years p.m.a., with the possibility for Member States to maintain or introduce a longer term.

7. The Presidency recognizes that an ideal solution is hard to find. However, it considers that a minimum harmonization proposal would achieve nothing, since it would merely perpetuate the present situation, which the Directive is intended to remedy. In the light of the considerations set out above, the Presidency suggests that the package proposed by the Commission—a term of 70 years p.m.a. for copyright and a term of 50 years for the holders of the related rights mentioned—constitutes the more reasonable solution from the point of view of the internal market.

C. Works First made available to the public after the expiry of copyright protection

8. The Berne Convention does not contain any specific provision concerning works first made available to the public after the death of the author (commonly known as "posthumous works"). Some Member States provide for a specific term of protection for such works irrespective of how many years have elapsed since the author's death. One Member State provides for a specific term of protection, provided that the work is first made available to the public within twenty years of the author's death. Other Member States exclude any protection once normal copyright protection has expired.

9. Under the Commission's proposal, the normal term of copyright protection (70 years p.m.a.) would apply where the work is made available to the public before the expiry of that term, but no provision is made for protection if the work is first made available to the public after the expiry of that term.
10. Some delegations are in favour of providing for protection for such works irrespective of how many years have elapsed since the expiry of normal copyright protection; other delegations are opposed to such protection; other delegations, while preferring not to provide for such protection, would have less difficulty in accepting it if it were to be limited to works first made available to the public within a specified number of years after the expiry of normal copyright protection.

11. In the light of the positions taken by the various delegations, the Presidency suggests a compromise solution with the following elements:

(a) a provision for protection of works first made available to the public after the expiry of normal copyright protection would be included in the Directive;

(b) this provision would apply only where the work was first lawfully made available to the public within 50 years after the expiry of normal copyright protection;

(c) the protection granted would not be copyright protection, but would be a related right equivalent to the economic rights of copyright;

(d) the term of this protection would be 50 years from the date when the work was first lawfully made available to the public (corresponding to the longest term at present applied by any Member State in such circumstances);

(e) the first owner of the right would be the person who first lawfully made the work available to the public.

---

2 France applies a longer term (70 years) to musical works only, but account would be taken of this in a provision ensuring that the Directive would not have the effect of shortening terms of protection already running.
This provision could be worded as follows:

"Works which are lawfully made available to the public within 50 years after the expiry of copyright in accordance with the provisions of Article 1 and which have not previously been made available to the public shall receive a protection equivalent to the economic rights of copyright. That protection shall begin on the date on which the work is lawfully made available to the public and shall end 50 years after that date. The first owner of these rights shall be the person who made the work lawfully available to the public."

The Commission has informed the Permanent Representatives Committee that the European Parliament's Legal Affairs Committee will propose a similar amendment to the Plenary.

D. Photographs

12. The Berne Convention provides for a minimum term of protection of 25 years from the making of a photographic work. Some Member States have a term of protection for photographic works equivalent to the normal term of copyright protection and a shorter term for "ordinary" photographs; other Member States have a term of protection for photographic works equivalent to the normal term of copyright protection but no protection for "ordinary" photographs; and other Member States make no distinction between photographic works and "ordinary" photographs, applying the normal term of copyright protection.

13. In the light of these differences, and of the difficulty of finding an objective criterion that could easily be applied for distinguishing between photographic works and "ordinary" photographs, the Commission's proposal provides that all photographs protected under the laws of the Member States, however protected, should have the normal term of copyright protection: this would allow Member States to continue to determine whether or not they distinguish between photographic works and "ordinary" photographs for purposes other than term of protection, and would ensure that a single term applied throughout the Community.
The Commission has informed the Permanent Representatives Committee that the European Parliament’s Legal Affairs Committee has not proposed any amendment to this proposal.

14. However, opinion is divided on this solution, and it has been pointed out that it has the disadvantage that it would allow some Member States to continue not to protect “ordinary” photographs, which are protected in other Member States.

15. In the light of the various positions of the Member States, the Presidency suggests the following compromise solution:

(a) the term of protection for protected photographs would be the normal term of copyright protection;

(b) those Member States which do not at present protect ordinary photographs would be obliged to introduce protection for them.

The Presidency recognizes that for some Member States this is not an ideal solution. However, any other solution would either have the disadvantage referred to in point 14 above, or would involve a reduction in the term of protection for “ordinary” photographs in those Member States which at present apply the normal term of copyright protection to them, with the need for a long transitional period as pointed out under point 5 above.

The corresponding provision could be worded as follows:

"Protected photographs shall have the term of protection provided for in Article 1. Member States which, on the date of adoption of the present Directive do not protect ordinary photographs shall introduce such a protection".
E. Application in time

16. In view of the different terms applicable at present in Member States, when the Directive comes into force certain works will still be in copyright or related rights protection in one or more Member States, while in the other Member States that protection will already have expired. Since it is proposed that the terms be harmonized at the length of the longest terms at present applied in the Community, several delegations have suggested that provision be made for reviving the protection that has already expired in such cases. These delegations have pointed out that, in the absence of such revival of protection, there would be a long transitional period during which particular works and other subject matter would continue to be protected in one or more Member States, but would no longer be protected in other Member States as a result of expiry of protection before the transposition of the Directive. The internal market would be subject to distortions during this transitional period.

Other delegations have expressed reservations on the possibility of reviving rights which have expired.

17. The Presidency considers that, if harmonization of the term of protection of copyright and of the related rights covered by the Directive, with the resulting removal of barriers to trade within the Community, is to be achieved reasonably rapidly, serious consideration should be given to the inclusion in the Directive of a provision providing for the revival of protection in such cases. This provision would not retrospectively make illegal any acts carried out before the Directive took effect, and it is accepted that provisions concerning the safeguard of acquired rights of third parties who have acted in good faith on the assumption that particular works would remain in or come into the public domain will be prepared at Working Party level.
The Commission has informed the Permanent Representatives Committee that the European Parliament's Legal Affairs Committee will propose an amendment to this effect to the Plenary.

F. Conclusions

18. The Council is invited to examine the issues set out in sections B to E above and consider the compromise solutions put forward in points 7, 11, 15 and 17 above, with a view to facilitating the adoption of a common position at the earliest possible date once the European Parliament has given its opinion.
19. Adequacy of investment firms and credit institutions

PRESIDENT. — The next item is the debate on the recommendation for the second reading (Doc. A3-0349/92) from the Committee on Legal Affairs and Citizens’ Rights (rapporteur: Mr Zavvos) on the common position adopted by the Council on 27 July 1992 (C3-0361/92 — SYN 257) with a view to the adoption of a directive on the capital adequacy of investment firms and credit institutions.

ZAVVOS (PPE), rapporteur. — (GR) Mr President, the aim of the directive we are examining today at its second reading on capital adequacy of investment firms and credit institutions is one of the main measures for the completion of the 1993 Single Market, especially in respect of its monetary and financial dimension, for a whole set of reasons.

Firstly, because without it there can be no money market, an investment market in the Community.

Secondly, because this directive strikes a critical balance between the well-known German universal banking system and the Anglo-Saxon system.

Thirdly, because the directive sets up a model, for the first time, to be used in international markets on the subject of capital adequacy. As we know, at this moment relative negotiations are taking place at international level within the framework of IOSCO. Since these negotiations are not going that well, the Community must approve this directive as quickly as possible to prove that it is confident that the model it proposes will greatly help the international negotiations to reach an agreement in the near future with other major financial partners, especially the United States.

Fourthly, this directive reminds us that we must quickly adopt and complete the directive concerning the liberalisation of investment firms in the Community which is now in the final critical stages of negotiations.

As rapporteur, I am quite satisfied that the Commission and the Council have respected most of the European Parliament’s amendments which were approved some time ago. To be precise, I should like to say that the European Parliament proposed for the first time a basic change as the directive made progress, with the adoption of the so-called building-block approach. The Commission has taken that on board and now the Council has adopted it in its common position.

At the same time there is a set of amendments, the most important of which I shall mention, adopted by the Council. For example, a new definition for the so-called trading-book. Also, the basic principle that market risk must be subject to a single audit. The European Parliament was also listened to concerning the significant increase in the starting capital of investment companies.

At this second reading, the discussions must concentrate on conveying a message and the significance the Parliament gives to the speedy adoption of this directive. We have made just one amendment — a sound, classical amendment — in line with the classical stance taken by the European Parliament in its amendment-making. We think that this will close the circle and will enable the very swift adoption of this highly important directive. It is significant, as I said, for the liberalisation of the financial services of the Community, which is literally the pillar and a vital dimension of cheap funding of European industry. It is also a directive which will give proper protection for European investors and will supply all the necessary rules for strengthening transparency and bolstering stability in the European financial system.

BRU PURÓN (S), — (ES) Mr President, this recommendation on the Council’s common position has been debated at length and Mr Zavvos’ excellent work was apparent during the first and second reading. The Socialists are in total agreement and, therefore, we subscribe to what Mr Zavvos proposes, as our vote will reflect.

BRTITAN, Sir Leon, Vice-President of the Commission. — Mr President, I should like first of all to thank the Committee on Legal Affairs and Citizens’ Rights and the rapporteur, Mr Zavvos, for their very valuable work on the important capital adequacy dossier and their favourable response to the common position adopted on 27 July. I listened very carefully to what Mr Zavvos said and would wholeheartedly endorse his very informative comments on the importance of this directive and its history. He is entirely right in this respect.

Fortunately, as a result of the handling of the matter in Parliament and the Council we are left with very little for today. The Legal Affairs Committee, as he has said, adopted a single amendment to the common position. It is a response to the Council’s decision to retain implementing powers for itself at this stage. The Legal Affairs Committee has called for implementing powers to be exercised by the Commission under the procedure 3a arrangements laid down in the Council’s comitology decision of 13 July 1987. The Commission would normally support Parliament’s amendment but in the present case the proposed modification is not necessary since the comitology provisions which are still before the Council will be coming back to Parliament shortly. I can assure Parliament that in the discussion on comitology which has yet to take place in the Council, the Commission will continue to press for a 3a type of committee. For that reason we cannot accept the proposed amendment but we understand and support the spirit in which it has been put forward. However, the Council has made known its readiness to move quickly on the creation of a securities’ markets committee, and the Commission fully supports that. In those discussions the Commission will seek the appropriate implementing powers as supported by Parliament, albeit under the 3a procedure.

PRESIDENT. — The debate is closed.

The vote will take place tomorrow at 5 p.m.

20. Copyright and related rights

PRESIDENT. — The next item is the report (Doc. A3-0348/929 by Mr Bru Purón on behalf of the Committee on Legal Affairs and Citizens’ Rights on the proposal from the Commission to the Council (COM(92)033 final — SYN 395 — C3-0189/92) for a directive harmonizing the term of protection of copyright and certain related rights.

BRU PURÓN (S), rapporteur. — (ES) Mr President, this draft directive is a key element in the work undertaken by the Community in the sphere of intellectual property rights, which is of prime importance in establishing a
single internal market and for two of its main components: freedom of movement of goods and freedom to render services. Likewise, attention should be drawn to the role these measures could play in promoting and disseminating the Community's cultural heritage through strengthening creative capacity which is a part of its wealth.

This draft complements other recent proposals examined by this Parliament: those concerning the right to hire and to loan and other neighbouring rights (Anastassopoulos report) and those concerning copyright and neighbouring rights in the sphere of radio broadcasting by satellite and cable retransmission (Medina Ortega report).

The purpose of the draft we are examining today is to harmonize terms of protection granted by Member States for copyright and neighbouring rights. Unfortunately, this fundamental consideration is as yet treated in different ways in the various Member States, thus hampering freedom of movement of products and rendering of services and creating distortions in competition.

The terms proposed are today 70 years for copyright and 50 years for what are called "neighbouring rights". In addition, harmonization requires not only that the same term be established, but also that the event marking initiation of the term is calculated in a standard manner in all Member States, whether it be the death of the author, in the case of rights of natural persons, or the time when a work was legally made available to the public in other cases, that is, in the case of legal persons.

The fact that a relatively long period is established responds both to fundamental reasons — for example, the need to increase protection of creative activity in the Community, general agreement of most of the sectors involved, and a general trend towards an extension of terms of protection, both in States and in international organizations —, and to technical reasons, particularly the need to achieve harmonization based on the longest term in force in any one Member State, to avoid problems during the transition period from one legal system to another. Thus, the Committee on Legal Affairs has unanimously accepted the basic principles of the Community draft since it is agreed that this term of protection should indeed be harmonized.

Let us look now at specific amendments. Some concern the way in which certain types of works are handled, such as those published in volumes, those involving posthumous works, or publication of unpublished works that are in the public domain. In all these cases, the Committee on Legal Affairs has sought to achieve a balance between protection of rightholders and the need to promote public dissemination of protected works.

Amendment 12 dealing with the timeframe for application of the directive is also worthy of note. It is established that its stipulations will come into force immediately, to ensure strictest respect of existing rights. The term of protection will apply to all works and objects that are protected, in accordance with legislation of at least one Member State at the time when the directive comes into force. This aims to avoid legal uncertainty that would arise by extending the term of protection in some States and not in others, as well as possible detrimental consequences for the single market in this connection.

If this amendment is not accepted, harmonization will be considerably delayed. Respect for rights acquired through mechanisms in which publishers' actions are guaranteed, in keeping with the principle of good faith and compensation to the author's successors, is assured however.

Another important point dealt with by the Committee on Legal Affairs — Amendment No. 3 — concerns ownership of cinematographic works. It was no whim which led us to tackle this point, Mr President, since it is a matter that is inextricably linked with the establishment of a term of protection. Allow me to point out that, if we are going to harmonize the term of protection, we also have to harmonize the point from which this term is computed. For audiovisual works, the question may be summarized as follows: the calculation of 70 years of protection would begin at different moments for the different copyright holders: death of the last of the natural persons acknowledged as author in any one Member State, and publication of the work by other Member States in which the rightholder is the producer and therefore a legal person.

And it is logical that, if the term of protection begins at different times, then it will also expire at different times, for which reason we find ourselves in a situation in which given works are protected in some States and yet are in the public domain in others. This would lead to extremely serious situations, such as that which arose with regard to the "Patricia" judgement, and could raise a genuine barrier against the movement of certain audiovisual cinematographic or phonographic products between Member States, and even to a form of dumping of production of these cultural products.

The Committee on Legal Affairs has concluded that partial harmonization will not suffice. Criteria for identifying the copyright holder of an audiovisual work must be harmonized. It has been stated that the copyright holder will be the legal person or persons responsible for the intellectual creation of the work, for which reason the period will be computed from the date of death of the last author.

May I point out that this does not exclude the audiovisual producers entitlement to a neighbouring right which is of 50 years duration and includes such important and financially remunerative rights as that to lend, loan, reproduce and distribute, without detriment to application of criteria of the Berne Convention — article 14 bis — which assumes assignment of rights in favour of the producer, which has generally occurred.

These apparently minor points of harmonization are proposed, not in an urge for uniformity, but rather as a result of the needs of a true internal market — which is what we indeed seek to achieve. And I believe that if, as a result of the Treaty of Maastricht, an examination of subsidiarity is one day carried out, that is, the need to legislate in order to harmonize the internal market, then the Commission draft and the additions made by the Committee on Legal Affairs will pass the exam and will do so with an outstanding cum laude at that.

MENDES BOTA (LDR), draftsman of the opinion of the Committee on Culture, Youth, Education and the Mass Media. — (PT) Mr President, the reaction of the Committee for Culture, Youth, Education and the Media to the draft directive on harmonization of the term of copyright
and neighbouring right protection, to be established at 70 years post-mortem autoris and 50 years respectively, is positive on the whole.

This draft falls within the framework of the international agreements of Berne and Rome, among others, assuring respect for rights acquired under national legislations, and does not affect the substance of these rights, as well as leaving Member States with full powers to determine who holds these rights.

The spirit and philosophy of our position tend to an increasing degree of defence of copyright. Authors are the financially most vulnerable group of all, they have no right to strike nor to unemployment benefit, at the same time they are indispensable and cannot be replaced. The fruit of their creative work is frequently their only bequest to their successors. Thus, neighbouring rights, or the interest of other sectors, should be made compatible with and never predominate over copyright, that is, the rights of authors without whose work neither creation nor invention exists.

The existence of different terms of protection, and the different forms this takes, is a real obstacle to implementation of the internal market of literary and artistic works and cultural products and services, such as was recognized, moreover, by the Court of Justice. If a term of less than 70 years were to be established, respect for rights acquired in Member States would only give the single market 70 years de facto after application of this directive. But harmonization of the term of protection is not enough in itself. We also have to harmonize the time from which the term of protection is computed. It is necessary, in addition, to identify the intellectual authors of audiovisual works. The opinion of the Committee for Culture is this includes the producer, the scriptwriter, author of dialogue, adapter and author of musical compositions specifically for incorporation in a given audiovisual work.

In the case of posthumous works — which are unaccountably missing from the draft directive — it would be correct that the right be generated by the dissemination of the work and not the death of the author. It is in the public interest that the legislator promote dissemination of works which were not communicated to the public during the author’s lifetime. The fact that each Member State is free to decide whether or not to offer specific protection for posthumous works is unfortunate, as far as the objective of harmonization is concerned.

We consider that moral rights should be recognized without limitation since this is an enduring and inalienable heritage. These are legitimate interests of an intellectual nature which should survive beyond the expiry of rights of ownership, as already occurs, moreover, in many Member States: France, Belgium, Germany, Spain, Portugal and Italy.

Finally, we appeal to the Council to accept the amendments proposed by this Parliament to the effect that the values in question are not merely rights of a financial nature but are, more particularly, of a cultural nature — and culture cannot be treated as just another commodity.

HOPPENSTEDT (PPE), draftsman for the opinion of the Committee on Economic and Monetary Affairs and Industrial Policy. — (DE) Mr President, ladies and gentlemen, on many points I can refer back to what has just been said, particularly the statement by Mr Bru Puron. I should like, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy, to make three comments.

Anyone involved with this subject, that is all three directives relating to copyright, will see that there was good reason why the television and radio directive, adopted in 1989, omitted the subject of copyright. We know how difficult it was and is to draft the new directive.

The Committee on Economic and Monetary Affairs and Industrial Policy naturally accepts the arguments that have just been mentioned but considers — and this is a point made by the Commission — that in consequence of the advanced age of those who produce works of art, 70 years after the death of the author should be the upper limit. My committee suggested 50 years — and why? In ten Member States that is the limit which currently applies, and the Committee on Social Affairs, Employment and the Working Environment was also in favour of that limit. This view of the committee applies not only to the protection of copyright but also takes into account, above all, those who have to deal with these works protected by copyright for the purpose of publication or information to the public.

SCHWARTZENBERG (S). — (FR) Mr President, ladies and gentlemen, is the European Community which we are busy building going to respect artistic creativity and cultural truth?

The issue is the recognition and defence of copyright. First of all, how do we define it? Who is the author of a work? Is a book’s author its publisher or the writer? Is the author of a painting the artist or the dealer? Is the author of a tragedy the dramatist or the theatre producer? Likewise, who is the author of a cinema or television film? The director or producer?

We regard it as essential to recognize that the author of a work is the person or persons who devised, conceived, created beings of flesh and blood, who contributed the best thing humanity has to give, namely artistic creation, which dominates the centuries and helps humanity to defy mortality. Cinema is the art of the 20th century. Far be it from us to despise the producers, to deny them the recognition they deserve. Without the printing presses, without the picture rails in the art galleries, without the cinema studios’ money a work cannot become known and publicized. There is a connection between those with links to manufacturing and industry who give substance to a work, and those who conceive it, create it and breathe the spirit of life into a work. Can they be the same, spirit and substance, a living entity and a business interest?

This report has two aims. Firstly, to harmonize the definition of copyright in Europe in the hope that it will subsequently be recognized worldwide. Secondly, to state a simple moral principle: the author is the author and no one else. My thanks to Mr Bru Puron.

Ladies and gentlemen, a way of life can conquer the world, a way of life based on money. Financial power can dictate certain eating habits, certain dress habits, certain ways of thinking. Let us Europeans be on our guard, let us take care not to let our creative artists, our authors, be crushed by the steamrollers of efficiency and profit. This old Europe of ours might lose its soul. We must make it
possible for authors in all countries of Europe first, and in all countries of the world thereafter, to command respect for the diversity of civilizations. European authors, British authors, American authors, be resolute like us in serving nothing but your art. Your art will make you free.

GARCÍA AMIGO (PPE). — (ES) Mr President, this draft directive arises out of an awareness of a need to harmonize the term of copyright in order to complete the single market. This was stated in a judgement by the Court of Justice in 1989. As a result, the draft directive has the main aim — which is not to say the only aim — of harmonizing the term of copyright. It could have chosen any period of time, but it opted for 70 years. Why? Because, in the first place, this is the longest period, thereby protecting all interests and, secondly, because this is in line with the criteria of two generations after the death of the author, given the increase in life expectancy.

I must say that, overall, my Group supports — and it could not be otherwise, as the Committee on Legal Affairs has already stated —, the series of amendments put forward by the Committee, as described by Mr Bru Purón. However, Mr President, amendments 3 and 12 do raise certain problems for some national factions of my Group. Of course, positions will be divided on these two amendments, the first concerning the concept of copyright, and the second the period of transition for application of the directive in respective Member States.

Mr President, with the exception of these two amendments, my Group gives overall support to the amendments by the Committee for Legal Affairs.

ODDY (S). — Mr President, the purpose of this directive is to harmonize copyright duration in the European Community. In EMI and Patricia, the European Court of Justice held that different periods of protection impede free movement of goods and distort competition. This is why the Commission has brought forward this proposal. In a case involving the Commission, the European Court of Justice held that retroactive withdrawal of legal measures which have conferred rights on individuals is contrary to general law. This is why the proposal harmonizes upwards to 70 years, as Germany gives the most generous protection.

However, I am speaking to object to the Schwartzenberg amendment and in favour of my amendment which defines who holds copyright. The original Commission proposal was silent on the definition. The Schwartzenberg amendment is taken from French law, is an exhaustive list and admits the rights of producers. It is in direct conflict with British law and Mr Schwartzenberg has just said that we should respect other civilisations. It takes away existing rights of producers, a practice condemned by the Court of Justice in the above case.

Some of my civil law colleagues have misunderstood British law. We have no concept of neighbouring rights and the producer cannot be assisted by this concept. Further, my amendment has been taken from the text, voted and approved already by this Parliament contained in the rental directive and cable/satellite directive. This definition was a compromise agreed by the political groups. The Commission has already agreed the definition in the rental rights directive last month in Strasbourg. It is a nonsense to have different definitions in the various directives.

It is also rumoured but not true that the British presidency is in favour of the Schwartzenberg amendment. Today I confirmed that this is not true and the British Government is against the Schwartzenberg amendment.

As far as producers are concerned, I go to the theatre regularly. I have seen many plays produced by different producers. I can assure you, Mr Schwartzenberg, that the production I saw of Richard III set in the Nazi period was completely different from other productions. A recent play I have seen: J B Priestley, "An inspector calls", set in the 1920s was a very stark version compared with others I have seen. And I could give many more examples. I love culture. It is the very breath of my life. I could not live without it. Mr Schwartzenberg’s amendment is trying to take away the rights of the British to have the very rich cultural life and diversity which we currently enjoy. I deplore this.

INGLEWOOD, The Lord (PPE). — During the last part-session of this Parliament I explained to the House that the establishment of a code of law relating to copyright and neighbouring rights seemed to me to be a very necessary element in the creation of the single market. This codification comes not in one piece of legislation, but in a series of directives which, it has been recognized by this House, the Commission and the Council, all hang together seamlessly. Separately, they are of relatively little value; together they are worth a lot. It is for that reason that the attempt to alter the definition of "author" is so deplorable since what is proposed in the amendment from the Committee on Legal Affairs and Citizens' Rights is different from that which Parliament agreed, as did the Commission in the cable and rental directives.

As I explained in this House last month, many compromises are being made to achieve an acceptable outcome: to create this code. The definition of "author" is one which is not naturally attractive to those of us coming from the Anglo-Saxon tradition but we agreed it as part of a compromise. It is now unacceptable to try to get it altered at this stage because that goes to the heart of the compromises contained in the other directives to which I have already referred and to which we have added our support in good faith.

A failure to reinstate the definition contained in the earlier directive, which is in front of us in Mrs Oddy’s amendment is, in my view, tantamount to deliberately wrecking the consensus which has been reached on the whole code.

SCHMIDHUBER, Member of the Commission. — (DE) Mr President, ladies and gentlemen, I should like to thank the House for having dealt so quickly and thoroughly with this proposal, as the Commission attaches great importance to a Council directive harmonizing the term of protection of copyright and other related property rights from two points of view.

First, this proposal is, in terms of the internal market, an essential requirement for the establishment of an internal market in all goods and services which contain an element of creativity. If different terms of protection continue to exist then, in the view of the Court of Justice also, owners of property rights in one Member State could object to the import of goods and services from
other Member States in which the term of protection had expired.

For that reason, the Commission is proposing a high level of protection. In the case of copyright, the term of protection should extend 70 years after the death of the author and in the case of ancillary copyright 50 years after performance or publication. The transitional periods required for a lesser term would delay the establishment of the internal market in this sector to the middle of the next century.

Second, there is the element of protecting and encouraging creativity. The criticism has often been levelled at the Commission that Community harmonization is always directed towards the lowest common denominator and that no account is taken of the special features of cultural life in this process. With this proposal, the Commission shows the opposite to be the case. The amendments contained in the report show that parliament supports the Commission view. The Commission is therefore able to accept the majority, that is ten, of the amendments. Amendments Nos 1, 2, 10, 13 and 14 can be accepted as they stand. The Commission wishes generally to keep an open mind on Amendments Nos 3 and 15 to enable to decide its position in the light of vote. Amendments Nos 6, 8, 9, 11 and 12 are also acceptable subject to some rewording and additions. Some have still, however, to be technically adjusted in line with the directive on leasing and hiring rights.

Only three amendments are unable to be accepted. This applies above all to Amendment No 7 which envisages extending the term of protection for posthumous works to 70 years if they have been published before expiry of the normal terms of protection of copyright. A provision of that kind would have the effect of extending the terms of protection of copyright. That proposal must be considered in relation to Amendment No 9 which also provides for protection for posthumous works and which the Commission is prepared to accept.

However, the discussions in the Council have revealed that the combination of measures is not acceptable to the majority of Member States. The extension of the term of protection of copyright per se was criticized, because if the heirs have omitted to publish the works left to them within a reasonable period, they should not be rewarded with a longer term of protection.

Amendment No 5 represents a further exception to the term of protection in copyright, but we do not consider this a justified exception, particularly since the objective of the directive is in fact to extend the term of protection in the majority of Member States. It is worth mentioning here that only a minority of Member States apply this kind of derogation. For that reason, it is likely to be very difficult to arrange it for the other Member States.

Amendment No 4 cannot be accepted, as the rule of presumption under Art 1(4) which it is intended to supplement, is being rejected by the majority of Member States. The Commission has therefore to withdraw that provision in its entirety.

Let me conclude by thanking the House for its efforts to improve the protection of those who are creative in the literary, artistic, music and film sectors of the Community economy.

INGLEWOOD, The Lord (PPE). — Mr President, I would just like to ask the Commissioner if I have understood him correctly. The content of Amendment No 3 is acceptable to him, yet this time last month a definition of authorship which is entirely incompatible and inconsistent with this definition of authorship was acceptable to the Commission. I would be grateful if the Commission could explain to the House why there is this inconsistency.

SCHMIDHUBER. — (DE) Mr President, the Commission wishes to decide upon that point after the House has voted and in the light of Parliament’s resolution.

ODDY (S). — Mr President, I should just like to reiterate that point. How come the Commission could accept my amendment last month in Strasbourg and not this month?

SCHWARTZENBERG (S). — (FR) Mr President, I would not have spoken but for the fact that, contrary to custom, Lord Inglewood spoke after the Commission representative. I would just like to say that the report presented by Mr Anastassopoulos the definition of copyright was identical to this one and that it was approved by the European Parliament.

PRESIDENT. — This will be put on record.

The debate is closed.

The vote will take place tomorrow at 5 p.m.

21. Transit and storage statistics

PRESIDENT. — The next item is the report (Doc. A3-0335/92) by Mr Donnelly on the proposal from the Commission to the Council (COM(92)097 — C3-0209/92 — SYN 407) for a regulation on transit statistics and storage statistics relating to the trading of goods between Member States.

DONELLY (S), rapporteur. — Mr President, can I just draw the Commission’s attention in particular to Amendment No 2. This matter has been extensively discussed in the Committee on Economic and Monetary Affairs and Industrial Policy. I have received a number of assurances from Vice-President Christophersen about the Commission’s position on some of our amendments and since we have had an extensive discussion and this is largely a technical report to amend an existing communication, I would just formally move it on to the floor of the House.

TYSSEN (PPE). — (NL) Mr President, we all appreciate that intra-Community traffic will undergo changes after 1992 and that the need for transit and storage statistics will increase. But the intrastat regulation bans Member States from gathering these statistics after 1992 unless the Council determines the conditions under which they may continue and that is exactly the point of the Commission proposal. The EPP Group is convinced that the Community must act as a whole and the amendment that reinforces that view in the relevant recital has our full support.

On the conditions referred to in the proposal we welcome the Commission’s determination to cut down on red tape by referring to the already existing information providers. For various reasons the Committee on Economic Affairs has tabled a second amendment to restrict provisionally
B. having regard to the continuing civil war in Sudan and the sufferings of the civilian population,

C. having regard to human rights violations by the Islamic fundamentalist junta, whose victims are mainly Christians and inhabitants of the southern part of the country,

D. whereas the refusal of the Sudanese leadership to countenance freedom of opinion and belief has resulted in Christian missionaries and bishops being placed under house arrest or expelled from the country,

E. outraged at reports by persons who have been expelled from the country that the junta is engaged in ethnic cleansing in the southern part of the country, that dissidents are being eliminated and that the number of civilians killed in Juba alone, in the south of the country, has reached 300 over the last few months,

1. Calls on the ACP-EEC Joint Assembly to examine the human rights situation in Sudan on the agenda of its next meeting;

2. Calls on the Sudanese government to put an end to the persecution and repression of non-Muslims, notably Christians and animists, and to put a halt to pressure on citizens to convert to Islam;

3. Expresses its support for all those striving to bring about the peaceful co-existence of different religions and to ease the plight of the civilian population;

4. Considers that international and local NGOs have an indispensable role to play in this situation and urges them to be allowed to operate without hindrance;

5. Calls for a delegation consisting of members of its Subcommittee on Human Rights to be sent to monitor current human rights violations in the country;

6. Calls for human rights violations by the Sudanese authorities to be investigated by the UN;

7. Instructs its President to forward this resolution to the Commission, the Council, the ACP-EEC Joint Assembly, the United Nations and the Sudanese Government.

6. Copyright and related rights **I

PROPOSAL FOR A DIRECTIVE COM(92)0033 — C3-0189/92 — SYN 395

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

The proposal was approved with the following amendments:

TEXT PROPOSED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES (*)

TEXT AMENDED BY THE EUROPEAN PARLIAMENT

(Amendment No 1)

Recital 2a (new)

Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which the term of...
TEXT PROPOSED BY THE COMMISSION
OF THE EUROPEAN COMMUNITIES

TEXT AMENDED
BY THE EUROPEAN PARLIAMENT

protection is calculated; whereas therefore it is necessary
to harmonize the definition of authorship of a cinematographic or televisual work;

(Amendment No 2)

20th recital

Whereas rightholders should be able to enjoy the longer
terms of protection introduced by this Directive equally
throughout the Community provided their rights have not
yet expired on 31 December 1994.

Whereas, for the Single Market to work properly, the
provisions of this Directive must be applied immediately
it enters into force, while ensuring that rights legitimately
acquired by third parties are respected,

(Amendment No 3)

Article 1(2a) (new)

2a. The author(s) of an audiovisual work shall be the
natural person(s) responsible for the creation of the
work. In the absence of evidence to the contrary, the
following shall be presumed to be the authors: the
director, script-writer, dialogue-writer, adaptor and the
composer of music with or without words which has been
specially written for that work.

(Amendment No 4)

Article 1(4)

4. Anonymous or pseudonymous works shall not be
protected if it is reasonable to presume that their author
has been dead for 70 years.

4. Anonymous or pseudonymous works shall not be
protected if it is reasonable to presume that their author
has been dead for 70 years. Member States may lay down
that a judicial ruling that a person is declared missing,
the validity of which has not expired by the end of a
period established under their own legislation, shall
constitute a presumption of death for the purposes of this
provision.

(Amendment No 5)

Article 1(5)

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.

5. Where a work is published in volumes, parts,
instalments, issues or episodes which are not indepen-
dent and the term of protection runs from the time when
the work was lawfully made available to the public, the
term of protection of the work shall be calculated from
the publication of the last volume, part, instalment, issue
or episode. Appendices, year books and other supple-
ments to a work shall be considered to be independent of
the latter.
(Amendment No 6)

**Article 1(6)**

6. *In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.*

6. *Where collective works or works created by a legal person have not been lawfully made available to the public pursuant to paragraph 3, they shall be protected for 70 years from their creation.*

(Amendment No 7)

**Article 1(6a) (new)**

6a. *In the case of posthumous works, and by way of exception to the first paragraph of this Article, the term of protection shall be 70 years from the date on which the work was lawfully made available to the public, provided this occurs within 70 years after the death of the author.*

(Amendment No 9)

**Article 2(4a) (new)**

4a. *Any person who lawfully makes available to the public a work which is in the public domain, or causes it to be made available, shall have the same rights of exploitation relating thereto as would have fallen to the author. The term of protection of such rights shall be 25 years from the time when the work was first made available to the public.*

(Amendment No 10)

**Article 4(3)**

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, 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 right-holder is a national.*

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, 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 right-holder is a national and may not exceed the term laid down in Article 2.*
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. The terms of protection laid down in this Directive shall run from the event which gives rise to them, as specified for each case referred to in Articles 1 and 2. However, the length of these terms shall be calculated only from the first day of January of the year following the event which gives rise to them.

Article 6(1)

1. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

1a. The provisions of the preceding paragraph shall apply without prejudice to acts of exploitation lawfully carried out before 1 July 1994.

1b. Holders of copyright or related rights shall not be entitled to oppose the continuance of such acts of exploitation as a direct consequence of investment made in good faith before the provisions of this Directive had taken effect. Continuance of the act of exploitation shall include neither the assignment of rights nor other acts of exploitation distinct from the initial act.

1c. The Member States shall provide for the payment to rightholders of adequate remuneration for the acts of exploitation referred to in paragraph 1b, with effect from the date on which the provisions of this Directive enter into force. The Member States shall ensure that such remuneration is settled where the parties do not reach agreement.

Article 8(2)

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to 12 months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

Deleted
TEXT PROPOSED BY THE COMMISSION
OF THE EUROPEAN COMMUNITIES

TEXT AMENDED
BY THE EUROPEAN PARLIAMENT

(Amendment No 14)

Article 10(1), first subparagraph

1. Member States shall bring into force the laws, Regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

1. Member States shall bring into force the laws, Regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 1 July 1994.

LEGISLATIVE RESOLUTION A3-0348/92
(Cooperation procedure: first reading)

Legislative resolution embodying the opinion of the European Parliament on the Commission proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights

The European Parliament,

— having regard to the Commission proposal to the Council (COM(92)0033 — SYN 395) (1),
— having been consulted by the Council pursuant to Articles 57(2), 66, 100a and 113 of the EEC Treaty (C3-0189/92),
— having regard to the report of the Committee on Legal Affairs and Citizens’ Rights and the opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media (A3-0348/92),

1. Approves the Commission proposal subject to Parliament’s amendments and in accordance with the vote thereon;
2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;
3. Reserves the right to open the conciliation should the Council intend to depart from the text approved by Parliament;
4. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;
5. Calls on the Council to incorporate Parliament’s amendments in the common position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;
6. Instructs its President to forward this opinion to the Council and Commission.

hemicycle. It was like an opium den! There are no facilities for non-smokers and I would ask that non-smoking facilities be made available in all the eating establishments in this building.

PRESIDENT. — I will bring that to the attention of the Quaestors and ask them to comply with French law.

(The sitting was suspended at 5.55 p.m. and resumed at 6 p.m.)

IN THE CHAIR: MRS PERY
Vice-President (1)

7. Votes
Report (Doc. A3-0348/92) by Mr Bru Purón, on behalf of the Committee on Legal Affairs and Citizens’ Rights, on the proposal from the Commission to the Council (COM(92)0033/92 — C3-0189/92 — SYN 395) for a directive harmonizing return of protection of copyright and certain related human rights.

Concerning Amendment No 15
BRU PURÓN (S), rapporteur. — (ES) I would simply like to point out, Madam President, that there is an error in the order of vote, namely that Amendment No 15 appears before Amendment No 3. We have to abide by the Rules of Procedure, and Rule 92(2) states that, if two mutually exclusive amendments are tabled — and that is the case at present — the amendment which departs furthest from the original text shall be put to the vote first; given that Amendment No 3 by the Committee on Legal Affairs departs further from the original text than Amendment No 15 by Mrs Oddy and others, I would request that Amendment No 3 should be put to the vote first.

PATTERSON (PPE). — Madam President, I think you will find in fact that there has been no mistake at all. Rule 92(1) says: "Amendments shall have priority over the text to which they relate and shall be put to the vote before that text". If you look at the report itself, you will see that the text to which it relates is a new paragraph which has been inserted by Mr Bru Purón in committee which takes the form of Amendment No 3. This, therefore, is the basic text and the amendment must have priority over it, so I would submit that the original ruling is correct.

FONTAINE (PPE). — (FR) I simply wished to say that I quite agree with the views expressed by our rapporteur, Mr Bru Purón. I have looked closely at this question because I knew that it would arise, and it seems clear to me that Amendment No 3 must be taken before Amendment No 15.

ODDY (S). — Madam President, I think that the House will find that it is Mr Patterson who is correct and that no error has been made by the Parliamentary services. I do not think we should blame them.

PRESIDENT. — The Presidency must be scrupulously objective about this matter. I would simply note that Mrs Fontaine supports Mr Bru Purón and that Ms Oddy supports Mr Patterson. Over and above the technical difficulty, I suspect that there are much more sensitive issues. Rule 92 is certainly clear. The amendment furthest away must be put to the vote. I have the two amendments in front of me. Speaking for myself, I would suggest you follow the rapporteur’s opinion, but this is a matter you must each decide for yourself. For my own part I find it very difficult, on a strictly legal basis, to judge which is further away. In any event, it is you who will choose the amendment you wish to vote. I would, however, like to know your opinion on this change of order. In line with the rapporteur’s view, I propose that we reverse the order of vote.

(Parliament agreed to the request)

Explanations of vote
SCHWARTZENBERG (S). — (FR) I should just like to say thank you to the European Parliament, Madam President, on behalf of all European film-makers and directors and, in particular, on behalf of all the film-makers in Britain.

ODDY (S). — Madam President, I am ashamed of this House. There has been nothing but deception on this report since the beginning. We were told that we had to have urgency on this because of the British presidency. We were told that the British presidency was in favour of Mr Schwartzenberg’s amendment. I have checked with Her Majesty’s Government and this is simply a lie.

I am also ashamed because Parliament is inconsistent. When will it grow up? We voted my text last month. The Commission accepted it. And now, like silly children, we are changing our minds and voting against.

Not only that, we are breaking Community law. Under Verli and Wallace it was said that rights cannot be taken away from individuals without compensation. It is illegal. That is precisely what we are proposing to do. Not only that, we are acting against international law. This is against the Berne Convention. Do we deserve the title of "Parliament" or are we just the puppets of the Commission who have set up Mr Schwartzenberg to do this? There has been nothing but lies and deception. I think Parliament should be ashamed of itself!

(Mixed reactions)
INGLEWOOD, The Lord (PPE). — Mr President, last month the Commission accepted in this House a definition of authorship which was consistent with the Berne Convention, which accommodated both the Anglo-Saxon and the continental French traditions of film-making and which it had previously accepted on a number of occasions on the floor of this House. Suddenly this month it accepts a contradictory definition in this House, without even being prepared to give an explanation of its reasons when specifically asked to do so by me. This definition excludes the Anglo-Saxon tradition, is incompatible with the Berne Convention, is illegal under European law and is inconsistent with its previous statements. Such inconstancy is shameless, such partiality unworthy and such lack of candour unforgivable. Now that the Commission has developed the habit of saying
INGEWOOD, The Lord

something one month and something quite different the next, its integrity as guardian of the Treaty has gone. In the circumstances I am quite sure I speak for all in this House when I say that it would help us in the future when the Commission gives us its position if it would say whether or not a particular statement is to be reversed the following month so that Members know what they can rely on and what is valueless.

(Mixed reactions)

PISONI F. (PPE). — (IT) Madam President, I would point out to the Commission that the introduction of Amendments Nos 7 and 12 extends copyright protection not just for 70 years but for a much longer period and, furthermore, brings in a whole series of derogations. This is detrimental to the exploitation and dissemination of scientific knowledge and also to consumers, because in practice the effect will be to prevent the publication of cheap editions.

I would therefore suggest that the content of these amendments should be reviewed and some minor adjustments considered, so as to avoid effects such as the one I have just mentioned, which are not the intention of the House.

BRU PURÓN (S), rapporteur. — (ES) Madam President, the greatest European expert on copyright — who is German, and therefore not as suspect as a Frenchman or a Spaniard — said in 1980 that the multiplicity of duration of copyright protection in Europe made a free market in written, cinematographic and audiovisual works impossible. And he later regretted the fact that the 1985 green paper did not broach the subject of harmonization. Happily, the Commission has finally realized the need for harmonization, and it has provided for the minimum amount that is needed to create a free market — a free market which, in the long run, will further the cultural wealth of this continent. And I believe that, in this post-industrial era, culture is the greatest thing that Europe has to offer to the rest of the world.

And if we are seeking harmonization, a certain amount of harmony is necessary in this House: the harmony of conduct, for example, that is disrupted when a Member who is in a minority refuses to accept what has been adopted by the majority. That is a strange way for a British Member to look at democracy.

(Appause)

I also believe that it is prejudicial to harmony to accuse Members of being puppets of the Commission or silly children when, in attempting to achieve harmonization, we are not seeking to give precedence to one right over another, but simply trying to establish a level playing field, so that creative works — and the creative works of the British as well as the Greeks, the Spanish and the Danes — are able to reach every corner of the Community and, tomorrow, the globe.

(Appause)

Madam President, it is incredible that worthy and respectable legal traditions such as the common law, which goes back to the thirteenth century and the Magna Carta, should be used to defend the tradition of copyright protection for cinematographic works, which is only 50 years old. We want this copyright directive to be adopted, despite the difficulties that it raises for a few British companies who, in any case, will appreciate that it is essential for the harmonization of legislation which, in turn, will lead to greater cultural wealth.

SALEMA (LDR), in writing. — (PT) I am in favour of harmonizing the protection of copyright and certain neighbouring rights within the Community.

I agree that such harmonization should begin with the establishment of the term of protection at Community level. The Commission is proposing a term of 70 years, starting on the date of the death of the author.

Only one Member State is in favour of this proposal, whereas the majority are proposing a term of 50 years.

Many arguments could be put forward in favour of the longer period and, in the extreme, it could even be suggested that a right of this nature should be perpetual.

I believe that reasoned and objective criteria should be established before the term of protection is fixed at Community level.

In the Committee on Legal Affairs, I put forward proposals to the effect that the term should be fixed at 60 years. All my proposals were rejected. No representative of a parliamentary group or committee has given their opinion on this suggestion in plenary. Since my position appears to be isolated in the House, I shall abstain on this report, thereby maintaining consistency with the positions I have adopted in the past.

I note, however, that the opinion of the Economic and Social Committee also suggests fixing the term at 50 years.

(Parliament adopted the legislative resolution)

* * *

PATTERSON (PPE). — Madam President, I naturally accept your ruling, which was to put to the House the point as to whether Amendment No 3 or Amendment No 15 was further away, and the House decided. But you did not rule on my point about Rule 92(1), concerning was the basic text. I would ask, for the sake of clarification, that the Rules Committee be asked to look into this matter, because it is a separate point from which amendment is furthest away, it is a fundamental matter as to what is considered to be the basic text.

PRESIDENT. — We take note of your request, Mr Patterson. I think we can now continue.

FORD (S). — Madam President, I will be brief. I am unhappy with the product, but I do accept that the process was entirely fair.

* * *

Report (Doc. A3-335/92) by Mr Donnelly, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy, on the proposal from the Commission (COM(92) 97 — C3-209/92 — SYN 407) for a regulation on transit statistics and storage statistics relating to the trading of goods between Member States

(Parliament adopted the legislative resolution)

* * *
II
(Preparatory Acts)

COMMISSION

Amended proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights (*)

(93/C 27/09)

COM(92) 602 final — SYN 395

(Submitted by the Commission pursuant to Article 149 (3) of the EEC Treaty on 7 January 1993)


THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2), 66, 100a and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the Berne Convention for the protection of literary and artistic works and the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations lay down only minimum terms of protection of the rights they refer to, leaving the Contracting States free to grant longer terms; whereas certain Member States have exercised this entitlement; whereas in addition certain Member States have not become party to the Rome Convention;

Whereas there are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas, therefore, with a view to the establishment of the internal market and its operation thereafter, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community;

Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which each term of protection is calculated; whereas therefore it is necessary to harmonize the definition of authorship of a cinematographic or audiovisual work;
Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations;

Whereas certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works;

Whereas at the 1967 Stockholm conference for the revision of the Berne Convention certain Member States' delegations approved a resolution asking the Contracting States to extend the term of copyright protection; whereas in the discussions which have taken place within the World Intellectual Property Organization (WIPO) in preparation for a possible Protocol to the Berne Convention this question has been put on the agenda;

Whereas for the protection of related rights certain Member States have introduced a term of 50 years after publication or dissemination; whereas in other Member States which are currently preparing legislation on the subject the term of protection chosen is likewise 50 years;

Whereas the Community proposals for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) provide for a term of protection for producers of phonograms of 50 years after first publication;

Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to begin operating in practice on 31 December 1992, the harmonization of the term of protection should take place on the basis of a long term;

Whereas in its communication of 17 January 1991 'Follow-up to the green paper — Working programme of the Commission in the field of copyright and neighbouring rights' (1), the Commission stresses the need to harmonize copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation and their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole;

(1) COM(90) 584 final.
Whereas in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonized at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running;

Whereas these terms should be calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions;

Whereas Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes (1) provides that Member States are to protect computer programmes, by copyright, as literary works within the meaning of the Berne Convention (Paris Act 1971); whereas the present Directive harmonizes the term of protection of literary works in the Community; whereas Article 8 of Directive 91/250/EEC, which merely makes provisional arrangements governing the term of protection of computer programmes, should accordingly be repealed;

Whereas Articles 9 and 10 of Council Directive 92/100/EEC of 19 November 1992 on rental right, lending right, and on certain rights related to copyright make provision for minimum terms of protection only, subject to any later harmonization; whereas these Articles should be repealed, in order to align the terms of protection of those rights on the terms laid down in this Directive;

Whereas under the Berne Convention photographic works qualify for a minimum term of protection of only 25 years from their making; whereas, moreover, certain Member States have a composite system for the protection of photographic works, which are protected by copyright if they are considered to be artistic works within the meaning of the Berne Convention and protected under one or more other arrangements if they are not so considered; whereas provision should be made for the complete harmonization of these differing terms of protection;

Whereas in order to avoid differences in the term of protection it is necessary that when a term of protection begins to run in one Member State it should begin to run throughout the Community;

Whereas Article 6 (a) (2) of the Berne Convention provides that the moral rights of the author are to be maintained after his death at least until the expiry of the economic rights; whereas that provision can usefully be taken over in this Directive, without prejudice to any possible later harmonization of moral rights;

(1) OJ No L 122, 17. 5. 1991, p. 42.

(1) OJ No L 346, 27. 11. 1992, p. 61.
Whereas the terms of protection laid down in this Directive should also apply to literary and artistic works whose country of origin within the meaning of the Berne Convention is a third country, but protection should not exceed that fixed in the country of origin of the work;

Whereas where a rightholder who is not a Community national qualifies for protection under an international agreement the term of protection of related rights should be the same as that laid down in this Directive, except that it should not exceed that fixed in the country of which the rightholder is a national;

Whereas this provision must not be allowed to bring Member States into conflict with their international obligations; whereas international obligations may require the Member States to accord different treatment to third-country nationals and their works, and this may lead to disturbances on the Community market; whereas a procedure should therefore be laid down which enables such difficulties to be remedied;

Whereas rightholders should be able to enjoy the longer terms of protection introduced by this Directive equally throughout the Community provided their rights have not yet expired on 31 December 1994,

HAS ADOPTED THIS DIRECTIVE:

Article 1

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 70 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.

3. In the case of anonymous or pseudonymous works, of works considered under the legislation of a Member State to have been created by a legal person and of collective 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.

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

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.
ORIGINAL PROPOSAL

6. In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

AMENDED PROPOSAL

6. In the case of collective works or works created by a legal person which have not been made lawfully available to the public within 70 years from their creation, the protection expires.

Article 1a

1. The authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work.

2. The principal director shall be considered as one of its authors.

3. The Member States may provide, without prejudice to Article 2, paragraph 6 of Directive 92/100/EEC, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work.

Article 2

1. The rights of performers shall run for 50 years from the point at which the fixation of a performance is lawfully published for the first time or, if this has not occurred, after the first lawful communication to the public of the performance if neither of the above has taken place during that time.

2. The rights of producers of phonograms shall run for 50 years from the first publication of the phonogram. However, they shall expire 50 years after the fixation was made if the phonogram has not been published during that time.

3. The rights of producers of the first fixations of cinematographic works and of sequences of moving images, whether or not accompanied by sound, shall expire 50 years after the first publication. However, they shall expire 50 years after the fixation was made if the work or sequence of moving images has not been published during that time.

4. The rights of broadcasting organizations shall run for 50 years from the first transmission of a broadcast.

Article 2a

Any person who for the first time makes lawfully available to the public a work the copyright protection of which has expired, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.

Article 3

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

Unchanged
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, 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.

4. Pending the conclusion of any future international agreements on the term of protection by copyright or related rights, the decision may be taken by means of the procedure set out in Article 9:
   (a) to waive or to vary the rule requiring a comparison of the terms of protection in certain third countries which is laid down in paragraphs 2 and 3, particularly in order to prevent Member States from being brought into conflict with their international obligations; in any event, however, the term granted may not exceed that laid down in Articles 1 and 2;
   (b) to take appropriate measures where protection is granted to third-country nationals by some Member States only, and this fact causes appreciable distortion of competition or deflection of trade in the Community market.

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. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

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

Article 5

The terms of protection subsequent to the death of the author and the terms provided by Article 1 paragraphs 3 to 6 and Articles 2 and 2a shall run from the event which gives rise to them in each particular case. However, the length of these terms shall be calculated only from the first day of January of the year following the death or the event which gives rise to them.

Article 6

Deleted

Unchanged
Article 6a

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 to all works and objects which are protected at least in one Member State, on the date of adoption of the present Directive, under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.

3. Member States shall adopt the necessary provisions which need to be taken by virtue of Community law and national law in order to protect acquired rights and legitimate expectations of third parties.

4. The present Article is without prejudice to Article 13 of Directive 92/100/EEC.

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

Article 7

1. Article 8 of Directive 91/250/EEC is hereby deleted.

2. Articles 9 and 10 of Directive 92/100/EEC are hereby deleted.

Article 8

1. Member States shall immediately notify the Commission of any plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to 12 months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

Article 9

The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.
**ORIGINAL PROPOSAL**

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

**Article 10**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

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

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

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

**Article 11**

This Directive is addressed to the Member States.

---

**AMENDED PROPOSAL**

**Article 10**

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

Unchanged
At its meeting held on 15 January 1993, the Working Party on Intellectual Property (Copyright) examined Articles 2 to 6 of the above proposal on the basis of the consolidated text contained in 4398/93 PI 7 CULTURE 6, Annex I.

2. The Commission services also made available advance copies of the Commission's amended proposal, which has since been circulated under reference 4483/93 PI 9 CULTURE 8. The Commission representative pointed out that the stage reached in the Working Party's discussions on a number of points was reflected more accurately in the consolidated text than in the Commission's amended proposal, since the European Parliament had not proposed amendments corresponding to the consolidated text on these points; however, this would not prevent the Commission services from continuing to negotiate
on the basis of the consolidated text, with a view to the adoption by the Council of a common position as soon as possible.

Article 2(1)

3. The Working Party noted that several words had been omitted from the English-language version of this provision in the Commission's amended proposal.

4. Following questions by the Belgian delegation as to the difference between the terms "the first lawful publication of the fixation of the performance" and "the first lawful communication to the public of the performance" in the consolidated text, the Commission representative was invited to prepare a recital explaining these terms. The Belgian and Portuguese delegations expressed scrutiny reservations on paragraph 1 pending examination of that recital; the scrutiny reservation of the Portuguese delegation also extended to paragraph 2.

5. The French delegation asked whether the term of protection provided for in Article 2(1) would apply where a performance took place in a third country and a fixation of that performance was made and published in that third country. The Commission representative replied that in the case of a performer who was a Community national, Article 2(1) would apply irrespective of whether the events concerned took place in the Community or in a third country; in the case of a performer who was not a Community national, the application of Article 2(1) would depend upon the conditions of Article 4(3) being met.

6. The United Kingdom delegation drew attention to an anomaly resulting from Article 2(1) and (2): in the event of a fixation of a performance being broadcast before that
fixation was published, the rights of the performers would expire under Article 2(1) before the expiry of the rights of the producer of the same fixation under Article 2(2). The Commission representative was invited to consider the possibility of an additional provision which would prolong the rights of the performers until the expiry of the rights of the phonogram producer in such a case.

Article 2(3)

7. The United Kingdom and Irish delegations expressed reservations on this paragraph pending discussion of Article 1bis (Cinematographic or audiovisual works).

Article 2bis

8. The Commission representative explained that the consolidated text of this provision in Annex I of 4398/93, which had been drawn up following the discussion in the Internal Market Council on 10 November 1992 and following the adoption of the European Parliament's opinion on 19 November 1992, and which corresponded to the Commission's amended proposal, contained the following changes in relation to the previous non-paper (Annex I of 4196/93):

- this provision had been moved from Article 1bis to Article 2bis, making it clear that the protection provided for was not copyright protection, but that of a related right; in this respect, the Commission had accepted the substance of amendment No. 9 proposed by the European Parliament, but not that of amendment No. 7;

- the term of protection now proposed was 25 years, as proposed by the European Parliament in amendment No. 9.

\[1\]

A possible provision to this effect appears as Article 2(5) in 4465/93 PI 8 CULTURE 7.
9. The Netherlands and Portuguese delegations expressed reservations on the need for a provision of this nature.

10. The Luxembourg delegation considered that this provision was too general, and that its scope should be limited.

11. Following a question from the Greek delegation as to the relationship between this provision and Article 1(1), the Commission representative explained that where a work was first lawfully made available to the public in the seventy years which followed the death of the author, Article 1(1) would apply; where a work was first lawfully made available to the public after the expiry of this seventy-year period from the death of the author, Article 2bis would apply.

12. The French delegation, supported by the Belgian and Irish delegations, considered that the combination of Articles 1(1) and 2bis would mean that a work first lawfully made available to the public shortly before the expiry of the seventy-year period from the death of the author would enjoy a shorter term of protection than if it were not published until after the expiry of that period: thus a work first published 65 years after the death of the author would enjoy a term of protection of only five years, while a work first published 75 years after the death of the author would enjoy a term of protection of 25 years. These delegations considered that a provision should be added to ensure that works first lawfully made available to the public shortly before the expiry of the 70-year period set out in Article 1(1) did not receive a shorter period of protection than works covered by Article 2bis. The Belgian delegation reserved the right to submit a written proposal to this effect.
The German delegation was prepared to consider a proposal of this nature if it were supported by a majority of delegations.

The Commission representative pointed out that the purposes of Article 1(1) and Article 2bis were different: the purpose of Article 1(1) was to safeguard the interests of the author and his heirs during his lifetime and for a certain period after his death; once that period had expired, the main interest to be taken into consideration was the interest of the public in the publication of newly-discovered works, which Article 2bis was intended to encourage. He also pointed out that the Directive would have the effect of increasing the term of copyright protection in most Member States from 50 to 70 years after the death of the author, and therefore saw no need to provide for an additional term of protection for works first published towards the end of this term. This view was shared by the Danish, Netherlands, Portuguese and United Kingdom delegations.

13. The United Kingdom delegation noted that the condition, which had been included in the compromise solution put to the Internal Market Council by the United Kingdom Presidency (9836/92 PI 114 CULTURE 114, point 11), that this provision would apply only where the work was first lawfully made available to the public within 50 years after the expiry of normal copyright protection, did not appear in the consolidated text or the Commission’s amended proposal. This delegation and the Danish delegation entered a reservation on the absence of this condition, considering that without it Article 2bis would imply latent copyright protection for an indefinite period.
The Commission representative stated that this condition had not been included in the consolidated text or in the Commission's amended proposal in the light of the objections made to it in the Internal Market Council. Moreover, it had been made clear that the right conferred by Article 2bis was not copyright, but a related right. It should also be borne in mind that the term now proposed was 25 years, not 50 or 70 years as envisaged earlier.

14. The French delegation expressed a reservation on the nature of the protection conferred by Article 2bis, considering that it should be copyright protection rather than a related right. It feared in particular that in the event of infringement of this right, the sanctions available for copyright infringement could not be applied.

The Commission representative drew attention to the purpose of Article 2bis (see point 12 above), which justified a related right rather than copyright. He also indicated that, since this provision specified that the protection would be "equivalent to the economic rights of the author", the sanctions available for copyright infringement could be applied.

15. The Belgian delegation withdrew the reservation which it had made in the Internal Market Council in respect of the protection under this provision being equivalent to the economic rights of the author.

16. The Italian delegation, while welcoming the fact that it had now been made clear that the right conferred by this provision was a related right, considered it unnecessary to specify that the protection was "equivalent to the economic rights of the author" and expressed a reservation in this respect.
The Commission representative pointed out that without this element, Member States would be free to determine the contents of this right, with the danger that different contents in different Member States could disrupt the free flow of the works concerned within the Community.

17. The French, Greek and Irish delegations expressed a reservation with regard to the term of 25 years proposed, considering that the term should be at least 50 years.

The German and Italian delegations were prepared to consider a term of 50 years, but could accept a term of 25 years.

The Belgian, Danish and United Kingdom delegations were prepared to accept a term of 25 years as a reasonable compromise between the position of those who considered a provision of this nature to be unnecessary and the position of those who advocated a term of 50 years or more.

18. The Italian delegation asked whether the category of works known under Italian law as "critical works" would fall under this provision. The Commission representative considered that this category of works would be covered by the concept of collections of works as provided for in Article 2(5) of the Berne Convention, and therefore was more likely to fall under Article 1 of the Directive.

19. In this context, the German delegation considered that the category of works known under German law as "scientific works", which were protected by a related right, were not covered by this Directive. The Commission representative stated that if Article 2bis were adopted, all Member States would have to adopt a provision covering all works,
including scientific works, which were first lawfully made available to the public after the expiry of copyright protection.

20. The United Kingdom delegation asked for confirmation that the Directive would not affect the United Kingdom's "published edition right". The Commission representative stated that the United Kingdom would have to provide for protection under Article 2bis of the Directive; to the extent that the "published edition right" overlapped the right provided for under Article 2bis, the latter would prevail; to the extent that it did not overlap, it could be maintained in United Kingdom law.

21. In the light of the discussion of this Article, the Chairman appealed to delegations to consider the consolidated text as a reasonable compromise between the various positions.

Article 3

22. The Danish, German, French and United Kingdom delegations considered that this provision, which was unchanged from the Commission's original proposal, was insufficient, since it would allow some Member States to continue to protect photographic works only, to the exclusion of "ordinary" photographs, which are protected in other Member States. Attention was drawn to the compromise solution put forward by the United Kingdom Presidency, whereby a sentence would be added obliging those Member States which do not at present protect "ordinary" photographs to introduce protection for them (9836/92 PI 114 CULTURE 114, point 15).
The Commission representative pointed out that the solution put forward by the United Kingdom Presidency had not been included in either the consolidated text or the Commission's amended proposal since there had been insufficient consensus in favour of it at the Internal Market Council, and since the European Parliament had made no proposal to this effect.

The Italian, Netherlands and Portuguese delegations expressed a preference for the Commission's proposal, considering that there was no need to harmonize the categories of photographs to be protected. The Greek delegation was also not in favour of protecting "ordinary" photographs.

The Belgian delegation considered that both the Commission's proposal and the United Kingdom Presidency solution had the disadvantage of not distinguishing between copyright protection and protection by rights related to copyright.

23. The Danish delegation suggested orally an alternative solution for this Article². Other delegations reserved their positions on this alternative solution until they had seen it in writing.

Article 4(1)

24. The Danish, German, French, Irish, Netherlands and United Kingdom delegations expressed scrutiny reservations on the need for this paragraph, considering that it would be unnecessary if Articles 1 to 3 made it clear when the terms concerned began to run, and pointing out that the Commission services had been invited to provide written

²This alternative solution has since been submitted in writing, and has been incorporated in 4465/93 PI 8 CULTURE 7 as Variant 2 of Article 3.
explanations of how Article 4(1) was intended to operate in relation to those Articles (4196/93 PI 3 CULTURE 1, point 30).

The Commission representative stated that the Commission services could not provide such written explanations until a consensus had been reached on the contents of Articles 1 to 3.

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

The French delegation expressed a reservation on the inclusion of Article 113 of the EEC Treaty in the legal basis for the Directive.

The Commission representative considered that Article 113 was necessary as a legal basis for the external aspects covered in Article 4(2), (3) and (4).

The representative of the Council Legal Service considered that there were no elements in the proposed Directive, including Article 4, that concerned exchanges of goods with third countries, and that therefore Article 113 was not necessary as a legal basis.

In the light of this statement, all delegations considered that Article 113 should be deleted from the legal basis for the Directive.

The Commission representative expressed a reservation on this deletion.
Article 5

26. The French delegation expressed a preference for the Commission's amended proposal, based on an amendment proposed by the European Parliament, over the consolidated text. It feared that the consolidated text could be interpreted as meaning that there would be no protection between the date of the event which gave rise to a term of protection and 1 January of the following year.

The Working Party took note of this preference.

Article 6

27. The Irish and United Kingdom delegations maintained their reservation on the inclusion of a provision concerning moral rights in the Directive, pointing out that the Commission was still considering whether or not there was a need for Community action on moral rights in general. They considered that no evidence had been provided that any substantial problem had arisen in the field of moral rights with an effect on the operation of the internal market, and that inclusion of a provision of this nature in this Directive would be seen as a precedent for the Council accepting the need for Community action on moral rights.

The French delegation also maintained its reservation on the inclusion of a provision concerning moral rights in this Directive. Unlike the Irish and United Kingdom delegations, it was in favour of harmonization of the term of protection of moral rights, but considered that this should be done in an instrument covering all aspects of moral rights, rather than dealing with the term of moral rights in this Directive in isolation from the other aspects of moral rights.
The Portuguese delegation also expressed a reservation on this Article.

In the light of these reservations, the Commission representative put forward an oral suggestion for an alternative solution for this Article, which could take the form of either an operative provision or a recital.

The Working Party agreed to continue discussion of this Article at its next meeting when delegations would have had the opportunity to examine this alternative solution.

Other business

28. The Chairman invited delegations which wished to make written contributions to be considered at the Working Party's next meeting to forward them to the Secretariat as soon as possible.

29. It was agreed that the Secretariat would prepare a revised edition of the consolidated text, incorporating the reservations expressed at this meeting.

3 This alternative solution has since been submitted in writing and has been incorporated in 4465/93 PI 8 CULTURE 7 as Variant 2 of Article 6.

4 This consolidated text has been circulated under reference 4465/93 PI 8 CULTURE 7.
At the meeting of the Working Party on Intellectual Property (Copyright) on 15 January 1993, the United Kingdom delegation offered to prepare a text on the subject of cinematographic and audiovisual works.

Delegations will find in the Annex wording prepared by the United Kingdom delegation which would introduce the so-called "Swiss Approach" to authorship into the text of the Directive.

The underlined sections indicate alternative or additional wording compared with the draft amended proposal circulated in the Working Party on 15 January.

The United Kingdom delegation emphasises that this non-paper is put forward purely to facilitate the discussion and does not prejudice its position in subsequent negotiations.
Draft Council Directive harmonising the term of protection of copyright and certain related rights

Article 1

DURATION OF AUTHOR’S RIGHTS

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

Article 1 bis

CINEMATOGRAPHIC AND AUDIOVISUAL WORKS

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

2. In the case of a cinematographic or audiovisual work considered under the laws of a Member State to be a work of joint authorship, the rights of the authors shall expire 50 years after the death of its principal director.

3. The Member States may provide, without prejudice to Article 2, paragraph 6 of Directive 92/100/EEC, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the author or authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorised the exploitation of their work.
RESULTATS DES TRAVAUX

du : Groupe "Propriété intellectuelle" (Droit d'auteur)

en date du : 2 décembre 1992

n° doc. préc. 4196/93 PI 3 CULTURE 1
n° prop. Cion 5509/92 PI 33 CULTURE 21

Objet : Proposition de directive du Conseil relative à l'harmonisation de la durée de protection du droit d'auteur et de certains droits voisins

1. Lors de sa réunion du 2 décembre 1992, le groupe "Propriété intellectuelle" (Droit d'auteur) a examiné les articles 1er et 1er bis de la proposition citée en objet sur la base d'un texte consolidé figurant en annexe I.

Depuis la réunion précédente du groupe consacrée au même sujet, le Conseil "Marché intérieur" a procédé à un débat d'orientation sur certains aspects de la proposition de directive lors de la session du 10 novembre 1992 et le Parlement européen a rendu son avis le 13 novembre 1992.

Article 1er paragraphe 1

2. Les délégations irlandaise et néerlandaise ont maintenu une réserve sur la durée proposée de 70 ans post mortem autoris (pma), estimant qu'une durée de 50 ans pma était suffisante.

La délégation luxembourgeoise a également marqué une préférence pour une durée de 50 ans pma.
Les délégations danoise et portugaise ainsi que la délégation du Royaume-Uni ont émis une réserve d'attente sur la durée proposée de 70 ans pma. Elles ont indiqué qu'elles seraient prêtes à envisager cette durée d'un œil favorable si des solutions satisfaisantes étaient trouvées pour d'autres dispositions de la directive.

La délégation allemande a fait observer qu'elle avait levé sa réserve concernant la durée proposée au titre de l'article 2 paragraphes 2, 3 et 4 à condition que la durée de protection prévue à l'article 1er paragraphe 1 soit de 70 ans pma.

Article 1er paragraphe 2

3. Le groupe a noté que cette disposition ne suscitait pas de réserves.

Article 1er paragraphe 3 point a)

4. Le groupe a noté que cette disposition ne suscitait pas de réserves autres que celles concernant la durée proposée de 70 ans pma, qui sont liées à celles figurant au point 2 ci-dessus.

Article 1er paragraphe 3 point b)

5. Les délégations belge, française, italienne et néerlandaise ne peuvent accepter l'optique dans laquelle s'inscrit cette disposition. Elles ont estimé que, pour des œuvres de cette nature, la personne qui a pris l'initiative de créer l'œuvre devrait avoir un droit sur l'ensemble de l'œuvre, pour lequel la durée de protection serait calculée à partir de la date de publication, sans préjudice des droits de chaque auteur pour sa propre contribution. Par ailleurs, ce qui, selon ces délégations, caractérise ces œuvres n'est pas l'impossibilité d'identifier les auteurs qui y ont contribué mais le fait que les contributions se fondent de telle façon qu'il est impossible d'attribuer les différentes contributions à des auteurs bien déterminés.
Le représentant de la Commission et le président ont expliqué que l’approche préconisée par les délégations n’était pas compatible avec la Convention de Berne pour la protection des œuvres littéraires et artistiques. Aux termes de cette convention, si un ou plusieurs auteurs peuvent être identifiés, la durée de protection doit être calculée à partir de la mort de l’auteur ou du dernier survivant des collaborateurs. Ce n’est que lorsque l’auteur ou les auteurs ne peuvent pas être identifiés et que, par conséquent, la durée de protection ne peut pas être calculée en fonction de leur mort, que la durée de protection peut être calculée à partir de la date à laquelle l’œuvre a été licitement rendue accessible au public. Le facteur pertinent pour déterminer le mode de calcul de la durée de protection est donc le fait que l’auteur ou les auteurs peuvent ou non être identifiés et non le fait que les contributions à l’œuvre peuvent ou non être attribuées à des auteurs déterminés. Lorsqu’un au moins des auteurs peut être identifié, la durée de protection serait celle résultant de l’article 1er paragraphe 1 ou 2 de la directive, selon le cas. Lorsque les auteurs ne peuvent pas être identifiés, la durée de protection serait celle résultant de l’article 1er paragraphe 3 point b). Cela signifie que les États membres dont la législation actuelle prévoit que la durée de protection des œuvres collectives est calculée à partir de la date de publication de l’œuvre, même lorsque les auteurs peuvent être identifiés, devraient, en raison de la directive, modifier leurs dispositions législatives afin de les rendre conformes à la Convention de Berne.

Dans le cas de recueils d’œuvres littéraires ou artistiques au sens de l’article 2 paragraphe 5 de la Convention de Berne, ces principes s’appliqueraient comme suit :

- dans le cas d’une anthologie d’œuvres existantes, le ou les rédacteurs bénéficieraient de la durée de protection prévue à l’article 1er paragraphe 1 ou 2 de la directive pour l’anthologie en tant que telle, sans préjudice de tout droit d’auteur qui subsisterait pour chacune des œuvres faisant partie de l’anthologie ;
- dans le cas de plusieurs auteurs créant ensemble une nouvelle oeuvre, par exemple une encyclopédie, si ces auteurs peuvent être identifiés, la durée de protection serait celle résultant de l’article 1er paragraphe 1 ou 2. Si les auteurs ne peuvent pas être identifiés, la durée de la protection de l’oeuvre en tant que telle serait celle résultant de l’article 1er paragraphe 3 point b).

La délégation allemande et la délégation du Royaume-Uni ont approuvé cette analyse.

6. Le représentant de la Commission a en outre fourni les précisions suivantes :

a) en vertu de l’article 1er de la directive, seules les personnes physiques peuvent être des auteurs ; cependant, aucune disposition de la directive n’empêche les États membres de prévoir que les personnes morales peuvent être des auteurs lorsque le but n’est pas la fixation de la durée de protection ;

b) la question de la paternité de l’ensemble ou d’une partie d’une oeuvre n’est pas régie par la directive ; c’est aux tribunaux qu’il appartient de trancher au besoin ;

c) la directive n’empêche pas les États membres de prévoir la réfragabilité des présomptions de transfert de droits.

7. Le représentant de la Commission a proposé de préciser quelque peu le libellé de l’article 1er paragraphe 3 point b) et d’ajouter des considérants à la lumière de la discussion.

Article 1er paragraphe 5

8. Le représentant de la Commission a déclaré que les services de la Commission n’étaient pas favorables à l’amendement que propose le Parlement européen pour ce paragraphe, préférant conserver la proposition initiale de la Commission, qui correspond au texte consolidé. La délégation italienne partage cet avis.
Les délégations danoise, allemande et espagnole ont indiqué que, bien que préférant une solution différente de celle proposée par la Commission, elles étaient prêtes à accepter cette dernière.

La délégation française a fait savoir qu'elle revoirait sa position sur ce paragraphe à la lumière de l'examen de l'article 1er paragraphe 3 point b).

Article 1er paragraphe 6

9. Ce paragraphe n'a pas été examiné lors de la réunion.

Article 1er bis

10. Le représentant de la Commission a indiqué que le Parlement européen a adopté un amendement sur la paternité des œuvres cinématographiques et audiovisuelles, connu sous le nom d'amendement Schwartzenberg (1). La Commission n'a pas encore décidé si elle allait ou non insérer cet amendement dans sa proposition révisée. Cependant, les services de la Commission ont estimé qu'une disposition concernant la paternité des œuvres cinématographiques et audiovisuelles devait être insérée dans la directive, dont le contenu devrait au moins correspondre à l'article 2 paragraphe 2 (2) de la directive 92/100/CEE du Conseil, du 19 novembre 1992, relative au droit de location et de prêt et à certains droits voisins du droit d'auteur dans le domaine de la propriété intellectuelle (3).

(1) "Ont la qualité d'auteur(s) d'œuvres audiovisuelles la ou les personnes physiques qui assurent la création intellectuelle de l'œuvre. Sauf preuve du contraire sont présumés avoir cette qualité : le réalisateur, le scénariste, le dialoguiste, l'adaptateur et l'auteur de compositions musicales, avec ou sans paroles, spécialement réalisées pour l'œuvre."

(2) "Aux fins de la présente directive, le réalisateur principal d'une œuvre cinématographique ou audiovisuelle est considéré comme l'auteur ou un des auteurs. Les États membres peuvent prévoir que d'autres personnes sont considérées comme co-auteurs."

(3) JO n° L 346 du 27.11.1992, p. 61.
11. La délégation française a diffusé une note sur le système français de paternité des œuvres audiovisuelles, qui est à la base de l’amendement Schwartzenberg. Cette note figure en annexe II.

12. La plupart des délégations ont déclaré qu’elles n’avaient pas encore arrêté de position définitive sur la question de la paternité des œuvres cinématographiques et audiovisuelles.

13. Les délégations belge, française, italienne et portugaise ont réagi favorablement à l’amendement proposé par le Parlement européen. La délégation belge préférerait remplacer l’expression “la ou les personnes physiques qui assurent la création intellectuelle de l’œuvre” par une référence à la ou les personnes qui ont apporté une contribution substantielle à l’œuvre.

La délégation allemande est disposée à envisager une disposition prévoyant que la durée de la protection d’une œuvre cinématographique ou audiovisuelle serait calculée à partir de la mort du dernier des collaborateurs, comme ce serait le cas en vertu de l’amendement proposé par le Parlement européen. Elle a cependant exprimé des hésitations à propos de la seconde phrase de l’amendement, en particulier sur l’expression “sauf preuve du contraire” et elle a souligné l’incertitude quant à la possibilité pour d’autres catégories de personnes que celles citées d’être considérées comme auteurs d’une œuvre cinématographique ou audiovisuelle. Ces préoccupations sont partagées par la délégation néerlandaise.

Les délégations belge et française ont expliqué que la liste n’excluait pas que d’autres catégories de collaborateurs soient considérées comme auteurs ; les personnes figurant sur cette liste sont généralement celles dont la contribution créative à une œuvre cinématographique ou audiovisuelle est la plus grande.

La délégation irlandaise et la délégation du Royaume-Uni sont opposées à l’insertion de cet amendement dans la directive.
14. Les délégations allemande et néerlandaise ont indiqué qu’elles seraient prêtes à envisager une disposition correspondant à l’article 2 paragraphe 2 de la directive "Location" (cf. note (2) de la page 5).

15. La délégation du Royaume-Uni, appuyée par les délégations irlandaise et luxembourgeoise, a déclaré qu’elle préférerait que la durée de protection d’une œuvre cinématographique ou audiovisuelle soit une durée fixe calculée à partir de la date de publication de l’œuvre ; elle ne doit pas nécessairement être de 70 ans. Cette solution offrirait un degré de certitude bien plus grand que l’amendement du Parlement européen quant à la date d’expiration de la protection.

La délégation portugaise a émis des doutes sur cette solution et la délégation française y est opposée parce qu’il en résulterait une durée de protection plus courte que celle existant actuellement dans certains États membres.

16. La délégation du Royaume-Uni a en outre suggéré d’étudier la loi adoptée récemment en la matière par la Suisse : s’agissant des autres œuvres collectives, c’est la règle normale de la Convention de Berne qui s’applique (à savoir que, lorsque le droit d’auteur appartient en commun aux collaborateurs d’une œuvre, la durée de protection est calculée à partir de la mort du dernier survivant des collaborateurs) tandis que, dans le cas d’œuvres cinématographiques ou audiovisuelles, la durée de protection est calculée à partir de la mort du réalisateur.

Les délégations belge, danoise, allemande, espagnole, italienne et portugaise ont manifesté de l’intérêt pour cette formule.

La délégation française est opposée à une disposition de ce type parce que, sauf lorsque le réalisateur est le dernier survivant de collaborateurs, il en résulterait une durée de protection plus courte que celle existant actuellement dans certains États membre.
ARRÊTE LA PRÉSENTE DIRECTIVE :

**Article premier**

**DURÉE DU DROIT D'AUTEUR**

1. Le droit d'auteur d'œuvres littéraires et artistiques au sens de l'article 2 de la convention de Berne dure toute la vie de l'auteur et 70 ans après sa mort, quel que soit le moment où l'œuvre a été légitimement rendue accessible au public.

2. Lorsque le droit d'auteur appartient en commun aux collaborateurs d'une œuvre, le délai visé au paragraphe 1 est calculé à partir de la mort du dernier survivant des collaborateurs.

3.a) Pour les œuvres anonymes ou pseudonymes, la durée de protection est de 70 ans après que l'œuvre a été légitimement rendue accessible au public. Toutefois, quand le pseudonyme adopté par l'auteur ne laisse aucun doute sur son identité ou si l'auteur révèle son identité pendant la période visée à la première phrase, le délai de protection visé au paragraphe 1 s'applique.

b) Pour les œuvres :

   - qui sont créées par plusieurs auteurs sur l'initiative et sous la direction d'une personne physique ou morale, dont il est entendu qu'elles seront divulguées uniquement par cette personne et sous son nom, et

   - qui consistent en contributions d'auteurs impossibles à identifier,

   la durée est calculée conformément aux dispositions du paragraphe a) ci-dessus relatif aux œuvres anonymes ou pseudonymes.

Ce paragraphe est sans préjudice des droits des auteurs identifiés dont les contributions sont incluses dans de telles œuvres, auquel cas les paragraphes 1 ou 2 s'appliquent.

4. Supprimé.

5. Pour les œuvres publiées par volumes, parties, fascicules, numéros ou épisodes, dont le délai de protection court à partir du moment où l'œuvre a été légitimement rendue accessible au public, le délai de protection court pour chaque élément pris séparément.
6. Pour les œuvres dont la durée de protection n'est pas calculée à partir de la mort de l'auteur ou des auteurs et qui n'ont pas été licitement rendues accessibles au public pendant les 70 ans qui suivent leur création, la protection prend fin.

Article premier bis

ŒUVRES CINÉMATOGRAPHIQUES OU AUDIOVISUELLES

...(à décider).

Article 2

DUREE DES DROITS VOISINS

1. Les droits des artistes-interprètes ou exécutants expirent 50 ans après la première publication licite de la fixation de l'exécution ou, à défaut de publication, après la première communication licite au public de l'exécution. Toutefois, ils expirent 50 ans après l'exécution si la publication ou la communication au public n'a pas eu lieu dans ce délai.

2. Les droits des producteurs de phonogrammes expirent 50 ans après la première publication licite du phonogramme. Toutefois, ils expirent 50 ans après la fixation si le phonogramme n'a pas été licitement publié dans ce délai.

3. Les droits des producteurs de premières fixations de films expirent 50 ans après la première communication licite au public. Toutefois, ils expirent 50 ans après la fixation si le film n'a pas été licitement communiqué au public dans ce délai. Le terme "film" désigne une œuvre cinématographique ou audiovisuelle ou séquence animée d'images, accompagnées ou non de son.

4. Les droits des organismes de radiodiffusion expirent 50 ans après la première diffusion d'une émission, que cette émission soit diffusée sans fil ou avec fil, y compris par câble ou par satellite.

considerant additionnel

considérant que les droits des organismes de radiodiffusion sur leurs émissions, que celles-ci soient diffusées sans fil ou avec fil, y compris par câble ou par satellite, ne doivent pas être perpétuels; qu'il est donc nécessaire de faire courir la durée de protection seulement après la première diffusion d'une émission particulière; que cette disposition est destinée à éviter qu'une nouvelle durée de protection ne coure lorsqu'une émission est identique à une précédente;
Article 2 bis

PROTECTION DES OEUVRES NON PUBLIÉES

La personne qui pour la première fois rend licitement accessible au public une œuvre pour laquelle la protection du droit d’auteur a expiré, bénéficie d’une protection équivalente à celle des droits patrimoniaux de l’auteur. La durée de protection de ces droits est de 25 ans à compter du moment où l’œuvre a été licitement rendue accessible au public.

Article 3

PROTECTION DES PHOTOGRAPHIES

Les photographies protégées bénéficient de la durée de protection de l’article premier.

Article 4

FAIT GENERATEUR ET PROTECTION VIS-A-VIS DES PAYS TIERS

1. Lorsqu’un des délais visés aux articles 1 à 3 commence à courir dans un État membre, il est réputé courir dans toute la Communauté.

2. Pour les œuvres dont le pays d’origine, au sens des dispositions de la convention de Berne, est un pays tiers et dont l’auteur n’est pas un ressortissant communautaire, la protection accordée dans les États membres expire au plus tard à la date d’échéance de la protection dans le pays d’origine de l’œuvre sans pouvoir dépasser la durée prévue à l’article premier.

3. Les durées de protection prévues à l’article 2 valent également pour les titulaires qui ne sont pas des ressortissants communautaires, pour autant que la protection leur soit accordée par les États membres.

Toutefois, sans préjudice des obligations internationales des États membres, la protection accordée par les États membres expire au plus tard à la date d’échéance prévue dans le pays tiers dont le titulaire est ressortissant, sans pouvoir dépasser la durée prévue aux articles 2 ou 2 bis.

4. Les États membres qui garantissent, à la date d’adoption de la présente directive, notamment en exécution de leurs obligations internationales, une durée de protection plus longue que celle qui résulterait des dispositions de la présente directive, peuvent maintenir cette protection jusqu’à la conclusion d’accords internationaux sur la durée de protection du droit d’auteur ou des droits voisins.
Article 5
CALCUL DES DELAIS

Les délais prévus par la présente directive sont calculés à partir du premier janvier de l'année qui suit leur fait générateur.

Article 6
DROITS MORAUX

Les droits moraux reconnus à l'auteur sont maintenus au moins jusqu'à l'extinction des droits patrimoniaux de l'auteur.

Article 6 bis
APPLICATION DANS LE TEMPS

1. Les dispositions de la présente directive n'ont pas pour effet de raccourcir des durées de protection en cours qui sont garanties par les législations des Etats membres. Elles sont sans préjudice des actes d'exploitation accomplis avant le 1er juillet 1994.

2. Les dispositions de la présente directive s'appliquent à toutes les œuvres ou objets qui, à la date d'adoption de la présente directive, sont protégés dans un des Etats membres au moins en raison de l'application des dispositions nationales relatives aux droits d'auteur ou aux droits voisins ou qui répondent à cette date aux critères de protection prévus par les dispositions de la directive du Conseil n°. 92/100/CEE.

3. Les Etats membres adoptent les dispositions nécessaires afin d'assurer la protection des droits acquis et de la confiance légitime des tiers qui s'imposent en vertu du droit communautaire et de leur droit national.

4. Les dispositions du présent article sont sans préjudice de l'article 13 de la directive du Conseil n°. 92/100/CEE.

5. Les Etats membres peuvent déterminer la date de mise en application de l'article premier bis, à condition qu'elle ne soit pas postérieure au 1er juillet 1997.

Article 7
ADAPTATION TECHNIQUE

1. L'article 8 de la directive du Conseil n°. 91/250/CEE est supprimé.

2. Les articles 11 et 12 de la directive du Conseil n°. 92/100/CEE sont supprimés.
Article 8

PROCEDURE DE NOTIFICATION

Les États membres communiquent immédiatement à la Commission tout projet de nouveaux droits voisins et indiquent les motifs qui justifient leur introduction, ainsi que leur durée prévue.

Article 9

Supprimé.

Article 10

DISPOSITIONS GÉNÉRALES

1. Les États membres mettent en vigueur les mesures législatives, réglementaires et administratives nécessaires pour se conformer aux dispositions des articles 1 à 7, au plus tard le 1er juillet 1994.

Lorsque les États membres adoptent ces dispositions, celles-ci contiennent une référence à la présente directive ou sont accompagnées d'une telle référence lors de leur publication officielle. Les modalités de cette référence sont arrêtées par les États membres.

Les États membres communiquent à la Commission le texte des dispositions de droit interne qu'ils adoptent dans le domaine régi par la présente directive.

2. Les États membres appliquent les dispositions de l'article 8 dès la prise d'effet de la présente directive.

Article 11

Les États membres sont destinataires de la présente directive.

Fait à Bruxelles, le

Par le Conseil

4398/93
NOTE
SUR LA QUALITE DE COAUTEUR
DE L'OEUVRE AUDIOVISUELLE

I - L'oeuvre audiovisuelle se caractérise par le fait que sa création nécessite, la plupart du temps, la participation d'un nombre important de créateurs intervenant principalement dans les domaines de l'écriture, de la réalisation et de la composition musicale. Par ailleurs, l'oeuvre audiovisuelle n'existrait pas sans l'initiative d'une personne physique ou morale, le producteur, qui "prend l'initiative et la responsabilité de la réalisation " en pratique en assurant le financement et la garantie la bonne fin.

Un régime particulier de coopération entre le producteur et les auteurs de l'oeuvre a donc été mis en place. Il se traduit notamment par une détermination des personnes susceptibles de faire valoir leur droit en qualité d'auteur et un mécanisme de présomption de cession des droits d'exploitation.

II - Le strict respect des principes classiques du droit d'auteur implique que les personnes physiques qui font acte de création intellectuelle soient investies de la qualité d'auteur et que soient protégées les seules œuvres originales.

L'article L. 113-7 du code de la propriété intellectuelle énumère un certain nombre de personnes qui sont présumées, sauf preuve contraire, coauteurs de l'oeuvre audiovisuelle, à savoir : l'auteur du scénario, l'auteur de l'adaptation, l'auteur du texte parlé, l'auteur de la composition musicale, le réalisateur.

Cette liste indicative ne fait que reprendre ceux des auteurs qui généralement travaillent ensemble pour assurer la réalisation d'une œuvre commune et la pratique professionnelle au plan international, quelque soit le régime juridique en vigueur, est identique. On retrouve là, en effet, ceux qui participent aux différentes composantes de l'oeuvre, sur la base d'un scénario ou d'une oeuvre préexistante adaptée sont construits les dialogues et le réalisateur, à partir de ces apports, crée les images qui vont donner vie à l'oeuvre et y lie la musique originale.
Ce régime de présomption ne dispense toutefois par les coauteurs en cas de contestation d'apporter la preuve qu'ils ont réellement participé à l'élaboration de l'œuvre et dans le cas où l'apport n'est pas original la qualité d'auteur sera refusée. Cet élément essentiel s'apprécie au regard de la marque de la personnalité et exclut la titularité du droit en cas d'usage de simple technique ou d'adaptation à un résultat industriel.

D'une façon générale, et sous réserve de l'appréciation des tribunaux, on peut considérer que :

- le scénariste, comme l'auteur du roman en matière littéraire, est la personne qui est à l'origine de l'histoire qui prend la forme d'un scénario généralement écrit.

- le dialoguiste travaille à partir d'un scénario et crée les dialogues spéciaux pour le film qui seront en particulier repris par les interprètes à partir d'une mise en forme littéraire.

- le réalisateur bien que venant en fin de liste a sans nul doute le rôle essentiel. Sa contribution est caractérisée par le choix qu'il effectue librement ; il intervient au cœur même de l'œuvre. Il est chargé de transformer en images le scénario, d'y adapter les dialogues et de veiller au rythme de succession des scènes comme au choix des prises de vue et participe à titre essentiel à la création artistique de l'œuvre.

En revanche, au cas où il ne dirige pas effectivement la mise en scène et l'action dramatique qui vont être fixées, la qualité d'auteur peut être contestée en particulier si la prestation du réalisateur ne consiste qu'en la mise en œuvre d'une technique ce qui le rapproche alors de certains de ses collaborateurs, par exemple le directeur de la photographie lorsqu'il est responsable de seule la technique et que ses initiatives sont prises sur les directives et selon les découpages prévus par le réalisateur.

Le caractère limitatif de la présomption de la qualité de coauteur n'implique pas l'impossibilité pour d'autres spécialistes de réclamer la qualité d'auteur à condition qu'ils apportent la preuve de l'originalité de leur contribution et de leur participation à l'élaboration de l'ensemble du film produit.

A ce titre le producteur pourrait se voir reconnaître la qualité de coauteur en tant que personne physique et rien n'interdit de cumuler les deux rôles de producteur et réalisateur.
On peut évoquer par ailleurs la situation des artistes-interprètes qui sont très généralement exclus à défaut d'apport personnel au film et qui disposent de droits spécifiques distincts du droit d'auteur.

III - Toutefois, l'intérêt de la ou des personnes qui financent la production de l'œuvre n'a pas été oublié par le législateur. Afin de permettre l'exploitation de l'œuvre par le producteur, la loi prévoit qu'un contrat devra obligatoirement être conclu, et que ce contrat emporte au bénéfice du producteur cession des droits exclusifs d'exploitation de l'œuvre audiovisuelle.

Par ce mécanisme, il s'agit d'assurer au producteur la maîtrise de l'exploitation de l'œuvre audiovisuelle. S'il n'était pas cessionnaire présumé des droits des coauteurs, le producteur n'aurait pas la latitude nécessaire pour exploiter.

On notera encore que cette volonté du législateur de donner au producteur la maîtrise de l'œuvre audiovisuelle l'a conduit à instituer également une présomption irréfragable de cession applicable aux droits des artistes-interprètes.

Le contrat conclu entre le producteur et les artistes-interprètes vaut autorisation de fixer, reproduire, communiquer au public la prestation de ces artistes.

IV - La loi française, tout en préservant les droit des auteurs et des artistes-interprètes ne s'oppose donc nullement à la concentration des pouvoirs d'exploitation de l'œuvre audiovisuelle entre les mains du producteur. En contrepartie des droits dont il dispose, la loi impose au producteur d'assurer aux auteurs une rémunération proportionnelle aux recettes d'exploitation de l'œuvre.
from: Commission of the European Communities, signed by
Mr Martin BANGEMANN

dated: 7 January 1993

to: Mr Uffe ELLEMAN JENSEN, President of the Council of the
European Communities

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

Sir,

I would inform you that, in response to the European Parliament's
Opinion, the Commission has decided, under Article 149(3) of the
Treaty establishing the European Economic Community, to amend the
proposal for a Council Directive harmonizing the term of protection
of copyright and certain related rights, which it submitted to the

The text of the amended proposal is enclosed.

(Complimentary close).

(s.) Martin BANGEMANN

Encl.: COM(92) 602 final SYN 395
COMMISSION OF THE EUROPEAN COMMUNITIES

Amended proposal for a

COUNCIL DIRECTIVE

HARMONIZING THE TERM OF PROTECTION

OF COPYRIGHT AND CERTAIN RELATED RIGHTS

(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)
EXPLANATORY MEMORANDUM


The Economic and Social Committee delivered its opinion on the proposal on 1 July 1992.

The European Parliament, consulted under the cooperation procedure, discussed the proposal in detail in its Committees. On 17 November 1992, it debated the report drawn up on behalf of the Committee on Legal Affairs and Citizen's rights by Mr. Bru Purón, voting in support of the proposed Directive as amended by Parliament on 19 November 1992.

The amended proposal for a Directive presented by the European Commission is intended to take into account the Opinion of the European Parliament. It contains three major modifications to the original proposal.

a) The copyright owners of cinematographic or audiovisual works are defined in a precise manner. Hence the ownership of such works is subject to total harmonization in conformity to the amendment of Parliament.

b) The protection of posthumous works is subject to a specific provision. As proposed by the amendment of Parliament a new related right is introduced in the proposal.

c) As regards the application in time, the Commission largely follows the amendment of Parliament and proposes that the provisions of the Directive receive a more immediate application. Acquired rights of third parties are however safeguarded.

The Commission accepts, in totality or in part, 11 out of 14 amendments of Parliament.

The three amendments which were not adopted by the Commission are in relation to Article 1:

a) Parliament proposes to add to paragraph 4 of Article 1 a provision allowing Member States to establish that certain court decisions shall be considered as presumptions of death. The very fact that such a provision is optional has the consequence of weakening the harmonizing effect of the whole paragraph. Furthermore, some Member States which do not have such presumptions would therefore not introduce them into their law.
b) Parliament proposes to introduce a derogation to the calculation of the term of protection for works published in volumes, parts, instalments, issues or episodes for which the term of protection is not calculated after the death of the author. Such a provision can only be applied in a limited number of cases and does not appear justified because the directive has the consequence that the term of protection will be longer in most of the Member States.

c) Parliament proposes two amendments concerning posthumous works. The first one states that a term of protection of 70 years after the publication shall be granted if the publication takes place before the end of the normal copyright term. This provision thus aims at prolonging the term of protection of copyright. Such a prolongation does not seem to be justified because if the heirs of an author have not taken the measures to ensure the publication of the work of their parent within a reasonable period of time, which would allow them to enjoy a long term of protection, it is not advisable to grant them additional protection. The Commission, however, accepts the other amendment which seeks to grant protection for 25 years after the end of copyright for those who make unpublished works lawfully available to the public. Thus the Commission accepts a major modification to its proposal as regards posthumous works.
Commentary on the recitals

**Recital n° 2 bis**

This recital explains the reason for which it is necessary to harmonise authorship in cinematographic or audiovisual work. The text of the amendment is accepted as it is.

**Recital n° 13**

The title of the Directive of the Council on rental right and lending right and on certain rights related to copyright in the field of intellectual property having changed, this recital has to be updated.

**Recital n° 20**

This recital corresponds to the new article 6 bis. The text of the amendment is accepted as it is.
Commentary on the articles

Article 1, paragraph 6

The amendment of Parliament relates to the wording. It notably specifies that the determining factor is the act of making a work lawfully available to the public. This is accepted by the Commission.

Article 1 bis

The Commission accepts most of the amendment of Parliament. It must, however, change its wording and complete it.

Paragraph 1 is the text of Parliament.

Paragraph 2 specifies that the principal director is an author. This conforms to article 2(2) of the Council Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

Paragraph 3 allows Member States to introduce rebuttable presumptions of transfer of rights from the authors to the producers. Such presumptions are indeed essential for a better exploitation of works.

Thus, total harmonization of authorship and in turn of the term of protection for cinematographic or audiovisual works is achieved. This is not to the detriment of producers, as these enjoy their own exclusive rights under the rental directive and can benefit from rebuttable presumptions of transfer of rights.

Article 2, paragraph 1

The amendment of Parliament relates to the wording. It specifies that only a lawful act triggers the running of the term of protection. This useful precision is accepted by the Commission even if the term "publication" is maintained in order to keep the parallel with the term of protection of phonogram producers. Also the term "communication to the public" is used rather than "dissemination" because it is broader and more in line with the rental directive.
**Article 2 bis**

The amendment of Parliament seeks to introduce an exclusive related right for persons who, for the first time, make available to the public posthumous works of which the copyright has expired. This right is accepted by the Commission. Only the wording is changed.

**Article 3**

No amendments were proposed by Parliament.

**Article 4, paragraph 3**

The addition proposed by Parliament is accepted.

**Article 5**

The amendment of Parliament is accepted but it is necessary to keep more closely to the wording of the Berne Convention in order not to cast any doubt on the fact that the author is also protected during his or her lifetime.

**Article 6 bis**

The amendment of Parliament on the application in time is for a large part accepted but has to be adapted to the Council Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property and to other amendments of Parliament. Some rewording was felt necessary.

The complexity of these provisions justifies their presentation in a new and separate Article 6 bis.

Paragraph 1 states that this Directive shall not have the effect of shortening terms of protection which are already running in the Member States. It thus protects the acquired right of rightowners. It also states that acts of exploitation carried out before the date of transposition remain unaffected. This provision excludes any retroactive effect of the Directive.

Paragraph 2 corresponds to the amendment of Parliament as to which rights the Directive applies with two modification or additions. Firstly the date of adoption of the Directive is preferred to the date of transposition in order to avoid that rightowners see their rights ending between these two dates. This allows a more immediate application in time and seems more equitable as regards the above-mentioned persons. It was also felt necessary to create a linkage with the rental right Directive in order to enable a more uniform application in the entire Community.
Paragraph 3 states that the Member States take the necessary measures in order to safeguard the rights of third parties who have exploited works or objects which are in the public domain or who have made investments linked to such works. Indeed, it seems difficult to define Community measures where the legal traditions of the member States are so divergent. Furthermore, the situations covered are complex and differ according to whether Member States already have long terms of protection or not.

Paragraph 4 reserves the application of the provisions on application in time of the rental right Directive.

Paragraph 5 constitutes a parallel provision to Article 13 (5) of the rental right Directive. It is necessary because of the new Article 1 bis.

Art. 7

No amendments were proposed by Parliament.

Art. 8

The Commission accepts the deletion of paragraph 2 as proposed by Parliament.

Art. 9

No amendments were proposed by Parliament.

Art. 10

The Commission accepts the new date of transposition of the Directive proposed by Parliament.

Art. 11

No amendments were proposed by Parliament.
Amended proposal for a

COUNCIL DIRECTIVE
harmonizing the term of protection
of copyright and certain related rights

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2), 66, 100a and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

1. Whereas the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations lay down only minimum terms of protection of the rights they refer to, leaving the contracting states free to grant longer terms; whereas certain Member States
have exercised this entitlement; whereas in addition certain Member States have not become party to the Rome Convention;

2. Whereas there are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas, therefore, with a view to the establishment of the internal market and its operation thereafter, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community;

2 bis
Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which each term of protection is calculated; whereas therefore it is necessary to harmonize the definition of authorship of a cinematographic or audiovisual work;
3. Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and fifty years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations;

4. Whereas certain Member States have granted a term longer than fifty years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works;

5. Whereas at the 1967 Stockholm conference for the revision of the Berne Convention certain Member States' delegations approved a resolution asking the contracting states to extend the term of copyright protection; whereas in the discussions which have taken place within the World Intellectual Property Organization (WIPO) in preparation for a possible Protocol to the Berne Convention this question has been put on the agenda;
6. Whereas for the protection of related rights certain Member States have introduced a term of fifty years after publication or dissemination; whereas in other Member States which are currently preparing legislation on the subject the term of protection chosen is likewise fifty years;

7. Whereas the Community proposals for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) provide for a term of protection for producers of phonograms of fifty years after first publication;

8. Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to begin
operating in practice on 31 December 1992, the harmonization of the term of protection should take place on the basis of a long term;

9. Whereas in its Communication of 17 January 1991 "Follow-up to the Green Paper - Working Programme of the Commission in the field of Copyright and neighbouring rights"(1), the Commission stresses the need to harmonize copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation and their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole;

10. Whereas in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonized at seventy years.

(1) COM(90) 584 final.
after the death of the author or seventy years after the work is lawfully made available to the public, and for related rights at fifty years after the event which sets the term running;

11. Whereas these terms should be unchanged calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions;

12. Whereas Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes(2) provides that Member States are to protect computer programmes, by copyright, as literary works within the meaning of the Berne Convention (Paris Act - 1971); whereas the present Directive harmonizes the term of protection of literary works in the Community; whereas Article 8 of Directive 91/250/EEC, which merely makes provisional arrangements governing the term of protection of computer programmes, should accordingly be repealed;

(2) OJ No L 122, 17.5.1991, p. 42.
13. Whereas Articles 9 and 10 of Council Directive on rental right, lending right, and on certain rights related to copyright(3) make provision for minimum terms of protection only, subject to any later harmonization; whereas these Articles should be repealed, in order to align the terms of protection of those rights on the terms laid down in this Directive;

14. Whereas under the Berne Convention photographic works qualify for a minimum term of protection of only twenty-five years from their making; whereas, moreover, certain Member States have a composite system for the protection of photographic works, which are protected by copyright if they are considered to be artistic works within the meaning of the Berne Convention and protected under one or more other arrangements if they are not so considered; whereas provision should be made for the complete harmonization of these differing terms of protection;

(3) OJ No L 346, 27.11.1992, p. 61.
15. Whereas in order to avoid unchanged
   differences in the term of
   protection it is necessary that
   when a term of protection
   begins to run in one
   Member State it should begin to
   run throughout the Community;

16. Whereas Article 6bis(2) of
   unchanged
   the Berne Convention provides
   that the moral rights of the
   author are to be maintained
   after his death at least until
   the expiry of the economic
   rights; whereas that provision
   can usefully be taken over in
   this Directive, without
   prejudice to any possible later
   harmonization of moral rights;

17. Whereas the terms of protection unchanged
   laid down in this Directive
   should also apply to literary
   and artistic works whose
   country of origin within the
   meaning of the Berne Convention
   is a third country, but
   protection should not exceed
   that fixed in the country of
   origin of the work;

18. Whereas where a rightholder who unchanged
   is not a Community national
   qualifies for protection under
   an international agreement the
   term of protection of related
   rights should be the same as


that laid down in this Directive, except that it should not exceed that fixed in the country of which the rightholder is a national;

19. Whereas this provision must not be allowed to bring Member States into conflict with their international obligations; whereas international obligations may require the Member States to accord different treatment to third-country nationals and their works, and this may lead to disturbances on the Community market; whereas a procedure should therefore be laid down which enables such difficulties to be remedied;

20. Whereas rightholders should be able to enjoy the longer terms of protection introduced by this Directive equally throughout the Community provided their rights have not yet expired on 31 December 1994,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. The rights of an author of a literary or artistic work within

HAS ADOPTED THIS DIRECTIVE:

Article 1

20. Whereas, for the smooth functioning of the single market, this Directive must be applied immediately it enters into force, while ensuring that rights legitimately acquired by third parties are safeguarded,
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.

3. In the case of anonymous or pseudonymous works, of works considered under the legislation of a Member State to have been created by a legal person and of collective 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.

4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for seventy years.
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, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

6. In the case of collective works or works created by a legal person which have not been made lawfully available to the public within 70 years from their creation, the protection expires.

**Article 1 bis**

1. The authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work.

2. The principal director shall be considered as one of its authors.
3. The Member States may provide, without prejudice to Article 2, paragraph 6 of Directive 92/100/EEC, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work.

**Article 2**

1. The rights of performers shall run for fifty years from the first publication of the fixation of the performance or, if there has been no publication of the fixation, from the first dissemination of the performance. However, they shall expire fifty years after the performance if there has been no publication or dissemination during that time.
2. The rights of producers of phonograms shall run for fifty years from the first publication of the phonogram. However, they shall expire fifty years after the fixation was made if the phonogram has not been published during that time.

3. The rights of producers of the first fixations of cinematographic works and of sequences of moving images, whether or not accompanied by sound, shall expire fifty years after the first publication. However, they shall expire fifty years after the fixation was made if the work or sequence of moving images has not been published during that time.

4. The rights of broadcasting organizations shall run for fifty years from the first transmission of a broadcast.

Article 2 bis

Any person who for the first time makes lawfully available to the public a work, the copyright protection of which has expired, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.
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, the term of protection granted by Member States shall expire no later than the date of expiry of the
later than the date of expiry of
the protection granted in the
country of which the rightholder is
a national.

4. Pending the conclusion of any
future international agreements
on the term of protection by
copyright or related rights, the
decision may be taken by means
of the procedure set out in
Article 9:

(a) to waive or to vary the rule
requiring a comparison of the
terms of protection in
certain third countries which
is laid down in paragraphs 2
and 3, particularly in order
to prevent Member States from
being brought into conflict
with their international
obligations; in any event,
however, the term granted may
not exceed that laid down in
Articles 1 and 2;

(b) to take appropriate measures
where protection is granted
to third-country nationals by
some Member States only, and
this fact causes appreciable
distortion of competition or
deflection of trade in the
Community market.
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 5

The terms of protection subsequent to the death of the author and the terms provided by Article 1 paragraphs 3 to 6 and Articles 2 and 2 bis shall run from the event which gives rise to them in each particular case. However, the length of these terms shall be calculated only from the first day of January of the year following the death or the event which gives rise to them.

Article 6

1. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

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

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 to all works and objects which are protected at least in one Member State, on the date of adoption of the present Directive, under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.

3. Member States shall adopt the necessary provisions which need to be taken by virtue of Community law and national law in order to protect acquired rights and legitimate expectations of third parties.

4. The present Article is without prejudice to Article 13 of Directive 92/100/EEC.

5. Member States may determine the date from which Article 1 bis shall apply, provided that that date is no later than 1 July 1997.
1. Article 8 of Directive 91/250/EEC is hereby deleted.

2. Articles 9 and 10 of Directive ... are hereby deleted.

1. Member States shall immediately notify the Commission of any plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.
Article 9

The Commission shall be assisted by a committee of an advisory nature composed of representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

Article 10

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

Article 10

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 1 July 1994.
When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

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

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

**Article 11**

This Directive is addressed to the Member States.
NOTE
from : Council Secretariat
to : Working Party on Intellectual Property (Copyright)

No. prev. doc.: 4398/93 PI 7 CULTURE 6
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

Delegations will find attached a consolidated text of the above
proposal, drawn up following the Working Party's meeting held on
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.\(^2\)

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

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

3a. In the case where a work:

- is created by several physical authors on the initiative and under the direction of a physical person or legal entity, on the understanding that it will be disclosed only by - and under the name of - that person or entity, and

- consists of contributions of several authors who are impossible to identify,

\(^1\) Article 1 was not discussed at the meeting held on 15 January 1993. The positions indicated are those expressed by delegations at the meeting held on 2 December 1992.

\(^2\) Reservations by the Irish and Netherlands delegations and waiting reservations by the Danish, Portuguese and United Kingdom delegations on the proposed term of 70 years post mortem auctoris.

\(^3\) The reservations and waiting reservations mentioned in footnote 2 also apply to this term.
the duration shall be calculated for this work as such as provided for in paragraph 3 for anonymous or pseudonymous works.

This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, for which contributions paragraph 1 or 2 shall apply.\(^4\)\(^5\)

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.\(^6\)

\(^4\) The wording of Article 1(3a) (numbered Article 1(3)(b) in previous non-papers) has been clarified since the meeting held on 2 December 1992, and the Commission services suggest that the following recitals be added:

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

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

\(^5\) Reservations by the Belgian, French, Italian and Netherlands delegations on the approach adopted in Article 1(3a).

\(^6\) Reservation by the French delegation on this paragraph, to be reconsidered in the light of paragraph 3a.
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.\(^7\)

**Article 1 bis**

*Cinematographic or audiovisual works*

1. The authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work.

2. The principal director shall be considered as one of its authors.

3. The Member States may provide, without prejudice to Article 2(6) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,\(^8\) that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the

---

\(^7\) Article 1(6) was not discussed on 2 December 1992. At previous meetings, several delegations had expressed doubts on the need for this paragraph.

\(^8\) OJ N° L 346 of 27.11.1992, p. 61.
authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their 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.

---

9 The text given for Article 1bis was circulated at the meeting held on 15 January 1993, but not discussed at that meeting. At the meeting held on 2 December 1992, delegations gave their initial reactions to the text proposed by the European Parliament, upon which the above text is based (4398/93 PI 7 CULTURE 6, points 10 to 16). A non-paper by the United Kingdom delegation, containing an alternative solution, has been circulated under reference 4543/93 PI 6 CULTURE 5.

10 Scrutiny reservation by the Belgian and Portuguese delegations on this paragraph pending examination of an additional recital explaining the terms "first lawful publication" and "first lawful communication to the public". For the Portuguese delegation, this scrutiny reservation includes paragraph 2.
to the public during that time. The term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.\textsuperscript{11}

4. The rights of broadcasting organizations shall expire fifty years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.\textsuperscript{12}

[5. Where, pursuant to the provisions of this Article, the rights of performers would have a shorter term of protection than that granted to producers of phonograms, producers of films or broadcasting organizations, those rights shall be prolonged automatically until the expiry of the rights of these other rightholders.]\textsuperscript{13}

\textbf{Article 2 bis}
\textbf{Protection of unpublished works}

Any person who for the first time makes lawfully available to the public a work, the copyright protection of which has expired, shall

\textsuperscript{11} Reservations by the Irish and United Kingdom delegations on this paragraph pending discussion of Article lbis.

\textsuperscript{12} The following recital is to be added:

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

\textsuperscript{13} The Working Party has not yet examined Article 2(5), which has been proposed following observations made at the meeting held on 15 January 1993.
benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.\textsuperscript{14}

\textbf{Article 3}

\textbf{Protection of photographs}

\textbf{Variant 1}

Protected photographs shall have the term of protection provided for in Article 1. [Member States which, on the date of adoption of the present Directive, do not protect ordinary photographs shall introduce such a protection.]\textsuperscript{15}

\textbf{Variant 2}

Photographs [which are protected as works within the meaning of Article 2 of the Berne Convention] [which are original in the sense that they are the author's own intellectual creation] shall have the

\textsuperscript{14} Reservations by the Netherlands and Portuguese delegations on the need for this provision. Reservations by the French, Irish and Greek delegations on the duration of the protection. Reservation by the French delegation on the nature of the protection. Reservation by the Italian delegation on the words "equivalent to the economic rights of the author". Reservations by the United Kingdom and Danish delegations on the absence of a time limit calculated from the expiry of copyright protection. The Belgian, French and Irish delegations advocated an additional special period of protection where the work was first lawfully made available to the public shortly before the expiry of copyright protection. The Belgian delegation reserved the right to make a proposal to this effect.

\textsuperscript{15} The Italian, Netherlands and Portuguese delegations are in favour of this variant without the sentence in square brackets. Reservation by the German, French and United Kingdom delegations on this variant if the second sentence is not included. Scrutiny reservation by the Belgian delegation on this variant since it does not distinguish between copyright protection and protection by rights related to copyright.
term of protection provided for in Article 1. Other photographs shall be protected for [50] [25] years from their creation.\textsuperscript{16}

\textbf{Article 4}

\textbf{Triggering event and protection vis-à-vis third countries\textsuperscript{17}}

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.\textsuperscript{18}

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 or 2 bis.

4. Member States which, at the date of adoption of this Directive, in particular pursuant to their international obligations, granted a longer term of protection than that which would result

\textsuperscript{16} Variant proposed by the Danish delegation and not yet examined by the other delegations.

\textsuperscript{17} Reservation by the Commission services on the position of all delegations and the Council Legal Service that Article 113 is not necessary as a legal basis.

\textsuperscript{18} Scrutiny reservations by the Danish, German, French, Irish, Netherlands and United Kingdom delegations on the need for this paragraph.
from the above mentioned provisions, may maintain this protection until the conclusion of international agreements on the term of protection by copyright or related rights.

**Article 5**  
**Calculation of terms**

The terms laid down in this Directive are calculated from the first day of January of the year following the event which gives rise to them.19

**Article 6**  
**Moral rights**

**Variant 1**

The moral rights granted to the author shall be maintained at least until the expiry of the economic rights of the author.20

**Variant 2**

This Directive shall not prevent Member States from providing for or maintaining terms of protection for moral rights which are longer than those provided for by this Directive.21

---

19 Scrutiny reservation by the French delegation, which prefers the amendment proposed by the European Parliament.

20 Reservations by the French, Irish and United Kingdom delegations on this variant.

21 This variant could take the form of either an operative provision or a recital.
Article 6 bis

Application in time

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 to all works and objects which are protected in at least one Member State, on the date of adoption of the present Directive, under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.

3. Member States shall adopt the necessary provisions which need to be taken by virtue of Community law and national law in order to protect acquired rights and legitimate expectations of third parties.

4. The present Article is without prejudice to Article 13 of Council Directive 92/100/EEC.

5. Member States may determine the date from which Article 1 bis shall apply, provided that that date is no later than [1 July 1997].

22 Articles 6 bis to 11 were not discussed at the meeting held on 15 January 1993.
Article 7
Technical adaptation


Article 8
Notification procedure

Member States shall immediately notify the Commission of any plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.

Article 9

Deleted.

Article 10
General provisions

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

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

---

21 OJ No L 122 of 17.5.1991, p. 42.
Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

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

**Article 11**

This Directive is addressed to the Member States.

Done at Brussels,  

For the Council  
The President
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 18 and 19 February 1993

No. prev. doc.: 4735/93 PI 11 CULTURE 11
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

1. At its meeting held on 18 and 19 February 1993, the Working Party on Intellectual Property (Copyright) examined Articles 6 to 11, 1 and 1bis of the above proposal on the basis of the consolidated text contained in 4465/93 PI 8 CULTURE 7. Its discussions also took into account the Commission's amended proposal (4483/93 PI 9 CULTURE 8), a non-paper from the United Kingdom delegation (4345/93 PI 6 CULTURE 5 + COR 1(f)), working document No 1/93 from the Netherlands delegation (SN 1207/93) and working document No 2/93 from the Belgian delegation (SN 1208/93).

   Article 6

2. The representative of the Council Legal Service, who was consulted on this Article, expressed the views set out in the Annex.
The Commission representative did not share these views. He considered that the opinion of the Council Legal Service in 9290/91 needed to be reviewed in the light of the specific contents of this proposal for a Directive, which concerned the term of protection of copyright and certain related rights. He pointed out that the substance of both the moral rights and the economic rights of authors differed from one Member State to another, yet no delegation disputed the need to harmonize the term of protection of the economic rights of authors. Moreover, it was impossible in many cases to separate the economic rights of an author from his moral rights: for instance, it was impossible to separate the economic and moral aspects of the right of disclosure (a moral right), while the right of adaptation (an economic right) was very close to the moral right to the integrity of a work. He also indicated that the "economic nature of the rights" was not a relevant criterion under Community law. There was no doubt that the exercise of moral rights could have the consequence of hindering the free circulation of goods and that that criterion was sufficient to establish that the Community was competent to harmonize this aspect of copyright on the basis of Article 100a. Explicit reference was made to the Dassonville judgment in which the Court of Justice had stated that even measures which could have a potential effect on intra-Community trade constituted measures having an effect equivalent to quantitative restrictions. He therefore did not agree that harmonization of moral rights required the use of Article 235 as a legal basis.

Several delegations and the Commission representative invited the Council Legal Service to set out its views in writing. The Irish delegation requested that this written opinion should make clear the practical application to this specific proposal for a Directive of the opinion set out in 9290/91. The Irish delegation also invited the Commission to set out in
writing the reasons why it considered harmonization of the term of protection of moral rights to be necessary, to demonstrate how the absence of such harmonization affected the internal market, and to provide evidence that any disruption of the internal market resulting from this absence of harmonization was significant.

3. In the light of the conflicting views expressed by the Council Legal Service and the Commission representative, the Portuguese delegation considered that the Council should be invited to take a political decision on the legal basis of the proposal for a Directive.

    The Irish delegation reserved its position on the appropriateness of Article 235 as a legal basis in respect of moral rights.

4. The Belgian, Spanish and Italian delegations considered that moral rights had economic aspects and could create obstacles to the free movement of copyright works within the internal market, and that therefore there was a need to harmonize their term of protection.

    The French delegation on the other hand considered that moral rights were different in nature from the author's economic rights and were not primarily economic. This delegation, together with the Danish, Netherlands and United Kingdom delegations considered that the whole question of moral rights and their possible effect on the internal market should be studied thoroughly by the Commission before any action was proposed in respect of any aspect of moral rights, such as their duration.
The French and Netherlands delegations pointed out furthermore that Article 6 as proposed by the Commission would not harmonize the term of protection of moral rights, but merely impose a minimum term.

The Irish, Netherlands and United Kingdom delegations were opposed to both variants of Article 6. The French delegation was opposed to variant 1, since it implied that the normal rule was that moral rights should be given the same term of protection as economic rights, while this delegation considered that they should be protected in perpetuity; it expressed a scrutiny reservation in respect of variant 2.

In the light of the above positions, the Danish, German, French, Irish, Netherlands, Portuguese and United Kingdom delegations were in favour of deleting Article 6 and replacing it by either a provision or a recital to the effect that moral rights were outside the scope of the Directive and therefore not affected by it. The Italian delegation could accept deletion of Article 6 on the express condition that it would be replaced by such a provision.

The German delegation asked whether, in the view of the Council Legal Service, a provision excluding moral rights from the scope of the Directive would require use of Article 235 as a legal basis.

The representative of the Council Legal Service replied that if moral rights were to be excluded from the scope of the Directive, the most appropriate means would be an explicit provision to this effect. This could be done either by drafting Article 1 in such a way that moral rights were excluded, or by
replacing Article 6 by a provision to the effect that moral rights were excluded from the scope of the Directive. In either case, the legal basis proposed would be sufficient.

6. The Commission representative reserved his position on the solution advocated by the majority of delegations, indicating that he would report to his authorities on the positions expressed.

Article 6 bis

7. The Belgian and Netherlands delegations expressed a scrutiny reservation in respect of the whole of Article 6 bis.

Article 6 bis (1)

8. The French delegation asked whether the first sentence of Article 6 bis (1) would allow France to maintain its 1951 law which provided for an extension of copyright protection for thirty years for the benefit of the descendants of authors killed in action in past or future military conflicts.

The United Kingdom delegation and the Commission representative replied that this provision applied only in respect of terms of protection which were already running for individual works under the laws of a Member State on the date of transposition of the Directive, but did not allow Member States to keep laws which provided for longer terms of protection than the corresponding terms under the Directive.

9. The Italian delegation asked which Member States had laws which would allow copyright protection of longer than 70 years after the author's death, pointing out that the provisions in Italy on extensions to offset the effects of wars would not have
such a result, as they provided for an extension of only 12 years to the normal term of 50 years after the author's death.

The Commission representative cited the following cases:

- terms of protection already running in Spain for works of authors who died before the law reducing the term of copyright protection from 80 to 60 years post mortem auctoris entered into force;

- the thirty-year extension in France already mentioned;

- perpetual protection for "Peter Pan" under United Kingdom law.

In addition, the Commission representative indicated that there was a possibility that the provisions of the Directive on cinematographic and audiovisual works and on photographs, which were still under discussion, might result in the terms of protection for those works under the Directive being shorter than the present terms in some national laws.

10. The French delegation asked whether terms already running in respect of works covered by Article 1(3a) of the Directive would be affected by the first sentence of Article 6 bis (1).

The Commission representative indicated that this depended on the solution finally adopted for Article 1(3a), but that if the term under that provision were to be longer than the term provided for under present national law, the term of Article 1(3a) would apply.

11. In reply to questions from the Netherlands and Italian delegations, the Commission representative explained that the first sentence of Article 6 bis (1) was applicable only to those Member States whose present laws provided for longer terms of
protection than the corresponding terms under the Directive; other Member States were not required to extend protection until the expiry of these longer terms. It was agreed that the text of this sentence would be clarified.\(^{(4)}\)

12. The German delegation, supported by several other delegations, expressed a reservation on the date mentioned in the second sentence of Article 6 bis (1) and in Article 10(1).

13. The Netherlands delegation suggested a clarification to the wording of the second sentence of Article 6 bis (1),\(^{(2)}\) and the Danish delegation, supported by the Italian delegation, suggested transferring this sentence to Article 6 bis (3).

The Commission representative agreed with both suggestions.

Article 6 bis (2)

14. The Commission representative explained that Article 6 bis (2) as now proposed represented a fundamental change of approach from the Commission's original proposal (Article 6(1) in 5509/92 PI 33 CULTURE 21), whereby the Directive would have applied to rights which had not expired on or before 31 December 1994, but protection of works or other subject matter which had fallen into the public domain would not have been revived. Following requests from several delegations that consideration be given to the possibility of reviving protection which had expired in one or more Member States in cases where that protection would not have expired had the Directive already been in force, the United Kingdom Presidency had proposed a text to this effect.\(^{(3)}\) However, that text would have had the consequence that

---

(1) See revised version of the consolidated text in working document N° 4/93 (SN 1210/93).
(2) See SN 1208/93.
(3) 9636/92 PI 108 CULTURE 108, point 18.
protection could be revived even where the work or subject matter concerned was no longer protected in any Member State. The Commission's amended proposal and the consolidated text in 4465/93 took over the principle of revival of protection, but included the criterion proposed by the European Parliament that the works or subject matter concerned be protected in at least one Member State, since there would be no obstacles to their free movement within the Community if they were in the public domain in all Member States.

15. The German and United Kingdom delegations agreed in principle with this provision. The United Kingdom delegation could also accept the text proposed by the United Kingdom Presidency.

The Spanish, Luxembourg, Netherlands and Portuguese delegations were opposed to the principle of revival of rights which had already expired. The Spanish and Belgian delegations, supported by the Portuguese delegation proposed that this paragraph be replaced by a provision to the effect that where a work was still protected in one Member State but was in the public domain in the other Member States, protection should continue in that Member State until the expiry of the term resulting from the Directive, but the work should remain in the public domain in the other Member States.

The Commission representative rejected this proposal, which corresponded to the Commission's original proposal, on the grounds that it would result in a long transitional period during which the internal market would be subject to distortions.

A proposal by the Spanish delegation to delete Article 6 bis (2) was opposed by the United Kingdom delegation on the same grounds.
16. The German delegation considered that the date mentioned in this paragraph should not be the date of adoption of the Directive, since this would mean that when the Directive was transposed into national law, this paragraph would have to be applied retroactively. It therefore considered that the date of transposition was more appropriate.

17. With a view to establishing the practical implications of Article 6 bis (2), the United Kingdom delegation asked whether those Member States which at present had copyright terms of longer than 50 years post mortem auctoris (pma) applied the principle of "comparison of terms" set out in Article 7(8) of the Berne Convention for the Protection of Literary and Artistic Works.\(^{(4)}\)

It was explained that this principle was applied in France. In Germany, a work of a foreign author which was translated into German was given the same term of protection (70 years pma) as a work of a German author. In addition, a work of a foreign author was given this same term of protection if it was published in Germany not later than 30 days after being published in the country of origin. Otherwise, if the term of protection in the country of origin was shorter than 70 years pma, the principle of "comparison of terms" was applied.

It was pointed out that in these circumstances, Article 6 bis (2), which, as far as copyright works were concerned, would have a bearing only on works whose authors had died between 50 and 70 years before the relevant date, would in general have the following effect:

\[(4) \text{"In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."} \]
- if the work originated in a Member State which at present had a term of copyright protection of longer than 50 years pma, the work would be protected throughout the Community until the expiry of 70 years pma, involving revival of protection in those Member States in which it had already expired;

- if the work originated in a Member State which at present had a term of copyright protection of 50 years pma, it would remain in the public domain throughout the Community.

Several delegations considered that such a result would be discriminatory.

The German delegation pointed out that, while it could be considered that Article 6 bis (2) would operate in favour of copyright works originating in Germany, it could also be considered that it would operate to the disadvantage of subject matter protected by related rights in Germany for which the present terms of protection were shorter than those provided for in the Directive and applied at present by a number of other Member States. The United Kingdom delegation agreed that this provision should be considered not only in relation to copyright but also in relation to related rights.

18. In addition to the reservations on the principle of this paragraph, the Belgian, Danish, Spanish, Irish, Italian, Netherlands and Portuguese delegations expressed scrutiny reservations on the wording, which they considered to be in need of clarification. The Italian delegation suggested a redraft which was intended to make the necessary clarifications and would combine Article 6 bis (2) and (3).\(^{(5)}\)

---

(5) See Annex to SN 1210/93.
Article 6 bis (3)

19. **The Spanish delegation** expressed a reservation on this paragraph. This reservation was linked to its reservation on the revival of rights under paragraph 2 and was based on a ruling by the Spanish Constitutional Court that legitimate expectations could not give rise to claims for compensation. It was invited to set out its position in writing.

20. **The Portuguese delegation** also expressed a reservation which was linked to its reservation on paragraph 2.

21. **The German and United Kingdom delegations**, while agreeing with the principle that Member States should be given flexibility as to the measures to be taken to protect the acquired rights and legitimate expectations of third parties affected by the revival of protection which had previously expired, considered that the wording proposed was too narrow; they considered in particular that Member States should also be permitted to regulate what effect the revival of protection should have on contracts which had been concluded for the original term of protection. **The German delegation** also suggested that this paragraph be made optional.

22. **The Belgian and Netherlands delegations** also expressed scrutiny reservations on this paragraph.

Article 6 bis (4)

23. **The Netherlands delegation** considered that this paragraph was unnecessary.
Article 6 bis (5)

24. Discussion of this paragraph was postponed until further progress had been made on the contents of Article 1 bis.

Article 8

25. The French delegation expressed a scrutiny reservation on this Article in connection with its reservations on Article 2 bis. It also considered that it would be useful if Member States were to notify the Commission of existing related rights.

26. The Irish delegation expressed a scrutiny reservation on this Article, pointing out that the creation of new related rights would result in further obstacles to the free movement of goods within the Community.

27. The French, Irish, Italian, Portuguese and United Kingdom delegations also expressed scrutiny reservations on the wording of this provision.

The French delegation queried the word "immediately", which the Irish delegation suggested be replaced by the words "at an early stage".

The Portuguese, United Kingdom and Italian delegations queried the words "any plan to grant new related rights". The United Kingdom delegation suggested replacing "plan" by "intentions", and the Italian delegation suggested referring to initiatives taken by the Governments of Member States (as opposed to Parliaments or other bodies) with a view to the creation of new related rights.
Article 10

28. The reservations expressed in relation to the date mentioned in the second sentence of Article 6 bis (1) (see point 12 above) also applied to the date mentioned in the first sentence of Article 10(1). The general feeling was that this date should be placed in square brackets for the present.

Article 1 (3a)

29. The Netherlands delegation stated that the changes made in this provision in 4465/93 in relation to the previous consolidated text (Annex I to 4398/93) did not remove its reservation on the approach adopted in this paragraph.

30. The Italian delegation, supported by the Spanish delegation stated that its reservation on this provision could be overcome if the words "who are impossible to identify" were to be deleted from the second indent.

The Irish delegation opposed the deletion of these words. It was prepared to support the text in 4465/93, provided that it was clear that it meant that the human authors who created the work would be protected unless it was impossible to identify them.

31. The United Kingdom and German delegations stated that they had not considered it necessary to include a provision of this nature in the Directive, but were prepared to accept it if the majority of delegations were in favour of its inclusion, and

(6) The objections of the Netherlands delegation are set out in working document № 1/93 (SN 1207/93) and working document № 5/93 (SN 1211/93).
provided that it was clear and consistent with the Berne Convention. They considered the present text to be consistent with the Berne Convention, but lacking in clarity, and therefore expressed a scrutiny reservation on the wording.

**Article 1bis**

32. In addition to the consolidated text in 4465/93, which corresponded to the Commission's amended proposal (4483/93), alternative proposals for this Article were contained in the non-paper from the United Kingdom delegation (4345/93 + COR 1(f)) and in working document № 2/93 from the Belgian delegation (SN 1208/93). The Belgian delegation pointed out that the words "50 years after the death of the director" in its proposal should read "70 years after the death of the principal director".

33. The Greek delegation expressed a scrutiny reservation in respect of the whole Article.

34. The Danish, German, Irish, Netherlands, Portuguese and United Kingdom delegations questioned the need to harmonize film authorship, considering that there was no evidence that the coexistence of different systems in different Member States had created any distortion within the Community. The Irish delegation questioned whether the Community was competent to propose such harmonization in the absence of any significant practical disruption of the internal market resulting from the present situation. While not accepting the harmonization proposed by the Commission in paragraphs 1 and 2 of its amended proposal, these delegations were prepared, in a spirit of compromise, to accept the general application of the partial
harmonization achieved in Article 2(2) of the rental Directive,\(^7\) as proposed in paragraph 1 in the United Kingdom's non-paper.

**The French and Italian delegations and the Commission representative** supported the Commission's amended proposal for paragraphs 1 and 2, considering that the term of protection of cinematographic and audiovisual works could not be separated from the question of their authorship. **The Commission representative** considered that harmonization of film authorship was within the Community's competence, since the economic considerations involved were sufficient to distort competition within the Community to a degree justifying Community action.

**The Belgian delegation**, while preferring the Commission's amended proposal, was prepared to consider positively the United Kingdom delegation's proposal.

35. **The Italian delegation** considered that the solution proposed by the Commission had the advantage of specifying that the authors of these works were natural persons. It suggested that the text proposed by the United Kingdom delegation be clarified on this point.

**The United Kingdom delegation**, supported by the German and Netherlands delegations, preferred not to depart from the wording of Article 2(2) of the rental Directive, which did not limit the possible co-authors of such works to natural persons.

36. **The United Kingdom delegation**, while preferring that the term of protection of a cinematographic or audiovisual work be a

---

fixed term calculated from the publication of the work, was prepared to propose, as a compromise solution between its preferred solution and the solution proposed by the Commission, that this term be the life of the principal director plus 50 or 70 years (whichever was finally adopted in Article 1). It considered that under this solution it would be clear when the term of protection expired, whereas under the Commission's amended proposal there would be a great deal of uncertainty as to who were the authors of a particular cinematographic or audiovisual work, and consequently as to the expiry of the term of protection, which would be calculated from the death of the last surviving author in accordance with Article 1(2) of the Directive. The German, Irish, Netherlands and Portuguese delegations agreed that the United Kingdom delegation's proposal would give greater legal certainty as to the expiry of the term of protection than would the Commission's amended proposal.

The French delegation and the Commission representative did not agree that the Commission's amended proposal would give rise to legal uncertainty.

37. The Belgian delegation drew attention to the fact that the United Kingdom delegation's proposal for paragraph 2 was limited to cinematographic or audiovisual works considered under the laws of a Member State to be works of joint authorship, leaving unresolved the term of protection for cinematographic or audiovisual works which did not meet this criterion. Moreover, this proposal had the disadvantage of providing that cinematographic or audiovisual works which were considered to be works of joint authorship should have a different term of protection from that normally accorded to works of joint authorship in accordance with Article 1(2) of the Directive and Article 7 bis of the Berne Convention. The Belgian delegation
therefore considered that its proposal for paragraph 2, which
did not refer to works of joint authorship, was more
appropriate.

The United Kingdom delegation accepted this criticism and
withdrew its proposal for paragraph 2 in favour of the proposal
by the Belgian delegation with the corrections indicated under
point 32 above. The Danish, German, Italian, Netherlands and
Portuguese delegations also supported this proposal by the
Belgian delegation.

The French delegation and the Commission representative
pointed out that the proposal by the Belgian delegation would
have the consequence of reducing the term of protection in cases
where a co-author other than the principal director was the last
surviving co-author in Member States in which cinematographic
and audiovisual works were considered at present to be works of
joint authorship. The French delegation expressed a reservation
on this proposal in this respect.

The United Kingdom and Irish delegations considered that in
practice there would be little difference between a term of
protection expiring 70 years after the death of the principal
director and the present term in such Member States, which
expired 50 years after the death of the last surviving author.
They pointed out that in those cases where the term of
protection resulting from the proposal by the Belgian delegation
would be shorter, this reduction was likely to be less than the
increase in protection which would have to be accorded by those
Member States which at present had a term of 50 years from the
publication of the cinematographic or audiovisual work.
39. The Irish, Netherlands and United Kingdom delegations pointed out that the provisions in Article 6 bis on application in time would have to be reviewed in the light of the solution adopted in Article 1 bis.

40. The Belgian, Danish, Spanish, French and Netherlands delegations considered that the wording of Article 1 bis (3) would have to be examined carefully.

41. The Chairman concluded that, in the light of the discussion, the next consolidated text\(^{(8)}\) would contain:

- a paragraph 1 generalizing the solution adopted in Article 2(2) of the rental Directive, as proposed by the United Kingdom delegation,

- a paragraph 2 as proposed by the Belgian delegation, with the corrections indicated under point 32 above,

- a paragraph 3 as set out in the present consolidated text, which would have to be examined at the Working Party's next meeting.

42. The Commission representative stated that he would report to his authorities on the positions expressed by the delegations.

---

\(^{(8)}\) See working document No 4/93 (SN 1210/93).
CONTRIBUTION
FROM THE LEGAL SERVICE
to the report of the Working Party on Intellectual Property
on 18 and 19 February 1993
(doc. 5243/93 PI 16 CULTURE 14)

Subject: Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights
No. Cion prop. 5509/92 PI 33 CULTURE 21
doc. 4465/93 PI 8 CULTURE 7

Having been invited to give its views on the provisions of Article 6 of the present proposal under examination by the Working Party, the representative of the Council Legal Service put forward the following considerations:

1. The proposal provides - at the present stage - in Article 6(9) that

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

There is no definition of the moral rights of the author in the proposal. Since this provision is based on Article 6 bis (2) of the Berne Convention(10), the only definition of moral rights that can be invoked is that of the Berne Convention; it would be appropriate to

(9) Doc. 4465/93 PI 8 CULTURE 7, variant 1.
(10) Cf. the 16th recital of the proposal.
clarify this point in the Directive in the interests of greater clarity and legal certainty.

It can be seen from Article 6 bis of the Berne Convention that independently of his "economic rights", the author has "the right to claim authorship of the work and to object to any distortion, mutilation ... which would be prejudicial to his honour or reputation".

The economic nature of this right is not obvious and in any case is not exclusive, in spite of the fact that present practice would seem to show that it can give rise - in certain cases - to remuneration, as is proved by the example of "colouring" cinematographic films originally made in black and white. Consequently, even if it can be considered that this right may fall under Community competence, it does not seem possible to base the legislative provision concerned on Articles 57 and 100a of the Treaty. It would also appear difficult to consider this to be an accessory or ancillary provision within the meaning of the case law of the Court of Justice. Indeed, these are "separable" provisions which pursue objectives of their own.

As no other Treaty Article specifically empowers the Community to act in pursuit of such objectives, the Council Legal Service considers that only Article 235 of the Treaty could be used to justify the provision in question, if the Council considers that action by the Community is necessary to attain, in the course of the operation of the common market, one of the objectives of the Community. (11)

Should the Council consider it necessary to act in this respect,

(11) Cf. opinion of the Council Legal Service on the proposal for a Council Decision concerning the accession of the Member States to the Berne and Rome Conventions, 9290/91.
Treaty Articles providing for different adoption procedures (qualified majority decision in cooperation with the European Parliament in the case of Articles 57(2) first and third sentences and 100a, unanimous decision after consulting the European Parliament in that of Article 235) would have to be used simultaneously. However, under the case law of the Court(12), the use of that combined legal basis is not possible since it would "undermine" the conduct of the cooperation procedure. Hence the proposal in question would have to be adopted by means of two different acts.

2. With regard to the second variant of this Article (13) as proposed by the Commission at the Working Party's meeting on 15 January 1993 providing that:

"This Directive shall not prevent Member States from providing for or maintaining terms of protection for moral rights which are longer than those provided for by this Directive",

the same observations apply as for the first variant. It is true that such a provision would allow the Member States to introduce a longer term of protection for moral rights than that provided for by the Directive. However, the Community would then create an obligation on the Member States to provide for a term of protection for moral rights at least as long as that provided for by the Directive. Under these circumstances, the Community would assert its competence and the difficulties of maintaining the legal basis of Articles 57 and 100a in this respect would be the same as those mentioned above.

3. The Council Legal Service considers that under a third option the Council could legislate on the same legal basis as that proposed

(13) Article 6, variant 2, in 4465/93 PI 8 CULTURE 7.
for the adoption of this Directive to provide in the context of the application of this Directive, and without legislating on the scope and substance of moral rights, a term of protection of these rights to the extent that they have an economic scope. The Legal Service is prepared to suggest such an option if the Working Party so wishes.
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 11 and 12 March 1993

No. prev. doc.: 5143/93 PI 16 CULTURE 14
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

1. At its meeting held on 11 and 12 March 1993, the Working Party on Intellectual Property (Copyright) examined Articles 1, 1bis, 2bis, 3, 6 and 6bis of the above proposal on the basis of the consolidated text contained in SN 1210/93. Its discussions also took into account a number of working documents submitted by various delegations.

   Article 1(1)

2. The Luxembourg delegation associated itself with the reservations of the Irish and Netherlands delegations on the proposed term of 70 years post mortem auctoris (p.m.a.).

   Article 1(2)

3. It was noted that, following the withdrawal by the United Kingdom delegation at the Working Party's previous meeting (5143/93, point 37) of its proposal for amendment of Article 1bis (2), this delegation's proposal for amendment of Article 1(2) (4345/93) was also withdrawn.
Article 1(3a)

4. In discussing this provision, the Working Party also took into account working documents Nos. 1/93 and 5/93 from the Netherlands delegation (SN 1207/93 and SN 1211/93) and working document No. 6/93 from the Italian delegation (SN 1212/93).

5. The Spanish, French, Italian, Netherlands and Portuguese delegations continued to express reservations on this provision, which they considered to be unclear. The Netherlands, Italian and Spanish delegations considered that it would be preferable to revert to the Commission's proposal (Article 1(3) in 4483/93). The Netherlands delegation considered that this provision as set out in the consolidated text did not take account of the situation in the Netherlands where a legal entity could be deemed to be the author of a collective work, whereas the Commission's proposal would cover this situation.

6. In addition to the delegations mentioned, the Belgian, German and United Kingdom delegations also considered that this provision as worded in the consolidated text was unclear. However, the Belgian, German and United Kingdom delegations and the Commission representative drew attention to the fact that the Commission's proposal had attracted the criticism that it was not compatible with the requirement of the Berne Convention¹ that the term of copyright protection be calculated in relation to the death of the author, the only exceptions allowed concerning cinematographic works, anonymous or pseudonymous works, photographic works and works of applied art; it therefore would not be appropriate to revert to the Commission's proposal.

(1) Berne Convention for the Protection of Literary and Artistic Works.
With regard to the point raised by the Netherlands delegation, the Commission representative pointed out that the question of who was the first owner of copyright was not covered by this Directive.

The Netherlands, Italian, Spanish and Portuguese delegations suggested that at least the second indent of the consolidated text be deleted, as they saw a contradiction between this indent and the last sentence of this paragraph.

The Commission representative, supported by several delegations, suggested instead that this indent be reworded to read: "- consists of contributions of several authors who are not identified,". However, the Netherlands and Italian delegations considered that this rewording did not provide a satisfactory solution.

The United Kingdom delegation, supported by the German delegation suggested that the last sentence of paragraph 3a might be deleted, as they were not satisfied with its wording and considered that it did no more than repeat an obligation under the Berne Convention.

However, the Commission representative considered it important that reference should be made to this obligation under the Berne Convention, and the Italian delegation considered that deletion of this sentence would not improve the clarity of the text; it preferred that the second indent be deleted.

The Chairman concluded that this provision should be referred to the Permanent Representatives Committee.

Article 1(5)

The French delegation maintained a scrutiny reservation on this paragraph.
Article 1bis (1) and (2)

11. The Commission representative explained that this provision had been included in the proposal for a Directive for reasons of legal security and because a similar provision was contained in the draft text under discussion in GATT. He also indicated that the situation referred to in this provision would arise only rarely.

In the light of these explanations, the Working Party agreed to this provision.

12. The Irish, Netherlands, Portuguese and United Kingdom delegations considered that it was not necessary to harmonize the authorship of cinematographic and audiovisual works in this Directive; however, they were prepared to accept Article 1bis (1) and (2) as set out in the consolidated text as a compromise solution. The Irish delegation made its acceptance subject to a reservation on the term of 70 years, this reservation being linked to its reservation on Article 1(1) and (3).

13. The German delegation stated that it could accept paragraph 1 either as contained in the Commission's amended proposal, or as contained in the consolidated text; however, it considered that the consolidated text was more likely to achieve a consensus. It also considered that paragraph 2 of the consolidated text was necessary, irrespective which version of paragraph 1 was adopted.

14. The French delegation continued to advocate paragraphs 1 and 2 of the Commission's amended proposal and to oppose paragraph 2 of the consolidated text for the reasons given at the Working Party's previous meeting (5143/93, point 38).
15. The Italian and Belgian delegations agreed with the French delegation that paragraph 1 should be limited to natural persons, as in the Commission's amended proposal; however, the Belgian delegation could accept paragraph 1 of the consolidated text as a compromise solution if it were acceptable to the majority of delegations.

16. The Chairman concluded that there was a clear majority in favour of the consolidated text of paragraphs 1 and 2, which would be presented to the Permanent Representatives Committee together with the positions of the various delegations.

Article 1bis[3]

17. The Commission representative explained that this paragraph had been drawn up in relation to paragraphs 1 and 2 of the Commission's amended proposal; however, he considered that it was still useful in relation to paragraphs 1 and 2 of the consolidated text, since these paragraphs would create new rights for the principal director in a number of Member States and in those circumstances it was useful to make clear which presumptions Member States might introduce in their national laws. The United Kingdom delegation agreed with this reasoning.

18. The Greek, Spanish, Irish, Italian and Netherlands delegations expressed scrutiny reservations on the need for a provision of this nature.

19. Several criticisms were made of the drafting of this paragraph:
(a) the French delegation was opposed to the words "individually or collectively"; the Commission representative was prepared to delete these words if paragraphs 1 and 2 of the consolidated text were to be adopted;
(b) the German delegation suggested that it be specified that the presumption concerned the authors covered by the contract, in alignment with Article 2(5) and (6) of Directive 92/100/EC; the United Kingdom delegation could agree to this clarification;

(c) the German delegation suggested that it be specified that the person whom the authors were presumed to have authorized to exploit their work was the producer; the United Kingdom and French delegations could accept this clarification;

(d) several delegations considered the terms "to have authorized the exploitation of their work" inappropriate: the French and the Netherlands delegations considered that a reference to transfer of rights, rather than authorization of exploitation, would be preferable; a number of drafting suggestions were made for improving this wording, including "to have transferred their exploitation rights for the means of exploitation provided for in the contract", and "to have transferred their exploitation rights for the means of exploitation existing at the time of conclusion of the contract"; other delegations considered that, since this paragraph was optional, the nature of the presumption should not be delimited too closely, but should be left to national law;

(e) the Netherlands delegation suggested that the wording of Article 14bis(2)(b) of the Berne Convention either be taken over or be referred to in this paragraph.

20. The Chairman concluded that this paragraph would have to be reconsidered by the Working Party at a subsequent meeting.
Article 2bis

21. Delegations confirmed their positions in respect of this provision as set out in footnote 16 of the consolidated text, the Greek delegation drawing attention also to its position as set out in SN 1209/93.

22. The Working Party also examined the proposal by the Belgian delegation for an additional paragraph to this Article, as set out in SN 1208/93.

The French and Irish delegations supported this proposal, subject to the term of protection being 50 rather than 25 years.

The German delegation found this proposal interesting, but doubted whether it would attract sufficient support from other delegations.

The Netherlands and Portuguese delegations opposed this proposal, since they were opposed to any provision on the protection of unpublished works in this Directive.

The Danish, Greek, Italian and United Kingdom delegations and the Commission representative considered that this proposal created confusion between copyright protection and protection under neighbouring rights. They considered that the publisher of the work could not have copyright protection between the publication of the work and the expiry of the normal term of copyright protection, and expressed doubts whether a related right during this period would be compatible with the copyright protection still in force.

The Chairman concluded that there was not a sufficient majority in favour of the proposal by the Belgian delegation, which would be mentioned in the report to the Permanent Representatives Committee.
The Belgian delegation reserved the right to revise its proposal in the light of the discussion.

23. The Working Party also examined the proposal by the Italian delegation for an additional paragraph to this Article, as set out in SN 1212/93.

The initial reaction of the Belgian, German and French delegations to this proposal was favourable.

The Netherlands and Portuguese delegations opposed this proposal, since they were opposed to Article 2bis.

The Danish, Greek, Spanish, Irish and United Kingdom delegations and the Commission representative expressed scrutiny reservations on this proposal, several of these delegations considering that this question could be left to national law.

The Chairman concluded that there was not sufficient support at this stage for this proposal for it to be included in an overall compromise package. It would be mentioned in the report to the Permanent Representatives Committee.

Article 3

24. The Working Party examined the 2 variants of this Article set out in the consolidated text, each of which contained sub-variants, and the proposal made by the Netherlands delegation in SN 1211/93. Since neither sub-variant of variant 1 had attracted sufficient support, this examination concentrated on Variant 2 and the proposal by the Netherlands delegation.

25. The Belgian, Spanish, French and Italian delegations stated a preference for a solution based on variant 2. The Danish, Greek and Portuguese delegations were also prepared to accept a solution based on this variant.
The Belgian delegation was in favour of limiting variant 2 to the first sentence only, with the first sub-variant. The Portuguese delegation was also prepared to accept this solution.

The French delegation suggested adding to the solution advocated by the Belgian delegation "without the merit or the purpose of the work being taken into consideration".

The Italian delegation was also in favour of limiting variant 2 to the first sentence only, with a recital indicating that protection of other photographs would be left to national law.

The Spanish delegation was in favour of the second sub-variant of variant 2.

The German, Irish, Netherlands and United Kingdom delegations considered that variant 2 would achieve insufficient harmonization, since Member States interpreted Article 2 of the Berne Convention in different ways in respect of photographs.

26. The Danish, Irish, Netherlands, Portuguese and United Kingdom delegations were prepared to accept the proposal by the Netherlands delegation.

The German and French delegations and the Commission representative entered a scrutiny reservation on this proposal, with the German delegation and the Commission representative indicating favourable initial reactions.

The Irish and United Kingdom delegations gave their positive reactions to this proposal following clarifications that it would be left to Member States to determine what (if any) protection to give to photographs which did not meet the originality criterion. The Netherlands delegation also explained that in its view press photographs and fashion photographs would meet this
criterion, while photographs which did not have a human author could not.

The Irish and United Kingdom delegations considered that commercially significant photographs should be covered by this provision. However, no proposal was made to include wording to this effect in the provision, although the possibility of covering this point in the recitals was mentioned.

27. The Chairman concluded that, although a number of delegations were in favour of a solution based on variant 2, they were divided as to which of the sub-variants should be accepted and as to whether or not the second sentence should be included; other delegations felt that variant 2 would not provide sufficient harmonization. He added that several delegations were prepared to consider the proposal by the Netherlands delegation as a compromise solution, and noted that no delegation had actively opposed this proposal. He therefore considered that this proposal should be submitted to the Permanent Representatives Committee as the solution most likely to command a consensus.

Article 6

28. The majority of delegations supported a proposal by the German delegation to replace this Article by the following provision:

"This Directive shall be without prejudice to the provisions of the Member States regulating moral rights".

The Belgian, Spanish and Italian delegations were in favour of maintaining variant 1 of the consolidated text, although the Spanish and Italian delegations could accept the majority position. The Commission representative maintained a scrutiny reservation on the majority position.
Article 6bis

29. The Netherlands delegation maintained a reservation on the whole of Article 6bis.

The Belgian delegation stated that its scrutiny reservation concerned paragraph 2 in combination with paragraph 3.

Article 6bis(1)

30. The French delegation maintained its reservation on this paragraph.

Article 6bis(2)

31. The Spanish, Luxembourg, Netherlands and Portuguese delegations maintained their reservation on the principle of revival of protection which had expired in one or more Member States.

The United Kingdom delegation and the Commission representative opposed a suggestion by the Netherlands delegation that this principle be replaced by the principle that the Directive would not be applicable to existing works.

The German and United Kingdom delegations considered that the revival of rights was acceptable, provided that acquired rights were safeguarded as proposed in Article 6bis(3).

32. The Danish delegation continued to consider that the revival of protection for works which were still protected in at least one Member State would discriminate in favour of those Member States which had long terms of protection at present. It therefore proposed reverting to the text proposed by the United Kingdom Presidency in 9636/92, point 18.
The German and Italian delegations were opposed to this proposal, as they considered that there was no justification for reviving rights which had expired in all Member States.

The Chairman concluded on this point that both options would be submitted to the Permanent Representatives Committee.

33. The German delegation again proposed that the date mentioned in Article 6bis(2) should be the date of transposition of the Directive rather than the date of its adoption.

The Chairman proposed to submit both options to the Permanent Representatives Committee.

34. Following a proposal by the United Kingdom delegation, it was agreed that the beginning of this paragraph should read: "The terms of protection provided for in this Directive shall apply ...". The purpose of this amendment was to ensure that provisions such as Article 1bis(1), which did not concern the term of protection, would not have to be transposed in respect of existing works.

Article 6bis(3)

35. The Spanish delegation explained that it was not possible under the Spanish Constitution to protect legitimate expectations of third parties; only the legitimate expectations of the parties to a contract could be protected. It therefore proposed replacing Article 6bis(2) and (3) by the following sentence:

"The provisions of this Directive shall be without prejudice to acquired rights and legitimate expectations which may be protected under the law of each Member State".
After discussion, it was agreed that this concern of the Spanish delegation could be met by making the second sentence of Article 6bis(3) optional. It was also agreed that the reference to Community law and national law was not necessary. The second sentence of Article 6bis(3) should therefore read as follows:

"Member States may adopt the necessary provisions to protect acquired rights and legitimate expectations of third parties".

**Article 6bis(4)**

36. The Commission representative agreed to review the need for this provision in the light of changes made elsewhere in the proposal for a Directive.

**Article 6bis(5)**

37. It was agreed that discussions of this paragraph would be suspended pending a political decision in respect of Article 1bis.

38. The Chairman concluded that the Presidency would submit an overall compromise package covering the following issues to the Permanent Representatives Committee(1):

---

(1) The report to the Permanent Representatives Committee is set out in 5494/93 PI 18 CULTURE 17.
- the term of protection for copyright and related rights, together with provisions on application in time;
- Article 1(3a) on collective works;
- Article 1bis(1) and (2) on cinematographic and audiovisual works;
- Article 2bis on works published after the expiry of copyright protection;
- Article 3 on photographs;
- Article 6 on moral rights.
REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 5143/93 PI 16 CULTURE 14
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

A. Introduction

1. Under cover of a letter dated 23 March 1992, the Commission submitted to the Council a proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights.\(^{(1)}\) The proposal is based on Articles 57(2), 66, 100a and 113 of the Treaty establishing the European Economic Community.

2. The Economic and Social Committee gave its opinion on the proposal on 1 July 1992.\(^{(2)}\) The European Parliament gave its opinion on 19 November 1992.\(^{(3)}\) The Commission submitted an amended proposal on 7 January 1993.\(^{(4)}\)

---

\(^{(2)}\) OJ No C 287, 4.11.1992, p. 53.
\(^{(3)}\) Not yet published in the Official Journal.
3. The Council (Internal Market) has already held a policy debate on a number of aspects of this proposal at its session on 10 November 1992. It instructed the Permanent Representatives Committee to continue work in the light of the European Parliament's opinion when given, with a view to enabling the Council to adopt its common position at the earliest possible opportunity.

4. Examination of the proposal, amended in the light of the European Parliament's opinion, has continued at Working Party level. The Presidency now submits the main unresolved issues to the Permanent Representatives Committee, with a view to enabling the Council to seek a common position at its session on 5 April 1993. Although other questions remain open, the Presidency considers that their resolution will be facilitated by agreement on a package covering the main unresolved issues set out in this report.

B. Term of protection of copyright and of certain related rights; application in time of the Directive

5.1. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) provides that the term of copyright protection is to be 50 years "post mortem auctoris" (p.m.a.), i.e. the life of the author and 50 years after his death, while allowing the parties to the Convention to grant a longer term of protection. Some of the Community Member States have taken advantage of this option of granting a longer term of protection, while the other Member States grant the Berne Convention minimum of 50 years p.m.a.. These differences between terms of protection give rise to barriers to trade and distortions of competition which the proposal for a Directive seeks to eliminate with a view to the completion of the internal market.

(5) 9929/92 PV/CONS 65, point 7.
5.2. With regard to related rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) provides for a minimum term of protection of 20 years for performers, producers of phonograms and broadcasting organizations. The terms of protection granted to these categories of rightholders in the Member States vary considerably, ranging from 20 to 50 years in those Member States which are parties to the Rome Convention, while other Member States which are not yet parties to that Convention give no protection at present to some or all of these categories of rightholders. Some Member States also grant a related right to film producers, whose term varies from 25 to 50 years. However, the substance of these related rights has been harmonized by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (rental Directive).

6.1. Although the basic term of protection for copyright at present applied in the majority of Member States is 50 years p.m.a., a harmonized term of 50 years p.m.a. throughout the Community would require transitional arrangements in those Member States which at present grant longer terms, in order not to affect the acquired rights of authors and their heirs for whom terms of protection are currently running. The Commission has pointed out that these acquired rights must be maintained according to the case law of the Court of Justice. Such transitional arrangements could continue for as long as 70 years or more. In order to avoid such a long transitional period, during which barriers to trade would continue to exist, the Commission's proposal provides that the term of protection is to be harmonized at the length of the longest term at present applied in the Community, namely 70 years p.m.a.

6.2. The Commission's proposal also provides that the term of protection for all the related rights referred to under point 5.2. above will be harmonized at the length of the longest term at present applied in the Community, namely 50 years, for practically the same reasons as set out above in relation to copyright.

6.3. The European Parliament agrees to this solution of 70 years p.m.a. for copyright and 50 years for related rights.

7. The Irish, Luxembourg and Netherlands delegations have expressed a reservation on the need to harmonize the term of protection of copyright; they also consider that a term of 50 years p.m.a. is sufficient for copyright.

The Danish, Portuguese and United Kingdom delegations have entered a scrutiny reservation on the term of 70 years p.m.a. for copyright, pending satisfactory solutions being found for other provisions of the Directive.

8. For the reasons set out under point 6 above, the Presidency considers that the Commission's proposals in this respect should form part of an overall package.

9. The application in time of the Directive is closely related to the fundamental option of harmonizing the term of copyright at 70 years p.m.a. and the term of related rights at 50 years.

10. The Commission's original proposal contained the principle that where a longer term of protection than that resulting from the Directive was already running in a Member State when the Directive took effect, the Directive would not have the effect of shortening that term in that Member State. This principle as such is accepted by all delegations, but the French delegation

(7) See Annex I, Article 6a (1).
has a reservation to the extent that those Member States which have such longer terms of protection would not be allowed to maintain them for works produced after the Directive takes effect.

11. The Commission's original proposal also contained the principle that the Directive would apply solely to rights which had not yet expired when the Directive took effect. A number of delegations have pointed out that under this approach, there would be a long transitional period during which particular works and other subject matter would continue to be protected in those Member States where the present term of protection is longer than the minimum under the Berne Convention or the Rome Convention, but would no longer be protected in other Member States, with the result that the internal market would be subject to distortions during that time. Following requests from these delegations that consideration be given to the possibility of overcoming this difficulty by providing for the revival of protection in such cases and following a similar proposal for amendment from the European Parliament, the Commission has amended its proposal to the effect that where works or subject matter are protected in at least one Member State, on the date of adoption of the Directive, protection will have to be revived or introduced in the other Member States until the expiry of the term provided for by the Directive, with Member States taking any necessary measures to protect any rights acquired or legitimate preparations made by third parties to exploit such works or subject matter before protection was revived or introduced. (9)

(8) French law provides for an extension of copyright protection for thirty years for the benefit of the descendants of authors killed in action in past or future military conflicts. Other cases are the perpetual protection for "Peter Pan" under United Kingdom law and the terms of protection already running in Spain for works of authors who died before the law reducing the term of copyright protection in Spain from 80 to 60 years p.m.a. entered into force.

(9) See Annex I, Article 6a (2), Variant 1 and (3).
The Belgian, Danish, Spanish, Luxembourg, Netherlands and Portuguese delegations have entered reservations on this revival of protection. Their reservations are based partly on an objection in principle to the revival of protection, partly on the opposition of some of these delegations to the harmonization of the term of copyright protection at 70 years p.m.a., and partly on the fact that they consider that the Commission's amended proposal would have a discriminatory effect in respect of works whose authors had died between 50 and 70 years before the date of adoption of the Directive: such a work originating in a Member State which had a term of copyright protection of longer than 50 years p.m.a. would be protected throughout the Community until the expiry of 70 years p.m.a., involving revival of protection in those Member States in which it had already expired; whereas such a work originating in a Member State which had a term of copyright protection of 50 years p.m.a. would remain in the public domain throughout the Community.

The Danish delegation has requested that further consideration be given to a proposal made by the United Kingdom Presidency whereby protection would be revived in respect of all works or subject matter which would have been in protection on the date of transposition of this Directive if this Directive and the rental Directive had already been in force. (10) This would not have the discriminatory effect referred to above, but the Commission representative has pointed out that it would have the effect that protection could be revived even where the work or subject matter was no longer protected in any Member State, in which case there would be no obstacle to its free movement within the Community.

(10) See Annex I, Article 6a (2), Variant 2.
Views are also divided on the question whether the reference date should be that of the adoption of the Directive or the deadline for its transposition.

12. The Presidency invites the Permanent Representatives Committee to examine the respective advantages and disadvantages of the two variants of Article 6a (2) as set out in Annex I, as well as the two dates, and to decide which is more appropriate.

C. Collective works

13. The laws of a number of Member States make provision for what are known as "collective works", a concept which does not appear in the Berne Convention. (11) Under the Commission's original proposal, the term of protection for these collective works would be seventy years after the work is lawfully made available to the public, as in the case of anonymous or pseudonymous works. Since the European Parliament did not propose any amendment in this respect, the Commission's amended proposal also remains unchanged on this point (Article 1(3)).

14. However, in the course of the Working Party's discussions it emerged that the solution proposed would not be in conformity with the Berne Convention in cases where the authors of such works were identified. The normal rule of the Berne Convention is that the term of copyright protection is the life of the author (or the last surviving author in the case of a work of joint authorship) and a number of years after his death (Articles 7(1) and 7bis). The only exceptions allowed from this general rule concern cinematographic works (Article 7(2)), anonymous or pseudonymous works (Article 7(3)) and photographic works and works of applied art (Article 7(4)). A provision has therefore been drawn up whereby collective works would have the

(11) However, Italy uses this term of "collective works" in respect of "collections of literary or artistic works", which are regulated by Article 2(5) of the Berne Convention.
same term of protection as anonymous or pseudonymous works where their authors are not identified, but would be subject to the normal rule of the Berne Convention where their author or authors are identified.\(^{(12)}\) This provision would oblige those Member States whose laws provide for collective works but do not fully respect these rules to bring their laws into line with the Berne Convention.

15. **The Spanish, French, Italian, Netherlands and Portuguese delegations** have reservations on this provision, which they consider to be unclear. **The Spanish, Italian and Netherlands delegations** would prefer to revert to the Commission's proposal. **The Netherlands delegation** considers that the new provision does not take account of the situation in the Netherlands where a legal entity can be deemed to be the author of a collective work, whereas the Commission's proposal would cover this situation.

16. Since the new provision does not deal with authorship and fits in with the requirement of the Berne Convention while the Commission's proposal does not, the Presidency considers that Article 1(3a) as set out in Annex II should form part of an overall package.

D. **Cinematographic and audiovisual works**

17. In the United Kingdom and Ireland, the producer of a cinematographic or audiovisual work is considered to be its author, and the term of protection of such a work is 50 years from the date when it is first lawfully made available to the public. In the other Member States, the principal director and other creative contributors are considered to be the authors of a cinematographic or audiovisual work, and its term of protection is calculated in relation to the death of the last surviving author.

\(^{(12)}\) Article 1(3a) as set out in Annex II to this report.
18. Whereas the Commission's original proposal did not contain any provisions concerning harmonization of the term of protection of cinematographic or audiovisual works, the European Parliament proposed an amendment which would harmonize the authorship of such works and which was based on the principle of the term of protection being calculated in relation to the death of the last surviving author. The Commission's amended proposal contains a provision based on the European Parliament's amendment, whereby the principal director and the other natural persons who made the intellectual creation of the work would be its authors.\(^{(13)}\)

19. A number of delegations consider that it is not necessary to harmonize the authorship of cinematographic and audiovisual works in a Directive concerning the term of protection; however, in a spirit of compromise, they are prepared to generalize in this Directive the provision contained in Article 2(2) of the rental Directive.\(^{(14)}\)

20. Several delegations have also drawn attention to the difficulty of determining the date of expiry of the term of protection of a particular cinematographic or audiovisual work where that term is calculated in relation to the death of the last surviving author and when criteria for determining who are the authors of that particular work may vary from one Member State to another. With a view to achieving greater legal certainty in this respect, it has been proposed that the term of protection be calculated instead in relation to the death of the principal director.

\(^{(13)}\) Article 1a as set out in Annex III to this report.
\(^{(14)}\) "For the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors".
21. The great majority of delegations are prepared to accept a compromise solution containing the elements mentioned in points 19 and 20 above.\(^{(15)}\)

22. The French delegation and the Commission representative remain in favour of the Commission's amended proposal for Article 1a, since the solution acceptable to the majority of delegations would have the consequence of reducing the term of protection in cases where a co-author other than the principal director was the last surviving co-author in Member States in which the term of protection is at present calculated in relation to the death of the last surviving author.

Other delegations have pointed out that in practice there would be relatively few cases where a term of protection of 70 years after the death of the principal director would expire earlier than the present term of 50 years after the death of the last surviving author.

23. The Presidency considers that Article 1a (1) and (2) as set out in Annex IV to this report should form part of an overall package. (Paragraph 3 requires further consideration at Working Party level).

E. Works published after the expiry of copyright protection

24. The Commission's original proposal did not contain any proposal in respect of protection of works first published after the expiry of copyright protection. A number of Member States which have provisions in this respect advocated the inclusion of a provision on this subject in the Directive, while other Member States were opposed to the inclusion of such a provision. Following proposals for amendment on this subject by the European Parliament, the Commission's amended proposal included

\(^{(15)}\) Article 1a (1) and (2) as set out in Annex IV to this report.
a provision(16), which was intended to constitute a compromise solution between the positions of the various delegations, with the following elements:

(a) the protection granted in respect of such works would not be copyright protection, but a related right equivalent to an author's economic rights;

(b) the beneficiary of such protection would be the person who for the first time makes the work lawfully available to the public;

(c) the term of protection would be 25 years.

25. The Netherlands and Portuguese delegations have a reservation on the need for a provision of this nature.

The French delegation considers that the protection granted should be full copyright protection, and the Italian delegation has a reservation on the protection being "equivalent to the economic rights of the author".

The Greek, French and Irish delegations consider that the term of protection should be at least 50 years.

The other delegations consider that this provision constitutes an acceptable compromise.

26. The Belgian delegation, supported by the French and Irish delegations, has proposed an amendment to this provision with the intention of ensuring that a work first lawfully made available to the public in the last few years before the expiry of the 70-year copyright term from the death of the author would not receive a shorter term of protection than it would receive under Article 2a if it were first published shortly after the

(16) Article 2a as set out in Annex V to this report.
expiry of copyright protection. This proposal is set out in Annex VI to this report.

27. The Italian delegation has proposed an additional paragraph to Article 2a with the intention of taking account of "critical or scientific works". This proposal is set out in Annex VII to this report.

28. The Presidency considers that Article 2a as set out in Annex V to this report represents a balanced compromise and should form part of an overall package. It considers that the proposals set out in Annexes VI and VII have not obtained enough support to be included in an overall package.

F. Photographs

29. The Commission's original proposal was that "protected photographs shall have the term of protection provided for in Article 1" (70 years p.m.a.). The European Parliament has proposed no amendment and the Commission's amended proposal remains unchanged on this point.

30. However, a number of delegations considered that this would lead to insufficient harmonization, since some Member States accord different forms and/or different terms of protection to photographs which are considered to be photographic works and other photographs, while other Member States protect all original photographs without making such a distinction, and other Member States protect photographic works but do not protect other photographs. The Commission's proposal would therefore have the effect that photographs other than photographic works would remain protected in some Member States but not in others, with consequent distortions to the internal market.

31. Various alternatives proposals have been considered by the Working Party. The proposal which has come nearest to achieving
a consensus is set out in Annex VIII to this report, although there are still a number of scrutiny reservations. This proposal by the Netherlands delegation is based on Article 1(3) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs⁽¹⁷⁾.

32. The Presidency considers that Article 3 as set out in Annex VIII to this report should form part of an overall package.

G. Moral rights

33. The Commission's original and amended proposals contained a provision to the effect that "the moral rights granted to the author shall be maintained at least until the expiry of the economic rights".

34. Since the Commission is considering the whole area of moral rights, the great majority of delegations takes the view that harmonization of the term of protection of moral rights should not be considered in isolation from the other aspects of moral rights. Moreover, the Council Legal Service⁽¹⁸⁾ considers that the provision proposed by the Commission could not be based on Articles 57 and 100a of the EEC Treaty, but would have to be based on Article 235; since Article 235 requires a different adoption procedure from that required by Articles 57 and 100a, such a provision would have to be adopted in a separate act.

35. In the light of all these considerations, the great majority of delegations is in favour of replacing this provision by the following provision:

"This Directive shall be without prejudice to the provisions of the Member States regulating moral rights".

⁽¹⁷⁾ OJ No L 122, 17.5.1991, p. 42
⁽¹⁸⁾ See Annex to 5143/93 PI 16 CULTURE 14.
36. The Belgian delegation and the Commission representative have a scrutiny reservation on this solution.

37. The Presidency considers that Article 6 as set out in point 35 above should form part of an overall package.

H. Conclusion

38. The Presidency invites the Permanent Representatives Committee to pronounce on an overall package comprising:

(a) terms of protection of 70 years p.m.a. for copyright and 50 years for related rights, together with the provisions on application in time as set out in Article 6a in Annex I; a decision on which of the variants in Article 6a (2) is more appropriate is also invited;

(b) Article 1(3a) on collective works as set out in Annex II;

(c) Article 1a (1) and (2) on cinematographic and audiovisual works as set out in Annex IV;

(d) Article 2a on works first published after the expiry of copyright protection, as set out in Annex V;

(e) Article 3 on photographs as set out in Annex VIII;

(f) Article 6 on moral rights as set out in point 35 above.
Article 6a
Application in time

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

2. [Variant 1]
The term of protection provided for in this Directive shall apply to all works and subject matters which are protected in at least one Member State, [on the date of adoption of this Directive] [on the date referred to in Article 10(1)], under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.

[Variant 2]
The terms of protection provided for in this Directive shall apply to all works and subject matter which would have been in protection [on the date of adoption of this Directive] [on the date referred to in Article 10(1)], had this Directive and Council Directive 92/100/EEC already been in force.

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

[4. Member States may determine the date from which Article 1a shall apply, provided that that date is not later than 1 July 1997].
Article 1 (3a)

3a. In the case where a work:

- is created by several physical authors on the initiative and under the direction of a physical person or legal entity, on the understanding that it will be disclosed only by - and under the name of - that person or entity, and

- consists of contributions of several authors who are not identified

the duration shall be calculated for this work as such as provided for in paragraph 3 for anonymous or pseudonymous works.

This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, for which contributions paragraph 1 or 2 shall apply.
Article 1a - Commission's amended proposal

Article 1a

1. The authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work.

2. The principal director shall be considered as one of its authors.

3. The Member States may provide, without prejudice to Article 2, paragraph 6 of Directive 92/100/EEC, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work.
ANNEX IV

Article 1a - compromise solution

Article 1a
Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the principal director.

[3. The Member States may provide, without prejudice to Article 2(6) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work]^{(19)}.

(19) Paragraph 3 requires further consideration by the Working Party.
Article 2a
Protection of unpublished works

Any person who for the first time makes lawfully available to the public a work, the copyright protection of which has expired, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.
Article 2a as proposed by the Belgian delegation

Article 2a

Where a work has for the first time been lawfully made available to the public after the expiry of the protection provided for in Article 1, it shall benefit from protection for 25 years, equivalent to the economic rights of the author, from the time when the work was first lawfully made available to the public.

However, if the work has for the first time been lawfully made available to the public in the 25 years preceding the expiry of the term of protection, it shall in all cases enjoy copyright protection for the remaining term as well as protection for 25 years within the meaning of paragraph 1, from the time when the work was first lawfully made available to the public.
ANNEX VII

Addition to Article 2a
proposed by the Italian delegation

Any person who produces a critical edition which is the result of scientific research and studies to reconstruct the text of a literary, dramatic or musical work, or to restore a cinematographic work in its original forms, shall have the exclusive right to its exploitation for a term of thirty years from the year of publication, whatever form such publication takes.
Article 3 - Compromise solution

Protection of photographs

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected according to Article 1. No other criteria shall be applied to determine their eligibility for protection.
Report

from: Presidency

to: Council (Internal Market)

No. prev. doc.: 5494/93 PI 18 CULTURE 17
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

A. Introduction

1. Under cover of a letter dated 23 March 1992, the Commission submitted to the Council a proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights.(1) The proposal is based on Articles 57(2), 66, 100a and 113 of the Treaty establishing the European Economic Community.


3. The Council (Internal Market) has already held a policy debate on a number of aspects of this proposal at its session on 10 November 1992.(5) It instructed the Permanent Representatives Committee to continue work in the light of the European Commission's recommendations.

(2) OJ No C 287, 4.11.1992, p.53.
(3) Not yet published in the Official Journal.
(5) 9929/92 PV/CONS 65, point 7.
Parliament's opinion when given, with a view to enabling the Council to adopt its common position at the earliest possible opportunity.

4. Examination of the proposal, amended in the light of the European Parliament's opinion, has continued in accordance with these instructions. The Presidency now submits three key issues to the Council for a policy debate.

B. Term of protection of copyright and of certain related rights (Articles 1 and 2)

5.1. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) provides that the term of copyright protection is to be 50 years "post mortem auctoris" (p.m.a.), i.e. the life of the author and 50 years after his death, while allowing the parties to the Convention to grant a longer term of protection. Some of the Community Member States have taken advantage of this option of granting a longer term of protection, while the other Member States grant the Berne Convention minimum of 50 years p.m.a. These differences between terms of protection give rise to barriers to trade and distortions of competition which the proposal for a Directive seeks to eliminate with a view to the completion of the internal market.

5.2. With regard to related rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) provides for a minimum term of protection of 20 years for performers, producers of phonograms and broadcasting organizations. The terms of protection granted to these categories of rightholders in the Member States vary considerably, ranging from 20 to 50 years in those Member States which are parties to the Rome Convention, while other Member States which are not yet parties to that Convention give no protection at present to some or all of these categories of
rightholders. Some Member States also grant a related right to film producers, whose term varies from 25 to 50 years. However, the substance of these related rights has been harmonized by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (rental Directive).

6.1. Although the basic term of protection for copyright at present applied in the majority of Member States is 50 years p.m.a., a harmonized term of 50 years p.m.a. throughout the Community would require transitional arrangements in those Member States which at present grant longer terms, in order not to affect the acquired rights of authors and their heirs for whom terms of protection are currently running. The Commission has pointed out that these acquired rights must be maintained according to the case law of the Court of Justice. Such transitional arrangements could continue for as long as 100 years or more. In order to avoid such a long transitional period, during which barriers to trade would continue to exist, the Commission's proposal provides that the term of protection is to be harmonized at the length of the longest term at present applied in the Community, namely 70 years p.m.a.

6.2. The Commission's proposal also provides that the term of protection for all the related rights referred to under point 5.2. above will be harmonized at the length of the longest term at present applied in the Community, namely 50 years, for practically the same reasons as set out above in relation to copyright.

6.3. The European Parliament agrees to this solution of 70 years p.m.a. for copyright and 50 years for related rights.

(6) OJ No L 346, 27.11.1992, P; 61.
7. The Danish, Irish, Luxembourg, Netherlands and Portuguese delegations have expressed a reservation on the need to harmonize the term of protection of copyright; they also consider that a term of 50 years p.m.a. is sufficient for copyright. The United Kingdom delegation has entered a scrutiny reservation on the term of 70 years p.m.a. for copyright, pending satisfactory solutions being found for other provisions of the Directive.

The Netherlands delegation considers that rather than harmonizing the term of protection of copyright, it would be preferable to adopt a system of mutual recognition, whereby each Member State would accord to a copyright work the term of protection provided for by the national law of the country of origin of the work. It has reserved the right to submit to the Council a paper setting out its position in this respect.

8. The Council is invited to consider whether the term of copyright and related rights should be harmonized at 70 years p.m.a. and 50 years respectively as proposed by the Commission, or whether a system of mutual recognition should be applied as proposed by the Netherlands delegation.

C. Cinematographic and audiovisual works (Article 1a)

9. In the United Kingdom, Ireland and Luxembourg, the producer of a cinematographic or audiovisual work is considered to be its author, and the term of protection of such a work is 50 years from the date when it is first lawfully made available to the public. In most of the other Member States, the principal director and other creative contributors are considered to be the authors of a cinematographic or audiovisual work, and its term of protection is calculated in relation to the death of the last surviving author.
10. Whereas the Commission's original proposal did not contain any provisions concerning harmonization of the term of protection of cinematographic or audiovisual works, the European Parliament proposed an amendment which would harmonize the authorship of such works and which was based on the principle of the term of protection being calculated in relation to the death of the last surviving author. The Commission's amended proposal contains a provision based on the European Parliament's amendment, whereby the principal director and the other natural persons who made the intellectual creation of the work would be its authors. 

11. A number of delegations consider that it is not necessary to harmonize the authorship of cinematographic and audiovisual works in a Directive concerning the term of protection; however, in a spirit of compromise, they are prepared to generalize in this Directive the provision contained in Article 2(2) of the rental Directive.

12. Several delegations have also drawn attention to the difficulty of determining the date of expiry of the term of protection of a particular cinematographic or audiovisual work where that term is calculated in relation to the death of the last surviving author and when criteria for determining who are the authors of that particular work may vary from one Member State to another. With a view to achieving greater legal certainty in this respect, it has been proposed that the term of protection be calculated instead in relation to the death of the principal director.

(7) Article 1a as set out in Annex I to this report.
(8) "For the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors."
13. The great majority of delegations are prepared to accept a compromise solution containing the elements mentioned in points 11 and 12 above.\(^9\)

14. The French delegation and the Commission representative remain in favour of the Commission's amended proposal for Article 1a, since the solution acceptable to the majority of delegations would have the consequence of reducing the term of protection in cases where a co-author other than the principal director was the last surviving co-author in Member States in which the term of protection is at present calculated in relation to the death of the last surviving author. In addition, the French and Italian delegations are in favour of it being stated expressly that only natural persons may be considered to be authors of a cinematographic or audiovisual work: this is stated in the Commission's amended proposal, while the compromise solution leaves open the possibility of both natural and legal persons being considered to be authors of such works.

Other delegations have pointed out that in practice there would be relatively few cases where a term of protection of 70 years after the death of the principal director would expire earlier than the present term of 50 years after the death of the last surviving author. They have also pointed out that Article 2(2) of the rental Directive also leaves open the possibility of both natural and legal persons being considered to be authors of such works. The Irish, Luxembourg and United Kingdom delegations would be opposed to limiting this possibility to natural persons.

15. The Council is invited to consider whether paragraphs 1 and 2 of the Commission's amended proposal (Annex I) or paragraphs 1 and 2 of the compromise solution (Annex II) constitute the

\(^9\) Article 1a (1) and (2) as set out in Annex II to this report. Paragraph 3 requires further consideration at Working Party level.
appropriate approach to the term of protection of cinematographic or audiovisual works.

D. Moral rights (Article 6)

16. The Commission's original and amended proposals contained a provision to the effect that "the moral rights granted to the author shall be maintained at least until the expiry of the economic rights".

17. Since the Commission is considering the whole area of moral rights, the great majority of delegations takes the view that harmonization of the term of protection of moral rights should not be considered in isolation from the other aspects of moral rights. It has also been pointed out that the Commission's proposal would achieve only partial harmonization, as Member States would remain free either to provide for the same term of protection for moral rights as for economic rights, or to provide for a longer term, even perpetuity, for moral rights. Moreover, the Council Legal Service\textsuperscript{10} considers that the provision proposed by the Commission could not be based on Articles 57 and 100a of the EEC Treaty, but would have to be based on Article 235; since Article 235 requires a different adoption procedure from that required by Articles 57 and 100a, such a provision would have to be adopted in a separate act.

18. In the light of all these considerations, the great majority of delegations is in favour of removing moral rights from the scope of the Directive by replacing this provision by the following provision:

"This Directive shall be without prejudice to the provisions of the Member States regulating moral rights."

\textsuperscript{10} See Annex to 5143/93 PI 16 CULTURE 14.
19. The Commission representative has a scrutiny reservation on this solution.

20. The Council is invited to confirm that moral rights should be excluded from the scope of the Directive.
ANNEX I

Article 1a - Commission's amended proposal

Article 1a

1. The authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work.

2. The principal director shall be considered as one of its authors.

3. The Member States may provide, without prejudice to Article 2, paragraph 6 of Directive 92/100/EEC, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work.
Article 1a - compromise solution

Article 1a

Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the principal director.

[3. The Member States may provide, without prejudice to Article 2(6) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work.](*)

---

(11) Paragraph 3 requires further consideration by the Working Party.
EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 28 July 1993 (12.08)
(OR. f)

5864/93

RESTREINT

PV/CONS 17
(Internal Market)

DRAFT
MINUTES

of the 1652nd meeting of the Council
(Internal Market)

held in Luxembourg on Monday 5 April 1993
CONTENTS

1. Adoption of the agenda ................................................................. 4
2. Approval of the list of "A" items ..................................................... 4
3. Completion of the internal market, including abolition of frontier controls ....... 5
4. The internal market after 1992
   - Future developments ............................................................... 6
5. Amended proposals for a Council Regulation on the Statute for a European Company (SE) and a Council Directive complementing the Statute ......................................................... 8
7. Amended proposal for a Council Directive on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ................................................................. 14
8. Amended proposal for a Council Regulation on the Community trade mark .......... 15
   (b) on sweeteners for use in foodstuffs
11. Affixing and use of the CE mark of conformity on industrial products .................. 18

13. Other business
   - Commission communication on trans-European telematic networks between administrations ................................................................. 21
1. Adoption of the agenda
5709/93 OJ/CONS 17 (Internal market)

The Council adopted the above agenda.

2. Approval of the list of "A" items
5710/93 PTS A 18

The Council approved the "A" items listed in 5710/93 PTS A 18.

When approving items 4 and 6, however, the Council noted the following statements:

(a) concerning item 4:

Adoption in the official languages of the Communities of the Council Decision concerning the negotiation of customs co-operation procedures with the Community's main trading partners
5563/93 CID 10

Statement by the German delegation:

"With this Decision the Commission is receiving from the Council a wide-ranging negotiating mandate for the conclusion of customs co-operation agreements with certain named third countries.

Because, on the one hand, draft treaties which have once been negotiated by the Commission with third countries can, in line with international conventions, only be altered in limited ways at the stage of adoption by the Council but, on the other hand, the customs administrations of the Member States are greatly affected by the contents of the agreements, Germany expects the Commission to involve the Member States' experts in this sector in the negotiation process fully and at an early stage, and to take their opinions and wishes into account under a broad interpretation of Article 113(3) of the EEC Treaty."
(b) concerning item 6:

Adoption in the official languages of the Communities of the Council Directive on the harmonization of provisions governing the placing on the market and supervision of explosives for civil uses
5739/93 ENT 63
5736/93 ENT 62

Statement by the Italian delegation:

"The Italian Government requests that the Committee established by the Directive address as soon as possible the issue of the relationship between this Directive and the international conventions in this area.

The Italian Government believes that the agreement on this Directive does not preclude the application at national level, for reasons of public policy, of international conventions which lay down higher safety standards in this area."

3. **Completion of the internal market, including abolition of frontier controls**

The Council noted an oral report from the Commission representative emphasizing the slow progress recorded since the previous Council meeting as regards

- the adoption of measures necessary to ensure the completion of the internal market;

- the transposition of measures already adopted into national law.

The Commission representative thought it essential that any delays should be made up before the European Council meeting in Copenhagen and stressed the need to step up efforts particularly in the areas of intellectual property, indirect taxation, the Statute of the European Company and the Community trade mark.
The Italian delegation, which endorsed the Commission representative’s view on the latter point, also reiterated the urgent need for progress in the area of precious metals, footwear and the flammability of furniture.

The Portuguese delegation emphasized the importance of a swift settlement of outstanding problems in connection with dual-use goods and technologies.

4. The internal market after 1992 - Future developments

- Political debate
  9837/92
  10813/92
  10127/92
  5753/93

The Council held an open general discussion on the follow-up to the completion of the internal market, i.e. the further measures which the Community and the Member States should take to guarantee that citizens (workers and consumers) and undertakings benefited in full from the single market.

The discussion focused on certain matters identified by the Presidency as key issues, as outlined in 5753/93, viz:

- the internal market - benefits

- economic efficiency and improved rights

- transparency

- information and communication
- the enforcement of internal market rules and administrative co-operation.

In the course of the discussion it was stressed that the following were key points:

- the role of the single market in the promotion of SMEs and measures to combat unemployment;

- the need to ensure monetary stability within the Community, both Economic and Monetary Union and economic convergence being seen as vital to the smooth operation of the internal market;

- the achievement of urgent progress on the question of freedom of movement for persons at Community level and in the context of the Schengen Agreement;

- observance of the principle of subsidiarity, which should lead to a drop in the number of new legislative proposals and, at the same time, ensure continuing efforts to prevent the creation of new barriers to trade;

- consideration of the problems created by the geographical isolation of certain parts of the Community and the development of trans-European networks;

- the need to prevent the introduction of bureaucratic structures in internal market management by favouring a pragmatic co-ordinating approach.
Several delegations announced steps taken at national level to ensure access to information on Community law and to deal with any problems in connection with the implementation of the internal market.

In conclusion, the Council agreed to resume the discussion once the Commission had submitted a formal communication on the subject to it at its next meeting.

5. **Amended proposals for a Council Regulation on the Statute for a European Company (SE) and a Council Directive complementing the Statute**

5269/93 SE 7
5270/93 SE 8
5735/93 SE 10

The Council tackled discussion of this question on the basis of the report from the Permanent Representatives Committee, focusing more especially on the initial key question of the need to create the SE.

Two opposite approaches were voiced:

- the German and United Kingdom delegations thought that the SE was not vital to the completion of the internal market and emphasized that firms in their respective countries displayed no special interest in this instrument. The German delegation suggested that the discussions be suspended for a certain period at least and emphasized the considerable difficulty which it would have in agreeing to any Community proposal which would jeopardize its "Mitbestimmung" system. The United Kingdom delegation stated that the appropriate legal basis for both the Regulation and the Directive would be Article 235 of the Treaty and that any compulsory system of employee involvement
would be unacceptable to it. It also reaffirmed the problem which it had with the provisions on the transfer of the registered office. In conclusion, the United Kingdom delegation said that an alternative to continuing the discussions on the SE would be to resume talks on the company law Directives, which were currently in abeyance, although it did not deny that similar difficulties to those affecting the SE could arise in connection with the said Directives.

- The Spanish, French, Italian, Greek, Belgian and Danish delegations emphasized that there were major and unwarranted gaps in company law in the single market context. A company coming under one Community Member State could not transfer its registered office to another Member State without first being wound up, with resultant heavy tax implications for it, nor did any Community legal instrument exist which enabled two or more firms from different Member States to merge, which meant that free movement of undertakings was not guaranteed in a single market which should already have been completed. The alternative indicated by the United Kingdom delegation had no credibility since it would result in an impasse; consequently the most rational solution was to press ahead with the discussions on the SE, which had already reached a much more advanced stage.

Three other delegations (NL/L and IRL) were less categorical in their views, inasmuch as they thought that the SE represented a most useful contribution towards the completion of the internal market, but considered that:
greater flexibility should be provided in the operation of the Statue of the SE so as to make the instrument more attractive, particularly as regards the question of the registered office/head office (NL and L);

- the Directive needed to be thought about in detail (IRL).

Commissioner Vanni d'Archirafi told the Council that the Commission still regarded the SE as fundamental to the completion of the internal market, as several European Councils had already affirmed. He expressed support for the arguments put forward by the second group of delegations, regarding the gaps in company law, and emphasized that the Commission's view for the idea of the SE encompassing a system of employee involvement did not mean the extension of any particular national system to the whole of the Community.

The positions of the delegations on the other questions referred to in the Permanent Representatives Committee report were confirmed, except on the problem of the registered office and the head office having to be located in the same place, on which the Luxembourg delegation expressed its support for the Netherlands delegation.

In conclusion, the President of the Council, noting that the great majority of delegations had expressed views in favour of the need for the SE, said that the Presidency would conduct bilateral talks in order to establish whether possible solutions could be formulated in time to be referred to the Internal Market Council meeting in June.
6. **Amended proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights**

4483/93 PI 9 CULTURE 8

5702/93 PI 25 CULTURE 22

The Council held a political discussion on the matters referred to in Parts B, C and D of the Presidency’s report (5702/93 PI 25 CULTURE 22).

On the question of the term of copyright protection,

- the Belgian, German, Greek, Spanish, French and Italian delegations confirmed their support for a term of 70 years pma (post mortem auctoris), as proposed by the Commission;

- the Danish and United Kingdom delegations, while not convinced of the need to harmonize the term at 70 years pma, were willing to examine the solution with a favourable eye as part of a satisfactory overall compromise;

- the Irish, Luxembourg, Netherlands and Portuguese delegations still saw no real need for harmonization of the term; if it were to be harmonized, these delegations questioned the need for a term of 70 years pma, the Irish delegation suggesting 50 years pma, coupled with a provision allowing the Member States currently operating a longer term to maintain the latter in respect of existing works;
the Netherlands delegation submitted a document (5895/93 PI 26 CULTURE 26) proposing mutual recognition instead of harmonization; the Luxembourg and Portuguese delegations expressed interest in examining this alternative at the appropriate level; the Danish and German delegations were opposed to such an alternative;

the Commission representative outlined the arguments in favour of harmonization at 70 years pma;

the President noted in conclusion a certain drift of opinion towards the solution proposed by the Commission, along with the call by some delegations for a closer scrutiny of the alternative advanced by the Netherlands delegation.

For related rights, the Council noted a consensus in favour of the 50-year protection term proposed by the Commission, the Luxembourg delegation voicing a reservation.

On the matter of cinematographic and audiovisual works:

the great majority of delegations favoured the solution contained in Annex II to 5702/93 as part of an overall compromise and subject to the following remarks:

- The Irish delegation stood by a reservation regarding the 70-year period laid down in paragraph 2;
the Luxembourg and United Kingdom delegations would consider the Directive as a whole unacceptable in the absence of such a solution;

the Italian delegation thought that the term "other persons" in paragraph 1 should read "other natural persons" in the interest of greater clarity;

- the French delegation indicated a strong preference for the amended Commission proposal and underlined the contradiction which it thought existed between the possibility of recognizing more than one co-author and the requirement to calculate the term of protection with reference to the decease of the principal director only; it advocated at the very least a provision allowing the Member States to provide for the term to be calculated with reference to the decease of the last surviving co-author;

- the Commission representative said that the Commission was prepared to review its position if an overall solution could be found for the Directive as a whole.

The Council noted that the great bulk of delegations favoured the exclusion of moral rights from the scope of the Directive, the Italian delegation for its part supporting the Commission proposal. The Commission representative said that, as part of an overall compromise, the Commission was willing to consider the solution advocated by the great majority of delegations.
Finally, several delegations stressed the need for satisfactory solutions to other problems, in particular the protection of posthumous works and works of criticism, the protection of legal persons and the restoration of rights.

The Council instructed the Permanent Representatives Committee to continue examination of the Directive proposal with a view to the adoption of a common position.

7. Amended proposal for a Council Directive on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

The Council confirmed its political agreement, with one abstention and subject to finalization in the official languages of the Community in accordance with the customary procedure, to the proposal for a Directive as contained in 5600/93 PI 22 CULTURE 20 + COR 1 (f), with the date of 1 January 1998 referred to in Article 7(2) being replaced by 1 January 2000.

The Council also noted the following Commission statement:

"The Commission notes that, within the framework of Community law, one of the tasks of the bodies provided for as an option under Article 12(2) will be to promote the negotiation of agreements between cable operators and broadcasting organizations, with a view to achieving equitable results."
8. **Amended proposal for a Council Regulation on the Community trade mark**

8896/84 PI 19 (MARCA)
9355/92 PI 101 (MARCA) + ADD 1 + ADD 2 + ADD 3
10994/92 PI 129 (MARCA)
5535/93 PI 19 (MARCA)

The President of the Council said that, following the informal discussion on the language arrangements for the Office, during which the German delegation advanced a number of compromise proposals, the Presidency would continue to work on a compromise solution, taking as a basis, however the compromise proposal submitted by the United Kingdom Presidency in December 1992, with certain details amended where necessary and possibly a review clause added. The Presidency would discuss the matter with the German delegation.

The German delegation stressed that it had not agreed to the December 1992 compromise proposal.

The Spanish delegation also wished to discuss the matter with the Presidency, while the Portuguese delegation said that it would like to be fully involved in any developments.

9. **Proposals for Council Directives**

7726/92 AGRILEG 208
5748/93 AGRILEG 71


(b) on sweeteners for use in foodstuffs

10451/92 AGRILEG 342 ADD 1 + COR 1 (en, dk)

Following a discussion, which confirmed the link between the two proposals, the Council instructed the Permanent Representatives Committee to continue discussing the matter once the European Parliament had delivered its Opinion on the first of the two proposals.

4352/83 ENT 11
5727/93 ENT 61

Subject to examination of the European Parliament's Opinion on the first reading and to the parliamentary scrutiny reservation maintained by the United Kingdom delegation, all Member States' delegations were able to agree to:

- the compromise drafted by the Presidency and contained in the Annex to 5727/93,

- the entry of the following statements in the Council minutes:

"The Council agrees that, pending the adoption of Community regulations for helmets intended for the users of two- or three-wheeled motor vehicles, Member States shall have the right to prescribe, in conformity with the Treaty, the use of helmets which are in compliance with UN/ECE Regulation No 22 or the standards of other Member States."

"The Council and the Commission agree that the special treatment of motorcycle helmets shall not be treated as a precedent for the exclusion of items of personal protective equipment from the Directive."

- the addition of the following sentence to the statement on page 8 of 5727/93:

"The Commission undertakes to submit this proposal within the next six months."
The Commission representative was against the exclusion of motorcycle helmets from the scope of the Directive on the grounds that such exclusion would amount to not only a distortion of the Commission's proposal but also a violation of the Commission's right of initiative under the terms of Article 100a of the Treaty. Protesting against the approach formulated by the Council, he asked that the following statement be entered in the minutes:

"The Commission states that the exclusion of helmets from the field of application of the PPE Directive was not a part of its original proposal on the extension of the transitional period. The Commission has no intention of making a proposal to exclude helmets. The political decision taken by the Council would therefore lead to a violation of the Commission's right of initiative, as contained in Article 100a of the Treaty.

In addition the Commission recalls that the Parliament has not yet given its opinion on the Commission's proposal.

The Commission states that it is ready to make a proposal specifically dealing with the question of motor cycle helmets during the next six months, within the framework of the PPE Directive.

The Commission further states that only if such an approach were followed would there be grounds for allowing a Member State to apply, during the transitional period, the provision of UN/ECE regulation No 22 or the standards applied by other Member States."
11. **Affixing and use of the CE mark of conformity on industrial products**


- Proposal for a Council Decision amending the Council Decision of 13 December 1990 (90/683/EEC) concerning the modules for the various phases of the conformity assessment procedures, supplementing it with provisions relating to the arrangements for affixing and using the CE conformity marking

5540/93 ENT 49
5692/93 ENT 59

**The Council:**

- reached unanimous political agreement on the draft Directive and the draft Decision contained in Annexes A and B respectively to 5540/93 ENT 49, amended in accordance with Annex I to 5692/93 ENT 59;

- confirmed its agreement to the draft statements for the Council minutes which accompanied the drafts, as contained in Annex 2 to 5692/93, with the German delegation dissociating itself from statements Nos 3, 6 (iii) and 6 (iv);

- instructed the Permanent Representatives Committee to have the texts of the Directive and the Decision finalized with a view to the formal adoption of a common position as an "A" item at one of its forthcoming meetings.

**The German delegation** tabled the following unilateral statement for the Council minutes:
"The Federal Government does not consider that Directive 89/106/EEC relating to construction products and Directive 73/23/EEC relating to electrical equipment designed for use within certain voltage limits should be reviewed and, if appropriate, amended as stipulated in statements Nos 3 and 6 (iii) and (iv). The Federal Government therefore cannot support statements Nos 3 and 6 (iii) and (iv)."


The Council discussed in detail the question of limiting the maximum power of 2- or 3-wheel vehicles.

The United Kingdom delegation stood by its reservations on the limit of 74 kW contained in the draft Directive and reaffirmed that studies on this question were not, in its view, conclusive, that the proposed step would amount to discrimination against motorcycles as opposed to high-performance cars, for which no such limit was proposed, and, finally, that the effect of limiting power would be to weaken the position of Community industry vis-à-vis competition from Japan. It upheld its request for a derogation to be provided for in the case of vehicles registered within a country's own territory.

The Commission representative stated that:
small series vehicles could in any case be exempted from the requirements of the separate Directives,

the Member States would have 24 months in which to transpose and implement the Directive and that approvals issued at a national level prior to the date of implementation could preserve their validity for a period of 4 years as of that date.

The United Kingdom delegation thought that the limit of 200 vehicles a year on small series production runs was likely to prove insufficient and that setting a time-limit for nationally issued approvals would in the long run result in restricting the consumer’s freedom of choice.

It called on the other delegations and the Commission to reconsider the reasoning behind the imposition of a maximum power limit.

The Commission representative, while stressing the need for such a limit on road-safety grounds, was willing to give further thought to the matter

- in order to assess the effect on each manufacturer’s overall production of the planned limit on small-series production runs

- in order to consider whether an extension of the validity period for national approvals was advisable.

The Council accordingly instructed the Permanent Representatives Committee to resume examination of these various points, without prejudice to the positions of the great majority of the delegations, in order to enable the Council to adopt the common position at its next meeting.
13. **Other business**

- Commission communication on trans-European telematic networks between administrations
  5521/93 ECO 58

Vice-President Bangemann submitted the above communication on behalf of the Commission. Concern was expressed by certain delegations over the potential financial repercussions for the Member States and the Commission was requested to submit more realistic proposals in this area.
NOTE

from: the Netherlands delegation

dated: 5 April 1993

to: Working Party on Intellectual Property (Copyright)

No. prev. doc.: 5702/93 PI 25 CULTURE 22
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

- Duration of protection of authors' rights: full or partial harmonization?

Full harmonization on a period of 70 years, as proposed by the Commission, has significant economic and legal consequences in the 10 Member States that apply a shorter period so far.

- It shifts the balance of interests between authors/users towards the former;

- It creates legal uncertainties in providing for revival of expired rights;

- It adds complications to the relations with third countries (accession; GATT);

- It lacks a financial/economic analysis of advantages and disadvantages.

Mutual recognition of protection periods might provide a possible solution which is slightly less clear-cut, but still workable and avoiding most of the aforementioned inconveniences. It represents a familiar technique on which most modern Internal Market legislation has been based. It shows more respect for existing
national practices and is more proportional, it would seem, to the objective. It therefore merits further scrutiny.

Mutual recognition might be inspired by the rules of origin as foreseen in the Berne Convention, Article 5(4), and based on the following ingredients:

1. A given work is protected in the entire Community for the duration applicable in the Member State where the work was first published (50 or 70 years).

2. In case of simultaneous publication in several Member States the period concerned is the term of the country with the shortest protection period.

3. If first publication occurs in a Member State with a longer protection period than the country of which the author is a national, without such publication occurring simultaneously in his own country, the duration of the author's national legislation applies.

For comparison is added the relevant text of the Berne Convention (Article 5). In particular, for filmmakers or architects another criterion than national law might be considered (country of habitual residence, place of the work, etc.). A rule along these lines is relevant, however, to prevent undue exploitation of a situation of co-existence of different terms of protection.
Article 5

(Rights Guaranteed: 1. and 2. Outside the country of origin; 3. In the country of origin; 4. "Country of origin")

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Copyright)
on: 23 April 1993

No. prev. doc.: 5895/93 PI 26 CULTURE 26
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

1. At its meeting held on 23 April 1993, the Working Party on
Intellectual Property (Copyright) exammed a note from the
Netherlands delegation (5895/93 PI 26 CULTURE 26) and continued
its consideration of Article 1(3a) and Article 1a of the above
proposal.

Note from the Netherlands delegation

2. At the Council session (Internal Market) held on 5 April
1993, the Netherlands delegation had tabled a note (5895/93 PI 26
CULTURE 26) proposing that harmonization of the term of
protection of copyright at 70 years post mortem auctoris
(p.m.a.), as proposed by the Commission, be replaced by a system
of mutual recognition of the terms of protection existing in the
Member States.

3. The Netherlands delegation explained that its note first
set out this delegation's objections to harmonization of the term
of protection of copyright at 70 years p.m.a. (it did not object
to harmonization of the term of protection of related rights at
50 years), and then outlined a system of mutual recognition of

(1) The Luxembourg delegation was not represented at this meeting.
terms of protection based on Article 5(4) of the Berne Convention for the Protection of Literary and Artistic Works.

4. The Commission representative pointed out that the trend in Europe was towards a term of protection of copyright of 70 years p.m.a.: two Member States and two other European States already accorded this term for all works protected by copyright, at least one Member State had proposed legislation to this effect, and a further Member State accorded this term of protection for musical works. The Commission was not aware that lengthening the term of protection to 70 years p.m.a. had given rise to any problems; on the other hand, harmonization at a shorter term would require a lengthy transitional period. Moreover, the discussion in Council on 5 April had shown a political majority of the Member States in favour of harmonization at this term. He did not accept the argument that such harmonization would shift the balance of interests between authors and users towards the former, pointing out that in many cases strong copyright protection was a prerequisite for ensuring that works were made available to the public. With regard to the argument that the Commission proposal would create legal uncertainties in providing for revival of expired rights, the Commission representative considered that these uncertainties would be even greater under the system proposed by the Netherlands delegation, in particular in situations where the protection of a given work had already expired in a Member State which had to recognize a longer term of protection which had not yet expired in the Member State where that work was first published. The Commission representative did not agree that the harmonization proposed would add complications to the relations with third countries; indeed, two States which were seeking accession to the Community already had a term of 70 years p.m.a.. He doubted the feasibility of carrying out a financial/economic analysis of advantages and disadvantages of harmonization at 70 years p.m.a., but pointed out that a clear majority of the interested circles consulted had been in favour of the proposed harmonization. As for the system of mutual recognition proposed by the Netherlands delegation, the Commission representative considered that it would create serious...
distortions of competition and pointed out that the rule proposed in point 3 of the note by the Netherlands delegation would be contrary to Article 7 of the EEC Treaty, as well as Article 5(3) of the Berne Convention. Moreover, the co-existence of more than one term of protection within the Community would complicate the application of the rule of comparison of terms in relation to third countries (Article 4(2) of the proposal for a Directive). Furthermore, the majority of delegations had opposed the principle of mutual recognition when it had been suggested in respect of collective works.

5. **The Belgian, German, Greek, Spanish and French delegations** remained strongly in favour of harmonization of the term of copyright protection at 70 years p.m.a. **The United Kingdom delegation**, whose acceptance of such harmonization would depend upon the final contents of the overall package, did not consider that the system proposed by the Netherlands delegation constituted a serious alternative to the Commission's proposal. For **the German, Italian and United Kingdom delegations**, the main objection to the system proposed by the Netherlands delegation was that it would lead to serious distortions of competition.

6. **The Irish and Portuguese delegations** remained opposed to harmonization of the term of copyright protection at 70 years p.m.a., the **Portuguese delegation** considering that there were no positive arguments in its favour. However, the **Irish delegation** also had serious misgivings about the system of mutual recognition proposed by the **Netherlands delegation**.
7. The Netherlands delegation, taking note of the reactions of the other delegations to its proposal, asked the Commission to give serious consideration to harmonization of the term of copyright protection at 50 instead of 70 years p.m.a., with the possibility of allowing those Member States which already had longer terms to maintain them. The Irish delegation endorsed this request.

The Belgian, German, Greek, Spanish, French and Italian delegations emphasized the need to maintain clear distinctions between copyright and related rights, including in respect of terms of protection. Since there was general agreement that the term of protection for the related rights covered by Article 2 of the proposal for a Directive should be harmonized at 50 years, these delegations insisted on harmonization of the term of copyright protection at the longer term of 70 years p.m.a..

8. The Chairman concluded that the system of mutual recognition proposed by the Netherlands delegation had found very little support, and that a considerable majority of delegations continued to support harmonization of terms of protection at 70 years p.m.a. for copyright and 50 years for related rights.

Article 1(3a)

9. Since no agreement had been reached on the various drafts of this provision which had been discussed previously, delegations were invited to consider the following new draft:

"In the case of collective works or works for which a legal entity is considered to be the first owner of copyright under the legislation of a Member State, the term of protection shall be calculated according to the provisions
of paragraph 3 above, except if the authors who are the physical persons who have created the work are identified as such in the versions of the work which are made available to the public."

10. The initial reaction of the Belgian, Greek, Spanish, French, Italian and Netherlands delegations to this new draft was positive, subject to certain improvements being made. The United Kingdom delegation was willing to give it positive consideration.

The Irish delegation stated a preference for the draft of this provision contained in SN 1210/93.

The Portuguese delegation entered a reservation on this draft, as it considered that it did not make a sufficient distinction between the compilers of works of this nature and the authors whose contributions were included in these works.

11. The German delegation proposed an amendment to this draft with a view to making it clear that Member States which did not at present make provision for collective works in their national law would not be obliged to introduce them as a result of this provision. It proposed that the beginning of this provision be redrafted as follows:

"Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal entity to be considered the first owner of copyright, the term of protection ... ."

12. The Belgian delegation, supported by the German delegation, considered that the words "the authors" should read "at least one of the authors".

13. The United Kingdom delegation, supported by the French and Italian delegations, suggested the clarification "... who have created the work as such are ... ".

9029/93  cs  EN
14. The Belgian delegation supported by the Irish delegation, considered that "identified" should be replaced by "identifiable".

15. The Netherlands delegation suggested replacing "versions" by "copies".

The Commission representative considered that the word "copies" would not be appropriate in cases where the works were made available to the public by electronic means.

16. The United Kingdom and German delegations considered that where the author or authors were identified subsequently, the term of protection should be calculated in accordance with Article 1(1) or (2).

17. Following a suggestion by the Italian delegation, it was agreed that the following sentence be added:

"This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, for which contributions paragraph 1 or 2 shall apply."(2)

18. The Chairman concluded that consideration of this provision would continue at the next meeting.

---

(2) This sentence had been included in earlier drafts, including that in SN 1210/93.
Article 1a

19. In the light of the majority which had emerged at the Council session on 5 April 1993 in favour of the Presidency compromise solution for paragraphs 1 and 2 of this Article, the Working Party limited its discussions to paragraph 3 as set out in Annex II to 5702/93.

20. The Netherlands delegation questioned the need for this paragraph.

The French delegation considered that this paragraph was a necessary part of this Article as proposed in the Commission's amended proposal, but doubted its relevance in relation to the Presidency solution for paragraphs 1 and 2.

The Commission representative, while confirming that this paragraph had been conceived as an integral part of Article 1a of his Institution's amended proposal, considered that it would still be useful in the context of the Presidency solution, in particular for those Member States which would have to change their law as a result of that solution.

21. The United Kingdom and the Irish delegations were prepared to consider this provision either as an optional provision or as a compulsory provision.

The German delegation and the Commission representative considered that it should not be compulsory.

22. The French, Greek and Netherlands delegations considered that the terms "authorized the exploitation of their work" were too broad.
The Irish and Netherlands delegations could support a suggestion by the United Kingdom delegation that it would be more appropriate to refer to transfer of rights rather than to authorization of exploitation.

The French delegation considered that the presumption of authorization should not be so broad as to cover any means of exploitation but should be limited to the means of exploitation provided for in the contract.

23. The Chairman concluded that consideration of this provision would continue at the next meeting.
REPORT

from: Presidency

to: Council and Ministers for Culture meeting within the Council

Subject: Copyright and neighbouring rights
- State of progress

1. Following the publication by the Commission of the green paper on copyright and the challenge of technology (1) in 1988, questions of copyright and neighbouring rights have assumed increasing importance in the work of the Community. Against this background the Portuguese Presidency, in common with its predecessors, has given copyright an important position in its work programme.

2. The Portuguese Presidency is actively pursuing work on the amended proposal for a Council Decision concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961 (2)

(1) 7675/88 PI 64 - COM(88) 172 final.
Further to the conclusions of the Council meeting (Internal Market) of 19 December 1991 (3), which confirmed the urgency of harmonizing Member States' laws in the field of copyright and neighbouring rights on the basis of the Berne and Rome Conventions (4) but which found that Member States were having serious difficulties accepting the method proposed by the Commission, the Permanent Representatives Committee agreed to distinguish between the internal and external objectives of the proposal:

- it took the view that the internal objectives could be attained in the framework of the proposal for a rental Directive (see point 3 below);

- as regards external objectives, it proposed the adoption of a Council Resolution on increased protection for copyright and neighbouring rights (5); the Resolution is due for adoption at the Council meeting (Internal Market) on 14 May 1992.

3. The current Presidency attaches the highest priority to the proposal for a Council Directive on rental right, lending right and on certain rights related to copyright (6), the purpose of which is to gain control over the increasing use, sometimes new and sometimes illicit, of works protected by copyright and certain objects protected by neighbouring rights by ensuring uniform and strengthened legal protection throughout Community territory. Following the Opinion delivered by the European Parliament on 20 February and in the light of the amended proposal submitted by the Commission on 30 April (7), the Presidency has entered this proposal on the agenda for the Council meeting (Internal Market) on 14 May 1992.

(3) 10543/91 PV/CONS 84 (Marché Intérieur), item 9.
(5) 6205/92 P1 48 CULTURE 40.
(7) 6344/92 P1 49 CULTURE 45.
The most important problems still to be resolved concern:

- inclusion of lending right in the Directive (Articles 1 and 4);

- authors' and performers' entitlement to fair remuneration in connection with rental (Article 3);

- applicability of the Directive to works and objects in existence on the date of its transposition (Article 11);

- the person considered to be the author of a film (Article 2(2)).

The Presidency may supplement this report as regards the proposal in the light of the outcome of the Council meeting (Internal Market) on 14 May.

4. The Portuguese Presidency attaches great importance to the proposal for a Council Directive on the co-ordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission (8). The Council authorities are currently undertaking a technical examination of the proposal in order to make it easier to seek a common position once the European Parliament has delivered its Opinion.

Insofar as a number of questions addressed in this proposal for a Directive also arise in the context of the Draft European Convention relating to questions on copyright law and neighbouring rights in the framework of transfrontier broadcasting by satellite, prepared by the Council of Europe, the Council's subordinate bodies are in the process of establishing a common position of Member States with a view to the Council of Europe informal

(8) OJ No C 255, 1.10.1991, p. 3.
ministerial meeting scheduled for the end of May in Oslo. The common position would related to the definition of the phrase "communication to the public by satellite", the level of legal protection to be granted to the various categories of rightholders and the acquisition of broadcasting rights.

5. Finally, it should be noted that the Commission has recently adopted two new proposals:

- a proposal for a Council Directive harmonizing the duration of copyright protection and protection of certain neighbouring rights (9);


Council bodies are due to begin technical examination of these new proposals in the coming months.

---

(9) 5509/92 PI 33 CULTURE 21.
(10) COM(92) 24 final - SYN 393. At the time of drafting this report, the final version of this document had not yet reached the Council.
NOTE

from: Presidency

to: Permanent Representative Committee

No. prev. doc.: 6488/93 PI 34 CULTURE 47
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

Delegations will find attached a consolidated text of the above amended proposal.
AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE
HARMONIZING THE TERM OF PROTECTION
OF COPYRIGHT AND CERTAIN RELATED RIGHTS

Article 1
Duration of authors' rights

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

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

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

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

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

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

4. deleted.

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

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

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

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

Whereas in all cases where one or more physical persons are identified as authors the term of protection is calculated after their death; whereas the question of authorship in the whole or a part of a work is a question of fact which the national courts may have to decide;"
Article 1a (4)
Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others(5) to be considered as its co-authors.

2. The term of protection of cinematographic or audiovisual works shall expire 70 years(6) after the death of the principal director.

3. deleted.(7)

Article 2
Duration of related rights(8)

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

(4) Reservations by the French delegation and the Commission on this Article.
(5) The Italian delegation considers that "others" should be replaced by "other natural persons".
(6) Reservation by the Irish delegation on the term of 70 years.
(7) Scrutiny reservations by the French and Portuguese delegations and the Commission on the deletion of paragraph 3. This paragraph would be replaced by the following recital:

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

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

(9) The United Kingdom delegation requests the Commission to make the following statement to be recorded in the Council minutes:

"The Commission considers that the provision of Article 2(3) does not oblige Member States to create a separate neighbouring right for film producers where they enjoy in their own right, elsewhere in their national law, the same rights as are introduced by the provision mentioned."
4. The rights of broadcasting organizations shall expire fifty years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.(10)

Article 2a
Protection of previously unpublished works

Any person who, after the expiry of copyright protection, for the first time makes lawfully available to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.(11)

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

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

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

(11) Reservation by the Netherlands and Portuguese delegations on the need for this provision. Reservation by the French, Irish and Greek delegations on the duration of the protection.
Article 3
Protection of photographs

Variant 1
Photographs which are original in the sense that they are the author's own intellectual creation shall be protected according to Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for a different system of protection for other photographs. (12)

Variant 2
Photographs which are protected as works within the meaning of Article 2 of the Berne Convention, without taking account of their merit or purpose, shall have the term of protection provided for in Article 1. Member States may provide for a different system of protection for other photographs. (13)

(12) Variant 1 would be accompanied by the following recital:

"Whereas the protection of photographs in the Member States is the subject of varying régimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in the present Directive; whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs can be left to national law;".

(13) Variant 2 would be accompanied by the following recital:

"Whereas the protection of photographs in the Member States is the subject of varying régimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character are of importance within the internal market, it is necessary to define the level of originality required in the present Directive; whereas the protection of other photographs can be left to national law;".
Article 4

Protection vis-à-vis third countries

1. - deleted -(15)

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 or 2a.

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

(14) Reservation by the Commission on the position of all delegations and the Council Legal Service that Article 113 is not necessary as a legal basis.
(15) Reservations by the French and Greek delegations on the deletion of paragraph 1.
Article 5
Calculation of terms

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

Article 6
Moral rights

1. Deleted.

2. This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.⁽¹⁶⁾

Article 6a
Application in time⁽¹⁷⁾

1. Where a term of protection, which is longer than the corresponding term provided for by this Directive, is already running in a Member State on the date referred to in Article 10(1), this Directive shall not have the effect of shortening that term of protection in that Member State.⁽¹⁸⁾

2. [Variant 1

The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State, on the date referred to in Article 10(1), under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.]

⁽¹⁶⁾ Reservation by the Commission on this provision.
⁽¹⁷⁾ Reservations by the Belgian and Netherlands delegations on the whole of this Article.
⁽¹⁸⁾ Waiting reservation by the French delegation on this paragraph.
The terms of protection provided for in this Directive shall apply to all works and subject matter which would have been in protection on the date referred to in Article 10(1), had this Directive and Council Directive 92/100/EEC already been in force.\(^{(19)}\)

3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in Article 10(1). Member States may adopt the necessary provisions to protect acquired rights and legitimate expectations of third parties.\(^{(20)}\)

4. Member States need not apply the provisions of Article 1a(1) to cinematographic or audiovisual works created before 1 July 1994.\(^{(21)}\)

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

**Article 7**

**Technical adaptation**


---

\(^{(19)}\) Reservation by the Irish, Luxembourg, Netherlands and Portuguese delegations on the principle of revival of rights.

\(^{(20)}\) Reservation by the Italian delegation on the second sentence of this paragraph.

This paragraph would be accompanied by the following recitals: "Whereas Member States are free to adopt provisions on the interpretation, adaptation and further execution of contracts on the exploitation of protected works and other subject matter which were concluded before the extension of the term of protection resulting from this Directive;" "Whereas the measures adopted by Member States to protect acquired rights and legitimate expectations of third parties must meet the requirements of Community law;".

\(^{(21)}\) Scrutiny reservations by the Irish and United Kingdom delegations on this date.

\(^{(22)}\) OJ No L 122 of 17.5.1991, p. 42.

**Article 8**

**Notification procedure**

Member States shall immediately notify the Commission of any governmental plan to grant new related rights, indicating the grounds for their introduction and the term of protection envisaged.\(^\text{(23)}\)

**Article 9**

Deleted.

**Article 10**

**General provisions**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by [1 July 1994.]\(^\text{(24)}\)

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

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

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

\(\text{(23)}\) Reservation by the Irish delegation and scrutiny reservations by the French, Italian and Portuguese delegations on the wording of this provision.

\(\text{(24)}\) Reservation by most delegations on this date.
Article 11

This Directive is addressed to the Member States.

Done at Brussels, For the Council

The President
REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 6613/93 PI 37 CULTURE 52
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

A. Introduction

1. The Permanent Representatives Committee considered a report from the Presidency\(^1\) on this proposal on 25 March 1993. It forwarded\(^2\) three issues to the Council (Internal Market) for a policy debate on 5 April 1993, and instructed the Working Party to pursue its examination of the other issues mentioned in the report. Following this further examination it has still not been possible to reach complete agreement. However, the Presidency has prepared a consolidated text of the proposal in 6613/93 PI 37 CULTURE 52, which seeks to present an overall compromise package. The present report describes the progress made since this proposal was last examined by the Permanent Representatives Committee.

B. Term of protection of copyright and of certain related rights

2. It emerged from the policy debate held by the Council on 5 April 1993 that there was a consensus in favour of a term of 50 years for related rights, with a reservation by the

\(\text{(1) 5494/93 PI 10 CULTURE 17.}
\(\text{(2) 5702/93 PI 25 CULTURE 22.}

---

\(6614/93\) RESTREINT
Luxembourg delegation. With regard to the term of protection of copyright, six delegations supported the Commission's proposal for harmonizing at 70 years post mortem auctoris (p.m.a.), two delegations were prepared to give favourable consideration to this proposal as part of an overall package, and four delegations remained opposed to it. Interest was expressed in examining a proposal by the Netherlands delegation that harmonization of the term of protection of copyright be abandoned in favour of a system of mutual recognition.

3. Examination by the Working Party of the proposal by the Netherlands delegation revealed that there was no support for a system of mutual recognition. The Belgian, German, Greek, Spanish, French and Italian delegations continued to support harmonization at 70 years p.m.a., the Danish and United Kingdom delegations maintained their position that they would be able to give favourable consideration to this solution on condition that a satisfactory overall package were concluded, while the Irish, Luxembourg, Netherlands and Portuguese delegations continued to oppose this solution, advocating harmonization at 50 years p.m.a.

4. The Presidency recommends that harmonization of the term of copyright at 70 years p.m.a. and harmonization of the term of related rights at 50 years form part of the overall package.

C. Application in time of the Directive (Article 6a)

5. The application in time of the Directive is closely related to the fundamental option of harmonizing the term of copyright at 70 years p.m.a. and the term of related rights at 50 years.

6. The Commission's original proposal contained the principle that the Directive would apply solely to rights which had not yet expired when the Directive took effect. A
number of delegations have pointed out that under this approach, there would be a long transitional period during which particular works and other subject matter would continue to be protected in those Member States where the present term of protection is longer than the minimum under the Berne Convention or the Rome Convention, but would no longer be protected in other Member States, with the result that the internal market would be subject to distortions during that time. Following requests from these delegations that consideration be given to the possibility of overcoming this difficulty by providing for the revival of protection in such cases and following a similar proposal for amendment from the European Parliament, the Commission has amended its proposal to the effect that where works or subject matter are still protected in at least one Member State, protection will have to be revived or introduced in the other Member States until the expiry of the term provided for by the Directive, with Member States taking any necessary measures to protect any rights acquired or legitimate preparations made by third parties to exploit such works or subject matter before protection was revived or introduced.

7. The Irish, Luxembourg, Netherlands and Portuguese delegations, which are opposed to the harmonization of the term of copyright protection at 70 years p.m.a., are also opposed in principle to the revival of protection which has expired. The Belgian delegation also has a scrutiny reservation in this respect.

8. Consideration has also been given to a variant put forward by the United Kingdom Presidency whereby protection would be revived in respect of all works or subject matter which would have been in protection on the date of transposition of this Directive if this Directive and Directive 92/100/EEC had already been in force, since a number of delegations consider that the Commission's amended proposal would have a discriminatory effect in respect of works whose authors had died between 50 and 70 years before

(4) Article 6a (2) (Variant 1) and (3) in the consolidated text.
(5) Article 6a (2) (Variant 2) in the consolidated text.
the date of adoption of the Directive: such a work originating in a Member State which had a term of copyright protection of longer than 50 years p.m.a. would be protected throughout the Community until the expiry of 70 years p.m.a., involving revival of protection in those Member States in which it had already expired; whereas such a work originating in a Member State which had a term of copyright protection of 50 years p.m.a. would remain in the public domain throughout the Community.

The Belgian, German, Greek, Spanish, French, Italian and United Kingdom delegations prefer the Commission's amended proposal, since the other variant would have the effect that protection could be revived even where the work or subject matter was no longer protected in any Member State, in which case there would be no obstacle to its free movement within the Community. The Danish, Irish, Luxembourg, Netherlands and Portuguese delegations are opposed to the Commission's amended proposal because of its discriminatory effect and would prefer the other variant as the lesser evil.

9. Under the Commission's amended proposal, the reference date for the revival of protection would be the date of adoption of the Directive. However, the Belgian, Danish, German, Greek, Irish, Italian and Luxembourg delegations have expressed a preference for the reference date being the deadline for transposition of the Directive, and those delegations which would prefer the date of adoption would not be opposed to the date of transposition. The Commission remains in favour of the date of adoption.

10. The Presidency recommends that:

(a) the overall package should include the revival of protection;

(b) although there is a clear majority in favour of Variant 1, the Permanent Representatives Committee should also consider Variant 2, since adoption of Variant 1 would increase the difficulties of those delegations which have
fundamental reservations on harmonization of the term of copyright protection at 70 years p.m.a.;

(c) the reference date should be the deadline for transposition of the Directive.

D. Collective works (Article 1(3a))

11. Further consideration has been given to the question of collective works, and agreement has been reached on a compromise text, only the Portuguese delegation maintaining a scrutiny reservation. The Presidency recommends that this provision be included in the overall compromise package.

E. Cinematographic and audiovisual works (Article 1a)

12. It emerged from the policy debate at the Council session on 5 April 1993 that the great majority of delegations were in favour of the Presidency compromise solution, with the French delegation and the Commission maintaining reservations above all on the calculation of the term of protection from the death of the principal director. The Italian delegation considered that only natural persons could be considered co-authors, and the Irish delegation expressed a reservation on the term of 70 years.

13. The Working Party has reconsidered the paragraph on presumptions and decided to replace it by a recital, the French and Portuguese delegations and the Commission expressing scrutiny reservations on this solution.

14. The Presidency recommends that Article 1a as set out in the consolidated text form part of the overall package.

(6) Article 1(3a) and the accompanying recitals in the consolidated text.
F. Works first published after the expiry of copyright protection
(Article 2a)

15. The great majority of delegations are prepared to accept the provision on works first published after the expiry of copyright protection as a compromise solution and as part of an overall package. The Netherlands and Portuguese delegations maintain a reservation on the need for such a provision, while the Greek, French and Irish delegations have a reservation on the term of protection, preferring 50 to 25 years.

The Presidency recommends that Article 2a as set out in the consolidated text be included in the overall package.

16. Further consideration has been given to the proposal by the Belgian delegation to add to Article 2a a further paragraph seeking to ensure that a work first lawfully made available to the public in the last few years before the expiry of the 70-year copyright term would not receive a shorter term of protection than it would receive under Article 2a if it were first published shortly after the expiry of copyright protection.

The Belgian, Spanish, French and Irish delegations were in favour of this proposal. Other delegations expressed interest in this proposal, but were concerned that it would invoke overlapping of copyright and a related right, and doubted whether the number of works likely to benefit from such a provision would justify the complications it would entail. The Netherlands and Portuguese delegations opposed it for the same reasons as they opposed Article 2a.

The Presidency recommends that this proposal should not be included in the overall package, as it considers that it does not command sufficient support.

(7) Annex VI to 5494/93.
17. Consideration was also given to a proposal made by the German delegation in an attempt to meet the criticism made of the proposal by the Belgian delegation. This would consist of adding to Article 1 a paragraph to the effect that if a work was first published in the last ten years before expiry of copyright protection, copyright protection would be prolonged until ten years after publication.

The Presidency recommends that this proposal should not be included in the overall package, as it considers that it does not command sufficient support.

18. Further consideration has also been given to the proposal by the Italian delegation(8) to add to Article 2a a further paragraph concerning critical or scientific works.

This proposal was supported by several delegations, while other delegations were reluctant to agree to introduce such a provision into the Directive without examining it in greater depth. Fears were also expressed that inclusion of this proposal might encourage requests for other related rights to be harmonized at Community level.

The Italian delegation agreed to withdraw its proposal, on the understanding that it would be made clear in the appropriate way that the Directive does not prevent Member States from maintaining or introducing in their national laws provisions corresponding to that proposed by the Italian delegation.

The Presidency recommends that the proposal should not be included in the overall package in the light of the above.

G. Photographs (Article 3)

19. Further consideration has been given to the question of photographs. In addition to the proposal by the Netherlands delegation, which was submitted to the Permanent

(8) Annex VII to 5494/93.
Representatives Committee in March, the French delegation has put forward an alternative proposal. These proposals are contained in the consolidated text as Variant 1 and Variant 2 of Article 3; recitals have also been proposed to accompany them.

Variant 1 is supported by the German, Spanish, Irish, Netherlands, Portuguese and United Kingdom delegations. They consider that this provision has the advantage of using the definition of originality contained in Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. They consider that a reference to Article 2 of the Berne Convention is insufficient, since that provision is interpreted in different ways by Member States in respect of photographs.

Variant 2 is supported by the Belgian, Greek, French and Italian delegations. They consider that the definition of originality contained in Directive 91/250/EEC in respect of computer programs is not necessarily appropriate for determining the originality of photographs.

The Presidency recommends that the Permanent Representatives Committee consider these two variants.

H. Moral rights (Article 6)

20. At the Council session on 5 April 1993 a consensus was reached on the text proposed by the Presidency in respect of moral rights. The Commission maintained a reservation on this text.

The Presidency recommends the inclusion of this text in the overall package.
I. Legal basis

21. The Commission proposed that the Directive be based on Articles 57(2), 66, 100a and 113 of the EEC Treaty.

All delegations and the Council Legal Service consider that Article 113 is not necessary as a legal basis. The Commission has a reservation on removing Article 113 from the legal basis.

The Presidency recommends that Article 113 be removed from the legal basis.

J. Other questions

22. It will be seen from the footnotes in the consolidated text that there are a few reservations and scrutiny reservations on other points.

The Presidency invites the Permanent Representatives Committee to seek the lifting of these reservations and scrutiny reservations.

K. Conclusions

23. The Presidency invites the Permanent Representatives Committee to:

(a) consider and pronounce on the variants included in the consolidated text in respect of revival of protection (section C above) and photographs (section G above);
(b) approve an overall compromise package as set out in the consolidated text and containing the elements described in this report;

(c) forward this overall compromise package to the Council for the adoption of a common position.
RESUMÉ DES TRAVAUX

du : Comité des Représentants Permanents (1ère Partie)
en date du : 28 mai 1993

n° doc. préc. : 6614/93 PI 38 CULTURE 53
n° prop. Cion. : 4483/93 PI 9 CULTURE 8

Objet : Préparation de la session du Conseil (Marché intérieur) du 14 juin 1993
- Proposition modifiée de directive du Conseil relative à l'harmonisation de la durée de protection du droit d'auteur et de certains droits voisins

1. Les travaux du Comité des Représentants Permanents se sont basés sur le texte consolidé figurant au document 6613/93 PI 37 CULTURE 52 et sur le rapport de la Présidence dans le document 6614/93 PI 38 CULTURE 53.

2. Le Président a fait appel aux délégations et à la Commission de voir dans le texte consolidé un paquet global de compromis qui représente la solution qui a les plus grandes chances d'être acceptable à tous, et d'éviter de défaitre ce paquet. Il a invité le Comité à centrer ses travaux sur les deux dispositions pour lesquelles des options ont été présentées (l'article 6 bis paragraphe 2 et l'article 3).

La délégation néerlandaise, soutenue par les délégations irlandaise, luxembourgeoise et portugaise, a rappelé ses doutes quant à la nécessité de procéder à une harmonisation aussi poussée que celle proposée par la Commission et reprise dans le texte consolidé. Elle s'est interrogée notamment sur la nécessité d'une telle harmonisation pour l'achèvement du marché intérieur, ainsi que sur les incidences économiques et financières d'une telle harmonisation. Elle a préconisé une révision de la proposition en
vue d'enlever tous les éléments qui ne seraient pas strictement nécessaires pour le bon fonctionnement du marché intérieur et qui ne concerneraient pas la durée de protection en tant que telle.

Les délégations belge, française et italienne ont fait valoir que certains éléments - qui de leur avis n'étaient pas des moindres - du texte consolidé étaient susceptibles d'amélioration.

3. Pour ce qui concerne le rappel à la protection (article 6 bis paragraphe 2), les délégations irlandaise, luxembourgeoise, néerlandaise et portugaise ont confirmé leur opposition à ce principe. Par conséquent, elles n'acceptaient aucune des options proposées mais demandaient le rétablissement de la proposition initiale de la Commission.

La délégation britannique par contre est intervenue en faveur du principe du rappel à la protection, en faisant valoir qu'en l'absence d'un tel rappel, l'harmonisation de la durée de protection ne serait réalisée qu'après plusieurs décennies.

La délégation néerlandaise a invité le Service juridique du Conseil à se prononcer sur la question de savoir si le rappel à la protection risquait de porter atteinte à la sécurité juridique des opérateurs économiques.

Pour les délégations allemande et française, seule l'option 1 était acceptable.

Les délégations belge, grecque, espagnole, italienne et britannique ont exprimé une nette préférence pour l'option 1 ; toutefois, la délégation britannique était disposée à envisager l'option 2 si elle était susceptible de faire l'objet d'un consensus, et à condition que la directive dans son ensemble constitue un paquet satisfaisant.

La délégation danoise a indiqué que l'adoption de l'option 2 lui permettrait d'accepter la durée de protection du droit d'auteur proposée de 70 ans après la mort de l'auteur ; si, par contre, l'option 1 était adoptée, elle ne pourrait accepter cette durée.
4. Pour ce qui concerne les photographies (article 3), la délégation néerlandaise s'est interrogée sur la nécessité de cette disposition pour le bon fonctionnement du marché intérieur.

Les délégations danoise, allemande, espagnole, irlandaise et britannique ainsi que le représentant de la Commission ont exprimé une préférence pour l'option 1. Toutefois, les délégations allemande, irlandaise et britannique ont indiqué leur disponibilité à envisager l'option 2 si elle faisait l'objet d'un consensus.

Les délégations belge, grecque, française et italienne ont exprimé une préférence pour l'option 2. Toutefois, la délégation italienne a indiqué sa disponibilité à envisager l'option 1 si elle faisait l'objet d'un consensus.

La délégation française a invité la Commission à indiquer les conséquences en matière de protection pour certaines catégories de photographies (photographies de presse, photographies de publicité, photographies de reportage, photographies de mode, photographies prises par satellite, ...) de chacune des deux options proposées.

5. Le Président a invité les délégations à retirer les différentes réserves d'attente mentionnées dans les notes en bas de page du texte consolidé.

Le Comité a pris acte des réactions suivantes à cette invitation :

- la délégation portugaise a maintenu toutes ses réserves et réserves d'attente au stade actuel,

- à l'article premier paragraphe 3 bis, la délégation grecque a proposé de remplacer les termes "sauf si les personnes physiques" à la quatrième ligne par les termes "sauf si la ou les personnes physiques" ;

- en ce qui concerne l'article 1 bis,

= la délégation néerlandaise s'est interrogée sur la nécessité de cet article ;
la délégation française a présenté une nouvelle proposition de compromis pour cet article ;

les délégations allemande, luxembourgeoise et britannique, tout en déclarant leur disponibilité à examiner cette nouvelle proposition, ont indiqué qu'à première vue elle ne semblait pas écarter tous les problèmes ;

la délégation italienne a maintenu sa réserve en attendant l'examen de la nouvelle proposition ;

la délégation française a indiqué que l'acceptation de sa nouvelle proposition lui permettrait de lever sa réserve d'examen sur la suppression du paragraphe 3 ; la délégation luxembourgeoise par contre s'est jointe aux réserves d'examen sur la suppression de ce paragraphe ;

- en ce qui concerne l'article 2 bis,

la délégation belge a présenté une proposition d'ajouter un deuxième paragraphe ;

la délégation allemande a indiqué que, à la lumière de la nouvelle proposition de la délégation belge, elle maintenait en tant que proposition de compromis la proposition dont il est fait état à l'avant-dernier alinéa du point 17 du rapport de la Présidence ;

la délégation italienne a indiqué qu'elle maintenait sa proposition en matière d'éditions critiques (point 18 du rapport de la Présidence) et a présenté un aide-mémoire à ce sujet ;

- en ce qui concerne l'article 6 bis,

la délégation française a indiqué qu'elle pourrait lever sa réserve sur le paragraphe 1 dans le cadre d'une solution d'ensemble satisfaisante ;
= la délégation grecque s'est jointe à la réserve sur la seconde phrase du paragraphe 3 ;

= la délégation belge a présenté une proposition alternative du paragraphe 3, assortie d'un nouveau considérant ;

= la délégation irlandaise a indiqué que sa réserve d'examen sur le paragraphe 4 pourrait être levée si les termes "avant le 1er juillet 1994" étaient remplacés par les termes "avant la date visée à l'article 10 paragraphe 1".

6. En conclusion, le Président a invité les Attachés à se pencher notamment sur les articles 6 bis, 1 bis, 2 bis et 3, sans exclure d'emblée d'autres dispositions, et de lui faire rapport pour sa réunion du 9 juin 1993.
RESUME DES TRAVAUX

du : Comité des Représentants Permanents (1ère Partie)
en date du : 28 mai 1993

Objet : Préparation de la session du Conseil (Marché intérieur) du 14 juin 1993
- Proposition modifiée de directive du Conseil relative à l'harmonisation de la durée de protection du droit d'auteur et de certains droits voisins

1. Les travaux du Comité des Représentants Permanents se sont basés sur le texte consolidé figurant au document 6613/93 PI 37 CULTURE 52 et sur le rapport de la Présidence dans le document 6614/93 PI 38 CULTURE 53.

2. Le Président a fait appel aux délégations et à la Commission de voir dans le texte consolidé un paquet global de compromis qui représente la solution qui a les plus grandes chances d'être acceptable à tous, et d'éviter de défaire ce paquet. Il a invité le Comité à centrer ses travaux sur les deux dispositions pour lesquelles des options ont été présentées (l'article 6 bis paragraphe 2 et l'article 3).

La délégation néerlandaise, soutenue par les délégations irlandaise, luxembourgeoise et portugaise, a rappelé ses doutes quant à la nécessité de procéder à une harmonisation aussi poussée que celle proposée par la Commission et reprise dans le texte consolidé. Elle s'est interrogée notamment sur la nécessité d'une telle harmonisation pour l'achèvement du marché intérieur, ainsi que sur les incidences économiques et financières d'une telle harmonisation. Elle a préconisé une révision de la proposition en
vue d'enlever tous les éléments qui ne seraient pas strictement nécessaires pour le bon fonctionnement du marché intérieur et qui ne concerneraient pas la durée de protection en tant que telle.

Les délégations belge, française et italienne ont fait valoir que certains éléments - qui de leur avis n'étaient pas des moindres - du texte consolidé étaient susceptibles d'amélioration.

Pour ce qui concerne le rappel à la protection (article 6 bis paragraphe 2), les délégations irlandaise, luxembourgeoise, néerlandaise et portugaise ont confirmé leur opposition à ce principe. Par conséquent, elles n'acceptaient aucune des options proposées mais demandaient le rétablissement de la proposition initiale de la Commission.

La délégation britannique par contre est intervenu en faveur du principe du rappel à la protection, en faisant valoir qu'en l'absence d'un tel rappel, l'harmonisation de la durée de protection ne serait réalisée qu'après plusieurs décennies.

La délégation néerlandaise a invité le Service juridique du Conseil à se prononcer sur la question de savoir si le rappel à la protection risquait de porter atteinte à la sécurité juridique des opérateurs économiques.

Pour les délégations allemande et française, seule l'option 1 était acceptable.

Les délégations belge, grecque, espagnole, italienne et britannique ont exprimé une nette préférence pour l'option 1 ; toutefois, la délégation britannique était disposée à envisager l'option 2 si elle était susceptible de faire l'objet d'un consensus, et à condition que la directive dans son ensemble constitue un paquet satisfaisant.

La délégation danoise a indiqué que l'adoption de l'option 2 lui permettrait d'accepter la durée de protection du droit d'auteur proposée de 70 ans après la mort de l'auteur ; si, par contre, l'option 1 était adoptée, elle ne pourrait accepter cette durée.
4. Pour ce qui concerne les photographies (article 3), la délégation néerlandaise s'est interrogée sur la nécessité de cette disposition pour le bon fonctionnement du marché intérieur.

Les délégations danoise, allemande, espagnole, irlandaise et britannique ainsi que le représentant de la Commission ont exprimé une préférence pour l'option 1. Toutefois, les délégations allemande, irlandaise et britannique ont indiqué leur disponibilité à envisager l'option 2 si elle faisait l'objet d'un consensus.

Les délégations belge, grecque, française et italienne ont exprimé une préférence pour l'option 2. Toutefois, la délégation italienne a indiqué sa disponibilité à envisager l'option 1 si elle faisait l'objet d'un consensus.

La délégation française a invité la Commission à indiquer les conséquences en matière de protection pour certaines catégories de photographies (photographies de presse, photographies de publicité, photographies de reportage, photographies de mode, photographies prises par satellite, ...) de chacune des deux options proposées.

5. Le Président a invité les délégations à retirer les différentes réserves d'attente mentionnées dans les notes en bas de page du texte consolidé.

Le Comité a pris acte des réactions suivantes à cette invitation :

- la délégation portugaise a maintenu toutes ses réserves et réserves d'attente au stade actuel,

- à l'article premier paragraphe 3 bis, la délégation grecque a proposé de remplacer les termes "sauf si les personnes physiques" à la quatrième ligne par les termes "sauf si la ou les personnes physiques" ;

- en ce qui concerne l'article 1 bis,

= la délégation néerlandaise s'est interrogée sur la nécessité de cet article ;
= la délégation française a souligné que dans l'hypothèse du maintien du texte actuel de cet article, elle s'opposerait à l'adoption de la directive dans son ensemble ; elle a présenté une nouvelle proposition de compromis pour cet article ;

= les délégations allemande, luxembourgeoise et britannique, tout en déclarant leur disponibilité à examiner cette nouvelle proposition, ont indiqué qu'à première vue elle ne semblait pas écarter tous les problèmes ;

= la délégation italienne a maintenu sa réserve en attendant l'examen de la nouvelle proposition ;

= la délégation française a indiqué que l'acceptation de sa nouvelle proposition lui permettrait de lever sa réserve d'examen sur la suppression du paragraphe 3 ; la délégation luxembourgeoise par contre s'est jointe aux réserves d'examen sur la suppression de ce paragraphe ;

- en ce qui concerne l'article 2 bis,

= la délégation belge a présenté une proposition d'ajouter un deuxième paragraphe ;

= la délégation allemande a indiqué que, à la lumière de la nouvelle proposition de la délégation belge, elle maintenait en tant que proposition de compromis la proposition dont il est fait état à l'avant-dernier alinéa du point 17 du rapport de la Présidence ;

= la délégation italienne a indiqué qu'elle maintenait sa proposition en matière d'éditions critiques (point 18 du rapport de la Présidence) et a présenté un aide-mémoire à ce sujet ;

- en ce qui concerne l'article 6 bis,

= la délégation française a indiqué qu'elle pourrait lever sa réserve sur le paragraphe 1 dans le cadre d'une solution
d'ensemble satisfaisante;

= la délégation grecque s'est jointe à la réserve sur la seconde phrase du paragraphe 3 ;

= la délégation belge a présenté une proposition alternative du paragraphe 3, assortie d'un nouveau considérant ;

= la délégation irlandaise a indiqué que sa réserve d'examen sur le paragraphe 4 pourrait être levée si les termes "avant le 1er juillet 1994" étaient remplacés par les termes "avant la date visée à l'article 10 paragraphe 1".

6. En conclusion, le Président a invité les Attachés à se pencher notamment sur les articles 6 bis, 1 bis, 2 bis et 3, sans exclure d'emblée d'autres dispositions, et de lui faire rapport pour sa réunion du 9 juin 1993.
A. Introduction

1. The Permanent Representatives Committee considered a Presidency report on the proposal (6614/93 PI 38 CULTURE 53) together with a consolidated text (6613/93 PI 37 CULTURE 52) at its meeting on 28 May 1993 and instructed the Attachés responsible for intellectual property matters (Copyright) to examine a number of aspects of this proposal\(^{(1)}\).

The present report describes the progress made by the Attachés at their meeting on 3 June 1993.

\(^{(1)}\) The Permanent Representatives Committee's discussions on this point are summarized in 6978/1/93 PI 47 CULTURE 58 REV 1.
B. **Cinematographic and audiovisual works** (Article 1a)

2. In its previous report to the Permanent Representatives Committee (6614/93 PI 38 CULTURE 53, points 12 to 14), the Presidency recommended that Article 1a as set out in the consolidated text (6613/93 PI 37 CULTURE 52) form part of the overall package.

3. At the Permanent Representatives Committee's discussions on 28 May 1993, the French delegation stressed that the inclusion of Article 1a in that form would result in the French delegation opposing the Directive as a whole. Its main criticisms were:

   - that while it allowed Member States the freedom to determine who were the co-authors of a cinematographic or audiovisual work, it related the term of protection to the death of the principal director alone;

   - that it would have the consequence, in cases where the principal director died young, that the term of protection would be reduced considerably in those Member States in which the term of protection was calculated at present in relation to the death of the last surviving co-author.

4. The French delegation had therefore proposed an alternative version of this Article (Annex I to this report) which sought to achieve a compromise between the position of the French delegation and the positions of the other delegations. The first element of this proposal was that it abandoned the provision harmonizing the authorship of cinematographic or audiovisual works (Article 1a(1) of the consolidated text), since the majority of delegations did not accept the solution advocated by the Commission and the French delegation; the French delegation was prepared to add a recital to
the effect that the absence from this Directive of a provision harmonizing the authorship of cinematographic or audiovisual works was without prejudice to both the systems of authorship in the Member States and the provisions on this subject in previous Community directives (2). The second element of the proposal by the French delegation was that it left Member States free to determine whether the term of protection of a cinematographic or audiovisual work was calculated in relation to the death of the principal director or the death of the last surviving author. The choice involved in this second element would require the retention of Article 4(1) of the proposal. This proposal would still achieve a considerable degree of harmonization: the term of protection of all cinematographic or audiovisual works would expire 70 years after the death of an author, and there would be a single point of departure throughout the Community for calculating this term for any given film.

5. At the Attachés' meeting, the Commission representative pointed out that the Commission still had a reservation on Article 1a of the consolidated text, which could be reconsidered in the light of the final overall package. With regard to film authorship, the Commission's original proposal had not contained any specific provision in this respect, but the adoption of Council Directive 92/100/EEC, with a provision harmonizing film authorship for the purposes of that Directive, had led the Commission to include a provision on this subject in its amended proposal. The Commission

considered that the harmonization achieved in this respect in that Directive and in the common position adopted on 10 May 1993 needed to be consolidated in the present directive, and was therefore opposed to the delation of Article 1a(1). While sharing the French delegation's concern as to the reduction of protection resulting in certain cases from relating the term to the death of the principal director alone, the Commission representative considered that leaving Member States the option whether the term of protection of cinematographic or audiovisual works would be calculated in relation to death of the principal director or the death of the last surviving author would not achieve sufficient harmonization of the term of protection.

6. The German, Luxembourg, Portuguese and United Kingdom delegations continued to support the consolidated text(3) and considered the proposal by the French delegation unacceptable for the reasons put forward by the Commission representative.

The Irish delegation also continued to support the consolidated text(4). While reserving its position on the proposal by the French delegation, its initial reaction to this proposal was negative.

The Spanish delegation was in favour of maintaining paragraph 1 of Article 1a (on film authorship) as in the consolidated text and was prepared to seek a reasonable solution for the calculation of the term of protection of cinematographic or audiovisual works.

(3) The Luxembourg delegation maintained a reservation on the term of 70 years.
(4) The Irish delegation maintained a reservation on the term of 70 years.
The Italian delegation was prepared to give further consideration to both the consolidated text and the proposal by the French delegation.

The Netherlands delegation was prepared to seek a middle way between the consolidated text and the proposal by the French delegation.

7. In the light of the reactions of the other delegations and the Commission representative, the French delegation stressed that the most unacceptable aspect of Article 1a of the consolidated text was paragraph 2, relating the term of protection to the death of the principal director alone. If the price to be paid for the adoption of the proposal made by the French delegation was the retention of Article 1a(1) of the consolidated text, the French representative was prepared, in a personal capacity, to recommend this solution to his authorities, on the understanding that Article 4(1) would also be retained.

8. The Commission representative, also speaking in a personal capacity, suggested a further compromise solution. This would consist of maintaining Article 1a(1) as in the consolidated text and of adding to Article 1a(2) of the consolidated text a "safety net" intended to minimalize any reduction of the term of protection in those Member States in which the term is calculated at present in relation to the death of the principal director: this would be achieved by adding the following sentence to Article 1a(2): "However, this term shall not be shorter than 100 years after the creation of the work."

9. All delegations agreed to submit the suggestions described under points 7 and 8 above to their authorities.
10. The Presidency considers that the suggestion set out under point 8 above constitutes a reasonable compromise solution and recommends that the Permanent Representatives Committee give serious consideration to its inclusion in the overall package.

C. Works first published after the expiry of copyright protection (Article 2a) and critical works

11. During the Permanent Representatives Committee's discussions on 28 May 1993, the Italian delegation requested that further consideration be given to its proposal to include a provision concerning critical works (see 6614/93 point 18), and presented an explanatory memorandum on this subject.

12. At the Attachés' meeting, it was agreed that the Commission and the Italian delegation would cooperate in preparing a recital which would make it clear that Member States were free to introduce new rights related to copyright the duration of which was not harmonized by this Directive, provided that they notified the Commission in accordance with Article 8. The Commission was also invited to prepare a statement for the Council minutes in which it would undertake to study the appropriateness of proposing Community harmonization of the protection of critical works.

The Presidency recommends that the Permanent Representatives Committee approve the solution set out above in respect of critical works.

13. At the meeting of the Permanent Representatives Committee on 28 May 1993, the Belgian delegation presented a proposal to add a paragraph 2 to Article 2a (Annex II to this report). The German delegation also indicated that it maintained its proposal mentioned in the penultimate paragraph of point 17 of 6614/93
Annex III to this report) as a compromise solution between the consolidated text of Article 2a and the proposal by the Belgian delegation.

14. At the Attachés' meeting, the French and Spanish delegations supported the proposal by the Belgian delegation\(^5\), the Spanish delegation indicating that it could accept the proposal by the German delegation as a fallback position in the event of the former not being adopted.

The Italian and Luxembourg delegations expressed positive initial reactions to the proposal by the Belgian delegation, but maintained scrutiny reservations.

The Danish, Greek, Netherlands and Portuguese delegations opposed both proposals\(^6\).

The United Kingdom delegation opposed the proposal by the Belgian delegation but was prepared to give further consideration to the proposal by the German delegation in a spirit of compromise.

The Irish delegation reserved its position on both proposals.

\(^5\) The French delegation considered that the term should be 50 years, both in this proposal and in Article 2a as set out in the consolidated text.

\(^6\) The Netherlands and Portuguese delegations also reiterated their opposition to Article 2a as set out in the consolidated text. The Greek delegation considered that the term in Article 2a as set out in the consolidated text should be 50 years, and that the wording should be improved to make clear that the right concerned is a right related to copyright.
The Commission representative did not oppose either proposal, but expressed doubts as to their usefulness in view of the small number of works likely to be affected.

In the light of the number of delegations which oppose these proposals, the Presidency recommends that neither of them be included in the compromise package.

D. Photographs (Article 3)

15. At the meeting of the Permanent Representatives Committee on 28 May, the two variants of Article 3 remained on the table and the French delegation questioned the Commission on the practical consequences of the two variants (6978/1/93, point 4).

16. At the Attachés' meeting, the Commission representative explained that Variant 1 would cover all the categories of photographs mentioned by the French delegation with the exception of photographs taken by satellite; while Variant 2 would probably cover the same categories in some Member States but not in others.

17. After discussion, the French delegation put forward the following suggestion as a compromise solution between the two variants(7):

"Photographs which are original in the sense that they bear the personal mark of the author shall be protected according to Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for a different system of protection for other photographs."

The Netherlands delegation expressed a scrutiny reservation on this suggestion, considering that it would

(7) The wording of the accompanying recital would have to be reconsidered if this solution were adopted.
give a lower level of originality than that resulting from the terms "intellectual creation" in Variant 1.

The Presidency recommends that serious consideration be given to the above suggestion as a compromise solution between the two Variants in the consolidated text.

E. Application in time of the Directive (Article 6a)

18. At the meeting of the Permanent Representatives Committee on 28 April, the Netherlands delegation requested an opinion from the Council Legal Service on the revival of protection proposed in Article 6a(2).

19. At the meeting of the Attachés, the representative of the Council Legal Service gave an initial reply. Following requests by several delegations that the views of the Council Legal Service be given in writing, these views will be set out in an Addendum to the present report.

20. The Netherlands delegation requested that the Commission's original proposal(8) be included in the consolidated text as a third Variant. The Commission representative pointed out that the Commission's original proposal was no longer on the table, as it had been replaced by the Commission's amended proposal (4483/93 PI 9 CULTURE 8). The German and United Kingdom delegations also expressed a strong reservation on reverting to the Commission's original proposal.

(8) "This Directive shall apply to rights which have not expired on or before 31 December 1994." (Article 6(1), first sentence, in 5509/92 PI 33 CULTURE 21).
21. The positions of the delegations with regard to Article 6a(2) can be summarized as follows:

(a) the Belgian, German, Greek, Spanish, French, Italian and United Kingdom delegations and the Commission representative expressed a preference for Variant 1; the Belgian delegation specified that Variant 1 would have to be accompanied by clearer safeguards in paragraph 3 (see points 22 and 23 below); the Italian delegation indicated that it could also accept Variant 2 if there were a consensus in favour of it;

(b) the Danish, Irish, Luxembourg, Netherlands and Portuguese delegations still expressed a preference for the Commission's original proposal; if this were no longer on the table, the Danish delegation would prefer Variant 2, while the Irish and Luxembourg delegations found Variant 1 less unacceptable than Variant 2.

In the light of these positions, the Presidency recommends that Variant 1 of Article 6a(2) be included in the overall package.

22. At the meeting of the Permanent representatives Committee on 28 May 1993, the Belgian delegation presented an alternative proposal for Article 6a(3), accompanied by a new recital (Annex IV to this report).

23. At the Attachés' meeting, the Commission representative pointed out that the addition proposed by the Belgian delegation to Article 6a(3) would have the effect of restricting the safeguards provided by this paragraph, and suggested that the recital proposed by the Belgian delegation be redrafted with a view to reinforcing those safeguards. This view was supported by the majority of delegations.
After discussion, the majority of delegations agreed to give favourable consideration to the recital set out in Annex V to this report, which would replace the second of the two recitals contained in footnote 20 on page 10 of the consolidated text.

The Netherlands delegation expressed a reservation on this recital.

The Presidency recommends that the recital in Annex V be included in the overall package.

F. Conclusions

24. The Permanent Representatives Committee is invited to:

(a) approve the recommendations made by the Presidency in Sections B to E above;

(b) take note of the results of the Attachés' examination of other outstanding reservations and scrutiny reservations as summarized in Annex VI to this report;

(c) refer the resulting package to the Council with the view to the adoption of a common position.
Article 1a - Proposal by the French delegation

The term of protection of a cinematographic or audiovisual work shall expire 70 years after either the death of the principal director or the death of the last of the co-authors.
Article 2a - Proposal by the Belgian delegation

Add a paragraph 2 as follows:

"However, if the work has for the first time been made available to the public in the 25 years preceding the expiry of the term of protection, it shall in all cases enjoy (copyright protection) (protection within the meaning of paragraph 1) for 25 years from the time when the work was first lawfully made available to the public."
Additional paragraph to be added to Article 1: Proposal by the German delegation

If a posthumous work is published after expiration of sixty years and before expiration of seventy years after the death of the author, the protection ends ten years after the publication.
Article 6a: Proposal by the Belgian delegation

1. Reword paragraph 3 as follows:

"This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in Article 10(1). In order to protect acquired rights and legitimate expectations of third parties, Member States may adopt necessary provisions. They may provide in particular that in certain circumstances, such as danger of bankruptcy or danger of substantial financial loss, the copyright and related rights which are revived in application of this Directive may not give rise to the payment of such rights by persons who undertook in good faith the exploitation of the works at the time when such works were in the public domain and to the extent that such persons perform acts which are subject to the payment of rights and which are necessary for the exploitation as undertaken before the adoption of the Directive."

2. Add the following recital:

"Whereas the protection of acquired rights and legitimate expectations of third parties is a principle of the Community legal order, in application of Article 6a(3) Member States may provide in particular that in certain circumstances, such as danger of bankruptcy or danger of substantial financial loss, the copyright and related rights which are revived in application of this Directive may not give rise to the payment of such rights by persons who undertook in good faith the exploitation of the works at the time when such works were in the public domain. The measure suspending the payment of rights is applicable only to those acts which are necessary for the exploitation as undertaken before the adoption of the Directive."
Recital concerning Article 6a(3)\(^{(9)}\)

Whereas acquired rights and legitimate expectations of third parties are subject to protection\(^{(10)}\) in the Community legal order; whereas in application of Article 6a(3) Member States may provide in particular that in certain circumstances the copyright and related rights which are revived in application of this Directive may not give rise to payments by persons who undertook\(^{(11)}\) the exploitation of the works at the time when such works were in the public domain.

\(^{(9)}\) Reservation by the Netherlands delegation on this recital.  
\(^{(10)}\) The Spanish delegation would prefer to replace the words "are subject to protection" by the words "are respected".  
\(^{(11)}\) Scrutiny reservation by the Commission representative on the omission of the words "in good faith" at this point.
1. Article 1(3a)

The Greek delegation withdrew the suggestion made in the Permanent Representatives Committee on 28 May (6978/1/93, second indent) in the light of the wording of the second recital in footnote 3 on page 3 of the consolidated text.

2. Article 2

2.1. The German delegation withdrew its scrutiny reservation on the wording of Article 2.

2.2. The Commission representative reserved his position on the statement requested by the United Kingdom delegation in relation to Article 2(3) until Article 1a was resolved.

2.3. A request by the Irish delegation to amend the beginning of Article 2(3) to read: "The rights of producers of the first fixation of a film other than a right granted under Article 1a(1) shall expire ..." was postponed until Article 1a was resolved.

2.4. A request by the Luxembourg delegation to amend Article 2(4) was referred to bilateral discussions between the Luxembourg delegation and the Commission representative.

2.5. A request by the Greek delegation to clarify certain expressions used in Article 2 was referred to bilateral discussions between the Greek delegation and the Commission representative.
3. **Article 4(1)**

The deletion or retention of Article 4(1) was postponed until Article 1a was resolved.

4. **Article 6**

The joint statement proposed by the French delegation at the meeting of the Permanent Representatives Committee on 28 May 1993 (Annex VII to this report) was approved by all delegations. The Commission representative indicated that the Commission still had a reservation on Article 6 as set out in the consolidated test, which could be reconsidered in the light of the final overall package; this statement would be included in that reconsideration.

5. **Article 6a(4)**

The Irish delegation undertook to re-examine its request made at the meeting of the Permanent Representatives Committee on 28 May 1993 (6978/1/93, point 5, last indent).

6. **Article 8**

The Irish delegation agreed to give favourable consideration to the following rewording of this provision:

"Member States shall immediately notify the Commission of any governmental plan to grant new related rights, including the basic reasons for their introduction and the term of protection envisaged."

The Portuguese delegation maintained a scrutiny reservation on the need for the words "the basic reasons for their introduction and".
7. **Article 10(1)**

The Commission representative suggested that the date in the first paragraph be 28 December 1994.

There was general agreement that this date could not be fixed until the Council's common position was ready for adoption.
Article 6: Proposal by the French delegation

Add the following joint statement by the Council and the Commission:

The Council and the Commission confirm that the wording of Article 6 of this Directive has the effect that moral rights are excluded from its field of applications.
At its meeting on 28 May 1993, the Permanent Representatives Committee asked the Council Legal Service for its opinion on the effects of the provision in Article 6a(2) of the above proposal (1).

1. Article 6a ("Application in time") sets out, in paragraph 2 as it stands at present, two alternatives (2), both of which would affect the application of the proposed Directive differently from the original Commission proposal (3).

2. Article 6(1), first sentence, of the original Commission proposal

(1) 6613/93 PI 37 CULTURE 52, p. 9 and 6978/1/93 REV 1 (f) PI 47 CULTURE 58, p. 2.
(2) 6613/93, pp. 9 and 10.
(3) 5509/92 PI 33 CULTURE 21 - COM(92) 33 final - SYN 395.
stipulated that:

"This Directive shall apply to rights which have not expired on or before 31 December 1994." (4).

The effect of this would be to make the Directive applicable to works protected under a Member State’s legislation as at 31 December 1994, with such protection being extended only in the Member State in which it obtained on that date. If protection for the same work had already expired in another Member State by 31 December 1994, that work would continue to be protected in the first Member State and remain in the public domain in the second. The result of such differing protection for the same work in individual Member States, as is already entailed at present by the discrepancies between national laws regarding the term of protection and recognition of some classes of rights, would be to postpone for a time the effects of harmonization of the term of protection under the Directive in all Member States.

For the time in question, that state of affairs would involve the same risks for the operation of the internal market as the present unharmonized situation. It should be noted that in its judgment of 24 January 1989 (5) the Court of Justice stated that:

"Insofar as the disparity between national laws may give rise to restrictions on intra-Community trade in sound recordings, such restrictions are justified under

(4) Ibid., p. 53.
Article 36 of the Treaty if they are the result of differences between the rules governing the period of protection and this is inseparably linked to the very existence of the exclusive rights.

3. To alleviate the difficulties arising from such a situation for the proper operation of the internal market, the Commission envisaged a different application rule in its amended proposal, in response to a European Parliament amendment.

That rule forms the first alternative for Article 6a(2) in the consolidated text (6):

"The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State, on the date referred to in Article 10(1) (7), under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC".

The effect of this would be to apply the terms of protection laid down by the Directive not just in those Member States in which works continue to be protected under national legislation but also in those Member States in which protection has ceased and works have entered the public domain. In the latter States, the fact that the work is protected in another Member State would revive the economic rights of rightholders until such

(6) 6613/93 PI 37 CULTURE 52.
(7) Deadline for transposition of the Directive by the Member States.
time as the term of protection has expired throughout the Community.

This rule on application in time is designed to remedy the difficulties arising from the system originally proposed by the Commission. It would eliminate the risk of barriers to intra-Community trade since the work would be protected throughout the Community for the same term.

The question put to the Legal Service is whether the provision in question would be likely to call into question certain rights of individuals. It should be pointed out that, in general terms, the adoption of provisions designed to govern legal situations is, by definition, likely to call into question certain rights. However, in exercising its powers, the Community legislative authority is required, under the Court's case law, to act in compliance with the principles of the Treaty and in particular the principle of proportionality. It should therefore be considered whether application of the Directive's provisions as envisaged in that alternative might disproportionately prejudice the rights of individuals exploiting works which have already entered the public domain in one or more Member States.

It should first be pointed out that, under Article 6a(3), first sentence, those exploiting works protected by copyright or related rights could not be required to pay any fees to the rightsholders for acts of exploitation performed before the deadline for implementing the Directive. With regard to future acts of exploitation, the situation would be altered...
after that date. Payment of fees to intellectual property rightholders would become a factor again in economic calculations for future operations.

Insofar as the rule introduced by the first alternative applied without prejudice to past acts of exploitation and was accompanied by appropriate transitional provisions, it would seem possible to keep the effect of that alternative within the bounds of compliance with the principle of proportionality. The Legal Service notes that the second sentence of Article 6a(3) reads as follows:

"Member States may adopt the necessary provisions to protect acquired rights and legitimate expectations of third parties."

In order for Community legislation to ensure such protection, the Council Legal Service considers that this provision should entail an obligation and not merely an option for the Member States.

4. The second alternative for Article 6a(2) states that:

"The terms of protection provided for in this Directive shall apply to all works and subject matter which would have been in protection on the date referred to in Article 10(1), had this Directive and Council Directive 92/100/EEC already been in force."

The effect of this alternative would be to revive protection for works no longer protected in the Community on the date for implementing the Directive. It would therefore be difficult to justify applying it as a measure aimed at the establishment and operation of the internal market. The true purpose of the provision would be not
the elimination of barriers resulting from the discrepancies between national laws on the
term of protection, but more proper protection for holders of copyright or related rights.
That being so, Article 100a would not be the correct legal basis. If the Permanent
Representatives Committee so wishes, the Legal Service is prepared to consider on
what legal basis EEC competence could be exercised.

CONCLUSIONS

In conclusion, the Council Legal Service is of the opinion that:

- The rule on the Directive’s application in time laid down in the first alternative for
  Article 6a(2) in the consolidated text would not run counter to the principles of
  Community law inasmuch as:

  = the object of the exercise is to eliminate the risk of barriers to intra-Community trade
    resulting from the discrepancies between national laws on the term of protection;
  
  = that rule is accompanied by paragraph 3 of the same Article, the second sentence of
    which should be couched in compulsory terms.

- The rule on application in time laid down by the second alternative for Article 6a(2)
  could not be based on Article 100a of the EEC Treaty.
NOTE

from: Presidency

to: Council (Internal Market)

No. prev. doc.: 7191/93 JUR 82 PI 52
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

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

Article 1
Duration of authors' rights

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

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

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

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

---

(1) Reservations by the Irish, Luxembourg, Netherlands and Portuguese delegations and waiting reservations by the Danish and United Kingdom delegations on the proposed term of 70 years post mortem auctoris.
(2) The reservations and waiting reservations mentioned in footnote 1 also apply to this term.
of identified authors whose identifiable contributions are included in such works, for which contributions paragraph 1 or 2 shall apply."

4. deleted.

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

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

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

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

Whereas in all cases where one or more physical persons are identified as authors the term of protection is calculated after their death; whereas the question of authorship in the whole or a part of a work is a question of fact which the national courts may have to decide;"
Article 1a (4)
Cinematographic or audiovisual works

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

2. The term of protection of cinematographic or audiovisual works shall expire 70 years (5) after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.

3. deleted. (6)

Article 2
Duration of related rights

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

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

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

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

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

3. The rights of producers of the first fixation of a film shall expire fifty years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire fifty years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound. (7)

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

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

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

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

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

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

7233/93 prk EN - 6 -
Article 2a
Protection of previously unpublished works

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

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

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

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

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

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected according to Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for a different system of protection for other photographs.\(^{(10)}\)

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

1. - deleted -

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

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

\(^{(10)}\) This Article would be accompanied by the following recital:

"Whereas the protection of photographs in the Member States is the subject of varying régimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in the present Directive; whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs can be left to national law;".

\(^{(11)}\) Reservation by the Commission on the deletion of Article 113 from the legal basis of the Directive.
Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 2 or 2a.

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

**Article 5**

**Calculation of terms**

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

**Article 6**

**Moral rights**

1. Deleted.

2. This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.⁽¹⁾

---

⁽¹⁾ Reservation by the Commission on this provision. This provision would be accompanied by the following statement in the Council minutes:

"The Council and the Commission confirm that the wording of Article 6 of this Directive has the effect that moral rights are excluded from its field of application."

The French delegation would prefer Article 6 to read:

"Moral rights are excluded from the field of application of this Directive" and to dispense with the statement.
Article 6a

Application in time

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

2. The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State, on the date referred to in Article 10(1), under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.

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

(13) Reservation by the Netherlands delegation on the whole of this Article.

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

(15) This paragraph would be accompanied by the following recitals:

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

"Whereas respect of acquired rights and legitimate expectations is part of the Community legal order; whereas in application of Article 6a(3) Member States may provide in particular that in certain circumstances the copyright and related rights which are revived in application of this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works were in the public domain;"

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

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

**Article 7**

**Technical adaptation**


**Article 8**

**Notification procedure**

Member States shall immediately notify the Commission of any governmental plan to grant new related rights, including the basic reasons for their introduction and the term of protection envisaged.\(^{(18)}\)

**Article 9**

Deleted.

---

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

\(^{(17)}\) OJ N° L 122 of 17.5.1991, p. 42.

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

General provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by [28 December 1994.]\(^{(19)}\)

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

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

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

Article 11

This Directive is addressed to the Member States.

Done at Brussels, For the Council

The President

---

\(^{(19)}\) This date will be decided when the Council's common position is adopted.
REPORT

from: Presidency

to: Council (Internal Market)

No. prev. doc.: 7233/93 PI 53 CULTURE 64
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

A. Introduction

1. The Council (Internal Market) held a policy debate on several aspects of the above proposal at its 1652nd session on 5 April 1993. It instructed the Permanent Representatives Committee to continue its examination of the proposal with a view to the adoption of a common position. Following this further examination, the Presidency submits an overall compromise proposal in 7233/93 PI 53 CULTURE 64. The present report outlines the main elements of this proposal, which it invites the Council to consider as an overall package.

B. Term of protection of copyright and of certain related rights (Articles 1 and 2)

2. The majority of delegations agrees with the Commission's proposal, also approved by the European Parliament, that the term of protection of copyright be harmonized at 70 years post mortem auctoris and that the term of protection of a certain number of rights related
to copyright be harmonized at 50 years.

The Irish, Luxembourg, Netherlands and Portuguese delegations have a reservation on the harmonization of the term of copyright protection at 70 years post mortem auctoris. The Danish and United Kingdom delegations have scrutiny reservations on this term, which they would consider lifting if the final overall package were to be satisfactory to them.

The Luxembourg delegation has a reservation on the term of 50 years for rights related to copyright.

3. The Presidency recommends acceptance of harmonization of copyright at 70 years post mortem auctoris and of rights related to copyright at 50 years as part of its overall compromise proposal.

C. Cinematographic or audiovisual works (Article 1a)

4. There has been much discussion on two questions:

- whether and to what extent the authorship of cinematographic or audiovisual works should be harmonized in this Directive;

- how the term of protection of cinematographic or audiovisual works should be calculated.

A solution has emerged in the Permanent Representatives Committee covering both of these questions.

This solution would consolidate the partial harmonization achieved in Council Directive 92/100/EEC(1) as regards authorship (Article 1a(1) of this Directive) by obliging the Member States to consider the principal

director of such a work as its author or one of its authors, while leaving them free to designate other co-authors. The compromise reached on the method of calculation of the term is that it will be calculated in relation to the death of the last of 4 persons to survive, without this method of calculation prejudicing the freedom of the Member States to designate the co-authors of such works (Article 1a(2)).

This solution is still under consideration by a number of delegations and the Commission.

5. The Presidency recommends acceptance of this solution as part of its overall compromise proposal.

D. Protection of previously unpublished works (Article 2a)

6. The majority of delegations agrees with a compromise solution worked out whereby a work first published after the expiry of the term of copyright would benefit from a right related to copyright (Article 2a).

The Netherlands and Portuguese delegations have reservations on the need for harmonization in this respect\(^{(2)}\), while the French, Irish and Greek delegations have reservations on the term of this protection being 25 years rather than the 50 years which they advocate.

The Commission is reflecting on the possibility of an alternative solution based on the principle of mutual recognition.

7. The Council is invited to consider whether the solution set out in Article 2a in 7233/93 PI 53 CULTURE 64 or a solution based on mutual recognition

\(^{(2)}\) Other delegations, while not being convinced of the need for such a provision, are prepared to accept it as a compromise solution.
should form part of the final overall package.

8. In connection with the discussion on the protection of previously unpublished works, The Italian delegation has proposed that a provision be included in the Directive concerning the protection of critical or scientific works.

The majority of Member States and the Commission were reluctant to introduce such a provision in this Directive without examining its implications in depth. They doubted whether a Directive concerned primarily with the harmonization of the term of protection was the appropriate instrument for imposing protection of such works at Community level. There was agreement that nothing in the Directive would prevent Member States from introducing or maintaining provisions in their national laws concerning the protection of such works. The general feeling, therefore is that this issue should not be regulated in the body of the Directive, but that a recital and a statement would clarify the situation (see footnote 9 in 7233/93 PI 53 CULTURE 64).

9. The Presidency recommends that this issue be dealt with in this way.

E. Photographs (Article 3)

10. The main problem encountered in attempting to harmonize the term of protection of photographs is the great differences existing between the laws of the Member States with regard to the substantive protection of photographs. A need was therefore felt to achieve at least a minimum of harmonization of the criteria to be applied for protecting photographs by copyright if harmonization of the term of protection was to be at all meaningful. After much discussion, delegations came to agreement in substance on the categories of photographs to be protected and various attempts were made to find
the appropriate wording for a legal instrument. Delegations are giving favourable consideration to the wording of Article 3 as set out in the Presidency's overall compromise proposal, together with the accompanying recital.

11. The Presidency recommends acceptance of this solution as part of its overall compromise proposal.

F. Application in time (Article 6a)

12. As a result of the length of the terms of protection proposed by the Directive for copyright and rights related to copyright (see section B above), the majority of delegations is prepared to accept that rights which have expired in one or more Member States be revived where the works concerned are still protected in at least one Member State (Article 6a(2)), on the double proviso that any acts of exploitation performed while the works concerned were in the public domain are not affected, and that Member States take the necessary measures to protect acquired rights and legitimate expectations of third parties (Article 6(3), together with the accompanying recital).

The Danish, Irish, Luxembourg, Netherlands and Portuguese delegations have reservations on the principle of such a revival of rights, the Netherlands delegation in particular doubting whether there would be any substantial barriers to the operation of the internal market in the absence of such revival.

The Spanish delegation has a reservation on the obligation on Member States to protect legitimate expectations, considering that such an obligation would be contrary to a ruling given by its constitutional court.
13. In the light in particular of the opinion given by the Council Legal Service in this respect (7191/93 JUR 82 PI 52), the Presidency recommends acceptance of the solution contained in Article 6a(2) and (3) and the accompanying recital as part of its overall compromise proposal.

G. CONCLUSIONS

14. The Council is invited to:

(a) adopt the recommendations made by the Presidency under points 3, 5, 9, 11 and 13 above;

(b) consider and pronounce on the option presented under point 7 above;

(c) approve the resulting overall compromise package;

(d) instruct the Permanent Representatives Committee to finalize the text with a view to the adoption by the Council of a common position.
ADDENDUM TO THE REPORT

from: Presidency
to: Council (Internal Market)

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

- Article 2a (Protection of previously unpublished works)

Point 6 of the Presidency report (7234/93 PI 54 CULTURE 65) mentions the possibility of an alternative solution to Article 2a as it appears in 7233/93 PI 53 CULTURE 64, based on mutual recognition.

After consultation with the Commission, if such an alternative solution were to be envisaged, it could be drafted as follows:
Article 2a

Protection of previously unpublished works

1. Member States may introduce a right for the protection of works of which the copyright has expired and which are lawfully made available to the public for the first time. Protection shall be for 75 years from the time when the work was first lawfully made available to the public and shall be equivalent to that of the economic rights of the author.

2. Such protection shall apply throughout the Community to works which meet the criteria set out in paragraph 1 and of which the country of origin within the meaning of the Berne Convention is one of the Member States which have introduced such a right.

3. Those Member States which do not avail themselves of the provisions of paragraph 1 shall take all appropriate measures to guarantee that protection arising in accordance with paragraph 2 is effective within their territory.
INFORMATION NOTE

from: General Secretariat of the Council

No. prev. doc.: 7234/93 PI 54 CULTURE 65
No. Cion prop.: 4483/93 PI 9 CULTURE 8

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

- Political agreement by the Council

The political agreement adopted by the Council (Internal Market) on 14 June 1993 involves the following amendments to the text set out in 7233/93 PI 53 CULTURE 64 + COR 1(f):

1. Add an Article 2b worded as follows:

   "Article 2b
   Critical and scientific publications

   Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such works shall be 30 years from the date of publication."

2. The last sentence of Article 3 should read as follows:

   "Member States may provide for the protection of other photographs."
3. The second sentence of Article 6a(3) should read as follows:
"Member States shall adopt the necessary provisions to protect, in particular, acquired rights of third parties."

4. The first subparagraph of Article 10(1) should read as follows:
"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 1 July 1995."
"I/A" ITEM NOTE

from : Council Secretariat

to : Permanent Representatives Committee/Council

Subject: Adoption in the official languages of the Community of the Council’s common position with a view to adoption of a Directive harmonizing the term of protection of copyright and certain related rights

1. At its 1671st meeting held in Luxembourg on 14 June 1993, the Internal Market Council signified its political agreement on a common position concerning the above Directive, an agreement to which the Irish, Luxembourg, Netherlands and Portuguese delegations were unable to subscribe.

2. The text of this common position, as finalized by the Legal/Linguistic Experts, is given in 7831/93 PI 64 CULTURE 83 PRO-COOP 35.

3. The Permanent Representatives Committee is asked to suggest that the Council:

   - adopt the common position as set out in 7831/93 PI 64 CULTURE 83 PRO-COOP 35 as an "A" item on the agenda for a forthcoming meeting, and

   - enter the attached statements in the minutes.
1. **Commission statement concerning the legal basis**

"Since in the Community the terms of protection of copyright and related rights held by nationals of third countries are the outcome of international negotiations which, in the view of the Commission, fall within the scope of common commercial policy as their purpose is to protect intellectual property as it relates to goods and services, the Commission in its original proposal included a provision expressly covering this point and proposed that the Directive should be based inter alia on Article 113 of the EEC Treaty. It regrets that this choice of legal basis has been rejected by all the delegations from the Member States.

The Commission notes that the text of the Directive resulting from the Council’s discussions, which it finds acceptable, no longer contains any element which warrants the retention of Article 113 of the EEC Treaty as the legal basis. Without prejudice to the question of the scope of the common commercial policy, the Commission is therefore prepared to omit the reference to Article 113 EEC in its proposal. This is indeed consistent with its policy to limit the number of legal bases for a proposal as far as possible and does not involve any change to the decision-making procedure."

2. **Commission statement re Article 3(3)**

"The Commission considers that Article 3(3) is without prejudice to the terms of protection laid down in Article 2(2) granted to authors of cinematographic or
audiovisual works as defined by the legislation of the Member States in accordance with Article 2(1)."

3. Commission statement re Article 5

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

4. Council and Commission statement re Article 9

"The Council and the Commission confirm that the wording of Article 9 of this Directive has the effect that moral rights are excluded from its field of application."

5. Commission statement re Article 9

"As part of an overall compromise, the Commission is prepared to withdraw the provision on harmonization of the term of protection of moral rights. However, it remains convinced that moral rights are an essential factor in copyright and, as a number of previous cases have shown, the exercise of that right may cause barriers to trade and possibly distortions of competition. The Commission accordingly reserves the right to submit any appropriate proposal in the future.

In this connection, the Commission cannot share the view put forward during the Council proceedings that harmonizing the term of protection of moral rights requires the legal basis of Article 235 EEC."
TRANSLATION OF LETTER

from: Commission of the European Communities, signed by
Mr Raniero VANNI d'ARCHIRAFI

dated: 8 September 1993

to: Mr Willy CLAES, President of the Council of the European Communities

Subject: Communication from the Commission to the European Parliament concerning the
common position of the Council on the proposal for a Directive harmonizing the
term of protection of copyright and certain related rights

Sir,

I enclose herewith for the Council’s information a communication from the Commission to the
European Parliament concerning the Council’s common position of 22 July 1993 on the
proposal for a Directive harmonizing the term of protection of copyright and certain related
rights (COM(92) 33 final amended by COM(92) 602 final SYN 395).

(Complimentary close).

(s.) Raniero VANNI d'ARCHIRAFI
Member of the Commission

Encl.: SEC(93) 1324 final SYN 395
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

pursuant to Article 149.2(b) of the EEC Treaty

cconcerning the

common position of the Council

on the proposal for a Directive

harmonizing the term of protection

of copyright and certain related rights
1. Introduction

On 22 July the Council, acting by a qualified majority, adopted a common position under Article 149(2) of the EEC Treaty on the abovementioned Commission proposal.

2. Legal basis

The original proposal was based on Articles 57(2), 66, 100a and 113 of the EEC Treaty. It was presented to the Council on 23 March 1992. The Economic and Social Committee delivered its opinion on 1 July 1992. Parliament, which was consulted under the cooperation procedure, delivered its opinion on 19 November 1992.

Since in the Council's view the proposal, as reflected in its common position, does not necessitate recourse to Article 113 of the EEC Treaty as a legal basis, the reference to that article has been deleted.

The Commission would point out that the wording of the common position, which it endorses, no longer contains anything that militates strongly in favour of maintaining Article 113 as a legal basis. It accordingly agrees, without prejudging the question of the scope of the common commercial policy, to the deletion of the reference to that Article. This is in keeping, moreover, with its policy of limiting as far as possible the number of legal bases for a proposal and does not entail any modification of the decision-making procedure.

3. Object of the Commission's proposal

The purpose of the Directive is to bring about complete harmonization of the terms of protection of copyright and the principal rights related to copyright.

In its proposal the Commission opted for long terms of protection in order to afford rightholders a high level of protection and avoid the lengthy transition periods which respect for established rights would have required had short terms been chosen.

This approach was endorsed by Parliament, and the Council also concurred.

2 OJ No C 287, 4.11.1992, p. 53.
4. Comments

4.1 As was explained in the explanatory memorandum accompanying the Commission's amended proposal, Parliament proposed certain amendments in its opinion, almost all of which were adopted by the Commission.

4.2 The principal amendments proposed by Parliament and incorporated by the Commission in its amended proposal are reflected clearly in the common position.

The main ways in which the amended proposal differs from the original proposal are as follows:

(a) Separate provisions concerning cinematographic or audiovisual works are added in order to secure complete harmonization of the term of protection for such works. It is stipulated that the principal director is to be considered one of the authors of a cinematographic or audiovisual work.

It is further stipulated that the other individuals responsible for creating the work are to be considered co-authors. It follows from this that the term of protection of such works would be calculated from the death of the last surviving co-author. In order to make it easier for producers to exploit such works, Member States may provide that they shall be presumed to be authorized to exploit them.

(b) An exclusive related right is introduced for the benefit of persons who for the first time make lawfully available to the public a posthumous work the copyright in which has expired.

(c) The provision on application in time provides for the immediate application of the Directive to all works and objects protected by a related right which are still protected in at least one Member State, even if this leads to rights being revived in certain Member States.

4.3 In terms of the objectives pursued, the common position does not depart from the Commission's proposal, as amended in the light of Parliament's opinion.

(a) The Council has deleted the fifth recital, which referred to the work of the World Intellectual Property Organization. This amendment does not affect the Directive's scope. A number of other recitals have been either amended or added to ensure consistency with the wording of the substantive provisions.

(b) The Council has simplified the wording of Article 1(3), which deals with anonymous, pseudonymous and collective works and works the author of which is a legal person. The new paragraph 3 deals only with anonymous and pseudonymous works and corresponds to the previous wording and to the Berne Convention.

In a new Article 1(4), the Council sets out the rules for calculating the term of protection where a Member State has particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder. This is a useful addition and makes it possible to harmonize the term in respect of such works, irrespective of the regimes to which they are subject under Member States' laws. The reasons behind this provision are given in the new twelfth and thirteenth recitals.

The old paragraph 4, which provided that the presumption that an author has been dead for 70 years brings the protection to an end, has been deleted by the Council. This deletion can be accepted as it has no major impact given that cases in which the death of an author cannot be established are necessarily rare.

The Council has slightly modified Article 1(6) so as to give it a general scope covering all cases in which the term of protection is not calculated from the death of the author. This systematic approach is to be welcomed.

In providing that the principal director is to be considered an author and that Member States are to be free to designate other co-authors, Article 2, which is concerned with cinematographic or audiovisual works, reproduces and gives general applicability to the terms of the compromise reached in Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property and in the common position adopted by the Council with a view to adopting a Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

This consolidation is important as it treats a cinematographic or audiovisual work as a collaborative work the principal director of which, as one of its authors, enjoys all rights existing under copyright law.

Article 2(2) introduces a long term of protection which corresponds to a high level of protection. The four categories of person mentioned are taken from Article 14bis(3) of the Berne Convention.

Since the approach adopted by the Council does not call for complete harmonization of the ownership of the copyright, the third recital has been modified.

The Council has not considered it necessary to include, as the Commission did in its amended proposal, a provision on the possibility of introducing a presumption to the effect that exploitation is authorized, as this matter is addressed by Article 14bis of the Berne Convention. The Council has pointed this out in a new fourth recital.

The Commission is able to accept the provisions of Article 2 because, not only do they respect the compromise reached elsewhere, but they also ensure a high level of protection for authors.

5 OJ No L 346, 27.11.1992, p. 61.
6 Council document 6028/1/93, 10.5.1993.
(d) Article 3 on the duration of related rights has undergone only linguistic amendment and slight modification in order to bring its wording into line with that of Directive 92/100/EEC. The 18th and 19th recitals are intended to clarify the meaning of these provisions. These are useful amendments and additions and the Commission is able to accept them.

(e) Article 4 on the related right for the protection of previously unpublished works has undergone only linguistic amendment. It has been considered that, instead of referring to the lawfully making available of a work to the public, the terminology used in the related rights field should be adopted.

(f) The common position contains a new provision on critical and scientific publications in the form of Article 5. This addition has been made because publications which consist in restoring works to their original state are of definite cultural importance. The protection of such publications is considered no less justified than that of posthumous works. However, given that such a right currently exists in only one Member State, it has been considered appropriate to make this provision only optional.

In the Commission's view, this provision is useful as it introduces a maximum term of protection, thereby preventing excessively divergent terms from being introduced by Member States which propose to grant such a right. Member States remain free to introduce new related rights, as can be seen from Article 12, which provides that any plan to grant such rights should be notified. Article 5 does not therefore amount to a major amendment of the Commission's proposal.

(g) Article 3 of the Commission's original proposal provided for harmonization of the term of protection of protected photographs, irrespective of the protection regime and the level of originality required. This approach would therefore have meant that photographs which were not protected in some Member States, owing, say, to a high level of originality being required, would have had an unharmonized status in the Community. The Council considered that such a consequence was undesirable in the case of photographs which, because of their artistic or professional character, are of importance within the internal market, and that a harmonized level of originality should be provided for in Article 6. The criterion adopted, which corresponds to that contained in Directive 91/250/EEC, is that of the "author's own intellectual creation". All this is explained in the new 17th recital. The option Member States are given of protecting other photographs is necessary so as not to affect any existing protection.

The Commission agrees that this amendment is an improvement on its original proposal.

(h) The provisions concerning protection vis-à-vis third countries have been left largely unchanged (Article 7). The system of comparing terms of protection is maintained, subject to Member States' international obligations.

---

7 OJ No L 122, 17.5.1991, p. 42.
The Council has nevertheless deleted Article 4(1) of the amended proposal as being redundant since there are no longer any exceptions to the across-the-board harmonization of terms of protection. Similarly, the Council has struck out the advisory committee procedure, under which it would have been possible to modify the system of comparison of terms or to take interim measures.

The Commission is willing to accept these amendments, as they are useful and do not call into question the Directive's objectives.

(i) As far as the calculation of terms is concerned (Article 8), the Council has preferred to reinstate the simpler wording of the original proposal.

(j) Article 9 excludes moral rights from the scope of the Directive. Given that the Commission's proposal provided only for a minimum amount of harmonization and that possible Community measures concerning moral rights are still being examined, the Commission is able to accept this amendment.

(k) The wording of Article 10, which concerns the Directive's application in time, is broadly similar to that of the corresponding article of the amended proposal. It has undergone linguistic editing and modification to bring it into line with Directive 92/100/EEC. The Council has nevertheless preferred to take the date of the Directive's transposition into national law as the operative time for determining whether or not there is any protection. This choice has been made for reasons of legal certainty and is acceptable to the Commission. The reasons behind this provision are given in the 26th and 27th recitals.

(l) The scope of Article 12, which is concerned with the notification procedure, has appropriately been defined more clearly by the Council so as to leave no doubt that it is to governmental plans that this obligation relates.

(m) The date by which the Directive must be incorporated into national law laid down in Article 13 has been changed to 1 July 1995. The Council considers this postponement to be essential. National transposition measures are vital as far as the rights of individuals are concerned. Member States must therefore be allowed sufficient time as failure to transpose the Directive would have complex and serious consequences for those concerned.

The time horizon chosen by the Council is reasonable and therefore acceptable to the Commission.

5. The Commission considers that the common position faithfully reflects those of Parliament's proposals which were incorporated in the Commission's amended proposal. The improvements made by the Council do not amount to significant or substantial changes.

6. Conclusion

In view of the above, the Commission supports this common position which the Council has adopted by a qualified majority.
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. 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 ad 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).

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).

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."

9330/92 prk EN 5
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 P1 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 3 into national law.

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

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).
17. 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:

8. 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.
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).

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.

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 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. 4

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.
Article 1(4)

31. 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).

32. 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)

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

Article 1(6)

34. 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

35. 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).

36. 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.
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).
ANNEX

NON-PAPER

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)

3ter. 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 of pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for seventy years.

Alternative 2

(UK 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 Ibis

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.
EUROPEAN PARLIAMENT

COMMITTEE ON LEGAL AFFAIRS AND CITIZENS' RIGHTS

MINUTES

of the meeting of

Tuesday, 21 September 1993, at 3 p.m.
Wednesday, 22 September 1993, at 10 a.m. and 3 p.m.
Thursday, 23 September 1993, at 9 a.m.

Room 2 - VAN MAERLANT
BRUSSELS

CONTENT S

Tuesday, 21 September 1993, at 3 p.m.

1. Announcements and admission of visitors ...................... 4
2. Adoption of agenda .............................................. 4
3. Obligation to publish listing particulars for the admission of securities to stock exchange listing (amendment of Directive 80/390) (6/93)
   **I T02525 - (SYN 0451 - COM(92) 0566 - C3-0110/93)
   PE 203.938
   Rapporteur: James JANSSEN van RAAY
   - Consideration of draft report
   - Decision on procedure ........................................... 4
4. Programme of work of the Committee on Legal Affairs and Citizens Rights until the end of the present parliamentary term: setting of priorities ........................................ 4
5. Other business .................................................... 4

Wednesday, 22 September 1993, at 10 a.m.

6. Possible initiation of proceedings before the Court of Justice (not in public)
   (78/93)
   TACIS regulation (technical assistance to the independent states of the former USSR and Mongolia) COM(92) 0475
   * (PE 206.098) .................................................. 5
7. Equal treatment of men and women - amendment of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (39/93)
   * T02825 - (CSA1483 - COM(93) 0106 - C3-0148/93)
     (PE 205.035)
     Rapporteur: Marie-Claude VAYSSADE
     - Consideration of draft report
     - Decision on procedure

8. Charter for ethnic groups (115/89)
   T00867 - (B3-0177/89 - - ) (PE 204.838)
   (B3-0478/90 - - ) (PE 204.838/Am. 1)
   (B3-0690/90 - - )
   Rapporteur: Siegbert ALBER
   - Consideration of amendments

   **I T02593 - (SYN 0453 - COM(93) 0037 - C3-0114/93)
     (PE 204.839/A)
     (PE 204.839/B)
     (PE 204.839/Am. 1)
     Rapporteur: Carlos PERREAU DE PINNINCK DOMENECH
     - Adoption of draft report

10. Copyright and related rights: term of protection 83/91
    **II T01647 - (SYN 0395 - COM(92) 0033 - C3-0189/92)
        (SYN 0395 - COM(92) 0602)
        (SYN 0395 - A3-0348/92)
        (PE 203.331/CM)
        Rapporteur: Carlos María BRU PURON
        - Discussion

11.1 General budget for 1994: Section III (32/93A)
    T02711 - (BUD0050 - COM(93) 0400 - C3-0250/93)
    (PE 205.957/Am. 1)
    Draftsman: Siegbert ALBER
    - Discussion

11.2 General budget for 1994: other sections (32/93B)
    T02736 - (BUD0051 - COM(93) 0400)
    (PE 205.957/Am. 2)
    Draftsman: Siegbert ALBER
    - Discussion
Thursday, 23 September 1993, at 9 a.m.

12. Confidentiality for journalists' sources
   (192/90)
   TO1444 - (B3- 1544/90 - - - )
   (PE 205.642)
   Rapporteur: Georgios ANASTASSOPOULOS
   - Consideration of draft report
   - Decision on procedure
   (PE 203.469/fin.) .......................... 7

13. Approval of minutes of meetings of
   - 31 March to 2 April 1993 (Tenerife)  (PE 204.233)
   - 5 to 7 May 1993  (PE 204.832)
   - 1 and 2 June 1993  (PE 204.836)
   - 8 to 10 June 1993  (PE 204.837)
   - 28 and 29 June 1993  (PE 205.397) .... 7

14. Appointment of rapporteurs and draftsmen
   - Decisions on procedure to be adopted
   (PE 205.403/An. 1)
   (PE 205.403/An. 2) .......................... 7

15. Decision on the opening of future meetings to the public
   (Rule 124(2) of the Rules of Procedure) 7

16. Other business .............................. 7

17. Date of next meeting ........................ 7

Annexes: I. Record of attendance
        II. List relating to Item 14
The meeting opened at 3 p.m. with Mr Alber, chairman, in the chair.

1. The following visitors were admitted:
   Mrs Tahon, Association of European Publishers
   Dr Schulze-Wilk, Brussels Office of the Federal German Chamber of Dentists.

The chairman said that the Committee on External Economic Relations had requested that the question of initiating legal proceedings in connection with the TACIS regulation be considered; he proposed that this question should be discussed on 22 September in the presence of the chairman of the Committee on External Economic Relations, Mr De Clercq.

The chairman drew attention to the Green Paper on remedying environmental damage submitted by the Commission and reminded those present of the hearing on this problem arranged by the Committee on the Environment, Public Health and Consumer Protection for 3 and 4 November 1993.

The chairman also said that the chairman of the Committee on the Environment, Public Health and Consumer Protection intended to propose that his committee and the Committee on Legal Affairs and Citizens' Rights should table a joint question on the seat of the Environment Agency. The committee agreed to act jointly with the Committee on the Environment, Public Health and Consumer Protection in this respect.

2. The chairman informed the committee that Item 6 (the Community and sport), Item 7 (freedom of movement, Article 8a of the EEC Treaty, possible initiation of legal proceedings pursuant to Article 175 of the EEC Treaty) and Item 13 (financial stability and regulation of Community markets) of the draft agenda would have to be held over. He proposed a change in the order in which the items were taken. The agenda was adopted in the modified form proposed by the chairman, as evident from these minutes.

Mr Janssen van Raay, Mr Defraigne, Mrs Salema and Mr Medina Ortega spoke to the agenda.

3. The rapporteur presented his draft report. The deadline for tabling amendments was set at 12 noon on Tuesday, 28 September 1993.

4. The chairman presented his proposal for the priorities in the Committee's programme of work until the end of the parliamentary term. Mr Garcia Amigo, Mr Bandres Molet and Mr Medina Ortega spoke. The chairman called on the political groups to submit proposals for the choice of subjects and for the application of Rule 37 of the Rules of Procedure by the next week.

5. The chairman read out a draft oral question without debate tabled by Mr Medina Ortega on the procedure for the appointment of judges to the European Court of Justice. The aim of the question was to give the
European Parliament, and especially its Committee on Legal Affairs and Citizens' Rights, an opportunity to meet candidate judges before their appointment.

The committee decided to endorse the question tabled in July 1993 by Mr Janssen van Raay on behalf of the EPP Group on the European Parliament's role in the appointment of the members of the Court of Justice of the European Communities and to submit to the President a motion for a resolution with a request for an early vote pursuant to Rule 58(7) of the Rules of Procedure.

Mrs Salema raised the question of the definition of the terms of reference of the committees and especially of the Committee on Civil Liberties and Internal Affairs vis-à-vis the Committee on Legal Affairs and Citizens' Rights. The Committee on Civil Liberties and Internal Affairs had received a petition from a British citizen the contents of which were such that it might well be considered in the own-initiative report she had drawn up on interference in people's lives. The Committee on Civil Liberties and Internal Affairs had decided not to draw up a report.

Mr Falconer spoke. The chairman said that he would raise the matter in the Enlarged Bureau on 29 September 1993.

The meeting adjourned at 4.05 p.m. and resumed at 10 a.m. the next day, 22 September.

* * *

Wednesday, 22 September 1993, at 10 a.m.

6. Meeting in camera, the committee considered the possibility of initiating legal proceedings before the Court of Justice in connection with the TACIS regulation.

Mr Chabert, Mr Janssen van Raay, Mr Medina Ortega, Mrs Vayssade, Mr Hoon, Mr Rothley and the chairman of the Committee on External Economic Relations, Mr De Clercq, spoke.

The opinion of the Legal Service was presented by Mr Pennera. The committee decided unanimously to recommend to the President that proceedings be initiated.

7. The rapporteur presented her draft report. Mrs Salema spoke.

The deadline for the tabling of amendments was set at 12 noon on Tuesday, 5 October 1993.

8. The rapporteur discussed the 102 amendments that had been tabled.

Mr Bandres Molet, Mr Cooney, Mr Medina Ortega, Mrs Vayssade, Mr Inglewood, Mr Garcia Amigo and Mrs Salema spoke.

The rapporteur asked the groups to submit lists showing which of the various amendments they approved or rejected.
9. The rapporteur presented his draft report and the additional amendments he had tabled after its completion and commented on the amendments tabled by Mr Zavvos.

Mr Bru Purón and Mr Lohengrin of the Commission spoke.

The result of the voting was as follows:

<table>
<thead>
<tr>
<th>Amendment No.</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>2</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>21</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>22</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>23</td>
<td>adopted (8/1/0);</td>
</tr>
<tr>
<td>24</td>
<td>adopted (8/1/1);</td>
</tr>
<tr>
<td>4</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>25</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>24 and 5</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>26</td>
<td>rejected (5/7/0);</td>
</tr>
<tr>
<td>27</td>
<td>adopted (7/4/0);</td>
</tr>
<tr>
<td>6</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>28</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>7</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>29</td>
<td>rejected (5/7/0);</td>
</tr>
<tr>
<td>30</td>
<td>adopted (7/5/0);</td>
</tr>
<tr>
<td>8</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>31</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>9</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>32</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>10</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>11 and 12</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>33</td>
<td>adopted (7/4/0);</td>
</tr>
<tr>
<td>13</td>
<td>lapsed;</td>
</tr>
<tr>
<td>14</td>
<td>withdrawn;</td>
</tr>
<tr>
<td>34</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>35</td>
<td>adopted (8/3/1);</td>
</tr>
<tr>
<td>15</td>
<td>lapsed;</td>
</tr>
<tr>
<td>36 to 38, 16 to 18 and 20</td>
<td>adopted unanimously;</td>
</tr>
<tr>
<td>19</td>
<td>lapsed;</td>
</tr>
</tbody>
</table>

Proposal for a directive as amended and draft legislative resolution: adopted unanimously.

10. The rapporteur, Mr Garcia Amigo and Mrs Salema spoke.

At the rapporteur's suggestion, the deadline for the tabling of amendments was set at 12 noon on Tuesday, 28 September 1993. The adoption of a recommendation for second reading was scheduled for the sitting from 6 to 8 October 1993.

11. The draftsman of the opinion and Mr Rothley commented on those aspects of the general budget which fell within the terms of reference of the Committee on Legal Affairs and Citizens' Rights.
The deadline for the tabling of amendments was set at 12 noon on Friday, 24 September 1993.

The meeting adjourned at 5.15 p.m. and resumed at 9 a.m. the next day, 23 September 1993.

* *

Thursday, 23 September 1993 at 9 a.m.

12. The rapporteur introduced the subject of his draft report, referring in particular to the case of the British journalist Goodwin, which was currently before the European Commission of Human Rights in Strasbourg. The chairman and Mr Bradley of the Legal Service then spoke.

The deadline for the tabling of amendments was set at 12 noon on Thursday, 21 October 1993.

13. The committee approved the five sets of minutes submitted.

14. The chairman informed the committee of the outcome of the Coordinators' meeting the previous evening (see the annex to these minutes).

15. The chairman pointed out that, of 17 committees, 12 met in public. He therefore proposed that as a rule the Committee on Legal Affairs and Citizens' Rights should meet in public, the public being excluded as the need arose. As the committee was not quorate, a decision was held over until the next meeting.

16. The chairman said that Item 12 (industrial property rights and standardization), Item 13 (financial stability and regulation of Community markets) and Item 14 (elimination of obstacles to the use of the ECU) could not be considered at this meeting and must therefore be held over.

Mr Rothley requested that the motions for resolutions tabled pursuant to Rule 63 of the Rules of Procedure (Nos. 209 and 211 in Annex I to the agenda) be discussed again at the next meeting.

17. The next meeting would take place on Tuesday, 28 September 1993, at 3 p.m. and Wednesday, 29 September 1993, at 9 a.m.
### DELTAGERLISTE/ANWESENHEITSLISTE/KATAITAIH NAPONTON/
**RECORD OF ATTENDANCE/LISTA DE ASISTENCIA/LISTE DE PRESENCE/** 
**ELENCO DEI PRESENTI/PRESENTIELIJST/LISTA DE PRESENCAS**

<table>
<thead>
<tr>
<th>Til stede</th>
<th>Formandskabet/Vorstand/Noodopvolger/Bureau/Ufficio di Presidenza/Mesa: (*)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALBER (P), VAYSSADE (1,2) (VP), ROTHLEY (2,3) (VP), CASINI (1) (VP)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Anwesend</th>
<th>Medlemmer/Mitglieder/Ml&quot;n/Members/Diputados/Députés/Deputati/Leden/Deputados:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ANASTASSIOPOULOS (3), BANDRES MOLET, BONTEMPI (1), BRU PURON (2),</td>
</tr>
<tr>
<td></td>
<td>GARCIA AMIGO, HOON (2), LORD INGLEWOOD (2,3), JANSEN VAN RAAY (1,2), MALANGRE</td>
</tr>
<tr>
<td></td>
<td>(1), MEDINA ORTEGA, ODDY (3), REYMAN (1), SALEMA O.MARTINS (1,2), SIMPSON</td>
</tr>
<tr>
<td></td>
<td>(2), UKEIWE (2,3)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Rapport</th>
<th>Stedfortrædere/Stellvertreter/Avundepoot/Substitutes/Suplentes/Suppléants/</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Stedfortræderene/Stellvertreteren/Avundepootere/Suplentes/Suppléantene:</td>
</tr>
<tr>
<td></td>
<td>BLAK (1), CODNEY (1,2), DEGRAIVE (1). DE GUCHT (2), DUERGER (1), FALCONER</td>
</tr>
<tr>
<td></td>
<td>(2), FONTAINE (2,3), LAFUENTE LOPEZ (3), LANDA MENDIBE (1), PERREAU DE</td>
</tr>
<tr>
<td></td>
<td>PINNINCK (1,2), STAMOULIS (1,2), von HOGAU (2), ZAVVOS (2)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Present</th>
<th>Medlemmer/Mitglieder/Ml&quot;n/Members/Diputados/Députés/Deputati/Leden/Deputados:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BLAK (1), COONEY (1,2), DEGRAIVE (1). DE GUCHT (2), DUERGER (1), FALCONER</td>
</tr>
<tr>
<td></td>
<td>(2), FONTAINE (2,3), LAFUENTE LOPEZ (3), LANDA MENDIBE (1), PERREAU DE P</td>
</tr>
<tr>
<td></td>
<td>INNINCK (1,2), STAMOULIS (1,2), von HOGAU (2), ZAVVOS (2)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Presentes</th>
<th>Medlemmer/Mitglieder/Ml&quot;n/Members/Diputados/Députés/Deputati/Leden/Deputados:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BLAK (1), COONEY (1,2), DEGRAIVE (1). DE GUCHT (2), DUERGER (1), FALCONER</td>
</tr>
<tr>
<td></td>
<td>(2), FONTAINE (2,3), LAFUENTE LOPEZ (3), LANDA MENDIBE (1), PERREAU DE P</td>
</tr>
<tr>
<td></td>
<td>INNINCK (1,2), STAMOULIS (1,2), von HOGAU (2), ZAVVOS (2)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Aanwezig</th>
<th>Medlemmer/Mitglieder/Ml&quot;n/Members/Diputados/Députés/Deputati/Leden/Deputados:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BLAK (1), COONEY (1,2), DEGRAIVE (1). DE GUCHT (2), DUERGER (1), FALCONER</td>
</tr>
<tr>
<td></td>
<td>(2), FONTAINE (2,3), LAFUENTE LOPEZ (3), LANDA MENDIBE (1), PERREAU DE P</td>
</tr>
<tr>
<td></td>
<td>INNINCK (1,2), STAMOULIS (1,2), von HOGAU (2), ZAVVOS (2)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Art. 111,2</th>
<th>SCHLECHTER (1,2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 124,4</td>
<td>DALSASS (3), DE CLERQ (2), CHABERT (2), SELIGMAN (2), VALVERDE LOPEZ (1)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Endv. deltag/Weitere Teiln./</th>
</tr>
</thead>
<tbody>
<tr>
<td>Izouetelyon enlong/Also present</td>
</tr>
<tr>
<td>Participaron igualmente/</td>
</tr>
<tr>
<td>Particiapent également/</td>
</tr>
<tr>
<td>Hanno partecipato altresi'/</td>
</tr>
<tr>
<td>Andere deelnemers/</td>
</tr>
<tr>
<td>Outros participantes/</td>
</tr>
<tr>
<td>(Dagsorden/Tagesordnung/</td>
</tr>
<tr>
<td>Huenunga Ætsto'en/OJ/OJ/Agenda/</td>
</tr>
<tr>
<td>Orden do dia-Pkt./Iníció/Point/</td>
</tr>
<tr>
<td>Punto/Punt/Punto):</td>
</tr>
</tbody>
</table>

* (P) = Formand/Vorsitzender/Noodopvolger/Chairman/President/Presidente/Voorzitter/Presidente
* (VP) = Næstform./Stellv. Vorsitz./Avundepoot/vice-Chairman/Vice-President/Vicepresidente/
  Ondervoors./Vice-Pres./Vicepres.

Til stede den/anwesend am/Rapport otüg/Present on/Present le/Presente ii/Aanwezig op/Presente en/Presente e1

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>21.09.1993</td>
</tr>
<tr>
<td>(2)</td>
<td>22.09.1993</td>
</tr>
<tr>
<td>(3)</td>
<td>23.09.1993</td>
</tr>
</tbody>
</table>
Efter indbydelse fra formanden/Auf Einladung d. Vorsitzenden/Mc np6o><>.teriori
Tou
npot6potou/At
the
invitation
of
the
Chairman/Por invitación del presidente/Sur l'invitation du président/Su invito del
presidente/Op uitnodiging van de voorzitter/A convite do presidente:

Radet/Rat/IuµBoûlo/Council/Consejo/Conseil/Consiglio/Raad/Conselho: (*)

Kommissionen/Kommission/Enlipo/i/Commission/Comisión/Commissione/Commissione/Commission: (*)

ARTEAGOITIA, LAU, LÖVENGREEN, MAIER

Cour des comptes:

C.E.S.:

<table>
<thead>
<tr>
<th>Gruppernes sekretariat</th>
<th>SOC</th>
<th>CLARKE, KLÜBER, FULMINI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sekretariat der Fraktionen</td>
<td>PPE</td>
<td>KALVIÉRAKIS, RATCHFORD</td>
</tr>
<tr>
<td>Γραμματεία του Νομ. Οµόσυνυ</td>
<td>LDR</td>
<td>COLERA GARZÓN, CHADWICK</td>
</tr>
<tr>
<td>Secretariat of pol. groups</td>
<td>Verts</td>
<td>MORERA</td>
</tr>
<tr>
<td>Secr. de los grupos políticos</td>
<td>GUE</td>
<td>ESTEBAN</td>
</tr>
<tr>
<td>Secr. des gr. politiques</td>
<td>ROE</td>
<td>MOEHRING</td>
</tr>
<tr>
<td>Seegr. dei gruppi politici</td>
<td>DR</td>
<td></td>
</tr>
<tr>
<td>Secr. van de fracties</td>
<td>CG</td>
<td></td>
</tr>
<tr>
<td>Secr. dos grupos políticos</td>
<td>ARC</td>
<td>PRETA, DEL BADO</td>
</tr>
<tr>
<td>Outros participantes</td>
<td>NI</td>
<td></td>
</tr>
</tbody>
</table>

Cab. du Président

<table>
<thead>
<tr>
<th>Cab. du Secréttaire Général</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Generaldirektorat</td>
<td>I</td>
<td>OLIVARES MARTINEZ</td>
</tr>
<tr>
<td>Generaldirektion</td>
<td>II</td>
<td>CHICCO</td>
</tr>
<tr>
<td>Γενικός Αντιπρόεδρός Κοινοβουλίου</td>
<td>III</td>
<td>PACHECO</td>
</tr>
<tr>
<td>Directorate-General</td>
<td>IV</td>
<td>DI STEFANO</td>
</tr>
<tr>
<td>Dirección general</td>
<td>V</td>
<td></td>
</tr>
<tr>
<td>Direction générale</td>
<td>VI</td>
<td></td>
</tr>
<tr>
<td>Direzione generale</td>
<td>VII</td>
<td></td>
</tr>
<tr>
<td>Directoire-général</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Directcción general</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contrôle financier</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Service juridique</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Udvalgssekretariatet            |      |                         |
| Ausschusssekretariat            |      |                         |
| Γραμματεία του Οµόσυνυ           |      |                         |
| Committee secretariat           |      |                         |
| Secretaría de la comisión       |      |                         |
| Secretariat de la comission     |      |                         |
| Segretariato della commissione  |      |                         |
| Commissionessecretariat         |      |                         |
| Secretaria de comission         |      |                         |
| Assist. /Bonâç                   |      |                         |

* (P) = Formand/Præs./Πρόεδρος/Chairman/Président/Voorzitter
(VP) = Næstform./Vice-Præs./Vice-Président/Vice-Chairman/Vice-Président/Ondervoorz./Vice-pres.
(M) = Medlem./Mitglied/Miúcio/Member/Membro/Membre/Lid/Membro
(F) = Tjenestemand/Beamter/Yndlînõg/Official/Funcionario/Fonctionnaire/Funzionario/Ambtenaar/Functionário
I. Appointment of rapporteurs

Consultations

1. Legal professions: rules on right of establishment currently applying to the professions (directive) (79/93) T02585
Rapporteur: Nicole FONTAINE

2. Setting up of a securities committee
   **I T02972 - (SYN 2007 - 5111/1/93 - C3-0289/93) (72/93)
   Rapporteur: Carlos Maria BRU PURON
   (PE 205.962)

3. Conditions of employment of staff of CEDEFOP and the Foundation for the Improvement of Living and Working Conditions (83/93)
   * T02962 - (CSA2743 - COM(93) 0105 - C3-0274/93)
   (CSA2753 - COM(93) 0105 - C3-0275/93)
   Rapporteur: Marie-Claude VAYSSADE

4. Amendment of directive on credit institutions, non-life and life assurance and investment firms (84/93)
   **I T02969 - (SYN 0468 - COM(93) 0363 - C3-0296/93)
   Rapporteur: James JANSSEN VAN RAAY

II. Appointment of draftsmen

Consultations

5. A strategic programme on the internal market (74/93) T02922 - (COS0079 - COM(93) 0256 - C3-0214/93)
   Decision: no opinion

III. Appointment of draftsmen

Rule 63 motions for resolutions

6. Pornography (35/93) MARTIN David W. (PSE)
   T02358 - (B3-0121/93 - - )
   - (with which is associated the motion for a resolution (B3-420/92 on pornography) on which LEGA has not been asked for an opinion)
   Decision: no opinion

7. Alternative medicine (50/93) PIMENTA Carlos (LDR), DIEZ DE RIVERA ICAZA Carmen
   T02918 - (B3-0344/93 - - )
   Decision: no opinion

8. Consumer protection, advertising and the internal market (71/93) COLLINS Kenneth D. (PSE), SCHLEICHER Ursula, IVERSEN John,
   AMENDOLA Gianfranco
   T02919 - (B3-0472/93 - - )
   Decision: No opinion
EUROPEAN PARLIAMENT

COMMITTEE ON LEGAL AFFAIRS AND CITIZENS' RIGHTS

MINUTES

of the meeting of
Wednesday, 6 October 1993,
Thursday, 7 October 1993 and
Friday, 8 October 1993

BRUSSELS

CONTENTS

Page

Wednesday, 6 October 1993

1. Adoption of draft agenda (PE 206.233) ........................................... 3

In the presence of the Council and the Commission of the European Communities

2. Twenty-second annual report on competition policy
(56/93) (PE 205.645)
Draftsman: Mr Anthony SIMPSON
- Consideration of a draft opinion
- Decision on procedure ................................................................. 3

3. Securities committee
(72/93)
Rapporteur: Carlos María BRU PURÓN
- Adoption of draft report .............................................................. 3

4. The European Community and sport
(65/92)
Draftsman: Mr J. JANSSEN VAN RAAY
- Consideration of a draft opinion .................................................. 3

5. Listing particulars for the admission of securities to official stock exchange listing (amendment of Dir. 80/390)
(6/93)
Rapporteur: Mr J. JANSSEN VAN RAAY
- Adoption of draft report .............................................................. 3

6. Providing legal protection against interference in people's private lives
(153/91)
Rapporteur: Margarida SALEMA O. MARTINS
- Consideration of a draft report
- Decision on procedure to follow .................................................. 3
Thursday, 7 October 1993

7. Copyright and neighbouring rights: duration of protection (83/91)
   Rapporteur: Mr Carlos María BRU PURÓN
   Adoption of a draft report ........................................ 4

8. Consideration of the position defined by the Commission in the context of Art. 175 EEC Treaty (free circulation of people) (60/93)
   Rapporteur: Mr Manuel MEDINA ORTEGA
   Exchange of views ...................................................... 4

9. Consideration of the possibility of instituting proceedings before the Court of Justice ........................................ 4

10. Presentation by the Legal Service of the Parliament concerning cases pending before the Court of Justice in which the Parliament is involved ........................................ 4

11. Petition No. 150/91 on the bad treatment of animals in the EEC (107/91)
    Rapporteur: Ms Christine ODDY ...................................... 4

12. Intellectual property rights and standardization (1/93)
    Rapporteur: Ms Christine ODDY ...................................... 4

13. Pluralism and media concentration in the internal market: an assessment of the need for Community action (13/93)
    Draftsman: Mr Kurt MALANGRÉ
    Exchange of views ...................................................... 5

Friday, 8 October 1993

14. Appointment of rapporteurs and draftsman decisions on procedure ........................................ 5

15. Approval of minutes of meeting of:
    - 15.07.1993 (Strasbourg)

16. Conditions of employment of staff of the European Centre for the Development of Vocational Training (83/93)
    Rapporteur: Mrs Marie-Claude VAYSSADE
    Exchange of views ...................................................... 5

17. Removal of legal obstacles to the use of the ECU (17/93)
    Draftsman: Mr Manuel MEDINA ORTEGA
    Exchange of views ...................................................... 5

18. Date of next meeting ..................................................... 5
The meeting opened at 3.00 p.m. with Mr Alber, chairman, in the chair.

***

The following members of the public were admitted to the meeting for the following points:

Anthony GOOCH  Cabinet Stewart Consultants  3, 6
Martin HARVEY  Interel Consultants  2, 3
Peter KERSTENS  Charles Barker Consultants  3, 4, 7

1. The draft agenda was adopted in accordance with the order as hereafter appears in these minutes.

As a preliminary point Mr Defraigne referred to point 6 on the draft agenda and the judgment handed down by the Court in Liège concerning the transfer of football players. As the Court had decided to refer questions to the Court of Justice in accordance with Article 177 of the EC Treaty the case was now sub judice.

2. The draftsman introduced his draft opinion, and referred to the importance of competition policy for the European Community. Mr Hoon suggested that it would be better if paragraph 2 of the conclusion to the draft opinion was withdrawn, a suggestion which was accepted by the draftsman.

The deadline for tabling amendments was set for 12 noon on 11 October 1993.

3. This point was introduced by the rapporteur who outlined his position on the 5 amendments which had been tabled, all 5 of which were unanimously adopted by the committee.

4. The draftsman introduced this point and referred to the intervention made by Mr Defraigne at the beginning of the meeting. The following members then took part in a discussion: the chairman, Defraigne, Janssen van Raay and Rothley. At the end of the discussion it was agreed that the draftsman would revise his draft opinion with a view to its adoption at the meeting scheduled for 14 and 15 October 1993.

5. The rapporteur introduced his draft report and the 3 amendments which he had tabled, referring to the great interest which had been shown in this proposal. All the amendments were unanimously adopted by the committee.

6. This point was introduced by the rapporteur, who emphasised the importance of protecting individuals against unauthorized interference in their private lives. The following members then took part in a discussion: Bru Puron, Garcia Amigo, Hoon, Janssen van Raay and Oddy. At the end of this discussion the rapporteur agreed to amend the conclusions to the draft report in accordance with suggestions made by Mr Hoon. A deadline for tabling amendments was set for 12 noon on 21 October 1993.

***

The meeting adjourned at 4.47 pm and reconvened the following morning at 9.15 a.m. with Mr Alber, chairman, in the chair.
7. This point was introduced by the rapporteur who referred to the problems which he had encountered in getting his amendments accepted by the Commission. The following members then took part in a discussion: the chairman, Bontempi and Janssen van Raay. The meeting then adjourned at 10.00 a.m. and resumed at 3.00 p.m. with Mr Alber, chairman in the chair. Mr Bru Puron referred to his earlier intervention which he had made and informed the committee that he had decided to withdraw his amendments Nos. 1 and 4. Mr Mayer, on behalf of the Commission, informed the committee that the Commission could accept amendments 2 and 3 which related to the Spanish version only of the text. The committee adopted amendments 2 and 3 unanimously.

8. The rapporteur introduced this point and said that all that remained to do was to take a formal decision to recommend the initiation of proceedings under Article 175 of the EC Treaty. He reminded members of the committee that there had been unanimous agreement during the last meeting on this course of action. Mr Turner, chairman of the Committee on Civil Liberties and Internal Affairs stated that before proceeding to a vote he would nonetheless like to hear the views of Parliament's Legal Service on this point.

Mr. Schoo spoke on behalf of Parliament's Legal Service, pointing out that the Commission could not opt for an 'intergovernmental' solution to the problem of the free circulation of individuals, since Article 8a of the EC Treaty called for the Community to take action in this area. The committee decided unanimously to recommend to the President that legal proceedings be initiated against the Commission for its failure to act in this area.

9. This point was adjourned in order to enable Mr Medina Ortega to study the possibility of initiation of proceedings more closely. It was agreed that this point would be dealt with at the meeting of 4 November 1993.

10. This point was introduced by Mr Peter of Parliament's Legal Service who said that there were some 23 cases pending before the Court which could be divided into 3 types:

(1) cases relating to contractual matters
(2) cases relating to officials
(3) cases relating to institutional matters

After hearing an outline of the above cases, the following members took part in a discussion: Bontempi, Garcia Amigo, Inglewood, Medina Ortega and Vayssade.

11. This point was introduced by the draftsperson, who referred to the fact that it was important that Parliament's role in protecting animals throughout the Community should be recognized. The following members then took part in a discussion: the draftsperson, Garcia Amigo and Inglewood. A deadline for tabling amendments was set for 18 October 1993.

12. In respect of this point, the committee decided that the rapporteur would prepare a draft report in time for the committee meeting scheduled for 4 and 5 November 1993.
13. The rapporteur introduced this point and said that he would prepare a draft opinion for the meeting of 4 and 5 November 1993.

***

The meeting adjourned at 4.20 p.m. and resumed the following morning at 9.10 a.m. with Mr Alber, chairman, in the chair.

***

14. The chairman referred to a letter from Mr Medina Ortega and said that the decisions reached at the coordinators' meeting the previous day would be formally adopted at a later date if the members so requested.

15. The minutes of the meeting of 15 July 1993 were adopted in accordance with the provisions of Rule 89(1) of the Rules of Procedure.

16. The rapporteur introduced this point and immediately gave the floor to the Commission representative, Mr Kahn, who outlined the background to this proposal. Mr Bieber and Mr Sheehan spoke on behalf of CEDEFOP and the Foundation for the Improvement of Living and Working Conditions respectively. The rapporteur suggested that this report should be approved without a report in accordance with the provisions of Rule 116.1 of the Rules of Procedure. Mr Garcia Amigo concurred with this suggestion.

17. The draftsman introduced this point and proposed to the committee not to deliver an opinion on this matter. The committee followed the draftsman's view.

18. The next meeting was scheduled to take place on 14 and 15 October 1993, in Brussels.

The meeting ended at 9.40 a.m.
<table>
<thead>
<tr>
<th>Tidstede</th>
<th>Formandskabet/Vorstand/Npoc6poc/Bureau/Ufficio di Presidenza/Mesa</th>
<th>(*) FormanolkejNy/Chairman/Président/Presidente/Voorzitter/Presidente</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALBER (P), VAYSSADE (VP) (2, 3), ROTHLEY (VP) 1, 3</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Medlemmer/Mitglieder/Members/Diputados/Deputés/Leden/Deputados:</th>
</tr>
</thead>
<tbody>
<tr>
<td>BONTEMPI (1, 2), BANDRES MOLET (3), BRU PURON (1), COT (2), GARCIA AMIGO, GOLLNISCH (2), GRUND (3), HOON (1), INGLEWOOD (2, 3), JANSSEN VAN RAAY (1, 2), MALANGRE (2), MEDINA ORTEGA (2), ODDY (1), SALEMA O. MARTINS (1), SIMPSON (1), UKEIWE (1, 3)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Stedfortrædere/Stellvertreter/Avantnpocct/Substitutes/Suplentes/Suppléants/ Membri supplenti/Plaatsvervangers/Membros suplentes:</th>
</tr>
</thead>
<tbody>
<tr>
<td>COONEY (1), DEFRAGNE (1, 3), FANTINI (2, 3), MARTIN (1), NEUBAUER (1)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Art. 111, 2</th>
<th>SCHLECHTER (1), TURNER (2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 124, 4</td>
<td>OOMEN-RUIJTEN (1)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Endv. deltog/Weitere Teiln./Iuµµctlyav emion/Also present</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participaron igualmente/Participaron également/Hanno partecipato altresi'/Andere deelnemers/Outros participantes/</td>
</tr>
<tr>
<td>(Dagsorden/Tagesordnung/Hµcp<del>o</del>a ~a,aED/OJ/OG/Agenda/Ordem do dia-Pkt./Inµctlo/Point/Punto/Punto):</td>
</tr>
</tbody>
</table>

* (P) = Formand/Vorsitzender/Npoc6poc/Chairman/Président/Presidente/Voorzitter/Presidente |
| (VP) = Næstform./Stellv. Vorsitz./Avntnpocct/Vice-Chairman/Vice-Président/Vicepresidente/  
| Ondervoorz./Vice-Pres./Vicepres. |

1. 6.10.1993  
2. 7.10.1993  
3. 8.10.1993
Efter indbydelse fra formanden/Auf Einladung d. Vorsitzenden/Mc np6pou /At the invitation of the Chairman/Por invitación del presidente/Sur l'invitation du président /Su invito del presidente /Op uitzending van de voorzitter /A convite do presidente:

Radet/Rat/Iuµ~ou~Lo/Council/Consejo/Conseil/Consiglio/Raad/Conselho: (*)

Kommissionen/Kommission/Enltpomh/Commission/Comisión/Commissione/Commission/Commissie/Comissão: (*)

GARCIA PALENCIA, KANN, LAU, MAIER, RIVA, SHEEHAN

Cour des comptes:

C.E.S.:

<table>
<thead>
<tr>
<th>Andre deltagere</th>
<th>Andre Teilnehmer</th>
<th>Enlōng Παράκτιες</th>
</tr>
</thead>
<tbody>
<tr>
<td>Also present</td>
<td>Otros participantes</td>
<td>Παράκτιες</td>
</tr>
<tr>
<td>Andere Teilnehmer</td>
<td>Andere anwezigen</td>
<td>Andere participantes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Andre deltagere</th>
<th>Andre Teilnehmer</th>
<th>Enlōng Παράκτιες</th>
</tr>
</thead>
<tbody>
<tr>
<td>Also present</td>
<td>Otros participantes</td>
<td>Παράκτιες</td>
</tr>
<tr>
<td>Andere Teilnehmer</td>
<td>Andere anwezigen</td>
<td>Andere participantes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C.E.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(*)</td>
</tr>
</tbody>
</table>

Gruppernes sekretariat
Sekretariat der Fraktionen
Секретариат групп политик
Secretariat of pol. groups
Secr. de los grupos políticos
Secr. des gr. politiques
Secr. dei gruppi politici
Secr. van de fracties
Secr. dos grupos políticos

<table>
<thead>
<tr>
<th>Gruppernes sekretariat</th>
<th>SOC</th>
<th>CARLKE, KLEIST, KlÜBER, LANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sekretariat der Fraktionen</td>
<td>PPE</td>
<td>CARRE, REID</td>
</tr>
<tr>
<td>Secr. de los grupos políticos</td>
<td>LDR</td>
<td>COLERA GARZON</td>
</tr>
<tr>
<td>Secr. des gr. politiques</td>
<td>GUE</td>
<td>MOHRING</td>
</tr>
<tr>
<td>Secr. dei gruppi politici</td>
<td>DR</td>
<td></td>
</tr>
<tr>
<td>Secr. van de fracties</td>
<td>CG</td>
<td></td>
</tr>
<tr>
<td>Secr. dos grupos políticos</td>
<td>ARC</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cab. du Président</th>
</tr>
</thead>
<tbody>
<tr>
<td>(*)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cab. du Secretaire Général</th>
</tr>
</thead>
<tbody>
<tr>
<td>(*)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Generaldirektorat</th>
<th>Generaldirektion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Γενευκή Ἀλήθειαν</td>
<td>Direction des pol. groups</td>
</tr>
<tr>
<td>Πρεσιόν πολ. Ομάδων</td>
<td>Direction générale</td>
</tr>
<tr>
<td>Directeur-General</td>
<td>Direction générale</td>
</tr>
<tr>
<td>Dirección general</td>
<td>Dirección general</td>
</tr>
<tr>
<td>Direction-génerale</td>
<td>Dirección general</td>
</tr>
<tr>
<td>Direcção general</td>
<td>Direcrição general</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Service juridique</th>
<th>BRADLEY, PETER, RUFAS, SCHOO, VAINKER</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Udvalgssekretariatet</th>
<th>Ausschusssekretariat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Τομή Προϊτονάς</td>
<td>Committee secretariat</td>
</tr>
<tr>
<td>Γραμματεία εντύπων</td>
<td>Secretariat de la comision</td>
</tr>
<tr>
<td>Committee secretariat</td>
<td>Secretariato della commissione</td>
</tr>
<tr>
<td>Secretaria de la comisión</td>
<td>Commissionssecretariat</td>
</tr>
<tr>
<td>Secretaria de comisión</td>
<td>Secretariato de comision</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Assist./Bonôμë</th>
<th>BOURSEAU</th>
</tr>
</thead>
</table>

* = Formand/Pras./Πρόεδρος/Chairman/President/Voorzitter
(P) = Næstform./Vize-Pras./Αντιπρόεδρος/Vice-Chairman/Vice-Président/Ondervoorz./Vice-pres.
(VP) = Næstform./Vize-Pras./Αντιπρόεδρος/Vice-Chairman/Vice-Président/Ondervoorz./Vice-pres.
(M) = Medlem./Mitglied/Miembro/Membre/Membro/Lid/Membro
(F) = Tjenestemand/Beamter/Vmāληνος/Official/Funcionario/Fonctionnaire/Funzionario/Ambtenaar/Functionário
4483/93 PI 9 CULTURE 8
5702/93 PI 25 CULTURE 22

On page 12, the first full paragraph should read:

"For related rights, the Council noted that eleven delegations were in favour of the 50-year protection term proposed by the Commission, the Luxembourg delegations voicing a reservation."
RECOMMENDATION

of the Committee on Legal Affairs and Citizens' Rights

on the COMMON POSITION established by the Council with a view to the adoption of a directive harmonizing the term of protection of copyright and certain related rights

(C3-0300/93 - SYN 0395)

Rapporteur: Mr Carlos María BRU PURON
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural page</td>
<td>3</td>
</tr>
<tr>
<td>A. RECOMMENDATION</td>
<td>4</td>
</tr>
<tr>
<td>B. EXPLANATORY STATEMENT</td>
<td>5</td>
</tr>
</tbody>
</table>
At its sitting of 19 November 1992 the European Parliament delivered its opinion at first reading on the Commission proposal for a Council directive harmonizing the term of protection of copyright and certain related rights.

At the sitting of 17 September 1993 the President of Parliament announced that the common position had been received and referred to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media for their opinions.

At its meeting of 22 September 1993 and 7 October 1993 the Committee on Legal Affairs and Citizens' Rights considered the common position and the draft recommendation.

At the latter meeting it adopted the following recommendation unanimously.

The following were present for the vote: Alber, chairman; Vayssade, vice-chairman; Bru Puron, rapporteur; Bontempi, Cot, García Amigo, Gollnisch, Lord Inglewood, Janssen van Raay, Malangré, Medina Ortega, Oddy and Turner (for Simpson, pursuant to Rule 111(2)).

The recommendation was tabled on 8 October 1993.

The deadline for tabling amendments to the common position or proposals to reject it will appear on the draft agenda for the part-session at which the recommendation is to be considered.
A

DRAFT RECOMMENDATION

(Cooperation procedure: second reading)

on the common position established by the Council with a view to
the adoption of a directive harmonizing the term of protection of
copyright and certain related rights
(COM(92) 0033\(^1\) and COM(92) 0602\(^2\))

The Committee on Legal Affairs and Citizens' Rights,
- having regard to the common position of the Council (C3-0300/93 - SVN 0395),
Recommends that the European Parliament amend the common position as follows:

**Common position of the Council**

<table>
<thead>
<tr>
<th>Amendments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(Amendment No. 1)</strong></td>
</tr>
<tr>
<td><strong>Article 1(5)</strong></td>
</tr>
</tbody>
</table>

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.

**(Amendment No. 2)**

**Article 5**

Critical and scientific publications

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be thirty years from the time when the publication was first lawfully published.

---

\(^1\) OJ No. C 92, 11.4.1992, p. 6
\(^2\) OJ No. C 27, 30.1.1993, p. 7
B

EXPLANATORY STATEMENT

On 22 July 1993 the Council, acting by a qualified majority, adopted the common position on harmonizing the term of protection of copyright and certain related rights.

The original Commission proposal was presented on 23 March 1992. Parliament delivered its opinion at first reading on 19 November 1992. The Commission's amended proposal included all or part of 11 of the 14 amendments which Parliament had adopted.

The common position retains the main amendments proposed by Parliament and incorporated by the Commission in its amended proposal. None of the changes has modified in a substantial way the text examined by Parliament at first reading.

Main points of the common position

(a) Harmonization of the term of protection at 70 years for copyright and 50 years for related rights (Articles 1 and 3): Parliament supported these periods in principle, basically on the grounds that only harmonization in line with the longest term of copyright existing in the Community would avoid lengthy transition periods, which would have created a serious obstacle to completion of the single market. The maintenance of these terms in the common position is therefore satisfactory.

(b) Treatment of audiovisual works (Article 2): After considerable discussion in the Council the following agreement was reached:

* As regards the designation of authors of an audiovisual work, the text reproduces the solution reached in the Directive on rental right and lending right, i.e. the principal director of the work is considered to be the author and the Member States may designate other co-authors (this allows some Member States to maintain the figure of the producer as one of the authors of an audiovisual work).

* As regards the starting date for calculating the term of protection (which as Parliament has pointed out is essential to achieve effective harmonization), this will be the death of the last of the persons in the following four categories, whether or not they are regarded as the authors of the audiovisual work: the principal director, the author of the screenplay, the author of the dialogue and the composer of the music specially created for the film.

This solution is certainly a departure from the traditional system of copyright, since certain categories of persons who in many cases will not be granted any

5 COM(92) 0602 final - SYN 395 of 7 January 1993.

DOC_EN\RR\236\236587 - 5 - PE 206.235/fin
form of author's rights are taken into account to determine the period of protection. The formula has, nevertheless, obtained the necessary consensus and will ensure that the term of protection for audiovisual works throughout the Community is fully harmonized.

(c) Treatment of posthumous works and works published for the first time after the term of protection has expired (Article 4): On posthumous works the Council has followed the Commission's original position (the term of protection expires 70 years after the author's death, without taking into account the time when the work was first lawfully made available to the public). The amendment adopted by Parliament at first reading was not accepted. However, Parliament's proposed solution for works published for the first time after the expiry of the term of protection has been accepted and is incorporated in Article 4.

(d) Treatment of critical or scientific works (Article 5): The common position allows Member States to protect critical and scientific works for a maximum period of 30 years.

(e) Protection of photographs (Article 6): An acceptable compromise seems to have been reached on this point by harmonizing only the treatment of photographs considered to be original within the meaning of the Berne Convention. Member States may provide for the protection of other photographs.

(f) Application in time (Article 10): This article was originally proposed by Parliament, which considered it of vital importance in ensuring that harmonization takes immediate effect, without having to maintain transitional periods which would obstruct the free movement of goods and services.

The common position broadly speaking retains the idea put forward by Parliament: the term of protection applies to all works which are protected in at least one Member State on the date when the directive enters into force, without adversely affecting previous acts of exploitation where the work concerned was already in the public domain and while respecting acquired rights.

It is left to the Member States to adopt the necessary provisions to protect acquired rights (paragraph 3). Recitals 26 and 27 complement this provision, leaving it to the discretion of the Member States to devise a suitable system to protect acquired rights. In view of the different legal systems in the Member States the rapporteur regards this as a realistic solution. At the same time efforts would need to be made to prevent the creation of distortion in the market due to the introduction of different systems.
9. Copyright and related rights

PRESIDENT. – The next item is the recommendation for the second reading (Doc. A3-278/93) by Mr Bru Púron, on behalf of the Committee on Legal Affairs and Citizens’ Rights, on the common position established by the Council (C3-0300/93 – SYN 395) with a view to the adoption of a directive harmonizing the term of protection of copyright and certain related rights.

ÁLVAREZ DE PAZ (PSE), deputy rapporteur. – (ES) Mr President, we are today considering the recommendation on this proposal for a directive approximately one year after Parliament delivered its opinion at first reading.

This proposal forms part of a substantial package of measures necessary for the functioning of the internal market in intellectual property, among which one can single out the directives already approved on rental right and lending right and on satellite broadcasting and cable retransmission.

The purpose of the common position we are considering is total harmonization of the terms of protection of copyright and certain related rights through the establishment of a common term for the twelve Member States – seventy years in the case of copyright; fifty years for related rights – and the uniform fixing of the factors to be taken into account in determining the starting point for calculating the term of protection.

Despite the difficulties encountered in reaching a compromise, the need for harmonization in this area was indisputable. Not just authors, producers, broadcasters, artists, performers and the like, but also consumers, had made this clear. There also existed case law of the Court of Justice that demonstrated the need to carry out this harmonization in order to complete the internal market. In particular, this measure is necessary to ensure free circulation of certain goods (objects protected by copyright and related rights) and services (broadcasts, for example), and to avoid distortions of competition. The compromise achieved is the fruit of long negotiations in Council in which substantial account was taken of Parliament’s positions.

We should recall that, in its opinion at first reading, Parliament adopted 14 amendments, 11 of which were totally or partially incorporated in the Commission’s amended proposal. In its common position Council has taken up a substantial number of the amendments proposed by Parliament. I shall single out the solution applied in the treatment of audiovisual works, a subject that aroused considerable controversy during the first reading in this Parliament. Total harmonization of the period of protection is achieved, while at the same time respecting both the continental and the Anglo-Saxon copyright systems and following the line adopted by Parliament in the directive on rental right and lending right. We must welcome the compromise achieved, which has the virtue of commanding the consensus so necessary in this matter.

Other important points taken up in the common position that are the result of proposals put forward by Parliament at first reading are, for example, the treatment of works published for the first time after the term of protection has expired – article 4 of the common position – or the system established for application in time of the provisions of the directive – article 10 of the common position.

In general, then, we are confronted with a very satisfactory common position. On the basis of these considerations the Committee on Legal Affairs adopted a recommendation that contains only two drafting amendments which, furthermore, concern only the Spanish version of the text. We are thus tabling no substantive amendment in this plenary, because we consider that the compromise achieved is a balanced and realistic solution that will secure the harmonization necessary for the functioning of the internal market, a market in which goods and services protected by intellectual property rights play an increasingly important role.

The rapporteur, on whose behalf I am speaking, Mr President, therefore asks Parliament to vote in favour of the recommendation presented to it, and accordingly, to vote for the common position adopted by Council.

GARCÍA AMIGO (PPE). – (ES) Mr President, ladies and gentlemen, the Group of the European People’s Party will be supporting the report of the Committee on Legal Affairs, as it has already done in committee, and accepting the common position of Council.

In point of fact, in so doing, Mr President, the plenary of the Parliament will merely be supporting its own amendments adopted at first reading, since practically all those amendments have been taken up by the Commission and by Council. I predict that the two short and necessary drafting amendments that concern the Spanish version and that are being tabled now will also be taken up by the Commission and Council, to bring greater technical and legal rigour to the final text of this new Community law.

In short, Mr President, my group is going to vote as proposed by the rapporteur, whom we wish to congratulate on his excellent work.

VANNI D’ARCHIRAFI, Member of the Commission. – (IT) Mr President, I should just like to stress that I am not surprised that we have achieved this unanimity of views between Parliament, Council and Commission. It does not surprise me because we are here faced with a measure essential for completing the safeguarding of intellectual property protection on a Community-wide basis.

Some time ago, as has been pointed out, we approved the directive on protection of satellite and cable broadcasts. This directive extends and consolidates that protection in the field of copyright and certain related rights, in particular, with regard to their term. There are also other measures ‘in the pipeline’, as they say, which include a proposal, recently approved by the Commission, for the protection of industrial design, a proposal which is also very important on the level of establishing an external bulwark against fraud, which is undoubtedly one of the greatest threats to trade in the Community and to Community trade with third countries; that is, trade in those products that have a high built-in component of intellectual property and inventiveness.

I am thus very pleased at this state of affairs. As regards the language factor, I would say that we are looking at a question of editing rather than an amendment, as some trivial errors had crept into the Spanish text.

So, Mr President, I, too, welcome the step forward on the road to adoption of this directive that will be represented by Parliament’s approval of the common position.

PRESIDENT. – The debate is closed.
1. On 22 July 1993 the Council adopted its common position on the above Directive \(^{1}\) by a qualified majority, subsequently lodging it with the European Parliament on 13 September 1993 under the co-operation procedure.

2. The European Parliament approved the common position at its sitting on 27 October 1993 without proposing any amendments; it proposed certain purely linguistic modifications to the Spanish text. These linguistic modifications are contained in COR 1 (es) to 7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35.

3. It is therefore suggested that, as an "A" item at a forthcoming meeting, in accordance with the second subparagraph of Article 149(2)(b) of the EEC Treaty, the Council definitively adopt the above Directive, the text of which appears in 7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35 + COR 1 (es) and order its publication in the Official Journal of the European Communities.

---

\(^{1}\) 7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35.
(Amendment No 17)

Article 18(1)(b)(i), introduction

However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

(Amendment No 18)

Article 18(1)(b)(i), first indent

— no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work;

(Amendment No 19)

Article 18(1)(b)(i), last subparagraph

Before the expiry of a period of seven years from the date referred to in (a), the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this point (i) and decide on what action to take. Deleted

(Amendment No 22)

Article 18(5)

The Commission shall at regular intervals submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive taking into account paragraphs 1, 2, 3 and 4.

The Commission shall at three-yearly intervals submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive taking into account paragraphs 1, 2, 3 and 4.

19. Protection of copyright and related rights

A3-0278/93

Decision on the common position established by the Council with a view to the adoption of a Directive harmonizing the term of protection of copyright and certain related rights (C3-0300/93 — SYN 395)

(Cooperation procedure: second reading)

The European Parliament,

— having regard to the common position of the Council (C3-0300/93 — SYN 395),

— having regard to its opinion delivered at first reading (1) on the Commission proposal (COM(92)0033),

— having regard to the amended Commission proposal (COM(92)0602) (1),
— having regard to the relevant provisions of the EEC Treaty and its Rules of Procedure,

1. Amends the common position as set out below;
2. Instructs its President to forward this decision to the Council and Commission.

COMMON POSITION
OF THE COUNCIL

TEXT AMENDED
BY PARLIAMENT

(Amendment No 1)

Article 1(5)

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.

(Does not affect the English version.)

(Amendment No 2)

Article 5

Critical and scientific publications

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be thirty years from the time when the publication was first lawfully published.

(Does not affect the English version.)

20. Safety and health on board fishing vessels  **II

A3-0285/93

Decision on the common position established by the Council with a view to the adoption of a Directive concerning the minimum safety and health requirements for work on board fishing vessels (C3-0242/93 — SYN 369)

(Cooperation procedure: second reading)

The European Parliament,
— having regard to the common position of the Council (C3-0242/93 — SYN 369),
— having regard to its opinion delivered at first reading (1) on the Commission proposal (COM(91)0466),
— having regard to the amended Commission proposal (COM(92)0409) (2),
— having regard to the relevant provisions of the EEC Treaty and its Rules of Procedure,

(2) OJ No C 311, 27.11.1992, p. 21.
Subject: Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights

1. On 22 July 1993, the Council adopted its common position on the above Directive (¹) by a qualified majority, subsequently lodging it with the European Parliament on 13 September 1993 under the co-operation procedure.

2. The European Parliament approved the common position at its sitting on 27 October 1993, without proposing any amendments; it proposed certain purely linguistic modifications to the Spanish text which are contained in COR 1 (es) to 7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35.

3. A qualified majority in favour of the proposal was reached within COREPER, with the Luxembourg, Netherlands and Portuguese delegations opposed. The Danish delegation entered a parliamentary scrutiny reservation. The Netherlands delegation stated its intention of explaining its vote at Council level.

(¹) 7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35.
4. It is therefore suggested that, on the assumption that the Danish delegation’s parliamentary scrutiny reservation is withdrawn, the Council:

- definitively adopt by a qualified majority, as an "A" item at a forthcoming meeting, in accordance with the second subparagraph of Article 149(2)(b) of the EEC Treaty, the above Directive, the text of which appears in 7831/1/93 REV 1 PI 64 CULTURE 83 PRO-COOP 35 + COR 1 (es);

- order its publication in the Official Journal of the European Communities;

- decide to publish the votes.
THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2), 66 and 100a thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

(1) Whereas the Berne Convention for the protection of literary and artistic works and the International Convention for the protection of performers, producers of phonograms and broadcasting organizations (Rome Convention) lay down only minimum terms of protection of the rights they refer to, leaving the Contracting States free to grant longer terms; whereas certain Member States have exercised this entitlement; whereas in addition certain Member States have not become party to the Rome Convention;

(2) Whereas there are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas therefore with a view to the smooth operation of the internal market, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community;

(3) Whereas harmonization must cover not only the terms of protection, but also certain implementing arrangements such as the date from which each term of protection is calculated;

(4) Whereas the provisions of this Directive do not affect the application by the Member States of the provisions of Article 14a (2) (b), (c) and (d) and (3) of the Berne Convention;

(5) Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations;

(6) Whereas certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works;

(7) Whereas for the protection of related rights certain Member States have introduced a term of 50 years after lawful publication or lawful communication to the public;

(8) Whereas under the Community position adopted for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) the term of protection for producers of phonograms should be 50 years after first publication;

(9) Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to operate in practice, the harmonization of the term of protection should take place on a long term basis;

(10) Whereas in its communication of 17 January 1991 'Follow-up to the Green Paper — Working programme of the Commission in the field of copyright and neighbouring rights' the Commission stresses the need to harmonize copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation and stresses that their protection ensures the maintenance and development of creativity in
the interest of authors, cultural industries, consumers and society as a whole;

(11) Whereas in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonized at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running;

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

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

(14) Whereas terms of protection should be calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions;

(15) Whereas Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (1) provides that Member States are to protect computer programs, by copyright, as literary works within the meaning of the Berne Convention; whereas this Directive harmonizes the term of protection of literary works in the Community; whereas Article 8 of Directive 91/250/EEC, which merely makes provisional arrangements governing the term of protection of computer programs, should accordingly be repealed;

(16) Whereas Articles 11 and 12 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2) make provision for minimum terms of protection only, subject to any further harmonization; whereas this Directive provides such further harmonization;

(17) Whereas the protection of photographs in the Member States is the subject of varying regimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive; whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs should be left to national law;

(18) Whereas, in order to avoid differences in the term of protection as regards related rights it is necessary to provide the same starting point for the calculation of the term throughout the Community; whereas the performance, fixation, transmission, lawful publication, and lawful communication to the public, that is to say the means of making a subject of a related right perceptible in all appropriate ways to persons in general, should be taken into account for the calculation of the term of protection regardless of the country where this performance, fixation, transmission, lawful publication, or lawful communication to the public takes place;

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

(20) Whereas the Member States should remain free to maintain or introduce other rights related to copyright in particular in relation to the protection of critical and scientific publications; whereas, in order to ensure transparency at Community level, it is however necessary for Member States which introduce new related rights to notify the Commission;

(21) Whereas it is useful to make clear that the harmonization brought about by this Directive does not apply to moral rights;

(22) Whereas, for works whose country of origin within the meaning of the Berne Convention is a third country and whose author is not a Community national, comparison of terms of protection should

---

(1) OJ No L 122, 17. 5. 1991, p. 42.
(2) OJ No L 346, 27. 11. 1992, p. 61.
be applied, provided that the term accorded in the Community does not exceed the term laid down in this Directive;

(23) Whereas where a rightholder who is not a Community national qualifies for protection under an international agreement the term of protection of related rights should be the same as that laid down in this Directive, except that it should not exceed that fixed in the country of which the rightholder is a national;

(24) Whereas comparison of terms should not result in Member States being brought into conflict with their international obligations;

(25) Whereas, for the smooth functioning of the internal market this Directive should be applied as from 1 July 1995;

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

(27) Whereas respect of acquired rights and legitimate expectations is part of the Community legal order; whereas Member States may provide in particular that in certain circumstances the copyright and related rights which are revived pursuant to this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain,

HAS ADOPTED THIS DIRECTIVE:

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 70 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.

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.

4. Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work as such are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply.

5. Where a work is published in volumes, parts, instalments, issues or episodes 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 from the death of the author or authors and which have not been lawfully made available to the public within seventy years from their creation, the protection shall terminate.

Article 2

Cinematographic or audiovisual works

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

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

Article 3

Duration of related rights

1. The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the
phonogram is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

3. The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term 'film' shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

4. The rights of broadcasting organizations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.

Article 4

Protection of previously unpublished works

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.

Article 5

Critical and scientific publications

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the work was first lawfully published.

Article 6

Protection of photographs

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.

Article 7

Protection vis-à-vis third countries

1. 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.

2. The terms of protection laid down in Article 3 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 3.

3. Member States which, at the date of adoption of this Directive, in particular pursuant to their international obligations, granted a longer term of protection than that which would result from the provisions, referred to in paragraphs 1 and 2 may maintain this protection until the conclusion of international agreements on the term of protection by copyright or related rights.

Article 8

Calculation of terms

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

Article 9

Moral rights

This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.

Article 10

Application in time

1. Where a term of protection, which is longer than the corresponding term provided for by this Directive, is already running in a Member State on the date referred to in Article 13 (1), this Directive shall not have the effect of shortening that term of protection in that Member State.

2. The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State, on the date referred to in Article 13 (1), pursuant to national provisions on copyright or related rights or which meet the criteria for protection under Directive 92/100/EEC.

3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to...
in Article 13 (1). Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.

4. Member States need not apply the provisions of Article 2 (1) to cinematographic or audiovisual works created before 1 July 1994.

5. Member States may determine the date as from which Article 2 (1) shall apply, provided that date is no later than 1 July 1997.

**Article 11**

Technical adaptation

1. Article 8 of Directive 91/250/EEC is hereby repealed.

2. Articles 11 and 12 of Directive 92/100/EEC are hereby repealed.

**Article 12**

Notification procedure

Member States shall immediately notify the Commission of any governmental plan to grant new related rights, including the basic reasons for their introduction and the term of protection envisaged.

**Article 13**

General provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 11 of this Directive before 1 July 1995.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such a reference shall be laid down by the Member States.

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

2. Member States shall apply Article 12 from the date of notification of this Directive.

**Article 14**

This Directive is addressed to the Member States.

Done at Brussels, 29 October 1993.

For the Council

The President

R. URBAIN
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the term of protection of copyright and certain related rights

(Codified version)

(presented by the Commission)
EXPLANATORY MEMORANDUM

1. In the context of a people’s Europe, the Commission attaches great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him.

This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules.

For this reason a codification of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

2. On 1 April 1987 the Commission therefore decided\(^1\) to instruct its staff that all legislative acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they are responsible, to ensure that the Community rules are clear and readily understandable.

3. The Conclusions of the Presidency of the Edinburgh European Council (December 1992) confirmed this\(^2\), stressing the importance of codification as it offers certainty as to the law applicable to a given matter at a given time.

Codification must be undertaken in full compliance with the normal Community legislative procedure.

Given that no changes of substance may be made to the instruments affected by codification, the European Parliament, the Council and the Commission have agreed, by an interinstitutional agreement dated 20 December 1994, that an accelerated procedure may be used for the fast-track adoption of codification instruments.

4. The purpose of this proposal is to undertake a codification of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights\(^3\). The new Directive will supersede the various acts incorporated in it\(^4\); this proposal fully preserves the content of the acts being codified and hence does no more than bring them together with only such formal amendments as are required by the codification exercise itself.

---

1 COM(87) 868 PV.
2 See Annex 3 to Part A of the Conclusions.
4 See Annex I, Part A of this proposal.
5. The codification proposal was drawn up on the basis of a preliminary consolidation, in all official languages, of Directive 93/98/EEC and the instrument amending it, carried out by the Office for Official Publications of the European Communities, by means of a data-processing system. Where the Articles have been given new numbers, the correlation between the old and the new numbers is shown in a table contained in Annex II to the codified Directive.
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the term of protection of copyright and certain related rights

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights has been substantially amended. In the interests of clarity and rationality the said Directive should be codified.

(2) The Berne Convention for the protection of literary and artistic works and the International Convention for the protection of performers, producers of phonograms and broadcasting organisations (Rome Convention) lay down only minimum terms of protection of the rights they refer to, leaving the Contracting States free to grant longer terms. Certain Member States have exercised this entitlement.

---

5 OJ C [...], [...], p. [...].
6 OJ C [...], [...], p. [...].
8 See Annex I, Part A.
(3) There are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market. Therefore, with a view to the smooth operation of the internal market, the laws of the Member States should be harmonised so as to make terms of protection identical throughout the Community.

(4) It is important to lay down not only the terms of protection as such, but also certain implementing arrangements, such as the date from which each term of protection is calculated.

(5) The provisions of this Directive should not affect the application by the Member States of the provisions of Article 14a(2)(b), (c) and (d) and (3) of the Berne Convention.

(6) The minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants. The average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations.

(7) Certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works.

(8) For the protection of related rights certain Member States have introduced a term of 50 years after lawful publication or lawful communication to the public.

(9) Under the Community position adopted for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) the term of protection for producers of phonograms should be 50 years after first publication.
Due regard for established rights is one of the general principles of law protected by the Community legal order. Therefore, the terms of protection of copyright and related rights established by Community law cannot have the effect of reducing the protection enjoyed by rightholders in the Community prior to the entry into force of Directive 93/98/EEC. In order to keep the effects of transitional measures to a minimum and to allow the internal market to operate in practice, those terms of protection should be applied for long periods.

The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.

In order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonised at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running.

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

In all cases where one or more physical persons are identified as authors, the term of protection should be calculated after their death. The question of authorship in the whole or a part of a work is a question of fact which the national courts may have to decide.

Terms of protection should be calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions.
(16) The protection of photographs in the Member States is the subject of varying regimes. In order to ensure a sufficient term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive. A photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.

(17) In order to avoid differences in the term of protection as regards related rights it is necessary to provide the same starting point for the calculation of the term throughout the Community. The performance, fixation, transmission, lawful publication, and lawful communication to the public, that is to say the means of making a subject of a related right perceptible in all appropriate ways to persons in general, should be taken into account for the calculation of the term of protection regardless of the country where this performance, fixation, transmission, lawful publication, or lawful communication to the public takes place.

(18) The rights of broadcasting organisations in their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite, should not be perpetual. It is therefore necessary to have the term of protection running from the first transmission of a particular broadcast only. This provision is understood to avoid a new term running in cases where a broadcast is identical to a previous one.

(19) The Member States should remain free to maintain or introduce other rights related to copyright in particular in relation to the protection of critical and scientific publications. In order to ensure transparency at Community level, it is however necessary for Member States which introduce new related rights to notify the Commission.

(20) It should be made clear that this Directive does not apply to moral rights.

(21) For works whose country of origin within the meaning of the Berne Convention is a third country and whose author is not a Community national, comparison of terms of protection should be applied, provided that the term accorded in the Community does not exceed the term laid down in this Directive.
Where a rightholder who is not a Community national qualifies for protection under an international agreement, the term of protection of related rights should be the same as that laid down in this Directive, except that it should not exceed that fixed in the country of which the rightholder is a national.

(23) Comparison of terms should not result in Member States being brought into conflict with their international obligations.

(24) Member States should remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the exploitation of protected works and other subject matter which were concluded before the extension of the term of protection resulting from this Directive.

(25) Respect of acquired rights and legitimate expectations is part of the Community legal order. Member States may provide in particular that in certain circumstances the copyright and related rights which are revived pursuant to this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain.

(26) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

(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 70 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.
3. In the case of anonymous or pseudonymous works, the term of protection shall run for 70 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.

4. Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply.

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 from 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 2

Cinematographic or audiovisual works

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

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

Article 3

Duration of related rights

1. The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.
2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, if those rights were no longer protected on 22 December 2002 pursuant to Article 2(2) of Directive 93/98/EEC, this paragraph shall not have the effect of protecting anew.

3. The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term “film” shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

4. The rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.

Article 4

Protection of previously unpublished works

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.

Article 5

Critical and scientific publications

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.
Article 6

Protection of photographs

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.

Article 7

Protection vis-à-vis third countries

1. 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.

2. The terms of protection laid down in Article 3 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 3.

Article 8

Calculation of terms

The terms laid down in this Directive shall be calculated from the first day of January of the year following the event which gives rise to them.
Article 9

Moral rights

This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.

Article 10

Application in time

1. Where a term of protection, which is longer than the corresponding term provided for by this Directive, was already running in a Member State on 1 July 1995, this Directive shall not have the effect of shortening that term of protection in that Member State.

2. The terms of protection provided for in this Directive shall apply to all works and subject matter which were protected in at least one Member State on the date referred to in paragraph 1, pursuant to national provisions on copyright or related rights, or which meet the criteria for protection under Council [Directive 92/100/EEC].

3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in paragraph 1. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.

4. Member States need not apply the provisions of Article 2(1) to cinematographic or audiovisual works created before 1 July 1994.

Article 11

Notification and communication

Member States shall immediately notify the Commission of any governmental plan to grant new related rights, including the basic reasons for their introduction and the term of protection envisaged.

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

Article 12

Repeal


References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 13

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
ANNEX I

Part A

Repealed Directive with its amendment
(referred to in Article 12)

(OJ L 290, 24.11.1993, p. 9)

(OJ L 167, 22.6.2001, p. 10)

Part B

List of time-limits for transposition into national law and application
(referred to in Article 12)

<table>
<thead>
<tr>
<th>Directive</th>
<th>Time-limit for transposition</th>
<th>Date of application</th>
</tr>
</thead>
<tbody>
<tr>
<td>93/98/EEC</td>
<td>1 July 1995 (Articles 1 to 11)</td>
<td>19 November 1993 (Article 12)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 July 1997 at the latest as regards Article 2(1) (Article 10(5))</td>
</tr>
<tr>
<td>2001/29/EC</td>
<td>22 December 2002</td>
<td></td>
</tr>
</tbody>
</table>
## ANNEX II

### CORRELATION TABLE

<table>
<thead>
<tr>
<th>Directive 93/98/EEC</th>
<th>This Directive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Articles 1 to 9</td>
<td>Articles 1 to 9</td>
</tr>
<tr>
<td>Article 10(1) to (4)</td>
<td>Article 10(1) to (4)</td>
</tr>
<tr>
<td>Article 10 (5)</td>
<td>-</td>
</tr>
<tr>
<td>Article 11</td>
<td>-</td>
</tr>
<tr>
<td>Article 12</td>
<td>Article 11(1)</td>
</tr>
<tr>
<td>Article 13(1) first subparagraph</td>
<td>-</td>
</tr>
<tr>
<td>Article 13(1) second subparagraph</td>
<td>-</td>
</tr>
<tr>
<td>Article 13(1) third subparagraph</td>
<td>Article 11(2)</td>
</tr>
<tr>
<td>Article 13(2)</td>
<td>-</td>
</tr>
<tr>
<td>-</td>
<td>Article 12</td>
</tr>
<tr>
<td>-</td>
<td>Article 13</td>
</tr>
<tr>
<td>Article 14</td>
<td>Article 14</td>
</tr>
<tr>
<td>-</td>
<td>Annex I</td>
</tr>
<tr>
<td>-</td>
<td>Annex II</td>
</tr>
</tbody>
</table>
NOTICE TO MEMBERS No. 16/2006


In accordance with the interinstitutional agreement of 20 December 1994 (see Notice to Members No 16/96 - PE 217.343) on an accelerated working method for official codification of legislative texts, this proposal from the Commission is to be considered by a consultative working party comprising the legal services of the European Parliament, Council and Commission.

Please find attached the opinion of the consultative working party concerning the proposal in question.

The Committee on Legal Affairs is due to deliver its opinion on this text at its meeting on 11 September 2006
OPINION

FOR THE ATTENTION OF
THE EUROPEAN PARLIAMENT
THE COUNCIL
THE COMMISSION


Having regard to the Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts, and in particular to point 4 thereof, the Consultative Working Party, comprising the legal services of the European Parliament, the Council and the Commission, examined the aforementioned Commission proposal at its meeting of 31 May 2006.


1. In recital 2 of the proposal for codification, corresponding to recital 1 of Directive 93/98/EEC, the final phrase: “whereas in addition certain Member States have not become party to the Rome Convention” has been deleted. However, the Working Party feels obliged to point out that two Member States, namely Cyprus and Malta, have apparently not yet become party to that Convention.

2. The text of recital 9 should be replaced by the following text, which is an adaptation of part of the text of recital 15 of Directive 2001/29/EC: “The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of the "WIPO Performances and Phonograms Treaty", dealing with the protection of performers and phonogram producers. That Treaty significantly updates the international protection for copyright and related rights.”

3. In recital 16, the word “sufficient” should be deleted.

1 The Consultative Working Party had all language versions of the proposal and worked on the basis of the French version, being the master-copy language version of the text under discussion.
4. The wording of Article 3(2), second subparagraph, should be replaced by the following wording, adapted from the wording of Article 11(2) of Directive 2001/29/EC: "However, where through the expiry of the term of protection granted pursuant to Article 3(2) of Directive 93/98/EEC in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew".

After examining the proposal, Working Party is thus able to confirm by common agreement that it is indeed confined to straightforward codification, with no substantive changes to the acts concerned.

G. GARZÓN CLARIANA
Jurisconsult

J.-C. PIRIS
Jurisconsult

M. PETITE
Director-General
 REPORT


Committee on Legal Affairs

Rapporteur: Giuseppe Gargani

(Simplified procedure - Codification - Rules 80 and 43 of the Rules of Procedure)
Symbols for procedures

* Consultation procedure
  majority of the votes cast

**I Cooperation procedure (first reading)
  majority of the votes cast

**II Cooperation procedure (second reading)
  majority of the votes cast, to approve the common position
  majority of Parliament’s component Members, to reject or amend
  the common position

*** Assent procedure
  majority of Parliament’s component Members except in cases
  covered by Articles 105, 107, 161 and 300 of the EC Treaty and
  Article 7 of the EU Treaty

***I Codecision procedure (first reading)
  majority of the votes cast

***II Codecision procedure (second reading)
  majority of the votes cast, to approve the common position
  majority of Parliament’s component Members, to reject or amend
  the common position

***III Codecision procedure (third reading)
  majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the )
Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in **bold italics**. Highlighting in **normal italics** is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.
CONTENTS

Page

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION........................................ 5
PROCEDURE .................................................................................................................. 6
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION


(Codecision procedure - Codification) The European Parliament,

– having regard to the Commission proposal to the Council (COM(2006)0219)¹,

– having regard to Articles 47(2), 55 and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0152/2006),

– having regard to the Interinstitutional Agreement of 20 December 1994 – Accelerated working method for official codification of legislative texts²,

– having regard to Rules 80, 51 and 43 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs (A6-0323/2006),

1. Approves the Commission proposal;

2. Instructs its President to forward its position to the Council and the Commission.

¹ Not yet published in OJ.
### PROCEDURE

<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<th>Proposal for a directive of the European Parliament and of the Council on the term of protection of copyright and certain related rights (Codified version)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date of consulting Parliament</strong></td>
<td>19.5.2006</td>
</tr>
<tr>
<td><strong>Committee responsible</strong></td>
<td>JURI</td>
</tr>
<tr>
<td><strong>Date announced in plenary</strong></td>
<td>1.6.2006</td>
</tr>
<tr>
<td><strong>Rapporteur(s)</strong></td>
<td>Giuseppe Gargani</td>
</tr>
<tr>
<td><strong>Simplified procedure – date of decision</strong></td>
<td>12.9.2006</td>
</tr>
<tr>
<td><strong>Discussed in committee</strong></td>
<td>12.9.2006</td>
</tr>
<tr>
<td><strong>Date adopted</strong></td>
<td>12.9.2006</td>
</tr>
<tr>
<td><strong>Date tabled</strong></td>
<td>6.10.2006</td>
</tr>
</tbody>
</table>
NOTE

from: General Secretariat
to: Permanent Representatives Committee/Council
term of protection of copyright and certain related rights (codified version)
  – Outcome of the European Parliament's first reading
    (Brussels, 11 to 12 October 2005)

I. INTRODUCTION

Pursuant to Article 43(1) of the European Parliament's Rules of Procedure, which provides for the
approval of a legislative proposal without amendment by a simplified procedure, the report by Ms
WALLIS (ALDE-UK) was adopted without debate.

II. VOTE

The European Parliament's legislative Resolution is set out in annex hereto.
Protection of copyright and certain related rights


(Codecision procedure - Codification)

The European Parliament,

– having regard to the Commission proposal to the European Parliament and the Council (COM(2006)0219)¹,

– having regard to Article 251(2) and Articles 47(2), 55 and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0160/2006),

– having regard to the Interinstitutional Agreement of 20 December 1994 – Accelerated working method for official codification of legislative texts²,

– having regard to Rules 80, 51 and 43 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs (A6-0323/2006),

1. Approves the Commission proposal;

2. Instructs its President to forward its position to the Council and the Commission.

¹ Not yet published in OJ.
CORRIGENDUM TO THE NOTE

from: General Secretariat
to: Permanent Representatives Committee/Council

– Outcome of the European Parliament's first reading
  (Brussels, 11 to 12 October 2005)

On page 1, subject must read:

(Brussels, 11 to 12 October 2006)

On page 2, Annex must read:

(12.10.2006)
1. On 19 May 2006 the Commission sent the above proposal\(^1\), based on Article 47(2), Article 55 and Article 95 of the TEC, to the Council.

2. The Economic and Social Committee delivered its opinion on 24 October 2006\(^2\).

3. The European Parliament delivered its opinion at first reading on 13 October 2006, approving the Commission proposal without proposing any amendments\(^3\).

4. The Working Party on Codification of Legislation examined the text at its meetings on 27 June, 18 September and 19 October 2006, and reached agreement on it at its meeting on 27 October 2006.

---

\(^1\) 9711/06.
\(^2\) Not yet published in the Official Journal.
\(^3\) 13949/06 + COR 1.
5. The Permanent Representatives Committee is therefore asked to suggest that the Council adopt the Directive as set out in PE-CONS 3643/06 as an "A" item at a forthcoming meeting.

Once the legislative act has been signed by the President of the European Parliament, the President of the Council and the Secretaries-General of the two institutions, it will be published in the Official Journal of the European Union.
NOTE

Subject:
  (LA) (first reading)
  = Adoption of the legislative act
    PE-CONS 3643/06 CODIF 55 PI 51 CULT 73 CODEC 976 OC 678
    + COR 1 (en)
    + COR 2 (cs)
    + REV 1 (hu)
    15286/06 CODEC 1297 CODIF 87 PI 68 CULT 104
    approved by COREPER, Part 1, on 22.11.06
- Voting result
- 2767th Meeting of the Council of the European Union
  (Employment, Social Policy, Health and Consumer Affairs
  Thursday 30 November and Friday 1 December 2006

This information note contains the result of the vote at the above Council meeting.

### General Secretariat of the Council
Institution: Council of the European Union
Session: 2767th meeting
Configuration: Employment, Social Policy, Health and Consumer Affairs
Item: 3 (Document: PE-CONS 3643/06)
Voting Rule: Qualified majority (EU-25)
Subject: On the term of protection of copyright and certain related rights

#### Member State Vote Weighting

<table>
<thead>
<tr>
<th>Member State</th>
<th>Vote</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>BELGIQUE / BELGIE</td>
<td>🟢</td>
<td>12</td>
</tr>
<tr>
<td>ČESKA REPUBLIKA</td>
<td>🟢</td>
<td>12</td>
</tr>
<tr>
<td>DANMARK</td>
<td>🟢</td>
<td>7</td>
</tr>
<tr>
<td>DEUTSCHLAND</td>
<td>🟢</td>
<td>29</td>
</tr>
<tr>
<td>EESTI</td>
<td>🟢</td>
<td>4</td>
</tr>
<tr>
<td>ELΛΛΑΣ</td>
<td>🟢</td>
<td>12</td>
</tr>
<tr>
<td>ESPAÑA</td>
<td>🟢</td>
<td>27</td>
</tr>
<tr>
<td>FRANCE</td>
<td>🟢</td>
<td>29</td>
</tr>
<tr>
<td>IRELAND</td>
<td>🟢</td>
<td>7</td>
</tr>
<tr>
<td>ITALIA</td>
<td>🟢</td>
<td>29</td>
</tr>
<tr>
<td>KYΠΕΡΟΣ</td>
<td>🟢</td>
<td>4</td>
</tr>
<tr>
<td>LATVIJA</td>
<td>🟢</td>
<td>4</td>
</tr>
<tr>
<td>LITUVA</td>
<td>🟢</td>
<td>7</td>
</tr>
<tr>
<td>LUXEMBOURG</td>
<td>🟢</td>
<td>4</td>
</tr>
<tr>
<td>MAGYARORSZAG</td>
<td>🟢</td>
<td>12</td>
</tr>
<tr>
<td>MALTA</td>
<td>🟢</td>
<td>3</td>
</tr>
<tr>
<td>NEDERLAND</td>
<td>🟢</td>
<td>13</td>
</tr>
<tr>
<td>ÖSTERREICH</td>
<td>🟢</td>
<td>10</td>
</tr>
<tr>
<td>POLSKA</td>
<td>🟢</td>
<td>27</td>
</tr>
</tbody>
</table>

#### Member State Vote Weighting

<table>
<thead>
<tr>
<th>Member State</th>
<th>Vote</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>PORTUGAL</td>
<td>🟢</td>
<td>12</td>
</tr>
<tr>
<td>SLOVENIJA</td>
<td>🟢</td>
<td>4</td>
</tr>
<tr>
<td>SLOVENSKO</td>
<td>🟢</td>
<td>7</td>
</tr>
<tr>
<td>SUOMI / FINLAND</td>
<td>🟢</td>
<td>7</td>
</tr>
<tr>
<td>SVERIGE</td>
<td>🟢</td>
<td>10</td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>🟢</td>
<td>29</td>
</tr>
</tbody>
</table>

#### Sitting date
30/11/2006

#### Vote Members Votes Cast

<table>
<thead>
<tr>
<th>Vote</th>
<th>Members</th>
<th>Votes Cast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>28</td>
<td>321</td>
</tr>
<tr>
<td>No</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Abstain</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Not Participating</td>
<td>13</td>
<td>0</td>
</tr>
</tbody>
</table>

Total 25 321

* Qualified majority is reached if at least 232 votes in favour are cast by at least 13 Council members

For information only
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


{SEC(2008) 2287}
{SEC(2008) 2288}

(presented by the Commission)
EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- Grounds for and objectives of the proposal

The proposal aims to improve the social situation of performers, and in particular sessions musicians, taking into account that performers are increasingly outliving the existing 50 year period of protection for their performances.

The large scale production of phonograms is essentially a phenomenon that commenced in the 1950s. If nothing is done, over the next 10 years an increasing amount of performances recorded and released between 1957 and 1967 will lose protection. Once their performance fixed in a phonogram is no longer protected, around 7000 performers in any of the big Member States and a correspondingly smaller number in the smaller Member States will lose all of their income that derives from contractual royalties and statutory remuneration claims from broadcasting and public communication of their performances in bars and discotheques.

This affects featured performers (those who receive contractual royalties) but especially the thousands of anonymous session musicians (those who do not receive royalties and rely solely on statutory remuneration claims) who contributed to phonograms in the late fifties and sixties and have assigned their exclusive rights to the phonogram producer against a flat fee payment ('buy out'). Their 'single equitable remuneration' payments for broadcasting and communication to the public, which are never assigned to the phonogram producer, would cease.

In addition, the proposal also seeks to introduce a uniform way of calculating the term of protection that applies to a musical composition with words which contains the contributions of several authors. For example, a musical piece, for instance pop music or an opera, often includes lyrics (or a libretto) and a musical score. In different Member States, such co-written musical compositions are either classified as a single work of joint authorship with a unitary term of protection, running from the death of the last surviving co-author or as separate works with separate terms running from the death of each contributing author.

This means that in some Member States\(^1\), a musical composition with words will be protected until 70 years after the last contributing author dies, while in other Member States\(^2\), each contribution will lose protection 70 years after its author dies. These discrepancies in term that apply to one musical composition lead to difficulties in administering copyright in co-written works across the Community. It also leads to difficulties in cross-border distribution of royalties for exploitation that occurs in different Member States.

- General context

The social situation of performers

The current employment status and conditions for the average European performer are not very rewarding. Only famous performers, so-called featured artists that have signed a royalty-bearing contract with a major record label, are able to make a living from their profession. For instance, in the UK, in 2001, only 5% of performers earned over £10000 annually. Moreover, between 77 and 89.5% of all income distributed to performers goes to the top 20% of

---

\(^1\) Belgium, Bulgaria, Estonia, France, Greece, Italy (for operas), Latvia, Lithuania, Portugal, Spain, Slovakia.

\(^2\) Austria, Cyprus, Czech Republic, Denmark, Germany, Finland, Hungary, Ireland, Italy (except for operas), Luxembourg, Malta, the Netherlands, Poland, Romania, Slovenia, Sweden, and the UK.
Performers\(^3\). Economists have shown that the great discrepancies between the low earning of the majority of little-known performers and the significant earnings of "superstar" performers are endemic to the music industry\(^4\).

Moreover, the social situation of performers is not very secure. It is difficult for performers to find sufficient employment and most need other jobs to supplement their incomes\(^5\). Overall, only 5% of performers actually make a living from their profession – all the others have to seek parallel employment.

Performers usually transfer their most economically significant exclusive copyrights to record companies via contract. In most cases, individual performers have little bargaining power\(^6\). When signing a contract with a phonogram producer, performers are generally willing to accept the contract they are offered because the reputation and exposure gained by signing with a record label gives them the possibility of reaching a broad audience. Consequently, it is difficult for performers to negotiate which type of contract or which level of remuneration they will obtain. Session musicians, i.e., musicians that are hired on an ad hoc basis to play for a recording 'session', cannot negotiate at all, they have to transfer their copyrights 'in perpetuity' against a one off payment.

Contractual relations between record companies and performing artists vary greatly but typically fall into two categories:\(^7\)

- Session artists are generally paid a flat fee as their exclusive copyrights are bought out by the producer. Accordingly, their remuneration does not increase if the record becomes a huge success.
- Featured artists' contracts usually provide for a royalty-based remuneration. Depending on their fame and bargaining power, performers usually receive net royalties of 5-15% of revenues\(^8\).

The deduction of a variety of record producers' costs from the royalty payments can also significantly undermine the remuneration of performers. These deductions are often formulated in technical terms and included in complex legal documents\(^9\). In practice, after the various contractual deductions (for costs borne by the producers such as music videos, promotion, master costs), the average percentage of royalties actually received by performers can be lower. Moreover, as most performers' sound recordings do not sell enough copies for

---

\(^3\) AEPO study – "Performers' Rights in European Legislation: Situation and Elements for Improvement.", July 2007, p. 89
\(^5\) FIM – EP Hearing 31.1.2006 and meeting in Commission offices on 16 March 2006. For example, Luciano Pavarotti and Sting were initially teachers and Elton John worked in the packaging department of a record company.
\(^6\) In several instances courts have intervened to cast aside excessively harsh agreements, noting in particular the "immense inequality in bargaining power, negotiation ability, understanding and representation" between artists and professionals of the entertainment industries", Silvertone Records Limited v. Mountfield and Others, [1993] EMLR 152.
\(^7\) Adapted from contribution from Naxos to Commission questionnaire – May 2006.
\(^8\) CIPIL Study, p.36.
\(^9\) This has led courts to conclude that artists such as the "Stone Roses" rock band or Elton John were insufficiently aware of the sometimes excessive deductions operated from the basis for calculating royalties, see Silvertone Records Limited v. Mountfield and Others, [1993] EMLR 152.
the record company to recoup its initial investment (only 1 in 8 CDs is profitable)\(^\text{10}\), royalty payments are often not paid out at all.

However, performers also receive revenue from other sources. They receive income from collecting societies which administer so-called secondary remuneration claims. There are three principal sources: (1) equitable remuneration for broadcasting and communication to the public, (2) private copy levies and (3) equitable remuneration for the transfer of the performers' rental right. All of these sources are commonly referred to as 'secondary' sources of income and are paid to performers directly through their collecting societies. These payments are not affected by their contractual arrangements with the record companies.

Many European performers (musicians or singers) start their career in their early 20's. That means that when the current 50 year protection ends, they will be in their 70's and likely to live well into their 80's and 90's (average life expectancy in the EU is 75 years for men and 81 years for women). As a result, performers face an income gap at the end of their lifetimes, as they lose royalty payments from record companies as well as remuneration due for the broadcasting or public performance of their sound recordings. For session musicians, who play background music, and lesser known artists, that means that broadcasting and public performance income decreases when they are at the most vulnerable period of their lives, i.e. when they are approaching retirement. Once copyright protection expires, they will also lose out on potential revenue when their early performances are sold on the Internet.

Moreover, when their rights expire performers are exposed to potentially objectionable uses of their performance which are harmful to their name or reputation. Performers are also at a disadvantage as compared to authors whose works are protected until 70 years after their death. This could be seen as unfair since performers are nowadays not only just as necessary as authors but also more identifiable with the commercial success of a sound recording.

**The economic challenges faced by phonogram producers**

As regards producers of phonograms, the principal challenges they face are the evaporation of the CD markets and the insufficient replacement revenue from online sales. The latter is due to peer-to-peer piracy. The EU recorded music industry has suffered a decline in record sales: sales of music CDs peaked in 2000 and have been falling at an average rate of 6% ever since\(^\text{11}\). Estimates for the future show a continued decrease in physical album sales from $12.1bn in 2006 to $10.3bn by 2010\(^\text{12}\). Since 2001, the total European market for recorded music has lost 22% of its value\(^\text{13}\).

Revenues in general and profits in particular have decreased, largely due to increased piracy. In January 2006 the music trade publication ‘Billboard’ indicated that, worldwide, there were 350 million legal downloads for the whole year of 2005, but that there were also 250 million illegal downloads per week. The music industry indicates that approximately a third of all CDs bought in 2005 in the world were pirated – a total of 1.2 billion CDs. EMI's expenditure on anti-piracy and protection of IP for 2006 was in excess of £10m.

Due to losses in revenue, Universal's total number of employees which in 2003 amounted to 12000 was down to 7600 in 2006\(^\text{14}\). After an initial reduction in employees in 2006, EMI also

---

\(^\text{10}\) Comment from IFPI.


\(^\text{12}\) Figures from PricewaterhouseCoopers, Financial Times, 6 July 2006.

\(^\text{13}\) Article from the Times, 14 February 2007.

\(^\text{14}\) Interview with IFPI - and John Kennedy - on 29/3/2006 in Copyright Unit of DG MARKT.
announced a second reduction of 2000 jobs (about one third of its work force) in January 2008\textsuperscript{15}. EMI indicated in addition an intention to be more selective with its artist partnerships despite a significant reduction in its artist roster already in 2006\textsuperscript{16}. EMI has also been reducing its advertising expenditure\textsuperscript{17}.

In these circumstances, the European record industry faces the challenge of keeping up the steady revenue stream necessary to invest in new talent. Record companies claim that they invest around 17\% of their revenues in the development of new talent, i.e. to sign new talent, promote untried talent and produce innovative recordings. Therefore, a longer term of protection would generate additional income to help finance new talent and would allow record companies to better spread the risk in developing new talent. Due to uncertain returns (only one in eight sound recordings is successful) and so-called 'information asymmetries' such revenue is often not available on capital markets.

*Co-written musical works*

Music is overwhelmingly co-written. For example, regarding opera, there are often different authors to the music and to the lyrics. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

An analysis of the most popular French songs for the period 1919-2005 shows that 77\% of those songs are co-written. A similar analysis of the most popular songs in the UK for the period 1912-2003 shows that 61\% of those songs are co-written.\textsuperscript{18} Regarding newly created works, another survey sampling around 2000 newly registered works with SGAE the Spanish collective rights management society, in 2005-2006, reveals that over 60\% of such works are co-written.\textsuperscript{19}

The opera "Pelléas et Mélisande" illustrates how the different methods of calculating the term for co-written musical compositions results in different terms of protection for this composition across different Member States. Debussy, the composer, died in 1919, while Maeterlinck, the librettist, died much later in 1946. In those Member States that apply a unitary term (e.g., France, Portugal, Spain, Greece, Lithuania) the entire opera remains protected up to the year 2016 (life of the last surviving author, Maeterlinck plus seventy years). In those countries that consider the music and the libretto as two distinct works (e.g., United Kingdom, Netherlands, Austria, Poland, Slovenia) or two works that can be exploited separately (e.g., Czech Republic, Hungary, Germany) the protection of the music expired in 1989 while only the words (the libretto) remain protected until 2016.

Other examples include: Johann Strauss' operetta 'The Gipsy Baron'\textsuperscript{20}; the song 'Fascination (Love in the afternoon)', music by Fermò D. Marchetti (died 1940) and lyrics by Maurice de Féraudy (died 1932); the song 'When Irish Eyes Are Smiling', music by Ernest R. Ball (died 1927) and lyrics by Chauncey Olcott (died 1932) and George Graff, Jr. (died 1973).

\textsuperscript{15} International Herald Tribune, The Associated Press, January 14, 2008
\textsuperscript{16} EMI response to Gowers Review, 2006. EMI's workforce was reduced by a third to 6,000 persons.
\textsuperscript{17} Advertising expenditure by music industry dropped by 25\% in 2002 and 7\% in 2003. The four music majors are in the top 100 spenders on advertising and 2 of them are in the top 20. ("Evolution of the recorded music industry value chain", anonymous report) p. 13.
\textsuperscript{18} Figures provided by the International Confederation of Music Publishers (ICMP).
\textsuperscript{19} GESAC, September 2006.
\textsuperscript{20} Johann Strauss died in 1899, while one of the authors of the libretto, Leo Stein, died in 1921. The music was in the public domain in Germany in 1929, while the text was protected until 1991. In Belgium, the entire operetta was protected until 1981, and in Italy, until the end of 1977.
In the latter example, in those Member States that apply a unitary term, the entire song "When Irish eyes are smiling" would be protected until 2043. In those countries that consider the music and the lyrics as distinct works or apt for separate exploitation, the protection for the music expired in 1997 while only the lyrics would be protected until 2043.

- **Existing provisions in the area of the proposal**

The terms of protection for copyright and related rights were harmonised by Directive 93/98/EEC which was subsequently codified by Directive 2006/116/EC. The codification did not entail any substantive changes to the Directive. The term of protection for performers and phonogram producers is set out at 50 years after publication in these Directives whereas the current proposal would extend that protection to 95 years after publication. The current Directive contains no specific rules on co-written musical compositions with words.

- **Consistency with the other policies and objectives of the Union**

This proposal is in line with the objectives of the EU to promote social welfare and inclusion. Performers, and especially session musicians, are among the poorest earners in Europe, despite their considerable contribution to Europe's vibrant cultural diversity. In addition, the sound record industry that promotes European performers and produces in European studios faces significant challenges which undermine its competitiveness: rampant online piracy in many parts of the Community has lead to significant losses. The ability of the music industry to finance new talent and adapt to dematerialised distribution appears severely undermined.

2. **Consultation of interested parties and impact assessment**

- **Consultation of interested parties**

  **Consultation methods, main sectors targeted and general profile of respondents**

In the context of the Review of the EC legal framework in the field of copyright and related rights, a Commission Staff Working Paper was published on 19 July 2004. Interested parties were invited to submit their comments by 31 October 2004. Of the 139 contributions received, 76 position papers commented on Directive 93/98/EC harmonising the term of protection of copyright and certain related rights.  

During 2006-2007, Commission services had meetings with a variety of stakeholders on a bilateral basis to discuss relevant issues in more detail. A questionnaire was prepared by the Commission and distributed to major stakeholders in the framework of these bilateral discussions. More or less detailed responses were received from performers' associations and the recording industry.

  **Summary of responses and how they have been taken into account**

Responses in favour of term extension came from performers' associations, the recording industry, collecting societies, music publishers, performing artists and music managers. Those against term extension were telecoms, libraries, consumers and public domain companies. The arguments of those against term extension were addressed in the analysis of impacts of the various options.

- **Collection and use of expertise**

There was no need for external expertise.
• Impact assessment

The impact assessment (available at http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm) presents a total of seven options and discusses six of them. The options analysed were: (1) do nothing, (2) extend the term of protection to 'life or 50 years' for performers only, (3) extend the term of protection to 95 years for performers and phonogram producers, (4) promote performers' moral rights, (5) introduce a 'use it or lose it' clause in sound recording contracts and (6) establish a fund dedicated to session musicians.

All options are assessed against the following six operational objectives: (1) gradually align authors' and performers' protection; (2) incrementally increase the remuneration of performers; (3) diminish the discrepancies in protection between the EU and US; (4) incrementally increase A&R resources, i.e., the development of new talent; (5) ensure availability of music at reasonable prices; and (6) encourage digitisation of back catalogue. The IA concludes that 'doing nothing' is not an advisable option. If nothing is done, thousands of European performers whose performances were recorded in the late fifties and sixties would lose all of their contractual royalty income or statutory remuneration for broadcasting and communication to the public over the next ten years. This would have considerable social and cultural impacts. Equally, the sound recording industry would be obliged to cut down on the creation of new sound recordings in Europe. Production might have to be tailored to US tastes where a longer term of protection prevails.

The IA considers the impact of options not involving the term of performers' and record producers' rights (Options 3a, b, c and d).

Option 3a (unwaivable right to equitable remuneration for online sales) appears promising, but at this stage premature. It is unclear who would pay for this additional statutory remuneration claim and it is hard to estimate the financial benefit it would bring. Option 3b (the strengthening of moral rights), has no financial impact on performers and record producers and would thus not make an incremental contribution to performers' remuneration. Option 3c, the 'use it or lose it' clause, would be beneficial to performers by allowing them to make sure their performances are available on the market. This could positively impact on their remuneration and also foster availability of previously unused repertoire. On the other hand, this option, if applied in isolation, might be considered as an undue regulatory interference in the sanctity of ongoing contracts. Option 3d, the fund to be set up by phonogram producers, would be very beneficial for session musicians who transferred all their exclusive rights as part of their initial 'buy out' contracts. Record producers, however, would have to set aside at least 20% of the additional revenue generated by the sale of those phonograms they choose to commercially exploit during the term extension. The impact assessment does show, however, that the expected profits in the extended term would suffice to finance the 20% set aside in favour of session musicians (see below).

Options involving a term extension (2a "life or 50 years" and 2b "95 years for performers and record producers") seem to be rather more suitable in contributing towards the six policy objectives. Both options 2a and 2b bring financial benefits to performers and would thus allow more performers to dedicate more time to their artistic activities.

Option 2a, by linking the term to the life of a performer, would contribute to aligning the legal protection of performers and authors. It would reflect the personal nature of performers' artistic contributions and recognise that performers are as essential as authors to bringing music to the public. It would also allow performers to object to derogatory uses of their works during their lifetime. But linking the term of protection to the lifetime of performers would create complex situations when a sound track comprises contributions by several performers. Rules would then need to be established on how to determine whose death triggers the term of
protection. This would be, as the continued uncertainty on the term applicable to co-written works demonstrates, entail a significant administrative burden. In addition, Option 2a would not increase the A&R resources available to record producers.

Option 2b would increase the pool of A&R resources available to phonogram record producers and could thus have an additional positive impact on cultural diversity. The IA also demonstrates that the benefits of a term extension are not necessarily skewed in favour of famous featured performers. While featured performers certainly earn the bulk of the copyright royalties that are negotiated with the record companies, all performers, be it featured artists or session musicians, are entitled to so-called 'secondary' income sources, such as single equitable remuneration when the sound recording incorporating their performances is broadcast or performed in public. A term extension would ensure that these income sources do not cease during the performer's lifetime. Even incremental increases in income are used by performers to buy more time to devote to their artistic careers, and to spend less time on part time employment. Moreover, for the thousands of anonymous session musicians who were at the peak of their careers in the late fifties and sixties, 'single equitable remuneration' for the broadcasting of their recordings is often the only source of income left from their artistic career.

In addition to ensuring the increased availability of A&R, option 2b is also easier to implement than option 2a, because it does not link the term of protection to the, sometimes very different lifetimes of individual co-performers but to a uniform date, i.e., the publication of the phonogram that contains the performance.

On the other hand, the impact on users would be minimal. This is true in relation to statutory remuneration claims and for the sale of CDs:

- First, the 'single equitable remuneration' due for broadcasting and performances of music in public venues would remain the same as these payments are calculated as a percentage of the broadcasters or other operators revenue (a parameter independent of how many phonograms are in or out of copyright).

- Empirical studies also show that the price of sound recordings that are out of copyright are not lower than that of sound recordings in copyright. A study by Price Waterhouse Coopers concluded that there was no systematic difference between prices of in-copyright and out-of-copyright recordings. It is the most comprehensive study to date and covers 129 albums recorded between 1950 and 1958. On this basis, it finds no clear evidence that records in which the related rights have expired are systematically sold at lower prices than records which are still protected.

Other studies have been considered in analysing the impact of copyright or related rights on prices. Most of them focus on books. However, even in this category, either no overall price difference is found between the samples of books in- or out-of-copyright, or, the impact of copyright on the price is extremely model-dependant and therefore the estimates obtained cannot be seen as very robust. Given the lack of widely accepted models and the length of the time span, it is fair to say that there is no clear evidence that prices will increase due to term extension.

Overall, the extended term should have a positive impact on consumer choice and cultural diversity. In the long run, this is because a term extension will benefit cultural diversity by ensuring the availability of resources to fund and develop new talent. In the short to medium term, a term extension provides record companies with an incentive to digitise and market their back catalogue of old recordings. It is already clear that internet distribution offers unique opportunities to market an unprecedented quantity of sound recordings.
The impact on so-called public domain producers would be minimal. While those companies could that they have to wait longer to produce phonograms in which the performers and phonogram producers' rights have expired, the works performed in a phonogram would not lose protection once the term of protection for the phonogram expires. This is because the work performed on a phonogram remains protected for the life of the author (songwriter and composer) who wrote the work. As authors' rights last for the life of the songwriter or the composer plus seventy years, copyright protection for a musical work can last for between 140 and 160 years. It is therefore wrong to say that a performance fixed in a phonogram is in the 'public domain' once the protection for performers and phonogram producers lapses.

A 'use it or lose it' clause in contracts between performers and their producer would be beneficial for performers as it would mean that they would be in a better position to ensure their creative output reaches the public, should the phonogram producer decide not to publish or otherwise offer older sound phonograms to the public.

Option b, strengthening and harmonising the moral rights of performers, would bring some non-pecuniary benefits to performers, by allowing them to restrict objectionable uses of their performances. However, the strengthening of moral rights has no financial impact on performers and record producers and would thus not make an incremental contribution to performers' remuneration.

The creation of a fund for session musicians would be beneficial to that group and would ensure that they are included in the financial benefits of a term extension, which they would otherwise be largely excluded from under their "buy out" contracts. The fund's impact on session musicians would be positive, as the average performer's additional annual revenues during a 45-year term would rise from between € 47 and € 737 to between € 130 and € 2065, i.e., would almost triple.21

The impact on record producers would be negative, but should be considered against the benefits of the term extension. In the course of a 45 year term extension, the benefits of the extension of term for record producers would be reduced from € 758 million to € 607 million (high end estimate) or from € 39 million to € 31 million (low end estimate). Consequently, this would also reduce the additional revenue available for A&R from € 129 million to € 103 million (high end estimate) or from € 6.7 million to € 5.3 million (low end estimate). The IA analyses the cost structure of a CD and concludes that there will remain incentives for producers to market sound recordings during the extended term and still make a profit of approximately 17%.

3. **LEGAL ELEMENTS OF THE PROPOSAL**

- Summary of the proposed action

The proposal is to extend the term of protection for performers and phonogram producers to from 50 years to 95 years. In order to achieve the right balance between the benefits to record companies and featured artists and the genuine social needs of sessions musicians, the proposal contains certain accompanying measures such as establishing a fund for session musicians, introducing 'use it or lose it' clauses in contracts between performers and phonogram producers and a 'clean slate' for contracts in the extended period beyond the initial 50 years. This proposal would introduce amendments to Directive 2006/116/EC.

---

21 As the fund would be drawn from the income of record companies, the revenues of featured artists would not be adversely affected. The overall impact for performers would thus be positive.
• Legal basis

Articles 47(2), 55 and 95 of the EC Treaty

• Subsidiarity principle

The proposal falls under the exclusive competence of the Community. The reason why the Community has 'exclusive competence' in this area is because the existing legislation, as contained in Directive 2006/116/EC (the Directive) provides full harmonisation. The Directive provides for minimum and maximum harmonisation concurrently. This means that Member States may neither provide for shorter or for longer terms of protection than those prescribed by the Directive (recital 2). The subsidiarity principle therefore does not apply.

• Proportionality principle

The proposal complies with the proportionality principle for the following reason(s).

The above mentioned operational objectives: (1) gradually align authors' and performers' protection; (2) incrementally increase the remuneration of performers; (3) diminish the discrepancies in protection between the EU and US; (4) incrementally increase A&R resources, i.e., the development of new talent; (5) ensure availability of music at reasonable prices; and (6) encourage digitisation of back catalogue, can best be achieved by changes to the performers' and producers term of protection. Although other social measures in favour of performers are often mentioned (subsidies, inclusion in social security schemes), such measures have rarely materialised and the status and livelihood of creators is usually linked to royalties and remuneration payments that stem from copyright. A term-based proposal would thus increase income for performers.

Within the term based approaches, the approach based on a term that is triggered by a uniform event, such as publication of a phonogram is clearly preferable to a term based on the individual life of a performer. Linking the term of protection of performers to their individual life would lead to increased legislative burdens for Member States and considerable legal uncertainty as to the determination of the event that triggers the term. This is because of difficulties in relation to establish a uniform trigger point in cases of co-performances. Co-performances are the norm, i.e. performances by a band, an orchestra or a featured artists accompanied by session musicians. There are currently no rules providing for the calculation of the term of protection in such cases, because the event which triggers the current term of protection is the publication of the performance. If the event triggering the term of protection is the death of a performer, then, when several performers contribute to a recording or performance, the issue would arise whose death triggers the term. In cases of several co-performers it would seem appropriate to calculate the term from the death of the last surviving performer. However, there are currently no Community rules on this matter. The analogy with the term of copyright protection of co-written works is of limited assistance, as there are no Community rules on the calculation of the term of protection for co-written works either.

The proposal to extend the term of protection for performers and phonogram producers would mean a numerical change (substituting 50 by 95) to the current national legislation on related rights found in the EU Member States. The accompanying measures leave flexibility to MS on how to apply them and the administrative burden falls more on the phonogram producers and collecting societies.

The change in national copyright laws would be minimal and there would be no financial burden on any public authorities. Empirical studies also show that the price of sound recordings that are out of copyright is not lower than that of sound recordings in copyright. A recent study by Price Waterhouse Coopers finds no clear evidence that records in which the
related rights have expired are systematically sold at lower prices than records which are still protected.

Phonogram producers will have to each contribute to a fund and collecting societies will have to administer these revenues. However, their administrative burden inherent in setting aside 20% of revenues that are generated with the sales of phonograms containing performances by session musicians during the extended term would be offset by the advantages session musicians will enjoy through term extension. The level of the fund strikes a balance between the need to generate and appreciable incremental increase in the revenues of session musicians and the need to ensure that phonogram producers still derive sufficient profits from sales to have an incentive to market phonograms in the extended term.

A simple model calculation in the IA shows that a 20% share would strike the right balance between the profitability of phonograms that are exploited in the extended term and the creation of a tangible added benefit for performers. This calculation attempts to measure the impact that a revenue-based fund would have on record labels' profit margin in the years after term extension.

Average self-declared overall company-wide operating margin of the phonogram majors (EBITA/revenue) in 2007 is 9.1% (EMI 3.3% - Universal 12.8% - Warner 14% - BMG 6.2%). As mentioned above, according to IFPI, only one CD in eight is profitable.

If only 1 in 8 CDs is profitable and the average profit rate is 9.1%, this one profitable CD must be generating a profit margin that is high enough to compensate for seven unprofitable CDs and still produce an aggregate profit of 9.1%.

On this basis, one can venture a guess at the profitability of the one successful CD by comparing its profit margin with that of the remaining seven CDs. Assuming that: 5 CDs ("b" through "f" in the example) break even (profit = 0), which is extremely optimistic and 2 CDs ("g" and "h") make a loss (for "g" the loss is 30; for "h" the loss is 40); then the successful CD "a" has to make a substantial profit. In our example the profit margin is 60%.

As phonogram producers will focus on reissuing the "premium" CDs during the extended term, i.e., those with very high profit margins, a revenue-based fund (setting aside 20% of revenue achieved with the premium CDs) would mean that 20% of the revenue attributed to CD "a", 250 (i.e., 50) would be set aside for performers. Therefore, even after taking into account the fund, the phonogram producers' profit margin in the extended term would still be 100/250=40%.

<table>
<thead>
<tr>
<th></th>
<th>a</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>g</th>
<th>h</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>REVENUE</td>
<td>250</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>70</td>
<td>60</td>
<td>880</td>
</tr>
<tr>
<td>COST</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>800</td>
</tr>
<tr>
<td>PROFIT</td>
<td>150</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>-30</td>
<td>-40</td>
<td>80</td>
</tr>
<tr>
<td>PROFIT MARGIN</td>
<td>60%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>-43%</td>
<td>-66%</td>
<td>9.1%</td>
</tr>
</tbody>
</table>

As mentioned above, a fund based on setting aside 20% of revenue that is generated by phonograms in the extended term would triple the benefit that individual performers derive from an extension of term.

The proposed remedy on musical compositions with words is the least intrusive instrument to achieve a uniform term for musical compositions.

The effect of this proposed new Article 1(7) would be that, only for the purpose of calculating its term of protection, a musical composition with words would be treated as if it were a work
of joint authorship, whether or not this composition with words would qualify as a work of joint authorship under national rules.

This approach is in line with the subsidiarity principle. It would leave intact Member States discretion to determine what work constitutes a work of joint authorship. On the other hand, it introduces a minimum level of harmonisation, so that the term of all musical compositions with words which contain two or more separate contributions would be calculated in a uniform way.

- **Choice of instruments**

The proposed instrument is a Directive. Other means would not be adequate since the term of protection was already harmonised via a Directive, the only possibility to extend this term is to amend the said Directive.

4. **BUDGETARY IMPLICATION**

The proposal has no implication for the Community budget.

5. **ADDITIONAL INFORMATION**

- **European Economic Area**

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.

- **Detailed explanation of the proposal**

Article 1 amends the existing Articles 3(1) and 3(2) of Directive 2006/116 which governs the term of protection applicable to performances (Article 3(1)) and phonograms (Article 3(2)). The existing term of 50 years would be extended for both the phonogram and the performance embodied therein to 95 years.

The text provides that if a phonogram is lawfully published or communicated to the public within 50 years of its fixation, the rights shall expire 95 years after publication or communication to the public. If a performance is embodied in a phonogram which is lawfully published or communicated to the public within 50 years of its fixation, the rights shall expire 95 years after publication or communication to the public.

The newly proposed Article 10a would introduce a series of measures accompanying the term extension while Article 10(5) would contain the rules on which phonograms and performances are affected by the proposal.

The aim of the measures contained in Article 10a is largely to ensure that featured and non-featured performers whose performances are fixed in a phonogram effectively benefit from the proposed term extension.

Article 10a (3), (4) and (5) envisage to remedy the situation that session musicians (musicians that do not enjoy recurring contractual royalty payments), upon entering into a contractual relationship with a phonogram producer, often have to transfer their exclusive rights of reproduction, distribution and 'making available' to the phonogram producers. Session musicians transfer their exclusive rights against a one-off payment ('buy out').

The proposed remedy for the 'buy out' is that session musicians will obtain a claim to receive a yearly payment from a dedicated fund. In order to fund these payments, phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, rental, reproduction and 'making available'
of phonograms which, in the absence of term extension, would no longer be protected under Article 3. In order to ensure the most granular possible level of distribution to session musicians, Member States may require that distribution of these monies is entrusted to collecting societies representing performers.

Producers' revenues deriving from single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying shall not be included in the revenues to be set aside in favour of session musicians, as these secondary claims are never transferred to phonogram producers. Moreover, producer's revenues deriving from the rental of phonograms shall not be included, as performers still benefit from an unwaiverable right to equitable remuneration from such exploitation, under Article 5 of Directive 2006/115/EC.

Article 10a (6) provides for a statutory 'use it or lose it' clause. Therefore, if a phonogram producer does not publish a phonogram, which, but for the term extension, would be in the public domain, the rights in the fixation of the performance shall, upon his request, revert to the performer and the rights in the phonogram shall expire. Further, if after one year subsequent to the term extension, neither the phonogram producer nor the performer made the phonogram available to the public, the rights in the phonogram and the rights in the fixation of the performance shall expire.

For the purposes of the 'use it or lose it' clause, publication of a phonogram means the offering of copies of the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity. Publication would also comprise otherwise commercial exploitation of a phonogram, such as making the phonogram available to online retailers.

A further purpose of the clause is to ensure that phonograms which neither the phonogram producer nor the performers wish to exploit are not 'locked up'. This also means that orphan phonograms, for which neither the phonogram producer nor the performers can be identified or found, will benefit from the clause because such orphan phonograms will not be exploited by either the producer or the performer. All types of phonograms which are not exploited would thus be available for public use.

This clause has the purpose of allowing performers whose performances fixed in a phonogram are no longer published by the original phonogram producer after the initial 50 year term to regain control over their performance and make it available to the public themselves. On the other hand, the producers' right should expire in order to ensure that the performers' efforts to make their performances available as widely as possible are not hindered.

This initiative proposes that the term extension apply to performances and sound recordings whose initial term of protection of 50 years has not expired at the date of adoption of the amended Directive. It will not retroactively extend to performances that had already fallen into the public domain by this date. This criterion is simple to apply and is an approach already used in Directive 2001/29/EC.

The new Article 1(7) is introduced to apply a uniform method of calculating the term of protection of musical compositions with words. Article 1(7) is modelled on the existing Article 2, which provides a method for calculating the term of protection for cinematographic or audiovisual works. Under Article 1(7), when a musical composition is published with lyrics, the term of protection shall be calculated from the death of the last surviving person: the author of the lyrics or the composer of the music.
Article 2
Article 2 of the amending Directive provides for the rules on transposition of the amending Directive.

Article 3
Article 3 of the amending Directive relates to the date of entry into force of the amending Directive.

Article 4
Article 4 of the amending Directive indicates that the amending Directive is addressed to Member States.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission 22,

Having regard to the opinion of the European Economic and Social Committee 23,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights 24, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, 50 years from the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years with regard to performances fixed in phonograms and for phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and

related rights in the information society\(^{25}\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^{26}\) should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 95 years after publication of the phonogram and the performance fixed therein. If the phonogram or the performance fixed in a phonogram has not been published within the first 50 years, then the term of protection should run for 95 years from the first communication to the public.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non recurring remuneration).

(9) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing the directive shall continue to produce its effects for the extended term.

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain.

(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual


basis. Member States may require that distribution of those monies is entrusted to collecting societies representing performers. When the distribution of those monies is entrusted to collecting societies, national rules on non-distributable revenues may be applied.

(14) However, Article 5 of Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, _inter alia_, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms and from a single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying should.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity copies of a phonogram which, but for the term extension, would be in the public domain or from making such a phonogram available to the public. As a consequence, the rights of the phonogram producer in the phonogram should expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance whilst the latter rights are no longer transferred or assigned to the phonogram producer.

(16) This accompanying measure should also ensure that a phonogram is no longer protected once it is not made available to the public after a certain period of time following the term extension, because rightholders do not exploit it or because the phonogram producer or the performers cannot be located or identified. If, upon reversion, the performer has had a reasonable period of time to make available to the public the phonogram which, but for the term extension, would be no longer protected, the phonogram is not made available to the public, the rights in the phonogram and in the fixation of the performance should expire.

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation and can therefore, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States, separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, regarding opera, there are often different authors to the music and to the lyrics. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.
Consequently, the harmonisation of the term of protection in musical compositions with words is incomplete, giving rise to impediments to the free movement of goods and services, such as cross-border collective management services.

Directive 2006/116/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/116/EC is amended as follows:

1. The second sentence of Article 3(1) is replaced by the following:

"However,

- if a fixation of the performance otherwise than in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,

- if a fixation of the performance in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 95 years from the date of the first such publication or the first such communication to the public, whichever is the earlier."

2. In the second and third sentence of Article 3(2) the cipher "50" is replaced by the cipher "95"

3. In Article 10 the following paragraph 5 is inserted:

"5. Article 3 (1) and (2) in their version as amended by Directive // insert: Nr. of the amending directive shall continue to apply only to fixations of performances and phonograms in regard of which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below]."

4. The following Article 10 a is inserted:

"Article 10a

Transitional measures relating to the transposition of directive // insert: Nr. of the amending directive"

1. In the absence of clear indications to the contrary, a contract, concluded before [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter: a "contract on transfer or assignment"), shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive // insert: Nr. of this amending directive], the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

2. Paragraphs 3 to 6 of this article shall apply to contracts on transfer or assignment which continue to produce their effects beyond the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive // insert: Nr. of this amending directive)/EC, the performer and the phonogram producer would be no
longer protected in regard of, respectively, the fixation of the performance and the phonogram.

3. Where a contract on transfer or assignment gives the performer a right to claim a non recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3 (1) and (2) in its version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a minimum threshold of € 2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

5. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an annual supplementary remuneration referred to in paragraph 3 may be imposed.

6. If, after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram producer ceases to offer copies of the phonogram for sale in sufficient quantity or to make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 2, the rights of the phonogram producer in the phonogram shall expire.

If, one year after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram is not made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the rights of the phonogram producer in the
phonogram and the rights of the performers in relation to the fixation of their performance shall expire."

- (5) The following Article 1(7) is inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the music"

**Article 2**

**Transposition**

1. Member States shall adopt and publish, by at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from [...].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

**Article 3**

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

**Article 4**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
**The President**  

*For the Council*  
**The President**
COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.7.2008
SEC(2008) 2287

COMMISSION STAFF WORKING DOCUMENT

accompanying the

Proposal for a

COUNCIL DIRECTIVE

amending Council Directive 2006/116/EC as regards the term of protection of copyright and related rights

IMPACT ASSESSMENT ON
THE LEGAL AND ECONOMIC SITUATION OF PERFORMERS AND RECORD PRODUCERS IN THE EUROPEAN UNION

{COM(2008) 464 final}
{SEC(2008) 2288}
EXECUTIVE SUMMARY

This Impact Assessment (IA) analyses the economic and social situation of performers and record producers in the European Union.

With respect to performing artists, this IA shows that many European musicians or singers start their career in their early 20's. That means that when the current 50 year protection ends, they will be in their 70's and likely to live well into their 80's and 90's (average life expectancy in the EU is 75 years for men and 81 years for women). As a result, performers face an income gap at the end of their lifetimes, as they lose royalty payments from record companies as well as remuneration due for the broadcasting or public performance of their sound recordings. The latter income streams are paid to performers directly through their collecting societies and are not affected by their contractual arrangements with the record companies.

For session musicians, who play background music, and lesser known artists, that means that broadcasting and public performance income decreases when performers are at the most vulnerable period of their lives, i.e. when they are approaching retirement. Once copyright protection expires, they will also lose out on potential revenue when their early performances are sold on the Internet.

Moreover, when their rights expire performers are exposed to potentially objectionable uses of their performance which are harmful to their name or reputation. Performers are also at a disadvantage as compared to authors whose works are protected until 70 years after their death. This could be seen as unfair since performers are nowadays not only just as necessary as authors but also more identifiable with the commercial success of a sound recording.

As regards producers of sound recordings, the IA shows that their principal challenge is peer-to-peer piracy and their need to adapt their business to the challenges of dematerialised distribution. In these circumstances, they face the challenge of keeping up the steady revenue stream necessary to invest in new talent. Record companies claim that they invest around 17% of their revenues in the development of new talent, i.e. to sign new talent, promote untried talent and produce innovative recordings. Therefore, a longer term of protection would generate additional income to help finance new talent and would allow record companies to better spread the risk in developing new talent. Due to uncertain returns (only one in eight sound recordings is successful) and so-called 'information asymmetries' such revenue is often not available on capital markets.

The impact assessment analyses the economic, social and cultural impacts of six options

This IA presents a total of seven options, but one option was discarded before the analysis of impacts. Apart from the standard option of 'doing nothing' and letting the music market develop, the IA analyses two options linked to the term of protection for sound recordings and three options that would not require a change in the current terms that apply to sound recordings.

With respect to the term of protection this IA looks at the option of extending the term of performers to 'life or 50 years', whichever is longer. This option would enhance the status of performers and, by linking protection to their lifetime, recognise the individual and creative nature of their performances. This option would not only apply to the performers' exclusive
rights but also to the variety of broadcasting and public performance rights that are not transferred to the record companies.

Another option involving the term of protection would be to extend the current 50 year term to 95 years for performers and record companies. This option ensures full equivalence with the longest term of protection in the world. In order to ensure that the benefit of term extension accrues to performing artists, especially session musicians that have transferred their related right against a one off payment, the extension of the term of protection for record companies should be accompanied by the payment of a certain percentage of record companies' increased revenues into a fund dedicated to improving the situation of session musicians. Again, as in the 'life or 50 year' option, the remuneration for broadcasting and public performance would remain with the performer for 95 years.

Another set of options looks at ways to address the problems identified above without modifying the term of protection. These options comprise various possibilities which could improve the financial situation and moral rights of performers. These measures, of course, could be used either as alternatives to a term extension or as measures to complement an extension of the term of protection. Several of these measures could only be the subject of Community legislation.

This IA describes how performers contractually transfer their exclusive rights to record labels, (including their reproduction, distribution, rental and making available rights, but not their remuneration claims for broadcasting and public performances. In order to limit the effect of the systematic contractual transfer of performers' exclusive rights to record companies, the IA examines the possibility of an 'unwaivable' right to remuneration to which performers would remain entitled even after having transferred their making available right to a record producer. The creation of a claim for equitable remuneration for online sales or other forms of making performances available online is an interesting option, whose time may yet come. However, at this stage, the uncertainties surrounding the issue of who should pay this 'equitable remuneration' are such that the likely effects of this option cannot be quantified with any reasonable measure of certainty. In light of the uncertainties surrounding the practical administration of the claim for equitable remuneration, further study on this option is imperative. While in the future this option might well be introduced to enhance performers' participation in revenue generated online, it is too early to discuss at this stage. This option was therefore discarded before the analysis of impacts.

Another option analysed is to strengthen performers' moral rights. The scope of their moral rights could be harmonised to include a right to restrict derogatory uses of their performances.

A further option is to ensure that 'use it or lose it' clauses are included in agreements between performers and record labels. This means that, if a record company is unwilling to re-release a performance during the extended term, the performer can move to another record company or exploit the record himself.

The impacts of the different options

All options are assessed against the following six operational objectives: (1) gradually align authors' and performers' protection; (2) incrementally increase the remuneration of performers; (3) diminish the discrepancies in protection between the EU and US; (4)
incrementally increase A&R resources, i.e., the development of new talent; (5) ensure availability of music at reasonable prices; and (6) encourage digitisation of back catalogue.

The IA concludes that 'doing nothing' is not a preferable option. If nothing was done, thousands of European performers who recorded in the late fifties and sixties would lose all of their airplay royalties over the next ten years. This would have considerable social and cultural impacts. Equally, the sound recording industry would be obliged to cut down on the creation of new sound recordings in Europe.

The IA considers the impact of options not involving the term of performers' and record producers' rights (options 3a, b, c and d). Option 3a (unwaivable right to equitable remuneration) appears premature as it is unclear who would pay for this remuneration and it is hard to estimate the financial benefit it would bring. Option 3b (the strengthening of moral rights), has no financial impact on performers and record producers. Option 3c, the 'use it or lose it' clause, would be beneficial to performers by allowing them to make sure their performances are available on the market. It would also be beneficial for cultural diversity. Option 3d, the fund to be set up by record companies, would be very beneficial to non-featured performer. Record producers, however, would have to pay into the fund at least 20% of the additional revenue generated by the term extension. However, the IA concludes that marketing sound recordings would remain profitable for record companies despite having to pay 20% towards thus fund.

Options involving a term extension (2a "life or 50 years" and 2b "95 years for performers and record producers") seem to be rather more suitable in contributing towards the six policy objectives. Both options 2a and 2b bring financial benefits to performers and would thus allow more performers to dedicate more time to their artistic activities.

Option 2a, by linking the term to the life of a performer, would contribute to aligning the legal protection of performers and authors. It would reflect the personal nature of performers' artistic contributions and recognise that performers are as essential as authors to bringing music to the public. It would also allow performers to object to derogatory uses of their works during their lifetime.

In addition, option 2b would increase the pool of A&R resources available to record producers and could thus have an additional positive impact on cultural diversity. This IA also demonstrates that the benefits of a term extension are not necessarily skewed in favour of famous featured performers. While featured performers certainly earn the bulk of the copyright royalties that are negotiated with the record companies, all performers, be it featured artists or session musicians, are entitled to so-called 'secondary' income sources, such as single equitable remuneration when the sound recording incorporating their performances is broadcast or performed in public. A term extension would ensure that these income sources do not cease during the performer's lifetime. Even incremental increases in income are used by performers to buy more time to devote to their artistic careers, and to spend less time on part time employment. Moreover, for the thousands of anonymous session musicians who were at the peak of their careers in the late fifties and sixties, 'single equitable remuneration' for the broadcasting of their recordings is often the only source of income left from their artistic career.

In addition to ensuring the increased availability of A&R, option 2b is also easier to implement than option 2a, because the latter option is linked to the life of individual performers. As the example of co-written works demonstrates, linking a copyright to the life of
individual contributors raises complex issues when several performers contribute to a sound recording. These would increase the legislative and administrative burden on Member States and create legal uncertainty, because the term of protection to the term of protection would no longer be linked to a certain and uniform date, i.e., the publication of the phonogram that contains the performance, but to the sometimes very different lifetimes of individual co-
performers.

What are the likely provisions in the proposal to ensure that it is the performing artists that benefit?

In order to ensure that the benefit of term extension would accrue to performing artists, especially session musicians, this IA concludes that record companies should contribute towards a fund for session musicians (option 3d). In order to have the financial volume necessary to ensure real benefits for session musicians, this IA proposes that the record companies set aside at least 20% of the revenue that accrues during the extended term for session musicians. The fund's impact on session musicians would be positive, as the average performer' additional annual revenues during a 45-year term would almost triple

In respect of featured artists, the Commission's analysis concludes that original advances paid by the record companies should no longer be set off against royalties in the extended term. That means the artist would get all the royalties during the extended term.

The IA also proposes that a term extension should be accompanied by a 'use it or lose it' provision (option 3c). This means that, in the event that a record company is unwilling to re-release a performance during the extended term, the performer can move to another record company or make his performance available himself.

Empirical studies show that the impact of a term extension would not be negative for consumers.

Empirical studies show that the price of sound recordings that are out of copyright is not lower than that of sound recordings in copyright. This is true in relation to statutory remuneration claims and for the sale of CDs.

The 'single equitable remuneration' due for broadcasting and performances of music in public venues would remain the same as these payments are calculated as a percentage of the broadcasters or other operators' revenue. As far as CD sales are concerned, very few studies analyse the price between prices of in-copyright and out-of copyright recordings. A study by Price Waterhouse Coopers concluded that there was no systematic difference between prices of in-copyright and out-of copyright recordings. It is the most comprehensive study to date and covers 129 albums recorded between 1950 and 1958. On this basis, it finds no clear evidence that records in which the related rights have expired are systematically sold at lower prices than records which are still protected.

Other studies have been considered in analysing the impact of copyright or related rights on prices. Most of them focus on books. However, even in this category, either no overall price difference is found between the samples of books in- or out-of-copyright, or, the impact of copyright on the price is extremely model-dependant and therefore the estimates obtained cannot be seen as very robust. Given the lack of widely accepted models and the length of the time span, it is fair to say that there is no clear evidence that prices will increase due to term extension.
In addition, overall, the extended term should have a positive impact on consumer choice and cultural diversity. In the long run, this is because a term extension will benefit cultural diversity by ensuring the availability of resources to fund and develop new talent. In the short to medium term, a term extension provides record companies with an incentive to digitise and market their back catalogue of old recordings. It is already clear that internet distribution offers unique opportunities to market an unprecedented quantity of sound recordings.
**International dimension**

The IA also looked at the trade implications of a longer term of protection and provisionally concludes that most of the additional revenue collected in an extended term would stay in Europe and benefit European performers. This is good for promoting Europe's performers and the cultural vibrancy of European sound recordings.
1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

A Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights was published on 19 July 2004. Interested parties were invited to submit their comments by 31 October 2004. Full information can be found at the following link to the DG MARKT copyright unit web page set aside specifically for this exercise: http://ec.europa.eu/internal_market/copyright/review/consultation_en.htm. Even though all copyright issues were open for comment, of the 139 contributions received, 76 position papers commented on Directive 93/98/EC harmonising the term of protection of copyright and certain related rights. More specifically, 36 organisations and stakeholders were in favour of extending the protection of related rights (performers and record producers) while 29 indicated that they were against any extension. Table 1A indicating the summary of these submissions can be found in the Annex, section 1.

In 2005, the Commission contracted out a study entitled "The recasting of copyright for the knowledge economy". Part of this study was to consider the term of protection for performers, record companies and broadcasters in Europe in general and whether these related rights holders are at a disadvantage when compared to those in the USA and other major economic competitors (see Annex, section 4). The study was completed in December 2006 and published on the Commission's web site on January 2007. During 2006-2007, Commission services had meetings with a variety of stakeholders on a bilateral basis to discuss relevant issues in more detail. A questionnaire was prepared by the Commission and distributed to major stakeholders in the framework of these bilateral discussions. More or less detailed responses were received from performers' associations and the recording industry. It was not possible to establish a steering-group on the subject of this impact assessment.


---

4 Telecom Italia/ETNO, FIM/FIA, IFPI, PPL, MPA, GIART, Eurocopyxa/Eurocinema, Naxos, EMI, AER, EBU, BEUC, British Library, ACT
5 AEPO, BEUC, IFPI, Naxos.
2. PROCEEDINGS BEFORE THE IAB

A draft version of the impact assessment was discussed before the Impact Assessment Board (IAB) on 2 April 2008. In the course of this meeting the IAB raised a series of issues that DG MARKT undertook to address. In particular, the IAB asked for clarification on:

- The relationship between the EU acquis and international conventions governing the field of performers and producers rights;
- The scope of the intended initiative, especially as the impact assessment distinguishes between performers and producers in the musical and the audiovisual sectors; and
- The events that triggered the initiative.

2.1. International conventions and the EU acquis

The impetus behind the initiative can best be explained against the backdrop of international conventions. These also explain the distinction between performers and producers in the musical and audiovisual fields.

Performers, whether in the musical or in the audiovisual field, are not covered by the 1886 Berne Convention on Literary and Artistic Works. Although several proposals were made to include performers and performances within the scope of the Berne Convention at later revision conferences, none of these proposals found sufficient support. The need for protection of performers and record producers was only perceived as imminent with the proliferation of phonographic technology and the subsequent introduction of sound recordings and broadcasting. In these circumstances, performers and producers were first granted protection against a variety of unauthorised acts in the 1961 Rome Convention. Both groups of rightholders were considered jointly under the Convention not because of the similar nature of their rights, but because of the development, in the 1950s, of commercial markets for sound recordings. Most significantly, to compensate both rightholders for the relatively narrow scope of their exclusive rights (there is no right governing the communication of performances to the public), the 1961 Rome Conventions provides both groups of rightholders with a right to receive 'single equitable remuneration' for the broadcasting or communication to the public of a commercially published phonogram. Significantly, this important claim to equitable remuneration only covers the broadcasting or public communication of a phonogram and would thus exclude audiovisual performers or film producers from its scope.

It is also relevant to note that film producers, based on Article 14bis of the Berne Convention, already enjoy a far better status than the producers of sound recordings. By virtue of this Article, a film producer can either be granted co-ownership in the copyright that applies to authors (like in the UK or Ireland) or benefit from a variety of statutory assignments (Italy, Austria) or presumptions of copyright ownership in their favour (Belgium, France, Germany, Luxembourg, the Netherlands or Spain). Ownership of copyright, of course, entitles film producers to a copyright term that spans the life of the film authors, plus seventy years. In respect of the term of protection, the situations of film and phonogram producers thus differ fundamentally.

The 1996 WIPO Performances and Phonograms Treaty (WPPT) upgraded musical performers and producers rights by introducing a new right of 'making available' that is tailored essentially to cover digital downloads offered on an individualised basis. The 1996 WPPT
does not cover audiovisual performances or productions. Indeed, a 2000 conference at WIPO aimed at introducing a WIPO Audiovisual Performances Treaty ended in failure as delegations were unable to agree on provisions governing the transfer of rights of performers to film producers.

The EU acquis essentially mirrors the above mentioned international conventions. Like the Rome Convention, the acquis only provides for equitable remuneration in case of broadcasting or communication to the public of a commercial sound recording (cf. Article 8(2) of Directive 2006/115) and there are no comparable provisions governing audiovisual performances. Audiovisual performances do, however, benefit from the reproduction right now contained in Article 2 of Directive 2001/29 and would thus also appear eligible for levies that apply in case of private reproductions.

2.2. The scope of the intended initiative

The impact assessment focuses not only on the term of protection that would apply to performers' and producers' exclusive rights but also on the (identical) term that governs a series of highly relevant 'secondary' remuneration claims. Special emphasis is put on the claim to receive equitable remuneration for broadcasting and communication to the public it is not transferred to producers but administered by performers' collecting societies directly. As this claim does not apply to audiovisual productions, the analysis of the impacts of term expiry is limited to musical performances and phonograms.

In addition, as mentioned above, the term applicable to phonogram producers differs from that applicable to film producers. As the latter usually enjoy copyright ownership, a statutory assignment of the author's rights or at least a presumption of such a transfer, copyright for film producers essentially lasts for seventy years after the death of the last surviving author while the phonogram producers' right expires 50 years after the recording was made or published. This, again, explains why the impact assessment deals with phonogram producers only.

2.3. Events triggering the term initiative

Since promulgation of the 2004 Staff Working Paper, a series of studies on the social and economic situation of the European performing artist were conducted and published. Most notably, a study by AEPO ARTIS 'Performers Rights in European Legislation: Situation and Elements for Improvement' have brought the social and economic difficulties of performers to the fore. This study has also revealed the crucial importance that secondary remuneration schemes play in rewarding the creative efforts of performers. For many performers, equitable remuneration collected for broadcasting and communication to the public is a more important source of revenue than the exercise of their exclusive rights, which are often transferred to the producers. For example, 57% of monies collected by performers collecting societies stem from equitable remuneration for broadcasting and communication to the public. A term extension to cover at least the life of a performer would thus benefit individual performers primarily by extending their eligibility to receive a share of equitable remuneration payments. None of these issues had been fully considered in the 2004 Staff Working Paper.
3. **INTRODUCTION**

This impact assessment will cover the issue of performers' and record producers' rights under the Community *acquis*. Only performers whose performances are included in a sound recording are considered. Audio-visual performers and producers are not considered, as their economic and legal situation is significantly different. This concerns their legal status as well as the assignment and transfers of their rights. Film producers, in certain Member States, are considered as co-authors of a film\(^6\) while in others they are considered as proprietors of so-called 'related' rights\(^7\). Moreover, contracts in the film industry differ from those in music, especially in respect of presumptions of rights transfer to the producer\(^8\).

3.1. **Who are performers?**

A performer is a person who performs or executes a work such as a piece of music, an opera, a play or a film. "Actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works" are all performers\(^9\).

The status and income of performers varies considerably. A small number of performers such as "featured artists" (whose name appears on the album credits) achieve fame and fortune or "superstardom". At the other end of the spectrum, most performers are less well-known and cannot earn a living from their creative activities. They include session musicians (whose names do not appear on the album credits) who are employed *inter alia* to provide background music and performers who are aspiring to a career as featured artists.

It is difficult to provide a precise estimate of the number of performers in the EU. Membership in performers' collecting societies or artists unions or the number of artists active in musical education only provide rough proxies. In 2004, the total number of members of performers' collecting societies amounted to nearly 400000\(^10\).

3.2. **Who are record producers?**

Record producers create sound recordings (i.e. the "fixation" of a performance)\(^11\) and ensure their subsequent promotion and marketing, distribution to retail outlets and sale to consumers/end users. Record producers provide the financial investment necessary to produce and sell music records. They also invest in discovering and developing performers both commercially and artistically. As it is estimated that only 1 in 8 CDs is profitable, the investments of record producers in the music industry are regarded as risky.

The recording industry is dominated by a few large companies (often integrated into bigger media conglomerates), which are also known as "the majors": Universal Music Group, Sony

---

\(^6\) For instance in the U.K., under section 9(2)(ab) of the 1988 Copyright Patent and Designs Act.

\(^7\) E.g. in France, see Article L.215-1 Intellectual Property Code.

\(^8\) See, at international level, Article 14bis Berne Convention, and at Community level, Article 2(5)-(7) of the Rental and Lending Directive. National laws contain more detailed provisions regarding transfer of rights and the status of film producers.

\(^9\) See Article 3 of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations.

\(^10\) Based on AEPO-ARTIS data complemented by Commission's own research.

\(^11\) See Article 3 (c) of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations (the first international convention which provided performers with exclusive rights).
BMG Music Entertainment, EMI group and the Warner Music Group, which control about 80% of the recorded music sales\(^{12}\). The remainder of the market belongs to a myriad of small and medium-sized cultural entrepreneurs, the so-called independent record companies or "indies"\(^{13}\). Some recent successful bands are signed up to independent labels (Franz Ferdinand with Domino Records founded in 1993 and Kaiser Chiefs with B-Unique founded in 2004)\(^{14}\). The independent record companies are more vulnerable financially than the music majors and have more difficulty accessing financing to keep them afloat between successes.

### 3.3. How are record producers and performers protected under copyright law?

At Community level, both performers and record producers enjoy a similar set of so-called 'related' rights in their records and recorded performances. These rights are referred to as related rights to distinguish them from authors' and composers' copyright that arises in respect of the 'works' they create. Performances and phonograms are not works.

Record producers and performers are therefore granted 'related' rights under Directives 2006/115/EC and 2001/29/EC. These related rights were harmonised at European level by Directive 93/98/EEC (now codified by Directive 2006/116/EC) and last for 50 years from the date of the performance or from the publication of the sound recording. This length of protection represents the minimum international standard as provided for in the TRIPS Agreement of 1994 and the WIPO Performances and Phonograms Treaty from 1996. In this impact assessment the rights in performances and sound recordings will either be referred to as rights in performances (held by performing artists) or rights in sound recordings (held by the record producers) or collectively as 'related' rights.

Related rights can either be exclusive rights or rights to receive equitable remuneration for the commercial use of performances and sound recordings. Performers' exclusive rights (such as the right of reproduction, distribution, rental and 'making available' online) are usually transferred to the producer of the sound recording. The latter licenses the exclusive rights to end users, such as broadcasters, rental shops or online music shops. Rights to receive equitable remuneration are not transferred to producers but are exercised by performers themselves through their collecting societies. Such claims for equitable remuneration are collected from broadcasters, a series of public venues (bars, hotels, shopping arcades, etc.). Compensation for private copying is also administered by collecting societies and paid by a variety of ICT industries\(^{15}\).

### 4. Problem Definition

#### 4.1. What is the problem?

If the present term of protection were maintained for performers, some 7000 performers, in the UK alone, over the next ten years, would lose the single equitable remuneration they

---

\(^{12}\) IFPI –The recording industry in numbers 2007.

\(^{13}\) According to IFPI there are around 1000 independents active in the European music market.


\(^{15}\) It should be noted that exclusive rights are almost always governed by individual contracts between the performer and the producer of the sound recording while remuneration claims are administered by collecting societies.
receive for the broadcasting and communication to the public of their performances\textsuperscript{16}. It is expected that a corresponding number would be affected in the other big Member States and a proportionally lower number would be affected in the smaller Member States.

Expiry of related rights would not appear as urgent with respect to famous superstars, featured artists like Sir Cliff Richards or the Beatles. But an expiry of related rights would be a serious blow to the thousands of anonymous session musicians, i.e., musicians hired for one recording only and not members of a group, who contributed to sound recordings in the late fifties and sixties. They will no longer get single equitable remuneration for broadcasting and communication to the public, private copying levies and equitable remuneration for the transfer of the performers' rental right. They will find it more difficult to devote time to their artistic career, as they generally respond to small increase in revenues, such as provided by the income flows mentioned above, by devoting more time to their creative activities. They will also lose protection just when online retailing promises a new source of revenue.

Single equitable remuneration is important, especially with respect to early performances. Many performers or singers start their career in their early 20's, if not earlier. That means that the current 50 year protection ends when they will be in their 70's. Once protection has ended, performers no longer receive any income from these sound recordings. For session musicians and lesser known artists that means that income from those sound recordings stops when performers are at the most vulnerable period of their lives (retirement).

Record companies argue that their main problem is a decrease in revenues following large scale piracy over the internet. They also point out that record producers in the USA and other countries in the world enjoy a much longer term of protection. This, they argue, will divert creative efforts away from Europe and toward those markets that grant longer periods of protection and thus income. They point to a tendency for record producers to orient their productions to cater to the taste of those jurisdictions where most revenue could be achieved.

The underlying problems of performers and record producers will be considered separately.

4.2. What are the underlying drivers behind these problems for performers

4.2.1. The treatment of performers, in comparison with authors, is unfair

The term of protection for performers is much shorter than that for authors. Their moral rights, which entitle them to restrict objectionable alterations to their performances, are weaker than those of authors.

Performers are essential contributors to the cultural industries. They are often the necessary intermediary between the author and the public. For instance, very few people can derive the same enjoyment from reading sheet music as from listening to a sound recording. The contribution of performers is socially accepted and recognised by the public, as the popularity and success of well known performers suggests.

However, performers are concerned about the disparities that exist in relation to the length of protection they currently enjoy as compared to that given to authors. Authors are protected for 70 years after their death whereas performers are only protected for 50 years from the

\textsuperscript{16} UK House of Commons Committee for Culture, Media and Sport, May 2007, p. 78.
performance or when their performance is published or communicated to the public via a CD or DVD, or a radio or TV broadcast, for example. Performers believe that their creative input is as important as that of the author of the work. In view of the development and importance of music over the past few decades, performers feel that the value of their contribution to the success of a piece of music is at least equal to, and sometimes even more identifiable, than that of the authors (i.e. the composer, the lyricist, the photographer/art designer of the cover of the compact disc, the writer of the sleeve notes). It could seem unfair that "the graphic artist who designs the artwork on a CD cover is protected for longer than the singer or musician who performs on the recording."18

The following examples illustrate the different terms of protection between performers and authors:

<table>
<thead>
<tr>
<th>Name of song</th>
<th>Date of &amp; publication</th>
<th>Performer (and expiry of protection)</th>
<th>Author (and expiry of his protection)</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>A teenager in Love</td>
<td>1959</td>
<td>Marty Wilde (1.1.2010)</td>
<td>Doc Pomax, died 1991 (1.1.2063) and Mort Shuman, died 1991 (1.1.2063)</td>
<td>52 years</td>
</tr>
<tr>
<td>Walkin' back to happiness</td>
<td>1961</td>
<td>Helen Shapiro (1.1.2012)</td>
<td>J. Schroeder, M. Hawker (since they are both still alive, protection lasts at least until 2078)</td>
<td>More than 66 years</td>
</tr>
</tbody>
</table>

In addition, the moral rights of performers are weaker than the moral rights of authors. At international level, the moral rights of performers are not recognised under the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, but are recognised under Art 5 of the 1996 WIPO Performances and Phonograms Treaty (WPPT).19 However, the level of protection under Article 5 WPPT is in some respects lower than that afforded to authors under Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works. While authors are protected against "other derogatory action in relation to the said work", performers can only object to "other modifications". The term "derogatory action" used in the Berne Convention allows authors to restrict objectionable uses of their performance (for instance use in pornographic material, use in advertising or in a political context which is contrary to the performers' opinion or beliefs) which do not imply a "modification" of the work but simply its use in an objectionable context.

This discrepancy between the moral rights of authors and performers is also reflected in national laws. In addition, the duration of moral rights varies. In some countries, these last as long as economic rights, while in others they are perpetual.21 While in any case authors are

---

17 "I put as much creative effort into my performances as I do into my compositions, so there does not appear to be any justification for this big discrepancy", letter from Udo Jürgens to Commissioner McCreevy, 12 July 2007. Mr. Jürgens is both an author and performer.
19 Art 5 (1) of the WIPO Performers and Phonograms Treaty 1996 provides that : "Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation". The Treaty is in force in some, but not all, Member States, and has been signed but not yet ratified by the EC.
21 For example the moral rights of performers are perpetual in France and Romania, protected 50 years after death in Portugal and the Netherlands, life or 25 years after the performance if longer in Germany.
protected during their lifetime and beyond, this is not the case for performers. In the UK for instance, their moral rights will only be protected for 50 years from the first publication of the fixation of their performance. They will thus be exposed to distortions or mutilations of their performances during their lifetime at least in respect of their early performances.

4.2.2. Performers create young and live longer: the performers’ age gap

Performers suffer from an "income gap" towards the end of their life
Performers have no control of their performances after the 50 years.

Protection for performers stands at 50 years from the event that triggers protection (the performance or the publication or communication to the public of a recording of the performance). An increasing number of performing artists are seeing their performances falling into the public domain during their lifetimes. PPL, the UK collecting society that represents performers has indicated that sound recordings from 1955 to 1965 will involve 7000 performers who will stop receiving royalties or equitable remuneration from 2005 onwards as the sound recordings reach the 50 year protection cut off date.

Current average life expectancy stands at 75.1 years for men and 81.2 years for women, although it is not unusual for persons to live well into their 80's and 90's. On average, most performing artists or singers start their career in their early 20's which means that the current 50 year protection ends when they are in their 70's. For instance, the singer/songwriter Elton John signed his first contract aged 20. Once protection has ended, performers no longer have a say in how their performances are used nor do they receive any further remuneration from the commercial exploitation of their performances. In fact, income from those recordings stops when performers are at the most vulnerable period of their lives.

4.2.3. Most performers do not earn a living from their artistic work

Performers' earnings are on average low and distribution of income is highly uneven.
Performers are under-employed and supplement their income with part time jobs

The current employment status and conditions for the average performer are not necessarily very rewarding. Apparently, only famous performers make a living from their profession. For instance, in the UK, in 2001, only 5% of performers earned over £10000 annually. Moreover, between 77 and 89.5% of all income distributed to performers goes to the top 20% of earning


Section 205I — (1) of the 1988 Copyright Designs and Patents Acts.
The market for recorded music started in the 1950's and really blossomed in the 60's and 70's (and has increased ever since) so the number of musical works that will be falling into the public domain after the 50 year protection period will show a significant increase from 2010 onwards.
In an interview on 31/3/2006 in premises of DG MARKT Copyright unit.

Eurostat, Life expectancy at birth.
See Elton John and Others v. Richard Leon James [1991] FSR 397, High Court decision of 29th November 1985. Other examples include Irish performer Bono, from U2 (first record released when he was 17), French singer Johnny Halliday (first record released when he was 17), Greek singer George Michael (first record released when he was 19), etc.
performers. Economists have shown that the great discrepancies between the low earning of the majority of little-known performers and the significant earnings of "superstar" performers are endemic to the music industry. However, the lesser paid performers are as essential as superstars, as the latter are invariably plucked from a large number of lesser-known performers.

Moreover, the social situation of performers is not very secure. It is difficult for performers to find sufficient employment and most need other jobs to supplement their incomes. Overall, only 5% of performers actually make a living from their profession – all the others have to seek parallel employment. Often, performers qualify as self employed. This limits the impact of collective bargaining through unions.

However, studies suggest that performers use incremental increases in income to devote more time to their artistic careers. This means that when performers receive additional income from a part time activity or from royalty payments, they spend more time creating.

4.2.4. Performers lose the financial benefits of their exclusive rights when they transfer them

Session artists transfer their exclusive rights against a lump sum payment, irrespective of the success of the work.

The rights recognised to performers under the acquis do not result in concrete benefits for performers.

Performers usually transfer their most economically significant exclusive rights to record companies via contract. In most cases, individual performers have little bargaining power. Session musicians may be part of a union or association and benefit from collectively bargained minimum terms. Featured artists are generally willing to accept the contract they are offered because the reputation and exposure gained by signing with a record label gives them the possibility of reaching a broad audience. Consequently, it is difficult for performers to negotiate which type of contract or which level of remuneration they will obtain. Session musicians cannot negotiate at all, they have to transfer their rights 'in perpetuity' against a one off payment.

Contractual relations between record companies and performing artists vary greatly but typically fall into three categories:

---

27 AEPO study – "Performers' Rights in European Legislation: Situation and Elements for Improvement.", July 2007, p. 89
29 FIM – EP Hearing 31.1.2006 and meeting in Commission offices on 16 March 2006. For example, Luciano Pavarotti and Sting were initially teachers and Elton John worked in the packaging department of a record company.
31 E.g. R. Towse, op.cit (for artists generally).
32 In several instances courts have intervened to cast aside excessively harsh agreements, noting in particular the "immense inequality in bargaining power, negotiation ability, understanding and representation" between artists and professionals of the entertainment industries", Silvertone Records Limited v. Mountfield and Others, [1993] EMLR 152.
33 Adapted from contribution from Naxos to Commission questionnaire – May 2006.
Table 1: Types of performers' contracts

<table>
<thead>
<tr>
<th>No.</th>
<th>Type of contract</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Buy Out</td>
<td>Record company acquires all rights in perpetuity from the performing artist(s) other than the equitable remuneration for public performance which is normally paid directly by the collecting societies to the performer. This is used especially for session musicians (i.e. non-permanent members of groups) and members of orchestras.</td>
</tr>
<tr>
<td>2</td>
<td>Advance against royalties (and other costs)</td>
<td>Featured artists receive an advance against royalties; additional royalties are payable once the advance has been recouped by the record company (as well as production, marketing and other costs have been recouped by the record company).</td>
</tr>
<tr>
<td>3</td>
<td>Royalties only (after recoup of costs)</td>
<td>The featured artist receives a percentage of the licence fee charged for the use made of the recording (only after production, marketing and other costs have been recovered by the record company).</td>
</tr>
</tbody>
</table>

Session artists are generally paid a flat fee as their rights are bought out by the producer. Accordingly, their remuneration does not increase if the record becomes a huge success. For instance, the school of the children singing in the choir in Pink Floyd's hit *Another brick in the wall (part II)* in *The Wall* (1979) album, which sold 30 million copies worldwide, was paid a flat fee. The 2004 film *Les Choristes* included the contributions of an amateur choir of children. Although the soundtrack achieved considerable commercial success, the choir association was paid €21000 for three days of work and subsequently obtained only 1% from sales.

Featured artists' contracts usually provide for a royalty-based remuneration on terms which are not necessarily very favourable. For example, the highly successful British singer/songwriter Gilbert O'Sullivan was initially paid £10 a week, the equivalent of his previous wages as a postal clerk, when retail sales of records of his music between 1970 and 1978 realised a gross figure of some £14.5 million. More generally, depending on their fame and bargaining power, performers usually receive net royalties of 5-15% of revenues.

The deduction of a variety of record producers' costs from the royalty payments can also significantly undermine the remuneration of performers. These deductions are often formulated in technical terms and included in complex legal documents. In practice, after the various contractual deductions (for costs borne by the producers such as music videos, promotion, master costs), the average percentage of royalties actually received by performers can be lower. Moreover, as most performers' sound recordings do not sell enough copies for

---

34 School children were "hired" and the school received a lump sum payment of £1000, without any royalty payments. The children received no remuneration other than a concert ticket, a single and an album each. They were denied the right to participate in the video of the album on the ground that they did not have card from "Equity", a UK union of performers. However, at that time performers enjoyed very limited protection in the UK. After the law was revised, an agent sought to relocate the choir performers and initiated legal proceedings to obtain payment. See The Times, November 27, 2004, "Payout after Pink Floyd leaves them kids alone", available at http://www.timesonline.co.uk/tol/news/uk/article395989.ece and BBC News Magazine, 2 October 2007, "Just another brick in the Wall", available at http://news.bbc.co.uk/1/hi/magazine/7021797.stm.

35 According to the parents of some choir boys, the soundtrack generated €20 million. Some parents initiated legal proceedings against the producer, as the children had received no remuneration at all for their performance.

36 See *O'Sullivan v Management Agency and Music Ltd.* [1985] Q.B. 428 at 444 before the Court of Appeal of England and Wales. See also Financial Times, 29/30 September 2007, Life & Arts, p. 3.

37 CIPIL Study, p.36.

38 This has led courts to conclude that artists such as the "Stone Roses" rock band or Elton John were insufficiently aware of the sometimes excessive deductions operated from the basis for calculating royalties, see *Silvertone Records Limited v. Mountfield and Others*, [1993] EMLR 152.
the record company to recoup its initial investment (only 1 in 8 CDs is profitable)\textsuperscript{39}, royalty payments are often not paid out at all.

However, performers also receive revenue from other sources. In most cases, they do not assign certain exclusive rights to record producers, such as their right to authorise use of their performance in advertising or films (so-called 'synchronisation rights'). Moreover, they receive income from collecting societies which administer their secondary remuneration claims. There are three principal sources: equitable remuneration for broadcasting and communication to the public, private copying levies and equitable remuneration for the transfer of the performers' rental right. All of these sources are commonly referred to as 'secondary' sources of income and performers receive them directly.

4.3. What are the underlying drivers behind these problems for record producers?

4.3.1. Loss of revenue for record producers

Declining sales and profits of record producers.
Loss of revenue through piracy.

The EU recorded music industry has indicated a slump in their activities; sales of music CDs peaked in 2000 and have been falling at an average rate of 6% ever since\textsuperscript{40}. Estimates for the future show a continued decrease in physical album sales from $12.1bn in 2006 to $10.3bn by 2010\textsuperscript{41}. Since 2001, the total European market for recorded music has lost 22% of its value\textsuperscript{42}.

Revenues in general and profits in particular have decreased, largely due to increased piracy. In January 2006 the music trade publication ‘Billboard’ indicated that, worldwide, there were 350 million legal downloads for the whole year of 2005, but that there were also 250 million illegal downloads per week. The music industry indicates that approximately a third of all CDs bought in 2005 in the world were pirated – a total of 1.2 billion CDs. EMI's expenditure on anti-piracy and protection of IP for 2006 was in excess of £10m.

4.3.2. Loss of revenue entails a reduction in Artist & Repertoire (A&R) spending

Less profits means fewer new acts (new releases or re-releases).
Less profit means fewer artists under contract.
Less profits means less diversity, particularly in (smaller) niche markets.

Due to losses in revenue, the worldwide music industry, during the last five years, has contracted by some 25%. For instance, Universal's total number of employees which in 2003 amounted to 12000 was down to 7600 in 2006\textsuperscript{43}. After an initial reduction in employees in 2006, EMI also announced a second reduction of 2000 jobs (about one third of its work force) in January 2008\textsuperscript{44}. EMI indicated in addition an intention to be more selective with its artist

\textsuperscript{39} Comment from IFPI.
\textsuperscript{41} Figures from PricewaterhouseCoopers, Financial Times, 6 July 2006.
\textsuperscript{42} Article from the Times, 14 February 2007.
\textsuperscript{43} Interview with IFPI - and John Kennedy - on 29/3/2006 in Copyright Unit of DG MARKT.
\textsuperscript{44} International Herald Tribune, The Associated Press, January 14, 2008
partnerships despite a significant reduction in its artist roster already in 2006\textsuperscript{45}. EMI has also been reducing its advertising expenditure\textsuperscript{46}.

Record companies claim the creative cycle will become unsustainable under the current financial constraints. According to record producers, the music industry is a risky business and finding and developing talented artists (A&R) is expensive\textsuperscript{47}. They claim long term earnings are required to discover and market new talent\textsuperscript{48}. Record companies point out that their A&R spending, which can be up to 20\% of their turnover, is comparable to R&D expenditure in other sectors. The comparison reveals that they invest substantially more than the automobile and parts industrial sector (4.2\% of turnover) or than the software and computer services sector (10.4\% of turnover)\textsuperscript{49}. In popular music, it is estimated that only about 10\% to 12\% of all recordings reach break-even or become profitable\textsuperscript{50}. It has been suggested that profitability is achieved only once sales exceed 20000 CDs\textsuperscript{51}. With online piracy, this target is increasingly difficult to achieve.

The recording industry has indicated that if their revenues are lower they will spend less on A&R\textsuperscript{52} and discovering and promoting new talent. If these trends persist, there will be a real risk that European based talent will not be developed nor benefit from the possibility of global exposure offered through on-line exploitation.

The digitisation of record producers' back catalogue will also be hampered by declining revenues. Digitisation is an ongoing process which is costly but necessary to ensure the availability of local repertoire and cater for the needs of niche markets.

4.3.3. Cultural diversity

The term gap could lead to record companies producing sound recordings to cater to American taste in music.

In the US, the record companies point out that the longer term of protection (95 years) gives incentives for companies to invest in repertoire that will appeal to US markets, and thus yield higher returns. The economic benefits of the longer terms of protection in the US should nevertheless take into account the fact that the protection of record producers and performers suffers more exceptions in the US\textsuperscript{53}. This would offset some of the benefits of the longer term of protection in the US. However, the US is considering the adoption of the performance

---

\textsuperscript{45} EMI response to Gowers Review, 2006. EMI's workforce was reduced by a third to 6,000 persons.

\textsuperscript{46} Advertising expenditure by music industry dropped by 25\% in 2002 and 7\% in 2003. The four music majors are in the top 100 spenders on advertising and 2 of them are in the top 20. ("Evolution of the recorded music industry value chain", anonymous report) p. 13.


\textsuperscript{48} "The Recording Industry in numbers", IFPI, June 2007, p. 17; EMI says it invests over 20\% of revenues on musicians and music in more than 50 countries” – 2006 Annual Report.

\textsuperscript{49} DTI figures – "The Top 800 UK and 1250 Global Companies business R & D investment", 2006.

\textsuperscript{50} Comment from Naxos on 10\% and IFPI for the 12\%

\textsuperscript{51} Study entitled ‘The Recasting of Copyright and related rights for the Knowledge Economy’, October 2006, Institute for Information law, University of Amsterdam, page 112.


\textsuperscript{53} Under US Copyright law, broadcasters as well as a number of public venues are exempted from payments to rightholders, see Gowers Review of Intellectual Property, p. 49.
rights bill\textsuperscript{54}, which would significantly increase the scope of protection in the US and increase the appeal of the US market. Overall, record companies argue, the level of protection in the US will divert creative efforts away from European repertoire and performers and towards those markets that grant longer periods of protection and thus income. They point to a tendency for record producers to orient their productions to cater to the taste of those jurisdictions where most revenue could be achieved. Some economists point out that, over time, this could lead to fewer incentives to produce sound recordings that appeal to the European market\textsuperscript{55} and, in turn, to a decline in European repertoires and cultural diversity. However, it is difficult to assess the precise extent of this problem as other parameters than the term of protection may affect the investments of the record industry.

4.4. How would the problem evolve, all things being equal?

The impacts of 'doing nothing' are analysed in detail in section 7.1 below. Suffice it to say at this stage that, if nothing were done, this would have individual impacts on the roughly 24500 performers who will see their term of protection expire over the course of the next decade (24500 is 3.5 times the number of UK performers that, over the next decade, will lose protection. This multiplier was chosen because European sales account for roughly 3.5 times of UK sales). These performers will lose revenue from royalties and, more importantly, from equitable remuneration for broadcasting and communication to the public. They will also lose their entitlement to compensation for private copying.

On the other hand, there will be few, if any, positive impacts if nothing was done, as retail prices for consumes and equitable remuneration payments for commercial users are unlikely to be affected by the term of protection of sound recordings and performances. The only beneficiary of the 'do nothing' scenario would be 'public domain' record companies who could progressively re-issue sound recordings from the period between 1957 and 1967 without paying royalties to performers. As there is little evidence that records in which the rights of performers and producers have expired are cheaper than those still protected, the 'do nothing' option would lead to a shift in economic income from performers to "public domain" companies.

4.5. Does the EU have the right to act?

4.5.1. Treaty base

The Term Directive was adopted on the basis of the Articles 47(2), 55 and 95 TEC. Any amendment to this Directive should be based on the same legal basis because the subject matter covers the free circulation of services and the good functioning of the Internal Market. If alternative measures not involving modification of the Directive were chosen to be the optimal remedy to the problems identified in this IA, further consideration has to be given to the identification of the most appropriate instrument and legal base. Operational action may have to be taken at the level of Member States.

\textsuperscript{54} Performance Rights Act. Bill H.R. 4789, introduced on December 18, 2007, in the House of Representatives: "To provide parity in radio performance rights under title 17, United States Code, and for other purposes."

\textsuperscript{55} Liebowitz (February 2006), "What are the Consequences of the EU extending Copyright Length for Sound Recordings, report prepared for IFPI., p. 22.
4.5.2. **Subsidiarity test**

The length of protection of copyright and related rights has already been harmonised at EU level and falls under the exclusive competence of the Community. However, the harmonisation achieved in Directive 93/98/EEC was not complete in that, as provided for in its Article 10(1), certain Member States were allowed to keep longer terms of protection already in place before 1 July 1995, as is the case in Greece 56. Options involving a term extension (2a "life or 50 years" and 2b "95 years for performers and record producers") would involve modifications to Directive 93/98/EEC and thus could only be achieved at Community level.

4.6. **Summary of problems**

*Performers are treated unfairly, in financial, legal and social terms:* most performers are in a precarious financial and social situation. In addition, from a legal perspective, the importance of their contribution to musical creation is not appropriately recognised. They are granted lesser moral and economic rights than authors.

*The record industry faces significant challenges which undermine its competitiveness:* online piracy has lead to significant losses. The ability of the music industry to finance new talent and adapt to dematerialised distribution is severely undermined. In addition, the longer term of protection in the US risks undermining the production of European music.

*Consumers may not have access to the widest choice of music available at reasonable prices.* The opportunities offered by online digital distribution, allowing the dissemination of local repertoire and catering for niche markets, may not be fully seized by the music industry under the current conditions.

5. **OBJECTIVES**

The following graph presents an overview of the general policy objectives, the specific objectives and the operational objectives.

---

56 Article 52 of Law 2121/1993 provides for ‘life or 50 years whichever is the longer’ for performers. This applies to the last surviving performer of any set of performs who are members of the same group.
5.1. General objectives

*Promoting music production in Europe:* The protection of performers and record producers should ensure a sustainable level of creation. The European music industry should also play a leading role in promoting European music in the world.

5.2. Specific objectives

*Contribute to enhancing the welfare of performers in the music industry:* Performers should feel that they are receiving a just reward for their effort and creativity throughout their lives.

*Contribute to enhancing the competitiveness of the European music industry:* The music industry should remain competitive. It should be equipped to face the challenges of piracy and the opportunities of dematerialised distribution. It should not be at a competitive disadvantage, in order to preserve the place of European music.

*Increase available music repertoire:* the public should have access to a large and diverse choice of music.

5.3. Operational objectives

*Gradually align authors' and performers' protection:* The legal protection of performers should reflect the importance of their contribution to cultural diversity. They should not be

---

57 Competitiveness is a comparative concept of the ability and performance of a firm, sub-sector or country to sell and supply goods and/or services in a given market. In this case, competitiveness is used to refer in a broader sense to the economic competitiveness of the region (the EU) on global markets.
treated as second tier contributors to cultural diversity, in particular in comparison with authors.

**Incremental increase in the remuneration of performers:** Ensure that performers receive an increase in revenues from as many different sources as possible to alleviate their difficult financial situation, especially at the end of their lives. Revenues accruing to performers and in particular less well-known performers, who are mostly self-employed, will ensure they can devote more time to creation and possibly make a living from their artistic activities.

**Diminish the discrepancies in protection between the EU and US music markets:** The legal protection afforded to record producers should encourage investment and production of music for the European market.

**Incremental increase in A&R resources:** Revenue streams derived from current repertoire should be sufficient to finance a healthy A&R sector in the recording industry.

**Ensure availability of music at reasonable prices:** a balanced protection should both encourage the creation of music and ensure that as wide a public as possible can access it.

**Encourage the digitisation of back catalogue:** the widest possible choice should be offered to consumers, including niche and local repertoire.

### 6. Policy Options

Some of the options considered would be complementary to options involving a term extension. Apart from options 2a and 2b, other combinations of options are not mutually exclusive.

<table>
<thead>
<tr>
<th>Option</th>
<th>Sub-options</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Do nothing</td>
<td></td>
</tr>
<tr>
<td>2. Extend the term</td>
<td>a. Amend the term of protection for performers to &quot;life or 50 years&quot;</td>
</tr>
<tr>
<td></td>
<td>b. Extend the term of protection for performers and record producers from 50 to 95</td>
</tr>
<tr>
<td>3. Complementary measures not requiring term extension</td>
<td>a. Performers' equitable remuneration</td>
</tr>
<tr>
<td></td>
<td>b. Moral rights of performances</td>
</tr>
<tr>
<td></td>
<td>c. &quot;Use it or lose it&quot;</td>
</tr>
<tr>
<td></td>
<td>d. Fund for session musicians</td>
</tr>
</tbody>
</table>

**Table 2: Overview of Options**

**6.1. The wait and see option**

The **first option** is to leave the copyright acquis as it is.

**6.2. Options related to an extension of the term of protection**

The **second option** is to extend the term of protection. There are various possibilities (sub-options) for such an extension, all of which would require an amendment to the Term Directive, in particular to Article 3. There could be three options in the application in time of a term extension: it could apply only to new recordings, be 'partially' retroactive (applying to all recordings which are currently still protected) or be fully retroactive (applying to all recordings, including those in which the rights of performers and producers have expired).
Out of these three options, which are analysed in the Annex (section 2), the preferable option is to extend the term with 'partial' retroactive effect. This means that only recordings which are still protected at a certain date, such as the implementation date of the Directive, will benefit from the term extension. It is the simplest option to apply and brings immediate benefit to many right holders. It is also in line with previous practice, such as Directive 2006/115 (rental and lending Directive) and Directive 2001/29 (copyright in the information society).

6.2.1. Amend the term of protection for performers only to "life or 50 years"

Sub-option 2a amends the term of protection for performers only to "life or 50 years", whichever is the longer. This option ensures that the performer enjoys protection during his/her entire life. It would apply to the performers' exclusive rights and to the variety of 'secondary' remuneration or compensation claims that a performer enjoys under the acquis (see section 3.3 above).

6.2.2. Extend the term of protection for performers and record producers from 50 to 95 years

Under sub-option 2b the term of protection is extended from 50 to 95 years for performers and record companies. This option ensures equivalence with the term of protection in the US.

6.3. Complementary options not involving an extension of the term of protection but which improve the situation of performers

The third option comprises various possibilities which could improve the financial situation and moral rights of performers without necessarily extending the term of protection. These measures could be used either as alternatives to a term extension or as complementary measures to an extension of the term of protection for performers.

6.3.1. Create an 'unwaivable right to equitable remuneration' for performers who transfer their rights to record companies

This impact assessment previously describes how performers contractually transfer their exclusive rights (including their reproduction, distribution and making available rights) to record labels. As a result, performers are often deprived of a fair share of the revenues generated from the exploitation of their performances. To address this issue in relation to the rental right, Article 4 of Directive 2006/115 provides for an unwaivable right to remuneration to which authors and performers remain entitled even after having transferred their rental right to a producer. In view of the fact that performers do not enjoy any share in the money collected by record producers for sales of music on the internet, one option to improve the social situation of performing artists would thus be an amendment to extend the scope of Article 4 of the Rental and Lending Directive to also cover the situation when the making available right is transferred. The remuneration right would have to be administered by a collecting society.

58 Concretely, one would have to substitute the number '50' by '95' in the respective paragraphs in Article 3 of Directive 2006/116/EC.
The impact assessment identifies three possible approaches in respect to the issue of who should pay the equitable remuneration to performers. It could be paid by a number of stakeholders: (1) equitable remuneration could be paid by users and distributors. Such payment will be likely to occur through a collecting society, because performers are not contractually linked to distributors; (2) equitable remuneration could be paid by record producers and (3) it could be left to interested parties to decide who pays the equitable remuneration to performers.

For example, Article 108 of the Spanish IP Code stipulates that, where a performer has transferred his exclusive 'making available' right, he retains an unwaivable claim to equitable remuneration. The remuneration has to be paid by whoever makes the fixation of his performance available, usually online music providers, and the claim is exercised against them by collecting societies. Since this provision was only introduced in July 2006, collecting societies have not yet collected any monies under the new provisions. It is thus too early to say whether this scheme of collectively administered performers' remuneration will work in practice.

It is, at this stage, also hard to quantify the financial benefit that would arise from a remuneration claim for the making available of performances online. A study conducted by the French collecting society ADAMI suggests that a performer receives between € 0.03 and 0.04 for a download sold at € 0.99\textsuperscript{59}, and that online music yielded € 120 million in revenues in the EU in 2004\textsuperscript{60}. This implies that the new claim would yield roughly between € 3.6 million and 4.8 million per year. This compares to approximately €351 million collected in 2005 by performers' collecting societies' from single equitable remuneration, private copying levies and the rental right\textsuperscript{61}. Given the fast pace of change in the online music market, which is far from mature, it is also difficult to predict how such figures would evolve in time.

Moreover, the uncertainties surrounding the issue of who should pay this 'equitable remuneration' also contribute to the difficulties in quantifying its impact. Should equitable remuneration be paid by the record producers, the latter would likely shift the overall payment burden to performers by reducing royalty payments and the buy-out fees to session musicians. On the other hand, if payment of equitable remuneration were made incumbent on online retailers or operators of similar online services, such a measure might well complicate the administration of online rights. Indeed, online retailers, in order to offer legitimate services, would now have to clear another right with a collecting society representing performers. Finally, if it were left open to interested parties to decide who should pay the claim for 'equitable remuneration', as is the case under Belgian law, the entire option might well become moot.

In light of the uncertainties surrounding the practical administration of the claim for equitable remuneration, this option appears untimely, as further study would be required to assess its impact. While in the future this option might well be introduced to enhance performers participation in revenue generated online, it cannot be considered at this stage.

\textsuperscript{59} ADAMI study, 'Filière de la musique enregistrée : quels sont les véritables revenus des artistes interprètes?' (April 2006), p.27.
\textsuperscript{60} Study for the European Commission, 'Interactive content and convergence' (2007), p. 42 (source: Screen Digest).
6.3.2. Moral rights of performers

Several Member States recognise the moral rights of performers but to a lesser extent than they recognise the rights of authors. The moral rights of performers could be strengthened. The scope of their moral rights could be harmonised to include a right to restrict derogatory uses of their performances. However, since moral rights have not been harmonised at Community level, it would be preferable that Member States strengthen the protection of moral rights under their national laws.

6.3.3. A "use it or lose it" provision for performers' rights

A safety net protecting performers against practices which deprive them of the benefits of a term extension could be promoted. This could take the form of a so-called "use it or lose it" provision. Use it or lose it provisions are currently in force in some EU Member States for authors' rights and in some cases for performers. We have learnt from our discussions with stakeholders that some independent record companies transfer rights back to the performer if they are not selling his record any more.

The effect of a use it or lose it provision would be to allow the performer to move to another record company or exploit a recording himself if the producer does not exploit it. This provision would also apply should the record company decide to only use certain channels of distribution (like sales of CDs) but not others (like online sales). In order for a use it or lose it clause to achieve this result, however, it must also be clear that the producer cannot use his exclusive right in the recording to oppose the new exploitation or ask for remuneration which would render the exploitation of the performance not viable economically.

"Use it or lose it" provisions could be made mandatory, in order to ensure that all performers benefit from them. However, as they must articulate with existing national copyright and contract legislation of the Member States, sufficient flexibility should be allowed for the transposition of such a provision.

6.3.4. Create a fund for session musicians

In order to ensure that the benefit of term extension would accrue to performing artists, especially session musicians that have transferred their related right against a one off payment, the extension of protection for record companies should be accompanied by a payment of 20% of the increased revenues the record companies will enjoy into a fund, set up in each record company, dedicated to improving the situation of performers, including session musicians whose performances are used in recordings. The basis for calculating this percentage would comprise producers' revenue (and not profit) from: (1) the sale of sound recordings and (2) online distribution of sound recordings.

---

62 Austria, Belgium, Germany, Luxemburg, Nordic Countries, Portugal and Spain.
63 Denmark (articles and of the Danish Copyright Act) and Germany (articles 41 and 79(2) of the German Copyright Act).
64 Comment from the Chairman of IMPALA (the independent music label association) on 5 December 2007.
65 In order to have the financial volume necessary to ensure real benefits for session musicians, this IA proposes that the fund should reserve at least 20% of the annual revenue that accrues during the extended term. This fund should be administered by each record company in close cooperation with performers and their representatives. Such an obligation would be in line with an earlier commitment by
7. **ANALYSIS OF IMPACTS**

This section looks at the economic and social impacts resulting from the options presented above. For purposes of better presentation such impacts are presented according to the group of stakeholders that is affected by the option in question. Environmental impacts are neglected since they are marginal. If there is no obvious impact on one group of market players, they are not necessarily mentioned in the impact analysis.

7.1. **Doing nothing**

7.1.1. **Impact on performers**

Over the next 10 years performers and records producers will lose their neighbouring rights over an increasing amount of recorded music (those recorded and released between 1957 and 1967). It is estimated that around 7000 performers, in the UK alone, will lose all of their airplay and reproduction-related payments (e.g., the 'single equitable remuneration' for broadcasting and any communication to the public and compensation for private copying) over the next ten years\(^{66}\). This concerns the thousands of anonymous session musicians who contributed to recordings in the late fifties and sixties. Their income will stop when they are at the most vulnerable period of their lives, i.e., as they are approaching retirement.

For those individual performers affected by the expiry of their term, this would entail an annual loss of between €181 and €3663 in equitable remuneration payments that they currently receive\(^{67}\).

Moreover, in view of the current and suggested future steady increase in digital sales many older sound recordings get a second life in the digital format. Performers whose performances fall into the public domain will lose out on immediate and future revenues from the digital exploitation of recordings. Furthermore, income from primary exploitation, such as sound recording sales may stop. Only the big names will enjoy financial security and good bargaining power with record companies.

The number of performers able to sustain a long term livelihood from their performances would perhaps decrease, and performers would not be able to devote as much time to their artistic career. Over time, the problem will worsen as the rights of performers and record producer will expire in an increasing numbers of recordings. Finally, in several Member States performers would also not be in a position to restrict objectionable uses of their performances.

---

\(^{66}\) UK House of Commons Committee for Culture, Media and Sport, May 2007.

\(^{67}\) According to the AEPO study ('Performers' Rights in European Legislation: Situation and Elements for Improvements', July 2007), collecting societies in the EU, in 2005, collected €351 million and distributed this sum to around 400000 performers. This revenue is not evenly distributed. 77-90% of the revenue is distributed to 20% of the performers. On average €293 million is distributed to 80000 performers, whereas €58 million is distributed to 320000 performers. The average annual income per performer that is attributable to secondary remuneration claims therefore ranges between €181 and €3663 per year.
7.1.2. Impact on record producers

Record companies will continue to suffer from piracy and spend a lot of money on anti-piracy law suits. The financial situation of record producers would not improve. While popular recordings from the 50's and 60's are still in demand and the record company that holds the master copy would still derive revenue from their exploitation, this revenue stream might now be subject to competition from re-releases by public domain companies. Indeed, an increasing number of popular performances (from the golden 1950s and 1960s) will fall into the public domain and the revenue from these recordings will no longer be available to fund the production and marketing of new recordings (see below).

Record producers would still receive remuneration for 'secondary' forms of exploitation, in particular their share of the 'single equitable remuneration' for broadcasting and communication to the public of music. These revenues would not be significantly affected by some records falling out of protection. According to KEA, they amounted to € 293 million in 200468.

7.1.3. Impact on broadcasters and public venues where music is played

While the rights of performers and record producers will expire in certain recordings, this would not affect the fees paid by broadcasters and public venues for using music. Such fees are not calculated on a 'per track' basis and the amount of recordings which are no longer protected by related rights is thus not relevant to establishing the fee.

Broadcasters (TV and Radio) pay the 'equitable remuneration' due to performers and record producers via a variety of payments, all of which are not linked to the number of performances and sound recordings protected by copyright. For instance, commercial TV broadcasters pay a percentage of their total revenue (France), net broadcasting revenue (UK), or advertising (Germany). In Germany, an additional graduation is made according to the percentage of music that is contained in the broadcast. Cable re-transmitters, for example, in Germany, pay on the basis of their subscription income. In addition, equitable remuneration by broadcasters represents a relatively small share of their revenues. According to IFPI estimates, only 1% of broadcaster's total revenue is paid to rightholders in 'equitable remuneration'.

Equally, public venues where music is played – bars, hairdressers, fitness studios or doctors – do not pay on a 'per track' basis. These establishments pay according to seating capacity (UK, hairdressers), square meters (Germany, bars, hotels, hairdressers, UK, public houses, pubs, restaurants), revenue (France, discothèques), on the basis of the number of instructors (UK, gyms). In Germany and France, the revenue for related rights is sometimes calculated as a percentage of the revenue charged for authors. Again, those payments are not influenced by the number of performances or sound recordings that are in copyright.

7.1.4. Impact on public domain record labels

By doing nothing, public domain record companies would continue to profit from a larger share of sound recordings, from late fifties and sixties, which would no longer be protected by the rights of performers and record producers.

7.1.5. Impact on consumers

There is no clear empirical evidence that price difference between sound recordings that are in- or out-of copyright would be significant. This would imply that public domain companies would not necessarily sell sound recordings at prices lower than those applied to protected recordings marketed by recording companies. Thus if the term of protection were not extended the economic rent would be shifted away from the artists and record producers to the public domain labels. While this may be good for public domain record labels it is not beneficial to cultural diversity, because the revenue would not be redistributed to performers nor used for A&R.

7.1.6. Impact on cultural diversity

By doing nothing there may be a risk that a percentage of recordings phonograms in regard of which the performer and the phonogram producer are no longer protected disappear due to a lack of stewardship by the original record company. Once out of protection, and thus of lesser value, there will be no incentive to 'look after' master copies of old recordings and public domain companies will only reissue the better known and potentially profitable repertoire. Cultural diversity might therefore suffer.

7.1.7. Impact on information society services

The impact on digital libraries and other services which organise collections of digital content made available to the public would be neutral. While digital libraries would have to clear the rights of producers and performers in phonograms for an additional period, it should not be forgotten that, even after expiry of all neighbouring rights in a phonogram, the rights of the author of the musical compositions performed and recorded must still be cleared during the entire life of the author plus seventy years thereafter. Information society services would, even in the absence of term extension, be obliged to clear a variety of authors' rights.

7.1.8. The international dimension

The gap in length of protection as compared to the US would not be closed. Records produced or recorded in the EU are protected in the US for 95 years. Investors would be more inclined to support creators who produce sound recordings destined for the USA as a recording popular in the US market would bring them better revenue streams for a longer period than a recording popular in the EU.

7.2. Extend the term of protection for performers to "life or 50"

7.2.1. Impact on performers

A term extension to life or 50 years whichever is longer, will benefit all performers. The financial benefits to performers will be positive (see further, section 7.3.1.)

Extending the term of protection would also lead to more fairness in the remuneration of all performers: also It would lead to increased revenues for performers whose performances experience popularity late after the initial release of the record. For example, the song 'Build me up Buttercup', performed by 'The Foundations' and released in 1968, was used in the film

---

69 See 17 U.S.C. 104. The US does not apply a 'comparison of terms' with the term of protection in the EU and thus grants the full 95 years term of protection to EU phonograms.
'There's Something About Mary' (1998). The sudden renewed interest in this tracks brought significantly increased earnings to the performers. An extended term would ensure that performers or their heirs do not see commercially successful exploitations free-riding their performance and are not unfairly deprived of their share of the revenues. In addition, performer's 'life' in the term of protection would also mark a convergence between the legal protection of performers and authors. This is because linking a term to the life of the creator is indirectly an acknowledgement of the personal nature of the creator's contribution. Academics indeed point out that linking the term of protection to the life of creators acknowledges to some degree the personal nature of their creative contribution and this is one reason why the term of protection of an author is linked to the individual author's life. As Mick Hucknall states: "Modern music, especially popular music, with its roots in the oral traditions of the blues, country and folk music, lays far greater emphasis on the characteristics of performers and performances, than on the nuances of composition or musical structure. Given the huge increase over the past 50 years or so in the importance of sound recordings to consumers, the law should strive to catch up and grant performers equivalent protection to composers."70

In those Member States that recognise some moral rights of performers only for the duration of the economic rights, performers would also be protected during their entire lifetime. However, in Member States which do not recognise the moral right of performers to restrict objectionable uses of their performances, performers would remain powerless to prevent such uses.

7.2.2. Impact on record producers

For record companies, the term extension for performers would bring a smaller financial impact than an extension to 95 years (sub-option 2b). Even though producers' rights would not be affected by this option, producers would benefit from additional sales revenue when they have been assigned of the performers' exclusive rights of reproduction, distribution and 'making available' online.

7.2.3. Impact on broadcasters and public venues where music is played

There is no evidence that TV broadcasters or venues that perform sound recording in public (bars, discotheques, hairdressers or doctors) would have to pay more for the blanket licenses covering the 'secondary' uses they make of a performance incorporated in a sound recording71. The Gowers report argues that, once protection in a sound recording ends: "No royalties are due for that recording and fewer licences are required to play those songs. … Because the cost of licences reflects the royalties payable to the copyrights, as those copyrights expire, so the cost of licences will fall"72. This implies that broadcasters or the operators of venues where a public performance occurs pay royalties for sound recordings on a 'per-track' basis. However, this is not the case, as explained above (see section 7.1.3).

---

70 Mick Hucknall, Simply Red (UK), Speech to AIM Annual Assembly, June 2004.
71 For example, the BBC alone uses around 180,000 music items per week and spends over £230 million a year on the acquisition of IP rights from programme contributors (actors, writers, musicians and presenters) in BBC-produced programmes.
7.2.4. Impact on public domain labels

An extension covering life of the performer or 50 years, whichever is longer, will imply that those record companies that republish so-called "public domain" music under their own labels will have to wait longer for recordings to fall out of copyright. However, the term extension would only marginally affect the availability of sound recordings phonograms in regard of which the performer and the phonogram producer are no longer protected, because it is not fully retroactive, and thus the recordings which are currently free of any related rights would remain so. Moreover, performances which have fallen into the public domain are not always freely available for public domain labels to use. This is because several Member States allow performers to use their moral rights to restrict certain uses of performances even after the performance has fallen into the public domain. Performers can for example restrict the re-release of public domain records which have not been re-mastered, object to the inclusion of their performance in new compilations or even to a sales environment which is detrimental to their reputation. For instance, the French performer Henri Salvador was allowed to object to a public domain label issuing a cheap and low quality compilation of his early performances73.

The impact of the term extension would also be limited as there are very few labels that specialise exclusively in distributing copies of records which are in the public domain. Music is truly in the public domain once both (a) the copyright in the musical composition and (b) the neighbouring rights of performers and record producers have expired. There are very few labels distributing such music, and they tend to be very small, release a limited number of recordings and employ very few people - in fact, they are usually a one-man operation74. However, other so-called public domain labels tend to focus on releasing new recordings of compositions which are in the public domain (essentially classical music). This is for example the case of Naxos, a leading public domain label75. For Naxos, reissuing public domain music is only a marginal part of its activities, and in this sense, the company acknowledges it would benefit from an extension of the term of protection76.

Any negative effect on public domain labels would also have limited, if any, knock-on effect on performers. Indeed public domain companies have no A&R costs and they do no discover and develop new talent.

7.2.5. Impact on consumers

As broadcasters and other venues that owe equitable remuneration for broadcasting and any communication to the public do not pay on a 'per track' basis, the impact of a life or 50 year term is neutral on these operators and thus on consumer prices (e.g., licence fees to public

73 In a judgment delivered on Thursday 15 November 2007, the Paris Court of Appeal ruled in favour of Henri Salvador by holding that a song, even if recorded more than 50 years ago and thus in the public domain, cannot be used without restrictions. The Court of Appeal condemned the company for having violated Henri Salvador's moral rights in his works and performances by publishing a compilation of his songs without his prior authorisation and awarded € 85000 of damages to the artist (including € 35000 for the moral rights as a performer and € 30000 for the moral rights as an author). Paris Court of Appeal, November 14th, 2007, SARL Jacky boy Music v Salvador, JurisData : 2007-349990.
74 Sepia Records has a catalogue of 80 titles from the 1930s to the 1950s and has one employee; Flare Records has a catalogue of 45 titles and has one employee; Windyridge has a catalogue of 76 titles.
75 For example, in 2005, Naxos released 194 new recordings of currently unavailable works that had fallen into the public domain.
76 As acknowledged by Naxos in its response to the Commission questionnaire on the term of protection for sound recordings, point 61.
broadcasters). In addition, a life or 50 year term for performers only would have no impact on retail prices as the performers' share on a retail sale is very low.

7.2.6. Impact on cultural diversity

Term extension for performers only will also lead to some financial benefit for record producers. This might result in a limited increase in A&R investments, the development and the promotion of new artists. Without a significant improvement of the financial situation of the recording industry there might be less opportunities for promoting performers in both popular and niche repertoire.

7.2.7. Impact on information society services

The impact on digital libraries and other similar services would be negative. However, it is difficult to identify such services and to quantify to what effect they would be affected, given that have yet to fully develop on the market.

Clearing the rights of performers would be more complex, as it would involve identifying all performers whose performances are embodied in a sound recording. Moreover, when the term of protection for record producers and performers is the same, all the rights can be cleared from the record producer. This is because the producer has an assignment from all the performers who perform on the record. If the rights of performers only are extended, it may no longer be possible to clear the performers' rights from the producer, and the rights of each performer would have to be cleared individually during the extended term.

7.2.8. The international dimension

A term extension for performers only would have a negligible impact on the flow of royalties between the EU and the US. Section 7.3.7 describes in more detail why the impact on royalty flows would not be significant.

7.2.9. Administrative burden

Extending the term of protection for performers would require an amendment to Directive 2006/116/EC and Member States would then have to amend their national laws accordingly. This would only require Member States to adapt their existing laws covering performers. The administrative burden incumbent on Member States would be considerably lower than introducing a new law.

However, linking the term of protection to the lifetime of performers would raise complex issues, essentially because co-performances, i.e. performances by a band, an orchestra or a featured artists accompanied by session musicians are the rule.

This leads to an increased legislative burden for Member States. There are currently no rules providing for the calculation of the term of protection for co-performances, because the event which triggers the current term of protection is the publication of the performance. If the event triggering the term of protection is the death of a performer, then, when several

---

77 Under international and national laws, performers enjoy rights in their performance, unlike copyright, irrespective of its originality. It is likely that all performers would have to be taken into account to calculate the term of protection.
performers contribute to a recording or performance, it might seem more appropriate to calculate the term from the death of the last surviving performer, but this could also lead to excessively long terms of protection. Alternatively, it could be provided that the contributions of session musicians should not be taken into account to calculate the term of protection. However, there are currently no Community rules on this matter. The analogy with the term of copyright protection of co-written works is of limited assistance, as there are no Community rules on the calculation of the term of protection for co-written works.

In addition, the calculation of the term of protection from the death of the performers would also have a negative impact on tracking costs and transaction costs. Tracking costs are the costs of identifying the performers whose performances are embodied in a sound recording and registering their death. In practice, it would be excessively cumbersome to identify all the members of an orchestra, which includes more than 80 musicians, and of session musicians which are hired on an occasional basis to perform certain parts or instruments in a recording. Because session musicians are paid a flat fee for the assignment of their rights, the recording companies do not keep track of them. In addition to identifying performers, the databases used to manage performers' rights and to calculate the term of protection would then have to be modified to include additional data on the death of all the performers in a sound recording. In addition, for collecting societies, the cross-border administration of rights would also become more complex and more expensive. This could be even more complex if Member States adopt different rules on the calculation of term for co-performances.

Finally, the term of protection of co-performed musical works would give rise to legal uncertainty, because the term of protection would no longer depend on an easily identifiable and certain event, namely the date of publication or broadcasting of the record. Instead, the term of protection would depend on two factors: first, which performers are performing in the record, and second, the date of each performer's death. Third parties exploiting a record which they believe in the public domain would face the risk of unidentified performers bringing claims in sound recordings and thus extending the term of protection of that record.

7.3. Extend the term of protection for performers and record producers from 50 to 95 years

7.3.1. Impact on performers

The effect on performers would be more extensive than under the 'life or 50 years' term. For instance, Edith Piaf's interpretation of 'Non, je ne regrette rien', recorded in 1960, was used in the film 'La Môme' (2007), and experienced renewed success. However, as Edith Piaf died in 1963, the term of protection under the "life or 50 years term" would effectively not be extended and expire on 1st January 2011, thus leading to a shortfall after that date. Under the 95 years option, the recording would be protected until 1st January 2056.

---

78 This would be possible because the minimum term of protection required under international agreements (50 years from end of the calendar year on which the performance took place, under Article 14(5) of the TRIPs agreement) would be complied with. However, it would require articulating in legal term a difficult distinction between session musicians and other performers.

79 In effect, collecting societies often exploit each other's repertoire on their own territory and exchange information and payments under so-called "reciprocal agreements". For a more detailed explanation of the cross-border management of copyright, see 'Impact Assessment Reforming Cross-Border Collective Management Of Copyright And Related Rights For Legitimate Online Music Services', SEC (2005) 1254, p.6, available at http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf.
Performers derive revenue both from royalty income linked to the sale of sound recordings and from secondary remuneration claims linked to the broadcasting and communication to the public of their performances. As the overall level of revenue generated from secondary remuneration claims should not increase because of the term extension, the impact is difficult to determine. Individual performers would however benefit from income streams for 45 additional years.

For the sale of sound recordings, the PWC study estimates the present value of performers' and producers' additional income in the extended term between €44 and €843 million in the EU (see section 7.3.2). On this basis, an estimate of the additional annual revenue accruing to performers from a 45 year term extension can be drawn up.

The calculation of annual revenue for an average performer is based on a variety of assumptions that are further explained in the Annex, section 3. These assumptions concern the distribution of financial benefits between performers and record producers (performers getting 10% and producers 90% of the revenues), the annual distribution of the overall present value gain and the number of performers that would benefit from a term extension. On the basis of these assumptions, the additional term of protection would generate between €46 and €737 per performer per year. Just as for the 'life or 50' option, one should also mention that a term extension would be a boost for performers' and session musicians' social status. They will feel that their artistic contribution is properly valued by society.

7.3.2. Impact on record producers

Several economic studies attempt to analyse the impact that a term extension from 50 to 95 years would have on the sales revenue of record producers. All of them come to the conclusion that an extension would have some financial benefits; however they are not unanimous on how large this benefit would be. This IA is based on three principal studies submitted by stakeholders. These studies consider the future revenue stream that record companies can expect to receive from an additional 45 years of protection and compare this revenue with the revenue stream generated during the initial 50 years of protection.

---

80 These studies are: 1) Liebowitz (February 2006), "What are the Consequences of the EU extending Copyright Length for Sound Recordings, report prepared for IFPI. ("Liebowitz"); 2) PriceWaterhouseCoopers (April 2006), "The Impact of Copyright Extension for Sound Recordings in the UK", report prepared for BPI. ("PWC"); 3) Centre for IP and Information Law (2006), "Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings", report prepared for the Gower's review. ("CIPIL")

81 The estimates vary on account of the basic assumptions that each study makes with respect to three key parameters: (1) the discount rate that is applied to determine the present value of future income that results from term extension; (2) assumptions as to the depreciation of annual sales value with the passage of time (so-called 'cultural depreciation'); (2) the possible loss of market share upon expiry of the 50 year term. The choice of the discount rate is one of the core issues addressed by all of the studies surveyed. The authors of these studies find it difficult to choose the appropriate discount rate, especially in relation to a 45 year period in the future. Due to differences in the appraisal of the risk inherent in the production of sound recordings, the three studies apply discount rates that range from 3% to 9% in real terms (Liebowitz: 3-6%; PWC: 9% and CIPIL: 5-9%). The European Commission Impact Assessment Guidelines SEC(2005) 791, (p. 37), recommend, on the other hand, application of a standard discount rate of 4%. This rate broadly corresponds to the average real yield on longer-term government debt in the EU over a period from the early 1980s onwards. The economics of copyright literature is, however, unanimous that using a 4% discount rate to calculate the present value of a 45 year term extension yields results that are too optimistic. For the purpose of this analysis, therefore, more conservative estimates are presented.
Estimated future revenue from extension is then calculated as a percentage of the revenue achieved in the initial 50 years. The uncertainty that accompanies these studies is understandable since estimates must cover almost five decades. Besides, not all impacts are of economic dimension.

The three studies come to the following conclusions as to the percentage that estimated future income generated in the extra 45 years of protection represents when compared to the income achieved in the initial 50 years: Liebowitz: 3-14%; PWC: 0.1-1.9%; and CIPIL: <1%.

The PWC study is the only study based on actual data and enables us to add a concrete dimension to the results. This study applies to the UK and it analyses the revenues from music sales, license fee income and other royalty income. The value of the initial 50 year term for sales in the UK is calculated to reach £ 8.568 billion. The high-end estimate of total present value of the 95-year period would amount to £ 8.731 billion, whereas the low-end estimate would yield £ 8.576 billion. A 45 year extension of the term of protection would create between £ 8.4 million and £ 163 million in additional revenues. The PWC study is limited to the UK sales revenue. As EU sales are 3.5 times larger than the UK sales, it can be roughly estimated that a 45 year term extension would generate between € 44 million and € 843 million in additional revenues for the EU. If record producers get 90% of the sales price and performers only 10%, the benefit to record producers would yield between € 39 million and € 758 million. If a fund of 20% were set up for performers, the benefit to record producers would decrease to between € 31 million and € 607 million.

If the benefit from term extension were to be calculated on the basis of other, higher estimates (using a lower discount rate) (see Liebowitz study), the music industry could get an additional £ 1.182 billion in the UK. Extrapolated to the EU level, this would yield to over € 6 billion. However, some economists have expressed reservations on this high-end estimate. This is due to the fact that Liebowitz relies on very optimistic assumptions with respect to the discount rate, the continued popularity of repertoire (the so-called 'cultural depreciation') and the potential loss of market share if the term of protection expires.

7.3.3. Impact on broadcasters and public venues where music is played

For the reasons explained in relation to the 'life or 50' term extension for performers (see section 7.2.3), there would be no impact on prices paid for broadcasts and performances of music in public venues.

7.3.4. Impact on public domain record labels

The impact of a term extension for both performers and record producers would be similar to the impact of a term extension for performers only (see section 7.2.4). This is because record producers are usually granted an assignment of the performers’ rights. The longer term would imply that the impact on public domain labels would last longer. Their loss of earnings would be equivalent to the additional earnings of record producers (see section 7.3.2).

---

82 The higher range estimate assumes, in favour of the proponents of term extension, that the expiry of copyright entails a 100% market share loss, whereas the lower end estimate assumes no market loss.
7.3.5. Impact on consumers

A term extension would have no negative impacts on consumer prices and would have a positive impact on the quality of services offered to consumers as well as on consumer choice. It would send a clear signal that the interests of the music industry and of consumers are not opposed but instead concur on a competitive music market.

The impact of on consumer prices is expected to be minimal. The only study that compares prices for in-copyright and out-of-copyright sound recordings is the PWC study on "The Impact of Copyright Extension for Sound Recordings in the UK". The PWC study looks at 129 albums recorded between 1950 and 1958. It finds no clear evidence that records in which the related rights have expired are sold systematically at lower prices than records which are still protected.

Other studies have considered the price impact of copyright protection. For instance, the Gower's review relies on a study analysing the impact of copyright on the price of books, and relies on partial results of that survey. Studies on books are not directly relevant to the impact of copyright on prices of sound recordings. This is because books are only subject to one copyright (i.e., of the authors) while sound recordings, as well as being protected by the related rights of producers and performers, incorporate copyright protected musical works. Thus when the related rights in the sound recording have expired, the copyright in the musical composition often has not. As a result, the gradual "de-protection" (first the neighbouring rights, then the authors in co-written) leads to even less price fluctuations as with books. However, even in the category of books, either no overall price difference is found between samples of books in- or out-of-copyright, or the impact of copyright on the price is extremely model-dependant and therefore the estimates obtained cannot be very robust. Given the lack of widely accepted models and the length of the time span, it is fair to say that there is no clear evidence that prices for sound recordings will increase due to term extension.

Consumers can also access music online or from mobile phones. The digital music market is growing and currently accounts for approximately 15% of the music market worldwide. The various pricing models of online music clearly show that whether a sound recording is in or out of copyright is not a relevant factor to determine consumer prices. For instance, as far as "download to own" is concerned, several music vending platform operate by selling tracks individually, for instance MSN Music, Nokia Music Store, iTunes, Napster Light.

---

83 PriceWaterhouseCoopers (April 2006), "The Impact of Copyright Extension for Sound Recordings in the UK", report prepared for BPI.
85 The Gowers review relies on Heald (2006). In the whole sample of bestsellers, no difference in price is to be found, which is however not true for the much smaller sub-sample of durable books (i.e. most enduringly popular), where books in-copyright were priced higher than books out-of-copyright. Gowers presents only these latter results.
86 MSN Music operates in Austria, Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Spain, Sweden and the United Kingdom.
87 Nokia Music Store operates in France, Finland, Germany, Ireland, Italy, Netherlands, Sweden and the UK.
88 iTunes operates in Austria, Belgium, Denmark, Germany, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, Spain and the U.K., at the same price. See Apple press release, London, January 9, 2008.
89 Napster operates in Germany and the UK.
Musicload.de^{90} or Fnacmusic.com^{91}. The vast majority of these services sell tracks at a single fixed price^{92}, whether or not it is in copyright or not^{93}. Other business models offer their customers access to music on a subscription basis, either for a limited number of downloads or on an "all you can eat" basis (unlimited downloads). Such services, for example Omniphone Music Service^{94}, FNAC musique illimitée^{95}, eMusic^{96} (which includes the complete classical music catalogue of Naxos Records) or Napster to go, charge a monthly fee whatever the tracks downloaded, i.e. whether they are in copyright or not. Finally, some services offer music "bundled" with another product such as a mobile phone ("Nokia comes with music^{97}") or services such as Internet Access (for example, in France, Neuf Cegetel bundled with access to Universal's catalogue or Alice bundled with EMI's catalogue). Again, in that case, it is clear that the price paid by the consumer is the same whether he downloads music which is in or out of copyright. Finally, it should be noted that public domain companies do not release their sound recordings on the internet, but instead only sell them as CDs.

The above circumstances would indicate that the very small copyright payments to performers and the producers of sound recordings might not be the most relevant factor determining retail prices. This is partly because sound recordings are only fully in the 'public domain' when both the related rights in the performance and the record and the copyright in the musical work are no longer protected. Accordingly, other than classical music, few records are completely in the 'public domain'. Moreover, the sound recordings will still be protected in the US where the term of protection is 95 years. Making available a work on the internet would therefore not be possible on a global scale, because the making available would amount to an infringement of the record producer's rights in the US^{98}. Moreover, sound recordings compete with all other sound recordings of the same genre for the same audience whether they are in or out of copyright^{99}. This competition between protected recordings and between protected and non-protected recordings keeps prices down.

The impact on the quality of the products and services offered to consumers might also be positive. Although competition in offering public domain sound recordings might increase

^{90} Musicload.de operates in Germany.
^{91} Fnacmusic.com operates in France.
^{92} With some exceptions, such as Musicload in Germany. Several factors come into account in Musicload's pricing, such as the price of the album in relation to the number of tracks, and the duration of the tracks.
^{93} MSN Music: €0.99 per track; Nokia Music Store: €1.00 per track, £0.80 in the UK; iTunes: € 0.99 per track; Napster Light: €0.99, £0.79 in the UK; Fnacmusic.com: €0.99 per track.
^{94} UK.
^{95} France.
^{96} Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Poland, Slovenia, Spain, Sweden and the UK.
^{97} Yet to be launched.
^{98} In the US, the Federal term of protection only applies from 1972. All records previously released are still protected under most state laws and are not pre-empted under federal law. Only in 2067 will the rights in records start falling in the public domain in the whole of the US under federal law. See New York Court of Appeals, 5 April 2007, Capitol Records, Inc. v. Naxos of America, Inc, decision: USCOA,2 No. 30.
^{99} "In the vast majority of instances, copyright provides no monopoly power to the copyright owner and the only cost advantage that would accrue to consumers of non-copyright protected works would be the saving for not having to pay the creator of the work" (Liebowitz, February 2006, 'What are the Consequences of the EU extending Copyright Length for Sound Recordings', report prepared for IFPI., p. 22).
their quality, it is not clear that this is the case. Indeed performers and record producers have an interest in defending their artistic integrity and their reputation which ensures that they offer only the highest quality recordings to the public. In contrast, some public domain companies re-release recordings without due regard for the quality of the recording, without re-mastering old titles, and often without regard for the value of the performance. Instead, the records are used as cheap promotional material to bring consumers to supermarkets. This is true to such an extent that in some instances, such as the Henri Salvador case\textsuperscript{100}, the moral rights of the performer can be infringed. Also, the record company which continues to exploit a sound recording has an incentive to maximise the value of the recording. Record companies therefore invest heavily in the promotion and marketing of their records – up to 16% of their revenues\textsuperscript{101} – thus ensuring that there is demand for those sound recordings and that they reach a wide audience.

Likewise, it has been seen above that very few public domain companies market records which are genuinely out of copyright, i.e. when the copyright in the musical composition and the related rights in the phonogram and performances have expired. While some companies do, they perform this on a very limited scale, and the sound recordings are not available for download. Indeed when all rights have expired, there are few incentives to publish old sound recordings, because any competitor can free ride the effort expended in digitising and marketing the sound-recording.

The \textit{impact on consumer choice} is also expected to be positive. In the long run, this is because a term extension will benefit cultural diversity by ensuring the availability of resources to fund and develop new talent (see below). In the short to medium term, a term extension provides record companies with an incentive to digitise and market their back catalogue of old recordings. It is already clear that internet distribution offers unique opportunities to market an unprecedented quantity of sound recordings. The major download services currently offer more than six million tracks available online. In addition, many recordings are now expected to enjoy a 'second life' on the Internet. Since digital distribution can represent new cheaper ways in which to offer a very wide variety of recordings on a global scale, record companies will be incentivised to benefit from what has been coined as the 'long tail' effect – low sales volumes in small markets (especially in the digital online context) which can collectively add up to and even rival the relatively few bestsellers\textsuperscript{102}. For instance, in the UK, the top 40 single tracks account for only 10% of all tracks downloaded, while the 'long tail' accounts for most online sales volume\textsuperscript{103}. Universal’s download only re-issue programme, which includes only “deleted” recordings, launched in 2006, has prompted 3 million downloads since its launch in 2006. Many record companies will make their entire back catalogue available online and the still popular sound recordings from the 1960s will experience a further upturn in sales as a result of an expansion in digital distribution. For example, Universal makes available to consumers 18 000 previously ‘deleted’ tracks and the digitisation of its back catalogue should

\textsuperscript{100} Paris Court of Appeal, November 14\textsuperscript{th}, 2007, \textit{SARL Jacky boy Music v Salvador}, JurisData : 2007-349990, see above, section 7.24.

\textsuperscript{101} ADAMI study, 'Filière de la musique enregistrée : quels sont les véritables revenus des artistes interprètes?' (April 2006), p.13.


reach 60,000 tracks by the end of 2008; Deutsche Grammophon offers a music download service which includes 2,500 albums, 600 of which are not available on CD\textsuperscript{104}. This contributes to enhancing consumer choice as many recordings that are not available in retail stores due to limited shelf space can now be made available online. Older or niche European repertoire will be more widely available. While it might be expected that public domain companies would make more recordings available, this has not been the case. As explained above, there are few companies who market public domain sound recordings of out-of-copyright musical compositions. Moreover, as far as niche markets are concerned, they do so at relatively high prices and do not offer those recordings for download. This is partly because absent property rights, public domain companies are exposed to free-riding: they have no incentive to invest in promotion and marketing which could be free-ridden by any competitor. This is why companies such as Naxos opt to re-record public domain classical music\textsuperscript{105}.

7.3.6. Impact on cultural diversity

Since term extension will lead to some financial benefit for record producers, more resources from old recordings are available to fund new talent. Resources from old recordings, especially from recordings in the golden fifties and sixties, can still be considerable, even in the years to come. Sales of sound recordings have an initial boost in the first few years following their publication and then decline from that level to remain, for decades, at a fairly constant level\textsuperscript{106}. Record companies state that they often use the income derived from older recordings to produce and market new recordings. More income from the golden 1960's and other enduringly successful recordings will help finance investment in new recordings. According to Nigel Parker, "the music business has grown based on the long-tail income from established copyrights. Accumulation of copyrights spreads risk and generates funds to finance new music. Without long term profits from the most successful creators, investment in new music would be almost non-existent"\textsuperscript{107}. This means that the music industry is essentially a portfolio business where successful recordings will generate the revenue required to finance new recordings. This would mean that new successful European repertoire would need to rely on older repertoire providing the revenue necessary to finance cultural diversity.

An increase in A&R spending and a better financial situation of the recording industry will therefore provide increased opportunities for performers in both popular and niche repertoire. According to the PWC study, A&R amounts to 17\% of revenues. If the estimated financial benefit of the record producers is between €39 million and €758 million, this results in the additional A&R value of between €6.7 million and €129 million. In the first decade, the additional A&R value would be between €1.7 million and €28 million\textsuperscript{108}. Part of this additional investment will benefit directly new EU performers.

\textsuperscript{106} Liebowitz (February 2006), 'What are the Consequences of the EU extending Copyright Length for Sound Recordings', report prepared for IFPI.
\textsuperscript{107} Nigel Parker (2004), 'Music Business: Infrastructure, Practice and Law'.
\textsuperscript{108} All figures should be adapted, if a fund diverting 20\% of record producers' additional revenue to performers was accounted for (see Annex, section 3).
7.3.7. **Impact on information society services**

The impact on digital libraries and other similar services would be negative. Although the issue of rights clearance would not be as complicated as under option 2b, it would arise over a longer period of time. However, flexible solutions for rights clearance and orphan works could be found on an ad hoc basis.

7.3.8. **The international dimension**

The impact of a term extension on the international flow or royalties should be considered separately in relation to sales and secondary exploitation. The income from secondary exploitation is collectively administered and as a consequence, the distributions to EU performers are more easily traceable. Moreover, a significantly larger share of remuneration from secondary exploitation is distributed to performers than from sales\(^{109}\).

As far as *sales* are concerned, according to available IFPI figures, the domestic repertoire of each Member State represents in EU aggregate terms 48% in value of music sales in tangible form (mainly CDs). The international repertoire accounts for 45%. But 'international' repertoire here includes European repertoire from other Member States as well as US and non-US repertoire (*e.g.*, Latin American repertoire).

Equally, the Gowers report claims that 43% of the revenues that would be earned in the extended term would be remitted 'overseas'\(^{110}\). However, these 43% include US repertoire and repertoire from other European states. It is therefore a fallacy to believe that 43% of UK remittances in a longer term would all go to the US or to other non-EU countries. On the contrary, much of this revenue would remain in the European Union. For example, figures available for Denmark show that 45% of the repertoire sold in Denmark is of Danish (i.e., domestic) origin, 37% comes from other-European Member States and only 14% is imported from the US and 4% from other non-EU sources\(^{111}\). This means that most of the additional revenue collected over an extended term of protection would therefore stay in Europe and benefit European performers. The Gowers estimates would not, therefore, be relevant to determine the trade balance of the EU as a whole.

The flow of royalties from broadcasting and performing phonograms in public venues would be only very marginally affected by a term extension. This is because the EU's only significant trading partner for music is the US\(^{112}\), and under the applicable international conventions, the remittances between the EU and the US are currently minimal (see Annex, section 4).

Under the Rome Convention and the WIPO Performances and Phonograms Treaty (WPPT), the royalty flows from the EU to the US are small. Indeed most EU Member States do not grant equitable remuneration under the Rome Convention to phonograms produced by US

---

\(^{109}\) The split for revenues from the single equitable remuneration for performers is usually 50-50 between performers and producers. Overall, in the EU in 2004, performers collecting societies collected € 351 million and producers collecting societies collected € 293 million, KEA Study, p. 34.


\(^{111}\) 2004 Annual Report of KODA, the Danish Performing Rights Society.

\(^{112}\) In particular, in 2004 EU-15 imports of record materials from the US amounted to USD 752 million in 2004, while the added imports from Japan, Australia, Canada and China amounted to USD 260 million (source: OECD).
record producers or first fixed in the US\textsuperscript{113}. Under the WPPT, to which the US and the EC are signatories, the US applies equitable remuneration only to certain digital audio transmissions (such as webcasting). Accordingly, EU Member States are under no obligation under the WPPT to grant phonograms produced by US record producers or first fixed in the US a right to equitable remuneration for broadcasting and communication to the public\textsuperscript{114}. In practice, only a small number of Member States (e.g. UK, Ireland) pay royalties to US record producers for records produced by US producers or published simultaneously in the US and another country which is a party to the Rome Convention or the WPPT. Even though, the UK and Ireland do not grant such payments to US performers.

The term extension would thus not result in additional remittances to the US for secondary remuneration claims.

7.3.9. Administrative burden

Changing the term of protection would require an amendment to Directive 2006/116/EC and Member States would then have to amend their national laws accordingly. However, this burden would not be substantial since they would not be introducing new laws but amending existing legislation.

7.4. Moral rights of performers

The impact on performers would be positive. Performers would have the right to object to derogatory uses of their performances. This would not provide them with supplementary income other than awards for damages. It would allow them to restrict objectionable uses of their performances, for instance use in advertising, use in conjunction with pornographic material or use in certain political contexts. It would also improve their social standing and signal the recognition of their artistic contributions more or less on a par with authors.

However, merely granting performers the right to restrict objectionable uses of their performances would not necessarily protect them during the whole of their lifetime. In some Member States, the moral rights of performers are perpetual. In others, moral rights last as long as the performer's economic rights: performers thus lose their moral rights when their performances fall into the public domain.

The impact on record producers would be negative. Performers might be able to restrict certain uses of their performances, for instance in commercial advertising. As music is often used in advertising, this could in certain cases deprive record producers of revenues. The performers might also have a claim for damages against producers who allow objectionable uses without the performer's authorisation. For instance, the French singer/songwriter Gilbert Montagné successfully relied on his moral rights (as an author) in the song "On va s'aimer" to sue Universal Music publishing, for allowing the use of a modified version of the song ("On va fluncher") in a commercial for a food chain\textsuperscript{115}.

The impact on broadcasters and public venues where music is played would also be negative as performers could object to certain uses of their performances in radio and TV broadcasts.

\textsuperscript{113} This stems from notifications made under the Article 5(3) of the Rome Convention.
\textsuperscript{114} Article 15(3) in conjunction with Article 4(2) of the WPPT.
\textsuperscript{115} Didier B., Gilbert M. and SNAC v Universal Music Publishing and others, French Cour de Cassation, 1st section, 5 December 2006, case n°1718 FS-D.
The impact on public domain labels could be negative. Performers may be able to restrict certain uses of their works once they are in the public domain, depending on whether their moral rights are limited in time or perpetual. For example, in France, the performer Henri Salvador successfully sued a label for releasing and distributing in supermarkets at a minimal price a cheap compilation including his songs\textsuperscript{116}. The public domain labels wishing to exploit songs in the public domain would thus have to request the authorisation of the performer or his heirs.

The impact on cultural diversity would be positive. Strengthening moral rights of performers would be beneficial for European cultural diversity, as their social status and recognition would be improved. Although this is a non-pecuniary aspect of protection, it would contribute to a 'feel good' factor for performers who would be confident in their ability to exercise control over objectionable uses of their work.

The administrative burden would be significant. Since moral rights have not yet been harmonised at European level, the Commission would have to propose stand alone legislation.

Harmonising moral rights would thus entail a significant legislative burden on many Member States, as there are currently significant disparities in the moral rights granted to performers in Member States, relating to the substance and the duration of those rights. Such differences are permitted under international law and reflect the different copyright traditions of Member States. For instance in the UK\textsuperscript{117}, the moral rights of performers are limited in time and some must be asserted or can be waivered, while in France, the moral rights of performers are unwaiverable and perpetual\textsuperscript{118}.

7.5. Protection of performers’ rights: ‘use it or lose it’

The impact on performers would be positive. Performers would be in a better position to ensure their creative output reaches the public. The rights in unexploited recordings would revert to them and they could re-release them through another record company (or do it themselves) if the original company does not publish or release the record. This is already possible for authors under some national laws\textsuperscript{119} and it appears that some independent record companies do actually give rights back to performers if they have stopped selling the record for a certain time. Specific legislative measures would nevertheless strengthen the position of performers.

The impact on cultural diversity would also be positive. If performers were to make use of the possibility to get their sound recording re-released by another record company, or by themselves, more repertoire, including niche and local music, would be widely available. This would strengthen European cultural diversity.

Consumers would also benefit from a wider selection of repertoire because the performer would be able to reissue the sound recording if the original record company ceases to market it.

\textsuperscript{116} Paris Court of Appeal, November 14\textsuperscript{th}, 2007, SARL Jacky boy Music v Salvador, JurisData : 2007-349990.
\textsuperscript{117} See The Performances (Moral Rights, etc.) Regulations 2006, which amends the 1988 Copyright Designs and Patents Act.
\textsuperscript{118} See Article L. 212-2 of the French Intellectual Property Code.
\textsuperscript{119} Austria, Belgium, Germany, Luxemburg, Nordic Countries, Portugal, Spain.
In terms of *administrative burden*, further amendments to Directive 2006/116/EC would be required, as well as transposition measures from Member States which do not currently provide for a ‘use it or lose it’ provision. Flexibility should be allowed in transposition, in order for measures to fit in with the Member States' existing copyright and contract legislation. Alternatively the Directive could adopt a softer approach, by encouraging Member States to be vigilant that record companies voluntarily introduce ‘use it or lose it’ conditions into their contracts.

### 7.6. Creation of a fund for session musicians

The fund dedicated to session musicians would include 20% of the revenues derived by record companies from the sale of sound recordings benefiting from a term extension. The 20% should be based on revenues, as this allows transparency and enforceability of the provision. The 20% strike an appropriate balance between the interests of session musicians and of the record producers.

The *impact on session musicians* would be positive. The amount of additional revenue for session musicians would depend on the extent of the increase in the term of protection for record producers. An average performer would benefit from €47 to €737 in additional revenues every year (see Annex, section 3 for methodology) from a 45-year term extension.

As there are no estimates available as to the number of session musicians whose performances would fall into the public domain, we present indicative estimates on how much an average performer would benefit if the term were extended to 95 years and the fund were to benefit all performers. The payment to an average performer would increase to an average of €130 to €2065 every year, i.e. 2.8 times\(^{120}\).

The *impact on record producers* would be negative, but should be considered against the benefits of the term extension. In the course of a 45 year term extension, the benefits of the extension of term for record producers would be reduced from €758 million to €607 million (high end estimate) or from €39 million to €31 million (low end estimate). Consequently, this would also reduce the additional revenue available for A&R from €129 million to €103 million (high end estimate) or from €6.7 million to €5.3 million (low end estimate).

A simple model calculation in the IA shows that a 20% share would strike the right balance between the profitability of phonograms that are exploited in the extended term and the creation of a tangible added benefit for performers. This calculation attempts to measure the impact that a revenue-based fund would have on record labels' profit margin in the years after term extension.

Average self-declared overall company-wide operating margin of the phonogram majors (EBITA/revenue) in 2007 is 9.1% (EMI 3.3% - Universal 12.8% - Warner 14% - BMG 6.2%). As mentioned above, according to IFPI, only one CD in eight is profitable.

If only 1 in 8 CDs is profitable and the average profit rate is 9.1%, this one profitable CD must be generating a profit margin that is high enough to compensate for seven unprofitable CDs and still produce an aggregate profit of 9.1%.

---

\(^{120}\) As the fund would be drawn from the income of record companies, the revenues of featured artists would not be adversely affected. The overall impact for performers would thus be positive.
On this basis, one can estimate the profitability of the one successful CD by comparing its profit margin with that of the remaining seven CDs. Assuming that: 5 CDs ("CD2" through "CD6" in the example) break even (profit = 0), which is extremely optimistic and 2 CDs ("CD7" and "CD8") make a loss (for "CD7" the loss is 30; for "CD8" the loss is 40); then the successful CD "CD1" has to make a substantial profit. In our example the profit margin is 60%.

As phonogram producers will focus on reissuing the "premium" CDs during the extended term, i.e., those with very high profit margins, a revenue-based fund (setting aside 20% of revenue achieved with the premium CDs) would mean that 20% of the revenue attributed to CD "CD1", 250 (i.e., 50) would be set aside for performers. Therefore, even after taking into account the fund, the phonogram producers' profit margin in the extended term would still be 100/250=40%.

<table>
<thead>
<tr>
<th>CD</th>
<th>CD2</th>
<th>CD3</th>
<th>CD4</th>
<th>CD5</th>
<th>CD6</th>
<th>CD7</th>
<th>CD8</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>REVENUE</strong></td>
<td>250</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>70</td>
<td>60</td>
</tr>
<tr>
<td><strong>COST</strong></td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td><strong>PROFIT</strong></td>
<td>150</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>-30</td>
<td>-40</td>
</tr>
<tr>
<td><strong>MARGIN</strong></td>
<td>60%</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>-43%</td>
<td>-66%</td>
</tr>
</tbody>
</table>

Table 3: Profitability of CDs

**Administrative burden:** the creation of the fund for session musicians would require each record company to set up an account in favour of session musicians. Such accounts appear to be relatively straightforward to set up as the US example on the remuneration scheme for webcasting shows. The administrative burden on record companies would be further limited by the fact that the record companies would not have to identify the beneficiaries and distribute the monies collected in the fund. Distribution would be incumbent on the performing artists collecting society that represents session musicians and that, in consequence, has a database on session musicians in place.

7.7. Summary of impacts

Table 4 summarises the impact analysis contained in section 7 identifying economic and social (cultural) impacts of the different options.

---

121 Under the Small Webcasters Settlement Act of 2002, session musicians are entitled to 2.5% of royalties. The royalties "are deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians".
8. **Comparison of Options**

Table 5 summarises the degree to which the different options are suitable to achieve the six operational objectives identified in the impact assessment (section 5.3). It becomes clear from this table that the options involving a term extension (2a and 2b) seem to be rather more successful in contributing towards the policy objectives of increasing performers' remuneration and international competitiveness. Both options 2a and 2b bring incremental financial benefits to performers and would thus allow more performers to dedicate more of their time to creation. In addition, option 2b would also increase incrementally the pool of resources available to record producers for A&R and digitisation of their back catalogue, and could thus have an additional positive impact on cultural diversity.

Option 2b is easier to implement than option 2a, as the latter links calculation of the term of protection to the life of individual performers. As the example of co-written works shows, linking a copyright to the life of individual contributors in practice raises complex issues when several performers contribute to a sound recording. Each co-performer in a performance would have to be registered and the term would only be triggered upon the death of the last co-performer.

On the other hand, Option 3c has very substantial and undeniable benefits as well. It would incrementally increase the revenue stream channelled to performers as they regain control over recordings which would otherwise not be commercially exploited by the record industry and the revitalisation of this long 'dormant' repertoire would open up business opportunities for new recording labels, especially those who rely on smaller repertoire.
This option would thus be useful as a complement to enhance the positive impact of a term extension on the revenue of performers.

<table>
<thead>
<tr>
<th>Objective 1: Gradually align authors' and performers' protection</th>
<th>Objective 2: Incremental increase in remuneration of performers</th>
<th>Objective 3: Diminish the discrepancies between the EU and US protection</th>
<th>Objective 4: Incremental increase in A&amp;R resources</th>
<th>Objective 5: Ensure availability of music at reasonable prices</th>
<th>Objective 6: Encourage digitisation of back catalogue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 2a: &quot;extension for 50 years or life&quot;</td>
<td>++</td>
<td>++</td>
<td>+</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Option 2b: &quot;extension to 95 years with conditions&quot;</td>
<td>++</td>
<td>++</td>
<td>++</td>
<td>++</td>
<td>0</td>
</tr>
<tr>
<td>Option 3b: &quot;moral rights&quot;</td>
<td>+</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Option 3c: &quot;use it or lose it&quot;</td>
<td>++</td>
<td>+</td>
<td>++</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Option 3d: &quot;fund for session musicians&quot;</td>
<td>0</td>
<td>++</td>
<td>0</td>
<td>-</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 5: Analysis of options against objectives

9. **Monitoring and Evaluation**

Monitoring and evaluation will be conducted in line with the policy objectives as identified above. As policy options have not yet been chosen, the details of monitoring and evaluation will be more specifically defined at a later stage.

The monitoring could develop along three models:

(i) The first concentrates on the short-term, starting right after the adoption of the proposal. It focuses on the sheer implementation of the proposal, i.e. amendments of national rules.

(ii) The second would be mid-term and focus on direct effects such as performers' income and A&R spending by record companies in Europe.

(iii) Finally, monitoring could be set up of the overall economic and social impacts of the proposal “on the ground” in the mid- to long-term.

9.1. **Contribute to enhancing the welfare of performers**

The remuneration of performers can be monitored using the following indicators:

Income from secondary remuneration claims: information on how much is collected and how it is distributed can be provided by collecting societies.

Income from performers and trade unions about the evolution of types and content of contracts and collective agreements between performers and session musicians and record companies
Remuneration from exclusive rights: precise information is difficult to obtain as the remuneration is governed by individual contracts. However, record producers, collecting societies and performer's unions can provide indicators of the level of remuneration of performers.

Remuneration from record companies' in-house funds for session musicians: information on whether such in-house funds have been set up and whether payments have been made to session musicians.

**Gradually align authors' and performers' protection:**

Implementation of the proposal by Member States: depending on the option chosen, the transposition process would be monitored and indicate the level of protection enjoyed by performers in the Member States.

Case law upholding the moral and economic rights of performers would also provide an indicator of the practical and legal effects of implementation.

**9.2. Contribute to enhancing the competitiveness of the EU music industry**

**Diminish the discrepancies in protection between the EU and US music markets:**

The amount of 'European' music broadcast in Europe, and the size of the music market, are indicators of whether the production of European music is commercially attractive for record companies. This information can be provided by collecting societies which collect single equitable remuneration for performers and producers and by broadcasters.

Information on the trend in the number and size of record producers in the EU and in the US would give an indicator on the development of the general economic situation of the music industry in the EU.

**Incremental increase in A&R resources:**

A&R expenditure would be directly obtained from record companies. Alternatively, the evolution of the revenues of record companies would also provide an indicator, as A&R expenditure is usually in proportion to record producers' revenues.

**9.3. Increase available music repertoire**

**Ensure availability of music at reasonable prices:**

Information on the pricing of records could be obtained from record companies, distributors and consumer groups.

Information on the evolution of broadcasting tariffs can be obtained from collecting societies.

**Encourage the digitisation of back catalogue**

Repertoire and back catalogues made available online by record companies, and the revenues derived, are indicators of whether the record industry used the additional
income from term extension to develop the offer of music to consumers. This information could be provided by record companies, distributors, 'brick and mortar' and online music retailers.

Information on revenues generated from the 'long tail' effect would indicate whether record companies have an incentive to digitise and offer as many recordings as possible. This information could be provided by record companies, distributors, 'brick and mortar' and online music retailers.

A more detailed set of indicators will be considered in the light of the policy choice selected.

A first comprehensive evaluation could therefore take place 5 years after the entry into force of the proposal.
ANNEX

To the impact assessment on the legal and economic situation of performers and record producers in the European Union
1. **Public Consultation on the Review of the EC Legal Framework on Copyright and Related Rights**

The following table presents the results of the above public consultation as concerns the length of protection of related rights.

<table>
<thead>
<tr>
<th>Name of Contributor</th>
<th>Remarks</th>
<th>Reasons Given</th>
</tr>
</thead>
</table>
| **AEPO** (Association of European Performers Organisations) | 70 yrs | - Expiry in 2004 of recordings from 1954 (additional income)  
- compare to authors |
| **AFI** (Associazione dei fonografici italiana) |         | - increased investments, promotion of new talents  
- music in past not recouped investment costs  
- new technology good for global exploitation by (especially SME’s)  
new technology good for new business models  
- new fashion for singles (via internet)  
- phonogram producers are current ‘weak links’? in production chain |
| **AFYVE** (Asociacion Fonografica y Videografica Española) | 95 yrs | - countries with significant markets have already extended protection: India (60), Turkey, Chile, Brazil (70), Mexico (75), USA (95 if published, 120 from fixation if not published); Singapore and Australia have signed Free Trade Agreements with the US to extend protection to 70 years  
- producers need longer to recoup investment  
- lifespans increased  
- cost of producing & marketing original material increased  
- losses due to piracy reduced recoup on investment  
- present famous artists still alive seeing their recordings fall into public domain – unfair + not in line with objectives of protection  
- differences in term between EU and US cause legal uncertainty, and lead to infringements  
- especially problematical in on-line environment (where a phonogram can be exploited simultaneously in many different countries)  
- different terms could hamper development of new legitimate on-line business models  
- longer term of protection gives incentive for RH to create and disseminate works in that territory  
- longer term indicative of commitment to protect RH, local culture & creativity in general  
- lower term of protection in EU difficult for RH to meet foreign competition and obtain adequate international protection (“comparison of terms”). |
### Organisation of Performing Artists

- GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten)
- IFPI and its national groups (Austria, Belgium, Czech Republic, Denmark, Germany, Finland, Greece, Hungary, Slovakia, Sweden, Poland [ZPAV])
- LaMPA (Latvian Music Producers Association)
- NVPI (Dutch Music Industry)
- PPL & VPL
- UPFR (Romanian Association of Music Producers)

### Richard, Sir Cliff

- **Extension** (for at least the lifetime of the artists)
  - present famous artists still alive seeing their recordings fall into public domain – unfair + not in line with objectives of protection
  - matter of protecting European culture

### ARTIS – GEIE

- **Extension** (same as authors)
  - should align with the term applicable to films

### BECTU

- **Extension** (same as authors)
  - unacceptable that compositions should enjoy a term of protection up to three times longer than that for performances; no justification for such discriminatory treatment (the reason is entirely historical)
  - the argument that a shorter term of protection benefits consumers is not borne out in practice since phonogram producers continue to sell recordings that are in the public domain at the same price as when they were protected by copyright
  - an extension of sound recording copyright will also take thousands of musicians off means tested benefits and greatly lessen the burden of the state; the state will benefit both from the a reduction in benefits paid to poor musicians and from increased taxation of rich musicians and phonogram producers
<table>
<thead>
<tr>
<th>Organization</th>
<th>Extension/No Extension</th>
</tr>
</thead>
</table>
| AZNAVOUR, Charles                    | - Recordings are principal source of income.  
                                         - Internet possibilities are competition to sales of CDs  
                                         - Internet use of recordings in public domain are unfair competition to recent recordings |
| ESDA (European Sound Directors’ Association) | Extension  
                                         - Urgent consideration should be given to changing the term of copyright in sound recordings to safeguard the revenues of European produced sound recordings that would otherwise be due to producers and performers  
                                         - Concerned that any adjustment of the term of protection of phonograms applies a parallel extension to the performers’ rights to equitable remuneration |
| Music Business Forum                 | - It promotes entrepreneurship in the creative economy, a sector of increasing importance for the UK’s international competitiveness, and benefits consumers by generating innovation and investment in new British music  
                                         - An appropriate duration of copyright for performances and sound recordings is fundamental to the ability of the music sector in Britain to continue to take a leading role, culturally and economically, on the international stage |
| ASLIB (Association for Information Management) |  
                                         - Actually talk about author’s rights….(but can presume same for related rights) |
| LACA (Libraries and archives copyright alliance) |  
                                         -  |
| McLean, Wallace                      |  
                                         -  |
| SCONUL (Society of College, National and University Libraries) |  
                                         - |
<table>
<thead>
<tr>
<th>ARD / ZDF</th>
<th>NO extension</th>
</tr>
</thead>
<tbody>
<tr>
<td>BAK (Bundesarbeitskammer)</td>
<td>- IP Content should be available for public – Art 11 and Art 17 EU Charter of Fundamental Rights (Freedom of expression and information &amp; Right to Property)</td>
</tr>
<tr>
<td>BEUC (European Consumers’ Organisation)</td>
<td>- Good balance of interests already found in 1993</td>
</tr>
<tr>
<td>Naxos</td>
<td>- Too soon to re-open debate and extend again</td>
</tr>
<tr>
<td>PEARLE (Performing Arts Employers Associations League Europe)</td>
<td>- Music will disappear in archives</td>
</tr>
<tr>
<td>Publishers Association UK</td>
<td>- Only “top seller” works will be produced for economic reasons</td>
</tr>
<tr>
<td>S., Christiano Schaefer, Franz</td>
<td>- US protects especially producer industry.</td>
</tr>
<tr>
<td>STM (International Association of Scientific, Technical and Medical Publishers)</td>
<td>- Further extension will benefit producers and not artists. New creative impulse would be hindered, not encouraged.</td>
</tr>
<tr>
<td>Wirtschaftskammer Austria</td>
<td>- most artists that would be affected of an extension are either no longer recording or have deceased and will not therefore be motivated to make new recordings just because copyright extension has been granted to them</td>
</tr>
<tr>
<td>BSAC (British Screen Advisory Council)</td>
<td>- The effect of extending the copyright period would diminish the availability of a broad range of music at an affordable price</td>
</tr>
<tr>
<td>Law Society of Scotland</td>
<td></td>
</tr>
<tr>
<td>CRID (Centre de Recherches Informatique et Droit)</td>
<td>- US legal regime of copyright does not know the notion of a related right in the musical sector (the 95-yrs-term of protection for musical works applies to copyright in sound recordings and not to a related right in music productions)</td>
</tr>
<tr>
<td>EDRI (European Digital Rights)</td>
<td>- the extension of the duration of copyright in the US was based on the will to align the term of protection to that of the EU (some specific provisions of the US copyright regime – e.g. works made for hire, sound recordings – required another way of calculating the duration than the death of the author)</td>
</tr>
<tr>
<td>FIPR (Foundation for</td>
<td>- extension would diminish the choice of music on the market in Europe and undermine reprint houses, depriving them of income they now earn lawfully by republishing out-of-copyright works; and it is not possible to motivate dead authors to create new works</td>
</tr>
<tr>
<td>NO extension</td>
<td>- a &quot;use it or lose it&quot;-clause should be introduced into copyright law: if a work has been unavailable to</td>
</tr>
<tr>
<td>Organization</td>
<td>Comment</td>
</tr>
<tr>
<td>--------------</td>
<td>---------</td>
</tr>
<tr>
<td>Information Policy Research</td>
<td>the public for three yrs the creator should be able to reclaim the copyright from the publisher; if the creator does not exercise this right, then, after a further two yrs, the copyright should expire and the work should fall into the public domain</td>
</tr>
<tr>
<td>VOSN (Foundation for Open Source, Netherlands)</td>
<td></td>
</tr>
<tr>
<td>EFFI (Electronic Frontier Finland)</td>
<td></td>
</tr>
</tbody>
</table>
| EICTA (European Industry Association) | Term of protection is part of the balance between interested parties which in this field includes not just the producers of the sound recording and the public but also would have impact on balance between owners of copyrights and right owners of related rights  
- a change in the term of protection would undoubtedly be argued to impact the question of fair compensation (“levies”) for private copying, which would serve to further exacerbate current problems with levies as applied in some MS |
| Intellect | |
| Nokia corporation | |
| TMPDF (Trade Marks, Patents & Designs Federation) | |
| Foundation for a Free Information Infrastructure | - lack of economic rationale: the expansion mechanism does not provide a long time perspective on which the market can trust; an ex-post prolongation would not provide any incentive for businesses as only historic works are covered that are already there (only the RH of expiration candidates would benefit)  
- public domain creates a lot of opportunities for businesses to make profit from recycling old works  
- trust in legislation would be undermined  
- prolongation in the US is often regarded as an example of political failure |
| National Consumer Council | - it remains unclear how an extension meaningfully adds to the incentives to produce new works to justify the loss of public benefit  
- there can be little justification for extending the term merely because the US has |
| Wind Telecomunicazioni S.p.A. | - suggests a system of (ex ante) compulsory licensing and (ex post) determination of the appropriate consideration thereof, according to fair and reasonable criteria by independent third parties  
- favours reduction of copyright term |
2. RETROACTIVITY

For both options concerning term extension, the issue of when the term extension should apply (either retroactively or not) has to be considered. There are different degrees of retroactivity that can be chosen in providing a term extension.

- If one applied the term extension only to new recordings, created after the entry into force of the amended Term Directive, one could perhaps imagine that performers would be stimulated to increase their creative activity. Moreover, the real financial benefit for the extra protection would be found far into the future, although could be accounted for as net present value in the short term. Extending the term for new performances and recordings only is a simple solution, but does not provide any immediate relief to the problems identified earlier in this impact assessment. It is for this reason that it is not of interest to performer representatives and is excluded from further detailed analysis.

- A partially retroactive term extension would provide supplementary revenue for existing recordings that soon to fall into the public domain. This is the sort of extension that is of greater interest to related rights holders because the financial advantages would be felt in the near term, especially for recordings that are from the 50's and 60's. This is the approach used in Directive 2001/29/EC in its Article 10. This means that the extension would apply to all sound recordings which were still protected on the date of adoption (or coming into force) of the amended Directive122.

- Full retro-active extension covers all recordings which are under protection as if the extended term had applied as from the start of protection. In other words, it would be as though the recording was protected for 95 years when it was produced. This solution generates the maximum value for right holders, but requires a mechanism to compensate for the revival of rights and to exonerate users of music which was no longer protected under the old term but is protected again under the new term. The problem of revival of rights arose after the adoption of the Term Directive in 1993. A case was brought to the European Court of Justice (the Butterfly Case – see footnote 106) to clarify what would be a reasonable time to allow for third parties to continue selling reissues of public domain material when the rights had revived and therefore returned to the original copyright holder.

<table>
<thead>
<tr>
<th></th>
<th>New acts only</th>
<th>Partially retro-active</th>
<th>Fully retro-active</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advantages</td>
<td>Simple</td>
<td>Simple</td>
<td>Maximum value for right holders</td>
</tr>
<tr>
<td>Disadvantages</td>
<td>No immediate benefit to right holders</td>
<td>Immediate benefit to many right holders</td>
<td>Complicated Risk of legal uncertainty</td>
</tr>
</tbody>
</table>

Table 1A: Impacts of retroactive extension

---

122 This will avoid the problem that arose with acquired rights on recordings which had fallen out of protection before the amended Term Directive entered into force on 1 July 1995, but which were eligible for the extended term and resulted in a legal dispute at the ECJ. (Case C-60/98, Butterfly Music v CEMED, judgement of 29 June 1999).
It appears that a partially retro-active extension, with a specific cut off date, would be the simplest solution as regards the legal and administrative aspects and would bring the most benefit to right holders from the start.

3. IMPACT OF 45 YEAR TERM EXTENSION: METHODOLOGY

This section explains the methodology employed to quantify the impact of a 45 year term extension on performers and record producers. The estimation is based on the PWC study, which is the only study that is based on actual historical data. Other studies would lead to different estimates.

Because the PWC study is based on actual data, it enables us to add a concrete dimension to the results. This study applies to the UK and it analyses the revenues from music sales, licence fee income and other royalty income. The value of the initial 50 year term for sales in the UK is calculated to reach £ 8.568 billion. The high-end estimate of total present value of the 95-year period would amount to £ 8.731 billion, whereas the low-end estimate would yield £ 8.576 billion. A 45 year extension of the term of protection would create between £ 8.5 million and £ 163 million in additional revenues.

The PWC study is limited to the UK sales revenue. As EU sales are 3.5 times larger than the UK sales, it can be roughly estimated that a 45 year term extension would generate between € 44 million and € 843 million in additional revenues for the EU.

The additional income, however, will not be evenly spread over the additional period of the 45 years. Different assumptions of the distribution of income have been taken into account. This impact assessment is based on calculations provided by the PWC study which states that the financial benefit that will accrue to the UK music industry in the first ten years amounts to between £ 2.2 and £ 35 million. Again, this benefit could be approximated to a financial benefit of between € 11.4 million and € 181 million in Europe in the first ten years.

Furthermore, the estimates provided by the PWC apply to the music industry (i.e. performers and record producers together). In order to determine the impact of a 45 year term extension on individual performers, it must first be determined how much of the additional income would accrue to performers as opposed to record producers. The CIPIL study assumes that performers obtain a 5-15% share from sales of sound recordings. We take the average value of 10% to estimate the performers' share of sales revenue. The sum of € 44 to € 843 million is therefore distributed as follows:

- Performers obtain a present value of between € 4 million and € 84 million during the extended term, whereas record producers obtain a present value of between € 39 million and € 758 million.

---

123 The higher range estimate assumes, in favour of the proponents of term extension, that the expiry of copyright entails a 100% market share loss, whereas the lower end estimate assumes no market loss.

124 The low-end estimate assumes the loss of market share of 0%, whereas the high-end estimate assumes the loss of market share of 100%.


– In the first decade, performers would get between €1.1 million and €18 million, whereas record producers would get between €10.2 million and €163 million.

To determine what, on average, this implies for an individual performer, the number of performers benefiting from the additional revenue must be estimated. The UK House of Commons Culture, Media and Sport Committee report provides an estimate. It concludes that, over the next ten year, over 7000 performers would lose protection if the term was not extended\(^{127}\). This means that if we extrapolate the UK estimate to the EU, approximately 24500 performers would lose protection in the first decade. By dividing the financial benefits for performers (€1.1 million and €18 million) by 24500 performers, the average additional benefit per performer ranges from €46 and €737.

The average additional benefit per performers would increase if the effects of a fund proposed in sub-option 2b would be factored in. Under this model, 20% of the record producers' benefit from term extension would be redistributed to performers. The fund would therefore yield between €7.8 million and €151.7 million in the whole period and between €2 million and €32.5 million in the first decade.

If the fund were set up, the income to performers and record producers would therefore have to be redistributed:

– In the first decade, performers benefit would be increased to between €3.2 million and €50.6 million; whereas record producers would obtain between €8.2 million and €130.1 million.

– Average financial benefit to a performer would yield to between €130 and €2065.

It results from the above that the establishment of the fund would increase average payments per performers 2.8 times.

An increase in A&R spending and a better financial situation of the recording industry will therefore provide increased opportunities for performers in both popular and niche repertoire. According to the PWC study, A&R amounts to 17% of revenues.

– If the estimated financial benefit of the record producers is between €39 million and €758.5 million, this results in the additional A&R value of between €6.7 million and €129 million. If, however, a fund diverting 20% of record producers' additional revenue to performers were set up, record companies' additional revenue would be between €31.3 million and €607 million, which would result in the additional A&R value of between €5.3 million and €103 million.

– In the first decade, the additional A&R value would be between €1.7 million and €27.6 million. If, however, a fund diverting 20% of record producers' additional revenue to performers were set up, the additional A&R value would be between €1.4 million and €22.1 million.

– Part of this additional investment will benefit directly new EU performers.

\(^{127}\) UK House of Commons Committee for Culture, Media and Sport, May 2007.
<table>
<thead>
<tr>
<th></th>
<th>UK (million £)</th>
<th>EU (million €)</th>
<th>Benefit without fund (million €)</th>
<th>A&amp;R / average (without fund) (million €)</th>
<th>Fund (million €)</th>
<th>Benefit with fund (million €)</th>
<th>A&amp;R / average (with fund) (million €)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>WHOLE PERIOD</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loss of market share of 100%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record producers</td>
<td>162.8</td>
<td>842.7</td>
<td>758.5</td>
<td>A&amp;R 128.9</td>
<td>151.7</td>
<td>606.8</td>
<td>A&amp;R 103.2</td>
</tr>
<tr>
<td>Performers</td>
<td></td>
<td></td>
<td>84.3 avg /</td>
<td></td>
<td></td>
<td>236.0 avg /</td>
<td></td>
</tr>
<tr>
<td>Loss of market share of 50%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record producers</td>
<td>143.1</td>
<td>740.8</td>
<td>666.7</td>
<td>A&amp;R 113.3</td>
<td>133.3</td>
<td>533.3</td>
<td>A&amp;R 90.7</td>
</tr>
<tr>
<td>Performers</td>
<td></td>
<td></td>
<td>74.1 avg /</td>
<td></td>
<td></td>
<td>207.4 avg /</td>
<td></td>
</tr>
<tr>
<td>Loss of market share of 0%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record producers</td>
<td>8.4</td>
<td>43.5</td>
<td>39.1</td>
<td>A&amp;R 6.7</td>
<td>7.8</td>
<td>31.3</td>
<td>A&amp;R 5.3</td>
</tr>
<tr>
<td>Performers</td>
<td></td>
<td></td>
<td>4.3 avg /</td>
<td></td>
<td></td>
<td>12.2 avg /</td>
<td></td>
</tr>
<tr>
<td><strong>FIRST TEN YEARS</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loss of market share of 100%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record producers</td>
<td>34.9</td>
<td>180.7</td>
<td>162.6</td>
<td>A&amp;R 27.6</td>
<td>32.5</td>
<td>130.1</td>
<td>A&amp;R 22.1</td>
</tr>
<tr>
<td>Performers</td>
<td></td>
<td></td>
<td>18.1 avg /</td>
<td></td>
<td></td>
<td>50.6 avg /</td>
<td>2064.7</td>
</tr>
<tr>
<td>Loss of market share of 50%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record producers</td>
<td>27.3</td>
<td>141.3</td>
<td>127.2</td>
<td>A&amp;R 21.6</td>
<td>25.4</td>
<td>101.7</td>
<td>A&amp;R 17.3</td>
</tr>
<tr>
<td>Performers</td>
<td></td>
<td></td>
<td>14.1 avg /</td>
<td></td>
<td></td>
<td>39.6 avg /</td>
<td>1615.1</td>
</tr>
<tr>
<td>Loss of market share of 0%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record producers</td>
<td>2.2</td>
<td>11.4</td>
<td>10.2</td>
<td>A&amp;R 1.7</td>
<td>2.0</td>
<td>8.2</td>
<td>A&amp;R 1.4</td>
</tr>
<tr>
<td>Performers</td>
<td></td>
<td></td>
<td>1.1 avg /</td>
<td></td>
<td></td>
<td>3.2</td>
<td>avg 130.2</td>
</tr>
</tbody>
</table>

avg = average

**Table 2A: Impacts on performers and record producers**
4. **ROYALTY FLOWS BETWEEN THE EU AND THE US FOR SECONDARY EXPLOITATION OF PHONOGRAMS UNDER INTERNATIONAL AGREEMENTS**

The main international conventions for the protection of phonograms are the 1961 Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations, and the WIPO Performances and Phonograms Treaty. The EC is party only to the WPPT but has not yet ratified. The U.S. is also party to the WPPT but has ratified. All EU Member States are parties to the Rome Convention.

4.1. **Broadcasting and communication to the public of 'US phonograms'**

4.1.1. **Under the Rome Convention**

The Rome Convention provides that broadcasting and communication to the public of phonograms gives rise to the payment of a single equitable remuneration to the producers or performers or both (Article 12). Although the US is not a party to the Rome Convention, it can still benefit from protection under the Convention, because in principle Contracting Parties to the Convention apply the so-called 'national treatment' principle to performers and producers. This means that in a Contracting Party certain producers and performers who are not nationals of that state should be treated in the same way as nationals, i.e. granted the same rights.

The Rome Convention provides criteria (so-called 'points of attachment') to establish which record producers and performers are entitled to national treatment. Under Article 5 of the Convention, *producers* are protected if they are nationals of a Contracting State to the Convention ("nationality criteria"), or if the sound was fixed in the record in another Contracting State ("fixation criteria"), or if the phonogram was first published in another contracting state ("publication criteria"). This would not cover US records. However, under Article 5(2), if a phonogram is published first in a non-contracting state, such as the US, and published within 30 days in another contracting state, such as the UK, it will be eligible for national treatment ("simultaneous publication"). In that situation, by virtue of article 4 of the Convention, the *performer* whose performance is recorded will also be eligible for protection under the Convention. This means it is possible for records produced by a US company, recorded in the US and by US artists, published first in the US but published in the UK or another State which is party to the Convention within 30 days, to enjoy protection under the Convention in all the contracting states, i.e. in effect in all EU Member States.

However, Contracting Parties to the Rome Convention may limit the application of certain criteria by way of notification under Article 5(3). Parties may decide not to apply either the 'publication criteria' or the 'fixation criteria' to determine whether a producer (and indirectly, a performer) is eligible for national treatment. If a State retains only the fixation criteria, 'simultaneous publication' will no longer qualify a US phonogram for protection under the Convention. This is the case in the following EU Member States: Belgium, Denmark, Estonia, Finland, France, Italy, Luxemburg, Poland, Slovenia and Spain. As a result, these EU Member States will not apply the Rome Convention and will not grant a reproduction right or a right to single equitable remuneration to phonograms produced by a US producer, or first fixed in the US.
Moreover, under Article 16(1)(a), States may decide to not apply or limit the effect of Article 12 of the Convention (single equitable remuneration). Possible limitations include not applying equitable remuneration to phonograms the producer of which is not a national of another Contracting State. This reservation has been notified by the following EU Member States: Austria, Belgium, Bulgaria, Estonia, France, Italy, Lithuania, Latvia, Netherlands, Czech Republic, Romania, UK, Slovakia and Spain. As a result of those exemptions, these Member States will not apply equitable remuneration to phonograms produced by a US record producer.

4.1.2. Under the WPPT

The WPPT is currently in force in the US and in several EU Member States, i.e. Belgium, Cyprus, the Czech Republic, Hungary, Latvia, Lithuania, Poland and Romania. The EC is due to ratify the WPPT.

The WPPT provides for a right to equitable remuneration for broadcasting and communication to the public of works\(^{128}\). It also applies the principle of national treatment to certain producers and performers. The notifications made under Article 5(3) of the Rome Convention may be notified also under the WPPT, thus allowing Parties to choose a first publication or first fixation criteria for eligibility for national treatment. It is generally understood that EU Member States will be free to make such notifications even after ratification of the WPPT by the EC. However, these reservations lose their significance regarding the US, which is a party to WPPT. Phonograms produced by a US producers will in any case be entitled to national treatment under the WPPT.

However, the US has notified reservations in relation to single equitable remuneration under Article 15(3). The US reservation reads as follows: "the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law". This means that in effect, the US does not apply single equitable remuneration for broadcasting and communications to the public.

Due to the US reservation, other parties to the WPPT are entitled not to apply national treatment to US nationals (Article 4(2)). Under WPPT, EU Member States would not have to provide that US companies receive single equitable remuneration for the broadcasting and communication to the public of phonograms produced by US producers and recorded by US performers. They would have to protect US produced phonograms only in relation to certain acts of broadcasting and communication to the public as provided under US law.

However, phonograms produced by a US producer would still be entitled to national treatment in other respects, i.e. in relation to the rights of reproduction, distribution, rental and making available.

\(^{128}\) Under the WPPT, Performers and producers enjoy rights of reproduction, distribution, rental, and making available.
4.2. Protection of 'EU phonograms' in the US

Under US Law, sound recordings enjoy copyright protection\textsuperscript{129}. Sound recordings are protected by law provided that the author is a US or 'treaty party', that the work was first published in the US or a 'treaty party', or fixed by a national of a 'treaty party'\textsuperscript{130}. In other words, a record produced by an EU record producer, first published in the EU or first fixed in the EU qualifies for protection in the US.

**Term of protection:** The author and of a sound recording is the person who creates it by fixing it in a copy or phonorecord for the first time. Although the author is the initial owner of a copyright, it seems sound recordings generally qualify as works made for hire\textsuperscript{131} (at any rate they are usually registered as such with the US Copyright Office), and thus enjoy a term of protection of 95 years from creation\textsuperscript{132}. Under US law, works created after January 1\textsuperscript{st} 1978 are protected, as long as the work qualifies under section 104 of the US Copyright Act. Thus US does not apply a comparison of terms.

**Rights in sound recordings:** the copyright in a sound recording entitles the owner to the rights of reproduction, distribution, rental, lending, the right to make derivative works and the right to perform the copyrighted work publicly by means of a digital audio transmission\textsuperscript{133}. The copyright owner does not have the right to authorise performance of the sound recording publicly, i.e. to authorise broadcasting and communication to the public, other than 'digital audio transmissions'. The right to authorise digital audio transmissions covers essentially webcasting and digital subscription services. In addition, where the transmission is not interactive, the consent of the owner of the copyright in the sound recording is not required. Instead, use of the sound recording is subject to a statutory licence. Payments under the statutory licence are divided between producers and performers on a 50-50 basis.

**Rights of performers:** Performers are not the initial owners of the copyright (i.e. they don’t undertake to fix the record and they might be subject to work for hire) in a sound recording. They enjoy very limited rights (in addition to the share of the revenues from the statutory licence for non interactive webcasting). The protection of performers is essentially limited to a protection against bootlegging and trafficking in bootlegged recordings, see 17 U.S.C. 1101.

---

\textsuperscript{129} 17 U.S.C. 102(7) refers to 'sound recordings', which are defined in section 101 as 'works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work'.

\textsuperscript{130} 17 U.S.C. 104. 'Treaty party' refers inter alia to parties to WTO and WPPT.

\textsuperscript{131} 17 U.S.C. 201(b).

\textsuperscript{132} 17 U.S.C. 302(c).

\textsuperscript{133} 17 U.S.C. 114(a) and 106.
COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.7.2008
SEC(2008) 2288

COMMISSION STAFF WORKING DOCUMENT

accompanying the

Proposal for a

COUNCIL DIRECTIVE

amending Council Directive 2006/116/EC as regards the term of protection of copyright and related rights

SUMMARY OF THE IMPACT ASSESSMENT
ON THE LEGAL AND ECONOMIC SITUATION OF PERFORMERS AND RECORD PRODUCERS IN THE EUROPEAN UNION

{COM(2008) 464 final}
{SEC(2008) 2287}
SUMMARY

This Impact Assessment (IA) analyses the economic and social situation of performers and record producers in the European Union.

With respect to performing artists, this IA shows that many European musicians or singers start their career in their early 20's. That means that when the current 50 year protection ends, they will be in their 70's and likely to live well into their 80's and 90's (average life expectancy in the EU is 75 years for men and 81 years for women). As a result, performers face an income gap at the end of their lifetimes, as they lose royalty payments from record companies as well as remuneration due for the broadcasting or public performance of their sound recordings. The latter income streams are paid to performers directly through their collecting societies and are not affected by their contractual arrangements with the record companies.

For session musicians, who play background music, and lesser known artists, that means that broadcasting and public performance income decreases when performers are at the most vulnerable period of their lives, i.e. when they are approaching retirement. Once copyright protection expires, they will also lose out on potential revenue when their early performances are sold on the Internet.

Moreover, when their rights expire performers are exposed to potentially objectionable uses of their performance which are harmful to their name or reputation. Performers are also at a disadvantage as compared to authors whose works are protected until 70 years after their death. This could be seen as unfair since performers are nowadays not only just as necessary as authors but also more identifiable with the commercial success of a sound recording.

As regards producers of sound recordings, the IA shows that their principal challenge is peer-to-peer piracy and their need to adapt their business to the challenges of dematerialised distribution. In these circumstances, they face the challenge of keeping up the steady revenue stream necessary to invest in new talent. Record companies claim that they invest around 17% of their revenues in the development of new talent, i.e. to sign new talent, promote untried talent and produce innovative recordings. Therefore, a longer term of protection would generate additional income to help finance new talent and would allow record companies to better spread the risk in developing new talent. Due to uncertain returns (only one in eight sound recordings is successful) and so-called 'information asymmetries' such revenue is often not available on capital markets.

The impact assessment analyses the economic, social and cultural impacts of six options

This IA presents a total of seven options, but one option was discarded before the analysis of impacts. Apart from the standard option of 'doing nothing' and letting the music market develop, the IA analyses two options linked to the term of protection for sound recordings and three options that would not require a change in the current terms that apply to sound recordings.

With respect to the term of protection this IA looks at the option of extending the term of performers to 'life or 50 years', whichever is longer. This option would enhance the status of performers and, by linking protection to their lifetime, recognise the individual and creative nature of their performances. This option would not only apply to the performers' exclusive rights but also to the variety of broadcasting and public performance rights that are not transferred to the record companies.
Another option involving the term of protection would be to extend the current 50 year term to 95 years for performers and record companies. This option ensures full equivalence with the longest term of protection in the world. In order to ensure that the benefit of term extension accrues to performing artists, especially session musicians that have transferred their related right against a one off payment, the extension of the term of protection for record companies should be accompanied by the payment of a certain percentage of record companies' increased revenues into a fund dedicated to improving the situation of session musicians. Again, as in the 'life or 50 year' option, the remuneration for broadcasting and public performance would remain with the performer for 95 years.

Another set of options looks at ways to address the problems identified above without modifying the term of protection. These options comprise various possibilities which could improve the financial situation and moral rights of performers. These measures, of course, could be used either as alternatives to a term extension or as measures to complement an extension of the term of protection. Several of these measures could only be the subject of Community legislation.

This IA describes how performers contractually transfer their exclusive rights to record labels, (including their reproduction, distribution, rental and making available rights, but not their remuneration claims for broadcasting and public performances. In order to limit the effect of the systematic contractual transfer of performers' exclusive rights to record companies, the IA examines the possibility of an 'unwaivable' right to remuneration to which performers would remain entitled even after having transferred their making available right to a record producer. The creation of a claim for equitable remuneration for online sales or other forms of making performances available online is an interesting option, whose time may yet come. However, at this stage, the uncertainties surrounding the issue of who should pay this 'equitable remuneration' are such that the likely effects of this option cannot be quantified with any reasonable measure of certainty. In light of the uncertainties surrounding the practical administration of the claim for equitable remuneration, further study on this option is imperative. While in the future this option might well be introduced to enhance performers' participation in revenue generated online, it is too early to discuss at this stage. This option was therefore discarded before the analysis of impacts.

Another option analysed is to strengthen performers' moral rights. The scope of their moral rights could be harmonised to include a right to restrict derogatory uses of their performances.

A further option is to ensure that 'use it or lose it' clauses are included in agreements between performers and record labels. This means that, if a record company is unwilling to re-release a performance during the extended term, the performer can move to another record company or exploit the record himself.

The impacts of the different options

All options are assessed against the following six operational objectives: (1) gradually align authors' and performers' protection; (2) incrementally increase the remuneration of performers; (3) diminish the discrepancies in protection between the EU and US; (4) incrementally increase A&R resources, i.e., the development of new talent; (5) ensure availability of music at reasonable prices; and (6) encourage digitisation of back catalogue.

The IA concludes that 'doing nothing' is not a preferable option. If nothing was done, thousands of European performers who recorded in the late fifties and sixties would lose all of their airplay royalties over the next ten years. This would have considerable social and
cultural impacts. Equally, the sound recording industry would be obliged to cut down on the creation of new sound recordings in Europe.

The IA considers the impact of options not involving the term of performers' and record producers' rights (options 3a, b, c and d). Option 3a (unwaivable right to equitable remuneration) appears premature as it is unclear who would pay for this remuneration and it is hard to estimate the financial benefit it would bring. Option 3b (the strengthening of moral rights), has no financial impact on performers and record producers. Option 3c, the 'use it or lose it' clause, would be beneficial to performers by allowing them to make sure their performances are available on the market. It would also be beneficial for cultural diversity. Option 3d, the fund to be set up by record companies, would be very beneficial to non-featured performer. Record producers, however, would have to pay into the fund at least 20% of the additional revenue generated by the term extension. However, the IA concludes that marketing sound recordings would remain profitable for record companies despite having to pay 20% towards thus fund.

Options involving a term extension (2a "life or 50 years" and 2b "95 years for performers and record producers") seem to be rather more suitable in contributing towards the six policy objectives. Both options 2a and 2b bring financial benefits to performers and would thus allow more performers to dedicate more time to their artistic activities.

Option 2a, by linking the term to the life of a performer, would contribute to aligning the legal protection of performers and authors. It would reflect the personal nature of performers' artistic contributions and recognise that performers are as essential as authors to bringing music to the public. It would also allow performers to object to derogatory uses of their works during their lifetime.

In addition, option 2b would increase the pool of A&R resources available to record producers and could thus have an additional positive impact on cultural diversity. This IA also demonstrates that the benefits of a term extension are not necessarily skewed in favour of famous featured performers. While featured performers certainly earn a bulk of the copyright royalties that are negotiated with the record companies, all performers, be it featured artists or session musicians, are entitled to so-called 'secondary' income sources, such as single equitable remuneration when the sound recording incorporating their performances is broadcast or performed in public. A term extension would ensure that these income sources do not cease during the performer's lifetime. Even incremental increases in income are used by performers to buy more time to devote to their artistic careers, and to spend less time on part time employment. Moreover, for the thousands of anonymous session musicians who were at the peak of their careers in the late fifties and sixties, 'single equitable remuneration' for the broadcasting of their recordings is often the only source of income left from their artistic career.

In addition to ensuring the increased availability of A&R, option 2b is also easier to implement than option 2a, because the latter option is linked to the life of individual performers. As the example of co-written works demonstrates, linking a copyright to the life of individual contributors raises complex issues when several performers contribute to a sound recording. These would increase the legislative and administrative burden on Member States and create legal uncertainty, because the term of protection to the term of protection would no longer be linked to a certain and uniform date, i.e., the publication of the phonogram that contains the performance, but to the sometimes very different lifetimes of individual co-performers.

What are the likely provisions in the proposal to ensure that it is the performing artists that benefit?
In order to ensure that the benefit of term extension would accrue to performing artists, especially session musicians, this IA concludes that record companies should contribute towards a fund for session musicians (option 3d). In order to have the financial volume necessary to ensure real benefits for session musicians, this IA proposes that the record companies set aside at least 20% of the revenue that accrues during the extended term for session musicians. The fund's impact on session musicians would be positive, as the average performer’s additional annual revenues during a 45-year term would almost triple.

The IA also proposes that a term extension should be accompanied by a 'use it or lose it' provision (option 3c). This means that, in the event that a record company is unwilling to re-release a performance during the extended term, the performer can move to another record company or make his performance available himself.

**Empirical studies show that the impact of a term extension would not be negative for consumers.**

Empirical studies show that the price of sound recordings that are out of copyright is not lower than that of sound recordings in copyright. This is true in relation to statutory remuneration claims and for the sale of CDs.

The 'single equitable remuneration' due for broadcasting and performances of music in public venues would remain the same as these payments are calculated as a percentage of the broadcasters or other operators' revenue. As far as CD sales are concerned, very few studies analyse the price between prices of in-copyright and out-of copyright recordings. A study by Price Waterhouse Coopers concluded that there was no systematic difference between prices of in-copyright and out-of copyright recordings. It is the most comprehensive study to date and covers 129 albums recorded between 1950 and 1958. On this basis, it finds no clear evidence that records in which the related rights have expired are systematically sold at lower prices than records which are still protected.

Other studies have been considered in analysing the impact of copyright or related rights on prices. Most of them focus on books. However, even in this category, either no overall price difference is found between the samples of books in- or out-of-copyright, or, the impact of copyright on the price is extremely model-dependant and therefore the estimates obtained cannot be seen as very robust. Given the lack of widely accepted models and the length of the time span, it is fair to say that there is no clear evidence that prices will increase due to term extension.

In addition, overall, the extended term should have a positive impact on consumer choice and cultural diversity. In the long run, this is because a term extension will benefit cultural diversity by ensuring the availability of resources to fund and develop new talent. In the short to medium term, a term extension provides record companies with an incentive to digitise and market their back catalogue of old recordings. It is already clear that internet distribution offers unique opportunities to market an unprecedented quantity of sound recordings.

**International dimension**

The IA also looked at the trade implications of a longer term of protection and provisionally concludes that most of the additional revenue collected in an extended term would stay in Europe and benefit European performers. This is good for promoting Europe's performers and the cultural vibrancy of European sound recordings.
COUNCIL OF
THE EUROPEAN UNION
Brussels, 23 October 2008 (28.10)
(OR. fr)

Interinstitutional File:
2008/0157 (COD)

14536/08
PI 72
CULT 122
CODEC 1368

WORKING DOCUMENT
from: Presidency
to: Working Party on Intellectual Property (Copyright)
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023
- Compromise proposal

Delegations will find attached a compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 29 October 2008.

Amendments to the Commission proposal are indicated.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission\(^1\),

Having regard to the opinion of the European Economic and Social Committee\(^2\),

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights\(^3\), the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, 50 years from the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

\(^1\) OJ C

\(^2\) OJ C

(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years with regard to performances fixed in phonograms and for phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\(^4\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^5\) should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 95 years after publication of the phonogram and the performance fixed therein. If the phonogram or the performance fixed in a phonogram has not been published within the first 50 years, then the term of protection should run for 95 years from the first communication to the public.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non-recurring remuneration).

(9) The Member States must remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the transfer or assignment of the rights of the performer in the fixation of his performance to a phonogram producer concluded before the extension of the term of protection resulting from this Directive.

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain.
(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Member States may require that distribution of those monies is entrusted to collecting societies representing performers. When the distribution of those monies is entrusted to collecting societies, national rules on non-distributable revenues may be applied.

(14) However, Article 5 of Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, *inter alia*, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms and from a single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying should.
(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations⁶ copies of a phonogram which, but for the term extension, would be in the public domain or from making such a phonogram available to the public. As a consequence, the rights of the phonogram producer in the phonogram should expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance whilst the latter rights are no longer transferred or assigned to the phonogram producer.

(16) This accompanying measure should also ensure that a phonogram is no longer protected once it is not made available to the public after a certain period of time following the term extension, because rightholders do not exploit it or because the phonogram producer or the performers cannot be located or identified. If, upon reversion, the performer has had a reasonable period of time to make available to the public the phonogram which, but for the term extension, would be no longer protected, the phonogram is not made available to the public, the rights in the phonogram and in the fixation of the performance should expire.

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation and can therefore, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this directive does not go beyond what is necessary in order to achieve those objectives.

⁶ Done at Rome on 26 October 1961.
(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States, separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, regarding opera, there are often different authors to the music and to the lyrics. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words is incomplete, giving rise to impediments to the free movement of goods and services, such as cross-border collective management services.

(19a) Whenever words and a musical composition are specifically created to be used in a musical composition with words, the term of protection of that composition should be harmonised.

(20) Directive 2006/116/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:
Article 1

Directive 2006/116/EC is amended as follows:

– (1) The second sentence of Article 3(1) is replaced by the following:

"However,

- if a fixation of the performance otherwise than in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,

- if a fixation of the performance in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 95 years from the date of the first such publication or the first such communication to the public, whichever is the earlier."

– (2) In the second and third sentence of Article 3(2) the cipher "50" is replaced by the cipher "95"

– (3) In Article 10 the following paragraph 5 is inserted:

"5. Article 3 (1) and (2) in their version as amended by Directive [// insert: Nr. of the amending directive] shall apply only to fixations of performances and phonograms in regard of which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below]."
(4) The following Article 10 a is inserted:

"Article 10a

Transitional measures relating to the transposition of directive [// insert: Nr. of the amending directive]

1. Deleted.

2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as "contracts on transfer or assignment"), which continue to produce their effects beyond the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

3. Where a contract on transfer or assignment gives the performer a right to claim a non recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3 (1) and (2) in its version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram. The right to obtain an annual supplementary remuneration cannot be waived by the performer.
4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a maximum threshold amount of € 2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

5. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an annual supplementary remuneration referred to in paragraph 3 may be imposed.

6. If, after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access
them from a place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 2, the rights of the phonogram producer in the phonogram shall expire.

If, one year after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [/insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram is not made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the rights of the phonogram producer in the phonogram and the rights of the performers in relation to the fixation of their performance shall expire."

– (5) The following Article 1(7) is inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the music".

Article 2

Transposition

1. Member States shall adopt and publish, by […] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from […].
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

**Article 3**

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

**Article 4**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*
Delegations will find in Annex, for information, a non-paper from the Commission services addressing certain arguments against the above-mentioned Commission proposal put forward in a Joint Statement formulated by a group of academics.
ANNEX

Commission services non-paper on a Joint Academic Statement

The Commission's services were asked to comment on the arguments presented in a Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings¹ (the 'Joint Statement').

The following comments do not in any way replace, make moot or detract from the Commission's impact assessment, which, in various sections, addresses the issues raised in the Joint Statement. The impact assessment is available on the Commission website at the following address: http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm.

The Joint Statement is grouped in four headings: (1) earnings arising from a term extension will be skewed in favour of 'rich and famous' performers (the 'artists' earning effect'); (2) retroactive term extension provides no incentive for future cultural production (the 'supply effect'), (3) term extension will increase retail prices (the 'price effect'); and (4) term extension will negatively affect the EU trade balance (the 'trade argument').

This non-paper will deal with the four issues in turn.

The artists' earning effect

The Joint Statement raises the question of how the proposed term extension would benefit living performers. The authors doubt that living artists as a whole would benefit from an extension of the exclusive rights held by record companies. They argue that the benefits of term extension would fall to a few wealthy performers, their estates and to record companies.

The Commission services found that performers' income depended on (1) contractual payments and (2) secondary remuneration claims which are not transferred; in addition, the proposal ensures that the lowest earning artists benefit from the extension.

¹ [2008] EIPR, 341.
1. Performers do not transfer all their rights to record producers: While performers contractually transfer certain exclusive rights to phonogram producers (such as the exclusive right of distribution, rental, and making available online\(^2\)) they keep the entitlement to all so-called secondary or statutory remuneration claims, such as equitable remuneration for broadcasting and public performance in bars and discotheques, as well as the entitlement to receive fair compensation for acts of private copying.

The Joint Statement ignores the fact that performers do not transfer all of their rights to record producers. Statutory remuneration claims are not included in transfer contracts between performers and record companies\(^3\). Hence, all featured performers (those who transfer against royalty payments) and the often anonymous session musicians (those who transfer against a one-off or 'flat fee' payment) would directly benefit from term extension because these two forms of remuneration would continue to produce revenue in their favour during the extended period. This aspect is often overlooked in the debate which, in the Commission service's view, focuses unduly on contractual royalty payments that stem from the sale of CDs.

2. All performers benefit from secondary remuneration: the Commission's services found that a large part of an average performer's income stems from so-called secondary or statutory remuneration claims not linked to the exercise of exclusive rights. These "rights to remuneration usually represent the main or sole guarantee of remuneration for performers for the multiple uses of their performances"\(^4\). Such secondary sources, which are managed by performers' collecting societies, comprise equitable remuneration for the broadcasting of commercial phonograms, communication of the phonogram in bars, discothèques, cafés or other public places. Indeed,

---

\(^2\) Some performers transfer their rights under a "buy out" contract, and are not entitled to any further remuneration. Other performers obtain a royalty bearing contract, which will continue to bear revenues for performers in the extended term.

\(^3\) It appears to be usual practice to exclude statutory remuneration claims from the scope of the 'transfer of rights' provisions. For example, contracts often have an express disclaimer to the effect that 'Ce contrat ne porte pas atteinte au droit pour l'artiste de percevoir directement par l'intermédiaire de la société civile dont il est membre, toute rémunération due par l'application de la loi ou d'accords collectifs'.

\(^4\) IVIR Study, page 121.
performers collecting societies have indicated to the Commission that equitable remuneration payments represent 57% of all revenue managed collectively. Moreover, in 22 EU Member States performers receive income as compensation for private copying. This represents 38% of a performers' collecting society's income. On a per capita basis these payments may not appear significant to those who benefit from salaried income. But those payments are an essential supplement to the often meagre income of average performers.

The Commission agrees with the Joint Statement that a term extension will not lead to an increase in remuneration paid by broadcasters, webcasters, supermarkets, bars, restaurants or the like for the broadcasting and public performance of sound recordings. This means indeed that the pie will remain constant and will have to be sliced more thinly. However, that does not alter the fact that more performers will have – slightly reduced – income for a longer period. There is a moral case for performers to benefit from remuneration for at least their lifespan, as the Joint Statement acknowledges.

3. The revenues of low earning performers will be boosted by accompanying measures: The proposal provides that performers who sell out their rights against a one-off payment (in effect, session performers) are entitled to 20% of the revenues derived by producers from the sales and the 'making available' of sound recordings during the extended term. While this provision is confined to a footnote in the Joint Statement, it addresses an essential point, ensuring that the worse-off artists benefit from term extension in a meaningful way.

Firstly, this is because the 20% applies to the gross revenues of record producers, who cannot deduct any costs from payments to session musicians.

Secondly, the distribution would not be skewed in favour of famous and high earning artists, because only the worse off musicians would benefit. Finally, the Commission calculated that the payment to an average performer would in effect almost triple from between € 46 and € 737 to between € 130 and € 2065 per year.\(^5\)

---

\(^5\) An increase by a factor of 2.8, see Commission Impact Assessment, page 47. This is a conservative estimate, as, owing to lack of reliable data on the exact number of session musicians, the estimate spreads the benefits of the fund amongst all performers.
Thirdly, even if the fund were to remain a "transitory measure", it would hardly be temporary in nature, as it would operate between, e.g., 2011 until 2104\textsuperscript{6}.

**The supply effect**

The Joint statement claims that "the core purpose of copyright is to stimulate creativity and innovation". A retroactive term extension would defeat this purpose, as it would not encourage additional investments devoted to making more recordings available to consumers. It concludes that the evidence shows that the term extension would negatively affect access and exploitation of the back catalogue of recorded music.

1. **The purpose of copyright in the EU is not only to provide an incentive for creation and innovation.** While such a view is supported by the copyright clause of the US Constitution\textsuperscript{7}, it is much less relevant to most copyright traditions in Europe. Notwithstanding moral rights, concerns relating to distributive justice and social aspects are legitimate and recognised objectives of protection. This is for instance recognised in the reforms to German copyright contract law, which apply to authors as well as performers, or in the Rome Convention\textsuperscript{8}. Moreover, a specific rationale for the protection of record producers is their capacity to enforce rights on their behalf and on the behalf of performers\textsuperscript{9}.

2. **The proposed term extension is not 'fully retroactive'.** This means that it does not affect any sound recordings which are no longer protected by the time the proposal has to be transposed into national law by the Member States. The proposal would thus, if the deadline of transposition was

---

\textsuperscript{6} Assuming the Directive comes into force in 2010; payments will have to be made for all records released between 1961 and 31 December 2009. That means that the fund will operate between 2011 until 2104, i.e., until the term of the last sound recording produced prior to the entry into force of the Directive lapses after 95 years.

\textsuperscript{7} Article I, Section 8, Clause 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

\textsuperscript{8} See IVIR Study, page 96.

later than 2010, only apply to phonograms published from 1960 onwards. This is referred to as 'partial retroactivity'. The Joint Statement implies that a sound recording published as far back as 1910 would regain protection. This is clearly not envisaged.

3. **Record companies promote new talent and spread their risks over a portfolio of recordings:** The Joint Statement also argues that a retroactive extension cannot constitute an incentive. To bolster this point, the Joint Statement quotes an *amici curiae* brief of 2002 which concludes: "Once a work is created, additional compensation to the producer is simply a windfall".

This conclusion may be correct when one looks at each sound recording in isolation. However, this isolated view does not reflect current practice in the sound recording industry: proceeds from the sale of earlier sound recordings are used to finance investments in new artists and repertoire (A&R). This essentially means that incentives for future production are provided by having a broad portfolio of recordings that span a significant period of time. Our impact study estimates that a term extension would create anything between €44 to 843 million in additional revenue. The sound recording industry claims that approximately 17% of revenue is reinvested in A&R. This means that between €7.5 and 143 would be available for reinvestment in new recordings.

4. **The proposed term extension would not hinder access to recordings**.

Firstly, the Commission does not agree that the evidence submitted is relevant. The Joint Statement claims that "Paul Heald, in a new study (2008), shows that musical compositions are more likely to be exploited in movies once they fall into the public domain". Paul Heald, in that study, states that "the study does not prove a positive public domain effect on availability" and that "the comparative rates of exploitation of public domain and copyrighted music are not significantly different".

---

10 BPI figures, cited by the IVIR Study.
11 The IVIR notes that "the public domain status of creative material would in itself not constitute a guarantee that material will indeed be made accessible and available to the public", page 110.
12 In this respect, it is not clear why the Joint Statement claims DG Markt (the Commission) is relying on the PWC report. The IA does not rely on the PWC report on this point.
The Joint Statement also relies on a 2005 study by Tim Brookes to assert that “the prime re-issuers of historical recordings are not the copyright owners” and that “historical recordings from the same period are more available in Europe, due to the shorter term”.

Regarding the latter point, the study contains no evidence to such effect\textsuperscript{13}.

On the former point, the statement that “only 14 per cent of pre-1965 recordings in this sample are available from rights holders” is deceptive\textsuperscript{14}. Firstly, the study does not compare the re-issue of protected sound recordings vs. non-protected recordings. All samples in the study pertain to protected sound recordings. In these circumstances, the study cannot draw any conclusion as to whether the frequency of re-issue depends on copyright protection. Secondly, the study itself concedes that the proportion of records re-issued by right-holders is higher\textsuperscript{15}. Moreover, the study finds that after 1950, right-holders are consistently the prime re-issuers of CDs\textsuperscript{16}.

The proposed extension would only cover recordings released from 1960\textsuperscript{17} onwards: according to the study, 33\% of historical recordings from 1960-1964 are re-issued by rightholders.

\textsuperscript{13} The sole relevant passage refers to one company releasing historical recordings. It does not specify whether these recordings are still protected, produced under licence, etc. The fact that the company in question itself claims that it "has acquired the exclusive rights to over 360 hours of previously unreleased material produced by the Edison Company" and offers "music licensing" services raises some doubts.

\textsuperscript{14} Other elements cast doubt over the relevance of this study here, in particular, the fact that it does not take into account recordings made available over the internet.

\textsuperscript{15} The production of recordings has increased steadily over time. The study divides the time between 1890 and 1964 into five year periods. For each period, it considers the same number of sampled recordings. In reality, the number of recordings in the latter periods are much higher: see Tim Brooks (2005), FN 3: "Since more recordings were made in later years, and the rights-holder reissue rate is also higher for later years, the gross reissue percentage for all recordings would presumably be higher – at least for rightholders".

\textsuperscript{16} Tim Brooks (2005), p. 8.

\textsuperscript{17} Assuming the term extension applies from 2010.
Secondly, a term extension encourages digitisation and online distribution of recordings. The Commission notes that the extension might provide a medium term incentive for record producers to digitise recordings which are on the brink of falling out of copyright. This is important, because record companies, who hold the master recordings, have a "natural competitive advantage" and are in a better position to digitise an old recording from their back catalogue. They are also in a better position to market these old recordings. Finally, it is not clear what the extent of the much debated "long tail" effect will be. The only empirical study, to the Commission's knowledge, suggests that the "tail" is getting longer, i.e. more and more recordings are available online, but the overall value of the long tail seems less than anticipated. The Commission's Impact Assessment notes that record companies have started digitising their back catalogue.

Thirdly, and most important, no sound recordings can be “locked-up” under the proposal: The Commission has proposed an innovative 'use-it-or-lose-it' provision. These clauses will allow performers to get their rights back if the producer does not market their recordings anymore in the period covered by the term extension. The performer will then be able to remarket the music himself or find another record company. Should neither the performer nor the record producer market the sound recording within a year after term extension, protection will lapse. This clause aims to ensure that a maximum number of sound recording are made available to the public.

**The price effect**

Thirdly, the Joint Statement raises the issue of consumer prices. The Joint Statements argues that it is preposterous to argue that term extension will not affect retail prices and record companies need term extension to boost revenues.

---

18 Page 43 of the Commission's Impact Assessment.
19 IVIR Study, page 108.
21 Universal makes available to consumers 18 000 previously ‘deleted’ tracks and the digitisation of its back catalogue should reach 60 000 tracks by the end of 2008; Deutsche Grammophon offers a music download service which includes 2500 albums, 600 of which are not available on CD. See Commission Impact Assessment, page 47.
The consumer impact of the term proposal was carefully studied. You will find many references to this in the impact study itself. At the outset, it is useful to distinguish between two possible price impacts: (1) the remuneration rates that apply to broadcasting and public performances; and (2) the retail prices for physical and online sales. It is fair to say that the Joint Statement does not address remuneration rates at all.

1. Payments by broadcasters, bars and discotheques would not increase: The Commission's impact assessment has an extensive chapter on broadcast and public performance remuneration\(^\text{22}\). The Commission concludes that the calculation methods for broadcast remuneration or discothèque royalties are not dependent on the number of sound recordings that are protected by copyright, a finding which is in accordance with the IVIR Study\(^\text{23}\). In other words, these payments are not dependant on how many sound recordings are or remain protected.

2. Retail prices would not increase

Firstly, the retail prices for CDs and physical goods would not increase due to the term extension. While all economists concur that it is difficult to estimate retail price impacts of copyright protection in an abstract manner – there are many factors that influence the price of a sound recording – it appears fair to say that there is no evidence pointing to a causal link between performers' or producers copyright protection and the retail price of a sound recording\(^\text{24}\). The Commission's impact assessment explains in detail why this is the case, and why the Heald study on the price of books is not relevant to this debate: sound recordings in which the performers and record producers' rights have lapsed are indeed not in the public domain, because the copyright in the music usually lasts for much longer.

\(^{22}\) Section 7.1.3.

\(^{23}\) The IVIR Study notes that collecting societies do not adjust their collections and distributions to the actual share of repertoire that is still protected (page 114), and that "equitable remuneration paid by broadcasters [...] are currently usually paid in lump sums, not differentiating between single recordings being protected or not" (page 119), although it still seems to conclude that the price would increase.

\(^{24}\) The IVIR Study provides no empirical evidence on the subject, but nevertheless notes that "the public domain status of creative material would in itself not constitute a guarantee that material will indeed be made accessible and available to the public".
Moreover, the Joint Statement confuses the re-issuing of sound recordings that are no longer protected with the re-recording of musical compositions which are out of copyright. What the academics fail to explain is that related rights arise anew when such re-recordings are produced. As a major so-called 'public domain' label specialised in re-recording label itself concedes\(^ {25}\), they would thus benefit from a term extension. Therefore, the pricing of these re-recordings is not relevant to the debate of whether related rights have an impact on retail prices.

The Commission thus concluded that the pricing of sound recordings is constrained by many other factors\(^ {26}\), including shelf space, which minimise the importance of related rights protection in the pricing of CDs. The cost savings from the absence of protection for performers and record producers are therefore not passed on to consumers but kept by the "middlemen", distributors or public domain companies, while performers are entirely left out.

**Secondly, the term extension would not cause a price increase for online music.** This is because online music services do no differentiate between non-protected and protected recordings\(^ {27}\). The currently dominant services, such as iTunes, offer downloads at a fixed price per track\(^ {28}\). Subscription based services\(^ {29}\) offer access to a repertoire or a number of tracks in consideration for a

\(^{25}\) Naxos response to the Commission questionnaire on the term of protection for sound recordings, point 61.

\(^{26}\) Other factors including entry barriers, marketing costs associated with the fact that music is an experience good, the lower sales of older recordings (see sales figures from Liebowitz (2006) cited in the Joint Statement), implying less economies of scale and difficult access to shelf space, fewer substitutes (such as concerts or broadcasts) for old CDs, different buyer characteristics, as old repertoire often attracts heavy music consumers who are less sensitive to price variations.

\(^{27}\) The Commission also considered a paper by the Open Rights Group, which claims that users "single handedly" digitise sound recordings and offer free downloads. The vast majority of downloads available from the service referred to are, however, infringing the copyright in the music. This again illustrates the misconception that recordings which are no longer protected are in the public domain.

\(^{28}\) Other services include Nokia Music Store, MSN Music, Napster Light, fnacmusic.com. Some services offer variable prices for a download, such as Musicload.de, depending the price of the album in relation to the number of tracks, and the duration of the tracks, or

\(^{29}\) Such as e-Music (which includes Naxos' catalogue), Omniphone Music Service, FNAC musique illimitee, Napster to go.
monthly payment. Bundled access to music services, such as "Nokia comes with music" (phones, mobile) or "Orange music max" (ISP, mobile)\(^{30}\), also costs the same regardless of what tracks the consumer downloads. Out of the 100 music services surveyed in the recent "Observatoire de la musique: Etat des lieux de l'offre de musique numerique au premier semester 2008", only one service offers access to sound recordings which are no longer protected, and the price, at € 1.00 per track\(^{31}\), is identical to the price charged for tracks where the sound recording remains protected.

**The trade argument**

Fourthly, the Joint Statement raises the issue of how a longer term pertaining to sales, broadcasts and communications to the public that occur in Europe, would affect international trade in sound recordings.

1. **The comparative advantage argument**

The Joint Statement approaches this issue from the angle of Europe trying to gain a 'comparative advantage' over the United States. It also links an industry lobby letter to Commissioner McCreevy's press release to wrongly suggest that the Commission adopts this argument as a rationale for the proposal\(^{32}\). It should be clear that Commission did not adopt this line of reasoning. Moreover, the Joint Statement argues that a shorter term gives the EU an advantage over the US - because there are more public domain sound recordings available in the EU\(^{33}\). One issue should be clarified at the outset. There is no such thing as a 'public domain' sound recording. If a company re-issues a sound recording that is no longer protected by the related right that vests in the sound recording, this does not imply that the sound recording is available at no charge. Copyright royalties for authors and composers are still due until 70 years after their deaths. If a public domain label

\(^{30}\) Other services include Neuf Cegetel (ISP, Universal music), Alice (ISP, EMI), Sony's "playnow plus" (mobile phone).

\(^{31}\) Few companies offer downloads of non-protected sound recordings. Other than the service mentioned by the Observatoire de la Musique, Document Records offers downloads at £0.79 (approximately €1.00) per track.

\(^{32}\) At pages 344-345.

\(^{33}\) The "smaller" public domain in the US is due to transitory measures which mean that under federal law, recordings will only start to fall in the public domain in 2067.
reissues these sound recordings without paying the author's societies, it is infringing copyright. This partly explains why the Commission found no evidence that the shorter term of protection gives European creative industries an innovative edge, and why the Joint Statement provides no such evidence.

2. A term extension would benefit overwhelmingly European performers

The Commission did not focus on the international trade flows of record companies. It did not, for instance, rely on figures which relate to the international trade in manufactured goods, because these figures are based on where CDs are manufactured, not where the sound recording was produced; The IVIR Study, for its part, does\(^\text{34}\) rely on such figures coming to the counterintuitive result that Singapore would be the 5\(^{\text{th}}\) largest exporter of music to the rest of the world.

The Commission did therefore refrain from simplistic analysis of such 'trade flows' because, as the Joint Statement points out, the accounting methods and the shareholder structure of major labels make it impossible to track where the money will end.

It should nevertheless be pointed out that in the top 10 EU markets, 75% of music sales are of European repertoire – in Germany, the second largest market in the EU, the share of sales attributed to US repertoire is as low as 15%\(^\text{35}\).

As the main objective of the term extension is to benefit European performers, the Commission focussed on secondary or statutory remuneration sources, such as broadcasting or public performance revenues. As explained above, all performers are entitled to such revenue, even when they transferred their exclusive rights to producers. In this respect, the Commission found that an overwhelming majority of revenues would benefit European performers, for two reasons.

\(^{34}\) IVIR Study, page 128, citing figures from the OECD ITCS International Trade by Commodity database, which uses the Standard International Trade Classification (Revision 3).

\(^{35}\) IFPI, Recording industry in numbers, 2008.
– The first is that European repertoire represents the large majority of music broadcast in Europe. The share of US repertoire on European airwaves is below 30\%\textsuperscript{36}.

– Secondly, as explained in the Impact Assessment\textsuperscript{37}, due to reservations under the Rome Convention\textsuperscript{38} and under the WPPT Treaty\textsuperscript{39}, equitable remuneration for broadcasting and public performance is rarely paid to US performers and record companies. For example, collecting societies in Austria, Belgium, Denmark, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, the Netherlands, Portugal, Romania, the Slovak Republic, Slovenia and Sweden do not distribute income to US record companies and performers. Collecting societies in Ireland and the UK distribute income only to US record companies, and not performers, who have a subsidiary in their territory.

In these circumstances, we believe that the proposal provides necessary and important support for Europe's performers who deserve recognition for their contribution to European culture.

An indication that performers are not currently given proper recognition might be found in the fact that the term of protection in the EU is shorter than in countries such as the US (where performers might be protected 95 years under the 'work for hire' doctrine, or 70 years \textit{pma} when they are considered as holders of copyright (the US does not make a distinction between copyright and neighbouring rights). Performers 'neighbouring rights' terms are also longer in Australia (70 years), Brazil (70 years), Chile (70 years), India (60 years), Peru (70 years) or Turkey (70 years).

\footnotesize
\textsuperscript{36} Figures for 2007 submitted by collecting societies in the UK, Sweden, Portugal, Latvia, Ireland, Greece, France, Estonia, Denmark, Belgium and Austria.
\textsuperscript{37} Page 44 and pages 63-64.
\textsuperscript{38} Articles 5(3) and 16(1)(a).
\textsuperscript{39} Articles 4(2) and 15(3).
WORKING DOCUMENT

from: Presidency
to: Working Party on Intellectual Property (Copyright)

No prev doc: 14536/08 PI 81 CULT 129 CODEC 1500
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023


Delegations will find attached a revised compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 18 November 2008.

Changes to 14536/08 are indicated.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, 50 years from the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

¹ OJ C
² OJ C
(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances and to phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to [95] years after the relevant event [...].

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram

---

producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non-recurring remuneration).

(9) The Member States must remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the transfer or assignment of the rights of the performer in the fixation of his performance to a phonogram producer concluded before the extension of the term of protection resulting from this Directive.

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain.

(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.
(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Member States may require that distribution of those monies is entrusted to collecting societies representing performers. When the distribution of those monies is entrusted to collecting societies, national rules on non-distributable revenues may be applied.

(14) However, Article 5 of Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, *inter alia*, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations\(^6\) copies of a phonogram which, but for the term extension, would be in the public domain or from

\(^6\) Done at Rome on 26 October 1961.
making such a phonogram available to the public. As a consequence, the rights of the phonogram producer in the phonogram should expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(16) This accompanying measure should also ensure that a phonogram is no longer protected once it is not made available to the public after a certain period of time following the term extension, because rightholders do not exploit it or because the phonogram producer or the performers cannot be located or identified. If, upon reversion, the performer has had a reasonable period of time to make available to the public the phonogram which, but for the term extension, would be no longer protected, the phonogram is not made available to the public, the rights in the phonogram and in the fixation of the performance should expire.

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is
often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services.

[...]

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making⁷, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/116/EC is amended as follows:

– (1) The second sentence of Article 3(1) is replaced by the following:

"However,

[...]

if a fixation of the performance [...] is lawfully published or lawfully communicated to the public within this period, the rights shall expire [95] years from the date of the first such publication or the first such communication to the public, whichever is the earlier."

– (2) In the second and third sentence of Article 3(2) the number "50" is replaced by ["95"].

– (3) In Article 10 the following paragraph 5 is inserted:

"5. Article 3(1) and (2) in their version as amended by Directive [insert number of the amending directive] shall apply only to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert the date by which the Member States must transpose the amending directive, as mentioned in Article 2 below]."
(4) The following Article 10a is inserted:

"Article 10a  
Transitional measures relating to the transposition of  
directive [insert number of the amending directive]  

1. Deleted.

2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert the date by which the Member States must transpose the amending directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as "contracts on transfer or assignment"), which continue, in accordance with national legislation, to produce their effects beyond the moment at which, by virtue of Article 3(1) […] in its version before amendment by Directive [insert number of the amending directive]/EC, the performer […] would be no longer protected […].

3. Where a contract on transfer or assignment gives the performer a right to claim a non recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3(1) […] in its version before amendment by Directive [insert number of the amending directive], the performer […] would be no longer protected […]. The right to obtain an annual supplementary remuneration cannot be waived by the performer.
4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) […] in its version before amendment by Directive [insert number of the amending directive], the performer […] would be no longer protected on 31 December of the said year.

Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a maximum threshold amount of EUR 2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) […] in its version before amendment by Directive [insert number of the amending directive], the performer […] would be no longer protected on 31 December of the said year.

5. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an annual supplementary remuneration referred to in paragraph 3 may be imposed.

6. If, after the dates at which, by virtue of Article 3(1) and (2) in their version before amendment by Directive [insert number of the amending directive], the performer and the phonogram producer would be no longer protected in regard to, respectively, the fixation of the performance and the phonogram, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access
them from a place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 3, the rights of the phonogram producer in the phonogram shall expire.

If, three years after the dates at which, by virtue of Article 3(1) and (2) in their version before amendment by Directive [insert number of the amending directive], the performer and the phonogram producer would be no longer protected in regard to, respectively, the fixation of the performance and the phonogram, the phonogram is not made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the rights of the phonogram producer in the phonogram and the rights of the performers in relation to the fixation of their performance shall expire.

– (5) The following Article 1(7) is inserted:

"The term of protection of a musical composition and of lyrics specifically created to constitute a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition".

– (6) The following Article 10(6) is inserted:

"Article 1(7), in its version amended by Directive [insert number of the amending directive], shall apply solely to musical compositions with words which before [insert the date by which the Member States must transpose the amending directive, as mentioned in Article 2 below] are protected in at least one Member State."
The previous subparagraph shall be without prejudice to any acts of exploitation performed before [insert the date by which the Member States must transpose the amending directive, as mentioned in Article 2 below] Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.

Article 2
Transposition

1. Member States shall bring into force, by […] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions […].

[…]
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
PROGRESS REPORT

from: Presidency

to: Permanent Representatives Committee (Part 1)

No. prev. doc.: 15380/08 PI 81 CULT 129 CODEC 1500
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023


1. The Commission submitted the above proposal to the Council on 24 July 2008. The purpose of the proposal is to extend from 50 to 95 years the term of rights of performers over the fixation of their performance on a phonogram, and that of the rights of the producer over the phonogram when the phonogram has been lawfully published or communicated to the public. It provides for a series of transitional measures designed in particular to ensure that session musicians are able to benefit fully from the extension of the term of protection and that phonograms for which the term of protection has been extended are in fact made available to the public.

In addition, the Commission proposal aims to introduce a uniform method of calculating the term of protection which applies to a musical composition with words.
2. The European Parliament has been consulted on the same proposal under the co-decision procedure but has not yet given its opinion at first reading. That opinion is expected in February 2009.

3. The Working Party on Intellectual Property (Copyright) (hereinafter "the Working Party") examined the Commission proposal on 9 September and 6 October 2008. A first compromise proposal prepared by the Presidency (14536/08) was discussed at the Working Party's meeting on 29 October 2008. At that meeting, the Working Party also had before it, following requests by some delegations, a non-paper from the Commission (14593/08) responding to the economic arguments put forward in certain academic circles against extending the term of protection. The note made it possible to clarify discussions on the economic impact of the proposed Directive, in particular on the artists' earning effect, the supply effect, the price effect and the trade argument. It was then possible for a revised compromise proposal (15380/08) to be debated by the Working Party on 18 November 2008.

4. The purpose of the present report is to inform the Competitiveness Council at its meeting on 1 and 2 December 2008 of progress so far.

5. Several delegations are maintaining a scrutiny reservation or a parliamentary scrutiny reservation at this stage. The delegations have said that they support the proposed Directive's principal objective of providing performers with better protection. While agreeing with that objective, some delegations have expressed doubts as to the ability of this proposal to achieve it in a satisfactory or balanced way.

6. In response to the doubts expressed by two delegations, the Council Legal Service has been able to confirm orally that the legal basis used by the Commission in its proposal is adequate.
7. On the proposed extension of the term of protection of rights of performers over the fixation of their performance on a phonogram and the rights of the producer over the phonogram, some delegations consider that a 95-year term of protection would be too long but have indicated that they could accept an extension for a more moderate term. The Presidency's most recent compromise proposal indicates that this figure is a matter for discussion.

8. In response to delegations which regarded the exclusion of audiovisual performers from the scope of extension of the term of protection as unjustified discrimination, the Presidency has proposed extending this extension of the term of protection to fixations of audiovisual performances.

9. In the case of application of the Directive to rights that are the subject of contracts in progress (Article 10a), some delegations wanted to reconsider the provision creating a presumption of continuity of contracts on transfer or assignment during the additional period of protection. There was a call for further examination. In response to the criticisms formulated regarding compliance with the principle of subsidiarity, the Presidency has proposed referring this question to the law of each Member State.

On the right of session musicians to claim additional annual remuneration and the option for the performer of recuperating his rights in the absence of exploitation by the phonogram producer, several delegations wanted to strengthen, adapt and clarify these measures. Even though some clarification has already been provided, examination of these issues by the Working Party continues. Moreover, following requests by delegations, the Presidency has proposed indicating that such rights may not be waived.
10. Finally, regarding harmonisation of the method of calculating the term of protection of musical compositions with words, several delegations have pointed out that the scope of such harmonisation should be made clear. The Presidency's most recent proposal tries to allay this concern by suggesting that the scope of this provision be limited solely to musical compositions and lyrics specifically created to constitute a musical composition with words. It also introduces an arrangement to settle the question of the period of application.

11. The Permanent Representatives Committee is asked to take note of the Presidency's intention of submitting this report to the next Competitiveness Council, inviting the latter to take note thereof and instruct its preparatory bodies to continue discussions with a view to finding solutions to the questions outstanding in the Council and reaching agreement as soon as possible.
1. The Commission submitted the above proposal to the Council on 24 July 2008. The purpose of the proposal is to extend from 50 to 95 years the term of rights of performers over the fixation of their performance on a phonogram, and that of the rights of the producer over the phonogram when the phonogram has been lawfully published or communicated to the public. It provides for a series of transitional measures designed in particular to ensure that session musicians are able to benefit fully from the extension of the term of protection and that phonograms for which the term of protection has been extended are in fact made available to the public.

In addition, the Commission proposal aims to introduce a uniform method of calculating the term of protection which applies to a musical composition with words.
2. The European Parliament has been consulted on the same proposal under the co-decision procedure but has not yet given its opinion at first reading. That opinion is expected in February 2009.

3. The Working Party on Intellectual Property (Copyright) (hereinafter "the Working Party") examined the Commission proposal on 9 September and 6 October 2008. A first compromise proposal prepared by the Presidency (14536/08) was discussed at the Working Party's meeting on 29 October 2008. At that meeting, the Working Party also had before it, following requests by some delegations, a non-paper from the Commission (14593/08) responding to the economic arguments put forward in certain academic circles against extending the term of protection. The note made it possible to clarify discussions on the economic impact of the proposed Directive, in particular on the artists' earning effect, the supply effect, the price effect and the trade argument. It was then possible for a revised compromise proposal (15380/08) to be debated by the Working Party on 18 November 2008.

4. The purpose of the present report is to inform the Competitiveness Council at its meeting on 1 and 2 December 2008 of progress so far.

5. Several delegations are maintaining a scrutiny reservation or a parliamentary scrutiny reservation at this stage. The delegations have said that they support the proposed Directive's principal objective of providing performers with better protection. While agreeing with that objective, some delegations have expressed doubts as to the ability of this proposal to achieve it in a satisfactory or balanced way.

6. In response to the doubts expressed by two delegations, the Council Legal Service has been able to confirm orally that the legal basis used by the Commission in its proposal is adequate.
7. On the proposed extension of the term of protection of rights of performers over the fixation of their performance on a phonogram and the rights of the producer over the phonogram, certain delegations consider that a 95-year term of protection would be too long but some of them have indicated that they could accept an extension for a more moderate term. The Presidency's most recent compromise proposal indicates that this figure is a matter for discussion.

8. In response to delegations which regarded the exclusion of audiovisual performers from the scope of extension of the term of protection as unjustified discrimination, the Presidency has proposed extending this extension of the term of protection to fixations of audiovisual performances.

9. In the case of application of the Directive to rights that are the subject of contracts in progress (Article 10a), some delegations wanted to reconsider the provision creating a presumption of continuity of contracts on transfer or assignment during the additional period of protection. There was a call for further examination. In response to the criticisms formulated regarding compliance with the principle of subsidiarity, the Presidency has proposed referring this question to the law of each Member State.

On the right of session musicians to claim additional annual remuneration and the option for the performer of recuperating his rights in the absence of exploitation by the phonogram producer, several delegations wanted to strengthen, adapt and clarify these measures. Even though some clarification has already been provided, examination of these issues by the Working Party continues. Moreover, following requests by delegations, the Presidency has proposed indicating that such rights may not be waived.
10. Finally, regarding harmonisation of the method of calculating the term of protection of musical compositions with words, several delegations have pointed out that the scope of such harmonisation should be made clear. The Presidency's most recent proposal tries to allay this concern by suggesting that the scope of this provision be limited solely to musical compositions and lyrics specifically created to constitute a musical composition with words. It also introduces an arrangement to settle the question of the period of application.

11. The Council is invited to take note of this report and to instruct its preparatory bodies to continue discussions with a view to finding solutions to the questions outstanding in the Council and reaching agreement as soon as possible.
COUNCIL OF THE EUROPEAN UNION

Brussels, 5 December 2008 (08.12)
(OR. fr)

16692/08

Interinstitutional File:
2008/0157 (COD)

PI 89
CULT 140
CODEC 1712

WORKING DOCUMENT

from: Presidency

to: Working Party on Intellectual Property (Copyright)

No. prev. doc: 16005/08 PI 87 CULT 136 CODEC 1611

No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023

– Revised compromise proposal

Delegations will find attached a revised compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 9 December 2008.

Changes to 15380/08 are indicated.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, 50 years from the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

¹ OJ C [...], [...], p. [...].
² OJ C [...], [...], p. [...].
(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances and to phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\(^4\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^5\) should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to [95] years after the relevant event.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram

producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non-recurring remuneration).

(9) The Member States must remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the transfer or assignment of the rights of the performer in the fixation of his performance to a phonogram producer concluded before the extension of the term of protection resulting from this Directive.

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least [20] percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.
(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Member States may require that distribution of those monies is entrusted to collecting societies representing performers. When the distribution of those monies is entrusted to collecting societies, national rules on non-distributable revenues may be applied.

(14) However, Article 5 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations6 copies of a phonogram which, but for the term extension, would be in the public domain or refrains

---

6 Done at Rome on 26 October 1961.
from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(16) This accompanying measure should also ensure that [...] if, upon reversion, the performer has had a reasonable period of time to make available to the public the phonogram which, but for the term extension, would be no longer protected, and the phonogram is not made available to the public by the end of this period, the rights of the performer in [...] the fixation of his performance should expire.

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a
librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words whose lyrics and music were created for use together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services.

(19a) Given the development of the information society and new forms of exploitation, it is appropriate for the Commission to draw up a report, three years after [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], on the application of this Directive, including a survey of the situation of performers and producers of phonograms with respect to the development of the digital market.

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making\(^7\), Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/116/EC is hereby amended as follows:

– (1) The second sentence of Article 3(1) shall be replaced by the following:

"However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire [95] years from the date of the first such publication or the first such communication to the public, whichever is the earlier."

– (2) In the second and third sentence of Article 3(2), the number "50" shall be replaced by ["95"].

– (3) In Article 10, the following paragraph 5 shall be inserted:

"5. Article 3(1) and (2) in the version amended by Directive [insert number of the amending directive] shall apply only to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]."
(4) The following Article 10a shall be inserted:

"Article 10a

Transitional measures relating to the transposition of Directive [insert number of the amending directive]

1. Deleted.

2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as "contracts on transfer or assignment"), which continue, where provided for under the applicable legislation, to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected.

3. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected. The right to obtain an annual supplementary remuneration cannot be waived by the performer.
4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least [20] percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.

Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a maximum threshold amount of EUR 2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.

5. Member States may regulate whether and to what extent administration of the right to obtain an annual supplementary remuneration referred to in paragraph 3 by collecting societies may be imposed.

6. If, after the dates on which, by virtue of Article 3(1) and (2) in the version before amendment by Directive [insert number of the amending Directive], the performer and the phonogram producer would be no longer protected in regard to, respectively, the fixation of the performance and the phonogram, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a
place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. The right to terminate the contract may be exercised when the conditions laid down in the first sentence have been met, on expiry of a period of [one] year from the notification by the performer of his intention to terminate the contract pursuant to sentence 1. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 4, the rights of the phonogram producer in the phonogram shall expire.

If, three years after the date on which the contract on transfer or assignment is terminated in the conditions referred to in the previous subparagraph, the phonogram is not made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, [...] the rights of the performers in the fixation of their performance shall expire.

– (5) The following Article 1(7) shall be inserted:

"The term of protection [...] of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, where they were specifically created for a musical composition with lyrics."

– (6) The following Article 10(6) shall be inserted:

"Article 1(7), in its version amended by Directive [insert number of the amending Directive], shall apply solely to musical compositions with words which before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] are protected in at least one Member State."
The previous subparagraph shall be without prejudice to any acts of exploitation performed before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."

Article 2

Transposition

1. Member States shall bring into force, by […] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
On page 2, the second recital should read as follows:

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, it expires 50 years from the first such publication or the first such communication to the public, whichever is the earliest.


(2009/C 182/07)

Rapporteur: Mr GKOFAS


The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on this subject, adopted its opinion on 6 January 2009. The rapporteur was Mr GKOFAS.

At its 450th plenary session of 14 and 15 January 2009 (meeting of 14 January), the European Economic and Social Committee adopted the following opinion by 115 votes to 3, with 15 abstentions.

1. Conclusions and recommendations

1.1 The EESC calls for the establishment of a single system to harmonise Member States' rules on protecting the copyright of musical compositions that contain the contributions of several authors, in order to avoid problems in the cross-border distribution of royalties.

1.2 The EESC also calls for music compositions with lyrics to be treated as single works, with a period of protection lasting 70 years after the death of the last author.

1.3 The Member States often give many differing collecting societies responsibility for copyright, meaning that users are subject and liable to more than one of them even for a work that the user obtained as a complete, unedited and single work, produced in one medium. Provision should be made and it should be clearly stated that works produced in this way are single complete and non-divisible products and must be treated as such.

1.4 A single copyright management body should be established to collect duties and protect copyright holders. It should be the sole body responsible for collecting duties and distributing any sums to other existing or newly-founded bodies representing copyright holders, so that users have only to deal and make contracts with one organisation and not several.

1.5 The EESC recommends extending the duration of protection for fixations of performances from 50 to 85 years. In order to step up efforts to protect anonymous performers, who generally cede their copyright in the phonogram in return for an 'equitable remuneration' or a lump sum payment, there should be a regulation stating that record producers should reserve at least 20 % of receipts from the sale of phonograms that they decide to use during the extended period of protection.

1.6 The EESC recommends establishing a fund for performers and above all for less-well known performers, as the big names always come to agreements with producers regarding percentages of sales of phonograms.

1.7 The EESC believes that a contract should be drawn up between the performers represented and members of collecting societies to ensure that royalties are managed and collected legally. The collecting societies would then have no right to collect any sum on behalf of any individual copyright holder with whom they had no written and dated contract.

1.8 These companies should be of a non-profit nature and be fully transparent in their records of receipts and payments of royalties, in order to ensure resources are distributed properly.

1.9 The EESC is however concerned that receipts from secondary sources of income put an excessive burden on those responsible for payment. More specifically, there is a need to clarify the meaning of public performance via radio or television at Community level and then to translate that into Member State legislation, so that reasonable performance and rebroadcasting is understood as the private rebroadcasting of prepaid public performances.
1.10 The EESC believes that remuneration should be equitable for both sides, for the copyright holders and for those subject to payment. The lack of clarity surrounding equitable remuneration for the transfer of the performer’s rental right must be dealt with. It is unacceptable that there is no single Community rule on this and that it is left to the discretion of legislators in individual Member States, who in turn transfer responsibility to collecting societies that determine often inequitable payments that are not subject to controls.

1.11 The EESC believes that there is a need to specify that public use means the use of a work for profit in the context of a business activity that demands or justifies that use (of a work involving sound, images, or sound and images).

1.12 More specific mention should be made of whether the performance is broadcast via equipment or through direct communication (optical disks, magnetic waves (receivers)). In such cases, responsibility for public broadcasting (and the choice) belongs not to the end user but to the broadcaster; the user of the work is not therefore the end user and therefore the concept of public performance does not apply here.

1.13 Use of the media cannot be considered a primary public performance when it is broadcast from places such as restaurants, cafes, buses, taxis, etc. and as a result these should be exempt from the payment of performers’ royalties. Royalties from phonograms have already been paid by those who obtained the phonograms, who have the right to play them with wired or wireless devices. Listening to phonograms on the radio must be considered to be private use by the public, whether at home, at work, on the bus or at the restaurant. As members of the public cannot be in two places at once, the royalties are paid by the stations that are the real users.

1.14 Professional sectors where music and/or images play no role in the production process should be exempt. Sectors where the broadcast of music or images plays a secondary role in the conduct of business activities should pay a lower set amount, clearly determined following negotiations between the representatives of users’ collective organisations and the single copyright management body.

1.15 The EESC believes that there should be an additional fund to act as a guarantee for collecting societies and ensure that they pay out the sums to performers even if they encounter difficulties. The ‘use it or lose it’ provision should be written into contracts between performers and phonogram producers, in addition to the ‘clean slate’ principle for contracts covering the extension period, after the first 50 years.

1.16 The EESC is particularly concerned that Community legislation is aimed in general terms at protecting intellectual and related property rights without taking into account the corresponding rights of users and final consumers. While reference is made to the fact that creative, artistic and business activities are largely carried out by self-employed persons and as such should be facilitated and protected, the approach is not the same for users. It is therefore necessary to iron out inconsistencies between Member States’ national rules, replacing penalties for failure to pay royalties, where they exist, with administrative fines.

1.17 The EESC agrees with the amendment to Article 3(1) but with the inclusion of an 85-year protection period. The EESC would also like the second and third sentences of Article 3(2) to refer to 85 years. The EESC welcomes the inclusion in Article 10 of paragraph 5 concerning the retroactive nature of the directive.

1.18 The EESC calls on the Commission to take into account the comments and proposals aimed at improving the existing case-law and calls on the Member States to comply with the directives and take the necessary legislative measures in order to build them into national law.

2. Introduction

2.1 The current regime, which provides protection lasting 50 years, stems from European Parliament and Council Directive 2006/116/EC on the term of protection of copyright and more generally the related rights of performers.

2.2 Furthermore, as stressed in the explanatory memorandum of the proposal, as well as affecting well-known artists, the main impact will be on those who have ceded their exclusive rights to the phonogram producer in exchange for a lump sum payment. Naturally these equitable one-off payments for radio or television broadcasts of their phonograms will cease.

3. General comments

3.1 The aim of the opinion is to amend certain of the existing articles of Directive 2006/116, which governs the protection period relating to performances and phonograms, and to highlight certain additional measures and issues in order to help achieve the aims of the opinion more effectively, i.e. easing social disparities between producers, top-level performers and session musicians.

3.2 The EESC is highly concerned about the protection of performers’ copyright and related rights, particularly in connection with phonograms, and would recommend meeting their requirements with a minimum contribution during the extended protection period.

4. Specific comments

4.1 The Commission’s main idea focuses on extending the duration of protection of copyright for performers.

4.2 The EESC believes that this harmonisation among Member States is necessary in order to avoid difficulties in the cross-border distribution of royalties from other Member States.
4.3 The EESC also believes that music compositions with lyrics should be treated as single works, with a period of protection lasting 70 years after the death of the last author, given that it is better to increase protection of authors' copyright rather than have a shrinking period of protection that would cause many problems.

4.4 Accordingly, the EESC recommends that protection for fixations of performances should be increased from 50 to 85 years.

4.5 In order to step up efforts to protect anonymous performers, who tend to cede their copyright in the phonogram in return for 'equitable remuneration' or a lump sum payment, there should be a regulation stating that record producers should reserve at least 20% of receipts from the sale of those phonograms that they choose to use during the extended period of protection.

4.6 In line with the above aims, the EESC believes a fund should be set up for performers, especially for less well-known performers.

4.7 The administration and payment of sums should be carried out by collecting societies which should administer so-called secondary remuneration claims. Specific safeguards should however be put in place regarding the running and composition of these bodies.

4.8 The EESC believes that in principle there should be a written contract between performers who are represented and the collecting societies, in order to ensure the legality of the administration and receipt of royalties.

4.9 These societies should be of a non-profit nature and should be fully transparent in their records of royalties collected and distributed. The EESC believes that these societies, which should be established in accordance with the standards and rules of each State, should be separated into two categories depending on whether they represent authors or performers. The EESC believes that the existence of more such societies representing different groups would lead to confusion and would certainly make transparency and controls more difficult to secure.

4.10 Meanwhile, performers also collect income from other sources. The collecting societies were set up mainly to administer so-called 'secondary remuneration claims', of which there are three main types: a) equitable remuneration for broadcasting and communication to the public b) private copying levies, and c) equitable remuneration for the transfer of the performers' rental right. Naturally, this income will increase with the extension of the protection period from 50 to 85 years.

4.11 Nevertheless, the EESC is concerned that these receipts from secondary sources of income place an excessive burden on those responsible for their payment, an issue that is clearly quite separate from the extension of the protection period. More specifically, there is a need to clarify the meaning of communication to the public via radio or television at Community level and then to translate that into Member State legislation, so that there is a proper understanding of reasonable performance and rebroadcasting by private means of prepaid public performances.

4.12 The EESC believes that the payment of equitable remuneration for rebroadcasting of a previous performance, particularly when the rebroadcast is not for profitable ends, is excessive and contributes to copyright fraud in music.

4.13 The EESC is also concerned by the way funds gained from artists' other two sources of income are administered. It is a major issue that concerns all those subject to royalties. Without a prior written contract between the person due the above-mentioned additional income and the person acting as their representative in the collecting society responsible for paying it, how can the former be sure that the latter will make the additional payment properly?

4.14 Furthermore, the lack of clarity surrounding equitable remuneration for the transfer of the performer's rental right must be dealt with. The EESC believes that the payment should be equitable for both sides: for the person receiving royalties and the person paying. In addition, this payment should be determined in a proportionate way, every five years or so, following bilateral collective negotiations.

4.15 The EESC believes that in this way, while also regulating payments for copies for private use, especially for professionals in the leisure industry that use the copies for other than strictly private purposes, it will be possible to ensure a stable flow of income from secondary sources throughout the extended period of protection, while combating music piracy and increasing legal sales of phonograms over the internet.

4.16 In addition, the EESC believes that to ensure that collecting societies pass on payments to performers there should be an additional fund to act as a guarantee in the event of difficulties, and able to pay the sums concerned.

4.17 The EESC also believes that to achieve the desired objectives, certain accompanying measures should be included in the directive. More specifically, the 'use it or lose it' clause should be included in contracts between performers and phonogram producers, as well as the principle of the 'clean slate' for contracts covering the extension period, after the first 50 years. If a year passes following the extension of the protection period, the rights to the phonogram and the fixation of the performance shall expire.

4.18 The EESC is certain that priority should be given to protecting performers who find that their works are locked into phonograms that the producer through failure to act has not made available to the public. It believes that additional measures are necessary to prevent producers from discarding performers' work; these could be administrative measures or take the form of fines or penalties.
4.19 The EESC also believes that, since the Member States have a great tradition of popular songs, there should be special regulations for this type of song and others of a similar nature that can be deemed ‘orphan works’, in order to bring them into the public domain.

4.20 The EESC agrees with the reference in Article 10 to the retroactive nature of the law for all current contracts.

4.21 The EESC also agrees with paragraphs 3 and 6 of Article 10.

4.22 The EESC agrees with the right to an annual additional payment for the extended period of protection in contracts concerning the transfer or assignment of rights from artists or performers.

4.23 The EESC agrees that 20% of the receipts that the producer receives during the year preceding the payment is an appropriate amount for the additional payment.

4.24 The EESC disagrees with the proposal that the Member States should regulate the payment of the additional annual amount by the collecting societies.

4.25 The EESC believes it is essential that there be a written contract between each individual performer and the representatives of the society. This contract must precede the collection of royalties by representatives on behalf of the performer. The societies must submit annual accounts to another distinct body made up of performers and producers, showing the administration of receipts gained from additional payments made during the extended protection period.

4.26 The EESC agrees with the transition measure in Article 10 and with the one on the exploitation of the phonogram by the artist.

4.27 The EESC therefore considers it necessary to have a single regulation under which certain producers should be exempt from the rule on reserving 20%, for instance, those whose annual income does not exceed EUR 2 million. Naturally, an annual check of producers would be necessary in order to ascertain which fell into this category.

4.28 The EESC is concerned that in the absence of legislative provisions on means of payment, payment checks, payment proof, possible bankruptcy of companies, cases where royalty holders die or renounce their rights, agreements between persons with rights and collecting societies, checks on collecting societies and many other legal issues, the adoption of this directive, particularly in the area of the management and payment of the 20% of additional income, will generate greater problems upon implementation, without really resolving the problems of levelling out conditions for well-known performers and unknown performers.

4.29 The solution to this problem lies not only in extending the protection period, but in carefully designed contracts including the “use it or lose it” clause. The EESC believes that legislative provisions that help to avoid works being locked up for 50 years should be adopted at the same time as adopting the amendment to the directive. Additional provisions are essential particularly for the means of payment of royalties to royalty holders, before the amendment is adopted as internal law by the Member States.

4.30 The EESC believes that in order to avoid generalisations and differing interpretations, the concept of ‘publication of a phonogram’ must be made sufficiently clear. There is also the issue of the simultaneous publication of a phonogram by two different artists and above all by session musicians, who have not ceded their rights to the producer concerned (media broadcasts, rehearsals of songs for competitions, or the broadcast of songs on the internet).


The President
of the European Economic and Social Committee
Mario SEPÍ
COUNCIL OF THE EUROPEAN UNION

Brussels, 14 January 2009

Interinstitutional File:
2008/0157 (COD)

Pi 2  
CULT 2  
CODEC 30

WORKING DOCUMENT

from: Presidency  
to: Working Party on Intellectual Property (Copyright)

No. prev. doc. : 16692/08 PI 89 CULT 140 CODEC 1712  
No. Cion prop. : 12217/08 PI 35 CULT 82 CODEC 1023

– Revised compromise proposal

Delegations will find attached a revised compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 26 January 2009.

Changes to 16692/08 are indicated.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

¹ OJ C [...], [...], p. [...].
² OJ C [...], [...], p. [...].
(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances and to phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\(^4\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^5\) should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to [95] years after the relevant event.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non-recurring remuneration).

(9) The Member States must remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the transfer or assignment of the rights of the performer in the fixation of his performance to a phonogram producer concluded before the extension of the term of protection resulting from this Directive.

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies representing performers and national rules on non-distributable revenues may be applied.
(14) However, Article 5 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations\textsuperscript{6} copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(16) [...]

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of

\textsuperscript{6} Done at Rome on 26 October 1961.
proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words whose lyrics and music were created for use together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services.

(19a) […]

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

---

Article 1

Directive 2006/116/EC is hereby amended as follows:

- (1) In the second sentence of Article 3(1), the number “50” shall be replaced by [“95”].

- (2) In the second and third sentence of Article 3(2), the number "50" shall be replaced by ["95"].

- (3) In Article 10, the following paragraph 5 shall be inserted:

  "5. Article 3(1) and (2) in the version amended by Directive [insert number of the amending directive] shall apply only to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]."
(4) The following Article 10a shall be inserted:

"Article 10a

Transitional measures relating to the transposition
of Directive [insert number of the amending directive]

1. Deleted.

2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as "contracts on transfer or assignment"), which continue, where provided for under the applicable legislation, to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected.

3. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected. The right to obtain an annual supplementary remuneration cannot be waived by the performer.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.
Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a maximum threshold amount of EUR 2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.

5. Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 3 is administered by collecting societies representing performers.

6. If, after the dates on which, by virtue of Article 3(1) and (2) in the version before amendment by Directive [insert number of the amending Directive], the performer and the phonogram producer would be no longer protected in regard to, respectively, the fixation of the performance and the phonogram, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. The right to terminate the contract may be exercised when the conditions laid down in the first sentence have been met, on expiry of a period of [one] year from the notification by the performer of his intention to terminate the contract pursuant to sentence 1. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national laws. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 4, the rights of the phonogram producer in the phonogram shall expire.

[...]

5309/09 LK/mg 9

DG C I EN
(5) The following Article 1(7) shall be inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, where they were specifically created for a musical composition with lyrics."

(6) The following Article 10(6) shall be inserted:

"Article 1(7), in its version amended by Directive [insert number of the amending Directive], shall apply solely to musical compositions with words which before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] are protected in at least one Member State.

The previous subparagraph shall be without prejudice to any acts of exploitation performed before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."

Article 1a

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than [3] years from [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] a report on the application of this Directive in the light of the development of the digital market.
Article 2

Implementation

1. Member States shall bring into force, by [...] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3
This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 4
This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
COUNCIL OF THE EUROPEAN UNION

Brussels, 30 January 2009

5877/09

Interinstitutional File: 2008/0157 (COD)

5877/09 PI 7 CULT 4 CODEC 96

WORKING DOCUMENT
from: Presidency
to: Working Party on Intellectual Property (Copyright)
No. prev. doc.: 5309/09 PI 2 CULT 2 CODEC 30
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023
– Revised compromise proposal

Delegations will find attached a revised compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 10 February 2009.

Changes to 5309/09 are indicated.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

---

¹ OJ C [...], [...], p. [...].
² OJ C [...], [...], p. [...].
(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances and to phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\(^4\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^5\) should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to \([70]\) years after the relevant event.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration).

---


(9) The Member States must remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the transfer or assignment of the rights of the performer in the fixation of his performance to a phonogram producer concluded before the extension of the term of protection resulting from this Directive.

(10) In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, [...20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

[(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.]

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies representing performers and national rules on non-distributable revenues may be applied.
(14) However, Article 5 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations6 copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(16) **Deleted**

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of

6 Done at Rome on 26 October 1961.
subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words whose lyrics and music were created for use together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services.

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making\(^7\), Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

---

Article 1

Directive 2006/116/EC is hereby amended as follows:

- (1) In the second sentence of Article 3 (1), the number “50” shall be replaced by [“70”].

- (2) In the second and third sentence of Article 3(2), the number "50" shall be replaced by ["70"].

- (3) In Article 10, the following paragraph 5 shall be inserted:

"5. Article 3(1) and (2) in the version amended by Directive [insert number of the amending directive] shall apply only to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]."
The following Article 10a shall be inserted:

"Article 10a

Transitional measures relating to the transposition of Directive [insert number of the amending directive]

1. Deleted.

2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as "contracts on transfer or assignment"), which continue, where provided for under the applicable legislation, to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected.

3. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected. The right to obtain an annual supplementary remuneration cannot be waived by the performer.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to [...] 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.
Member States shall provide that performers who are entitled to the annual supplementary remuneration referred to in paragraph 3 may require from the phonogram producer any information which may be necessary in order to secure the payment of that remuneration.

[Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a maximum threshold amount of EUR 2 million, shall not be obliged to dedicate 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.]

5. Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 3 is administered by collecting societies representing performers.

6. If, after the dates on which, by virtue of Article 3(1) and (2) in the version before amendment by Directive [insert number of the amending Directive], the performer and the phonogram producer would be no longer protected in regard to, respectively, the fixation of the performance and the phonogram, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. The right to terminate the contract may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract pursuant to the previous sentence, does not carry out both acts of exploitation mentioned in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire."
The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, where they were specifically created for a musical composition with words."

"Article 1(7), in its version amended by Directive [insert number of the amending Directive], shall apply solely to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below].

The previous subparagraph shall be without prejudice to any acts of exploitation performed before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."

Article 1a

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than [3] years from [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] a report on the application of this Directive in the light of the development of the digital market.
Article 2
Implementation

1. Member States shall bring into force, by [2 years after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament For the Council
The President The President
COUNCIL OF
THE EUROPEAN UNION

Brussels, 13 February 2009

6446/09

LIMITE

PI 11
CULT 8
CODEC 166

INTERINSTITUTIONAL FILE:
2008/0157 (COD)

6446/09

LIMITE

PI 11
CULT 8
CODEC 166

WORKING DOCUMENT

from: DELETED delegation
to: Working Party on Intellectual Property (Copyright)

No. prev. doc.: 5877/09 PI 7 CULT 4 CODEC 96

No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023

Subject:
- Drafting suggestions by the DELETED delegation

Delegations will find in Annex a set of drafting suggestions regarding the above proposal submitted by the DELETED delegation.
Directive 2006/11 6/EC is hereby amended as follows:

(1) In the second sentence of Article 3 (1), the number “50” shall be replaced by 70.

(2) In the second and third sentence of Article 3(2), the number “50” shall be replaced by 70.

(3) After art 3(2) the following paragraph is inserted:

2 bis. The rights of phonogram producer expire if, after 50th year of protection, he does not offer, during a period of six months [one year] copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

(4) In article 10 the following paragraph shall be inserted:

“5. Article 3(1) and (2) in the version amended by Directive [number of the amending directive] shall apply only to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [ insert the date by which the member States must transpose the amending Directive, as mentioned in Article 2 below].”
(5) The following article 10A shall be inserted:

Article 10A
Transitional measures

1 th OPTION

1. The contracts concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as “contracts on transfer or assignment”), continue to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive, the performer would be no longer protected, only if the performer and the producer, within the term of six months, agree, with a new negotiation, to prolong their duration.

The agreement can also provide for new economic clauses.

If the performer or his heir can’t be found, the agreement can be signed by the collecting society that manage his rights.

Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer can ask that the agreement to prolong the contract provides for a recurring remuneration.

Member States may ensure that, regarding performers having a right to a non-recurring remuneration, the negotiations in order to find an agreement to prolong the contract are conducted by collecting societies representing them.

If no agreement is reached within the dates indicated before, the rights of the performer and of the producer expire unless Member States provide that in case that no agreement is found in order to prolong the contract, the performers or the producers may ask a Court or ad administrative Authority to decide the case.

Article 3(2 bis) applies also in transitional period.
2 th OPTION

1. The contracts concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as “contracts on transfer or assignment”), continue to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive, the performer would be no longer protected.

In any case, the performer or the producer may ask, within three months after the date beyond which the performer rights would be extinguished, to negotiate new clauses (also economic) in order to modify the prolonged contract.

Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer may ask for a recurring remuneration.

Member States may ensure that, regarding performers having a right to a non-recurring remuneration, the negotiations in order to find an agreement about new clauses may be conducted by collecting societies representing them.

In case of no request of renegotiation, the original contract is prolonged as it was.

If, in the term of nine month from the request of renegotiation, any agreement is reached, the contract is terminated unless Member States may provide that in case that no agreement is found in order to modify the contract clauses, the performers or the producers may ask a Court or an administrative Authority to decide the case.

Article 3(2 bis) applies also in transitional period

ALL THE OTHER PARAGRAPHS TO BE DELETED
COUNCIL OF THE EUROPEAN UNION

Brussels, 19 February 2009

Interinstitutional File: 2008/0157 (COD)

WORKING DOCUMENT

from: Presidency
to: Working Party on Intellectual Property (Copyright)

No. prev. doc.: 6446/09 PI 11 CULT 8 CODEC 166
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023

– Revised compromise proposal

Delegations will find attached a revised compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 3 March 2009.

Changes to 5877/09 are indicated.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

¹ OJ C [...], [...], p. [...].
² OJ C [...], [...], p. [...].
(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances and to phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\(^4\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^5\) should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration).

(9) The Member States must remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the transfer or assignment of the rights of the performer in the fixation of his performance to a phonogram producer concluded before the extension of the term of protection resulting from this Directive.

(10) In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

(12) Deleted

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies representing performers and national rules on non-distributable revenues may be applied.
(14) However, Article 5 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 6 copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(16) Deleted

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of

---

6 Done at Rome on 26 October 1961.
subsidarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words whose lyrics and music were created for use together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services.

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

---

Article 1

Directive 2006/116/EC is hereby amended as follows:

- (1) **(Option A - cover also audiovisual performers, eventually under the condition that the Commission will present an impact assessment regarding the audiovisual sector before the adoption of the proposal.)**

  In the second sentence of Article 3 (1), the number “50” shall be replaced by “70”.

**(Option B)**

Limit the extension of the term of protection to fixations of performances in a phonogram (as in the Commission proposal) plus a review clause calling upon the Commission to present an impact assessment regarding the audiovisual sector.

- (2) In the second and third sentence of Article 3(2), the number "50" shall be replaced by "70".

- (3) In Article 10, the following paragraph 5 shall be inserted:

  "5. Article 3(1) and (2) in the version amended by Directive [insert number of the amending directive] shall apply [...] to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] and to fixations of performances and phonograms which come into being after this date."
(4) The following Article 10a shall be inserted:

"Article 10a

Transitional measures relating to the transposition
of Directive [insert number of the amending directive]

1. Deleted.

2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as "contracts on transfer or assignment"), which continue, where provided for under the applicable legislation, to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected.

3. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected. The right to obtain an annual supplementary remuneration cannot be waived by the performer.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.
Member States shall provide that performers who are entitled to the annual supplementary remuneration referred to in paragraph 3 may require from the phonogram producer any information which may be necessary in order to secure the payment of that remuneration.

[…] 

5. Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 3 is administered by collecting societies […]

6. If, after the dates on which, by virtue of Article 3(1) and (2) in the version before amendment by Directive [insert number of the amending Directive], the performer and the phonogram producer would be no longer protected in regard to, respectively, the fixation of the performance and the phonogram, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. The right to terminate the contract may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract pursuant to the previous sentence, does not carry out both acts of exploitation mentioned in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire."
(5) The following Article 1(7) shall be inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, where they were specifically created for a musical composition with words."

(6) The following Article 10(6) shall be inserted:

"Article 1(7), in its version amended by Directive [insert number of the amending Directive], shall apply solely to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]. The previous subparagraph shall be without prejudice to any acts of exploitation performed before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."

Article 1a

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than [3] years from [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] a report on the application of this Directive in the light of the development of the digital market and, where appropriate, it shall submit a proposal to further amend the Directive. The Commission shall examine in particular whether the performer's right under Article 10a(6) should also apply to contracts on transfer or assignment concluded after [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below].
Article 2

Implementation

1. Member States shall bring into force, by [2 years after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
COUNCIL OF
THE EUROPEAN UNION

Brussels, 10 March 2009

Interinstitutional File:
2008/0157 (COD)

WORKING DOCUMENT
from: General Secretariat of the Council
to: Working Party on Intellectual Property (Copyright)
No. prev. doc. : 6634/08 PI 12 CULT 10 CODEC 205
No. Cion prop. : 12217/08 PI 35 CULT 82 CODEC 1023
- Drafting suggestion by the deleted delegation

Delegations will find in Annex a drafting suggestion regarding the above proposal submitted by the deleted delegation.
Calculation of the Term for Combinations of Works

On the basis of the revised compromise proposal 5877/09 would like to make the following proposal:

1. Delete Article 1 (5) and (6).

2. Include the following new Article 1 (5):

- “(5) Article 1 (2) reads as follows:

"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. For the purposes of this Directive a work of joint authorship is a work which consists of creative contributions which cannot be separately exploited. The combination of works of different kinds - such as of a musical work with a work of language or a cinematographic work - shall not in itself constitute joint authorship."

Explanation

At least in some Member States the proposal made by the Commission would lead to legal uncertainty and additional administrative burden. It concentrates on one possible combination of certain work categories only. However, the problem of works of joint authorship is of a more general nature. We think that there should be a rule applicable to all possible combinations of different creative contributions.
Furthermore, the approach chosen by the Commission cannot give a practice-oriented answer to the question which requirements are to be met to constitute a “musical composition with words” in the meaning of the directive. The additional wording found during the negotiations in the Council Working Group suggests that there has to be an intention to create the combination. However, such an intention could be hardly perceived from the combination as such. Thus, the proof or exclusion that a combination of a musical work with a work of literature meets the requirements of the directive would cause practical difficulties.

This would not apply to the criteria of indivisibility or impossibility of separate exploitation of the creative contributions. To avoid difficulties in practice and to justify the deviation from the general rule for the calculation of the term, the collaboration between the authors concerned has to lead to a manifest result.

Thus, **DELETED** suggests the deletion of the provisions on the harmonization of the term of musical compositions with words and the adoption of a narrow approach to joint authorship based on the possibility of separate exploitation of the combined creative contributions.
COUNCIL OF THE EUROPEAN UNION

Brussels, 11 March 2009

Interinstitutional File:
2008/0157 (COD)

PI 17
CULT 14
CODEC 307

WORKING DOCUMENT
from: General Secretariat of the Council
to: Working Party on Intellectual Property (Copyright)
No. prev. doc.: 6634/09 PI 12 CULT 10 CODEC 205
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023
– Revised Presidency compromise proposal

Delegations will find attached a revised compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 23 March 2009.

Changes to 6634/09 are indicated.
ANNEX

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

¹ OJ C [...], [...], p. [...].
² OJ C [...], [...], p. [...].
(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances [...] often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁴, as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property⁵ should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") as well as some other performers who appear in the credits ("featured performers") usually transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration).

(9) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing the Directive shall continue to produce its effects for the extended term.

(10) In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

(12) Deleted

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies representing performers and national rules on non-distributable revenues may be applied.
(14) However, Article 5 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

14a) In order to rebalance contracts whereby performers transfer their exclusive rights, on a royalty basis, to a phonogram producer, a further condition attached to term extension should be a 'clean slate' for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations\(^6\) copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

\(^6\) Done at Rome on 26 October 1961.
(16) Deleted

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words whose lyrics and music were created so that they should be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such impediments, all such works in protection at the date by which the Member States must transpose the present Directive should have the same harmonised term of protection in all Member States.

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making\(^7\), Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/116/EC is hereby amended as follows:

- (1) The second sentence of Article 3(1) is replaced by the following:
  "However,
  - if a fixation of the performance otherwise than in a phonogram is lawfully published
    or lawfully communicated to the public within this period, the rights shall expire
    50 years from the date of the first such publication or the first such communication to
    the public, whichever is the earlier,
  - if a fixation of the performance in a phonogram is lawfully published or lawfully
    communicated to the public within this period, the rights shall expire 70 years from the
    date of the first such publication or the first such communication to the public,
    whichever is the earlier."

- (2) In the second and third sentence of Article 3(2), the number "50" shall be replaced
  by "70".

- (2a) In Article 3, the following paragraph 2a shall be inserted:
  "2a.  If, after the date on which, by virtue of Article 3 (2) in the version before
  amendment by Directive [insert number of the amending Directive], the phonogram
  producer would be no longer protected with regard to the phonogram, the phonogram
  producer does not offer copies of the phonogram for sale in sufficient quantity or does
  not make it available to the public, by wire or wireless means, in such a way that
  members of the public may access them from a place and at a time individually chosen
  by them, the performer may terminate the contract on transfer or assignment. The right
  to terminate the contract may be exercised if the producer, within a year from the
  notification by the performer of his intention to terminate the contract pursuant to the
  previous sentence, does not carry out both acts of exploitation mentioned in that
  sentence. This right to terminate may not be waived by the performer. Where a
  phonogram contains the fixation of the performances of a plurality of performers, they
  may terminate their contracts on transfer or assignment in accordance with the
  applicable national law. If the contract on transfer or assignment is terminated pursuant
  to this paragraph, the rights of the phonogram producer in the phonogram shall expire."
- (3) In Article 10, the following paragraph 5 shall be inserted:

"5. Article 3(1) and (2) in the version amended by Directive [insert number of the amending directive] shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] and to fixations of performances and phonograms which come into being after this date."

- (4) The following Article 10a shall be inserted:

"Article 10a

Transitional measures relating to the transposition of Directive [insert number of the amending directive]

1. In the absence of clear indications to the contrary, a contract concluded before [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter: a "contract on transfer or assignment"), shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) in its version before amendment by Directive [// insert: Nr. of this amending directive], the performer would be no longer protected.

2. Paragraphs 3 to 5 of this Article shall apply to contracts on transfer or assignment concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], [...] which continue, [...] to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected.
3. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected. The right to obtain an annual supplementary remuneration cannot be waived by the performer.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.

Member States shall provide that performers who are entitled to the annual supplementary remuneration referred to in paragraph 3 may require from the phonogram producer any information which may be necessary in order to secure the payment of that remuneration.

5. Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 3 is administered by collecting societies.

6. Deleted (turned into a permanent claus - see paragraph 2 above).

6a. Where a performer is entitled to recurring payments, neither advance payments nor any contractually agreed deductions shall be deducted from the payments to the performer after the moment at which, by virtue of Article 3(1) before amendment by Directive [insert the number of this amending directive]/EC, the performer would be no longer protected."

"
– (5) The following Article 1(7) shall be inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, where they were specifically created for a musical composition with words."

– (6) The following Article 10(6) shall be inserted:

"Article 1(7), in its version amended by Directive [insert number of the amending Directive], shall apply [...] to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] and to musical compositions with words which come into being after this date.

The previous subparagraph shall be without prejudice to any acts of exploitation performed before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."

**Article 1a**

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than [3] years from [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] a report on the application of this Directive in the light of the development of the digital market and, where appropriate, it shall submit a proposal to further amend the Directive. The Commission shall examine in particular whether the performer's right under Article 10a(6) should also apply to contracts on transfer or assignment concluded after [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below].
Article 1b

The Commission shall launch an impact assessment procedure in relation to the situation of the European audiovisual sector in order to consider the need for an extension of the term of protection of copyright to performers and producers in the audiovisual sector; that procedure should be completed by 1 January 2010 so that a proposal for a new Directive may, if appropriate, be presented before June 2010.

Article 2

Implementation

1. Member States shall bring into force, by [2 years after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament    For the Council
The President                  The President
ADDENDUM TO WORKING DOCUMENT

from: General Secretariat of the Council

to: Working Party on Intellectual Property (Copyright)

No. prev. doc.: 6634/09 PI 12 CULT 10 CODEC 205
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023

– Revised Presidency compromise proposal

1. A second sentence is added to Article 10a (1) as follows:

"Member States may provide that such contracts which provide for recurring remuneration can be adapted."

2. A second sentence is added to recital 9 as follows:

"Member States may provide that certain terms in those contracts which provide for recurring remuneration can be renegotiated for the benefit of performers. Member States should have procedures in place in case the renegotiation fails."
On page 11, Article 1b should read as follows:

"Article 1b

The Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector and it shall report on the outcome of such an assessment to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2010. If appropriate, the Commission shall submit a proposal to amend this Directive."
ADDENDUM TO THE NOTE

from: General Secretariat of the Council
to: Permanent Representatives Committee (Part 1)

No. prev. doc. :  7440/09 PI 18 CULT 16 CODEC 341
No. Cion prop. :  12217/08 PI 35 CULT 82 CODEC 1023

- Preparation for the informal trialogue

Delegations will find attached a revised compromise proposal prepared by the Presidency as a basis for discussions at the Permanent Representatives Committee meeting on 27 March 2009.

Changes to 7261/09 + ADD 1 + COR 1 are indicated.
Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

¹ OJ C [...], [...], p. [...].
² OJ C [...], [...], p. [...].
(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that may occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, as well as fair compensation for reproductions for private use within the meaning of that Directive, from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(7a) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation.

---

6 Done at Rome on 26 October 1961.
The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration). This is particularly the case with performers who play in the background and do not appear in the credits ("non-featured performers") but sometimes also with performers who appear in the credits ("featured performers").

(9) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing the Directive shall continue to produce its effects for the extended term.

(10) In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, a sum corresponding to 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

(12) Deleted
(13) Those payments should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer against a one-off payment. The payments set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies representing performers and national rules on non-distributable revenues may be applied.

(14) However, Article 5 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

14a) A second accompanying transitional measure in order to rebalance contracts whereby performers transfer their exclusive rights, on a royalty basis, to a phonogram producer, [...] should be a 'clean slate' for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

(15) Moved to recital 7a above.
(15a) Member States should be able to provide that certain terms in those contracts which provide for recurring remuneration can be renegotiated for the benefit of performers. Member States should have procedures in place in case the renegotiation fails.

(16) Deleted

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words whose lyrics and music were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such impediments, all such works in protection at the date by which the Member States must transpose the present Directive should have the same harmonised term of protection in all Member States.

(20) Directive 2006/116/EC should therefore be amended accordingly.
(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making\(^7\), Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

---

Article 1

Directive 2006/116/EC is hereby amended as follows:

- (1) The second sentence of Article 3(1) is replaced by the following:
  "However,
  - if a fixation of the performance otherwise than in a phonogram is lawfully published
    or lawfully communicated to the public within this period, the rights shall expire
    50 years from the date of the first such publication or the first such communication to
    the public, whichever is the earlier,
  - if a fixation of the performance in a phonogram is lawfully published or lawfully
    communicated to the public within this period, the rights shall expire 70 years from the
    date of the first such publication or the first such communication to the public,
    whichever is the earlier."

- (2) In the second and third sentence of Article 3(2), the number "50" shall be replaced
  by "70".

- (2a) In Article 3, the following paragraph 2a shall be inserted:
  " 2a. If, 50 years after the phonogram was lawfully published, or failing such
  publication, 50 years after it was lawfully communicated to the public, the phonogram
  producer does not offer copies of the phonogram for sale in sufficient quantity or does
  not make it available to the public, by wire or wireless means, in such a way that
  members of the public may access them from a place and at a time individually chosen
  by them, the performer may terminate the contract on transfer or assignment. The right
  to terminate the contract may be exercised if the producer, within a year from the
  notification by the performer of his intention to terminate the contract pursuant to the
  previous sentence, does not carry out both acts of exploitation mentioned in that
  sentence. This right to terminate may not be waived by the performer. Where a
  phonogram contains the fixation of the performances of a plurality of performers, they
  may terminate their contracts on transfer or assignment in accordance with the
  applicable national law. If the contract on transfer or assignment is terminated pursuant
  to this paragraph, the rights of the phonogram producer in the phonogram shall expire."
(3) In Article 10, the following paragraph 5 shall be inserted:

"5. Article 3(1) and (2) in the version amended by Directive [insert number of the amending directive] shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] and to fixations of performances and phonograms which come into being after this date."

(4) The following Article 10a shall be inserted:

"Article 10a

Transitional measures relating to the transposition of Directive [insert number of the amending directive]

1. In the absence of clear contractual indications to the contrary, a contract concluded before [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter: a "contract on transfer or assignment"), shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) in its version before amendment by Directive [// insert: Nr. of this amending directive], the performer would be no longer protected.

2. Paragraphs 3 to 7 of this Article shall apply to contracts on transfer or assignment concluded before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below], which continue, to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected.
3. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected. The right to obtain an annual supplementary remuneration cannot be waived by the performer.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.

Member States shall ensure that phonogram producers are required to provide to performers, who are entitled to the annual supplementary remuneration referred to in paragraph 3, on request, any information which may be necessary in order to secure the payment of that remuneration.

5. Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 3 is administered by collecting societies.

6. Deleted (turned into a permanent clause, see Art. 1(2a) above).

6a. Where a performer is entitled to recurring payments, neither advance payments nor any contractually agreed deductions shall be deducted from the payments to the performer after the moment at which, by virtue of Article 3(1) before amendment by Directive [insert the number of this amending directive]/EC, the performer would be no longer protected.

7. Member States may provide that contracts on transfer or assignment whereby a performer is entitled to recurring payments can be modified.
(5) The following Article 1(7) shall be inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words."

(6) The following Article 10(6) shall be inserted:

"Article 1(7), in its version amended by Directive [insert number of the amending Directive], shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] and to musical compositions with words which come into being after this date.

The previous subparagraph shall be without prejudice to any acts of exploitation performed before [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."

Article 1a

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than [3] years from [insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below] a report on the application of this Directive in the light of the development of the digital market and, where appropriate, it shall submit a proposal to further amend the Directive. […]"
Article 1b

The Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector and it shall report on the outcome of such an assessment to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2010. If appropriate, the Commission shall submit a proposal to amend this Directive.

Article 2

Implementation

1. Member States shall bring into force, by [2 years after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
Delegations will find in Annex a drafting suggestion proposed by the United Kingdom delegation for discussion at the Intellectual Property Attachés meeting on 3 April 2009.
The UK suggests the following changes to Article 1(4) in order that the transitional measures become permanent measures.

Changes are marked up in **bold & underlined** and *bold & strikethrough* with reference to 7261/09 of 11th March.

**Article 1(4)**

(4) *The following Article 10a shall be inserted:*

*Article 10a*

*Transitional Measures relating to the transposition of Directive [insert number of the amending directive]*

1. In the absence of clear indications to the contrary, a contract concluded before [*insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below*], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter: a "contract on transfer or assignment"), shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) in its version before amendment by Directive [// insert: Nr. of this amending directive], the performer would be no longer protected.

2.  [Deleted]

3.  [Deleted]

4.  [Deleted]

5.  [Deleted]

6.  *Deleted (turned into a permanent claus - see paragraph 2 above).*

6a  [Deleted]
Article 1 (2b)

(2b) In Article 3, the following paragraphs 2b to 2e shall be inserted:

2b Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the end of the 50th year of the term of protection. The right to obtain an annual supplementary remuneration cannot be waived by the performer.

2c The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 2b shall correspond to 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.

Member States shall ensure that phonogram producers are required to provide to performers, who are entitled to the annual supplementary remuneration referred to in paragraph 2b, on request, any information which may be necessary in order to secure the payment of that remuneration.

2d Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 2b is administered by collecting societies.

2e Where a performer is entitled to recurring payments, neither advance payments nor any contractually agreed deductions shall be deducted from the payments to the performer for use of his work in the period following the end of the 50th year of the term of protection.
"
Article 1(3)

“5. Article 3(1) to (2g) in the version….”

Consequential amendments would also be necessary at Recitals 10, 11 and 15:

“... accompanying transitional measures...”
Term of protection of copyright and related rights


(Codecision procedure: first reading)

The European Parliament,

— having regard to the Commission proposal to the European Parliament and the Council (COM(2008)0464),

— having regard to Article 251(2) and Articles 47(2), 55 and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0281/2008),

— having regard to Rule 51 of its Rules of Procedure,

— having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Industry, Research and Energy, the Committee on the Internal Market and Consumer Protection and the Committee on Culture and Education (A6-0070/2009),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;

3. Instructs its President to forward its position to the Council and the Commission.

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee (1),

Acting in accordance with the procedure laid down in Article 251 of the Treaty (2),

Whereas:


(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or its publication within 50 years after fixation, or, if it is not published, its communication to the public within 50 years after fixation.

(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that may occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (4), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5), should be available to performers for at least their lifetime.

(2) of the European Parliament of 23 April 2009.
(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(9) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits (‘non-featured performers’) but sometimes also for performers who appear in the credits (‘featured performers’).

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers actually benefit from the term extension, a series of accompanying measures should be introduced.

(11) A first accompanying measure should be that phonogram producers are under an obligation to set aside, at least once a year, a sum corresponding to 20% of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms. ‘Revenues’ means the revenues derived by the phonogram producer before deducting costs.

(12) Those payments should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer against a one-off payment. The payments set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies and national rules on non-distributable revenues may be applied. In order to avoid a disproportionate burden in the collection and administration of those revenues, Member States may regulate the extent to which micro enterprises are subject to the obligation to contribute where such payments would appear unreasonable in relation to the costs of collecting and administering such revenues.

(13) However, Article 5 of Directive 2006/115/EC already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under point (b) of Article 5(2) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.
A second accompanying measure in order to rebalance contracts whereby performers transfer their exclusive rights, on a royalty basis, to a phonogram producer, should be a ‘clean slate’ for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing this Directive shall continue to produce its effects for the extended term.

Member States should be able to provide that certain terms in those contracts which provide for recurring remuneration can be renegotiated for the benefit of performers. Member States should have procedures in place in case the renegotiation fails.

Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, inasmuch as national measures in that field would either lead to distortion of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

This Directive does not affect national rules and agreements which are compatible with its provisions, for example collective agreements concluded in Member States between organisations representing performers and organisations representing producers.

In certain Member States, musical compositions with words are given a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

Consequently, the harmonisation of the term of protection in respect of musical compositions with words the lyrics and music of which were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such obstacles, all such works in protection at the date by which the Member States are required to transpose this Directive should have the same harmonised term of protection in all Member States.

Directive 2006/116/EC should therefore be amended accordingly.

In accordance with point 34 of the Interinstitutional Agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and to make them public.
HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2006/116/EC

Directive 2006/116/EC is hereby amended as follows:

(1) The following paragraph shall be added to Article 1:

‘7. The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.’

(2) Article 3 shall be amended as follows:

a) In paragraph 1, the second subparagraph shall be replaced by the following:

‘However,

— if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier;

— if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.’

b) In paragraph 2, in the second and third sentence, the number ‘50’ shall be replaced by ‘70’

c) The following paragraphs shall be inserted in:

‘2a. If, 50 years after the phonogram was lawfully published, or failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract whereby he has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter, a ‘contract on transfer or assignment’). The right to terminate the contract may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract pursuant to the previous sentence, does not carry out both acts of exploitation mentioned in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.

2b. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.'
2c. The overall amount to be set aside by a phonogram producer for payment of the supplementary remuneration referred to in paragraph 2b shall correspond to 20% of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

Member States shall ensure that phonogram producers are required on request to provide to performers who are entitled to the annual supplementary remuneration referred to in paragraph 2b any information which may be necessary in order to secure payment of that remuneration.

2d. Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies.

2e. Where a performer is entitled to recurring payments, neither advance payments nor any contractually agreed deductions shall be deducted from the payments made to the performer following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

(3) The following paragraphs shall be added to Article 10:

5. Article 3(1) to 3(2e) in the version provided for by Directive …/…/EC (*) shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on … (**) and to fixations of performances and phonograms which come into being after that date.

6. Article 1(7), as added by Directive …/…/EC (*), shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before … (**), and to musical compositions with words which come into being after that date.

The first subparagraph shall be without prejudice to any acts of exploitation performed before … (**). Member States shall adopt the necessary provisions to protect, in particular, acquired rights of third parties.

(*) OJ L …
(**) 2 years from the date of entry into force of this amending Directive.

(4) The following Article shall be inserted:

‘Article 10a

Transitional measures relating to the transposition of Directive …/…/EC (*)

1. In the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before … (**) shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) in the version thereof before amendment by Directive …/…/EC (*), the performer would be no longer protected.

2. Member States may provide that contracts on transfer or assignment which entitle a performer to recurring payments and which are concluded before … (**) can be modified following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

(*) 2 years from the date of entry into force of this amending Directive.
(**) 5 years from the date of entry into force of this amending Directive.'
Article 2

Report

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee, not later than ...(*) a report on the application of this Directive in the light of the development of the digital market and shall, where appropriate, submit a proposal for the further amendment of Directive 2006/116/EC.

Article 3

Assessment

The Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector and it shall report on the outcome of such assessment to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2010. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC.

Article 4

Transposition

1. Member States shall bring into force, by ...(**) at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 5

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 6

Addressees

This Directive is addressed to the Member States.

Done at ,

For the European Parliament
The President

For the Council
The President

(*) 5 years from the date of entry into force of this amending Directive.
(**) 2 years from the date of entry into force of this Directive.
COUNCIL OF THE EUROPEAN UNION

Brussels, 30 April 2009

Interinstitutional File:
2008/0157 (COD)

NOTE
from: General Secretariat
to: Permanent Representatives Committee/Council

I. INTRODUCTION

The Rapporteur, Mr Brian CROWLEY (UEN - IE), presented a report on behalf of the Committee on Legal Affairs consisting of 20 amendments (amendments 1-20). In addition, the Greens/EFA political group tabled five amendments (amendments 21-25), the EUL/NGL political group tabled nine amendments (amendments 26-34), the UEN, EPP-ED and PES political groups tabled 41 amendments (amendments 35-46, 48-63, 65-76 and 78), and the ALDE political group tabled three amendments (amendments 79-81). Amendments 47, 64 and 77, tabled by the UEN, EPP/ED and PES political groups, had been cancelled.
II. DEBATE

The Rapporteur, Mr Brian CROWLEY (UEN - IE) opened the debate, which took place on 22 April 2009, and:

- thanked all MEPs for their contributions to the debate;
- stated his disappointment with the role played by the Council and Member States, who in his opinion had tried to hinder the process;
- pointed out the extension of the term of protection from 50 to 70 years as part of a compromise;
- emphasised the fact that proposal recognised for the first time the rights of session musicians by establishing a fund to ensure their protection;
- stated that the specificities of the audiovisual sector and of collection societies had been properly considered; and
- affirmed that the use of creative rights should be paid for.

Speaking on behalf of the European Commission, Commissioner on Internal Market, Mr Charlie MCCREEVY:

- expressed the full support of the Commission for the compromise text of the European Parliament in all its parts;
- stated his special satisfaction with the introduction of the session players’ fund, the provision on the clean slate and the clause allowing performers to rescind buy-out contracts, all of which are intended to increase protection for performers, especially session musicians and lesser-known artists;
- expressed the intention of the Commission to deliver a separate impact assessment on the audiovisual sector;
- read out the Commission declaration on the issue of online rights for the redistribution of radio and TV programmes; and
- thanked the Rapporteur and the Parliament in general for their work.

Speaking on behalf of the Committee on Industry, Research and Energy, Ms Erna HENNICOT-SCHOEPGES (EPP-ED - LU):

- stressed the high level of protection provided by the proposal to musicians; and
- stated that much work remains to be done and the proposal is just a first step.
Speaking on behalf of the Committee on Internal Market and Consumer Protection, Mr Emmanouil ANGELAKAS (EPP-ED - GR) stated that the extension of protection from 50 to 70 years was a good compromise that would enhance creativity.

Speaking on behalf of the Committee on Culture and Education, Mr Christopher HEATON-HARRIS (EPP-ED - UK) noted how the proposal will protect session musicians and expressed therefore his support to it.

Speaking on behalf of the EPP/ED political group, Mr Jacques TOUBON (EPP/ED - FR):

- expressed the support of the EPP-ED group for the proposal;
- stated that the text was the result of a compromise that had taken into account many different interests;
- noted that under the Spanish presidency of the Council, the issue of the extension to the audiovisual sector will be addressed; and
- noted the protection offered to session musicians by the proposal.

Speaking on behalf of the PES political group, Ms Neena GILL (PES - UK):

- welcomed the agreement reached within the Parliament while expressing her dissatisfaction with the fact that the Council could not reach a similar agreement;
- stressed the fact that the report meted the aims of the PES group;
- singled out amendments 58, 59 to 61, 62, 71 and 75 as being especially important;
- asked the support of MEPs who still had reservations; and
- called on the Council to urgently come to an agreement on the issue.

Speaking on behalf of the ALDE political group, Ms Sharon BOWLES (ALDE - UK):

- stated that the text could not, in its current form, have her support; and
- argued that assignment for life without renewal clauses was not acceptable.

Speaking on behalf of the UEN political group, Ms Roberta ANGELILLI (UEN - IT):

- thanked the Rapporteur for the work done and expressed her support for the proposal; and
- supported for the extension of the protection term to 95 years.
Speaking on behalf of the Greens/EFA political group, Ms Eva LICHTENBERGER (Greens/EFA - AT):

- noted that there was indeed a problem with copyrights and musicians;
- stated that nevertheless the right situations were in a direction contrary to that offered by the proposal; and
- argued that the proposal only defended the rights of the industry and was not adequate to the digital age.

Speaking on behalf of the EUL/NGL political group, Ms Mary Lou McDonald (EUL/NGL - IE):

- objected to the proposal as it did not improve the social situation of performers;
- argued that the extension of the protection term was unfit for the digital age and would only protect the industry; and
- asked for MEPs to reject the proposal in its current terms.

Mr Manuel MEDINA ORTEGA (PES - ES):

- stressed that the proposal was an excellent one, deserving full support.

Mr Olle SCHMIDT (ALDE - SE):

- stated that the protection offered by the proposal was disproportionate; and
- asked for a new proposal.

Mr Roberto MUSACCHIO (EUL/NGL - IT) stated that the proposal would only benefit major companies and promote the merchandising of creative activities.

Ms Athanasios PAFILIS (EUL/NGL - GR) stated that the proposal equated creativity with merchandise.

Mr Jens HOLM (EUL/NGL - SE) expressed his rejection of the extension of the protection term, as it only protects companies.

Mr Manolis MAVROMMATIS (EPP-ED - GR) expressed his support for the extension of the protection term.
Mr Glyn FORD (PES - UK) supported the extension of the protection term to 70 years but questioned who would benefit from it.

Mr Christopher FJELLNER (EPP-ED - SE) rejected the extension of the protection term.

Commissioner Charlie MCCREEVY once more took the floor and:

- noted the difficulty and complexity of all proposals relating to intellectual property;
- stated that most of the lobbying had come from performers and not the industry;
- agreed with the intervention of Mr. Manuel MEDINA ORTEGA (PES - ES) as to the need to propose a text that could be accepted by the Council; and
- repeated the support of the Commission to the proposal and his gratitude to the rapporteur.

The Rapporteur, Mr Brian CROWLEY (UEN - IE) again took the floor and:

- regretted the fact that some MEPs had still not fully grasped the object of the proposal;
- repeated that the proposal intends to protect musicians as the the weakest part in the contractual relation;
- rejected that the advent of the digital era should mean free use of music; and
- thanked the help received by his colleagues in the Parliament.

III. VOTE

When it voted on 23 April 2009, the plenary adopted the 41 amendments tabled and maintained by the UEN, EPP-ED and PES political groups (amendments 35-46, 48-63, 65-76 and 78).

The text of the legislative resolution is annexed to this note.
Term of protection of copyright and related rights


(Codecision procedure: first reading)

The European Parliament,

– having regard to the Commission proposal to the European Parliament and the Council (COM(2008)0464),

– having regard to Article 251(2) and Articles 47(2), 55 and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0281/2008),

– having regard to Rule 51 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Industry, Research and Energy, the Committee on the Internal Market and Consumer Protection and the Committee on Culture and Education (A6-0070/2009),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;

3. Instructs its President to forward its position to the Council and the Commission.

Amendment 35
Proposal for a directive – amending act
Recital 2

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, 50 years from the first such publication or the first such communication to the public, whichever is the earliest.</td>
<td>(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.</td>
</tr>
</tbody>
</table>

Amendment 36
Proposal for a directive – amending act
Recital 5

Text proposed by the Commission

(5) Performers generally start their careers young and the current term of protection of 50 years with regard to performances fixed in phonograms and for phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

Amendment 37
Proposal for a directive – amending act
Recital 7

Text proposed by the Commission

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 95 years after publication of the phonogram and the performance fixed therein. If the phonogram or the performance fixed in a phonogram has not been published within the first 50 years, then the term of protection should run for 95 years from the first communication to the public.

Amendment

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

Proposal for a directive – amending act
Recital 8

Text proposed by the Commission

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance

Amendment

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has
Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non-recurring remuneration).

Other performers transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits ("non-featured performers") but sometimes also for performers who appear in the credits ("featured performers").

Amendment 40
Proposal for a directive – amending act
Recital 9

Text proposed by the Commission

(9) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing the directive shall continue to produce its effects for the extended term.

Amendment

(15) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing the directive shall continue to produce its effects for the extended term.

Amendment 41
Proposal for a directive – amending act
Recital 10

Text proposed by the Commission

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

Amendment

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers actually benefit from that extension, a series of accompanying measures should be introduced.
(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain.

"Revenues" means the revenues derived by the phonogram producer before deducting costs.

Amendments 43 and 7

Proposal for a directive – amending act
Recital 12

(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.

Amendment 44
Proposal for a directive – amending act
Recital 13

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Member States may require that distribution of those monies is entrusted to collecting societies representing performers. When the

Amendment

(11) A first accompanying measure should be that phonogram producers are under an obligation to set aside, at least once a year, a sum corresponding to 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms. "Revenues" means the revenues derived by the phonogram producer before deducting costs.
distribution of those monies is entrusted to collecting societies, national rules on non-distributable revenues may be applied.

Amendment 45
Proposal for a directive – amending act
Recital 14

Text proposed by the Commission

(14) However, Article 5 of Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms and from a single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying should.

Amendment

(14) However, Article 5 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

Amendment 46
Proposal for a directive – amending act
Recital 14 a (new)

Text proposed by the Commission

(14 a) A second accompanying measure in order to rebalance contracts whereby
performers transfer their exclusive rights, on a royalty basis, to a phonogram producer, should be a 'clean slate' for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

Amendment 38
Proposal for a directive – amending act
Recital 15

Text proposed by the Commission

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity copies of a phonogram which, but for the term extension, would be in the public domain or from making such a phonogram available to the public. As a consequence, the rights of the phonogram producer in the phonogram should expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance whilst the latter rights are no longer transferred or assigned to the phonogram producer.

Amendment

(7a) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

Amendment 48
Proposal for a directive – amending act
Recital 15 a (new)
Text proposed by the Commission

(15a) Member States should be able to provide that certain terms in those contracts which provide for recurring remuneration can be renegotiated for the benefit of performers. Member States should have procedures in place in case the renegotiation fails.

Amendment 49
Proposal for a directive – amending act
Recital 16

Text proposed by the Commission

(16) This accompanying measure should also ensure that a phonogram is no longer protected once it is not made available to the public after a certain period of time following the term extension, because rightholders do not exploit it or because the phonogram producer or the performers cannot be located or identified. If, upon reversion, the performer has had a reasonable period of time to make available to the public the phonogram which, but for the term extension, would be no longer protected, the phonogram is not made available to the public, the rights in the phonogram and in the fixation of the performance should expire.

Amendment 50
Proposal for a directive – amending act
Recital 17 a (new)

Text proposed by the Commission

(17a) This Directive does not affect national rules and agreements which are compatible with its provisions, for example collective agreements concluded in Member States between organisations representing performers and organisations representing producers.

Amendment 51
Proposal for a directive – amending act
Recital 18

**Text proposed by the Commission**

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States, separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, regarding opera, there are often different authors to the music and to the lyrics. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

**Amendment**

Amendment 52
Proposal for a directive – amending act

Recital 19

**Text proposed by the Commission**

(19) Consequently, the harmonisation of the term of protection in musical compositions with words is incomplete, giving rise to impediments to the free movement of goods and services, such as cross-border collective management services.

**Amendment**

(19) Consequently, the harmonisation of the term of protection in musical compositions with words whose lyrics and music were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such obstacles, all such works in protection at the date by which the Member States must transpose this Directive should have the same harmonised term of protection in all Member States.

Amendment 53
Proposal for a directive – amending act

Recital 21 (new)

**Text proposed by the Commission**

(21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating the
correlation between this Directive and the transposition measures and to make them public.

Amendment 72
Proposal for a directive – amending act
Article 1 – point 5
Directive 2006/116/EC
Article 1 – paragraph 7

Text proposed by the Commission

The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the music.

Amendment

The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.

Amendment 55
Proposal for a directive – amending act
Article 1 – point 1
Directive 2006/116/EC
Article 3 – paragraph 1 – sentence 2

Text proposed by the Commission

However,
- if a fixation of the performance otherwise than in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,

- if a fixation of the performance in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 95 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

Amendment

However,
- if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,

- if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.
Amendment 56
Proposal for a directive – amending act
Article 1 – point 2
Directive 2006/116/EC
Article 3 – sentences 2 and 3

Text proposed by the Commission

(2) In the second and third sentence of Article 3(2) the cipher "50" is replaced by the cipher "95".

Amendment

(2) In the second and third sentence of Article 3(2), the number "50" is replaced by "70".

Amendment 57
Proposal for a directive – amending act
Article 1 – point 2 a – introductory part (new)
Directive 2006/116/EC
Article 3

Text proposed by the Commission

(2 a) In Article 3, the following paragraphs 2a to 2e shall be inserted :

Amendment

(2 a) In Article 3, the following paragraphs 2a to 2e shall be inserted :

Amendment 58
Proposal for a directive – amending act
Article 1 – point 2 a (new)
Directive 2006/116/EC
Article 3 – paragraph 2 a (new)

Text proposed by the Commission

2a. If, 50 years after the phonogram was lawfully published, or failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract whereby he has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter, a "contract on transfer or assignment"). The right to terminate the contract may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the
contract pursuant to the previous sentence, does not carry out both acts of exploitation mentioned in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.

Amendment 59
Proposal for a directive – amending act
Article 1 – point 2 a (new)
Directive 2006/116/EC
Article 3 – paragraph 2 b (new)

Text proposed by the Commission

2b. Where a contract of transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published, or failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain an annual supplementary remuneration may not be waived by the performer.

Amendment 60/rev
Proposal for a directive – amending act
Article 1 – point 2 a (new)
Directive 2006/116/EC
Article 3 – paragraph 2 c (new)

Text proposed by the Commission

2c. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 2b shall correspond to 20 percent of the revenues which he has
derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms, following the 50th year after the phonogram was lawfully published, or failing such publication, the 50th year after it was lawfully communicated to the public.

Member States shall ensure that phonogram producers are required to provide to performers, who are entitled to the annual supplementary remuneration referred to in paragraph 2b, on request, any information which may be necessary in order to secure the payment of that remuneration.

Amendment 61
Proposal for a directive – amending act
Article 1 – point 2 a (new)
Directive 2006/116/EC
Article 3 – paragraph 2 d (new)

Text proposed by the Commission

Amendment

2d. Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 2b is administered by collecting societies.

Amendment 62
Proposal for a directive – amending act
Article 1 – point 2 a (new)
Directive 2006/116/EC
Article 3 – paragraph 2 e (new)

Text proposed by the Commission

Amendment

2e. Where a performer is entitled to recurring payments, neither advance payments nor any contractually agreed deductions shall be deducted from the payments to the performer the 50th year after the phonogram was lawfully published, or failing such publication, the 50th year after it was lawfully communicated to the public.

Amendment 63
Proposal for a directive – amending act
5. Article 3 (1) and (2) in their version as amended by Directive [... insert: Nr. of the amending directive] shall continue to apply only to fixations of performances and phonograms in regard of which the performer and the phonogram producer are still protected, by virtue of these provisions, on [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below].

Amendment 73
Proposal for a directive – amending act
Article 1 – point 3 a
Directive 2006/116/EC
Article 10 – paragraph 6 (new)

(3a) In Article 10, the following paragraph 6 is added:

"6. Article 1(7), in its version amended by Directive [insert number of the amending Directive], shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before ... [insert the date in Article 2(1) of the amending Directive] and to musical compositions with words which come into being after that date.

The previous subparagraph shall be without prejudice to any acts of exploitation performed before ... [insert the date in Article 2(1) of the amending Directive]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."
1. In the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before [insert date as mentioned in Article 2(1) below] shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) in its version before amendment by Directive [// insert: Nr. of this amending directive], the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

Amendment 66
Proposal for a directive – amending act
Article 1 – point 4
Directive 2006/116/EC
Article 10 a – paragraph 2

Text proposed by the Commission

2. Paragraphs 3 to 6 of this article shall apply to contracts on transfer or assignment which continue to produce their effects beyond the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

Amendment 67
Proposal for a directive – amending act
Article 1 – point 4
Directive 2006/116/EC
Article 10 a – paragraph 3

deleted.
3. Where a contract on transfer or assignment gives the performer a right to claim a non recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3 (1) and (2) in its version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

Amendment 68
Proposal for a directive – amending act
Article 1 – point 4
Directive 2006/116/EC
Article 10 a – paragraph 4

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a minimum threshold of €2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is...
paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

Amendments 23, 28 and 69
Proposal for a directive – amending act
Article 1 – point 4
Directive 2006/116/EC
Article 10 a – paragraph 5

Text proposed by the Commission
5. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an annual supplementary remuneration referred to in paragraph 3 may be imposed.

Amendment
deleted.

Amendments 23, 28 and 70
Proposal for a directive – amending act
Article 1 – point 4
Directive 2006/116/EC
Article 10 a – paragraph 6 – subparagraph 1

Text proposed by the Commission
6. If, after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram producer ceases to offer copies of the phonogram for sale in sufficient quantity or to make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a place ant at a time individually chosen by them, the performer may terminate the contract on

Amendment
deleted.
transfer or assignment. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 2, the rights of the phonogram producer in the phonogram shall expire.

Amendment 71
Proposal for a directive – amending act
Article 1 – point 4
Directive 2006/116/EC
Article 10 a – paragraph 6 a

Text proposed by the Commission

Amendment 6a. Member States may provide that contracts on transfer or assignment whereby a performer is entitled to recurring payments and concluded before … [insert date in Article 2(1) of the amending Directive] can be modified following the 50th year after the phonogram was lawfully published, or failing such publication, the 50th year after it was lawfully communicated to the public.

Amendment 74
Proposal for a directive – amending act
Directive 2006/116/EC
Article 1 a (new)

Text proposed by the Commission

Amendment

Article 1a
The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than [3] years from … [insert the date in Article 2(1)] a report on the application of this Directive in the light of the development of the digital market and, where appropriate, it shall submit a proposal to further amend Directive 2006/116/EC.
Amendment 75
Proposal for a directive – amending act
Directive 2006/116/EC
Article 1 b (new)

Text proposed by the Commission

Amendment

Article 1b
The Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector and it shall report on the outcome of such an assessment to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2010. If appropriate, the Commission shall submit a proposal to amend Directive 2006/116/EC;

Amendment 76
Proposal for a directive – amending act
Directive 2006/116/EC
Article 2 - paragraph 1 - subparagraphs 1 and 2

Text proposed by the Commission

1. Member States shall adopt and publish, by at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from [...]..

Amendment

1. Member States shall bring into force, by... [2 years after entry into force of this Directive] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

Amendment 78
Proposal for a directive – amending act
Directive 2006/116/EC

Article 3

Text proposed by the Commission

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Amendment

This Directive shall enter into force 20 days following that of its publication in the Official Journal of the European Union.
Delegations will find in the Annex the consolidated version of the proposed Directive, incorporating the amendments adopted by the European Parliament at first reading.

Having regard to errors identified in its position at first reading, the European Parliament intends to adopt a corrigendum along the following lines:

"1. Article 1, point 3
   In Article 10, paragraph 6, first subparagraph, of Directive 2006/116/EC, as amended, the words "before …**" are replaced by the words "on …***".

2. Article 3
   The words "1 January 2010" are replaced by the words "1 January 2012"."
In the light of this information, delegations are invited to indicate whether they would be in a position to support the adoption of the proposed Directive at first reading at the Intellectual Property Attachés meeting on 14 April 2011.
Draft

Directive 2009/.../EC

of the European Parliament and of the Council

amending Directive 2006/116/EC

on the term of protection of copyright and related rights

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

Whereas:


(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

---

¹ Opinion of 14 January 2009 (not yet published in the OJ).
(3) For phonogram producers the period starts with the fixation of the phonogram or its publication within 50 years after fixation, or, if it is not published, its communication to the public within 50 years after fixation.

(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that may occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\(^4\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^5\), should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(9) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits ("non-featured performers") but sometimes also for performers who appear in the credits ("featured performers").

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers actually benefit from the term extension, a series of accompanying measures should be introduced.

(11) A first accompanying measure should be that phonogram producers are under an obligation to set aside, at least once a year, a sum corresponding to 20 % of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

(12) Those payments should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer against a one-off payment. The payments set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies and national rules on non-distributable revenues may be applied. In order to avoid a disproportionate burden in the collection and administration of those revenues, Member States may regulate the extent to which micro enterprises are subject to the obligation to contribute where such payments would appear unreasonable in relation to the costs of collecting and administering such revenues.

(13) However, Article 5 of Directive 2006/115/EC already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under point (b) of Article 5(2) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.
(14) A second accompanying measure in order to rebalance contracts whereby performers transfer their exclusive rights, on a royalty basis, to a phonogram producer, should be a "clean slate" for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

(15) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing this Directive shall continue to produce its effects for the extended term.

(16) Member States should be able to provide that certain terms in those contracts which provide for recurring remuneration can be renegotiated for the benefit of performers. Member States should have procedures in place in case the renegotiation fails.

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, inasmuch as national measures in that field would either lead to distortion of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) This Directive does not affect national rules and agreements which are compatible with its provisions, for example collective agreements concluded in Member States between organisations representing performers and organisations representing producers.

(19) In certain Member States, musical compositions with words are given a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(20) Consequently, the harmonisation of the term of protection in respect of musical compositions with words the lyrics and music of which were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such obstacles, all such works in protection at the date by which the Member States are required to transpose this Directive should have the same harmonised term of protection in all Member States.

(22) In accordance with point 34 of the Interinstitutional Agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:
Article 1
Amendments to Directive 2006/116/EC

Directive 2006/116/EC is hereby amended as follows:

(1) The following paragraph shall be added to Article 1:

"7. The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words."

(2) Article 3 shall be amended as follows:

a) In paragraph 1, the second subparagraph shall be replaced by the following:

"However,

– if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier;

– if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier."

b) In paragraph 2, in the second and third sentence, the number "50" shall be replaced by "70"
c) The following paragraphs shall be inserted in:

"2a. If, 50 years after the phonogram was lawfully published, or failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract whereby he has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter, a 'contract on transfer or assignment'). The right to terminate the contract may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract pursuant to the previous sentence, does not carry out both acts of exploitation mentioned in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.

2b. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.

2c. The overall amount to be set aside by a phonogram producer for payment of the supplementary remuneration referred to in paragraph 2b shall correspond to 20 % of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

Member States shall ensure that phonogram producers are required on request to provide to performers who are entitled to the annual supplementary remuneration referred to in paragraph 2b any information which may be necessary in order to secure payment of that remuneration.
2d. Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies.

2e. Where a performer is entitled to recurring payments, neither advance payments nor any contractually agreed deductions shall be deducted from the payments made to the performer following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public."

(3) The following paragraphs shall be added to Article 10:

"5. Article 3(1) to 3(2e) in the version provided for by Directive .../.../EC* shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on ...** and to fixations of performances and phonograms which come into being after that date.

6. Article 1(7), as added by Directive .../.../EC*, shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before ...**, and to musical compositions with words which come into being after that date.

The first subparagraph shall be without prejudice to any acts of exploitation performed before ...**. Member States shall adopt the necessary provisions to protect, in particular, acquired rights of third parties."

(4) The following Article shall be inserted:

"Article 10a

Transitional measures relating to the transposition of Directive .../.../EC*

1. In the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before ...** shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) in the version thereof before amendment by Directive .../.../EC*, the performer would be no longer protected.

* OJ L ...
** 2 years from the date of entry into force of this amending Directive.
* OJ L ...
** 2 years from the date of entry into force of this amending Directive.
2. Member States may provide that contracts on transfer or assignment which entitle a performer to recurring payments and which are concluded before \( \ldots \) can be modified following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public."

Article 2

Report

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee, not later than \( \ldots \) a report on the application of this Directive in the light of the development of the digital market and shall, where appropriate, submit a proposal for the further amendment of Directive 2006/116/EC.

Article 3

Assessment

The Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector and it shall report on the outcome of such assessment to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2010. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC.

Article 4

Transposition

1. Member States shall bring into force, by \( \ldots \) at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

* 2 years from the date of entry into force of this amending Directive.
** 5 years from the date of entry into force of this amending Directive.
* 2 years from the date of entry into force of this Directive.
Article 5
Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 6
Addressees

This Directive is addressed to the Member States.

Done at ,

For the European Parliament
The President

For the Council
The President
COUNCIL OF THE EUROPEAN UNION
Brussels, 13 July 2011

Interinstitutional File:
2008/0157 (COD)

NOTE
from: General Secretariat
to: Delegations
No. prev. doc.: 8824/11 PI 29 CULT 24 CODEC 614
No. Cion prop.: 12217/08 PI 35 CULT 82 CODEC 1023
- Examination of the European Parliament's position at first reading


2. The proposed Directive aims to prolong the term of protection of the rights of musical performers and producers on a phonogram which has been lawfully published or communicated to the public. In addition, the Commission proposal aims to introduce a uniform method of calculating the term of protection which applies to a musical composition with words.
3. The European Parliament adopted its position at first reading on 23 April 2009.\(^1\)
   The consolidated position of the European Parliament is set out in the Annex to this Note.

4. Attachés are invited to consider whether there exists sufficient support within the Council for the approval of the European Parliament's position at first reading.

\(^1\) 8898/09. In April 2011, the European Parliament adopted a corrigendum to that position.
Draft

Directive 2009/.../EC

of the European Parliament and of the Council

amending Directive 2006/116/EC

on the term of protection of copyright and related rights

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

Whereas:


¹ Opinion of 14 January 2009 (not yet published in the OJ).
(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or its publication within 50 years after fixation, or, if it is not published, its communication to the public within 50 years after fixation.

(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that may occur during their lifetimes.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\(^1\), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^2\), should be available to performers for at least their lifetime.

---

\(^1\) OJ L 167, 22.6.2001, p. 10.
(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations copies of a phonogram which, but for the term extension, would be in the public domain or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(9) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights against a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits ("non-featured performers") but sometimes also for performers who appear in the credits ("featured performers").
(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers actually benefit from the term extension, a series of accompanying measures should be introduced.

(11) A first accompanying measure should be that phonogram producers are under an obligation to set aside, at least once a year, a sum corresponding to 20% of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms. "Revenues" means the revenues derived by the phonogram producer before deducting costs.

(12) Those payments should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer against a one-off payment. The payments set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies and national rules on non-distributable revenues may be applied. In order to avoid a disproportionate burden in the collection and administration of those revenues, Member States may regulate the extent to which micro enterprises are subject to the obligation to contribute where such payments would appear unreasonable in relation to the costs of collecting and administering such revenues.
(13) However, Article 5 of Directive 2006/115/EC already grants performers an unwaivable right to equitable remuneration for the rental, inter alia, of phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under point (b) of Article 5(2) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(14) A second accompanying measure in order to rebalance contracts whereby performers transfer their exclusive rights, on a royalty basis, to a phonogram producer, should be a "clean slate" for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

(15) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing this Directive shall continue to produce its effects for the extended term.
(16) Member States should be able to provide that certain terms in those contracts which provide for recurring remuneration can be renegotiated for the benefit of performers. Member States should have procedures in place in case the renegotiation fails.

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, inasmuch as national measures in that field would either lead to distortion of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(18) This Directive does not affect national rules and agreements which are compatible with its provisions, for example collective agreements concluded in Member States between organisations representing performers and organisations representing producers.

(19) In certain Member States, musical compositions with words are given a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.
(20) Consequently, the harmonisation of the term of protection in respect of musical compositions with words the lyrics and music of which were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such obstacles, all such works in protection at the date by which the Member States are required to transpose this Directive should have the same harmonised term of protection in all Member States.


(22) In accordance with point 34 of the Interinstitutional Agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:
Article 1
Amendments to Directive 2006/116/EC

Directive 2006/116/EC is hereby amended as follows:

(1) The following paragraph shall be added to Article 1:

"7. The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words."

(2) Article 3 shall be amended as follows:

a) In paragraph 1, the second subparagraph shall be replaced by the following:

"However,

– if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier;

– if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier."
b) In paragraph 2, in the second and third sentence, the number "50" shall be replaced by "70"

c) The following paragraphs shall be inserted in:

"2a. If, 50 years after the phonogram was lawfully published, or failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract whereby he has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter, a 'contract on transfer or assignment'). The right to terminate the contract may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract pursuant to the previous sentence, does not carry out both acts of exploitation mentioned in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire."
2b. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.

2c. The overall amount to be set aside by a phonogram producer for payment of the supplementary remuneration referred to in paragraph 2b shall correspond to 20% of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

Member States shall ensure that phonogram producers are required on request to provide to performers who are entitled to the annual supplementary remuneration referred to in paragraph 2b any information which may be necessary in order to secure payment of that remuneration.

2d. Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies.
2e. Where a performer is entitled to recurring payments, neither advance payments nor any contractually agreed deductions shall be deducted from the payments made to the performer following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public."

(3) The following paragraphs shall be added to Article 10:

"5. Article 3(1) to 3(2e) in the version provided for by Directive .../.../EC* shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on ...** and to fixations of performances and phonograms which come into being after that date.

6. Article 1(7), as added by Directive .../.../EC*, shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State on ...**, and to musical compositions with words which come into being after that date.

The first subparagraph shall be without prejudice to any acts of exploitation performed before ...**. Member States shall adopt the necessary provisions to protect, in particular, acquired rights of third parties."

---

* OJ L ...
** 2 years from the date of entry into force of this amending Directive.
* OJ L ...
** 2 years from the date of entry into force of this amending Directive.
(4) The following Article shall be inserted:

"Article 10a

Transitional measures relating to the transposition of Directive .../.../EC*

1. In the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before ..."** shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) in the version thereof before amendment by Directive .../.../EC*, the performer would be no longer protected.

2. Member States may provide that contracts on transfer or assignment which entitle a performer to recurring payments and which are concluded before ...* can be modified following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public."

Article 2
Report

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee, not later than ...** a report on the application of this Directive in the light of the development of the digital market and shall, where appropriate, submit a proposal for the further amendment of Directive 2006/116/EC.

---

* 2 years from the date of entry into force of this amending Directive.
** 5 years from the date of entry into force of this amending Directive.
Article 3
Assessment

The Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector and it shall report on the outcome of such assessment to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2012. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC.

Article 4
Transposition

1. Member States shall bring into force, by * at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

* 2 years from the date of entry into force of this Directive.
Article 5
Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 6
Addressees

This Directive is addressed to the Member States.

Done at ,

For the European Parliament
The President

For the Council
The President
COUNCIL OF THE EUROPEAN UNION

Brussels, 2 September 2011 (06.09)

(OR. fr)

10568/11

Interinstitutional file:
2008/0157 (COD)

CODEC 881
PI 51
CULT 35

"I/A" ITEM NOTE

from: General Secretariat of the Council
to: Coreper/Council

1. On 24 July 2008 the Commission sent the Council the above proposal\(^1\), which is based on Articles 47(2), 55 and 95 of the TEC. Following the entry into force of the Lisbon Treaty, the proposal has to be adopted on the basis of Articles 53(1), 62 and 114 of the TFEU.

2. The European Economic and Social Committee issued its opinion\(^2\) on 14 January 2009.

3. In accordance with the joint declaration on practical arrangements for the codecision procedure\(^3\), informal talks were held between the Council, the European Parliament and the Commission with a view to reaching agreement at first reading.

\(^1\) 12217/08.
\(^2\) OJ C 182, 4.8.2009, p. 36.
\(^3\) OJ C 145, 30.6.2007, p. 5.

5. The Permanent Representatives Committee is therefore asked to confirm its agreement and advise the Council to:

- adopt the Directive, as set out after legal and linguistic editing in PE-CONS 16/11, as an "A" item at a forthcoming meeting, with the Czech, Slovak, Luxembourg, Swedish, Romanian, Slovenian, Belgian and Netherlands delegations voting against and the Austrian delegation abstaining;

- have the statements in the addendum to this note entered in the minutes of that meeting.

Once signed by the President of the European Parliament and the President of the Council, the legislative act will be published in the Official Journal of the European Union.

---

\(^1\) 8898/09.
ADDENDUM TO THE "I/A" ITEM NOTE

from: General Secretariat of the Council
to: COREPER / COUNCIL
- Adoption of the legislative act (LA + S)
  = Statements

Declaration by Sweden

Throughout the negotiations, Sweden has had strong reservations regarding the commissions proposal to extend the term of protection for sound recordings.

As regards copyright regulation in general Sweden has always stressed the importance of taking all relevant aspects and involved interests into account, in order to maintain a fair balance in the copyright system. We believe this to be essential if we are to successfully uphold respect for the copyright system in the future.
Extending the term of protection for sound recordings as proposed is neither fair nor balanced. It therefore risks undermining the respect for copyright in general even further. Such a development is very unfortunate for all those who depend on copyright protection to make a living.

Sweden believes there to be good reasons for measures aiming at improving the situation for those professional musicians and other artists who often operate under economically difficult conditions. Extending the term of protection will however not primarily be of benefit to this group.

Against this background Sweden regrets the decision to adopt the proposal amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights.

**Belgian declaration**

With regard to the proposal for a directive on the term of protection of copyright and certain related rights, Belgium believes that a term extension is not an appropriate measure to improve the situation of the performing artists. Furthermore, we believe that the negative consequences the proposal entails do not outweigh the advantages it brings. We can therefore not support this proposal.

It seems that the measure will mainly benefit record producers and not performing artists, will only have a very limited effect for most of the performing artists, will have a negative impact on the accessibility of cultural material such as those contained in libraries and archives, and will create supplementary financial and administrative burdens to enterprises, broadcasting organisations and consumers. Therefore, the overall package of the proposal appears, as demonstrated by a large amount of academic studies\(^1\), unbalanced.

---

\(^1\) See e.g. “The Proposed Directive for a Copyright Term Extension – A backward-looking package” Centre for Intellectual Property Policy & Management (CIPPM, Bournemouth University), the Centre for Intellectual Property & Information Law (CIPIL, Cambridge University), the Institute the Institute for Information Law (IViR, University of Amsterdam), and the Max Planck Competition and Tax Law (Munich); N. HELBERGER, N. DUFFT, S. VAN GOMPEL, B. HUGENHOLTZ, ‘Never forever: why extending the term of protection for sound recordings is a bad idea’, *EIPR* 2008, 174; S. DUSOLLIER, ‘Les artistes-interprètes pris en otage’, *Auteurs & Media* 2008, 426.
Finally, one has to observe that several initiatives which have clear links with and impact on the proposal, have recently been adopted or announced by the Commission in its Communication of 24 May 2011\(^1\). These initiatives include for example a proposal for a directive on orphan works, a new initiative on collective management, and a new initiative on online distribution of audiovisual works. Taking into account this global approach of copyright issues in the internal market, we think that it would only be reasonable to re-examine the merits of this proposal in the context of this global approach.

\(^1\) Communication from the Commission of 24 May 2011, A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM (2011) 287
CORRIGENDUM TO ADDENDUM TO "I/A" ITEM NOTE

from: General Secretariat of the Council

to: COREPER / COUNCIL


On page 2, in the Belgian declaration, first paragraph, second sentence

For: "Furthermore, we believe that the negative consequences the proposal entails do not outweigh the advantages it brings."

Read: "Furthermore, we believe that the negative consequences the proposal entails outweigh the advantages it brings."
CORRIGENDUM TO "I/A" ITEM NOTE

from: General Secretariat of the Council
to: Coreper/Council


– Adoption of the legislative act (LA + S)

Page 2, point 5, first indent

For: "– adopt the Directive, as set out after legal and linguistic editing in PE CONS 16/11, as an "A" item at a forthcoming meeting, with the Czech, Slovak, Luxembourg, Swedish, Romanian, Slovenian, Belgian and Netherlands delegations voting against and the Austrian delegation abstaining;"

Read: "– adopt the Directive, as set out after legal and linguistic editing in PE CONS 16/11, as an "A" item at a forthcoming meeting, with the Czech, Slovak, Luxembourg, Swedish, Romanian, Slovenian, Belgian and Netherlands delegations voting against and the Austrian and Estonian delegations abstaining;"
COUNCIL OF
THE EUROPEAN UNION

Brussels, 12 September 2011
13972/11
PRESSE 303

New rules on term of protection of music recordings

The Council today¹ adopted by qualified majority a directive extending the term of protection of the rights of performers and phonogram producers on music recordings within the EU from 50 to 70 years. (16/11).

The Belgian, Czech, Dutch, Luxembourg, Romanian, Slovak, Slovenian and Swedish delegations voted against and the Austrian and Estonian delegations abstained (10568/11 ADD1).

The new directive intends to increase the level of protection of performers by acknowledging their creative and artistic contributions.

Performers generally start their careers young and the current term of protection of 50 years often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that may occur during their lifetimes.

The directive also foresees measures in order to ensure that artists who have transferred their exclusive rights to phonogram producers actually benefit from the term extension and may recuperate their rights subject to certain conditions.

¹ The decision was taken without discussion at the General Affairs Council meeting.
Furthermore, the directive harmonises the method of calculating the term of protection of songs and other musical compositions with words created by several authors. The term of protection will expire 70 years after the death of the last person to survive: the author of the lyrics or the composer of the music.

Member states will have to incorporate the new provisions into their national legislations within two years.

Adoption of the directive, which modifies directive 2006/116/EC, follows an agreement with the European Parliament at first reading.

COUNCIL OF
THE EUROPEAN UNION

Brussels, 12 September 2011

Interinstitutional File:
2008/0157 COD

14132/11

VOTE 55
INF 158
PUBLIC 65
CODEC 1434

NOTE

Subject:
– Voting result
– Directive amending Directive 2006/116/EC as regards the term of protection of copyright and related rights [First reading]
– Adoption of the legislative act
3109th meeting of the Council of the European union
(General Affairs)
Brussels, Monday 12 September 2011

The outcome of voting on the above mentioned legislative act is attached to this note.

Reference documents:

PE-CONS 16/11 PI 27 CULT 23 CODEC 593
+ REV 1 (sv)
10568/11 CODEC 881 PI 51 CULT 35
+ COR 1
+ ADD 1 + COR 1
approved by COREPER, Part 1 on 07.09.2011

Any statements and/or explanations of vote are available on the Council's website, under "Documents", "Legislative Transparency", "Monthly Summary of Council acts":

**General Secretariat of the Council**

**Institution:** Council of the European Union  
**Session:** 3109  
**Configuration:** General Affairs  
**Item:** 2008/0157 (COD) (Document: PE-CONS 16/11)  
**Voting Rule:** qualified majority  
**Subject:** Directive amending Directive 2006/116/EC as regards the term of protection of copyright and related rights (first reading)

<table>
<thead>
<tr>
<th>Member State</th>
<th>Vote</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgique/België</td>
<td>📈</td>
<td>12</td>
</tr>
<tr>
<td>България</td>
<td>📈</td>
<td>10</td>
</tr>
<tr>
<td>Česká republika</td>
<td>📈</td>
<td>12</td>
</tr>
<tr>
<td>Danmark</td>
<td>📈</td>
<td>7</td>
</tr>
<tr>
<td>Deutschland</td>
<td>📈</td>
<td>29</td>
</tr>
<tr>
<td>Esti</td>
<td>📈</td>
<td>4</td>
</tr>
<tr>
<td>Eire/Ireland</td>
<td>📈</td>
<td>7</td>
</tr>
<tr>
<td>El Salvador</td>
<td>📈</td>
<td>12</td>
</tr>
<tr>
<td>España</td>
<td>📈</td>
<td>27</td>
</tr>
<tr>
<td>France</td>
<td>📈</td>
<td>29</td>
</tr>
<tr>
<td>Italia</td>
<td>📈</td>
<td>29</td>
</tr>
<tr>
<td>Kína</td>
<td>📈</td>
<td>4</td>
</tr>
<tr>
<td>Latvija</td>
<td>📈</td>
<td>4</td>
</tr>
<tr>
<td>Lituva</td>
<td>📈</td>
<td>7</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>📈</td>
<td>4</td>
</tr>
<tr>
<td>Magyarország</td>
<td>📈</td>
<td>12</td>
</tr>
<tr>
<td>Malta</td>
<td>📈</td>
<td>3</td>
</tr>
<tr>
<td>Nederland</td>
<td>📈</td>
<td>13</td>
</tr>
<tr>
<td>Österreich</td>
<td>📈</td>
<td>10</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Member State</th>
<th>Vote</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Polska</td>
<td>📈</td>
<td>27</td>
</tr>
<tr>
<td>Portugal</td>
<td>📈</td>
<td>12</td>
</tr>
<tr>
<td>România</td>
<td>📈</td>
<td>14</td>
</tr>
<tr>
<td>Slovenija</td>
<td>📈</td>
<td>4</td>
</tr>
<tr>
<td>Slovenško</td>
<td>📈</td>
<td>7</td>
</tr>
<tr>
<td>Suomi/Finland</td>
<td>📈</td>
<td>7</td>
</tr>
<tr>
<td>Sverige</td>
<td>📈</td>
<td>10</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>📈</td>
<td>29</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Vote</th>
<th>Members</th>
<th>Votes Cast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>17</td>
<td>255</td>
</tr>
<tr>
<td>No</td>
<td>8</td>
<td>76</td>
</tr>
<tr>
<td>Absent</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>Not Participating</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**Total:** 27 votes cast

*qualified majority: is reached if at least 255 votes in favour are cast by at least 14 of the 27 participating Council members*

For information only:

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2011/77/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 27 September 2011
amending Directive 2006/116/EC on the term of protection of copyright and certain related rights

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EU

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee (1),

Acting in accordance with the ordinary legislative procedure (2),

Whereas:


(2) In the case of performers this period starts with the performance or, when the fixation of the performance is lawfully published or lawfully communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or its lawful publication within 50 years after fixation, or, if it is not so published, its lawful communication to the public within 50 years after fixation.

(4) The socially recognised importance of the creative contribution of performers should be reflected in a level of protection that acknowledges their creative and artistic contribution.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetime. In addition, performers are often unable to rely on their rights to prevent or restrict an objectionable use of their performances that may occur during their lifetime.

(6) The revenue derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (4), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5), should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity,
(9) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights in return for a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits (non-featured performers) but sometimes also for performers who appear in the credits (featured performers).

(10) In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers actually benefit from the term extension, a series of accompanying measures should be introduced.

(11) A first accompanying measure should be the imposition on phonogram producers of an obligation to set aside, at least once a year, a sum corresponding to 20 % of the revenue from the exclusive rights of distribution, reproduction and making available of phonograms. 'Revenue' means the revenue derived by the phonogram producer before deducting costs.

(12) Payment of those sums should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer in return for a one-off payment. The sums set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies and national rules on non-distributable revenue may be applied. In order to avoid the imposition of a disproportionate burden in the collection and administration of that revenue, Member States should be able to regulate the extent to which micro-enterprises are subject to the obligation to contribute where such payments would appear unreasonable in relation to the costs of collecting and administering such revenue.

(13) However, Article 5 of Directive 2006/115/EC already grants performers an unwaivable right to equitable remuneration for the rental of, inter alia, phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under point (b) of Article 5(2) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenue which the phonogram producer has derived from the rental of phonograms, of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(14) A second accompanying measure designed to rebalance contracts whereby performers transfer their exclusive rights on a royalty basis to a phonogram producer, should be a ‘clean slate’ for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

(15) For the sake of legal certainty it should be provided that, in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing this Directive shall continue to produce its effects for the extended term.

(16) Member States should be able to provide that certain terms in those contracts which provide for recurring payments can be renegotiated for the benefit of performers. Member States should have procedures in place to cover the eventuality that the renegotiation fails.

(17) This Directive should not affect national rules and agreements which are compatible with its provisions, such as collective agreements concluded in Member States between organisations representing performers and organisations representing producers.
(18) In some Member States, musical compositions with words are given a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in respect of musical compositions with words the lyrics and music of which were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such obstacles, all such works in protection at the date by which the Member States are required to transpose this Directive should have the same harmonised term of protection in all Member States.

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) Since the objectives of the accompanying measures cannot be sufficiently achieved by the Member States, inasmuch as national measures in that field would either lead to distortion of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Union legislation, and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(22) In accordance with point 34 of the interinstitutional agreement on better law-making (1), Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables which will, as far as possible, illustrate the correlation between this Directive and their transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2006/116/EC

Directive 2006/116/EC is hereby amended as follows:

(1) The following paragraph shall be added to Article 1:

'7. The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.'.

(2) Article 3 shall be amended as follows:

(a) in paragraph 1, the second sentence shall be replaced by the following:

'However,

— if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,';

(b) in the second and third sentences of paragraph 2, the number ‘50’ shall be replaced by ‘70’;

(c) the following paragraphs shall be inserted:

'2a. If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter a "contract on transfer or assignment"). The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.'

2b. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.

2c. The overall amount to be set aside by a phonogram producer for payment of the annual supplementary remuneration referred to in paragraph 2b shall correspond to 20% of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

Member States shall ensure that phonogram producers are required on request to provide to performers who are entitled to the annual supplementary remuneration referred to in paragraph 2b any information which may be necessary in order to secure payment of that remuneration.

2d. Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies.

2e. Where a performer is entitled to recurring payments, neither advance payments nor any contractually defined deductions shall be deducted from the payments made to the performer following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

(3) The following paragraphs shall be added to Article 10:

‘5. Article 3(1) to (2e) in the version thereof in force on 31 October 2011 shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of those provisions in the version thereof in force on 30 October 2011, as at 1 November 2013 and to fixations of performances and phonograms which come into being after that date.

6. Article 1(7) shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State on 1 November 2013, and to musical compositions with words which come into being after that date.

The first subparagraph of this paragraph shall be without prejudice to any acts of exploitation performed before 1 November 2013. Member States shall adopt the necessary provisions to protect, in particular, acquired rights of third parties.’.

(4) The following Article shall be inserted:

‘Article 10a

Transitional measures

1. In the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before 1 November 2013 shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3(1) in the version thereof in force on 30 October 2011, the performer would no longer be protected.

2. Member States may provide that contracts on transfer or assignment which entitle a performer to recurring payments and which are concluded before 1 November 2013 can be modified following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.’.

Article 2

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 November 2013. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

Reporting

1. By 1 November 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive in the light of the development of the digital market, accompanied, where appropriate, by a proposal for the further amendment of Directive 2006/116/EC.
2. By 1 January 2012, the Commission shall submit a report to the European Parliament, the Council and the European Economic and Social Committee, assessing the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 27 September 2011.

For the European Parliament
The President
J. BUZEK

For the Council
The President
M. DOWGIELEWICZ
COUNCIL OF THE EUROPEAN UNION

Brussels, 22 February 2013

Interinstitutional File:
2008/0157 (COD)

LEGISLATIVE ACTS AND OTHER INSTRUMENTS: CORRIGENDUM/RECTIFICATIF


(OJ L 265, 11.10.2011, p. 1)

LANGUAGES concerned: BG, CS, DE, IT, LT, MT, RO, SK

PROCEDURE APPLICABLE according to the Council Statement of 1975.
(The procedures are explained in Council document 5980/07 JUR 49, available in the official languages, together with a translation of the structure of this cover page)

— Procedure 2(c) (obvious errors in a number of language versions)

TIME LIMIT for the agreement of the Presidency and of the European Parliament (in case of acts adopted under the ordinary legislative procedure): 8 days

Any observations regarding this corrigendum should be notified to the Presidency:

Mr. David Kelly and Mrs. Caroline Daly:
e-mail: david.kelly@dfa.ie
caroline.daly@dfa.ie
ПРИЛОЖЕНИЕ

ПОПРАВКА

на Директива 2011/77/ЕС на Европейския парламент и на Съвета от 27 септември 2011 година за изменение на Директива 2006/116/ЕО за срока за закрила на авторското право и някои сродни права

(ОВ L 265, 11.10.2011 г., стр. 1)

Страничата 4, член 1, точка 3, нов параграф 5, добавен към член 10

Вместо:

„5. Член 3, параграфи 1—2д във версията в сила на 31 октомври 2011 г., се прилагат за записи на изпълнения и за звукозаписи, по отношение на които правата на изпълнителя и на продуцента на звукозаписи по силата на тези разпоредби във версията в сила на 30 октомври 2011 г. продължават да са защитени към 1 ноември 2013 г., както и за записи на изпълнения и звукозаписи, създадени след тази дата.“

da се чете:

„5. Член 3, параграфи 1—2д във версията в сила на 31 октомври 2011 г., се прилага за записи на изпълнения и за звукозаписи, по отношение на които правата на изпълнителя и на продуцента на звукозаписи продължават да са защитени по силата на тези разпоредби във версията в сила на 30 октомври 2011 г. към 1 ноември 2013 г., както и за записи на изпълнения и звукозаписи, създадени след тази дата.“

-----------------------------------------------
PŘÍLOHA

OPRAVA

směrnice Evropského parlamentu a Rady 2011/77/EU ze dne 27. září 2011, kterou se mění směrnice 2006/116/ES o době ochrany autorského práva a určitých práv s ním souvisejících

(Úř. věst. L 265, 11.10.2011, s. 1)

Strana 1 a 2, 8. a 9. bod odůvodnění

Místo:

„(8) Při vstupu do smluvního vztahu s výrobcem zvukových záznamů musí výkonní umělec obvykle převést na výrobce zvukových záznamů svá výlučná práva na rozmnožování, rozšířování, pronájem a zpřístupňování záznamů svých výkonů. Výměnou za to je některým výkonným umělcům vyplacena záloha na autorský honorář a platby dostávají až v okamžiku, kdy výrobce zvukových záznamů získá zpět počáteční zálohu a provede smluvně stanovené srážky. Jiní výkonní umělci převádějí svá výlučná práva výměnou za jednorázovou platbu (jednorázová odměna). Platí to zejména pro výkonné umělce, kteří účinkují v pozadí a jejichž jména se neuvádějí („vedlejší výkonní umělci“), ale někdy i pro výkonné umělce, jejichž jména se uvádějí („přední výkonní umělci“).

(9) Práva k záznamu výkonu by se měla vrátit výkonnému uměléci, pokud výrobce zvukových záznamů nenabídne k prodeji kopie zvukového záznamu v dostatečném množství ve smyslu Mezinárodní úmluvy o ochraně výkonných umělců, výrobců zvukových záznamů a rozhlasových organizací, nebo nezpřístupní tento zvukový záznam veřejnosti, přičemž bez prodloužení doby ochrany by takový zvukový záznam byl volný. Tato možnost by měla být dostupná po uplynutí přiměřené lhůty pro výrobce zvukových záznamů k vykonání obou uvedených způsobů využití. Práva výrobce zvukových záznamů na zvukový záznam by v důsledku toho měla zaniknout, aby nedošlo k situaci, kdy by tato práva existovala zároveň s právy výkonného umělce k záznamu výkonu, zatímco posledně jmenovaná práva již nejsou na výrobce zvukových záznamů předehra nebo na něj nejsou postoupena.“
má být:

„(8) Práva k záznamu výkonu by se měla vrátit výkonnému umělci, pokud výrobce zvukových záznamů nenabídne k prodeji kopie zvukového záznamu v dostatečném množství ve smyslu Mezinárodní úmluvy o ochraně výkoných umělců, výrobce zvukových záznamů a rozhlasových organizací, nebo nezpřístupní tento zvukový záznam veřejnosti, přičemž bez prodloužení doby ochrany by takový zvukový záznam byl volný. Tato možnost by měla být dostupná po uplynutí přiměřené lhůty pro výrobce zvukových záznamů k vykonání obou uvedených způsobů využití. Práva výrobce zvukových záznamů na zvukový záznam by v důsledku toho měla zaniknout, aby nedošlo k situaci, kdy by tato práva existovala zároveň s právy výkonného umělce k záznamu výkonu, zatímco posledně jmenovaná práva již nejsou na výrobce zvukových záznamů převedena nebo na něj nejsou postoupena.

(9) Při vstupu do smluvního vztahu s výrobcem zvukových záznamů musí výkonní umělec obvykle převést na výrobce zvukových záznamů svá výlučná práva na rozmnožování, rozšiřování, pronájem a zpřístupňování záznamů svých výkonů. Výměnou za to je některým výkonným umělcům vyplacena záloha na autorský honorář a platby dostávají až v okamžiku, kdy výrobce zvukových záznamů získá zpět počáteční zálohu a provede smluvně stanovené srážky. Jiní výkonní umělci převádějí svá výlučná práva výměnou za jednorázovou platbu (jednorázovou odměnu). Platí to zejména pro výkonné umělce, kteří účinkují v pozadí a jejichž jména se neuvádějí („vedlejší výkonní umělci“), ale někdy i pro výkonné umělce, jejichž jména se uvádějí („přední výkonní umělci“).“

_________________________

6778/13
PŘÍLOHA JUR
3 CS
BERICHTIGUNG

der Richtlinie 2011/77/EU des Europäischen Parlaments und des Rates vom 27. September 2011
zur Änderung der Richtlinie 2006/116/EG über die Schutzdauer des Urheberrechts und bestimmter
verwandter Schutzrechte

(ABl. L 265 vom 11.10.2011, S. 1)

Seite 4, Artikel 1 Nummer 3, hinzuzufügender Artikel 10 Absatz 5

Statt:

"(5) Artikel 3 Absätze 1 bis 2e in der am 31. Oktober 2011 geltenden Fassung gilt für
Aufzeichnungen von Darbietungen und für Tonträger, deren Schutzdauer für den
ausübenden Künstler und den Tonträgerhersteller am 30. Oktober 2011 aufgrund dieser
Bestimmungen in der am 1. November 2013 geltenden Fassung noch nicht erloschen ist,
und für Aufzeichnungen von Darbietungen und für Tonträger, die nach diesem Datum
entstehen."

muss es heißen:

"(5) Artikel 3 Absätze 1 bis 2e in der am 31. Oktober 2011 geltenden Fassung gilt für
Aufzeichnungen von Darbietungen und für Tonträger, deren Schutzdauer für den
ausübenden Künstler und den Tonträgerhersteller aufgrund dieser Bestimmungen in der am
30. Oktober 2011 geltenden Fassung am 1. November 2013 noch nicht erloschen ist, und für
Aufzeichnungen von Darbietungen und für Tonträger, die nach diesem Datum entstehen."
Pagina 4, articolo 1, punto 3) (nuovo paragrafo 5)

Anziché:

"5. L’articolo 3, paragrafi da 1 a 2 sexies, nella versione in vigore al 31 ottobre 2011, si applica alle fissazioni di esecuzioni e ai fonogrammi per i quali l’artista, interprete o esecutore, e il produttore di fonogrammi sono ancora protetti in virtù di tali disposizioni nella versione in vigore al 30 ottobre 2011, quale al 1° novembre 2013, e alle fissazioni di esecuzioni e ai fonogrammi successivi a tale data."

leggasi:

"5. L’articolo 3, paragrafi da 1 a 2 sexies, nella versione in vigore al 31 ottobre 2011, si applica alle fissazioni di esecuzioni e ai fonogrammi per i quali al 1° novembre 2013 l’artista, interprete o esecutore, e il produttore di fonogrammi sono ancora protetti in virtù di tali disposizioni nella versione in vigore al 30 ottobre 2011 e alle fissazioni di esecuzioni e ai fonogrammi successivi a tale data."
KLAIÐÛ IÞTAISYMAS

2011 m. rugsêjo 27 d. Europos Parlamento ir Tarybos direktyva 2011/77/ES, kuria ið dalies keiðiama Direktyva 2006/116/EB dël autorûi ir tam tikrû gretutiniû teisiû apsaugos terminû

(OL L 265, 2011 10 11, p. 1)

1 puslapis, 8 konstatuojamoji dalis

Yra:

„<…> kuri, jei bûtû pratûstas terminas, taptû vieða, kopijû ir nepateikia tokios fonogramos vieðai. <…>“,

turi bûti:

„<…> kuri, jei bûtû pratûstas terminas, taptû vieða, kopijû ar nepateikia tokios fonogramos vieðai. <…>“.

4 puslapis, 1 straipsnis, 3 punktas (dël Direktyvos 2006/116/EB 10 straipsnio), 5 nauja dalis

Yra:

„5. 2011 m. spalio 31 d. galiojanûsios redakcijos 3 straipsnio 1–2e dalys taikomos kûriniû ãraûams ir fonogramoms, kûriû atûvûlgiu atlikûjui ir fonogramos gamintojui 2011 m. spalio 30 d. pagal tas 2013 m. lapkriûcio 1 d. galiojanûsios redakcijos nuostatas dar taikoma apsauga, ir tiems kûriniû ãraûams ir fonogramoms, kurie sukuriami po tos datos.“, 

turi bûti:

„5. 2011 m. spalio 31 d. galiojanûsios redakcijos 3 straipsnio 1–2e dalys taikomos kûriniû ãraûams ir fonogramoms, kûriû atûvûlgiu atlikûjui ir fonogramos gamintojui 2013 m. lapkriûcio 1 d. pagal tas 2011 m. spalio 30 d. galiojanûsios redakcijos nuostatas dar taikoma apsauga, ir tiems kûriniû ãraûams ir fonogramoms, kurie sukuriami po tos datos.“;
RETTIFIKA


(ĠU L 265, 11.10.2011, p. 1)

Pagna 4, Artikolu 1, punt 3 (fir-rigward tal-Artikolu 10 tad-Direttiva 2006/116/KE), il-punt 5 żdid

Flok:


Aqra:

ANEXĂ

RECTIFICARE

la Directiva 2011/77/UE a Parlamentului European și a Consiliului din 27 septembrie 2011 de modificare a Directivei 2006/116/CE privind durata de protecție a dreptului de autor și a anumitor drepturi conexe

(JO L 265, 11.10.2011, p. 1)

Pagina 4, articolul 1 punctul 3 (privind articolul 10 din Directiva 2006/116/CE), noul alineat (5)

în loc de:

„(5) Articolul 3 alineatele (1)-(2e), în versiunea în vigoare la data de 31 octombrie 2011, se aplică fixărilor de interpretări și executări și fonogramelor cu privire la care drepturile artistului interpret sau executant și ale producătorului de fonograme sunt încă protejate în temeiul dispozițiilor respective în versiunea în vigoare la data de 30 octombrie 2011, ca și la 1 noiembrie 2013, și fixărilor de interpretări și executări și fonogramelor care iau naștere după data respectivă.”

se citează:

„(5) Articolul 3 alineatele (1)-(2e), în versiunea în vigoare la data de 31 octombrie 2011, se aplică fixărilor de interpretări și executări și fonogramelor cu privire la care la 1 noiembrie 2013 drepturile artistului interpret sau executant și ale producătorului de fonograme sunt încă protejate, în temeiul dispozițiilor respective în versiunea în vigoare la data de 30 octombrie 2011, precum și fixărilor de interpretări și executări și fonogramelor care iau naștere după data respectivă.”
KORIGENDUM

k smernici Európskeho parlamentu a Rady 2011/77/EÚ z 27. septembra 2011, ktorou sa mení a
dopĺňa smernica 2006/116/ES o lehote ochrany autorského práva a niektorých súvisiacich práv

(Ú. v. EÚ L 265, 11.10.2011, s. 1)

Strana 4, článok 1, bod 3, nový bod 5

Namiesto:

„5. Článok 3 ods. 1 až 2e v znení účinnom 31. októbra 2011 sa uplatňuje na záznamy výkonov a
zvukové záznamy, v súvislosti s ktorými sú výkonný umelec a výrobca zvukových záznamov k 30.
októbru 2011 ešte vždy chránení na základe uvedených ustanovení v znení účinnom 1. novembra
2013 a na záznamy výkonov a zvukové záznamy, ktoré vzniknú po tomto dátume."

má byť:

„5. Článok 3 ods. 1 až 2e v znení účinnom 31. októbra 2011 sa uplatňuje na záznamy výkonov a
zvukové záznamy, v súvislosti s ktorými sú výkonný umelec a výrobca zvukových záznamov ešte
vždy chránené na základe uvedených ustanovení v znení účinnom 30. októbra 2011, a to k
1. novembra 2013, a na záznamy výkonov a zvukové záznamy, ktoré vzniknú po tomto dátume.“
COUNCIL OF THE EUROPEAN UNION

Brussels, 3 April 2013

Interinstitutional File:
2008/0157 (COD)

LEGISLATIVE ACTS AND OTHER INSTRUMENTS: CORRIGENDUM/RECTIFICATIF


(OJ L 265, 11.10.2011, p. 1)

LANGUAGES concerned: BG, CS, DE, IT, LT, MT, RO, SK

PROCEDURE APPLICABLE according to the Council Statement of 1975.
(The procedures are explained in Council document 5980/07 JUR 49, available in the official languages, together with a translation of the structure of this cover page)

— Procedure 2(c) (obvious errors in a number of language versions)

TIME LIMIT for the agreement of the Presidency and of the European Parliament (in case of acts adopted under the ordinary legislative procedure): 8 days

This REV 1 modifies only the IT and MT version of the Corrigendum/Rectificatif.

Any observations regarding this corrigendum should be notified to the Presidency:

Mr. David Kelly and Mrs. Caroline Daly:
e-mail: david.kelly@dfa.ie
caroline.daly@dfa.ie
ПРИЛОЖЕНИЕ

ПОПРАВКА

на Директива 2011/77/ЕС на Европейския парламент и на Съвета от 27 септември
2011 година за изменение на Директива 2006/116/ЕО за спора за закрила на авторското право
и някои сродни права

(ОВ L 265, 11.10.2011 г., стр. 1)

Страница 4, член 1, точка 3, нов параграф 5, добавен към член 10

Вместо:

„5. Член 3, параграфи 1—2д във версията в сила на 31 октомври 2011 г., се прилагат за
записи на изпълнения и за звукозаписи, по отношение на които правата на изпълнителя и на
продуцента на звукозаписи по силата на тези разпоредби във версията в сила на 30 октомври
2011 г. продължават да са защитени към 1 ноември 2013 г., както и за записи на изпълнения
и звукозаписи, създадени след тази дата.“

da се чете:

„5. Член 3, параграфи 1—2д във версията в сила на 31 октомври 2011 г., се прилага за записи
на изпълнения и за звукозаписи, по отношение на които правата на изпълнителя и на
продуцента на звукозаписи продължават да са защитени по силата на тези разпоредби във
версията в сила на 30 октомври 2011 г. към 1 ноември 2013 г., както и за записи на
изпълнения и звукозаписи, създадени след тази дата.“


PŘÍLOHA

OPRAVA

směrnice Evropského parlamentu a Rady 2011/77/EU ze dne 27. září 2011, kterou se mění směrnice 2006/116/ES o době ochrany autorského práva a určitých práv s ním souvisejících

(Úř. věst. L 265, 11.10.2011, s. 1)

Strana 1 a 2, 8. a 9. bod odůvodnění

Místo:

„(8) Při vstupu do smluvního vztahu s výrobcem zvukových záznamů musí výkonné umělec obvykle převést na výrobce zvukových záznamů svá výlučná práva na rozmnožování, rozšířování, pronájem a zpřístupňování záznamů svých výkonů. Výměnou za to je některým výkonným umělcům vyplacena záloha na autorský honorář a platby dostávají až v okamžiku, kdy výrobce zvukových záznamů získá zpět počáteční zálohu a provede smluvně stanovené srážky. Jiní výkonní umělci převádějí svá výlučná práva výměnou za jednorázovou platbu (jednorázová odměna). Platí to zejména pro výkonné umělce, kteří účinkují v pozadí a jejichž jména se neuvádějí („vedlejší výkonní umělci“), ale někdy i pro výkonné umělce, jejichž jména se uvádějí („přední výkonní umělci“).

(9) Práva k záznamu výkonu by se měla vrátit výkonnému umělci, pokud výrobce zvukových záznamů nenabídne k prodeji kopie zvukového záznamu v dostatečném množství ve smyslu Mezinárodní úmluvy o ochraně výkonných umělců, výrobců zvukových záznamů a rozhlasových organizací, nebo nezpřístupně tento zvukový záznam veřejnosti, přičemž bez prodloužení doby ochrany by takový zvukový záznam byl volný. Tato možnost by měla být dostupná po uplynutí přiměřené lhůty pro výrobce zvukových záznamů k vykonání obou uvedených způsobů využití. Práva výrobce zvukových záznamů na zvukový záznam by v důsledku toho měla zaniknout, aby nedošlo k situaci, kdy by tato práva existovala zároveň s právy výkonného umělce k záznamu výkonu, zatímco posledně jmenovaná práva již nejsou na výrobce zvukových záznamů předvedena nebo na něj nejsou postoupena.“
má být:

„(8) Práva k záznamu výkonu by se měla vrátit výkonnému umělci, pokud výrobce zvukových záznamů nenabídne k prodeji kopie zvukového záznamu v dostatečném množství ve smyslu Mezinárodní úmluvy o ochraně výkonných umělců, výrobců zvukových záznamů a rozhlasových organizací, nebo nezpřístupní tento zvukový záznam veřejnosti, přičemž bez prodloužení doby ochrany by takový zvukový záznam byl volný. Tato možnost by měla být dostupná po uplynutí přiměřené lhůty pro výrobce zvukových záznamů k vykonání obou uvedených způsobů využití. Práva výrobce zvukových záznamů na zvukový záznam by v důsledku toho měla zaniknout, aby nedošlo k situaci, kdy by tato práva existovala zároveň s právy výkonného umělce k záznamu výkonu, zatímco posledně jmenovaná práva již nejsou na výrobce zvukových záznamů převedena nebo na něj nejsou postoupena.

(9) Při vstupu do smluvního vztahu s výrobcem zvukových záznamů musí výkonní umělci obvykle převést na výrobce zvukových záznamů svá výlučná práva na rozmnožování, rozšířování, pronájem a zpřístupňování záznamů svých výkonů. Výměnou za to je některým výkonným umělcům vyplacena záloha na autorský honorář a platby dostávají až v okamžiku, kdy výrobce zvukových záznamů získá zpět počáteční zálohu a provede smluvně stanovené srážky. Jiní výkonní umělci převádějí svá výlučná práva výměnou za jednorázovou platbu (jednorázovou odměnu). Platí to zejména pro výkonné umělce, kteří účinkují v pozadí a jejichž jména se neuvádějí („vedlejší výkonní umělci“), ale někdy i pro výkonné umělce, jejichž jména se uvádějí („přední výkonní umělci“).“

____________________

6778/1/13 REV 1
PŘÍLOHA JUR
CS

3
BERICHTIGUNG

der Richtlinie 2011/77/EU des Europäischen Parlaments und des Rates vom 27. September 2011 zur Änderung der Richtlinie 2006/116/EG über die Schutzdauer des Urheberrechts und bestimmter verwandter Schutzrechte

(ABl. L 265 vom 11.10.2011, S. 1)

Seite 4, Artikel 1 Nummer 3, hinzuzufügender Artikel 10 Absatz 5

Statt:


muss es heißen:

"


________________________________________
RETTIFICA

della direttiva 2011/77/UE del Parlamento europeo e del Consiglio, del 27 settembre 2011, che
modifica la direttiva 2006/116/CE concernente la durata di protezione del diritto d’autore e di alcuni
diritti connessi

(GU L 265 dell'11.10.2011, pag. 1)

Pagina 4, articolo 1, punto 3) (nuovo paragrafo 5)

Anziché:

"5. L’articolo 3, paragrafi da 1 a 2 sexies, nella versione in vigore al 31 ottobre 2011, si applica
alle fissazioni di esecuzioni e ai fonogrammi per i quali l’artista, interprete o esecutore, e il
produttore di fonogrammi sono ancora protetti in virtù di tali disposizioni nella versione in
vigore al 30 ottobre 2011, quale al 1° novembre 2013, e alle fissazioni di esecuzioni e ai
fonogrammi successivi a tale data."

leggasi:

"5. L’articolo 3, paragrafi da 1 a 2 sexies, nella versione in vigore al 31 ottobre 2011, si applica
alle fissazioni di esecuzioni e ai fonogrammi per i quali al 1° novembre 2013 l’artista,
interprete o esecutore, e il produttore di fonogrammi sono ancora protetti in virtù di tali
disposizioni nella versione in vigore al 30 ottobre 2011 e alle fissazioni di esecuzioni e ai
fonogrammi successivi al 1° novembre 2013."
PRIEDAS

KLAIÐŲ IŠTAISYMAS

2011 m. rugsėjo 27 d. Europos Parlamento ir Tarybos direktyva 2011/77/ES, kuria ið dalies keiðiama Direktyva 2006/116/EB dël autorių ir tam tikrų gretutinių teisių apsaugos terminų

(OL L 265, 2011 10 11, p. 1)

1 puslapis, 8 konstatuojamoji dalis

Yra:

„<…> kuri, jei bûtų pratęstas terminas, taptų vieða, kopijų ir nepateikia tokios fonogramos vieðai. <…>“, turi bûtį:

„<…> kuri, jei bûtų pratęstas terminas, taptų vieða, kopijų ar nepateikia tokios fonogramos vieðai. <…>“.

4 puslapis, 1 straipsnis, 3 punktas (dël Direktyvos 2006/116/EB 10 straipsnio), 5 nauja dalis

Yra:

„5. 2011 m. spalio 31 d. galiojanèios redakcijos 3 straipsnio 1–2e dalys taikomos kûrinių įraðams ir fonogramoms, kurių atþvilgiu atlikëjui ir fonogramos gamintojui 2011 m. spalio 30 d. pagal tas 2013 m. lapkrièio 1 d. galiojanèios redakcijos nuostatas dar taikoma apsauga, ir tiems kûrinių įraðams ir fonogramoms, kurie sukuriami po tos datos.“, turi bûtį:

„5. 2011 m. spalio 31 d. galiojanèios redakcijos 3 straipsnio 1–2e dalys taikomos kûrinių įraðams ir fonogramoms, kurių atþvilgiu atlikëjui ir fonogramos gamintojui 2013 m. lapkrièio 1 d. pagal tas 2011 m. spalio 30 d. galiojanèios redakcijos nuostatas dar taikoma apsauga, ir tiems kûrinių įraðams ir fonogramoms, kurie sukuriami po tos datos.“;
RETTIFIKA


(ĠU L 265, 11.10.2011, p. 1)

Pagna 4, Artikolu 1, punt 3 (fir-rigward tal-Artikolu 10 tad-Direttiva 2006/116/KE), il-punt 5 ġdid

Flok:


Aqra:


RECTIFICARE

la Directiva 2011/77/UE a Parlamentului European și a Consiliului din 27 septembrie 2011 de modificare a Directivei 2006/116/CE privind durata de protecție a dreptului de autor și a anumitor drepturi conexe

(JO L 265, 11.10.2011, p. 1)

Pagina 4, articolul 1 punctul 3 (privind articolul 10 din Directiva 2006/116/CE), noul alineat (5)

în loc de:

„(5) Articolul 3 alineatele (1)-(2e), în versiunea în vigoare la data de 31 octombrie 2011, se aplică fixărilor de interpretări și executări și fonogramelor cu privire la care drepturile artistului interpret sau executant și ale producătorului de fonograme sunt încă protejate în temeiul dispozițiilor respective în versiunea în vigoare la data de 30 octombrie 2011, ca și la 1 noiembrie 2013, și fixărilor de interpretări și executări și fonogramelor care iau naștere după data respectivă.”

se citește:

„(5) Articolul 3 alineatele (1)-(2e), în versiunea în vigoare la data de 31 octombrie 2011, se aplică fixărilor de interpretări și executări și fonogramelor cu privire la care la 1 noiembrie 2013 drepturile artistului interpret sau executant și ale producătorului de fonograme sunt încă protejate, în temeiul dispozițiilor respective în versiunea în vigoare la data de 30 octombrie 2011, precum și fixărilor de interpretări și executări și fonogramelor care iau naștere după data respectivă.”
PRÍLOHA

KORIGENDUM

k smernici Európskeho parlamentu a Rady 2011/77/EÚ z 27. septembra 2011, ktorou sa mení a
dopĺňa smernica 2006/116/ES o lehote ochrany autorského práva a niektorých súvisiacich práv

(Ú. v. EÚ L 265, 11.10.2011, s. 1)

Strana 4, článok 1, bod 3, nový bod 5

Namiesto:

„5. Článok 3 ods. 1 až 2e v znení účinnom 31. októbra 2011 sa uplatňuje na záznamy výkonov a
zvukové záznamy, v súvislosti s ktorými sú výkonný umelc a výrobca zvukových záznamov k 30.
októbru 2011 ešte vždy chránení na základe uvedených ustanovení v znení účinnom 1. novembra
2013 a na záznamy výkonov a zvukové záznamy, ktoré vzniknú po tomto dátume.“

má byť:

„5. Článok 3 ods. 1 až 2e v znení účinnom 31. októbra 2011 sa uplatňuje na záznamy výkonov a
zvukové záznamy, v súvislosti s ktorými sú výkonný umelc a výrobca zvukových záznamov ešte
vždy chránení na základe uvedených ustanovení v znení účinnom 30. októbra 2011, a to k
1. novembra 2013, a na záznamy výkonov a zvukové záznamy, ktoré vzniknú po tomto dátume.“