

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 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 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;

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 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 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;

⁽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.