COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DIRECTIVE

harmonizing the term of protection
of copyright and certain related rights

(presented by the Commission)

EXPLANATORY MEMORANDUM

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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

I. 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 nromal 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 (i.e. fifty, sixty or seventy years pma).

(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(1)a) (iv)).

II 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.

3)

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.

(1) OJ No C 24, 31.1.1991, p. 5.

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.

40. 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. Sacchi[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.

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1 Case 155/73 [1974] ECR 409.

2 Case 52/79 [1980] ECR 833.

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 than 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 fulfil 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.

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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)).(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.

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(1) OJ No C 53, 28.2.1991, p. 35.

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.

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(1) OJ No L 109, 26.4.1983, p. 8.

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 N°87/373/CEE 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.

COMPARISON OF MAIN TERMS OF PROTECTION IN MEMBER STATES

	Copyright				Related rights		
	Standard	Anonymous/pseudonymous	Photographs	Films	Performers	Producers of phonograms	Broadcasting organizations
Berne/ Rome	at least 50 pma	at least 50 from making available to public	at least 25 from making	standard or 50 from making available to public	at least 20 from performance	at least 20 from fixation	at least 20 from transmission
B	50 pma + 10 ewt	50 from publication	-	-	-	-	-
DK	50 pma	50 from publication	25 from making	50 pma	50 from performance	50 from recording	50 from broadcast
D	70 pma	70 from publication	70 pma or 50 or 25 from publication	70 pma	50 from publication	25 from publication or production	25 from broadcast
GR	50 pma	50 from publication	50 pma	50 pma	50	-	-
E	60 pma/80	60 from publication/80	60 pma/80 or 25 from making	60 pma/80	40 from publication or performance	40 from publication or production	40 from making
F	50/70 pma + 8 or 14 ewt	50/70 from publication + 8 or 14 ewt	50 pma + 8 or 14 ewt	50 pma + 8 or 14 ewt	50 from publication or performance	50 from production	50 from broadcast
IRL	50 pma	50 from publication	50 from publication	50 from publication	-	50 from publication	50 from broadcast
I	50 pma+ 6 or 12 ewt	50 from publication + 6 ewt	50 pma or 20 from making + 6 ewt.	50 from publication or production + 6 ewt	20 from performance	30 from filing or 40 from production	—
L	50 pma	50 from publication	50 from making	50 from publication	20 from performance	20 from recording	20 from broadcast
NL	50 pma	50 from publication	50 pma	50 pma	-	-	-
P	50 pma	50 from publication	25 from making	50 pma	50 from performance	50 from recording	50 from broadcast
UK	50 pma	50 from publication	50 pma	50 from making or publication	50 from performance	50 from recording or publication	50 from broadcast

pma: post mortem auctoris
ewt: extension for wartime

Terms of protection in some non-Community countries

	Performers	Producers of phonograms	Broadcasters	Copyright
Austria	50 from performance	50 from recording/publication	30 from from broadcast	70 pma/from publication
Cyprus	-	20 from recording	20 from broadcast	50 pma/from publication
Czechoslovakia	50 from recording	50 from recording	50 from broadcast	50 pma/from publication
Finland	50 from recording	50 from recording	50 from broadcast	50 pma/from publication
Hungary	-	20 from recording	-	50 pma/from publication
Iceland	25 from recording	25 from recording	25 from broadcast	50 pma/from publication
Malta	-	25 from recording	25 from broadcast	50 pma/from publication
Norway	50 from performance	50 from recording	50 from broadcast	50 pma/from publication
Sweden	50 from recording	50 from recording	50 from broadcast	50 pma/from publication
Switzerland	-	-	-	50 pma/from publication
USA	-	75 from publication	-	50 pma/75 from publication
Japan	30 from perfomance	30 from recording	30 from broadcast	50 pma/from publication
Canada	-	50 from recording	-	50 pma/from publication

Draft legislation and draft international agreements

	Copyright	Related rights
B	70 pma	50
NL		50
GR	70 pma	50
CH	70 pma	50
WIPO	70 pma	
GATT	50 pma	50 (broadcasters 20)

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;

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(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 $6^{bis}(2)$ 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, 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.

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 I : 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.

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