

# COMMISSION OF THE EUROPEAN COMMUNITIES

COM(92) 602 final - SYN 395

Brussels, 7 January 1993

Amended proposal for a

## COUNCIL DIRECTIVE

HARMONIZING THE TERM OF PROTECTION  
OF COPYRIGHT AND CERTAIN RELATED RIGHTS

(presented by the Commission pursuant to Article 149(3)  
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

On 23 March 1992, the Commission presented to the Council its proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights.

The Economic and Social Committee delivered its opinion on the proposal on 1 July 1992.

The European Parliament, consulted under the cooperation procedure, discussed the proposal in detail in its Committees. On 17 November 1992, it debated the report drawn up on behalf of the Committee on Legal Affairs and Citizen's rights by Mr. Bru Purón, voting in support of the proposed Directive as amended by Parliament on 19 November 1992.

The amended proposal for a Directive presented by the European Commission is intended to take into account the Opinion of the European Parliament. It contains three major modifications to the original proposal.

- a) The copyright owners of cinematographic or audiovisual works are defined in a precise manner. Hence the ownership of such works is subject to total harmonization in conformity to the amendment of Parliament.
- b) The protection of posthumous works is subject to a specific provision. As proposed by the amendment of Parliament a new related right is introduced in the proposal.
- c) As regards the application in time, the Commission largely follows the amendment of Parliament and proposes that the provisions of the Directive receive a more immediate application. Acquired rights of third parties are however safeguarded.

The Commission accepts, in totality or in part, 11 out of 14 amendments of Parliament.

The three amendments which were not adopted by the Commission are in relation to Article 1 :

- a) Parliament proposes to add to paragraph 4 of Article 1 a provision allowing Member States to establish that certain court decisions shall be considered as presumptions of death. The very fact that such a provision is optional has the consequence of weakening the harmonizing effect of the whole paragraph. Furthermore, some Member States which do not have such presumptions would therefore not introduce them into their law.

- b) Parliament proposes to introduce a derogation to the calculation of the term of protection for works published in volumes, parts, instalments, issues or episodes for which the term of protection is not calculated after the death of the author. Such a provision can only be applied in a limited number of cases and does not appear justified because the directive has the consequence that the term of protection will be longer in most of the Member States.
- c) Parliament proposes two amendments concerning posthumous works. The first one states that a term of protection of 70 years after the publication shall be granted if the publication takes place before the end of the normal copyright term. This provision thus aims at prolonging the term of protection of copyright. Such a prolongation does not seem to be justified because if the heirs of an author have not taken the measures to ensure the publication of the work of their parent within a reasonable period of time, which would allow them to enjoy a long term of protection, it is not advisable to grant them additional protection. The Commission, however, accepts the other amendment which seeks to grant protection for 25 years after the end of copyright for those who make unpublished works lawfully available to the public. Thus the Commission accepts a major modification to its proposal as regards posthumous works.

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Commentary on the recitals

Recital n° 2 bis

This recital explains the reason for which it is necessary to harmonise authorship in cinematographic or audiovisual work. The text of the amendment is accepted as it is.

Recital n° 13

The title of the Directive of the Council on rental right and lending right and on certain rights related to copyright in the field of intellectual property having changed, this recital has to be updated.

Recital n° 20

This recital corresponds to the new article 6 bis. The text of the amendment is accepted as it is.

Commentary on the articles

Article 1, paragraph 6

The amendment of Parliament relates to the wording. It notably specifies that the determining factor is the act of making a work lawfully available to the public. This is accepted by the Commission.

Article 1 bis

The Commission accepts most of the amendment of Parliament. It must, however, change its wording and complete it.

Paragraph 1 is the text of Parliament.

Paragraph 2 specifies that the principal director is an author. This conforms to article 2(2) of the Council Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

Paragraph 3 allows Member States to introduce rebuttable presumptions of transfer of rights from the authors to the producers. Such presumptions are indeed essential for a better exploitation of works.

Thus, total harmonization of authorship and in turn of the term of protection for cinematographic or audiovisual works is achieved. This is not to the detriment of producers, as these enjoy their own exclusive rights under the rental directive and can benefit from rebuttable presumptions of transfer of rights.

Article 2, paragraph 1

The amendment of Parliament relates to the wording. It specifies that only a lawful act triggers the running of the term of protection. This useful precision is accepted by the Commission even if the term "publication" is maintained in order to keep the parallel with the term of protection of phonogram producers. Also the term "communication to the public" is used rather than "dissemination" because it is broader and more in line with the rental directive.

#### Article 2 bis

The amendment of Parliament seeks to introduce an exclusive related right for persons who, for the first time, make available to the public posthumous works of which the copyright has expired. This right is accepted by the Commission. Only the wording is changed.

#### Article 3

No amendments were proposed by Parliament.

#### Article 4, paragraph 3

The addition proposed by Parliament is accepted.

#### Article 5

The amendment of Parliament is accepted but it is necessary to keep more closely to the wording of the Berne Convention in order not to cast any doubt on the fact that the author is also protected during his or her lifetime.

#### Article 6 bis

The amendment of Parliament on the application in time is for a large part accepted but has to be adapted to the Council Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property and to other amendments of Parliament. Some rewording was felt necessary.

The complexity of these provisions justifies their presentation in a new and separate Article 6 bis.

Paragraph 1 states that this Directive shall not have the effect of shortening terms of protection which are already running in the Member States. It thus protects the acquired right of rightowners. It also states that acts of exploitation carried out before the date of transposition remain unaffected. This provision excludes any retroactive effect of the Directive.

Paragraph 2 corresponds to the amendment of Parliament as to which rights the Directive applies with two modification or additions. Firstly the date of adoption of the Directive is preferred to the date of transposition in order to avoid that rightowners see their rights ending between these two dates. This allows a more immediate application in time and seems more equitable as regards the above-mentioned persons. It was also felt necessary to create a linkage with the rental right Directive in order to enable a more uniform application in the entire Community.

Paragraph 3 states that the Member States take the necessary measures in order to safeguard the rights of third parties who have exploited works or objects which are in the public domain or who have made investments linked to such works. Indeed, it seems difficult to define Community measures where the legal traditions of the members States are so divergent. Furthermore, the situations covered are complex and differ according to whether Member States already have long terms of protection or not.

Paragraph 4 reserves the application of the provisions on application in time of the rental right Directive.

Paragraph 5 constitutes a parallel provision to Article 13 (5) of the rental right Directive. It is necessary because of the new Article 1 bis.

#### Article 7

No amendments were proposed by Parliament.

#### Article 8

The Commission accepts the deletion of paragraph 2 as proposed by Parliament.

#### Article 9

No amendments were proposed by Parliament.

#### Article 10

The Commission accepts the new date of transposition of the Directive proposed by Parliament.

#### Article 11

No amendments were proposed by Parliament.

Amended proposal for a

COUNCIL DIRECTIVE

harmonizing the term of protection  
of copyright and certain related rights

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THE COUNCIL OF THE EUROPEAN  
COMMUNITIES,

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COMMUNITIES,

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

unchanged

Having regard to the proposal from  
the Commission,

unchanged

In cooperation with the European  
Parliament,

unchanged

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

unchanged

1. Whereas the Berne Convention for  
the Protection of Literary and  
Artistic Works and the Rome  
Convention for the Protection of  
Performers, Producers of  
Phonograms and Broadcasting  
Organizations lay down only  
minimum terms of protection of  
the rights they refer to,  
leaving the contracting states  
free to grant longer terms;  
whereas certain Member States

unchanged



have exercised this entitlement;  
whereas in addition certain  
Member States have not become  
party to the Rome Convention;

2. Whereas there are consequently unchanged  
differences between the national  
laws governing the terms of  
protection of copyright and  
related rights, which are liable  
to impede the free movement of  
goods and freedom to provide  
services, and to distort  
competition in the common  
market; whereas, therefore,  
with a view to the establishment  
of the internal market and its  
operation thereafter, the laws  
of the Member States should be  
harmonized so as to make terms  
of protection identical  
throughout the Community;

2 bis

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

3. Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and fifty years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations; unchanged
  
4. Whereas certain Member States have granted a term longer than fifty years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works; unchanged
  
5. Whereas at the 1967 Stockholm conference for the revision of the Berne Convention certain Member States' delegations approved a resolution asking the contracting states to extend the term of copyright protection; whereas in the discussions which have taken place within the World Intellectual Property Organization (WIPO) in preparation for a possible Protocol to the Berne Convention this question has been put on the agenda; unchanged

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

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

8. Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to begin unchanged

operating in practice on 31 December 1992, the harmonization of the term of protection should take place on the basis of a long term;

9. Whereas in its Communication of 17 January 1991 "Follow-up to the Green Paper - Working Programme of the Commission in the field of Copyright and neighbouring rights"<sup>(1)</sup>, 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;

unchanged

10. Whereas in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonized at seventy years

unchanged

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(1) COM(90) 584 final.

after the death of the author or seventy years after the work is lawfully made available to the public, and for related rights at fifty years after the event which sets the term running;

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

12. Whereas Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes<sup>(2)</sup> 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;

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(2) OJ No L 122, 17.5.1991, p. 42.

13. Whereas Articles 9 and 10 of Council Directive .... on rental right, lending right, and on certain rights related to copyright<sup>(3)</sup> make provision for minimum terms of protection only, subject to any later harmonization; whereas these Articles should be repealed, in order to align the terms of protection of those rights on the terms laid down in this Directive;
14. Whereas under the Berne Convention photographic works qualify for a minimum term of protection of only twenty-five years from their making; whereas, moreover, certain Member States have a composite system for the protection of photographic works, which are protected by copyright if they are considered to be artistic works within the meaning of the Berne Convention and protected under one or more other arrangements if they are not so considered; whereas provision should be made for the complete harmonization of these differing terms of protection;
13. Whereas Articles 11 and 12 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property<sup>(3)</sup> 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 laid down in this Directive;
- unchanged

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(3)

(3) OJ No L 346, 27.11.1992, p. 61.

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

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

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

18. Whereas where a rightholder who unchanged  
is not a Community national  
qualifies for protection under  
an international agreement the  
term of protection of related  
rights should be the same as

that laid down in this Directive, except that it should not exceed that fixed in the country of which the rightholder is a national;

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

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

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. The rights of an author of a literary or artistic work within

unchanged

20. Whereas, for the smooth functioning of the single market, this Directive must be applied immediately it enters into force, while ensuring that rights legitimately acquired by third parties are safeguarded,

HAS ADOPTED THIS DIRECTIVE:

Article 1

unchanged



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 unchanged volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.

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

6. In the case of collective works or works created by a legal person which have not been made lawfully available to the public within 70 years from their creation, the protection expires.

Article 1 bis

- 1. The authors of a cinematographic or audiovisual work shall be the natural persons who made the intellectual creation of the work.
- 2. The principal director shall be considered as one of its authors.

3. The Member States may provide, without prejudice to Article 2, paragraph 6 of Directive 92/100/EEC, that when a contract concerning the production of a cinematographic or audiovisual work is concluded, individually or collectively, the authors of the work shall be presumed, subject to contractual clauses to the contrary, to have authorized the exploitation of their work.

Article 2

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

Article 2

1. The rights of performers shall run for fifty years from the point at which the fixation of a performance is lawfully published for the first time or, if this has not occurred, after the first lawful communication to the public of the performance if neither of the above has taken place during that time.

2. The rights of producers of unchanged  
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 unchanged  
first fixations of cinema-  
tographic 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 unchanged  
organizations shall run for  
fifty years from the first  
transmission of a broadcast.

Article 2 bis

Any person who for the first time makes lawfully available to the public a work, the copyright protection of which has expired, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully made available to the public.

Article 3

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

Article 3

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

Article 4

unchanged

unchanged

3. The terms of protection laid down in Article 2 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, the term of protection granted by Member States shall expire no later than the date of expiry of the

later than the date of expiry of the protection granted in the country of which the rightholder is a national.

protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 2.

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:

unchanged

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

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

Article 5

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

Article 5

The terms of protection subsequent to the death of the author and the terms provided by Article 1 paragraphs 3 to 6 and Articles 2 and 2 bis shall run from the event which gives rise to them in each particular case. However, the length of these terms shall be calculated only from the first day of January of the year following the death or the event which gives rise to them.

Article 6

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

Article 6

deleted

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

unchanged

Article 6 bis

1. This Directive shall not have the effect of shortening terms of protection which under the laws of the Member States are already running.

It shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

2. This Directive shall apply to all works and objects which are protected at least in one Member State, on the date of adoption of the present Directive, under the application of national provisions on copyright or related rights or meet the criteria for protection under the provisions of Council Directive 92/100/EEC.
3. Member States shall adopt the necessary provisions which need to be taken by virtue of Community law and national law in order to protect acquired rights and legitimate expectations of third parties.
4. The present Article is without prejudice to Article 13 of Directive 92/100/EEC.
5. Member States may determine the date from which Article 1 bis shall apply, provided that that date is no later than 1 July 1997.



Article 7

Article 7

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

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

2. Articles 11 and 12 of Directive  
92/100/EEC are hereby deleted.

Article 8

Article 8

1. Member States shall immediately unchanged  
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 deleted  
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

Article 9

The Commission shall be assisted by unchanged  
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

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.

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

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

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

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

Article 11

Article 11

This Directive is addressed to the Member States.

# DOCUMENTS

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