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from:	Presidency
to:	Working Party on Intellectual Property (Copyright)
No. Cion prop.:	12217/08 PI 35 CULT 82 CODEC 1023
Subject:	Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights - Compromise proposal

Delegations will find attached a compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 29 October 2008.

Amendments to the Commission proposal are indicated.

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights³, the term of protection for performers and producers of phonograms is 50 years.
- (2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, 50 years from the first such publication or the first such communication to the public, whichever is the earliest.
- (3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

¹ OJ C

² OJ C

³ OJ L 372, 27.12.2006, p. 12.

- (4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.
- (5) Performers generally start their careers young and the current term of protection of 50 years with regard to performances fixed in phonograms and for phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.
- (6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁴, as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property⁵ should be available to performers for at least their lifetime.
- (7) The term of protection for fixations of performances and for phonograms should therefore be extended to 95 years after publication of the phonogram and the performance fixed therein. If the phonogram or the performance fixed in a phonogram has not been published within the first 50 years, then the term of protection should run for 95 years from the first communication to the public.

⁴ OJ L 167, 22.6.2001, p.10.

⁵ OJ L 376, 27.12.2006, p. 28.

- (8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non-recurring remuneration).
- (9) The Member States must remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the transfer or assignment of the rights of the performer in the fixation of his performance to a phonogram producer concluded before the extension of the term of protection resulting from this Directive.
- (10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.
- (11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain.

- (12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.
- (13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Member States may require that distribution of those monies is entrusted to collecting societies representing performers. When the distribution of those monies is entrusted to collecting societies, national rules on non-distributable revenues may be applied.
- (14) However, Article 5 of Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, *inter alia*, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms and from a single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying should.

- (15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations⁶ copies of a phonogram which, but for the term extension, would be in the public domain or from making such a phonogram available to the public. As a consequence, the rights of the phonogram producer in the phonogram should expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance whilst the latter rights are no longer transferred or assigned to the phonogram producer.
- (16) This accompanying measure should also ensure that a phonogram is no longer protected once it is not made available to the public after a certain period of time following the term extension, because rightholders do not exploit it or because the phonogram producer or the performers cannot be located or identified. If, upon reversion, the performer has had a reasonable period of time to make available to the public the phonogram which, but for the term extension, would be no longer protected, the phonogram is not made available to the public, the rights in the phonogram and in the fixation of the performance should expire.
- (17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation and can therefore, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this directive does not go beyond what is necessary in order to achieve those objectives.

⁶ Done at Rome on 26 October 1961.

- (18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States, separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, regarding opera, there are often different authors to the music and to the lyrics. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.
- (19) Consequently, the harmonisation of the term of protection in musical compositions with words is incomplete, giving rise to impediments to the free movement of goods and services, such as cross-border collective management services.
- (19a) Whenever words and a musical composition are specifically created to be used in a musical composition with words, the term of protection of that composition should be harmonised.
- (20) Directive 2006/116/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/116/EC is amended as follows:

- (1) The second sentence of Article 3(1) is replaced by the following:

"However,

 - if a fixation of the performance otherwise than in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,
 - if a fixation of the performance in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 95 years from the date of the first such publication or the first such communication to the public, whichever is the earlier."
- (2) In the second and third sentence of Article 3(2) the cipher "50" is replaced by the cipher "95"
- (3) In Article 10 the following paragraph 5 is inserted:

"5. Article 3 (1) and (2) in their version as amended by Directive [// insert: *Nr. of the amending directive*] shall apply only to fixations of performances and phonograms in regard of which the performer and the phonogram producer are still protected, by virtue of these provisions, on [*insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below*]."

- (4) The following Article 10 a is inserted:

"Article 10a

**Transitional measures relating to the transposition of
directive [// insert: *Nr. of the amending directive*]**

1. *Deleted.*
2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as "contracts on transfer or assignment"), which continue to produce their effects beyond the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: *Nr. of this amending directive*]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.
3. Where a contract on transfer or assignment gives the performer a right to claim a non recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3 (1) and (2) in its version before amendment by Directive [// insert: *Nr. of this amending directive*]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram. The right to obtain an annual supplementary remuneration cannot be waived by the performer.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a maximum threshold amount of € 2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

5. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an annual supplementary remuneration referred to in paragraph 3 may be imposed.
6. If, after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access

them from a place and at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 2, the rights of the phonogram producer in the phonogram shall expire.

If, one year after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: *Nr. of this amending directive*]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram is not made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the rights of the phonogram producer in the phonogram and the rights of the performers in relation to the fixation of their performance shall expire. "

- (5) The following Article 1(7) is inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the music".

Article 2

Transposition

1. Member States shall adopt and publish, by [...] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from [...].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
