COUNCIL OF THE EUROPEAN UNION

Brussels, 23 October 2008

14593/08

Interinstitutional File: 2008/0157 (COD)

PI 74
CULT 123
CODEC 1390

NOTE

from :	Commission services
to :	Working Party on Intellectual Property (Copyright)
No. prev. doc.:	14536/08 PI 72 CULT 122 CODEC 1368
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 - Non-paper addressing arguments against the Commission proposal

Delegations will find in Annex, for information, a non-paper from the Commission services addressing certain arguments against the above-mentioned Commission proposal put forward in a Joint Statement formulated by a group of academics.

Commission services non-paper on a Joint Academic Statement

The Commission's services were asked to comment on the arguments presented in a Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings[1] (the 'Joint Statement').

The following comments do not in any way replace, make moot or detract from the Commission's impact assessment, which, in various sections, addresses the issues raised in the Joint Statement. The impact assessment is available on the Commission website at the following address: http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm.
The Joint Statement is grouped in four headings: (1) earnings arising from a term extension will be skewed in favour of 'rich and famous' performers (the 'artists' earning effect'); (2) retroactive term extension provides no incentive for future cultural production (the 'supply effect'), (3) term extension will increase retail prices (the 'price effect'); and (4) term extension will negatively affect the EU trade balance (the 'trade argument').

This non-paper will deal with the four issues in turn.

The artists' earning effect

The Joint Statement raises the question of how the proposed term extension would benefit living performers. The authors doubt that living artists as a whole would benefit from an extension of the exclusive rights held by record companies. They argue that the benefits of term extension would fall to a few wealthy performers, their estates and to record companies.

The Commission services found that performers' income depended on (1) contractual payments and (2) secondary remuneration claims which are not transferred; in addition, the proposal ensures that the lowest earning artists benefit from the extension.

[1] [2008] EIPR, 341.

1. Performers do not transfer all their rights to record producers: While performers contractually transfer certain exclusive rights to phonogram producers (such as the exclusive right of distribution, rental, and making available online[2]) they keep the entitlement to all so-called secondary or statutory remuneration claims, such as equitable remuneration for broadcasting and public performance in bars and discotheques, as well as the entitlement to receive fair compensation for acts of private copying.

The Joint Statement ignores the fact that performers do not transfer all of their rights to record producers. Statutory remuneration claims are not included in transfer contracts between performers and record companies[3]. Hence, all featured performers (those who transfer against royalty payments) and the often anonymous session musicians (those who transfer against a one-off or 'flat fee' payment) would directly benefit from term extension because these two forms of remuneration would continue to produce revenue in their favour during the extended period. This aspect is often overlooked in the debate which, in the Commission service's view, focuses unduly on contractual royalty payments that stem from the sale of CDs.

2. All performers benefit from secondary remuneration: the Commission's services found that a large part of an average performer's income stems from so-called secondary or statutory remuneration claims not linked to the exercise of exclusive rights. These "rights to remuneration usually represent the main or sole guarantee of remuneration for performers for the multiple uses of their performances"[4]. Such secondary sources, which are managed by performers' collecting societies, comprise equitable remuneration for the broadcasting of commercial phonograms, communication of the phonogram in bars, discothèques, cafés or other public places. Indeed,

---

[2] Some performers transfer their rights under a "buy out" contract, and are not entitled to any further remuneration. Other performers obtain a royalty bearing contract, which will continue to bear revenues for performers in the extended term.

[3] It appears to be usual practice to exclude statutory remuneration claims from the scope of the 'transfer of rights' provisions. For example, contracts often have an express disclaimer to the effect that *'Ce contrat ne porte pas atteinte au droit pour l'artiste de percevoir directement par l'intermédiaire de la société civile dont il est membre, toute rémunération due par l'application de la loi ou d'accords collectifs'.*

[4] IVIR Study, page 121.

performers collecting societies have indicated to the Commission that equitable remuneration payments represent 57% of all revenue managed collectively. Moreover, in 22 EU Member States performers receive income as compensation for private copying. This represents 38% of a performers' collecting society's income. On a *per capita* basis these payments may not appear significant to those who benefit from salaried income. But those payments are an essential supplement to the often meagre income of average performers.

The Commission agrees with the Joint Statement that a term extension will not lead to an increase in remuneration paid by broadcasters, webcasters, supermarkets, bars, restaurants or the like for the broadcasting and public performance of sound recordings. This means indeed that the pie will remain constant and will have to be sliced more thinly. However, that does not alter the fact that more performers will have – slightly reduced – income for a longer period. There is a moral case for performers to benefit from remuneration for at least their lifespan, as the Joint Statement acknowledges.

3. The revenues of low earning performers will be boosted by accompanying measures: The proposal provides that performers who sell out their rights against a one-off payment (in effect, session performers) are entitled to 20% of the revenues derived by producers from the sales and the 'making available' of sound recordings during the extended term.
While this provision is confined to a footnote in the Joint Statement, it addresses an essential point, ensuring that the worse-off artists benefit from term extension in a meaningful way.

Firstly, this is because the 20% applies to the gross revenues of record producers, who cannot deduct any costs from payments to session musicians.

Secondly, the distribution would not be skewed in favour of famous and high earning artists, because only the worse off musicians would benefit. Finally, the Commission calculated that the payment to an average performer would in effect almost triple from between € 46 and € 737 to between € 130 and € 2065 per year[5].

[5] An increase by a factor of 2.8, see Commission Impact Assessment, page 47. This is a conservative estimate, as, owing to lack of reliable data on the exact number of session musicians, the estimate spreads the benefits of the fund amongst all performers.

Thirdly, even if the fund were to remain a "transitory measure", it would hardly be temporary in nature, as it would operate between, e.g., 2011 until 2104[6].

The supply effect

The Joint statement claims that "the core purpose of copyright is to stimulate creativity and innovation". A retroactive term extension would defeat this purpose, as it would not encourage additional investments devoted to making more recordings available to consumers. It concludes that the evidence shows that the term extension would negatively affect access and exploitation of the back catalogue of recorded music.

1. *The purpose of copyright in the EU is not only to provide an incentive for creation and innovation*. While such a view is supported by the copyright clause of the US Constitution[7], it is much less relevant to most copyright traditions in Europe. Notwithstanding moral rights, concerns relating to distributive justice and social aspects are legitimate and recognised objectives of protection. This is for instance recognised in the reforms to German copyright contract law, which apply to authors as well as performers, or in the Rome Convention[8]. Moreover, a specific rationale for the protection of record producers is their capacity to enforce rights on their behalf and on the behalf of performers[9].

2. *The proposed term extension is not 'fully retroactive'*. This means that it does not affect any sound recordings which are no longer protected by the time the proposal has to be transposed into national law by the Member States. The proposal would thus, if the deadline of transposition was

---

6 Assuming the Directive comes into force in 2010; payments will have to be made for all records released between 1961 and 31 December 2009. That means that the fund will operate between 2011 until 2104, i.e., until the term of the last sound recording produced prior to the entry into force of the Directive lapses after 95 years.

7 Article I, Section 8, Clause 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

8 See IVIR Study, page 96.

9 See Commission proposal for the term Directive, COM (92) final, March 23, 1992, page 29. See also Cornish, "The Author as Risk Sharer", (2002); Kamina, Film Copyright in the European Union, page 85.

later than 2010, only apply to phonograms published from 1960 onwards. This is referred to as 'partial retroactivity'. The Joint Statement implies that a sound recording published as far back as 1910 would regain protection. This is clearly not envisaged.

3. Record companies promote new talent and spread their risks over a portfolio of recordings: The Joint Statement also argues that a retroactive extension cannot constitute an incentive. To bolster this point, the Joint Statement quotes an *amici curiae* brief of 2002 which concludes: "Once a work is created, additional compensation to the producer is simply a windfall".

This conclusion may be correct when one looks at each sound recording in isolation. However, this isolated view does not reflect current practice in the sound recording industry: proceeds from the sale of earlier sound recordings are used to finance investments in new artists and repertoire (A&R). This essentially means that incentives for future production are provided by having a broad portfolio of recordings that span a significant period of time. Our impact study estimates that a term extension would create anything between € 44 to 843 million in additional revenue. The sound recording industry claims that approximately 17% of revenue is reinvested in A&R[10]. This means that between € 7.5 and 143 would be available for reinvestment in new recordings.

4. The proposed term extension would not hinder access to recordings[11].
Firstly, the Commission does not agree that the evidence submitted is relevant[12]. The Joint Statement claims that "Paul Heald, in a new study (2008), shows that musical compositions are more likely to be exploited in movies once they fall into the public domain". Paul Heald, in that study, states that "the study does not prove a positive public domain effect on availability" and that "the comparative rates of exploitation of public domain and copyrighted music are not significantly different".

[10] BPI figures, cited by the IVIR Study.
[11] The IVIR notes that "the public domain status of creative material would in itself not constitute a guarantee that material will indeed be made accessible and available to the public", page 110.
[12] In this respect, it is not clear why the Joint Statement claims DG Markt (the Commission) is relying on the PWC report. The IA does not rely on the PWC report on this point.

The Joint Statement also relies on a 2005 study by Tim Brookes to assert that "the prime re-issuers of historical recordings are not the copyright owners" and that "historical recordings from the same period are more available in Europe, due to the shorter term".

Regarding the latter point, the study contains no evidence to such effect[13].

On the former point, the statement that "only 14 per cent of pre-1965 recordings in this sample are available from rights holders" is deceptive[14]. Firstly, the study does not compare the re-issue of protected sound recordings vs. non-protected recordings. All samples in the study pertain to protected sound recordings. In these circumstances, the study cannot draw any conclusion as to whether the frequency of re-issue depends on copyright protection. Secondly, the study itself concedes that the proportion of records re-issued by right-holders is higher[15]. Moreover, the study finds that after 1950, right-holders are consistently the prime re-issuers of CDs.[16]

The proposed extension would only cover recordings released from 1960[17] onwards: according to the study, 33% of historical recordings from 1960-1964 are re-issued by rightholders.

---

13 The sole relevant passage refers to one company releasing historical recordings. It does not specify whether these recordings are still protected, produced under licence, etc. The fact that the company in question itself claims that it "has acquired the exclusive rights to over 360 hours of previously unreleased material produced by the Edison Company" and offers "music licensing" services raises some doubts.

14 Other elements cast doubt over the relevance of this study here, in particular, the fact that it does not take into account recordings made available over the internet.

15 The production of recordings has increased steadily over time. The study divides the time between 1890 and 1964 into five year periods. For each period, it considers the same number of sampled recordings. In reality, the number of recordings in the latter periods are much higher: see Tim Brooks (2005), FN 3: "Since more recordings were made in later years, and the rights-holder reissue rate is also higher for later years, the gross reissue percentage for all recordings would presumably be higher – at least for rightholders".

16 Tim Brooks (2005), p. 8.

17 Assuming the term extension applies from 2010.

Secondly, a term extension encourages digitisation and online distribution of recordings. The Commission notes that the extension might provide a medium term incentive for record producers to digitise recordings which are on the brink of falling out of copyright[18]. This is important, because record companies, who hold the master recordings, have a "natural competitive advantage"[19] and are in a better position to digitise an old recording from their back catalogue. They are also in a better position to market these old recordings. Finally, it is not clear what the extent of the much debated "long tail" effect will be. The only empirical study, to the Commission's knowledge, suggests that the "tail" is getting longer, i.e. more and more recordings are available online, but the overall value of the long tail seems less than anticipated[20]. The Commission's Impact Assessment notes that record companies have started digitising their back catalogue[21].

Thirdly, and most important, no sound recordings can be "locked-up" under the proposal: The Commission has proposed an innovative 'use-it-or-lose-it' provision. These clauses will allow performers to get their rights back if the producer does not market their recordings anymore in the period covered by the term extension. The performer will then be able to remarket the music himself or find another record company. Should neither the performer nor the record producer market the sound recording within a year after term extension, protection will lapse. This clause aims to ensure that a maximum number of sound recording are made available to the public.

The price effect

Thirdly, the Joint Statement raises the issue of consumer prices. The Joint Statements argues that it is preposterous to argue that term extension will not affect retail prices and record companies need term extension to boost revenues.

---

18 Page 43 of the Commission's Impact Assessment.

19 IVIR Study, page 108.

20 Anita Elberse, "Should You Invest in the Long Tail?", Harvard Business Review, July-August 2008.

21 Universal makes available to consumers 18 000 previously 'deleted' tracks and the digitisation of its back catalogue should reach 60 000 tracks by the end of 2008; Deutsche Grammophon offers a music download service which includes 2500 albums, 600 of which are not available on CD. See Commission Impact Assessment, page 47.

The consumer impact of the term proposal was carefully studied. You will find many references to this in the impact study itself. At the outset, it is useful to distinguish between two possible price impacts: (1) the remuneration rates that apply to broadcasting and public performances; and (2) the retail prices for physical and online sales. It is fair to say that the Joint Statement does not address remuneration rates at all.

1. Payments by broadcasters, bars and discotheques would not increase: The Commission's impact assessment has an extensive chapter on broadcast and public performance remuneration[22]. The Commission concludes that the calculation methods for broadcast remuneration or discothèque royalties are not dependent on the number of sound recordings that are protected by copyright, a finding which is in accordance with the IVIR Study[23]. In other words, these payments are not dependant on how many sound recordings are or remain protected.

2. Retail prices would not increase

Firstly, the retail prices for CDs and physical goods would not increase due to the term extension. While all economists concur that it is difficult to estimate retail price impacts of copyright protection in an abstract manner – there are many factors that influence the price of a sound recording – it appears fair to say that there is no evidence pointing to a causal link between performers' or producers copyright protection and the retail price of a sound recording[24]. The Commission's impact assessment explains in detail why this is the case, and why the Heald study on the price of books is not relevant to this debate: sound recordings in which the performers and record producers' rights have lapsed are indeed not in the public domain, because the copyright in the music usually lasts for much longer.

---

22 Section 7.1.3.

23 The IVIR Study notes that collecting societies do not adjust their collections and distributions to the actual share of repertoire that is still protected (page 114), and that "equitable remuneration paid by broadcasters […] are currently usually paid in lump sums, not differentiating between single recordings being protected or not" (page 119), although it still seems to conclude that the price would increase.

24 The IVIR Study provides no empirical evidence on the subject, but nevertheless notes that "the public domain status of creative material would in itself not constitute a guarantee that material will indeed be made accessible and available to the public".

Moreover, the Joint Statement confuses the re-issuing of sound recordings that are no longer protected with the re-recording of musical compositions which are out of copyright. What the academics fail to explain is that related rights arise anew when such re-recordings are produced. As a major so-called 'public domain' label specialised in re-recording label itself concedes[25], they would thus benefit from a term extension. Therefore, the pricing of these re-recordings is not relevant to the debate of whether related rights have an impact on retail prices.

The Commission thus concluded that the pricing of sound recordings is constrained by many other factors[26], including shelf space, which minimise the importance of related rights protection in the pricing of CDs. The cost savings from the absence of protection for performers and record producers are therefore not passed on to consumers but kept by the "middlemen", distributors or public domain companies, while performers are entirely left out.

Secondly, the term extension would not cause a price increase for online music. This is because online music services do no differentiate between non-protected and protected recordings[27]. The currently dominant services, such as iTunes, offer downloads at a fixed price per track[28]. Subscription based services[29] offer access to a repertoire or a number of tracks in consideration for a

---

25 Naxos response to the Commission questionnaire on the term of protection for sound recordings, point 61.

26 Other factors including entry barriers, marketing costs associated with the fact that music is an experience good, the lower sales of older recordings (see sales figures from Liebowitz (2006) cited in the Joint Statement), implying less economies of scale and difficult access to shelf space, fewer substitutes (such as concerts or broadcasts) for old CDs, different buyer characteristics, as old repertoire often attracts heavy music consumers who are less sensitive to price variations.

27 The Commission also considered a paper by the Open Rights Group, which claims that users "single handedly" digitise sound recordings and offer free downloads. The vast majority of downloads available from the service referred to are, however, infringing the copyright in the music. This again illustrates the misconception that recordings which are no longer protected are in the public domain.

28 Other services include Nokia Music Store, MSN Music, Napster Light, fnacmusic.com. Some services offer variable prices for a download, such as Musicload.de, depending the price of the album in relation to the number of tracks, and the duration of the tracks, or

29 Such as e-Music (which includes Naxos' catalogue), Omniphone Music Service, FNAC musique illimitee, Napster to go.

monthly payment. Bundled access to music services, such as "Nokia comes with music" (phones, mobile) or "Orange music max" (ISP, mobile)[30], also costs the same regardless of what tracks the consumer downloads. Out of the 100 music services surveyed in the recent "*Observatoire de la musique: Etat des lieux de l'offre de musique numerique au premier semester 2008*", only one service offers access to sound recordings which are no longer protected, and the price, at € 1.00 per track[31], is identical to the price charged for tracks where the sound recording remains protected.

The trade argument

Fourthly, the Joint Statement raises the issue of how a longer term pertaining to sales, broadcasts and communications to the public that occur in Europe, would affect international trade in sound recordings.

1. The comparative advantage argument

The Joint Statement approaches this issue from the angle of Europe trying to gain a 'comparative advantage' over the United States. It also links an industry lobby letter to Commissioner McCreevy's press release to wrongly suggest that the Commission adopts this argument as a rationale for the proposal[32]. It should be clear that Commission did not adopt this line of reasoning. Moreover, the Joint Statement argues that a shorter term gives the EU an advantage over the US - because there are more public domain sound recordings available in the EU[33]. One issue should be clarified at the outset. There is no such thing as a 'public domain' sound recording. If a company re-issues a sound recording that is no longer protected by the related right that vests in the sound recording, this does not imply that the sound recording is available at no charge. Copyright royalties for authors and composers are still due until 70 years after their deaths. If a public domain label

---

30 Other services include Neuf Cegetel (ISP, Universal music), Alice (ISP, EMI), Sony's "playnow plus" (mobile phone).

31 Few companies offer downloads of non-protected sound recordings. Other than the service mentioned by the Observatoire de la Musique, Document Records offers downloads at £0.79 (approximately €1.00) per track.

32 At pages 344-345.

33 The "smaller" public domain in the US is due to transitory measures which mean that under federal law, recordings will only start to fall in the public domain in 2067.

reissues these sound recordings without paying the author's societies, it is infringing copyright. This partly explains why the Commission found no evidence that the shorter term of protection gives European creative industries an innovative edge, and why the Joint Statement provides no such evidence.

2. A term extension would benefit overwhelmingly European performers

The Commission did not focus on the international trade flows of record companies. It did not, for instance, rely on figures which relate to the international trade in manufactured goods, because these figures are based on where CDs are manufactured, not where the sound recording was produced; The IVIR Study, for its part, does[34] rely on such figures coming to the counterintuitive result that Singapore would be the 5th largest exporter of music to the rest of the world.

The Commission did therefore refrain from simplistic analysis of such 'trade flows' because, as the Joint Statement points out, the accounting methods and the shareholder structure of major labels make it impossible to track where the money will end.

It should nevertheless be pointed out that in the top 10 EU markets, 75% of music sales are of European repertoire – in Germany, the second largest market in the EU, the share of sales attributed to US repertoire is as low as 15%[35].

As the main objective of the term extension is to benefit European performers, the Commission focussed on secondary or statutory remuneration sources, such as broadcasting or public performance revenues. As explained above, all performers are entitled to such revenue, even when they transferred their exclusive rights to producers. In this respect, the Commission found that an overwhelming majority of revenues would benefit European performers, for two reasons.

---

[34] IVIR Study, page 128, citing figures from the OECD ITCS International Trade by Commodity database, which uses the Standard International Trade Classification (Revision 3).

[35] IFPI, Recording industry in numbers, 2008.

– The first is that European repertoire represents the large majority of music broadcast in Europe. The share of US repertoire on European airwaves is below 30%[36].

– Secondly, as explained in the Impact Assessment[37], due to reservations under the Rome Convention[38] and under the WPPT Treaty[39], equitable remuneration for broadcasting and public performance is rarely paid to US performers and record companies. For example, collecting societies in Austria, Belgium, Denmark, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, the Netherlands, Portugal, Romania, the Slovak Republic, Slovenia and Sweden do not distribute income to US record companies and performers. Collecting societies in Ireland and the UK distribute income only to US record companies, and not performers, who have a subsidiary in their territory.

In these circumstances, we believe that the proposal provides necessary and important support for Europe's performers who deserve recognition for their contribution to European culture.

An indication that performers are not currently given proper recognition might be found in the fact that the term of protection in the EU is shorter than in countries such as the US (where performers might be protected 95 years under the 'work for hire' doctrine, or 70 years *pma* when they are considered as holders of copyright (the US does not make a distinction between copyright and neighbouring rights). Performers 'neighbouring rights' terms are also longer in Australia (70 years), Brazil (70 years), Chile (70 years), India (60 years), Peru (70 years) or Turkey (70 years).

---

[36] Figures for 2007 submitted by collecting societies in the UK, Sweden, Portugal, Latvia, Ireland, Greece, France, Estonia, Denmark, Belgium and Austria.

[37] Page 44 and pages 63-64.

[38] Articles 5(3) and 16(1)(a).

[39] Articles 4(2) and 15(3).