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from: Presidency

to: Working Party on Intellectual Property (Copyright)

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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
– Revised compromise proposal

Delegations will find attached a revised compromise proposal prepared by the Presidency for the meeting of the Working Party on Intellectual Property (Copyright) on 3 March 2009.

Changes to 5877/09 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, with 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 [...], [...], p. [...].

² OJ C [...], [...], p. [...].

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 applicable to fixations of performances and to 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 70 years after the relevant event.
- (8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign 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 or assign their exclusive rights against a one-off payment (non-recurring remuneration).

⁴ OJ L 167, 22.6.2001, p. 10.

⁵ OJ L 376, 27.12.2006, p. 28.

- (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 or assigned 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, 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. "Revenues" means the revenues derived by the phonogram producer before deducting costs.
- (12) *Deleted*
- (13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned 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. Such distribution should be entrusted to collecting societies representing performers and national rules on non-distributable revenues may be applied.

- (14) However, Article 5 of Directive 2006/115/EC 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 or assign 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 or of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.
- (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 refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time left to the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.
- (16) *Deleted*
- (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

⁶ Done at Rome on 26 October 1961.

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.

- (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, an opera is often the work of a librettist and a composer. 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 whose lyrics and music were created for use together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services.
- (20) Directive 2006/116/EC should therefore be amended accordingly.
- (21) In accordance with point 34 of the Interinstitutional Agreement on Better Law-Making⁷, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

⁷ OJ C 321, 31.12.2003, p. 1.

Article 1

Directive 2006/116/EC is hereby amended as follows:

- (1) ***(Option A - cover also audiovisual performers, eventually under the condition that the Commission will present an impact assessment regarding the audiovisual sector before the adoption of the proposal.)***

In the second sentence of Article 3 (1), the number "50" shall be replaced by "70".

(Option B)

Limit the extension of the term of protection to fixations of performances in a phonogram (as in the Commission proposal) plus a review clause calling upon the Commission to present an impact assessment regarding the audiovisual sector.

- (2) In the second and third sentence of Article 3(2), the number "50" shall be replaced by "70".
- (3) In Article 10, the following paragraph 5 shall be inserted:

"5. Article 3(1) and (2) in the version amended by Directive [*insert number of the amending directive*] shall apply [...] to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of these provisions, on [*insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below*] and to fixations of performances and phonograms which come into being after this date."

- (4) The following Article 10a shall be inserted:

"Article 10a

**Transitional measures relating to the transposition
of Directive [insert number of the amending directive]**

1. *Deleted.*
2. Paragraphs 3 to 6 of this Article shall apply to contracts concluded before [insert the date by which the Member States must 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, where provided for under the applicable legislation, to produce their effects beyond the date on which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected.
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) in its version before amendment by Directive [insert number of the amending Directive], the performer would be no longer protected. 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 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 to which, by virtue of Article 3(1) in its version before amendment by Directive [insert number of the amending Directive], the performer would no longer be protected on 31 December of the said year.

Member States shall provide that performers who are entitled to the annual supplementary remuneration referred to in paragraph 3 may require from the phonogram producer any information which may be necessary in order to secure the payment of that remuneration.

[...]

5. Member States shall ensure that the right to obtain an annual supplementary remuneration referred to in paragraph 3 is administered by collecting societies [...].
6. If, after the dates on which, by virtue of Article 3(1) and (2) in the version before amendment by Directive [*insert number of the amending Directive*], the performer and the phonogram producer would be no longer protected in regard to, 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. The right to terminate the contract may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract pursuant to the previous sentence, does not carry out both acts of exploitation mentioned in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with the applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire."

- (5) The following Article 1(7) shall be 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 musical composition, where they were specifically created for a musical composition with words."

- (6) The following Article 10(6) shall be inserted:

"Article 1(7), in its version amended by Directive [*insert number of the amending Directive*], shall apply solely to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State before [*insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below*].

The previous subparagraph shall be without prejudice to any acts of exploitation performed before [*insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below*]. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties."

Article 1a

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than [3] years from [*insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below*] a report on the application of this Directive in the light of the development of the digital market and, where appropriate, it shall submit a proposal to further amend the Directive. The Commission shall examine in particular whether the performer's right under Article 10a(6) should also apply to contracts on transfer or assignment concluded after [*insert the date by which the Member States must transpose the amending Directive, as mentioned in Article 2 below*].

Article 2
Implementation

1. Member States shall bring into force, by [2 years after entry into force] 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.

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
