

EUROPEAN PARLIAMENT

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2009

Committee on Culture and Education

2008/0157(COD)

10.12.2008

OPINION

of the Committee on Culture and Education

for the Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights (COM(2008)0464 – C6-0281/2008 – 2008/0157(COD))

Rapporteur: Christopher Heaton-Harris

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SHORT JUSTIFICATION

The proposal aims to improve the social situation of performers, and in particular session musicians, taking into account that performers are increasingly outliving the existing 50 year period of protection for their performances.

The large scale production of phonograms is essentially a phenomenon that commenced in the 1950s. If nothing is done, over the next 10 years an increasing amount of performances recorded and released between 1957 and 1967 will lose protection. Once their performance fixed in a phonogram is no longer protected, around 7000 performers in any of the big Member States and a correspondingly smaller number in the smaller Member States will lose all of their income that derives from contractual royalties and statutory remuneration claims from broadcasting and public communication of their performances in bars and discotheques.

This affects featured performers (those who receive contractual royalties) but especially the thousands of anonymous session musicians (those who do not receive royalties and rely solely on statutory remuneration claims) who contributed to phonograms in the late fifties and sixties and have assigned their exclusive rights to the phonogram producer against a flat fee payment ('buy out'). Their 'single equitable remuneration' payments for broadcasting and communication to the public, which are never assigned to the phonogram producer, would cease.

The draftsman is very supportive of the Commission proposal - it provides extended benefits for performers and for phonograph producers, and in particular the clauses relating to the 20% levy and the "use it or lose it" clause both ensure that performers, and session musicians in particular, will be benefit significantly from the extension of term, and that their rights are well protected.

The draftsman believes that the €2 million limit for producers is not necessary, as this may prevent some performers from receiving the revenue they need, so recommends that it be removed. Similarly, the proposals to remove the rights from the performers should be removed as this could lead to artists and performers being disadvantaged financially.

The draftsman strongly supports the use of net revenue as the measure for the 20% levy - ensuring that producers can deduct reasonable costs directly related to the administration of the term extension of the phonogram. It must be ensured that only those costs directly related can be deducted, in order to ensure fair and consistent remuneration for performers.

AMENDMENTS

The Committee on Culture and Education calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive – amending act Recital 5 a (new)

Text proposed by the Commission

Amendment

(5a) The new technologies offer the possibility of the digital distribution of phonograms in legal online services. Within this framework, phonograms from previous years are included, thereby creating the opportunity to sell less popular phonograms, which will produce an income for older and less popular artists.

Justification

Extending the duration of protection for related rights will increase the motivation for record companies to digitalise their catalogues. Online distribution services will thus create new prospects for many recordings, thereby creating new sources of income for artists. Furthermore, the digitalisation of earlier phonograms will provide income for older or less popular artists who will benefit from so-called 'longtail sales'.

Amendment 2

Proposal for a directive – amending act Recital 5 b (new)

Text proposed by the Commission

Amendment

(5b) The European Parliament asks the Commission to launch an impact assessment procedure similar to that carried out for the music sector to consider whether there is a need to extend the term of protection that currently applies in the audiovisual sector (artists performers, producers and broadcasters).

Justification

In principle, the creative contribution of all performers should be recognised and reflected in the directive. However, as no impact assessment has been conducted by the European Commission on the consequences of a possible extension of the term of protection for performers in other sectors, such an extension is not reasonable at this stage. Therefore the

Commission is hereby mandated to conduct an impact assessment on the audiovisual sector.

Amendment 3

Proposal for a directive – amending act Recital 12

Text proposed by the Commission

Amendment

(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.

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Justification

As the transitional accompanying measure (the 20%) will be measured on net revenues, there will be no disproportionate costs incurred by SMEs, therefore to ensure that all performers benefit from these monies, it is reasonable to include them within the measure.

Amendment 4

Proposal for a directive – amending act Recital 13

Text proposed by the Commission

Amendment

(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.

(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 **should ensure** that distribution of those monies is entrusted to collecting societies representing performers. **National** rules on non-distributable revenues may be applied. **According to the principles stated in the UNESCO Universal Declaration on**

Cultural Diversity, collecting societies have to play their fundamental role in preserving cultural diversity.

Amendment 5

Proposal for a directive – amending act Recital 15

Text proposed by the Commission

(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 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.***

Amendment

(15) A second accompanying transitional measure should be that if a phonogram producer ***no longer offers*** for sale in sufficient quantity copies of ***at least one version of*** a phonogram which, but for the term extension, would be in the public domain, ***or no longer makes at least one version of*** such a phonogram available to the public, ***the performer may request him to do so, and if the producer does not fulfil that request within a reasonable time, the performer may terminate the assignment of the rights in the fixation of that performance.***

Justification

It is reasonable that phonogram producers need make available in sufficient quantity to the public one version of the phonogram in question.

Amendment 6

Proposal for a directive – amending act Recital 16

Text proposed by the Commission

(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

Amendment

(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.***

rightholders do not exploit it or because the phonogram producer or the performers cannot be located or identified.

Justification

The "use it or lose it" clause is designed to protect the rights of performers, and to ensure that phonographic producers cannot curtail those rights unfairly. Recital 15 achieves this, and the further measures in Recital 16 provide no further benefit to the performers - and in many cases will lead to performers losing out.

Amendment 7

Proposal for a directive – amending act Recital 17 a (new)

Text proposed by the Commission

Amendment

(17a) Among the accompanying transitional measures is the mandatory collective exercise of the rights of performers and phonogram producers concerning on-demand services by broadcasters of their radio or television productions of which music from lawfully published phonograms is an integral part. This system of collective rights management complements the remuneration regime for the broadcasting of lawfully published phonograms under Article 8(2) of Directive 2006/115/EC and guarantees that, throughout the full term of protection of lawfully published phonograms, the relevant performers and phonogram producers receive a fair share of the remuneration for the on-demand use of broadcast productions.

Amendment 8

Proposal for a directive – amending act Recital 19 a (new)

Text proposed by the Commission

Amendment

(19a) Member States should ensure that the proposal to extend the term of protection of performers' rights is accompanied by legislative provisions that offer protection to performers in the form of fair contractual terms on transfer or assignment.

Justification

There is no need for harmonisation at EU-level on the terms of contact on transfer or assignment; however, the attention of the Member States should be drawn to the fact that usually session performers do not have a real negotiating power therefore the terms of such contracts are usually one-sided.

Amendment 9

Proposal for a directive – amending act Article 1 – point 4 Directive 2006/116/EC Article 10a – paragraph 4 – subparagraph 2

Text proposed by the Commission

Amendment

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 minimum threshold 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

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***performer and the phonogram producer
would be no longer protected on 31
December of the said year.***

Justification

As the transitional accompanying measure (the 20%) will be measured on net revenues, there will be no disproportionate costs incurred by SMEs, therefore to ensure that all performers benefit from these monies, it is reasonable to include them within the measure.

Amendment 10

Proposal for a directive – amending act

Article 1 – point 4

Directive 2006/116/EC

Article 10a – paragraph 5

Text proposed by the Commission

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.***

Amendment

5. Member States ***shall ensure that*** the right to obtain an annual supplementary remuneration referred to in paragraph 3 ***is administered by the collecting society.***

Justification

It is essential that collecting societies distribute in the most precise way and on individual basis the remuneration collected on behalf of performers.

Amendment 11

Proposal for a directive – amending act

Article 1 – point 4

Directive 2006/116/EC

Article 10a – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. Collecting societies shall distribute those remunerations on an individual basis and taking into account the use of each performer's performances.

Justification

It is essential that collecting societies distribute in the most precise way and on individual basis the remuneration collected on behalf of performers.

Amendment 12

Proposal for a directive – amending act

Article 1 – point 4

Directive 2006/116/EC

Article 10a – paragraph 5 b (new)

Text proposed by the Commission

Amendment

5b. With respect to the administration of rights concerning on-demand services by broadcasters of their radio or television productions incorporating music from lawfully published phonograms, Member States shall ensure that the rights of performers and phonogram producers to grant or refuse authorization for such use may be exercised only through the collecting society which has been established for collecting and distributing the remuneration for broadcasting such phonograms.

Justification

The extension of the term of protection for performers and phonogram producers aggravates the administrative difficulties for radio and television broadcasters to clear the necessary on-demand rights for their productions, in particular their archives. In order to achieve both efficient rights management, as encouraged by Recital 26 of the 2001 Copyright (InfoSoc) Directive, and a fair share for all right-holders also for the on-demand use of broadcast productions, it is therefore appropriate to complement this remuneration regime by a mandatory collective licensing scheme for such use.

Amendment 13

Proposal for a directive – amending act

Article 1 – point 4

Directive 2006/116/EC

Article 10a – paragraph 6 – subparagraph 1

Text proposed by the Commission

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 ***ceases to offer*** copies of the phonogram for sale in sufficient quantity or to 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 *ant* 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.***

Amendment

6. If, after the moment at which, by virtue of Article 3(1) and (2) in their version before the 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 ***no longer offers*** copies of ***at least one version of*** the phonogram for sale in sufficient quantity or makes available to the public, by wire or wireless means, at least one version of the phonogram, in such a way that members of the public may access ***it*** from a place *and* at a time individually chosen by them, ***the performer may request to the producer to do so, and if the producer does not fulfil that request within a reasonable time***, the performer may terminate the ***assignment of rights in that phonogram***.

Justification

It is reasonable that phonogram producers need make available in sufficient quantity to the public one version of the phonogram in question.

Amendment 14

Proposal for a directive – amending act

Article 1 – point 4

Directive 2006/116/EC

Article 10a – paragraph 6 – subparagraph 2

Text proposed by the Commission

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,

Amendment

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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.

Justification

The "use it or lose it" clause is designed to protect the rights of performers, and to ensure that phonographic producers cannot curtail those rights unfairly. Article 10, Paragraph 1, Subparagraph 1 achieves this, and the further measures in Subparagraph 2 provide no further benefit to the performers - and in many cases will lead to performers losing out.

PROCEDURE

Title	Term of protection of copyright and related rights						
References	COM(2008)0464 – C6-0281/2008 – 2008/0157(COD)						
Committee responsible	JURI						
Opinion by Date announced in plenary	CULT 2.9.2008						
Drafts(wo)man Date appointed	Christopher Heaton-Harris 10.9.2008						
Discussed in committee	6.11.2008						
Date adopted	2.12.2008						
Result of final vote	<table> <tr> <td>+: </td><td>20</td></tr> <tr> <td>–: </td><td>0</td></tr> <tr> <td>0: </td><td>2</td></tr> </table>	+:	20	–:	0	0:	2
+:	20						
–:	0						
0:	2						
Members present for the final vote	Maria Badia i Cutchet, Katerina Batzeli, Ivo Belet, Guy Bono, Marie-Hélène Descamps, Věra Flasarová, Milan Gaľa, Vasco Graça Moura, Christopher Heaton-Harris, Luis Herrero-Tejedor, Ruth Hieronymi, Manolis Mavrommatis, Doris Pack, Zdzisław Zbigniew Podkański, Christa Prets, Karin Resetarits, Helga Trüpel, Thomas Wise						
Substitute(s) present for the final vote	Nina Škottová, László Tőkés, Ewa Tomaszewska, Cornelis Visser						