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The economic and social situation of Europe's performing artists

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What has happened since the last conference?

Much time and effort has been spent in the period from 2004 through 2007 on management aspects of European copyright. In 2005, collective management online was a big topic and the impacts of the 2005 Recommendation on EU-wide online licensing are still working their way through the system. In February 2008, we published our first monitoring report on the online recommendation. This document is now available at: http://ec.europa.eu/internal_market/copyright/management/management_en.htm

2006 and 2007 were mostly spent on consultations, studies and impact assessments surrounding the issue of private copying levies. This created a heated and, I believe, ultimately healthy debate. But it is fair to say that the debate so far has not yet allowed us to develop a policy around the phenomenon of private copying levies. The process is continuing and we have launched a second call for comments at: http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm

In 2007 we also issued the first report on the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society, the so-called 'Copyright in the Information Society' Directive (2001/29/EC). The report examines the application of Articles 5, 6 and 8 of the Directive in light of the development of the digital market. Article 5 is concerned with exceptions and limitations provided by the Directive, Article 6 is concerned with the obligation to protect against the circumvention of technological measures, while Article 8 is concerned with sanctions and remedies in respect of infringements of the rights and obligations set out in the Directive. The report assesses how Articles 5, 6 and 8 have been transposed by the Member States and applied by the national courts. The report is available at: http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm

What are we planning to do next?

As we enter the second phase of the current Commission, the social and economic implication of copyright policy has moved centre stage.

¹ My thanks to Barbara Norcross for drafting major sections of the impact study on the social and economic situation of performers and record producers in Europe. The views expressed here are my own and do not necessarily reflect those of the European Commission or bind the latter institution.

For quite a while now, but rather more in the background, policymakers have slowly come to the conclusion that the social aspects of copyright were not given the appropriate weight in the European debate. It is fair to say that European copyright discourse is often dominated by economic considerations as this field of law, quite naturally, is dealt with under the auspices of creating a 'single market' for copyright protected works and sound recordings. In these circumstances, it is not a surprise that issues surrounding the free movement of protected works and sound recordings have been in the foreground. In latter years, especially with the 2005 online licensing recommendation, the focus has shifted to services. Now, however, might be the time to look at the social effects of copyright on those who devote their life to the creation of works and sound recordings.

That is why the copyright unit has, already in 2006, started to examine the social implications of copyright and how it affects the livelihood of Europe's performers. Work on this impact assessment has finally come to fruition and, on 14 February 2008, EU Internal Market Commissioner, Charlie McCreevy, announced that he will shortly come forward with a proposal to extend the term of protection for European performers. Summarising the main thrust of the proposal, Commissioner McCreevy, on 14 February of this year stated: *"I strongly believe that copyright protection for Europe's performers represents a moral right to control the use of their work and earn a living from their performances. I have not seen a convincing reason why a composer of music should benefit from a term of copyright which extends to the composer's life and 70 years beyond, while the performer should only enjoy 50 years, often not even covering his lifetime. It is the performer who gives life to the composition and while most of us have no idea who wrote our favourite song – we can usually name the performer."*

When setting out the rationale underlying his proposal, Commissioner Charlie Mc Creevy stressed the social aspects of what he has in mind: *"I am determined to ensure that this extension will benefit all artists – whether featured artists or session musicians. For session musicians, the record companies will set up a fund – a substantial fund reserving at least 20% of the income during the extended term to them. For featured artists, original advances may no longer be set off against royalties in the extended term. That means the artist would get all the royalties during the extended term."* The Commissioner also proposes a 'use it or lose it' provision. That means that, in case a record company is unwilling to re-release a performance during the extended term, the performer can move to another label. That sets the social policy agenda for the next two years to come.

The impact study on the social and economic situation of performers and phonogram producers

No proposal can come forward nowadays without an extensive study on its probable impacts. Usually, in copyright, we look at economic, social and cultural impacts. This is what we did in respect of term extension as well. Some of our findings show the stark reality behind being a performer.

We decided to delve into the typical career of a performer. We found that most European musicians or singers start their career in their early 20's. That means that when the current 50 year protection ends, they will be in their 70's and likely to live well into their 80's and 90's (average life expectancy in the EU is 75 years for men and 81 years for women). As a result, performers face an income gap at the end of their lifetimes, as they lose royalty payments from record companies as well as remuneration due for the broadcasting or public

performance of their sound recordings. The latter income streams are paid to performers directly through their collecting societies and are not affected by their contractual arrangements with the record companies.

For session musicians, who play background music, and lesser known artists, that means that income from broadcasting and public performance decreases when performers are at the most vulnerable period of their lives, i.e. when they are approaching retirement. Once copyright protection expires, they will also lose out on potential revenue when their early performances are sold on the Internet.

Moreover, when their rights expire performers are exposed to potentially objectionable uses of their performance which are harmful to their name or reputation. Performers are also at a disadvantage as compared to authors whose works are protected until 70 years after their death. This could be seen as unfair since performers are nowadays not only just as necessary as authors but also more identifiable with the commercial success of a sound recording.

As regards producers of sound recordings, our study shows that they face the challenge of keeping up the steady revenue stream necessary to invest in discovering and promoting new talent. Record companies claim that they invest around 20% of their revenues in the development of new talent. They have to discover promising singers, sign them up, promote their nascent careers and, all the while, produce innovative recordings. Therefore, a longer term of protection would generate additional income to help finance new talent and would allow record companies to better spread the risk in developing new talent. Due to uncertain returns (only one in eight sound recordings is successful) and so-called 'information asymmetries' such revenue is often not available on capital markets.

What can be done about the situation?

The impact study presents a total of six options. Apart from the standard option of 'doing nothing' and letting the music market develop, we analysed two options linked to the term of protection for sound recordings and three options that would not require a change in the current terms that apply to sound recordings.

With respect to the term of protection our study looks at the option of extending the term of performers to 'life or 50 years', whichever is longer. This option would enhance the status of performers and, by linking protection to their lifetime, recognise the individual and creative nature of their performances. This option would not only apply to the performers' exclusive rights but also to the variety of broadcasting and public performance rights that are not transferred to the record companies.

Another option involving the term of protection would be to extend the current 50 year term to 95 years for performers and record companies. This option ensures full equivalence with the longest term of protection in the world. In order to ensure that the benefit of term extension accrues to performing artists, especially session musicians that have transferred their related right against a one off payment, the extension of protection for record companies should be accompanied by a payment of a certain percentage of record companies' increased revenues into a fund dedicated to improving the situation of session musicians. Again, similar to the 'life or 50 year' option, the performer would be entitled to remuneration for broadcasting and public performance for 95 years.

Another set of options looks at ways to address the problems identified above without modifying the term of protection. These options comprise various possibilities which could improve the financial situation and moral rights of performers. These measures, of course, could be used either as alternatives to a term extension or as measures to complement an extension of the term of protection.

One of the most significant findings was how performers contractually transfer all of their exclusive rights (including their reproduction, distribution and making available rights) to the record producers. On the other hand, and this is often overlooked by the opponents of term extension, performers do not transfer their remuneration claims for broadcasting and public performances, to record labels.

In order to limit the effect of the systematic contractual transfer of performers' exclusive rights to record companies, we examined the economic and social impacts of an 'unwaivable' right to remuneration to which performers would remain entitled even after having transferred their reproduction, making available or distribution rights to a record producer.

The creation of a claim for equitable remuneration for online sales or other forms of making performances available online is an interesting option, however, whose time may yet come. At this stage, the uncertainties surrounding the issue of who should pay this 'equitable remuneration' are such that the likely effects of this option cannot be quantified with any reasonable measure of certainty. In light of the uncertainties surrounding the practical administration of the claim for equitable remuneration, further study on this option is needed. While in the future this option might well be introduced to enhance performers' participation in revenue generated online, it is too early to discuss this option at this stage. This option was therefore discarded before the analysis of impacts.

Another option analysed is to strengthen performers' moral rights. The scope of their moral rights could be harmonised to include a right to restrict derogatory uses of their performances. A 'safety net' for performers' contracts is also analysed. This type of clause is destined to protect performers against practices which deprive them of the economic benefits of their rights. As copyright contracts have not been harmonised at EC level, such contractual protection would have to draw upon national copyright contract laws.

This safety net comes in the form of a 'use it or lose it' clause, meaning that, if a record company is unwilling to re-release a performance during the extended term, the performer can move to another record company. This provision would also apply should the record company decide to only use certain channels of distribution (like sales of CDs) but not others (like online sales). In this case, a performer would recover his exclusive right to make his performance available himself or entrust this form of exploitation to another record company. It would appear logical that, once the exclusive right reverts to the performer, the producer would not block the performers' independent exploitation by exercising his own producers' rights.

The impacts of the different options

All options are measured as to their suitability to contribute to the following six operational objectives: (1) bring the legal protection of performers on a more equal footing with that of authors; (2) increase remuneration for performers; (3) bring the European music market on an equal footing with the US market; (4) ensure the availability of sufficient A & R resources,

i.e., the development of new talent; (5) ensure availability of music at reasonable prices; and (6) encourage digitisation of back catalogue.

Our study concludes that 'doing nothing' is not a preferable option. If nothing was done, thousands of European performers who recorded in the late fifties and sixties would lose all of their airplay royalties over the next ten years. This would have considerable social and cultural impacts. Equally, the sound recording industry would be obliged to cut down on the development of European-based sound recordings.

The study reveals that the options not involving the term of performers' and record producers' rights are generally less suited to meet the four operational objectives set forth in the study. This is especially true for the option involving a strengthening of moral rights, which has no financial impact on performers and record producers.

Options involving a term extension (either "life or fifty years" or "95 years for performers and record producers") seem to be rather more suitable in contributing towards the six operational objectives. Both options bring financial benefits to performers and would thus allow more performers to dedicate their life to creation.

The option "life or fifty years", by linking the term to the life of a performer, would most closely reflect the fact that protection represents a moral right to control the use of their work and earn a living from their performances. Also, it would align the performer more closely to the author and composer of the music when evidence shows that it is the performer who breathes life into a composition and it is often the performance that makes a piece of music memorable.

The option involving a term extension to 95 years would arguably increase the pool of A&R resources available to record producers and could, if properly implemented by its beneficiaries, have an additional positive impact on cultural diversity.

In this context we looked at whether the benefits of a term extension are necessarily skewed in favour of famous featured performers. While featured performers certainly earn the bulk of the copyright royalties that are negotiated with the record companies, all performers, be it featured artists or session musicians, are entitled to so-called 'secondary' income sources, such as single equitable remuneration when the sound recording incorporating their performances is broadcast or performed in public. A term extension would ensure that these income sources do not cease during the expected life of a performer. For the thousands of anonymous session musicians who were at the peak of their careers in the late fifties and sixties, 'single equitable remuneration' for the broadcasting of their recordings is often their principal pension income.

On a technical level, we found that a term extension not linked to the life of the performer would be easier to implement than the "life or fifty years" option, because the latter option is linked to the life-time of thousands of individual performers. As the example of co-written works demonstrates, linking a copyright to the life of individual contributors raises complex issues when several performers contribute to a sound recording.

What are the likely provisions in the proposal to ensure that it is the performing artists that benefit?

In order to ensure that the benefit of term extension would accrue to performing artists, especially session musicians, our study concludes that record companies should set up a fund for session musicians. In order to have the financial volume necessary to ensure real benefits for session musicians, the fund should reserve some of the revenue that accrues during the extended term and distribute it to session musicians who signed a 'buy out' contract.

In respect of featured artists, the Commission's analysis concludes that it would be an advantage for performers if the original advances paid by the record companies would no longer be set off against royalties in the extended term. That means the artist would get all the royalties during the extended term.

We also considered whether a term extension should be accompanied by a 'use it or lose it' provision. This means that, in the event that a record company is unwilling to re-release a performance during the extended term, the performer can move to another record company. This provision would also apply should the record company decide to only exploit certain channels of distribution (like sales of CDs) but not others (like online sales). In this case, the performers could make his performance available himself or entrust this form of exploitation to another record company. In the latter case, he could himself exploit the channel which his label chooses not to exploit.

Price effects of a possible term extension

Empirical studies show that the price of sound recordings that are out of copyright are not systematically lower than that of sound recordings in copyright. A study by Price Waterhouse Coopers concluded that there was no systematic difference between prices of in-copyright and out-of copyright recordings.

There are not many studies that looked at the price differences in sound recordings. The Price Waterhouse Coopers study is the most comprehensive one and it looks at 129 albums recorded between 1950 and 1958. On this basis, it finds no clear evidence that records in which the related rights have expired are systematically sold at lower prices than records which are still protected.

International dimension

The IA also looked at the trade implications of a longer term of protection and provisionally concludes that most of the additional revenue collected in an extended term would stay in Europe and benefit European performers.

All in all, the issue of how to best ensure that performers can devote their life to creation has now moved centre stage. Our study is arguably just the beginning.