

# Intellectual property: term of protection of copyright and related rights

2008/0157(COD) - 16/07/2008 - Legislative proposal

**PURPOSE:** to extend the term of protection for performers and phonogram producers to from 50 years to 95 years.

**PROPOSED ACT:** Directive of the European Parliament and of the Council.

**BACKGROUND:** The paper points out that 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 to the public, which are never assigned to the phonogram producer, would cease.

In addition, the proposal also seeks to introduce a uniform way of calculating the term of protection that applies to a **musical composition with words** which contains the contributions of several authors. In different Member States, such co-written musical compositions are either classified as a **single work** of joint authorship with a unitary term of protection, running from the death of the last surviving co-author or as **separate works** with separate terms running from the death of each contributing author. This means that in some Member States, a musical composition with words will be protected until 70 years after the last contributing author dies, while in other Member States, each contribution will lose protection 70 years after its author dies. These discrepancies in term lead to difficulties in administering copyright in co-written works across the Community. It also leads to difficulties in cross-border distribution of royalties for exploitation that occurs in different Member States.

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

The main points of the proposal are as follows:

- Article 1 amends the existing Articles 3(1) and 3(2) of Directive 2006/116/EC which governs the term of protection applicable to performances. The **existing term of 50 years would be extended for both the phonogram and the performance embodied therein to 95 years;**

- the new Article 10a introduces a series of measures accompanying the term extension while Article 10 (5) would contain the rules on which phonograms and performances are affected by the proposal. The aim of the measures contained in Article 10a is largely to ensure that featured and non-featured performers whose performances are fixed in a phonogram effectively benefit from the proposed term extension.

Articles 10a (3), (4) and (5) seek to remedy the situation whereby session musicians, upon entering into a contractual relationship with a phonogram producer, often have to transfer their exclusive rights of reproduction, distribution and 'making available' to the phonogram producers. Session musicians transfer their exclusive rights against a one-off payment ('buy out');

- the proposed remedy for the 'buy out' is that **session musicians will obtain a claim to receive a yearly payment from a dedicated fund**. In order to fund these payments, phonogram producers are under an obligation to set aside, at least once a year, **at least 20% of the revenues** from the exclusive rights of distribution, rental, reproduction and 'making available' of phonograms which, in the absence of term extension, would no longer be protected under Article 3. Member States may require that distribution of these monies is entrusted to collecting societies representing performers;

- producers' revenues deriving from single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying shall not be included in the revenues to be set aside in favour of session musicians, as these secondary claims are never transferred to phonogram producers. Moreover, producer's revenues deriving from the rental of phonograms shall not be included, as performers still benefit from a right to equitable remuneration from such exploitation, under Directive 2006/115/EC;

- Article 10a (6) provides for a **statutory 'use it or lose it' clause**. Therefore, if a phonogram producer does not publish a phonogram, which, but for the term extension, would be in the public domain, the rights in the fixation of the performance shall, upon his request, revert to the performer and the rights in the phonogram shall expire. Further, if after one year subsequent to the term extension, neither the phonogram producer nor the performer made the phonogram available to the public, the rights in the phonogram and the rights in the fixation of the performance shall expire. A further purpose of the clause is to ensure that phonograms which neither the phonogram producer nor the performers wish to exploit are not 'locked up'. This also means that orphan phonograms, for which neither the phonogram producer nor the performers can be identified or found, will benefit from the clause because such orphan phonograms will not be exploited by either the producer or the performer. All types of phonograms which are not exploited would thus be available for public use. This clause has the purpose of allowing performers whose performances fixed in a phonogram are no longer published by the original phonogram producer after the initial 50 year term to regain control over their performance and make it available to the public themselves. On the other hand, the producers' right should expire in order to ensure that the performers' efforts to make their performances available as widely as possible are not hindered;

- lastly, under the new Article 1(7), when a **musical composition is published with lyrics**, the term of protection (70 years) shall be calculated from the death of the last surviving person: the author of the lyrics or the composer of the music.