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Commission staff working document accompanying the proposal for a Council Directive amending Council Directive 2006/116/EC as regards the term of protection of copyright and related rights

- Summary of the impact assessment on the legal and economic situation of performers and record producers in the European Union

Delegations will find attached Commission document SEC(2008) 2288.

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COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION STAFF WORKING DOCUMENT

accompanying the

Proposal for a

COUNCIL DIRECTIVE

**amending Council Directive 2006/116/EC as regards the term of protection of copyright
and related rights**

SUMMARY OF THE IMPACT ASSESSMENT
ON THE LEGAL AND ECONOMIC SITUATION OF PERFORMERS AND
RECORD PRODUCERS IN THE EUROPEAN UNION

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SUMMARY

This Impact Assessment (IA) analyses the economic and social situation of performers and record producers in the European Union.

With respect to performing artists, this IA shows that many 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 broadcasting and public performance income 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, the IA shows that their principal challenge is peer-to-peer piracy and their need to adapt their business to the challenges of dematerialised distribution. In these circumstances, they face the challenge of keeping up the steady revenue stream necessary to invest in new talent. Record companies claim that they invest around 17% of their revenues in the development of new talent, i.e. to sign new talent, promote untried talent and 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.

The impact assessment analyses the economic, social and cultural impacts of six options

This IA presents a total of seven options, but one option was discarded before the analysis of impacts. Apart from the standard option of 'doing nothing' and letting the music market develop, the IA analyses 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 this IA 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 the term of protection for record companies should be accompanied by the payment of a certain percentage of record companies' increased revenues into a fund dedicated to improving the situation of session musicians. Again, as in the 'life or 50 year' option, the remuneration for broadcasting and public performance would remain with the performer 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. Several of these measures could only be the subject of Community legislation.

This IA describes how performers contractually transfer their exclusive rights to record labels, (including their reproduction, distribution, rental and making available rights, but not their remuneration claims for broadcasting and public performances. In order to limit the effect of the systematic contractual transfer of performers' exclusive rights to record companies, the IA examines the possibility of an 'unwaivable' right to remuneration to which performers would remain entitled even after having transferred their making available right 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, whose time may yet come. However, 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 imperative. While in the future this option might well be introduced to enhance performers' participation in revenue generated online, it is too early to discuss 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 further option is to ensure that 'use it or lose it' clauses are included in agreements between performers and record labels. This means that, if a record company is unwilling to re-release a performance during the extended term, the performer can move to another record company or exploit the record himself.

The impacts of the different options

All options are assessed against the following six operational objectives: (1) gradually align authors' and performers' protection; (2) incrementally increase the remuneration of performers; (3) diminish the discrepancies in protection between the EU and US; (4) incrementally increase 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.

The IA 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 creation of new sound recordings in Europe.

The IA considers the impact of options not involving the term of performers' and record producers' rights (options 3a, b, c and d). Option 3a (unwaivable right to equitable remuneration) appears premature as it is unclear who would pay for this remuneration and it is hard to estimate the financial benefit it would bring. Option 3b (the strengthening of moral rights), has no financial impact on performers and record producers. Option 3c, the 'use it or lose it' clause, would be beneficial to performers by allowing them to make sure their performances are available on the market. It would also be beneficial for cultural diversity. Option 3d, the fund to be set up by record companies, would be very beneficial to non-featured performer. Record producers, however, would have to pay into the fund at least 20% of the additional revenue generated by the term extension. However, the IA concludes that marketing sound recordings would remain profitable for record companies despite having to pay 20% towards this fund.

Options involving a term extension (2a "life or 50 years" and 2b "95 years for performers and record producers") seem to be rather more suitable in contributing towards the six policy objectives. Both options 2a and 2b bring financial benefits to performers and would thus allow more performers to dedicate more time to their artistic activities.

Option 2a, by linking the term to the life of a performer, would contribute to aligning the legal protection of performers and authors. It would reflect the personal nature of performers' artistic contributions and recognise that performers are as essential as authors to bringing music to the public. It would also allow performers to object to derogatory uses of their works during their lifetime.

In addition, option 2b would increase the pool of A&R resources available to record producers and could thus have an additional positive impact on cultural diversity. This IA also demonstrates that the benefits of a term extension are not 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 performer's lifetime. Even incremental increases in income are used by performers to buy more time to devote to their artistic careers, and to spend less time on part time employment. Moreover, 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 the only source of income left from their artistic career.

In addition to ensuring the increased availability of A&R, option 2b is also easier to implement than option 2a, because the latter option is linked to the life 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. These would increase the legislative and administrative burden on Member States and create legal uncertainty, because the term of protection to the term of protection would no longer be linked to a certain and uniform date, i.e., the publication of the phonogram that contains the performance, but to the sometimes very different lifetimes of individual co-performers.

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, this IA concludes that record companies should contribute towards a fund for session musicians (option 3d). In order to have the financial volume necessary to ensure real benefits for session musicians, this IA proposes that the record companies set aside at least 20% of the revenue that accrues during the extended term for session musicians. The fund's impact on session musicians would be positive, as the average performer's additional annual revenues during a 45-year term would almost triple

The IA also proposes that a term extension should be accompanied by a 'use it or lose it' provision (option 3c). 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 or make his performance available himself.

Empirical studies show that the impact of a term extension would not be negative for consumers.

Empirical studies show that the price of sound recordings that are out of copyright is not lower than that of sound recordings in copyright. This is true in relation to statutory remuneration claims and for the sale of CDs.

The 'single equitable remuneration' due for broadcasting and performances of music in public venues would remain the same as these payments are calculated as a percentage of the broadcasters or other operators' revenue. As far as CD sales are concerned, very few studies analyse the price between prices of in-copyright and out-of-copyright recordings. A study by Price Waterhouse Coopers concluded that there was no systematic difference between prices of in-copyright and out-of-copyright recordings. It is the most comprehensive study to date and covers 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.

Other studies have been considered in analysing the impact of copyright or related rights on prices. Most of them focus on books. However, even in this category, either no overall price difference is found between the samples of books in- or out-of-copyright, or, the impact of copyright on the price is extremely model-dependant and therefore the estimates obtained cannot be seen as very robust. Given the lack of widely accepted models and the length of the time span, it is fair to say that there is no clear evidence that prices will increase due to term extension.

In addition, overall, the extended term should have a positive impact on consumer choice and cultural diversity. In the long run, this is because a term extension will benefit cultural diversity by ensuring the availability of resources to fund and develop new talent. In the short to medium term, a term extension provides record companies with an incentive to digitise and market their back catalogue of old recordings. It is already clear that internet distribution offers unique opportunities to market an unprecedented quantity of sound recordings.

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. This is good for promoting Europe's performers and the cultural vibrancy of European sound recordings.