

Opinion of the European Economic and Social Committee on the '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'

COM(2008) 464 final — 2008/0157 (COD)

(2009/C 182/07)

Rapporteur: **Mr GKOFAS**

On 4 September 2008 the Council decided to consult the European Economic and Social Committee, under Articles 47(2), 55 and 95 of the Treaty establishing the European Community, on the

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

COM(2008) 464 final — 2008/0157 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on this subject, adopted its opinion on 6 January 2009. The rapporteur was Mr GKOFAS.

At its 450th plenary session of 14 and 15 January 2009 (meeting of 14 January), the European Economic and Social Committee adopted the following opinion by 115 votes to 3, with 15 abstentions.

1. Conclusions and recommendations

1.1 The EESC calls for the establishment of a single system to harmonise Member States' rules on protecting the copyright of musical compositions that contain the contributions of several authors, in order to avoid problems in the cross-border distribution of royalties.

1.2 The EESC also calls for music compositions with lyrics to be treated as single works, with a period of protection lasting 70 years after the death of the last author.

1.3 The Member States often give many differing collecting societies responsibility for copyright, meaning that users are subject and liable to more than one of them even for a work that the user obtained as a complete, unedited and single work, produced in one medium. Provision should be made and it should be clearly stated that works produced in this way are single complete and non-divisible products and must be treated as such.

1.4 A single copyright management body should be established to collect duties and protect copyright holders. It should be the sole body responsible for collecting duties and distributing any sums to other existing or newly-founded bodies representing copyright holders, so that users have only to deal and make contracts with one organisation and not several.

1.5 The EESC recommends extending the duration of protection for fixations of performances from 50 to 85 years. In order to step up efforts to protect anonymous performers, who

generally cede their copyright in the phonogram in return for an 'equitable remuneration' or a lump sum payment, there should be a regulation stating that record producers should reserve at least 20 % of receipts from the sale of phonograms that they decide to use during the extended period of protection.

1.6 The EESC recommends establishing a fund for performers and above all for less-well known performers, as the big names always come to agreements with producers regarding percentages of sales of phonograms.

1.7 The EESC believes that a contract should be drawn up between the performers represented and members of collecting societies to ensure that royalties are managed and collected legally. The collecting societies would then have no right to collect any sum on behalf of any individual copyright holder with whom they had no written and dated contract.

1.8 These companies should be of a non-profit nature and be fully transparent in their records of receipts and payments of royalties, in order to ensure resources are distributed properly.

1.9 The EESC is however concerned that receipts from secondary sources of income put an excessive burden on those responsible for payment. More specifically, there is a need to clarify the meaning of public performance via radio or television at Community level and then to translate that into Member State legislation, so that reasonable performance and rebroadcasting is understood as the private rebroadcasting of prepaid public performances.

1.10 The EESC believes that remuneration should be equitable for both sides, for the copyright holders and for those subject to payment. The lack of clarity surrounding equitable remuneration for the transfer of the performer's rental right must be dealt with. It is unacceptable that there is no single Community rule on this and that it is left to the discretion of legislators in individual Member States, who in turn transfer responsibility to collecting societies that determine often inequitable payments that are not subject to controls.

1.11 The EESC believes that there is a need to specify that public use means the use of a work for profit in the context of a business activity that demands or justifies that use (of a work involving sound, images, or sound and images).

1.12 More specific mention should be made of whether the performance is broadcast via equipment or through direct communication (optical disks, magnetic waves (receivers)). In such cases, responsibility for public broadcasting (and the choice) belongs not to the end user but to the broadcaster; the user of the work is not therefore the end user and therefore the concept of public performance does not apply here.

1.13 Use of the media cannot be considered a primary public performance when it is broadcast from places such as restaurants, cafes, buses, taxis, etc. and as a result these should be exempt from the payment of performers' royalties. Royalties from phonograms have already been paid by those who obtained the phonograms, who have the right to play them with wired or wireless devices. Listening to phonograms on the radio must be considered to be private use by the public, whether at home, at work, on the bus or at the restaurant. As members of the public cannot be in two places at once, the royalties are paid by the stations that are the real users.

1.14 Professional sectors where music and/or images play no role in the production process should be exempt. Sectors where the broadcast of music or images plays a secondary role in the conduct of business activities should pay a lower set amount, clearly determined following negotiations between the representatives of users' collective organisations and the single copyright management body.

1.15 The EESC believes that there should be an additional fund to act as a guarantee for collecting societies and ensure that they pay out the sums to performers even if they encounter difficulties. The 'use it or lose it' provision should be written into contracts between performers and phonogram producers, in addition to the 'clean slate' principle for contracts covering the extension period, after the first 50 years.

1.16 The EESC is particularly concerned that Community legislation is aimed in general terms at protecting intellectual and related property rights without taking into account the corresponding rights of users and final consumers. While reference is made to the fact that creative, artistic and business activities are largely carried out by self-employed persons and as such should be facilitated and protected, the approach is not the same for users. It is therefore necessary to iron out inconsistencies between

Member States' national rules, replacing penalties for failure to pay royalties, where they exist, with administrative fines.

1.17 The EESC agrees with the amendment to Article 3(1) but with the inclusion of an 85-year protection period. The EESC would also like the second and third sentences of Article 3(2) to refer to 85 years. The EESC welcomes the inclusion in Article 10 of paragraph 5 concerning the retroactive nature of the directive.

1.18 The EESC calls on the Commission to take into account the comments and proposals aimed at improving the existing case-law and calls on the Member States to comply with the directives and take the necessary legislative measures in order to build them into national law.

2. Introduction

2.1 The current regime, which provides protection lasting 50 years, stems from European Parliament and Council Directive 2006/116/EC on the term of protection of copyright and more generally the related rights of performers.

2.2 Furthermore, as stressed in the explanatory memorandum of the proposal, as well as affecting well-known artists, the main impact will be on those who have ceded their exclusive rights to the phonogram producer in exchange for a lump sum payment. Naturally these equitable one-off payments for radio or television broadcasts of their phonograms will cease.

3. General comments

3.1 The aim of the opinion is to amend certain of the existing articles of Directive 2006/116, which governs the protection period relating to performances and phonograms, and to highlight certain additional measures and issues in order to help achieve the aims of the opinion more effectively, i.e. easing social disparities between producers, top-level performers and session musicians.

3.2 The EESC is highly concerned about the protection of performers' copyright and related rights, particularly in connection with phonograms, and would recommend meeting their requirements with a minimum contribution during the extended protection period.

4. Specific comments

4.1 The Commission's main idea focuses on extending the duration of protection of copyright for performers.

4.2 The EESC believes that this harmonisation among Member States is necessary in order to avoid difficulties in the cross-border distribution of royalties from other Member States.

4.3 The EESC also believes that music compositions with lyrics should be treated as single works, with a period of protection lasting 70 years after the death of the last author, given that it is better to increase protection of authors' copyright rather than have a shrinking period of protection that would cause many problems.

4.4 Accordingly, the EESC recommends that protection for fixations of performances should be increased from 50 to 85 years.

4.5 In order to step up efforts to protect anonymous performers, who tend to cede their copyright in the phonogram in return for 'equitable remuneration' or a lump sum payment, there should be a regulation stating that record producers should reserve at least 20 % of receipts from the sale of those phonograms that they choose to use during the extended period of protection.

4.6 In line with the above aims, the EESC believes a fund should be set up for performers, especially for less well-known performers.

4.7 The administration and payment of sums should be carried out by collecting societies which should administer so-called secondary remuneration claims. Specific safeguards should however be put in place regarding the running and composition of these bodies.

4.8 The EESC believes that in principle there should be a written contract between performers who are represented and the collecting societies, in order to ensure the legality of the administration and receipt of royalties.

4.9 These societies should be of a non-profit nature and should be fully transparent in their records of royalties collected and distributed. The EESC believes that these societies, which should be established in accordance with the standards and rules of each State, should be separated into two categories depending on whether they represent authors or performers. The EESC believes that the existence of more such societies representing different groups would lead to confusion and would certainly make transparency and controls more difficult to secure.

4.10 Meanwhile, performers also collect income from other sources. The collecting societies were set up mainly to administer so-called 'secondary remuneration claims', of which there are three main types: a) equitable remuneration for broadcasting and communication to the public b) private copying levies, and c) equitable remuneration for the transfer of the performers' rental right. Naturally, this income will increase with the extension of the protection period from 50 to 85 years.

4.11 Nevertheless, the EESC is concerned that these receipts from secondary sources of income place an excessive burden on those responsible for their payment, an issue that is clearly quite separate from the extension of the protection period. More specifically, there is a need to clarify the meaning of communication to the public via radio or television at Community level and then

to translate that into Member State legislation, so that there is a proper understanding of reasonable performance and rebroadcasting by private means of prepaid public performances.

4.12 The EESC believes that the payment of equitable remuneration for rebroadcasting of a previous performance, particularly when the rebroadcast is not for profitable ends, is excessive and contributes to copyright fraud in music.

4.13 The EESC is also concerned by the way funds gained from artists' other two sources of income are administered. It is a major issue that concerns all those subject to royalties. Without a prior written contract between the person due the above-mentioned additional income and the person acting as their representative in the collecting society responsible for paying it, how can the former be sure that the latter will make the additional payment properly?

4.14 Furthermore, the lack of clarity surrounding equitable remuneration for the transfer of the performer's rental right must be dealt with. The EESC believes that the payment should be equitable for both sides: for the person receiving royalties and the person paying. In addition, this payment should be determined in a proportionate way, every five years or so, following bilateral collective negotiations.

4.15 The EESC believes that in this way, while also regulating payments for copies for private use, especially for professionals in the leisure industry that use the copies for other than strictly private purposes, it will be possible to ensure a stable flow of income from secondary sources throughout the extended period of protection, while combating music piracy and increasing legal sales of phonograms over the internet.

4.16 In addition, the EESC believes that to ensure that collecting societies pass on payments to performers there should be an additional fund to act as a guarantee in the event of difficulties, and able to pay the sums concerned.

4.17 The EESC also believes that to achieve the desired objectives, certain accompanying measures should be included in the directive. More specifically, the 'use it or lose it' clause should be included in contracts between performers and phonogram producers, as well as the principle of the 'clean slate' for contracts covering the extension period, after the first 50 years. If a year passes following the extension of the protection period, the rights to the phonogram and the fixation of the performance shall expire.

4.18 The EESC is certain that priority should be given to protecting performers who find that their works are locked into phonograms that the producer through failure to act has not made available to the public. It believes that additional measures are necessary to prevent producers from discarding performers' work; these could be administrative measures or take the form of fines or penalties.

4.19 The EESC also believes that, since the Member States have a great tradition of popular songs, there should be special regulations for this type of song and others of a similar nature that can be deemed 'orphan works', in order to bring them into the public domain.

4.20 The EESC agrees with the reference in Article 10 to the retroactive nature of the law for all current contracts.

4.21 The EESC also agrees with paragraphs 3 and 6 of Article 10.

4.22 The EESC agrees with the right to an annual additional payment for the extended period of protection in contracts concerning the transfer or assignment of rights from artists or performers.

4.23 The EESC agrees that 20 % of the receipts that the producer receives during the year preceding the payment is an appropriate amount for the additional payment.

4.24 The EESC disagrees with the proposal that the Member States should regulate the payment of the additional annual amount by the collecting societies.

4.25 The EESC believes it is essential that there be a written contract between each individual performer and the representatives of the society. This contract must precede the collection of royalties by representatives on behalf of the performer. The societies must submit annual accounts to another distinct body made up of performers and producers, showing the administration of receipts gained from additional payments made during the extended protection period.

4.26 The EESC agrees with the transition measure in Article 10 and with the one on the exploitation of the phonogram by the artist.

4.27 The EESC therefore considers it necessary to have a single regulation under which certain producers should be exempt from the rule on reserving 20 %, for instance, those whose annual income does not exceed EUR 2 million. Naturally, an annual check of producers would be necessary in order to ascertain which fell into this category.

4.28 The EESC is concerned that in the absence of legislative provisions on means of payment, payment checks, payment proof, possible bankruptcy of companies, cases where royalty holders die or renounce their rights, agreements between persons with rights and collecting societies, checks on collecting societies and many other legal issues, the adoption of this directive, particularly in the area of the management and payment of the 20 % of additional income, will generate greater problems upon implementation, without really resolving the problems of levelling out conditions for well-known performers and unknown performers.

4.29 The solution to this problem lies not only in extending the protection period, but in carefully designed contracts including the "use it or lose it" clause. The EESC believes that legislative provisions that help to avoid works being locked up for 50 years should be adopted at the same time as adopting the amendment to the directive. Additional provisions are essential particularly for the means of payment of royalties to royalty holders, before the amendment is adopted as internal law by the Member States.

4.30 The EESC believes that in order to avoid generalisations and differing interpretations, the concept of 'publication of a phonogram' must be made sufficiently clear. There is also the issue of the simultaneous publication of a phonogram by two different artists and above all by session musicians, who have not ceded their rights to the producer concerned (media broadcasts, rehearsals of songs for competitions, or the broadcast of songs on the internet).

Brussels, 14 January 2009.

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of the European Economic and Social Committee*
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