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

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## EXECUTIVE 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*

*In respect of featured artists, the Commission's analysis concludes that original advances paid by the record companies should 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 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.*

## 1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

A Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights<sup>1</sup> was published on 19 July 2004. Interested parties were invited to submit their comments by 31 October 2004. Full information can be found at the following link to the DG MARKT copyright unit web page set aside specifically for this exercise: [http://ec.europa.eu/internal\\_market/copyright/review/consultation\\_en.htm](http://ec.europa.eu/internal_market/copyright/review/consultation_en.htm). Even though all copyright issues were open for comment, of the 139 contributions received, 76 position papers commented on Directive 93/98/EC harmonising the term of protection of copyright and certain related rights<sup>2</sup>. More specifically, 36 organisations and stakeholders were in favour of extending the protection of related rights (performers and record producers) while 29 indicated that they were against any extension. Table 1A indicating the summary of these submissions can be found in the Annex, section 1.

In 2005, the Commission contracted out a study entitled "The recasting of copyright for the knowledge economy". Part of this study was to consider the term of protection for performers, record companies and broadcasters in Europe in general and whether these related rights holders are at a disadvantage when compared to those in the USA and other major economic competitors (see Annex, section 4). The study was completed in December 2006 and published on the Commission's web site on January 2007.<sup>3</sup> During 2006-2007, Commission services had meetings with a variety of stakeholders on a bilateral basis<sup>4</sup> to discuss relevant issues in more detail. A questionnaire was prepared by the Commission and distributed to major stakeholders in the framework of these bilateral discussions. More or less detailed responses were received from performers' associations and the recording industry.<sup>5</sup> It was not possible to establish a steering-group on the subject of this impact assessment.

The Commission also analysed other independent studies such as the "Gowers Review of Intellectual Property" (2006) in the UK, "The Economy of Culture in Europe" (2006), by Kern European Affairs, "Performers' Rights in European Legislation: Situation and Elements for Improvement" (2007), by AEPO-ARTIS, "What are the Consequences of the EU extending Copyright Length for Sound Recordings" (2006), by Liebowitz, "The Impact of Copyright Extension for Sound Recordings in the UK" (2006), by Price Waterhouse Coopers, "Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings" (2006), by the Centre for IP and Information Law.

## 2. PROCEEDINGS BEFORE THE IAB

A draft version of the impact assessment was discussed before the Impact Assessment Board (IAB) on 2 April 2008. In the course of this meeting the IAB raised a series of issues that DG MARKT undertook to address. In particular, the IAB asked for clarification on:

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<sup>1</sup> SEC(2004) 995 of 19 July 2004.

<sup>2</sup> Directive 93/98/EEC has been superseded by a codified version (Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L372 of 27.12.2006, p.12 (hereafter referred to as the "Term Directive"). This codified version did not include any substantive changes.

<sup>3</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf)

<sup>4</sup> Telecom Italia/ETNO, FIM/FIA, IFPI, PPL, MPA, GIART, Eurocopya/Eurocinema, Naxos, EMI, AER, EBU, BEUC, British Library, ACT

<sup>5</sup> AEPO, BEUC, IFPI, Naxos.

- The relationship between the EU *acquis* and international conventions governing the field of performers and producers rights;
- The scope of the intended initiative, especially as the impact assessment distinguishes between performers and producers in the musical and the audiovisual sectors; and
- The events that triggered the initiative.

## **2.1. International conventions and the EU *acquis***

The impetus behind the initiative can best be explained against the backdrop of international conventions. These also explain the distinction between performers and producers in the musical and audiovisual fields.

Performers, whether in the musical or in the audiovisual field, are not covered by the 1886 Berne Convention on Literary and Artistic Works. Although several proposals were made to include performers and performances within the scope of the Berne Convention at later revision conferences, none of these proposals found sufficient support. The need for protection of performers and record producers was only perceived as imminent with the proliferation of phonographic technology and the subsequent introduction of sound recordings and broadcasting. In these circumstances, performers and producers were first granted protection against a variety of unauthorised acts in the 1961 Rome Convention. Both groups of rightholders were considered jointly under the Convention not because of the similar nature of their rights, but because of the development, in the 1950s, of commercial markets for sound recordings. Most significantly, to compensate both rightholders for the relatively narrow scope of their exclusive rights (there is no right governing the communication of performances to the public), the 1961 Rome Conventions provides both groups of rightholders with a right to receive 'single equitable remuneration' for the broadcasting or communication to the public of a commercially published phonogram. Significantly, this important claim to equitable remuneration only covers the broadcasting or public communication of a phonogram and would thus exclude audiovisual performers or film producers from its scope.

It is also relevant to note that film producers, based on Article 14bis of the Berne Convention, already enjoy a far better status than the producers of sound recordings. By virtue of this Article, a film producer can either be granted co-ownership in the copyright that applies to authors (like in the UK or Ireland) or benefit from a variety of statutory assignments (Italy, Austria) or presumptions of copyright ownership in their favour (Belgium, France, Germany, Luxembourg, the Netherlands or Spain). Ownership of copyright, of course, entitles film producers to a copyright term that spans the life of the film authors, plus seventy years. In respect of the term of protection, the situations of film and phonogram producers thus differ fundamentally.

The 1996 WIPO Performances and Phonograms Treaty (WPPT) upgraded musical performers and producers rights by introducing a new right of 'making available' that is tailored essentially to cover digital downloads offered on an individualised basis. The 1996 WPPT does not cover audiovisual performances or productions. Indeed, a 2000 conference at WIPO aimed at introducing a WIPO Audiovisual Performances Treaty ended in failure as delegations were unable to agree on provisions governing the transfer of rights of performers to film producers.

The EU *acquis* essentially mirrors the above mentioned international conventions. Like the Rome Convention, the *acquis* only provides for equitable remuneration in case of

broadcasting or communication to the public of a commercial sound recording (cf. Article 8(2) of Directive 2006/115) and there are no comparable provisions governing audiovisual performances. Audiovisual performances do, however, benefit from the reproduction right now contained in Article 2 of Directive 2001/29 and would thus also appear eligible for levies that apply in case of private reproductions.

## **2.2. The scope of the intended initiative**

The impact assessment focuses not only on the term of protection that would apply to performers' and producers' exclusive rights but also on the (identical) term that governs a series of highly relevant 'secondary' remuneration claims. Special emphasis is put on the claim to receive equitable remuneration for broadcasting and communication to the public it is not transferred to producers but administered by performers' collecting societies directly. As this claim does not apply to audiovisual productions, the analysis of the impacts of term expiry is limited to musical performances and phonograms.

In addition, as mentioned above, the term applicable to phonogram producers differs from that applicable to film producers. As the latter usually enjoy copyright ownership, a statutory assignment of the author's rights or at least a presumption of such a transfer, copyright for film producers essentially lasts for seventy years after the death of the last surviving author while the phonogram producers' right expires 50 years after the recording was made or published. This, again, explains why the impact assessment deals with phonogram producers only.

## **2.3. Events triggering the term initiative**

Since promulgation of the 2004 Staff Working Paper, a series of studies on the social and economic situation of the European performing artist were conducted and published. Most notably, a study by AEPO ARTIS 'Performers Rights in European Legislation: Situation and Elements for Improvement' have brought the social and economic difficulties of performers to the fore. This study has also revealed the crucial importance that secondary remuneration schemes play in rewarding the creative efforts of performers. For many performers, equitable remuneration collected for broadcasting and communication to the public is a more important source of revenue than the exercise of their exclusive rights, which are often transferred to the producers. For example, 57% of monies collected by performers collecting societies stem from equitable remuneration for broadcasting and communication to the public. A term extension to cover at least the life of a performer would thus benefit individual performers primarily by extending their eligibility to receive a share of equitable remuneration payments. None of these issues had been fully considered in the 2004 Staff Working Paper.

## **3. INTRODUCTION**

This impact assessment will cover the issue of performers' and record producers' rights under the Community *acquis*. Only performers whose performances are included in a sound recording are considered. Audio-visual performers and producers are not considered, as their economic and legal situation is significantly different. This concerns their legal status as well as the assignment and transfers of their rights. Film producers, in certain Member States, are considered as co-authors of a film<sup>6</sup> while in others they are considered as proprietors of so-

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<sup>6</sup> For instance in the U.K., under section 9(2)(ab) of the 1988 Copyright Patent and Designs Act.

called 'related' rights<sup>7</sup>. Moreover, contracts in the film industry differ from those in music, especially in respect of presumptions of rights transfer to the producer<sup>8</sup>.

### 3.1. Who are performers?

A performer is a person who performs or executes a work such as a piece of music, an opera, a play or a film. "Actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works" are all performers<sup>9</sup>.

The status and income of performers varies considerably. A small number of performers such as "featured artists" (whose name appears on the album credits) achieve fame and fortune or "superstardom". At the other end of the spectrum, most performers are less well-known and cannot earn a living from their creative activities. They include session musicians (whose names do not appear on the album credits) who are employed *inter alia* to provide background music and performers who are aspiring to a career as featured artists.

It is difficult to provide a precise estimate of the number of performers in the EU. Membership in performers' collecting societies or artists unions or the number of artists active in musical education only provide rough proxies. In 2004, the total number of members of performers' collecting societies amounted to nearly 400000<sup>10</sup>.

### 3.2. Who are record producers?

Record producers create sound recordings (i.e. the "fixation" of a performance)<sup>11</sup> and ensure their subsequent promotion and marketing, distribution to retail outlets and sale to consumers/end users. Record producers provide the financial investment necessary to produce and sell music records. They also invest in discovering and developing performers both commercially and artistically. As it is estimated that only 1 in 8 CDs is profitable, the investments of record producers in the music industry are regarded as risky.

The recording industry is dominated by a few large companies (often integrated into bigger media conglomerates), which are also known as "the *majors*": Universal Music Group, Sony BMG Music Entertainment, EMI group and the Warner Music Group, which control about 80% of the recorded music sales<sup>12</sup>. The remainder of the market belongs to a myriad of small and medium-sized cultural entrepreneurs, the so-called independent record companies or "*indies*"<sup>13</sup>. Some recent successful bands are signed up to independent labels (Franz Ferdinand with Domino Records founded in 1993 and Kaiser Chiefs with B-Unique founded

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<sup>7</sup> E.g. in France, see Article L.215-1 Intellectual Property Code.

<sup>8</sup> See, at international level, Article 14*bis* Berne Convention, and at Community level, Article 2(5)-(7) of the Rental and Lending Directive. National laws contain more detailed provisions regarding transfer of rights and the status of film producers.

<sup>9</sup> See Article 3 of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations).

<sup>10</sup> Based on AEPO-ARTIS data complemented by Commission's own research.

<sup>11</sup> See Article 3 (c) of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations (the first international convention which provided performers with exclusive rights).

<sup>12</sup> IFPI –The recording industry in numbers 2007.

<sup>13</sup> According to IFPI there are around 1000 independents active in the European music market.



in 2004)<sup>14</sup>. The independent record companies are more vulnerable financially than the music majors and have more difficulty accessing financing to keep them afloat between successes.

### **3.3. How are record producers and performers protected under copyright law?**

At Community level, both performers and record producers enjoy a similar set of so-called 'related' rights in their records and recorded performances. These rights are referred to as related rights to distinguish them from authors' and composers' copyright that arises in respect of the 'works' they create. Performances and phonograms are not works.

Record producers and performers are therefore granted 'related' rights under Directives 2006/115/EC and 2001/29/EC. These related rights were harmonised at European level by Directive 93/98/EEC (now codified by Directive 2006/116/EC) and last for 50 years from the date of the performance or from the publication of the sound recording. This length of protection represents the minimum international standard as provided for in the TRIPS Agreement of 1994 and the WIPO Performances and Phonograms Treaty from 1996. In this impact assessment the rights in performances and sound recordings will either be referred to as rights in performances (held by performing artists) or rights in sound recordings (held by the record producers) or collectively as 'related' rights.

Related rights can either be exclusive rights or rights to receive equitable remuneration for the commercial use of performances and sound recordings. Performers' exclusive rights (such as the right of reproduction, distribution, rental and 'making available' online) are usually transferred to the producer of the sound recording. The latter licenses the exclusive rights to end users, such as broadcasters, rental shops or online music shops. Rights to receive equitable remuneration are not transferred to producers but are exercised by performers themselves through their collecting societies. Such claims for equitable remuneration are collected from broadcasters, a series of public venues (bars, hotels, shopping arcades, etc.). Compensation for private copying is also administered by collecting societies and paid by a variety of ICT industries<sup>15</sup>.

## **4. PROBLEM DEFINITION**

### **4.1. What is the problem?**

If the present term of protection were maintained for performers, some 7000 performers, in the UK alone, over the next ten years, would lose the single equitable remuneration they receive for the broadcasting and communication to the public of their performances<sup>16</sup>. It is expected that a corresponding number would be affected in the other big Member States and a proportionally lower number would be affected in the smaller Member States.

Expiry of related rights would not appear as urgent with respect to famous superstars, featured artists like Sir Cliff Richards or the Beatles. But an expiry of related rights would be a serious blow to the thousands of anonymous session musicians, i.e., musicians hired for one recording only and not members of a group, who contributed to sound recordings in the late fifties and

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<sup>14</sup> Gowers Review 2006, page 57.

<sup>15</sup> It should be noted that exclusive rights are almost always governed by individual contracts between the performer and the producer of the sound recording while remuneration claims are administered by collecting societies.

<sup>16</sup> UK House of Commons Committee for Culture, Media and Sport, May 2007, p. 78.

sixties. They will no longer get single equitable remuneration for broadcasting and communication to the public, private copying levies and equitable remuneration for the transfer of the performers' rental right. They will find it more difficult to devote time to their artistic career, as they generally respond to small increase in revenues, such as provided by the income flows mentioned above, by devoting more time to their creative activities. They will also lose protection just when online retailing promises a new source of revenue.

Single equitable remuneration is important, especially with respect to early performances. Many performers or singers start their career in their early 20's, if not earlier. That means that the current 50 year protection ends when they will be in their 70's. Once protection has ended, performers no longer receive any income from these sound recordings. For session musicians and lesser known artists that means that income from those sound recordings stops when performers are at the most vulnerable period of their lives (retirement).

Record companies argue that their main problem is a decrease in revenues following large scale piracy over the internet. They also point out that record producers in the USA and other countries in the world enjoy a much longer term of protection. This, they argue, will divert creative efforts away from Europe and toward those markets that grant longer periods of protection and thus income. They point to a tendency for record producers to orient their productions to cater to the taste of those jurisdictions where most revenue could be achieved.

The underlying problems of performers and record producers will be considered separately.

## **4.2. What are the underlying drivers behind these problems for performers**

### *4.2.1. The treatment of performers, in comparison with authors, is unfair*

The term of protection for performers is much shorter than that for authors.

Their moral rights, which entitle them to restrict objectionable alterations to their performances, are weaker than those of authors.

Performers are essential contributors to the cultural industries. They are often the necessary intermediary between the author and the public. For instance, very few people can derive the same enjoyment from reading sheet music as from listening to a sound recording. The contribution of performers is socially accepted and recognised by the public, as the popularity and success of well known performers suggests.

However, performers are concerned about the disparities that exist in relation to the length of protection they currently enjoy as compared to that given to authors. Authors are protected for 70 years after their death whereas performers are only protected for 50 years from the performance or when their performance is published or communicated to the public via a CD or DVD, or a radio or TV broadcast, for example. Performers believe that their creative input is as important as that of the author of the work<sup>17</sup>. In view of the development and importance of music over the past few decades, performers feel that the value of their contribution to the success of a piece of music is at least equal to, and sometimes even more identifiable, than that of the authors (i.e. the composer, the lyricist, the photographer/art designer of the cover of the compact disc, the writer of the sleeve notes). It could seem unfair that "the graphic artist

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<sup>17</sup> "I put as much creative effort into my performances as I do into my compositions, so there does not appear to be any justification for this big discrepancy", letter from Udo Jürgens to Commissioner McCreevy, 12 July 2007. Mr. Jürgens is both an author and performer.

who designs the artwork on a CD cover is protected for longer than the singer or musician who performs on the recording"<sup>18</sup>.

The following examples illustrate the different terms of protection between performers and authors:

Name of song	Date of Performance /publication	Performer (and expiry of his protection)	Author (and expiry of his protection)	Difference
A teenager in Love	1959	Marty Wilde (1.1.2010)	Doc Pomus, died 1991 (1.1.2062) and Mort Shuman, died 1991 (1.1.2062)	<b>52 years</b>
Walkin' back to happiness	1961	Helen Shapiro (1.1.2012)	J. Schroeder, M. Hawker (since they are both still alive, protection lasts at least until 2078)	<b>More than 66 years</b>

In addition, the **moral rights** of performers are weaker than the moral rights of authors. At international level, the moral rights of performers are not recognised under the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, but are recognised under Art 5 of the 1996 WIPO Performances and Phonograms Treaty (WPPT)<sup>19</sup>. However, the level of protection under Article 5 WPPT is in some respects lower than that afforded to authors under Article *6bis* of the Berne Convention for the Protection of Literary and Artistic Works. While authors are protected against "other derogatory action in relation to the said work", performers can only object to "other modifications". The term "derogatory action" used in the Berne Convention allows authors to restrict objectionable uses of their performance (for instance use in pornographic material<sup>20</sup>, use in advertising or in a political context which is contrary to the performers' opinion or beliefs) which do not imply a "modification" of the work but simply its use in an objectionable context.

This discrepancy between the moral rights of authors and performers is also reflected in national laws. In addition, the duration of moral rights varies. In some countries, these last as long as economic rights, while in others they are perpetual<sup>21</sup>. While in any case authors are protected during their lifetime and beyond, this is not the case for performers. In the UK for instance, their moral rights will only be protected for 50 years from the first publication of the fixation of their performance<sup>22</sup>. They will thus be exposed to distortions or mutilations of their performances during their lifetime at least in respect of their early performances.

<sup>18</sup> Submission from the Irish Recorded Music Association to Michael Ahern, Minister for Innovation Policy in Ireland, November 2007.

<sup>19</sup> Art 5 (1) of the WIPO Performers and Phonograms Treaty 1996 provides that : "*Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation*". The Treaty is in force in some, but not all, Member States, and has been signed but not yet ratified by the EC.

<sup>20</sup> Sam Ricketson, "The Berne Convention: 1886-1986", p. 469, 1987.

<sup>21</sup> For example the moral rights of performers are perpetual in France and Romania, protected 50 years after death in Portugal and the Netherlands, life or 25 years after the performance if longer in Germany. See "Study contract concerning moral rights in the context of the exploitation of works through digital technology", (April 2000), available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd1999b53000e28\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf).

<sup>22</sup> Section 205I — (1) of the 1988 Copyright Designs and Patents Acts.

#### 4.2.2. *Performers create young and live longer: the performers' age gap*

Performers suffer from an "income gap" towards the end of their life

Performers have no control of their performances after the 50 years.

Protection for performers stands at 50 years from the event that triggers protection (the performance or the publication or communication to the public of a recording of the performance). An increasing number of performing artists are seeing their performances falling into the public domain during their lifetimes<sup>23</sup>. PPL, the UK collecting society that represents performers has indicated<sup>24</sup> that sound recordings from 1955 to 1965 will involve 7000 performers who will stop receiving royalties or equitable remuneration from 2005 onwards as the sound recordings reach the 50 year protection cut off date.

Current average life expectancy stands at 75.1 years for men and 81.2 years for women,<sup>25</sup> although it is not unusual for persons to live well into their 80's and 90's. On average, most performing artists or singers start their career in their early 20's which means that the current 50 year protection ends when they are in their 70's. For instance, the singer/songwriter Elton John signed his first contract aged 20<sup>26</sup>. Once protection has ended, performers no longer have a say in how their performances are used nor do they receive any further remuneration from the commercial exploitation of their performances. In fact, income from those recordings stops when performers are at the most vulnerable period of their lives.

#### 4.2.3. *Most performers do not earn a living from their artistic work*

Performers' earnings are on average low and distribution of income is highly uneven.

Performers are under-employed and supplement their income with part time jobs

The current employment status and conditions for the average performer are not necessarily very rewarding. Apparently, only famous performers make a living from their profession. For instance, in the UK, in 2001, only 5% of performers earned over £10000 annually. Moreover, between 77 and 89.5% of all income distributed to performers goes to the top 20% of earning performers<sup>27</sup>. Economists have shown that the great discrepancies between the low earning of the majority of little-known performers and the significant earnings of "superstar" performers are endemic to the music industry<sup>28</sup>. However, the lesser paid performers are as essential as superstars, as the latter are invariably plucked from a large number of lesser-known performers.

<sup>23</sup> The market for recorded music started in the 1950's and really blossomed in the 60's and 70's (and has increased ever since) so the number of musical works that will be falling into the public domain after the 50 year protection period will show a significant increase from 2010 onwards.

<sup>24</sup> In an interview on 31/3/2006 in premises of DG MARKT Copyright unit.

<sup>25</sup> Eurostat, Life expectancy at birth.

<sup>26</sup> See *Elton John and Others v. Richard Leon James* [1991] FSR 397, High Court decision of 29<sup>th</sup> November 1985. Other examples include Irish performer Bono, from U2 (first record released when he was 17), French singer Johnny Halliday (first record released when he was 17), Greek singer George Michael (first record released when he was 19), etc.

<sup>27</sup> AEPO study – "Performers' Rights in European Legislation: Situation and Elements for Improvement.", July 2007, p. 89

<sup>28</sup> For a survey of economic "superstar theories", see R. Towse, "Creativity, Incentive and Reward" (2000), pp. 99-108.

Moreover, the social situation of performers is not very secure. It is difficult for performers to find sufficient employment and most need other jobs to supplement their incomes<sup>29</sup>. Overall, only 5% of performers actually make a living from their profession – all the others have to seek parallel employment. Often, performers qualify as self employed. This limits the impact of collective bargaining through unions<sup>30</sup>.

However, studies suggest that performers use incremental increases in income to devote more time to their artistic careers<sup>31</sup>. This means that when performers receive additional income from a part time activity or from royalty payments, they spend more time creating.

#### 4.2.4. Performers lose the financial benefits of their exclusive rights when they transfer them

Session artists transfer their exclusive rights against a lump sum payment, irrespective of the success of the work.

The rights recognised to performers under the *acquis* do not result in concrete benefits for performers.

Performers usually transfer their most economically significant exclusive rights to record companies via contract. In most cases, individual performers have little bargaining power<sup>32</sup>. Session musicians may be part of a union or association and benefit from collectively bargained minimum terms. Featured artists are generally willing to accept the contract they are offered because the reputation and exposure gained by signing with a record label gives them the possibility of reaching a broad audience. Consequently, it is difficult for performers to negotiate which type of contract or which level of remuneration they will obtain. Session musicians cannot negotiate at all, they have to transfer their rights 'in perpetuity' against a one off payment.

Contractual relations between record companies and performing artists vary greatly but typically fall into three categories:<sup>33</sup>

N°	Type of contract	Description
1	Buy Out	Record company acquires all rights in perpetuity from the performing artist(s) other than the equitable remuneration for public performance which is normally paid directly by the collecting societies to the performer. This is used especially for session musicians (i.e. non-permanent members of groups) and members of orchestras.
2	Advance against royalties (and other costs)	Featured artists receive an advance against royalties; additional royalties are payable once the advance has been recouped by the record company (as well as production, marketing and other costs have been recouped by the record company).
3	Royalties only (after recoup of costs)	The featured artist receives a percentage of the licence fee charged for the use made of the recording (only after production, marketing and other costs have been recovered by the record company).

**Table 1: Types of performers' contracts**

<sup>29</sup> FIM – EP Hearing 31.1.2006 and meeting in Commission offices on 16 March 2006. For example, Luciano Pavarotti and Sting were initially teachers and Elton John worked in the packaging department of a record company.

<sup>30</sup> "The Collective negotiation and its actors in the culture and media sector", Research project conducted on behalf of the Social Affairs Directorate of the European Commission, March 2005.

<sup>31</sup> E.g. R. Towse, *op.cit* (for artists generally).

<sup>32</sup> In several instances courts have intervened to cast aside excessively harsh agreements, noting in particular the "immense inequality in bargaining power, negotiation ability, understanding and representation" between artists and professionals of the entertainment industries", *Silverstone Records Limited v. Mountfield and Others*, [1993] EMLR 152.

<sup>33</sup> Adapted from contribution from Naxos to Commission questionnaire – May 2006.

Session artists are generally paid a flat fee as their rights are bought out by the producer. Accordingly, their remuneration does not increase if the record becomes a huge success. For instance, the school of the children singing in the choir in Pink Floyd's hit *Another brick in the wall (part II)* in *The Wall* (1979) album, which sold 30 million copies worldwide, was paid a flat fee<sup>34</sup>. The 2004 film *Les Choristes* included the contributions of an amateur choir of children. Although the soundtrack achieved considerable commercial success<sup>35</sup>, the choir association was paid € 21000 for three days of work and subsequently obtained only 1% from sales.

Featured artists' contracts usually provide for a royalty-based remuneration on terms which are not necessarily very favourable. For example, the highly successful British singer/songwriter Gilbert O'Sullivan was initially paid £10 a week, the equivalent of his previous wages as a postal clerk, when retail sales of records of his music between 1970 and 1978 realised a gross figure of some £14.5 million<sup>36</sup>. More generally, depending on their fame and bargaining power, performers usually receive net royalties of 5-15% of revenues<sup>37</sup>.

The deduction of a variety of record producers' costs from the royalty payments can also significantly undermine the remuneration of performers. These deductions are often formulated in technical terms and included in complex legal documents<sup>38</sup>. In practice, after the various contractual deductions (for costs borne by the producers such as music videos, promotion, master costs), the average percentage of royalties actually received by performers can be lower. Moreover, as most performers' sound recordings do not sell enough copies for the record company to recoup its initial investment (only 1 in 8 CDs is profitable)<sup>39</sup>, royalty payments are often not paid out at all.

However, performers also receive revenue from other sources. In most cases, they do not assign certain exclusive rights to record producers, such as their right to authorise use of their performance in advertising or films (so-called 'synchronisation rights'). Moreover, they receive income from collecting societies which administer their secondary remuneration claims. There are three principal sources: equitable remuneration for broadcasting and communication to the public, private copying levies and equitable remuneration for the transfer of the performers' rental right. All of these sources are commonly referred to as 'secondary' sources of income and performers receive them directly.

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<sup>34</sup> School children were "hired" and the school received a lump sum payment of £1000, without any royalty payments. The children received no remuneration other than a concert ticket, a single and an album each. They were denied the right to participate in the video of the album on the ground that they did not have card from "Equity", a UK union of performers. However, at that time performers enjoyed very limited protection in the UK. After the law was revised, an agent sought to relocate the choir performers and initiated legal proceedings to obtain payment. See *The Times*, November 27 2004, "Payout after Pink Floyd leaves them kids alone", available at <http://www.timesonline.co.uk/tol/news/uk/article395989.ece> and *BBC News Magazine*, 2 October 2007, "Just another brick in the Wall", available at <http://news.bbc.co.uk/1/hi/magazine/7021797.stm>.

<sup>35</sup> According to the parents of some choir boys, the soundtrack generated €20 million. Some parents initiated legal proceedings against the producer, as the children had received no remuneration at all for their performance.

<sup>36</sup> See *O'Sullivan v Management Agency and Music Ltd.* [1985] Q.B. 428 at 444 before the Court of Appeal of England and Wales. See also *Financial Times*, 29/30 September 2007, *Life & Arts*, p. 3.

<sup>37</sup> CIPIL Study, p.36.

<sup>38</sup> This has led courts to conclude that artists such as the "Stone Roses" rock band or Elton John were insufficiently aware of the sometimes excessive deductions operated from the basis for calculating royalties, see *Silverstone Records Limited v. Mountfield and Others*, [1993] EMLR 152.

<sup>39</sup> Comment from IFPI.

### 4.3. What are the underlying drivers behind these problems for record producers?

#### 4.3.1. Loss of revenue for record producers

Declining sales and profits of record producers.

Loss of revenue through piracy.

The EU recorded music industry has indicated a slump in their activities: sales of music CDs peaked in 2000 and have been falling at an average rate of 6% ever since<sup>40</sup>. Estimates for the future show a continued decrease in physical album sales from \$12.1bn in 2006 to \$10.3bn by 2010<sup>41</sup>. Since 2001, the total European market for recorded music has lost 22% of its value<sup>42</sup>.

Revenues in general and profits in particular have decreased, largely due to increased piracy. In January 2006 the music trade publication 'Billboard' indicated that, worldwide, there were 350 million legal downloads for the whole year of 2005, but that there were also 250 million illegal downloads per week. The music industry indicates that approximately a third of all CDs bought in 2005 in the world were pirated – a total of 1.2 billion CDs. EMI's expenditure on anti-piracy and protection of IP for 2006 was in excess of £10m.

#### 4.3.2. Loss of revenue entails a reduction in Artist & Repertoire (A&R) spending

Less profits means fewer new acts (new releases or re-releases).

Less profit means fewer artists under contract.

Less profits means less diversity, particularly in (smaller) niche markets.

Due to losses in revenue, the worldwide music industry, during the last five years, has contracted by some 25%. For instance, Universal's total number of employees which in 2003 amounted to 12000 was down to 7600 in 2006<sup>43</sup>. After an initial reduction in employees in 2006, EMI also announced a second reduction of 2000 jobs (about one third of its work force) in January 2008<sup>44</sup>. EMI indicated in addition an intention to be more selective with its artist partnerships despite a significant reduction in its artist roster already in 2006<sup>45</sup>. EMI has also been reducing its advertising expenditure<sup>46</sup>.

Record companies claim the creative cycle will become unsustainable under the current financial constraints. According to record producers, the music industry is a risky business and finding and developing talented artists (A&R) is expensive<sup>47</sup>. They claim long term

<sup>40</sup> "Back to the Digital Future: The Role of Copyrights in Sustaining Creativity and Diversity in the Music Industry", page 3, April 2006, Professor Joseph Lampel, Cass Business School, London.

<sup>41</sup> Figures from PricewaterhouseCoopers, Financial Times, 6 July 2006.

<sup>42</sup> Article from the Times, 14 February 2007.

<sup>43</sup> Interview with IFPI - and John Kennedy - on 29/3/2006 in Copyright Unit of DG MARKT.

<sup>44</sup> International Herald Tribune, The Associated Press, January 14, 2008

<sup>45</sup> EMI response to Gowers Review, 2006. EMI's workforce was reduced by a third to 6,000 persons.

<sup>46</sup> Advertising expenditure by music industry dropped by 25% in 2002 and 7% in 2003. The four music majors are in the top 100 spenders on advertising and 2 of them are in the top 20. ("Evolution of the recorded music industry value chain", anonymous report) p. 13.

<sup>47</sup> Input from responses to public consultation carried out on the Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995 of 19.7.2004.

earnings are required to discover and market new talent<sup>48</sup>. Record companies point out that their A&R spending, which can be up to 20% of their turnover, is comparable to R&D expenditure in other sectors. The comparison reveals that they invest substantially more than the automobile and parts industrial sector (4.2% of turnover) or than the software and computer services sector (10.4% of turnover)<sup>49</sup>. In popular music, it is estimated that only about 10% to 12% of all recordings reach break-even or become profitable<sup>50</sup>. It has been suggested that profitability is achieved only once sales exceed 20000 CDs<sup>51</sup>. With online piracy, this target is increasingly difficult to achieve.

The recording industry has indicated that if their revenues are lower they will spend less on A&R<sup>52</sup> and discovering and promoting new talent. If these trends persist, there will be a real risk that European based talent will not be developed nor benefit from the possibility of global exposure offered through on-line exploitation.

The digitisation of record producers' back catalogue will also be hampered by declining revenues. Digitisation is an ongoing process which is costly but necessary to ensure the availability of local repertoire and cater for the needs of niche markets.

#### 4.3.3. *Cultural diversity*

The term gap could lead to record companies producing sound recordings to cater to American taste in music.

In the US, the record companies point out that the longer term of protection (95 years) gives incentives for companies to invest in repertoire that will appeal to US markets, and thus yield higher returns. The economic benefits of the longer terms of protection in the US should nevertheless take into account the fact that the protection of record producers and performers suffers more exceptions in the US<sup>53</sup>. This would offset some of the benefits of the longer term of protection in the US. However, the US is considering the adoption of the performance rights bill<sup>54</sup>, which would significantly increase the scope of protection in the US and increase the appeal of the US market. Overall, record companies argue, the level of protection in the US will divert creative efforts away from European repertoire and performers and towards those markets that grant longer periods of protection and thus income. They point to a tendency for record producers to orient their productions to cater to the taste of those jurisdictions where most revenue could be achieved. Some economists point out that, over time, this could lead to fewer incentives to produce sound recordings that appeal to the European market<sup>55</sup> and, in turn, to a decline in European repertoires and cultural diversity.

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<sup>48</sup> "The Recording Industry in numbers", IFPI, June 2007, p. 17; EMI says it invests over 20% of revenues on musicians and music in more than 50 countries" – 2006 Annual Report.

<sup>49</sup> DTI figures – "The Top 800 UK and 1250 Global Companies business R & D investment", 2006.

<sup>50</sup> Comment from Naxos on 10% and IFPI for the 12%

<sup>51</sup> Study entitled 'The Recasting of Copyright and related rights for the Knowledge Economy', October 2006, Institute for Information law, University of Amsterdam, page 112.

<sup>52</sup> International Herald Tribune, The Associated Press, January 14, 2008 and EMI contribution to Gowers Review 2006.

<sup>53</sup> Under US Copyright law, broadcasters as well as a number of public venues are exempted from payments to rightholders, see Gowers Review of Intellectual Property, p. 49.

<sup>54</sup> Performance Rights Act. Bill H.R. 4789, introduced on December 18, 2007, in the House of Representatives: "To provide parity in radio performance rights under title 17, United States Code, and for other purposes."

<sup>55</sup> Liebowitz (February 2006), "What are the Consequences of the EU extending Copyright Length for Sound Recordings, report prepared for IFPI., p. 22.



However, it is difficult to assess the precise extent of this problem as other parameters than the term of protection may affect the investments of the record industry.

#### **4.4. How would the problem evolve, all things being equal?**

The impacts of 'doing nothing' are analysed in detail in section 7.1 below. Suffice it to say at this stage that, if nothing were done, this would have individual impacts on the roughly 24500 performers who will see their term of protection expire over the course of the next decade (24500 is 3.5 times the number of UK performers that, over the next decade, will lose protection. This multiplier was chosen because European sales account for roughly 3.5 times of UK sales). These performers will lose revenue from royalties and, more importantly, from equitable remuneration for broadcasting and communication to the public. They will also lose their entitlement to compensation for private copying.

On the other hand, there will be few, if any, positive impacts if nothing was done, as retail prices for consumes and equitable remuneration payments for commercial users are unlikely to be affected by the term of protection of sound recordings and performances. The only beneficiary of the 'do nothing' scenario would be 'public domain' record companies who could progressively re-issue sound recordings from the period between 1957 and 1967 without paying royalties to performers. As there is little evidence that records in which the rights of performers and producers have expired are cheaper than those still protected, the 'do nothing' option would lead to a shift in economic income from performers to "public domain" companies.

#### **4.5. Does the EU have the right to act?**

##### *4.5.1. Treaty base*

The Term Directive was adopted on the basis of the Articles 47(2), 55 and 95 TEC. Any amendment to this Directive should be based on the same legal basis because the subject matter covers the free circulation of services and the good functioning of the Internal Market. If alternative measures not involving modification of the Directive were chosen to be the optimal remedy to the problems identified in this IA, further consideration has to be given to the identification of the most appropriate instrument and legal base. Operational action may have to be taken at the level of Member States.

##### *4.5.2. Subsidiarity test*

The length of protection of copyright and related rights has already been harmonised at EU level and falls under the exclusive competence of the Community. However, the harmonisation achieved in Directive 93/98/EEC was not complete in that, as provided for in its Article 10(1), certain Member States were allowed to keep longer terms of protection already in place before 1 July 1995, as is the case in Greece<sup>56</sup>. Options involving a term extension (2a "life or 50 years" and 2b "95 years for performers and record producers") would involve modifications to Directive 93/98/EEC and thus could only be achieved at Community level.

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<sup>56</sup> Article 52 of Law 2121/1993 provides for 'life or 50 years whichever is the longer' for performers. This applies to the last surviving performer of any set of performs who are members of the same group.

## 4.6. Summary of problems

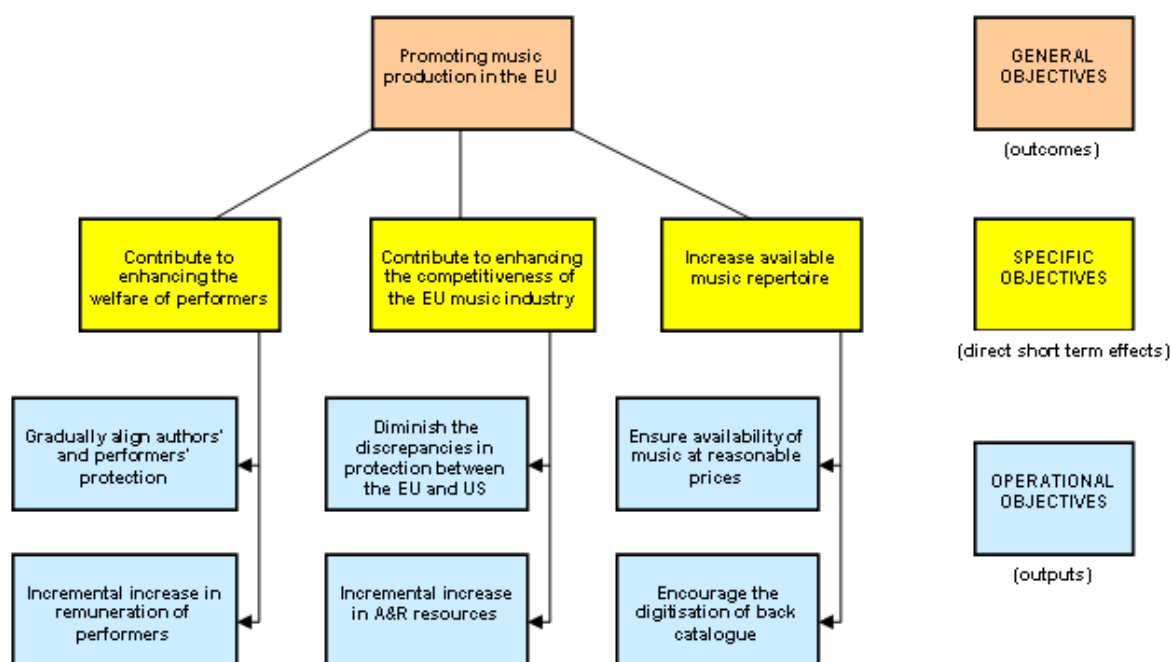
*Performers are treated unfairly, in financial, legal and social terms:* most performers are in a precarious financial and social situation. In addition, from a legal perspective, the importance of their contribution to musical creation is not appropriately recognised. They are granted lesser moral and economic rights than authors.

*The record industry faces significant challenges which undermine its competitiveness:* online piracy has led to significant losses. The ability of the music industry to finance new talent and adapt to dematerialised distribution is severely undermined. In addition, the longer term of protection in the US risks undermining the production of European music.

*Consumers may not have access to the widest choice of music available at reasonable prices.* The opportunities offered by online digital distribution, allowing the dissemination of local repertoire and catering for niche markets, may not be fully seized by the music industry under the current conditions.

## 5. OBJECTIVES

The following graph presents an overview of the general policy objectives, the specific objectives and the operational objectives.



**Figure 1: Overview of objectives**

### 5.1. General objectives

*Promoting music production in Europe:* The protection of performers and record producers should ensure a sustainable level of creation. The European music industry should also play a leading role in promoting European music in the world.

## 5.2. Specific objectives

*Contribute to enhancing the welfare of performers in the music industry:* Performers should feel that they are receiving a just reward for their effort and creativity throughout their lives.

*Contribute to enhancing the competitiveness of the European music industry:* The music industry should remain competitive<sup>57</sup>. It should be equipped to face the challenges of piracy and the opportunities of dematerialised distribution. It should not be at a competitive disadvantage, in order to preserve the place of European music.

*Increase available music repertoire:* the public should have access to a large and diverse choice of music.

## 5.3. Operational objectives

*Gradually align authors' and performers' protection:* The legal protection of performers should reflect the importance of their contribution to cultural diversity. They should not be treated as second tier contributors to cultural diversity, in particular in comparison with authors.

*Incremental increase in the remuneration of performers:* Ensure that performers receive an increase in revenues from as many different sources as possible to alleviate their difficult financial situation, especially at the end of their lives. Revenues accruing to performers and in particular less well-known performers, who are mostly self-employed, will ensure they can devote more time to creation and possibly make a living from their artistic activities.

*Diminish the discrepancies in protection between the EU and US music markets:* The legal protection afforded to record producers should encourage investment and production of music for the European market.

*Incremental increase in A&R resources:* Revenue streams derived from current repertoire should be sufficient to finance a healthy A&R sector in the recording industry.

*Ensure availability of music at reasonable prices:* a balanced protection should both encourage the creation of music and ensure that as wide a public as possible can access it.

*Encourage the digitisation of back catalogue:* the widest possible choice should be offered to consumers, including niche and local repertoire.

## 6. POLICY OPTIONS

Some of the options considered would be complementary to options involving a term extension. Apart from options 2a and 2b, other combinations of options are not mutually exclusive.

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<sup>57</sup> Competitiveness is a comparative concept of the ability and performance of a firm, sub-sector or country to sell and supply goods and/or services in a given market. In this case, competitiveness is used to refer in a broader sense to the economic competitiveness of the region (the EU) on global markets.

Option	Sub-options
1 Do nothing	
2 Extend the term	a. Amend the term of protection for performers to "life or 50 years" b. Extend the term of protection for performers and record producers from 50 to 95
3 Complementary measures not requiring term extension	a. Performers' equitable remuneration b. Moral rights of performances c. "Use it or lose it" d. Fund for session musicians

**Table 2: Overview of Options**

## 6.1. The wait and see option

The **first option** is to leave the copyright *acquis* as it is.

## 6.2. Options related to an extension of the term of protection

The **second option** is to extend the term of protection. There are various possibilities (sub-options) for such an extension, all of which would require an amendment to the Term Directive, in particular to Article 3. There could be three options in the application in time of a term extension: it could apply only to new recordings, be 'partially' retroactive (applying to all recordings which are currently still protected) or be fully retroactive (applying to all recordings, including those in which the rights of performers and producers have expired). Out of these three options, which are analysed in the Annex (section 2), the preferable option is to extend the term with 'partial' retroactive effect. This means that only recordings which are still protected at a certain date, such as the implementation date of the Directive, will benefit from the term extension. It is the simplest option to apply and brings immediate benefit to many right holders. It is also in line with previous practice, such as Directive 2006/115 (rental and lending Directive) and Directive 2001/29 (copyright in the information society).

### 6.2.1. Amend the term of protection for performers only to "life or 50 years"

**Sub-option 2a** amends the term of protection for **performers only** to "life or 50 years", whichever is the longer. This option ensures that the performer enjoys protection during his/her entire life. It would apply to the performers' exclusive rights and to the variety of 'secondary' remuneration or compensation claims that a performer enjoys under the *acquis* (see section 3.3 above).

### 6.2.2. Extend the term of protection for performers and record producers from 50 to 95 years

Under **sub-option 2b** the term of protection is extended from 50 to **95 years** for performers and record companies.<sup>58</sup> This option ensures equivalence with the term of protection in the US.

<sup>58</sup> Concretely, one would have to substitute the number '50' by '95' in the respective paragraphs in Article 3 of Directive 2006/116/EC.

### 6.3. Complementary options not involving an extension of the term of protection but which improve the situation of performers

The **third option** comprises various possibilities which could improve the financial situation and moral rights of performers without necessarily extending the term of protection. These measures could be used either as alternatives to a term extension or as complementary measures to an extension of the term of protection for performers.

#### 6.3.1. *Create an 'unwaivable right to equitable remuneration' for performers who transfer their rights to record companies*

This impact assessment previously describes how performers contractually transfer their exclusive rights (including their reproduction, distribution and making available rights) to record labels. As a result, performers are often deprived of a fair share of the revenues generated from the exploitation of their performances. To address this issue in relation to the rental right, Article 4 of Directive 2006/115 provides for an **unwaivable right to remuneration** to which authors and performers remain entitled even after having transferred their rental right to a producer. In view of the fact that performers do not enjoy any share in the money collected by record producers for sales of music on the internet, one option to improve the social situation of performing artists would thus be an amendment to extend the scope of Article 4 of the Rental and Lending Directive to also cover the situation when the making available right is transferred. The remuneration right would have to be administered by a collecting society.

The impact assessment identifies three possible approaches in respect to the issue of who should pay the equitable remuneration to performers. It could be paid by a number of stakeholders: (1) equitable remuneration could be paid by users and distributors. Such payment will be likely to occur through a collecting society, because performers are not contractually linked to distributors; (2) equitable remuneration could be paid by record producers and (3) it could be left to interested parties to decide who pays the equitable remuneration to performers.

For example, Article 108 of the Spanish IP Code stipulates that, where a performer has transferred his exclusive 'making available' right, he retains an unwaivable claim to equitable remuneration. The remuneration has to be paid by whoever makes the fixation of his performance available, usually online music providers, and the claim is exercised against them by collecting societies. Since this provision was only introduced in July 2006, collecting societies have not yet collected any monies under the new provisions. It is thus too early to say whether this scheme of collectively administered performers' remuneration will work in practice.

It is, at this stage, also hard to quantify the financial benefit that would arise from a remuneration claim for the making available of performances online. A study conducted by the French collecting society ADAMI suggests that a performer receives between € 0.03 and 0.04 for a download sold at € 0.99<sup>59</sup>, and that online music yielded € 120 million in revenues in the EU in 2004<sup>60</sup>. This implies that the new claim would yield roughly between € 3.6

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<sup>59</sup> ADAMI study, 'Filière de la musique enregistrée : quels sont les véritables revenus des artistes interprètes?' (April 2006), p.27.

<sup>60</sup> Study for the European Commission, 'Interactive content and convergence' (2007), p. 42 (source: Screen Digest).

million and 4.8 million per year. This compares to approximately €351 million collected in 2005 by performers' collecting societies' from single equitable remuneration, private copying levies and the rental right<sup>61</sup>. Given the fast pace of change in the online music market, which is far from mature, it is also difficult to predict how such figures would evolve in time.

Moreover, the uncertainties surrounding the issue of who should pay this 'equitable remuneration' also contribute to the difficulties in quantifying its impact. Should equitable remuneration be paid by the record producers, the latter would likely shift the overall payment burden to performers by reducing royalty payments and the buy-out fees to session musicians. On the other hand, if payment of equitable remuneration were made incumbent on online retailers or operators of similar online services, such a measure might well complicate the administration of online rights. Indeed, online retailers, in order to offer legitimate services, would now have to clear another right with a collecting society representing performers. Finally, if it were left open to interested parties to decide who should pay the claim for 'equitable remuneration', as is the case under Belgian law, the entire option might well become moot.

In light of the uncertainties surrounding the practical administration of the claim for equitable remuneration, this option appears untimely, as further study would be required to assess its impact. While in the future this option might well be introduced to enhance performers participation in revenue generated online, it cannot be considered at this stage.

### 6.3.2. *Moral rights of performers*

Several Member States recognise the **moral rights** of performers but to a lesser extent than they recognise the rights of authors. The moral rights of performers could be strengthened. The scope of their moral rights could be harmonised to include a right to restrict derogatory uses of their performances. However, since moral rights have not been harmonised at Community level, it would be preferable that Member States strengthen the protection of moral rights under their national laws.

### 6.3.3. *A "use it or lose it" provision for performers' rights*

A safety net protecting performers against practices which deprive them of the benefits of a term extension could be promoted. This could take the form of a so-called "**use it or lose it**" provision. 'Use it or lose it' provisions are currently in force in some EU Member States for authors' rights<sup>62</sup> and in some cases for performers<sup>63</sup>. We have learnt from our discussions with stakeholders that some independent record companies transfer rights back to the performer if they are not selling his record any more<sup>64</sup>.

The effect of a use it or lose it provision would be to allow the performer to move to another record company or exploit a recording himself if the producer does not exploit it. 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 order for a use it or lose it clause to achieve this result, however, it must also be clear that the producer cannot use his

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<sup>61</sup> KEA Study, 'The collective management of rights in Europe' (2006), p. 33.

<sup>62</sup> Austria, Belgium, Germany, Luxemburg, Nordic Countries, Portugal and Spain.

<sup>63</sup> Denmark (articles and of the Danish Copyright Act) and Germany (articles 41 and 79(2) of the German Copyright Act).

<sup>64</sup> Comment from the Chairman of IMPALA (the independent music label association) on 5 December 2007.

exclusive right in the recording to oppose the new exploitation or ask for remuneration which would render the exploitation of the performance not viable economically.

"Use it or lose it" provisions could be made mandatory, in order to ensure that all performers benefit from them. However, as they must articulate with existing national copyright and contract legislation of the Member States, sufficient flexibility should be allowed for the transposition of such a provision.

#### 6.3.4. *Create a fund for session musicians*

In order to ensure that the benefit of term extension would accrue 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 20% of the increased revenues the record companies will enjoy into a **fund**, set up in each record company, dedicated to improving the situation of performers, including session musicians whose performances are used in recordings. The basis for calculating this percentage would comprise producers' revenue (and not profit) from: (1) the sale of sound recordings and (2) online distribution of sound recordings<sup>65</sup>.

## 7. ANALYSIS OF IMPACTS

This section looks at the economic and social impacts resulting from the options presented above. For purposes of better presentation such impacts are presented according to the group of stakeholders that is affected by the option in question. Environmental impacts are neglected since they are marginal. If there is no obvious impact on one group of market players, they are not necessarily mentioned in the impact analysis.

### 7.1. Doing nothing

#### 7.1.1. *Impact on performers*

Over the next 10 years performers and records producers will lose their neighbouring rights over an increasing amount of recorded music (those recorded and released between 1957 and 1967). It is estimated that around 7000 performers, in the UK alone, will lose all of their airplay and reproduction-related payments (e.g., the 'single equitable remuneration' for broadcasting and any communication to the public and compensation for private copying) over the next ten years<sup>66</sup>. This concerns the thousands of anonymous session musicians who contributed to recordings in the late fifties and sixties. Their income will stop when they are at the most vulnerable period of their lives, i.e., as they are approaching retirement.

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<sup>65</sup> In order to have the financial volume necessary to ensure real benefits for session musicians, this IA proposes that the fund should reserve at least **20%** of the annual revenue that accrues during the extended term. This fund should be administered by each record company in close cooperation with performers and their representatives. Such an obligation would be in line with an earlier commitment by the sound recording industry and the musicians' union FIM. In a joint letter of 5 June 2007 addressed to Commissioner McCreevy, IFPI, on behalf of the international sound recording industry and FIM, on behalf of musicians unions from several countries, stated as follows: "FIM and IFPI are working together to find ways to ensure that all performers benefit financially from any extension of term of protection and that their older recordings can be made available to the public". The Commission might undertake to monitor how this fund develops and how many session musicians benefit from it.

<sup>66</sup> UK House of Commons Committee for Culture, Media and Sport, May 2007.

For those individual performers affected by the expiry of their term, this would entail an annual loss of between € 181 and € 3663 in equitable remuneration payments that they currently receive<sup>67</sup>.

Moreover, in view of the current and suggested future steady increase in digital sales many older sound recordings get a second life in the digital format. Performers whose performances fall into the public domain will lose out on immediate and future revenues from the digital exploitation of recordings. Furthermore, income from primary exploitation, such as sound recording sales may stop. Only the big names will enjoy financial security and good bargaining power with record companies.

The number of performers able to sustain a long term livelihood from their performances would perhaps decrease, and performers would not be able to devote as much time to their artistic career. Over time, the problem will worsen as the rights of performers and record producer will expire in an increasing numbers of recordings. Finally, in several Member States performers would also not be in a position to restrict objectionable uses of their performances.

#### *7.1.2. Impact on record producers*

Record companies will continue to suffer from piracy and spend a lot of money on anti-piracy law suits. The financial situation of record producers would not improve. While popular recordings from the 50's and 60's are still in demand and the record company that holds the master copy would still derive revenue from their exploitation, this revenue stream might now be subject to competition from re-releases by public domain companies. Indeed, an increasing number of popular performances (from the golden 1950s and 1960s) will fall into the public domain and the revenue from these recordings will no longer be available to fund the production and marketing of new recordings (see below).

Record producers would still receive remuneration for 'secondary' forms of exploitation, in particular their share of the 'single equitable remuneration' for broadcasting and communication to the public of music. These revenues would not be significantly affected by some records falling out of protection. According to KEA, they amounted to € 293 million in 2004<sup>68</sup>.

#### *7.1.3. Impact on broadcasters and public venues where music is played*

While the rights of performers and record producers will expire in certain recordings, this would not affect the fees paid by broadcasters and public venues for using music. Such fees are not calculated on a 'per track' basis and the amount of recordings which are no longer protected by related rights is thus not relevant to establishing the fee.

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<sup>67</sup> According to the AEPO study ('Performers' Rights in European Legislation: Situation and Elements for Improvements', July 2007), collecting societies in the EU, in 2005, collected € 351 million and distributed this sum to around 400000 performers. This revenue is not evenly distributed. 77-90% of the revenue is distributed to 20% of the performers. On average € 293 million is distributed to 80000 performers, whereas € 58 million is distributed to 320000 performers. The average annual income per performer that is attributable to secondary remuneration claims therefore ranges between € 181 and € 3663 per year.

<sup>68</sup> KEA, 'The Collective Management of Rights in Europe: The Quest for Efficiency' (July 2006).



Broadcasters (TV and Radio) pay the 'equitable remuneration' due to performers and record producers via a variety of payments, all of which are not linked to the number of performances and sound recordings protected by copyright. For instance, commercial TV broadcasters pay a percentage of their total revenue (France), net broadcasting revenue (UK), or advertising (Germany). In Germany, an additional graduation is made according to the percentage of music that is contained in the broadcast. Cable re-transmitters, for example, in Germany, pay on the basis of their subscription income. In addition, equitable remuneration by broadcasters represents a relatively small share of their revenues. According to IFPI estimates, only 1% of broadcaster's total revenue is paid to rightholders in 'equitable remuneration'.

Equally, public venues where music is played – bars, hairdressers, fitness studios or doctors – do not pay on a 'per track' basis. These establishments pay according to seating capacity (UK, hairdressers), square meters (Germany, bars, hotels, hairdressers, UK, public houses, pubs, restaurants), revenue (France, discothèques), on the basis of the number of instructors (UK, gyms). In Germany and France, the revenue for related rights is sometimes calculated as a percentage of the revenue charged for authors. Again, those payments are not influenced by the number of performances or sound recordings that are in copyright.

#### *7.1.4. Impact on public domain record labels*

By doing nothing, public domain record companies would continue to profit from a larger share of sound recordings, from late fifties and sixties, which would no longer be protected by the rights of performers and record producers.

#### *7.1.5. Impact on consumers*

There is no clear empirical evidence that price difference between sound recordings that are in- or out-of copyright would be significant. This would imply that public domain companies would not necessarily sell sound recordings at prices lower than those applied to protected recordings marketed by recording companies. Thus if the term of protection were not extended the economic rent would be shifted away from the artists and record producers to the public domain labels. While this may be good for public domain record labels it is not beneficial to cultural diversity, because the revenue would not be redistributed to performers nor used for A&R.

#### *7.1.6. Impact on cultural diversity*

By doing nothing there may be a risk that a percentage of recordings phonograms in regard of which the performer and the phonogram producer are no longer protected disappear due to a lack of stewardship by the original record company. Once out of protection, and thus of lesser value, there will be no incentive to 'look after' master copies of old recordings and public domain companies will only reissue the better known and potentially profitable repertoire. Cultural diversity might therefore suffer.

#### *7.1.7. Impact on information society services*

The impact on digital libraries and other services which organise collections of digital content made available to the public would be neutral. While digital libraries would have to clear the rights of producers and performers in phonograms for an additional period, it should not be forgotten that, even after expiry of all neighbouring rights in a phonogram, the rights of the author of the musical compositions performed and recorded must still be cleared during the

entire life of the author plus seventy years thereafter. Information society services would, even in the absence of term extension, be obliged to clear a variety of authors' rights.

#### 7.1.8. *The international dimension*

The gap in length of protection as compared to the US would not be closed. Records produced or recorded in the EU are protected in the US for 95 years<sup>69</sup>. Investors would be more inclined to support creators who produce sound recordings destined for the USA as a recording popular in the US market would bring them better revenue streams for a longer period than a recording popular in the EU.

### 7.2. **Extend the term of protection for performers to "life or 50"**

#### 7.2.1. *Impact on performers*

A term extension to life or 50 years whichever is longer, will benefit all performers. The financial benefits to performers will be positive (see further, section 7.3.1.)

Extending the term of protection would also lead to more fairness in the remuneration of all performers: also It would lead to increased revenues for performers whose performances experience popularity late after the initial release of the record. For example, the song 'Build me up Buttercup', performed by 'The Foundations' and released in 1968, was used in the film 'There's Something About Mary' (1998). The sudden renewed interest in this tracks brought significantly increased earnings to the performers. An extended term would ensure that performers or their heirs do not see commercially successful exploitations free-riding their performance and are not unfairly deprived of their share of the revenues. In addition, performer's 'life' in the term of protection would also mark a convergence between the legal protection of performers and authors. This is because linking a term to the life of the creator is indirectly an acknowledgement of the personal nature of the creator's contribution. Academics indeed point out that linking the term of protection to the life of creators acknowledges to some degree the personal nature of their creative contribution and this is one reason why the term of protection of an author is linked to the individual author's life. As Mick Hucknall states: "Modern music, especially popular music, with its roots in the oral traditions of the blues, country and folk music, lays far greater emphasis on the characteristics of performers and performances, than on the nuances of composition or musical structure. Given the huge increase over the past 50 years or so in the importance of sound recordings to consumers, the law should strive to catch up and grant performers equivalent protection to composers"<sup>70</sup>.

In those Member States that recognise some moral rights of performers only for the duration of the economic rights, performers would also be protected during their entire lifetime. However, in Member States which do not recognise the moral right of performers to restrict objectionable uses of their performances, performers would remain powerless to prevent such uses.

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<sup>69</sup> See 17 U.S.C. 104. The US does not apply a 'comparison of terms' with the term of protection in the EU and thus grants the full 95 years term of protection to EU phonograms.

<sup>70</sup> Mick Hucknall, *Simply Red (UK)*, Speech to AIM Annual Assembly, June 2004.

### 7.2.2. *Impact on record producers*

For record companies, the term extension for performers would bring a smaller financial impact than an extension to 95 years (sub-option 2b). Even though producers' rights would not be affected by this option, producers would benefit from additional sales revenue when they have been assigned of the performers' exclusive rights of reproduction, distribution and 'making available' online.

### 7.2.3. *Impact on broadcasters and public venues where music is played*

There is no evidence that TV broadcasters or venues that perform sound recording in public (bars, discotheques, hairdressers or doctors) would have to pay more for the blanket licenses covering the 'secondary' uses they make of a performance incorporated in a sound recording<sup>71</sup>. The Gowers report argues that, once protection in a sound recording ends: "No royalties are due for that recording and fewer licences are required to play those songs. ... Because the cost of licences reflects the royalties payable to the copyrights, as those copyrights expire, so the cost of licences will fall"<sup>72</sup>. This implies that broadcasters or the operators of venues where a public performance occurs pay royalties for sound recordings on a 'per-track' basis. However, this is not the case, as explained above (see section 7.1.3).

### 7.2.4. *Impact on public domain labels*

An extension covering life of the performer or 50 years, whichever is longer, will imply that those record companies that republish so-called "public domain" music under their own labels will have to wait longer for recordings to fall out of copyright. However, the term extension would only marginally affect the availability of sound recordings phonograms in regard of which the performer and the phonogram producer are no longer protected, because it is not fully retroactive, and thus the recordings which are currently free of any related rights would remain so. Moreover, performances which have fallen into the public domain are not always freely available for public domain labels to use. This is because several Member States allow performers to use their moral rights to restrict certain uses of performances even after the performance has fallen into the public domain. Performers can for example restrict the re-release of public domain records which have not been re-mastered, object to the inclusion of their performance in new compilations or even to a sales environment which is detrimental to their reputation. For instance, the French performer Henri Salvador was allowed to object to a public domain label issuing a cheap and low quality compilation of his early performances<sup>73</sup>.

The impact of the term extension would also be limited as there are very few labels that specialise exclusively in distributing copies of records which are in the public domain. Music is truly in the public domain once both (a) the copyright in the musical composition and (b)

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<sup>71</sup> For example, the BBC alone uses around 180,000 music items per week and spends over £230 million a year on the acquisition of IP rights from programme contributors (actors, writers, musicians and presenters) in BBC-produced programmes.

<sup>72</sup> Gowers Review on Intellectual Property, December 2006, p. 56.

<sup>73</sup> In a judgment delivered on Thursday 15 November 2007, the Paris Court of Appeal ruled in favour of Henri Salvador by holding that a song, even if recorded more than 50 years ago and thus in the public domain, cannot be used without restrictions. The Court of Appeal condemned the company for having violated Henri Salvador's moral rights in his works and performances by publishing a compilation of his songs without his prior authorisation and awarded € 85000 of damages to the artist (including € 35000 for the moral rights as a performer and € 30000 for the moral rights as an author). Paris Court of Appeal, November 14<sup>th</sup>, 2007, *SARL Jacky boy Music v Salvador*, JurisData : 2007-349990.

the neighbouring rights of performers and record producers have expired. There are very few labels distributing such music, and they tend to be very small, release a limited number of recordings and employ very few people - in fact, they are usually a one-man operation<sup>74</sup>. However, other so-called public domain labels tend to focus on releasing new recordings of compositions which are in the public domain (essentially classical music). This is for example the case of Naxos, a leading public domain label<sup>75</sup>. For Naxos, reissuing public domain music is only a marginal part of its activities, and in this sense, the company acknowledges it would benefit from an extension of the term of protection<sup>76</sup>.

Any negative effect on public domain labels would also have limited, if any, knock-on effect on performers. Indeed public domain companies have no A&R costs and they do not discover and develop new talent.

#### 7.2.5. *Impact on consumers*

As broadcasters and other venues that owe equitable remuneration for broadcasting and any communication to the public do not pay on a 'per track' basis, the impact of a life or 50 year term is neutral on these operators and thus on consumer prices (e.g., licence fees to public broadcasters). In addition, a life or 50 year term for performers only would have no impact on retail prices as the performers' share on a retail sale is very low.

#### 7.2.6. *Impact on cultural diversity*

Term extension for performers only will also lead to some financial benefit for record producers. This might result in a limited increase in A&R investments, the development and the promotion of new artists. Without a significant improvement of the financial situation of the recording industry there might be less opportunities for promoting performers in both popular and niche repertoire.

#### 7.2.7. *Impact on information society services*

The impact on digital libraries and other similar services would be negative. However, it is difficult to identify such services and to quantify to what effect they would be affected, given that they have yet to fully develop on the market.

Clearing the rights of performers would be more complex, as it would involve identifying all performers whose performances are embodied in a sound recording. Moreover, when the term of protection for record producers and performers is the same, all the rights can be cleared from the record producer. This is because the producer has an assignment from all the performers who perform on the record. If the rights of performers only are extended, it may no longer be possible to clear the performers' rights from the producer, and the rights of each performer would have to be cleared individually during the extended term.

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<sup>74</sup> Sepia Records has a catalogue of 80 titles from the 1930s to the 1950s and has one employee; Flare Records has a catalogue of 45 titles and has one employee; Windyridge has a catalogue of 76 titles.

<sup>75</sup> For example, in 2005, Naxos released 194 new recordings of currently unavailable works that had fallen into the public domain.

<sup>76</sup> As acknowledged by Naxos in its response to the Commission questionnaire on the term of protection for sound recordings, point 61.

### 7.2.8. *The international dimension*

A term extension for performers only would have a negligible impact on the flow of royalties between the EU and the US. Section 7.3.7 describes in more detail why the impact on royalty flows would not be significant.

### 7.2.9. *Administrative burden*

Extending the term of protection for performers would require an amendment to Directive 2006/116/EC and Member States would then have to amend their national laws accordingly. This would only require Member States to adapt their existing laws covering performers. The administrative burden incumbent on Member States would be considerably lower than introducing a new law.

However, linking the term of protection to the lifetime of performers would raise complex issues, essentially because co-performances, i.e. performances by a band, an orchestra or a featured artists accompanied by session musicians<sup>77</sup> are the rule.

This leads to an *increased legislative burden for Member States*. There are currently no rules providing for the calculation of the term of protection for co-performances, because the event which triggers the current term of protection is the publication of the performance. If the event triggering the term of protection is the death of a performer, then, when several performers contribute to a recording or performance, it might seem more appropriate to calculate the term from the death of the last surviving performer, but this could also lead to excessively long terms of protection. Alternatively, it could be provided that the contributions of session musicians should not be taken into account to calculate the term of protection<sup>78</sup>. However, there are currently no Community rules on this matter. The analogy with the term of copyright protection of co-written works is of limited assistance, as there are no Community rules on the calculation of the term of protection for co-written works.

In addition, the calculation of the term of protection from the death of the performers would also have a *negative impact on tracking costs and transaction costs*. Tracking costs are the costs of identifying the performers whose performances are embodied in a sound recording and registering their death. In practice, it would be excessively cumbersome to identify all the members of an orchestra, which includes more than 80 musicians, and of session musicians which are hired on an occasional basis to perform certain parts or instruments in a recording. Because session musicians are paid a flat fee for the assignment of their rights, the recording companies do not keep track of them. In addition to identifying performers, the databases used to manage performers' rights and to calculate the term of protection would then have to be modified to include additional data on the death of all the performers in a sound recording. In addition, for collecting societies, the cross-border administration of rights would also become

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<sup>77</sup> Under international and national laws, performers enjoy rights in their performance, unlike copyright, irrespective of its originality. It is likely that all performers would have to be taken into account to calculate the term of protection.

<sup>78</sup> This would be possible because the minimum term of protection required under international agreements (50 years from end of the calendar year on which the performance took place, under Article 14(5) of the TRIPs agreement) would be complied with. However, it would require articulating in legal term a difficult distinction between session musicians and other performers.

more complex and more expensive<sup>79</sup>. This could be even more complex if Member States adopt different rules on the calculation of term for co-performances.

Finally, the term of protection of co-performed musical works would give rise to *legal uncertainty*, because the term of protection would no longer depend on an easily identifiable and certain event, namely the date of publication or broadcasting of the record. Instead, the term of protection would depend on two factors: first, which performers are performing in the record, and second, the date of each performer's death. Third parties exploiting a record which they believe in the public domain would face the risk of unidentified performers bringing claims in sound recordings and thus extending the term of protection of that record.

### **7.3. Extend the term of protection for performers and record producers from 50 to 95 years**

#### *7.3.1. Impact on performers*

The effect on performers would be more extensive than under the 'life or 50 years' term. For instance, Edith Piaf's interpretation of 'Non, je ne regrette rien', recorded in 1960, was used in the film 'La Môme' (2007), and experienced renewed success. However, as Edith Piaf died in 1963, the term of protection under the "life or 50 years term" would effectively not be extended and expire on 1<sup>st</sup> January 2011, thus leading to a shortfall after that date. Under the 95 years option, the recording would be protected until 1<sup>st</sup> January 2056.

Performers derive revenue both from royalty income linked to the sale of sound recordings and from secondary remuneration claims linked to the broadcasting and communication to the public of their performances. As the overall level of revenue generated from secondary remuneration claims should not increase because of the term extension, the impact is difficult to determine. Individual performers would however benefit from income streams for 45 additional years.

For the sale of sound recordings, the PWC study estimates the present value of performers' and producers' additional income in the extended term between € 44 and € 843 million in the EU (see section 7.3.2). On this basis, an estimate of the additional annual revenue accruing to performers from a 45 year term extension can be drawn up.

The calculation of annual revenue for an average performer is based on a variety of assumptions that are further explained in the Annex, section 3. These assumptions concern the distribution of financial benefits between performers and record producers (performers getting 10% and producers 90% of the revenues), the annual distribution of the overall present value gain and the number of performers that would benefit from a term extension. On the basis of these assumptions, the additional term of protection would generate between € 46 and € 737 per performer per year. Just as for the 'life or 50' option, one should also mention that a term extension would be a boost for performers' and session musicians' social status. They will feel that their artistic contribution is properly valued by society.

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<sup>79</sup> In effect, collecting societies often exploit each other's repertoire on their own territory and exchange information and payments under so-called "reciprocal agreements". For a more detailed explanation of the cross-border management of copyright, see 'Impact Assessment Reforming Cross-Border Collective Management Of Copyright And Related Rights For Legitimate Online Music Services', SEC (2005) 1254, p.6, available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/sec\\_2005\\_1254\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf).

### 7.3.2. *Impact on record producers*

Several economic studies attempt to analyse the impact that a term extension from 50 to 95 years would have on the sales revenue of record producers. All of them come to the conclusion that an extension would have some financial benefits; however they are not unanimous on how large this benefit would be. This IA is based on three principal studies submitted by stakeholders<sup>80</sup>. These studies consider the future revenue stream that record companies can expect to receive from an additional 45 years of protection and compare this revenue with the revenue stream generated during the initial 50 years of protection.<sup>81</sup> Estimated future revenue from extension is then calculated as a percentage of the revenue achieved in the initial 50 years. The uncertainty that accompanies these studies is understandable since estimates must cover almost five decades. Besides, not all impacts are of economic dimension.

The three studies come to the following conclusions as to the percentage that estimated future income generated in the extra 45 years of protection represents when compared to the income achieved in the initial 50 years: Liebowitz: 3-14%; PWC: 0.1-1.9%; and CIPIL: <1%.

The PWC study is the only study based on actual data and enables us to add a concrete dimension to the results. This study applies to the UK and it analyses the revenues from music sales, license fee income and other royalty income. The value of the initial 50 year term for sales in the UK is calculated to reach £ 8.568 billion. The high-end estimate of total present value of the 95-year period would amount to £ 8.731 billion, whereas the low-end estimate would yield £ 8.576 billion<sup>82</sup>. A 45 year extension of the term of protection would create between £ 8.4 million and £ 163 million in additional revenues. The PWC study is limited to the UK sales revenue. As EU sales are 3.5 times larger than the UK sales, it can be roughly estimated that a 45 year term extension would generate between € 44 million and € 843 million in additional revenues for the EU. If record producers get 90% of the sales price and performers only 10%, the benefit to record producers would yield between € 39 million and €

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<sup>80</sup> These studies are: 1) Liebowitz (February 2006), "What are the Consequences of the EU extending Copyright Length for Sound Recordings, report prepared for IFPI. ("**Liebowitz**")"; 2) PriceWaterhouseCoopers (April 2006), "The Impact of Copyright Extension for Sound Recordings in the UK", report prepared for BPI. ("**PWC**")"; 3) Centre for IP and Information Law (2006), "Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings", report prepared for the Gower's review. ("**CIPIL**")

<sup>81</sup> The estimates vary on account of the basic assumptions that each study makes with respect to three key parameters: (1) the discount rate that is applied to determine the present value of future income that results from term extension; (2) assumptions as to the depreciation of annual sales value with the passage of time (so-called 'cultural depreciation'); (2) the possible loss of market share upon expiry of the 50 year term. The choice of the discount rate is one of the core issues addressed by all of the studies surveyed. The authors of these studies find it difficult to choose the appropriate discount rate, especially in relation to a 45 year period in the future. Due to differences in the appraisal of the risk inherent in the production of sound recordings, the three studies apply discount rates that range from 3% to 9% in real terms (Liebowitz: 3-6%; PWC: 9% and CIPIL: 5-9%). The European Commission Impact Assessment Guidelines SEC(2005) 791, (p. 37), recommend, on the other hand, application of a standard discount rate of 4%. This rate broadly corresponds to the average real yield on longer-term government debt in the EU over a period from the early 1980s onwards. The economics of copyright literature is, however, unanimous that using a 4% discount rate to calculate the present value of a 45 year term extension yields results that are too optimistic. For the purpose of this analysis, therefore, more conservative estimates are presented.

<sup>82</sup> The higher range estimate assumes, in favour of the proponents of term extension, that the expiry of copyright entails a 100% market share loss, whereas the lower end estimate assumes no market loss.

758 million. If a fund of 20% were set up for performers, the benefit to record producers would decrease to between € 31 million and € 607 million.

If the benefit from term extension were to be calculated on the basis of other, higher estimates (using a lower discount rate) (see Liebowitz study), the music industry could get an additional £ 1.182 billion in the UK. Extrapolated to the EU level, this would yield to over € 6 billion. However, some economists have expressed reservations on this high-end estimate. This is due to the fact that Liebowitz relies on very optimistic assumptions with respect to the discount rate, the continued popularity of repertoire (the so-called 'cultural depreciation') and the potential loss of market share if the term of protection expires.

### 7.3.3. *Impact on broadcasters and public venues where music is played*

For the reasons explained in relation to the 'life or 50' term extension for performers (see section 7.2.3), there would be no impact on prices paid for broadcasts and performances of music in public venues.

### 7.3.4. *Impact on public domain record labels*

The impact of a term extension for both performers and record producers would be similar to the impact of a term extension for performers only (see section 7.2.4). This is because record producers are usually granted an assignment of the performers' rights. The longer term would imply that the impact on public domain labels would last longer. Their loss of earnings would be equivalent to the additional earnings of record producers (see section 7.3.2).

### 7.3.5. *Impact on consumers*

A term extension would have no negative impacts on consumer prices and would have a positive impact on the quality of services offered to consumers as well as on consumer choice. It would send a clear signal that the interests of the music industry and of consumers are not opposed but instead concur on a competitive music market.

The *impact of on consumer prices* is expected to be minimal. The only study that compares prices for in-copyright and out-of-copyright sound recordings is the PWC study on "The Impact of Copyright Extension for Sound Recordings in the UK"<sup>83</sup>. The PWC study looks at 129 albums recorded between 1950 and 1958. It finds no clear evidence that records in which the related rights have expired are sold systematically at lower prices than records which are still protected.

Other studies have considered the price impact of copyright protection<sup>84</sup>. For instance, the Gower's review relies on a study analysing the impact of copyright on the price of books, and relies on partial results of that survey<sup>85</sup>. Studies on books are not directly relevant to the

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<sup>83</sup> PriceWaterhouseCoopers (April 2006), "The Impact of Copyright Extension for Sound Recordings in the UK", report prepared for BPI.

<sup>84</sup> Liebowitz (May 2007 – preliminary draft), "Copyright: How Large are the Deadweight Losses"; and Heald (2006), "Property Rights and the Efficient Exploitation of Copyrighted Works: an Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers".

<sup>85</sup> The Gowers review relies on Heald (2006). In the whole sample of bestsellers, no difference in price is to be found, which is however not true for the much smaller sub-sample of durable books (i.e. most enduringly popular), where books in-copyright were priced higher than books out-of-copyright. Gowers presents only these latter results.



impact of copyright on prices of sound recordings. This is because books are only subject to one copyright (i.e., of the authors) while sound recordings, as well as being protected by the related rights of producers and performers, incorporate copyright protected musical works. Thus when the related rights in the sound recording have expired, the copyright in the musical composition often has not. As a result, the gradual "de-protection" (first the neighbouring rights, then the authors in co-written) leads to even less price fluctuations as with books. However, even in the category of books, either no overall price difference is found between 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 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 for sound recordings will increase due to term extension.

Consumers can also access music online or from mobile phones. The digital music market is growing and currently accounts for approximately 15% of the music market worldwide. The various pricing models of online music clearly show that whether a sound recording is in or out of copyright is not a relevant factor to determine consumer prices. For instance, as far as "download to own" is concerned, several music vending platform operate by selling tracks individually, for instance MSN Music<sup>86</sup>, Nokia Music Store<sup>87</sup>, iTunes<sup>88</sup>, Napster Light<sup>89</sup>, Musicload.de<sup>90</sup> or Fnacmusic.com<sup>91</sup>. The vast majority of these services sell tracks at a single fixed price<sup>92</sup>, whether or not it is in copyright or not<sup>93</sup>. Other business models offer their customers access to music on a subscription basis, either for a limited number of downloads or on an "all you can eat" basis (unlimited downloads). Such services, for example Omniphone Music Service<sup>94</sup>, FNAC musique illimitée<sup>95</sup>, eMusic<sup>96</sup> (which includes the complete classical music catalogue of Naxos Records) or Napster to go, charge a monthly fee whatever the tracks downloaded, i.e. whether they are in copyright or not. Finally, some services offer music "bundled" with another product such as a mobile phone ("Nokia comes with music"<sup>97</sup>) or services such as Internet Access (for example, in France, Neuf Cegetel bundled with access to Universal's catalogue or Alice bundled with EMI's catalogue). Again, in that case, it is clear that the price paid by the consumer is the same whether he downloads music which is in or out of copyright. Finally, it should be noted that public domain companies do not release their sound recordings on the internet, but instead only sell them as CDs.

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<sup>86</sup> MSN Music operates in Austria, Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Spain, Sweden and the United Kingdom.

<sup>87</sup> Nokia Music Store operates in France, Finland, Germany, Ireland, Italy, Netherlands, Sweden and the UK.

<sup>88</sup> iTunes operates in Austria, Belgium, Denmark, Germany, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, Spain and the U.K., at the same price. See Apple press release, London, January 9, 2008.

<sup>89</sup> Napster operates in Germany and the UK.

<sup>90</sup> Musicload.de operates in Germany.

<sup>91</sup> Fnacmusic.com operates in France.

<sup>92</sup> With some exceptions, such as Musicload in Germany. Several factors come into account in Musicload's pricing, such as the price of the album in relation to the number of tracks, and the duration of the tracks.

<sup>93</sup> MSN Music: €0.99 per track; Nokia Music Store: €1.00 per track, £0.80 in the UK; iTunes: € 0.99 per track; Napster Light: €0.99, £0.79 in the UK; Fnacmusic.com: €0.99 per track.

<sup>94</sup> UK.

<sup>95</sup> France.

<sup>96</sup> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Poland, Slovenia, Spain, Sweden and the UK.

<sup>97</sup> Yet to be launched.

The above circumstances would indicate that the very small copyright payments to performers and the producers of sound recordings might not be the most relevant factor determining retail prices. This is partly because sound recordings are only fully in the 'public domain' when both the related rights in the performance and the record and the copyright in the musical work are no longer protected. Accordingly, other than classical music, few records are completely in the 'public domain'. Moreover, the sound recordings will still be protected in the US where the term of protection is 95 years. Making available a work on the internet would therefore not be possible on a global scale, because the making available would amount to an infringement of the record producer's rights in the US<sup>98</sup>. Moreover, sound recordings compete with all other sound recordings of the same genre for the same audience whether they are in or out of copyright<sup>99</sup>. This competition between protected recordings and between protected and non-protected recordings keeps prices down.

The *impact on the quality of the products and services offered to consumers* might also be positive. Although competition in offering public domain sound recordings might increase their quality, it is not clear that this is the case. Indeed performers and record producers have an interest in defending their artistic integrity and their reputation which ensures that they offer only the highest quality recordings to the public. In contrast, some public domain companies re-release recordings without due regard for the quality of the recording, without re-mastering old titles, and often without regard for the value of the performance. Instead, the records are used as cheap promotional material to bring consumers to supermarkets. This is true to such an extent that in some instances, such as the Henri Salvador case<sup>100</sup>, the moral rights of the performer can be infringed. Also, the record company which continues to exploit a sound recording has an incentive to maximise the value of the recording. Record companies therefore invest heavily in the promotion and marketing of their records – up to 16% of their revenues<sup>101</sup> – thus ensuring that there is demand for those sound recordings and that they reach a wide audience.

Likewise, it has been seen above that very few public domain companies market records which are genuinely out of copyright, i.e. when the copyright in the musical composition and the related rights in the phonogram and performances have expired. While some companies do, they perform this on a very limited scale, and the sound recordings are not available for download. Indeed when all rights have expired, there are few incentives to publish old sound recordings, because any competitor can free ride the effort expended in digitising and marketing the sound- recording.

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<sup>98</sup> In the US, the Federal term of protection only applies from 1972. All records previously released are still protected under most state laws and are not pre-empted under federal law. Only in 2067 will the rights in records start falling in the public domain in the whole of the US under federal law. See New York Court of Appeals, 5 April 2007, *Capitol Records, Inc. v. Naxos of America, Inc.*, decision: USCOA,2 No. 30.

<sup>99</sup> "In the vast majority of instances, copyright provides no monopoly power to the copyright owner and the only cost advantage that would accrue to consumers of non-copyright protected works would be the saving for not having to pay the creator of the work" (Liebowitz, February 2006, 'What are the Consequences of the EU extending Copyright Length for Sound Recordings', report prepared for IFPI., p. 22).

<sup>100</sup> Paris Court of Appeal, November 14<sup>th</sup>, 2007, *SARL Jacky boy Music v Salvador*, JurisData : 2007-349990, see above, section 7.24.

<sup>101</sup> ADAMI study, 'Filière de la musique enregistrée : quels sont les véritables revenus des artistes interprètes?' (April 2006), p.13.

The *impact on consumer choice* is also expected to be positive. 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 (see below). 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. The major download services currently offer more than six million tracks available online. In addition, many recordings are now expected to enjoy a 'second life' on the Internet. Since digital distribution can represent new cheaper ways in which to offer a very wide variety of recordings on a global scale, record companies will be incentivised to benefit from what has been coined as the 'long tail' effect – low sales volumes in small markets (especially in the digital online context) which can collectively add up to and even rival the relatively few bestsellers<sup>102</sup>. For instance, in the UK, the top 40 single tracks account for only 10% of all tracks downloaded, while the 'long tail' accounts for most online sales volume<sup>103</sup>. Universal's download only re-issue programme, which includes only "deleted" recordings, launched in 2006, has prompted 3 million downloads since its launch in 2006. Many record companies will make their entire back catalogue available online and the still popular sound recordings from the 1960s will experience a further upturn in sales as a result of an expansion in digital distribution. For example, Universal makes available to consumers 18 000 previously 'deleted' tracks and the digitisation of its back catalogue should reach 60 000 tracks by the end of 2008; Deutsche Grammophon offers a music download service which includes 2500 albums, 600 of which are not available on CD<sup>104</sup>.

This contributes to enhancing consumer choice as many recordings that are not available in retail stores due to limited shelf space can now be made available online. Older or niche European repertoire will be more widely available. While it might be expected that public domain companies would make more recordings available, this has not been the case. As explained above, there are few companies who market public domain sound recordings of out-of-copyright musical compositions. Moreover, as far as niche markets are concerned, they do so at relatively high prices and do not offer those recordings for download. This is partly because absent property rights, public domain companies are exposed to free ridding: they have no incentive to invest in promotion and marketing which could be free-ridden by any competitors. This is why companies such as Naxos opt to re-record public domain classical music<sup>105</sup>.

### 7.3.6. *Impact on cultural diversity*

Since term extension will lead to some financial benefit for record producers, more resources from old recordings are available to fund new talent. Resources from old recordings, especially from recordings in the golden fifties and sixties, can still be considerable, even in the years to come. Sales of sound recordings have an initial boost in the first few years following their publication and then decline from that level to remain, for decades, at a fairly constant level<sup>106</sup>. Record companies state that they often use the income derived from older

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<sup>102</sup> "The Long Tail", by Chris Anderson, 'Wired' magazine, October 2004.

<sup>103</sup> IFPI Digital Music Report 2008, p.8.

<sup>104</sup> IFPI Digital Music Report 2008, p.11; Universal press release, LONDON, January 18, 2006, available at <http://new.umusic.com/News.aspx?NewsId=355>.

<sup>105</sup> See e.g. W. Landes, R. Posner, 'Indefinitely Renewable Copyright', John M. Olin Law and Economics Working Paper 154, p. 19, available at [http://ssrn.com/abstract\\_id=319321](http://ssrn.com/abstract_id=319321).

<sup>106</sup> Liebowitz (February 2006), 'What are the Consequences of the EU extending Copyright Length for Sound Recordings', report prepared for IFPI.

recordings to produce and market new recordings. More income from the golden 1960's and other enduringly successful recordings will help finance investment in new recordings.

According to Nigel Parker, "the music business has grown based on the long-tail income from established copyrights. Accumulation of copyrights spreads risk and generates funds to finance new music. Without long term profits from the most successful creators, investment in new music would be almost non-existent"<sup>107</sup>. This means that the music industry is essentially a portfolio business where successful recordings will generate the revenue required to finance new recordings. This would mean that new successful European repertoire would need to rely on older repertoire providing the revenue necessary to finance cultural diversity.

An increase in A&R spending and a better financial situation of the recording industry will therefore provide increased opportunities for performers in both popular and niche repertoire. According to the PWC study, A&R amounts to 17% of revenues. If the estimated financial benefit of the record producers is between € 39 million and € 758 million, this results in the additional A&R value of between € 6.7 million and € 129 million. In the first decade, the additional A&R value would be between € 1.7 million and € 28 million<sup>108</sup>. Part of this additional investment will benefit directly new EU performers.

#### 7.3.7. *Impact on information society services*

The impact on digital libraries and other similar services would be negative. Although the issue of rights clearance would not be as complicated as under option 2b, it would arise over a longer period of time. However, flexible solutions for rights clearance and orphan works could be found on an ad hoc basis.

#### 7.3.8. *The international dimension*

The impact of a term extension on the international flow of royalties should be considered separately in relation to sales and secondary exploitation. The income from secondary exploitation is collectively administered and as a consequence, the distributions to EU performers are more easily traceable. Moreover, a significantly larger share of remuneration from secondary exploitation is distributed to performers than from sales<sup>109</sup>.

As far as *sales* are concerned, according to available IFPI figures, the domestic repertoire of each Member State represents in EU aggregate terms 48% in value of music sales in tangible form (mainly CDs). The international repertoire accounts for 45%. But 'international' repertoire here includes European repertoire from other Member States as well as US and non-US repertoire (e.g., Latin American repertoire).

Equally, the Gowers report claims that 43% of the revenues that would be earned in the extended term would be remitted 'overseas'<sup>110</sup>. However, these 43% include US repertoire and repertoire from other European states. It is therefore a fallacy to believe that 43% of UK remittances in a longer term would all go to the US or to other non-EU countries. On the

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<sup>107</sup> Nigel Parker (2004), 'Music Business: Infrastructure, Practice and Law'.

<sup>108</sup> All figures should be adapted, if a fund diverting 20% of record producers' additional revenue to performers was accounted for (see Annex, section 3).

<sup>109</sup> The split for revenues from the single equitable remuneration for performers is usually 50-50 between performers and producers. Overall, in the EU in 2004, performers collecting societies collected € 351 million and producers collecting societies collected € 293 million, KEA Study, p. 34.

<sup>110</sup> Gowers Review on Intellectual Property, December 2006, p. 55.

contrary, much of this revenue would remain in the European Union. For example, figures available for Denmark show that 45% of the repertoire sold in Denmark is of Danish (i.e., domestic) origin, 37% comes from other-European Member States and only 14% is imported from the US and 4% from other non-EU sources<sup>111</sup>. This means that most of the additional revenue collected over an extended term of protection would therefore stay in Europe and benefit European performers. The Gowers estimates would not, therefore, be relevant to determine the trade balance of the EU as a whole.

*The flow of royalties from broadcasting and performing phonograms in public venues* would be only very marginally affected by a term extension. This is because the EU's only significant trading partner for music is the US<sup>112</sup>, and under the applicable international conventions, the remittances between the EU and the US are currently minimal (see Annex, section 4).

Under the Rome Convention and the WIPO Performances and Phonograms Treaty (WPPT), the royalty flows from the EU to the US are small. Indeed most EU Member States do not grant equitable remuneration under the Rome Convention to phonograms produced by US record producers or first fixed in the US<sup>113</sup>. Under the WPPT, to which the US and the EC are signatories, the US applies equitable remuneration only to certain digital audio transmissions (such as webcasting). Accordingly, EU Member States are under no obligation under the WPPT to grant phonograms produced by US record producers or first fixed in the US a right to equitable remuneration for broadcasting and communication to the public<sup>114</sup>. In practice, only a small number of Member States (e.g. UK, Ireland) pay royalties to US record producers for records produced by US producers or published simultaneously in the US and another country which is a party to the Rome Convention or the WPPT. Even though, the UK and Ireland do not grant such payments to US performers.

The term extension would thus not result in additional remittances to the US for secondary remuneration claims.

#### 7.3.9. Administrative burden

Changing the term of protection would require an amendment to Directive 2006/116/EC and Member States would then have to amend their national laws accordingly. However, this burden would not be substantial since they would not be introducing new laws but amending existing legislation.

### 7.4. Moral rights of performers

*The impact on performers* would be positive. Performers would have the right to object to derogatory uses of their performances. This would not provide them with supplementary income other than awards for damages. It would allow them to restrict objectionable uses of their performances, for instance use in advertising, use in conjunction with pornographic material or use in certain political contexts. It would also improve their social standing and signal the recognition of their artistic contributions more or less on a par with authors.

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<sup>111</sup> 2004 Annual Report of KODA, the Danish Performing Rights Society.

<sup>112</sup> In particular, in 2004 EU-15 imports of record materials from the US amounted to USD 752 million in 2004, while the added imports from Japan, Australia, Canada and China amounted to USD 260 million (source: OECD).

<sup>113</sup> This stems from notifications made under the Article 5(3) of the Rome Convention.

<sup>114</sup> Article 15(3) in conjunction with Article 4(2) of the WPPT.

However, merely granting performers the right to restrict objectionable uses of their performances would not necessarily protect them during the whole of their lifetime. In some Member States, the moral rights of performers are perpetual. In others, moral rights last as long as the performer's economic rights: performers thus lose their moral rights when their performances fall into the public domain.

The impact on record producers would be negative. Performers might be able to restrict certain uses of their performances, for instance in commercial advertising. As music is often used in advertising, this could in certain cases deprive record producers of revenues. The performers might also have a claim for damages against producers who allow objectionable uses without the performer's authorisation. For instance, the French singer/songwriter Gilbert Montagné successfully relied on his moral rights (as an author) in the song "On va s'aimer" to sue Universal Music publishing, for allowing the use of a modified version of the song ("On va fluncher") in a commercial for a food chain<sup>115</sup>.

The Impact on broadcasters and public venues where music is played would also be negative as performers could object to certain uses of their performances in radio and TV broadcasts.

The impact on public domain labels could be negative. Performers may be able to restrict certain uses of their works once they are in the public domain, depending on whether their moral rights are limited in time or perpetual. For example, in France, the performer Henri Salvador successfully sued a label for releasing and distributing in supermarkets at a minimal price a cheap compilation including his songs<sup>116</sup>. The public domain labels wishing to exploit songs in the public domain would thus have to request the authorisation of the performer or his heirs.

The impact on cultural diversity would be positive. Strengthening moral rights of performers would be beneficial for European cultural diversity, as their social status and recognition would be improved. Although this is a non-pecuniary aspect of protection, it would contribute to a 'feel good' factor for performers who would be confident in their ability to exercise control over objectionable uses of their work

The administrative burden would be significant. Since moral rights have not yet been harmonised at European level, the Commission would have to propose stand alone legislation.

Harmonising moral rights would thus entail a significant legislative burden on many Member States, as there are currently significant disparities in the moral rights granted to performers in Member States, relating to the substance and the duration of those rights. Such differences are permitted under international law and reflect the different copyright traditions of Member States. For instance in the UK<sup>117</sup>, the moral rights of performers are limited in time and some must be asserted or can be waived, while in France, the moral rights of performers are unwaiverable and perpetual<sup>118</sup>.

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<sup>115</sup> *Didier B., Gilbert M. and SNAC v Universal Music Publishing and others*, French Cour de Cassation, 1st section, 5 December 2006, case n°1718 FS-D.

<sup>116</sup> Paris Court of Appeal, November 14<sup>th</sup>, 2007, *SARL Jacky boy Music v Salvador*, JurisData : 2007-349990.

<sup>117</sup> See The Performances (Moral Rights, etc.) Regulations 2006, which amends the 1988 Copyright Designs and Patents Act.

<sup>118</sup> See Article L. 212-2 of the French Intellectual Property Code.

## 7.5. Protection of performers' rights: 'use it or lose it'

*The impact on performers* would be positive. Performers would be in a better position to ensure their creative output reaches the public. The rights in unexploited recordings would revert to them and they could re-release them through another record company (or do it themselves) if the original company does not publish or release the record. This is already possible for authors under some national laws<sup>119</sup> and it appears that some independent record companies do actually give rights back to performers if they have stopped selling the record for a certain time. Specific legislative measures would nevertheless strengthen the position of performers.

*The impact on cultural diversity* would also be positive. If performers were to make use of the possibility to get their sound recording re-released by another record company, or by themselves, more repertoire, including niche and local music, would be widely available. This would strengthen European cultural diversity.

*Consumers* would also benefit from a wider selection of repertoire because the performer would be able to reissue the sound recording if the original record company ceases to market it.

In terms of *administrative burden*, further amendments to Directive 2006/116/EC would be required, as well as transposition measures from Member States which do not currently provide for a 'use it or lose it' provision. Flexibility should be allowed in transposition, in order for measures to fit in with the Member States' existing copyright and contract legislation. Alternatively the Directive could adopt a softer approach, by encouraging Member States to be vigilant that record companies voluntarily introduce 'use it or lose it' conditions into their contracts.

## 7.6. Creation of a fund for session musicians

The fund dedicated to session musicians would include 20% of the revenues derived by record companies from the sale of sound recordings benefiting from a term extension. The 20% should be based on revenues, as this allows transparency and enforceability of the provision. The 20% strike an appropriate balance between the interests of session musicians and of the record producers.

The *impact on session musicians* would be positive. The amount of additional revenue for session musicians would depend on the extent of the increase in the term of protection for record producers. An average performer would benefit from € 47 to € 737 in additional revenues every year (see Annex, section 3 for methodology) from a 45-year term extension.

As there are no estimates available as to the number of session musicians whose performances would fall into the public domain, we present indicative estimates on how much an average performer would benefit if the term were extended to 95 years and the fund were to benefit all performers. The payment to an average performer would increase to an average of € 130 to € 2065 every year, i.e. 2.8 times<sup>120</sup>.

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<sup>119</sup> Austria, Belgium, Germany, Luxemburg, Nordic Countries, Portugal, Spain.

<sup>120</sup> As the fund would be drawn from the income of record companies, the revenues of featured artists would not be adversely affected. The overall impact for performers would thus be positive.

The *impact on record producers* would be negative, but should be considered against the benefits of the term extension. In the course of a 45 year term extension, the benefits of the extension of term for record producers would be reduced from € 758 million to € 607 million (high end estimate) or from € 39 million to € 31 million (low end estimate). Consequently, this would also reduce the additional revenue available for A&R from € 129 million to € 103 million (high end estimate) or from € 6.7 million to € 5.3 million (low end estimate).

A simple model calculation in the IA shows that a 20% share would strike the right balance between the profitability of phonograms that are exploited in the extended term and the creation of a tangible added benefit for performers. This calculation attempts to measure the impact that a revenue-based fund would have on record labels' profit margin in the years after term extension.

Average self-declared overall company-wide operating margin of the phonogram majors (EBITA/revenue) in 2007 is 9.1% (EMI 3.3% - Universal 12.8% - Warner 14% - BMG 6.2%). As mentioned above, according to IFPI, only one CD in eight is profitable.

If only 1 in 8 CDs is profitable and the average profit rate is 9.1%, this one profitable CD must be generating a profit margin that is high enough to compensate for seven unprofitable CDs and still produce an aggregate profit of 9.1%.

On this basis, one can estimate the profitability of the one successful CD by comparing its profit margin with that of the remaining seven CDs. Assuming that: 5 CDs ("CD2" through "CD6" in the example) break even (profit = 0), which is extremely optimistic and 2 CDs ("CD7" and "CD8") make a loss (for "CD7" the loss is 30; for "CD8" the loss is 40); then the successful CD "CD1" has to make a substantial profit. In our example the profit margin is 60%.

As phonogram producers will focus on reissuing the "premium" CDs during the extended term, i.e., those with very high profit margins, a revenue-based fund (setting aside 20% of revenue achieved with the premium CDs) would mean that 20% of the revenue attributed to CD "CD1", 250 (i.e., 50) would be set aside for performers. Therefore, even after taking into account the fund, the phonogram producers' profit margin in the extended term would still be  $100/250=40\%$ .

	CD1	CD2	CD3	CD4	CD5	CD6	CD7	CD8	TOTAL
REVENUE	250	100	100	100	100	100	70	60	880
COST	100	100	100	100	100	100	100	100	800
PROFIT	150	0	0	0	0	0	-30	-40	80
PROFIT MARGIN	60%	0	0	0	0	0	-43%	-66%	9.10%

**Table 3: Profitability of CDs**

*Administrative burden:* the creation of the fund for session musicians would require each record company to set up an account in favour of session musicians. Such accounts appear to be relatively straightforward to set up as the US example on the remuneration scheme for webcasting shows<sup>121</sup>. The administrative burden on record companies would be further

<sup>121</sup> Under the Small Webcasters Settlement Act of 2002, session musicians are entitled to 2.5% of royalties. The royalties "are deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians".



limited by the fact that the record companies would not have to identify the beneficiaries and distribute the monies collected in the fund. Distribution would be incumbent on the performing artists collecting society that represents session musicians and that, in consequence, has a database on session musicians in place.

**7.7. Summary of impacts**

Table 4 summarises the impact analysis contained in section 7 identifying economic and social (cultural) impacts of the different options.

	Option 2a "extension for 50 years or life"	Option 2b "extension to 95 years with conditions"	Option 3b "moral rights"	Option 3c "use it or lose it"	Option 3d "fund for session musicians"
Performers	+	++	+	++	++
Record producers	+	++	-	O	-
Broadcasters	O	O	-	O	O
Public domain record labels	-	--	-	O	O
Consumers	O	O	O	O	O
Cultural diversity	+	+	+	++	+
Information Society services	--	-	-	-	O
International dimension	O	O	O	O	O
Administrative burden	--	-	--	-	-
++	larger impact				
+	some impact				
O	no impact				
-	some negative impact				
--	larger negative impact				

**Table 4: Summary table of impacts**

**8. COMPARISON OF OPTIONS**

Table 5 summarises the degree to which the different options are suitable to achieve the six operational objectives identified in the impact assessment (section 5.3). It becomes clear from this table that the options involving a term extension (2a and 2b) seem to be rather more successful in contributing towards the policy objectives of increasing performers' remuneration and international competitiveness. Both options 2a and 2b bring incremental financial benefits to performers and would thus allow more performers to dedicate more of their time to creation. In addition, option 2b would also increase incrementally the pool of resources available to record producers for A&R and digitisation of their back catalogue, and could thus have an additional positive impact on cultural diversity.

Option 2b is easier to implement than option 2a, as the latter links calculation of the term of protection to the life of individual performers. As the example of co-written works shows, linking a copyright to the life of individual contributors in practice raises complex issues when several performers contribute to a sound recording. Each co-performer in a performance

would have to be registered and the term would only be triggered upon the death of the last co-performer.

On the other hand, Option 3c has very substantial and undeniable benefits as well. It would incrementally increase the revenue stream channelled to performers as they regain control over recordings which would otherwise not be commercially exploited by the record industry and the revitalisation of this long 'dormant' repertoire would open up business opportunities for new recording labels, especially those who rely on smaller repertoire.

This option would thus be useful as a complement to enhance the positive impact of a term extension on the revenue of performers.

	Objective 1 Gradually align authors' and performers' protection	Objective 2: Incremental increase in remuneration of performers	Objective 3: Diminish the discrepancies between the EU and US protection	Objective 4: Incremental increase in A&R resources	Objective 5: Ensure availability of music at reasonable prices	Objective 6: Encourage digitisation of back catalogue
Option 2a "extension for 50 years or life"	++	++	+	○	○	○
Option 2b "extension to 95 years with conditions"	++	++	++	++	○	+
Option 3b "moral rights"	+	○	○	○	○	○
Option 3c "use it or lose it"	+	+	++	○	○	++
Option 3d "fund for session musicians"	○	++	○	-	○	○
++	larger impact					
+	some impact					
○	no impact					

**Table 5: Analysis of options against objectives**

## 9. MONITORING AND EVALUATION

Monitoring and evaluation will be conducted in line with the policy objectives as identified above. As policy options have not yet been chosen, the details of monitoring and evaluation will be more specifically defined at a later stage.

The *monitoring* could develop along three models:

- (i) The first concentrates on the short-term, starting right after the adoption of the proposal. It focuses on the sheer implementation of the proposal, i.e. amendments of national rules.
- (ii) The second would be mid-term and focus on direct effects such as performers' income and A&R spending by record companies in Europe.
- (iii) Finally, monitoring could be set up of the overall economic and social impacts of the proposal "on the ground" in the mid- to long-term.

### **9.1. Contribute to enhancing the welfare of performers**

The *remuneration of performers* can be monitored using the following indicators:

Income from secondary remuneration claims: information on how much is collected and how it is distributed can be provided by collecting societies.

Income from performers and trade unions about the evolution of types and content of contracts and collective agreements between performers and session musicians and record companies

Remuneration from exclusive rights: precise information is difficult to obtain as the remuneration is governed by individual contracts. However, record producers, collecting societies and performer's unions can provide indicators of the level of remuneration of performers.

Remuneration from record companies' in-house funds for session musicians: information on whether such in-house funds have been set up and whether payments have been made to session musicians.

*Gradually align authors' and performers' protection:*

Implementation of the proposal by Member States: depending on the option chosen, the transposition process would be monitored and indicate the level of protection enjoyed by performers in the Member States.

Case law upholding the moral and economic rights of performers would also provide an indicator of the practical and legal effects of implementation.

### **9.2. Contribute to enhancing the competitiveness of the EU music industry**

*Diminish the discrepancies in protection between the EU and US music markets:*

The amount of 'European' music broadcast in Europe, and the size of the music market, are indicators of whether the production of European music is commercially attractive for record companies. This information can be provided by collecting societies which collect single equitable remuneration for performers and producers and by broadcasters.

Information on the trend in the number and size of record producers in the EU and in the US would give an indicator on the development of the general economic situation of the music industry in the EU.

*Incremental increase in A&R resources:*

A&R expenditure would be directly obtained from record companies. Alternatively, the evolution of the revenues of record companies would also provide an indicator, as A&R expenditure is usually in proportion to record producers' revenues.

### **9.3. Increase available music repertoire**

*Ensure availability of music at reasonable prices:*

Information on the pricing of records could be obtained from record companies, distributors and consumer groups.

Information on the evolution of broadcasting tariffs can be obtained from collecting societies.

*Encourage the digitisation of back catalogue*

Repertoire and back catalogues made available online by record companies, and the revenues derived, are indicators of whether the record industry used the additional income from term extension to develop the offer of music to consumers. This information could be provided by record companies, distributors, 'brick and mortar' and online music retailers.

Information on revenues generated from the 'long tail' effect would indicate whether record companies have an incentive to digitise and offer as many recordings as possible. This information could be provided by record companies, distributors, 'brick and mortar' and online music retailers

A more detailed set of indicators will be considered in the light of the policy choice selected.

A first comprehensive *evaluation* could therefore take place 5 years after the entry into force of the proposal.

## ANNEX

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

## 1. PUBLIC CONSULTATION ON THE REVIEW OF THE EC LEGAL FRAMEWORK ON COPYRIGHT AND RELATED RIGHTS

The following table presents the results of the above public consultation as concerns the length of protection of related rights.

NAME OF CONTRIBUTOR	REMARKS	REASONS GIVEN
<b>ISSUE 1 : Duration of protection of related rights</b>		
<b>AEPO</b> (Association of European Performers Organisations)	<b>70yrs</b>	- Expiry in 2004 of recordings from 1954 (additional income) - compare to authors
<b>AFI</b> (Associazione dei fonografici italiana)	<b>95 yrs</b>	-increased investments, promotion of new talents - music in past not recouped investment costs - new technology good for global exploitation by (especially SME's) new technology good for new business models - new fashion for singles (via internet) - phonogram producers are current 'weak links' ? in production chain
<b>AFYVE</b> (Asociacion Fonografica y Videografica Española) <b>BAMP</b> (Bulgarian Association of the Music Producers) <b>BPI</b> (British Phonographic Industry) <b>Croatian Phonographic Association</b> <b>EMI Music</b> <b>FGPA</b> (Lithuania) <b>FIMI</b> (Italian Federation of the Music Industry) <b>GIART</b> (International		- countries with significant markets have already extended protection: India (60), Turkey, Chile, Brazil (70), Mexico (75), USA (95 if published, 120 from fixation if not published); Singapore and Australia have signed Free Trade Agreements with the US to extend protection to 70 years - producers need longer to recoup investment - lifespans increased - cost of producing & marketing original material increased - losses due to piracy reduced recoup on investment - present famous artists still alive seeing their recordings fall into public domain – unfair + not in line with objectives of protection - differences in term between EU and US cause legal uncertainty, and lead to infringements - especially problematical in on-line environment (where a phonogram can be exploited simultaneously in many different countries) - different terms could hamper development of new legitimate on-line business models - longer term of protection gives incentive for RH to create and disseminate works in that territory - longer term indicative of commitment to protect RH, local culture & creativity in general - lower term of protection in EU difficult for RH to meet foreign competition and obtain adequate international protection (“comparison of terms”).

<p>Organisation of Performing Artists)</p> <p><b>GVL</b> (Gesellschaft zur Verwertung von Leistungsschutzrechten)</p> <p><b>IFPI and its national groups (Austria, Belgium, Czech Republic, Denmark, Germany, Finland, Greece, Hungary, Slovakia, Sweden, Poland [ZPAV])</b></p> <p><b>LaMPA</b> (Latvian Music Producers Association)</p> <p><b>NVPI</b> (Dutch Music Industry)</p> <p><b>PPL &amp; VPL</b></p> <p><b>UPFR</b> (Romanian Association of Music Producers)</p>		<p>- discrimination with film producers who are considered as authors</p>
<p><b>RICHARD, Sir Cliff</b></p>	<p><b>Extension (for at least the lifetime of the artists)</b></p>	<p>- present famous artists still alive seeing their recordings fall into public domain – unfair + not in line with objectives of protection</p> <p>- matter of protecting European culture</p>
<p><b>(ARTIS – GEIE BECTU</b></p> <p><b>IMMF</b> (International Music Managers Forum))</p>	<p><b>Extension (same as authors)</b></p>	<p>- should align with the term applicable to films</p>
<p><b>Music Manager’s Forum</b></p>		<p>- unacceptable that compositions should enjoy a term of protection up to three times longer than that for performances; no justification for such discriminatory treatment (the reason is entirely historical)</p> <p>- the argument that a shorter term of protection benefits consumers is not borne out in practice since phonogram producers continue to sell recordings that are in the public domain at the same price as when they were protected by copyright</p> <p>- an extension of sound recording copyright will also take thousands of musicians off means tested benefits and greatly lessen the burden of the state; the state will benefit both from the a reduction in benefits paid to poor musicians and from increased taxation of rich musicians and phonogram producers</p>

<b>AZNAVOUR, Charles</b>		<ul style="list-style-type: none"> <li>- recordings are principal source of income.</li> <li>- internet possibilities are competition to sales of CDs</li> <li>- internet use of recordings in public domain are unfair competition to recent recordings</li> </ul>
<b>ESDA</b> (European Sound Directors' Association)	<b>Extension</b>	<ul style="list-style-type: none"> <li>- Urgent consideration should be given to changing the term of copyright in sound recordings to safeguard the revenues of European produced sound recordings that would otherwise be due to producers and performers</li> <li>- concerned that any adjustment of the term of protection of phonograms applies a parallel extension to the performers' rights to equitable remuneration</li> </ul>
<b>Music Business Forum</b>		<ul style="list-style-type: none"> <li>- It promotes entrepreneurship in the creative economy, a sector of increasing importance for the UK's international competitiveness, and benefits consumers by generating innovation and investment in new British music</li> <li>- An appropriate duration of copyright for performances and sound recordings is fundamental to the ability of the music sector in Britain to continue to take a leading role, culturally and economically, on the international stage</li> </ul>
<b>ASLIB</b> (Association for Information Management) <b>LACA</b> (Libraries and archives copyright alliance) <b>McLean, Wallace</b> <b>SCONUL</b> (Society of College, National and University Libraries)	<b>NO extension</b>	<p>Actually talk about author's rights....(but can presume same for related rights)</p>



<p><b>ARD / ZDF</b></p> <p><b>BAK</b> (Bundesarbeitskammer)</p> <p><b>BEUC</b> (European Consumers' Organisation)</p> <p><b>Naxos</b></p> <p><b>PEARLE</b> (Performing Arts Employers Associations League Europe)</p> <p><b>Publishers Association UK</b></p> <p><b>S., Christiano</b></p> <p><b>Schaefer, Franz</b></p> <p><b>STM</b> (International Association of Scientific, Technical and Medical Publishers)</p> <p><b>Wirtschaftskammer Austria</b></p>	<p><b>NO extension</b></p>	<ul style="list-style-type: none"> <li>-IP Content should be available for public – Art 11 and Art 17 EU Charter of Fundamental Rights (Freedom of expression and information &amp; Right to Property)</li> <li>- Good balance of interests already found in 1993</li> <li>- Too soon to re-open debate and extend again</li> <li>- Music will disappear in archives</li> <li>- Only “top seller” works will be produced for economic reasons</li> <li>- US protects especially producer industry.</li> <li>- Further extension will benefit producers and not artists. New creative impulse would be hindered, not encouraged.</li> <li>- most artists that would be affected of an extension are either no longer recording or have deceased and will not therefore be motivated to make new recordings just because copyright extension has been granted to them</li> <li>- The effect of extending the copyright period would diminish the availability of a broad range of music at an affordable price</li> </ul>
<p><b>BSAC</b> (British Screen Advisory Council)</p> <p><b>Law Society of Scotland</b></p>		
<p><b>CRID</b> (Centre de Recherches Informatique et Droit)</p>		<ul style="list-style-type: none"> <li>- US legal regime of copyright does not know the notion of a related right in the musical sector (the 95-yrs-term of protection for musical works applies to copyright in sound recordings and not to a related right in music productions)</li> <li>- the extension of the duration of copyright in the US was based on the will to align the term of protection to that of the EU (some specific provisions of the US copyright regime – e.g. works made for hire, sound recordings – required another way of calculating the duration than the death of the author)</li> </ul>
<p><b>EDRI</b> (European Digital Rights)</p> <p><b>FIPR</b> (Foundation for</p>		<ul style="list-style-type: none"> <li>- extension would diminish the choice of music on the market in Europe and undermine reprint houses, depriving them of income they now earn lawfully by republishing out-of-copyright works; and it is not possible to motivate dead authors to create new works</li> <li>- a “use it or lose it”-clause should be introduced into copyright law: if a work has been unavailable to</li> </ul>

Information Policy Research) <b>VOSN</b> (Foundation for Open Source, Netherlands) <b>EFFI</b> (Electronic Frontier Finland)		the public for three yrs the creator should be able to reclaim the copyright from the publisher; if the creator does not exercise this right, then, after a further two yrs, the copyright should expire and the work should fall into the public domain
<b>EICTA</b> (European Industry Association) <b>Intellect</b> <b>Nokia corporation</b> <b>TMPDF</b> (Trade Marks, Patents & Designs Federation)		Term of protection is part of the balance between interested parties which in this field includes not just the producers of the sound recording and the public but also would have impact on balance between owners of copyrights and right owners of related rights - a change in the term of protection would undoubtedly be argued to impact the question of fair compensation (“levies”) for private copying, which would serve to further exacerbate current problems with levies as applied in some MS
<b>Foundation for a Free Information Infrastructure</b>		- lack of economic rationale: the expansion mechanism does not provide a long time perspective on which the market can trust; an ex-post prolongation would not provide any incentive for businesses as only historic works are covered that are already there (only the RH of expiration candidates would benefit) - public domain creates a lot of opportunities for businesses to make profit from recycling old works - trust in legislation would be undermined - prolongation in the US is often regarded as an example of political failure
<b>National Consumer Council</b>		- it remains unclear how an extension meaningfully adds to the incentives to produce new works to justify the loss of public benefit - there can be little justification for extending the term merely because the US has
<b>Wind Telecomunicazioni S.p.A.</b>		- suggests a system of (ex ante) compulsory licensing and (ex post) determination of the appropriate consideration thereof, according to fair and reasonable criteria by independent third parties - favours reduction of copyright term

## 2. RETROACTIVITY

For both options concerning term extension, the issue of when the term extension should apply (either retroactively or not) has to be considered. There are different degrees of retroactivity that can be chosen in providing a term extension.

- If one applied the term extension only to new recordings, created after the entry into force of the amended Term Directive, one could perhaps imagine that performers would be stimulated to increase their creative activity. Moreover, the real financial benefit for the extra protection would be found far into the future, although could be accounted for as net present value in the short term. Extending the term for new performances and recordings only is a simple solution, but does not provide any immediate relief to the problems identified earlier in this impact assessment. It is for this reason that it is not of interest to performer representatives and is excluded from further detailed analysis.
- A partially retroactive term extension would provide supplementary revenue for existing recordings that **soon to fall into the public domain**. This is the sort of extension that is of greater interest to related rights holders because the financial advantages would be felt in the near term, especially for recordings that are from the 50's and 60's. This is the approach used in Directive 2001/29/EC in its Article 10. This means that the extension would apply to all sound recordings which were still protected on the date of adoption (or coming into force) of the amended Directive<sup>122</sup>.
- Full retro-active extension covers all recordings which are under protection as if the extended term had applied as from the start of protection. In other words, it would be as though the recording was protected for 95 years when it was produced. This solution generates the maximum value for right holders, but requires a mechanism to compensate for the revival of rights and to exonerate users of music which was no longer protected under the old term but is protected again under the new term. The problem of revival of rights arose after the adoption of the Term Directive in 1993. A case was brought to the European Court of Justice (the Butterfly Case – see footnote 106) to clarify what would be a reasonable time to allow for third parties to continue selling reissues of public domain material when the rights had revived and therefore returned to the original copyright holder.

	<b>New acts only</b>	<b>Partially retro-active</b>	<b>Fully retro-active</b>
Advantages	Simple	Simple	Maximum value for right holders
Disadvantages	No immediate benefit to right holders	Immediate benefit to many right holders	Complicated Risk of legal uncertainty

**Table 1A: Impacts of retroactive extension**

<sup>122</sup> This will avoid the problem that arose with acquired rights on recordings which had fallen out of protection before the amended Term Directive entered into force on 1 July 1995, but which were eligible for the extended term and resulted in a legal dispute at the ECJ. (Case C-60/98, *Butterfly Music v CEMED*, judgement of 29 June 1999).

It appears that a partially retro-active extension, with a specific cut off date, would be the simplest solution as regards the legal and administrative aspects and would bring the most benefit to right holders from the start.

### 3. IMPACT OF 45 YEAR TERM EXTENSION: METHODOLOGY

This section explains the methodology employed to quantify the impact of a 45 year term extension on performers and record producers. The estimation is based on the PWC study, which is the only study that is based on actual historical data. Other studies would lead to different estimates.

Because the PWC study is based on actual data, it enables us to add a concrete dimension to the results. This study applies to the UK and it analyses the revenues from music sales, licence fee income and other royalty income. The value of the initial 50 year term for sales in the UK is calculated to reach £ 8.568 billion. The high-end estimate of total present value of the 95-year period would amount to £ 8.731 billion, whereas the low-end estimate would yield £ 8.576 billion.<sup>123</sup> A 45 year extension of the term of protection would create between £ 8.5 million and £ 163 million in additional revenues.<sup>124</sup>

The PWC study is limited to the UK sales revenue. As EU sales are 3.5 times larger than the UK sales<sup>125</sup>, it can be roughly estimated that a 45 year term extension would generate between € 44 million and € 843 million in additional revenues for the EU.<sup>126</sup>

The additional income, however, will not be evenly spread over the additional period of the 45 years. Different assumptions of the distribution of income have been taken into account. This impact assessment is based on calculations provided by the PWC study which states that the financial benefit that will accrue to the UK music industry in the first ten years amounts to between £ 2.2 and £ 35 million. Again, this benefit could be approximated to a financial benefit of between € 11.4 million and € 181 million in Europe in the first ten years.

Furthermore, the estimates provided by the PWC apply to the music industry (i.e. performers and record producers together). In order to determine the impact of a 45 year term extension on individual performers, it must first be determined how much of the additional income would accrue to performers as opposed to record producers. The CIPIL study assumes that performers obtain a 5-15% share from sales of sound recordings. We take the average value of 10% to estimate the performers' share of sales revenue. The sum of € 44 to € 843 million is therefore distributed as follows:

- Performers obtain a present value of between € 4 million and € 84 million during the extended term, whereas record producers obtain a present value of between € 39 million and € 758 million.

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<sup>123</sup> The higher range estimate assumes, in favour of the proponents of term extension, that the expiry of copyright entails a 100% market share loss, whereas the lower end estimate assumes no market loss.

<sup>124</sup> The low-end estimate assumes the loss of market share of 0%, whereas the high-end estimate assumes the loss of market share of 100%.

<sup>125</sup> IFPI, 2007.

<sup>126</sup> 2006 exchange rate EUR/GBP. IFPI, 2007.

- In the first decade, performers would get between € 1.1 million and € 18 million, whereas record producers would get between € 10.2 million and € 163 million.

To determine what, on average, this implies for an individual performer, the number of performers benefiting from the additional revenue must be estimated. The UK House of Commons Culture, Media and Sport Committee report provides an estimate. It concludes that, over the next ten year, over 7000 performers would lose protection if the term was not extended<sup>127</sup>. This means that if we extrapolate the UK estimate to the EU, approximately 24500 performers would lose protection in the first decade. By dividing the financial benefits for performers (€ 1.1 million and € 18 million) by 24500 performers, the average additional benefit per performer ranges from € 46 and € 737.

The average additional benefit per performers would increase if the effects of a fund proposed in sub-option 2b would be factored in. Under this model, 20% of the record producers' benefit from term extension would be redistributed to performers. The fund would therefore yield between € 7.8 million and € 151.7 million in the whole period and between € 2 million and € 32.5 million in the first decade.

If the fund were set up, the income to performers and record producers would therefore have to be redistributed:

- In the first decade, performers benefit would be increased to between € 3.2 million and € 50.6 million; whereas record producers would obtain between € 8.2 million and € 130.1 million.
- Average financial benefit to a performer would yield to between € 130 and € 2065.

It results from the above that the establishment of the fund would increase average payments per performers 2.8 times.

An increase in A&R spending and a better financial situation of the recording industry will therefore provide increased opportunities for performers in both popular and niche repertoire. According to the PWC study, A&R amounts to 17% of revenues.

- If the estimated financial benefit of the record producers is between € 39 million and € 758.5 million, this results in the additional A&R value of between € 6.7 million and € 129 million. If, however, a fund diverting 20% of record producers' additional revenue to performers were set up, record companies' additional revenue would be between € 31.3 million and € 607 million, which would result in the additional A&R value of between € 5.3 million and € 103 million.
- In the first decade, the additional A&R value would be between € 1.7 million and € 27.6 million. If, however, a fund diverting 20% of record producers' additional revenue to performers were set up, the additional A&R value would be between € 1.4 million and € 22.1 million.
- Part of this additional investment will benefit directly new EU performers.

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<sup>127</sup> UK House of Commons Committee for Culture, Media and Sport, May 2007.

WHOLE PERIOD		UK (million £)	EU (million €)	Benefit without fund (million €)	A&R / average (without fund) (million €)		Fund (million €)	Benefit with fund (million €)	A&R / average (with fund) (million €)	
Loss of market share of 100%	Record producers	162.8	842.7	758.5	A&R	128.9	151.7	606.8	A&R	103.2
	Performers			84.3	avg	/		236.0	avg	/
Loss of market share of 50%	Record producers	143.1	740.8	666.7	A&R	113.3	133.3	533.3	A&R	90.7
	Performers			74.1	avg	/		207.4	avg	/
Loss of market share of 0%	Record producers	8.4	43.5	39.1	A&R	6.7	7.8	31.3	A&R	5.3
	Performers			4.3	avg	/		12.2	avg	/
FIRST TEN YEARS		UK (million £)	EU (million €)	Benefit without fund (million €)	A&R / average (without fund) (million €)		Fund (million €)	Benefit with fund (million €)	A&R / average (with fund) (million €)	
Loss of market share of 100%	Record producers	34.9	180.7	162.6	A&R	27.6	32.5	130.1	A&R	22.1
	Performers			18.1	avg	737.4		50.6	avg	2064.7
Loss of market share of 50%	Record producers	27.3	141.3	127.2	A&R	21.6	25.4	101.7	A&R	17.3
	Performers			14.1	avg	576.8		39.6	avg	1615.1
Loss of market share of 0%	Record producers	2.2	11.4	10.2	A&R	1.7	2.0	8.2	A&R	1.4
	Performers			1.1	avg	46.5		3.2	avg	130.2
avg = average										

**Table 2A: Impacts on performers and record producers**

#### 4. ROYALTY FLOWS BETWEEN THE EU AND THE US FOR SECONDARY EXPLOITATION OF PHONOGRAMS UNDER INTERNATIONAL AGREEMENTS

The main international conventions for the protection of phonograms are the 1961 Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations, and the WIPO Performances and Phonograms Treaty. The EC is party only to the WPPT but has not yet ratified. The U.S. is also party to the WPPT but has ratified. All EU Member States are parties to the Rome Convention.

##### 4.1. Broadcasting and communication to the public of 'US phonograms'

###### 4.1.1. Under the Rome Convention

The Rome Convention provides that broadcasting and communication to the public of phonograms gives rise to the payment of a single equitable remuneration to the producers or performers or both (Article 12). Although the US is not a party to the Rome Convention, it can still benefit from protection under the Convention, because in principle Contracting Parties to the Convention apply the so-called 'national treatment' principle to performers and producers. This means that in a Contracting Party certain producers and performers who are not nationals of that state should be treated in the same way as nationals, i.e. granted the same rights.

The Rome Convention provides criteria (so-called 'points of attachment') to establish which record producers and performers are entitled to national treatment. Under Article 5 of the Convention, *producers* are protected if they are nationals of a Contracting State to the Convention ('*nationality criteria*'), or if the sound was fixed in the record in another Contracting State ('*fixation criteria*'), or if the phonogram was first published in another contracting state ('*publication criteria*'). This would not cover US records. However, under Article 5(2), if a phonogram is published first in a non-contracting state, such as the US, and published within 30 days in another contracting state, such as the UK, it will be eligible for national treatment ('*simultaneous publication*'). In that situation, by virtue of article 4 of the Convention, the *performer* whose performance is recorded will also be eligible for protection under the Convention. This means it is possible for records produced by a US company, recorded in the US and by US artists, published first in the US but published in the UK or another State which is party to the Convention within 30 days, to enjoy protection under the Convention in all the contracting states, i.e. in effect in all EU Member States.

However, Contracting Parties to the Rome Convention may limit the application of certain criteria by way of notification under Article 5(3). Parties may decide not to apply either the '*publication criteria*' or the '*fixation criteria*' to determine whether a producer (and indirectly, a performer) is eligible for national treatment. If a State retains only the fixation criteria, '*simultaneous publication*' will no longer qualify a US phonogram for protection under the Convention. This is the case in the following EU Member States: Belgium, Denmark, Estonia, Finland, France, Italy, Luxemburg, Poland, Slovenia and Spain. As a result, these EU Member States will not apply the Rome Convention and will not grant a reproduction right or a right to single equitable remuneration to phonograms produced by a US producer, or first fixed in the US.

Moreover, under Article 16(1)(a), States may decide to not apply or limit the effect of Article 12 of the Convention (single equitable remuneration). Possible limitations include not applying equitable remuneration to phonograms the producer of which is not a national of another Contracting State. This reservation has been notified by the following EU Member States: Austria, Belgium, Bulgaria, Estonia, France, Italy, Lithuania, Latvia, Netherlands, Czech Republic, Romania, UK, Slovakia and Spain. As a result of those exemptions, these Member States will not apply equitable remuneration to phonograms produced by a US record producer.

#### 4.1.2. *Under the WPPT*

The WPPT is currently in force in the US and in several EU Member States, i.e. Belgium, Cyprus, the Czech Republic, Hungary, Latvia, Lithuania, Poland and Romania. The EC is due to ratify the WPPT.

The WPPT provides for a right to equitable remuneration for broadcasting and communication to the public of works<sup>128</sup>. It also applies the principle of national treatment to certain producers and performers. The notifications made under Article 5(3) of the Rome Convention may be notified also under the WPPT, thus allowing Parties to choose a first publication or first fixation criteria for eligibility for national treatment. It is generally understood that EU Member States will be free to make such notifications even after ratification of the WPPT by the EC. However, these reservations lose their significance regarding the US, which is a party to WPPT. Phonograms produced by a US producers will in any case be entitled to national treatment under the WPPT.

However, the US has notified reservations in relation to single equitable remuneration under Article 15(3). The US reservation reads as follows: "the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law". This means that in effect, the US does not apply single equitable remuneration for broadcasting and communications to the public.

Due to the US reservation, other parties to the WPPT are entitled not to apply national treatment to US nationals (Article 4(2)). Under WPPT, EU Member States would not have to provide that US companies receive single equitable remuneration for the broadcasting and communication to the public of phonograms produced by US producers and recorded by US performers. They would have to protect US produced phonograms only in relation to certain acts of broadcasting and communication to the public as provided under US law.

However, phonograms produced by a US producer would still be entitled to national treatment in other respects, i.e. in relation to the rights of reproduction, distribution, rental and making available.

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<sup>128</sup> Under the WPPT, Performers and producers enjoy rights of reproduction, distribution, rental, and making available.



## 4.2. Protection of 'EU phonograms' in the US

Under US Law, sound recordings enjoy copyright protection<sup>129</sup>. Sound recordings are protected by law provided that the author is a US or 'treaty party', that the work was first published in the US or a 'treaty party', or fixed by a national of a 'treaty party'<sup>130</sup>. In other words, a record produced by an EU record producer, first published in the EU or first fixed in the EU qualifies for protection in the US.

Term of protection: The author and of a sound recording is the person who creates it by fixing it in a copy or phonorecord for the first time. Although the author is the initial owner of a copyright, it seems sound recordings generally qualify as works made for hire<sup>131</sup> (at any rate they are usually registered as such with the US Copyright Office), and thus enjoy a term of protection of 95 years from creation<sup>132</sup>. Under US law, works created after January 1<sup>st</sup> 1978 are protected, as long as the work qualifies under section 104 of the US Copyright Act. Thus US does not apply a comparison of terms.

Rights in sound recordings: the copyright in a sound recording entitles the owner to the rights of reproduction, distribution, rental, lending, the right to make derivative works and the right to perform the copyrighted work publicly by means of a digital audio transmission<sup>133</sup>. The copyright owner does not have the right to authorise performance of the sound recording publically, i.e. to authorise broadcasting and communication to the public, other than 'digital audio transmissions'. The right to authorise digital audio transmissions covers essentially webcasting and digital subscription services. In addition, where the transmission is not interactive, the consent of the owner of the copyright in the sound recording is not required. Instead, use of the sound recording is subject to a statutory licence. Payments under the statutory licence are divided between producers and performers on a 50-50 basis.

Rights of performers: Performers are not the initial owners of the copyright (i.e. they don't undertake to fix the record and they might be subject to work for hire) in a sound recording. They enjoy very limited rights (in addition to the share of the revenues from the statutory licence for non interactive webcasting). The protection of performers is essentially limited to a protection against bootlegging and trafficking in bootlegged recordings, see 17 U.S.C. 1101.

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<sup>129</sup> 17 U.S.C. 102(7) refers to 'sound recordings', which are defined in section 101 as 'works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work'.

<sup>130</sup> 17 U.S.C. 104. 'Treaty party' refers *inter alia* to parties to WTO and WPPT.

<sup>131</sup> 17 U.S.C. 201(b).

<sup>132</sup> 17 U.S.C. 302(c).

<sup>133</sup> 17 U.S.C. 114(a) and 106.