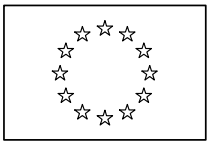

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
COM(2008) 464/3

2008/xxxx (CNS)

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

amending Directive 2006/116/EC of the European Parliament an of the Council on the term of protection of copyright and certain related rights

(presented by the Commission)

{SEC(2008) 2287}
{SEC(2008) 2288}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

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

The large scale production of phonograms is essentially a phenomenon that commenced in the 1950s. If nothing is done, over the next 10 years an increasing amount of performances recorded and released between 1957 and 1967 will lose protection. Once their performance fixed in a phonogram is no longer protected, around 7000 performers in any of the big Member States and a correspondingly smaller number in the smaller Member States will lose all of their income that derives from contractual royalties and statutory remuneration claims from broadcasting and public communication of their performances in bars and discotheques.

This affects featured performers (those who receive contractual royalties) but especially the thousands of anonymous session musicians (those who do not receive royalties and rely solely on statutory remuneration claims) who contributed to phonograms in the late fifties and sixties and have assigned their exclusive rights to the phonogram producer against a flat fee payment ('buy out'). Their 'single equitable remuneration' payments for broadcasting and communication to the public, which are never assigned to the phonogram producer, would cease.

In addition, the proposal also seeks to introduce a uniform way of calculating the term of protection that applies to a musical composition with words which contains the contributions of several authors. For example, a musical piece, for instance pop music or an opera, often includes lyrics (or a libretto) and a musical score. In different Member States, such co-written musical compositions are either classified as a **single work** of joint authorship with a unitary term of protection, running from the death of the last surviving co-author or as **separate works** with separate terms running from the death of each contributing author.

This means that in some Member States[1], a musical composition with words will be protected until 70 years after the last contributing author dies, while in other Member States[2], each contribution will lose protection 70 years after its author dies. These discrepancies in term that apply to one musical composition lead to difficulties in administering copyright in co-written works across the Community. It also leads to difficulties in cross-border distribution of royalties for exploitation that occurs in different Member States.

- **General context**

The social situation of performers

The current employment status and conditions for the average European performer are not very rewarding. Only famous performers, so-called featured artists that have signed a royalty-bearing contract with a major record label, are able to 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

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1 Belgium, Bulgaria, Estonia, France, Greece, Italy (for operas), Latvia, Lithuania, Portugal, Spain, Slovakia.

2 Austria, Cyprus, Czech Republic, Denmark, Germany, Finland, Hungary, Ireland, Italy (except for operas), Luxembourg, Malta, the Netherlands, Poland, Romania, Slovenia, Sweden, and the UK.

performers[3]. 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[4].

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[5]. Overall, only 5% of performers actually make a living from their profession – all the others have to seek parallel employment.

Performers usually transfer their most economically significant exclusive copyrights to record companies via contract. In most cases, individual performers have little bargaining power[6]. When signing a contract with a phonogram producer, performers 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, i.e., musicians that are hired on an ad hoc basis to play for a recording 'session', cannot negotiate at all, they have to transfer their copyrights 'in perpetuity' against a one off payment.

Contractual relations between record companies and performing artists vary greatly but typically fall into two categories:[7]

- Session artists are generally paid a flat fee as their exclusive copyrights are bought out by the producer. Accordingly, their remuneration does not increase if the record becomes a huge success.
- Featured artists' contracts usually provide for a royalty-based remuneration. Depending on their fame and bargaining power, performers usually receive net royalties of 5-15% of revenues[8].

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[9]. 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

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3 AEPO study – "Performers' Rights in European Legislation: Situation and Elements for Improvement.", July 2007, p. 89

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

5 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.

6 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", *Silvertone Records Limited v. Mountfield and Others*, [1993] EMLR 152.

7 Adapted from contribution from Naxos to Commission questionnaire – May 2006.

8 CIPIL Study, p.36.

9 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 *Silvertone Records Limited v. Mountfield and Others*, [1993] EMLR 152.

the record company to recoup its initial investment (only 1 in 8 CDs is profitable)[10], royalty payments are often not paid out at all.

However, performers also receive revenue from other sources. They receive income from collecting societies which administer so-called secondary remuneration claims. There are three principal sources: (1) equitable remuneration for broadcasting and communication to the public, (2) private copying levies and (3) equitable remuneration for the transfer of the performers' rental right. All of these sources are commonly referred to as 'secondary' sources of income and are paid to performers directly through their collecting societies. These payments are not affected by their contractual arrangements with the record companies.

Many European performers (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. For session musicians, who play background music, and lesser known artists, that means that broadcasting and public performance income decreases when they 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.

The economic challenges faced by phonogram producers

As regards producers of phonograms, the principal challenges they face are the evaporation of the CD markets and the insufficient replacement revenue from online sales. The latter is due to peer-to-peer piracy. The EU recorded music industry has suffered a decline in record sales: sales of music CDs peaked in 2000 and have been falling at an average rate of 6% ever since[11]. Estimates for the future show a continued decrease in physical album sales from $12.1bn in 2006 to $10.3bn by 2010[12]. Since 2001, the total European market for recorded music has lost 22% of its value[13].

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.

Due to losses in revenue, Universal's total number of employees which in 2003 amounted to 12000 was down to 7600 in 2006[14]. After an initial reduction in employees in 2006, EMI also

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10 Comment from IFPI.

11 "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.

12 Figures from PricewaterhouseCoopers, Financial Times, 6 July 2006.

13 Article from the Times, 14 February 2007.

14 Interview with IFPI - and John Kennedy - on 29/3/2006 in Copyright Unit of DG MARKT.

announced a second reduction of 2000 jobs (about one third of its work force) in January 2008[15]. 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[16]. EMI has also been reducing its advertising expenditure[17].

In these circumstances, the European record industry faces 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.

Co-written musical works

Music is overwhelmingly co-written. For example, regarding opera, there are often different authors to the music and to the lyrics. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

An analysis of the most popular French songs for the period 1919-2005 shows that 77 % of those songs are co-written. A similar analysis of the most popular songs in the UK for the period 1912-2003 shows that 61% of those songs are co-written.[18] Regarding newly created works, another survey sampling around 2000 newly registered works with SGAE the Spanish collective rights management society, in 2005-2006, reveals that over 60% of such works are co-written.[19]

The opera "Pelléas et Mélisande" illustrates how the different methods of calculating the term for co-written musical compositions results in different terms of protection for this composition across different Member States. Debussy, the composer, died in 1919, while Maeterlinck, the librettist, died much later in 1946. In those Member States that apply a unitary term (e.g., France, Portugal, Spain, Greece, Lithuania) the entire opera remains protected up to the year 2016 (life of the last surviving author, Maeterlinck plus seventy years). In those countries that consider the music and the libretto as two distinct works (e.g., United Kingdom, Netherlands, Austria, Poland, Slovenia) or two works that can be exploited separately (e.g., Czech Republic, Hungary, Germany) the protection of the music expired in 1989 while only the words (the libretto) remain protected until 2016.

Other examples include: Johann Strauss' operetta 'The Gipsy Baron'[20]; the song 'Fascination (Love in the afternoon)', music by Fermo D. Marchetti (died 1940) and lyrics by Maurice de Féraudy (died 1932); the song 'When Irish Eyes Are Smiling', music by Ernest R. Ball (died 1927) and lyrics by Chauncey Olcott (died 1932) and George Graff, Jr. (died 1973).

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15 International Herald Tribune, The Associated Press, January 14, 2008

16 EMI response to Gowers Review, 2006. EMI's workforce was reduced by a third to 6,000 persons.

17 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.

18 Figures provided by the International Confederation of Music Publishers (ICMP).

19 GESAC, September 2006.

20 Johann Strauss died in 1899, while one of the authors of the libretto, Leo Stein, died in 1921. The music was in the public domain in Germany in 1929, while the text was protected until 1991. In Belgium, the entire operetta was protected until 1981, and in Italy, until the end of 1977.

In the latter example, in those Member States that apply a unitary term, the entire song "When Irish eyes are smiling" would be protected until 2043. In those countries that consider the music and the lyrics as distinct works or apt for separate exploitation, the protection for the music expired in 1997 while only the lyrics would be protected until 2043.

- **Existing provisions in the area of the proposal**

The terms of protection for copyright and related rights were harmonised by Directive 93/98/EEC which was subsequently codified by Directive 2006/116/EC. The codification did not entail any substantive changes to the Directive. The term of protection for performers and phonogram producers is set out at 50 years after publication in these Directives whereas the current proposal would extend that protection to 95 years after publication. The current Directive contains no specific rules on co-written musical compositions with words.

- **Consistency with the other policies and objectives of the Union**

This proposal is in line with the objectives of the EU to promote social welfare and inclusion. Performers, and especially session musicians, are among the poorest earners in Europe, despite their considerable contribution to Europe's vibrant cultural diversity. In addition, the sound record industry that promotes European performers and produces in European studios faces significant challenges which undermine its competitiveness: rampant online piracy in many parts of the Community has lead to significant losses. The ability of the music industry to finance new talent and adapt to dematerialised distribution appears severely undermined.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

In the context of the Review of the EC legal framework in the field of copyright and related rights, a Commission Staff Working Paper was published on 19 July 2004. Interested parties were invited to submit their comments by 31 October 2004. 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.

During 2006-2007, Commission services had meetings with a variety of stakeholders on a bilateral basis 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.

Summary of responses and how they have been taken into account

Responses in favour of term extension came from performers' associations, the recording industry, collecting societies, music publishers, performing artists and music managers. Those against term extension were telecoms, libraries, consumers and public domain companies. The arguments of those against term extension were addressed in the analysis of impacts of the various options.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The impact assessment (available at http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm) presents a total of seven options and discusses six of them. The options analysed were: (1) do nothing, (2) extend the term of protection to 'life or 50 years' for performers only, (3) extend the term of protection to 95 years for performers and phonogram producers, (4) promote performers' moral rights, (5) introduce a 'use it or lose it' clause in sound recording contracts and (6) establish a fund dedicated to session musicians.

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 an advisable option. If nothing is done, thousands of European performers whose performances were recorded in the late fifties and sixties would lose all of their contractual royalty income or statutory remuneration for broadcasting and communication to the public 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. Production might have to be tailored to US tastes where a longer term of protection prevails.

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 for online sales) appears promising, but at this stage premature. It is unclear who would pay for this additional statutory remuneration claim 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 and would thus not make an incremental contribution to performers' remuneration. 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. This could positively impact on their remuneration and also foster availability of previously unused repertoire. On the other hand, this option, if applied in isolation, might be considered as an undue regulatory interference in the sanctity of ongoing contracts. Option 3d, the fund to be set up by phonogram producers, would be very beneficial for session musicians who transferred all their exclusive rights as part of their initial 'buy out' contracts. Record producers, however, would have to set aside at least 20% of the additional revenue generated by the sale of those phonograms they choose to commercially exploit during the term extension. The impact assessment does show, however, that the expected profits in the extended term would suffice to finance the 20% set aside in favour of session musicians (see below).

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. But linking the term of protection to the lifetime of performers would create complex situations when a sound track comprises contributions by several performers. Rules would then need to be established on how to determine whose death triggers the term of

protection. This would be, as the continued uncertainty on the term applicable to co-written works demonstrates, entail a significant administrative burden. In addition, Option 2a would not increase the A&R resources available to record producers.

Option 2b would increase the pool of A&R resources available to phonogram record producers and could thus have an additional positive impact on cultural diversity. The 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 it does not link the term of protection to the, sometimes very different lifetimes of individual co-performers but to a uniform date, i.e., the publication of the phonogram that contains the performance.

On the other hand, the impact on users would be minimal. This is true in relation to statutory remuneration claims and for the sale of CDs:

- First, 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 (a parameter independent of how many phonograms are in or out of copyright).
- Empirical studies also show that the price of sound recordings that are out of copyright are not lower than that of sound recordings in copyright. A study by Price Waterhouse Coopers concluded that there was no systematic difference between prices of in-copyright and out-of copyright recordings. 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.

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.

The impact on so-called public domain producers would be minimal. While those companies could that they have to wait longer to produce phonograms in which the performers and phonogram producers' rights have expired, the works performed in a phonogram would not lose protection once the term of protection for the phonogram expires. This is because the work performed on a phonogram remains protected for the life of the author (songwriter and composer) who wrote the work. As authors' rights last for the life of the songwriter or the composer plus seventy years, copyright protection for a musical work can last for between 140 and 160 years. It is therefore wrong to say that a performance fixed in a phonogram is in the 'public domain' once the protection for performers and phonogram producers lapses.

A 'use it or lose it' clause in contracts between performers and their producer would be beneficial for performers as it would mean that they would be in a better position to ensure their creative output reaches the public, should the phonogram producer decide not to publish or otherwise offer older sound phonograms to the public.

Option b, strengthening and harmonising the moral rights of performers, would bring some non-pecuniary benefits to performers, by allowing them to restrict objectionable uses of their performances. However, the strengthening of moral rights has no financial impact on performers and record producers and would thus not make an incremental contribution to performers' remuneration.

The creation of a fund for session musicians would be beneficial to that group and would ensure that they are included in the financial benefits of a term extension, which they would otherwise be largely excluded from under their "buy out" contracts. The fund's impact on session musicians would be positive, as the average performer' additional annual revenues during a 45-year term would rise from between € 47 and € 737 to between € 130 and € 2065, i.e., would almost triple[21].

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). The IA analyses the cost structure of a CD and concludes that there will remain incentives for producers to market sound recordings during the extended term and still make a profit of approximately 17%.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The proposal is to extend the term of protection for performers and phonogram producers to from 50 years to 95 years. In order to **achieve the right balance** between the benefits to record companies and featured artists and the genuine social needs of sessions musicians, the proposal contains certain accompanying measures such as establishing a fund for session musicians, introducing 'use it or lose it' clauses in contracts between performers and phonogram producers and a 'clean slate' for contracts in the extended period beyond the initial 50 years. This proposal would introduce amendments to Directive 2006/116/EC.

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[21] 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.

- **Legal basis**

Articles 47(2), 55 and 95 of the EC Treaty

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the Community. The reason why the Community has 'exclusive competence' in this area is because the existing legislation, as contained in Directive 2006/116/EC (the Directive) provides full harmonisation. The Directive provides for minimum and maximum harmonisation concurrently. This means that Member States may neither provide for shorter or for longer terms of protection than those prescribed by the Directive (recital 2). The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

The above mentioned 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, can best be achieved by changes to the performers' and producers term of protection. Although other social measures in favour of performers are often mentioned (subsidies, inclusion in social security schemes), such measures have rarely materialised and the status and livelihood of creators is usually linked to royalties and remuneration payments that stem from copyright. A term-based proposal would thus increase income for performers.

Within the term based approaches, the approach based on a term that is triggered by a uniform event, such as publication of a phonogram is clearly preferable to a term based on the individual life of a performer. Linking the term of protection of performers to their individual life would lead to increased legislative burdens for Member States and considerable legal uncertainty as to the determination of the event that triggers the term. This is because of difficulties in relation to establish a uniform trigger point in cases of co-performances. Co-performances are the norm, i.e. performances by a band, an orchestra or a featured artists accompanied by session musicians. There are currently no rules providing for the calculation of the term of protection in such cases, 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, the issue would arise whose death triggers the term. In cases of several co-performers it would seem appropriate to calculate the term from the death of the last surviving performer. 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 either.

The proposal to extend the term of protection for performers and phonogram producers would mean a numerical change (substituting 50 by 95) to the current national legislation on related rights found in the EU Member States. The accompanying measures leave flexibility to MS on how to apply them and the administrative burden falls more on the phonogram producers and collecting societies.

The change in national copyright laws would be minimal and there would be no financial burden on any public authorities. Empirical studies also show that the price of sound recordings that are out of copyright is not lower than that of sound recordings in copyright. A recent study by Price Waterhouse Coopers 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.

Phonogram producers will have to each contribute to a fund and collecting societies will have to administer these revenues. However, their administrative burden inherent in setting aside 20% of revenues that are generated with the sales of phonograms containing performances by session musicians during the extended term would be offset by the advantages session musicians will enjoy through term extension. The level of the fund strikes a balance between the need to generate and appreciable incremental increase in the revenues of session musicians and the need to ensure that phonogram producers still derive sufficient profits from sales to have an incentive to market phonograms in the extended term.

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 venture a guess at the profitability of the one successful CD by comparing its profit margin with that of the remaining seven CDs. Assuming that: 5 CDs ("b" through "f" in the example) break even (profit = 0), which is extremely optimistic and 2 CDs ("g" and "h") make a loss (for "g" the loss is 30; for "h" the loss is 40); then the successful CD "a" 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 "a", 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%.

	a	B	C	d	e	f	g	h	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%**	**9.1%**

As mentioned above, a fund based on setting aside 20% of revenue that is generated by phonograms in the extended term would triple the benefit that individual performers derive from an extension of term.

The proposed remedy on musical compositions with words is the least intrusive instrument to achieve a uniform term for musical compositions.

The effect of this proposed new Article 1(7) would be that, only for the purpose of calculating its term of protection, a musical composition with words would be treated as if it were a work

of joint authorship, whether or not this composition with words would qualify as a work of joint authorship under national rules.

This approach is in line with the subsidiarity principle. It would leave intact Member States discretion to determine what work constitutes a work of joint authorship. On the other hand, it introduces a minimum level of harmonisation, so that the term of all musical compositions with words which contain two or more separate contributions would be calculated in a uniform way.

- **Choice of instruments**

The proposed instrument is a Directive. Other means would not be adequate since the term of protection was already harmonised via a Directive, the only possibility to extend this term is to amend the said Directive.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5. ADDITIONAL INFORMATION

- **European Economic Area**

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.

- **Detailed explanation of the proposal**

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

The text provides that if a phonogram is lawfully published or communicated to the public within 50 years of its fixation, the rights shall expire 95 years after publication or communication to the public. If a performance is embodied in a phonogram which is lawfully published or communicated to the public within 50 years of its fixation, the rights shall expire 95 years after publication or communication to the public

The newly proposed Article 10a would introduce a series of measures accompanying the term extension while Article 10(5) would contain the rules on which phonograms and performances are affected by the proposal.

The aim of the measures contained in Article 10a is largely to ensure that featured and non-featured performers whose performances are fixed in a phonogram effectively benefit from the proposed term extension.

Article 10a (3), (4) and (5) envisage to remedy the situation that session musicians (musicians that do not enjoy recurring contractual royalty payments), upon entering into a contractual relationship with a phonogram producer, often have to transfer their exclusive rights of reproduction, distribution and 'making available' to the phonogram producers. Session musicians transfer their exclusive rights against a one-off payment ('buy out').

The proposed remedy for the 'buy out' is that session musicians will obtain a claim to receive a yearly payment from a dedicated fund. In order to fund these payments, phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, rental, reproduction and 'making available'

of phonograms which, in the absence of term extension, would no longer be protected under Article 3. In order to ensure the most granular possible level of distribution to session musicians, Member States may require that distribution of these monies is entrusted to collecting societies representing performers.

Producers' revenues deriving from single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying shall not be included in the revenues to be set aside in favour of session musicians, as these secondary claims are never transferred to phonogram producers. Moreover, producer's revenues deriving from the rental of phonograms shall not be included, as performers still benefit from an unwaiverable right to equitable remuneration from such exploitation, under Article 5 of Directive 2006/115/EC .

Article 10a (6) provides for a statutory 'use it or lose it' clause. Therefore, if a phonogram producer does not publish a phonogram, which, but for the term extension, would be in the public domain, the rights in the fixation of the performance shall, upon his request, revert to the performer and the rights in the phonogram shall expire. Further, if after one year subsequent to the term extension, neither the phonogram producer nor the performer made the phonogram available to the public, the rights in the phonogram and the rights in the fixation of the performance shall expire.

For the purposes of the 'use it or lose it' clause, publication of a phonogram means the offering of copies of the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity. Publication would also comprise otherwise commercial exploitation of a phonogram, such as making the phonogram available to online retailers.

A further purpose of the clause is to ensure that phonograms which neither the phonogram producer nor the performers wish to exploit are not 'locked up'. This also means that orphan phonograms, for which neither the phonogram producer nor the performers can be identified or found, will benefit from the clause because such orphan phonograms will not be exploited by either the producer or the performer. All types of phonograms which are not exploited would thus be available for public use.

This clause has the purpose of allowing performers whose performances fixed in a phonogram are no longer published by the original phonogram producer after the initial 50 year term to regain control over their performance and make it available to the public themselves. On the other hand, the producers' right should expire in order to ensure that the performers' efforts to make their performances available as widely as possible are not hindered.

This initiative proposes that the term extension apply to performances and sound recordings whose initial term of protection of 50 years has not expired at the date of adoption of the amended Directive. It will not retroactively extend to performances that had already fallen into the public domain by this date. This criterion is simple to apply and is an approach already used in Directive 2001/29/EC.

The new Article 1(7) is introduced to apply a uniform method of calculating the term of protection of musical compositions with words. Article 1(7) is modelled on the existing Article 2, which provides a method for calculating the term of protection for cinematographic or audiovisual works. Under Article 1(7), when a musical composition is published with lyrics, the term of protection shall be calculated from the death of the last surviving person: the author of the lyrics or the composer of the music.

Article 2

Article 2 of the amending Directive provides for the rules on transposition of the amending Directive.

Article 3

Article 3 of the amending Directive relates to the date of entry into force of the amending Directive.

Article 4

Article 4 of the amending Directive indicates that the amending Directive is addressed to Member States.

2008/xxxx (CNS)

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission[22],

Having regard to the opinion of the European Parliament[23],

Having regard to the opinion of the European Economic and Social Committee[24],

Having regard to the opinion of the Committee of the Regions[25],

Whereas:

(1) Under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights[26], the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of their performance is published or communicated to the public within 50 years after the performance is made, 50 years from the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or from its publication within 50 years after fixation, or, if not published, from its communication to the public within 50 years after fixation.

(4) The socially recognised importance of the creative contribution of performers needs to be reflected in a level of protection that acknowledges their creative and artistic contributions.

(5) Performers generally start their careers young and the current term of protection of 50 years with regard to performances fixed in phonograms and for phonograms often does not protect their performances during their entire lifetime. Therefore, performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that occur during their lifetimes.

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22 OJ C , , p. .
23 OJ C , , p. .
24 OJ C , , p. .
25 OJ C , , p. .
26 OJ L 372, 27.12.2006, p. 12.

(6) The revenues derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[27], as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property[28] should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 95 years after publication of the phonogram and the performance fixed therein. If the phonogram or the performance fixed in a phonogram has not been published within the first 50 years, then the term of protection should run for 95 years from the first communication to the public.

(8) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer to the phonogram producers their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Performers who play in the background and do not appear in the credits ("non-featured performers") usually transfer their exclusive rights against a one-off payment (non recurring remuneration).

(9) For the sake of legal certainty it should be provided that in the absence of clear indications to the contrary, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing the directive shall continue to produce its effects for the extended term.

(10) In order to ensure that performers who have transferred their exclusive rights to phonogram producers before the extension of the term of protection actually benefit from that extension, a series of accompanying transitional measures should be introduced. These measures should apply to contracts between performers and phonogram producers which actually continue to produce their effects for the extended term.

(11) A first accompanying transitional measure should be that phonogram producers are under an obligation to set aside, at least once a year, at least 20 percent of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms which, in the absence of the extension of the term of protection as a result of lawful publication or lawful communication, would be in the public domain.

(12) The first transitional accompanying measure should not entail a disproportionate administrative burden on small and medium sized phonogram producers. Therefore, Member States shall be free to exempt certain phonogram producers who are deemed small and medium by reason of the annual revenue achieved with the commercial exploitations of phonograms.

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[27] OJ L 167, 22.6.2001, p.10.

[28] OJ L 376, 27.12.2006, p. 28.

(13) Those monies should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred their rights to the phonogram producer against a one-off payment. The monies set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Member States may require that distribution of those monies is entrusted to collecting societies representing performers. When the distribution of those monies is entrusted to collecting societies, national rules on non-distributable revenues may be applied.

(14) However, Article 5 of Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property already grants performers an unwaivable right to equitable remuneration for the rental, *inter alia*, of phonograms. Likewise, in contractual practice performers do not usually transfer to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under Article 5(2)(b) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenues which the phonogram producer has derived from the rental of phonograms and from a single equitable remuneration for broadcasting and communication to the public and fair compensation for private copying should.

(15) A second accompanying transitional measure should be that the rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity copies of a phonogram which, but for the term extension, would be in the public domain or from making such a phonogram available to the public. As a consequence, the rights of the phonogram producer in the phonogram should expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance whilst the latter rights are no longer transferred or assigned to the phonogram producer.

(16) This accompanying measure should also ensure that a phonogram is no longer protected once it is not made available to the public after a certain period of time following the term extension, because rightholders do not exploit it or because the phonogram producer or the performers cannot be located or identified. If, upon reversion, the performer has had a reasonable period of time to make available to the public the phonogram which, but for the term extension, would be no longer protected, the phonogram is not made available to the public, the rights in the phonogram and in the fixation of the performance should expire.

(17) Since the objectives of the proposed accompanying measures cannot be sufficiently achieved by the Member States, as national measures in that field would either lead to distortion of the conditions of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Community legislation and can therefore, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this directive does not go beyond what is necessary in order to achieve those objectives.

(18) In certain Member States, musical compositions with words are applied a single term of protection, calculated from the death of the last surviving author, while in other Member States, separate terms of protection apply for music and lyrics. Musical

compositions with words are overwhelmingly co-written. For example, regarding opera, there are often different authors to the music and to the lyrics. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in musical compositions with words is incomplete, giving rise to impediments to the free movement of goods and services, such as cross-border collective management services.

(20) Directive 2006/116/EC should therefore be amended accordingly.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/116/EC is amended as follows:

– (1) The second sentence of Article 3(1) is replaced by the following:

"However,

- if a fixation of the performance otherwise than in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,

- if a fixation of the performance in a phonograph is lawfully published or lawfully communicated to the public within this period, the rights shall expire 95 years from the date of the first such publication or the first such communication to the public, whichever is the earlier."

– (2) In the second and third sentence of Article 3(2) the cipher "50" is replaced by the cipher "95"

– (3) In Article 10 the following paragraph 5 is inserted:

"5. Article 3 (1) and (2) in their version as amended by Directive [*// insert: Nr. of the amending directive*] shall continue to apply only to fixations of performances and phonograms in regard of which the performer and the phonogram producer are still protected, by virtue of these provisions, on [*insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below*]."

– (4) The following Article 10 a is inserted:

"*Article 10a*

Transitional measures relating to the transposition of directive [*// insert: Nr. of the amending directive*]

1. In the absence of clear indications to the contrary, a contract, concluded before [*insert date before which Member States are to transpose the amending directive, as mentioned in Article 2 below*], whereby a performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter: a "contract on transfer or assignment"), shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive], the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

2. Paragraphs 3 to 6 of this article shall apply to contracts on transfer or assignment which continue to produce their effects beyond the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

3. Where a contract on transfer or assignment gives the performer a right to claim a non recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year in which, by virtue of Article 3 (1) and (2) in its version before amendment by Directive *[// insert: Nr. of this amending directive*]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram.

4. The overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration referred to in paragraph 3 shall correspond to at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive *[// insert: Nr. of this amending directive*]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

   Member States may provide that a phonogram producer whose total annual revenue, during the year preceding that for which the said remuneration is paid, does not exceed a minimum threshold of € 2 million, shall not be obliged to dedicate at least 20 percent of the revenues which he has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of those phonograms in regard of which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive [// insert: Nr. of this amending directive]/EC, the performer and the phonogram producer would be no longer protected on 31 December of the said year.

5. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an annual supplementary remuneration referred to in paragraph 3 may be imposed.

6. If, after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive *[// insert: Nr. of this amending directive*]/EC, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram producer ceases to offer copies of the phonogram for sale in sufficient quantity or to make it available to the public, by wire or wireless means, in such a way that members of the public may access them from a place ant at a time individually chosen by them, the performer may terminate the contract on transfer or assignment. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 2, the rights of the phonogram producer in the phonogram shall expire.

   If, one year after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment by Directive *[// insert: Nr. of this amending directive*]/EC, the performer and the phonogram producer would be no longer

protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram is not made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, the rights of the phonogram producer in the phonogram and the rights of the performers in relation to the fixation of their performance shall expire. "

– (5) The following Article 1(7) is inserted:

"The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the music"

Article 2

Transposition

1. Member States shall adopt and publish, by at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

   They shall apply those provisions from […].

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*