

STATEMENT OF THE NEXA CENTER FOR INTERNET & SOCIETY ON THE DRAFT DIRECTIVE ON THE EXTENSION OF THE PROTECTION OF PHONOGRAM PRODUCERS' AND PERFORMERS' RIGHTS

1. The European Commission presented 16 July 2008 a draft directive intended to extend the term of protection of performers' and phonogram producers' rights.¹ Currently these rights are protected for fifty years starting from the recording (or 'fixation') or from the performance, as the case may be. According to Art. 1 of the draft directive the term would be extended to 95 years.
2. According to the Commission, the proposal would improve the plight of performers, and particularly of those among them who accepted a flat sum and therefore do not receive recurring payments or royalties from labels.² The proposal would also take into account that an increasing number of performers outlives the current 50 years term of protection of their performances. The draft directive additionally provides for auxiliary measures, such as the setting up of a fund for musicians which have only received lump sum payments.
3. All the independent studies which examined the proposal came to the conclusion that the proposed measures fail to reach each and all of their intended goals.³ We also came to the conclusion that the proposal has to be rejected on the basis of five different grounds.
4. *First*, the proposal fails to provide for additional income effectively accruing to the pockets of performers. The reason why performers are not likely to benefit from any extended success of their performances is to be found in their lack of bargaining power vis-à-vis their more powerful counterparts, the labels. This imbalance induces a large proportion of performers to waive their rights or to assign them to their counterparts through so called buy-out agreements. This shortcoming can be solved only by mandatory provisions reserving a share of the overall proceeds deriving from a given performance to the benefit of performers themselves, e.g. by means of some form of 'equitable remuneration'. Otherwise, any extension of the term of protection of performers would ultimately accrue to the main or even exclusive benefit of their assignees, that is the labels, which, moreover would in parallel benefit from the extension of the term of protection of phonogram producers' rights.
5. Art. 10*bis* of the proposal goes so far as to provide that agreements between performers and phonogram producers entered into before the date of the term extension would remain in force, unless otherwise provided. If

¹ http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm.

² See Art. 10(3) of the Proposal.

³ See the study by the Munich Max Planck (R. HILTY-A. KUR-N. KLASS-C. GEIGER-A. PEUKERT-J. DREXL-P. KATZENBERGER, *Comment on the Commission's proposal for a Directive to Amend Directive 2006/116 EC of the European Parliament and Council concerning the Term of Protection for Copyright and Related Rights*) and the contribution by the Amsterdam-located IVIR (N. HELBERGER-N. DUFT-S. VAN GOMPEL-B. HUGENHOLZ, *Never Forever: Why Extending the Term of Protection of Sound Recordings is a Bad Idea*, in *EIPR* 2008, 174 ff.).

the objective of the proposal really were to address the plight of performers, these should at a minimum have been given a chance to renegotiate the current contracts with phonogram producers.

6. This conclusion is not affected by the provision whereby a minimum of 20% of the additional proceeds received by phonogram producers would be allocated to a collecting-society managed social fund (Art. 1(4) of the proposal). This benefit would accrue only to session musicians and, moreover, its calculation method is at best uncertain. The relevant proceeds are only the ones generated through the reproduction, distribution and making available of the performances, with the exclusion of the important income deriving as a result of communication to the public (e.g. by radio broadcasting). Moreover, the provision is based on a transitional norm. This which means that, while the sharing of proceeds is temporary in that it goes to the benefit of those performers who have transferred all their rights to phonogram producers before the coming into force of the legislation (Art. 10(2) of the proposal), by contrast the extension from 50 to 95 years is on a permanent basis.
7. *Second*, while the proposal does not provide for adequate remuneration to performers for the reasons just indicated, it does not even supply any effective incentive to phonogram producers and to labels. This is so for the very simple, but fundamental, reason that no provision adopted today may even in principle provide any incentive towards investments which were already decided and adopted in the past. Even if we look at the future only, the need for an additional prospective incentive is hardly proved. Indeed, the common intuition whereby digital technology has decreased rather than increased the costs necessary to set up a performance and to fixate it has been confirmed by available empirical evidence.⁴
8. *Third*, it is hard to see how the extension of the term may in any way deter illegal distribution of music, as the Commission seems to believe, unless the – unexpressed – idea is that the severity of the offence is in some way to be related to the outstanding term of protection.
9. *Fourth*, the case made by the proposal whereby European label companies should be put on an equal footing with their US counterparts, which recently were granted an extension of terms similar to the one proposed for the EU, is technically flawed and misguided. Indeed, in the field of IP, including in connection with the neighbouring rights here considered, which in the US are described as copyright in sound recordings, the principle of National Treatment (NT) applies. Now, as a result of this principle, the same treatment which is provided in the US legal system for the benefit of US nationals is automatically extended to nationals of other States, including EU record companies. As a result, European labels currently are not in any way disadvantaged in comparison to their US counterparts. EU labels are treated in the US in the same way as their American competitors, which, in turn, are treated as European labels in the EU. Quite apart from this, all the “majors” are US labels; therefore any

⁴ N. HELBERGER-N. DUFT-S. VAN GOMPEL-B. HUGENHOLZ, *Never Forever*, cit., 177.

term extension would disproportionately benefit US firms to the detriment of EU consumers.

10. *Fifth*, and in specific connection with the issue of the assessment of the costs the legislative measure would involve, the argument advanced by the Commission whereby the term extension would not entail additional costs, as a survey has shown that the price of in copyright music does not exceed the cost of music out of copyright, is disingenuous and self-contradictory. Elsewhere the Commission mentions that the term extension would generate additional income for phonogram producers in the range of over € 750 million.⁵ Now, it would appear that it is impossible that additional income accrues to one group of beneficiaries, if nobody pays for it, that is unless a miracle comparable to the multiplication of bread loaves and of fishes occasioned by the Canaan wedding is to take place once more.
11. A few additional notes may be in place. The recording industry was quick enough to increase its legal prerogatives in connection with the legislative changes which accompanied the digital revolution. Phonogram producers, as such and as assignees of performers, successfully bargained for the legislative grant of a new exclusive right, the right of making available interactively performed and fixated works (Art. 3(2) of Directive 29/2001). This result was obtained at a time in which collecting societies representing authors have reasons to question whether their mandate from rightholders also extends to this interactive feature. This was by itself a quite remarkable power shift to the advantage of the labels. This does not however mean that the power shift should also extend to the term of protection and that labels should thereby be put in a position to stake claims also for a time horizon in which, under current rules, all exclusive rights are due to concentrate in the hands of the authors and of their successors and assigns.
12. Indeed, under current rules, most copyright protected works would keep enjoying protection even though no term extension is granted. Typically the expiry of the current 50 years term for the protection of performers' and phonogram producers' right would bring into the public domain von Karajan's performances of Beethoven, not Beatles' songs. The latter still enjoy copyright protection; most of the times classical music does not.
13. This means that, if the current situation were to remain unchanged, the dissemination of a sizeable chunk of non classical music by means of CD, DVDs or digital tracks as distributed through i-stores would in the near future require consent only from copyright holders (i.e. authors of music and lyrics; their heirs and assigns such as music publishers; collecting societies) to the exclusion of holders of performers' and phonogram producers' rights. This might lead to a benefit for the public, as economic theory predicts that the costs for end users tend to go up, when dissemination requires the authorisation of multiple categories of rightholders.⁶

⁵ P. 9 of the Explanatory Memorandum.

⁶ In this connection we should keep in mind that typically neighbouring rights holders control not only individual works but libraries of works, so that they tend to possess market power. When the

14. That the public would benefit from the confirmation of the current set of legal rules is not an unlikely proposition, if one considers that, in digital distribution, out of the typical 99 cents paid by end users to i-Tunes, 30 go to i-Tunes itself, 14 to authors and all the other 55 flow to labels.
15. This means that the expiry of the final term of protection of neighbouring rights may entail a remarkable promise in specific connection with digital distribution. Only one category of rightholders, the authors and their successors and assigns, would be entitled to compensation. Some of the works for which performers' and phonogram producers' rights are about to expire under the current regime, which include works by the Beatles and the Rolling Stones, still enjoy a much greater acclaim and market success than the one obtained by many of the recent artists, whose success tends to fall in line with the decline of the initial promotional expenditure devoted to them. If we add to the sector of still successful works due to lose neighbouring rights protection in a short time the growing sector of musicians who prefer to make their work available under open licenses, such as Creative Commons, it becomes possible to start imagining that the two sectors may meet and contribute to innovative digital delivery business models. This is possible, however, only if the term extension is not approved.
16. May be these very innovative perspectives are a key to understanding why labels fight so hard to get the extension. One may understand this and even sympathise. What is unacceptable is that this position is described by the EU Commission as a crusade in favour of performers, who in fact derive minimal benefits. Hardly more acceptable is that the Commission has refused to incorporate in the decision-making process all the independent studies on the issue, including the IVIR Study it itself commissioned.
17. Therefore, the proposal presented by the EU Commission should be withdrawn.

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fixation of the price of one specific input depends on the decision of more than one entity possessing market power, the applicable price not only is likely to be higher than the one which would obtain under competitive conditions, but in principle tends to underdetermined outcomes, as the different actors are likely to behave strategically to capture the highest possible share of consumers' surplus. Innovation economics has shown, particularly with empirical evidence derived from the biotechnology sector (C. LONG, *Proprietary Rights and Why Initial Allocation Matters*, in 49 *Emory Law Journal*, 2000, 823 ff.; M.A. HELLER, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, in 111 *Harvard Law Review*, 1998, 111 ff.) that multiple layers of monopoly over the same input tend to create inefficient equilibria, described as cases of the 'tragedy of anticommons.'