



## **Amended Directive Extends the Term of Protection for Performers and Sound Recordings**

GRUR International, 2011-11, p. 987

By Christina Angelopoulos, researcher and PhD candidate at the Institute for Information Law (IViR), University of Amsterdam

On 12 September 2011 the EU Council of Ministers, in the final stage of the first reading, adopted by a qualified majority the long-debated proposed amendment to Directive 2006/116/EC on the term of protection of copyright and certain related rights.<sup>1</sup> The new text<sup>2</sup> introduces two important alterations to the EU rules on the term of protection: the first concerns a 20-year extension of performers' and phonogram producers' rights over sound recordings and the second harmonises the rules on the calculation of the term of protection of co-written musical works.

Under the amended Directive the term of protection for performers' and phonogram producers' rights in sound recordings is extended from 50 to 70 years from the starting point which sets the term running. The new 70-year rule was significantly scaled back by the European Parliament<sup>3</sup> from the Commission's initial proposal for an extension of 95 years from the triggering event. The extended term of protection for performers and record producers does not have retroactive effect, but shall instead only apply to fixations of performances and phonograms which, under the old rules, will be still protected at a date set at two years from the (as yet unknown) date of entry into force of the new Directive.

The change is intended to accommodate the rise in life expectancy, as well as to bring the protection of neighbouring rights further into line with that offered to copyright, which already lasts (as a general rule) for 70 years after the death of the author. It thus aims to improve the insecure social situation and unrewarding financial landscape that the average performer, among the poorest earners in Europe according to the Explanatory Memorandum,<sup>4</sup> typically faces. The extension is targeted in particular at session musicians, i.e. musicians that are hired on an ad hoc basis to play for a recording session. As opposed to featured artists, who usually retain royalty-based remuneration rights, session musicians generally relinquish their exclusive rights to record companies in favour of a flat fee and accordingly rely only on their statutory secondary remuneration claims for future revenue from their performances. As stated explicitly in the Explanatory Memorandum to the Commission's initial proposal for an amending Directive, the amendment was triggered by the imminent fall into the public domain of performances recorded and released in the 1950s and 1960s, whose performers are now facing an income gap as they approach retirement.

The extension is not uncontroversial. A review carried out in 2006 for the UK Government by Andrew Gowers<sup>5</sup> recommended retaining the length of protection of performers' and producers' rights at 50

---

<sup>1</sup> Directive 2006/116/EC of the European Parliament and the of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372/12.

<sup>2</sup> Directive of the European Parliament and the of the Council amending Directive 2006/116/EC of the European Parliament and the of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2008/0157 (COD).

<sup>3</sup> European Parliament legislative resolution of 23 April 2009 on the proposal for a directive of the European Parliament and of the Council amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, COM(2008) 406.

<sup>4</sup> Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and the of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 16 July 2008, COM(2008) 464 final.

<sup>5</sup> Gowers Review of Intellectual Property, December 2006.

years, a position also taken by the Recasting of Copyright & Related Rights for the Knowledge Economy study<sup>6</sup> commissioned by the European Commission. Opponents of the extension contend that, despite the rhetoric, small artists will gain very little from the amendment, with the majority of the extra cash flow benefiting record labels instead. Moreover, the additional revenue for producers is likely to come from the most popular recordings, thus providing small relief to little-known performers, while depriving the public domain of high cultural value material.

It is worth pointing out that the new text retains the discrepancy between the term of protection of performers' and phonogram producers' rights. Performers' rights are thus set to expire 50 years after the date of the fixation of the performance. If the fixation of the performance in a phonogram is lawfully published or communicated to the public in the meantime, the rights persist till 70 years after the first lawful publication or communication to the public of the sound recording, whichever is earlier. By contrast, producers' rights are set to run until 70 years after the fixation is made, unless the recording is lawfully published within that period, in which case they shall last until 70 years from that date. If the recording is not published, but is communicated to the public within the same period, the rights persist till 70 years after the date of the first lawful communication to the public. The result is a seemingly slight disconnect between the terms of the two rights, which could however prove significant in the context of the exploitation of phonograms in the Internal Market. For example, practical difficulties could result for the collection and distribution of the single equitable remuneration for the broadcasting or communication to the public of commercial sound recordings, which according to Article 8(2) of the Rental Right Directive is to be shared between performers and phonogram producers. This is particularly noteworthy given the patchy implementation of Article 3(2) of the old Directive in the Member States, many of which have chosen to replicate the "whichever is earlier" pattern of performers' rights in the rules on the term of producers' rights as well. Inconsistent implementation hampers harmonisation by creating an uneven environment for the exploitation of rights across EU countries' borders.

The term of protection was left at 50 years from first publication or communication to the public for performances which are fixated otherwise than in a phonogram. The term of protection was also left unchanged at 50 years for producers of the first fixation of a film, as well as for broadcasting organisations.

The clause included in the initial proposal according to which, if one year subsequent to the date at which under the old rules the term would have expired neither the performer nor the producer have made the sound recording available to the public their rights shall expire has been removed from the final text. The provision was intended to guarantee the release into the public domain of orphan phonograms and phonograms the right-holders of which do not wish to exploit.

The amended Directive also contains accompanying measures intended to benefit performers. Thus, under the new "use it or lose it" clause (Article 1(2)(c) of the new Directive), if a record producer does not market a sound recording during the first 50 years after it was first lawfully published or, failing publication, communicated to the public, the performer may opt to reclaim the rights, increasing their bargaining power and enabling them to make use of the sound recording in another way, e.g. by finding another producer or exploiting the sound recording independently. Thus, phonogram producers are prevented from "locking up" phonograms they do not find commercially interesting. The performer has to give notification of his/her intention to terminate the contract of transfer or assignment of rights. If the producer fails to both offer copies for sale of the sound recording in sufficient quantity and make it available to the public within a year, termination is activated. Member States cannot permit waiver of the right to terminate on the part of the performer.

In addition, record companies are obliged to set up compensation funds intended to help session musicians. The sums set aside into such funds shall amount to 20% of the revenues earned during the

---

<sup>6</sup> P.B. Hugenholtz, M.M.M. van Echoud et al., "The Recasting of Copyright & Related Rights for the Knowledge Economy", report to the European Commission, DG Internal Market, November 2006.

extended 20-year period of protection from the reproduction, distribution and making available of the sound recording in question, not however from the rental of the recording or from the equitable remuneration received for secondary uses. Payment of this annual supplementary remuneration shall be reserved solely for performers who have transferred or assigned their rights in exchange for a one-off payment and will be due for each full year following the 50<sup>th</sup> year after the publication or, failing publication, the communication to the public of the phonogram. As with the “use it or lose it” clause, this right too cannot be waived by the performer, although micro-enterprises for which the costs of collecting and administering such revenue would impose a disproportionate burden may be exempted by national rules. Member States are instructed to entrust the distribution of the sums set aside in this manner to collecting societies.

To ensure that a percentage of the royalties arising during the extended term will go to performers, regardless of pre-existing contractual arrangements, under the new Article 3(2e), a “clean slate” is given to performers, preventing record producers from making deductions to the royalties due to performers after the initial 50 years of protection are over. Thus, any unrecovered advances on the part of the producer are no longer taken into account in the extended term and artists are allowed to receive full royalties for that period.

Finally, in the absence of clear contractual indications to the contrary, for the sake of legal certainty it is provided that a contractual transfer or assignment of rights concluded before two years from the date of entry into force of the Directive shall continue to produce effects for the extended term, i.e. beyond the moment at which under the old provisions the performer would no longer be protected.

The second big change introduced by the Directive involves the rules governing the term of protection of copyright in co-written musical works (“musical compositions with words”), i.e. works the lyricist and composer of which are different persons. Under the new provisions, copyright in such works shall last for 70 years after the death of the last of the following persons to survive, regardless of whether they are designated as co-authors under national law: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the co-written musical work. The new provisions apply to co-written musical works which are already protected in at least one Member State two years from the date of entry into force of the new rules or which are created after that date.

This provision was introduced to counteract the obscurity that accompanies the fluid, open-textured legal term “work of joint authorship”, which remains undefined on the EU level. Under Article 1(2) of the 2006 Directive, in the case of a work of joint authorship, the term of protection will persist until 70 years after the death of the last-surviving from among the two or more joint authors. However, the lack of a harmonised definition of the notion of joint authorship has resulted in a lack of conceptual alignment of the relevant rules between EU jurisdictions. In practice, this means the appearance of “split-term copyrights” across the EU – i.e. cases where the same work will be protected for a different length of time, depending on the Member State within which protection is sought. This can lead to difficulties in administering copyright in such works across the Community, as well as in the cross-border distribution of royalties for exploitation that occurs in different Member States. This problem was found to be particularly acute in the case of co-written musical works; in some jurisdictions, such as e.g. France or Spain, a co-written musical work will be classified as a single work of joint authorship with a unitary term of protection, to be calculated in accordance with the Directive’s rule, from the death of the last surviving co-author. In others, such as the Netherlands or the UK, the lyrics and music will be viewed as constituting two separate works, each with its own individual term of protection running from the death of its own author. Finally, specialised national provisions may apply: in Italy, for example, under current rules, the separable parts of co-written musical works will be understood as being independent creations attracting their own individual term of protection. An exception covers dramatico-musical works (such as operas), works of dumb show and choreographic works, which, although not in fact understood as constituting works of joint authorship under Italian law, are nevertheless granted a term of protection starting from the date of death of the last contributing author to survive.

With the new provision the Commission applies the same solution to musical compositions with words as had been previously introduced under Article 2 for cinematographic and audiovisual works, by successfully disentangling their term of protection from their nature as works of joint authorship. The advantage of this approach lies in its very superficiality, as it sidesteps the need to harmonise the substantive underlying copyright rules, an ambitious and politically thorny aspiration. At the same time however it raises the question of why musical and cinematographic works are singled out for a significantly more straightforward calculation process when other works face the same legal intra-EU cross-border discrepancies. Musical and cinematographic works are well-established types of creative production, which European courts have had decades to ruminate upon and as to the legal nature of which to draw conclusions. In the modern world of mash-ups and multimedia works however, other types of co-written production are very likely to receive diverse classification across Member States and thus attract disparate terms of protection. Moreover, works of joint authorship are not the only area of unharmonised substantive law which influences the calculation of the term of protection: other terms, such as e.g. that of “collective works” remain undefined in the Directive, while even fundamental criteria that determine the initial recognition of copyright, such as that of “originality”, do not currently have a unitary European interpretation.

The first draft of the directive was published in July 2008, while in April 2009 the European Parliament voted in favour of the new text. After a two-year stall before the Council, the proposal was finally adopted after Denmark removed itself from the blocking minority last April. However, with Belgium, the Czech Republic, the Netherlands, Luxembourg, Romania, Slovakia, Slovenia and Sweden all voting against and Austria and Estonia abstaining, the list of dissenting countries remains quite long. The Directive is expected to be published in the EU’s Official Journal in October 2011. Member States have been given two years from the date of its coming into force to incorporate the new provisions into their national legislation.

As a result of the new provisions, the Beatles’ debut album “Please Please Me”, which would otherwise come out of copyright on 1 January 2014, will retain protection for an additional twenty years. The band’s first single however, “Love Me Do”, first released in 1962, will narrowly escape extended protection.