



**Comment by the Max-Planck Institute**

**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**

**Prof. Dr. Reto M. Hilty, Prof. Dr. Annette Kur, Dr. Nadine Klass, Dr. Christophe Geiger, PD Dr. Alexander Peukert, Prof. Dr. Josef Drexl, Dr. Paul Katzenberger\***

**Summary**

*The ostensible aim of the Commission's proposal to improve the economic situation of performing artists makes sense. Similarly, the descriptions of certain deficiencies in the music trade are true. However, the measures proposed by the Commission to remedy these problems – mainly a prolongation of the term of performance rights from 50 to 95 years – will, if at all, only bring marginal benefits to performing artists. In fact, the Commission also rightly recognizes that the problem of performing artists lies primarily in their lack of bargaining power as against the sound recording producers. However, it does not draw the obvious consequence that performers should be put in a better position by means of binding contractual provisions.*

*Nor can any objection be raised to the Commission's description of the challenges faced by the sound recording industry by new – illegal – ways of using performances on the Internet. However, no mention is made of a number of conceivable specific options. Instead, the Commission also limited its considerations on the producers' situation to the said prolongation of the period of protection, although there is no objective relationship whatsoever between the duration of the performance rights and the user behaviour objected to.*

*In truth, both groups of beneficiaries of performance rights would best be served if more effective use was made of the existing protection during the current 50 year term. On the part of the sound recording industry, an almost "perpetual" protection must not be allowed to distract from the necessity of using competition-based business models to recover the necessary investments and achieve a reasonable profit within realistic periods of time, taking into account the fact that the market presence of most productions will end much sooner than after five decades.*

---

\* Prof. Dr. Dres. h.c. Josef Straus was for reasons of time unable to participate in the drafting of this comment- However, it enjoys his general support, and he also points out the somewhat negative macro-economic effects of the Commission's proposal.



*Within that period of time, the performing artists can also be allowed to participate fairly in the profits by means of appropriate contractual provisions.*

*The proposed prolongation of the term of protection instead leaves all the shortcomings of the present system untouched. The proposed term of 95 years is based blindly on the US copyright system, albeit wrongly interpreted and incapable of easy comparison with European law. This also ignores the fact that the overwhelming part of the proposed term of protection can in any event no longer serve to improve the economic situation of living performing artists. If at all, only the phonogram producers will profit – or any heirs of performing artists, and it is not their protection that seems to be what the Commission intends, or at least no mention is made of them anywhere.*

*Even the Commission apparently does not believe that this initiative will achieve anything positive – even if only to the benefit of the sound recording industry; otherwise, it would be difficult to explain why its estimations are vague in such a manner that the figure of the estimated maximum is 20 times higher than the minimal estimation. Independent investigations suggest, however, that the prolongation of the protection period would have no perceptible benefits at all for those entitled to performance rights. At the same time, it cannot be disregarded that the prolongation of protection by a further 45 years would render access to musical productions difficult for a much longer period than at present if the copyright protection of the works used has already expired, which would often be the case particularly for classical music.*

*However, it is not only with respect to the commercial effects that the Commission's proposals are half-baked. Even superficially well meant approaches such as specifically the creation of a fund for needy performing artists, are on closer examination nothing but window-dressing, particularly since they are only intended as transitional solutions. The same applies to the use-it-or-lose-it clause, the applicability of which will depend on overcoming unrealistically high obstacles. Certainly, the general aim of increasing the protection of the performing artist is to be welcomed. However, what is necessary, and also possible, are measures other than those proposed by the Commission.*



## I. Introduction

The proposal submitted by the Commission on 16 July for an amendment of Directive 2006/116 EC<sup>1</sup> is aimed at improving the social situation of performance, and in particular session musicians (p.2<sup>2</sup>; see also the summary of the measures on p. 9) by means of a variety of in part mutually complementary measures. *The core of the proposal is to extend the current term of protection of performing artists and phonogram producers from 50 to 95 years.*

One of the central reasons for the poor income situation of performing artists is identified by the Commission as being their *deficit of bargaining power* when they are required to assign “their [economically] [most] significant exclusive copyrights [recte: performing rights] to record companies via contract” ... often “‘in perpetuity’ against a one off payment” (p. 3). This statement is true. However, it is confusing that the Commission does not draw from this the almost compelling conclusion, namely to propose *binding contract law*, as applies in other socially relevant contractual relationships characterized by a similar imbalance of powers (employment law, consumer protection law, etc).

That this possibility has not merely been overlooked but explicitly rejected (p. 7 “premature”), with a prolongation of the term of protection being proposed instead, seems almost cynical. For as long as the said constellation of one off payments (known as buy-out contracts) are permissible without restriction, *the performing artists will precisely not benefit from a prolongation of the term of protection*, and instead, the benefits will fall to the producer as the stronger contracting partner, to whom these rights will thus simply have to be assigned for a longer period.

The Commission soon turns *its attention to producers anyway*. Under the heading “The economic challenges faced by phonogram producers”, the by now well-know developments of the last few years are raised, based uncritically in terms of both argumentation and figures on information from the lobbies concerned, *without a serious examination of the multi-faceted causes for these developments* (see below Para. 8<sup>3</sup>). Instead, the Commission follows the well-established pattern and, without seriously considering the interests of all the circles involved, demands a huge increase of legal protection as a consequence of the illegal conduct identified.

This approach on the part of the Commission is made explicit in a press release by Commissioner *McCreevy* dated 14 February 2008. Within a short period of time, above all academic circles responded unusually forcibly. Across all the different disciplines, in particular from the

---

<sup>1</sup> [http://ec.europa.eu/internal\\_market/copyright/term-protection/term-protection\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm).

<sup>2</sup> All page numbers (“p.”) refer to the Commission's proposal.

<sup>3</sup> All paragraph numbers (“Para.”) refer to the points of reference within the present comment.



point of view of economists, the proposal encountered unanimous and decisive rejection.<sup>4</sup> The arguments vary considerably, but they ultimately without exception follow the same line, namely that it is impossible for an extension of the term of protection to achieve the effects assumed by the Commission – and certainly not to the benefit of performing artists – and that the extended protection will instead indeed have negative effects on third-party interests, and hence *taking account of all the circumstances, cannot be justified*.

The astonishing fact about the Commission's proposal is that *no mention whatsoever has been made of these comments*, although in part by top-level experts and although they were all available in advance of the paper now published. On the contrary, the proposal, under the heading “Consultation of interested parties and impact assessment” (p. 6) states, following the basically self-evident comment on which parties were in favour and which were against the prolongation of the protection period: “There was no need for external expertise”. The truth is that a study had even been commissioned by the Commission in advance, which however rejected the need for a prolongation of the term of protection.<sup>5</sup> *However, as an independent study it no longer suited the Commission's strategy*.

This selective presentation of the facts by the Commission speaks for itself, and is then coupled with arguments that in no way withstand closer analysis; added to this, there are simply professional inconsistencies. The following only refers to a few of the inconsistencies – without claiming to be complete and without taking up every single item. It should be pointed out first of all that the interest of the Commission mentioned above, *namely to improve the social situation of performing artists, indeed deserves support*. The present comment therefore does not reject the intervention per se; what is demanded here, however, is that the proposal should be redimensioned in such a way that genuine account is taken of this intention, without causing losses for third-party interests.

---

<sup>4</sup> In this context see for instance *Helberger, Dufft. van Gompel and Hugenholtz*, “Never forever: Why extending the term of protection for sound recordings is a bad idea”, E.I.P.R. 2008, 30 (5), 174 ff., and “Creativity stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings”, E.I.P.R., 30 (9), 341 ff. (also available at <http://www.cippm.org.uk/publications/index.html>).

<sup>5</sup> Institute for Information Law of the University of Amsterdam, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf), pp. 83-137 (see also the “Open Letter” to Commission President Barroso, [http://www.ivir.nl/news/Open\\_Letter\\_EC.pdf](http://www.ivir.nl/news/Open_Letter_EC.pdf)). In addition, other studies have also impressively shown that a prolongation of the term of protection does not make sense and hence is inadvisable. See for instance the Commission Staff Working Paper on the Review of the EC legal framework in the field of copyright and related rights, Brussels, 19.07.2004 SEC (2004) 995; the Gowers Report: Gowers Review of Intellectual Property for the UK Government, 2006, which in turn is based decisively on the Review of the Economic Evidence Relating an Extension of the term of Copyright in Sound Recordings by the Centre for Intellectual Property and Information Law at the University of Cambridge (CIPIL).



## II. Analysis

### *Grounds and the objectives of the proposal (p.2)*

- (1) In justification of the *main intention*, the prolongation of the term of protection, it is argued that performing artists are increasingly outliving the existing 50-year period of protection (p.2). Many of them would lose all of their income that derives from contractual royalties and statutory remuneration claims from broadcasting and the public communication of the performances in bars and discotheques; this refers to the collective administration of the rights by means of collecting societies.

What is true is that the income of performing artists, assuming that the *buy-out contracts (p.2) rightly addressed* by the Commission continue to be lawful, often consist only of a one-off payment followed by the revenue from the collective administration of rights by collecting societies (see also p.4). Even under the *existing protection period regime*, this total amount of earned income could, in the case of successful performers be *substantially increased if the lawfulness of buyout contracts were restricted* (notwithstanding the question of competence, which is not to be discussed here). Artists whose interpretations are only crowned with success in later years must feel cheated at having been fobbed off with a low one-off price. In such cases, *only the producer earns the big money* without any participation on the part of the performing artists. No doubt the increase of the income from the collective administration of rights also increases in proportion to success, but the income earned in this way by the performer will never achieve the magnitude that he might earn from a contractual remuneration obligation imposed on the producer – particularly since the producer (in Germany pursuant to Sec. 86 of the Copyright Act) also participates in the distributions from the collecting societies and hence profits twice from the success of performing artists.

With these relationships in mind, it appears *hypocritical* to attempt to improve the situation of performing artists by not only retaining this obviously unjust and otherwise solvable<sup>6</sup> *system unchanged* but also *prolonging it with all its deficiencies by 45 years*. While a few performers may as a result benefit for a few years longer from the – as a rule – in any event marginal revenue from the collective administration of rights; for the majority, it remains a drop in the ocean.

- (2) However, even from the point of view of the meaning and purpose of the system of protective rights, the intention of practically doubling the period of protection appears nonsensical. First



of all, the comparison with the concept of copyright law – from today's economic point of view in any event regarded critically – is inappropriate, since here we are not talking about the creation of works but rather about an *entrepreneurial achievement or investment* (see also Para. 12). If these are to be provided, there is no denying that the legal system must create the appropriate conditions; however, *the purpose of a proprietary right is not to guarantee a lifelong annuity*. With respect to the phonogram producers, there is also the fact that they provided their services in full knowledge of a protection period of 50 years, and were able to calculate their prices accordingly. Hence the end of the protection period does not for them constitute an evil to be combated, and it is to a certain extent a known basis for their business. And in general, retrospective prolongation of the protection period does not achieve the function of a stimulus; for the achievements provided so far, the 50 year period was apparently sufficient.

Like every entrepreneur, the holders of related rights are called upon to provide for the *time when the regular income will have terminated*. The protection period of 50 years, particularly in a comparison e.g. with the situation of the holders of patents or utility models, is not only dimensioned generously enough for the right holder to take precautions under his own responsibility; in addition the holders of related rights are privileged by the fact that they can *regularly release new productions*, even using the same works, so that the protection periods regularly restart.

In any event, it would be unrealistic to assume that performing artists mainly – or even entirely – lived from the productions that they made in their young years. A few examples of persons that have become the victims of time-related political conditions (since they were forbidden during Nazi Germany and only could gain income from there recordings decades later) are certainly regrettable fates, but their cases should not be “misused” in order to chip away at the time limit to the current protection system, a limit that lies in the interests of the general public. The starting point should, rather, be the normal case in which a performing artist, like any other professional, can work and hence earn money throughout his life. For instance, older artists such as Phil Collins (1951), Mick Jagger (1943) or Sir Elton John (1947) would from the current point of view have to reach the age of 110 or so in order to be able themselves to exploit the revenue from their more recent productions under the 50 year protection period. If, on the other hand, a performer is no longer capable of being active at this stage, he will be in the same position as any other free entrepreneur; no one can rely on earlier activities in order to be able to earn income until the end of their days.

---

<sup>6</sup> In this context reference is made in particular to the German approach in § 32a concerning the further participation of the author “if the agreed consideration is grossly disproportionate to the income from the use of the work,



*The social situation of performers (p.2 et seq.)*

- (3) It is not disputed that the Commission is right to distinguish between the income of superstars and less well-known performers.<sup>7</sup> The phenomenon is also well known from the field of copyright; thus only a very small number of authors can live off the income from the exploitation of their works.<sup>8</sup> However, with architects too, only a few stars can earn considerable sums from particular construction projects, while most eke out an existence after completing their studies or even have to turn to other activities. In none of these cases does anyone ever suggest intervening in the relevant employment market by means of distribution or other measures. If there is an excess supply, this necessarily is reflected in the income of the group concerned. Those affected, and hence also many performers who cannot live from their performances, must necessarily ask whether they have chosen the right profession or whether they should make their artistic existence into a hobby and earn a living elsewhere.

However, first of all it must be stated that *unfortunate performers will not benefit whatsoever from a prolongation of the protection period*. Their earnings are inadequate even during the present exploitation period of 50 years, and nothing will change if it is extended by a further 45 years; to this extent, many a superficially thoughtful consideration by the Commission has an unrealistic impact (for instance “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” p.8); for, if the then 20-year-old is now, at the age of 70, to earn a further 45 years of “incremental” income, he will not survive to experience the great breakthrough.<sup>9</sup> If, however, artists are successful, 50 years are more than sufficient to compensate them for their efforts – at the time – without them being reliant on a further 45 years (see above, Para. 2). In addition, successful performers will long since have invested in other ever new productions, from which they will be able to generate income for a further 50 years in each case.

- (4) The truth is, on the other hand, that these last considerations will fail if even successful performers do not have sufficient bargaining power as against the phonogram producers (p.3).

---

having regard to the whole of the relationship between the author and the other party.”

<sup>7</sup> See also *Towse*, Creativity, Incentive and Reward, p. 123 ff., who in her investigation based on data from Great Britain, Sweden and Denmark on the income of performing artists came to the conclusion that only the superstars among performing artists profited from the distributions from the collecting societies, while the large majority only received very small payments.

<sup>8</sup> Thus *Kretschmer und Hardwick*, Authors’ Earnings from Copyright and Non-Copyright Sources, p. 6, recently showed that only a small number of authors could live on the income from the sale of their books (only 20.3% earn their entire income from writing). The overwhelming majority of authors must also pursue another source of income. In addition, they found that only 10% of the professional text authors polled in Great Britain received 60% of the total income from fees for their activity as authors.



As mentioned in the introduction, this problem can be dealt with. *The right approach to achieving greater balance*, however, can only be achieved by means of *certain specific binding rules with respect to the contract between performers and producers*. Even the successful performer will benefit far more from balanced agreements over a 50 year period than from imbalanced agreements for 95 years. Hence it is legitimate to ask whether a certain harmonisation would be desirable at contractual level.

- (5) With respect to the “*secondary*” *sources of income for the collective administration of rights* already mentioned (p.4; above, Para. 2), the Commission’s starting point is one of partially incorrect legal preconditions, since harmonisation is lacking in the said fields. Thus the private copy is by no means permitted in all countries (e.g. Great Britain) and hence does not everywhere generate income to the benefit of all performing artists (and the recording industry); attempts by the Commission to achieve harmonisation in this context have become bogged down. Hence, and above all, *it is simply not true that such payments by the collecting societies are not affected by the contractual arrangements with the record companies*. It is only true if the member states lay down such provisions within national law, which is by no means the case throughout Europe; and even if it were, the revenue from the collective administration of rights is in any event divided between the different groups of holders of neighbouring rights.

The Commission’s desire to ensure that these “*secondary*” *sources of income actually amount to a substantial figure for performing artists, of itself deserves support*. However, it is not helped by a prolongation of the protection period; instead (a) it must be achieved that *specific restrictions subject to remuneration (statutory licences) are imposed by binding national law* (see below Paras. 8, 16, 17 and 18), hence the producers’ prohibition rights should be restricted, particularly since they already participate in the remuneration earned. And (b), at European level it is necessary to achieve *harmonisation with respect to the distribution of the revenue achieved by the collecting societies* so that not only producers but also the authors (hence the creators of the works) and the performers necessarily receive a specific and appropriate share.

- (6) The Commission’s calculations with respect to the social situation of performers do not make it clear why the protection period should be increased from 50 to 95 years. Leaving aside the untenable misconception that the start of a career “in their early 20s” should be decisive for the calculation of the protection period (p.4; see above, Para. 2), the aim of “covering” the present average age expectancy of performing artists by means of the protection period, according to the information of the Commission, assuming a first production at the age of 20, would lead to

---

<sup>9</sup> The figures mentioned by the Commission in connection with the proposed fund on p.11 speak for themselves; the funds would increase the average annual (!) income from Euro 47-737 to 130-2065.



a *protection period for men of 55 years and one of 61 years for women. If the protection were instead to last four decades longer, this would benefit at most the heirs, who do not appear to be the issue for the Commission (see below, Para. 22), or (far more obviously) the producers.*

- (7) Hence the Commission's concern that there is the risk that performers could suffer from "uses ... which are harmful to their name or reputation" (p.4) appears to be a camouflage. First of all, in all EU member states – at least in terms of function – there are regulations to protect performers' *general personality rights* (and basically international law pursuant to Article 5 of the WPPT is not intended to secure anything more extensive); at least during their lifetime, and, in the case of post-mortem personality protection as in Germany, subsequently, they do not need any (longer) special protection. If there is an additional need for protection, this aspect could also be regulated separately without prolonging legal protection generally; there is no rule of international law that requires economic rights and moral rights to have the same term of protection.

Of course, at another point, the Commission itself indicates that this is not a serious concern, namely where it rejects the option of "strengthening and harmonising the moral rights of performers" as a special measure on the grounds that it would have no financial impact (p.9). *If the method of argumentation were more honest, there would be no need to raise this aspect to justify the financial prolongation of the protection period to 95 years.*

***The economic challenges faced by phonogram producers (p.4 et seq.)***

- (8) An amazingly simple explanation is given of why the CD market has simply collapsed over the last few years; it is "due to the phenomenon of the pirate copy," in the opinion of the Commission, adopting the often heard jeremiad of the phonogram industry. However, the mere regular repetition of the figures that have been falling since 2000 does not make this simplistic view any more logical; on the contrary, *such reductions miss the opportunity to examine the complex interrelationships in a manner that can be verified.* The fact that the downturn began in 2000 is, namely, not surprising if account is taken of the general changes of user behaviour in the light of the rapid development of Internet technology. The resulting new opportunities were, however, ignored by the phonogram industry until third parties filled the gap in order to satisfy the growing demand for music to be present in the new media. In the light of the existing copyright protection of music, such a move was of course indeed unlawful; however, it can also be seen as a textbook example of the dynamism of competition: *the demand that one party doesn't satisfy is another's business opportunity.*



However, even today, when the producers themselves are present on the Internet with online sales, and hence have implicitly also realised that the medium of the future will no longer be the physical phonogram (or at least not to the same extent as before) and that the number of CDs sold will therefore *necessarily* continue to fall, the phonogram industry is insisting on business and price models that purchasers are only reluctant, if at all, to accept. Conversely, it is highly disputed whether the dramatic number of illegal downloads (reproduced on p.4 et seq.) can simply be converted into legal copies. *In most cases, irrational motives lie behind these downloads*; what is satisfied in particular is the urge to collect. Hence what the phonogram industry is really losing as a result of illegal downloads cannot be calculated so easily. To this must be added the fact that the leisure habits of large parts of the population have switched from the consumption of music to, for instance, computer games or the like.

These findings certainly do not mean that the file-sharing networks etc. do not constitute a problem and that they do not *need to be fought with appropriate legal means*, alongside a more adequate market behaviour on the part of the phonogram industry itself. For this, there are indeed certain *options for action*, specifically on the European level, since in the internal market there must in any event be a uniform legal framework. Mention need only be made here of the problem of the usual defendant's legal venue and the associated difficulties of enforcing rights against certain infringements, but there are also unsolved problems of the indirect infringement of protected rights, and the many difficulties simply due to a lack of competition; hence, a selective restriction of copyright, leading as it does to monopolistic structures, in the form of statutory licences, could revive the supply side to such an extent that more attractive and at the same time less expensive business models would compete for the favour of potential customers.

- (9) However, the prolongation of the term of protection from 50 to 95 years has no connection whatsoever with illegal downloads – for if really adequate countermeasures are not taken, such illegality will simply continue for a further 45 years. The impact assessment then repeats masses of figures from recording industry circles; the only relevant details concerning the prolongation of the protection period, however, namely within what time framework what returns on investment are usually possible, are missing (see also below, Para. 21). The statement that only one in eight recordings (i.e. CD) is successful (for details see p.11) is no substitute for this information – on the contrary: every entrepreneur bears the responsibility for the extent to which his products are successful on the market; the legislature does not help anyone if he misestimates demand. Nor can this modest statement of the success be justified simply by the demand for cultural variety (such as on p.8); if the phonogram producers were able to work more successfully, they would, rightly as profit-focussed enterprises, certainly do so. The cross subsidies that exist are thus completely involuntary and the argument of the promotion of culture is merely a camouflage. Moreover, one should not forget the fact that the recording industry



knows exactly how attractive its CDs are; for whenever a CD is launched, there is basically a type of “bundling”, since the purchaser is unable to determine what tracks (alongside the one that he actually wanted) he buys and pays for. The fact that this type of compulsory sale is avoided when tracks are purchased online may be one of the reasons for the success of this technology.

In any event, a prolongation of the protection period would first of all have no – or even a negative – impact on the obvious lack of success of the recording industry on the market. If the volume for possible cross subsidies is thereby genuinely increased, *there would be even less pressure to provide productions that are based on demand. Nor does there appear to be any reason why higher income through cross subsidies should automatically lead to a greater encouragement of young talents* – if the recording industry were at all capable of producing more talent, it would naturally already now invest more than the 17% of its income that it claims to. After all – at least this is how the problem is often presented – what is at issue is its survival; in this situation, no entrepreneur would wait for state protection in order to decide whether to invest more in research and development for instance.

What is therefore missing, however, is the evidence of what could be earned after a period of 50 years, although user behaviour could indeed already be identified (irrespective of the lack of legal protection after expiry of the 50 years; see also below, Para. 21). Nor are there any specific details about exactly how the cross-subsidies would work. If, however, the *alleged necessity of such cross-subsidies is to be used as a reason for justifying the prolongation of the protection period – which does after all require justification – such relationships must be disclosed*. It would be inappropriate to rely here on business secrets – an inadequate ground for dispensation in anti-trust law investigations too. In both cases, a state that focuses on healthy competition cannot grant an individual interest group greater legal protection without further consideration purely on the basis of blind trust. On the contrary, *proof that the present legal protection is insufficient must be provided by the recording industry; its reference to illegal downloads, however, does not constitute such proof, since as stated above, there is no causal relationship between these downloads and the prolongation of the protection period*.

#### ***Co-written musical works (p.5 et seq.)***

- (10) The aim of developing *unitary methods for the calculation of the protection period for musical compositions with text*, where as a rule different authors are involved, is admittedly independent of the prolongation of protection period, but as such *would be welcome*. However, this does not mean that the alternative proposed by the Commission is to be favoured. The question of the adequate solution need not be examined in further detail at this point.



***Consultation of interested parties and impact assessment (p.6 et seq.)***

- (11) The impact assessment cited and discussed in the Commission's proposal<sup>10</sup> examines a variety of options, some of which involve sub-alternatives; the present comments will not examine them in detail, but will only consider the proposals put forward.

All the alternatives are based on the same six “operational objectives” that the Commission uses as the basis for its proposal as an apparently settled matter, although some of them fail to convince. In the following, these six premises – also referred to as political objectives (p.7; see also Para. 11) – must be questioned to the extent that the Commission’s argumentation behind these premises is not taken up again at any other point in the course of this comment on the Commission's proposal:

- (12) “(1) gradually align authors’ and performers’ protection”

This approach fails to recognize a substantive difference between two protective systems that must be examined separately:

- *Creative or innovative production* involves the production of something that was previously not there, for instance something *so new that the general public can draw a long term benefit from it* (inventions, compositions etc). This production should be encouraged as far as possible; the legal protection of inventions, works etc is a central element for this purpose. The attempts to justify this legal protection (patent law, copyright law etc) are admittedly varied, an issue which is not to be examined here, but what they all have in common is a certain generosity in that a potential excess of protection tends to have to be accepted in the light of the prevailing general benefits.
- New items that have been produced in this way are used by certain competing entities using appropriate (professional etc, possibly also artistic) means in order to “supply” them to the general public. *As a basic principle, they are acting in free competition* – a plurality of them can act alongside each other as competitors (if they have obtained the necessary permission from the holder of the copyright or patent rights in question). *Like competitors generally, they do not as a matter of principle enjoy any special legal protection.* Accordingly, anyone for instance who manufactures machines using a patent (hence to this extent “supplies” the patent to the purchaser of the machine) does not automatically acquire a (patent-) related right; hence he is not protected against a third party using the same patent, nor does he re-

---

<sup>10</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf).



ceive any compensation whenever anyone commercially uses the machine acquired. Instead, he must pursue his trade in such a way that allows him to survive in competition.

Similarly, *it is not a given fact of nature that the producers of records or performing artists should enjoy a special legal protection for their “supplying” activities; on the contrary, this is an exception to the fundamental freedom of competition, an exception that requires justification.* There is indeed a justification for it in the fact that without special protection the market would risk failing since complete freedom allowing third parties to copy sound recordings or the like might prevent the “suppliers” from covering the costs of their investments, with the consequence that possible and desirable investments would not be made. However, to grant protection beyond the necessary minimum would mean unnecessarily impeding the – necessary – competition between these “suppliers” (of whom none are active creatively themselves, hence do not themselves produce anything new but must share in the existing stock of works created by third parties). Accordingly, there can be *no automatic mechanism for an extension of the protection* – and even less so *is there any reason at all for aligning this special protection (ultimately motivated by competition law) in any way to copyright law.*

(13) “(2) *incrementally increase the remuneration of performers*”

Depending on one's standpoint, there might from a legal policy point of view be grounds for welcoming the objective of increasing the income of individual groups of the labour force. *However, the appropriate measures have been known for over a hundred years; they consist in using binding law to force the contracting partner to grant to a socially weak group that to which its members are entitled but which the contracting party refuses to grant voluntarily.* A number of things have already been said on this point, in particular that the practice of buy-out contracts must be curtailed and participation in later successes ensured (above, Para. 1). However, *it would be in conflict with basic market economy theories if an intervention of the state was primarily to benefit the group on which the socially weak group depended, and which accordingly bears responsibility for the latter's insufficient income.*

Whether the proposed fund for certain performers constitutes an adequate means for increasing their income is a different question, and shall be examined later (below, Para. 20).

(14) “(3) *diminish the discrepancies between the protection between the EU and US*”

The Commission's ignorance with respect to the legal comparison with the USA is alarming. *The country of protection principle and the national treatment principle are fundamental prin-*



*ciples of intellectual property law,*<sup>11</sup> although the latter may occasionally be restricted or subject to conditions; in any event, specifically the USA does not apply any comparison of the protection period. From this it follows that the – allegedly – lower level of protection under European law does not discriminate Europeans. On the contrary, the fact is that American performers and above all American producers – and it is these that ultimately matter, as the Commission itself proves by analysing not only EMI (p.4 et seq.) but also the examples of Universal, Warner and BMG (p.11) – enjoy exactly the same protection in Europe as their European counterparts; similarly, *the said principles lead to European producers and performers in the USA basically being subject to the US system of protection* – and hence are by no means disadvantaged by virtue of their origin alone.

However, the two systems of protection cannot as a matter of principle be compared one-to-one. *The American system does not distinguish between copyright and related rights.* Sound recordings constitute works within the meaning of the Copyright Act. The precondition for the acquisition of copyright in them is a minimum of creativity, the achievement that this involves being provided by the performer or by another technical or artistic person responsible (e.g. a recording engineer); it is these persons who then also acquire the rights. The producer himself can, subject to the conditions of the work made for hire, admittedly also acquire original copyright, although it is disputed whether sound recordings can at all satisfy the particular preconditions of a work made for hire. *However, if the producer does not acquire copyright himself in this way, he must have it granted to him by contract by the persons entitled.*

In the latter case, the *protection period in the USA is calculated exactly as in Europe*, i.e. the protection lasts until 70 years after the death of the original persons entitled under copyright. In practical terms, this in most cases leads to a total protection period of over 100 years. That period is only calculated differently in the USA if the producer himself acquires original copyright on the basis of the concept of the work made for hire; in such a case, the protection period indeed lasts 95 years from the first year of publication (or 120 years from the year of creation, depending on which of these periods expires first). *However, in terms of result, this changes little as to the total protection period.*

The decisive factor, however, is that the Commission's proposal for a prolongation of the protection period does not concern this (copyright) protection. What is at issue, on the contrary is the *producer's additional (original) "related" rights* – which do not exist in the USA in this way – *to which he is entitled only in Europe for his entrepreneurial achievement.* This additional protection today lasts 50 years – and hence already 50 years longer than in the USA.

---

<sup>11</sup> See as examples Art. 3 TRIPS or Art. 5 of the Berne Convention.



During these 50 years, the European (and also the American in Europe) record producers, in contrast to the situation under American law, enjoy an *additional claim* to compensation within the framework of the collective administration of rights. The performing artist under certain conditions can also be the holder of an original copyright in the USA. However, if these conditions are not met, he has no rights there at all, while in Europe *any performing artist can benefit from the 50 year performance rights*.

Bearing this in mind, certain arguments with which the Commission attempts to promote a longer term of protection are beyond comprehension. For instance, the claim that, without prolongation, “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,” *completely misses the point in the light of the principles of international copyright*.

- (15) “(4) *incremental increase of A&R resources [A&R: artists and repertoire], i.e., the development of new talent*”

Indeed, the effects of greater investments in new talent in the music sector can be deemed to be of a positive nature. However, it is *not the function of the state to use an inappropriate legal intervention to increase the income of an industry that in the past has failed to invest sufficiently in its own future*, and certainly not if this income need not – imperatively and extensively – be applied to this purpose (see also above Para. 9).

- (16) “(5) *ensure availability of music at reasonable prices*”

The aim of making more music available at reasonable – in other words lower – prices deserves unconstrained consent. However, this is completely in conflict with the intention of prolonging the term of protection. It is sufficiently well known that the best means of adjusting supply to demand is well-functioning competition. At the same time, it is not difficult to identify a number of constellations in which protective rights which, in the light of the potential risk, were tailor-made to meet the specific situation in a primary market (e.g. illegal – physical – copies of CDs or DVDs) have subsequently been extended by the right holders to a *secondary market on which – in truth – a number of suppliers should be competing for the favour of the purchasers so that a supply that is as diversified as possible can be created at prices that are as favourable as possible*. Strengthening the protection, however, achieves precisely the opposite on such secondary markets: possible competition, which today (with respect to related rights) could have begun after 50 years, is prevented for a further 45 years.



Nor can the prolongation of the term of protection simply be justified with the argument that (general) copyright protection applies in any event, so that third parties would not be able to set up, for instance, online sales (thus p.8). To the extent that this legal situation at all exists and that copyright is applied on secondary markets – not under competitive conditions and hence with a tendency to increase prices – the resulting *negative effects would, if at all, have to be countered by means of limitations (subject to remuneration)*. The fact that current European law does not yet permit such limitations to promote competition,<sup>12</sup> cannot be used to lead to the converse conclusion that related rights can also be extended in time without hesitation.

Above all, however, the said legal situation is by no means applicable everywhere. On the contrary, specifically in the field of *classical music, a large percentage of the works are already today in the public domain or will be so soon*; hence these recordings are only still subject to related rights. It is comprehensible that the sound recording industry is concerned about this market – and here the Commission wants to secure it 45 further years of exclusivity and hence a continuing flow of income from the marketing of the recordings concerned. The fact is, however, that at the time when most of these old recordings were made, cost calculations initially *involved no related rights at all, and subsequently in any event no longer than 50 years, such that a prolongation of the term can in no way be justified from an economic point of view in the sense of the necessary covering of the cost of investments; a retrospective prolongation is economically pointless in terms of an incentive function* (see above Para. 2).

(17) “(6) encourage digitisation of back catalogue”

If digitised recordings meet market demand, there will be suppliers who will make the necessary investments. These need not necessarily be the same as those who produced the pieces of music in question years ago; on the contrary, if the latter are not willing or see no sufficient prospect of profits, they can also grant the necessary rights to third parties. And if they are not willing to do so, but *if there is a general interest in such digitisation, it is, in a liberal economic system, a matter for the State to ensure the necessary competition* so that such will ultimately be possible. The need here is again for *specific limitations (subject to remuneration)*. On the other hand, to hope that a longer term of protection would encourage digitisation appears speculative.

---

<sup>12</sup> See (allegedly exhaustive, Recital 32) Art. 5 Directive 2001/29 dated 22 May 2001.



### *Users?*

- (18) The *situation of the users* is not worth a single heading to the Commission; within the framework of the impact assessment – but not under the heading “General context” (p .2 et seq.), – all that is stated is that “the impact on users would be minimal” (p.8; see also p.10). However, the two arguments offered for this fail to convince. Nowhere is it said that today’s “only appropriate remuneration” for public broadcasts or the communication of works of music will in fact remain the same; in any event, the setting of the tariffs is a matter for the national law of the member states and *in the light of a prolongation of the term of protection there would indeed be scope for a demand for an increase of the rates of remuneration*. In addition, in this context, the comparison with the book market (p.8) is also inappropriate; these findings could at most be used to draw conclusions about the CD market, which as compared with online sales is in any event expected to continue to fall significantly (see above Para. 8).

Above all, however, there is no place for astonishment if “no systematic difference between prices of in-copyright and out-of-copyright recordings” was found, since legal protection is only one of many factors involved in determining the price irrespective of the medium used to market a production. If this cost factor ceases to apply, this by no means necessarily allows the conclusion that the product in question must immediately become correspondingly cheaper – an effect that can also be observed, for instance, in the context of patent law (e.g. the prices of pharmaceuticals). On the contrary, *the price is determined by the specific situation on the market in question*; if cost-reducing factors are not passed on to consumers, this is merely an indication of a lack of competitive pressure. There are many arguments in support of this view with respect to the matter at issue, particularly since a continuing copyright would remain in the hands of a producer, hence the latter would, after expiry of the 50 year term of protection for the related rights still hold the necessary prohibitive rights in order to effectively prevent competition. Hence for the producer the prolongation of the term of protection would only mean that a certain part of the income (the part that is earned under the heading of related rights from the collective administration of the rights) would not be lost after 50 years. Hence it goes without saying that this “*uncompetitive*” *situation cannot be eliminated simply by not prolonging the term of protection in question*, but rather – as already stated (Para. 18) – only by means of competition oriented limitations (subject to remuneration).

However, there is no need to advance to the level of such market economy discussion in order to show that the Commission's arguments lack credibility. For *someone must pay the bill* if an allegedly rewarding additional amount as compared with the present plan is to be paid to the sound recording producers and performers (see also p.9 and below, Para. 21), and if this amount can be used by the sound recording industry to establish a fund, particularly since new

talent is to be encouraged, and if in the opinion of the Commission compensation is also to be provided for the dramatic collapse resulting from pirate copies (see p.4). *However, who is going to pay for all this if not the user?*

- (19) The *use-it-or-lose-it clause* first explained briefly in the impact assessment (p.9; see also p .5) is an interesting approach. The idea is by no means unknown to German copyright law, since Section 41 of the Copyright Act contains a *revocation right* in the event of non-use. Details (and not irrelevance doctrinal differences) need not be discussed here; what is made clear by this reference is that such a (*binding*) *contractual provision – no doubt indeed effective for certain performing artists – could already be introduced in the existing system of protective rights*; there is no need for the term of protection to be prolonged to 95 years. On the other hand, it is also clear that this does not correspond with the Commission's intentions. The proposal for an Art. 10a Para. 6 proves, on closer examination, to be nothing but a fig leaf, since it is limited to *cases under the old law* – the clause is not intended to apply to new rights arising after the prolongation of the term – and even for older rights, the obstacle is unrealistically high if a plurality of performers involved can only issue notice jointly. In brief, the proposal submitted is of no use; however, a certain protection of performers could be achieved by means of an adequately shaped forfeiture clause.
- (20) The same applies to the idea of supporting socially weak groups by means of *funds based on a certain redistribution* (p.9 et seq., for the specific proposals see also p.11). Such approaches are well-known within the context of the collective administration of rights (although designed differently, mainly via the remuneration received by the collecting societies) and to a certain extent deserve support. However, the scene is extremely heterogeneous here, since at European level there has as yet been no attempt whatsoever to harmonise the substantive law principles that apply to the activities of the collecting societies (for instance the distribution principles, state control, etc); the same would apply *mutatis mutandis* to the funds subject to national law. To this extent, this isolated approach by the Commission is to be regarded with caution. *If those affected – performers and other authors in need – are to be helped in the longer term in this manner, this would already be possible today.* In the specific proposal, however, there does not appear to be a focus on a holistic approach, and it tends to leave the impression that this “countermeasure” is intended to “buy”, so to speak, the consent to the prolongation of the term of protection, which would still give the sound recording industry the lion's share despite the setting up of such funds (see also p.9). On closer analysis of the proposed Art. 10a Para. 3, this impression is confirmed by the fact that this fund is ultimately only intended to be temporary, i.e. only for *cases under the old law*. Hence there can be no question of a long-term approach, since after expiry of this transitional period the bargaining imbalance would continue between



performing artists and sound recording producers – but without the fund – as before, the only difference being that the rights would then exist for 95 years.

- (21) At the end of the discussions on impact assessment, the Commission provides concrete figures concerning the expected additional income resulting from the additional 45 year term of protection (p 11). This is the core of the matter on this issue; for this reason, it is astonishing that these figures are only mentioned here – and this only because the Commission wishes at this point to justify why the proposed fund, to which 20% of (certain) income from the prolonged term of protection is to be paid, will not be an excessive burden on the music industry.

Even more astonishing is of course the *uncertainty that the Commission reveals at this point. It has apparently no idea of the effects that the prolongation of the term of protection would ultimately have on the income side of the sound recording industry* – and how should it know, since it does not know the really relevant figures from the industry (see Para. 9). Instead, the Commission is satisfied with estimates, and apparently *itself considers that there is a very high risk that the estimates are incorrect*. It attempts to limit this risk by setting an “upper” and a “lower” limit. Specifically, as a minimum it expects (total) additional income of merely Euro 39 million to the benefit of the sound recording industry, and a maximum of Euro 758 million – *in other words, the maximum estimate is no less than 2000% of the minimum figure*.

There is no need to discuss here how commercial enterprises would be assessed if they made such a rough estimate as to whether the launching of a new product was worthwhile. However, it should also be noted that the *Commission's proposal with respect to the economic impact assessment lacks the necessary reliability*. This is also demonstrated by a number of independent studies that come to entirely different results to those of the Commission.<sup>13</sup> Thus *all the Commission's assumptions – including with respect to the impact of the prolongation of the term of protection to the detriment of the users – lacks any basis in facts*.

**“3. Legal elements of the proposal– proportionality principle (p.10 et seq.)”**

- (22) Under the heading of proportionality, the Commission takes up the six objectives already examined and called into question in connection with the impact assessment (above, Para. 11)

---

<sup>13</sup> Institute for Information Law of the University of Amsterdam, The Recasting of Copyright & Related Rights for the Knowledge Economy, [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf), pp. 83-137, and Commission Staff Working Paper on the Review of the EC legal framework in the field of copyright and related rights, Brussels, 19.07.2004 SEC (2004) 995; see also the Gowers Report: Gowers Review of Intellectual Property for the UK Government, 2006, which in turn is based decisively on the Review of the Economic Evidence Relating an Extension of the term of Copyright in Sound Recordings of the Centre for Intellectual Property and Information Law at the University of Cambridge (CIPIL).



and weighs up – with numerous repetitions which will not be set out here again – individual options, in particular the question whether *the term of protection should be limited to the lifetime of the performer or in fact generally set at 95 years*. It is true that the first – individualised – alternative would involve considerable complexity, as is also known from copyright (but which must also be coped with by the system). No mention is made, on the other hand, of the fact that under the “simpler” alternative it is *the heirs of the performers that would necessarily enjoy these rights* after the latter’s death – and as a rule for decades with a term of protection of 95 years (see also above, Para. 6). Of course no objective justification is provided for why these heirs should derive income from (another’s) related rights – under certain circumstances for a lifetime – particularly since a comparison with copyright would not be possible (above, Para. 12).

This benefiting of the heirs is particularly difficult to understand with respect to a second income from the collective administration of rights. If there should be binding *rules* – as yet non-existent in European law (see above Para. 5) – *between the performing artists on the one hand and the sound recording producers on the other hand* with respect to the distribution of income to the beneficiaries, the purpose of such provisions would be to *protect the performer*; the latter should not be exposed to pressure from the producers with their significantly greater bargaining power to grant the latter the entire share of the income. On the other hand, the purpose of such distribution rules can hardly be to protect the heirs, who are not mentioned at all by the Commission – although it is the heirs who would actually play the main role in the event of the prolongation of the term of protection – nor are they mentioned with respect to the proposed *fund* (see Para. 20), the intention of which can hardly be to benefit any heirs.

If on the other hand there are no binding distribution rules between the two categories of beneficiaries of performing rights – which would in any event primarily benefit the heirs – this would in practice mean that the *sound recording industry would be the sole beneficiary of the prolongation of the term of protection*. In this event it would also attempt to secure the performing artist’s share by contract (in addition to the share of the remuneration from the collective administration of rights to which it is entitled by origin), whether already during the performer's lifetime or in any event for the time of his death. If the Commission is not to be imputed such an intention, it simply shows *how half-baked its proposal is*.



### III. Conclusion

1. The above analysis of the Commission's proposal shows that the prolongation of the term of protection cannot be justified from any point of view. It can only marginally, if at all, benefit the performing artists who the proposal claims to protect; they would not survive to benefit from by far the largest share resulting from the prolongation of the term.
2. If the economic situation of the performer is to be improved, the decisive factor for him is measures that would take effect immediately following the provision of the performance. The focus would be on binding rules for the contractual relationship with the sound recording producer (buy-out contracts).
3. Flanking measures could improve the situation of certain performing artists. The Commission proposes a “use-it-or-lose-it” clause and a fund, two possibilities that in the form presented are admittedly unsuitable but provide food for thought that could be developed.
4. A prolongation of the term of protection would profit the sound recording industry, above all if the copyright protection of the works used has expired (classical music) and the recordings are more than 50 years old. The aspect of the necessary return on the investments made at the time does not constitute a justification for this.
5. On a subordinate level, the sound recording industry could benefit from the longer period based on the collective administration of rights, depending on the legal situation also in terms of the share of the performing artists, in particular after their death. However, taking into account the additional costs to the national economy, there is no justification for this.
6. The Commission's proposal shows that there is an absolute lack of clarity with respect to the additional income expected. Consequently, it is not possible to assess the costs for the user. Independent studies, however, assume completely different figures than those used by the Commission; hence the factual situation itself has not been sufficiently investigated.
7. The proposed prolongation of the term of protection is in no causal connection to the problem of illegal acts, specifically on the Internet. The latter development is a cause of



concern, even if the figures submitted must be treated with maximum caution. However, they are to be countered using very different measures.

8. The fact that a number of productions are no longer profitable is no justification in itself for a prolongation of the term of protection. In particular, the prolongation cannot be justified indiscriminately on the grounds of necessary cross-subsidies, the promotion of culture or of younger talent. It is for the sound recording industry to prove that the 50 year protection period is not sufficient for this purpose.
9. The comparison with the legal situation in the USA that is always raised in this connection is misleading and wrong. European and American right holders enjoy the same protection in the territory in question, related rights do not exist in the USA and copyright protection is, depending on calculation, hardly longer than in Europe.
10. The relationships addressed by the Commission in its proposal are complex. The Commission cannot be expected to have exhaustive legal or factual expert knowledge in this field. However, this is no justification for the blind implementation of specific commercial interests without consulting independent experts.

Munich, 10 September 2008