

The seven-year itch: is the Term Extension Directive working for performers?

Kluwer Copyright Blog
May 24, 2018

Ana Ramalho (Maastricht University) and Aurelio Lopez-Tarruella (University of Alicante)

Please refer to this post as: Ana Ramalho and Aurelio Lopez-Tarruella, "The seven-year itch: is the Term Extension Directive working for performers?", *Kluwer Copyright Blog*, May 24 2018, <http://copyrightblog.kluweriplaw.com/2018/05/24/seven-year-itch-term-extension-directive-working-performer/>

Almost seven years ago, Directive 2011/77/EU – also called the Term Extension Directive – was passed. As mentioned in the [Impact Assessment that accompanied the Proposal for the Directive](#), its general objective was to promote music production in the EU. The Impact Assessment also referred to specific objectives, which included contributing to enhancing the welfare of performers and the competitiveness of the EU music industry, and increasing the available music repertoire. The Directive contains several measures to achieve these objectives – an extension of the term of protection of performers' and producers' rights to 70 years after publication or communication to the public of the fixation of the performance; the "use it or lose it" clause, granting performers the right to terminate the contract with a producer after 50 years where the latter does not exploit the phonogram; the annual supplementary remuneration (20% fund), granting performers who only received a lump sum payment the right to obtain an annual supplementary remuneration from the phonogram producer for each full year following the 50th year of publication or communication of the phonogram; and the "clean slate" provision, which establishes that neither advance payments nor any contractually defined deductions can be deducted from the payments made to performers as from the 50th year after the phonogram was published or communicated to the public.

The deadline for implementing the Directive was 1 November 2013. While not every Member State complied with that deadline, the Directive has now been implemented in all Member States of the EU. A [Study](#) conducted by these bloggers at the request of the European Parliament's Committee on Legal Affairs (JURI) sought to evaluate the status quo of implementation of the Directive, to identify best practices in the Member States, and to consider the potential long-term effects of the term extension of protection, both within and outside the EU. The study provides an overview of implementation in all EU Member States, and carries out an in-depth analysis of the implementation of the Directive in selected Member States (France, Germany, Portugal, Romania, Spain, Sweden and the UK).

The Study drew several conclusions on different aspects of the Directive. This blog post, however, will only tackle the findings concerning performers. The main conclusion from the Study is that **the enhancement of the welfare of performers has been modest at best**. Performers only enjoy the so-called accompanying measures (i.e., the "use it or lose it" clause, the annual supplementary remuneration and the "clean slate" provision) during the extension period (i.e., from the 50th till the 70th year). However, performers have a weak contractual position vis-à-vis producers throughout the entire period of protection. In this context, Arts. 14 to 16 of the [Proposal for a Directive on Copyright in the Digital Single Market](#) (hereinafter, "DSM Proposal") provide additional safeguards. The provisions would oblige Member States to introduce a much clearer and stronger right for performers to request an adjustment of their remuneration in cases where the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues derived from the exploitation of the performance. As a consequence, the (optional) right of performers to ask for the modification of their contract (Art. 10a (2) of the Term Extension Directive) might become superfluous. Only one of the Member States surveyed (France) has introduced this right in its national law and, in any case, its regulation is not satisfactory since many questions relating to its exercise remain unanswered.

Moreover, the identification of the performers entitled to the rights provided by the Directive's provisions is problematic in practice. The role played by Collective Management Organisations (CMOs) in informing performers about their new rights varies from one Member State to another. Producers also play an essential role in identifying performers entitled to the rights, since they hold the necessary information about the performances that are entering the extension period, the performers who participated in their fixation, and the terms of their participation. Good internal organisation of CMOs, the use of advanced and up-to-date electronic databases of their members and good communication schemes, either with CMOs representing producers or directly with producers, seem essential to guarantee the effectiveness of the Directive. The Directive establishes an obligation for producers to provide information on very limited terms: a) information necessary to secure the payment of the annual supplementary remuneration (but not covering any other aspect necessary for the exercise of other rights provided for in the Directive); and b) information only provided upon request. None of the seven Member States surveyed have expanded the scope of this obligation in national law. The obligation of producers to provide information should be reinforced. The general obligation established in the [CMO Directive](#) for users (Art. 17) does not apply to producers (however, if adopted, Art. 14 of the DSM Proposal will help to reinforce the obligation of producers to provide information to performers).

Another issue that weakens the position of performers is the way in which the lawful publication or lawful communication to the public are taken into account in the Directive. These events are important in two instances: first, to calculate the term of protection; second, to calculate the beginning of the extension period where performers start to enjoy the rights provided for them in the Directive. Except for the calculation of the term of protection of performers' rights, the lawful publication prevails over the lawful communication. In relation to producers' rights, the lawful publication prevails over lawful communication even if it takes place later in time. However, considering the evolution of the music industry, "lawful communication" may soon become the rule and "lawful publication" the exception. In such a scenario, it would be hard to sustain the position that the second should prevail over the first to calculate the term of protection. In fact, record companies could choose to abuse the provision, although the consequences would not be felt in the short-medium term: a record company that made a record available on the Internet in 2008 may decide to wait until 2028 to publish the record as an album. In this case, the term of protection of the phonogram would extend until 2098. Performers would then have to wait until 2078 to enjoy the rights provided by the accompanying measures.

Only Portugal out of the seven Member States surveyed has deviated from the wording of the Directive on this issue. The Directive's rule is cause for a number of concerns. It opens the door to abusive practices by producers, as they can make new releases available on the Internet and delay the publication of records until the 50-year period from the performance is about to expire (which would mean that the term of protection could expand to almost 120 years). Moreover, there is no justification to apply different terms of protection to performers' rights (lawful publication or lawful communication of the performance, whichever is first) and to producers' rights (lawful publication or, if this does not happen, lawful communication). If producers put into practice the abusive practice mentioned above, during the "new" term of protection they would also benefit from the fact that performers' rights would have expired. In addition, an interpretation of "lawful publication" as the offering of "fixed copies that can be put into circulation as tangible objects" in the sense of Art. 2(e) and the Agreed Statement in WPPT is not adapted to actual practices in the music sector, where the making available of performances on the Internet is increasingly gaining more relevance. These concerns could be adequately addressed by interpreting the term "lawful publication" as including the making available of a performance on the Internet.

In relation to the **"use it or lose it" clause**, the expression "offering for sale in sufficient quantity" raises interpretation problems that have only been partially addressed in some of the Member States surveyed (UK and Spain). "Offering for sale in sufficient quantity" should be found to exist where the performance is made available on the Internet in a manner that satisfies the reasonable needs of the public, taking into account the nature and aim of the phonogram. The fulfilment of this requirement would need to be established on a case by case basis, although it can be safely assumed that making a new record available on popular streaming services such as Spotify or Deezer, where it can be easily located by the general public, should be enough to comply with the threshold of "sufficient quantity". Likewise, uploading a new recording of a piano concerto on a website specialising in piano music would also meet the requirement; whereas uploading a pop record exclusively on the website of an independent record company that does not promote products on third parties' websites or social networks would probably not amount to offering for sale sufficient quantities of said record. This interpretation means that, contrary to what is explicitly or implicitly established in the laws of the Member States surveyed, producers do not need to both release the record in tangible form and make it available on the Internet to make sure that the "use it or lose it" clause is not triggered. The opposite interpretation (where both acts of exploitation are needed) would be more beneficial to performers; however, it would also be unrealistic having in mind actual practices in the music sector.

Considering that music performances involving a plurality of performers is the general practice in many music genres, a deeper analysis of the exercise of the "use it or lose it" clause in these cases seems necessary. Very different solutions exist across the Member States surveyed. These divergences may create obstacles to the functioning of the internal market. In certain Member States, the solution provided by law is so complex that the effectiveness of the measure is at risk. Because of that, a simple rule should be proposed according to which a majority of performers can agree to terminate the contract, and they should select one representative to exercise the right. Such a rule may grant more weight to the vote of featured artists as recognition for the essential role they play in the conception of the performance.

The national expert reports show that clarification is needed in relation to certain aspects of the functioning of the **annual supplementary remuneration** – e.g., the information that producers are obliged to provide, the person entitled to ask for such information, the measures that can be adopted against those producers who do not provide information or who provide incomplete information, and the method of calculation of the remuneration. This may be easily accomplished by competent authorities in the Member States through the publication of guidelines. Said reports also reveal that the remuneration is not fully working in practice in many Member States (known exceptions at the time of writing the Study were Spain and the UK, where the CMOs were distributing the 20% fund among their members).

In relation to the **"clean slate" provision**, while the Directive explicitly states the mandatory nature of the "use it or lose it" clause, nothing is said with respect to this provision. As a consequence, Sweden has established that the "clean slate" provision can be derogated by contract. This diminishes the effectiveness of the Directive. Taking into account the objective of the provision, the "clean slate" clause must be understood as an overriding mandatory rule in the sense of Art. 9 of the Regulation 593/2008 on the law applicable to contractual obligations (Rome I): such a clause cannot be derogated by contract and it is applicable even if the parties have chosen the law of a non-EU country. This should have been clearly established in the Directive to avoid other Member States following Sweden's stance.

Another point of attention concerns audio-visual performers and producers, who are excluded from the scope of application of the Directive. None of the seven Member States surveyed have applied the term extension to this category of performers and producers. Despite the differences between the film industry and the music sector, this does not seem justified, not least because it creates difficulties where the same performance is recorded both on a phonogram and on audio-visual media.

Also relevant to performers are the findings regarding the competitiveness of the European music industry vis-à-vis foreign trading partners. The research shows that from a legal point of view the "comparison of terms" argument used by the Commission to justify the term extension is unfounded. Such argument was based on the premise that non-EU countries were allowed to not grant longer protection to EU right holders, despite granting this to their nationals, thus putting EU performers and producers at a disadvantage. Due to the obligations assumed in the Rome Convention, EU trading partners cannot apply a rule on comparison of terms. The only exceptions are the United States and India, which are not parties to the Rome Convention. However, in the case of the United States, its national legislation does not apply a comparison of terms, with the consequence that its term of protection applies equally to national and foreign sound recordings (provided of course that such sound recordings are protectable under US law). In the case of India, any negative impact on the EU's exports to India would likely derive from the latter's weak enforcement and pervasive piracy rather than on the rule on comparison of terms.

All in all, it might be sweeping to say there is a seven-year itch in the workings of the Term Extension

Directive, if we take it as accurate that a seven-year itch implies a decrease in happiness after seven years. After all, it's not like there were unanimous feelings of happiness about the Directive (quite the contrary – see for example [here](#)). Still, for those who harboured the belief that the Directive would be a game changer for performers, disappointment is bound to happen.

More conclusions from the Study can be found [here](#).