

EC TERM EXTENSION PROPOSALS

FEATURED PERFORMERS CALL FOR A BETTER BALANCE BETWEEN STAKEHOLDERS

The IMMF (International Music Managers Forum) supports the principal of extending the term of protection of copyright in sound recordings in the EU from 50 to 95 years. However, we are very concerned that the EC has not achieved the correct balance between the stakeholders in its current proposals.

TWO MYTHS DISPELLED

1. ***There will be just as many featured (contracted) artists struggling in their old age as there are session players and singers.*** The 50 or so superstar rich and very successful featured performers in the EU completely distort the picture. For every one such very successful featured performer there are 1000 featured performers that only enjoyed moderate success but whose recordings gave enrichment to the culture of Europe.
2. ***The proposals imply that the term of protection in the USA is 95 years. In fact it is 70 years after the last surviving significant performer on a recording, with a limitation of assignment or license of 35 years.*** This means that in the USA the term of protection for recordings can be up to 160 years, over 3 times longer than the existing 50 years in the EU. The 35 years limitation on transfer of copyright (to a phonogram producer) ensures that featured artists will not suffer unreasonable long-term exploitation of their recordings and this automatically ensures an element of 'use it or lose it'. This is an elegant solution to the dilemma of featured artists who suddenly find that their contracts have been extended due to legislation on term extension. The term of protection is reduced to 95 years in the USA if the recording is deemed to be a 'work made for hire'. (i.e. a phonogram producer employs performers to make recordings on their behalf).

EFFECT ON STAKEHOLDERS

Phonogram Producers

Big winners. In the existing proposals phonogram producers will be 'gifted' a further 45 years of copyright protection in sound recordings but will have to pay 20% of the dealer price of the recording to a fund for session players during the extension period. They will also receive a further 45 years of equitable remuneration income from the broadcasting and public performance of the recordings that they own. This will be an extremely valuable extension of monopoly rights for phonogram producers.

Session Players and Singers

Big winners. Session players will gain from the 20% fund in old age. They will also receive a further 45 years of income as a result of the equitable remuneration for broadcasting and public performance during the extension period.

The IMMF fully supports an extra benefit for session players and singers during the extension period. However, 20% of PPD (dealer price) is over twice the percentage the author (songwriter) of the underlying musical work will receive (current mechanical royalties to authors in the EU are in the 8-9% of PPD region) and well over twice the royalty that would be paid to featured artists (royalties in the fifties, sixties and seventies were in the 1%- 8% region after deductions.)

Featured Artists

The losers. Featured artists, the majority of which are already locked in to a 50 year contract will have to endure a further 45 years with the same phonogram producer with the same contractual conditions. These conditions for agreements in the fifties, sixties and seventies were punitive. The abandonment of the 'clean slate' provision as promised in the 14th February EC press release has made things far worse. This means that the 7 out of 8 featured artists who are un-recouped with the phonogram producer after 50 years will receive nothing from record sales in the extension period as any royalties will simply be credited to the

un-recouped royalty account and will not be paid through to the artist.

Also, most recording contracts have a clause that states that if a recording is sold for 50% of PPD (dealer price) or less no royalties are payable to the contracted artist. So even if the artist is one of the lucky 1 in 8 that is recouped after 50 years they will still receive no royalties if the phonogram producer sells the recording at 50% of PPD or less which is quite likely for a 50 year old recording.

The 'use it or lose it' provisions will only apply to existing recordings in the extension period. Unless they are applied to all recordings (past and future) in both the primary period (first 50 years) and through the extension period they will be of little value to featured artists. Also the use it or lose it provision needs to apply to both physical and digital availability. i.e. if a recording is not purchasable by consumers in both physical format and on-line as a download for a period of perhaps 2 years the copyright is transferred to the featured artist if so requested.

As with phonogram producers and session players, featured artists will enjoy any income generated by the equitable remuneration right in broadcasting or public performance during the extension period, but this will in the vast majority of cases be insignificant after 50 years. A session player may have played on several hundred recordings by different featured artists some of which will still be played after fifty years. The chances of that happening for a featured artist are much less.

So for the vast majority of featured artists that are un-recouped at 50 years they will receive the following in the extension period:

1. Nothing from record sales in the extension period (any royalties will simply be credited to the un-recouped balance and nothing will be paid through)
2. Nothing from the performer fund (this is all going to session players)
3. Next to nothing from public performance income (Only very big hits stand a chance of receiving any airplay after 50 years)

The only featured artists that will receive some benefit in the extension period are those very successful featured artists who are recouped at 50 years and who had big hits in their day. These are the very artists which Charlie McCreevy said he did NOT want to help in his 14th February press release.

THE SOLUTION

In order to provide a fair balance between the stakeholders the following provisions should be incorporated:

ALTERNATIVE A

1. ***The term of protection for sound recordings and the public performance right in sound recordings in the EU should be extended from 50 to 95 years***
2. ***Limitation of transfer of rights for featured performers..***
We suggest this should be 50 years for existing contracts (so that there would be no negative impact on existing agreements) and 35 years (as in USA) for new contracts going forward. This would ensure that featured artists could gain ownership of their recordings (if they so wished) every 35 years.
3. ***Use it or Lose it provision should apply to both physical and on-line availability and should apply through both the primary 50 year period and the extension period.***
If this is not done, the phonogram producer can fail to make recordings available to the public (which is often the case at present) which puts the featured artist in a position of restraint of trade. The only way consumers can access these recordings is by illegal CD burning or illegal on-line file sharing which causes loss to all stakeholders.
4. ***All future transfer of copyright in recordings should be by license only as is already the law in Germany.***
Assignment should be made illegal. In this way the featured performer always has ultimate ownership of their creations even if the license is for life of copyright.

5. ***There should be extra compensation in the extension period for session players and singers.***

ALTERNATIVE B

1. ***The term of protection for sound recordings and the public performance right in sound recordings in the EU should be extended from 50 to 95 years.***
2. ***There should be clean slate provision whereby any unrecouped balance between a featured artist and their phonogram producer would be written off after 50 years.***
This would allow featured artists to start actually receiving income again after 50 years.
3. ***There should be a minimum royalty payable to featured artists of perhaps 15% of PPD (with no deductions) during the extension period.*** Many old contracts provide for between 1% and 8% after deductions.
4. ***Any performer fund should be shared by ALL performers both non-featured (session players and singers) and featured performers.*** There will be just as many poor and struggling featured performers in old age as there are session players.
5. ***'Use it or Lose it' provision should apply to both physical and on-line availability and should apply through both the primary 50 year period and the extension period.*** If this is not done, the phonogram producer can fail to make recordings available to the public (which is often the case at present) which puts the featured artist in a position of restraint of trade. The only way consumers can access these recordings is by illegal CD burning or illegal on-line file sharing which causes loss to all stakeholders.

CONCLUSION

As it stands the EC proposals will be of great benefit to phonogram producers and session players and singers but will be of little value to the featured artists who are the source of over 95% of the

income in the EU music industry. In most EU member states the artist pays all of the recording costs and video costs from their royalties. There can be few situations in world business where someone pays for something in its entirety but never gets to own it. The phonogram producers will argue that they take the risk but this is already taken care of in the royalty structures.

It is essential that the above provisions are incorporated in the term extension proposals in order to give a fair balance to all the stakeholders.

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