EUROFIA AND COLLECTING SOCIETIES MEETING

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THE EXTENSION OF THE TERM OF PROTECTION - HOW TO ENSURE BENEFIT FOR AUDIOVISUAL PERFORMERS?

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As you remember, we all welcomed the announcement by Commissioner McCreevy last year, proposing an extension of the performers' term of protection from 50 to 95 years. According to Mr. McCreevy, this initiative aimed to improve the social situation of performers, "***in particular session musicians***", taking into account that *performers* [and not just *session musicians*, or just *musicians*] are increasingly outliving the current 50-year period of protection.

When announcing such proposal, Mr. McCreevy argued that he had not seen "*a convincing reason why a composer of* ***music*** *should benefit from a term of copyright which extends to the composer's life and 70 years beyond, while the performer should only enjoy 50 years, often not even covering his lifetime. It is the performer who gives life to the composition and while most of us have no idea who wrote our favourite* ***song*** *- we can usually name the performer*".

Despite the fact that this argument is also valid for audiovisual performances, when making the announcement, the Commission drew attention just to **singers and musicians**. But to tell you the truth, at the beginning we all thought, or at least those of us being more gullible, that the reference to the sound recordings was not literal. May be we were too naïve, but we (or at least me) thought that the allusion made by Mr McCreevy to sound recordings was a mere example. How to imagine a possible discrimination on the basis of the nature of the performance or its fixation? – Even though we knew that, despite all the efforts made by AEPO-ARTIS, among others, this initiative of the Commission came **at the end** from the pressure of the phonographic industry.

In fact, although this initiative pretended to have been conceived to benefit

performers, it was clear that the proposal, as drafted, was the result of the intense lobbying activity carried out by a phonographic industry in crisis. Everything was aimed to avoid the "*crown jewels*" of popular music of the fifties and sixties falling into the public domain. Therefore, the proposal, not only was poorly conceived, but also introduced an unacceptable discrimination among performers never seen before in the EU legal system.

As different terms of protection would apply depending on the nature of the recording, one single performance could enjoy two different terms of protection. This could lead, as AEPO-ARTIS has repeatedly pointed out, to absurd situations in which, for instance, an opera performance might be protected for a longer period if its fixed as a sound recording on a CD than if fixed on a DVD displaying both sound and images. **THIS IS CLEAR EVIDENCE THAT THIS PROPOSAL WAS NOT DESIGNED FOR PERFORMERS AS SUCH**. As the FIA's President, Ms. AGNETE HAALAND, pointed out during the press conference held at the European Parliament on the last 3rd of March: "*I frankly do not understand why when my voice is recorded I get a 95-year protection and when my image is also recorded I only get 50 years. Why would my appearance be less important than my voice? It simply does not make any sense. I am a performer and deserve to be protected as a whole, no matter if my work is recorded on a CD or on a DVD*".

But the fact is that the proposal submitted by the Commission to the Parliament excluded the audiovisual performances from its scope, something that was received with deep concern by all the performers' organizations in Europe, and not just by those ones representing audiovisual performers.

The arguments in the explanatory memorandum of the proposal were applicable to ALL the performers, and not just to those ones fixing their performances in a sound recording. The relation between the performer and the audiovisual producer is as unbalance (or even worse) than that of the performer and the phonogram producer. Furthermore, most of the audiovisual performers have little or no access to social security, retirement schemes, unemployment compensation or health and safety protection, and are generally confronted with widespread unfair contractual practices. In sum, and above all, all the facts that justified the proposal from the Commission, regarding the social and economic situation of the musicians, were also applicable to audiovisual performers.

So, the starting point was (and still is) that we couldn't find any reason for introducing different regimes of protection depending on the nature of the performances (musical or audiovisual) or of the fixation of such performances (sound or audiovisual recordings).

As I have mentioned before, may be we (or at least me) have been too naïve. As we were receiving the reports from the different Committees of the European Parliament before the end of last year – including the first draft report from Brian Crowley, at the Committee on Legal Affairs –, I remained hopeful, as I believed that we would finally achieve the inclusion of the audiovisual performances in the scope of the proposal.

But all those who really believed that we would see the audiovisual performances included in the scope of the Directive are not to blame for such gullibility, specially if we take into consideration some of the conclusions expressed last October by Brian Crowley in its draft report on the Commission proposal "***The discrimination between music and audiovisual performers is totally unacceptable as the Directive 93/98/EEC, whose codified version is Directive 2006/116/EC doesn't make any discrimination between performers, so create different regimes for the same category of performers would be a discrimination under the European Law and against national treatment. Furthermore there is no reason for such discrimination".***

In the same direction, in December 2008, some outstanding members of this committee seemed to be going to put forward different amendments for the inclusion of the audiovisual performances in the scope of the proposal.

But some weeks later, in February 2009, the JURI Committee, or at least some of its members – specially Crowley –, made an unreasonable U-turn in their position, supporting in its final report what they first considered an unacceptable discrimination.

This change of position obeyed to the intense lobbying carried out by other groups, basically by broadcasters and audiovisual producers – specially the French ones –, who were fearful of an increase in the payment due to the granting of more rights to the performers. Now I believe that asking for an additional remuneration right (for the making available) did not help us out, but I don't want to open such debate now.

We can say that the final report by Crowley raised the alarm: audiovisual performers were not even mentioned, as the new recital 5(a) made reference only to broadcasters and producers, who, by the way, **DID NOT EVEN ASK FOR IT**.

In spite of the few possibilities we still seemed to have, we went on struggling for the inclusion of the audiovisual performances through joint actions carried out with AEPO-ARTIS, FIA and FIM, as well as some of the most concerned collecting societies, such as AISGE, ADAMI, BECS and FILMEX, and we tried to adapt our strategy according to the fast-moving calendar.

First we held some meetings in Brussels with different members of the Parliament, such as the one of March 3rd, which was followed by a press conference in the Parliament building, with the presence of Medina Ortega and Jacques Toubon. After such constructive meeting we learned that:

a) There was no consensus between the Council and the Parliament, especially with regards to the accompanying measures. **Such lack of consensus was indeed the main risk for the whole project**, and not any possible lobbying activity from our side (as some Members of the Parliament and of the Commission, and even rightholders' organizations were saying by that time).

b) The voting at the plenary was going to be postponed to the 3rd week of April, as some representatives of the Commission, the Parliament and the Council were called to a "trilogue" meeting on March 31st, looking for a compromise text.

c) Our best chance seemed to be a possible amendment of the Recital 5(a), including in it the audiovisual performers instead of the broadcasters, providing that the Commission "**SHALL**" launch an impact assessment, instead of "should", and trying to include it among the articles, and not just as a recital.

So, considering that:

1. such change in the wording of Recital 5(a) would not necessarily mean a much better position for the audiovisual performers. It would be better, of

course, but not much better, since any impact assessment may take years, and any further action regarding the audiovisual performances (as we have learned from the WIPO experience) may take decades,

2. the whole project was in danger because of the lack of consensus between the Parliament and the Council - and not because of the petitions from our side,

we thought that we might have nothing to lose, and much to achieve, if at least until the "trilogue" meting we pushed for the inclusion of the audiovisual performances in the articles of the Directive, "*from day one*", as Dominick used to say. Only after such "trilogue" meeting, and depending on its outcome, we then could consider a different strategy. That is to say: only if it was clear that finally both the Parliament and the Council were to reach a common position, leaving the audiovisual performances out of the scope of the future Directive, we could then focus on pushing for an amendment of Recital 5(a).

Now we know that the compromise text agreed with the Council (even though with the opposition of many Member States, which endanger the project – and still may be too early to determine whether the Council will adopt the text voted three weeks ago in Strasbourg), **apart from reducing the term extension from 95 to 70 years**, **limits the scope of the future Directive to the sound recordings**. **AT LEAST WE HAVE ACHIEVE OUR SECONDARY GOAL: to "move" the Recital 5(a) to the articles, and to change its wording**.

In this sense, the Parliament voted in favour of the Amendment 75, which provides as follows:

"*The Commission* ***SHALL*** *carry out an assessment of the* ***possible need for an extension of the term of protection of rights to PERFORMERS and producers in the AUDIOVISUAL SECTOR*** *and* ***it SHALL report on the outcome of such an assessment to the European Parliament, the Council and the Economic and Social Committee NOT LATER THAN 1 JANUARY 2010***. ***IF APPROPRIATE, THE COMMISSION SHALL SUBMIT A PROPOSAL TO AMEND DIRECTIVE 2006/116/EC***".

I think that, although the result does not meet our (or at least my) expectations, we must be pleased with it. Such provision is certainly better than nothing.

If the Council finally adopts the text voted by the Parliament (most likely in its meeting of the next 18th of May), we have the chance to see the term of protection of the audiovisual performers also extended. **And we cannot fail to achieve such goal**. So, beyond going into the substance of such text, which is something that my colleague from ADAMI, Isabelle Feldman will do later, I would like to encourage all of you to keep on working for the extension of the term of protection of the audiovisual performers' rights.

For such purpose, all the performers' organizations (collecting societies and unions) should coordinate efforts and, with the support of AEPO-ARTIS and FIA, draft a complete report on the audiovisual sector, **CONCLUDING WITH THE URGENT NEED OF THE PERFORMERS TO HAVE AN EXTENDED TERM OF PROTECTION OF THEIR RIGHTS**.

Such report could be signed by an independent consultant such as Price Waterhouse Coopers, or any other. I'm thinking of the report completed by such consultant under the petition of the British Phonographic Industry, and which was taken into consideration by the Commission for drafting its proposal – as well as other reports, mainly the "*Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound recordings*" (IVIR or Institute for Information Law, 2006); and "*Performers' Rights in European Legislation: Situation and Elements for Improvement*" (AEPO-ARTIS 2007).

In any case, this report on the need of an extended term of protection for the audiovisual performers should be circulated to the Commission as soon as possible, and no later than next September or October. Most probably, the Commission will end up asking the Institute for Information Law (the IVIR) for a report on this field, and we all know how will conclude… So, we must push the Commission, we must convince the Commission, with our own report, that the audiovisual performers need and deserve an extension of the term of protection of their rights and, what may be more important, that the revenues of such extension will not have to be paid by consumers of audiovisual recordings (as the IVIR will probably suggest). The consumer prices won't be higher, nor such extension will benefit just the owners of important catalogues, but just, or mainly, the performers.

If we finally decide to hire the services of an independent consultant, we could ask for financial support or funds to both AEPO-ARTIS and FIA.

In any case today is a good chance for all of us to discuss how to do it, since most of the concerned parties are in this room, so I shall leave this question open for debate.

Let me just add that we have no time to lose, and that we all have to do our biggest efforts because, as I have just said, we cannot fail. We have to leave aside any further petition, we don't need to ask for complementary measures, neither for further rights, we must ask just for the same term of protection for all the performers. In this sense, as difficult as it will be with the opposition of the producers, having the users and the consumers against it will make it impossible. And finally, we must also take into consideration that some of our most supportive Members of the Parliament won't be in Brussels next year.