European Economic and Social Committee

INT/418
Intellectual property rights

Brussels, 14 July 2011

OPINION

of the
European Economic and Social Committee
on
Intellectual property rights in the music sector
(own-initiative opinion)

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Rapporteur: **Mr Gkofas**

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On 17 January 2008, the European E0conomic and Social Committee, acting under the second paragraph of Rule 29 of its Rules of Procedure, decided to draw up an opinion on:

Intellectual property rights in the music sector
(own-initiative opinion).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 26 May 2011.

At its 473rd plenary session of 13 and 14 July (meeting of 14 July), the European Economic and Social Committee adopted the following opinion by 119 votes to 51 with 42 abstentions.

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1. Conclusions and recommendations

1.1 Background

1.1.1 The protection of copyright and the related rights of performers in the music industry, concerning non-material products that are increasingly marketed and distributed in the form of digital files, is a subject that affects civil society in a very direct way.

1.1.2 The present opinion addresses five main points. The **first** concerns defining and identifying the rights and obligations of copyright holders and collecting societies in the music industry, and also the obligations arising from the buying or selling of intellectual property rights and related rights. The **second** is remuneration, in particular remuneration for use by third parties (consumers) of intellectual property rights or related rights. The **third** point is the way in which remuneration is fixed, and the meaning of public performance and what constitutes a public performance. The **fourth** point concerns the penalties that should be imposed on users for illegal use of this right. The **fifth** point is the structure and functioning of the collecting agencies or societies representing copyright-holders in certain Member States.

1.1.3 The EESC is concerned about the lack of harmonisation between Community law and national laws, and the differences in individual countries' laws; the risk is that the necessary balance between the public's access to cultural and leisure content, free movement of goods and services and the protection of intellectual property rights will not be fully struck.

1.1.4 The starting point for preparing a regulation to harmonise the Member States' legislation in this controversial area should be for the EU to vote on and adopt certain basic "fundamental

principles", in keeping with existing international conventions and in particular the Berne Convention for the Protection of Literary and Artistic Works, without prejudice to users' rights and taking the EESC's proposals into account.

1.1.5 The EESC would recommend harmonisation of Member States' legislation on those points that pose problems for civic life and affect it directly, so that acquired and constitutionally protected rights are not endangered by either literal or erroneous or partial interpretations of the law that prejudice consumers and users. Controversial points arising from the legal interpretations of terms used by the various legislators must be dealt with by the Commission, and the EESC believes it is its task to bring them to the negotiating table in order to achieve a fair outcome. The protection of authors and performers should not become a barrier to the free movement of works; it should also ensure that consumers have free access to and use of electronic content, based on amendments to the relevant provisions, so that the same rights are upheld on- and off-line that respect intellectual property.

1.1.6 The EESC recommends that a single legislative framework be established for: a) granting licences for the representation of copyright holders, b) framing agreements on the exploitation of authors' copyright, and c) the use of mediation in the event of differences or disagreements. This could help users of content and consumers, together with copyright holding authors and other right holders, to resolve disputes concerning the use of a work. It requires the establishment at national level of a single arbitration body for resolving disputes between copyright holders and users of content.

1.1.7 The EESC believes that this objective can be achieved by creating a single independent national body, which in addition to the above-mentioned duties would also be responsible for ensuring transparency regarding the full payment to copyright holders of payments collected by the collecting societies, in the event that this does not occur, with safeguards under European law, leaving Member States legislative latitude with respect to the establishment, organisation and running of the relevant body. This body would be empowered to ensure: a) strict application of existing Community or national legislation to achieve the above goal, b) establishment of full transparency in the collection and payment of remuneration for the use of copyright, and c) measures to combat tax evasion in connection with payment of public taxes arising from the use of works.

1.1.8 To maintain the trust of right-holders and users and facilitate cross-border licensing, the EESC considers that the governance and transparency of collective rights management needs to improve and adapt to technological progress. Easier, more uniform and technologically neutral solutions for cross-border and pan-European licensing in the audiovisual sector will stimulate creativity and help the content authors, producers and broadcasters, to the benefit of European consumers.

1.2 **The effectiveness of digital rights management (DRM)**

1.2.1 In addition, the EESC supports the promotion and improvement of legal services – such as Deezer, the first internet site to allow free and legal access to music, or Spotify, which allows the legal streaming of music via the internet and is financed via advertising – and believes that this medium should be allowed to continue to flourish alongside the legislative process.

1.2.2 **Education and awareness campaigns, particularly for the young, should be included among the measures to be taken.**

1.2.3 The EESC urges the Commission to flesh out the principles contained in its Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

1.2.4 The Committee urges the Commission to adopt as soon as possible the proposal for a framework directive on the collective management of rights as set out in the Digital Agenda.

2. **Introduction**

2.1 Authors and performers draw their income from revenue from the use of their artistic works throughout the world. Collecting societies, operating in all artistic sectors, collect revenue from the use of works throughout the world on behalf of the authors.

2.2 The size and power of these collecting societies vary from one Member State to another: some companies have limited scope, while others are so powerful that they are, in some cases, able to become de facto monopolies. The services they provide for artists also vary in accordance with these parameters.

2.3 It would be fair to ask, as the European Commission already has, whether in its complexity the current system is efficient enough and whether it safeguards the interests of both right holders and users of content and citizens as final consumers.

2.4 Would it be useful to look beyond the "simple" technical harmonisation of copyright and related rights? How might it be possible to improve the national management of copyright and overcome the problems caused by the current fragmentation of private copying levies, to give just one example? How can the efforts to improve legislation be reconciled with the effective cross-border management of collective rights? Legislation is needed in these areas.

2.5 The complexity of the situation and the sensitive nature of this subject for civil society have led the Committee to address the issue and examine it from all possible angles.

2.6 Indeed, the ignorance, if not indifference or even hostility, of the public towards the concept of intellectual property rights makes it necessary for civil society to react.

2.7 The current framework for the protection of copyright (not moral rights) and certain related rights of performers and producers in the music industry is governed by a series of directives, including European Parliament and Council Directives 2006/115/EC and 2006/116/EC of 12 December 2006, and European Parliament and Council Directive 2001/29/EC of 22 May 2001. Their primary aim is to facilitate the free movement of goods and ideas under conditions of healthy competition and to establish balance, as well as to combat piracy. All harmonisation of copyright and related rights is based on a high level of protection, as these rights are crucial to intellectual creation. Such protection helps to protect and develop creativity in the interest of authors, performers, producers, consumers, content users, culture, industry and the general public. Intellectual property has therefore been recognised as coming fully under property rights and is protected by the European Charter of Fundamental Rights: the creative and artistic work of authors and performers requires sufficient income to provide a foundation for further creative and artistic work, and only proper legal protection of right holders can provide an effective guarantee of such income.

2.8 Some countries have extremely repressive laws forbidding any form of copying or exchange of files protected by intellectual property rights, regardless of whether this takes place for private or commercial purposes[1].

2.9 European consumers, whose organisations have condemned their exclusion from the negotiations on these matters as an untransparent and anti-democratic act, have warned that police control over all internet exchanges and communications must not be introduced under the pretext of combating piracy, undermining the right to privacy in correspondence and the circulation of information. The Committee would also like to be informed about the discussions and proposals currently on the table, and to express its views.

3. Specific comments

3.1 Intellectual property: precisions and distinctions

3.1.1 It is of the utmost importance to be able to understand and define copyright and related rights. Both types of right fall under the umbrella concept of intellectual property. The concept of intellectual property was established internationally with the Convention of 14 July 1967 that set up the World Intellectual Property Organization and has subsequently been incorporated into Community legislation, in particular by means of Directive EC/115/2006, and is consequently a concept that is consolidated as part of the *acquis communautaire*.

3.1.2 The EESC considers that if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as

1 The penalties are the same whether it is a case of counterfeiting for commercial purposes or of private use.

phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

3.1.3 The EESC calls for the harmonisation of certain aspects of copyright and related rights. The various reports on the implementation of the directives, and the case-law of the Court of Justice in this area, must be taken into account for the purposes of this harmonisation.

3.1.4 The EESC welcomes the recent proposal for a directive on certain permitted uses of orphan works [COM(2011) 289 final], the content of which it will discuss in a forthcoming opinion.

3.2 **Remuneration**

3.2.1 The remuneration of music industry authors who hold a copyright (as an asset) is probably one of the most problematic issues for the majority of Member States in relation to transactions between collecting societies and users: most of these have been resolved by Court of Justice case-law.

3.2.2 The EESC considers it necessary to recommend that the principle of equality for all citizens before the law be applied, as well as the principle of proportionality, with respect both to the intellectual property of authors and other right holders and the rights of content users and final consumers. Intellectual property rights in Europe are now protected by the World Intellectual Property Organization's "Internet Treaties", which were ratified by the EU and the Member States in December 2009. In principle, this harmonises the laws that apply, although various national statements made at the time shed doubt on the utility of a unified approach at EU level. These treaties call for a ban on copying and counterfeiting for commercial purposes, as does the directive on copyright and related rights in the information society.

3.3 **Definition of remuneration and public performance**

3.3.1 Particular consideration must be given to determining when remuneration is owing for use of music, what constitutes a public performance, and when "exploitation" is a more appropriate term than "use".

3.3.2 The EESC considers that a clear distinction should be made between commercial exploitation and private use, when it comes to the purpose of use and the penalties imposed. In practice, the charges applied by the collecting societies, agreed with the associations representing the various user sectors, already cover the different uses that public establishments make of music, and those where music plays an essential role, such as discotheques, do not pay the same amount as those where music plays a secondary or incidental role, such as hairdressers or department stores.

3.3.3 The EESC believes that remuneration for "secondary exploitation", covered by the Berne Convention, is fully justified because the owners of the broadcasting establishments, of the television or radio broadcasts, are secondary exploiters of the works included in the primary broadcasts, on the basis of which such works and performances are "publicly communicated" in the above-mentioned places.

3.3.4 There is a need to reform the current system of copyright remuneration as a payment for reproduction for private use so as to improve transparency in the calculation of the "equitable remuneration", and in collection and distribution of royalties. Remuneration should reflect and be based on the actual financial loss suffered by copyright holders as a result of private copies.

3.3.5 In order to facilitate the granting of cross-border licences, the EESC considers that the contractual freedom of right holders must be upheld. They should not be obliged to grant licences for European territory as a whole, or to set the level of licence fees by contract.

3.3.6 The EESC advocates promoting more innovative negotiating models, providing access to content in different forms (free, premium, freemium) according to the viability of supply and the expectations and attitude of final users, thereby striking a fair balance between the remuneration of the right holders and access by consumers and the general public to content.

3.4 **Sanctions and penalties**

3.4.1 The EESC takes the view that protecting works is of fundamental importance for the economic and cultural development of the Union, particularly in the light of new economic and technological developments, in order to safeguard the creative and artistic work of authors and performers. A system of sanctions has been established for this purpose, meeting the requirements of effectiveness, dissuasiveness and proportionality as set out in Court of Justice case-law.

3.4.2 The EESC considers that the use of a number of intellectual works, which is permitted only as an exception to the exclusive rights of copyright-holders, with limitations for users, should be seen as a positive and universal citizens' right. Similarly, the terms of use are not entirely clear or legally defined and consumers come up against the current legislation as regards establishing permitted usage.

The defence of intellectual property under criminal law is an essential guarantee in defending and ensuring social, cultural, economic and political order in advanced countries.

The EESC is opposed to the use of criminal-law sanctions against users who are not motivated by profit.

3.4.3 The Amsterdam University Institute for Information Law carried out a study for the European Commission's Internal Market Directorate on the application and effects on Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society[2]. The chapters of the second part relating to the application of the directive in the EU's other Member States reveal that only six of the 26 states studied provide for a custodial sentence.

3.4.4 The EESC asks and recommends that a fourth paragraph be added to Article 8 of Directive 2001/29/EC stipulating that with respect to legal protection against violations of the rights and obligations arising from the said directive, the use by users and consumers of content, for which those who have publicly broadcast it have not paid the intellectual property rights fees in advance, will be decriminalised. Where it is made publicly available, this will be subject only to civil liability and the resulting penalties, i.e. compensation in proportion to the royalties owed to the holders of the copyright and related rights. Criminal sanctions for infringements of copyright should apply only in clearly defined cases of organised criminal violations of commercial laws and unlawful commercial exploitation of intellectual property rights. In any case, the implementing measures must uphold the fundamental rights of consumers.

3.5 **Structure and operation of the collecting societies and agencies**

3.5.1 It should be stressed that the existing directives at issue are characterised by a complete absence of protection for consumers, whose fortunes depend on provisions made by collecting societies, which are not subject to any real control. The EESC calls for the legal framework to recognise, protect and guarantee the rights of citizens and consumers and equality for all citizens before the law when it comes to the protection of users and consumers vis-à-vis authors and holders of related rights, in accordance with the laws of intellectual property and especially the Commission recommendation of 18 May 2005.

3.5.2 The EESC calls for the addition of a fifth paragraph to Article 5 of Directive 2006/115/EC, stipulating that collecting societies that are issued licences for collecting royalties and representing copyright-holders should not be commercial companies but bodies with non-profit-making status, in the form of an association made up of the holders of copyright and related rights.

3.5.3 The EESC calls for a sixth paragraph to be added to Article 5 of Directive 2006/115/EC to the effect that collecting societies or agencies should be supervised by an independent body at national level (single national management body). This could be the body responsible for issuing their licences to collect royalties for performers. In other words, the body that issues licences could be the body that carries out the supervision.

2 Study published in February 2007.

3.5.4 The EESC calls for a seventh paragraph to be added to Article 5 of Directive 2006/115/EC stipulating that copyright-holding authors and performers have the right to cede their copyright ownership and to transfer leasing or franchising rights to more than one existing or newly founded collecting society or agency. In this case, there will be more than one collecting society, and therefore a risk that: a) artists' remuneration is collected more than once by different collecting societies or agencies, resulting in b) a risk that the user may end up concluding contracts and collaborating with a number of collecting societies or agencies rather than with just one, and c) that payment may be made twice for use of the same work. The body that grants licences to the collecting societies or agencies should be responsible for determining the distribution among the authors and holders of related rights of the remuneration collected from users by them. Current software technology should be installed in the places concerned where works are performed to enable details to be kept of sound recordings (author, performer, duration, etc.) when they are made, so that the user will pay to use the rights for the work in question and the payments made can be proportionate. The above-mentioned body would also be responsible for ensuring that remuneration for the work as a whole is not collected more than once. Member States with no such body for issuing licences to collecting societies or agencies should provide for one to be set up under their national law.

3.5.5 The Committee calls for an eighth paragraph to be added to Article 5 of Directive 2006/115/EC stipulating that collecting societies representing performers must draw up a budget and a nominal financial statement on the management and distribution of remuneration collected on behalf of copyright-holders, and provide any other information needed to demonstrate that the income concerned has been paid to the copyright-holders and that that income has been declared and taxed by the fiscal authorities of the Member States. The accounts of agencies that collect royalties and pass them on to copyright-holders should be approved by an independent auditor, whose report must be published. They must also be subject to regular oversight by an authorised authority, such as a panel of auditors or an independent public authority.

3.5.6 The EESC calls for a ninth paragraph to be added to Article 5 of Directive 2006/115/EC to the effect that in the event of a collecting society not paying the royalties it has collected to the copyright-holders or not complying with the provisions of paragraphs 5 and 7 of the article in question, the licence-issuing body will first withdraw the licence and then, depending on the seriousness of the infringement, initiate proceedings in the national courts.

Brussels, 14 July 2011.

The President
of the
European Economic and Social Committee

Staffan Nilsson

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N.B.: Appendix overleaf.

APPENDIX
TO THE OPINION
of the
European Economic and Social Committee

The following sections of the section opinion were amended to reflect amendments adopted by the assembly but received more than one quarter of the votes cast (Rule 54(4) of the Rules of Procedure):

a) **Point 1.1.8**

1.1.8 There is questionable transparency in the management of revenues collected by collecting societies in a cross-border context. Indeed, authors, the holders of related rights, those obliged to pay rights and also consumers are not always aware of what exactly is being collected or of who will receive the revenue collected via the collecting society system.

Outcome of the vote on the amendment:

Votes in favour: 113
Votes against: 61
Abstentions: 23

b) **Point 3.1.1**

3.1.1 It is of the utmost importance to be able to understand and define copyright and related rights of performers. Both types of right fall under the umbrella concept of intellectual property. There is common ground inasmuch as intellectual property is made up of copyright, which belongs to the authors, composers and lyricists of a work, and related rights, which belong to the artists and performers of the works.

Outcome of the vote on the amendment:

Votes in favour: 116
Votes against: 55
Abstentions: 27

c) **Point 3.1.3**

3.1.3 The EESC calls for the harmonisation of certain aspects of copyright and the related rights of performers. This is necessary in the context of communication and information, e.g. when a sound recording (phonogram) enters the public domain. To ensure legal certainty and protection of the above-mentioned rights, Member State legislation must be harmonised,

for instance with respect to the definition of something in the public domain as a source of income, providing authors with revenue, all of which ensures the smooth running of the internal market.

Outcome of the vote on the amendment:

Votes in favour: 108
Votes against: 57
Abstentions: 31

d) **Point 3.2.1**

3.2.1 The remuneration of music industry authors who hold a copyright (as an asset) is probably one of the most problematic issues for the majority of Member States in relation to transactions between collecting societies and users.

Outcome of the vote on the amendment:

Votes in favour: 88
Votes against: 71
Abstentions: 34

e) **Point 3.3.2**

3.3.2 The EESC considers that a clear distinction should be made between commercial exploitation and private use, when it comes to the purpose of use and the penalties imposed. Any use or performance or presentation of a work should be considered public when the work is made accessible to a wider group than the immediate family or social circle, regardless of whether the people in the wider circle are in the same place or elsewhere, or to an audience not present at the place of the presentation; this definition must include all broadcasts and rebroadcasts of a work to the public using wired or wireless devices, including television broadcasts.

Outcome of the vote on the amendment:

Votes in favour: 103
Votes against: 53
Abstentions: 27

f) **Point 3.3.3**

3.3.3 The EESC believes that it should be made absolutely clear that public use means the exploitation of a work for profit and as part of a business activity that requires or justifies that use (of a work, sound, image or combined sound and image).

Outcome of the vote on the amendment:

Votes in favour: 100
Votes against: 58
Abstentions: 28

g) **Point 3.3.6**

Since equitable remuneration should by its very nature incorporate proportionality, which is often applied in practice, we need to distinguish between business activities where performing or using works is the main activity and source of income (concert or show organisers, cinema, radio, television, etc.) and other business activities, where performance of the work has no bearing on business (e.g. a taxi driver listening to the radio while carrying a fare-paying passenger) or has a secondary bearing on the main business activity (background music in department store lifts, restaurants, etc.). Fees should therefore be applied on a scale ranging from cost-free use to full payment, depending on the work's effective contribution to business activities. A clear application of these distinctions exists in some countries, such as France, which apply different charges to show organisers and the broadcasters of works on the one hand, and to cafes and restaurants on the other hand.

Outcome of the vote on the amendment:

Votes in favour: 106
Votes against: 62
Abstentions: 27

h) **Point 3.3.7**

3.3.7 The EESC calls for an eighth paragraph to be added to Article 11 of Directive 2006/115/EC stipulating that in the absence of an agreement between copyright-holders Member States may fix the level of equitable remuneration, with legislative provisions to establish that equitable remuneration. This paragraph should state that a committee is to be set up to resolve disputes between copyright-holders and users; both sides would be obliged to refer to the committee and negotiations should lead to an agreement between copyright-holders and performers on the one hand and users and consumers on the other, setting the

sum of the equitable payment for the entire royalty. Recourse to this committee to resolve disputes requires collecting societies to have entered into a prior written agreement to represent copyright-holders and performers in relation to given works. Collecting societies would not be eligible to make any collection on behalf of a copyright-holder with whom they do not have an agreement supported by a document (bearing a certified date) for each work or sound recording for every individual copyright-holder. Any presumed authorisation, where the fact of collection is taken to imply authorisation, is unacceptable. The committee should be made up of one user representative, one copyright-holders' representative and one representative from each side of industry or, at European level, one EESC member on behalf of the social partners.

Outcome of the vote on the amendment:

Votes in favour: 116
Votes against: 57
Abstentions: 23

i) **Point 3.4.1**

3.4.1 The EESC takes the view that protecting works is of fundamental importance for the economic and cultural development of the Union, particularly in the light of new economic and technological developments. But this sometimes seems to have the opposite to the desired effect, restricting economic activity substantially when the protection of the relevant rights is disproportionate, to the detriment of users and consumers.

Outcome of the vote on the amendment:

Votes in favour: 104
Votes against: 61
Abstentions: 36

j) **Point 3.4.2**

3.4.2 The EESC is concerned that rather than removing them the existing directive actually creates obstacles to trade and innovation in this area. For instance, the lack of clarity regarding equitable remuneration makes it harder, not easier, for SMEs to continue their activities without the necessary safeguards during an extended protection period. The same applies when collecting societies do not act properly or openly, when commercial users are not fully aware of the situation, and when potential damage suffered by copyright-holders owing to use of the work is negligible whereas the corresponding penalties are excessively severe.

Outcome of the vote on the amendment:

Votes in favour: 104
Votes against: 61
Abstentions: 36

k) **Point 3.4.3**

3.4.3 The EESC insists that the paragraph giving Member States the discretion to set penalties should be replaced, as in many Member States the penalties applied, sometimes even criminal, are not proportionate in the way they should be.

Outcome of the vote on the amendment:

Votes in favour: 104
Votes against: 61
Abstentions: 36

l) **Point 3.4.4**

3.4.4 The EESC is particularly concerned that Community legislation is aimed at protecting copyright and related rights of authors and artists, etc. without taking into account the corresponding rights of users and consumers. While reference is made to the fact that creative, artistic and business activities are largely carried out by self-employed persons and as such should be facilitated and protected, the approach is not the same for users. The use of a number of intellectual works is permitted only as an exception to the exclusive rights of copyright-holders, with limitations for users; however the terms of use are not entirely clear or legally defined and consumers come up against the current legislation as regards establishing permitted usage.

Outcome of the vote on the amendment:

Votes in favour: 104
Votes against: 61
Abstentions: 36