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COMMISSION STAFF WORKING DOCUMENT

Assessment of the possible need for an extension of the term of protection of rights of performers and producers in the audiovisual sector

PART I – INTRODUCTION

1. Background and scope

This staff working document assesses the possible need for an extension of the term of protection of the rights of performers and producers in the audiovisual sector as required by Article 3(2) of Directive 2011/77/EU[1] [the '2011 Term Directive']. This assessment takes into account the two consultations[2] conducted by the European Commission as well as the existing legal framework, including the most recent changes to copyright and related rights introduced by Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market ('the DSM Directive'). The assessment set out in this staff working document will be submitted to the European Parliament, the Council and the European Economic and Social Committee.

The 'term of protection' for copyright and related rights is the period during which rightholders hold rights in their works that are protected by copyright, and other subject matter which are protected as related rights. There are several factors involved in calculating the duration of the term of protection of any type of work or protected subject matter. Particular attention must be given to determining the commencement and expiry of the term of protection of the relevant rightholder in the work or other subject matter.

For the copyright of authors, the relevant convention at international level is the Berne Convention[3], which requires a minimum term of protection of 50 years after the death of the author. Although the European Union ('the EU') is not a party to the convention, the requirement for the same term of protection is incorporated into EU law through the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1 January 1995 (the 'TRIPS') to which the EU is party[4].

However, EU rules now go beyond this minimum international standard. Directive 2006/116/EC on the term of protection of copyright and certain related rights [the '2006 Term Directive'] sets this term of protection at 70 years after the death of the author[5]. For copyright

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[1] Article 3(2) of the Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. The Directive was adopted on 27 September 2011 and entered into force on 31 October 2011: '*By 1 January 2012, the Commission shall submit a report to the European Parliament, the Council and the European Economic and Social Committee, assessing the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC'.* – On that Directive, see also the Explanatory Memorandum, Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0464. And the Impact Assessment on the legal and economic situation of performers and record producers in the European Union, COM 2008, 464 final. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008SC2287&from=FR

[2] The Commission carried out a Public consultation on the review of the EU copyright rules between 5 December 2013 and 5 March 2014 and a Targeted consultation on the exercise of rights and related rights of performers and producers in the audiovisual sector between 31 July and 31 December 2019.

[3] Article 7(1) of the Berne Convention for the Protection of Literary and Artistic Works.

[4] Article 9 of the TRIPS Agreement.

[5] Article 1 of the 2006 Term Directive.

in films (i.e. the authors' right) the term of protection expires 70 years after the death of the last of the following individuals: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work[6]. For related rights, the international conventions to which the EU is a party, namely the TRIPS and the WIPO Performances and Phonograms Treaty of 20 December 1996 (the 'WPPT') do not provide for any specific form of protection for film producers. They provide for the protection of performers, producers of phonograms and broadcasting organisations, and set out a minimum protection of 50 years and a minimum protection of 20 years for broadcasting organisations[7].

The 2006 Term Directive set the term of protection of related rights to 50 years (usually starting from the first publication or communication to the public) for performers, producers of phonograms and broadcasting organisations. It also provided for the protection of film producers. Subsequently, the 2011 Term Directive extended the term of protection, notably of performers and producers[8] for phonogram fixations or sound recordings, and for works of co-authorship of musical compositions, from 50 to 70 years from the first publication or communication to the public[9]. The term of protection of authors (principal director), film producers and performers in the audiovisual sector continues to be governed by the 2006 Term Directive. This means that film producers and performers in the audiovisual sector still benefit from a protection of 50 years starting from the first communication to the public or the first publication of the performance or film[10]. The term of protection of performers and producers in the music sector therefore differs from the term applicable to films although the same term applies to broadcasting organisations in respect of broadcasts under the 2006 Term Directive.

Against this background, this staff working document addresses the situation of holders of certain related rights - namely the rights of producers in fixations of films whereby the term 'film' refers to a cinematographic or audiovisual work or moving images, whether or not accompanied by sound[11]; and also the rights of performers in the fixations of their performances in films.[12] Accordingly, 'films' is used as an encompassing term, except for in specific instances where the authors' rights are discussed, in which case the terms 'cinematographic works' or 'audiovisual works' are used. In certain instances, under a

[6] Article 2(2) of the 2006 Term Directive.
[7] The most recent international convention in the field is the WIPO Beijing Treaty on Audiovisual Performances (BTAP), a multilateral treaty acknowledging the intellectual property rights of performers with regard to their audiovisual performances. The BTAP grants performers in the audiovisual sector moral and economic rights, including for online exploitation. The Beijing Treaty has not changed the minimum term of protection of 50 years. The EU is a signatory of the BTAP but it has not ratified the treaty as of the drafting of this report. The BTAP has entered into force on 28 April 2020.
[8] The length of the term of protection of performers and producers in the music sector was previously regulated by the 2006 Term Directive.
[9] Article 3(1) and 3(2) of the 2011 Term Directive.
[10] Article 3 of the 2006 Term Directive.
[11] Article 3 (2) of the 2006 Term Directive. The term 'film' is a term used by the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter the Rental and Lending Directive).
[12] The term 'film' is also a term used by the Rental and Lending Directive.

contractual transfer, a producer may also hold rights of the authors in cinematographic works as such and where necessary. This report also deals with the impact of such transfers.

This staff working document does not address the term of protection of the rights of broadcasting organisations, as these rights fall outside the scope of the 2011 Term Directive[13]. However, a term extension for performers and film producers may affect broadcasting organisations, as they are market players involved in the distribution of films. The potential effect on broadcasters is described in this staff working document under the broader category of 'providers of content'[14] which also encompasses other entities involved in the distribution of films, such as online platforms and cultural heritage institutions. This staff working document generally uses the term 'providers of content' to refer to this category of entities involved in the distribution of films - more precisely those entities that provide content directly to the public via different means. Broadcasting organisations may also be the producer of the film in question, in which case they would be considered to be able and entitled to exercise the rights of producers in the fixation of the film.

2. Rights of film producers and performers under EU law

2.1. Rights of film producers

Producers have a central role in film production as they initiate, coordinate, supervise and control the film's production including ensuring its financing. They encompass a diverse category, which includes for example independent producers[15], bigger production companies, production companies who mainly produce commissioned films[16] or broadcasting organisations in the role of producers. It is however common that their role involves significant investment and risk taking, as acknowledged in Recital 6 of the Rental and Lending Directive which states that 'the investments required particularly for the production of (…) films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.'

[13] The exclusive rights of broadcasting organisations for the fixation of their broadcasts is governed by the Rental and Lending Directive. These rights are not governed by the 2006 Term Directive and do not form the reporting obligation laid down in the 2011 Term Directive.

[14] The term 'providers of content' has been used in the targeted consultation carried out by the Commission to prepare this report to refer to the category of entities that are involved in the distribution of films such as broadcasters, online platforms or cultural heritage institutions who provide content directly to the public via different means.

[15] In line with Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the Audiovisual Media Services Directive) independent producers are producers who are independent of broadcasters. Recital 71 adds that 'When defining 'producers who are independent of broadcasters Member States should take appropriate account notably of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.'

[16] Commissioned films are films that are ordered and paid for by another entity, for example a broadcaster, whereby the organisation commissioning the films is usually setting the specifications of the film, including creative aspects.

Film producers enjoy exclusive rights covering the reproduction[17], distribution[18] and making available to the public[19] of the original and copies of their films, as well as rental and lending rights[20]. Certain types of film transmissions are subject to specific rules[21].

However, cinematographic works and films are the collaborative effort of many different rightholders. Therefore, in practice, even where a producer has provided the necessary investment to enable the film to be produced, they may have to acquire rights from the other rightholders in order to exploit the film or cinematographic work (acquisition of rights). In the case of the rights of performers in fixations of films, the transfer of rights from performers to producers can occur in different ways, for example through an employment contract, a licence agreement or legal presumptions. Furthermore, Member States may introduce a presumption of transfer of rights from the performer to the producer in accordance with Article 3 of the Rental and Lending Directive (see below).

Through the acquisition of these rights, producers may also be able to exploit the rights of authors in cinematographic works. There may also be instances where the producer is also the author of the cinematographic work. When it comes to the term of protection, this means that producers hold exclusive rights in cinematographic works by way of acquisition of rights for much longer (70 years after the death of the last author) than the expiry of their own related rights in their films (50 years after first communication to the public or publication).

2.2. Rights of performers

Performers are granted certain *exclusive rights* to either authorise or prohibit the exploitation of the fixation of their performances. These are rights of fixation[22], rental and lending[23], reproduction[24], distribution[25], broadcasting by wireless means and communication to the public[26], and the right to make the performance available to the public on demand[27].

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[17] Article 2(d) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter the Information Society Directive).
[18] Article 9(1)(c) of the Rental and Lending Directive.
[19] Article 3(2)(c) of the Information Society Directive.
[20] Article 3(1)(d) of the Rental and Lending Directive. Both rental and lending mean the making available of a film for a limited time, but rental is commercial in nature (e.g. video rental shops or VOD rental), while lending is a non-commercial public service (e.g. libraries).
[21] Articles 8 and 9 of the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereinafter the Satellite and Cable Directive) and article 4 of the Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (hereinafter the Broadcaster Directive).
[22] Article 7 of the Rental and Lending Directive.
[23] Article 3(1)(b) of the Rental and Lending Directive. Article 3(6) of the directive provides that if rental rights have been transferred to the producer, the performer retains the right to receive equitable remuneration for the rental of the film as provided in Article 5.
[24] Article 2(b) of the Information Society Directive for fixations of their performances.
[25] Article 9 of the Rental and Lending Directive.
[26] Except where the performance is itself already a broadcast performance or is made from a fixation, cf. Article 8(1) of the Rental and Lending Directive.
[27] Article 3 of the Information Society Directive.

Beyond these exclusive rights, performers also benefit from certain *rights to remuneration* such as the right to authorise any retransmission[28]. The Rental and Lending Directive provides for an unwaivable right to remuneration rights in case the rental right is transferred to the producer[29]. Article 8(2) of the Rental and Lending Directive, which is the EU's implementation of its international obligation under Article 15 WPPT, grants to performers in sound recordings and producers of phonograms the right to equitable remuneration for broadcasting and communication to the public.

In addition, the Rental and Lending Directive provides for certain rules for film production contracts which apply presumptions of transfer for certain rights subject to contractual clauses to the contrary. Member States may also stipulate that the signing of a contract between a performer and a film producer for the production of a film has the effect of authorising rental, provided that the contract provides for an equitable remuneration within the meaning of Article 5. Member States may also stipulate that this paragraph will apply by and large to the rights included in Chapter II[30].

A key difference between exclusive rights and rights to remuneration is relevant for this report. Payment for the transfer of exclusive rights is typically determined contractually and is usually paid directly to the performer by the producer or the performer's agent. In contrast, a right to remuneration is typically managed collectively and should be paid to performers by collective management organisations ('CMOs') in accordance with EU law. Therefore, a right to remuneration could represent recurring payments to performers for as long as the performance is exploited. CMOs may also manage the payment due to performers based on exclusive rights under the mandate given by the performer to a CMO. However, this is not common practice for audiovisual performers - according to input gathered through the targeted consultation, the collective management of exclusive rights is not as widespread in the audiovisual sector as in the music sector[31].

3. Measures on the fair remuneration of performers under the DSM Directive

The term of protection was not included in the recent reform of EU copyright law. However, the DSM Directive contains several elements which aim to improve the situation of performers in their contractual relationships with producers. Member States have to implement the DSM Directive by 7 June 2021. The implementation of the DSM Directive's

[28] Articles 8 and 9 of the Satellite and Cable Directive and Online broadcasting Directive Article 4. As mentioned above, this right (often referred to as 'cable retransmission right') is subject to mandatory collective management.
[29] Article 5 of the Rental and Lending Directive. Article 6 of the Rental and Lending Directive provides for a remuneration right in respect of the lending right, if Member States derogate from the lending right in their national legislation. The directive requires Member States to provide for a remuneration right for at least authors in these cases, but a Member State can decide to include performers in the remuneration right. This is for example the case in Belgium, Czechia, Germany, Lithuania, the Netherlands, Spain and Sweden where a contract concerning the production of a film is concluded, please see Performers' Rights in European Legislation: Situation and Elements for Improvement, A study prepared for AEPO-ARTIS by Els Vanheusden, Lawyer, Antwerp, Belgium, June 2007, p. 54. http://www.aepo-artis.org/usr/files/di/fi/2/Study-Performers-Rights-in-Acquis_AEPO-ARTIS_201611291146.pdf.
[30] Article 3(6) of the Rental and Lending Directive.
[31] Performers answering to the targeted consultation indicated that if CMOs had a stronger presence in the audiovisual market, this could improve their current weak negotiation position when transferring their exclusive rights to the producer.

rules on remuneration in exploitation contracts of authors and performers may bring about changes that could in future have an impact on the need to extend the term for performers as explained below.

Chapter 3 of Title IV of the DSM Directive relates to the 'Fair remuneration in exploitation contracts of authors and performers.' This chapter lays down rules on the contractual relationships between authors and performers and their producers and publishers with the aim of improving the bargaining position of authors and performers[32]. They cover the following elements in particular:

- the *principle of appropriate and proportionate remuneration*, laid down for the first time in EU copyright law, with flexibility for Member States regarding its implementation (Article 18);
- a *transparency obligation* imposed on producers and publishers to ensure that authors and performers have access to more information about the exploitation of their works and performances (Article 19)[33];
- a *contract adjustment mechanism* which allows authors and performers to obtain a fair share of the revenues when the remuneration originally agreed becomes disproportionately low compared to the revenues that have been derived from the actual exploitation of their work or performance (Article 20);
- the *right of revocation* allowing creators, subject to various conditions, to take back their rights when their works are not exploited (Article 22)[34];
- a voluntary, *alternative dispute resolution procedure*, in particular for disputes concerning the transparency obligation and the contract adjustment mechanism (Article 21).

4. Stakeholder consultations

The Commission carried out a public consultation in 2013-2014 to gather input from all stakeholders on the review and modernisation of EU copyright rules[35]. It covered a broad range of issues[36] and included a general question on the term of protection[37].

[32] On this topic, see the study commissioned by the European Commission, Remuneration of authors and performers for the use of their works and the fixations of their performances, Europe Economics, IVIR, 2015. http://publications.europa.eu/resource/cellar/c022cd3c-9a52-11e5-b3b7-01aa75ed71a1.0001.01/DOC_1

[33] Note that certain proportionality measures have been attached to the transparency obligation. For example, Member States have the option to exclude authors or performers whose contribution is not significant for the overall work. It is possible that performers in the audiovisual sector in smaller roles would fall into this category.

[34] The directive contains several specific provisions that may impact the application of the right of revocation in the audiovisual sector. For example, Member States may exclude works or other subject matter from the application of the revocation mechanism if they usually contain contributions of a plurality of authors or performers, which is typically the case in the audiovisual sector.

[35] Public consultation on the review of the EU copyright rules, held between 5 December 2013 and 5 March 2014. The results were published in the report on the responses to the Public Consultation on the Review of the EU Copyright Rules, in July 2014. https://ec.europa.eu/digital-single-market/en/news/modernisation-eu-copyright-rules-useful-documents

[36] The public consultation generated broad interest with more than 9 500 replies and more than 11 000 messages - including questions and comments - sent to the Commission.

[37] Question 20 of the 2013-2014 public consultation.

Most respondents replied to this question in general terms. Consumers, institutional users such as cultural heritage institutions, service providers and intermediaries considered that the current terms of protection should be shortened and the minimum standards in international conventions should be applied. A majority of authors and performers, as well as publishers, distributors, producers in the audiovisual sector and broadcasters, were of the opinion that the current terms of protection are appropriate and should not be modified. Some producers of phonograms considered that the term of protection should be longer.

Only a few replies referred specifically to the term of protection of the various market players in the audiovisual sector. Some broadcasting organisations stated that the rights of performers and film producers in the audiovisual sector should not be extended. Some performers favoured a longer term of protection to better reflect longer life expectancy. They also stressed that the term of protection of their rights should be extended to align with the term applicable to performers in the music sector, which is 20 years longer. In their view, the difference in treatment between performers in the different sectors is not justified.

To gather evidence for this report, the Commission sought further input from stakeholders through a targeted consultation which ran from 31 July to 31 December 2019. It was addressed to stakeholders in the audiovisual sector, notably performers, producers, distributors, sales agents, online platforms, broadcasters and cultural heritage institutions. The questionnaire was designed to get detailed and up-to-date data and information on current market practices related to the rights of performers and producers in the audiovisual sector. It included questions on the practical aspects of exercising one's rights, as well as on the exploitation of films over time. It was available in three EU languages[38] and attracted 301 responses. An initial summary report of the input gathered was published on 31 January 2020[39].

As well as participating in the targeted consultation, some stakeholders submitted policy papers putting forward their position on a possible term extension in the audiovisual sector. The Commission also engaged with stakeholders directly, for example by holding meetings with them[40].

The full synopsis report of the stakeholder consultations is attached to this report (Annex 1).

[38] While respondents could answer in any of the EU languages.

[39] See https://ec.europa.eu/digital-single-market/en/news/summary-report-targeted-consultation-exercise-rights-performers-and-producers-audiovisual.

[40] The Commission met stakeholders representing performers, producers in the audiovisual sector and broadcasters. The stakeholders consulted included organisations at EU level and entities from several Member States (notably Spain, Germany, Greece and Denmark).

PART 2 – ASSESSMENT OF A POSSIBLE NEED FOR AN EXTENSION OF THE TERM OF PROTECTION OF PERFORMERS AND PRODUCERS IN THE AUDIOVISUAL SECTOR

In this part we discuss the various factors at play when assessing if the term of protection of audiovisual performers and producers should be extended.

In assessing whether there is a need to extend the term of protection of either performers or producers, or both, Section 1 discusses the potential effects – both negative and positive – that such an extension can have on these players. Section 2 looks at the potential effects, both positive and negative, on other stakeholders in the audiovisual value chain, in particular providers of content and consumers, including on the 'public domain[41]'.

Section 1 – Potential effects of a term extension on performers and film producers

The first part of this analysis looks at the contractual and market practices in the audiovisual sector to determine whether, taking them into account, an extension of the term of protection could benefit performers and producers. Potential drawbacks for these players are also discussed (1). The second part focuses on the exploitation of films over time, and aims to determine the significance of any potential benefit to these players, both in terms of increased remuneration and of the number of performers and producers potentially affected (2).

1. Potential effect of a term extension on performers and producers against the background of contractual practices in the audiovisual sector

1.1 Potential effects on producers

The 'producers' category is very broad, as reflected in the variety of contributions received in the targeted consultation. The Commission received input from individual producers, small companies, major broadcasters, film funds, distributors and trade associations with activities in almost all genres[42].

As explained above, the acquisition of rights by producers may include both the related rights of performers and the copyright of all authors - including authors of musical compositions or cinematographic works, which have a longer term of protection (70 years after the death of the last surviving author).

The number of contracts relating to producers acquiring the rights of authors is relatively low, as the number of authors involved in the production of a film is usually limited. According to Article 2(2) of the Rental and Lending Directive, only the *principal director* of a film can be considered as its author or one of its authors, but Member States may allow others to be considered as co-authors. In certain Member States, usually only creators having the role of

[41] For the purposes of this report, public domain refers to works that are not protected anymore by copyright and/or related rights.
[42] Nevertheless the amount of data gathered in each sub-category is limited.

director, screenwriter, composer, art director, director of photography or editor are considered as *authors*[43].

In contrast, the number of performers participating in a film is usually much higher and not restricted by law. As the targeted consultation shows, for some types of film the number of performers can even be in the hundreds. At the same time, performers typically have no control over exploitation including transfers of rights.

The producer may also be responsible for and even invest in the exploitation of films. They may use different intermediaries for different distribution channels. This allows the producer to act as a 'one-stop-shop' when dealing with sales agents and distributors, or directly with providers of content. This system ensures legal certainty on the 'chain of title' which is important in view of the financial investment necessary for the production of audiovisual works. In the motion picture industry, the 'chain of title' means a series of legal acts, and their documentation, which establishes proprietary rights in a film. These include contracts with authors and performers, acquisition of rights in underlying works and distribution agreements.

Contractual relationships between film producers and providers of content can be very diverse. In the case of broadcasting organisations, for example, the producer and the provider of content can be the same entity. In some cases broadcasting organisations may commission films that are produced by an external production company, while financing them entirely and maintaining a high level of creative control. In other cases, films are produced by 'independent' producers who may license them for exploitation to different providers of content (e.g. distributors, broadcasters, cinemas). Due to the risk of investing in film production and its high cost, rights in films are also often 'pre-sold', i.e. agreed in advance of production by producers as part of the financing structure where capital may be provided by others. In many cases, films are supported by national and regional funds, and the producers look for international distributors or sales agents at film festivals to take charge of the exploitation[44].

As a consequence of the different contractual and financing relationships, revenue models also vary. The replies to the targeted consultation showed a diverse picture as regards the revenues agreed in relation to the transfers or licensing of rights from producers to providers of content (lump sums, royalties and the combination of both).

It seems overall that an extension of the term could benefit film producers receiving royalties i.e. recurring payments from providers of content, more than those receiving only a lump sum by way of a single payment, as they may then have the possibility to continue receiving royalties from the providers of content for an additional 20 years. However, not only does this depend on the size of the lump sum as compared with the royalties, but also this in itself is not

[43] For the animation genre categories are slightly different. Also, whereas the list of authors is not a closed one in general, the number of authors involved in a single audiovisual work typically remains limited.
[44] See, for example: European Audiovisual Observatory: Fiction film financing in Europe, 2019 (Big Picture Book; A sample analysis of films released in 2017, p.2). https://rm.coe.int/fiction-film-financing-in-europe-big-picture-book/168094f6aa. See also Hammett-Jamart – Mitric – Redvall: European Film and Television Co-production, 2018, p. 86-88.

sufficient to conclude that a term extension would have a beneficial effect on these existing revenue models under transfers of rights, and what this would mean for producers.

The consultation also revealed varying practices on the period of the transfer of rights: roughly half of the producers license or assign the rights they hold in the films to providers of content for a limited period while the other half does so for the entire term of protection. For example, an independent producer is more likely to transfer or license the rights of the film for a limited period to providers of content, hoping for future deals in case of success. On the other hand, a producer working on a project commissioned and financed by a broadcasting organisation is more likely to transfer all rights for the duration of the term to the broadcasting organisation. The duration of the transfer of rights can also be limited in time by national regulations (e.g. in France) and public funding requirements (e.g. under the MEDIA programme[45]).

When the transfer of rights is for a limited period, producers usually transfer the rights to providers of content for 1-7 years, occasionally up to 20 years. This period largely corresponds to the usual period for which films generate most of their revenues, as explained in more detail in Section 2.

As explained above, producers not only hold their own related right and the rights of the performers in a film, but may also hold the copyright transferred to them by all the authors who contributed. Producers typically also obtain these rights for their entire term of protection. Consequently, providers of content also need a copyright authorisation from the producers to exploit these films. Accordingly, where producers hold the rights of authors of cinematographic works they may in principle negotiate contracts with providers of content that go beyond the length of the current term of protection of related rights (if the authors have transferred the rights to the producers for the entire duration of the copyright protection: i.e. 70 years after death). In such cases, an extension of the term of protection of related rights would therefore not necessarily make a difference to the length of the contracts that producers negotiate with providers of content, or to their negotiating position for that category of works.

The only benefit for producers would be that – in addition to the copyright of the authors – providers of content would also need to seek a license for the related rights of producers and performers for the extended period i.e. an additional 20 years. In theory, the producer could potentially negotiate higher revenues for this additional period as a result of the higher number of rights to be cleared by the provider of content. However, this scenario is likely to be largely theoretical, since in practice remuneration agreed contractually does not necessarily mean that a fee will be allocated for each specific right covered by the contract but rather that the remuneration is linked to the mode of exploitation. It is therefore difficult to assess how much additional revenue, if any, could be negotiated for the additional related rights that would result from a term extension. To some extent this also seems to be linked to the revenues generated by films over time, to be further examined in Section 2.

[45] The MEDIA Sub-programme of Creative Europe is designed to support European film and other audiovisual industries. It provides funding for the development, promotion and distribution of European works within Europe and beyond. https://ec.europa.eu/digital-single-market/en/media-sub-programme-creative-europe.

As indicated by their replies to the targeted consultation, producers seem to be concerned that a term extension for performers may have a negative effect on producers' earnings in some cases. Their concern is that producers' earnings may decrease as a consequence of having to share the revenues of the film with performers for a longer period going beyond the period during which a film is commercially viable and investments can be recouped. There is however no data available to analyse such a potential negative impact on producers.

When it comes to rights clearance, producers have expressed concern that an extension of the term of the performers' rights could result in additional burden for them should they need to renegotiate contracts with the performers to re-acquire their rights for the additional term. This scenario could in theory materialise if a potential extension of the term of protection applied not only to new films but also to those already published, but could be attenuated by transitional measures which could provide continuity to existing license agreements.

1.2 Potential effects on performers

As explained above, performers in the audiovisual sector hold rights under EU law in fixations of their performances[46], which are generally transferred to the producers. This section assesses in particular whether a potential term extension may have a positive effect (or potential drawbacks) on the negotiating position and the remuneration of performers. For this purpose, the consultation gathered views on the remuneration applied in performers' contracts with producers, and the duration of the transfer of rights.

The two main types of payments received by performers in the audiovisual sector are fixed payments where performers receive a predetermined amount of money for their work and their rights in the form of a lump sum, and recurring payments or royalties, where performers receive a certain amount of money - often a percentage of revenues - based on the ongoing exploitation[47]. Royalties can be stipulated in contracts, and performers are also entitled to payments based on their remuneration rights. Our analysis suggests that a term extension would only have a significant positive impact for performers in cases where they receive recurring payments for the exploitation of their performances.

The information gathered to prepare this staff working document indicates that, when transferring their rights to the producers, performers usually only receive a fixed payment for their performance in a film. These fixed payments may come in the form of a salary in an employment contract, or a one-off lump-sum payment in a contract for the transfer of rights. In this case, the performer receives no additional remuneration for the exploitation of the work. When it comes to the duration of the transfer, an overwhelming majority of performers have reported that the rights are commonly transferred for the entire term of protection.

This seems to suggest that an extension of the term of protection of performers would probably not make a huge difference to the performers' negotiating position nor would it lead to a significant increase in their remuneration as agreed in their contracts with producers.

[46] See Section 2.2 on the rights of performers in Part 1 above.
[47] These schemes can also be combined and a performer entitled to royalties usually also receives an upfront fixed payment.

Given the current practice of transferring their exclusive rights to producers for a fixed payment and for the entire duration of the protection period, performers would have very limited opportunities to negotiate additional or higher payments.

A term extension could have a more significant effect if performers received royalty-based payments from producers for the exploitation of their exclusive rights. However, this is not the current practice and the situation is not likely to change with a term extension.

Only a few performers – lead actors in films where either the film or the performer achieves a certain status and/or success – are likely to have the chance to obtain perceptible benefits from a term extension. Indeed, usually only well-known artists are in a strong negotiating position and are able to obtain recurring royalty payments based on the success of the work. In such a case, performers could receive additional payments linked to the extended period.

However, in addition to their exclusive rights that are usually transferred to the producers, performers still keep certain remuneration rights that are collectively managed by CMOs, for example the remuneration right for rental or the mandatory collective management of the cable retransmission right[48]. In addition, performers may receive recurrent payments from CMOs under compensation schemes related to exceptions, such as private copying. These remuneration rights or compensation managed by CMOs ensure that performers receive a recurring remuneration as long as the film is exploited. The term extension would therefore probably have a positive effect on performers, as they may be able to receive additional remuneration based on their rights to remuneration, or on compensation schemes.

As explained, even though exclusive rights can also be collectively managed by CMOs, in most cases CMOs in the audiovisual sector mainly deal with remuneration rights. Collective management of exclusive rights is not widespread in this sector[49]. The targeted consultation showed that the overwhelming majority of performers receive fees distributed by CMOs. These fees are related to the following uses: exploitation or use of a performance for cable distribution (39.5% of the total remuneration distributed by CMOs to performers), private copying (38.3%), television broadcast (11.9%) or distribution on video-on-demand platforms (5.3%).

The potential effect of a term extension on the revenues that performers receive from CMOs is likely to be positive, but it is difficult to assess to what extent. This is notably due to the lack of data on the proportion of the revenues received by performers from CMOs based on remuneration rights, as compared to the revenues they receive from exclusive rights.

According to the available information, performers in the audiovisual sector might receive less from CMOs today compared to music performers, because, as indicated above, they do not hold a right to remuneration for broadcasting and communication to the public[50]. For

[48] See Section 2.2 on the rights of performers in Part 1 above.
[49] *Ibid*.
[50] *Ibid*.

music performers this right seems to count for more than half of the remuneration they receive from CMOs[51].

To conclude, due to the contractual practices in the audiovisual sector, an extension of the term of protection would probably not have a significant positive impact on the payments performers receive from producers, except for certain high status performers. However, a term extension could potentially result in an increase of the remuneration performers receive from CMOs[52] based on remuneration rights or similar, such as those received for rental, cable distribution or private copying. Such an increase would only materialise for films that are still being exploited after 50 years i.e. during the period of any term extension. Given the lack of data on the revenues provided by CMOs on remuneration rights, it is difficult to quantify this possible positive effect on performers based on the available information.

Such a quantification would also require an analysis of how CMOs would collect and distribute any additional revenues generated by a term extension, and in particular what administrative burden and costs this would imply for users. This would also allow a determination of how much of the additional revenue collected by the CMOs is likely to reach the performers themselves. The information collected during the consultation indicates that there is a lack of reliable data on rights ownership, especially for older films, which can make it very challenging to identify and locate the relevant rightholders.

2. Assessment of the potential impact of a term extension against the background of the exploitation of films over time

To complete the assessment of the possible need for a term extension for the audiovisual sector, in particular how significant the effects in the sector would be, it is crucial to look into the issue of the exploitation of films over time.

In this section, we attempt to determine the number of films that would be affected in practice by a term extension, as well as the scale of the potential additional remuneration received by performers and producers. This section therefore looks into the levels of exploitation of films and the related revenues generated both during and after the current term of protection.

Most films have limited commercial viability. It is generally considered that the primary commercial lifespan of a film does not exceed 10 years[53], even though a very small percentage may still enjoy a second run[54]. According to the information gathered the exploitation of films decreases exponentially with their age. In general, films generate most of their revenues during the first 5-10 years of exploitation and cease to generate significant

[51] The Performers' Rights in European Legislation: Situation and Elements for Improvement, A study prepared for AEPO-ARTIS by Els Vanheusden, *Ibid*., p. 5.
[52] Collective management has administrative costs.
[53] See for instance Simone P., The exploitation of catalogue films in the EU: Cinema, television and video on demand, European Audiovisual Observatory, Strasbourg, 2018, p. 19. Available here: https://rm.coe.int/the-exploitation-of-catalogue-films-in-the-eu/16808e643d.
[54] Simone P., *Ibid.*, p. 19: '*This does not mean that older films cannot generate revenues after their first run of exploitation, but it can be realistically maintained that only a small share of old films will be re-released in the distribution circuit for strictly commercial purposes'.*

revenues after 20 years. Some producers even reported that certain types of films generate almost all their revenues within the first year. Information submitted by providers of content points to the same trend, with broadcasters indicating that films released after 2010 make up around 95% of their programming.

Fully aware of the limited lifespan of films, producers explained in the consultation that producers and investors do not generally consider revenues beyond the first 5-20 years for a film's recoupment plan i.e. balancing the budget spent on production with receipts at the box office or other channels of distribution. There are exceptions of course: a few classics and cult films still generate revenues after 20 years. In such cases, this revenue is important for producers to be able to recoup losses from less successful productions and to invest in new projects. Nevertheless, as producers explained, this is in practice very difficult to predict and it is limited to a small number of films.

The specific data gathered in the targeted consultation also confirms the overall sharp decrease of exploitation over time, and the related decline in revenues. In particular, according to producers, films released between 1970 and 1990 represent only 5-10% of the total amount of films generating revenues today. The proportion is even less for films released before 1970, which are now more than 50 years old. Producers and providers of content indicated that relatively few films are still exploited 50 years after their release. These films represent around 5% of all exploited films and generate at best 1% of producers' total revenues.

When it comes to the few old films that are still exploited, even if they could be made available through various distribution channels, e.g. in cinemas, on video-on-demand (VOD) platforms or television broadcasting, they rarely generate significant viewing or attendance levels. Producers and performers indicated that old films are typically exploited through special screenings, occasional television broadcasts, specialised VOD platforms and DVD/Blu-ray publishers, or in cultural heritage institutions. This means that while, as reported by producers, old films could be theoretically exploited through the same distribution channels as more recent films, in practice they are usually exploited via specific, more niche channels. In this regard, there is also no evidence available to suggest that the emergence of certain new distribution channels (e.g. VOD platforms or specialised TV channels[55]) would lead to a change in this general trend, even if these channels offer new exploitation possibilities for certain older films. Nevertheless, a term extension could be relevant for older films produced in the second half of the twentieth century[56] if these films are further exploited because of a growing interest in them.

This indicates that extending the term of protection would affect very few existing films: only the small percentage that are still being exploited 50 years after the start of their term of

[55] Such as Ciné+ Classic or Turner Classic Movies.

[56] Apart from new distribution channels, the gradually increasing quality of productions and of image and sound, as well as the development of film as an art form and as a reference point in popular culture could lead to increased interest from audiences in the future. Notable European films where rights expire in the next years include: *Amarcord* by Federico Fellini, *Aguirre, the Wrath of God* by Werner Herzog, *Cries and Whispers* by Ingmar Bergman, as well as multiple films of Luis de Funès or Bud Spencer and Terence Hill.

protection. In 2020, this would mean films produced prior to 1970. A term extension for old films would therefore only concern a few performers and producers, i.e. those who contributed to these particular films. Available data suggests that the revenues generated by these few old films, to be distributed among their producers and performers, is relatively low. Although there is no data available on the lifespan of films to be produced in the future, their exploitation is likely to follow a similar trend. It is not possible to draw definitive conclusions, however.

This further corroborates the conclusion reached in the previous section that for producers, a term extension is unlikely to have any tangible impact. As explained above, where producers can rely on the copyright transferred to them by the authors (such as the film's director), they can in practice already negotiate contracts for the exploitation of films far longer than the term of protection of their related rights (and those of the performers). According to the input received, this is usually the case in practice. As shown above, the revenues generated in this period, after 50 years from release, are marginal. According to the producers, these revenues constitute only up to 1% of their total revenues. Even if extending the term of protection of related rights could in theory translate into additional revenues for the producers, these are likely to be very limited. At the same time, such a term extension could represent an additional burden for producers in terms of rights clearance, particularly performers' rights[57]. An extension could also mean that producers may have to share revenues that the films generate after 50 years with the performers. In conclusion, a term extension is not likely to have a tangible impact on producers, and any potential positive effects are likely to be minimal.

As indicated, a term extension could benefit performers if the films they performed in are still being exploited after 50 years and if they are entitled to recurring payments for the ongoing exploitation. However, the available evidence suggests that any such positive effect is likely to be very limited as very few films are exploited after this time and the revenues they generate are marginal. These small revenues would also potentially need to be shared between a large number of performers, depending on the film. Most performers who replied to the targeted consultation indicated that they no longer received remuneration, including from CMOs, for films that are over 40 years old. All things considered, extending the term of protection would probably have a very limited impact on the remuneration received by performers.

Section 2 – The potential effects of a term extension on providers of content and on the availability of films

This section looks into the potential effects of a term extension on other players in the audiovisual ecosystem, such as providers of content and final users, and the impact on the public domain.

[57] As explained above, for films where the term of protection is already ongoing, transitional measures attached to a possible term extension could facilitate the rights clearance process between performers and producers, as well as between producers and providers of content for the extended term.

Providers of content - both commercial players (such as broadcasting organisations or online service providers) and non-commercial ones (such as cultural heritage institutions) - would be likely to face difficulties related to the clearance of rights[58] in the event of a term extension. However, the concrete impact on these two categories of players may differ in practice.

Providers of content do not usually report significant difficulties in relation to rights clearance of films. This is probably due to film rights being centralised by producers. But difficulties can sometimes arise. According to the targeted consultation, the main rights clearance-related challenges faced by providers of content concern: (i) difficulties in identifying rightholders after a certain period of time; (ii) the high number of rightholders involved in film production; and (iii) the difficulty to recover proofs of transfer.

Rights clearance problems typically arise in two scenarios. The first is when the producer does not hold all the necessary rights. This can be the case, for example, for film archives or broadcasters when they want to make available older titles that were produced at a time when online uses did not exist, and the old contracts therefore do not cover online rights. The second is when it is not possible to identify or locate the producer (e.g. old footage in an archive without any credits, or when the production company no longer exists). In both cases the provider of content needs to engage in the difficult process of directly contacting all rightholders to clear the rights. This requires a careful analysis of the chain of title in the works. Sometimes providers of content need to acquire rights from authors and performers ex-post, in particular for online uses, which is very burdensome.

As mentioned, a key practical difficulty is the often very high number of performers involved in film production. Also, unlike in the music sector, collective rights management is not a common way to manage exclusive rights in the audiovisual sector[59]. Consequently, if a provider of content cannot clear the rights directly with the producer and has to contact each performer individually for authorisation, this can result in a particularly complicated rights clearance process.

The consultation confirmed that these rights clearance problems typically arise in the case of older titles. Several providers of content also stressed that there is a general lack of information on ownership of rights[60]. Cultural heritage institutions indicated that these rights clearance challenges often deter them from making older films available when added to technical challenges and the costs of digitisation. Extending the term of protection of related rights would mean that providers of content would need to clear these rights for a longer period. This would cause additional rights clearance difficulties, in particular due to the potentially high number of performers that may need to be identified. In this regard, some providers of content stressed that today's rights clearance process is comparatively easier for films published more than 50 years ago as the related rights are no longer protected and only

[58] Rights clearance means the obtaining of authorisations from rightholders for the use of their works and other subject matter (e.g. to put a movie in its programme a broadcaster has to *clear the rights*, typically through buying a licence from the producer).
[59] See Section 2.2 on the rights of performers in Part 1 above.
[60] Some providers of content suggested a collective database or service to manage rights as a possible solution for this.

the authors' rights need to be cleared. However, other providers of content indicated that clearing the authors' rights is still a challenge for these films, because the older the film the more difficult it becomes to find the correct rights information and to locate the rightholders. Some cultural heritage institutions indicated that they tend to focus their activities on works in the public domain, to avoid difficulties related to the clearance of rights[61].

Extending the term of protection of related rights may further complicate the rights clearance process in cases where providers of content cannot acquire all the necessary rights from the producer. This would create additional challenges for providers of content willing to exploit films. Moreover, since older films rarely generate significant revenues[62], a more complicated rights clearance process may result in providers of content becoming even less interested in the distribution of older content, in particular if they are commercial players.

The DSM Directive notably introduces new provisions on out-of-commerce works for cultural heritage institutions[63]. They should make it easier for institutions such as film archives to use films in their collections that are not available through usual commerce channels by reducing the transaction cost of clearing rights. In contrast, for films that are still commercially available, it is assumed that the commercial interest will incentivise rights clearance. However, as indicated above, this may only be the case for certain films given that older films do in general only generate limited revenues. It is therefore unclear whether commercial players would always have sufficient incentives to invest in a complicated rights clearance process.

Finally, in case of a term extension, providers of content may have to once again clear the performers and producers' rights in a film, for the time period corresponding to the extension, even when the providers have a licence. This problem could however be addressed by transitional measures which could provide continuity to existing licence agreements.

It is important to stress that the expiry of the term of protection of the rights of performers and producers in the audiovisual sector does not mean that audiovisual works fall into the public domain, as they may still be protected by authors' rights in the case of a cinematographic or audiovisual work[64], which last longer. According to the 2006 Term Directive, authors' rights expire 70 years after the death of the last of either the principal director, the author of the screenplay, the author of the dialogue, or the composer of music specifically created for use in audiovisual works. While this does not have an impact on performers, it is relevant for producers who might hold the rights of the author, as well as for providers of content who still need to obtain an authorisation for these rights for the extended period. Therefore, extending the term of protection of performers and producers in the audiovisual sector is not likely to have a significant impact on the public domain.

[61] EU law does not preclude the application of presumptions in this regard. See Case C-484/18.
[62] See the assessment of the potential impact of a term extension against the background of the exploitation of films over time above in Part 2, Section 1, §2.
[63] Articles 8-11 of the DSM Directive.
[64] 'La durée de vie du droit d'auteur d'une œuvre audiovisuelle', Iris 2012-2, European Audiovisual Observatory. And notably C. Angelopoulos, 'La détermination de la durée de protection des films : A quel moment un film passe-t-il dans le domaine public en Europe ?', pp. 7-22 (https://rm.coe.int/1680783bd4).

Nevertheless, a term extension may still have a negative effect on the availability of older films and on the evolution of their prices. As mentioned, the term extension could create additional difficulties with clearing rights, potentially leading to additional costs for providers of content.

A term extension might also lead to an increase in the price of the licences that providers of content have to pay to producers and, as a result, in the final price to the consumer. This could be the consequence of the additional remuneration that performers and producers may receive. It is however difficult to determine whether this would happen and to quantify any possible rise in licencing prices.

CONCLUSION

This Staff Working Document concludes that the results of the consultation do not call, at this stage, and based on the available evidence, for an extension of the term of protection of performers and film producers in the audiovisual sector.

The purpose of a term of protection is to grant the rightholder a period of time during which they can exploit the work, protect the subject matter itself, or permit others to do so. Looking at the results of the targeted consultation and those of the 2013-2014 public consultation, the 50-year term of protection of producers and performers in the audiovisual sector appears to be long enough to enable effective exploitation.

While the terms of protection of related rights clearly differ between the music sector and the audiovisual sector, EU law applies the prevailing standard in the international conventions for performers in the audiovisual sector. EU law applies the same standard to film producers, whereas international conventions do not provide any specific form of protection. In addition, the available information indicates that most films are not commercially viable after a period of 5-10 years and are very rarely revived. This means that only a minority of older films would be affected. Extrapolating from the data for older films, this is also the case for new films.

The analysis in this report also shows that there are significant differences in market practices – particularly when it comes to exercising one's rights – between the music and the audiovisual sector, and that this may still justify a different term of protection in these two sectors. This includes for example the contracting practices, the role of CMOs or the expected commercial lifespan of the works at stake. When it comes to stakeholders' views, extending the term of related rights in the audiovisual sector is clearly an important issue for performers. It seems however that other copyright stakeholders do not consider it necessary, and some film producers and providers of content even argue against an extension.

Looking at the impacts of a potential term extension on film producers and performers in the audiovisual sector, the analysis shows that the effects are likely to be somewhat different for the two groups. A term extension is not likely to have any tangible impact on film producers. In practice, producers can already rely on the authors' right for a longer period, meaning that

they can control the exploitation of their films even after the expiry of their related rights. A term extension would not significantly alter their relationship with provider of content, their negotiating position or the licensing fees.

Producers may even be negatively affected as they will need to re-clear the rights in the films they exploit to match the new term of protection. However, these negative impacts could be addressed by transitional measures. Some producers also seem to be concerned that an extension of the performers' rights may negatively affect their earnings, although it is difficult to determine whether this would really be the case.

In contrast, a term extension could have a positive impact on performers in the audiovisual sector, but such impact is likely to be very limited. Performers who receive ongoing remuneration for the exploitation of the fixation of their performances in films would continue to receive such remuneration even after 50 years if their films are still being exploited. A term extension is likely to be more impactful for performers' remuneration rights, and in general for performers' remuneration received on a regular ongoing basis, in particular through CMOs, rather than for their exclusive rights. The latter are usually transferred to producers and performers can rarely negotiate ongoing, royalty-based payments. This is not likely to change with a term extension.

The legal context has also changed. New rules set out in the DSM Directive on fair remuneration of authors and performers may notably lead to more balanced contracts, more extensive remuneration rights and collective management in the future. Such developments could increase the potential practical benefits of a potential term extension. However, this can only be fully assessed once the new rules are transposed and applied in practice.

In any event, the present analysis clearly shows that even if a term extension could bring about certain benefits for performers in the audiovisual sector, this positive impact would be very limited. Only very few films (around 5% of all exploited works according to the targeted consultation) are still exploited after 50 years. In addition, the revenues they generate are marginal, representing at best 1% of producers' total revenues. Most performers indicated that they usually do not receive any remuneration, including from CMOs, after 40 years. While the emergence of new distribution channels may in theory help to increase the exploitation of older films and there are sporadic examples of certain 'cult' films that are still exploited after many years, there is no evidence to suggest that a change is likely in the current overall trend. As a general conclusion, while a term extension could still be relevant for those individual performers whose works are exploited for over 50 years, this impact is likely to be very limited.

The likely impacts of a term extension on the other players in the value chain, notably providers of content, and on the availability of works to consumers, are likely to be slightly negative. Providers of content are likely to be negatively impacted, namely by potentially higher license fees and additional rights clearance difficulties. In turn, all this may, at least in theory, lead to a more limited availability of older works to consumers and higher prices. The

likely limited negative impact on the public domain (due to the fact that audiovisual works are protected by copyright for a much longer period) does not significantly change this conclusion.

Against this background, and to conclude our analysis, it is worth revisiting certain general considerations on the term of protection.

The key rationale for protecting copyright and related rights is to encourage authors, performers and producers to engage in artistic creation. It is unclear whether a potential term extension and related financial benefits would in practice serve as a real incentive for performers to participate in and for producers to produce creative works[65]. While the consultation did not explore that aspect in detail, other sources seem to indicate that extending the term would be unlikely to incentivise producers to invest more in production[66].

At the same time, performers in the audiovisual sector argue that the term of protection of performers should be better aligned with their life expectancy. Nevertheless, the findings of this report suggest that extending the term for performers in the audiovisual sector would not necessarily bring about perceptible benefits for performers as very few films are still exploited after 50 years.

To conclude, the results of the consultation do not point to a need, at this stage, and based on the available evidence, to extend the term of protection of performers and film producers in the audiovisual sector. However, this matter will be also examined in the broader context of the assessment of the functioning of the 2011 Term Directive[67], which the Commission will carry out as a next step to prepare the report required under Article 3(1) of that directive.

[65] Gowers Review of Intellectual Property, December 2006, p. 52, n° 4.32 on music: 'there are a large number of bands already creating music without any hope of a financial return'. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf.

[66] See for instance, PNG, Ivan Paak Liang and WANG, Qiu-Hong. Copyright law and the supply of creative work: Evidence from the movies. (2016), esp. p. 423. Comparative law and economics. 407-441. Research Collection School Of Information Systems (https://ink.library.smu.edu.sg/sis_research/4161); Gowers Review of Intellectual Property, December 2006, p. 52, n° 4.31; Hugenholtz, P. Bernt and van Eechoud, Mireille M. M. and Gompel, Stef van and Helberger, Natali, The Recasting of Copyright & Related Rights for the Knowledge Economy (March 8, 2012). Report to the European Commission, DG Internal Market, p. 308, November 2006; Amsterdam Law School Research Paper No. 2012-44; Institute for Information Law Research Paper No. 2012-38. Available at SSRN: https://ssrn.com/abstract=2018238.

[67] A study on the *Implementation of the Directive 2011/77/EU: copyright term of protection*, was conducted in several Member States at the request of the JURI committee, European Parliament, and published in April 2018 (PE 604 957) https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604957.

ANNEX 1 – SYNOPSIS REPORT*

Targeted consultation on the exercise of rights of performers and producers in the audiovisual sector

I. INTRODUCTION

The Commission conducted a targeted consultation on the exercise of rights and related rights of performers and producers in the audiovisual sector between 31 July and 31 December 2019. The consultation was addressed to stakeholders in the audiovisual sector. It mainly concerned performers and film producers who are holders of neighbouring rights and their contractual partners such as distributors, sales agents, broadcasters, online platforms and cultural heritage institutions.

The purpose of this consultation was to gather information and data on current market practices and on the exercise of rights of performers and producers in the audiovisual sector, in order to feed into the Commission's report assessing the possible need to extend the term of protection of the rights of performers and producers in this sector as required by Directive 2011/77/EU ('the 2011 Term Directive')[68]. Some stakeholders also submitted policy papers to the Commission setting out their preferences on a possible term extension for performers and producers in the audiovisual sector. These statements are reported in Section VII below.

II. METHOD OF ANALYSING AND REFERENCING RESPONSES

To enable each category of audiovisual stakeholder to answer the pertinent questions for their activity, the questionnaire was divided into three sections: one for performers; one for producers including distributors and sales agents; and one for providers of content, such as broadcasters, online platforms or cultural heritage institutions. Respondents were asked to fill in (only) the section relevant to them and to provide relevant information and data on their activities. Stakeholders carrying out activities in more than one section (for instance broadcasters who are at the same time producers) were asked to fill in all relevant sections. Civil society representatives were also invited to participate in the consultation by filling in the category named 'other'.

This synopsis report generally classifies the respondents as performers, producers or providers of content in order to clearly illustrate the trends.

* The synopsis report presents the main results of the targeted consultation. This analysis does not represent the official position of the Commission and its departments, and it is only a summary of the answers to the consultation.

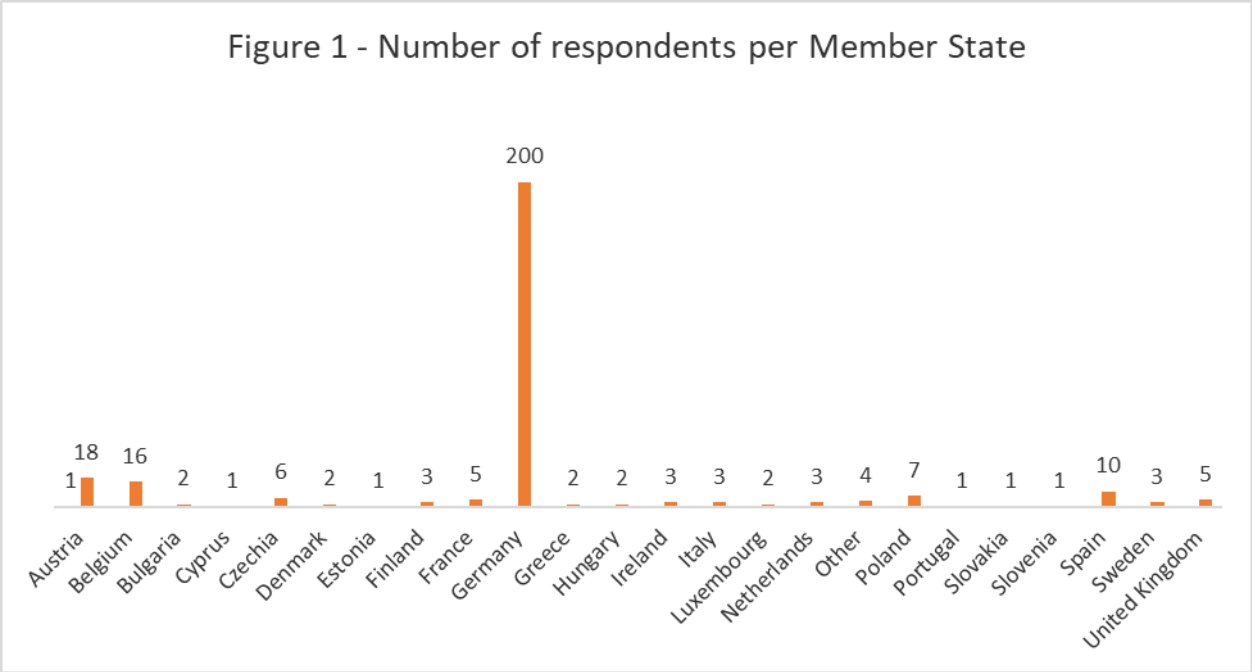
[68] Article 3(2) of Directive 2011/77/EU.

As the targeted consultation did not require respondents to answer all questions, the percentages in this report refer to the amount of respondents that answered the particular question and not the total amount of respondents in a category.

III. OVERVIEW OF THE PARTICIPANTS

1. Respondents to the targeted consultation

The targeted consultation gathered 301 replies. As Figure 1 shows, the overwhelming majority of contributions (200 responses) came from Germany, most of them from performers in the audiovisual sector or their representative organisations. The number of contributions from other Member States ranged from 1 to a maximum of 18 contributions, with Austria, Belgium and Spain having the highest numbers after Germany, with 18, 16 and 10 responses respectively. The figures also show that there were no contributions from the following EU Member States: Croatia, Latvia, Lithuania, Malta and Romania. Furthermore, there were two contributions from non-EU countries (Switzerland and Iceland).



2. Category of stakeholders participating in the targeted consultation

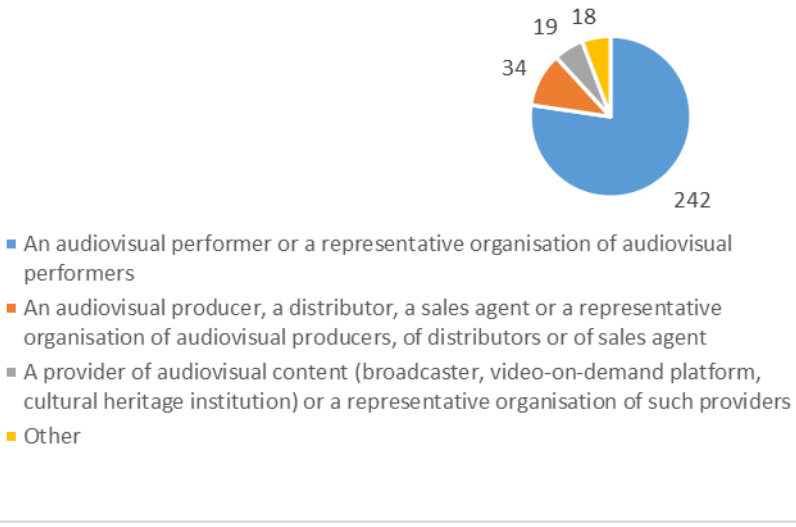
As indicated above, respondents were asked to contribute to the category/ies corresponding to their activity in the audiovisual sector: performers; producers; providers of content; other.

Figure 2 shows that, the overwhelming majority of respondents (242) replied as performers or as their representative organisations; while 34 replied as producers (producers, distributors, sales agents) or as their representative organisations; 19 replied as providers of content[69]

[69] Some broadcasters also replied as producers.

(broadcasters, video-on-demand platforms, cultural heritage institutions) or as their representative organisations; and 18 replied as others[70].

Figure 2 - Total number of replies, taking into consideration the selection of different categories



3. General information about the respondents' activities

The 'performers' category encompasses a wide range of performers and representative organisations. For example, some organisations representing performers in the audiovisual sector only represent one category (e.g. dancers) while others represent a variety of performers. The replies from performers themselves cover a wide range of disciplines and various types of films[71], for example actors, dubbers and performers doing voice-overs for documentaries. Some of the performers carried out non-audiovisual activities at the same time, such as reading for audio-books and talking on the radio. Many performers were involved in various types of performances in both the audiovisual and non-audiovisual sectors. The number of works in which they performed also varied greatly: from just 4 films to 10 000.

For the 'producers' category (encompassing producers, distributors, sales agents or their representative organisations), the nature and characteristics of the different entities also varies significantly, including in terms of their size and scope of activities. Sixteen (16) respondents (around 50%) in this category are independent producers and production companies – mostly micro or small enterprises – whose main activity is film production. Nine replies (around 30%) were submitted by European and national trade associations of producers and distributors, while six contributions (around 20%) came from major broadcasters.

[70] Among these 18 respondents, only 4 provided answers to the consultation: one music author, one organisation representing both authors and performers (whose answers have been included in the analysis of the performers' answers), and two organisations representing only authors.
[71] The term 'film' should be understood as encompassing cinematographic and audiovisual works. See the explanation in the Report, Part 1, § 1 'Background and scope'.

The respondents in this category are also very diverse in terms of content produced, covering feature films, documentaries, short films, animation and TV programmes, but also music and corporate videos, web and VR content and commercials.

The third category, 'providers of content', also encompasses a broad array of entities, including public and private broadcasters, platforms, as well as cultural heritage institutions, archives and museums. Consequently, depending on their respective business models, they provide access to different types of films. The respondents cover a wide variety of films, including feature films, TV series, documentaries, children's programmes, sport, entertainment, news and other types of clips. Most of the content provided by these players is recent, but it can also include older titles especially in the case of cultural heritage institutions.

IV. EXERCISE OF RIGHTS OF PERFORMERS AND PRODUCERS IN THE AUDIOVISUAL SECTOR

A set of questions concentrated on the exercise of rights of performers and producers in the audiovisual sector. The aim was to collect information and data on the contractual relationships between performers and producers (1), and between producers and providers of content (2). The information gathered also provided insight related to the difficulties related to the transfer of rights (3).

1. Contractual relationships between performers and producers in the audiovisual sector

a. The transfer of rights from performers to producers

The overwhelming majority of performers reported to be in an employment relationship that is linked to the execution of their performance. Overall, 88.2% of the performers replied to '*Always'* or '*Often'* when asked if they were in such an employment relationship with the producer.

To the question on whether a rights transfer is taking place, almost all (98.7%) performers in the audiovisual sector answered that their related rights are indeed transferred to producers. Within this, most of the performers (69.1%) replied that their related rights were usually transferred to producers through an employment contract that entails a presumption of transfer of the performer's rights.

12.5% of performers reported that their rights were transferred to the producer directly through a contract of transfer of rights. 14.0% replied that their rights were transferred through a combination of a contract of transfer of rights and employment contract. The replies also indicated that collective bargaining agreements were also used in the context of the transfer of the rights from performers to producers.

The replies received from producers confirmed that in most cases producers receive performers rights through the contracts they conclude with them, to be able to produce and

exploit films. The form and legal content of such contracts may vary. Around 90% of producers indicated that they obtain the rights of audiovisual authors and performers through a contract of transfer of rights. In various Member States (according to approximately 45% of the answers), these contracts are complemented by a legal presumption in favour of the producer. In this case, all rights in the completed films are presumed to be transferred to the producer in order to facilitate the centralisation of the rights in the hands of the producer.

To sum up, the answers from all categories of respondents indicate that in most cases – in one form or another – the performers rights are transferred to the producer. In the national legislation of a few Member States, performers' rights are non-transferable. This is the case in Greece and Slovakia, for instance. However, this implies that in practice those rights are *licensed* in a written contract, and usually for the entire protection period, resulting in a similar outcome. In general, it has been reported that the use of buy-out contracts[72] remains quite common.

b. Duration of the transfer of rights and remuneration

The overwhelming majority of performers (91.3%) reported that their rights are transferred to the producer for the entire term of protection.

However, the extent of the transfer of rights differs according to the status of the performer (depending on whether they are very famous or unknown). Well-known artists seem to have better possibilities to avoid a transfer of rights for the entire term of protection or to negotiate a better rate for doing so, as explained by an organisation representing performers.

The consultation also asked what types of remuneration were usually provided for the transfer of performers' rights. The vast majority of performers (70.3%) replied that they usually only receive a salary for their performance. This seems to be in line with the fact that the vast majority of performers transfers their rights through employment contracts.

8% of performers replied that they receive no salary but a lump-sum remuneration, whereas 6.3% replied that they receive a supplementary lump-sum remuneration in addition to a salary.

Only 3.1% answered that they receive supplementary percentage-based remuneration in addition to a salary, and another 3.1% answered that in addition to a salary, they received supplementary remuneration composed both of an upfront payment and a percentage-based remuneration.

Finally, performers widely reported that they are in a weak negotiating position with producers when it comes to the issue of rights transfer and remuneration. Many replied that

[72] A buy-out contract means that the producer acquires the rights of the performers for the entire term of protection. In such contracts, producers do not need to renegotiate terms because there is no need for further authorisations from the performer.

they were experiencing a decrease in remuneration when negotiating contracts compared to what they received years ago.

c. Fees received by performers from CMOs

These questions aimed to gather information and data on how CMOs participate in the collection and distribution of fees to performers.

The overwhelming majority of performers (94.0% overall) reported that they do receive fees distributed by a CMO.

39.5% of performers replied that these fees are received for the exploitation or use of a performance for cable retransmission, whereas 38.3% replied that they receive fees for exploitation or use of a performance regarding private copying. The third largest group with 11.9% replied that they receive fees for television broadcast and 5.3% replied that they receive fees for distribution on video-on-demand platforms.

2. Contractual relationships between producers and providers of content in the audiovisual sector

The consultation included questions on the rights producers usually transfer/license to providers of content, on the revenue usually provided for in these contracts, and on the duration of these contracts.

Producers indicated that of the rights they transfer or license to providers of content, authors' rights are the most common (mentioned by close to 100% of the respondents), closely followed by related rights of producers (mentioned by 85%) and related rights of performers (listed by 80%). Other relevant rights mentioned include rights of the use of musical works/recordings contained in films.

According to the producers, the contracts they conclude with providers of content for the exploitation of films apply different revenue models in almost equal proportions: 35% of respondents mentioned lump sums (a one-off payment), 32% mentioned royalties (percentage-based remuneration) and 32% mentioned a combination of upfront lump-sum payments and royalties.

The answers given by providers of content on revenue models applied in their contracts with producers indicate a similar trend: 38% mention lump sums, 31% mention royalties and in 31% mention a combination of these.

As regards the length of the transfer of rights, the producers' answers indicate that in a majority of cases (55% of the responses) rights are transferred or licensed to the providers of content for a part of the term of protection. Transferring the rights for the entire term of protection is slightly less frequent but still very common (45% of the responses). When the

transfer happens for a limited amount of time, the rights are customarily transferred for 1-7 years, but this can go up to 20 years.

The few replies received from providers of content also indicated that in most cases (66% of the answers) the transfer is for a part of the term of protection while it is also often done for the entire term of protection (33% of the responses).

3. Difficulties related to the transfer of rights

Producers indicated that, while every film is different, the number of authors (such as film directors, scriptwriters, etc.) involved in an audiovisual work is usually limited to 3-10 people by the nature of the creative process. However, the number of performers involved is usually much higher. In fact, as some respondents indicated, 'there is no limit on the number of performers, except for the budget.' According to the responses, the number of performers (e.g. actors, voice talent, musical performers, etc.) vary greatly depending on the film being produced, often reaching up to 25-50 people, or even hundreds in some cases.

77% of the producers reported that when concluding a contract with a providers of content they rarely or never find it difficult to prove that they have obtained the rights from authors or performers. Still, 20% replied that problems sometimes occur. These include: difficulties in of identifying rightholders after a certain period of time (33%); the high number of rightholders involved in the films (27%); and the difficulty to retrieve proofs of transfer (23%). A few producers mentioned other problems related to clearing musical rights with collecting societies.

On the difficulties to prove the rights ownership, most producers (66%) indicated that demonstrating the chain of title becomes more difficult and burdensome over time, notably for older films, while only 33% stated that this is not the case.

The vast majority (80%) of the small number of providers of content who responded to this question indicated that in their opinion, producers rarely or never encounter a problem to prove that they obtained the rights from authors or performers. Those who pointed to problems (20%) mentioned in particular the difficulties related to retrieving proofs of transfer and identifying rightholders after a certain period of time.

V. EXPLOITATION OF FILMS OVER TIME

Another set of questions addressed the exploitation of films over the period of the related rights protection. They aimed to gather data about the trends of the exploitation of films over time (1) as well as about the related rights clearance challenges (2).

1. Trends of the exploitation of films over time

Only a few producers provided detailed information on the evolution of the exploitation of films over time. All contributions showed that the number of films still exploited decreases

exponentially with their age. Looking at films released before 2010 and still generating revenues, the data shows that the majority of these works (50-70%) were produced between 2000 and 2010, while 20-30% were made between 1990 and 2000. For the works dating from between 1970 and 1990, the numbers drop significantly to around 5-10%, and works released before 1970 still exploited and generating revenues is in the range of 1-2% of all works released before 2010.

Producers generally reported that their films generate most revenues during the first 5-10 years of exploitation and cease to generate significant revenues after 20 years. Some types of films generate almost all their revenues within the first year, and the revenues generated after 20 years, if any, are usually marginal.

According to the answers, there are some exceptions to this general rule, notably animation and films that achieve a cult status. However, producers say that these factors are very difficult to predict.

Turning to performers, the vast majority (91.5%) reported that they still receive remuneration after 10 years, whereas 3% reported that they only receive remuneration for 5-10 years. 4% reported that they stopped receiving remuneration after 2 years and 1.5% reported that it stopped after 5 years. This seems to broadly confirm the general trend outlined in the producers' answers.

2. Challenges related to the exploitation of films over time

Providers of content were asked about the difficulties and obstacles they encounter on the exploitation of films, including in terms of rights clearance. The questions focused on films that were released more than 50 years ago.

Most providers of content highlighted difficulties related to rights clearance, especially for older films where authors' rights have usually not been cleared for online exploitation. If providers of content want to exploit old releases online they may need to re-acquire the rights for the new mode of exploitation from all rightholders, which they consider to be complicated and burdensome.

Some public service broadcasters highlighted that while they have huge archives of films, the necessary rights clearance for their use is still, in many Member States, an insurmountable problem. This prevents them from making these works available even if they are interested in doing so.

Some cultural heritage institutions indicated that it is very important for their mission to make available older content for research, historical insight or entertainment purposes. However, many of them have refrained from distributing audiovisual material due to technical and legal challenges. The technical challenge of digitisation is already very complex: it requires advanced technology, specialised equipment and personnel, and a significant upfront

investment for digitisation and data storage. The complicated and burdensome right clearance adds another layer of difficulty.

A particular difficulty for rights clearance, raised by several providers of content, is the general lack of information on ownership of rights. They also stressed that the administrative efforts related to rights clearance increase for older films. Respondents indicated, for example, that data on the content is in multiple databases and spreadsheets, even in old cue sheets[73]. Retrieving this data for rights clearance is a manual and time-consuming exercise.

VI. EXPLOITATION OF FILMS AFTER 50 YEARS FROM THEIR RELEASE

A specific set of questions dealt with the exploitation of films after the expiry of the term of protection of performers and producers. They aimed to gather data about the trends of such an exploitation (1) as well as about the related challenges (2).

1. Trends of exploitation of films after 50 years from their release

Regarding the exploitation of films after 50 years from their release, a significant proportion of performers, 31.6%, replied that less than 5% of the films they had performed in were still exploited after 50 years. For 22.4% of performers, this proportion was 5-10%, whereas 15.8% and 14.5% of performers respectively replied that 10-25% and 25-50% of their works were still exploited after 50 years.

Regarding the revenues received per film for works that are more than 40 years old, most performers indicated that they received nothing or close to nothing, whereas some reported to receive up to around EUR 10 000 per year.

Performers indicated that TV broadcast, streaming and DVD sales are the main forms of exploitation of works still being exploited after 50 years. Certain performers added that these works are exploited at a different frequency, some once per year and some almost daily.

Regarding producers, 77.8% of those who replied stated that less than 5% of their films are still exploited 50 years after their release. Of the remaining 20%, a nearly equal number said that the proportion stood at 5-10%, 10-25%, and more than 75%.

Overall, producers reported very little use beyond 50 years after release: less than 5% of their catalogues, generating at best 1% of their total revenues. While in principle older titles could be exploited through the same distribution channels as any new title, even in a theatrical release after restoration, the typical forms of exploitation for such old films are special screenings, screenings in cinematheques and other heritage or educational establishments,

[73] A cue sheet is a list of music used in a film, containing information on the music, the right holders and their share of the royalties, the length and type of use, and more. This is the primary way of tracking the use of music in films and TV, enabling accurate remuneration of composers, performers and publishers.

television broadcasts, specialised VOD platforms, and sometimes release on physical carriers (DVD/Blu-ray).

The question on the average share of films still exploited after 50 years was only answered by around half of the providers of content who participated in the consultation. A majority of them (55%) replied that this is less than 5%. Two providers indicated 10 to 25%, and there was one respondent in each of the three categories of 25-50%, 50-75% and over 75%. The highest percentages were provided by an archive and a museum.

2. Challenges related to the exploitation of films after 50 years from their release

Stakeholders were also invited to provide their input on the challenges faced when exploiting films after 50 years from their release.

More than a third of the responding performers (33.3%) indicated a lack of market demand as the reason for the lack of exploitation of films after 50 years, while 26.4% suggested difficulties on rights clearance. 17.6% pointed to the cost of exploitation and 15.1% mentioned the lack of appropriate distribution channels. A few performers indicated that in their experience the demand for older content was growing and that new technologies may create new distribution channels for such content.

When it comes to rights clearance, the general challenges described in Section V.2 are partly still relevant in the period after 50 years from release, with some specific features. These are related in particular to the expiry of the term of protection of performers and producers after 50 years from the release of the audiovisual work while the copyright persists for 70 years after the death of the author.

Providers of content notably reported that for audiovisual productions that were published more than 50 years ago, the rights clearance process is facilitated because ‘only’ the authors’ rights need to be cleared.

Nevertheless, some providers of content reported that using audiovisual works that are more than 50 years old is not significantly easier because finding the correct information on the ownership of the authors’ rights is still a problem. One provider explained that this is mainly due to the transition of tape-based content to digital files and the relevant data are in multiple historical databases.

Cultural heritage institutions considered that making audiovisual content available to the public becomes much easier after the expiry of the copyright protection and that, for this reason, they tend to focus their activities on content in the public domain.

VII. STAKEHOLDERS’ POLICY STATEMENTS

Some stakeholders expressed their views on a possible extension of the term of protection of performers and producers in the audiovisual sector. Stakeholders representing performers,

producers and providers of content submitted position papers in the context of the targeted consultation. The Commission also organised meetings with stakeholders[74].

Performers were generally in favour of an extension of the term of protection of performers in the audiovisual sector. Some representative organisations expressed the view that the difference between the term of protection of performers in the music and in the audiovisual sectors is discriminatory. They considered that the term of protection of a performance should not depend on the medium on which the performance is fixed (e.g. a CD vs a film). They therefore argued that the term of protection of performers in the audiovisual sector should be aligned with that of the music sector.

On a general note, performers stressed that the arguments supporting the extension of the term of protection of music performers under the 2011 Term Directive – notably the precarious financial, social and legal situation of this category of stakeholders, and the increase in life expectancy – were, in their view, also valid for performers in the audiovisual sector.

Finally, performers considered that extending the term of protection of performers in the audiovisual sector would not negatively affect the accessibility of films. This is because authors' *copyright* already protect these works for a longer period – 70 years after the death of the last author – regardless of the term of protection of *related rights*.

By contrast, providers of content were generally not in favour of extending the term of protection of performers and producers in the audiovisual sector. Several broadcasters (some of them being also producers) reported that the differences between the audiovisual and the music sectors justify the difference in the length of the terms of protection of performers and producers. They pointed to differences in how the sectors are structured, with music having a long-standing tradition of using collective management organisations, which is not comparable to the audiovisual sector. Those broadcasters also stressed that so far there is no evidence to prove that the extension of the term of protection of music performers and producers under the 2011 Term Directive has had a positive impact. They also indicated that one of the current challenges for broadcasters is to develop and offer online content and that an extension of the term would significantly complicate the clearance of rights for these uses.

Among providers of content, one organisation representing cultural heritage institutions indicated that an extension of the term of protection of audiovisual performers and producers would not be justified from a legal and economic point of view. The organisation finds the current terms of protection already too long and stressed that they hinder cultural heritage institutions from digitising and making available copyright protected content.

[74] The Commission met stakeholders representing performers, producers in the audiovisual sector and broadcasters. These stakeholders came from different Member States (notably Spain, Germany, Greece and Denmark) or were represented by an organisation at EU level.

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