

Proposal to extend the term of copyright protection on sound recordings

Response of the Open Rights Group

Detail of Respondents

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Introduction

The UK Intellectual Property Office (UKIPO) has said in its response to the European Commission's proposal to extend the term of copyright protection afforded to sound recordings from 50 years to 95 years, that it will consider new evidence. As we will demonstrate in this submission, no new economic evidence has been put forward by the Commission since the UK Government agreed not to extend the term in 2006.

The Commission impact assessment relies on the same evidence used in the Gowers Review of Intellectual Property: the PricewaterhouseCoopers (PwC) report and selective parts of the Centre for Intellectual Property and Information Law, Cambridge (CIPIL) report. It ignores new evidence, work that it itself commissioned, which finds against term extension. The impact assessment also unfairly dismisses evidence accepted by the Gowers Review about the costs the proposed extension is likely to impose on consumers.

It is therefore clear to us that the conclusion reached both by Gowers, and by the Commission's own research, should stand. Term should be kept at its current length.

We firmly believe that the defining purpose of intellectual property is to incentivise creation. It does so, however, at the cost of reducing access and reuse of works produced. Thus, in determining the strength of an IP right it is necessary for policy-makers to balance these two competing effects.

Andrew Gowers recognised the importance of this, when he stated:

The ideal IP system creates incentives for innovation, without unduly limiting access for consumers and follow-on innovators. It must strike the right balance in

a rapidly changing world so that innovators can see further by standing on the shoulders of giants.¹

We agree with Ian Fletcher, Chief Executive of UKIPO, that the Gowers Review represents a significant step forward in policy-making by emphasising the importance of a strong economic basis for IP rights:

...the message is that the IP framework is legal and it's scientific, but underneath it has a purpose that is economic – it is fundamental.²

In this respect the UK leads the way in IP policy. The 2005 Adelphi Charter, a framework for policy makers considering changes to IP legislation, urged governments to automatically presume against extending the scope or term of IP rights. Stating that "the burden of proof in such cases must lie on the advocates of change" it argues that rigorous analysis that changes would promote economic well-being and people's basic rights was needed before any extension of the scope or term of IP rights should be considered.³ No such analysis has been produced by the advocates of this change.

IP policy should be guided by reason and an equal concern for the interests of all UK and European citizens. The Commission makes much of the challenging financial situation facing ageing performers. While we do not accept that IP law is an appropriate mechanism to deal with this situation, as we will demonstrate in the second section of this submission, it also turns out to be a very inefficient one.

Section 1: The evidence

In addressing the need for balance and for common sense, the UK Government has recognised the problems of extending copyright term by committing not to do so. The Commission presents no new evidence that should compel the UK Government to renege on this commitment.

Cost to consumers

It is disappointing that there is no mention in the impact assessment of the conclusions of the IViR study, commissioned by DG Internal Market, on the higher costs to consumers likely to result from an extended term. As they concluded:

Ultimately, the revenues that phonogram producers and performing artists would reap from a term extension (see para. 3.4.2.1 and para. 3.4.2.6) would have to be paid by users and consumers of sound recordings⁴

1 http://www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr06/press_notices/prebud_pbr06_pressgowers.cfm

2 <http://www.iwr.co.uk/information-world-review/news/2189341/copyright-drives-economic>

3 http://www.ipcharter.org/pdfs/adelphi_charter2.pdf

4 Hugenholtz et al (2006) The Recasting of Copyright & Related Rights for the Knowledge Economy: Final report Available at http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf

In an open letter released this month, IViR has criticised the Commission's refusal to confront the critical arguments made in their study, arguing that this might:

*reveal an intention to mislead the Council and the Parliament, as well as the citizens of the European Union. In doing so the Commission reinforces the suspicion, already widely held by the public at large, that its policies are less the product of a rational decision-making process than of lobbying by stakeholders.*⁵

The CIPIL study is dismissed because the Commission argues that books are not the same as recordings. Instead, the impact assessment relies on the industry-commissioned PwC report to make its claim that there is no evidence that term extension will affect consumers. However this study, based on analysis of only 129 recordings, itself admits:

*[T]here is not a large number of recordings, relative to the amounts, to be introduced in the future... Hence, there is no certainty that the current observed effect (i.e. lack of price differential of in-copyright and out-of-copyright recordings) will be repeated in the future.*⁶

The CIPIL report explains at some length why a study like PwCs is an unsatisfactory basis for this proposal⁷.

It is logically impossible to have benefits to producers and no costs to consumers. The reality for consumers, according to the CIPIL report, is more likely to be one of significant costs:

*Taking the upper bounds for producer gains determined in previous sections... implies consumer costs of between 240 and 480 million pounds from retrospective term extensions.*⁸

We believe it would be fair and proper to assume that more evidence on the cost to consumers is likely to be forthcoming as more sound recordings enter the public domain. In the meantime any attempt to extend term should be put on hold. The Adelphi Charter highlights the importance of this – if the evidence surrounding extension is not available then we should wait until it is.

Balance of trade

For the UK at least it remains the case that the proposal will have a negative effect on the balance of trade. The Commission's basis for assuming there will be no negative impact on the balance of trade at the European level is evidenced in the document by a single member state case – Denmark. This is not a satisfactory evidence base from which to

⁵ See http://www.ivir.nl/news/Open_Letter_EC.pdf

⁶ Bournemouth Statement page 8, available at <http://www.cippm.org.uk/images/Bournemouth%20Statement.pdf>

⁷ See Centre for Intellectual Property and Information Law, University of Cambridge (2006) *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, page 61, FN 51 available at http://www.hm-treasury.gov.uk/media/B/4/gowers_cipilreport.pdf

⁸ *ibid* page 42

draw a firm conclusion. UKIPO should demand more evidence before sacrificing the UK's interest to Europe's.

Information professionals and follow-on innovators

While the costs to information professionals in terms of rights clearance remains, the Commission makes no attempt to mitigate against it bar a suggestion that "flexible solutions for rights clearance and orphan works could be found on an ad hoc basis".⁹ It is clear that if the term is extended, information professionals will have to clear at least two sets of rights for the works that remain in copyright. Additionally there will be more orphan works, the problems surrounding which the proposed "use it or lose it clause" will do little to solve, and may exacerbate.

Additionally, the assessment ignores the cost to follow on innovators (besides public domain record labels) such as musicians and film makers, who will incur costs both in licensing recordings that are in copyright for another 45 years, and in seeking permission to use works which may or may not have been affected by the proposed "use it or lose it" clause.

Cultural diversity

The impact assessment makes groundless and often contradictory assumptions about the effects the proposal will have on cultural diversity. We do not see a strong basis from which to argue that record companies will be incentivised to digitise niche cultural works¹⁰ and would tend to agree more with the Commission's admission that "phonogram producers will focus on re-issuing the premium CD's during the extended term, i.e., those with very high profit margins"¹¹. Further research in this area backs up this assumption:

*A US study for the Library of Congress by Tim Brooks (2005), based on a selection of recordings considered to be of particular historical importance, shows that the prime re-issuers of historical recordings are not the copyright owners. According to Brooks, only 14 percent of pre-1965 recordings in this sample are available from rights holders. Historical recordings from the same period are more available in Europe, due to the shorter term.*¹²

As such the proposal looks very likely to consign vast swathes of our cultural heritage to a commercial vacuum. Contrast this with non-rightsholder efforts to digitise works of historic value, such as those of music fan Christopher Bolling, who single-handedly archived 4,000 tracks from old 78rpm records¹³, and it becomes clear that allowing recordings to enter the public domain is of significant value to cultural diversity.

9 Impact assessment, page 44

10 Impact assessment, page 43

11 Impact assessment, page 48

12 Bournemouth Statement Pg. 6

13 <http://blog.wired.com/music/2008/08/one-mans-quest.html> . Other notable examples of non-rightsholder digitisation efforts include www.openmusicarchive.org and www.archive.org .

The assumption that record companies will tailor A&R to US markets because of more favourable terms is ridiculous. The proposal appears to suggest that A&R will look out for bands who are more likely to be popular in the US than in the EU in fifty years time. Following this logic brings us to the conclusion that in 1962 George Martin would have been better off inventing gangsta rap than signing The Beatles. This seems, to say the least, unlikely.

The current term is working

In the examples provided by the Commission – the song "Build me up Buttercup", performed by The Foundations and used in the film *There's Something About Mary*, and Edith Piaf's interpretation of "Non, je ne regrette rien", used in the film *La Môme* – show that the fifty year term is fit for purpose. While it can be argued that a sudden renewed interest in these tracks has brought significantly increased earnings to the performers, the assessment does state that Edith Piaf actually died in 1963, thus showing that, in this example, a blanket extension is clearly devoid of either compensatory or incentivisation benefit to the performer.

The proposal refers again and again to the "golden" 1950s and 1960s when performers were clearly incentivised to contribute their talents to works. If we are to believe that performers are the same as artists, and we advise UKIPO to approach this theoretical assumption with the caution it deserves, then perhaps the term for authors needs to come down.

Section 2: Who gains?

The Commission does put forward one new piece of "evidence", the AEPO ARTIS study¹⁴, which deals with the economic welfare of performers. It states that the proposal to extend term in sound recordings is in line with the objectives of the EU to promote welfare and social inclusion. However, as we will demonstrate, it turns out that copyright term extension is an inefficient mechanism to reward this subset of society.

Improving the situation for performers might be more sensibly tackled if legislators scrutinised the situation of contractual terms between performers and producers, rather than extending term for the overall benefit of very few. Effective retirement and social insurance schemes are also more appropriate areas for scrutiny.

It seems unclear why the Commission is so worried about ageing session musicians living in poverty when there are so many other groups that are equally, if not more, disadvantaged. It is further ill-advised to address this problem via an indirect tax that is regressive and hugely inefficient. As we will demonstrate, the Commission's proposal will do very little to help the majority of Europe's recording artists.

¹⁴ Vanheusden, E (2007), *Performers' Rights in European Legislation: Situation and Elements for Improvement*

A thinner slice of the same pie

Evidence provided by the leading European centres of intellectual property research has shown an increase in payments to dead composers, from 2.4 percent in 1995, to 14.1 percent, following an increase in term extension by 20 years in Sweden. This indicates that the proposed extension for sound recordings will lead to a similar, if not more pronounced, effect in favour of the estates of deceased performing artists.¹⁵

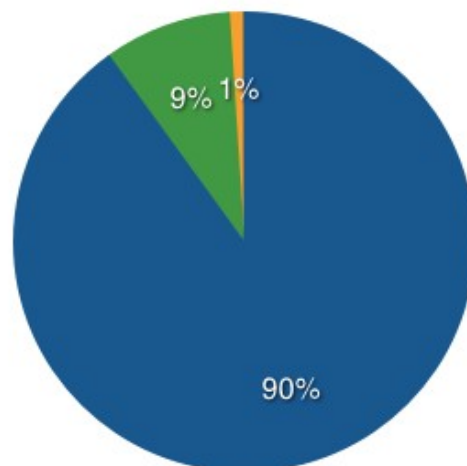
Assuming that licensing fees paid by users of recordings, e.g. broadcasters, remain constant – which the Commission's impact assessment assures us they will – the amount of earnings available to performers will not grow but be sliced more thinly and distributed for longer to more rightsholders. Artists will not earn more over their life time, and are likely to earn less, as money will be transferred from the living to the estates of the dead.

Who really benefits from term extension?

This proposal is not about helping poor performers. The figures in the Commission's impact assessment take an average value of 10% to estimate the performer's share of new sales revenues generated from the proposed term extension.

● Music labels share ● Top 20% of performers ● Bottom 80% performers

How the financial benefits pan out



However, the figures quoted conveniently ignore the impact assessment's own statement that redistribution of this 10% will be highly skewed in favour of the top earning 20% of performers. As the impact assessment states "... between 77% and 89.5% of all income distributed to performers goes to the top 20% of earning performers".¹⁶

Instead of taking this into account when it comes to calculating projected returns to performers from the proposed term extension and the musicians' fund, the Commission's impact assessment simply divides the purported financial benefits by the number of performers, omitting to illustrate the skew towards top earning performers.¹⁷ As we demonstrate in the table overleaf, the projected financial gains for the vast majority of

¹⁵ Bournemouth Statement Pg. 4

¹⁶ Commission Impact Assessment, 15 April 2008, 4.2.3., Pg 18

¹⁷ Ibid Pg. 56

performers are meagre: from as little as 50¢ p.a. (low estimate, no fund) in the first ten years, to as "much" as €26.79 p.a. (high estimate, with fund).

Increased Royalties from sales: Performers (exc. fund)

| | Low estimate € 1,100,000 over 10 years | | High estimate € 18,000,000 over 10 years | |
|------------------|---|--------------|---|--------------|
| | Top 20% | Bottom 80% | Top 20% | Bottom 80% |
| No of performers | 4900 | 19600 | 4900 | 19600 |
| Share of gain | € 984,500 | € 115,500 | € 16,110,000 | € 1,890,000 |
| Per performer | € 201 | € 6 | € 3,288 | € 96 |
| Per year | €20.09 | €0.59 | €328.78 | €9.64 |

Increased Royalties from sales: Performers (inc. fund)

| | Low estimate (see endnote) € 3,200,000 over 10 years | | High estimate € 50,000,000 over 10 years | |
|------------------|---|--------------|---|---------------|
| | Top 20% | Bottom 80% | Top 20% | Bottom 80% |
| No of performers | 4900 | 19600 | 4900 | 19600 |
| Share of gain | € 2,864,000 | € 336,000 | € 44,750,000 | € 5,250,000 |
| Per performer | € 584 | € 17 | € 9,133 | € 268 |
| Per year | €58.45 | €1.71 | €913.27 | €26.79 |

By contrast, each major label would be expected to gain €8.2million-€163million over the 45 year term (see below). That, in turn, works out at €205,000-€4.075m, per label, per year. Now at least we get to the heart of the matter - that this is a windfall for record labels.

Increased Royalties from sales: Labels (exc. Fund)

| | Low estimate (over 10 yrs) | High estimate (over 10 years) |
|-----------------|-------------------------------|----------------------------------|
| | € 10,200,000 | € 163,000,000 |
| No of labels | 4 | 4 |
| Share of gain | € 2,550,000 | € 40,750,000 |
| Per year | € 255,000 | € 4,075,000 |

Increased Royalties from sales: Labels (inc. Fund)

| | Low estimate (over 10 yrs) | High estimate (over 10 years) |
|-----------------|-------------------------------|----------------------------------|
| | € 8,200,000 | € 130,100,000 |
| No of labels | 4 | 4 |
| Share of gain | € 2,050,000 | € 32,525,000 |
| Per year | € 205,000 | € 3,252,500 |

The real question here is whether this spectacular windfall for labels is deserved. It comes at a cost: the cost imposed on consumers; the cost of renegeing on the public promises of rightsholders; the cost to information professionals; the cost to follow-on innovators, and the hidden cost of further aggravating public attitudes towards IP¹⁸.

The windfall approach will not, as the impact assessment seems to suggest, fix the problem of piracy. No one denies that the music industry has a difficult job to do in the face of changing technology. However, as technology has continued to develop, with better and faster ways of sharing music, the music industry has adapted poorly. Businesses need to offer services that give consumers what they want and value. Responding instead by demanding the extension of IP rights as well as tougher laws and intrusive and excessive digital rights management (DRM), is inappropriate, and serves neither artists nor consumers. We should not reward an industry that cannot perform for the European creative economy.

Conclusion

The proposal of the European Commission suggests both an inefficient solution for the purposes of social inclusion and welfare and an ill-grounded hand-out to the perceived incentive problems inherent in this sector. In reality term extension will confuse and anger consumers by imposing costs and ignoring economic logic. It fundamentally breaks the social contract and endangers the respect and acceptance necessary for a functioning intellectual property system.

To date the balance in deciding IP rights policy has been one sided. Everyone agrees it is essential to have evidence-based policy but the Commission is supplying policy-based evidence which strongly suggests that it has been swayed by special-interest lobbying. It is for this reason that the raised bar of evidence we have mentioned is vital. This is in order to halt those with the loudest voices, greatest means and the ears of policy-makers, from having their requests for more waved through at the public expense.

By emphasising the principles of balance and empiricism the UK has shown that it can lead the way in IP policy. As the Adelphi Charter outlined, laws regulating intellectual property must serve as a means of achieving creative, social and economic ends and not as ends in themselves. This proposal clearly fails that test. It should be rejected in the strongest terms.

About the Open Rights Group

The Open Rights Group is a grassroots technology advocacy organisation, founded in 2005. Our core operations are funded by hundreds of tech-literate UK citizens who want their voices heard in national debate around technology issues. We speak out against the poor regulation and implementation of digital technology. We aim to protect and promote civil, human and consumer rights in the context of digital technology.

¹⁸ We note that as of Friday 29 August, nearly 14,000 individuals had signed our petition against the proposed term extension. See <http://www.soundcopyright.eu/petition>

Endnote

In earlier versions of this document, a figure of €2m benefit over 10 years was used to calculate the increased royalties from sales due to performers (low estimate – with fund). In fact, the correct figure is €3.2million.

This slightly alters our calculations for benefits accrued to performers in this scenario. We had stated that the top 20% of performers would each receive €36.53 per year in this scenario. In fact they would receive €58.45 per year. We had stated that the remaining 80% of performers would each receive €1.07 per year in the first ten years. In fact they would receive €1.71. The document has therefore been amended and all figures are now accurate. We do not believe this correction alters the substance of our argument – that performers stand to gain very little from this proposal.