



OPEN RIGHTS GROUP

Release the Music

Should the term of copyright protection
for sound recordings be extended?

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🔗 A handful of major record labels are trying to break a fifty year-old promise. Musicians and their fans will not be the only victims.

The copyright term on sound recordings is 50 years. An independent review commissioned and endorsed by the UK government says it should remain at 50 years. Despite this, the recording industry continue to demand that this term be extended. But an extension of term would be an injustice to British musicians and musical culture, and may harm our economy.

Copyright is a bargain. In exchange for releasing sound recordings to the public, copyright holders are granted a limited monopoly during which they can pursue anyone who uses their recordings without permission. But when this time is up, these works join Shakespeare, Shelley and Bernard Shaw in the proper place for all human culture – the public domain.

The public domain is about to benefit from its half of this bargain, as tracks from a golden age of recorded sound reach the end of their copyright term. Seminal soul, reggae and rock and roll recordings will soon be freed from legal restrictions, allowing anyone to preserve, reissue and remix them.

Major record labels want to keep control of sound recordings well beyond the current 50 year term so that they can continue to make marginal profits from the few recordings that are still commercially viable half a century after they were laid down. Yet if the balance of copyright tips in their favour, it will damage not just the music industry as a whole, but also individual artists, libraries, academics, businesses and the public.

The labels lobby for change, but have yet to publicly present any compelling economic evidence to support their case. What evidence does exist shows clearly that extending term will discourage innovation, stunt the reissues market, and irrevocably damage future artists' and the general public's access to their cultural heritage.

As Europe looks to the Creative Industries for its economic future, it is faced with a choice. It can agree to extend the copyright term in sound recordings for the sake of a few major record labels. Or it can allow sound recordings to enter the public domain at the end of fifty years for the benefit of future innovation, future prosperity and the public good.

🔗 The copyright term on sound recordings should remain at fifty years.

A creative future

Intellectual property law is moving up the political agenda. The UK faces unbeatable competition in manufacturing from emerging economies like India and China and, as a result, politicians are increasingly turning to innovation-based business to ensure Britain keeps its competitive edge in the global marketplace and maintains its prosperity into the twenty-first century.

The Government has decided that a key factor in nurturing innovation in the UK lies in getting the balance right in intellectual property law. On the one hand, intellectual property rights (IPRs), such as copyright, give creators an incentive to create by legally guaranteeing them the exclusive right to exploit their own creations. On the other, IPRs limit the length of this monopoly, so that once it expires, other people can use past work as a basis for future innovation.

In the case of copyright, creative work can provide inspiration for future generations of artists — think of Disney’s *Snow White* or the works of the Reduced Shakespeare Company. Limits on the scope and term of IPRs also play an important role in civil society, providing access to material for critical and educational purposes, and guaranteeing that future generations will have access to their cultural heritage.

Andrew Gowers, author of the Gowers Review of Intellectual Property, an independent review whose recommendations were accepted by the UK Government at the end of 2006, recognises this fact when he writes that:

“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

The burden of proof

In 2005, the Royal Society of Arts sponsored an international commission of experts from the creative industries, law, economics, science, technology and the public sector to produce The Adelphi Charter², a framework for policy makers who are considering changing their IP legislation.

The Charter urges governments to automatically presume against extending the scope or term of IPRs, stating that “the burden of proof in such cases must lie on the advocates of change”³, who should provide rigorous analysis which clearly demonstrates that any extension would be in the economic and civil interest of the public at large.

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🔗 In the case of copyright terms on sound recordings, the growing body of evidence that is available consistently points to maintaining the term of protection at 50 years.

🔗 Where does the evidence lead us?

As part of a review of the harmonization of European copyright law, the European Commission asked the Dutch Institute for Information Law (iVIR) to examine proposals to increase the term of protection for sound recordings. The iVIR found the arguments behind the proposal lacked substance, especially compared to the reasons for maintaining the status quo⁴. The European Commission have not yet indicated its position on this issue, but its advisors are clearly opposed to the proposals.

Back in the UK, the Gowers Review based its recommendation not to extend term on an independent study commissioned from a specialist team at the University of Cambridge. They found only a weak economic case in favour of extending term, which would provide at best a gain of 2% in industry revenues; whereas there is strong economic case against — extending term would result in increased costs imposed on the wider economy and society. Based on a putative extension of 20 years, they calculated a net loss to the UK economy of £155 million per year, with a total cost to music consumers of £240-£480m, as well as a significant negative effect on the UK balance of trade⁵.

The UK Government's Department for Culture (DCMS), Media and Sport also rejects these calls for extension of monopoly controls⁶. Their decision is grounded in uncontested evidence that, despite small benefits for particular rights holders, extension would impose an economic drain on society, especially users of recordings across the creative industries.

Furthermore, DCMS rejected the complaints, of the record industry that terms for copyright protection are longer in other jurisdictions such as the US on the basis that there are more income streams such as royalties from radio airplay available to British recording artists at home than abroad.

The recording industry has vowed to take its fight for term extension to Europe. It is highly significant however that it will not have the support of its own government, especially given that the UK is home to the most lucrative recording industry in Europe.

Who will benefit from term extension?

Certainly not the vast majority of recording artists. It is estimated that approximately 80% of new recordings do not ‘recoup’, i.e. they do not earn back the money that was invested in their creation⁷. Because artists generally do not receive any royalty payments until the record label has covered the cost of production and promotion, this means that 80% of recording artists receive no royalties from their records. Their only income from recording is the non-refundable advance against royalties paid to them by the label so that they can survive whilst working on their album.

This need not be so, but royalty rates are set by the recording company and agreed in binding contracts which usually include pages of restrictions on how the artist can earn money. For example, a re-recording restriction is common, so artists can’t re-record any of their music, not just for the life of the contract but frequently for a period of time beyond it. Royalty rates are also slashed under certain specific circumstances, such as if the recording is advertised on television, or sold via new technologies or via discount music clubs. It is unsurprising that this is the case. Like any business, record companies are trying to maximise their income.

Industry revenue figures are shrouded in secrecy, but some evidence on the 20% of artists who do earn royalties can be found. For example, out of 15,500 artists surveyed for the Monopoly and Mergers Commission in 1996, only 16.5% were likely to earn more than £1,000 that year in royalties, with under 2% earning more than £20,000⁸. Bear in mind that these figures did not specify how many of these royalty payments were for tracks recorded over fifty years ago: it seems safe to assume that these would make up only a tiny fraction of total royalty revenues.

So why does Sir Cliff Richard, a high profile campaigner for term extension, characterise sound recording royalties as a “pension for artists”⁹? What figures are available show that extension would be of help only to Sir Cliff and a tiny number of other already highly successful artists.

In fact, the majority of recording artists would be best served by following the advice of Samuel Heath, spokesperson for Age Concern, when planning for old age: “People shouldn’t base their pension on something as unpredictable as royalties. Musicians should be planning for the future and making sure their pension is as big as possible, because you never know if your songs are going to remain popular.”¹⁰

Preserving our past

As well as being economically illogical, extending the term on sound recordings would also privatise and could even destroy vast swathes of British cultural heritage. Because of the inadequacy of existing provisions in copyright law, the British Library Sound Archive, one of the largest such archives in the world, is unable to digitise sound recordings still under copyright without seeking individual permissions from existing rightsholders. Although digitisation is important for preservation, the size of the sound archive and the cost of clearing the rights means that such a process is too expensive for the majority of recordings. So digitisation is put on hold, endangering the education, inspiration and enjoyment of future generations¹¹.

Retrospectively extending term, as the industry would prefer, would set the British Library's Sound Archive back at least 45 years by putting the majority of their collection back into copyright. Other libraries which have extensive collections of sound recordings, such as university libraries, would be affected just as badly.

Even if term extension was applied only to works currently in copyright, there would still be a 45-year public domain 'void' — 45 years during which nothing enters the public domain. If a 95 year term was passed in 2010, no recordings would come out of copyright until 2055, leaving the research community with very little to do for nearly half a century.

But whilst the music industry may offer to take the role of curator of our musical heritage, past experience shows that not all labels prioritise preservation as highly as they should. In 1979, when Polygram took over Decca Records, all the metal masters of the company's pre-1950s 78 rpm recordings were destroyed. And in the 1960s, US label King Records used all its metal masters as infill for a new car park¹².

The British Library, and libraries in general, perform a very different ideological function to the music industry, digitising for research need and preservation, rather than profit. It is in their organisational DNA to provide as much free access to as much of our culture for as many people as they can. And it is in their interests to be thorough and to ensure that their digitisation projects are 'future proof', not subject to the vagaries of what is a very fast-changing technology.

It is essential for the preservation of our musical heritage that the British Library and their colleagues be supported in their conservation efforts.

↳ **It's not just music**

Indeed, it is important to remember that whilst this document focuses on recorded music, term extension would affect all sound recordings, regardless of their nature. The British Library's sound archive includes drama and literature, oral history, wildlife sounds, accents and dialects, and sound effects, as well as classical, popular, world and traditional music.

Extending the term on sound recordings would affect all manner of audio, from radio archives to academic research. The commercially successful pop songs from the 1950s and 1960s that the music industry wishes to retain control over make up just a tiny proportion of our country's entire sound recording archive. We must not sacrifice this vast heritage for the benefit of a small number of business interests.

↳ **Conclusion**

Those lobbying to extend the term of copyright in sound recordings have presented no evidence to demonstrate the economic benefits of such a move. What evidence that does exist shows that the economic benefit would be marginal, afforded to a handful of major labels and very few artists.

Finally, it could sentence our cultural heritage to a commercial vacuum, preventing future artists from accessing, and being inspired by, a golden age of recorded sound.

↳ **The copyright term on sound recordings should remain at fifty years.**

Notes for Editors

- 1** Gowers Review of Intellectual Property:
http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf
- 2** For more information about the principles behind the Adelphi Charter, visit:
http://www.rsa.org.uk/projects/intellectual_property_charter.asp
- 3** For the full text of the Adelphi Charter, visit:
http://www.adelphicharter.org/adelphi_charter_document.asp
- 4** Hugenholtz et al, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Institute for Information Law Amsterdam:
http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_summary_2006.pdf
- 5** *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, Centre for Intellectual Property and Information Law, University of Cambridge:
http://www.hm-treasury.gov.uk/media/B/4/gowers_cipilreport.pdf
- 6** *Government Response to the Culture, Media and Sport Select Committee Report into New Media and the Creative Industries*:
http://www.culture.gov.uk/NR/rdonlyres/3E8E36E8-3B56-4219-89B2-0623C0AA8AF3/0/375268_GovResponse.pdf
- 7** Papadopoulos, Theo (2004), *Are Music Recording Contracts Equitable? An Economic Analysis of the Practice of Recoupment*, MEIEA Journal Vol 4 No 1, 83-104:
http://www.meiea.org/Journal/html_ver/Vol04_No01/Vol_4_No_1_A5.html
- 8** Kretschmer, Martin (2005), *Artists' Earnings and Copyright: A review of British and German music industry data in the context of digital technologies*, First Monday 10/1 (January): pp1-20:
http://www.firstmonday.dk/issues/issue10_1/kretschmer/
- 9** Sherwin, A, *Cliff challenges EU rock'n'roll 'swindle'*, The Times, 1 November 2004:
http://business.timesonline.co.uk/article/0,,1_1_0-1__8692,00.html
- 10** Charman, Suw, *Opposing copyright term extension*, Linux User & Developer:
<http://suw.org.uk/linux-user/opposing-copyright-term-extension/>
- 11** Grossman, Wendy M. *Preserving a copy of the future*, The Guardian, 19 October 2006:
<http://technology.guardian.co.uk/weekly/story/0,,1925067,00.html>
- 12** See Don Foster MP's contribution to a Westminster Hall debate:
<http://www.theyworkforyou.com/whall/>

🔗 About the Open Rights Group

The Open Rights Group is a fast-growing NGO focused on raising awareness of issues such as privacy, identity, data protection, access to knowledge and copyright reform. Founded in 2005 by a pledge from 1000 members, ORG is funded by small grants and donations from supporters. We aim to improve both understanding and policy in digital rights matters that affect both businesses and the public. Our activities include organising campaigns, lobbying government, and helping journalists find experts and alternative voices for stories.

The Open Rights Group's goals are to raise awareness of digital rights abuses; to provide a media clearinghouse, connecting journalists with experts and activists; to preserve and extend traditional civil liberties in the digital world; to collaborate with other digital rights and related organisations; and to nurture a community of campaigning volunteers, from grassroots activists to technical and legal experts.

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