

The Proposed Copyright Term Extension for Sound Recordings

A joint academic statement on the evidence¹

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How could locking up recorded music for another 45 years possibly benefit a creative and innovative society? European academics issue a joint statement on the proposed extension of copyright for sound recordings.

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In February of this year, EU internal market commissioner Charlie McCreevy declared his intention to propose a directive extending the European copyright term for sound recordings by 45 years, from 50 to 95 years.² The announcement overturned the recommendations of two recent independent reviews on the issue. One was conducted by the Centre for Intellectual Property and Information Law at Cambridge University for the UK Gowers Review of Intellectual Property (2006),³ the other was commissioned by the Commission itself as part of a larger study by the Amsterdam Institute for Information Law (2006).⁴

The 2004 Commission Staff Working Paper on the European copyright framework had summarised the policy consensus quite accurately: “It is feared that an extended term of protection would only tend to diminish the choice of music on the market by enforcing the flow of revenues from few best-selling recordings, while at the same time not providing any real new incentives for creation of new recordings or motivating new

¹ This statement was sent to the European Commission on Monday, 16 June 2008. It is also forthcoming in the *European Intellectual Property Review* (EIPR/9/2008).

² DG Internal Market press release, IP/08/240, 14 February 2008 [available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/240>]

³ Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings (2006), Centre for Intellectual Property and Information Law, University of Cambridge for Gowers Review of Intellectual Property [available at http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm]

⁴ The Recasting of Copyright & Related Rights for the Knowledge Economy (2006), Institute for Information Law (IViR), University of Amsterdam for DG Internal Market [available at <http://papers.ssrn.com>]

investment. It has also been pointed out that practically all developed countries, with the exception of the USA, apply the term of protection of 50 years. From the point of view of the Internal Market, the term of protection for phonogram producers does not cause particular concern since the term has been harmonised in the Community and also been incorporated by the 10 new Member States. (...) Moreover, it seems that public opinion and political realities in the EU are such as not to support an extension in the term of protection. Some would even argue that the term should be reduced. *At this stage, therefore, time does not appear to be ripe for a change, and developments in the market should be further monitored and studied.*⁵

It is indeed hard to see how extending exclusive rights to the catalogue of recorded music for another 45 years would benefit society. Following years of fierce and sustained lobbying by the trade bodies of the record industry, however, the copyright unit of the Internal Market Directorate is currently drafting the text of the extension directive which the European Commission aims to adopt as a formal proposal to the European Council and the European Parliament “before the summer break of 2008”. It is still possible for the Commission to see sense, in particular the commissioners who speak on competition (Neelie Kroes), consumer protection (Meglena Kuneva), enterprise and industry (Günter Verheugen), the information society (Viviane Reding), and science and research (Janez Potočnik).

In order to assist rational policy making, leading research institutes called a meeting at Bournemouth University in May 2008. Collectively, we have reviewed the empirical evidence on the issue of term extension. Here are our findings:

⁵ Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995 (p. 11). Following bilateral trade agreements with the United States, Chile (2003), Singapore (2003) and Australia (2004), have increased their copyright terms for sound recordings to 70 years. The very fact that these extensions were the result of bilateral trade pressure should make European policy makers hesitate.

1. The Artists' Earnings Effect

Will artists earn more as a result of copyright extension?

Commissioner McCreevy gives most prominence to this alleged effect, sought in the name of aging artists: “[O]nce copyright protection for sound recordings has ended, performers no longer receive any income from their sound recordings. For session musicians and lesser known artists that means that income stops when performers are at the most vulnerable period of their lives (retirement).” (Commissioner Charlie McCreevy, DG Internal Market press release, IP/08/240, 14 February 2008)

We find that artists' earnings are primarily a matter of contract, not copyright.⁶ Advances and royalties for record sales depend on the terms of the recording contract. Empirical studies consistently show that only a small percentage of artists are able to control their contracts.⁷ According to collecting society statistics, the top ten percent of artists account for between 80 and 90 percent of total earnings.⁸

Unsurprisingly, these artists (such as Cliff Richard) feature strongly in the industry's lobby submissions to governments, yet it is the remaining 90 percent on whom Commissioner McCreevy bases his case (ibid.): “I am talking about the thousands of anonymous session musicians who contributed to sound recordings in the late fifties and sixties. They will no longer get airplay royalties from their recordings. But these royalties are often their sole pension.”

While there is perhaps a moral argument for enabling musicians to benefit during their lifetime from the continuing commercial use of their performances, these payments are

⁶ Institute for Information Law (note 4 above), pp. 120-122; L.M.C.R. Guibault and P.B. Hugenholtz, “Study on the conditions applicable to contracts relating to intellectual property in the European Union”, study commissioned by the European Commission (May 2002) [available at http://europa.eu.int/comm/internal_market/copyright/docs/studies/etd2000b53001e69_en.pdf].

⁷ M. Kretschmer, G.M. Klimis, R. Wallis, “The Changing Location of Intellectual Property Rights in Music: A study of music publishers, collecting societies and media conglomerates” (1999), *Prometheus* 17/2: 163-186; Ruth Towse, *Creativity, Incentive and Reward* (2001), Cheltenham: Edward Elgar

⁸ M. Kretschmer and P. Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources: A survey of 25,000 British and German writers* (2007), London/Bournemouth: ALCS/CIPPM [available at www.cippm.org.uk]

comparatively small. In 2007, UK collecting society PPL made payments to 23,000 musicians, but interestingly does not reveal the distribution of earnings.⁹ Consolidating the figures published in the annual reports of various collecting societies, our best estimate is that for the *typical* performing artist,¹⁰ the annual payout is in the lower hundreds of pounds and will not increase from extension. Assuming that the licensing fees paid by users of recordings (such as broadcasters, webcasters, supermarkets, restaurants, airlines etc) remain constant, the pie will not grow but simply be sliced more thinly and distributed for longer to more right holders.¹¹ £250 a year is not a pension.

In any case, these arguments should not be considered for estates or record companies.¹² Swedish collecting society data evidences an increase in payments to dead composers from 2.4 percent of performing right royalties in 1995 (before term extension by 20 years) to 14.1 percent in 2006.¹³ In our assessment, the extension of the copyright term for sound recordings will lead to a similar effect in favour of the estates of best-selling performing artists.

Answer to question 1: We have seen no evidence that living artists as a whole would benefit decisively from an extension of exclusive rights held by record companies. The benefits will fall to those who need it least: already wealthy performers, and their estates and record companies. In fact, in as much as innovative musicians are users of existing recordings, their artistry will be hindered, not enabled, by extension.

⁹ Phonographic Performance Limited (PPL), Annual Report 2007. PPL collects and distributes royalties for the airplay and public performance of sound recordings.

¹⁰ A statistical approximation to the typical artist is one who earns a *median* income, i.e. 50 per cent of the population of artists earn less. The measure of average (or *mean*) income will be untypical because a small number of best-selling earners skew the distribution.

¹¹ This argument also applies to income from the private copy levy (EU countries except Ireland, Malta and the UK). To be sure, in recent years performing rights revenues have increased quite dramatically for some collecting societies. For example, PPL increased its income from £80.9million in 2003 to £115 million in 2007 but this trend depends on users' willingness to pay (which is unrelated to copyright extension).

¹² In her book on the UK 1842 Copyright Act, Catherine Seville notes that as long as the proposed extended term (from 28 years to life plus six) was to go to the authors, the publishers opposed; from 1840, when the "retrospective clause" was removed, many publishers started to support the extension. History tells us that extensions will not be passed without support from exploiters: C. Seville, *Literary Copyright Reform in Early Victorian England* (1999), Cambridge: CUP.

¹³ Data supplied to the Bournemouth meeting by SKAP.

2. The Supply Effect

As a result of copyright extension, will more (and more diverse) recordings be produced and made available to consumers, musicians and researchers?

“[A] longer term of protection would promote record company re-investment in fresh talent and a diverse range of new music, to the benefit of both artists and consumers.” (Industry lobby letter to Commissioner McCreevy, circulated in early 2008 for signature by performers, music publishers, independent and major record producers, entertainment retailers and collecting societies)

The core purpose of copyright law is to act as a stimulus to creativity and innovation. This second alleged effect of term extension is therefore central to the case.

It is well established that retrospective copyright extension, i.e. protection which the producers could not have anticipated at the time of creation, cannot constitute an incentive. Nor can returns beyond the time horizon of investors act as an *ex ante* stimulus. These arguments have been extensively rehearsed in the context of the constitutional challenge to the US Sonny Bono Copyright Extension Act of 1998. In an Amici curiae brief (2002)¹⁴, 17 economists (including five Nobel laureates) were scathing (p. 8): “Once a work is created, additional compensation to the producer is simply a windfall.”

Thus retrospective extension has only one purpose: to prevent the potential revenue loss to incumbent right holders from competition. Or as trade association BPI implores: What would happen “were the ‘crown jewels’ of British popular music of the Fifties and Sixties allowed to fall into the public domain”?¹⁵

¹⁴ Akerlof et al, An Economic Analysis of the Copyright Term Extension Act of 1998 (2002), Amici curiae brief in *Eldred v Ashcroft*, 537 U.S. (2003)

¹⁵ The Gowers Review of Intellectual Property: A Response from the British Phonographic Industry (2006), (p. 22) [available online, see note 3 above]

The BPI thus commissioned a study from PriceWaterhouseCoopers (PwC) (2006) to show the implausible: that existing records would become more available by guarding them with exclusive rights for longer. This study was disingenuously termed “independent”, has not been released to public scrutiny, yet is extensively used by DG Internal Market in its impact assessment of the proposed directive. If the argument holds, only perpetual copyright is the correct answer.

Any serious empirical work that has been done on this issue, points in the direction of common sense. Perpetual copyright is nonsense. Professor Paul Heald in a new study (2008)¹⁶ shows that musical compositions are more likely to be exploited in movies once they fall into the public domain. A US study for the Library of Congress by Tim Brooks (2005),¹⁷ 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. Parties other than the rights holders have been the sole re-issuers of 22 percent of the historic recordings.

This is not merely an economic issue. Karl F. Miller, head of re-release label Pierian Records, says: “Music is not simply entertainment. It can be amongst the best and most profound expressions of human thought.” Miller’s submission to the Gowers Review¹⁸ quotes from posts to the e-mail list of the Association of Recorded Sound Collections: “If the 95 years copyright extension becomes law, and is applied retrospectively, the only people allowed to reissue recordings in the past 95 years, ie after 1910, will be the companies who recorded them. Due to takeovers these ‘parent companies’ are now

¹⁶ Paul Heald, “Testing the Over- and Under-Exploitation Hypotheses: Bestselling musical compositions (1913-32) and their use in cinema (1968-2007)”, paper to be presented at Annual Congress of the Society for Economic Research on Copyright Issues (SERCI), Geneva 10-11 July 2008 [available at <http://papers.ssrn.com>]

¹⁷ Tim Brooks, *Survey of Reissues of U.S. Recordings* (2005), Council on Library and Information Resources / Library of Congress, Washington, D.C. [available at <http://www.clir.org/pubs/reports/pub133/contents.html>]

¹⁸ Karl F. Miller, submission to Gowers Review of Intellectual Property (2006) [available online, see note 3 above]

Polygram (for Decca, Winne) and EMI (HMV, Zonophone, Columbis, Regal, possibly Homochord, etc.). What chance do we have that they will ever reissue music hall recordings? Their collective track record of reissuing archive music hall recordings in the last 30 years is between nil and negligible.” Major labels are not the most reliable guardians of the records they control.

Answer to question 2: An exclusive term of protection of 50 years should be more than sufficient to cover the investment horizon of record producers. Any retrospective protection is in effect a windfall that will negatively affect access to, and exploitation of the back catalogues of recorded music. The evidence is clear: As the recordings of the 1950s and 1960s come to the end of their current 50 year term, they will become *more* available, not less.

3. The Price Effect

Will the price of recorded music change as a result of extension?

“Empirical studies on the price effects of copyright protection show that the price of sound recordings that are out of copyright are not necessarily lower than that of sound recordings in copyright.” (Commissioner Charlie McCreevy, DG Internal Market press release, IP/08/240, 14 February 2008)

Again, we are asked to believe the frankly bizarre: that term extension does not make any difference, yet is needed. And again, we have to deal with evidence supplied by PriceWaterhouseCoopers (PwC) on behalf of the record industry.

The PwC study obtained a sample of 129 albums recorded in the period 1950-1958 chosen so that the share of “in-copyright” was approximately equal. “Obtaining prices from a variety of sources, they do not find any statistically significant differences in price” (PwC, p. 49).

Paul Heald, in contrast, finds a significant price effect in his study of 334 best-selling public domain and in-copyright books.¹⁹ By picking bestsellers chronologically close in time (from the period 1913-1932) and tracking them when they enter the public domain, Heald shows that public domain books have a typical list price of \$4.45 while books in-copyright have a typical list price of \$8.05. If the sample is restricted to major publishers, the difference is still \$6.30 for public domain books and \$8.90 for in-copyright books.

There are methodological difficulties with this kind of research: Price is determined by many factors other than copyright (such as macroeconomic conditions, manufacturing and distribution costs, changes in taste, and so on). Thus, it is difficult to compare like with like (i.e. two recordings that only differ in copyright status and nothing else).²⁰

Even PwC admits: “it is important to note however, that there is not a large number of recordings currently in the public domain, relative to the amounts to be introduced in the future (dependent on availability, which we examine in the following pages). 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.”²¹

Rather than claiming on the basis of one study of dubious scope that the price of public domain sound recordings is “not necessarily lower” (what does that mean?), the Commission should seek out some robust evidence. An independent study of recordings that are subject to competition (that is: well-known recordings) is very likely to confirm that the price of public domain recordings is significantly lower than the price of those in copyright.

¹⁹ Paul Heald, “Property Rights and the Efficient Exploitation of Copyrighted Words: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers” (2007), paper presented at Second Annual Conference on Empirical Legal Studies, New York 9-10 November 2007 [available at <http://papers.ssrn.com>]

²⁰ Cambridge study for the Gowers Review (2006), note 3 above, p. 42

²¹ Quoted in Cambridge study for the Gowers Review (2006), note 3 above, p. 43

In another study commissioned by the International Federation of the Phonographic Industry (IFPI), economist Stan Liebowitz reproduces a BPI dataset that segregates the top 10,000 UK albums in 2004 by year of production.²²

Share of 2004 UK record sales by copyright date		
	Total Sales	% of Sales
1940s & earlier	413,000	0.30%
1950s	1,583,000	1.30%
1960s	6,982,000	4.80%
1970s	13,839,000	9.50%
1980s	16,022,000	11.00%
1990s	17,941,000	12.30%
2000s	88,904,000	60.90%

From this, allowing for the relative market volumes of these decades, Liebowitz calculates that increasing the copyright term from 50 to 95 years would likely increase nominal revenues to owners by almost 70%.²³ With the co-operation of the vested interests that sit on the data needed to assess their claims, consumer price effects could surely be established.

Answer to question 3: Exclusive rights are unlikely to be cost free. For sound recordings, copyright is provided so that record companies invest from a prospect of higher returns during the protected period. While the empirical evidence is missing, it is simply preposterous to claim both, that term extension does not make any difference to consumer prices, and that record companies need term extension to boost their revenues.

²² S. Liebowitz, *What are the consequences of the European Union extending copyright length for sound recordings?* (2006, p.14). Again, this study has been used in lobbying but remains unpublished on the IFPI website (www.ifpi.org).

²³ Depending on the discount rates applied, this equals an increase in net present value of revenues in the region of 1% to 6% (Cambridge study for the Gowers Review (2006), note 3 above).

4. The Trade Argument

“If Europe is going to achieve its goal of becoming a leading knowledge-based economy, it has to put its creative sector on a level playing field with other parts of the world. This is essential to ensure a thriving European musical culture and a competitive music business that will drive growth in the creative economy. The current disparities in term of protection, both within the European Union and between the EU and other music markets, have to be fixed if the European music sector is going to compete on an equal basis.” (Industry lobby letter to Commissioner McCreevy, circulated in early 2008 for signature by performers, music publishers, independent and major record producers, entertainment retailers and collecting societies)

This argument, citing the famous Lisbon goal²⁴, clearly impressed the Commission: “The Commission has also looked at the trade implications of a longer term of protection and provisionally concludes that most of the additional revenue collected in an extended term would stay in Europe and benefit European performers. This is good for promoting Europe’s performers and the cultural vibrancy of European sound recordings.” (Commissioner Charlie McCreevy, DG Internal Market press release, IP/08/240, 14 February 2008)

The trade argument is not easy to unpick. One half is a comparative advantage argument: i.e. that American industry will do better in its regulatory environment. The empirical evidence suggests that this is not so. In fact, the shorter term of protection gives Europe a distinct advantage. Having the raw material of culture more freely available in Europe than in the US should reduce the costs of innovation, such as re-releases and derivative records (using samples of earlier records). As discussed above, the increasing availability of historical recordings under the 50 year term has already spawned a European cottage industry. When the public domain reaches the 1960s, we can expect a wave of innovation in recorded music.

²⁴ According to the Lisbon Agenda, Europe aims to become “the most competitive and dynamic knowledge-based economy in the world” by 2010 (Lisbon European Council, 23-24 March 2000).

The second, and unrelated half of the argument is a balance of payments claim: European creative industries allegedly “leak” money due to the longer term in the US. International economists disagree to what extent the balance of payments is self-correcting. Given that there is a potential issue, the claim needs to be assessed.

Three points can be made:

(1) The 95 year term in the US is available to European right holders in the US, just as the 50 year term in Europe covers US right holders in Europe.²⁵ Thus commercial conditions are equal: There are two levels of protection, reflecting different cultural and economic priorities, but they are applied to all concerned.²⁶

(2) Given that there is a level playing field between all right holders, the issue is where the relevant right holders reside that take advantage of the longer term. Will the additional revenues flow to European firms and artists? Over 70 per cent of the global sales of recorded music is accounted for by only four multinational companies: Universal, Sony/BMG, Warner, and EMI. Of these, EMI, the smallest of the so-called majors, is based in the UK but controlled by Guy Hands’ private equity group Terra Firma – an unlikely long term proposition. It is unwise to make policy decisions on the basis of contingent, often non-transparent accounting methods of four multinational companies (even if we knew where their profits were taxed and re-invested).

²⁵ Under Article 7(8) of the Berne Convention, there is a possibility of a so-called “comparison of terms”. This means that any term granted that exceeds the international minimum standards can be based on reciprocal protection, i.e. protection available in the country with the shorter term. However, the United States grants protection to foreign works on the same terms as for works of US origin.

²⁶ It should be noted that the United States have not joined the Rome convention (and are unlikely to do so). Thus, artists and record companies in the US are not protected against the broadcasting of their records – they do not receive any royalties when their records are aired. For the first 50 years, European protection for sound recordings exceeds US protection in scope.

(3) For films, we have the reverse situation. In the US, all films published before 1 January 1923 are in the public domain, while Europe offers a term often exceeding 140 years (life of director / screenwriter / composer plus 70 years).²⁷ Does the Commission simultaneously propose to reduce that term?

Answer to question 4: In terms of comparative advantage, the shorter term gives Europe an edge in innovation. Regarding the balance of payments, reliable empirical evidence is difficult to obtain. In any case, the effects of term reduction should be as thoroughly investigated as the proposed extension.

Conclusion

If the European Commission wishes to support European artists, there are many possible measures that would *not* result in monopolising the back catalogue of recorded music for another 45 years. At the level of member states, policies include (i) the regulation of copyright contracts, and (ii) social security and insurance schemes; at the European level, policies include (i) equitable remuneration rights only available to living performers, and (ii) the regulation of collecting societies and licence tariffs, such as the nature and distribution of income from any copyright levy scheme.

The record industry was offered a generous commercial bargain when investing in recorded music under the current exclusive term of 50 years. This already far exceeds the protection available to other R&D intensive industries. It cannot be the job of the European Commission to protect the revenues of incumbent companies at the cost of consumers, creativity and innovation.

Bournemouth, 16 June 2008²⁸

²⁷ Article 2, Term Harmonisation Directive (93/98/EEC). To achieve the maximum term, it is therefore advisable to credit a young screen writer with co-authorship of the dialogue.

²⁸ Signatories in alphabetical order. The statement was drafted by Martin Kretschmer.

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