

Creativity stifled?

Why copyright term extension for sound recordings is a very bad idea

====

EU internal market commissioner Charlie McCreevy has announced his intention to extend the European copyright term for sound recordings from 50 to 95 year. Leading European academics have reviewed the empirical evidence on copyright extension, and ask the European Commission: How could locking up recorded music for another 45 years possibly benefit a creative and innovative society?

====

As the European Union struggles to contain the fall-out from the Irish referendum, a draft directive extending the term of copyright for sound recordings to 95 years is about to be adopted by the Commission. This Copyright Extension Directive, proposed by Commissioner McCreevy, will seriously damage the reputation of the Commission. It is a spectacular kowtow to one single special interest group: the multinational recording industry.

The proposed directive will overturn 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), the other was commissioned by the Commission itself as part of a larger study by the Amsterdam Institute for Information Law (2006).

The 2004 Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights 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 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.*”

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 (Janes Potočník).

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:

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. Empirical studies consistently show that only a small percentage of artists are able to control their contracts. According to collecting society statistics, the top ten percent of artists account for between 80 and 90 percent of total earnings.

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: "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 in favour of performing artists, these payments are comparatively small. In 2007, UK collecting society PPL made payments to 23,000 musicians, but interestingly does not reveal the distribution of earnings. Our best estimate is that for the *typical* (median income) performing artist, 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. £250 a year is not a pension.

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.

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)

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. 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), 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”?

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. 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. 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 Review quotes extensively 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 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 stretch out beliefs: 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).

Professor Paul Heald, in contrast, finds a significant price effect in his study of 334 best-selling public domain and in-copyright books (2007). 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.

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.

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.

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)

This argument, citing the famous Lisbon goal, 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). 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.

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.

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. Thus commercial conditions are equal: There are two levels of protection, reflecting different cultural and economic priorities, but they are applied to all concerned.

(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).

(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). 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 2008