

Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea

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Nothing is forever, not even the term of protection of sound recordings. Yet, arguments that the existing term is either too close to forever or not close enough periodically make their way onto the political agenda. The controversies about the US Sonny Bono Copyright Term Extension Act (or "Mickey Mouse Protection Act") of 1998 are still fresh in our minds. More recently, in the United Kingdom, where the rights to the early recordings of Sir Cliff Richard and the Beatles are about to fall into the public domain, the UK Committee for Culture, Media and Sport urged the UK Government to press the European Commission to extend the term of protection for the producers of sound recordings from the present 50 years to at least 70 years.¹ The British Government turned down the proposal,² following the advice of the Gowers Committee not to extend the term.³ The UK recorded music industry, not willing to accept a "no" for an answer, announced

that it would continue to press for an extension of the protection period both in the United Kingdom and in Europe. And indeed, far from being a national matter, the term of protection for sound recordings has become an issue of Europe-wide importance. Also, at the European level, the matter is under review after consultations with stakeholders.⁴ More recently, the European Commission announced its plan to propose an extension of the term of protection for the producers of sound recordings from the existing period of 50⁵ to 95 years.⁶

In 2006, the Institute for Information Law (IVI^R) carried out a study that was commissioned by the European Commission (inter alia) to evaluate the main arguments made in favour of a term extension.⁷ The study compiled, evaluated and weighed the various legal and economic arguments, which were brought in the course of the EC consultation, in interviews with stakeholders and in academic legal and economic literature. Based on this study, the present article will critically assess these arguments and conclude that they are not convincing. The structure of this article is as follows: after an initial introduction into some basic concepts, it analyses the most important arguments in favour of an extension of the term of protection for sound recordings. The following section describes in more general terms why the study found other arguments in favour of a term extension not convincing. The final section draws conclusions.

Gowers' review, the Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge, was commissioned to perform the study "Review of the Economic Evidence Relating to an Extension of Copyright in Sound Recordings", online available at http://www.cipil.law.cam.ac.uk/policy_documents [Accessed February 29, 2008]. The study, which was performed parallel and independently of the study from the Institute for Information Law (IVI^R) (see fn.7), arrived at the same conclusion than the IVI^R study, namely that an extension of the term of protection for the producers of sound recordings is not advisable.

4 Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, Brussels, July 19, 2004, SEC(2004) 995 and the responses to the consultation that are available at http://circa.europa.eu/Public/irc/market/market_consultations/library?l=copyright_neighbouring/legislation_copyright&vm=detailed&sb=Title [Accessed February 29, 2008] (Staff Working Paper on Copyright Review).

5 The present term of protection for sound recordings throughout Europe is "50 years after the fixation is made" or if the phonogram has been lawfully published within this period "50 years from the date of the first lawful publication", Art.3(2) of the Directive 2006/116 on the term of protection of copyright and certain related rights, [2006] O.J. L372, p.12, December 27, 2006 (EC Term Directive), by which the previous Council Directive 93/98 harmonizing the term of protection of copyright and certain related rights, [1993] O.J. L290, p.9, November 24, 1993 has been replaced.

6 Press release from the European Commission, Charlie McCreevy, "Performing artists—no longer be the 'poor cousins' of the music business", IP/08/240, Brussels, February 14, 2008.

7 Institute for Information Law, "The Recasting of Copyright & Related Rights for the Knowledge Economy", report to the European Commission, DG Internal Market, November 2006, online available at http://www.ivir.nl/publications/other/IVI^R_Recast_Final_Report_2006.pdf [Accessed February 29, 2008] (Institute for Information Law 2006), pp.83–137.

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1 House of Commons, Culture, Media and Sport Committee, "New Media and the Creative Industries", Fifth Report of Session 2006–2007, para.236, online available at <http://www.publications.parliament.uk/pa/cm/200607/cmselect/cmcmds/509/50902.htm> [Accessed February 29, 2008] (Culture, Media and Sport Committee 2007).

2 Government Response to the Culture, Media and Sport Select Committee Report into New Media and the Creative Industries, July 2007, Presented to Parliament by Secretary of State for Culture, Media and Sport by Command of Her Majesty, online available at <http://www.culture.gov.uk/NR/rdonlyres/3E8E36E8-3B56-4219-89B2-0623C0AA8AF3/0/375268.GovResponse.pdf> [Accessed February 29, 2008].

3 Gowers review of intellectual property, report, December 6, 2006, <http://www.ipa.gov.uk/policy/policy-issues/policy-issues-gowers.htm> [Accessed February 29, 2008]. In the course of the

General considerations when discussing the (optimal) term of protection for sound recordings

In order to fully appreciate the different arguments that are made in favour of and against an extension of the term of protection for sound recordings, it is necessary to have a basic knowledge of the underlying economic and legal reasons that have motivated the granting of exclusive rights to the producers of sound recordings in the first place.

A temporary monopoly

Related rights⁸ in sound recordings (phonograms) allow their producers to control temporarily the exploitation of a sound recording, such as the making of copies and the distribution or broadcasting thereof. Without prior authorisation of the right holder, which often involves payment of a license fee, a protected phonogram cannot be used or copied by anyone. The effect is that related rights remove some of the public good characteristics⁹ that sound recordings are usually assumed to have. In so doing, related rights address the typical free-rider problem of public goods,¹⁰ and allow phonogram producers to sell their phonograms at prices that are higher than the marginal costs that they would be able to charge under perfectly competitive conditions. This again allows them to recoup their investments for producing a sound recording.

As in any monopoly situation, granting phonogram producers exclusive rights with regard to the sound recordings they produce may affect the position of other market parties, notably competitors and consumers. The challenge in finding the optimal term of protection is to determine the optimum between giving one party the right to exclude others from the use of a principally non-rivalrous and non-exclusive good, and the costs of

restricting its use for society.¹¹ Or, in simpler words, to identify the point at which the costs of an extension would outweigh its benefits, that is the realisation of the objectives for which related rights were granted in the first place.

Possible costs from a term extension

Extending the existing term of protection for sound recordings will involve costs for consumers, competitors and innovators as well as costs for society as a whole.

Costs for consumers

Related rights protection enables right holders to charge a price higher than would be possible in a fully competitive market. This results in higher costs for consumers and potentially lower volumes produced compared to a competitive market situation without monopoly-like positions. Extending the term of protection means allowing excess pricing and inefficient allocation for an extended period of time.

Costs for competition and innovation

The temporary monopoly not only allows the original right holder to control prices, but also transaction costs, distribution channels and certain secondary uses. As competition not only takes place on price, but also on the basis of quality and service, a term extension might put a break on innovation as regards new distribution models (online stores, pay-per-listen, distribution via social network sites and legal p2p networks, etc.), new technologies for releasing older recordings, novel ways of marketing of back catalogue repertoire etc. This may affect competition not only in the market for sound recordings, but also in markets for secondary uses (such as the making of films, broadcasts, new recordings, etc.). Extending the term of protection would prolong this situation.

Costs for society

Restricted access to sound recordings can be the result of both inefficient allocation of existing sound recordings and a reduction of the public domain, which would both be perpetuated through a term extension.

The public domain can be described as a "sphere in which contents are free from intellectual property rights".¹² Everyone is free to use material in the public domain without being required to obtain

8 An explanatory note on terminology is in order here. Whereas sound recordings are protected in the United Kingdom and other common law countries by "copyright" (in a narrow sense), most countries at the European continent protect sound recordings by "neighbouring rights". At the European level, however, the more neutral term "related rights" (i.e. rights related to copyright) is used. This covers both dogmatic approaches. Since the discussion on term extension for sound recordings has become an issue of EU-wide importance, the term "related rights" shall be used in this article.

9 A good qualifies as a public good if it is non-rivalrous (i.e. once created, it can be used by everyone without depleting its quantity or quality) and non-exclusive (i.e. others cannot easily be excluded from consuming and/or copying it).

10 An interesting question that, however, exceeds the scope of this article is what influence the introduction of Digital Rights Management technologies has on the public goods problem, and thereby, indirectly, on the economic justification of an extension of related rights protection. See e.g. N. Elkin-Koren and E. Salzberger, *Economic Analysis of Intellectual Property*, Draft November 2005 (forthcoming, 2008) (Elkin-Koren/Salzberger 2005), pp.130 et seq. (about the question whether DRM protected content is still a public good). DRM allows producers to prevent others from unauthorized copying or re-distribution and thereby enforce exclusivity. Arguably, in such a situation, the granting of additional legal rights just adds another layer of protection, and it is debatable whether additional or longer protection is actually needed.

11 W.M. Landes and R.A. Posner, "Indefinitely renewable Copyright", [2002] Chicago: John M. Olin Law and Economics Working Paper No.154, <http://www.law.uchicago.edu/Lawecon/WkngPprs.151-175/154.wml-rap.copyright.new.pdf> [Accessed February 29, 2008] (Landes/Posner 2002); E. Rappaport, "Copyright Term Extension: Estimating the Economic Values", CRS Report for Congress, Washington: Congressional Research Service 1998, p.1 (Rappaport 1998).

12 P. Samuelson, "Digital Information, Digital Networks, and The Public Domain", [2001] draft paper, <http://www.law.duke.edu/pd/papers/samuelson.pdf> [Accessed February 29, 2008], pp.80-107 (Samuelson 2001), p.82. See generally L. Guibault and P.B. Hugenholtz, "The Future of the Public Domain", The Hague (etc.): (Kluwer Law International 2006, Guibault/Hughenoltz 2006).

prior authorisation or to pay royalties.¹³ The public domain serves as a valuable (re)source for creators, performers, researchers and educational institutions, who are inspired by older material or use it in new creations (for example, samples of recordings used in remixes).¹⁴ Public domain material is also used as input to innovative content distribution models, both commercial and not-for-profit.¹⁵ Extending the scope or duration of protection can have the effect that material falls into the public domain substantially later. Additional social costs are the creations that have never materialised because of transaction costs or lack of access to material enjoying prolonged protection.¹⁶

Objectives of related rights in sound recordings

Because of the various costs involved, granting a temporary monopoly to phonogram producers is acceptable in terms of efficiency and social welfare only to the extent and for the duration that is necessary to realise the goals for which exclusive rights are granted. Unlike the exclusive rights that are granted to authors, i.e. the creators of literary, musical or dramatic works, the objectives for granting related rights to sound recording producers are exclusively of an economic nature, not of a social or moral nature. This fact is often overlooked by proponents of a term extension complaining about an unreasonable discrimination of

sound recording producers vis-à-vis authors, who enjoy a far longer term of protection of their creations (life of the author plus 70 years, see Art.1(1) of the EC Term Directive).¹⁷ The main reason for granting related rights protection to sound recording producers is to provide them with incentives for producing new sound recordings, by allowing them to recoup the investments that are needed for the production.

The EC Rental Right Directive, which harmonises related rights, provides little guidance on what kinds of investments are covered, except that it concerns "investments required particularly for the production of phonograms and films".¹⁸ It has been argued that related rights for sound recordings cover at least the investment costs in a narrow sense, meaning the costs that are directly related to the recording process itself (e.g. the equipment needed to make recordings, the salary of the people operating the equipment, etc.).¹⁹ Others argue that investment costs in a broader sense are covered as well, namely the costs needed to make the recording (studio fees, studio musicians, sound engineers, rights acquisition, etc.).²⁰ Then there is a grey area of costs of which it is highly dubious whether they fall within the ambit of related rights protection. Examples are the costs for scouting and development of new talents (so called artist and repertoire or A&R), the costs for maintenance and distribution of existing material, and marketing costs. There are at least two convincing arguments why these costs are probably not covered by the objectives of related rights protection for sound recordings. The first is that the subject matter of protection of related rights for sound recordings is the specific object with a particular economic value, i.e. the sound as it has been fixed on a phonogram.²¹ The protection granted does not impede others from making independently identical sound recordings. This would be an argument against including costs that are related to the recording *business* (i.e. marketing, distribution, A&R) rather than to the recording *process*. Moreover, insofar as marketing costs accrue in the goodwill of trade marks or trade names (increasingly, successful performers are indeed branded as such), phonogram producers may derive *perpetual* protection under the law of trade marks. Secondly, the costs that are needed to distribute and market products in a competitive environment are costs that phonogram producers share with all other entrepreneurs. It is difficult to see why phonogram producers would qualify for preferential treatment in this respect.

13 Note that protected subject matter, such as phonograms, can be subject to a number of cumulative exclusive rights with different expiry dates. As long as the last exclusive right has not expired, the material is only partly in the public domain.

14 See for example M.D. Birnhack, "More or Better? Shaping the Public Domain", in *Guibault/Hughenoltz 2006*, pp.59–86, p.85 (Birnhack 2006); Y. Benkler, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain", paper submitted to the Conference on The Public Domain, November 9–11, 2001, Duke Law School, <http://www.law.duke.edu/pd/papers/benkler.pdf> [Accessed February 29, 2008], p.203 (Benkler 2001).

15 See for example the Archive of Contemporary Music, New York City (<http://www.arcmusic.org/>); British Library National Sound Archive (<http://www.bl.uk/collections/sound-archives/na.html>); Harvard University, Archive of World Music (<http://www.hcl.harvard.edu/loebmusic/awm-about.html>); Oesterreichische Akademie der Wissenschaft: Phonoarchiv (http://www.pha.oew.ac.at/home_e.htm); Queens College, Louis Armstrong Archives (<http://www.satchmo.net/>); Rutgers University, Institute of Jazz Studies (<http://www.libraries.rutgers.edu/rull/lib/jazz/jazz.shtml>); Yale University Historical Sound Recordings Collection (<http://www.library.yale.edu/musiclib/collections.htm#hsr>); The Classical Archive (<http://www.classicalarchives.com/>); and Public Domain Music (<http://www.pdinfo.com/>).

16 See for example R. Bard and L. Kurlantzick, *Copyright Duration, Term Extension, The European Union and the Making of Copyright Policy*, San Francisco: Austin & Winfield 1999 (Bard/Kurlantzick 1999), p.60; D.S. Karjala, "Comment of US Copyright Law Professors on the Copyright Office Term of Protection Study", [1994] E.I.P.R. 12, 531–537, (Karjala 1994), p.533. Critical S. Liebowitz and S. Margolis, "Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects", [2003] AEI-Brookings Joint Centre for Regulatory Studies, SSRN: <http://ssrn.com/abstract=488085> [Accessed February 29, 2008] or DOI: 10.2139/ssrn.488085 (Liebowitz/Margolis 2003), p.10, pointing to the fact that e.g. fair use exceptions (or, to speak in terms of European copyright law: the specific exceptions to copyright) would provide sufficient relief from the restrictions imposed by exclusive rights control.

17 Culture, Media and Sport Committee 2007, para.236.

18 Recital 7 of Council Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, [1992] O.J. L346/61 (November 27, 1992).

19 E. Ulmer, *Der Rechtsschutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendegesellschaften in internationaler und rechtsvergleichender Sicht*, München: Beck 1957 (Ulmer 1957), p.11; E. Ulmer, *Urheber- und Verlagsrecht*, Berlin (etc.): Springer-Verlag 1980 (Ulmer 1980), p.515.

20 M. Vogel in: G. Schrickler, *Urheberrecht: Kommentar*, München: Verlag C.H. Beck 1999, pp.1237–1293 (Vogel 1999) at p.1280. See also W. Nordemann, K. Vinck, P.W. Hertin and G. Meyer, *International copyright and neighboring rights law: commentary with special emphasis on the European Community*, Weinheim (etc.): VCH 1990 (Nordemann et al. 1990), p.362.

21 See Vogel 1999, p.1280.

Finally, there are the costs or economic interests which, when included, would clearly stretch the rationales of related rights protection too far. An example is the maximisation of profits and all costs that are related to this goal. It is clearly not the objective of related rights protection in sound recordings to maximise profits from successful recordings. For the same reason, another argument that is often heard, namely that a term extension is needed in order to compensate for the (larger) share of unsuccessful sound recordings, is equally invalid.²²

Assessing the need for an extension of the existing term of protection for sound recordings

A legal-economic analysis of the question of whether the existing term of protection for sound recordings needs extension involves balancing the different arguments in favour and against extension (including the possible costs and benefits), and assessing to what extent they promote the objectives behind the protection of related rights.²³ The following section will discuss three important arguments in favour of a term extension—the need to recoup investments, the need to enable investment in A&R, and the need to provide incentives to preserve and redistribute older recordings.

But first, a few caveats are in place. Until today, the literature on law and economics has not succeeded in identifying an optimal term of protection for any right of intellectual property.²⁴ Also, proof is still lacking that a specific term of protection has the desired effect of creating optimal incentives to produce, create and invest.²⁵ Stronger protection will not automatically lead to more creation, innovation and thriving markets; it

can also impede the same.²⁶ Evaluating the economic impact of an extension is further complicated by the fact that in a dynamic and unpredictable industry such as the music sector, it is extremely difficult to foretell which material will still sell after 50, 70 or 90 years. The lack of empirical data, one of the major problems of economic analysis in the area of intellectual property in general, and the inability of stakeholders arguing for a term extension to provide such data, add further to the difficulties of gaining concrete insights into the possible benefits and costs of an extension of the term of protection of related rights.

Term extension to recoup investments in production

An extension of the term of protection of sound recordings would be justified if the current term of protection of 50 years were not sufficient for phonogram producers to recoup their investment. Proponents of a term extension argue that “[p]roducers need a longer period of time to have a return on their creative work and investments”.²⁷ To evaluate whether this argument is justified requires an assessment of: (a) the average investment necessary to produce (and market) a sound recording; and (b) the average time needed to recoup this investment.

“Average” investment in sound recordings

The financial resources that are necessary to produce a sound recording are difficult to define. Production costs vary heavily, e.g. between large and small productions or between different genres like classic music (requiring an entire philharmonic orchestra) or electronic dance music (that can be produced on a computer). Average numbers are therefore not very meaningful in this setting. What can be said, though, is that production costs have decreased over the past thirty years due to technological advances. While, for example, master tapes used to be recorded in large, fully equipped sound studios that charged several thousands of dollars per day, today, due to digital studio techniques even large productions

22 But see S.J. Liebowitz, “What are the consequences of the European Union Extending copyright length for sound recordings”, study prepared for the IFPI, May 2006, p.7.

23 Compare Elkin-Koren/Salzberger 2005, p.122; Bard/Kurlantzick 1999, p.23; Landes/Posner 2002, p.5; R. Watt, *Copyright and economic theory: friends or foes?*, (Cheltenham, UK: Edward Elgar Publishing Ltd 2000) (Watt 2000), p.13.

24 See for example Landes/Posner 2002; George A. Akerlof, Kenneth J. Arrow, Timothy Bresnahan, James M. Buchanan, Ronald Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard L. Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser, “The Copyright Term Extension Act of 1998: An Economic Analysis”, AEI-Brookings Joint Centre for Regulatory Studies 2002, online available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=16> [Accessed February 29, 2008] (Akerlof et al. 2002), p.5; S. Liebowitz and J. Margolis, “Seventeen Famous Economists Weigh In on Copyright: The Role of Theory, Empirics, and Network Effects”, *Harvard Journal of Law and Technology*, Vol.18, No.2, Spring 2005; R. Pollock, “Forever Minus a Day? Some Theory and Empirics of Optimal Copyright”, MPRA Paper No.5024, February 2007, online available at <http://mpra.ub.uni-muenchen.de/5024/> [Accessed February 29, 2008].

25 Bard/Kurlantzick 1999, p.60; S.E. Sterk, “Rhetoric and reality in copyright law”, *Michigan Law Review* 1996, Vol.94, No.5, pp.1197–1249, at pp.1213–15, pp.1220–1222, pp.1225–1226 (Sterk 1996); Karjala 1994, p.533; and extensively Elkin-Koren/Salzberger 2005, pp.89 *et seq.*

26 For a discussion see Elkin-Koren/Salzberger 2005, pp.112 *et seq.* Positive: F.M. Scherer, “The Innovation Lottery”, in: C.R. Dreyfuss, D. Zimmerman and H. First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, (Oxford: Oxford University Press 2001), pp.3–21 (Scherer 2001), at pp.15 *et seq.*; critical: M.A. Lemley, “Property, Intellectual Property, and Free Riding”, *Texas Law Review* 2005, Vol.83, pp.1031–1075 (Lemley 2005), at pp.1060–1062; C. Nguyen, “Toward and Incentivized but Just Intellectual Property Practice: The Compensated IP Proposal”, *Cornell Journal of Law and Public Policy* 2004, Vol.14, pp.113–143 (Nguyen 2004), at pp.113 *et seq.* For example, in the course of the review of the sui generis right for non-original databases in the Database Directive, the Commission could find no hard evidence that the introduction of the sui generis right indeed has led to an increase in the production and distribution of databases in Europe, or to an increase in competitiveness of the European database market. See European Commission, First evaluation of Directive 96/9/EC on the legal protection of databases, DG Internal Market and Services Working Paper, Brussels, December 12, 2005, p.24 *et seq.*

27 Reponses to the Staff Working Paper on Copyright Review by AFYVE, UPFR, LaMPA.

Table 1: Exemplary investment in a small production of a sound recording

Fixed costs		Per cent of total cost
Studio production	€ 20,000	18%
Marketing and overhead	€ 40,000	37%
Video production for marketing	€ 15,000	14%
Variable costs per CD		
Production and shipment	€ 1.20	12%
Royalties authors and composers	€ 0.90	9%
Royalties artists	€ 1.00	10%
Total costs for 11,000 CDs	€ 109.100	
Total revenue at PPD €10 per CD	€ 110,000	

can be produced for less than €1,000 per day.²⁸ Digital recording tools are available that enable semi-professional sound recordings in small “home studios” and simple sound recordings can even be produced with the help of specialised software on a desktop computer. In the case of marketing costs, average numbers are even harder to estimate. To nevertheless give a rough picture of the “average” investment in a sound recording, Table 1 shows exemplary estimates of the costs for a small production for illustrative purposes.

The example in Table 1 assumes fixed studio production costs of €20,000 and marketing costs of €55,000 (including music video production). For most music labels (at least the larger ones) the costs of promotion and marketing of new phonograms is a major cost factor.²⁹ Major labels often simply acquire the rights to a readily produced master tape and only invest in the reproduction, distribution and marketing of the recording. Depending on whether one argues that recouping the marketing costs falls within or outside the objectives of related rights protection, these costs would or would not have to be considered as well.

In this example, the phonogram producer would need to sell about 11,000 CDs to recoup his investment, assuming a PPD (price published to dealer) of €10 per CD. This figure is broadly in line with assessments from stakeholders from the music industry, naming 20,000 sold CDs the threshold to make the production of an “average” CD profitable. If marketing costs and video production costs were excluded, sales of only 3,000 CDs would be sufficient to recoup investment.

Time needed to recoup investment

The question is then what “average” time is needed to sell 11,000, respectively 3,000 copies of a newly

released record. Such an assessment is again difficult, due to the large variations between hits of a popular band and an unknown artist. While, for example, in March 2006 the average top 40 album sold about 100,000 copies worldwide per week,³⁰ other records will never get anywhere close to this figure in years. However, what is known is that the life cycles of most sound recordings are very short and that the music markets are ever faster moving, resulting in shorter life cycles. Strack (2005) estimates the average diffusion rate (diffusion of a product from introduction to the market to last sales) of long-play sound recordings to be 6–12 months.³¹ Significant differences exist, however, between different music genres.³²

To conclude, the large majority of sound recordings probably either recoup their investment within the first years—if not months—after their release or never. Despite the lack of meaningful “hard” data to prove this hypothesis, it seems save to assume that 50 years are more than enough time for phonogram producers to recoup their investment in a sound recording, even if marketing costs are included. If a recording has not recouped its investment after 50 years it is very questionable that it ever will.

Term extension to enable investment in A&R

There are sound recordings that still generate revenues for their right holders after 50 years. An important argument of the proponents of a term extension is that these revenues are crucial for the ability of phonogram producers to invest in the development of new artists and creativity.³³

Arguably, repertoire that will loose related rights protection over the next 5–10 years provides an

28 A. Künne and A. Torkler, “Managing Recording und Production”, in: M. Clement, O.W. Schusser, *Ökonomie der Musikindustrie*, Wiesbaden: DUV-Verlag 2005, pp.113–130 (Künne/Torkler 2005).

29 OECD, Working Party on the Information Economy, “Digital Broadband Content: Music”, 2005 <http://www.oecd.org/dataoecd/13/2/34995041.pdf> [Accessed February 29, 2008], p.43 (OECD 2005).

30 Source: <<http://www.mediatraffic.de/>>.

31 J. Strack, *Musikwirtschaft und Internet*, Osnabrück: epOsmusic 2005 (Strack 2005).

32 See also the calculations by Liebowitz 2006, pp.12–17.

33 Response to the Staff Working Paper on Copyright Review by IFPI. Response to the Staff Working Paper on Copyright Review by BPI (Pt 1).

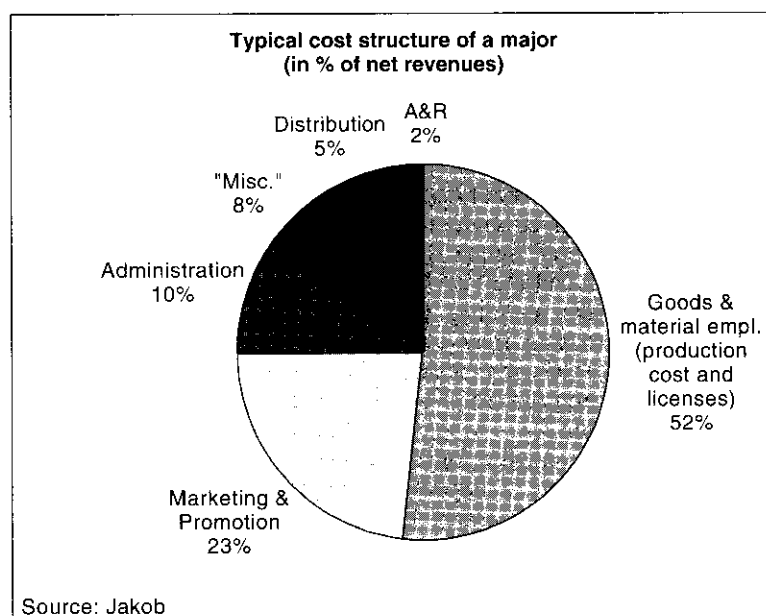


Figure 1 Typical cost structure of a major label in % of net revenue³⁸

important source of revenue to European phonogram producers.³⁴ Moreover, in the next 10–20 years, the market share of commercially still valuable repertoire for which related rights protection expires can be expected to increase considerably, when popular repertoire from the 1960s and 1970s will lose protection.³⁵ The question is then how much of the potential revenues will actually be spent on A&R. Jakob (2005) estimates that only about two per cent of the net revenues of major music labels are spent on A&R.³⁶ At the other end of the scale, the British Phonographic Industry estimates that the UK record industry reinvests about 17 per cent of its turnover in A&R to discover new talent.³⁷ In any case, the overall effect of a term extension on investment in new talent and repertoire would only be limited, as the lion's share of revenues primarily finances the running cost of phonogram producers (see Figure 1).

Moreover, there are indications that the music industry tends to rely on the exploitation of the few profitable parts of its back catalogues rather than on investing in new talent for new recordings.³⁹ Re-releases and compilations of old bestsellers are often more profitable and less risky than new recordings. According to Warner Music, less than 10 per cent of their annual

income is generally derived from artists without an established track record.⁴⁰

Term extension to provide incentives to maintain and distribute

Extending the term of protection can never be an incentive for the production of already existing recordings. It could however be an incentive to preserve and redistribute existing material. Proponents of a term extension argue that a term extension will "create an incentive for the creators of recordings, which own the original masters, to invest in remastering, digitising and remarketing older recordings in a new format to new audiences".⁴¹

As explained earlier, only a small share of sound recordings still continue to generate commercial value for phonogram producers after 50 years. The remaining (much larger) share of the back catalogue remains "locked in vaults"⁴² of the phonogram producers and is no longer commercially available. Some market participants estimate that more than 95 per cent of the music industry's back catalogue recordings remain unreleased.⁴³ This situation could have a negative impact on access to a diversity of material and prevent material from falling back into the public domain, a situation that would be aggravated if the term of protection were prolonged.

This is not to say that sound recordings that lose protection and fall into the public domain are

34 For more concrete estimates, see Institute for Information Law 2006, pp.113–115.

35 This is not to say that the recording industry would automatically forgo this amount of revenues, as they are still free to continue selling the phonograms affected, though they will face competition from other record producers that can now re-release the recordings at potentially lower prices.

36 H. Jakob, "Wirtschaftlichkeit in der Musikindustrie", in: M. Clement, O.W. Schusser, *Ökonomie der Musikindustrie*, Wiesbaden: DUV-Verlag 2005, pp.73–80 (Jakob 2005), p.74.

37 BPI, "Record industry reinvests 17% of turnover in new music", April 19, 2006, http://www.bpi.co.uk/index.asp?Page=news/stats/news_content_file_989.shtml [Accessed February 29, 2008].

38 Jakob 2005, p.74.

39 Response to the Staff Working Paper on Copyright Review by NAXOS.

40 Warner Music Group, 2005 Annual Report, http://library.corporate-ir.net/library/18/182/182480/items/181572/2005_AR.pdf [Accessed February 29, 2008], pp. 6–8.

41 Response to the Staff Working Paper on Copyright Review by BPI (Pt 1). See also Liebowitz 2006, p.21.

42 Response to the Staff Working Paper on Copyright Review by BEUC.

43 Response to the Staff Working Paper on Copyright Review by NAXOS.

automatically freely accessible to the public. The likelihood that someone would have to invest in making the material accessible, however, could greatly improve due to digitisation. Digitisation in general, and online music services in particular, offer to both original producers and their competitors entirely new opportunities to remarket back catalogues of recordings that could not economically be exploited over analogue distribution channels due to limited retail space for physical distribution. Digital distribution channels allow content goods with low individual sales volumes to be marketed in sufficient quantities so that they can collectively make up a market share that rivals or exceeds the relatively few bestsellers. This is often referred to as the "long tail" effect of digital distribution.⁴⁴

The question is whether extending the existing term of protection beyond 50 years would indeed induce phonogram producers to invest in digitising large(r) parts of their back catalogues and/or to make them available via new distribution models (e.g. online stores, social networks, legal p2p networks). This has not always been the case in the past. The opposite scenario could also be true: due to the exclusive rights they are granted and/or that have been assigned to them, phonogram producers have significant control over the exploitation, distribution, and certain secondary uses. Extending the existing term would prolong their power to withhold interested third parties from investing in digitising and re-disseminating existing material.

Other arguments brought in favour of a term extension

The IViR study identified a variety of additional arguments in favour of a term extension. The following section will briefly discuss some of these arguments.⁴⁵

The situation of performers

A prominent argument in the debate on term extension was the possible beneficial effect of an extension of the existing term for sound recordings on the situation of performers.⁴⁶ It was argued that prolonged protection would enable performing artists to receive for a longer time royalties from phonogram producers as well as from collecting societies (for the broadcasting of phonograms, the playing in bars, restaurants, discotheques, etc.). This would "take thousands of musicians off means-tested benefits—and greatly lessen the burden of the state . . . The state will benefit from both a reduction in benefits paid to poor musicians, and from increased taxation of the earnings of wealthy musicians and record companies".⁴⁷

The argument is flawed for several reasons. First, it is highly questionable whether a term extension would result in additional and sufficiently significant income for performers. Particularly the recordings of "poor" performers are unlikely to have any commercial value after 50 years; only few performers will receive royalties from sales after 50 years. If the phonogram producer decides to no longer publish the recording after a certain number of years, the performing artist concerned will not receive any royalties from sales either. At the same time, the assignment of exclusive rights to the phonogram producer can keep him from developing alternatives for exploiting his own recordings.⁴⁸ Even if a recording still had a commercial value after 50 years, only few performers earn enough from the exploitation of sound recordings to make a living. For example, it is estimated that the median individual payment for performers in the United Kingdom is +/- £75 per year,⁴⁹ hardly an amount an artist could survive on. The actual revenues for artists depend largely on contractual practice which determines to what extent royalties accrue to performers themselves or have been reserved to music publishers and phonogram producers.⁵⁰ Only in few cases the rights will remain with the performer. More commonly are contracts where all exclusive rights are transferred to the phonogram producer against a single fee (buyout)⁵¹ or contracts where performers sign an exclusive contract with a record company and get paid on a royalty basis as a percentage of the sales of the recording and for secondary uses (the latter depending on the contract). The royalties performers receive vary considerably and depend largely on the popularity and the negotiating power of the artist. If the legislator would want to improve the situation for all performers, the more sensible and effective thing to do would be to scrutinise the contractual terms between performers and music publishers and phonogram producers rather than to extend the term of protection of sound recordings for the benefit of only a few. An effective retirement or social insurance scheme might also be a better answer to the concerns of performers.

Piracy

Another argument that was brought in favour of extending the term of protection was the need to compensate for the increased risks and costs associated with piracy in the digital market place.⁵² Again, one may wonder whether it is within the rationales of related rights protection of phonograms to compensate for the ineffectiveness of existing schemes to fight digital piracy. Most certainly, in terms of social welfare and

44 C. Anderson, "The Long Tail", *Wired Magazine*, October 2004.

45 For a complete and extensive discussion, read Institute for Information Law 2006, pp.83–137.

46 See for example Culture, Media and Sport Committee 2007, para.236; N. Parker, "A raw deal for performers: Part 1—term of copyright", *Entertainment Law Review* 2006, Vol.17, No.6, at 161–166 (Parker 2006). See also European Commissioner Charlie McCreevy, "Performing artists—no longer be the 'poor cousins' of the music business", IP/08/240, Brussels, February 14, 2008.

47 Parker 2006, p.165.

48 Response to the Staff Working Paper on Copyright Review by IMMF.

49 R. Towse, *Creativity, incentive and reward: an economic analysis of copyright and culture in the information age*, (Cheltenham: Edward Elgar Publishing Ltd 2001) (Towse 2001), p.124.

50 Towse 2001, p.126. See also 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, online available at <http://www.ivir.nl/publications/other/contracts.html> (Guibault/Hughenoltz 2002).

51 The fee is by definition not proportionate to future sales and independent of the duration of rights.

52 Liebowitz 2006, p.9.

costs for competition and honest consumers, there are more effective means to address the problem, such as DRM technologies or effective enforcement of anti-piracy legislation.

Competition with non-EU states, notably the US

One line of arguments presented in support of a term extension relates to the competitive position of EU right holders in the global market. Proponents of a term extension argue that a shorter term in the EU, as compared to the US for example, would make it more difficult for phonogram producers in the EU to obtain adequate international protection, due to the application of the "comparison of terms"⁵³ rule in non-EU countries where protection is sought.⁵⁴ Moreover, due to the shorter term in the EU, the European content industry would find less favourable conditions to market their products, as compared to their competitors in the US for example. This situation could have a negative impact on profitability and diversity of the European content market.

It would exceed by far the scope of this article to discuss these arguments in detail.⁵⁵ The gist of the reasons why the arguments relating to competition with non-EU states are not too convincing is that in most cases a "comparison of terms" does not apply either because of international law in place or because many countries, including the US, do not apply a comparison of terms. The result is that EU phonogram producers receive in the US the same protection as US producers.⁵⁶ Moreover, the competitiveness of phonogram producers is based on a wide variety of factors, intellectual property protection in general and the term of protection in particular being just one of them. Apart from this, it is a simplification to juxtapose the interests of the

"European" and the "American" music industry for the reason that the worldwide music market is dominated by only four multinational companies that can not be characterised as either "European" or "American". Revenues received by these companies are often subject to intra-company flows that are not related to the shares of protected or unprotected recordings sold.

Conclusions

To conclude, the arguments made in favour of a term extension are not convincing. Many arguments already fall outside the objectives of related rights protection for phonograms. The fact that some recordings still have economic value as rights therein expire cannot in itself provide a justification for extending the term of protection. Related rights were designed as incentives to invest, without unduly restricting competition, not as full-fledged property rights aimed at preserving "value" in perpetuity. Other arguments do not convince because a term extension would either be ineffective in addressing the concerns in question, because there are other, better remedies available or advisable, or because the costs of an extension would outweigh its eventual benefits. The term of related rights must reflect a balance between incentives, market freedom and costs for society. This balance will be upset when terms are extended for the mere reason that content subject to expiration still has market value. The public domain is not merely a graveyard of recordings that have lost all value in the market place. It is also an essential source of inspiration to subsequent creators, innovators and distributors.

53 Comparison of terms means that a country where protection is sought grants to foreign right holders in its territory a term of protection that does not exceed the term granted by, in the case of related rights, the country of which the right holder is a national.

54 Response to the Staff Working Paper on Copyright Review by BPI (Pt 1) and the various national departments of IFPI.

55 See instead Institute for Information Law 2006, pp.122-130.

56 Institute for Information Law 2006, pp.123-126.