



OPEN RIGHTS GROUP

Release the Music

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

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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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🔗 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. The music industry has been lobbying government to extend this term and has submitted proposals for extension to the Gowers Review of Intellectual Property, which concludes this month. If Gowers decides in favour of extension, he will be doing 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 the UK government looks to the Creative Industries for Britain's 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.

To make sure this balance enshrined in IPRs is right for the new ‘knowledge economy’, in December 2005, HM Treasury commissioned an independent review of the UK’s intellectual property framework, headed by Andrew Gowers, former editor of the *Financial Times*¹.

The Gowers Review is due to report soon and the issue of copyright term extension for sound recordings is one of about a dozen specific questions that were raised in the call for evidence². The 50 year term will be examined in light of its extension to 95 years in other jurisdictions, (although the music industry is in fact lobbying for a much longer extension of ‘life plus 70 years’, which is the term of protection given to songwriters for their compositions).

o 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 Charter³, 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”⁴, who should provide rigorous analysis which clearly demonstrates that any extension would be in the economic and civil interest of the public at large.

But despite this clear guidance, those asking the government to extend the length of copyright term for sound recordings have published no compelling evidence or analysis. Instead, the arguments they have presented to the Gowers Review⁵ collapse under even passing scrutiny.

o Who is innovating?

Innovation is flourishing in the UK music industry. As Peter Jamieson, the chairman of industry lobby group the British Phonographic Institute (BPI), has pointed out, debut titles dominated the top ten albums by sales in Q1 2006⁶. Major record labels argue that revenues from past recordings allow them to take risks and support new sounds, but whilst a handful of major record labels split around 85% of the market between them, they are not breaking new acts in the way their rhetoric would suggest. In fact, a disproportionate amount of economically successful innovation is coming from the companies who make up the remaining 15%, the so-called ‘independents’.

Three of the seven debuts from the best-selling albums chart mentioned by the BPI were nurtured by independent labels who had existed for less than twenty years between them, i.e. 43% of successful debuts came from labels within that 15% market share. And a 17-year-old record label, Warp Records, won this year’s Digital Music Awards for their music store, bleep.com. None of these innovative companies has ancient back catalogue earnings to rely upon when finding money to invest in new ventures, and none of them will benefit from extending the term on sound recordings.

It’s important to remember, though, that the true innovation and creativity lies with the musicians themselves. The record industry may enable musicians to reach a wider audience, but without these individuals’ talent and hard work, the labels would have nothing to release. Reducing access to past works damages modern artists’ ability to innovate and create new material and could lead to stagnation.

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

Where does the evidence lead us?

It's not surprising that those who will really benefit from extending the term of copyright on sound recordings — a handful of major record labels — are not presenting Gowers with any real evidence to back up their claim that extending term would be good for the UK music business. Any evidence that does exist points the other way.

A survey by Tim Brooks¹¹ on reissues of pre-1945 sound recordings across the US (where they are still protected by copyright) and the EU (where they're not) showed that for every five-year period, non-rightsholders have issued more historical recordings than rightsholders at a ratio of close to two to one. And when the US was considering their term extension back in 1998, it was estimated that an extension of term from 75 to 90 years would increase revenues by a mere 0.1%¹².

An Institute for Public Policy Research report into IPRs recently concluded that “while we respect the value of IP to the UK economy and in protecting the rights of individual creators and innovators, we have not seen any evidence to suggest that current protections provided in law are insufficient. We feel that to extend terms any further than their current length is economically illogical and anti-competitive.”¹³

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 generations¹⁴.

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.

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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 park¹⁵.

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’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. It will not encourage innovation — rather than rewarding innovative new players in the industry, it would put them at a further disadvantage. And it would stifle a potential new reissues market.

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 For announcement of Gowers Review, see:

http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm

2 See Gowers Review Call For Evidence, at:

http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_callforevidence.cfm

3 For more information about the principles behind the Adelphi Charter, visit:

http://www.rsa.org.uk/projects/intellectual_property_charter.asp

4 For the full text of the Adelphi Charter, visit:

http://www.adelphicharter.org/adelphi_charter_document.asp

5 For an example of pro-copyright term extension rhetoric, see the chairman of the British Phonographic Industry, Peter Jamieson, writing in the *Media Guardian* around the deadline of Gowers' call for evidence:

<http://media.guardian.co.uk/mediaguardian/story/0,,1759643,00.html>

6 The top ten albums for Q1 2006 were as follows:

(* indicates debut album, + indicates independent label)

1*+	Whatever People Say I Am That's What I'm Not Arctic Monkeys (Domino Recordings)
2	In Between Dreams Jack Johnson (Universal Island)
3*+	Back To Bedlam James Blunt (Custard Records / Atlantic Records UK)
4*	Corinne Bailey Rae Corinne Bailey Rae (EMI Records)
5*	Eye To The Telescope KT Tunstall (Virgin)
6*+	Employment Kaiser Chiefs (B Unique / Polydor)
7*	Journey South Journey South (RCA Label Group)
8	Breakaway Kelly Clarkson (RCA Label Group)
9*	Stars Of CCTV Hard-Fi (Atlantic Records UK)
10	Demon Days Gorillaz (Parlophone)

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- 7** See 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** See Kretschmer, Martin (2005). 'Artists' Earnings and Copyright: A review of British and German music industry data in the context of digital technologies in *First Monday 10/1 (January)*: pp1-20 http://www.firstmonday.dk/issues/issue10_1/kretschmer/
- 9** See Sherwin, A. *Cliff challenges EU rock'n'roll 'swindle'* in *The Times*, 1 November 2004 at: <http://business.timesonline.co.uk/article/0,,13130-1338692,00.html>
- 10** Quote taken from forthcoming article by Suw Charman in *Linux User and Developer* magazine
- 11** See Brooks T (2005). *Survey of Reissues of U.S. Recordings, report commissioned for and sponsored by the National Recording Preservation Board, Library of Congress. Washington D.C.:* Council on Library and Information Resources and Library of Congress
- 12** See Akerlof GA, Arrow KJ, Bresnahan TF, Buchanan JM, Coase RH, Cohen LR, Friedman M, Green JR, Hahn RW, Hazlett TW, Hemphill CS, Litan RE, Noll RG, Schmalensee R, Shavell S, Varian HR and Zeckhauser (2002). *Brief, as Amici Curiae in support of Petitioners at 12, Eldred v. Ashcroft, No. 01-618 Washington DC:* Robbins, Russell, Englert, Orseck and Untereiner LLP
- 13** See Davies, Will and Withers, Kay (2006). *Public Innovation: Intellectual Property in a Digital Age*, ippr, October 2006 at: <http://www.ippr.org.uk/publicationsandreports/publication.asp?id=495>
- 14** See Grossman, Wendy M. *Preserving a copy of the future* in *The Guardian*, 19 October 2006 at: <http://technology.guardian.co.uk/weekly/story/0,,1925067,00.html>
- 15** See Don Foster MP's contribution to a Westminster Hall debate, at <http://www.theyworkforyou.com/whall/?id=2006-05-17a.331.0&s=speaker%3A10128>