

Extending the term of protection for related rights endangers a valuable public domain

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Recently, the European Commission announced its intention to bring forward a proposal to extend the term of protection for related rights in phonograms (sound recordings) from 50 years to 95 years.¹ This would form a serious threat to a valuable public domain. Delaying the moment from which phonograms are released into the public domain means delaying the moment from which anyone can freely use these materials, e.g. for studies, work or leisure or as raw materials for new creative efforts. This may create considerable costs for competition and innovation, for consumers, and for the public at large. As a result, the balance between protecting the rights of performers and phonograms producers (i.e. the beneficiaries of related rights) and safeguarding the interests of the public domain may be seriously disrupted.

For a term extension to be legitimate, there should be sound legal and economic reasons. Yet, two recently conducted studies, the one performed by the Centre for Intellectual Property and Information Law,² the other by the Institute for Information Law,³ convincingly conclude that an extension of the term of protection for related rights in phonograms is not advisable.

Focusing on the second study, of which the present author is one of the co-authors, this paper will shortly discuss why a term extension of related rights would be ill-advised.

Legal arguments

It has been advanced by proponents of a term extension that an unfair discrimination exists between the term of protection of authors (70 years after the author's death), on the one hand, and that of phonogram producers and performers (50 years), on the other. However, from a legal perspective, the objectives of the two categories of rights differ significantly. Whereas authors are protected for the creative efforts they put in producing literary and artistic works, phonogram producers merely deserve protection for the economic investment in producing sound recordings (the 'investment' rationale). Therefore, they merit a different treatment.

Performers have never been recognised *de jure* as authors, either. However creative they may be, they simply do not create new works, but only interpret existing ones. Furthermore, unlike copyrighted works, there is no threshold of originality for performances. Although performers argue that they need longer terms of protection, since (a) they want their income to be ensured throughout their lifetimes, and (b) they want to safeguard the deference of their performances at least during their lives, there may be better alternatives to address these concerns.

First, a term extension would not guarantee a proper 'pension' to all performers concerned, but only to those artists whose recordings are still popular after 50 years. Pension schemes for elderly artists may thus provide a better solution, because it allows *all* performers to benefit from an income throughout their retirement years. Second, to protect the performers' moral claims, it is pointless to extend the term of their *economic* rights. Instead, one could imagine extending the terms of the *moral* rights of artists. Finally, in view of contractual practices,

* This paper is based on the study, performed by Dr. N. Helberger, S.J. van Gompel, N. Dufft and Prof. P.B. Hugenholtz on 'Extending the term of protection for related (neighbouring) rights', i.e. Chapter 3 of the Recasting study (see footnote 3 below).

¹ "Performing artists - no longer be the 'poor cousins' of the music business" - Charlie McCreevy, IP/08/240, Brussels, 14 February 2008, <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/240&format=HTML&aged=0&language=EN&guiLanguage=en>>.

² Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge, 'Review of the Economic Evidence Relating to an Extension of Copyright in Sound Recordings', 2006, <http://www.cipil.law.cam.ac.uk/policy_documents/>.

³ Institute for Information Law, 'The Recasting of Copyright & Related Rights for the Knowledge Economy', report to the European Commission, DG Internal Market, November 2006, <http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf>, p. 83-137 (Chapter 3: Extending the term of protection for related (neighbouring) rights).

performers would benefit little from a term extension, as they routinely assign their rights to record companies. Therefore, a term extension would make little sense without accompanying statutory measures protecting performers against overbroad transfers of rights.

Economic arguments

From an economic perspective, a term extension would be sensible if the present term of 50 years was not sufficient for phonogram producers to recoup their investment. Yet, it appears that: “for the large majority of sound recordings the producers are likely to either recoup their investment within the first years, if not months, following their release, or never. If a recording has not recouped its investment after 50 years, it is very questionable that it ever will.”⁴ Thus, 50 years seem to be more than enough for producers to recoup their investment.

Second, record companies claim to depend to a large extent on continuing revenues from ‘old’ recordings of the 1950s and 1960s, which in Europe are due to fall in the public domain in the coming years. They say that, as a result thereof, prices will fall and competition will increase, which, in turn, will negatively affect future investments in A&R. However, “it appears that only limited shares of phonogram producers’ overall revenues are currently invested in A&R, so the predicted negative effect on investment in new talent is likely to be limited.”⁵

A third argument that has been advanced in favour of term extension is that a longer term of protection might inspire phonogram producers to breathe new life into their back catalogues recordings, and market them through online distribution channels.⁶ Although this may indeed be the case, the recent history of the internet indicates that these opportunities have not always been seized by those stakeholders now asking for a term extension. Hence, “it is questionable whether protection of sound recordings beyond 50 years would actually induce phonogram producers to better make use of the new business potential of digital distribution.”⁷

Finally, as regards performers, a term extension would surely benefit the small number of artists that are still popular after 50 years and still derive payments from collecting societies and/or royalties from record producers. For the larger part of performers that do not receive substantial revenues from their recordings after 50 years, however, a term extension would only, depending on the contractual situation (*see* the legal arguments above), result in their recordings not being commercially exploited and/or not being made available to the public.

Conclusion

There appear no sound legal and economic arguments for extending the term of protection for related right. If the Europe Commission is indeed considering a term extension, therefore, it cannot close its eyes for how this affects the public domain. “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. Without content that still triggers the public imagination a robust public domain cannot exist.”⁸ The question is, therefore, whether the Commission chooses to extend the terms of protection to the benefit of a few stakeholders of the music industry, or whether it maintains the status quo and thus opts for a rich and valuable public domain which will provide great advantages to society at large.

⁴ Institute for Information Law (2006), *supra* note 3, p. 111-113 and p. 135, and in the executive summary, p. iv.

⁵ Institute for Information Law (2006), *supra* note 3, p. 113-115 and p. 135, and in the executive summary, p. iv.

⁶ This refers to the so-called ‘long tail’ effect of digital distribution: marketed through online distribution channels, content goods with low individual sales volumes can collectively make up a market share that rivals or exceeds the relatively few bestsellers.

⁷ Institute for Information Law (2006), *supra* note 3, p. 117.

⁸ Institute for Information Law (2006), *supra* note 3, p. 137, and in the executive summary, p. v.