IRIGHTS-DOSSIER

TERM EXTENSION FOR RELATED RIGHTS IN SOUND RECORDINGS

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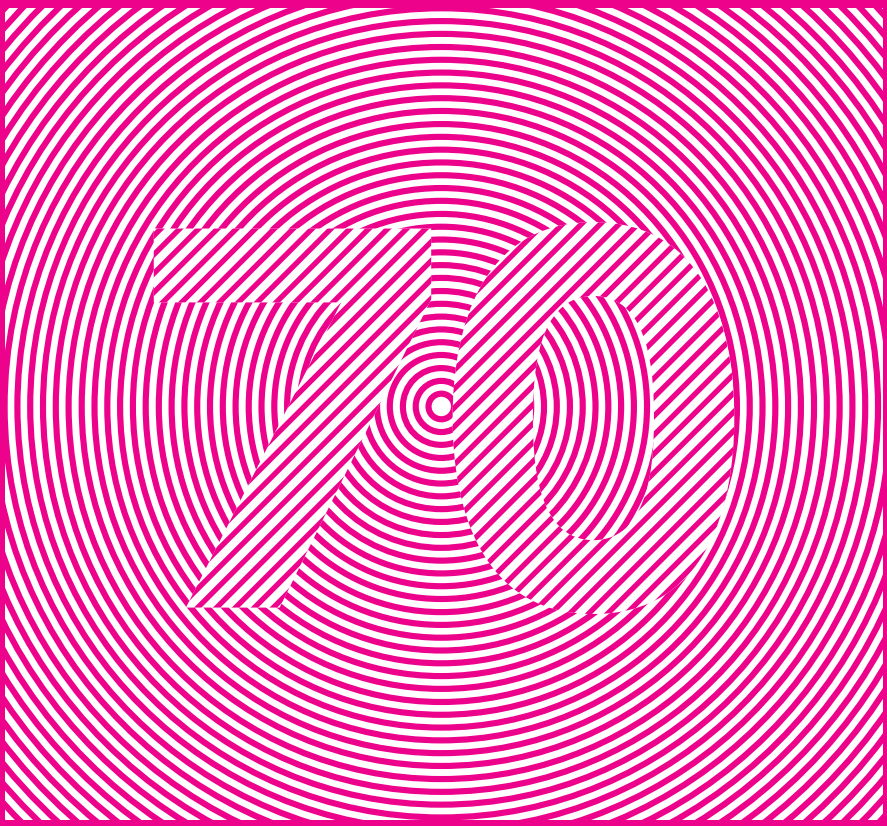

INTRODUCTION

This dossier aims at providing an overview of the presently escalating discussion taking place in Europe since 2005, about a term extension for related rights in sound recordings. Starting in the UK, music industry lobbyists have been pushing for years to have the term for all existing and future recordings extended by at least 20, better even by 45 years. Below follows a short description of the rights in question, of the points made for and against a term extension and of the chain of events that lead to the situation where this extension might, notwithstanding a strong opposition, be actually made into EU law in September 2011.

WHICH KIND OF PROTECTION OF WHAT IS IN QUESTION?

All sound recordings carry so-called »related rights«. This terminology points to the fact that these rights are not authors' rights, but rights of those who play, sing – in copyright language: perform – the works of authorship and/or record these performances or have them recorded by others, so that they can be replayed. They are given a temporary monopoly to the exploitation of the recordings, because they often contribute greatly to the commercial success of the recorded work. The related rights arise with the respective »performing artists«, i.e. the bands and session musicians in the recording studio or on the stage, but are usually in advance transferred to producers, record companies or labels through recording contracts or record deals. In addition, the labels receive an own kind of related right in the recording, in their role as »producer of phonograms«. This related right follows very similar rules to that of the performing artists. At the moment, the »life span« of these related rights in sound recordings, the »term of protection« or »term«, is uniformly set to 50 years in all european jurisdictions, calculated from first publication of the recordings (by contrast: Authors' rights in Europe usually last from creation of the work until the author dies plus another 70 years).

The song »Twist and Shout« is a suitable and famous example for showing what rights are in question here. It was written by Phil Medley and Bert Russell for the group Top Notes, was then covered by the Beatles who released it in the US on March 2nd 1964 and later reached the top 5 both in the US and the UK. The Beatles don't have any authors' rights in the song, but the related rights in their recorded performance will last until at least Dec. 31st 2015. Thus, for every public replay of the Beatles recording of »Twist and Shout«, royalties have to be paid to the band or other rights holders, based on the related rights of the band. For Germany those related rights are rooted in par. 77 and 78 of the copyright code (Urheberrechtsgesetz), the term is set by par. 82 and its calculation in par. 69. At the time the term runs out, many recordings will still carry authors' rights, but those who don't enter the »public domain«, which means they can be distributed, performed publicly, integrated into new productions, sampled and remixed without limitations.

Something often overlooked is the fact that related rights in sound recordings cover more than just recorded contemporary music. Rights of performing artists also exist in all other recordings, as long as their content is a work of authorship or a folkloristic work, which just as well applies to audio dramas, literature readings and recordings of sound effects, traditionals, world music and of course of classical music. The recorded works themselves don't even need to be protected anymore by authors' rights, which is why also a recording of any old christmas carol carries related rights, even though its composition and lyrics might long be public domain. The similar related right of phonogram producers, mentioned above, goes even further and is present in all other recordings even of completely unartistic things like documentary recordings of historic events, linguistic recordings (of dialecs, idioms, vanishing languages), nature and animal sounds and much more.

DEVELOPMENTS SO FAR

1993 — The first europe-wide harmonisation of terms was achieved by the »Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights«,[a] the first so-called »Copyright Duration Directive« which had to be adopted into all national copyright regimes within the following two years.

2005 — The British Royal Society of Arts commissions the »Adelphi Charter« [9], a basic blue print for good policy making for copyright law. It states inter alia that there should be a general presumption against retrospective term extension. The »burden of proof« for an extension actually being reasonalbe lies with its proponents.

2006 — In December, the british government accepts a study it had commissioned (on the current copyright system's fitness for the digital age), the »Gowers Review on Intellectual Property«. [2] The Gowers Review is not only clearly enclined against retrospective term extension for related rights, but moreover indicates that the existing terms are already longer than necessary.
For its econonomic assessment, the Gowers Review relies on a sub-study commissioned to Cambridge University's Centre for Intellectual Property and Information Law, the »CIPIL Report« [3] of the same year.
Subsequently, the british government declines the request for a term extension in british copyright law, but music industry lobbyists declare to further pursue an extension on the european level.
Another study is commissioned in 2006 by the EU Commission. The Institute for Information Law (IViR) at the University of Amsterdam is asked to assess and evaluate the existing studies regarding term extension. Again, this study titled »The Recasting of Copyright & Related Rights for the Knowledge Economy« [8] finds that all existing research evidence points to term extension not being a reasonable step.

2007 — The first Copyright Duration Directive is substituted by a second one, the »Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights«,[b] which sets the terms relevant for sound recordings to 50 years from first publication and for phonogram producers to 50 years from recording.

2008 — The EU Commission makes a proposal to the EU Parliament to extend the term for sound recordings from 50 to 95 years (combined with a limited revocation right for performing artists in case they transferred rights to a label which doesn't make use of the extension). [c]
In autumn the experts of the Max Planck Institute for IP Law in Munich, in a stement to the german Federal Ministry of Justice, clearly argue against the proposed extension. The German Association for the Protection of Intellectual Property (GRUR) seconds this opinion shortly after.[7] Nevertheless, the german government supports the extension on the european stage.

2009 — The EU Parliament passes the proposal to extend the term, amending it to only be 70 years and adding a provision for performing artists to receive a mandatory share in any additional revenue. In the Council of the EU (the upper house of EU legislation where member states are represented by their governments, also simply called »THE COUNCIL«, which had to also agree in order to amend the second Copyright Duration Directive of 2007) the amended proposal stalls for the time being, due to opposition by mainly northern and eastern european member states.

2011 — On Feb. 24th the danish government declares to now support the extension proposal. Shortly after, also Portugal indicates to no longer oppose it, which means that now there seems to exist a qualified majority to pass the amended proposal. Poland, holding the presidency in the Council at the moment, in a quick motion puts proposal COM (2008) 464/3 on the agenda of the COREPER session of Sept 7th 2011. COREPER is the committee of the member state's governments' permanent representatives in Brussels and prepares the sessions for the Council. Effectively, many decisions of the Council are made in COREPER, which makes it very likely that a term extension for related rights in sound recordings to 70 years will become EU law in Sept 2011. The so amended Copyright Duration Directive then has to be adopted into national jurisdictions within two years.

ARGUMENTS PUT FORWARD IN FAVOUR OF EXTENSION, AGAINST WHAT EXPERTS SAY ABOUT IT

Regarding the ratio why there are related rights of performers (and producers of phonograms) in the first place, the consensus is that the distinctive contribution and aesthetic of the performer adds value to the composition and is vital to making a song a commercial success. These rights were first recognised internationally in the Rome Convention of 1961 and granted for 20 years.

For why these rights should need to be extended – again – to 70 or even 95 years, the following points 1 to 6 are made by industry and are by and large accepted by the EU Commission's proposal (as compiled in the Gowers Review). In addition to each point, the expert opinion of the IP law institutions all over Europe is listed:

1 — PARITY WITH OTHER COUNTRIES

In the US, sound recordings are protected for 95 years, in Australia and Brazil the term of protection is 70 years. European musicians should not be granted less.

EXPERT OPINION — It is notable that for its proposal of a 95 years term the EU Commission almost exclusively relies on internal papers of the British Phonographic Industry trade association (BPI), which cannot reasonably be a suitable basis. Parts of the Commissions proposal reasons are copy-pasted from industry papers.[1]

A retrospective term extension is against all basic principles of copyright law, which grants ex ante time-limited monopolies only as an exception. When they near expiry they already fulfilled their purpose. [5]
An extension to 70 years would not mean a parity with composers, for their protection term doesn't even start before they die. [2]
The reference to jurisdictions (such as the US) giving 95 years term omits the fact that they have quite different remuneration models in place (e.g. the US »Bars and Grills Exception«, airplay royalties are only payed for digital radio, …) which renders them non-comparable with the situation in Europe. [2]

2 — FAIRNESS

Currently composers have copyright protection for life plus 70 years, whereas performers and producers only have rights for 50 years. Such a disparity is unfair.

EXPERT OPINION — A purported egality between authors' rights and related rights holders is not justified, to the contrary, it's common in copyright law that there are differences (e.g. in database protection, in the publishing industry). [5]
The alleged loss of control, suffered by performing artists after 50 years actually happens much earlier, at the time of recording the music and through record deals. It has very little to do with the term of protection. Often enought session musicians have to sign off even those rights to producers and labels that are granted in the form of future term extensions like the one in question here.[1]
»Fairness« needs to be defined in a broader sense than just »fair share for the performing artists« and must encompass welfare of society as a whole, for which monopolies are always detrimental and should not last a day longer than necessary. [2]
Already the digitisation efforts of the British Library Sound Archive are slowed down because rights have to be cleared for many recordings separately, having a devastating effect on conserving cultural heritage in time. This would be aggravated by a term extension, practically amounting to halted digitalisation for another 20 or 45 years. [4]
Above that, the expected additional revenues are marginal in comparison to the total number or recordings, for only very few of them are still commercially valuable after more than 50 years, while the extension will as a collateral damage also block all other recordings for another 20 or 45 years. The price of this extension would be payed by society, with no works entering the public domain for at least 20 or even 45 years. A retroactive extension would even pull countless works from the public domain – all this for mere marginal raise of revenue flowing from only a fraction of the music of the 1950s and 1960s. [4]
It's also notable that with the growing digitisation of public domain resources, it is likely that many existing public domain works will be made available to the public for free. If this is so, it implies an increase in the costs to consumers of a (retrospective) term extension. [3]

3 — FSUPPORT FOR PERFORMING ARTISTS

Related rights are a key factor of the 'pension' of performers, who should no longer be 'the poor cousins of the music business'.

EXPERT OPINION — Additional earnings would not go to the performing artists, firstly because an estimated 80 % of all recordings never earn back their costs, and until those costs are recovered session musicians do not usually receive any additional share. This means, that the musicians of those 80 % of recordings will receive nothing in the first place. [4]

Also, the share of yearly earnings of a performing artists based on related rights is already as low as under 300 € on average, with a highly unequal distribution between the artists.[1]

Not the performing artists but the four major record labels Universal, Sony BMG, Warner Music and EMI are holders of nearly all those rights, the term of which is now to be extended. They receive 72 %, the most successful fifth of artists a further 24 % of all earnings from recording rights. The remaining 4 % are distributed between the remaining 80 % of performing artists. Even in the most favourable scenario, they would earn additional 58 € per year on average in the first 10 years after term extension, in the opposite scenario just 4 € per year. [1]

There will be no perceptible rise in the earnings of performing artists through a term extension, rather will the distribution of earnings be shifted towards older rights holders (who are less active, sometimes only estates of artists).[1] [2]

Arguments of an actual flow of money to the performing artists are foiled by the contractual practice in the recording industry, which in numerous cases has musicians sign off even future term extensions to record companies. [2]

Even in the most favourable scenario of additional revenue, the performing artists would receive only 1 percent or less of this and in a highly uneven distribution favouring very few already very successful musicians. If the lawmaking would actually be about helping a large number of artists, a reform of the relevant contract law would be much more effective. [2]

In a survey conducted in the UK in 1996, only 16.5 % of 15.500 artists received more than 1.000 Pound in earnings per year from recording rights, with less than 2 % earning more than 20.000 Pound a year – from all existing recordings that is. The share that recordings aged 50 years or more have in this, is again only a sub-fraction. This fraction cannot reasonably be called »AN IMPORTANT CONTRIBUTION TO MUSICIANS PENSION«. Only an extremely small group of already very successful artists would actually profit. [4]

4 — EXTENSION OF TERM WOULD INCREASE THE INCENTIVES TO INVEST IN NEW MUSIC

The 'incentives argument' claims that increasing term would encourage more investment, as there would be longer to recoup any initial outlay.

EXPERT OPINION — Retrospective extension provides essentially no incentive to create new works. Once a work is created, additional compensation to the producer is simply a windfall. Investment in current artists should be based upon the prospects of profits, not the retrospectively extended availability of past ones. We therefore believe that retrospective term increases will have no effect upon the creation of new work. [3]

According to economists opinion, the incentivising effect for new productions, coming out of a term extension of 20 years would be 1 % at best. Possible future earnings, lying more than 50 years in the future, have no detectable effect on investment decisions of the music industry. They probably have even less effect on the musicians themselves who in countless cases make music even though they don't have the slightest prospect of profits, leave alone calculating a certain number of years of legal monopoly. [2 3]
Only a tiny number of recordings still earn money after 50 years, only few even after 10 years. About 2/3 of the music industry's revenue is earned with the recordings of the past 4 years, another 30 % with recordings of the 30 years before that and only 3 % with older recordings. An illustrating fact: Until they joined the Berne Convention, the US had a registering copyright with a term of 28 years which could be renewed once for another 28 years. Only 13 % of all registrations were actually renewed, which shows how small the share of works is that really need a long protection. [2]

5 — EXTENSION OF TERM WOULD INCREASE NUMBER OF WORKS AVAILABLE

Copyright provides incentives for rights holders to make works available to the public as it gives rights holders a financial incentive to keep work commercially available.

EXPERT OPINION — Empirical research tells us the exact opposite: All factors indicate a lack of interest of rights holders to keep works available for a long time. Rights holders are evidently under-represented in keeping old recordings commercially available. A commercial incentive seems not to exist today. To the contrary, when looking at books it can be observed that copyrighted works are available less and cost more on average compared to public domain works. Third parties are much more active in keeping works available. This would be hindered by a term extension and the availablility of existing material as a key prerequisite für innovation and creativity of following generations would decline. [2 1]
The EU Commission claims that »EMPOIRICAL STUDIES« (plural) showed that the average price of public domain works is not lower than that of in-copyright works. This, however, is only the conclusion of a single study – commissioned by the British Phonographic Industry trade association – which examined only 129 albums from between 1950 and 1958 for which there are no competing sources which would allow to compare prices. [1]

6 — MAINTAIN A POSITIVE TRADE BALANCE

Europe has an extremely successful music industry and longer lasting rights mean an advantage on the international market.

EXPERT OPINION — So far, no compelling evidence has been produced in favour of a term extension, according to the Cambridge study quite the opposite (it assumed an extension of 20 years and calculated the effect for the UK, having Europe's most valuable music industry): Even in the most favourable scenario only an additional 2 % revenue would be generated for the major labels, at the same time meaning costs for the rest of the british economy

and society of 155 million Pound per year. Spelled out in costs for the consumers this would amount to between 240 and 480 million Pounds altogether. These findings applied to the european or the world's economy there wouldn't be any advantage »ON THE INTERNATIONAL MARKET« or over »THE REST OF THE WORLD«, but rather a reallocation of money within all economies, from the consumers to four large corporations. [2] [3]

A GENERAL WARNING
BY THE CIPIL EXPERTS OF IRREVERSIBILITY OF AN EXTENDING DECISION

Any errors in policy-making, due to poor or incomplete data say, will have asymmetric effects: if term were extended now but further research over the next ten years showed the extension to have been a mistake, it would be very hard to correct this error by reducing term back to its original level; on the other hand if term were not extended and research over the next ten years showed this lack of extension to have been a mistake then it would be relatively easy to correct this error by introducing a term extension. This has two implications. Firstly, any decision to extend term should be based on stronger evidence than one to keep term at its current level. Secondly, the prudent policy-maker faced with uncertainty should prefer a course of inaction so as to keep options open and await better and more precise data. Thus, the case for an extension would have to be especially compelling to make it preferable to keeping term at its current length. This, combined with our conclusion that the case for term extension is, in fact, weak, means it would be particularly inadvisable, given our present state of knowledge, for a rational policy-maker to extend the term of copyright in sound recordings. [3]

CONCLUSION

The present case of a term extension for related rights in sound recordings is notable in several ways. Firstly, a rejection by the leading european research institutes is rarely ever as uniform as here. Usually the decision making in the field of immaterial goods protection is a complex matter, as are the respective academic positions, but not here. But even more notable is the way in which, against all expert advice to the contrary, the lobbyists of a very small group of multinational corporations seem to manage to reach their goal by tenaciously taking the detour of EU legislation.

Not only are the alleged positive effects of a term extension unproven so far or were even disproven, and not only do calculations show that an interest group other than the session musicians will benefit. The extension has been shown to predominantly have negative effects on availability, re-use and adoption of sound recordings from the second half of the 20th century onwards – and thus for innovation potential and cultural wealth of the european civil society of the future. How concrete such effects are, can be observed in Germany in the court decisions dealing with the use of samples of songs of the group Kraftwerk (Federal Supreme

Court and Hanseatic High Court on the song »Metall auf Metall«). The related rights now to be extended can develop a much more granular protection than copyright ever does, thus having a much more far-reaching chilling effect on new works and on whole genres like remix. That seems to be a high price to be paid for marginal additional profits of a few companies, from society's point of view: too high.

A clear way of putting these developments into perspective can be found in a talk that Prof. Bernt Hugenholtz gave in Vienna in 2010:

What we are protecting is not creation, but entrepreneurial achievement. The major labels are about to lose control over some of the most valuable assets (the 'crown jewels') in their recording catalogues. In contrast, for the smaller labels that do not have much to say in this debate, wonderful new opportunities for re-releasing older recordings would arise – that is if the terms would expire soon. The primary justification here is economic, not moral. Phonogram producers should count themselves lucky to have any related rights at all. Indeed in large parts of Europe, until the 1980's they had none. In the eyes of the public, the term extension proposal is nothing but a thinly veiled attempt to make record companies richer at the expense of the general public. Greed in its undiluted form., with session musicians as a mock-up argument. [5]

SOURCES

1 Term Statement of the Centre for Intellectual Property Policy & Management (CIPPM, Universität Bournemouth), the Centre for Intellectual Property & Information Law (CIPIL, Cambridge University), the Institute for Information Law (IViR, University of Amsterdam) and the Max Planck Institute for IP Law (Munich): http://www.cippm.org.uk/downloads/Term%20Statement%2027_10_08.pdf

2 Gowers Review: http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp

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4 Statement of the Open Rights Group: http://www.openrightsgroup.org/uploads/releasethemusic_aug07.pdf

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7 Statement of GRUR (in German): http://www.grur.de/cms/upload/pdf/stellungnahmen/2008/2008-10-02_GRUR_Stn_RL_2006-116_EG.pdf

8 IViR study: http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf

9 Adelphi Charter on Creativity, Innovation and Intellectual Property: http://www.thersa.org/projects/past-projects/adelphi-charter/

a Text of Directive 93/98/EEC: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0098:DE:NOT

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c Text and processing of the EU Commission's proposal: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=de&DosId=197285

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Grafik: studio grau