

## **SUBMISSION TO THE GOWERS REVIEW**

### **Re: Extension of 50 year copyright term in sound recordings**

1. I would like to make the following submissions in my capacity as (a) the owner of an independent record label, specialising in catalogue and historic records and (b) as one concerned over issues around the mooted extension of the 50 year copyright term in sound recordings, and the implications of any such extension for performers.

2. To begin with, I should state my basic belief that the 50 year term should be extended in some circumstances, to reflect the fact that today people (ie performers) live longer, often enjoy longer careers than in the past, and have a legitimate expectation to continue to be paid for work undertaken during their lifetime.

3. Since the Gowers Review was announced in December 2005 several industry bodies, notably the BPI and MBF, have mounted campaigns on this issue, and made submissions to the Review. In addition some performers have fronted these campaigns through the media, notably Sir Cliff Richard. Regrettably some of the material put forward has been misleading and inaccurate.

4. Assertions that an extension of the 50 year term will necessarily benefit the “performer” are misleading. Extension of the term will in fact benefit the owner of the copyright in the sound recording, which is almost always the record company rather than the performer. Certainly this is the case as regards most recordings released by the 5 (multinational) major label groups in the UK, and many smaller record companies also. Where this is the case, extension of the 50 year period simply extends the period in which the label retains the exclusive right to exploit the recordings - whether or not that is to the advantage of the performer. Very few performers have sufficient bargaining power to negotiate licensing their own recordings (in which they retain copyright) to a label.

5. This touches on a neighbouring issue of copyright reform that may or may not fall within the scope of the Gowers Review. Under current UK law, the basic presumption is that the party who paid for a recording (ie the label) owns the entire copyright in that sound recording. This is reflected in most recording contracts. However, there seems to be no justification for the label retaining this copyright once the recording has recouped. The situation may perhaps be compared to a householder paying off a mortgage, only to find that the building society retains sole ownership of the property.

6. Several major artists (including George Michael and Simply Red) have challenged this, but to date the issue seems not to have been the subject of a clear judicial ruling. Against this background, the proposed term extension could be said less a measure to protect performers than a power-grab by the record industry.

7. This situation (exclusive ownership of sound recordings by the label) is often to the great disadvantage of the performer. One example is where a ‘cult’ performer did not achieve mainstream success, or widespread public interest has waned, and their recordings are deleted. Major labels have a long history of deleting marginal catalogue, but also declining to licence the recordings to smaller niche labels which

can service a limited but viable market in which the larger labels are not interested. The result is that worthy recordings remain obscure and unavailable, and their cultural currency may actually diminish as a result.

8. I'm happy to cite an example of (7). In 2002 with the backing of the performer I attempted to licence a 1981 album from Virgin Records, who had apparently come to own the recordings following a series of mergers and acquisitions during the intervening period. The album had been a critical success in 1981 but not a commercial one, and had been deleted for many years. Virgin had no interest in re-issuing it themselves. However, as a small niche label I was offered a licence only if we guaranteed 20,000 sales in a two year period, selling in the UK and Eire only, at a royalty rate of 25% (the industry standard is closer to 18%). As a CD reissue the title was only likely to sell around 1500 copies, and the proposed licence terms completely unreasonable. A more realistic advance would have been £1000, with Virgin obtaining the benefit of the deteriorating analogue master tapes being digitally remastered at my expense, not theirs. As a result the recordings remain deleted, indeed effectively suppressed, and it's worth noting that the performer received only a fleeting mention in the book *Rip It Up and Start Again* by Simon Reynolds (2005).

9. The performer referred to in (8) would, without question, be more than happy for the copyright term to end after 50 years. They would then at least be able to arrange their own re-issue, even if that might be in competition with other parties. For them, the legal status quo smacks of restraint of trade, infringement of moral rights, and other ills. Extension of the term beyond 50 years simply makes their problem more intractable, as it would for many other performers, particular those who have not achieved mainstream commercial success, and/or who signed poor contracts in the first place and receive little or nothing by way of sales royalties in any event.

10. With rights come obligations, and (8) is a glaring example of that maxim being ignored to the detriment of a performer. Performers are not employees of record labels, so why should the law presume that their work be treated as though it were created in the course of employment?

11. There is a legitimate need to extend the protection term beyond 50 years, but this should be conditional. Any extension should apply only to musical recordings and not sound recordings per se, and should not apply if the piece of music itself is no longer published (and therefore the composer is no longer receiving income). Where a copyright owner fails to properly exploit a work during a defined statutory term, then that ownership should transfer to the performer, and/or there should be statutory provision for a compulsory licence. A fast-track Copyright Tribunal for 'small claims' should also be available.

12. There is also a need for clarification on what constitutes a sound recording. Today back-catalogue is an important revenue stream for the music industry, and sound recordings are regularly upgraded, remastered and re-released (notably on CD). Re-masters should qualify as 'new' sound recordings, and thus the owner obtain extended protection. Thus for example, even within the 50 year term, recordings by The Beatles from 1962 would only become public domain in 2012 in so far as transfers could be made from old vinyl pressings, in alternate packaging. Superior re-masters prepared from the original master tapes for release on a digital format would thus remain

protected. It may well be that comparatively few people would opt to buy an inferior 'public domain' product in favour of a state-of-the-art 'official' version. It may also be that straightforward piracy and counterfeiting would remain a bigger problem.

13. The main trust of submissions by bodies such as the BPI and MBF seems to be designed to protect current catalogue, with Cliff Richard, The Beatles, Pink Floyd among the examples cited. As I understand it, some even go as far as suggesting a term of life (of the performer) plus 70 years. I think that would be excessive. Rather, parity with the American term extended in 1998 (ie to 95 years) would be more appropriate. In any event I would refer back to my comments in (10).

14. If the term is to be extended any such legislation should not have retrospective effect. There is already vast quantities of public domain material on catalogue (for example, 1940s swing music collections, music hall, nostalgia etc), many of them on labels who support calls for an extended term. Where would that leave us? These markets are highly niche and marginal, and exist precisely because the material is public domain. Most of the original performers received a one-off session fee, not sales royalties, and extension of the protection term has no application for them at all. The composers (or their heirs) still receive publishing income where the material is still published, and indeed much of it is. However, an indiscriminate extension of the protection period to, say, 95 years would even catch material recorded during the First World War.

15. I have curated and released several CD collections of vintage recordings from both World Wars, as well as other historic sound recordings. The earliest recording dates from 1901. I put in a large amount of time tracing the recordings, restoring them, and presenting them in context through sleevenotes, web pages etc etc. These are used in many archives, educational institutions and libraries, and stocked by several leading museums. However one of these would have been possible if the material had not been public domain. I very much doubt that the industry wishes to see the unique actuality recording of Sergeant Edward Dwyer V.C. made in 1915 fall back into copyright (and so become unobtainable, in all likelihood), but that would be the result of an indiscriminate, retrospective extension of the term to 95 years, and the effect would be wholly negative.

16. Such draconian measures would serve to suppress many historic recordings. And it would be perverse for copyright to be returned to companies who long ago lost or discarded the production parts, as is usually the case with pre-1950 material. As I understand it, the 95 year term in the USA is not retrospective, and calls from the UK industry for parity should bear this in mind.

Signed

**James Hayward**