

British Music Hall - Comments on the Current Term of Protection on Sound Recordings and the Case against any Retrospective Extension in Term

Introduction

Music Hall is a uniquely British Institution. Many of its great names such as Harry Champion, Marie Lloyd and Florrie Forde, as well as many minor artists, made recordings in the early part of the 20th Century, but the major record labels have taken minimal interest in their reissue.

I run the Windyridge CD label which, starting in 2001, has specialised in the reissue of historic British Music Hall recordings which originally date from the 1900s. The current law in the UK, whereby the mechanical copyright on recordings expires after 50 years means that there is the opportunity to bring again before the public, performances and songs which are part of their musical heritage.

The majority of these recordings were made prior to 1925. In that year, there was a major technical breakthrough in recording technology with the first use of the microphone. Prior to this, all records were made mechanically by the artist performing into a horn. The earlier recordings were made technically obsolete by the changes of 1925, and today they present special problems and challenges for those wishing to restore and reissue them. Coupled with the small sales in this niche market, it is not economic for major labels to reissue such material.

Overall View

For the reasons given above, the major record companies involved have never taken any interest in these early recordings, and where they have not lost the original copies have merely locked them away in their vaults. In all cases, the recording artists are deceased, and in most cases were simply paid a flat rate per recording. Thus a change in term would not benefit the artists.

If the original recording companies had wished to exploit their older recordings, then they have had plenty of opportunities which they have not taken up. Where they hold original masters they could produce a superior product, but they choose (presumably for economic reasons) not to do so. A change in term of protection would not change this situation and would not benefit the original recording companies.

Reissues of these earliest recordings should remain possible for minor labels, who effectively provide a public service in this area.

As the Aldephi charter states: "Copyrights must be limited in time and their terms must not extend beyond what is proportionate and necessary."

Impact of an increase in term

There would be a major adverse effect if the term were increased to 95 years.

- Of my current catalogue of some 50 CDs, only 3 would fall entirely outside this period, and thus the project would not continue.
- The original recording companies, where they exist, would not gain any more income, but the original music composers and lyricists would lose their royalty income via MCPS.
- The general public, librarians and historians would be deprived of access to these historic recordings.

Effect of a longer term within USA

I here refer to the report "Survey of Reissues of U.S. Recordings" by Tim Brooks commissioned for the National Recording Preservation Board, Library of Congress in 2005 and available here:

www.clir.org/pubs/reports/pub133/contents.html

Several quotations from the Report follow (my italics) :

"Recorded sound has played an important role in the cultural, social, and political life of the United States.

With the exception of recordings of a few companies whose assets have been abandoned or donated to the public, **there are virtually no public domain U.S. sound recordings**. This includes many of the very first recordings, which were published as early as the 1890s. The usual allowances for copying or distributing given to older works by federal law under the orphan works clause do not and will not apply to pre-1972 recordings, further impeding public access. **Because only the copyright owner can legally make old recordings available, historical recordings are at risk** of physical loss as well as of passing, unnoticed, from the nation's aural memory.

One consideration by Congress in extending copyright protection to owners for such a long period was to give those owners an incentive to reissue, and thereby preserve, older recordings. How successful has this incentive been over time? Recordings, like other publications, do not usually remain in print in perpetuity. On the basis of statistical analysis, this report shows that **most pre-1965 recordings have not been reissued for public sale**. Ten percent or less of listed recordings have been made available by rights holders for most periods prior to World War II. **For periods before 1920, the percentage approaches zero.**

The demand for historic recordings: Despite laws discouraging unauthorized reissue activity in the United States or the importation of reissues of U.S. recordings from other countries (parallel import laws), foreign labels and small entities in the United States have made available a considerable number of such recordings. Our study found that other entities have exclusively reissued 22 percent of historic recordings, versus rights holders' 14 percent. To the extent that rights holders reissue older recordings, they concentrate on recent periods with larger potential markets, while third-party distributors serve all periods more or less equally. As a result, third-party entities reissued more than rights holders did in every five-year period prior to 1945. But **current copyright law has made such activity difficult and risky for small organizations and so has driven much of this activity overseas**. It is worth noting that **a label such as Europe's Document Records**, which has made available thousands of rare, pre-World War II American blues and gospel records not reissued by rights holders themselves, **could not exist in the United States because of copyright restrictions**.

The negative effect on U.S. record companies involved in reissues, and the general public's access to historical material resulting from such a long copyright period can be clearly seen in this study.

Possible alternative arrangements to accompany an extension of term

It might be supposed that a similar scheme to that operated by MCPS for music and lyrics might also apply to recordings. For instance, an automatic right for a third party to reissue recorded material 50 years after the original recording issue could be granted by the owners of the underlying copyright (the record labels that initially released this material) on automatic and equitable terms (eg a percentage of list price).

However, the third party who is reissuing a recording needs to find the rights holder. In many cases this would be impossible. Many recording companies from the early 1900s have gone out of business or been taken over. The uncertainty introduced by an extension of term could prevent reputable organisations from engaging in any reissue activity at all.

No retrospective extension in term.

It would seem that all the impetus for an extension in term is coming about as a result of recordings from the "Rock'n'Roll" and "Beatles" eras entering the public domain, and the subsequent loss of income to the original issuing companies. Changes which may be judged necessary to protect such material should not be applied retrospectively to recordings which have been in the public domain for many years. If the term is extended, then it should apply only to those items which are in copyright at the time of change.

Conclusion

This submission has highlighted the problems which any extension of the copyright term on sound recording would bring to specialist reissue labels, and to the general availability of British Music Hall material in particular. It would have a negative economic and cultural impact. It would not benefit the original record companies or artists. It is in nobody's interest. It is therefore essential that any changes be made non retrospective.