

Current term of protection on sound recordings and performers' rights

Background: The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

(a) What are your views on this issue?

I am strongly opposed to a blanket retrospective increase in the duration of copyright protection afforded to sound recordings in the UK.

I have strong views about the purpose of copyright, but I trust that others, more eloquent than myself, will argue persuasively and at length for a careful balance to be struck between copyright and the public domain¹.

The serious issue I want to focus on within this submission is that of sound recordings which were originally issued between 50 and 95 years ago. These recordings are currently in the public domain, but the proposed extension would bring them back into copyright.

This move would restrict the availability of these recordings to the general public, kill a successful UK industry, and in some cases would put their very survival at risk.

Sadly, the major record companies have neglected most of their back catalogue: though the Beatles, Cliff Richard, and even George Formby are still available on CD, up to 90% of pre-1965 material is not (see evidence, below).

Tragically for the cultural heritage of the UK, the major record companies have destroyed the masters of many of their older recordings, and do not even hold *copies* of many of these. Often, the only playable copy of an early recording is a 78rpm gramophone record or phonograph cylinder held by a private collector.

¹ In summary, the balance is already tipped against the public domain, to the detriment of all who want to access copyrighted works which are expensive or impossible to obtain. I cannot imagine it is worth exacerbating this situation merely to make the richest pop stars and record companies a little richer. When Sir Cliff Richard tried to defend the copyright extension on BBC news, he said "when I made those records, I wasn't looking 50 years ahead", which suggests that even a 50 year recording copyright has no bearing on creativity, and a longer term cannot increase it. A longer copyright term will aid record companies to maintain a monopoly on older material, but this will bring little benefit to new artists, many of whom already bypass the larger record companies and release their material independently or via the internet.

In this submission, I concentrate on the plight of very old recordings, but the same issues will apply to recordings from the 1950s and 1960s unless they too are allowed to enter the public domain after 50 years; it's not just about Elvis, Cliff, and The Beatles – it's about the hundreds of thousands of other recordings which will only become available to the public when they enter the public domain. The previous "harmonisation" in Europe to 50 years was already far enough; there is no reason to enter a catch-up race with the USA, especially where evidence of the advantages is so thin, while evidence of the disadvantages is so strong.

Thankfully, many enterprising companies have stepped in to fill the void left by the major record companies. They scour private collections to find surviving 78rpm discs of rare material, copy it, digitally enhance the sound, and re-issue these recordings on CD. This is a thriving, legal industry in the UK. It makes these early recordings available to the general public in a convenient form, and hopefully their wide availability will help to preserve them for future generations.

Copyright extension will kill this industry. Evidence from the USA suggests there will be little or nothing from the major record companies to fill the gap, and the only replacement will be via underground piracy of the newly re-copyrighted recordings. This benefits no one: availability and competition are reduced, profits are wiped out, and quality is decimated. The lack of widespread legal distribution of high quality CDs reduces the chances of these recordings surviving into the future.

The proposed copyright extension could have an even more dramatic impact in the near future. Mass preservation and dissemination of public domain works has recently become a reality, since the internet opens up great possibilities in this field. Already three groups (Google, Yahoo!, Microsoft and the European Digital Library, together with the British Library, the Oxford Bodleian library, and others) are embarking on projects involving the mass digitisation of out-of-print books, making these valuable resources available to anyone with an internet connection.

<http://books.google.co.uk/>

<http://www.opencontentalliance.org/>

http://europa.eu.int/information_society/activities/digital_libraries/index_en.htm

<http://www.bl.uk/news/2005/pressrelease20051104.html>

This concept can be applied to sound recordings. Previously, the only way to hear a rare sound recording was to visit the place where it was held, and to play it. This is both inconvenient, and damaging to the recording, which will eventually wear out. However, it has been realised that there now exists a fantastic opportunity to preserve the recordings, and give access to them, by digitisation.

In everyday life, most people wouldn't keep just *one* copy of an important document on a PC – they would make a back up. With digital data, this is trivial (though often neglected) – with old analogue sound recordings, this takes time and skill. For this reason, most of the UK's audio heritage has no back up. Thankfully, if digitisation can serve *two* goals, both *preserving* the original recording, and *making it available* to anyone with an internet connection, then it is the kind of activity which can attract national funds or commercial and philanthropic sponsors. However, if an extended recording copyright term prevents the recordings from being made freely available to the public via the internet, then a digitisation project looks much less attractive. As the European digital libraries project notes, “The limited use that can be legally made of the resulting digital copies is a further disincentive for digitisation”. If digitisation is not carried out, then not only is public access vastly restricted, but the recordings themselves are left without a back up.

Already in the USA, the University of California, Santa Barbara has digitised most of its Edison Phonograph cylinders and made them available on-line:

<http://cylinders.library.ucsb.edu/>

Sadly most other sound recordings in the USA fall within that country's longer copyright term, and are not available in any modern format. Thus the USA's cultural heritage in the form of early sound recordings is largely unavailable to the public, and slowly decays in public and private collections. There is no reason for this to happen in the UK – unless an extended recording copyright period makes public access impossible.

To summarise, the major record companies destroyed the masters of many early recordings, they have re-issued very few of those that remain, and the only convenient access to these recordings is currently through 3rd party CD re-issues or via the internet. These methods of access can only exist if the recordings are in the public domain. Putting these recordings back into copyright will bring no benefit to anyone, but will restrict public access and may help to destroy a part of the UK's valuable cultural heritage.

Whatever the eventual outcome of this consultation, it must not put these older recordings back into copyright.

(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?

- and -

(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?

1. I am aware of a report undertaken for the Library of Congress and the National Recording Preservation Board in the USA.

This report clearly shows how an *increase* in the copyright term will *decrease* the amount of recorded music which is available to the public!

The full report is available from

<http://www.clir.org/pubs/abstract/pub133abst.html>

To quote from this report...

“Historical recordings are more accessible abroad ... Copyright laws differ by country, and most countries have shorter terms of protection for rights owners than does the United States. So, while only 10 percent of historical blues recordings are available in the United States, 54 percent are available for sale legally in most other countries.”

2. I am aware of several recording companies in the UK which re-issue public domain recordings, including...

<http://www.pastperfect.com/>

<http://www.duttonvocalion.co.uk/products.asp?cat=373>

<http://www.naxos.com/mainsite/default.asp?label=NaxosHistorical>

<http://www.wyastone.co.uk/nrl/pvoce.html>

...and many smaller labels.

These show the profitable legal businesses that can exist in a country with a 50 year copyright term, which would be outlawed in a country with a 95 year copyright term.

3. The catalogues of the major record companies include some “public domain” recordings which were previously under the copyright of that record company.

This suggests that when a recording enters the public domain, this is *not* the end of its commercial life for the original record company. They are free to issue the recording, just like anyone else – but they have the advantage in that they are the only ones with access to the original masters (if they still exist). This allows them to differentiate their release in terms of quality (which can be higher than re-issues copied from commercial discs), in terms of price (they don’t have to expend time and effort looking for a source of the recording – they own the physical master!), and in terms of content (they may have further, related content which has not been commercially available in the past).

This suggests that the dire warnings of poverty when Cliff, Elvis, and the Beatles recordings “falling out of copyright” are unfounded. All that will happen is that additional, lower quality, 3rd party releases will appear at a lower price. The official releases will still be available, probably re-packaged and *improved* to position them as a “better” product.

(d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

1. One major purpose of copyright is to compensate artists for their work. I will leave others to expand on this issue, but wish to support a “use it or lose it” clause. This should be applied to all copyrights, not just recordings. If a recording, book, film etc is unavailable for a decade, its copyright should revert to the original creator(s). If it is unavailable for a further decade, its copyright should revert to the public domain. This gives an incentive for commercial exploitation, and ensures that creative works cannot be locked away, unavailable for “life plus 70”, as sometimes happens at present.

It is interesting to note that the earliest UK copyright law, the Statue of Anne of 1710, concludes...

“**XI.** Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.”

It seems authors were better protected in 1710 than in 2006!

2. The other major purpose of copyright is to increase the availability of creative works to the general public. Increasing the copyright term will not cause Elvis to make any new recordings, but it will prevent the public from accessing hundreds of thousands of earlier recordings. For this reason, I suggest that extending the recording copyright term will defeat one of the main purposes for the existence of copyright.

I believe there is an alternative change to the copyright law that could help with Elvis, The Beatles, and the earlier recordings. The problem faced by both large and small record companies is that there is no clear copyright in a straight re-issue of the original recording. Some claim copyright in remastering a recording, but this is not altogether clear in practice, so, for example, when The Beatles recordings enter the public domain, it is arguable that so do all the reissues, especially if copies thereof cannot be uniquely identified as coming from the later reissue.

The situation can be solved by allowing reissues to have their own distinct copyright – either of 25 or 50 years, in parallel with the present original recording copyright term of 50 years. This would be comparable to the existing 25 year copyright in the typographical arrangement of published editions.

What this would mean in practice is that any release of a 1955 Elvis recordings in 2010 would have to be taken from an original 1955-1960 release – it couldn't be copied from a 2006 CD reissue, because that reissue would still be in copyright.

(The question of enforcing this stance is a technical one. Aside from the obvious quality differences between a 1955 disc and a 2006 CD, there are both technical and artistic ways of marking content so that it can be uniquely identified, for example audio watermarks. These technical advances mean the time is right to enshrine this distinction in law.)

This allows the original copyright owners to issue a premium product from the physical masters that they own, and to protect this product through valid copyright. It allows them to continue generating revenue from recordings to which they formerly held the copyright even when those recordings are in the public domain, and allows them to protect their high quality reissues from piracy.

This gives the best of all worlds: Keeping the copyright term at 50 years solves the historic recordings problem and ensures competition enters the market places as each recording enters the public domain. Introducing a reissue copyright allows the original recording owners to continue to generate secure revenue in a competitive marketplace.

3. An alternative or additional change may be to put a mechanism in place to ensure that a standard fee is paid to the original artist or original copyright owner whenever the work is re-issued. However, this seemingly sensible suggestion causes huge problems for older recordings, where the cost of tracing the artist's descendents or the original copyright owner can be more than the profit that can be made from reissuing the recording. This has led to a great number of "orphaned" recordings in the USA – recordings where fees may be due, but no one knows who should be paid, so the recording cannot be reissued. This situation must be avoided, possibly by ensuring that only recordings registered with some official body (comparable to the MCPS) are chargeable in this way.

(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

There are three categories of recordings:

1. 50-95 years old
2. 0-50 years old
3. Not yet created

The first category of recordings must not be brought back into copyright for the reasons discussed above.

The second category of recordings were created under the existing terms, since the 50 year term has been in place for more than 50 years! Those making the recordings knew (or should have known) the law and contracts governing their work.

Further, I and many others have purchased many records knowing that I will be able to copy them and sell them (paying appropriate royalties) when they are over 50 years old.

It seems unfair, to say the least, to change the rules for these recordings now.

The third category of recordings will be created under new terms, and as such there is no legal or moral problem with applying new terms, though whether those terms are wise and just is a different matter.