



November 2008

Extending the term of protection of the exclusive rights of music performers and phonogram producers would stifle innovation and hinder legal online offers

The Commission proposal should be rejected

Copyright users strongly advocate rejection of the Commission's proposal to extend the term of protection of the rights of music performers and phonogram producers from 50 to 95 years after the first publication of the phonograms. The proposal runs counter to the Commission's declared objective of increasing the possibilities for access to creative content and services and of supporting innovative business models and legal offers. Instead of looking at a broader approach to modernizing copyright law, the proposal picks out a single aspect which creates new problems for consumers and users of copyright. Consumers and users support equitable remuneration for artists, who are essential partners in the dissemination of European culture and programmes. However, the extension of the term of protection would not improve effectively the situation of the alleged target group, the anonymous session musicians. The benefits would largely accrue to wealthy performers and record companies.

Reducing the public domain stifles innovation

Copyright law may stimulate creativity and innovation. However, extending the term of protection would lead to a significant reduction in the size of the public domain, which is a considerable source of material freely available for use in innovative projects, both commercial and non-profit-making, and thereby contributing to cultural diversity. The current duration of 50 years suffices to allow the music industry to recoup its investment. No evidence exists that the current situation creates any obstacles to the Internal Market. On the contrary, several studies¹ confirm that extending the term of protection would encourage the record

¹ Institute for Information Law of the University of Amsterdam, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, 2006:

industry to maintain a high level of revenue from existing recordings without an additional incentive to invest in new productions.

Consumers will ultimately pay the bill

Consumers would be at the forefront of suffering the financial consequences of a term extension, owing to the high price of phonograms and restrictions of use being maintained for almost twice as long. Ultimately the consumer will have more limited access to the European music heritage. The proposal raises many questions. It argues that record companies need the term extension to boost their revenue. At the same time it is claimed that the term extension would not make any difference to consumer prices or to the costs for users. Nonetheless, the Commission expects up to 850 million Euros in additional revenue. Where will that come from?

The proposed term extension is a disguised subsidy to record companies

According to the Commission's own impact assessment², around 90% of this 850 million Euros in additional revenues will solely be directed to record companies. As 80% of the market is dominated by only four record companies, the proposed term extension can be assimilated to a direct subsidy to these four record companies for their declining physical sales and profits; a fact that is recognised by the Commission itself. However, consumers and users should not be asked to subsidise record companies for their failure to adapt their economic models to a new business environment.

The scope of copyright protection and consumers' interests must be balanced

The scope of intellectual property protection and consumers' interests must be fairly balanced. Extending the term for sound recordings tilts this balance in favour of the record industry. Such an approach is counter-productive. How can consumers be encouraged to respect the rights of the record industry and artists online if rights are simply extended without any compensatory measures to improve consumers' access to content?

The comparison with the United States is not relevant

Legislation in the United States is entirely different as it confers protection only to copyright owners, e.g. music composers, but not on phonogram producers as such or on performers. The United States has for example not introduced a remuneration right for broadcasting in its legislation. In Europe the scope of protection is broader, as performers and record producers are protected independently from authors' rights by a neighbouring right (currently 50 years after

http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf pp. 83-137, esp. pp. 135-136; see also the Gowers Report: Gowers Review of Intellectual Property for the UK Government, 2006: http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf, pp 50-53;

² Commission Impact Assessment on the legal and economic situation of performers and record producers in the European Union, http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf, 23 April 2008, 4.2.3., p. 38

the first fixation of phonograms), and remuneration for the broadcast of sounds recordings is mandatory under European Directives.

Widening the scope to other artists is not relevant

The necessity to enclose other categories of artists, such as audiovisual performers, is not supported by any data or study. Assuming that the real objectives of the proposal is to improve the situation of artists, so far, no evidence has been given of the need for audiovisual performers to benefit from an extended copyright term, as it is proposed for music performers.

Session musicians would not benefit - the wrong instrument for a good cause

The Commission argues that the extension would especially benefit the anonymous session musicians who contributed to phonograms in the late 1950s and the 1960s and were obliged by the record labels to assign their exclusive rights to the record industry against a flat fee payment ("buy-out"). The Commission wants to create a social fund, as a form of social security of which the structure and functioning is unclear. Independent studies all agree that an extension of the term would not be the right instrument, because 90% of the increased income would go to the record industry. And, as the Commission's own impact assessment states, between 77% and 89.5% of all income distributed to performers goes to the top 20% of earning performers, and not to the anonymous session musicians³. According to the Commission, the average increase in revenue for the average performer would be around 90 Euros *per month*. Independent studies estimate that 80% of the performers would merely receive between 1 and 58 Euros *per year*. Neither amount can be regarded as serious support for bought-out session musicians.

Moreover, the Commission claims that the performers' additional income would mainly come from equitable remuneration paid by broadcasters and the private copying levy paid by consumers. However, in most countries this would mean that in the future the same pot of money would be distributed among more right-holders than today. In addition, this would inevitably create increased administrative costs.

Conclusion

If the aim is truly to support all musicians, the Commission should rather try to improve the contractual framework of musicians with record companies and to improve their situation through special retirement, second and third pillar pension or social insurance schemes. The path chosen by the Commission to improve the performers' and session musicians' social condition is therefore inadequate and ill-founded.

³ Commission Impact Assessment on the legal and economic situation of performers and record producers in the European Union, http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf, 23 April 2008, 4.2.3., p. 20

Studies / Articles of interest on this topic:

- Institute for Information Law of the University of Amsterdam, The Recasting of Copyright & Related Rights for the Knowledge Economy, 2006: http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf
- Gowers Report: Gowers Review of Intellectual Property for the UK Government, 2006: http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf
- Max Planck Institute for Intellectual Property, Competition and Tax Law: Comment by Max Planck Institute on the Commission's proposal for a Directive to amend Directive 2006/116 EC of the European Parliament and Council concerning the Term of Protection for Copyrights and Related Rights, September 10th, 2008: http://www.ip.mpg.de/en/data/pdf/stellungnahme-bmj-2008-09-10-def_eng.pdf
- Proposal to extend the term of copyright protection on sound recordings / Response of the Open Rights Group

Letters opposing the proposal:

- Copyright extension is the enemy of innovation; Times; July 21st, 2008: <http://www.timesonline.co.uk/tol/comment/letters/article4374115.ece>
- Letter of Prof. P. Bernt Hugenholtz to Mr. Barroso: http://www.ivir.nl/news/Open_Letter_EC.pdf

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